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LETWICK *v.* STATE.

4434 198 S. W. 2d 830

Opinion delivered January 20, 1947.

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

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

SMITH, J. The appellant was charged in the State of Colorado with participating in a "confidence game," which, under the laws of that state, is a felony. A requisition was issued for appellant's arrest, which was honored by the Governor of this state, and after appellant's arrest he filed a petition for a writ of *habeas corpus.* A hearing was had thereon, and appellant was remanded to the custody of the officer who had him under arrest, and this appeal is from that judgment.

To reverse this judgment, two pleas are interposed. First, the plea of *res judicata,* and second, that appellant is not the person named in the requisition.

It appears that appellant was arrested in the State of Texas, upon the requisition of the Governor of Colorado, upon the same charge. His release was denied by a District Court of the State of Texas, and that judgment was first affirmed by the Court of Criminal Appeals, but a rehearing was granted, and it was ordered that petitioner be discharged for the reason that his identity

as the person named in the requisition had not been established. *Letwick* v. *State,* 168 S. W. 2d 866.

But appellant is not to be given immunity from prosecution upon the charges against him because his identity was not established in Texas, if it has since been established in the proceeding from which is this appeal. At § 203 of the Chapter on *Habeas Corpus,* 29 C. J. 179, it is said: "But by the great weight of authority, the rule is, in the absence of a statute providing otherwise, that a refusal to grant a writ of *habeas corpus,* or a dismissal of the writ, or a remand of the relator to custody, or other refusal to discharge him, is not a bar to, or *res judicata* on, a subsequent application for the writ."

It was held in the case of *State ex rel. Shapiro* v. *Wall,* 187 Minn. 246, 85 A. L. R. 114, 244 N. W. 811, to quote a headnote from that case, that: "The discharge by writ of *habeas corpus* of a prisoner held upon an extradition warrant for the reason that the courts of one state hold that he is not a fugitive from justice is not *res judicata* in *habeas corpus* proceedings in another state where the same issue is raised." See, also, to the same effect *Kurtz* v. *State,* 22 Fla. 36, 1 Am. St. Rep. 173. See, also, annotations to the case of *People* v. *Toman,* 102 A. L. R. 379-382.

There is no question of former jeopardy in this case. Indeed the question is whether appellant shall be returned for a trial to the state where the offense is alleged to have been committed. We hold, therefore, that the plea of *res judicata* is not well taken. This view accords with the holding in the case of *State ex rel. Lewis* v. *Allen,* 194 Ark. 688, 109 S. W. 2d 952, where it was said: "If the circuit judge had authority to consider the petition, *Stewart* v. *Johnson,* 192 Ark. 757, 94 S. W. 2d 715, it could have been only for two purposes; first, to establish the identity of the prisoner; and, second, to determine the question of whether or not he was a fugitive. These questions are primarily for the Governor of the asylum state and, where the requisition shows the necessary facts to entitle the demanding state to the return of the alleged

fugitive, the two questions stated are the only ones to be considered. The evidence submitted did not relate to either of these questions, but was to the effect that the petitioner was innocent of the crime charged."

It cannot be questioned, indeed it is conceded, that if appellant is in fact the person named in the requisition he is a fugitive from justice. But is he that person? The cases on the subject uniformly hold that the person sought to be extradited may raise and have determined the question of identity on *habeas corpus.* In other words, a person arrested under a requisition has a right to show in a *habeas corpus* proceeding that he is not the person named in the requisition. Section 20 of the Uniform Criminal Extradition Act, which was enacted into law by Act 126 of the Acts of 1935, so provides.

There is a conflict in the authorities as to where the burden of proof lies in this proceeding, but it is unimportant here as appellant offered no proof whatever. *People* v. *Toman, supra.*

It is conceded that the requisition papers were prepared in exact compliance with the applicable statutes both of Colorado and of this state. The requisition from the Governor of Colorado is for the arrest of Albert Levine, and the warrant of arrest issued by the Governor of this state honoring the requisition, employs the same name. But it appears that the Governor of this state awarded appellant a hearing before honoring the demand of the Governor of Colorado, and at this hearing appellant admitted that he was known by both of the names, Albert Letwick and Albert Levine, although he denied at that hearing that he had ever been in the State of Colorado. At this hearing before the Governor a report by the F. B. I. was offered showing that Albert Levine had been arrested in numerous states on various charges, and it was shown that appellant, at the hearing before the Governor, admitted he had been arrested in all the places named.

The warrant issued by the Governor of this state directed any peace officer of this state to arrest Albert

Levine and to deliver his custody to E. S. Niles, the agent of the State of Colorado, for transportation to that state. Niles testified that he procured photographs of Levine which had been identified by persons who knew Levine, as the person alleged to have committed the "confidence game." One of these had been tried and convicted in Colorado as one of Levine's associates in the "confidence game." The photographs, four in number, were offered in evidence by Niles, who testified that they had been identified as the photographs of the person accused in Colorado of committing the "confidence game," but he did not testify that he personally knew Levine. The court therefore had the opportunity to determine whether appellant was the man who had been photographed.

This was hearsay testimony, of course, but appellant was not on trial for the commission of the offense charged. Indeed his guilt or innocence of that charge was not a question which the court could have heard or determined in the *habeas corpus* proceeding. The rule of evidence requiring that the accused be confronted with the witnesses against him does not apply.

The case of *U. S. ex rel. Austin* v. *Williams,* 6 Fed. 2d 13, was one in which petitioner sought by *habeas corpus* to procure his release upon the ground that he was not the person named in the requisition. Affidavits and photographs were offered in evidence, as in the instant case, which were objected to as offending against the hearsay evidence rule. In holding the evidence competent, the court said: "This is not a criminal case, controlled by the constitutional right of an accused to be confronted by witnesses, but is a civil case, and I conclude from this, and from the decisions (to which the opinion referred), that the relator's objection on this ground is not supported by law, and that the affidavits can be properly considered as evidence by the court."

This holding was affirmed by the Circuit Court of Appeals for the Fifth Circuit on the appeal to that court, 12 Fed. 2d 66, where it was said: "The principal complaint as to the discharge of the writ is based upon the

consideration by the Governor of Louisiana, and the admission in evidence on the hearing below, of affidavits by residents of Utah that the appellant, whose picture was attached to each of such affidavits, was the person who committed the alleged crime. Such evidence properly may be considered in determining whether the person sought to be surrendered is or is not the one charged with crime, and whether he was or was not in the demanding state when the crime is alleged to have been committed. *Munsey* v. *Clough,* 196 U. S. 364, 25 S. Ct. 282, 49 L. Ed. 515." *U. S. ex rel. Austin* v. *Williams,* 12 Fed. 2d 66.

Niles, the agent of the State of Colorado, testified that, practically speaking, the only method of identifying "confidence men" who are fugitives from justice, is by the use of photographs which had been identified as those of the person whose arrest was demanded.

In the case of *State ex rel.* v. *Allen, supra,* it was said: "The Governor of Arkansas, by his act in honoring the requisition, found that appellee was a fugitive from justice. In this state of the case the rule seems to be that before he would be entitled to a discharge by court order, the evidence would have to be practically conclusive in his favor. *Keeton* v. *Gaiser,* 331 Mo. 499, 55 S. W. 2d 302; *Munsey* v. *Clough,* 196 U. S. 364, 25 S. Ct. 282, 49 L. Ed. 515."

Certainly the evidence in this case is not practically conclusive that appellant, the person who calls himself Albert Letwick, is not the Albert Levine whose return to Colorado for trial has been demanded.

It appears that appellant did not make bail as the court ordered that he might do pending this appeal, and that he remained, and is now, in the custody of the officers of this state.

The action of the court below in dismissing the *habeas corpus* proceeding is therefore affirmed, and the officers having appellant in custody will deliver him to the authorized agent of the State of Colorado for transportation to that state.

Opinion delivered January 27, 1947.

Ras Priest, for appellant.

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

McHANEY, Justice. Appellant was convicted in the municipal court of Newport of unlawfully keeping gambling devices, slot machines, in violation of § 3320 of Pope's Digest, a misdemeanor. He appealed to the Circuit Court where he was again convicted, fined $500 and he has appealed to this Court.

On this appeal the only argument made for a reversal is that the evidence is insufficient to support the verdict and judgment against him, because the slot machines were found in a room called "Lou's Place" adjacent to or near appellant's liquor store, both in the same building. Appellant concludes his brief with this statement: "In view of the positive, direct proof that Chester Fortune owned the machines, paid the federal tax on them, set them up, operated them and took the money from them, it is respectfully submitted that the jury was not warranted in finding that the defendant, R. T. Simmons, set up, exhibited and operated the machines as charged in the information."

But we think the evidence justified the jury in finding appellant guilty. It is true that Chester Fortune testified in the circuit court that he owned and operated the machines and took the money out of them. He exhibited a federal license in his name showing payment of $300 for three "Coin Operated Gaming Devices." He made no such claim when the officers took the machines and arrested appellant, although he was present. He

made no such claim in the municipal court, did not even testify in that court. He is contradicted by appellant who told Mr. Huff, the newspaper man, that the machines had been taken out of "Lou's Place." Mr. Huff, in relating what appellant told him shortly after the raid on the slot machines was published, said: "He (appellant) told me at that time that the machines were owned by a fellow by the name of Lou and that they were not his machines and that this fellow had contract with him, that he didn't know where he was now, but that he had contracted with him to put the machines back there."

No one by the name of "Lou" has appeared and claimed to be either the owner of "Lou's Place" or the owner of the slot machines. So it appears to us the jury might have been justified in finding "Lou" to be fictitious. Although Chester Fortune testified he owned and operated the machines, he also testified when asked "Where do you work?", answered: "For R. T. Simmons." Chester was there when the raid was made and his master was arrested, yet he made no protest that they had the wrong man. He is also contradicted by Mr. Simmons who told the officers they could take the machines out, but he would have some more in there in a day or two; also Mr. Simmons wanted to take the money out of the machines before the officers took them away, but was not permitted to do so. Deputy Foushee testified: "We took the slot machines out and Uncle Bob Simmons wanted the money. The sheriff told him he couldn't get it, and for him to wait until they came to court." Appellant's abstract. None of this testimony is disputed, except as it may be by the late claim of Chester Fortune, the only witness for appellant.

The jury has settled this disputed question of fact against appellant and we think they were fully justified by the evidence is so doing.

The judgment is accordingly affirmed.

MISSOURI PACIFIC HOSPITAL ASSOCIATION
v. PULASKI COUNTY.

4-8031 199 S. W. 2d 329

Opinion delivered January 27, 1947.

Henry Donham, for appellant.

John M. Rose, for appellee.

ED F. MCFADDIN, Justice. The question for decision is whether the property of the appellant, Missouri Pacific Hospital Association, is exempt from taxation. The appellees are Pulaski County, the City of Little Rock, the Little Rock Special School District, and John M. Rose, as a property owner in Pulaski county. The status of the appellant, and the use of its property will be discussed subsequently.

Appellees filed petition with the Arkansas Public Service Commission to have the property of the appellant placed on the assessment roll for *ad valorem* taxes. The Public Service Commission, after hearing evidence, made the order sought by the appellees, and rendered a written opinion that has proved helpful to this court. The Pulaski Circuit Court affirmed the order of the Public Service Commission; and the appellant has appealed, presenting the points herein listed.

I. *Is the Appellant's Property "Used Exclusively for Public Charity," and Therefore Exempt?* The answer to this question depends on the use of the appellant's property measured to the applicable constitutional provisions. Article XVI, § 5 of the Arkansas Constitution says, in part:

". . . the following property shall be exempt from taxation: . . . buildings and grounds and materials used exclusively for public charity."

Article XVI, § 6 of the Constitution says:

"All laws exempting property from taxation other than as provided in this Constitution shall be void."

Some of our cases construing the constitutional language "used exclusively for public charity" are: *Brodie* v. *Fitzgerald,* 57 Ark. 445, 22 S. W. 29; *Hot Springs School District* v. *Sisters of Mercy,* 84 Ark. 497, 106 S. W. 954; *Grand Lodge F. & A. M.* v. *Taylor,* 146 Ark. 316, 226 S. W. 129; *School District of Ft. Smith* v. *Howe,* 62 Ark. 481, 37 S. W. 717; and *Robinson* v. *Indiana & Arkansas Lumber Co.,* 128 Ark. 550, 194 S. W. 870, 3 A. L. R. 1426. These cases afford the guide to a decision in the present case.

Acting under Art. XVI, § 5 of the Constitution, the Legislature, by Act No. 114 of 1883 (now found in § 13603, Pope's Digest) provided:

"All property described in this section, to the extent herein limited, shall be exempt from taxation . . .

"Seventh. All buildings belonging to institutions of purely public charity, together with the land actually

occupied by such institutions, not leased or otherwise used with a view to profit, and all monies and credits appropriated solely to sustaining and belonging exclusively to such institutions."

This subdivision has been several times before this court; but, as pointed out in *Brodie* v. *Fitzgerald, supra,* the right of exemption must be found in the Constitution rather than in the statute, since Art. XVI, § 6 so provides.

Appellant claims that its property is exempt as coming within the last clause of Art. XVI, § 5, *supra,* that is:

"All buildings and grounds and materials used exclusively for public charity."

We proceed, therefore, to determine whether the use made of appellant's property is "exclusively for public charity"; and these facts appear to be admitted: (1) Appellant is a benefit association organized under the laws of Missouri, and composed of the employees of the Missouri Pacific Railroad Company and the Missouri Pacific Transportation Company. (2) Appellant owns the hospital in Little Rock; and the employees of the railroad and transportation companies support the hospital by contributions from their wages and salaries each month; and these employees have absolute and exclusive control over the hospital, which is open to retired employees of these companies, and also to members of the families of the employees. (3) The hospital is principally open only to these people; but, in addition, the hospital receives some people who become sick or are injured on the property of the railroad or transportation company. (4) The hospital does not "go out and take in the public generally that might come in and ask for admission." (5) As previously stated, the hospital is supported by assessments made on the wages and salaries of employees. (6) These assessments are fixed by the Board of Trustees of the hospital, based on a scale depending on the amount of wages of each employee. (7) The assessments are made to meet the requirements of the

hospital; and, in the event that the hospital accumulates a surplus, the assessments are reduced or temporarily suspended.

The above admitted facts, as to the use and financing of the appellant's property, show that the property is not used "exclusively for public charity" within the rule announced in *Hot Springs School District* v. *Sisters of Mercy, supra.* In the reported case this court (speaking through Mr. Justice Hart) held the following to be *some* of the essentials existing in that case, and to be necessary to allow exemption of the property as "used exclusively for public charity":

A. The institution was open to any worthy sick person regardless of ability to pay.

B. No funds were diverted from the institution. Whatever profit was realized from those who paid went to the benefit of those who could not pay, to extend and enlarge the charity of the hospital.

Neither of these two essentials is present in the case at bar. The appellant's hospital is not open to "any worthy sick person"; it is open only to Missouri Pacific employees, their families, and persons who may become sick or be injured on Missouri Pacific property. Furthermore, if the hospital accumulates a surplus, then such is returned to the members by reducing or temporarily suspending assessments. In short, the proof here shows that the appellant's hospital is not used "exclusively for public charity"; and the use is the determining factor. As stated by Chief Justice McCulloch in *Grand Lodge* v. *Taylor, supra*: "This language of the exemption clause refers, not to the character of the corporation or association owning the property sought to be exempted, but, regardless of the character of the owner, to the direct and exclusive use of the property for public charity."

In 51 Am. Juris., 606, *et seq.*, there is an exhaustive discussion of hospitals as exempt from taxation. In 61 C. J. 500, *et seq.*, this matter is also discussed. Of course, the decision in any state depends, to a large extent, on

the wording of the constitutional provision in such state. Our Constitution limits the exemption to property "used exclusively for public charity"; and is much more restrictive than provisions in the constitutions of some other states. The wording of the restriction determines the distinction in some of the cases, as is pointed out in Annotations and cases cited in 51 Am. Juris., 606, *et seq.*, from which we quote a part of the text:

"Hospitals as such enjoy no inherent exemption from taxation, and their property is taxable except so far as exempted by constitutional provisions or legislative enactments. . . . Hospitals claiming exemption have the burden of showing that they clearly come within the terms of the exemption enactments. . . . Where the benefits of a hospital are restricted to a special class, the rules of law generally pertaining to such situations in the case of charitable institutions govern. So, a hospital to which the general public has no legal right of entry, and from which it may be excluded at the discretion of the managers, is not entitled to exemption from taxation as a purely public charity. A hospital maintained by a corporation created for the purpose of maintaining it for the benefit of employees of a railroad company, and used for treatment solely of members of an association composed entirely of such employees, is not for strictly charitable purposes within the meaning of a constitutional tax exemption."

To sustain the last-quoted sentence, there is cited the case of *Chaffee County* v. *D. & R. G. R. Co. Employees' Relief Assn.*, 70 Colo. 592, 203 Pac. 850, 22 A. L. R. 902. In that case the Supreme Court of Colorado held that the hospital, very much like the one in the case at bar, was not exempt from taxation, since its property was not "used solely and exclusively for strictly charitable purposes." The constitutional provision in Colorado concerning exemption is very similar to ours, and the hospital association in the Colorado case is very similar to the hospital association in the case at bar.

A most enlightening case, construing our own constitutional provision as applied to a hospital operated

for benefit of railway employees, is the case of *S. L. S. W. Ry. Co.* v. *Yates,* 23 Fed. 2d 283. In that case the U. S. Circuit Court of Appeals of the 8th Circuit decided that a hospital in Texarkana, Arkansas, was not exempt from taxation. The court said:

"Funds to support the institution are to be obtained by assessments, based on a wage-earning scale, collected monthly from the employees. There are other provisions which emphasize those above quoted or outlined but sufficient has been said to show the general plan of the trust to be that the use of the property is confined to the employees (and their dependents) of appellant and its affiliated lines. The public in general, nor any part thereof, nor any indefinite class have any right to any use in this property and it is in no wise supported by any charitable gifts or donations, but only by the direct beneficiaries thereof and by contributions, in the form of loans, from the railways whose employees are protected. In short, it is simply the familiar plan of a hazardous business providing hospital and medical services for those engaged therein. It seems to us that this is clearly not a usage 'exclusively for public charity.' We base the above conclusion on an independent construction of this provision of the Arkansas Constitution. However, there are certain Arkansas Supreme Court decisions which tend to support, if they do not compel the same conclusion. Those are *Hot Springs School Dist.* v. *Sisters of Mercy,* 84 Ark. 497, 106 S. W. 954; *McDonald* v. *Shaw,* 81 Ark. 235, 242, 98 S. W. 952; *Fordyce* v. *Woman's Christian National Library Association,* 79 Ark. 550, 96 S. W. 155, 7 L. R. A. (N. S.) 485. In all of these cases that court has held that to constitute a public charity within the meaning of this constitutional provision, the trust must be for the benefit of an indefinite class of persons. Another case, *Arkansas Midland R. Co.* v. *Pearson,* 98 Ark. 399, 135 S. W. 917, 34 L. R. A. (N. S.) 317, seems closely analogous, if not directly in point."

There are many cases on the question here at issue. Some cases support the views already expressed; and some are to the contrary. We make no effort to list all

such cases, nor to distinguish and discuss those apparently or actually holding to the contrary. It is sufficient to say that we reach the conclusion, in line with the cases and authorities we have cited, that the appellant's property is not "used exclusively for public charity," and is, therefore, not entitled to tax exemption under our constitutional provsion.

II. *Act 40 of 1931.* The appellant relies most strongly on this act as granting the exemption from taxation. This act, which may be found in § 13587, Pope's Digest, reads:

"All corporations or institutions heretofore or hereafter organized, created and operated as a hospital for the purpose of treating the members of said organization and others, not leased or otherwise used with a view of profit, are hereby declared to be institutions of public charity and shall be free from taxation."

But the vice of the appellant's argument in reliance on this act lies in the unconstitutionality of the act as applied to the facts in this case. Art. XVI, § 5 of the Constitution provides what property is exempt from taxation; Art. XVI, § 6, as previously quoted, says:

"All laws exempting property from taxation other than as provided in this Constitution shall be void."

When we hold, as we did in section I, *supra,* that the appellant's property was not "used exclusively for public charity," then Art. XVI, § 6 of the Constitution strikes down any legislative attempt to grant appellant any exemption from taxation. In *Supreme Lodge* v. *Board of Review,* 223 Ill. 54, 79 N. E. 23, 7 Ann. Cas. 38, the Supreme Court of Illinois struck down a legislative enactment which allowed a tax exemption broader than the constitutional provision. That is what we are obliged to do here. What was said in *Brodie* v. *Fitzgerald, supra,* is not only apropos; but is ruling:

"Section 6 provides that 'All laws exempting property from taxation other than as provided in this Constitution shall be void.' It follows that if this property

is not exempt from taxation under the Constitution, it cannot be exempt under any act of the General Assembly, as the section last quoted is a limitation upon the power of the Legislature to exempt property from taxation."

We, therefore, conclude that Act 40 of 1931 is unconstitutional insofar as it attempts to grant tax exemption to property not exempt under Art. XVI, § 5 of the Constitution; and for that reason does not support the appellant in the case at bar.

III. *Res Judicata.* Finally, appellant cites orders of the Pulaski County Court made in 1925 and 1931, and an order of the Arkansas Tax Commission made in 1929, each declaring appellant's property to be exempt from taxation; and appellant claims that these orders render *res judicata* any and all questions as to taxability of appellant's property in the present proceedings.

Against this plea, the appellees offer several defenses, some of which are: (1) administrative rulings are never *res judicata;* (2) there was no identity of parties as between any of the previous proceedings and the case at bar. We find it unnecessary to discuss or decide these contentions, because we hold that a judgment rendered in one year, holding property to be exempt from taxes because "used exclusively for public charity," is not *res judicata* regarding the taxes on the property for a subsequent year. The great weight of authority is to the effect that an adjudication upon liability for taxes of one year is no bar to an action for taxes for a subsequent year. In *Keokuk & W. R. Co.* v. *Missouri,* 152 U. S. 301, 38 L. Ed. 450, 14 S. Ct. 592, the U. S. Supreme Court said: "A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are distinct and separate causes of action."

In *City of Newport* v. *Commonwealth,* 106 Ky. 434, 50 S. W. 845, 51 S. W. 433, 45 L. R. A. 518, the Kentucky Court of Appeals said: "An adjudication upon a liability for taxes for one year is no bar to an action for taxes for a subsequent year."

In *Bank* v. *City of Memphis,* 101 Tenn. 154, 46 S. W. 557 the Tennessee Supreme Court said: "The plea of *res adjudicata* is limited in its effect, in tax cases, to the taxes actually in litigation, and is not conclusive in respect to other taxes assessed for other and subsequent years."

In *Lakeshore Ry. Co.* v. *People,* 46 Mich. 193, 9 N. W. 249 the Supreme Court of Michigan said: "The result of a suit for taxes of a particular year is not *res judicata* in subsequent suits between the same parties for taxes of other years, and the decisions upon legal questions arising in the first case are important only as precedents."

To the same effect see *Chicago R. Co.* v. *Cass County,* 72 Neb. 489, 101 N. W. 11, 117 A. S. R. 806; *City of Davenport* v. *C. R. I. & P. R. Co.,* 38 Iowa 633; *Shreveport Creosting Co.* v. *Shreveport,* 119 La. 637, 44 So. 325; and *State* v. *Brotherhood of R. Trainmen,* 74 O. App. 263, 54 N. E. 2d 320. See, also, 34 C. J. 966.

We, therefore, hold that the appellant's plea of *res judicata* is without merit.

The judgment of the Circuit Court is in all things affirmed.

Holt, J. (dissenting). I cannot agree with the view of the majority in this case.

Article XVI, § 5 of the Constitution of the State of Arkansas provides: "All property subject to taxation shall be taxed according to its value . . . provided that the following property shall be exempt from taxation: Public property used exclusively for public purposes; churches used as such; cemeteries used exclusively as such; school buildings and apparatus; libraries and grounds used exclusively for school purposes; and buildings and grounds and materials used exclusively for public charity." Section 6 reads: "All laws exempting property from taxation other than as provided in this Constitution shall be void."

Obviously § 5 was not self executing and an enabling act of the Legislature was necessary to make it effective and to define or classify the different species of property which the Constitution exempted from taxation. To this end, the Legislature of 1883 passed an act (now § 13603 of Pope's Digest), exempting the following property from taxation: "First. All public schoolhouses, etc. Second. All public colleges, academies, etc. Third. All lands used exclusively as graveyards, etc. Fourth. All property, whether real or personal, belonging exclusively to this State or the United States. Fifth. All buildings, belonging to counties used for holding courts, for jails or for county offices, etc. Sixth. All lands, houses and other buildings belonging to any county, city or town used exclusively for the accommodation of the poor. Seventh. All buildings belonging to institutions of purely public charity, etc. Eighth. All fire engines and other implements used for the extinguishment of fires, with the buildings, etc. Ninth. All markethouses, public squares, other public grounds, town and city houses or halls, etc." There was no attempt by the Legislature, by this act, to exhaust all of its powers under Art. XVI of the Constitution, *supra.*

By Act No. 40, the Legislature of 1931 further exercised its powers under Art. XVI. The title of that act was "An Act to Declare Certain Institutions Used for Hospital Purposes to be Purely Public Charity." Section 1 of the Act provides: "All corporations or institutions heretofore or hereafter organized, created and operated as a hospital for the purpose of treating the members of said organization and others, not leased or otherwise used with a view of profit, are hereby declared to be institutions of public charity and shall be free from taxation." Section 2 repealed all laws and parts of laws in conflict.

This act has been in effect for more than fifteen years and recognized and followed by all tax assessing agencies, resulting in appellant's property not being taxed during this period.

It will be observed that the exempting provision of the Constitution, *supra,* did not attempt to define "public property," "public purposes," "churches," "cemeteries," "school buildings and apparatus," "libraries and grounds," or "public charity," so as I view it, the present case presents this question: "Can the Legislature within reasonable limitations find and declare as the public policy of this State what constitutes public charity and what type of institutions shall be declared institutions of public charity?" I think it has that power.

Certainly, the Legislature of this State has the power to, and does, declare the State's public policy and when, as here, it has by legislation declared the State's policy to be that all corporations or institutions coming within the provisions of Act No. 40, *supra,* "are hereby declared to be institutions of public charity and shall be free from taxation," it was, it seems to me, acting within its powers and this court would not be warranted in striking down this legislation as being in contravention of the Constitution.

There is no contention that appellant does not come within the provisions of Act No. 40, but it is insisted that the act is unconstitutional.

In considering this question, there are certain well established rules of construction to guide us. This court in *Bush* v. *Martineau,* 174 Ark. 214, 295 S. W. 9, said: "First, that the Constitution of this State is not a grant of enumerated powers to the Legislature, not an enabling, but a restraining act (*Straub* v. *Gordon,* 27 Ark. 625), and that the Legislature may rightfully exercise its powers subject only to the limitations and restrictions of the Constitution of the United States and of the State of Arkansas. (Citing cases.) In other words, as was said in *McClure* v. *Topf & Wright,* 112 Ark. 342, 166 S. W. 174: 'It is not to be doubted that the Legislature has the power to make the written laws of the State, unless it is expressly, or by necessary implication, prohibited from so doing by the Constitution, and the act assailed must be plainly at variance with the Constitution before the court will so

declare it.' Second, that an act of the Legislature is presumed to be constitutional, and will not be held by the courts to be unconstitutional unless there is a clear incompatibility between the act and the Constitution; and further, that all doubt on the question must be resolved in favor of the act. (Citing cases.) In *Standard Oil Co. of La.* v. *Brodie,* 153 Ark. 114, 239 S. W. 753, this court quoted the language of the Supreme Court of the U. S. in *Hooper* v. *California,* 155 U. S. 48, 15 S. Ct. 207, 39 L. Ed. 297, that 'the elementary rule is that every reasonable construction must be resorted to in order to save the statute from unconstitutionality.' "

In *McEachin* v. *Martin,* 193 Ark. 787, 102 S. W. 2d 864, it was said: " . . . the well established rule of construction should be kept in mind that legislation will not be declared unconstitutional unless obviously so, and that all reasonable doubt upon the subject must be resolved in favor of the constitutionality of the legislation."

In *Alaska Steamship Co.* v. *United States,* 290 U. S. 256, 54 S. Ct. 159, 78 L. Ed. 203, the Supreme Court said: "Courts are slow to disturb the settled administrative construction of a statute long and consistently adhered to."

In *Moore* v. *Alexander,* 85 Ark. 171, 107 S. W. 695, this court said: "The general rule is that the acts of the General Assembly are valid unless in conflict with some express provision of the State or Federal Constitution, and it will not do to say that the act is contrary to the spirit of the Constitution, but the clause must be indicated and the repugnancy between it and the act apparent before the courts are justified in pronouncing the act null. 1 Lewis's Sutherland, Stat. Con. (2d Ed.), § 85."

A case which appears to be directly in point is that of *State ex rel.* v. *Packard et al.,* 35 N. D. 298, 160 N. W. 150, L. R. A. 1917B 710. There, four Masonic institutions sought to prevent the Tax Assessor and State Tax Commission from listing and assessing their properties for taxation, claiming exemption under the laws of North Dakota. The Constitution of that State provided:

"Laws shall be passed taxing by uniform rule all property according to its true value in money, but the property of the United States and the State, County and municipal corporations, both real and personal, shall be exempt from taxation, and the legislative assembly shall by general law exempt from taxation property used *exclusively for school, religious, cemetery or charitable purposes.*"

Pursuant to this mandate, the North Dakota Legislature passed a law exempting "all buildings belonging to institutions of public charity" from taxation. In 1901, the exemption statute was amended to exempt from taxation "the personal and real property owned by charitable associations known as posts, lodges, chapters, councils, commanderies, consistories, and like organizations and associations not organized for profit, grand or subordinate, and used by them as places of meeting and to conduct their business and ceremonies; provided, however, that such property is used exclusively for such charitable purposes."

In upholding these statutes and sustaining the contention of certain Masonic bodies that their property was exempt from taxation the court, among other things, said: "But if the meaning of the statute be deemed doubtful, we are reminded that the foregoing provisions have remained a part of the statute law of this State since 1901 (decision 1916) although subsequent Legislatures have made certain changes in the law designating the property declared to be exempt from taxation. . . . The provision therefore has remained a part of the statute law of this State for fifteen years. During this time it has not only been treated as valid by the various administrative officers and boards but has received the approval of three different legislative assemblies and three different Governors. . . . The contemporaneous construction placed thereon by the various administrative officers and boards is entitled to great weight, and the acquiescence in and approval of such construction by subsequent legislative assemblies and

chief executives ought to dispel all possible doubt as to the legislative intent. The State Tax Commission, however, contends that the Masonic bodies are not charitable associations and that property used for their places of meeting and to conduct their business and ceremonies is not used for charitable purposes; that it was beyond the constitutional power of the Legislature to so declare, and that consequently the provision under consideration is unconstitutional. . . . It is unnecessary for us, however, in this case to determine whether a Masonic lodge is a charitable organization. The Legislature has determined this question and in positive and unequivocal terms declared that the several Masonic bodies are charitable organizations and that their property when used for the purposes specified in the statute is used for charitable purposes and as such exempt from taxation. We are not called upon, nor is it our function, to review the correctness of this legislative determination. For it must be presumed that the Legislature had before it when the statute was passed any evidence that was required to enable it to act; and the passage of the statute must be deemed a finding by the Legislature of the existence of the facts justifying the enactment thereof. We have no power to supervise the acts of the Legislature or substitute our judgment for its judgment upon any matter within the scope of its constitutional powers. Our authority is limited to an inquiry into and a determination of whether the Legislature has exceeded its constitutional powers and has arbitrarily classified property as entitled to exemption from taxation on the ground that it was used for charitable purposes, when clearly and unquestionably the property sought to be exempted is not within the class which the Legislature has declared it to be.

"Every reasonable presumption is in favor of the constitutionality of a legislative enactment, as it is presumed that the Legislature acted within its constitutional powers and enacted a valid law. This presumption is conclusive unless it is clearly shown that the enactment is prohibited by the State or Federal Constitution. The primary duty of the courts is to construe statutes with

reference to the Constitution and it is only when a statute clearly violates the provisions of the Constitution that the courts may declare the statute to be unconstitutional. . . .

"No attempt was made to define charitable purposes in the State Constitution, or to determine what organizations or institutions would be entitled to the benefit of the exemption which the Constitution directed the Legislature to put into effect. Nothing was said to indicate any intent to exclude secret or fraternal societies from the benefit of such exemption or (as in some States) to restrict such exemption to property devoted purely and exclusively to the purposes of public charity. . . . The legislative construction and determination as we have already stated was in harmony with the weight of judicial authority in this country, and in our opinion we have no right to say that the Legislature exceeded its constitutional authority in enacting the statute under consideration."

I have quoted somewhat at length from this North Dakota case for the reasoning appears to me most logical and sound. See *Gay et al.* v. *State et al.*, 228 Ala. 253, 153 So. 767.

In the present case, not only has appellant's property been declared exempt by all taxing agencies in this state for more than fifteen years, but at least seven Legislatures have met and adjourned without further action, and certainly it appears to me that some action on the part of the Legislature would have been taken had there been any doubt about the meaning and validity of Act No. 40, *supra*. The presumption of the act's validity as pointed out in the above authorities is fortified by acquiescence continued through the years, until it has become a rule of property.

In *Union Pacific Ry. Co.* v. *Artist*, 60 Fed. 365, (C. C. A. 8 Circuit—opinion by Judge SANBORNE), 23 L. R. A. 581, it was held: "A hospital maintained by a railroad for free treatment of its employees, supported partly by monthly contribution of all its employees and partly by

the company, and not maintained for profit, is a charitable institution."

I think that the definition of "public charity" being promulgated in the majority opinion is a narrow and impracticable one. The majority is, in effect, saying that unless a charitable institution is open alike to all members of the public it is not such a public charity as to be exempt from taxation. Merely to give examples of what would flow from such a rule is to show its utter unsoundness. A home built and operated under an endowment that provided that it should be a haven for white orphan children of Pulaski county would not, under the majority's rule, be exempt from taxation, because it was not open to children of the Negro race or children from outside Pulaski county. Instances of the absurdities to which the narrow construction being given the word "public" by the majority could be multiplied, but I think the one given is sufficient to show that the majority's pronouncement that a charity must be available to all members of the public, in order to come within the constitutional exemption, is an unreasonable one.

The case of *S. L. S. W. Ry. Co.* v. *Yates,* 23 Fed. 2d 283, relied upon by the majority is, as I view it, not controlling here for the reason that that case was decided approximately four years before Act No. 40, *supra,* was enacted.

For the above reasons, I think the judgment should be reversed and the cause remanded with directions. Mr. Justice McHaney and Mr. Justice Robins concur.

Polk *v.* Gray.

4-8048 198 S. W. 2d 847

Opinion delivered January 27, 1947.

J. F. Quillin, for appellant.

J. M. Smallwood and *D. P. McKenzie,* for appellee.

GRIFFIN SMITH, Chief Justice. Questions presented are whether the Court erred in refusing to decree specific performance of a contract for sale and purchase of land; or in the alternative was it error to dismiss the plaintiff's prayer for damages, and to award liquidated damages to one of the defendants.

S. A. Gray, who owned 79 acres, listed it with United Farm Agency to be sold for $2,500. The Agency was represented by H. H. Vance.

June 14, 1944, Harrison Polk signed the Agency's printed form whereby he contracted to purchase the land and the seller agreed to execute a deed "containing a general warranty and the usual further covenants for the conveying and assuring to [the purchaser] the fee simple of the said premises, free from all encumbrances except those mentioned herein".

A cash payment of $250 was made, with $2,250 to be paid at one o'clock July 14th at the Agency office in Paris. The sale was subject to a coal lease held by W. H. Argo.

The evidence is not in substantial conflict except that part regarding possession. This, however, seems to have been restricted to Polk's use for pasturage, a right granted by Tom Stewart, who had the property rented. Gray seemingly told Polk he could graze his

cattle on a minor part of the acreage, provided Stewart did not object. Stewart agreed on condition that his crops were not to be injured. The testimony is undisputed that the cattle gave trouble, and "in about a month" they were removed at Stewart's request.

During trial it was stipulated that Vance was not liable unless it be for the cash deposit of $250, and this was tendered and paid into the Court registry.

Abstract of title was delivered to W. L. Kincannon, an attorney at Booneville, who addressed a letter to Nesto Regindtto, (referred to in one of the briefs as Reginato) stating that the title was good if certain conditions were met—among them being procurement of quitclaim deeds from four persons whose interests as joint heirs had been acquired by E. H. Avance. Arguing the proposition that in spite of these objections by counsel in examining the abstract, title was good in Gray because he had been in adverse possession a sufficient length of time for title to ripen, appellee contends that the partition suit pointed to by Kincannon as faulty occurred thirty-five years ago. One quitclaim deed was procured, but others were not.

It is quite clear that by mutual conduct time for closing the deal was extended beyond July 14th; and there is testimony to this effect. Gray and his wife, who executed a deed and tendered it to Polk, returned from a trip to California August 15, 1944. Gray immediately undertook to procure the required quitclaim deeds, but was unable to do so. Later Afton Mitchell offered $2,500 for the land. In the meantime Gray says he met Polk and told him he had done all he could, and that the "deal was off". Mitchell paid $2,000 in cash and withheld $500 until the argument with Polk could be disposed of. He claims to be an innocent purchaser.

After Mitchell completed his purchase, Polk offered to waive the conditions Kincannon had mentioned in the title letter. This was emphasized during trial, when Polk said that if Mitchell were willing to risk his money on the title, he was likewise willing.

The trouble is that Polk persistently contended the title was not merchantable; that under his contract he had a right to insist upon all of the conditions mentioned by Kincannon, and he refused to accept the deed until informed that the property had been disposed of.

The evidence as abstracted does not conclusively nor by resulting implication show that the title was bad. Mitchell took one view of it, Polk another until the land was sold; then he expressed a willingness to pay the balance of $2,250. In these circumstances we think the Chancellor was warranted in finding that Polk did not act in good faith. It was not stated in the contract of sale that title should be good, *prima facie*. The obligation was that a warranty deed would be executed, assuring a fee simple title free from encumbrances except those enumerated. If, as appellee says in his brief (and we assume there is unabstracted testimony supporting the statement, since it is not contradicted by appellant,) Gray had been in adverse possession for thirty-five years since the partition suit in respect to which quitclaim deeds were suggested by Kincannon, it can hardly be said that want of such deeds deprived the title of its merchantable character.

The decree finds that Gray is entitled to the cash payment of $250, but directs that the fund be held until this Court has disposed of the appeal. The contract and testimony as to subsequent transactions are not harmonious. The contract mentions a consideration of $2,500 as purchase price of the land, " . . . and [to] pay the same as follows: Amount paid on execution of this contract, $250; additional cash on delivery of deed, $2,250". Farther there is this paragraph: "[If] either party fails . . . to perform his part of this agreement, he shall forthwith . . . forfeit as liquidated damages . . . a sum equal to ten percent of the agreed price of sale".

While liquidated damages are stipulated, the payment of $250 is a part of the purchase price. Later, and in the oral testimony or depositions, the deposit is spoken of as a trust fund. Vance testified: "The down pay-

ment was what we call trust money. I tendered that back to Mr. Polk and he would not accept it. The money is in the bank and I will give him a check for it today. . . . Mr. Gray did not receive [the $250]".

It is our view that, in the circumstances attending the case, the item of $250 was, in fact, a guaranty fund against capricious conduct upon the part of the proposing purchaser, and the specific deposit was not absolutely and in all events to be treated as liquidated damages. While Polk may have refused to accept a merchantable title and to pay the balance of $2,250, he at least was acting on the advice of an attorney who did not feel that unqualified approval could be given. It seems certain that additional time was granted by common consent. Gray's act in procuring one of the four quitclaim deeds no doubt influenced Polk in believing the others were necessary; nor was there an unwillingness to refund the initial payment.

The decree will be reversed in so far as it requires payment to Gray of $250; with directions that this sum be refunded to Polk. That part of the decree denying specific performance is affirmed. Costs in each court are to be borne equally by Polk and Gray.

STATE, EX REL. PILKINTON, PROSECUTING ATTORNEY, *v.* BUSH, JUDGE.

4-8189 198 S. W. 2d 1004

Opinion delivered January 27, 1947.

James H. Pilkinton and *Philip G. Alston,* for petitioner.

Shaver, Stewart & Jones, for respondent.

ROBINS, J. A petition has been filed in this court by Honorable James H. Pilkinton, prosecuting attorney of the eighth judicial circuit of Arkansas, asking us to grant a writ of mandamus against the respondent, Honorable Dexter Bush, judge of that circuit, commanding him to approve the appointment of Mr. Henry Woods as deputy prosecuting attorney of Miller county.

It is alleged in the petition that the appointment has been duly made by petitioner, that the appointee is

duly qualified for the position, and that the respondent has arbitrarily and without good reason refused to approve the appointment. The respondent has answered, asserting that he had the right, without giving any reason, to approve or disapprove the appointment, but denying that he had acted arbitrarily and alleging that the appointee was not qualified for the position to which he had been named. The respondent also challenges the availability of the writ of mandamus in the instant case.

The authority of prosecuting attorneys to appoint deputies is found in § 10884 of Pope's Digest as follows: "Except as otherwise provided, the Prosecuting Attorneys of the several Judicial Circuits of this State may appoint one deputy in each of the several counties composing their circuits; provided, that such appointment shall not take effect until approved, in writing, by the judge of the Circuit Court of such circuit, which approval shall be filed in the office of the Clerk of the Circuit Court of the county for which such deputy is appointed; . . ."

The legislature did not intend that the duty imposed on a circuit judge in connection with the appointment of a deputy prosecuting attorney should be a merely formal or ministerial one. The word "approved," as used in the statute, connotes the exercise of discretion on the part of the judge.

"The very act of approval, unless limited by the context of the statute providing therefor, imports the act of passing judgment, the use of discretion and a determination as a deduction therefrom." *Fuller* v. *Board of University and School Lands,* 21 N. D. 212, 129 N. W. 1029. See, also, *Baynes* v. *Bank of Caruthersville* (Mo. App.), 118 S. W. 2d 1051; *People* v. *Hall,* 140 Calif. Supp. 745, 31 P. 2d 831; *Key* v. *Board of Education of Granville County,* 107 N. C. 123, 86 S. E. 1002; *Melton* v. *Cherokee Oil & Gas Company,* 67 Okla. 247, 170 Pac. 691; *In Re Robinson's Will* (*Henneman* v. *Robinson*), 218 Wis. 596, 261 N. W. 725.

The circuit judge is a member of the judiciary and his duties and powers are judicial. We held in the case

of *Oates* v. *Rogers,* 201 Ark. 335, 144 S. W. 2d 457, that the legislature could not vest in a circuit judge or chancellor a non-judicial duty. In that case we were considering the validity of an Act of the General Assembly creating the office of tax collector in counties having a population of 125,000 and an assessed valuation of real and personal property of $50,000,000 or more. The Act authorized the appointment of the collector by the judges of the circuit, chancery and county courts, and we held that this Act was unconstitutional because "the nature of the act of appointment is essentially non-judicial, and therefore not to be exercised by circuit and chancery judges . . . ." So, if the power of the circuit judge to pass on the appointment of a deputy prosecuting attorney may be upheld, it must be sustained on the theory that the power conferred is judicial in its nature.

Since the function of the judge in this matter is a judicial one, some discretion as to the approval of the appointment is necessarily vested in the judge, and, this being true, his action relative thereto cannot be controlled by mandamus. *Gunn's Adm'r.* v. *County of Pulaski,* 3 Ark. 427; *Williamson, Ex Parte,* 8 Ark. 424; *Hutt, Ex Parte,* 14 Ark. 368; *Johnson, Ex Parte,* 25 Ark. 614; *Hays, Et Al., Ex Parte,* 26 Ark. 510; *McMillen, Et Al.,* v. *Smith, Et Al.,* 26 Ark. 613; *County Court of Union County* v. *Robinson, Trustee,* 27 Ark. 116; *Willeford, Et Al.,* v. *State Ex Rel.,* 43 Ark. 62; *Rankin* v. *Fletcher,* 84 Ark. 156, 104 S. W. 933; *Maxey* v. *Coffin,* 94 Ark. 214, 126 S. W. 729; *Nixon* v. *Grace,* 98 Ark. 505, 136 S. W. 670; *Jackson* v. *Collins,* 193 Ark. 737, 102 S. W. 2d 48.

The power of the circuit judge being judicial, it is not absolute; and he does not have the right to refuse, without any valid reason, to approve an appointment of this kind. If he had such absolute power it would mean that the circuit judge might, in all cases, bring about the appointment of one selected by him, or, in event of the refusal of the prosecuting attorney to meet the judge's wishes, prevent any appointment whatever. We think the legislature meant to vest the power in the prosecuting attorney to make this appointment, subject

to the right of the circuit judge to refuse to approve such appointment when there is a good reason—such as moral unfitness or lack of proper training of the proposed appointee—for doing so.

Furthermore, since the authority vested in the circuit judge by the above quoted statute is a judicial one, his action is subject to review by this court, even though the proceeding relative to the appointment is before the judge and not the court. *Jackson, Ex Parte,* 45 Ark. 158; *State ex rel. Arkansas Industrial Company* v. *Neel,* 48 Ark. 283, 3 S. W. 631; *State ex rel. Attorney General* v. *Williams,* 97 Ark. 243, 133 S. W. 1017; *Bowden* v. *Webb,* 116 Ark. 310, 173 S. W. 181; § 4, Art. VII, Constitution of Arkansas.

It follows from what has been said that the writ of mandamus, as prayed for herein, must be denied, but without prejudice to the right of the petitioner again to present to respondent, for his action thereon, the appointment herein involved, whereupon the respondent should, if the propriety of the appointment be questioned, hear any testimony as to the fitness of the appointee that may be offered; and final action of the respondent in the premises to be subject to review by this court on *certiorari* proceedings. It is so ordered.

Mr. Justice McFaddin not participating.

GRANISON *v.* MORETZ.

4-8053 198 S. W. 2d 999

Opinion delivered January 27, 1947.

J. C. Brookfield, for appellant.

Giles Dearing, for appellee.

MINOR W. MILLWEE, Justice. Appellant, Robert Granison, filed suit in the St. Francis Chancery Court on October 23, 1945, alleging that appellees, W. L. Moretz and Gladys Riley, had falsely and fraudulently represented to him that they were the owners of the SW¼ of NE¼ and SE¼ of NW¼ of section 20, township 6 N, range 2 east, in St. Francis county and had executed and delivered their separate deeds to appellant for the two 40-acre tracts for $341.

The complaint alleged: "That the claim of title by such defendants was fraudulent which fraud was perpetrated by bogus representations and instruments in writing known by these defendants to be bogus and which could not reasonably have been so known to the plaintiff, to-wit:

"These defendants, Moretz and Riley, fraudulently represented to the plaintiff that the deceased owner, C. J. Ochse, was a relative of them, died at their home in Cross county and had executed to them a will to said

real estate; that said W. L. Moretz, claiming to be a lawyer, represented to this plaintiff that he had examined the will, orders of probate and tax redemptions and found them to be sufficient to convey a good and sufficient title to them; that plaintiff relied upon such statements, representations and evidences of title and paid to these defendants said $341 when in fact and in truth such evidences were fraudulent and of no account except as a foundation to perpetrate such fraud."

It was further alleged that the will of C. J. Ochse was void and that Mayo Riley, a minor and daughter of appellee, Gladys Riley, took no interest under the will, or if she did, that such interest was never legally conveyed by the proceedings in probate. The written instruments alleged to be spurious were: (1) the will of C. J. Ochse; (2) the deeds from appellees Moretz and Gladys Riley to appellant; and (3) certain tax redemption certificates issued to C. J. Ochse and Gladys Riley.

The complaint prayed: (1) that the will of C. J. Ochse be brought into court and cancelled; or (2) if the will be found valid, that an erroneous description of one 40-acre tract therein be corrected and a trustee ordered to sell, and appellees, W. L. Moretz and Gladys Riley, ordered to pay up to $341 for the property; (3) that appellant's title to the lands be confirmed; (4) that by way of further alternative relief appellant have judgment against appellees, Moretz and Gladys Riley for $341.

On November 22, 1945, appellees filed their demurrer alleging that the complaint did not state facts sufficient to constitute a cause of action against them. This demurrer was not acted upon until after appellant had taken proof in the form of depositions on December 28, 1945. The cause was heard by the chancellor on February 25, 1946, when appellees filed what is denominated "a demurrer to the evidence," pursuant to the provision of Act 257 of 1945. It was alleged in this pleading that the proof on behalf of appellant was insufficient to constitute a cause of action against appellees. The trial court sustained both the "demurrer to the evidence" and the demurrer which had previously been filed in the

case, and appellant declining to plead further, the complaint was dismissed.

The exhibits attached to the deposition of appellant tend to show that the will of C. J. Ochse was filed in the office of the county clerk of Cross county on May 20, 1941, and thereafter duly admitted to probate. The will devised certain lands in both Cross and St. Francis counties to several persons including a niece of the testator who resided in California. Two 40-acre tracts in St. Francis county were devised to Mayo Riley, the minor daughter of appellee, Gladys Riley. One of these tracts, SW¼ of NE¼ of sec. 20, T. 6 north, R. 2 east, was sold by order of the Probate Court on July 15, 1942, and appellee, W. L. Moretz, became the purchaser for $300.

In 1943, appellee, Gladys Riley, redeemed the SE¼ of NW¼ of sec. 20, T. 6 north, range 2 east, by payment of the delinquent taxes for the years 1940, 1941 and 1942. This 40-acre tract was not described in the will of C. J. Ochse, but had been redeemed by him in 1937 for the 1934 delinquent taxes along with the SW¼ of the NE¼ purchased by Moretz. On April 7, 1945, Gladys Riley executed her quitclaim deed to appellant to the tract redeemed by her for $41. Appellee, W. L. Moretz, on the same date likewise conveyed to appellant the 40 acres purchased by him at the probate sale for $300.

Prior to the institution of the present suit, appellant intervened in the proceedings had in the estate of C. J. Ochse, deceased, in the St. Francis Probate Court. He filed a motion to correct the record in those proceedings and his exceptions to the report of sale of the 40-acre tract to appellee, W. L. Moretz. After a hearing on appellant's intervention, the Probate Court dismissed the proceedings and no appeal was taken from this order.

Appellant testified that he moved on the land at the time he purchased it from appellees on April 7, 1945. He could "scarcely" read and write. At the time of the purchase appellees gave him the three tax redemption certificates which had been issued to C. J. Ochse and Gladys Riley. When asked what these certificates were

given to him for, appellant answered, "to show for the land that I was moving on." Appellees also told appellant that one of the 40-acre tracts had been left to the Riley child and he was informed of the proceeding in probate court and the sale to Moretz. Appellees told him to go ahead and move and they would give him a deed that would be all right. On cross-examination, appellant testified that he had been in possession of the land for four years under claim of ownership and had farmed and paid taxes on the land each year.

Two other witnesses testified on behalf of appellant that they were acquainted with the handwriting of C. J. Ochse and that the will did not appear to be in his handwriting.

Appellant is not interested in the estate of C. J. Ochse, deceased, either as heir, legatee, devisee or judgment creditor. The will of C. J. Ochse appears to have been duly admitted to probate in common form and its validity was attested to by the two subscribing witnesses. There has been no appeal from the order admitting the will to probate, and it seems to be conceded by appellant that he has no right to contest or reform the will in the instant suit. However, it is earnestly insisted that he should recover the purchase price of $341 because of fraudulent misrepresentations made by appellees, W. L. Moretz and Gladys Riley, and that the trial court erred in refusing to grant such relief.

Ordinarily a grantee under a deed without covenants of title has no recourse against his grantor upon a failure of title. There is, however, one exception to this general rule, and that arises where fraud has been practiced upon the purchaser. The rule is stated in *Fernanzo* v. *Tedford,* 186 Ark. 586, 54 S. W. 2d 700, as follows: "The rule is, as between vendor and vendee, in a conveyance by quitclaim deed, although the vendor makes no covenants which cover a defect in the title, the purchase money can be recovered by the vendee in case the vendor practiced fraud or its legal equivalent upon the vendee. *Tune* v. *Rector,* 21 Ark. 283; *Diggs* v. *Kirby,* 40 Ark.

420." See, also, 55 Am. Jur., Vendor and Purchaser, § 330.

We think the chancellor correctly held the evidence offered by appellant insufficient to show fraud practiced upon him by appellees, W. L. Moretz and Gladys Riley, in the execution of the quitclaim deeds. There was no evidence to support the allegation that appellees, Moretz and Gladys Riley, represented to appellant that C. J. Ochse was their relative and that he had devised the lands to them. On the contrary, appellant testified that appellees informed him that one of the 40-acre tracts belonged to the minor, Mayo Riley, and he was told of the proceedings in the probate court relative to this tract. There was no evidence that Moretz posed as an attorney and represented to appellant that he had examined the record title to the lands. The tax redemption certificates issued to C. J. Ochse and Gladys Riley were given to appellant and he was told what they were. There is no indication that these certificates were spurious or that appellees misrepresented them to appellant. The evidence of appellant was, therefore, insufficient to establish fraud on the part of appellees, Moretz and Gladys Riley.

Appellant also contends that the trial court erred in sustaining the demurrer to his complaint after the proof was taken. We agree with appellant that, under these circumstances, the pleadings should be treated as amended to conform to the proof in the case. But, when this is done, the pleadings are still insufficient to constitute a cause of action for cancellation of the deeds and recovery of the purchase price, for the reason that appellant has never surrendered, or offered to surrender, possession of the property to appellees. A purchaser in possession of lands cannot rescind and recover the purchase money on the ground of defects in the vendor's title without restoring or offering to restore possession. 55 Am. Jur., Vendor and Purchaser, § 607. While appellant asked for return of the purchase price, he did not offer in his complaint to surrender possession of the property. Nor was there any offer to surrender posses-

sion made in the proof so that the pleadings might be treated as conforming thereto.

In support of his contention that he was not required to surrender possession or offer to return the property, appellant relies on the case of *Held* v. *Mansur,* 181 Ark. 876, 28 S. W. 2d 704, where it is said: "A person who has been induced to enter into a contract for the purchase of property by the false representations of the vendor concerning its quantity or quality may, at his election, pursue one of three remedies. First, he may cancel the contract and, by returning or offering to return the property purchased within a reasonable time, entitle himself to recover whatever he had paid upon the contract. In the second place, he may elect to retain the property and sue for the damages he has sustained by reason of the false representations of the vendor as to the land; and in this event the measure of the damages would be the difference between the real value of the property in its true condition and the price at which he purchased it. In the third place, to avoid a circuity of actions and a multiplicity of suits, he may plead such damages in an action for the purchase money, and is entitled to have the same recouped against the sum he had paid for the land. *Matlock* v. *Reppy,* 47 Ark. 148, 14 S. W. 546; and *Danielson* v. *Skidmore,* 125 Ark. 572, 189 S. W. 57."

The case of *Held* v. *Mansur, supra,* was a suit for damages for fraudulent representation of the quality of the lands and the purchaser elected to pursue the second remedy mentioned above by retaining possession and recovering the difference between the real value of the property in its true condition and the purchase price. Appellant does not seek such relief in the instant case, but is seeking recovery of the purchase price as set out in the first remedy. Appellant did not ask that the quitclaim deeds be cancelled in his complaint, nor has he offered a return of the property upon recovery of the purchase money. He seeks equity, but has not offered to do equity. The complaint did not, therefore, state a cause of action and the chancellor correctly sustained the de-

murrer and dismissed the suit when appellant declined to plead further.

We do not discuss the demurrer to the evidence or the validity of Act 257 of 1945 for the reasons stated in the recent case of *Kelley* v. *Northern Ohio Co.*, 210 Ark. 355, 196 S. W. 2d 235.

Affirmed.

INGLE AND MICHAEL *v.* STATE.

4440 198 S. W. 2d 996

Opinion delivered January 27, 1947.

E. M. Ditmon, for appellants.

Guy E. Williams, Attorney General and *Arnold Adams,* Assistant Attorney General, for appellee.

HOLT, J. A jury found Houston Ingle and Eddie Michael guilty of the crime of burglary and fixed the

punishment of each at three years in the state penitentiary. From the judgment comes this appeal.

Eleven alleged errors are assigned by appellants, as follows: (1, 2, 3 and 4) that the evidence was not sufficient to support the verdict; (5 and 6) that the court erred in permitting the prosecuting attorney to amend the information during the course of the trial; (7) error in giving instruction No. 4; (8 and 9) error in refusing appellants' offered instructions 1 and 2; and (10 and 11) that the court erred in instructing the jury "that the offense of burglary was committed by a mere breaking without any entry into the building."

(5 and 6)

We consider first, assignments 5 and 6. The information based on § 3061 of Pope's Digest "accuses the defendants, Houston Ingle and Eddie Michael, of the crime of burglary committed as follows, to-wit: The said defendants, in the county, district and state aforesaid, on the 12th day of June, 1946, did unlawfully and feloniously and burglariously break and enter a certain building located at 112 Towson Avenue, Fort Smith, Arkansas, and occupied by the Hayes Furniture Company, a corporation, with the unlawful and felonious intent then and there to commit a known felony, to-wit: Grand larceny, against the peace and dignity of the State of Arkansas."

During the course of the trial, the prosecuting attorney was permitted to amend the information by inserting the words "in the night time" after the words "break and enter" and to strike out "a corporation" after the words "Hayes Furniture Company." Appellants say error was committed in striking the word "corporation." We cannot agree.

Section 3853 of Pope's Digest provides: "The prosecuting attorney or other attorney representing the State, with leave of the court, may amend an indictment, as to matters of form, or may file a bill of particulars. But no indictment shall be amended, nor bill of particulars filed, so as to change the nature of the crime

charged or the degree of the crime charged. All amendments and bills of particulars shall be noted of record."

As to the effect to be given this section, in the recent case of *Tate* v. *State,* 204 Ark. 470, 163 S. W. 2d 150, where the court had permitted the information to be amended, in circumstances similar to these here presented, we said: "Still another reason why no error was committed is that § 24 of Initiated Act 3, adopted at the General Election November 3, 1936 (now § 3853 of Pope's Digest) permits the amendment of indictments or informations. The only limitation on such amendment is that it relate to 'matters of form,' and not 'change the nature or the degree of the crime charged.' . . . In *Brewer* v. *State,* 195 Ark. 477, 112 S. W. 2d 976, this court in construing the effect of § 3853 of Pope's Digest, said: '. . . So, it will be seen that an indictment may be amended under this section with leave of the court provided it does not change the nature of the crime or the degree thereof. The amendment did not have the effect of changing the nature of the crime or the degree thereof. So the court properly permitted the amendment.' See, also, *Johnson* v. *State,* 197 Ark. 1016, 126 S. W. 2d 289," and in the more recent case of *Mitchell and Thurman* v. *State,* 205 Ark. 596, 169 S. W. 2d 867, we said: "But conceding that greater strictness was required under the older statutes, Initiated Act No. 3 of 1936 (page 1384 of the Acts of 1937) permits trial courts to authorize corrections as to form. While it is true that § 22 of the initiated Act directs that language of an indictment (or information—see Amendment No. 21) be certain 'as to the title of the prosecution, the name of the court in which the indictment is presented, and the names of the parties,' title, as used in the section, relates to the authority under which the proceeding is brought (as, for example, 'State of Arkansas v. John Doe')—and not to ownership of property alleged to have been stolen."

So here, the amendment allowed by the court did not have the effect of changing the nature of the crime or the degree thereof.

(1, 2, 3, 4 and 7)

Nor can we agree with appellants that the evidence was not sufficient to support the jury's verdict or that there was error in giving instruction No. 4. The material facts were: On the night of the burglary, Mr. H. A. McLean, who lived near the Hayes Furniture Store, testified that he heard breaking glass in the alley back of the store and heard two persons in the alley near the store and he called the police.

Fred B. Hayes, a part owner in the store, testified that there were three doors about thirty inches wide, each equipped with glass about twenty-four inches wide and thirty inches high, with iron bars about eight inches apart and bolts to keep intruders from breaking in. There was a catch at the bottom of the doors, and the morning following the burglary, he examined these doors, the glass had been broken and there was sufficient room for a man to get his hand through behind the iron bars and pry off the locks, that the glass being broken out, a person's arm could be reached between the bars, take hold of the cross bars and take them off.

Fletcher Bell, a police officer, testified that in answer to a summons, he approached the Hayes Furniture Company through an alley in his car and as his lights flashed down the alley, he observed the appellants who ran, but were apprehended. He further testified that the latch at the bottom of the door was torn loose, the plate and nails at the top had been pulled out, the hardware cloth over the north door, which was secured by a strip about three inches wide, had been torn off, along with the nails on this strip, the glass was broken out and was seven or eight feet inside of the building where it had been shattered, that he found a pinch bar and a pitch fork lying on the ground near the back door which were long enough to reach the top of the door, that there were iron bars inside the door about three-fourths of an inch wide and about eight inches apart, merchandise in the building, that the doors had a padlock and bars all the way across the two doors which dropped in a slot with the padlock in the center, the lock at the top of the door

was pried loose, and when he arrived at the store, appellants were at the back door and there were pieces of furniture and a blowtorch in the building. He further testified that a hand could be reached through the doors and take hold of the bars with the doors locked and that the opening at the top of the doors was about ten inches wide.

Mr. Ralph Swift, another police officer, corroborated Mr. Bell's testimony, and, in addition, testified that the blowtorch was sitting eight or ten inches inside the door.

Appellants offered no testimony.

Among the instructions given by the court was the following No. 4 complained of by appellants: "You are instructed that it is not necessary to prove both a breaking and an entering of the building in order to make out the crime of burglary. If one either break or enter a building of another with the unlawful, felonious and burglarious intent to commit grand larceny he is guilty of burglary. In this connection you are instructed that breaking means the making of an opening or mode of entrance into a building by force and it is not necessary that there should have been an absolute entrance by the whole body, but it is necessary that some act of physical force, however slight, by which an obstruction to entering the building was forcibly removed."

This instruction, based upon § 3061, *supra,* was a correct declaration of the law on the facts presented by this record. Section 3061 provides: "If any person shall, in the night time, willfully and maliciously, and with force, break or enter any house, tenement, boat, or other vessel or building, although not specially named herein, with the intent to commit any felony whatever, he shall be deemed guilty of burglary." (Rev. Stat., chap. 44, div. 4, art. 2, § 2.)

Beginning with *Minter* v. *State,* 71 Ark. 178, 11 S. W. 944, 23 A. L. R. 289, this court has consistently held that in order to prove burglary under this section, it is not necessary to prove both a breaking and entering of the building in question to work a felony therein, it

being only necessary to prove either. In the Minter case, it was said: "Under our statute, it is no longer necessary, as at common law, to show both a breaking and entering of the house to make out the crime of burglary, but in this state, if one either break or enter the house of another in the night time with intent to commit a felony, he is guilty of burglary. Sand. & H. Dig. §§ 1492-1494, (now §§ 3058, 3060 and 3061 of Pope's Digest). But it is necessary to show either a breaking or an entrance."

In *Anderson* v. *State,* 84 Ark. 54, 104 S. W. 1096, this court said: " 'The manner of the breaking or entering is not material, further than it may show the intent of the offender.' Section 1604, Kirby's Digest (now § 3060 of Pope's Digest). The statute does not change the character of the 'breaking' that was essential at common law to complete the offense. Such breaking at the common law was 'any disrupting or separating of material substances in any enclosing part of a dwelling house, whereby the entry of a person, arm, or any physical thing capable of working a felony therein may be accomplished.' "

Here the testimony shows, and the jury evidently found, that after the hardware cloth was removed and the large panes of glass in the door smashed, the iron cross-bars about eight inches apart alone prevented the physical entry of appellants to the building, certainly they were able to insert their arms through the openings torn through the doors.

When we consider all of the testimony presented in the light most favorable to the jury's verdict and the State, as we must do, (*Higgins* v. *State,* 204 Ark. 233, 161 S. W. 2d 400) we think the jury was warranted in finding that there was a breaking within the meaning of the statute and that the evidence was sufficient to meet the test announced in *Anderson* v. *State, supra.*

(8 and 9)

Appellants complain about the court's refusal to give their requested instructions 1 and 2. Instruction

No. 1 was a request for an instructed verdict of not guilty, and the effect of instruction No. 2 was to tell the jury that appellants could not be found guilty unless the jury found that "either of them actually entered into the building as alleged in the information." As we have pointed out above, no error was committed in refusing these instructions.

(10 and 11)

Since, as we have pointed out, the court properly gave instruction No. 4, *supra,* appellants' assignments of error, 10 and 11, are without merit.

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

BILLINGSLEY *v.* LIPSCOMB.

4-8049

Opinion delivered January 27, 1947.

D. H. Crawford, for appellant.

G. W. Lookadoo, for appellee.

SMITH, J. Mrs. Lizzie Lipscomb was the admitted owner of a lot in the City of Gurdon, which she rented to G. E. Billingsley. She failed to pay the taxes due on the lot for the year 1936, and it was sold in 1937 to the State, and this sale was confirmed September 4, 1940, in a suit brought by the State for that purpose. The State sold and conveyed the lot to Billingsley by deed from its Land Commissioner, dated November 28, 1943, at which time Billingsley was in possession as the tenant of Mrs. Lipscomb, and since that time he has refused to pay rent and claims title under his deed from the State.

Mrs. Lipscomb brought this suit to cancel the State's deed to Billingsley and to recover unpaid rents. The facts just stated are undisputed. Billingsley, in his answer, alleged ownership of the lot under his deed from the State, and prayed that his title be quieted, or if not, that he have judgment for taxes paid and improvements made by him.

Mrs. Lipscomb attacked the confirmation decree, and alleged that the tax sale which it purported to confirm was void for the following reasons: (a) The notice of sale was not published for the length of time required by law; (b) The County Clerk's Certificate of Publication was not certified; (c) The delinquent list was not kept posted in the Clerk's office for a year.

Conceding the sufficiency of the proof to establish these defects in the sale, they do not suffice to nullify the confirmation decree as none of them relate to the power to sell for the taxes admittedly due and unpaid on the lot. Other defects in the sale were alleged, but no proof was offered to sustain those allegations.

The confirmation decree was rendered under and pursuant to the provisions of Act 119 of the Acts of 1935, p. 318. This act has been considered and construed in numerous cases which have resulted in holdings as follows: When the power to sell land for the non-payment

of the taxes due thereon did not exist, the sale is void, and the confirmation thereof may be collaterally attacked. If, however, the power to sell existed, but was defectively exercised, the defects may be and are cured by appropriate confirmation proceedings which are not attacked within the time, and in the manner provided by law. See *Stringer* v. *Fulton,* 208 Ark. 894, 188 S. W. 2d 129, and the earlier cases on the subject there cited. We hold, therefore, that the confirmation decree vested in the State the title formerly owned by Mrs. Lipscomb.

The court made no finding on this issue, but did find and decree that the deed from the Land Commissioner to Billingsley was void for the reason that at the time of its execution Billingsley was in possession of the lot conveyed, as the tenant of Mrs. Lipscomb. The court then proceeded to state an account as to betterments, etc., which finding is challenged by both Mrs. Lipscomb and Billingsley, but this finding need not be considered if Billingsley acquired title to the lot by his purchase from the State, notwithstanding his occupancy as tenant at the time of his purchase.

The cases of this and of all the courts uniformly hold, and they are beyond numbering, that a tenant in possession of land belonging to another cannot, while occupying the land, as tenant, acquire for his own benefit a title adverse to that of his landlord, without first surrendering possession. But Billingsley did not acquire an adverse title. He acquired the landlord's title which had vested in the State under the confirmation decree. It was expressly held in the early cases of *Bettison* v. *Budd,* 17 Ark. 546, and *Ferguson* v. *Etter,* 21 Ark. 160, that a tenant in possession, and while in possession, might acquire at a tax sale the title of his landlord.

These cases have never been overruled or qualified. There was a departure, more apparent than real, from this holding in the case of *Waggener* v. *McLaughlin,* 33 Ark. 195, where a tax deed to a tenant was canceled. But the tenant tax purchaser had, in that case, improperly availed himself of the provisions of §§ 172 and 173, Ch. 148 of Gould's Digest, which gave actual settlers upon

forfeited lands a preferential right to purchase. The court there said: "But they (the tax purchasers) availed themselves of a possession which they held as tenants, as a basis to acquire title as actual settlers, which no one else under the circumstances could have acquired against them. They had no right to make use of a possession thus acquired, to found upon it a claim hostile to the landlord. If they had intended that, they should have restored possession, that the landlord might be free to contest the validity of the forfeiture to the State, and have the advantage of possession."

That the court did not intend and did not in fact, overrule the earlier cases holding that a tenant might acquire his landlord's title through a tax sale is clearly shown by the opinion subsequently rendered in the case of *Pickett* v. *Ferguson,* 45 Ark. 177, where it was said: "On the other hand, it is settled law in this state that a tenant, who is under no obligation to pay the taxes, may purchase at tax sale the lands of which he is in possession and may set up such title, and the sale, if otherwise valid, extinguishes the landlord's title and cuts off the lease. *Bettison* v. *Budd,* 17 Ark. 546; *Ferguson* v. *Etter,* 21 Id., 160."

This holding in the case of *Pickett* v. *Ferguson* was reaffirmed in the recent case of *Ray* v. *Stroud,* 204 Ark. 583, 163 S. W. 2d 173, and the still later case of *Sims* v. *Petree,* 206 Ark. 1023, 178 S. W. 2d 1016 is to the same effect.

The case chiefly relied upon by appellee for affirmance of the decree from which is this appeal is that of *Casey* v. *Johnson,* 193 Ark. 177, 98 S. W. 2d 67, but there is no intimation in that opinion of any intention to overrule or impair the holdings in the earlier cases. The case of *Casey* v. *Johnson* is somewhat similar to the case of *Waggener* v. *McLaughlin, supra,* in that it was necessary for the tenant to use the possession which he had as a tenant to perfect his title as a donee and obtain the donation deed.

The decree of the court below will, therefore, be reversed and the cause will be remanded with directions

to dismiss the complaint and to quiet appellant's title as against appellee, inasmuch as it is not contended that appellant was under any obligation to pay the taxes for the non-payment of which the lot was sold to the State. *Hunt* v. *Gaines,* 33 Ark. 267.

HUBBLE *v.* GRIMES.

4-8061 199 S. W. 2d 313

Opinion delivered February 3, 1947.

Pickens & Pickens, for appellant.

Kaneaster Hodges, for appellee.

MINOR W. MILLWEE, Justice. This suit involves the title to a part of lot 12, block 21, of the original town of Newport, Arkansas. Appellants became the owners of the property in October, 1929, as tenants in common and heirs at law of W. S. Hubble, deceased. The property is situated in the Newport levee district which instituted foreclosure proceedings for the unpaid levee assessments for the years 1932 and 1933, resulting in a decree of foreclosure entered on November 27, 1935. The levee district became the purchaser at a foreclosure sale held on April 4, 1936, which was confirmed on May 26, 1936. After expiration of the period of redemption, the property was conveyed to the board of directors of the levee district and the deed approved on May 24, 1938.

On June 30, 1944, the levee district conveyed the property to R. D. Wilmans and R. P. McCuistion for $193.43. R. D. Wilmans conveyed his interest in the property to R. P. McCuistion and wife, who conveyed to appellees, Harry Grimes and Daisy Grimes, on April 14, 1945, for $1,000. Prior to his conveyance to appellees, McCuistion also secured deeds from four municipal improvement districts which had foreclosed liens for delinquent assessments, but appellees are not claiming title under these conveyances. McCuistion also paid the general taxes and assessments of the levee district for 1944.

The property remained on the tax records in the name of appellants who paid the state and county taxes and the annual assessments of the Newport levee district for the years 1936 to 1943, inclusive, said levee assessments being paid to the county collector along with the general taxes each year.

Appellees, Harry Grimes and Daisy Grimes, instituted suit in the Jackson Chancery Court on September 18, 1945, to quiet their title to the property, alleging they were in possession and deraigning title under *mesne* conveyances from the Newport levee district. It was further alleged that appellants were claiming an interest in the property which, though unfounded, constituted a cloud upon appellees' title.

The answer of appellants denied the allegations of the complaint and alleged that appellants and their predecessor in title had been in adverse possession of the lands and paying taxes thereon for more than seven years. It was further alleged that the levee district should be estopped to assert title to the lands by accepting the levee assessments for the years 1936 to 1943. Appellants also pleaded the seven-year statute of limitations and by way of alternative relief prayed that they be given a lien on the lands for payment of the general taxes and levee assessments in the event it should be held that appellees had title to the property.

The cause was tried on oral testimony and stipulation of the parties and a decree was entered on April 8, 1946, in which the trial court found that appellees, and their predecessors in title, had been in possession of the property for approximately five years and that appellees had acquired title thereto; and that the title and interest of appellants had been foreclosed in the levee district foreclosure suit. The title of appellees was ordered quieted, but appellants were held to be entitled to recover from appellees the state and county taxes paid by appellants for the years 1936 to 1943 in the sum of $142.80, and appellants were given a lien on the property to secure such payment.

Appellants have appealed from the decree quieting appellees' title to the property while appellees have cross-appealed from that part of the decree which orders their payment of the general taxes.

The evidence discloses that the property is an uninclosed lot located in the business section of the city of

Newport, Arkansas, across an alley from the Hazel Hotel. At the time the Levee District purchased the property at its foreclosure sale, the property was being used as a parking place for a taxicab which was operated by a business tenant of the hotel. After the purchase by the levee district, it collected monthly rentals for two or three years from the hotel proprietor for the use of the lot as a "taxi stand." The district also collected rental from an outdoor advertising company which maintained a signboard on the property until it was removed at the request of the hotel proprietor. The property was also rented by the district to D. P. Fender for three months as a used car lot. McCuistion and appellees continued collection of monthly rentals from the hotel proprietor for use of the property as a "taxi stand" after their respective purchases.

Appellants do not question the regularity of the foreclosure proceedings in which the Newport levee district acquired title to the property and have abandoned the defense of estoppel set up in the answer upon the authority of *Board of Directors of St Francis Levee District* v. *Fleming,* 93 Ark. 490, 125 S. W. 132. It was held in that case (headnote 5): "Where a levee district foreclosed its lien for levee taxes on lands in the district and purchased the lands at the sale, it was not estopped to assert the title so acquired by the fact that its officers accepted subsequent levee taxes on the same lands from the former owner, the officers having no authority to do so."

Appellants insist, however, that they have acquired title by adverse possession under § 8920 of Pope's Digest which provides that unimproved and uninclosed land shall be deemed and held to be in possession of a person who pays the taxes thereon under color of title for seven years. In *Southern Lbr. Co.* v. *Arkansas Lbr. Co.,* 176 Ark. 906, 4 S. W. 2d 928, it was held that this statute in itself is not a statute of limitations. It was there said: "It only declares that the land shall be deemed to be in possession of the person paying taxes thereon under color of title. It only makes the payment of taxes under the

conditions named in the act a constructive possession: and it is only by applying thereto the general statute of limitations that such possession, like actual possession, can ripen into title by limitation. *Taylor* v. *Leonard,* 94 Ark. 122, 126 S. W. 387." The purpose of the statute was to create a constructive possession by the payment of taxes which will oust the constructive possession of the owner who did not pay taxes. *Wells* v. *Rock Island Improvement Co.,* 110 Ark. 534, 162 S. W. 572.

This court has also held that the statute has no application where the lands are actually occupied by the record owner. *Wheeler* v. *Foote,* 80 Ark. 435, 97 S. W. 447; *Connerly* v. *Dickinson,* 81 Ark. 258, 99 S. W. 82; *King* v. *Campbell,* 89 Ark. 450, 116 S. W. 899. The chancellor found that appellees and their predecessors in title were in actual possession of the property and had been for approximately five years at the time of the trial. We think this finding is supported by a preponderance of the evidence. Appellees and their predecessors in title rented the property as a used car lot and collected rent upon an advertising sign located on the property. They collected monthly rentals from the operator of the taxi-cab and the property was still being openly used as a taxi station at the time of the trial. A sign designating this use was affixed to the property. This evidence was undisputed and sufficient to constitute actual possession which interrupted the constructive possession of appellants by payment of taxes under § 8920 of Pope's Digest, *supra,* and prevented it from ripening into title.

Appellants failed to acquire title to the lands by payment of the state and county taxes from 1936 to 1943 for the further reason that the property was exempt from general taxation during those years. It has been repeatedly held by this court that when a drainage or improvement district acquires title to lands embraced within the district before the lien for state and county taxes becomes fixed, such lands are exempt from assessment for state and county taxes as long as they remain the property of the district, as during that time they are held by the district as a governmental agency and for

governmental purposes. *Robinson* v. *Indiana & Arkansas Lbr. Co.,* 128 Ark. 550, 194 S. W. 870, 3 A. L. R. 1426; *Kelley Trust Co.* v. *Lundell Land & Lbr. Co.,* 159 Ark. 218, 251 S. W. 680; *Lyle* v. *Sternberg,* 204 Ark. 466, 163 S. W. 2d 147; *Pinkert* v. *Wilson,* 208 Ark. 587, 186 S. W. 2d 949; *Deniston* v. *Burroughs,* 209 Ark. 436, 190 S. W. 2d 623.

The Newport Levee District purchased the land at the foreclosure sale on April 4, 1936, and this sale was confirmed on May 26, 1936. The state's lien for the taxes of 1936 did not become fixed until the first Monday in June, 1936, (§ 13770, Pope's Digest). The general taxes for 1936 did not, therefore, accrue on the property and this is true although no deed had been issued to the district and its title was subject to defeat by redemption. *Duncan* v. *Newport Levee District,* 206 Ark. 1130, 178 S. W. 2d 660.

This court has also held that the payment of state and county taxes on property exempt from taxation does not entitle one to the benefits of § 8920 of Pope's Digest. In the case of *Kelley Trust Co.* v. *Lundell Land & Lbr. Co., supra,* the court said: "Moreover, in *Robinson* v. *Indiana & Ark. Lbr. & Mfg. Co.,* 128 Ark. 550, 194 S. W. 870, 3 A. L. R. 1426, it was held that land in the hands of a levee district is exempt from taxation for state and county purposes. It thus appears from the record that the title to the land in question was in the Laconia Levee District during a part of the seven years relied upon by the plaintiff to obtain title to the land by the payment of taxes for seven years in succession, and the plaintiff acquired no title by the payment of taxes." Since the levee district did not dispose of the property in the case at bar until June 30, 1944, title was in the district during the period when appellants paid the state and county taxes and they acquired no title by virtue of such payments.

On their cross-appeal, appellees contend that the trial court erred in holding appellants entitled to recover the taxes which they paid for the years 1936 to 1943, inclusive. We think this contention must be sustained,

since the property was not subject to general taxation during those years. In the case of *Little Red River Levee District No. 2* v. *Moore,* 197 Ark. 945, 126 S. W. 2d 605, this court said: "It is also true, as appellees insist, that state and county taxes are not payable upon lands owned by the improvement districts which they acquired in consequence of sales for delinquent taxes. This is true because the districts hold the lands in their governmental capacities, and while so owned they are not subject to state and county taxes; nor are such taxes cumulative and chargeable to subsequent purchasers." This rule was applied in the recent case of *Baiers* v. *Cammack,* 207 Ark. 827, 182 S. W. 2d 938, where a grantee under void state deeds was held not entitled to recover from the grantee of an improvement district the consideration paid the state for the deeds. We there said: "Appellant was not entitled to recover from appellee the amount which he paid to the state for the two void deeds executed to him by the state, since the title to the property at the time the deeds were issued to him was in a governmental agency, the street improvement district, and Act 269 of the Acts of 1939 relied upon by appellant does not control here." It follows that the trial court erred in rendering judgment against appellees for the tax payments made by appellants.

The decree is affirmed on direct appeal. On the cross-appeal the decree is reversed and the cause remanded with directions to enter a decree not inconsistent with this opinion.

CRANE *v.* CRANE.

4-8060 199 S. W. 2d 317

Opinion delivered February 3, 1947.

C. Floyd Huff, Jr., for appellant.

James R. Campbell and *Walter J. Hebert,* for appellee.

Ed. F. McFaddin, Justice. This is a divorce suit; and the only question on appeal is, whether the appellee was a *bona fide* resident of Arkansas "for two months next before the commencement of the action," as is required by § 4386, Pope's Digest. We refer to the parties as they were styled in the lower court.

D. L. Crane filed this divorce suit on February 11, 1946. The defendant is a resident of Florida. Upon learning of the suit by letter from the attorney *ad litem,* she appeared specially, on March 5, 1946, and moved the court to dismiss the complaint for want of jurisdiction "for the reason that the plaintiff is not and has not been a resident of Garland county, Arkansas, for the time and in the manner prescribed by law to give this court jurisdiction." The evidence on this motion was heard on March 12, 1946. The chancery court denied the motion, and the defendant preserved her exceptions. Plaintiff then introduced some evidence as to alleged cause of divorce; and a decree was granted on the grounds of indignities, *i.e.*, alleged acts of jealousy. On this appeal the defendant relies solely on the issue of residence. We,

therefore, refrain from detailing, or passing on, the sufficiency of the evidence as to the grounds of divorce.

I. *The Residence Requirement.* The Arkansas requirement as to residence in the "ninety-day divorces" is found in § 4386, Pope's Digest; and requires, *inter alia:* "The plaintiff, to obtain a divorce, must prove, . . . a residence for two months next before the commencement of the action."

The plaintiff was a colonel in the United States Army. We have several recent cases involving residence requirements as applied to persons in the armed services. Some of these cases are: *Kennedy* v. *Kennedy,* 205 Ark. 650, 169 S. W. 2d 876; *Mohr* v. *Mohr,* 206 Ark. 1094, 178 S. W. 2d 502; *Feldstein* v. *Feldstein,* 208 Ark. 928, 188 S. W. 2d 295; *O'Keefe* v. *O'Keefe,* 209 Ark. 837, 192 S. W. 2d 556. In the O'Keefe case we quoted from the Mohr case:

" 'There are cases which hold that a person in the service of the United States may acquire residence in a state where he is in service sufficiently to invoke the jurisdiction of the courts of that state in divorce matters. . . . But in each of these cases there was something more than mere presence at a military post in the state. Without lengthening this opinion to analyze the holdings of other courts, we hold that there must be overt acts sufficient to demonstrate a real and *bona fide* intent to acquire residence here before the State of Arkansas—as a silent third party to every divorce suit here—will allow its courts to be used as the haven of the transient and dissatisfied spouse.' "

We also held in the O'Keefe case that proof of residence must be corroborated the same as every other essential fact in a divorce case. With the foregoing cited cases[1] as guides, we examine the evidence in the case at bar.

[1] In addition to the cases and annotations cited in the O'Keefe case, we add the following: Annotation in 158 A. L. R. 1474; *Sturdavant* v. *Sturdavant,* 189 S. W. 2d 410 (decided by the Court of Appeals of Tennessee on November 4, 1944); *Zimmerman* v. *Zimmerman,* 175 Ore. 585, 155 Pac. 2d 293 (decided by the Supreme Court of Oregon on January 16, 1945.) See, also, *Parseghian* v. *Parseghian,* 206 Ark. 869, 178 S. W. 2d 49, on the sixty-day requirement.

II. *The Evidence as to Residence.* The plaintiff, aged fifty years, was born in Florida, and is the eighth generation of his family to live in that state. He owns a home and other property in Florida; and his three children, ages 14, 5 and 2 years, respectively, live with their mother in that state. Colonel Crane has been in the Army 28 years. From 1941 to 1943 he was in many theaters of European warfare. He was with his wife and family in Florida for three months in 1943; and then in November of that year he went overseas to Asiatic campaigns. He returned to the United States on November 10, 1945, suffering from an asthmatic ailment; and, at his request, was sent to the Army-Navy Hospital in Hot Springs, Arkansas, for treatment. He reached Hot Springs on November 16, 1945, and stayed at the Army-Navy Hospital until December 5, 1945. Examination by doctors at the hospital indicated he might have to be retired from active service because of the asthmatic ailment. If so retired, he would, of course, seek the best climate to alleviate his suffering from asthma. His Army doctor in Hot Springs advised him to try several places for climatic reactions, and settle in the locality best suited to him. Acting on this advice, Colonel Crane purchased a car in Hot Springs, and left that city on December 5, 1945, and reached San Francisco, California, on December 12, 1945, where he maintained a hotel room continuously until February 8, 1946. He says that from December 5, 1945, until February 8, 1946, he visited Oklahoma, Texas, Arizona, New Mexico, Nevada, Wyoming, Utah and California, and found the climate in Arkansas gave him more relief than the climate of any of these other states. So, on February 8, 1946, he left California, and arrived in Hot Springs on February 16, 1946. He secured a room at a hotel, where he was living at the time of the hearing on March 12, 1946. On February 11, 1946, his attorney filed the present suit; and the question is whether Colonel Crane was a *bona fide* resident of Arkansas for two months prior to February 11th.

Colonel Crane's testimony—while a tribute to the climate of Arkansas—does not prove that he was a *bona fide* resident of Arkansas for 60 days prior to February

11, 1946. In fact, his testimony shows the contrary: it was only after Colonel Crane had visited all these other states that he reached the conclusion to reside in Arkansas; he intended to reside where the climate best suited his asthmatic ailment; he visited these other states to decide; and *then* returned to Arkansas. So, it is clear that he did not become a *bona fide* resident of Arkansas until he returned to this state on February 16, 1946. His residence could not begin before that date. He, therefore, did not have two months' residence when he filed the present suit on February 11, 1946.

The other facts relied on by Colonel Crane to corroborate his claim for residence, as beginning on November 16, 1945, fall short of sufficient corroboration:

(a) His assessment of property in Arkansas was made on March 11, 1946, which was after the filing of this suit. See *O'Keefe* v. *O'Keefe, supra.*

(b) The fact that he was initiated into the Hot Springs lodge of the Benevolent and Protective Order of Elks on February 18, 1946, does not furnish corroboration, because there is no proof in this record as to the residence requirement of that order.

(c) The fact that, when he purchased his automobile in Hot Springs in 1945, he secured an Arkansas license tag, does not corroborate his claim of residence, because (1) the license fee is a tax for the privilege of driving on the highways, and not a tax on the property or possession thereof. (*Wiseman* v. *Madison Cadillac Co.*, 191 Ark. 1021, 88 S. W. 2d 1007); and (2) even a non-resident must procure an Arkansas license for his motor vehicle if he does not have a license in the state of his residence, etc. (See §§ 6614 and 6632, Pope's Digest, as amended by Act 72 of 1941 and Act 60 of 1945.)

To detail all of the testimony would unduly prolong this opinion, but none of it affords sufficient corroborative evidence on the question of *bona fide* residence for two months before the filing of the divorce suit. The decree of the chancery court is, therefore, reversed, and

the cause dismissed; but without prejudice to the plaintiff's right to file a new suit when he can make sufficient proof to meet the requirements as to a *bona fide* residence.

McHaney, J., dissents.

HARRIS *v.* E. B. MOONEY, INC.

4-8057 199 S. W. 2d 319

Opinion delivered February 3, 1947.

Jay M. Rowland, for appellant.

Leland Leatherman and *Scott Wood,* for appellee.

HOLT, J. This litigation grew out of a dispute of a boundary line.

In 1922, Mrs. Fannie Felheimer owned lot 7, block 66, in the City of Hot Springs, and appellee, Pythian Bath House, Inc., owned an adjoining lot, No. 5, in this same block, both lots fronting on Cottage Street. In this same year, 1922, the Pythians, owners of lot 5, built a four-story brick building on their lot and, in so doing, erected their brick wall from approximately a foot to eighteeen inches over on lot 7, and this wall has remained, and claimed to be, the property dividing line between these two lots since its erection more than 24 years ago, and appears never to have been questioned by Mrs. Felheimer, her daughter, Mrs. Mendel, or any one else, until the present suit was filed by appellants May 16, 1946.

Appellants acquired lot 7 about two years before this suit from Mrs. Mendel, Mrs. Felheimer's daughter, and sold the Pythians 25 feet of this lot (then vacant) adjoining lot 5, for $1,000. The Pythians have erected the walls of a new two-story brick annex on the 25 feet purchased from appellants, and, in so doing, appellants alleged that appellees have encroached, from four to six

inches, on the remainder of lot 7, which appellants own. Appellants brought this suit to force appellees to move their brick wall back approximately six inches. Their prayer was that appellees be enjoined from encroaching upon their property and "that an order issue from this Court requiring the defendants to remove from plaintiffs' lot so much of their construction as presently encroaches thereon" and for all other equitable relief. From a decree denying the relief prayed comes this appeal.

The testimony of appellants' witnesses, M. D. Alford and L. R. Plemmons, the assistant city engineer, and city engineer, respectively, of Hot Springs, was to the effect that upon a survey by them of the property in question the wall of the old four-story Pythian building, erected in 1922, is over on lot 7 from a foot to a foot and one-half, and that the new two-story brick annex, when measured from a point approximately a foot and a half inside the old building wall, is approxmately four inches over on appellants' land on Cottage Street. They further testified in effect that when twenty-five feet is measured from the old wall which has stood for almost twenty-four years, it shows that the new annex building of appellee is entirely on appellee's lot and lacks a foot or more of reaching the division line between appellee and appellants.

The evidence further shows, as above indicated, that at the time the old four-story brick wall was built by the Pythians in 1922, Mrs. Felheimer, who then owned lot 7, made no objection to the location of the wall, and thereafter both Mrs. Felheimer and her daughter, Mrs. Mendel, (who acquired the property at her mother's death) for a period of seven years—in fact, more than twenty-four years—stood by, and made no objections to this wall as being the dividing line between lots 5 and 7.

In these circumstances, the rule appears to be well established that appellants' predecessors in title, Mrs. Felheimer and her daughter, Mrs. Mendel, by their acquiescence in the property line as established by the old wall for seven years, and occupation according to

such line, were bound thereby as also were appellants, their grantees. This court in *Deidrich* v. *Simmons,* 75 Ark. 400, 87 S. W. 649, said: "The proprietors of adjacent lands may by parol agreement establish an arbitrary division line, or an agreement may be inferred from long continued acquiescence and occupation according to such line, and they will be bound thereby. *Cox* v. *Daugherty,* 62 Ark. 629, 36 S. W. 184; *Jordan* v. *Deaton,* 23 Ark. 704; 5 Cyc., pp. 930, 935; *Pittsburgh Iron Co.* v. *Lake Superior Iron Co.,* 118 Mich. 109, 76 N. W. 395; *Jones* v. *Pashby,* 67 Mich. 459, 35 N. W. 152, 11 Am. St. Rep. 589; *Burris* v. *Fitch,* 76 Cal. 395; *Atchison* v. *Pease,* 96 Mo. 566, 10 S. W. 159; *Bloomington V. Bloomington Cem. Assn.,* 126 Ill. 221, 18 N. E. 298; *Clayton* v. *Feig,* 179 Ill. 534, 54 N. E. 149; *Edwards* v. *Smith,* 71 Tex. 156." See, also, *Furlow* v. *Dunn, Admx.,* 201 Ark. 23, 144 S. W. 2d 31.

Finding no error, the decree is affirmed.

LARIMORE *v.* HOWELL.

4-8047 199 S. W. 2d 320

Opinion delivered February 3, 1947.

Claude Duty, for appellant.

Vol T. Lindsey, for appellee.

Ed F. McFaddin, Justice. The refusal of the circuit court to grant appellant's motion for judgment notwithstanding the verdict is the basis of this appeal. Appellant filed action against appellee in the justice of the peace court for $150 claimed as earned real estate commission. There was a written complaint and a written answer, which latter was a general denial. From a plaintiff's judgment in the justice of the peace court there was appeal to the circuit court, and trial *de novo* to a jury. The defense was, that the contract relied upon by appellant had been materially changed, thereby releasing appellee from all liability. Neither side asked for an instructed verdict, and the case was submitted to the jury for a general verdict on instructions not complained of here.

The jury returned a general verdict for appellant for $1. Before entry of judgment on the verdict, appellant filed motion for judgment notwithstanding the verdict for the full amount of $150, claiming: (1) that under the evidence the amount of the recovery was not in issue; (2) that, if the plaintiff was entitled to any amount, he was entitled to the full amount claimed; and (3) that, since the jury found for the plaintiff for $1, therefore the court should enter a judgment *non obstante veredicto* for plaintiff for $150. The circuit court denied the said motion for judgment *non obstante veredicto,* and gave appellant 30 days in which to prepare, tender and file his bill of exceptions. The appellant never filed a motion for new trial; and appellee here moves for affirmance because of the absence of any motion for new trial.

We, therefore, have for decision, whether, in this case, it was necessary to file a motion for new trial in the lower court in order to challenge here the order of

the circuit court (1) refusing the appellant's motion for judgment *non obstante veredicto,* and (2) entering a judgment in accordance with the verdict of the jury. We make reference to 33 C. J. 1177, *et seq.,* and 30 Am. Juris. 844, *et seq.,* for the benefit of those who desire to study: (1) the common-law practice regarding motion *non obstante veredicto;* (2) the absorption of the *motion in arrest of judgment* by the motion *non obstante veredicto;* (3) the original idea that the motion *non obstante veredicto* was granted only to the party entitled to such relief on the face of the pleadings; and (4) how the consideration of the *evidence* gradually crept into the picture. These matters are all interesting, but not vital to this case.

We have many cases in Arkansas regarding motion for judgment *non obstante veredicto.* Some of these cases are: *Collier* v. *Newport Water Light & Power Co.,* 100 Ark. 47, 139 S. W. 635, Ann. Cas. 1913D, 458; *Scharff Distilling Co.* v. *Dennis,* 113 Ark. 221, 168 S. W. 141; *Coleman* v. *Utley,* 153 Ark. 233, 240 S. W. 10; *Jackson* v. *Carter,* 169 Ark. 1154, 278 S. W. 32; *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S. W. 2d 49; *Moore* v. *Rogers Wholesale Grocery Co.,* 177 Ark. 993, 8 S. W. 2d 457; *Oil Fields Corp.* v. *Cubage,* 180 Ark. 1018, 24 S. W. 2d 328; *McGuire* v. *Robertson,* 182 Ark. 759, 32 S. W. 2d 624; *Stanton* v. *Arkansas Democrat Co.,* 194 Ark. 135, 106 S. W. 2d 584. To discuss each of these cases, or to attempt to differentiate each statement therein, would unduly prolong this opinion. But, here are some of the rules which may be deduced from these cases, as they interpret and apply §§ 8227-8229, inclusive, Pope's Digest:

(A) When it appears from the face of the pleadings that either side is entitled to a judgment thereon, then the party so entitled may have a judgment notwithstanding the verdict; and on appeal to this court in such case, there need be no motion for new trial filed in the lower court; because the question presented here is one based entirely on the record, *i.e.,* the pleadings.

(B) But when the motion for judgment notwithstanding the verdict is asked because of matters claimed to appear in the evidence—as distinct from the pleadings—then the party who seeks to invoke the jurisdiction of this court must first have filed a motion for new trial in the lower court.

Applying these principles to the case at bar: (1) the appellant was not entitled to a judgment on the face of the pleadings, because there was a complaint and a general denial; (2) the appellant's claim for relief is based on matters that appear in the evidence; and (3) since there was no motion for new trial in the lower court, there is therefore no question presented to this court for decision.

Appellant says that in each of the cases of *Coleman* v. *Utley, supra,* and *Jackson* v. *Carter, supra,* this court considered, and decided on the merits, the motion for judgment *non obstante veredicto* without reciting that a motion for new trial had been filed in the lower court; and appellant cites these cases as authority for his position in the case at bar. But we have examined the original transcript in each of the cases last cited, and find that there was a motion for new trial in each case. In the case at bar the transcript shows no motion for new trial, so the cases relied on by the appellant do not support him.

Cases from other states afford the appellant no support, because such cases arose under statutes and court rules different from our own. In 3 C. J. 984 the text reads: "A motion for new trial is not a condition precedent to the right to review denial of a motion for judgment notwithstanding the verdict." But this quoted text is based on the North Dakota case of *Satterlee* v. *Modern Brotherhood of America,* 15 N. D. 92, 106 N. W. 561; and a study of that case shows that the North Dakota rules of practice are different from ours. For instance, the opinion recites, that in North Dakota it is not necessary to present a motion for new trial in the lower court in order to argue in the Supreme Court the action for the

trial court in granting or denying an instructed verdict. In Arkansas such a motion for new trial is necessary.

Likewise, in 4 C. J. S. 825, the text states: ". . . a motion for new trial is not a condition precedent to the right to review denial of a motion for judgment notwithstanding the verdict."

The quoted text is based on two Colorado cases, being *Fincher* v. *Bosworth,* 76 Colo. 69, 230 Pac. 596; and *Armstrong* v. *Gresham,* 70 Colo. 502, 202 Pac. 706. A study of each of these cases convinces us that the Supreme Court of Colorado was discussing errors that appeared on the face of the record, rather than errors that occurred in the course of the trial.

Coming back to the case at bar: Since the appellant was not entitled to a motion *non obstante veredicto* on the face of the pleadings, and since the evidence presented a sharp question of liability *vel non,* and since there is no motion for new trial in the record, therefore, the judgment of the circuit court is in all things affirmed.

STATE, EX REL. ROBINSON, PROSECUTING ATTORNEY *v.* CROW.

4-8126 199 S. W. 2d 323

Opinion delivered February 3, 1947.

Sam Robinson, for appellant.

Joe H. Schneider and *Frankel & Frankel,* for appellee.

McHaney, Justice. Appellant, as prosecuting attorney for the 6th judicial circuit, brought this action against appellees, who are the State Board of Chiropractic Examiners, to enjoin them from issuing licenses by reciprocity to applicants to practice chiropractic without requiring such applicants to present to them a certificate of ability in the basic sciences issued by the State Board of Examiners in the basic sciences, as, it is contended, is required by the Basic Sciences Act, No. 147 of 1929, §§ 10795 *et seq.,* of Pope's Digest.

The complaint alleged that appellees "have for many months past, and are now, persistently, intentionally, wrongfully and illegally licensing applicants to engage in the chiropractic practice in the State of Arkansas by reciprocity, without first requiring said applicants to obtain and present to said Board a certificate of ability in the basic sciences—issued by the Arkansas State Board of Examiners in the basic sciences, or without requiring said applicants to obtain a waiver of examination from said Board of Basic Science Examiners, all in violation of the provisions of Act 147 of 1929." It also alleged that, unless enjoined, appellees would continue to violate said act in the manner stated. An injunction, both temporary and permanent, was prayed.

To this complaint a general demurrer was interposed and sustained, and, on appellant's declining to plead further, his complaint was dismissed and he has appealed.

In *Stroud* v. *Crow,* 199 Ark. 814, 136 S. W. 2d 1095, we held that the Basic Sciences Act of 1929 applied to persons desiring to engage in chiropractic practice in this State.

A State Board of Chiropractic Examiners was first created by Act No. 126 of 1915, §§ 10771 *et seq.* of Pope's Digest. By Act 485 of 1921, the practice of chiropractic was further regulated, §§ 10776 *et seq.* of the Digest, § 3 of said latter act, § 10778 of the Digest, provides: "The board shall have authority to grant reciprocity with States having equally as high literary professional requirements as provided in this State."

The Basic Sciences Act of 1929, § 10802 of the Digest, has this provision as to reciprocity: "The State Board of Examiners in the Basic Sciences may in its discretion waive the examination required by § 10801 when proof, satisfactory to the Board, is submitted, showing that the applicant has passed an examination in the basic sciences before a board of examiners in the basic sciences or a board authorized to issue licenses to practice the healing art, in another State, when requirements of that State are, in the opinion of the Board, not less than those provided by this act. The provisions of this section shall apply only to examinations conducted by the boards or officers of States that grant like exemption from examination in the basic sciences to persons granted certificates by the Board." A further provision exempts persons then legally entitled to practice the healing art.

Other sections of the Basic Sciences Act, §§ 10804 to 10808 both inclusive, make void any basic science certificate and any license to practice the healing art issued contrary to the provisions of said act and fix heavy penalties for practicing the healing art without a basic science certificate, for fraudulently obtaining or attempting to obtain such a certificate, for any person obtaining or attempting to obtain a license to practice the healing art from any board authorized to issue such license without presenting to such board a valid basic science certificate, and § 10808 provides: "Any person who knowingly issues or participates in the issue of a license to practice the healing art or any branch thereof in (to) any person who has not presented to the licensing board a valid certificate from the State Board of Examiners in the Basic Sciences, or to any person who has

presented to such licensing board any such certificate obtained by dishonesty or fraud, or any forged or counterfeit certificate, shall be fined not more than five hundred dollars, or imprisoned not more than twelve months, or both, in the discretion of the judge." The enforcement section, 10810, provides: "The State Board of Examiners in the Basic Sciences and the various boards authorized to issue licenses to practice the healing art or any branch thereof shall investigate any supposed violation of this act and report to the proper county attorney all the cases that in the judgment of such board warrant prosecution. Every police officer, sheriff and peace officer shall investigate all supposed violations of this Act and apprehend and arrest all violators thereof. It shall be the duty of the attorney general and of the several county attorneys to prosecute violations of this Act."

So it is manifest that the Basic Sciences Act provides a plain and adequate remedy at law for the enforcement of its provisions without any necessity of applying to a court of equity to restrain a violation of the Act. Assuming without deciding that the State Board of Chiropractic Examiners is in error in licensing by reciprocity applicants from other States to practice chiropractic in this State without first requiring the presentation to it by such applicants of a certificate from the Basic Sciences Board, we think appellant should have pursued the enforcement remedy provided in the Act. Several letters from former Attorneys General and one from the present Attorney General have been appended to appellees' brief to the effect that the Basic Sciences Act has not taken away from the several examining boards for the healing arts the right to grant licenses by reciprocity to applicants from other States. Whether these opinions are correct or not, we express no opinion. If correct, appellees have not violated the Act. If incorrect, then the Act prescribes the method of enforcement by prosecution, and there is no necessity of resorting to the extraordinary remedy by injunction. In *Smith* v. *Hamm,* 207 Ark. 507, 181 S. W. 2d 475, it was held that, to justify a court of equity to enjoin a nuisance,

either public or private, there must be some interference, actual or threatened, to property rights or to civil rights.

It is well settled that equity will not intervene by injunction to restrain acts that are merely criminal, but, as it is said in 28 Am. Jur. 339, Injunctions, § 150, quoted in *Smith* v. *Hamm,* "this does not preclude injunctive relief against the commission of criminal acts which cause irreparable injury to the complainant's property or pecuniary rights, even though the acts complained of are committed by public officers." Here there is no allegation that appellant's property or pecuniary rights are invaded or threatened. It is a simple action to enjoin an alleged violation of the Basic Sciences Act which is made criminal by the Act itself and which prescribes serious penalties by fine and imprisonment for its violation. We do not think the cases of *Melton* v. *Carter,* 204 Ark. 595, 164 S. W. 2d 453, and *Ritholz* v. *Ark. State Board of Optometry,* 206 Ark. 671, 177 S. W. 2d 410, are controlling here.

Being a suit to enjoin the appellee Board from the alleged violation of the criminal provisions of the Basic Sciences Act, we think the trial court was without jurisdiction and correctly sustained the demurrer to the complaint.

Affirmed.

McFaddin, Justice, not participating.

Missouri Pacific Railroad Company, Thompson, Trustee, *v.* Lewis.

4-8051 199 S. W. 2d 325

Opinion delivered February 3, 1947.

Rehearing denied March 3, 1947.

[redacted]

Thos. B. Pryor and *Thos. Harper,* for appellant.

Howell & Howell, for appellee.

ROBINS, J. Appellee, a negro "extra gang" laborer, while working for appellant on appellant's right-of-way, was struck and injured by a piece of ice thrown from a passing train by one of appellant's employees. Appellee brought suit against appellant for $10,000 damages, alleging that he had been permanently injured by the negligence of appellant's servant as aforesaid. Appellant filed answer in which it was not denied that appellee was injured at the time and place and in the manner set forth in the complaint, but the extent of the injury as alleged by appellee was denied and appellant set up as a defense that, after the injury, appellant and appellee had made a compromise, under which appellee had been paid the sum of $1,500, and had executed a release of his claim growing out of said injury.

Appellee filed a response in which he alleged that the release was not binding on him because he had been induced to execute it by misstatements of appellant's physician and claim agent as to the extent of the injury.

The trial jury returned a verdict in favor of appellee for "$5,000, less the $1,500 already paid him; net $3,500."

From judgment entered on the verdict this appeal is prosecuted.

For reversal these contentions are urged by appellant:

1. That appellee's cause of action against appellant was barred by the release, and the lower court should have instructed the jury to find for appellant.

2. That the amount of the verdict was excessive.

I.

Both bones, between the knee and the ankle, in the left leg of appellee were broken as a result of being struck by the piece of ice. He was taken to a hospital where he was treated by the assistant division surgeon of appellant. Appellee's leg was put in a cast, and he went home on the first Monday in September, but was never able to return to his work for appellant.

After some prior negotiations a claim agent of appellant made a settlement with appellee for the agreed sum of $1,500, took a release from him and gave him a check for $1,500, which appellee cashed. Appellee could not read, but could sign his name. The release was read over to appellee, before he signed it, by appellant's roadmaster. It is set forth in the release that it was not made in reliance on anything said by a "company physician, claim agent, or other employee" of appellant.

Appellee testified that the assistant surgeon of appellant told him that his leg was in fine shape, that he would be able to go back to work in a few days and would walk as well as ever; that the claim agent told him he was doing fine and that it looked like he could go back to work in a few days; that he saw the doctor about two weeks before the settlement; that he relied on the statement of the claim agent in making the settlement; that he had never been able to go back to work on the railroad; that before he worked for appellant he had farmed, but since his leg was broken he had been unable to do any farm work; that he still suffered pain from the injury to

his leg; that in settling he was using his own judgment based on what the doctor said; that he thought the settlement was fair when he made it; that if he had known the real condition of his leg he would not have made the settlement; that he was told that his leg would get well and that was why he made the settlement.

A physician testified on behalf of appellee that he had made X-ray pictures of appellee's leg; that the pictures showed there had been a fracture through the larger leg bone; that the fracture had healed firmly, but with considerable deformity; that the leg is crooked and "bows"; that appellee "has got all of the union that he could ever get"; that witness "would not advise breaking it over"; that witness "would advise him to go through life in the manner that his leg is now"; that he will have a disability for the rest of his life; that there is some difference in the length of appellee's legs; that this type of fracture was very difficult to handle.

Appellant's division surgeon and his assistant testified that appellee had a good recovery considering his age, but conceded that appellee had a "bow" in the bones of his leg as a result of this injury. The assistant division surgeon also testified that he did not think it advisable to break the bone to straighten it; that he did assure appellee he would be all right, but did not tell him when he would be able to return to work; and that at the time he talked to the claim agent he believed that the leg would return to a normal condition and that appellee would have the same use of it as before.

The question of the validity of the release as a bar to appellee's action was submitted to the jury on an instruction, not complained of here, the effect of which was to tell the jury that it was not binding if the evidence showed that appellant's physician represented to appellee that his leg had properly healed and he would not have a permanent injury and that appellee relied on this representation in signing the release and it developed that his leg had not healed properly and that appellee did, in fact, have a permanent and disabling injury.

In the case of *F. Kiech Manufacturing Company* v. *James,* 164 Ark. 137, 261 S. W. 24, we held (headnote 4): "Where plaintiff, injured in defendant's employment, signed a release relying upon a mistaken opinion of the defendant's doctor that his injury was not permanent, he was not bound thereby, notwithstanding the release recites that he acted on his own judgment, and that no representations were made upon which he relied."

In the note to the decision in the case of *St. Louis-San Francisco Railway Company* v. *R. L. Cauthen* (112 Okla. 256), 241 P. 188, 48 A. L. R. 1447, at p. 1523, this language is used by the annotator: "But, notwithstanding the fact that they [releases] have sometimes expressly declared in effect that the releasor relied on his own judgment, and not on representations of others, such a declaration has been held not to preclude avoidance of the release on the ground of misrepresentations by the releasee's physician as to the nature or extent of the injuries." The F. Kiech Manufacturing Company case, *supra,* was cited in support of this rule.

The holding in the case of *Kiech Manufacturing Company* v. *James, supra,* was followed in the case of *Ozan Graysonia Lumber Company* v. *Ward,* 188 Ark. 557, 66 S. W. 2d 1074, where we held (headnote 8): "Where plaintiff, injured in defendant's employment, signed a release relying upon a mistaken opinion of defendant's doctor that his injury was not permanent, he was not bound thereby, though the release recited that he acted upon his own judgment, and that no representations induced him to make the settlement."

In discussing a similar question we said in the case of *Standard Oil Company of Louisiana* v. *Gill,* 174 Ark. 1180, 297 S. W. 1020: "The fact that a short time intervened, about 20 days, from his discharge to the time of the release, would not change the result, and neither would the fact that he was suffering at the time he signed same; the question being: Did he honestly rely on the assurance of his physicians that he would soon recover, and this was a question for the jury?" Other cases in which the same doctrine was enunciated are:

St. Louis, I. M. & So. Ry. Co. v. *Morgan,* 115 Ark. 529, 171 S. W. 1187; *Griffin* v. *St. Louis, Iron Mountain & Southern Railway Company,* 121 Ark. 433, 181 S. W. 278; *Sun Oil Company* v. *Hedge,* 173 Ark. 729, 293 S. W. 9; *Missouri Pacific Railroad Company* v. *Elvins,* 176 Ark. 737, 4 S. W. 2d 528; *National Life & Accident Insurance Company, Inc.,* v. *Hitt,* 194 Ark. 691, 109 S. W. 2d 426.

Appellee's testimony, as to the circumstances surrounding the execution of the release was not seriously contradicted by appellant's witnesses. The claim agent who made the settlement testified that a few days before the settlement was made he talked with the assistant surgeon of appellant about appellee's injury and (the claim agent) admitted that he "probably" told appellee that appellant's assistant surgeon had advised him (the claim agent) that appellee's leg was in good condition and that he would be able to go back to work about January first. But, conceding that there was a dispute in the testimony as to this phase of the case, such conflict was for the jury to settle, and, in determining whether the evidence was sufficient to support the verdict, we must give the evidence on behalf of appellee the strongest probative force that it will reasonably bear. *St. Louis, Iron Mountain & Southern Railway Company* v. *Coleman,* 97 Ark. 438, 135 S. W. 338.

We cannot say, when all the testimony is considered in the light of our pronouncements in the above cited cases, that the lower court erred in submitting the question of the validity of the release to the jury, or that the jury's finding that the release was executed under a mutual mistake of fact was without support in the evidence.

II.

Nor can we say, as a matter of law, that the amount of the jury's verdict was excessive. Appellee was 55 years old at the time of his injury. He was illiterate and capable of doing only manual labor. There was testimony indicating that his ability to do this kind of work had been seriously impaired for the remainder of his life and that he would always have a certain amount of lameness.

Under this proof we cannot say that the amount awarded by the jury to appellee is so excessive as to entitle appellant to relief therefrom.

The judgment of the lower court is affirmed.

GRIFFIN SMITH, C. J., and MCHANEY and HOLT, JJ., dissent.

WILSON, COLLECTOR *v.* OKLAHOMA TIRE & SUPPLY COMPANY.

4-8055 199 S. W. 2d 328

Opinion delivered February 3, 1947.

Curtis L. Ridgway and *Jay M. Rowland,* for appellant.

Owens, Ehrman & McHaney and *Herschell Bricker,* for appellee.

SMITH, J. The Tax Assessor of Garland county assessed an intangible property tax against the appellees, Oklahoma Tire & Supply Company and the Kroger Grocery & Baking Company, based upon the assumed apportionment of intangible assets attributable to their operations in Garland county, Arkansas, under the supposed authority of Act 47 of the Acts of the General Assembly of 1927, appearing as § 13744 of Pope's Digest.

When the Collector attempted to collect these taxes appellees filed a complaint in the Chancery Court denying ownership of any intangible property subject to taxation, and alleged that they had paid all taxes properly assessed against them, and they prayed that the Collector be restrained on the ground that the collection of these taxes would be a taking of their property without due process of law.

A demurrer was filed by the Collector on the ground that the complaint did not state facts sufficient to constitute a cause of action, and on March 12, 1946, the court overruled the demurrer. The Collector stood on the demurrer and refused to plead further, and a decree was entered enjoining the collection of the taxes from which decree is this appeal.

The case presented is controlled by the opinions in the cases of *State, ex rel Atty. Gen.* v. *Lion Oil Refining Co.,* 171 Ark. 209, 284 S. W. 33, and *State, ex rel Atty. Gen.* v. *Williams-Echols Dry Goods Co.,* 176 Ark. 324, 3 S. W. 2d 340, and upon the authority of these cases, the decree from which is this appeal must be affirmed.

The cases just cited involved the question of the constitutionality of the statutes under which the instant case arose.

The first of the cases above cited arose over the attempt of the Attorney General to collect certain back taxes alleged to be due by the Lion Oil Refining Company, a foreign corporation. The suit was predicated upon § 9965 of Crawford & Moses' Digest, which was a part of the Act of March 17, 1917, p. 1355, numbered 262. The Act was held unconstitutional as applied to foreign corporations. The case of *State, ex rel Atty. General* v. *Williams-Echols Dry Goods Company, supra,* was a similar suit by the Attorney General to collect back taxes from a domestic corporation under the authority of the same section of the statutes, and the Act was held to be unconstitutional as applied to domestic corporations for the reason that the provisions of the Act were not severable.

The Act of March, 1917, was amended by Act 47 of the Act of 1927, and the amendatory act appears as § 13744, Pope's Digest. But the change effected is unimportant so far as the question here under consideration is concerned. This fact does not appear to be questioned by appellant who insists however, that the instant case is distinguishable from the former cases in that the former cases were suits by the Attorney General to collect back taxes which had not been assessed, whereas, the instant suit is one to collect current taxes which have been assessed.

This distinction is unimportant for the reason that the Attorney General could not maintain his suit for back taxes unless such taxes were due and unpaid and the former opinion was based upon the holding that the Act under which the suit had been brought was void, and the payment of the taxes could not be enforced for that reason.

It is urged that the court went too far in the Lion Oil Refining Company case in holding the Act unconstitutional, as the Attorney General was trying to enforce it contrary to its provisions. But as we have said, the opinion was not based upon that ground, but upon the broader ground that the Act was invalid, and we test the constitutionality of legislation, not by what is attempted under it, but upon a consideration of what is permitted by it. *Pulaski County* v. *Commercial Nat. Bank,* 210 Ark. 124, 194 S. W. 2d 883.

Appellant in effect asks us to overrule the Lion Oil Refining Co. case, and argues that the case of *Alpha Portland Cement Co.* v. *Commonwealth of Mass.,* 268 U. S. 203, 45 S. Ct. 477, 69 L. Ed. 916, 44 A. L. R. 1219, and *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165, would support that action. The first answer to that contention is that these cases last cited involved the collection of excise taxes, and not *ad valorem* taxes as in the instant case. It was said in the case of the Lion Oil Refining Company of the taxes there involved that "It is in no sense an excise tax, such as was under consideration in *Alpha Portland Cement*

Co. v. *Massachusetts,* 268 U. S. 203, 45 S. Ct. 477, 69 L. Ed. 916, 44 A. L. R. 1219, and cases cited.

In the recent case of *Little Rock Special School Dist.* v. *Public Service Comm.,* 210 Ark. 165, 194 S. W. 2d 874, we said: "This court, in *State, ex rel* v. *Lion Oil Refining Co.,* 171 Ark. 209, 284 S. W. 33, held that section (Act 262, Acts of 1917) 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* 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."

Believing that our decisions are correct, we decline to overrule them, and the decree from which is this appeal must be affirmed, and it is so ordered.

CHAVIS *v.* MARTIN.

4-8063 199 S. W. 2d 598

Opinion delivered February 10, 1947.

Rehearing denied March 10, 1947.

A. D. Chavis, for appellant.

Rowell, Rowell & Dickey, for appellee.

McHaney, Justice. Sub-District No. 1 to Drainage District No. 2 of Jefferson County brought this action against appellee, David Martin, a negro, to cancel a deed from the State to appellee, dated August 21, 1945, to the east one-half, northeast quarter of section 32, township 4 south, range 7 west, on the ground that the forfeiture and sale to the State for the 1937 taxes were void and the State acquired no title because of a previous foreclosure and sale to the plaintiff in 1936 for delinquent assessments in plaintiff district. Also the cancellation of a deed from Plum Bayou Levee District to appellee, dated September 17, 1945, to the same land, was sought on the ground that said deed amounted to a redemption only, since appellee was relying on his purchase from the State and recognized his obligation to pay the taxes due said levee district. Cancellation of both deeds was sought to remove them as clouds on plaintiff's title.

Appellee Martin answered with a general denial and by way of cross-complaint against appellant, an attorney of Pine Bluff, Arkansas, alleged that he employed appellant as his attorney and paid him a fee of $35 to investigate the records and to advise appellee whether he could purchase from the State and several improvement districts his father's old home place, consisting of 80 acres in section 32-4-7; that subsequently appellant advised appellee that he had located his "Home 80," and that he could secure title from the State for $100 which appellee paid to appellant on July 2, 1945, receiving a receipt therefor; that on August 15, 1945, appellant wrote him that, if he would bring in $400 more, appellant could get title from the improvement districts involved, which amount was paid to appellant on August 20, 1945, for which he holds appellant's receipt; that on September

7, 1945, appellant again wrote him that the improvement taxes "look all right and you bring me $300, if you can, and it clear that up," which he did on September 10, 1945, for which he holds a receipt; that appellant negligently purchased in appellee's name from the State the land above described which was not appellee's "Home Place" and paid the sum of $329 for the State's deed, when he should have purchased the title of plaintiff district, and with such title he could have redeemed from the State for $1, because said district acquired the title before the State's lien for general taxes attached and for which it was sold to the State (See Act 206 of 1943); that, on September 17, 1945, appellant, as his attorney, purchased for him the title of Plum Bayou Levee District for which he paid $21.05, but failed to purchase the title of plaintiff district, or that of three other districts, each of which had foreclosed their liens for delinquent improvement district assessments on said lands; that said action on the part of appellant as attorney for appellee constituted negligence or fraud; and that, if plaintiff should prevail, he should have judgment against appellant in the sum of $835, with interest, for which he prayed.

Appellant appeared and moved to strike the cross-complaint on the grounds of misjoinder of actions, and that appellee had an adequate remedy at law, and that a court of equity had no jurisdiction. He also moved to require the cross-complaint to be made more definite and certain. These motions were overruled. He answered the cross-complaint admitting his employment as attorney for appellee for the purposes alleged, the payment to him of the sums of money as alleged, the writing of the various letters, the purchase from the State by him for appellee the land above described, the payment to the State of $329 for its deed and practically all other material allegations of the cross-complaint, but specifically denied that his actions as attorney for appellee constituted negligence or fraud, that he should be made a party to the action, or that appellee should recover against him. He further answered with a lengthy explanation or attempted justification of his dealings with

appellee, and again denied that he misrepresented anything or was negligent in any manner as attorney for him, and concluded with a special demurrer to the jurisdiction. He attached to his answer certain exhibits from "A" to "R," inclusive, consisting of correspondence with appellee and others, including certain memoranda regarding various improvement district taxes and titles.

Trial resulted in a decree canceling the deeds of the State and the Plum Bayou Levee District to appellee for the reasons alleged in the complaint. No appeal has been taken from that part of the decree. As to the cross-action the court found: "That the cross-defendant, A. D. Chavis, obtained from David Martin the sum of eight hundred thirty-five and 00/100 dollars ($835) upon the representation that he would ascertain whether what David Martin called his 'home 80' as State land and would obtain a good title thereto from the improvement districts within which it was located, as well as clear the State title and obtain a deed from the record owner; that instead of carrying out this agreement, the said A. D. Chavis did not, so far as the evidence in this case shows, examine the abstract records to determine which was the Martin 80 acres, although the same were readily accessible to him and although he had examined said abstract records at other times in the past; that instead of obtaining a good title to the Martin place, which was the west half of the northeast quarter of said section 32, the said A. D. Chavis obtained two deeds, one from the State of Arkansas and one from Plum Bayou Levee District on the east half of the northeast quarter of said section, leaving five improvement district titles outstanding.

"That the said A. D. Chavis expended the sum of three hundred twenty-nine and 00/100 dollars ($329) to obtain a deed from the State of Arkansas when the State's title could have been cleared by payment of one dollar ($1) under Act 206 of 1943; that such deed was void, operated to convey no title to the defendant and was an absolute waste of that much money. As already stated in this decree, the Plum Bayou Levee District

deed was also subject to cancellation so that the said cross-defendant has rendered no service of any sort to the defendant and that said cross-defendant has made no effort to contact the plaintiff or Drainage District No. 2 of Jefferson County, Arkansas, which are separate entities, Bradley Slough Drainage District, Sub-District No. 1 to Bradley Slough Drainage District or No Fence District No. 2, all of which districts embrace the land herein involved; that said cross-defendant also failed to obtain a deed from Miss Emma White, who was the record owner prior to the sales to said improvement districts.

"That the sums expended by said cross-defendant follows:

"Deed from the State of Arkansas, $329; deed from Plum Bayou Levee District, $21.05; subsequent taxes in Plum Bayou Levee District, $190; recording two deeds, $3, or a total of $543.05, and that said cross-defendant has converted to his own use the remainder of the $835 paid him, which amounts to $291.95.

"That the said cross-defendant, A. D. Chavis, is guilty of fraud in misleading and deceiving his client, David Martin, in his so-called effort to clear the title of either the west half or the east half of the northeast quarter of said section 32; that the services of said cross-defendant resulted in no benefit whatsoever to the defendant and that said cross-defendant is not entitled to the thirty-five dollars ($35) fee paid him for determining whether the Martin 'home 80' was State land subject to being purchased by the defendant."

Judgment was rendered against appellant for $835 with interest at 6 per cent. from the date of the decree, March 5, 1946. This appeal is from that part of said decree.

One of the questions relied on for a reversal of the judgment against him by appellant is that the cross-complaint was improper because he had no interest in the original cause of action. Section 1426 of Pope's Digest provides that: "A defendant may file a cross-complaint against persons other than the plaintiff . . . when a

defendant has a cause of action against a co-defendant, or a person not a party to the action, and affecting the subject-matter of the action . . ." Appellant says he had no interest in the action of plaintiff against appellee to cancel the two deeds he had procured for appellee as his attorney and for which he had received from appellee $835 to cover purchase price and fee. We think he did and that he should not be heard to say that he did not, in view of the facts here presented. Appellant did everything that was done in the unsuccessful attempt to acquire the title to land for appellee who trusted him implicitly and did nothing but follow the advice of appellant to put up more money when called upon to do so. Had appellant taken the title in his own name and then conveyed to appellee, he would have been a necessary party defendant in the original action, and a cross-action against him by appellee certainly would have been proper. In substance, his position here is the same and the cross-action was proper. Compare *Taylor* v. *Harris,* 186 Ark. 580, 54 S. W. 2d 701. Having jurisdiction in the main suit, the court retained it to administer complete relief. *Taylor* v. *Harris, supra.* See, also, *Norfleet* v. *Stewart,* 180 Ark 161, 20 S. W. 2d 868, where chancery entertained jurisdiction of a suit to recover money paid by a client to an attorney to be used in settling a judgment for damages against the client, which was converted by the attorney.

In *Maloney* v. *Terry,* 70 Ark. 189, 66 S. W. 919, 72 S. W. 570, it was held, to quote a headnote: "Chancery has jurisdiction of a suit by a client to have his attorney declared a trustee where the attorney, settling a claim against the client, fraudulently procured and retained a greater sum than was paid to settle the claim, although an action at law for money had and received would also lie."

Appellant also contends that he was guilty of neither negligence or fraud in the transaction complained of. The trial court found that appellant "is guilty of fraud in misleading and deceiving his client," but whether it was fraud, negligence, or breach of duty, the result would

be the same, and we think the least that can be said about it is that it was negligence or breach of duty. For instance, he used appellee's money to the extent of $329 to buy the State's title, when an investigation of the county records would have disclosed that the title to the tract had, previous to the sale to the State, been acquired by plaintiff district, and that a deed from the State would convey no title because the land was not subject to general taxation while the title is in an improvement district. *Robinson* v. *Indiana & Ark. Lbr. & Mfg. Co.,* 128 Ark. 550, 194 S. W. 870, 3 A. L. R. 1426, and a number of cases following it. See Sheppard's Ark. citations. Moreover, had he bought the plaintiff's title, or that of the levee district or either of the four other improvement districts, he could have gotten a deed from the State for $1 by following the provisions of Act 206 of 1943, and thus have saved his client $328. After he acquired a deed from the State, he got a deed from the levee district, paying $21.05 therefor, and then paid the accrued taxes to the district in the sum of $190. The court's decree canceled both titles and there is no appeal from said decree. As a net result appellee has been out $835, of which appellant has retained for his own use $291.95, and appellee got nothing but a sad experience, including a lawsuit, for his outlay. In *Norfleet* v. *Stewart,* 180 Ark. 161, 20 S. W. 2d 868, we held that "actual fraud in such cases is not necessary to give the client a right to redress. A breach of duty is constructive fraud, and is sufficient." Citing *Baker* v. *Humphrey,* 101 U. S. 494, 25 L. Ed. 1065, Chief Justice HART, for the court, there said: "A fiduciary relation exists between attorney and client, and the confidence which the relationship begets between the parties makes it necessary for the attorney to act in the utmost good faith. He must not only not misrepresent any fact to his client, but there must be an entire absence of concealment or suppression of any facts within his knowledge which might influence the client, and the burden of establishing the fairness of the transaction is upon the attorney. This rule is of universal application, and is recognized by all of the textwriters on the subject."

In the recent case of *Johnson, Admr.*, v. *Rolf*, 208 Ark. 554, 187 S. W. 2d 877, 188 S. W. 2d 137, after citing *Norfleet* v. *Stewart, supra,* and, after saying that, in the relationship between attorney and client, "there must be an entire absence of concealment or suppression of any facts within the attorney's knowledge which might influence the client, and the burden of establishing fairness of the transaction under investigation rests on the attorney," we quoted from *Thweatt* v. *Freeman,* 73 Ark. 575, 84 S. W. 720, the following: "Equity regards the relation of attorney and client much in the same light as that of guardian and ward, and will relieve a client from hard bargains or from an undue advantage secured over him by his attorney. And the client, in order to secure such relief, is not bound to show that there has been any imposition or fraud, nor is the transaction necessarily void; but if it is a transaction in which the relation between the parties exerted, or might reasonably have exerted, any influence in the attorney's favor, then the burden of establishing its perfect fairness is thrown upon the attorney."

From all of these cases it appears certain that the trial court had jurisdiction.

The evidence as to the vital facts is not in dispute, most of them being stipulated. Appellant did not testify and he called only one witness, the county clerk, to prove that the east one-half of the northeast quarter of said section forfeited in the name of Miss Emma White, from whom he unsuccessfully sought to get a quitclaim deed thereto.

We do not review the evidence, as to do so would unduly extend this opinion. We have carefully considered all of it and find it amply sufficient to support the judgment which is accordingly affirmed. This affirmance is without prejudice to appellant's right to apply to the chancery court, when he shall have satisfied the judgment against him, for subrogation to the right of appellee, if any, to the return from the State of the sum paid to it, or to the Plum Bayou Levee District.

4-8062 199 S. W. 2d 602

Opinion delivered February 10, 1947.

[redacted]

Ernest Briner and *Donham, Fulk & Mehaffy,* for appellant.

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

SMITH, J. Appellee recovered a judgment for $5,000 to compensate a personal injury which she sustained as the result of a collision between an automobile in which she was riding, driven by her husband, and an automobile driven by appellant.

For the reversal of this judgment it is insisted, first, that a verdict should have been directed in appellant's favor for the reasons, (a) that the undisputed testimony shows that the sole proximate cause of the collision and consequent injury was the negligence of appellee's husband and, (b) that appellee was guilty of contributory

negligence; second, that certain incompetent testimony was admitted and, third, that the verdict is excessive.

The collision occurred in the afternoon of December 8, 1945, at the intersection of Roosevelt Road and State Street, in the city of Little Rock. The cars involved were a Ford and a Buick. The Ford was owned and being driven by Bryant Laster, the husband of appellee, who was riding on the front seat with him. Burke Williams, an invited guest, was riding on the rear seat. The Buick was owned and being driven by appellant, who had no passenger.

State Street runs north and south, and Roosevelt Road runs east and west, and these streets cross at a right angle. The Buick car was proceeding west on Roosevelt Road, while the Ford was traveling south on State Street.

Under an ordinance of the city of Little Rock, Roosevelt Road is designated a boulevard, or through street, from a point east of the place of the collision to another point west thereof. The ordinance requires all traffic entering Roosevelt Road to stop before driving into that road and to ". . . proceed cautiously yielding to vehicles not so obliged to stop which are within the intersection or approaching so closely as to constitute an immediate hazard, and may then proceed." Pursuant to this ordinance a stop sign was maintained on State Street, at its entrance to Roosevelt Road. Appellee's husband resided at Bauxite, Arkansas, and testified that he was not familiar with the streets of Little Rock, and that he did not notice the stop sign as he drove into Roosevelt Road, without stopping, but the testimony shows that he had reduced his speed as he entered Roosevelt Road to six or eight miles per hour, although other testimony placed his speed higher. The testimony is conflicting as to the speed at which appellant was traveling, some of which placed the speed of that car as high as sixty miles per hour.

Traffic policemen were called to the scene after the collision by a witness who saw it, and Mr. Laster, appel-

lee's husband, was arrested and carried to the police station where he plead guilty to a violation of the stop ordinance, and paid a fine of $15 which was imposed.

It is urged that this negligence of Mr. Laster was the sole proximate cause of the collision, and that for this reason a verdict should have been directed in appellant's favor. Laster testified that he saw appellant's car three-fourths of a block up the street, and that he thought he could enter the road and right his car before the Buick overtook him, but that he misjudged the speed at which the Buick was approaching.

Appellant testified that he saw the Ford car, and it looked like it was not going to stop, although he assumed it would do so, as "lots of people run up to corners at forty miles an hour and stop," and that when he realized that the Ford car was not going to stop, it was then too late to avoid a collision, as he was then in the intersection of the streets.

This question of fact was submitted to the jury under instructions of which no complaint is made, and under the testimony recited the jury might have found, and evidently did find, that although Laster was negligent, this negligence was not the sole proximate cause of the collision; in other words, that the collision was the result of the concurring negligence of the drivers of the two cars. The recent case of *Oviatt* v. *Garratson,* 205 Ark. 792, 171 S. W. 2d 287, cites a number of other cases which state the law to be that where two or more persons were negligent and their negligence concurred to injure a third person, both parties are liable.

The defense of contributory negligence is based first upon the admission of appellee that she was not keeping a lookout, and did not warn her husband that he was ignoring the stop sign. While both the driver of a car and his guest are alike under the duty of exercising ordinary care, the conduct required to comply with that duty is ordinarily different because of the difference in the circumstances. The subject is extensively annotated in the case of *Leclair* v. *Boudreau,* 101 Vt. 270, 143 Atl. 401,

63 A. L. R. 1427. In the case of *Ark. Valley Coop. Rural Elec. Co.* v. *Elkins,* 200 Ark. 883, 141 S. W. 2d 538, we quoted with approval the following statement from 5 Am. Jur., § 475, p. 769: "A person riding in an automobile driven by another, even though generally not chargeable with the driver's negligence, is not absolved from all personal care for his own safety, but is under the duty of exercising reasonable care to avoid injury. The care exacted is that which an ordinarily prudent person would exercise under like circumstances. The law fixes no different standard of duty for a passenger in an automobile than for the driver. Each is bound to use reasonable care. What conduct on the passenger's part is necessary to comply with this duty must depend upon all the circumstances, one of which—and unquestionably an important one—is that he is merely a passenger having no control over the management of the vehicle in which he is riding."

We cannot say, as a matter of law, that appellee was under the duty of keeping the lookout, and this question of fact was submitted to and is concluded by the verdict of the jury.

Contributory negligence is also predicated upon the proposition that appellee voluntarily rode with her husband, knowing that he was in an intoxicated condition. The officers who investigated the collision and arrested Laster for not observing the stop sign, testified that Laster was drinking, and that they could detect the odor of liquor, but one of the officers said that Laster was not "driving drunk," and Laster was not arrested on that account. Laster denied being drunk and appellee corroborated that statement.

Upon this issue the court gave an instruction as favorable as appellant could ask, reading as follows:

"If you find from the evidence in this case that at the time of the collision complained of, the plaintiff's husband was under the influence of intoxicating liquor to an extent which appreciably affected his ability to operate the vehicle in the exercise of ordinary care; and

if you further find that such condition on his part caused or contributed to cause the collision and the plaintiff was herself aware, prior to the collision, of such condition on the part of her husband, but nevertheless continued voluntarily to ride in the said vehicle, then you are instructed that the plaintiff is not entitled to recover anything in this action, and your verdict will be for the defendant Willbanks."

Error is assigned in permitting appellee's family physician to testify as to a protraction of her menstrual period, the objection being that the complaint contained no such allegation. The complaint did allege, however, that appellee sustained a great nervous shock, and her doctor testified that the premature and continued bleeding of which appellee complained might have been caused by the collision, and we think the testimony was properly admitted. Nevertheless, we think the verdict in the case is grossly excessive, and cannot be sustained under the undisputed testimony.

The doctor testified that in his examination and treatment of appellee he had not thought of connecting the collision with appellee's condition referred to, although the doctor stated it might and could have caused that condition, but he did not testify that it had done so. He testified that appellee was highly nervous and had a case history of irregular bleeding, but he did not recall that appellee mentioned the collision in giving her case history, and that as her nervous condition improved her bleeding decreased. He testified that appellee was approaching her menopause, and that this bleeding was not uncommon during that period. He further testified that he did not find anything to indicate that appellee had sustained a permanent injury, and that the condition referred to would all eventually clear up as she goes through the complete menopause, and that the last showing of menstrual bleeding was two weeks prior to the trial. The doctor also testified that he found a wound on appellee's leg which had left a scar approximately one and one-half inches in length, and that her knee had been lacerated and bruised to some extent, and a slight

scar remained, and that one ankle was sprained or swollen. These appear to have been the matters for which the doctor treated appellee, although he stated that "her biggest difficulty" seemed to be her irregular bleeding. She did not require and did not receive hospitalization.

We think this testimony not sufficient to support a larger recovery than $1,500, and the judgment will be reduced to and affirmed for that amount.

McFaddin, J., dissents from so much of the opinion as affirmed the judgment.

Ed. F. McFaddin, Justice, dissenting. I agree with all of the opinion of the majority in this case, except the last 12 words thereof, which read:

". . . and the judgment will be reduced to and affirmed for that amount."

I think the better order would have been to reverse and remand the case for a new trial, unless a remittitur be entered. This may seem to be quibbling, but I regard it as vital to the sanctity of our jury system.

This present case is the first instance in which this court has *affirmed a reduced judgment* in a personal injury case since I became a member of the court on January 1, 1943. In all other cases the court has allowed the plaintiff the alternative of (1) entering a remittitur and accepting affirmance, or (2) having a reversal and new trial. But in the present case the majority is reducing the verdict and then affirming it as reduced. As I see it, the majority is thus (1) establishing itself as the jury and rendering a verdict; and (2) sitting as an appellate tribunal and affirming the judgment that it has rendered.

I am aware that there are cases in which this court has followed the same procedure as is followed here. One such case is *Standard Coffee Co.* v. *Watson,* 198 Ark. 592, 129 S. W. 2d 948. In that case there was a dissenting opinion by Mr. Justice Mehaffy; and the following paragraph, copied from the dissenting opinion, expresses my views in the present case:

"I think that if we reach the conclusion that there is not substantial evidence to support the amount of the verdict, the only thing we can rightfully do is to fix an amount which we think is not excessive and give the appellee an opportunity to enter a remittitur, or reverse the judgment and remand the case for a new trial."

Mo. Pac. R. v. *Newton,* 205 Ark. 353, 168 S. W. 2d 812 was the unanimous opinion of this court; and therein are listed some of the earlier cases on reduction of excessive verdicts. The opinion contains this language:

"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."

There are listed cases beginning with *Dodds* v. *Roane,* 36 Ark. 511 (written by Chief Justice English), and other cases on down to *S. L. I. M. & S. Ry. Co.* v. *Brabbzson,* 87 Ark. 109, 112 S. W. 222 (written by Mr. Justice McCulloch). In all of these cases the order was that, if the remittitur be entered, the judgment would be affirmed, otherwise, the judgment would be reversed and the cause remanded for a new trial. *Mo. Pac.* v. *Newton, supra,* was a unanimous opinion; so the majority there approved the wording of the last paragraph of that opinion, as follows:

"The plaintiff recovered a verdict for $2,000. Under the record in this case, any verdict in excess of $1,000 would be grossly excessive; and, if, within fifteen juridical days, a remittitur of $1,000 is entered by the appellee, then the case will be affirmed; otherwise, the cause is reversed and remanded for a new trial because of the excessive verdict."

It was my thought that the language last quoted settled the procedure that this court would follow on this

question. Now, the majority is departing from that procedure, and reverting to the procedure pursued by the majority in *Standard Coffee Co.* v. *Watson, supra*; and—as I see it—denying to the appellee her right to a new trial where she might show substantially stronger facts to support a larger verdict.

I therefore dissent, since I consider such denial of a new trial to the appellee to be an invasion of the sanctity of our jury system.

FARM BUREAU LUMBER CORPORATION *v.* STATE FOR USE OF SALINE COUNTY.

4-8052 199 S. W. 2d 593

Opinion delivered February 10, 1947.

Rehearing denied March 10, 1947.

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

GRIFFIN SMITH, Chief Justice. Farm Bureau Lumber Corporation, chartered by Indiana, is authorized to do business in Arkansas and operates with principal domestic offices at Benton. It uses trucks and tractors on highways and elsewhere. Charles O. Smithers is County Judge and Chairman of the County Highway Commission.[1] He

[1]Act 379, approved March 17, 1939.

is charged with official responsibility for maintaining County roads. One such road was used by appellant in its logging operations, in consequence of which damage amounting $3,000 was alleged. Appeal is from a judgment of $1,500 for the County.

The motion for a new trial contains forty-two assignments, most of which are not argued. Fifteen instructions were given and refused. Most have not been abstracted. Result is a presumption that errors complained of were cured by other instructions unless the vice is inherent, hence incapable of correction.

Judge Smithers testified that Kirk Road, in respect of which the damage occurred, was built and gravel-surfaced by the County with WPA aid, and that its completion represented "enormous sums of money." The use by appellant of cleat-treaded tractors and other heavy machinery, such as trucks, etc., caused unusual deterioration, necessitating expenditures equal to the sum claimed as damage, and created inconvenience to the traveling public, including delays because of road blockage, unusual care in driving on account of ruts and holes, partial destruction of hard surfaces, and other hindrances incidental to 200 cars per day operating over the fourteen-mile stretch, seven miles of which were used by Farm Bureu in its logging movements.

At one point the highway was used as a base for pulling heavy logging trucks over nearby slippery ground. The units were driven off the roadway and utilized in such a way that a caterpillar tractor and other mobile machinery weighing, with load, 35,000 pounds, had to be used to supply required power. The caterpillar was frequently turned on the surfaced road by the usual process of locking the tread on one side and driving the opposite "track." The tracks were built in sections forming partially flexible endless metal belts treaded with steel extensions designed to grip the ground in order to supply greater traction, and prevent skidding.

Appellant concedes that machinery was used without obtaining from the County Judge authority mentioned in

§ 7151 of Pope's Digest; and, while witnesses for Farm Bureau contend that little if any damage was directly caused by the operations, it is admitted that the motor units were used during wet weather. Another admission is that Farm Bureau management knew Judge Smithers was endeavoring to get in touch with its agent for the purpose of discussing the use then being made of Kirk Road, but the witness (H. C. Church) failed to call the County Judge by telephone after having been informed regarding matters the official sought to adjust. Clear inferences to be drawn from acquiescent comments by Church on cross-examination are that the Corporation needed daily supplies of logs for its mills; that a shutdown for want of raw material would be expensive, and Mr. Church did not want to talk with Judge Smithers because the latter had been insistent upon preservation of the road.

It is in evidence that logs, large limbs, or heavy saplings, were cut and dumped into roadway drains to facilitate truck and tractor movements in leaving the paved surface and in removing timber from adjacent lands; that in other respects ditches were filled while trailways were being opened, thus diverting surface water; also that holes were left in the road, gravel was cut through to an extent necessitating rebuilding, and overflow due to interference with drainage resulted in seepage through highway structure.

We think a question was made for the jury regarding damage, and that the verdict is supported by substantial evidence.

It is urged, however, that a condition precedent to civil liability is that the person proceeded against must first have been convicted of a violation of § 1 of Act 222, approved October 20, 1919; Pope's Digest, § 7151. Reliance is placed upon § 5 of Act 222 (Pope's Digest, § 7155) where it is provided that "In addition to the penalty hereinabove prescribed, . . . the person convicted shall be liable in a civil action for all damage occasioned or caused by such violation."

What is such violation? Section 1 prohibits ". . . the using, driving or operating upon any improved hard-surfaced public highway of the State of any tractor, truck, automobile, or other vehicle having corrugated, spiked, jointed or other rough-surfaced metal tires" without license. The license permits "use or operation" of such vehicles, not the right to damage public property. It is true that by § 5 civil liability is made cumulative as to the person convicted of violating the prohibitory portions of the Act; but the criminal liability created by § 4 arises when one without authority makes use of a hard-surfaced public highway, irrespective of damage to the road.

A cause of action for injury to a highway or structures incidental to it is conferred by Act 300, approved March 23, 1937. Pope's Digest, § 6809. Section 150 of the Act, subdivision (a), provides that "Any person driving any vehicle, object, or contrivance upon any highway structure shall be liable for all damage which said highway or structure may sustain as a result of any careless, negligent, or illegal operation, driving, or moving of such vehicle, object, or contrivance, or as a result of operation, driving, or moving any vehicle, object, or contrivance of excessive width or weight in excess of the maximum weight in this Act, even though authorized by a special permit. . . ."

The question of excessive weight was submitted to the jury in a circumstantial manner, but the testimony was nevertheless sufficient to inform practical men of what the plaintiff alleged was being done. Act 300 provides for certain weights in relation to tire sizes, both as to single and double mountings when either low- or high-pressure pneumatic tires are used. The computation and distribution of load with respect to axle is somewhat complicated; but if it be admitted that the plaintiff failed to minutely detail in pounds an excess load and improper distribution, the fact remains that effect of operations, including obstruction of ditches and adjacent highway drains, was enough to satisfy any reasonable man's mind that using the roadway as a base for logging operations

as the testimony disclosed caused the damage, and accelerated deterioration; and it amounted to an appropriation of the public's property.

It is insisted that prejudicial testimony was admitted; but, as has been shown, appellant relies upon what it thought to be inherently incorrect instructions, and did not abstract others. Since, because of Act 300 of 1937, the position cannot be sustained, judgment must be affirmed.

ALLDREAD *v.* MILLS.

4-8050 199 S. W. 2d 571

Opinion delivered February 10, 1947.

Y. W. Etheridge and *Williamson & Williamson,* for appellant.

C. T. Sims, for appellee.

Ed F. McFaddin, Justice. This appeal stems from a motor vehicle collision. Appellee was plaintiff in the trial court, and was awarded a verdict and judgment for $4,000. From an unavailing motion for new trial, the appellant (defendant below) brings this appeal, urging here for reversal the six assignments herein listed and discussed. For convenience, we refer to the parties as they were styled in the trial court.

First Assignment: "The verdict and judgment are contrary to clearly established and uncontroverted physical facts in the case."

Shortly after dark on Saturday night, October 28, 1944, the plaintiff, George Mills, accompanied by his wife and two other persons, was driving his Ford sedan northerly towards Monticello, and the defendant's servant (Monroe Franklin) was driving defendant's 1½-ton Ford truck southerly from Monticello. The two vehicles collided on State Highway No. 81, and plaintiff received injuries and damages, the nature and extent of which will be mentioned in the discussion of Assignment No. 6. At the place where the collision occurred the road is practically straight, and a heavy black line indicates the cen-

ter of the road. The plaintiff was attempting to drive on the east side, and the defendant on the west side. The hard-surface highway is 18 feet and 4 inches wide.

Plaintiff's witnesses testified that the plaintiff was on the *east* side, and that the defendant's truck crossed the center line and caused the collision. The defendant's witnesses testified that the defendant's truck was on the *west* side, and that the plaintiff's car crossed the center line and caused the collision. The cars did not hit head-on; but the left front of each vehicle received the impact, and each vehicle continued some distance before coming to a stop. Plaintiff's car had the left front wheel and fender damaged, and the left front door crushed. From the collision point, the car angled to the west (left) side of the road before stopping in the ditch about 50 yards from the collision. The defendant's truck had the left front wheel torn from the axle, and knocked "back up under" the truck, with the front or running part of the wheel turned out. Also, there was damage to the body of the truck on the left side just back of the cab door. The truck traveled about 50 yards southwest from the collision. The back end skidded to the right, and the truck stopped with the rear end in the ditch on the west side of the highway. As the truck went down the highway, the rubber from the front wheels left skid marks on the pavement, which skid marks remained visible for several weeks.

It is conceded by the defendant that there is sufficient evidence to sustain the verdict of the jury if the physical facts be ignored, but it is most earnestly contended that three physical facts establish the defendant's case and necessitate reversal of the jury's verdict. Learned counsel for defendant invokes the rule that a verdict will be set aside, if it be against incontrovertible physical facts; and, in support of that rule, cites *St. L. S. W. Ry. Co.* v. *Ellenwood,* 123 Ark. 428, 185 S. W. 768; *Waters-Pierce Oil Co.* v. *Knisel,* 79 Ark. 608, 96 S. W. 342; *Platt* v. *Owens,* 183 Ark. 261, 35 S. W. 2d 358; *Magnolia Petroleum Co.* v. *Saunders,* 193 Ark. 1080, 104 S. W. 2d 1062; *Mo. Pac. R. Co.* v. *Hancock,* 195 Ark. 414,

113 S. W. 2d 489; and *Guardian Life Ins. Co.* v. *Waters,* 205 Ark. 87, 167 S. W. 2d 886. To these cases might well be added the following authorities: 3 Am. Juris. 451; 4 C. J. 861; 5 C. J. S. 631 and note, p. 640; 46 C. J. 183; and the annotation in 21 A. L. R. 141 on "Evidence contrary to scientific principles or laws of nature." Mr. Justice HART, in *St. L. S. W. Ry. Co.* v. *Ellenwood, supra,* stated the rule in this language:

"Appellate courts take notice of the unquestioned laws of nature, of mathematics, of mechanics and of physics. So where there are undisputed facts shown in the evidence, and by applying to them the well known laws of nature, of mathematics and the like, it is demonstrated beyond controversy that the verdict is based upon what is untrue and what cannot be true, this court will declare as a matter of law that the testimony is not legally sufficient to warrant the verdict."

With this rule in mind, we proceed to examine the physical facts which defendant says (a) are incontrovertible; and (b) prove beyond controversy that the collision must have occurred on the west side of the center line of the highway. These physical facts are: (1) the skid marks on the pavement; (2) the condition of each vehicle after the collision; and (3) the final point of rest of each vehicle.

(1) *The skid marks.* As previously stated, definite skid marks were made on the pavement by the front wheels of the defendant's truck; and these marks began about ten inches *west* of the center line, and continued with the movement of the truck. Defendant argues that the collision happened where the skid marks began; and that, since the skid marks began on the *west* side of the center line, therefore, the defendant's driver as not on the east or wrong side of the road. But several witnesses testified that there was dirt caused by the collision on the east side of the center line; and that the truck tire skidded in the dirt for some distance before starting to make the rubber skid marks on the pavement. Also, witnesses testified that the rubber tires of the truck did not make the skid marks until the front wheels

became locked by being driven west across the center line. As typical of the plaintiff's evidence on this point, we quote a portion of the testimony of Dempsey Polk, city marshall of Monticello:

"Q. From the signs made from this on your investigation, tell the jury whether or not Mr. Mills' car was across the center line when the collision occurred, or whether or not the truck was on Mr. Mills' side when it occurred. A. The track made over here where this track started in the dirt, knocked off this car, was within six inches of the edge here and gradually went on across. . . . Q. Then the truck, according to your testimony, is bound to have hit this car on the east side of the center line of the highway? A. That's right."

It is thus made to appear that the plaintiff's witnesses claimed (a) that the skid marks began only after the wheels left the dirt, which had fallen from each vehicle at the point of collision; and (b) that the beginning of the rubber skid marks did not indicate the point of collision. If this evidence be true—and that was for the jury—the skid marks did not establish incontrovertible evidence as to the point of collision. The fixing of that point was still left to the evidence of witnesses. The jury took the plaintiff's version, and we cannot say that the jury's verdict was wrong as a matter of law.

(2) *The condition of each vehicle after the collision.* We have previously detailed the damage to each vehicle. Defendant submits that the marks of impact and the resulting physical conditions of the vehicles prove that the collision occurred west of the center line. But we cannot agree. The same marks of impact, and the same resulting physical conditions could have occurred, regardless of which side of the center line was the point of the collision.

(3) *The final point of rest of each vehicle.* Since the car and the truck both stopped in the ditch on the west side of the road, defendant argues that the car, being the lighter vehicle, must have been headed west before the collision, and merely "sideswiped" the truck.

This argument is reinforced by the fact that the left front headlight of the truck was not burning before the collision, and the plaintiff thought—until a moment before the collision—that it was the right front headlight of the truck that was not burning.

But we cannot say that the course traveled by the vehicles from the collision to the final point of rest furnishes "incontrovertible physical facts" that the collision occurred on the west side of the center line. The Missouri Court of Appeals, in *Lang* v. *Mo. Pac. R. Co.*, 115 Mo. App. 489, 91 S. W. 1012, uses this language, which expresses our views here:

"So frequently do unlooked-for results attend the meeting of interacting forces that courts, in such cases, should not indulge in arbitrary deductions from physical law and fact, except when they appear to be so clear and irrefutable that no room is left for the entertainment, by reasonable minds, of any other."

Regarding the defendant's first assignment, about incontrovertible physical facts in this case, it is not for us to substitute our conclusions for those of the jury, unless the physical facts demonstrate beyond a doubt that the verdict was erroneous. We cannot so declare in this case. We take the view, so well expressed by the Missouri Court of Appeals in *Stokes* v. *Metropolitan St. R. Co.*, 173 Mo. App. 676, 160 S. W. 46:

"We are asked to reverse the judgment on the ground that plaintiff's version of her injury is so contrary to physical law and so incredible that it should not be accorded any probative value. We would not be justified in treating as substantial that which has no substance, in committing the solecism of holding in effect that testimony might be true which common experience and common knowledge of physical laws would reject as palpably false; and should we find the evidence of plaintiff 'is so contrary to the daily experience of common life, so at war with the conceded physical facts,' as to be beyond reasonable belief, we would not hesitate to brush it aside as wholly valueless. . . . On the

other hand, it is our duty, as an appellate tribunal, to exercise great care and caution in applying the tests of common sense and common knowledge of physical law to a given state of facts. The testimony of unimpeached witnesses should not be lightly waved aside as impossible or incredible. Common experience and observation teach us that strange and astonishing things sometimes happen in the physical world, and it would not do to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over the testimony of apparently credible witnesses."

We adopt as our own the words of the Missouri Supreme Court in *Dempsey* v. *Horton,* 337 Mo. 379, 84 S. W. 2d 621:

"Only in those extraordinary cases, where deductions from physical laws and facts so clearly and irrefutably disprove the testimony of witnesses that reasonable minds may not entertain any other conclusion, are courts justified in ruling sworn testimony inherently unbelievable and impossible."

Second Assignment: "The court erred in permitting a hypothetical question which did not incorporate all the undisputed and essential facts."

The witness, Sweeny Copeland, was, at the time of the collision, a sergeant in the Arkansas State Police, and as such officer, made a personal investigation of the scene of the accident a few days after the collision. He was called as a witness by the defendant, and his evidence showed his keen perception of all marks, conditions, etc. In rebuttal, the plaintiff asked Copeland a hypothetical question, which did not incorporate all the undisputed and essential facts. But Copeland, in his answer, added to the question all these other undisputed and essential facts, when he said, in part:

". . . that, *with the other facts that I did find,* indicated, . . ." (Italics our own.)

Thus, the witness cured the defect in the question, because he added his own personally acquired knowledge

to the hypothetical facts. In *St. L. & S. F. R. Co.* v. *Fithian,* 106 Ark. 491, 155 S. W. 88, expert witnesses were asked hypothetical questions which did not include all the facts, but Mr. Justice KIRBY, speaking for this court, said:

"It is also insisted that the court erred in permitting the expert witnesses to answer hypothetical questions relative to the proper construction of the main track upon the curve without taking into consideration the undisputed fact that a switch track led off from the main line at a different curvature near the bridge. . . . These experts, however, were not answering hypothetical questions which failed to include the switch track construction, but gave their opinions upon conditions that they found reflected and to exist at the time of the accident from an examination of the place thereof after the occurrence, and it cannot be said that they did not take into consideration the switch track as constructed since it was upon the ground at the time of their examination. It was proper to permit the expression of their opinions under the circumstances and appellant could have tested their knowledge of the existing conditions and discovered whether this fact was taken into consideration by them in forming their opinions if it had desired to do so, upon proper cross-examination. *Ringlehaupt* v. *Young,* 55 Ark. 133, 17 S. W. 10."

To the same effect, see 20 Am. Juris. 665, *et seq.,* and the annotation in 82 A. L. R. 1338. We find no merit in defendant's second assignment.

Third Assignment: "The court erred in requiring Monroe Franklin to answer a question propounded to him relative to a conviction for carrying a pistol and disturbing the peace while drunk."

Monroe Franklin was the defendant's servant who was driving the truck that was in the collision with the plaintiff's car. Franklin was called as a witness by the defendant, and on cross-examination was asked about the officers taking him to Monticello Sunday morning after the collision on Saturday night. The record reflects:

"Q. Do you remember what was said to you? A. Yes, sir. He asked me wasn't I drunk and I told him, 'No, sir.' . . . Q. Do you remember whether you replied to Mr. Polk, and said, 'No, sir, I wasn't drunk but I was drinking some?' Did you say that? A. No, sir. . . . Q. Isn't it true that you were convicted here in this court for carrying a pistol and disturbing the peace while drunk down here at Lacey a couple of years ago?

"The defendant objects to each question and answer of Monroe Franklin concerning his former conviction in circuit court for carrying a pistol, and so forth, and saves his exceptions.

"A. No, sir, I wasn't drunk. Q. Were you drinking a right smart? A. No, sir.

"By the Court: Ladies and gentlemen of the jury, you will not consider these questions and answers in any manner in determining the facts in this case except as going to the credibility of this witness' testimony."

After the court made the last-quoted ruling, there was no further objection by the defendant, and no subsequent exception saved to this or any subsequent ruling of the court in the interrogation of this witness. In other words, the court's ruling, in telling the jury to limit the evidence to credibility, was made in response to the defendant's objection. If the defendant was not satisfied with the sufficiency of the ruling, he should have asked for another and different ruling, and then excepted if he did not obtain the desired ruling. He failed to do either of these things. He acquiesced in, and accepted as sufficient and satisfactory, the ruling made by the court. So he is in no position to raise his third assignment. In *So. W. Tel. and Tel. Co.* v. *Abeles,* 94 Ark. 254, 126 S. W. 724, 140 Am. St. Rep. 115, 21 Ann. Cas. 1006, Mr. Justice Hart, in passing on a somewhat similar situation, said:

". . . counsel for appellant insists that the court erred in not excluding certain portions of Dr. Green's testimony, and in certain remarks made by the court when appellant's counsel made objections to the testimony. It is sufficient answer to this to say that no

exceptions were saved either to the ruling of the court on the evidence or to the remarks made in doing so. Under the well established rules of this court, if any errors were committed, they have been waived."

In *Meisenheimer* v. *State,* 73 Ark. 407, 84 S. W. 494, Chief Justice Hill said:

"No exception was taken to the ruling. An objection precedes an exception. The objection calls for a ruling by the trial court, and the exception directs attention to and fastens the objection for a review on appeal. If a party does not follow the ruling on his objection by clinching it with an exception, he waives the objection."

See, also, *Valentine* v. *State,* 108 Ark. 594, 159 S. W. 26; *Holmes* v. *State,* 153 Ark. 339, 240 S. W. 425. So, even if the questions asked the witness were beyond the proper range of cross-examination—which we do not decide—nevertheless, there was no exception to the court's ruling.

Fourth assignment: "The court erred in refusing to give instruction 'C' requested by appellant."

The gist of the requested instruction was, that if plaintiff was negligent in assuming that the one headlight burning on the defendant's car was the left light, when in fact it was the right light, then the plaintiff could not recover. We see no error in refusing this instruction. Defendant's instruction No. 1 told the jury that the plaintiff could not recover if he was guilty of negligence. And defendant's instruction No. 9 defined negligence. We think these instructions Nos. 1 and 9 sufficiently covered the negligence issue so as to make the requested instruction "C" unnecessary, even if it were otherwise correct.

Sixth assignment: "The verdict and judgment are excessive."

Before considering the fifth assignment, we will consider now this sixth one. The plaintiff sued for $21,365.69, but received a verdict for only $4,000. He showed itemized financial damages, as follows:

Hospital and medical expenses	$ 667.08
Paid to repair damage to car	165.69
Loss of earnings between date of injury and trial	1,162.50
Total	$1,995.27

The above items covered monetary losses only. The plaintiff's arm was broken and otherwise injured. It was first set, and placed in a cast for 30 days; and then reset and placed in another cast for an additional 60 days. The plaintiff testified:

"Q. Tell the jury whether or not you suffered any pain and mental anguish from this injury?

"A. I suffered death for about two months."

Plaintiff also testified that he was still suffering at the time of the trial. In addition, the record reflects the following occurred in the plaintiff's testimony:

"Q. With reference to your working or doing the class of work that you did before you were injured, Mr. Mills, can you do that now, drive a tractor and do farm work and labor like you did before?

"A. No, sir.

"Q. Why can't you do that?

"A. I just haven't got but one hand to do it with.

"Q. I wish you would pull off your coat there and show the jury your hand and arm so they can see just what you do have.

"A. (Witness exhibits to jury his arm and hand).

"Q. Show the jury how much you can work your hand, and so forth.

"A. That is all I can work my hand (demonstrates).

"Q. In working on your arm was it necessary for the doctor to operate on it, cut into it or anything?

"A. Yes, sir.

"Q. When was that done?

"A. When I was first hurt, when I had the accident.

"Q. That is the sunken places on the back there?

"A. Yes, sir."

The jury thus observed not only the extent of the injury, but the condition of the plaintiff at the time of testifying, and also the degree of impairment of the arm. There are no photographs in the record, so we cannot say that the impairment was insufficient to justify some substantial award. Considering this impairment of the arm along with the pain and suffering and the monetary loss previously mentioned, we cannot say that the verdict of $4,000 was excessive.

Fifth assignment: "The court erred in giving instruction No. 3 requested by appellee." This instruction reads:

"If the jury find for the plaintiff, they will assess his damages at such a sum that will compensate him for the bodily injury sustained, if any; the physical pain and mental anguish suffered and endured by him in the past, if any, and that which will be endured in the future, if any, by reason of the said injury; his loss of time, if any; and his pecuniary loss from his diminished capacity for earning money through life, according to what you find his probable expectancy, if he had not received the injury complained of, if any; and the amount of money, expended for medicines and medical attention, if any; and from these, as proven from evidence, assess such damages as will compensate him for the injuries received."

The defendant objected both generally and specifically to this instruction; and the specific objection was:

". . . because there is no evidence sufficiently certain to submit to the jury upon which to base recovery for diminished earning capacity."

The plaintiff was 50 years old at the time of the injury, and it was stipulated that a person of that age

had expectancy of 20.91 years. The plaintiff testified that for five years before he received his injury, he had been employed by the Crossett Lumber Co. as a truck driver, and earned about $35 or $40 per week; that the only work he had done since he received his injury was as an overseer or foreman of a crew engaged in cutting a right of way for the Arkansas Power & Light Co. He was so employed at the time of the trial, and was then earning about $35 or $40 per week. From this evidence, the defendant argues that the plaintiff is making as much money now as before receiving his injury, and therefore has shown no diminished earning capacity. But it must be remembered: (1) that the jury saw the impairment of the plaintiff's arm, and knew whether he had thereby suffered a "diminshed capacity for earning money through life"; (2) that the evidence showed that the work as foreman of a right of way crew was merely a temporary, rather than a permanent, job; and (3) the plaintiff testified that his injury prevented him from doing the type of work he had formerly done. When these points are considered, it is obvious that there was some evidence to support the instruction as given. See *Ferguson & Wheeler Land, Lumber & Handle Co.* v. *Good,* 112 Ark. 260, 165 S. W. 628; *S. L. I. M. & S. Ry. Co.* v. *Oliver,* 92 Ark. 432, 123 S. W. 662; *Briley* v. *White,* 209 Ark. 941, 193 S. W. 2d, 326.

In disposing of the sixth assignment (on excessiveness of the verdict), we purposely omitted from the calculation the element of diminished earning capacity, because the verdict as rendered was not excessive, even if no part of the award was for diminshed earning capacity. If the verdict were for a large amount, then a different situation might be presented, but since the verdict was not excessive on the other elements of damages, then any error—and we do not say there was any—in instructing the jury to consider diminshed earning capacity, was rendered harmless by the jury's verdict. See *Lamden* v. *S. L. S. W. Ry. Co.,* 115 Ark. 238, 170 S. W. 1001; *Ferguson & Wheeler Land, Lumber & Handle Co.* v. *Good, supra; S. L. I. M. & S. Ry. Co.* v. *Oliver,*

supra; and cases collected in West's Arkansas Digest, "Appeal and Error," § 1068.

On the whole case we find no error, and the judgment is affirmed.

SMITH *v.* STATE, EX REL. DUTY, PROSECUTING ATTORNEY.

4-8141 199 S. W. 2d 578

Opinion delivered February 10, 1947.

Rehearing denied March 10, 1947.

John W. Nance, for appellant.

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

HOLT, J. This action was instituted June 21, 1946, in the name of the State, in the Benton Circuit Court, by the prosecuting attorney of that district, against J. Frank Smith and Eli Leflar, challenging the right of each of these parties to serve as judge of the municipal court of the city of Rogers. The action is brought under what is known as the Usurpation Statute, §§ 14325-14332, Pope's Digest.

The petition, and amendment thereto, alleged that Rogers is a city of the first class and by ordinance May 5, 1946, established a municipal court in said city under the authority of §§ 9897-9912, inclusive, of Pope's Digest. It was further alleged that after the passage of the ordinance, the office of municipal judge was vacant and "the clerk of said municipal court called for an election of a judge by the attorneys and the respondent, Eli Laflar, was designated as said judge by the attorneys voting, . . . and that the respondent, Eli Leflar, is acting as judge of said municipal court," . . . and (at the time the suit was filed) "is assuming to act continuously as municipal judge and for the full term of two years until the next regular city election, by virtue of said election by the attorneys," and "that Rogers, Arkansas, is a municipal corporation of the first class and that the respondent, J. Frank Smith, is the duly elected mayor of said city, and as such mayor has been assuming to act as *ex-officio* judge of said municipal court and has tried and decided cases as *ex-officio* municipal judge. Petitioner states further that said respondent, J. Frank Smith, is also assuming to exercise criminal jurisdiction as judge of the mayor's court of said city of Rogers," and it was prayed "that the bench of the municipal court of the city of Rogers be declared vacant and that said court be declared as the court of sole criminal jurisdiction within said city, and for all other relief to which petitioner may show itself entitled."

Eli Leflar, one of the respondents, alleged that under the ordinance, *supra,* which he made a part of his response, he was the duly elected and qualified judge of the municipal court of Rogers, entitled to the office, and that J. Frank Smith is a usurper and prayed that the court so declare. Section 4 of the ordinance provides: "Immediately after passage and approval of this ordinance, the clerk of the court shall give notice to attorneys to elect a special judge to fill the existing vacancy, as provided for in § 9901 of Pope's Digest of the Statutes of Arkansas. Said special judge so elected by the attorneys shall receive the same salary as hereinabove provided for the regularly elected judge, and shall hold office

until the next regular city election, at which time, and at each regular city election held every four years thereafter, a municipal judge shall be elected for a term of four years."

Mayor J. Frank Smith answered with a general denial, "and for affirmative defense states that the respondent, Eli Leflar, is assuming to exercise the jurisdiction and performing the functions of judge of the Rogers municipal court without legal right and is, therefore, a usurper."

Three resident citizens and taxpayers intervened and alleged, among other things, "that there is no municipal court in the city of Rogers, and (one) cannot at this time be formed . . , there being no legal authority for the institution of a municipal court in said city," and prayed accordingly.

The cause was submitted on the pleadings and an agreed statement of facts, the material portions of which were embodied in the judgment of the trial court. The judgment contained the following recitals: "The court further finds that the respondent, J. Frank Smith, is not entitled to assume the office of *ex officio* judge of said municipal court and that he was not a police judge at the time of the passage of said ordinance No. 292, and that he is not qualified under the law to hold said office. The court further finds that the respondent, Eli Leflar, is not entitled to hold the office of municipal judge under the law in that § 9901 of Pope's Digest applies only to the election of a special judge when the regular judge of the municipal court is unable to appear; that Eli Leflar was the regularly elected special judge only for those cases which were before the court at the time of said election, and his election by the attorneys did not constitute a filling of the vacancy in the office of municipal judge.

"The court finds that the bench of the municipal court in Rogers is vacant and that both the respondents, J. Frank Smith and Eli Leflar, should be ousted from any right, title or claim of said office of muncipal judge, either regular, special or *ex officio*.

"IT IS, THEREFORE, considered, ordered and adjudged by the court that the bench of the municipal court of Rogers be and it is hereby declared vacant, and that the respondents, J. Frank Smith and Eli Leflar, be and they are hereby ousted from any right, title or claim to the office of judge of said municipal court, either as regular, special or *ex officio* judge."

J. Frank Smith, alone, has appealed.

On this state of the record, at the very threshhold, we are met with appellant's contention that the prosecuting attorney, under what is known as the Usurpation Statute, lacked authority to institute the present suit, and on the authority of *State* v. *Tyson,* 161 Ark. 42, 255 S. W. 289, reaffirmed in *Purdy* v. *Glover,* 199 Ark. 63, 132 S. W. 2d 821, we must, and do, sustain this contention. In the Tyson case, the prosecuting attorney had brought suit to test the right of one to hold the office of town marshal under the Usurpation Statute, then § 10325, *et seq.,* C. & M. Digest, now § 14325, *et seq.,* of Pope's Digest. After pointing out, that under § 10328 of C. & M. Digest, now 14328, Pope's Digest, for usurpation other than county offices, "the action by the State shall be instituted and prosecuted by the attorney general," this court said: "The remaining question in the case is whether or not the action may be instituted by the prosecuting attorney. The statute quoted above (now § 14327, Pope's Digest) provides that the prosecuting attorney may only bring such actions against persons who usurp county offices. We held in *State* v. *Higginbotham,* 84 Ark. 537, 106 S. W. 484, that such an action could not be brought by the prosecuting attorney against any officer except a county officer, adopting the definition given by the Supreme Court of the United States in *Sheboygan County* v. *Parker,* 3 Wall. 93, that 'an officer of the county is an officer by whom the county performs its usual functions; its functions of government.' The decisions cited, *supra* (*Payne* v. *Rittman,* 66 Ark. 201, 49 S. W. 814; *Whittaker* v. *Watson,* 68 Ark. 555, 60 S. W. 652) are decisive that municipal officers are not county officers within the meaning of the usurpation statute, so the action could

not be brought by the prosecuting attorney. The circuit court has jurisdiction in such actions (*State* v. *Sams,* 81 Ark. 39, 98 S. W. 955), but, except in the case of county officers, suit must be instituted by the attorney general. Appellee had the right to challenge the authority of the prosecuting attorney, even though he acted in the name of the State. And since it appears that the action was instituted without legal authority, the circuit court was correct in dismissing the complaint." There was no showing of a demand on the attorney general, and his refusal to bring the instant suit.

Some of the sections of the statutes, and decisions of this court, affecting transactions of the nature herein presented, are: 9578 and 9941 of Pope's Digest, as amended by Act 154 of 1943, and *Payne* v. *Rittman,* 66 Ark. 201, 49 S. W. 814, and *Hogins* v. *Bullock,* 92 Ark. 67, 121 S. W. 1064, 19 Ann. Cas. 822.

We, therefore, hold that since the office involved here is a municipal office and not a county office, the prosecuting attorney was without authority to institute the suit and accordingly the judgment is reversed and the cause dismissed.

BELLAMY *v.* SHRYOCK.

4-8064 199 S. W. 2d 580

Opinions delivered February 10, 1947.

D. S. Plummer, for appellant.

Hal B. Mixon, for appellee.

MINOR W. MILLWEE, Justice. Appellants and appellees are owners of adjoining residential lots in the City of Marianna and this suit involves the title to a narrow triangular strip of land lying along the boundary line dividing the two lots.

Appellants are the heirs at law of Myra D. Brown who owned both lots in 1909. At that time Mrs. Brown resided on the south part of her lot and maintained a garden enclosed by a wire fence on the north part. On November 6, 1909, she conveyed the north part of the lot, referred to as the "garden spot," to George W. Greenhaw, who constructed two houses on the property. The house constructed next to the division line between the two lots was rented by Greenhaw to George Pilkington whose wife, Myrtie Mae Pilkington, was the daughter of Myra D. Brown. George Pilkington rented the property until 1920 when he purchased from George W. Greenhaw.

In 1934, George Pilkington and wife executed a mortgage of their lot to Home Owners Loan Corporation. This mortgage was foreclosed and title acquired by the corporation in 1939, when the lot was conveyed to D. S. Plummer, another son-in-law of Myra D. Brown. Plummer and wife reconveyed to the corporation in 1941. On

January 21, 1943, Home Owners Loan Corporation conveyed the property by warranty deed to appellees, J. G. Shryock and Gladys Shryock.

The Home Owners Loan Corporation had a survey made of the lot now owned by appellees in 1942 according to the description contained in appellees' deed, and, which is embraced in the description employed in the warranty deed from Myra D. Brown to George W. Greenhaw. Appellee, J. G. Shryock, took possession of the lot in February, 1943, and stretched a line along the south boundary from the stakes set when the 1942 survey was made. In March, 1943, he started removing vegetation and debris from that part of an embankment along his south bundary line which was located within the calls of his deed. This work was stopped at the request of the husband of one of the appellants who resided in the Myra D. Brown home. Appellees then brought this suit to quiet their title to the triangular strip in controversy and to restrain appellants from interfering with their possession.

Appellants filed an answer and cross-complaint in which they claimed title to the disputed tract by an agreed boundary allegedly marked by a fence along the base of the embankment or terrace which had been accepted as the true boundary by adjoining owners for a period of more than 25 years. Title was also claimed by adverse possession of Myra D. Brown and appellants for more than 30 years. In their cross-complaint appellants sought recovery of damages against appellees for destruction of trees, shrubs, plants and soil erosion preventives on the disputed strip. Home Owners Loan Corporation intervened in the suit in conformity with the covenant of warranty contained in its deed to appellees. The corporation adopted the complaint of appellees and pleaded estoppel of appellants to deny appellees' title by virtue of the covenant of warranty in the deed of Myra D. Brown to George W. Greenhaw.

The trial court found the issues in favor of appellees and the intervenor, Home Owners Loan Corporation. A decree was entered quieting appellees' title to the strip

of land in controversy and dismissing the cross-complaint of appellants.

The chain of title to the strip of land in controversy is complete in appellees. Appellants contend, however, that their ancestor, Myra D. Brown, did not intend to convey any portion of the land lying south of the base of the embankment, and that the testimony shows that the boundary between the two lots has been clearly established by mutual consent and acquiescence of the adjoining owners in a dividing line marked by a fence along the base of the embankment for a period of 35 years. Appellants also insist that they have acquired title by the adverse possession of Myra D. Brown for 25 years which was continued by appellants following Mrs. Brown's death.

In support of these contentions George H. Pilkington, the son-in-law of Myra D. Brown, testified that he rented the property now owned by appellees from George Greenhaw from 1910 until 1920 when he purchased the lot and that he resided on the property about 25 years; that prior to the conveyance by Myra D. Brown to George Greenhaw in 1909, a fence marked the dividing line between the lot upon which Mrs. Brown's residence was located and "the garden spot" on the north, and that this fence was located along the bottom of the terrace or embankment which divided the two lots. He further testified that the fence was maintained by his wife's mother and, while the line was never discussed, the fence was recognized as the dividing line between their properties while he lived there. He made no claim to any part of the land lying south of this fence and had no intention of buying this strip at the time he purchased the property from Greenhaw. The fence was still there when he left.

D. S. Plummer, the husband of one of appellants, who continued to reside in the home of Myra D. Brown after her death, testified to the same effect. This witness had known the property for 40 years and stated that Mrs. Brown and her heirs had the "exclusive, uninterrupted, undisputed possession of all that portion of the

lot south of the base of the terrace for the past 36 years or more.'' He also testified that he had no intention of purchasing any land from the Home Owners Loan Corporation in 1939 that extended south of the base of the terrace between the lots, or to reconvey such land to the corporation in 1941.

George W. Greenhaw testified on behalf of appellees that the ''garden spot'' was fenced when he purchased the property from Myra D. Brown in 1909. It was necessary to do some excavation to construct the house for Mrs. George Pilkington and he moved dirt from the embankment of the lot on the south side in order to fill in a part of the lot. The embankment was within the boundaries of his fence and he did not completely excavate back to the south line. Myra D. Brown was there when the lot was either measured or surveyed and witness had no trouble with her about the property line during the period of 11 years that he owned the lot.

Appellee, J. G. Shryock, testified that the house and premises were in a run-down condition when he purchased the lot in 1943. The embankment or slope of the terrace was about six or seven feet from the house on the front, but did not run parallel with the house being only three or four feet from the house at the rear and extending beyond the line of his house and into what would normally be his back yard at the west end of the lot. There were fragments of an old fence embedded in the embankment which was filled with ashes, boards, broken pieces of concrete, tin cans and other rubbish. There were a few shrubs near the line on the front of the embankment, but these were not on his property. The slope of the embankment extended about 1½ feet on his lot at the front and about 12 feet at the back, according to the survey and from the description contained in mesne conveyances from Myra D. Brown to appellees. Before beginning improvements on the south side for a driveway, Shryock took several pictures of the property in dispute which were introduced in evidence. These pictures tend to corroborate his testimony concerning

the condition and location of the embankment at that time.

Appellants rely on such cases as *Deidrich* v. *Simmons,* 75 Ark. 400, 87 S. W. 649, and *Barnett* v. *Gentry,* 117 Ark. 655, 173 S. W. 424, which hold that the proprietors of adjacent lands may by parole agreement establish an arbitrary division line, or an agreement may be inferred from long continued acquiescence and occupation according to such line, and they will be bound thereby. Appellants contend that Myra D. Brown had no intention of conveying the property in dispute to George W. Greenhaw in 1909 and that a fence between the two lots ran along the base of the embankment at that time which established an agreed boundary and has since been recognized by adjacent owners as the true line. The testimony of George W. Greenhaw tends to refute this contention, the effect of his testimony being that the fence was located upon the embankment when he purchased the property from Myra D. Brown and that the narrow strip in dispute was located upon the lot he had purchased and within the bounds of the fence as it was located at that time. The testimony of Shryock and the photographs of the property tend to corroborate Greenhaw's testimony that the fence ran upon and not at the base of the embankment. This was a sharply disputed question of fact and the testimony on behalf of appellees contradicts the testimony of appellants that an agreed boundary was established at the foot of the embankment. We cannot say that the finding of the chancellor on this issue is against the preponderance of the evidence.

Appellants' claim of title by adverse possession is subject to the general rule stated in 1 Am. Jur., Adverse Possession, § 47, p. 818: "The occupation of land by a grantor, after conveyance made, is presumed to be under, and in subordination to, the legal title held by his grantee, for he is estopped by his deed from claiming that his holding is adverse." See, also, *Graham* v. *St. Louis I. M. & S. Ry. Co.,* 69 Ark. 562, 65 S. W. 1048, 66 S. W. 344; *Morgan* v. *McCuin,* 96 Ark. 512, 132 S. W. 459. This

presumption is, however, rebuttable and the grantor may hold adversely where his intention to do so is manifested by unequivocal acts of hostility. 1 Am. Jur., p. 819; *Turman* v. *Bell,* 54 Ark. 273, 15 S. W. 886, 26 Am. St. Rep. 35; *Davis* v. *Burford,* 197 Ark. 965, 125 S. W. 2d 789.

The same general rule is applicable where the claim of adverse possession is predicated on the possession of the parent as against the child. In 2 C. J. S., Adverse Possession, § 109, p. 661, it is said: "As between parties sustaining parental and filial relations, the possession of the land of the one by the other is presumptively permissive or amicable, and, to make such a possession adverse, there must be some open assertion of hostile title, other than mere possession, and knowledge thereof brought home to the owner of the land."

Appellants' claim of adverse possession is predicated on the possession of Myra D. Brown as against her daughter and son-in-law for 25 or 30 years. While two sons-in-law of Myra D. Brown testified in general terms that Mrs. Brown had open and exclusive possession of the disputed tract, there is little testimony of actual acts of occupation by Mrs. Brown. The only evidence of such acts other than the alleged maintenance of a fence at the base of the embankment, was the planting of flowers and shrubs on the disputed tract and the placing of concrete blocks on the bank to prevent washing. As against her daughter and son-in-law residing next door these acts on the part of Mrs. Brown might be considered as having been committed for the benefit of both parties and are insufficient to convert a possession that is otherwise permissive and amicable into a clear assertion of hostile title. In *DeMers* v. *Graupner,* 186 Ark. 214, 53 S. W. 2d 8, this court held (headnote 2): "Evidence showing that an adjoining landowner mowed the grass on a small strip adjoining defendant's fence *held* insufficient to establish adverse possession where there was nothing to bring home to defendant the knowledge that plaintiff was intending to divest defendant of title by adverse occupancy"

Due to the relationship of the adverse claimants and the adjoining owners in the instant case, appellants were required to sustain their proof of adverse possession by stronger evidence than is required in ordinary cases involving the question. 1 Am. Jur. p. 819. The trial court found the proof offered by appellants on this issue insufficient to manifest an intention on the part of Myra D. Brown to hold the property in dispute adversely to the adjacent owners, and we are unable to say that this finding is against the preponderance of the testimony.

The decree is accordingly affirmed.

RUSSELL *v.* COCKRILL, JUDGE.

4-8181 199 S. W. 2d 584

Opinion delivered February 10, 1947.

Willis Townsend and *Wallace Townsend,* for petitioner.

Paul E. Talley, Wayne W. Owen and *Max Howell,* for respondent.

ROBINS, J. Petitioners, certain citizens of the incorporated town of Cammack Village, in Pulaski county, Arkansas, ask us to grant a writ of prohibition against the respondent, judge of the third division of the Pulaski Circuit Court, commanding him not to proceed further with a certain suit instituted in said court (No. 34203) by John Cornyn as plaintiff against petitioners and others as defendants, in which Cornyn seeks to contest

a special election held in Cammack Village on November 19, 1946, on the question of annexation of Cammack Village to the city of Little Rock.

On October 3, 1946, there was filed with the county clerk of Pulaski county a petition signed by electors of Little Rock, and by electors of Cammack Village, asking for annexation of Cammack Village to Little Rock. The city council of Little Rock approved the petition and the county court made an order directing that an election be held to determine the will of the electors of each of the affected municipalities as to the proposed annexation.

The election was held on November 19, 1946. The returns, as canvassed by the county court, showed that in Little Rock 308 electors voted for the proposed annexation and 112 electors voted against it, and that in Cammack Village 141 electors voted for the annexation and 139 electors voted against it. Since the proposal received a majority of the votes cast thereon in each municipality the county court, on November 26, 1946, entered an order declaring that the proposed annexation had received the necessary popular endorsement.

On the same day John Cornyn, an elector of Cammack Village, filed suit in the circuit court, naming as defendants the petitioners, the county judge of Pulaski county, and the mayor of Little Rock, and certain other parties. In his complaint, Cornyn alleged that the petition for annexation was improperly filed with the county clerk prior to its presentation to the city council of Little Rock, that an insufficient number of electors signed this petition, that the officials holding said election were not properly named, and that seven of the 141 persons who voted in favor of said annexation in Cammack Village were not qualified electors. The names of these seven persons and the reasons for their alleged ineligibility as voters were set forth in the complaint, the prayer of which was for a judgment declaring that the proposal had failed to carry.

To this complaint there was filed a "demurrer and motion for finding of law," in which it was set forth that

the court had no jurisdiction to hear the complaint because the General Assembly has not provided a method for contesting elections such as is involved here. A motion to dismiss, in which the propriety of the action as against the county judge and the mayor of Little Rock was challenged, was also filed.

The lower court overruled the demurrer and denied the motion to dismiss, but directed that the cause be held in abeyance so as to afford petitioners an opportunity to ask this court for a writ of prohibition. The instant proceeding ensued.

The statute involved in the case at bar is Act No. 318 of the General Assembly of Arkansas of 1913, and appears (in part) in §§ 9504, 9505 and 9506 of Pope's Digest as follows:

"§ 9504. *Method of consolidation.* When the inhabitants of any city or incorporated town lying adjoining or contiguous to another smaller municipal corporation of any class in the same county (and municipal corporations separated by a river shall be deemed contiguous) shall desire that said city or incorporated town shall annex to it or consolidate with it said smaller municipal corporation, they may apply by petition in writing signed by the inhabitants so applying, to be in number not less than fifty qualified electors from each of said municipal corporations, to the city or town council of said larger municipal corporation, which petition shall describe the municipal corporations to be consolidated and shall also name the person or persons authorized to act in behalf of the petitioners in presenting said petition as hereinafter provided for. When such petition shall be presented to said council it shall be lawful for the said council to pass an ordinance in favor of said annexation and approving and ratifying said petition, in which event it shall be the duty of the person or persons named in said petition as authorized to act in behalf of the petitioners, to file said petition, together with a certified copy of said ordinance, in the office of the county clerk of the county in which said municipal corporations are situated.

"§ 9505. *Special election.* Upon presentation of said petition to the county court by said authorized person or persons, the county court shall at once order and call a special election in both of said municipal corporations on the question of said annexation, and shall give thirty days' notice thereof by publication once a week in some newspaper with a *bona fide* circulation in said territory, and by notices posted in conspicuous places therein. The court shall appoint one judge and one clerk in each ward or other division of each municipal corporation, and the mayor and city council of each of said municipal corporations shall select two judges and one clerk for each of said wards or other divisions having the qualifications of electors, to act as judges and clerks of election within said respective wards. The county court shall fix all polling places at which the voting shall take place, and said election shall be held and conducted in each corporation in the manner prescribed by law for holding elections for cities or incorporated towns so far as the same are applicable, expenses thereof to be paid by said larger city or incorporated town. . . . The returns of said elections shall be made to the county court, and the result thereof declared by said court.

§ 9506. *Election contests.* Any elector shall have the right to test the legality and fairness of said election and the declared results, in a proceeding before the circuit court and without being required to give bond for costs; provided, that no such contest shall interfere with the consolidation until finally decided. At any election held under this act all qualified electors, residents of both municipalities, shall be allowed to vote on the adoption or rejection of the proposed annexation or consolidation, and if a majority of the votes cast in each of said respective municipalities, considered as a separate and distinct unit, and without reference to the vote cast in the other thereof, shall be in favor of consolidation or annexation, then said county court shall declare by an appropriate order said annexation or consolidation consummated, and upon the making of such order, the said smaller municipal corporation and the territory comprising it shall in law be deemed and be taken to be included

and shall be a part of said larger municipal corporation; and the inhabitants thereof shall in all respects be citizens thereafter of said larger municipal corporation. If a majority of said votes of either municipal corporation shall be against annexation, then said city or incorporated town shall not be again permitted to attempt the consolidation within two years thereafter."

It is first argued by petitioners that the lower court was without jurisdiction to hear the complaint of Cornyn because the first sentence of § 9506, *supra,* is unconstitutional and void in that it failed to provide a "mode" for the contest as required by Art. XIX, § 24, of the Constitution of Arkansas.

A cardinal rule which courts must follow in dealing with legislative enactments is that all doubts as to the validity of the legislation must be resolved in favor of the Act under consideration, and it is the duty of the courts to give to the statute such a construction, if possible, as will enable the Act and all parts thereof to be effective. *Wells, Fargo & Company's Express* v. *Crawford County,* 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371; *Compton* v. *State,* 102 Ark. 213, 143 S. W. 897.

Now it is obvious that the legislature, in enacting this statute, meant that any elector who conceived that the election had not been properly conducted might have the regularity of the election reviewed in the circuit court and relief there awarded from the result of illegal practices in the election, such as the counting of votes of those not qualified to vote. While the Act does not prescribe the form of pleadings or details of procedure, it may be assumed that the lawmakers intended that the contest proceeding would be adapted to existing procedure in the circuit court.

This provision authorizing a contest in the circuit court, as to the validity of an election of this kind, was written in practically the identical language, into the first statute on the subject, Act No. 86 of the General Assembly of 1903. It was carried forward, in almost the same wording, in the subsequent revisions of the law and

finally into the present statute. (See Act 154 of 1907, and also Act 318 of 1913.)

The failure of the General Assembly to include in the law a provision limiting the time in which such a contest should be instituted does not in itself render the statute invalid. The power of determining what period of limitation shall be applicable to a particular cause of action is an essentially nomothetic one. 34 Am. Jur. 14; *Barnhardt* v. *Morrison,* 178 N. C. 563, 101 S. E. 218; *Osborne* v. *Lindstrom,* 9 N. D. 1, 81 N. W. 72, 46 L. R. A. 715, 81 Am. St. Rep. 516. It is not urged that by any unreasonable delay in instituting the contest there has arisen such an estoppel as would bar the action; in fact Cornyn filed his complaint on the same day that the county court declared the result of the election.

That the legislature has, during all these years, continued this same provision in force is strong proof of a firm legislative intent that a forum and a remedy be provided for any affected elector to contest the result of an election on a proposal to annex one municipality to another. We conclude that the legislative will to authorize the circuit court to act in cases of this kind ought not to be thwarted merely because the wording of the statute extending such authority might be said to be inept or incomplete in some particulars.

It is next urged by petitioners that the circuit court did not have original jurisdiction in this matter. The matter of extending the boundaries of Little Rock by annexing to it the smaller municipality was not one over which the county court had exclusive jurisdiction. *City of Little Rock* v. *North Little Rock,* 72 Ark. 195, 79 S. W. 785. Nor is there anything in the constitution that forbids the legislature to authorize the circuit court to entertain a contest of this kind as an original proceeding. On the contrary, the circuit court is, under the constitution, the great reservoir of unassigned judicial power and it has original jurisdiction in all cases where jurisdiction is not expressly vested by law in some other tribunal.

Chief Justice ENGLISH, in the case of *State* v. *Devers,* 34 Ark. 188, said: "The constitution prescribes, limits and defines, with more or less accuracy, the jurisdiction to be exercised by all of the courts except the circuit courts, and instead of attempting to define their jurisdiction (other than appellate) leaves to them the great residuum of civil and criminal jurisdiction not distributed exclusively to other courts."

Chief Justice COCKRILL thus expressed the rule in the case of *Whitesides* v. *Kershaw,* 44 Ark. 377: "All jurisdiction was parceled out and distributed by the Constitution, and the jurisdiction not expressly granted to some other court, or authorized to be granted, is reserved to the circuit courts."

In the case of *Payne* v. *Rittman,* 66 Ark. 201, 49 S. W. 814, a claimant to the office of city marshal filed a suit partaking both of the nature of a *quo warranto* proceeding to oust the occupant of that office and also of the nature of an election contest to question the correctness of the election returns under which the occupant claimed the office. There was no statutory provision giving authority to the circuit court to hear a contest of an election for that office. In sustaining the jurisdiction of the circuit court in that case this court said: "The defendant interposed his demurrer also to the second paragraph of the complaint, which calls in question the jurisdiction of the circuit court to try a contested election. The plaintiff, on the other hand, contends that, no other tribunal having been named by law as having jurisdiction in contests for the office, it follows that the circuit court has such jurisdiction inherently, under the 11th section of article 7 of the constitution, which reads as follows: 'The circuit courts shall have jurisdiction in all civil and criminal cases, the exclusive jurisdiction of which may not be vested in some other court provided for by this constitution.' It is said by this court in *Heilman* v. *Martin,* 2 Ark. 158, that 'a plea to the jurisdiction of the circuit court must show that there is some other court having jurisdiction.' And now it should appear, not only that there is some other court

having jurisdiction, but exclusive jurisdiction. *State* v. *Devers,* 34 Ark. 188." Like holdings are found in *Whittaker* v. *Watson,* 68 Ark. 555, 60 S. W. 652, and in *Sumpter* v. *Duffie,* 80 Ark. 369, 97 S. W. 435.

While the statute authorized the county court to canvass the returns, it did not provide that one who would question these returns must appeal from the finding of the county court. The circuit court not only has appellate jurisdiction over the county court, but is given by the constitution (Art. VII, § 14) "a superintending control" over such tribunals; and this superintending control is the exercise of original and not appellate jurisdiction. *Anthony, Ex parte,* 5 Ark. 358; *Levy* v. *Lychinski,* 8 Ark. 113.

So the legislature did not create an inharmonious or unworkable scheme of procedure when it empowered the county court to canvass the returns of the election, and, at the same time, authorized the circuit court, with its constitutional power to review action of lower tribunals, to adjudicate a contest of the election in an original proceeding.

It is finally contended by petitioners that even if the circuit court should be permitted to hear the contest it should be required to eliminate from the complaint, as not germane to such a proceeding, those portions relating to the insufficiency of petitions for the election and of notice thereof. The complaint, with its allegation that enough unqualified voters cast their ballots for the proposal to change the result, stated a good cause of action within the jurisdiction of the circuit court. Since this is so, prohibition does not lie. *Russell* v. *Jacoway,* 33 Ark. 191; *Macon* v. *LeCroy,* 174 Ark. 228, 295 S. W. 31; *Bassett* v. *Bourland,* 175 Ark. 271, 299 S. W. 13; *Schley* v. *Dodge,* 206 Ark. 1151, 178 S. W. 2d 851. It is unnecessary, therefore, for us to consider the appropriateness of other allegations in the complaint, as they may never become essential to a decision of the controversy.

The writ of prohibition is denied.

WEEKS *v.* WEEKS.

4-8067 199 S. W. 2d 955

Opinion delivered February 17, 1947.

Rehearing denied March 17, 1947.

Buzbee, Harrison & Wright, for appellant.

Donham, Fulk & Mehaffy, for appellee.

HOLT, J. This action was brought for a construction of the will of F. G. Weeks, which contained the following provisions: "1. I hereby direct that all my just debts,

including funeral expenses, be paid out of my estate before the payment of any bequests. 2. It is my will and desire, and I hereby direct, that my body be embalmed and buried in accordance with my station in life.

"3. I give and bequeath to my daughter, Helen Louise Weeks, now living in Kiel, Wisconsin, United States Liberty Bonds of the par value of three thousand dollars ($3,000), said Liberty Bonds to be assigned and delivered to my said daughter as follows: Five hundred dollars ($500) par value as soon after my decease as may be convenient and practicable and the sum of fifty dollars ($50) or its equivalent in Liberty Bonds each and every succeeding month thereafter until the entire amount of three thousand dollars shall have been paid; and to carry out the foregoing I direct my executrix hereinafter named to set apart enough Liberty Bonds as soon after my decease as practicable and I further direct that the interest that shall accrue on said bonds so set aside shall be paid to the said Helen Louise Weeks.

"4. I give and bequeath to my son, Marvin F. Weeks, now living at Lansing, Michigan, United States Liberty Bonds of the par value of three thousand dollars ($3,000), said Liberty Bonds to be assigned and delivered to my said son as follows: Five hundred dollars ($500) par value as soon after my decease as is convenient and practicable, and fifty dollars ($50) par value on each and every succeeding month thereafter until the entire amount of three thousand dollars shall have been paid; and to carry out this bequest I direct my executrix to proceed as set out in paragraph three above, it being my will that the said Marvin F. Weeks shall have and receive all interest that shall accrue on the said bonds set apart for him.

"5. I give and bequeath unto my beloved wife, Louise McGie Weeks, all the rest, residue and remainder of my estate of whatever kind or nature and wherever located or situate, real, personal or mixed, to have and to hold for her own personal use so long as she shall live, and at her death I direct that whatever remains of said bequest

be divided between my son, Marvin F. Weeks, and my daughter, Helen Louise Weeks, share and share alike.

"6. I hereby nominate and appoint my wife, Louise McGie Weeks, executrix of this my last will and testament and direct that she serve without bond.

"In witness whereof, I have hereunto set my hand this 5th day of May, 1925. (Signed) F. G. Weeks."

Appellant made the will a part of her complaint and alleged that each of the bequests of $3,000 in United States Liberty Bonds to Helen Louise Quaid and Marvin F. Weeks had been paid and these bequests fully discharged and that under the terms of said will plaintiff was entitled to receive and to have and to hold for her own personal use, so long as she may live, all of the rest and residue of the estate of the said F. G. Weeks; that under the terms of said will, Helen Louise Weeks Quaid and Marvin F. Weeks have only a contingent interest in as much of said residue as remains at the death of plaintiff.

She prayed "for an order of this Court construing the will of the said F. G. Weeks to mean that plaintiff (appellant) is entitled to receive and to have and to hold for her own unrestricted personal use, so long as she may live, all of the rest, residue and remainder of the estate of the said F. G. Weeks beyond the bequests to the said Marvin F. Weeks and Helen Louise Weeks Quaid, and that she be authorized to have any securities owned by F. G. Weeks at the time of his death transferred to her individually and to fully receipt for such securities."

In their answer, appellees alleged that under paragraph 5 of the last will and testament of F. G. Weeks all of the property of said deceased, real, personal and mixed, was bequeathed to them, share and share alike, subject to a life estate in the plaintiff, and their prayer was "that plaintiff be required to file in this proceeding a statement listing and describing the real and personal property of which F. G. Weeks died seized, and upon

final hearing hereof that title to said property be adjudged to be in the defendants, share and share alike, subject to a life estate in the plaintiff, and for all proper relief."

Upon a hearing, the trial court found: "That under paragraph 5 of the last will and testament of F. G. Weeks, deceased, the plaintiff, Louise McGie Weeks, was bequeathed a life estate in the real and personal property owned by said deceased at the time of his death, remaining after payment of the bequests contained in paragraphs 3 and 4 of said will, and that the defendants, Marvin F. Weeks and Helen Louise Weeks Quaid, were bequeathed the remainder in fee subject to the life estate of the plaintiff.

"The Court further finds that the plaintiff has in her possession the following described property owned by the deceased, F. G. Weeks, at the time of his death, to-wit: Port of New York Authority Bonds, Series E, No. 16303, par value $1,000, No. 16304, par value $1,000. State of Missouri Bonds, Series H, No. 5918, par value $1,000, No. 5919, par value $1,000, No. 5920, par value $1,000. Missouri Road Bonds, Series G, No. 1149, par value $1,000, No. 6910, par value $1,000. City of Detroit Utility Bonds, No. 4827, par value $1,000. Certificate No. 2743, Jefferson Hotel Corporation Stock. Lot 14, Glenwood Addition, Rock Island, Illinois. Lots 19 and 20, New Shop Addition, East Moline, Illinois," and decreed that the plaintiff, Louise McGie Weeks, "has a life estate in the foregoing described property and all other property which she has in her possession coming into her hands under the last will and testament of F. G. Weeks, deceased, and that she shall receive the income from such property for and during her natural life and upon the death of said Louise McGie Weeks, that title in fee to said property in the hands of Louise McGie Weeks coming to her under the last will and testament of F. G. Weeks, deceased, shall be vested in the defendants, Marvin F. Weeks and Helen Louise Weeks Quaid, share and share alike."

From the decree comes this appeal.

In interpreting and construing a will, there are some well established rules of construction to guide us. This court said in *Webb* v. *Webb,* 111 Ark. 54, 163 S. W. 1167: "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, said: "The primary rule of construction in the interpretation of a will is to ascertain 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."

It would be difficult, if not impossible, to find two wills worded exactly alike. Each must be interpreted according to its particular wording, in the light of the conditions and circumstances surrounding the testator when he made the will, and in arriving at his intention, we attempt to place ourselves as nearly as possible in the position of the testator at the time of its execution.

On the record presented, we are unable to distinguish the present case in principle from *Johnson* v. *Lehr,* 192 Ark. 1004, 96 S. W. 2d 20, which, we think, is controlling. The will in that case was almost identical in wording, and in all respects similar in effect to the one presented here. There the will provided: "After the payment of such funeral expenses and debts, I give, devise and bequeath unto my beloved wife, Maude Taylor Williams, all of my property, both personal and real, wherever situated or located for her own personal use as long as she may live and at her death should there be any property or moneys

left after the payment of her funeral expenses and debts are paid, it is my desire that the residue be divided equally, etc."

In the present case, it will be observed that the testator used the following language: "5. I give and bequeath unto my beloved wife, Louise McGie Weeks, all the rest, residue and remainder of my estate of whatever kind or nature and wherever located or situate, real, personal or mixed, to have and to hold for her own personal use so long as she shall live, and at her death I direct that whatever remains of said bequest be divided between my son, Marvin F. Weeks, and my daughter, Helen Louise Weeks, share and share alike."

In the *Johnson* v. *Lehr* case, this court in construing the paragraph, *supra,* from the will, in that case, said: "The language of this paragraph is unambiguous and clearly devised the unlimited use, with implied power of sale, of all the testator's property, both real and personal, to his wife, Maude Taylor Williams. There is nothing in the clause to indicate that the testator devised a life estate only in the property to his widow with a vested remainder therein to his nephew and to the heirs of his wife to be selected by her. It is true that the testator devised any residue that might not be used by his widow to his nephew and her heirs to be selected by her, but this was far from vesting in the nephew and her heirs a remainder absolute in the estate. Such remainder as they might acquire under the will was contingent upon his widow dying before she used it by sale or otherwise. The widow's deed to appellee under her implied power to sell the property to pay her husband's debts or for her own personal requirements passes or will pass the fee simple title to appellee when accepted by him.

"The implied power of sale is just as effective as an express power to sell would have been. There could not be any question, if express power had been given to sell, that a sale would have passed a fee simple title to any of the property sold by the widow."

In *United States of America* v. *Moore,* 197 Ark. 664, 124 S. W. 2d 807, we said: "The great weight of authority, however, including this court, supports the rule that a life estate may be created, coupled with power of disposition, and that such power does not change the life estate into a fee for the reason that the power of disposition is not in itself an estate, but is an authority so to do derived from the will. See 17 R. C. L., p. 624, § 13. We so held in *Archer* v. *Palmer,* 112 Ark. 527, 166 S. W. 99, Ann. Cas. 1916B, 573, even though the power of disposition might defeat the rights of the remainderman."

In determining the testator's intention under paragraph 5, or the meaning of that paragraph, we must bear in mind that at the testator's death, after his widow had paid to each of his children $3,000 in Liberty Bonds, or a total of $6,000, in accordance with bequests to them, there remained eight other bonds above listed of the par value of $8,000. Just what income these bonds produced is not shown. There was also a certificate of stock in a hotel, along with a lot in Rock Island, Illinois, and two lots in the "New Shop Addition," East Moline, Illinois. Since the record here discloses that the real property described in the will is situated in another state, the only property over which the lower court had jurisdiction was the bonds, securities and personal property mentioned in the complaint. *Williams* v. *Nichol,* 47 Ark. 254, 1 S. W. 243. As to the value of this hotel stock and whether revenue producing, the record is silent.

In these circumstances, did the testator intend that his widow should be limited to use only the income, if any, from these eight bonds, three lots and a certificate of stock in a hotel, when he bequeathed unto his "beloved wife, . . . all the rest, residue and remainder of my estate . . . real, personal or mixed, to have and to hold for her own personal use so long as she shall live"? We do not think that such was his intention. That he did not so intend, we think, is emphasized by the provision that immediately followed, "and at her death I direct that whatever remains of said bequest be divided between

my son . . . and my daughter . . ." There would seem to be no purpose in the use of this latter provision if the testator had not intended that his widow might use the principal as well as the revenue from the property bequeathed to her for her personal use and needs during her lifetime. Had Mr. Weeks not intended to empower his widow, appellant, to so use all or any part of this property during her life, he could have very easily so provided with such a clause as "at her death, I direct that such property so bequeathed be divided between my son, Marvin F. Weeks, and my daughter, Helen Louise Weeks, share and share alike."

We hold, therefore, that appellant under the terms of the will was given a life estate in the property bequeathed with full power of sale and disposition, for her own personal use and needs during her life, and whatever remains at her death to be equally divided between the two children, *supra*.

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

SMITH, MCHANEY and MCFADDIN, JJ., dissent.

ED. F. MCFADDIN, Justice (Dissenting). A lengthy dissenting opinion (elaborating and discussing the points) would serve no useful purpose in this case; but a few lines are proper to indicate my reasons for divergence from the majority:

1. I think the entire case should have been remanded to the Chancery Court to have the evidence developed as to the extent and value of the estate before this court attempted to ascertain the testator's intentions from the circumstances surrounding the testator at the time he executed the will. There was no evidence introduced in this case.

2. In reversing the cause, I think the majority should also have directed the Chancery Court to require the life tenant to file an inventory of the estate, and then her petition for authority to sell such assets as she could

show her necessity required. These precautions should be taken to prevent the life tenant from committing irreparable waste at the expense of the remaindermen.

[redacted]

McALLISTER *v.* STATE.

Cr. 4427 199 S. W. 2d 751

Opinion delivered February 17, 1947.

Rehearing denied March 17, 1947.

[redacted]

Franklin Wilder, for appellant.

Guy E. Williams, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

ED. F. McFADDIN, Justice. On June 6, 1946, appellant was convicted of the crimes of burglary, and assault with intent to kill, and was sentenced to the penitentiary. On June 7, 1946, a motion for new trial was overruled, and his appeal prayed and granted, and his bond fixed and approved, and 58 days given for bill of exceptions.

On August 2, 1946, a certified copy of the judgment was filed in this court, and a writ of certiorari was issued to complete the record. In response to the writ, a skeleton transcript (without the evidence or bill of exceptions) was filed in this court on August 22, 1946. On the last-mentioned date appellant's present counsel was employed; and he has sought diligently to complete the record within the time allowed by statute, and the rules of this court, but has been unable to do so. The bill of exceptions was not filed here until September 19, 1946,

which was more than three months from the granting of the appeal.

The Attorney General moved to strike the bill of exceptions, and the motion was granted by this court on January 13, 1947, in an order reading: "Motion to strike bill of exceptions because of noncompliance with Rule 5-d and § 4236, Pope's Digest, is sustained."

With the bill of exceptions stricken, there is nothing before this court except the record. See *Foster* v. *State*, 128 Ark. 316, 194 S. W. 703. We find no errors on the face of the record; so the judgment of the circuit court is in all things affirmed.

HOLT, J., not participating.

ROYAL *v.* STATE.

Cr. 4436 199 S. W. 2d 744

Opinion delivered February 17, 1947.

Rehearing denied March 17, 1947.

J. R. Booker and *Thurgood Marshall, Robert L. Carter, Carl R. Johnson* (nonresidents), for appellant.

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

ROBINS, J. Appellant was convicted and fined $25 in the municipal court of Van Buren, Arkansas, for violating § 1197 of Pope's Digest, which is a part of § 2 of Act No. 17 of the General Assembly of Arkansas, approved February 23, 1891. This Act, which was amended (in certain particulars not important to a consideration of this case) by Act No. 114, approved April 1, 1893, requires railroad companies to give equal and separate accommodations to persons of the white and African races and directs that travelers of each race use the respective accommodations thus provided. He appealed to circuit court where he was again convicted and fined $25. To reverse the circuit court's judgment he prosecutes this appeal.

The Attorney General has moved to dismiss appellant's appeal on the ground that appellant has failed to make and file proper abstract of the record, as required by our Rule 9. An examination of the record (which a consideration of the Attorney General's motion requires) discloses that there is no bill of exceptions contained therein. Apparently the case was tried in the circuit court, by stipulation of counsel, on a transcript of the testimony adduced in the municipal court, which, without proper authentication, appears in the transcript filed in this court.

But such testimony cannot be made a part of the record on appeal, even by stipulation, in the absence of a bill of exceptions duly authorized by the trial court and authenticated as required by law. *Kinnanne* v. *State,* 106 Ark. 280, 153 S. W. 583; *Satterfield* v. *Loupe,* 160 Ark. 226, 254 S. W. 489. The recent Act of the General Assembly (Act 196 of 1945) providing that stipulations in equity cases may become part of the record without bill of exceptions has, of course, no application to the case at bar.

We have uniformly held that, where the testimony heard in the trial court is not brought into the record by bill of exceptions, we cannot review the evidence to determine whether it is sufficient to support the lower court's

judgment. *Lawrence* v. *State,* 71 Ark. 82, 71 S. W. 263; *McLaughlin* v. *State,* 117 Ark. 154, 174 S. W. 234; *State* v. *Chapman,* 118 Ark. 601, 176 S. W. 315; *Alexander* v. *State,* 138 Ark. 613, 211 S. W. 664; *Nix* v. *State,* 190 Ark. 1177, 81 S. W. 2d 15; *Williams* v. *State,* 192 Ark. 1178, 92 S. W. 2d 658; *Boatright* v. *State,* 195 Ark. 611, 113 S. W. 2d 107; *McCarty* v. *State,* 202 Ark. 954, 154 S. W. 2d 594; *Chandler* v. *State,* 205 Ark. 74, 167 S. W. 2d 142; *Westerdale* v. *State,* 205 Ark. 100, 168 S. W. 2d 615; *French* v. *State,* 205 Ark. 386, 168 S. W. 2d 829.

Appellant's only insistence for reversal is that the evidence against him in the lower court was insufficient to establish his guilt. Since this evidence has not been properly brought into the record, we may not appraise its adequacy.

Accordingly the judgment of the lower court is affirmed.

MALCO THEATRES, INC., *v.* BOSWELL.

4-8068 199 S. W. 2d 606

Opinion delivered February 17, 1947.

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

Hays, Wait & Williams, for appellee.

McHaney, Justice. Appellee is the owner of a building in Russellville, Arkansas, which has been under written lease to appellant to operate a picture show therein from January 1, 1941, to December 31, 1945, at a monthly rental of $90 for the first two years and $100 for the last three years. In addition to the usual terms and conditions, the lease provided for certain passes to appellee and her family as follows: "As a further consideration of rent herein specified, the party of the second part agrees to furnish four (4) annual passes to any and all picture shows operated by them in the City of Russellville, Arkansas, said passes issued to the party of the first part and members of her family, as follows: One pass to Mrs. Mattie Boswell; one pass to Vestal Boswell; one pass to Mr. and Mrs. Cletis Boswell (and small son), during the term of this lease."

On September 11, 1945, appellant wrote appellee a letter, calling her attention to the expiration date of the lease, December 31, 1945, and expressing a desire to extend the lease for another five years. A lease extension agreement executed by appellant was enclosed for this purpose, which provided that the terms and conditions set out in the original lease should bind the parties for an additional five years. On September 16, 1945, appellee wrote appellant she would "have to have an increase of $25 per month," over the $100 per month she was then getting. On September 26, 1945, appellant wrote appellee, in part, as follows: "We have been your tenants quite a while in Russellville, Mrs. Boswell, and I am sure

that we have been satisfactory. If you insist upon the $25 per month increase in rental, we have no alternative but to accept same; however, I do believe that in fairness on the extension of the lease, this should be increased for the first two years at $112.50 per month, and for the remaining three years at $125 per month. The rental on this building has increased from $50 per month from the time that it was rented to Mr. McGinnis to $100 per month that we are paying now.

"I am leaving this matter up to your own decision as I know that you will be fair about same."

At this point appellee seems to have consulted her attorney, Mr. Hays, for, on October 9, 1945, her attorney answered appellant's letter next above quoted, stating that the said letter and the proposed extension of lease agreement had been referred to him. In this letter appellant was advised that the rent would have to be $125 per month; that a new lease agreement would be required and that an exact duplicate of the then lease would be satisfactory, except the monthly payments would be $125 and except as to passes. In this connection Mr. Hays wrote appellant the following: "It seems that the original passes issued by your corporation provided for admission to all shows as set out in the paragraph on 'Passes' on page three, however, later these passes excepted passes for Sunday, Saturday, or Holiday shows. Cletis Boswell objected very strongly to this change in passes and now insists there shall be a clear understanding that the passes during the term would admit to all shows, subject of course to excise tax. It seems that the local manager and Mr. Boswell had some sharp words about it and Mrs. Boswell insisted this matter be clearly expressed. The four passes mentioned for Cletis Boswell shall be for himself 'and family.' He has one boy who would have to pay child's admission and another boy who would become chargeable during the term of a five-year lease. You understand, as I do, that it is the little things that make the most difficulty in closing such matters.

"Under Mrs. Boswell's direction we ask that you prepare a new lease contract embracing changes as to the monthly rental and passes, and mail same to us for approval."

Replying to this letter on October 17, 1945, appellant sent Mr. Hays a new lease agreement embodying the same terms as the old lease except the monthly rentals were to be $125, and except the clause as to passes which limited them to one pass for appellee, one for Vestal Boswell, and one each for Mr. and Mrs. Cletis Boswell. In its letter of said date appellant refused to change the condition of the passes, refused to remove the restriction against their use on Saturdays, Sundays and holidays. In reply to this letter Mr. Hays wrote appellant on October 31, 1945, asking that the lease, as to passes, be changed to read, "one pass each to Mr. and Mrs. Cletis Boswell and family," which added the words "and family" to the lease as written, and returned same to appellant. In reply to this letter appellant wrote Mr. Hays on November 1, 1945, declining to make the change in the lease agreement suggested, and, in part, said: "In as much as we have complied with Mrs. Boswell's letter of September 16 in an increase of $25 per month rental, we have taken the position that our lease is extended for that period of time. If Mrs. Boswell wishes to execute the leases on this basis, we will be glad to send them to you for her signature."

Appellee wrote appellant on January 2, 1946, that its lease had expired and its further occupancy of said building "is permissive only, from month to month." The check of appellant of January 9, for $125, was returned to it by appellee on January 10, as also the passes sent to her. On January 8, she wrote appellant notifying it that she would require the surrender of said building at the expiration of 30 days, and to have same vacated on or before February 10.

On February 12, appellee caused a notice to be served on appellant to quit and deliver up the possession of her building on or before February 15.

On February 16, appellee brought this action against appellant in unlawful detainer, gave bond in the sum of $5,000 and secured a writ of possession. Appellant gave a cross-bond and retained possession. Trial before the court sitting as a jury resulted in a judgment for appellee against appellant for the possession of said building and for the use and occupation thereof the sum of $887.50 on the basis of $125 per month from January 1 to August 3, 1946, with interest thereafter until paid at 6 per cent. and costs.

From this judgment there is here a direct appeal by appellant from the judgment for possession of the building and a cross-appeal by appellee from so much of the judgment as limited her recovery for damages to $125 per month for the use and occupancy of said building since January 1, 1946.

For a reversal of the judgment for possession, appellant contends that its letter to appellee of September 26, 1946, in answer to her letter of September 16, and particularly the sentence therein which said: "If you insist upon the $25 per month increase in rental, we have no alternative but to accept same," constitutes a "complete acceptance of Mrs. Boswell's proposition to rent to appellant the property for another five year period." Assuming without deciding that this is true, we cannot agree that a completed contract was made, because the amount of the monthly rental was not the only consideration moving to appellee to be agreed upon. The clause regarding passes was a part of the consideration for the lease as shown by the clause above quoted from the original lease agreement, and about which the parties never did agree. This is clearly demonstrated by the letter of appellee's attorney to appellant of October 9, 1945, and its reply thereto of October 17, and is further emphasized by their respective letters dated October 31 and November 1.

It thus appears that there was no meeting of the minds of the parties at least to one of the essential terms of the contract, the passes, and, therefore, there was no

binding contract. In *Southern Cotton Oil Co.* v. *Frauenthal,* 145 Ark. 394, 224 S. W. 730, we said: "It is true, as contended by counsel for the plaintiff, that a binding contract of sale may be entered into by letters and telegrams, and that an acceptance by letter or telegram of an unconditional offer made in the same manner will constitute an obligatory contract. *Allen* v. *Nothern,* 121 Ark. 150, 180 S. W. 465, and cases cited, and *J. I. Case Threshing Machine Co.* v. *Southwestern Veneer Co.,* 135 Ark. 607, 205 S. W. 978. It is equally well settled that before the contract is consummated each party must agree to the same proposition, and the agreement must be mutual to every essential term of the contract."

In the recent case of *Gatling* v. *Goodgame,* 209 Ark. 867, 192 S. W. 2d 878, we said: "It is well settled that in order to make a contract, there must be a meeting of the minds as to all terms." Citing a number of cases. But learned counsel for appellant contends that the matter of passes was a courtesy extended by appellant to appellee, and was an after thought brought up to find a loophole to evade carrying out the terms of the contract. The question of passes, we think, was not merely a courtesy by appellant to appellee, but was in compliance with an express provision of the original contract, and was a requirement demanded by appellee for a new contract and refused in the form demanded by appellant. We cannot say this consideration was *de minimis.*

As to the cross-appeal of appellee but little need be said. She contends that the rental value of the building is $200 per month and offered in evidence a check from another party dated December 15, 1945, for $1,800 for rent for 1946, if he could get possession of the building. But the fact remains that appellee offered to rent the building to appellant for $125 per month for five years. The court found this amount to be the correct measure of damages for holding over, and we think there was substantial evidence to support the finding.

The judgment will be affirmed both on the direct and cross-appeals.

GRIFFIN SMITH, C. J., dissents.

BAUGHMAN *v.* FORESEE.

4-8071 199 S. W. 2d 596

Opinion delivered February 17, 1947.

Len Jones, for appellant.

John H. Shouse and *J. Loyd Shouse,* for appellee.

MINOR W. MILLWEE, Justice. Appellee, L. B. Foresee, purchased a farm in Boone county, Arkansas, from W. T. Whitley in October, 1935. The farm was described as a 40 acre tract and was inclosed by a wire fence which had been erected at least 20 years prior to the purchase by appellee. Appellee went into immediate possession following his purchase and has continued to cultivate the lands up to the fence each year since.

In the spring of 1945, appellant, Lewis Baughman, informed appellee that he had purchased lands adjacent to appellee's farm and was claiming title to a part of the lands inclosed in appellee's fence. Appellee employed Doss Young to harvest his hay crop in 1945, but appellant advised Young to refrain from cutting hay on that part of the inclosure which appellant claimed until a survey was made and the property lines settled.

On August 6, 1945, appellee filed this suit in the Boone Chancery Court alleging his ownership of the inclosed lands and that appellant was threatening to remove his fences and reëstablish the lines upon appellee's land; and that appellee and those under whom he claimed title had been in adverse possession of the lands for more than 20 years. The prayer of the complaint was that appellant be restrained from removing appellee's fences or interfering in any manner with appellee's quiet and peaceable enjoyment of the property, and for all equitable relief.

Appellant filed an answer and cross-complaint denying that appellee had adverse possession of the lands and alleging that appellee had a part of appellant's land inclosed within his fences well knowing that the land belonged to appellant; and that appellant and those under whom he claimed had paid taxes on the land for more than seven years. The prayer of the answer was that the court establish the true lines between the parties and that the complaint be dismissed.

After a hearing held on September 14, 1945, the case was taken under advisement by the trial court until

March 4, 1946, when a decree was entered which found that appellee had acquired title to the lands within his fence by adverse possession. Appellant was permanently enjoined from interfering with appellee's possession of the inclosed lands and title thereto was quieted in appellee.

The evidence discloses that the wire fence which inclosed the farm purchased by appellee in 1935 also inclosed some land lying in adjoining 40 acre tracts. Although no survey was made and none of the witnesses knew the exact location of the land lines, it was variously estimated that from 10 to 25 acres of adjoining forties were inclosed within appellee's fence. This fence was constructed at least 10 years prior to 1935 and replaced a rail fence which stood on substantially the same lines for 20 years prior to the erection of the wire fence. It is undisputed that appellee and former owners of the 40 acre tract which he purchased had cultivated the lands up to the fence lines. All the witnesses knew that appellee was cultivating all the land within his fence, but some of them did not know that he was claiming title to that part of the inclosure which encroached upon the adjacent lands.

Appellant, in February, 1945, made a contract with a nonresident owner to purchase lands adjoining appellee's farm. He had not received a deed at the time of the trial, but exhibited tax receipts issued to the nonresident owner in payment of the taxes for the years 1936 to 1944, inclusive, on two adjoining 40 acre tracts. Although he knew that appellee had part of these lands inclosed within his fence, he made no inquiry as to the nature of appellee's claim to the lands until after he contracted to purchase the lands from the nonresident owner. Appellant testified that he talked with appellee about having the lands surveyed after he contracted to purchase the adjoining lands and that appellee offered to buy any lands within his fence that belonged to appellant. It is contended by appellant that this offer to purchase amounted to a recognition of appellant's title to the lands in dispute

and precludes appellee from claiming title thereto by adverse possession.

It is true that the offer to purchase, which was neither admitted nor denied by appellee, was to some extent a recognition of appellant's claim of title to the disputed lands, but at the time it was made appellee had already been in possession of the lands for 10 years. Our cases make a distinction between a recognition of title in another by an adverse claimant made during the statutory period of seven years and one that is made after the statutory period has run. An offer to purchase made after the seven year period has elapsed may be considered by the court or jury in determining the character of the possession of a claimant during the statutory period, but such offer will not have the effect of divesting a title that has already become vested in the adverse claimant. Evidence of an offer to purchase by an adverse claimant made after the statutory period elapsed was involved in *Shirey* v. *Whitlow,* 80 Ark. 444, 97 S. W. 444. Justice RIDDICK, speaking for the court, there said: "While it was proper for the jury to consider this evidence in determining the nature of the defendant's possession, whether adverse or not, the fact that he had to some extent recognized the title of the defendant after the statutory period had elapsed is not conclusive against him, for, not being a lawyer, he might have done so in ignorance of the fact that adverse possession for over seven years gave him title, or he might have made the offer to purchase, not in recognition of plaintiff's title, but in order to buy his peace and avoid litigation." This rule has been approved in many of our later cases. Some of these were cited with approval in *Hart* v. *Sternberg,* 205 Ark. 929, 171 S. W. 2d 475.

While it was proper for the chancellor to consider the offer to purchase in connection with the other evidence in determining whether appellee actually held the lands adversely, the offer did not necessarily amount to such recognition of title in appellant as to revest the title already acquired by adverse possession.

Appellant also insists that the evidence is insufficient to show that appellee had notorious possession of the lands in controversy and the case of *Terral* v. *Brooks,* 194 Ark. 311, 108 S. W. 2d 489, is cited in support of this contention. There, this court approved general statements of the rule laid down in 2 C. J. S., Adverse Possession, § 45, as follows: "Notorious possession contemplates possession that is so conspicuous that it is generally known and talked of by the public or the people in the neighborhood . . . The true owner must have knowledge or notice that the possession is hostile; and this may and must consist either of actual knowledge or of constructive notice arising from the openness and notoriety of the possession. . . . Possession which is so open, visible, and notorious as to give the owner constructive notice of an adverse claim need not be manifested in any particular manner; but there must be such physical evidence thereof as reasonably to indicate to the owner, if he visits the premises and is a man of ordinary prudence, that a claim of ownership adverse to his is being asserted."

The case of *Culver* v. *Gillian,* 160 Ark. 397, 254 S. W. 681, involved the claim of title by adverse possession where the claimant was without color of title. The court there said: "While, in such cases, to constitute an adverse possession, there need not be a fence or building, yet there must be such visible and notorious acts of ownership exercised over the premises continuously, for the time limited by the statute, that the owner of the paper title would have knowledge of the fact, or that his knowledge may be presumed as a fact. In other words, it has been well said that if the claimant 'raises his flag and keeps it up,' continuously for the statutory period of time, knowledge of his hostile claim of title may be inferred as a matter of fact."

We think the trial court was warranted in holding that the possession of appellee was open, notorious and adverse under the rules just announced. For 10 years he continuously occupied and cultivated the land as if it

were his own. Some of the witnesses who were acquainted with the lands testified they did not know that appellee was claiming title to the lands in controversy. It is not shown that these witnesses were closely associated with appellee or that they were in position to ascertain the nature of his claim with respect to the property. None of them testified to any act or admission by appellee that would evince a purpose on his part to hold only permissively during the 10 year period that he exercised complete dominion over the property. The conclusion of the trial court on this issue is supported by a preponderance of the evidence.

The decree is affirmed.

EAST ARKANSAS CONSTRUCTION CO. *v.* JAMES.

4-8065 199 S. W. 2d 589

Opinion delivered February 17, 1947.

Adams & Willemin, for appellant.

Ivie C. Spencer, for appellees.

GRIFFIN SMITH, Chief Justice. East Arkansas Construction Company was enjoined from operating a rock crusher between seven o'clock p. m. and seven a. m. The restraining order was issued August 23, 1946, effective August 26th. Upon showing that the Company, prior to information that legal steps would be taken against it, had contracted with State Highway Department, and that definite commitments for deliveries not later than October 1 were outstanding, this Court permitted continuation of 24-hour milling until October 1st. This was done after a temporary supersedeas had been executed August 31st by an individual Judge. When on September 23d the matter came before the entire Court, issues were briefly stated and the Company agreed (respondent acquiescing) that night work would be discontinued October 1st. Appeal is on the merits. Contention of the Company is that a preponderance of evidence shows (a) that the crusher is situated in an industrial area outside the corporate limits of Jonesboro, but adjoining it; (b) that T. D. James is estopped from maintaining the suit and Harry O'Neil in effect consented to activities; and, (c) other plaintiffs (appellees here) have not met the burden assumed in asserting that night operation of the crusher is attended by objectionable incidents justifying a court of equity in restricting use to the period allowed by the injunction.[1]

There is testimony that the area surrounding the crusher has always been industrial property and it is not denied that the district is beyond Jonesboro's city limits. On the other hand, witnesses owning homes, or residing near the crusher, contend that the distinction between "industrial," and "residential," is not defined by use to such an extent that industrial activities of an unusually objectionable nature should be permitted to destroy nor-

[1] Plaintiffs other than James were: E. P. Johnson, George Cockran, C. W. Gray, Ezra Down, Charles Hague, W. M. Coleman, and A. Bagget. Harry O'Neil was not a plaintiff.

mal home comforts and the ordinary utilitarian purposes for which such property is designed.

E. A. Stuck, a witness for the defendants,[2] testified that the crusher and appurtenances were located on property once owned by Barton Lumber & Brick Company and lies west of the Jonesboro Brick Company. The crusher is on land formerly occupied by a brick plant. When asked regarding general nature of the entire area with reference to residence property, Mr. Stuck said: "I would say the territory has always been industrial property. The natural boundary [in part] is Old Highway No. 1, known as the 'Aggie' Road. The Barton Lumber & Brick Company [on the north] is the old Greensboro Road. It extends about 2,000 feet beyond what is known as New Highway No. 1. In the past this whole area has been [industrial or non-residential] property. Recently a new shoe factory, Johnson's Welding Shop, and a grocery store have been put up north of New Highway No. 1 and a little west of this location. The shoe factory is east of 'the line of the crusher,' and northwest of the brick company. The welding shop is west of the shoe factory. South of the crusher the Snyder Drug Company has erected a concrete block warehouse 60 x 150 in size. East of the warehouse, along the old highway, the property is vacant except 'for a space and a frontage' used by Frape Truck Line. For a while the truck company maintained its shops there, with storage for vehicles. The old J., L. C. & E. Ry. has a spur track, and there are other such extensions."

Testimony as a whole sustains the Chancellor's finding (though not expressed affirmatively in the decree) that while the area had gradually acquired characteristics of an industrial nature, yet along with this development homes were erected without reason for apprehension that extraordinary and continuous inconveniences would be experienced, but to the contrary that the ordinary noise, smoke, dust, and movements incidental to the

[2] East Arkansas Construction Company is owned by J. M. Cartwright and Mary E. Kennedy. Apparently it is not incorporated.

character of industry then being operated would be the approximate measure of molestation. If O'Neil, who leased a right of way to appellant, or James, who bought of O'Neil and accepted $100 from appellant for right-of-way facilities, were the only injured parties, we would unhesitatingly say they are without equitable rights.

The rock crusher was not built until June, 1945. Extent to which it was operated during the first few months following installation is not shown. But it is definitely disclosed that all-night work did not begin until two or three weeks before the instant suit was filed. If it be conceded that the area was more suitable to industrial use than residential occupancy, the fact remains that erection of some of the homes was prior to crusher work on a continuous schedule—even before the crusher was put on the property—and certainly before its management inaugurated a 24-hour, seven-day week program. Witnesses testified that from eight to twelve heavy gravel trucks were used most of the time, being frequently compelled to reduce speed on account of road conditions and to shift gears; that this sometimes caused "back-firing" and other emergency noises; that headlights from trucks flashed through windows, and that the entire district was brilliantly illuminated to facilitate work. Because of the noise, employes who had to communicate with each other spoke loudly; while occasionally crude jokes were told. Effect was that some of the residents were unable to gain sleep until exhaustion aided them, often after two o'clock a. m.

In *Fort Smith* v. *Western Hide & Fur Co.*, 153 Ark. 99, 239 S. W. 724, Chief Justice McCulloch, in writing the Court's opinion, used this illustration: "The case affords, perhaps, an example where a business established at a place remote from population is gradually surrounded and becomes part of a populous center, so that a business that formerly was not an interference with the rights of others has become so by the encroachment of the population. Under these circumstances pri-

vate rights must yield to the public good, and a court of equity will afford relief, even where a thing originally harmless under certain circumstances has become a nuisance under changed conditions." [In the Fort Smith case the Hide & Fur Company was within the corporate limits.]

Jones v. *Kelley Trust Co.,* 179 Ark. 857, 18 S. W. 2d 356, is in point. It was there said that, although a rock crusher had been used in the vicinity for many years, ". . . the operation of the plant by appellees appears from the evidence to be materially different from the operation of the quarry and rock crusher formerly." It was then said that the plaintiffs below were not estopped. In the Jones-Kelley case restrictive directions were contained in the decree appealed from, and this Court held that the Chancellor acted with appropriate circumspection. A paragraph from the opinion is: "The cases holding that the rights of habitation are superior to the rights of trade, and, whenever they conflict, the right of trade must yield to the primary or natural right [are collected in a note to *Bristol* v. *Palmer,* 83 Vt. 54, 74 Atl. 332, 31 L. R. A. (N. S.) 881, and in 20 R. C. L. 480."] See American Jurisprudence, v. 39, pp. 333-4; Corpus Juris, v. 46, p. 670.

Mr. Justice MEHAFFY, who wrote the opinion in *Jones* v. *Kelley Co.,* expressed the broad proposition that "Every person is entitled to the undisturbed possession and enjoyment of his own property." However, scope of the statement is diminished by the subjoined sentence where it was said: "The mode of enjoyment is necessarily limited by the rights of others."

Granting that, in a general sense, appellants are entitled to "the undisturbed possession and enjoyment of their own property"—(in this instance a rock crusher) use to which machinery and necessary appurtenances are put may depend upon locality, proximity to others, deportment of employes, and sometimes (as in the case at bar) whether operations are continuous, or are restricted to ordinary working hours.

In view of the evidence, we are not able to say that the Chancellor erred in directing that operations be discontinued from seven o'clock in the evening until seven o'clock a. m.

Affirmed.

HINTON *v.* HINTON.

4-8069 199 S. W. 2d 591

Opinion delivered February 17, 1947.

Rains & Rains, for appellant.

Martin L. Green and *Dan F. White,* for appellee.

SMITH, J. Appellant filed suit for a divorce from his wife and prayed that he be awarded the custody of their minor child. The wife filed an answer denying that appellant was entitled to a divorce, and praying that she be granted a divorce and be awarded the custody of the child, and that provisions for her support and that of the child be made.

Appellant's complaint was dismissed and appellee was given a divorce, and was awarded the custody of the child, and it was ordered that appellant pay appellee for her support, and that of the child, the sum of $40 per month, to be paid semi-monthly. This decree was rendered March 24, 1941.

Appellant made only partial payments, and was cited to show cause why he had not complied with the order of the court. Appellant responded with a petition praying that the order be modified inasmuch as appellee had married subsequent to the rendition of the decree. She had remarried in September, 1941, and became Mrs. Clem Townley. Appellant has also remarried. The decree was so modified as to require appellant to pay only $20 per month, and this for the support of the child, but a judgment was rendered against him for $323.50 for arrearage in payments.

Appellant was inducted into the army on October 3, 1942, and ordered an allotment of $42 per month to be paid to appellee for the benefit of their child pursuant to army regulations presently to be discussed. These payments of $42 per month were made as directed, until appellant was honorably discharged from the army at which time the allotment payments ceased, and no further payments were made by the government, nor has appellant made any subsequent payments.

After his discharge from the army appellant was again cited to show cause why he had not made the payments directed in the amended decree, and he filed a response in which he alleged that the payments had not only been made, but that there had been an overpayment which sufficed to meet the payments which had accrued after appellant was discharged from the army.

After a hearing on the citation the court entered a decree from which is this appeal to the following effect: "That the total payments due to be paid from the date of the original decree is in the amount of $1,230 and that plaintiff owes for maintenance for said baby as of May

1, 1946 (the date of the final decree), a balance of $316, together with the cost of this action, and that the $20 per month maintenance for said child shall continue as per the order of November 3, 1941."

Appellant's insistence is that inasmuch as the government allotment of $42 per month, if he is allowed credit for the entire amount thereof, would suffice to pay all arrearages and to pay the $20 per month allowance fixed by the court, up to and even beyond the date of the trial, and that therefore he owed nothing at the time of the trial of the cause in the court below, and was not in default.

The government allotment ceased in November, 1945, as appellant was discharged from the army November 30, 1945. Since that date appellant has made no payments, but he insists that if given credit for the full amount of the government allotment paid appellee for the benefit of the child, he owed nothing at the time of the trial. Whether this is true or not is the controlling question in the case.

Title 37 of the U. S. C. A. deals with the pay of enlisted men, and that of the government allotments to their dependents. Section 201 of this title provides that: "The dependent or dependents of any enlisted man in the Army of the United States, the United States Navy, the Marine Corps, or the Coast Guard, including any and all retired and reserve components of such services, shall be entitled to receive a monthly family allowance for any period during which such enlisted man is in the active military or naval service of the United States on or after June 1, 1942, (1) during the existence of any war declared by Congress and the six months immediately following the termination of any such war . . ."

Section 202 of the title reads as follows: "The monthly family allowance payable under this chapter to the dependent or dependents of any such enlisted man shall consist of the Government's contribution to such allowance and the reduction in or charge to the pay of

such enlisted man, except as to the initial family allowance provided by § 207 (a) of this title."

Section 203 of this title divides the dependents into three groups and provides that: "The class A dependents of any such enlisted man shall include any person who is the wife, the child, or the former wife divorced of any such enlisted man." We presume the divorced wife referred to is one who has a claim for support under the divorce decree, but appellee is not such a person, and she is suing here only for the benefit of the child for whose support the decree ordered the appellant to pay $20 per month.

Section 205 of the title provides that: "To class A dependent or dependents: A wife but no child, $50; a wife and one child, $80, with an additional $20 for each additional child; a child but no wife, $42, . . .", which is the case here.

Section 206 of the title states: "For any month for which a monthly allowance is paid under this chapter to the dependent or dependents of any such enlisted man the monthly pay of such enlisted man shall be reduced by, or charged with, the amount of $22, and shall be reduced by, or charged with, an additional amount of $5, if the dependents to whom such allowance is payable include more than one class of dependents." This $5 provision has no application here as there is only one dependent.

These government allotments were not intended to increase the pay of enlisted men, but to make provision for the support of their dependents while in the armed services. Twenty dollars of this allotment was allowed for the dependent child, but $22 of this allotment was deducted from the pay which would otherwise have been paid to the soldier himself. While in the service the soldier's earning capacity ceased, except for the payments made to him by the government, and from this pay the government deducted $22 per month, and this deduction continued during the entire period of appellant's service, which was three years, one month, and five days, and this

deduction of $22 was in addition to the $20 monthly allotment to the child made by the government.

A witness who as a personnel officer in the army was familiar with the applicable statutes, differentiated between the allotments to the enlisted man's dependents which are designated as allotments "E" and "F," the latter being the allotment which the soldier makes, as in this case, the first being the allotment where the soldier has made no designation. But it would confuse, and not clarify the question presented to discuss these differences. Payments here by the government were made under allotment "F," at the direction of appellant when he was inducted into the service, and were made pursuant to the statutes from which we have quoted.

The allotment payments totaling $42 per month were not made under the divorce decree, but they were made nevertheless, and appellant should have credit therefor. They were made during the entire period of appellant's service in the army, and were in an amount sufficient to discharge his obligation to pay up to the time of his discharge from the army, so that he owed nothing when he was discharged from the army. But the obligation to pay $20 per month for the support of his child did not cease upon his discharge from the army. That obligation continued and now exists, and he should be charged with that amount since the date of his discharge. No allotment payments were made after November, 1945, and appellant should be charged with his child's support as provided in the decree, from that date.

The decree from which is this appeal rendered judgment against appellant for payments maturing up to May 1, 1946, and that amount was adjudged to be $316. This amount is excessive, as appellant should have been charged only from the date of his discharge, which was November 30, 1945, to the date fixed by the decree which was May 1, 1946, a period of five months, making a balance then due of only $100, and the decree is accordingly modified.

Inasmuch as subsequent payments have since matured and may not have been paid, the decree will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

JONES *v.* BROWN.

4-8054 199 S. W. 2d 973

Opinion delivered February 24, 1947.

Frank S. Quinn, for appellant.

Shaver, Stewart & Jones, for appellee.

GRIFFIN SMITH, Chief Justice. The appeal questions a decree holding that certain minerals pertaining to an old right-of-way through 560 acres were not reacquired by the appellants who through adverse possession prevailed as to the severed fee.

During and before 1917 Mrs. J. F. Jones owned the acreage in question, including minerals. She conveyed a 100-ft. strip to Sherve Lumber Co. The following year (1918) Sherve sold to Dorsey Land & Lumber Co., a corporation. In 1925 this grantee conveyed all of its property to Dorsey Corporation, (chartered by Delaware) the transaction by express terms including the strip which forms the subject matter of the controversy here.[1]

In 1932 Dorsey Land & Lumber Company, by its vice-president, undertook to quitclaim to Mrs. Jones the 100-ft. strip. The Dorsey Corporation, presumptively insolvent, was placed in the hands of a receiver—Abel Davis—appointed by an Illinois State Court. This occurred in 1927. The litigation was transferred to a Federal District Court, where the appointment of Abel was confirmed; that is, his status as receiver was recognized by the U. S. Court, where he continued to serve. In 1933

[1] Dorsey Land & Lumber Company's authority to do business in Arkansas was revoked April 21, 1931. Dorsey Corporation, according to records in the Secretary of State's office, was authorized to do business in this State October 13, 1925. H. S. Dorsey was named as agent for service. This corporation withdrew from Arkansas March 3, 1927.

the receiver conveyed to R. Brown, acting for himself and H. M. McIver, all of the Dorsey Corporation's property in Miller County, Arkansas. The so-called ancient logroad grant (about ten miles long by 100 feet wide) was minutely described by metes and bounds. McIver later surveyed the strip and caused a plat of it to be made. March 24, 1937, Brown conveyed half of the minerals incident to the strip. By mesne conveyances The Carter Oil Company acquired, *prima facie,* an oil and gas lease covering half of the interest. July 18, 1944, appellants filed their suit, alleging that the conveyance from Dorsey Land & Lumber Co. to Mrs. Jones was color of title. The land was wild and uninclosed, and she or those holding through her had continuously paid taxes on the full 560 acres, irrespective of outstanding mineral claims.

After the suit was begun it was discovered that the Tax Assessor, in extending 1936 assessments, showed the strip to be in Township Seventeen, when the correct description was Township Sixteen. In listing for taxation that part of the strip under which minerals are claimed by appellees (and as to which The Carter Oil Company lease pertains) the area was plotted in such manner that the property in question was designated Lot 17. It is not disputed that in assessing the minerals the trustee's grantees correctly described the property in Township Sixteen. Difficulty arose when the Assessor's records were transcribed.

When Dorsey Land & Lumber Company's vice-president executed the deed to Mrs. Jones in 1932 the attempt was to quitclaim property conveyed to Dorsey Corporation in 1925. But, say appellants, the deed was color of title, and subsequent payment of taxes served to defeat appellees. The issue therefore is, Can one by the payment of taxes on wild and unenclosed land for seven consecutive years acquire by adverse possession the right to undivided interests in minerals under a part of such land when the facts show that on some date between the first and final tax payments (constituting the seven-year period) the minerals had been conveyed to a

third person, it being assumed that the grantor of mineral rights had authority to sell, and that the instrument by which it was sought to effectuate the conveyance was legally sufficient as to form?

Before severance of the mineral estate the owner of real property has title not only to the land surface, but to that beneath and above the surface. *Bodcaw Lbr. Co.* v. *Goode,* 160 Ark. 48, 254 S. W. 345, 29 A. L. R. 578; *Grayson McCleod Lbr. Co.* v. *Duke,* 160 Ark. 76, 254 S. W. 350; *Claybrooke* v. *Barnes,* 180 Ark. 678, 22 S. W. 2d 390, 67 A. L. R. 1436; *Huffman* v. *Henderson Co.,* 184 Ark. 278, 42 S. W. 2d 221; 1 Am. Jur. 857; 1 Summers Oil & Gas (Permanent Edition), p. 138. In each of these citations there is the declaration that severance of the mineral estate or any part is completely effected by execution and delivery of a deed conveying such mineral estate, or conveying the land and reserving or excepting all or a portion of the minerals. Mr. Justice HART, speaking for the Court in *Claybrooke* v. *Barnes,* 180 Ark. 678 at p. 682, 22 S. W. 2d 390, at p. 392, 67 A. L. R. 1436, said:

"Where there has been a severance of the legal interest in the minerals from the ownership of the land, it has been held as to solid minerals, and the same rule has been applied to oil and gas, that adverse possession of the land is not adverse possession of the mineral estate, and does not defeat the separate interest in it . . ."[2]

[2] After mentioning applicable decisions, the opinion continues: "The rule [that an owner of minerals does not lose his right or his possession by any length of nonuse, nor did the owner of the surface acquire title by the statute of limitations to the minerals by his exclusive and continued occupancy and enjoyment of the surface merely] was approved by this court in *Bodcaw Lumber Co.* v. *Goode,* where it was said: 'The rule of those authorities is that the title to minerals beneath the surface is not lost by nonuse nor by adverse occupancy of the owner of the surface under the same claim of title, and that the statute can only be set in motion by an adverse use of the mineral rights, persisted in and continued for the statutory period.'

"So it may be taken as settled that the two estates, when once separated, remain independent, and title to the mineral rights can never be acquired by merely holding and claiming the land, even though title be asserted in the minerals all the time. The only way the statute of limitation can be asserted against the owner of the mineral rights or estate is for the owner of the surface estate or some other person to take actual possession of the minerals by open-

Once a mineral estate has been severed by grant or reservation, and the fee simple in the land is otherwise held, it is the duty of the assessor, when informed by personal notice or a recorded deed, to separately assess such mineral. Sec. 13600, Pope's Digest; *Huffman* v. *Henderson Co.*, for, "When this has not been done [mineral rights have not been assessed separately from the surface] the assessment made will be held to apply only to the surface rights".

While in the case at bar it is shown that a separate assessment of the minerals was undertaken, but failed on account of clerical error, this is immaterial, since an assessment after severance reaches only the land surface or fee, as distinguished from minerals.

It is conceded that under the authority of cases mentioned, if severance had been effected before the first payment of taxes by the adverse claimant, no title would have been acquired to the separate mineral estate; but it is argued that since the Jones payments began prior to such severance the statute was thereby put in motion as against the then undivided whole, both land and minerals, and its effect could not be interrupted by the severance.

At common law constructive possession of wild and uninclosed land followed the title and was deemed to be in the record owner until possession was invaded by actual occupancy. *Hardie* v. *Investment Guaranty & Trust Co., Limtd.*, 81 Ark. 141, 98 S. W. 701. By early statute Arkansas departed from this rule and enacted that such possession would be deemed to be in the person paying taxes under color of title for seven consecutive years. Pope's Digest 8920. This is the law here sought to be invoked by the adverse claimant. This statute is not in itself one of limitation, but merely creates a constructive possession by the payment of taxes and this creates a right to oust the constructive possession of the record owner, with the result that " . . . it is only by applying thereto

ing mines and operating the same. It is only when such possession has continued for the statutory period that title to the mineral estate by adverse possession is acquired."

the general statutes of limitation that such possession, like actual possession, can ripen into title by limitation". *Hubble* v. *Grimes, ante,* p. 49, 199 S. W. 2d 313. Under this statute payment of taxes constitutes possession for each year in which payment is made, (*Price* v. *Greer,* 76 Ark. 426, 88 S. W. 985) beginning with the first payment and continuing, only as long as made. *Gaither* v. *W. A. Gage Co.,* 82 Ark. 51, 100 S. W. 80; *Cotton Wood Lbr. Co.* v. *Hardin,* 78 Ark. 95, 92 S. W. 1118; *Macrae* v. *Johnson,* 78 Ark. 603, 92 S. W. 1120. These payments must be unbroken for at least seven consecutive years. *Updegraff* v. *Marked Tree Lbr. Co.,* 83 Ark. 154, 103 S. W. 606. The statutory bar giving rise to the right to legal title does not attach until expiration of the seven-year period. *Price* v. *Greer.* Such possession may be broken (1) by actual possession adverse to tax payment claimant, (2) legal proceedings by record owner against claimant, (3) payment of taxes for one or more years by record owner or any other person not acting for claimant, or (4) failure by claimant to make payment for any one or more of the seven years. *Sibly* v. *England,* 90 Ark. 420, 119 S. W. 820; *Southern Lbr. Co.* v. *Ark. Lbr. Co.,* 176 Ark. 906, 4 S. W. 2d 928; *Straub* v. *Capps,* 178 Ark. 709, 13 S. W. 2d 294; *Carmical* v. *Ark. Lbr. Co.,* 105 Ark. 663, 152 S. W. 286.

Since the adverse claimant's constructive possession cannot ripen into title until expiration of seven full years from first payment, it follows that legal title to the mineral interest was in the record owner at the time of its conveyance, and transfer of title vested a good and merchantable title in the mineral grantee. The fact that at the time the land was held adversely did not prevent a transfer of this interest. While at common law one out of possession could not convey lands, the rule was early abolished in this state by statute. Pope's Digest 1809. See *Cloyes* v. *Beebe,* 14 Ark. 489; *Moore* v. *Sharp,* 91 Ark. 407, 121 S. W. 341, 23 L. R. A., N. S. 937.

The deed having effectively transferred title to the mineral interest, it became the duty of the assessor to make separate assessments of mineral and land rights. The fact that the assessor failed to separately list the

severed mineral interest is not material; for, as was said in *Huffman* v. *Henderson Co.*, ". . . the assessment made will be held to apply only to the surface rights." Since there can be no valid collection or payment of taxes without a valid assessment, it follows that neither the adverse claimant nor anyone else could have paid taxes on the mineral estate after severance. Tax payments by the adverse claimant applied only to the surface and to the unsevered mineral right.

The primary requirement of § 8920 of Pope's Digest is that the adverse claimant pay taxes on the claimed property for seven full years. It follows that where there was failure to pay on a severed mineral interest for such time, (although such payments were made on the land and the unsevered portion of the minerals) the dominant estate claimant, nevertheless, did not acquire title. This would be true even though there had been an honest belief that payment was on the entire interest—since actual payment and not intent controls.

Affirmed.

WILKERSON *v.* JOHNSTON.

4-8072 200 S. W. 2d 87

Opinion delivered February 24, 1947.

Rehearing denied March 31, 1947.

Franklin Wilder, for appellant.

Duval Johnston, Heartsill Ragon, and *Daily & Woods,* for appellee.

MINOR W. MILLWEE, Justice. This is a suit by appellees, Burley C. Johnston and Duval Johnston, to quiet title to certain lands situated in the Fort Smith District of Sebastian county, Arkansas, and to cancel a deed from the state to appellants, J. F. Wilkerson and Ruth B. Wilkerson, dated October 25, 1945, and a similar deed from the state to appellant, Virgil Bracken, dated December 7, 1945.

The suit was filed on February 20, 1946, and on March 12, 1946, appellees filed their amended com-

plaint alleging that they were the owners and in possession of the lands in controversy; that the state deeds under which appellants claimed title were based upon a purported sale to the state for the nonpayment of the general taxes for the year 1931 which was void for numerous reasons set out in 18 separate paragraphs of the amended complaint; and that a tender to appellants of the amounts paid by them for their respective deeds, with interest, had been refused.

On March 19, 1946, Mr. Chester Holland appeared as attorney for all three appellants and filed a separate demurrer and motion to make the complaint more definite and certain. When the case was called for trial on June 19, 1946, counsel for appellees announced their election to rely upon only three of the 18 alleged grounds of invalidity of the tax sale set out in the complaint. After this was done, the answer of appellants was filed without a ruling being made or requested on their demurrer and motion to make the complaint more definite and certain. The answer denied the allegations of the complaint and pleaded the validity of the two deeds from the state to appellants.

The cause proceeded to trial, resulting in a decree cancelling the two deeds from the state to appellants and quieting title to the lands in appellee, Burley C. Johnston. Appellants were found entitled to recover from Johnston the amount paid the state for their respective deeds, with interest. The decree recites: "And the plaintiff, Burley C. Johnston, having here in open court paid to the defendant, Virgil Bracken, the said sum of $125.09, and having here in open court paid to Chester Holland, attorney for the defendants, J. F. Wilkerson and Ruth B. Wilkerson, the aforesaid sum of $124, these judgments are hereby satisfied in full."

On July 8, 1946, appellants, through their present attorney, filed a pleading denominated "Motion to Vacate Judgment and for a New Trial." The motion sets out certain facts developed in the trial of the case and argument designed to demonstrate that appellants should have prevailed upon these facts. It also alleges that other

facts should have been developed, and concludes with a prayer that the decree be set aside and a new trial ordered "so that defendants may be permitted to offer what they believe is a valid and complete defense in this suit, but which was not brought out in the original hearing." Appellants also tendered the amounts paid them under the decree of June 19, 1946.

Appellees filed a demurrer to the motion alleging that it did not state facts sufficient to authorize the relief prayed. The demurrer was sustained and the motion dismissed when appellants declined to plead further. This appeal follows.

For reversal of the decree it is first earnestly insisted that the trial court erred in refusing to set aside the decree as to appellants, J. F. Wilkerson and Ruth B. Wilkerson. Ruth B. Wilkerson is the wife of J. F. Wilkerson and the sister of appellant, Virgil Bracken, who was duly served with summons and testified in the trial of the case. The motion to vacate the decree was filed during the term at which the decree was rendered. It is well settled that courts have control over their orders and decrees during the term at which they are made, and for sufficient cause may, either upon application or upon their own motion, modify or set them aside. *American Building & Loan Ass'n* v. *Memphis Furniture Manufacturing Co.*, 185 Ark. 762, 49 S. W. 2d 377.

It is not alleged in the motion to vacate that Mr. Holland was unauthorized to appear for the Wilkersons, but their affidavit is attached to the motion which states that they have been residents of Colorado for the past four years; that they were not served with summons; and did not employ Mr. Holland or any other attorney to represent them in the case. It is not charged that Mr. Holland appeared for the Wilkersons through mistake or that such appearance was fraudulent and without their consent. It would not be unusual in a case of this kind for the resident defendant to employ counsel to represent his nonresident sister and brother-in-law with their knowledge and consent. It is reasonable to assume that if the Wilkersons had not known of the suit in time

to defend it, and had not consented to the appearance of Mr. Holland in their behalf, such facts would have been made known to the court and set out in the motion to vacate the decree. The record discloses that Mr. Holland had possession of the deed from the state to the Wilkersons, and this deed was introduced in evidence. Under all these circumstances, we are unable to say that the chancellor abused his discretion in refusing to vacate the decree as to appellants, J. F. Wilkerson and wife.

Appellees having waived the question in their brief, we will treat the proceeding herein as an appeal from the original decree. The remaining question is whether the trial court erred in holding the two state deeds to appellants void and ordering their cancellation. The complaint, as amended, alleged: "The lands were incorrectly described in the published list of delinquent lands, and in the clerk's certificate to the State, and in the State's deeds to the defendants." The deeds from the state to appellants described the two tracts as "Lots 1 to 12, Block 15, Prairie View Addition," and "Lots 1 to 12, Block 16, Prairie View Addition." The lands were thus described in the delinquent list, the clerk's certificate to the State, and a confirmation decree rendered in favor of the State in 1937.

The testimony discloses that the original plat of Prairie View Addition to the city of Fort Smith, Arkansas, was filed November 30, 1897. The addition consisted of 16 lots comprising approximately 5 acres each and numbered 1 to 16, inclusive. Lots 1 to 8, inclusive, constituted the north half of the addition and lots 9 to 16, inclusive, the south half, with a 50-foot street dividing the two halves. In 1905 the owners of the north half of the addition (lots 1 to 8, inclusive) subdivided it into 16 blocks with each block divided into 12 lots. A plat of the subdivision was filed of record on January 13, 1906, and is officially described as "Revised Plat of Lots 1, 2, 3, 4, 5, 6, 7, & 8 of the Plat of Prairie View." Blocks 15 and 16 of the revised plat are a part of lots 1 and 2 of the original addition. It will be observed that there is neither a block 15 nor a block 16 in Prairie View Addi-

tion. The lots in controversy are 12 lots in block 15 and 12 lots in block 16, not of "Prairie View Addition" but of "Revised Plat of Lots 1, 2, 3, 4, 5, 6, 7, & 8 of the Plat of Prairie View."

Leigh Kelley, who owned property in the subdivision and was engaged in the real estate business, testified that there was general confusion in the identity of the lots and blocks of the revised plat of lots 1 to 8, inclusive, of Prairie View Addition, as against the lots of the unrevised portion of the original Prairie View Addition. This confusion was demonstrated by example. When asked how the lands in the subdivision had been conveyed between individuals since the revised plat was filed, the witness answered: "For those who are careful in descriptions they have been conveyed as lot and block number of the Revised Plat of lots 1 to 8, Prairie View Addition. A great many people have conveyed them, however, as lot and block number in the revised plat of the north half of Prairie View Addition, but an accurate description should be 'of the Revised Plat of Lots 1 to 8, Prairie View Addition.' "

In *Buckner* v. *Sugg,* 79 Ark. 442, 96 S. W. 184, this court, in commenting upon the sufficiency of the description of lands in a tax proceeding, said: "It is well settled, not only by the decisions of this court, but by the adjudged cases in the courts of other states, as far as we can discover, that, in order to make a valid assessment and sale of land for taxes, the land must be described with certainty upon the assessment rolls and in all subsequent proceedings for the enforcement of payment of the tax. The chief reason for this requirement is that the owner may have information of the charge upon his property. It has sometimes been said that a description that would be sufficient in a conveyance between individuals would generally be sufficient in assessment for taxation. We do not, however, consider that a safe test. The description in tax proceedings must be such as will fully apprise the owner, without recourse to the superior knowledge peculiar to him as owner, that the particular tract of his land is sought to be charged with a tax lien.

It must be such as will notify the public what lands are to be offered for sale in case the tax be not paid." In *Cooper* v. *Lee,* 59 Ark. 460, 27 S. W. 970, this court said: "A description which is intelligible only to persons possessing more than the average intelligence, or the use and understanding of which is confined to the locality in which the land lies, is not sufficient." These statements have been cited with approval in many subsequent cases. See, *Beck* v. *Anderson-Tully Co.,* 113 Ark. 316, 169 S. W. 246; *Guy* v. *Stanfield,* 122 Ark. 376, 183 S. W. 966; *Brinkley* v. *Halliburton,* 129 Ark. 334, 196 S. W. 118, 1 A. L. R. 1225; *Buchanan* v. *Pemberton,* 143 Ark. 92, 220 S. W. 660; *Shelton* v. *Byrom,* 206 Ark. 665, 177 S. W. 2d 421.

In *Massey* v. *Bickford,* 208 Ark. 685, 187 S. W. 2d 541, the validity of a tax sale was involved where the property was described as "Lot 5, Block 6, Fishback No. 2 Addition to the City of Fort Smith." The evidence disclosed that there was a "Fishback Addition" but no "Fishback No. 2 Addition" in Fort Smith. This court held the description insufficient to convey title and the tax proceedings based thereon void and not subject to confirmation. It was urged there, as it is here, that the lot might be definitely located by proof *aliunde,* but we said: "This cannot be true. Since the description places the lot in Fishback No. 2 Addition, no amount of proof *aliunde* could locate it in an addition that does not exist." See, also, *Boswell* v. *Jordan,* 112 Ark. 159, 165 S. W. 295. Under the authorities cited, we think the descriptions employed in the tax proceedings in the instant case were defective and misleading to any person only ordinarily versed in such matters. It is undisputed that there is neither a block 15 nor block 16 in Prairie View Addition and no amount of testimony would cure this defect in the description. The trial court was warranted in finding that the descriptions were insufficient and the tax proceedings based thereon, including the decree of confirmation, void and of no effect.

Appellants also contend that appellees are barred from attacking the confirmation decree by Act 423 of 1941 which provides that all attacks upon such decrees

after one year shall be taken as collateral and ineffectual, except in those cases where the taxes have actually been paid. The confirmation decree herein was rendered in 1937 and we have held that Act 423 of 1941 does not apply to confirmation decrees rendered prior to passage of the Act. *Schuman* v. *Walthour,* 204 Ark. 634, 163 S. W. 2d 517; *Lumsden* v. *Erstine,* 205 Ark. 1004, 173 S. W. 2d 409, 147 A. L. R. 1132.

Since we hold the deeds to appellants void because of the insufficiency of the descriptions, we find it unnecessary to determine whether the tax proceedings were also void because the sales record fails to show a sale of the property to the State, and whether such defect may be cured by confirmation.

Affirmed.

HOLT, J., not participating.

FLOYD *v.* RICHMOND.

4-8074 199 S. W. 2d 754

Opinion delivered February 24, 1947.

Rains & Rains, for appellant.

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

HOLT, J. July 20, 1946, appellees brought this action against appellant to recover alleged compensatory and punitive damages for cutting down a number of cedar trees on their land.

They alleged in their complaint that appellant went on land which they owned and cut down and destroyed twenty cedar trees without permission or authority and that appellant knew that the land and trees were the property of appellees. They further alleged "that prior to the cutting of the said cedar trees the property was exceptionally suitable and desirable for building sites, but the cutting and destruction of said trees reduced and diminished the value of the property, and that because

of the willful and unlawful acts of the defendant in going upon the property of the plaintiffs and cutting and destroying the growing trees thereon, the plaintiffs have been damaged in the sum of $1,000," and prayed for compensatory damages accordingly. They further alleged that appellant, in cutting the trees, did so willfully and maliciously and prayed for punitive damages in the amount of $1,000.

Appellant answered with a general denial. A jury awarded appellees $200 for compensatory damages, but denied their prayer for punitive damages.

This appeal followed.

At the outset, we are met with appellees' contention that the bill of exceptions was not filed in time and should not be considered here as a part of the record. While a decision of this question is not required in view of our conclusions, since it appears to be of first impression, and due to its importance we proceed to dispose of this issue. The answer must depend upon our construction of Act 10 of 1943, amending § 1543 of Pope's Digest.

Section 2832, Pope's Digest, provides that the Crawford Circuit Court shall convene in regular term on the first Monday in July and again on the first Monday in November. Judgment in the present case was had March 29, 1946, on an adjourned day of the regular November, 1945, term, and appellant was allowed 120 days to prepare and file a bill of exceptions. The regular July, 1946, term convened on July 1, and on August 24, 1946, an adjourned day of the July, 1946, term, and after the 120 days originally granted by the court had expired, but before the expiration of the time for appeal to this court, the trial court granted appellant 45 days in addition to the original 120 days within which to file bill of exceptions and appellant duly filed his bill of exceptions within this extended time.

In these circumstances, appellees say: "It is the contention of the appellees that Act No. 10 of the Acts of Arkansas for 1943, which amends § 1543 of Pope's Digest of the Statutes of Arkansas, applies only to the granting

of an extension of time for filing a bill of exceptions during the same term of court, and has no application where the term of court at which the original time was granted has expired and a new term has been convened by which the court loses jurisdiction of its judgments rendered in the previous term of court."

We think appellees wrong in this contention.

Section 1543 of Pope's Digest, prior to the amendment by Act 10 of 1943, provided: "The party objecting to the decision must except at the time the decision is made, and time may be given to reduce the exception to writing, *but not beyond the succeeding term,* but the parties may agree that exceptions to all decisions made during the trial are saved without being especially mentioned at the time the decision is made." As amended, it now reads: "Section 1543: The party objecting to the decision must except at the time the decision is made. The judge who presided at the trial, or if he shall die or become incapacitated his successor in office, may give or extend time to reduce the exceptions to writing, and this may be done by the judge in vacation as well as in court, and may be done after as well as before the expiration of any time previously given. The parties may agree that exceptions to decisions made during the trial are saved without being especially mentioned at the time the decision is made."

"Section 2. Nothing in this Act shall be construed to repeal or amend any provision of law fixing the time for an appeal nor fixing the time within which the record on appeal must be filed in the Supreme Court."

Until this amendment became effective, appellees' contention found support in our decisions. (*Carroll* v. *Sanders,* 38 Ark. 216, and *Fernwood Mining Company* v. *Pluna,* 136 Ark. 107, 205 S. W. 822.)

It will be observed that before § 1543 was amended, it contained this specific provision: "Time may be given to reduce the exception to writing, but not beyond the succeeding term." As amended, the words "but not beyond the succeeding term" were eliminated and it now

provides that the court "may give or extend time to reduce the exceptions to writing . . . in vacation as well as in court, and . . . after as well as before the expiration of any time previously given," provided that the extra time given may not extend beyond the period allowed for appeal to this court. We think it obvious that the Legislature clearly intended, by this amendment, to give the court the power to grant or extend the time to file a bill of exceptions, in vacation as well as in term, and after as well as before the expiration of time previously given, provided the extension does not extend beyond the time for appeal, unhampered by an intervening regular term of court, so that it now has the power to grant the extension regardless of the intervening regular term, and we so hold.

Coming now to the merits of the case, it appears that appellees (plaintiffs below) based their right to recover primarily on the reduced value of their real property resulting from the severance of the trees and not for the value of the trees in their detached form, and tried the case on this theory.

The evidence was to the following effect: Appellant testified: "Q. This old wire that you spoke of, is that where the fence was when you went out there? A. That is right, because they shaded my trees in the evening. . . . Q. You didn't say anything at that time (when the road was put in) about having a strip on the west side of that road? A. I didn't know it. Q. In this 45 years that they had the property you didn't claim a bit of it? A. That's right. Q. You considered (the fence) as your west line as it runs along the apple orchard? A. We used it as that. . . . Q. Claude, at the time that you cut these trees, you hadn't at that time claimed any right to the land (west of the fence)? A. No, sir. Q. You had never claimed that you owned that property at the time you cut them? A. No, sir. . . . Q. You just walked over there and cut them? A. Yes, sir. . . . During the eight years that you lived there, you did consider that (fence) the line? A. We did use that for the line. Q. And you accepted it as such? A. We never had any

objections to each other. Q. You did consider it the line? A. Yes, sir."

There was other testimony that the land belonged to appellees and they had claimed it adversely and it was under fence for a period far beyond seven years. It was about three miles from Van Buren, one quarter of a mile from highway 59, and on the main route through Dora, the Pump Station, Greenwood Junction and Moffit, Okla. Approximately twenty-two cedar trees, some of them sixteen to eighteen inches in diameter, were cut by appellant on the east side of forty acres owned by appellees. Appellant had built his own home about 150 yards east of the trees here in question. From pictures and other evidence the land on which these cedars stood was on an elevation and desirable as building sites. There was testimony that the land had been damaged from $500 to $700 by the severance of the trees by appellant and that the difference in value of the land before the trees were cut down and immediately thereafter, was from $500 to $700.

Appellant has assigned twenty-one alleged errors in his motion for a new trial, and those which he argues here are presented in separate groups. We consider them as presented.

(1-2-3-4 and 21)

Under these assignments, appellant questions the sufficiency of the evidence. When the above and all the testimony is considered in the light most favorable to the jury's verdict, and to appellees, as we are required to do, we think it substantial, and ample, to warrant the jury in finding, as they must have, that appellant, without permission or right, went upon land belonging to appellees, and cut down trees belonging to appellees to their damage in the amount awarded.

On the measure of damages in a case of this kind, the rule announced in *Laser* v. *Jones,* 116 Ark. 206, applies. In that case action for damages was brought under § 7976 of Kirby's Digest, now § 1299 of Pope's Digest, and it was there said: "What is the measure of damages

against one who willfully destroys shade trees growing and being on the lands of another?

"In the case of *Fogel* v. *Butler,* 96 Ark. 87, 131 S. W. 211, it was said that the word value, as here employed, meant market value. The term 'market value' is one which has been defined, in its various applications, in many decisions. A number of these definitions are given in Words and Phrases, under that title, and among others so given are the following:

" 'In estimating the market value of property, all capabilities of the property and all uses to which it may be applied are to be considered. *Seaboard Air Line Ry.* v. *Chamblin,* 108 Va. 42, 60 S. E. 727.'

" 'The "market value of property" is its value for any use to which it may be adapted, and in estimating its value all the uses of which the property is susceptible should be considered, and not merely the condition in which it may be at the time and the use to which it may have been put by the owner. In re *Westlake Ave.,* 40 Wash. 144, 82 Pac. 279, (quoting and adopting the definition in *Seattle & M. R. Co.* v. *Murphine,* 30 Pac. 720, 4 Wash. 448).'

"The statute refers to 'any tree placed or growing for use or shade,' and this language indicates the intention of the Legislature to permit the jury to consider the use to which any tree was adapted in assessing the damages for its destruction. It is a matter of common knowledge that there are many trees which have but little value, except for shade; yet such trees would add greatly to the value of any property where shade was desired.

"(2) It is, therefore, proper to consider the use which may be, and is, made of the tree, and if the tree adds to the value of the land, while its destruction detracts from its value, then this difference in value is the measure of the recovery, even against one who, without malice, destroys it."

So here, it was proper to consider the use which may be made of these cedar trees, such as their value for

shade, ornamental purposes, and for building sites, and if these trees added to the value of the land in any way, and if their destruction detracted from that value, then as said in *Laser* v. *Jones, supra,* "this difference in value is the measure of the recovery, even against one who, without malice, destroys it."

(8-9-13)

Appellant also argues that any testimony tending to show that the value of the property was reduced for building sites by severance of the trees was incompetent. We cannot agree. What we have said above answers this contention.

(4-10-19)

Appellant next contends "that there was nothing in the record whatever to warrant the submission to jury of the question of punitive damages, and that in so doing the learned trial court gravely prejudiced this appellant and committed reversible error." We think this contention untenable for the reason that, as has been indicated, there was evidence from which the jury might have found that there was an element of willfulness in appellant's action in severing the trees and this warranted instructions on this issue. "To justify an award for punitive damages there must be malice, express or implied, or some element of willfulness or wantonness." *Missouri Pacific Railroad Company* v. *Yancey,* 178 Ark. 147, 10 S. W. 2d 22. The instructions which the court gave on this point correctly declared the law, and certainly since the jury returned a verdict in appellant's favor on this issue, he could not have been prejudiced.

Appellant next complains about an instruction given by the court on its own motion which appellant says contradicts itself. It appears from the record that other instructions properly declaring the law had already been given and this instruction was in effect repetition. In any event, it appears from the record that appellant made no general or specific objection to this instruction and we are unable to find an assignment of this alleged

error in appellant's motion for a new trial. Appellant is therefore not in position to complain.

(6-7-11)

Finally appellant says: "Were the trees on appellees' land?" This was a disputed question of fact for the jury to determine under proper instructions, which the court gave.

On the whole case we find no error, and accordingly the judgment is affirmed.

JOY *v.* STATE.

Criminal 4446 199 S. W. 2d 745

Opinion delivered February 24, 1947.

Boyd Tackett and *Thomas M. McCrary,* for appellant.

Guy E. Williams, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

SMITH, J. An indictment against appellant charged him with the offense of possessing beer, for purposes of sale, in a prohibited district. In a response to a motion filed by appellant, the prosecuting attorney filed a bill of particulars which recited that he was unable to state the actual percentage of alcohol by weight of the beer, but that a label on each bottle of the beer recited that it contained not more than five per cent. of alcohol by weight.

A stipulation was entered into by counsel for the state and for appellant reading as follows: "At this time it was stipulated by and between the parties that the beer and ale in question in this case contains not less than one-half of one (1%) per cent. alcohol by weight and not more than five (5%) per cent. alcohol by weight; and that Polk county is known as a 'dry county,' the people of the county having by a majority vote voted against the manufacture and sale of intoxicating liquors under Initiated Act 1 of 1942, the election being held during the month of April, 1946."

Appellant was found guilty upon his trial, and fined $250, and from that judgment is this appeal.

Two questions are presented for decision: First, whether it is a violation of the law to have possession of beer, in dry territory, containing more than one-half of one percent., but less than five per cent. of alcohol by weight, for purposes of sale; and second, if so, whether appellant had such possession.

The beer was found in a building occupied by Post No. 4451 of the Veterans of Foreign Wars, in the city of Mena, in Polk county, which, as stipulated, had become

"dry territory" pursuant to an election held under authority of Initiated Act No. 1 of 1942, appearing at page 998 of the Acts of 1943.

In § 2 of this Act, it is provided that: "Intoxicating liquor is hereby defined to include any beverage containing more than one-half of one per cent. of alcohol by weight," and § 6 of the Act recites that: "It is hereby expressly declared that this Act shall be cumulative to the liquor laws now in force in this state, . . ."

One of the laws on the subject is found in paragraph C of § 14134 of Pope's Digest, which reads as follows: "Any person who shall by himself or his employee, or servant, or agent for himself, or any other person, keep or carry around on his person, or in any vehicle or leave in a place for another to secure, any intoxicating alcoholic liquor with intent to sell the same in violation of this Act, . . . shall be guilty of a misdemeanor . . ." We conclude therefore that it is a violation of the law for one to have beer, or other intoxicating liquors in his possession in dry territory for purpose of sale. The remaining question is whether appellant had possession of the beer in question for purpose of sale. If the beer had been or was being sold, the implication is that it was possessed for that purpose. Was it so possessed?

Pursuant to a legal search warrant, the chief of police and other officers of the city of Mena raided the building occupied by the Post. When the officers entered the building they found only appellant present. He was the Post Commander. The officers found thirty-six cases of assorted beer and ale, and a quantity of beer which had been placed in the ice box to cool. A number of empty bottles were found inside the building, and a number of broken bottles were on the floor and around the tables in the room. There was found also some slot machines having money in them, and appellant proposed, when the officers took charge of the machines, that if the machines were not disturbed, he, appellant, would have the place cleaned up, and that they would not have any more beer there. The officers testified that appellant stated that they were selling the beer and operating the

slot machines for the purpose of raising money for a building fund for the Post, but the Post Commander denied making that statement.

Appellant admitted, however, that he was the Post Commander, and that the beer had been bought in Ft. Smith and hauled by truck to Mena, and had been paid for out of the Post fund which had been started by the sale of an automobile. He further testified that the beer had been bought for the use of the members of the club, although he admitted that one person, not a member, had drunk beer in the clubroom. There was a building fund box located on the bar, where the beer was served, in which box persons served dropped as much as a quarter of a dollar, although he testified that this was not required and was not always done, and that members sometimes drank beer without making a deposit. But it is fairly inferable that members were not expected to sponge on the club.

This witness also testified that the end sought was to augment the building fund, and it is certain, and no testimony was required to prove, that this could not be done by furnishing free beer to the Post members or visitors. Dances had been given to increase the building fund, but these had not been profitable, and the witness candidly admitted that, but for what he called contributions to the building fund, the beer would not have been provided.

It is not intimated that appellant derived or expected any personal gain or emolument from the disposition of the beer, but this was not essential to constitute a sale. If he aided, assisted in making and participated in the sale, he was as much responsible and liable as if the sale had been made for or by him, or for his account; nor may he escape liability because he was not the owner of the beer, as ownership would be and is unimportant if he participated in the sale. *Bird* v. *State,* 175 Ark. 1169, 299 S. W. 40.

The law may not be evaded by resort to subterfuge designed to conceal the character of the transaction, and as no one testified that the beer had been bought to be

given away, the court sitting as a jury was warranted in finding that it had been bought to be sold to augment the building fund, and that the contributions made by depositing money in the box on the bar, placed there for that purpose, was the method by which the sales were made. There could be no higher proof that the beer was possessed for purposes of sale, than the proof of the fact that it was sold, and the judge was warranted in finding that the club headquarters was, within the meaning of the portion of § 14134, Pope's Digest, above quoted, "a place for another to secure" the beer possessed, which could not be sold in Mena without violating the law.

The judgment is therefore affirmed.

BRADSHAW *v.* STATE.

Criminal 4437 199 S. W. 2d 747

Opinion delivered February 24, 1947.

John W. Baxter, for appellant.

Guy E. Williams, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

Ed. F. McFaddin, Justice. Appellant was charged with the crime of rape. He was convicted of assault with intent to rape; and brings this appeal. The motion for new trial contains nine assignments, which we group and discuss in convenient topic headings.

I. *Sufficiency of the Evidence.* This embraces assignments 1, 2 and 3. The defendant was an employee of a carnival company that was showing at Green Forest in Carroll county. He operated a concession known as a "spinning wheel," where prizes could be sought by the turning of a wheel and the stopping of an indicator at a selected number. On Saturday afternoon, July 27, 1946, the prosecuting witness—a girl 21 years of age, but with the mentality of a nine-year-old child—wandered from one concession to another. Several times she stopped at the defendant's concession, and he engaged her in conversation. About 5:30 p.m. defendant was seen sitting on a bench talking with the girl, and when she went towards the ladies' rest room, he was seen to follow her. This rest room was partially surrounded by trees and shrubbery, and was approximately fifty yards from the carnival concessions.

Some 30 minutes after the defendant was seen to follow the girl in the general direction of the rest room, the girl returned to the carnival, crying, and said "some

old man'' had choked her. This was about 6:00 p.m. The girl's mother was summoned, and then the girl told her of the act of rape. Suspicion was directed against the defendant; and a search for him revealed that a fellow-employee had informed the defendant that if he were guilty, he had better leave; and, coincidentally, that the defendant had packed his bag and boarded a bus for Fayetteville, where his family lived. He was arrested in that city when he alighted from the bus, and the next day was returned to Carroll county, and identified by the girl as the man who had choked and raped her. Several witnesses testified as to bruises on the girl's throat, indicating that she had been choked. A physician testified as to rupture of the hymen, etc. From the witness stand, the girl told about the defendant taking her over the fence, and choking her, and ravishing her forcibly and against her will. There was other evidence which we need not detail.

The defendant stoutly denied his guilt, and put his good character and war record in evidence. His military record is that of a hero; and it is a pity for such a splendid record to be sullied by this affair. The jury found the defendant guilty of assault with intent to rape. We conclude that the evidence was legally sufficient to sustain that verdict, or even the greater offense of rape. This conclusion disposes also of assignment 4 in the motion for new trial, in which appellant says that the verdict was the result of passion and prejudice. After examining the entire record, we think the jury's verdict reflected leniency, rather than passion and prejudice.

II. *Rape, as Including also the Crime of Assault with Intent to Rape.* Defendant argues that he was charged with and tried for rape; and that the circuit court erred in instructing the jury as to the crime of assault with intent to rape. This argument (based on assignment 5 in the motion for new trial) cannot be sustained. In *Pratt* v. *State,* 51 Ark. 167, 10 S. W. 233, Chief Justice COCKRILL, speaking for this court, said:

''An assault with intent to commit rape is included in the charge of rape, and a conviction may be had of

the former offense under an indictment for the latter. Mans. Dig., § 2288; *Davis* v. *Sate,* 45 Ark. 464; 1 Bish. Cr. Law, § 809.

"It is conceded that the testimony would sustain a verdict for rape. That being true, there can be no question of its sufficiency to sustain the verdict for assault with intent to commit the offense. If it be conceded that the testimony would logically demand a verdict of guilty of rape or nothing, it does not follow that a conviction of an attempt to rape should be avoided here. The jury had the power to return the verdict and the offense is less than the crime charged."

The rule announced in *Pratt* v. *State, supra,* has been followed in subsequent cases, some of which are: *Paxton* v. *State,* 108 Ark. 316, 159 S. W. 396; and *Sherman* v. *State,* 170 Ark. 148, 279 S. W. 353; see, also, 52 C. J. 1124. Since, under the indictment for rape, it was permissible for the jury to convict the defendant of the crime of assault with intent to rape, it follows that the court was correct in instructing as to the lesser offense; and no complaint is made as to the wording of these instructions on this lesser offense.

III. *Corroboration.* The defendant insists that the testimony of the prosecuting witness was not corroborated, and that the court should have instructed the jury that corroboration was necessary. This is assignment 6 in the motion for new trial. The answer to this argument is two-fold. In the first place, in a rape case, the testimony of the prosecutrix does not have to be corroborated. This was definitely decided in *Hodges* v. *State,* 210 Ark. 672, 197 S. W. 2d 52 (decided by this court on November 11, 1946). See, also, 44 Am. Juris. 969, 52 C. J. 1099, and the annotation in 60 A. L. R. 1124. One of the essential elements of the crime of rape is that the act was committed forcibly and against the will of the prosecutrix. The existence of that essential prevents the prosecutrix from being an accomplice. See *Hummel* v. *State,* 210 Ark. 471, 196 S. W. 2d 594.

The second and final answer to defendant's argument concerning corroboration is the fact that the testi-

mony of the girl was corroborated. The bruises on her throat, her instant crying and complaint—these, and other facts—afforded corroboration, even though such corroboration was not legally necessary.

IV. *Refusal to Give a Cautionary Instruction.* In assignment 9 in the motion for new trial, defendant complains of the court's refusal to give defendant's requested instruction 1, which reads:

"I charge you that prejudice is liable to be aroused against the accused by reason of the heinousness of the crime of which he is accused, and, because of the difficulty of a defense against this crime and the ease with which it can be fastened on an innocent and reputable person, you should exercise the utmost discretion to avoid attaching undue weight to the uncorroborated accusations of the prosecuting witness."

In a prosecution for rape it is proper for the court to give a suitable cautionary instruction. See 52 C. J. 1123; 44 Am. Juris. 979; and the annotation in 130 A. L. R. 1489. The giving of such an instruction usually rests in the sound discretion of the trial court. The words of Mr. Justice Wood in *Rayburn* v. *State,* 69 Ark. 177, 63 S. W. 356, on cautionary instructions are worthy of repetition:

"Circumstances and occasions do frequently arise, however, when cautionary instructions, drawn in proper form, given at the proper time, and in the proper manner, are important and necessary. The discretion of the trial judge will not be limited in these matters, unless it has been grossly abused to the prejudice of the accused."

Such an instruction in a case like this one should tell the jury, in effect: that the crime charged is a serious one, and such a charge is easily made and hard to contradict or disprove; that it is a character of crime that tends to create a prejudice against the person charged; and, for these reasons, it is the duty of the jury to weigh the testimony carefully, and then determine the truth with deliberative judgment, uninfluenced by the nature of the charge.

But in the case at bar there are two reasons why the appellant is not entitled to a reversal based on the absence of a cautionary instruction. In the first place, the giving of a non-prejudicial cautionary instruction was discretionary with the court, and no abuse of discretion was shown in this case. In the second place, the instruction requested by the appellant was erroneous, in one particular at least, in that it told the jury "to avoid attaching undue weight to the uncorroborated accusations of the prosecuting witness." This language could have led the jury to believe that corroboration was required and not present, so that court was correct in refusing it.

V. *Refusal to Charge on Circumstantial Evidence.* In assignments 6 and 7 in the motion for new trial, appellant complained of the refusal of the trial court to give his requested instruction, which read as follows:

"I charge you that circumstantial evidence is proof of a fact shown by circumstances. The chain of circumstances must point unerringly to the guilt of the accused, and if the chain of circumstances could have happened and the accused be innocent of the crime charged, they cannot be considered against him."

The court gave the jury 26 instructions covering every phase of the case, except circumstantial evidence. Some of the instructions given covered burden of proof, presumption of innocence and reasonable doubt. Since instructions were given covering these points, and since the state was relying on direct evidence—the testimony of the prosecuting witness—rather than circumstantial evidence, it follows that the trial court did not abuse its discretion in refusing the requested instruction on circumstantial evidence. See *Meadors* v. *State,* 171 Ark. 705, 285 S. W. 380; *Adams* v. *State,* 176 Ark. 916, 5 S. W. 2d 946; *Frick* v. *State,* 177 Ark. 404, 6 S. W. 2d 514; *Burrow* v. *State,* 177 Ark. 1121, 7 S. W. 2d 28; and West's Arkansas Digest, "Criminal Law," § 814.

VI. *Refusal of the Court to Require Certain Evidence to be Restated to the Jury.* This is assignment 8 in the motion for new trial. In the course of the prosecut-

ing attorney's closing argument to the jury, he commented on the evidence of a certain witness. The defendant's attorney then asked the court to have the stenographer read to the jury the testimony of such witness; and the record reflects the following:

"By the Court: Request denied, and exceptions noted. The jury may remember that point. However, if they do not, they may request that it, or any other testimony in this case, be read, and the court will have it read.

"(No member of the jury requested that the testimony requested by Mr. Baxter be read.)"

In 16 C. J. 857, and also 23 C. J. S. 421 the rule is stated:

"REPEATING OR READING TESTIMONY ON DISAGREEMENT. The common practice is, where a court stenographer is employed in taking the testimony, to have it read from his notes, where there is a disagreement as to what the witness said, and upon the request of the jury the court should direct the re-reading of depositions offered in behalf of accused. But where no predicate is laid for the impeachment of a witness who has testified before the jury, or where none of the jury express a desire to hear the testimony re-read, and it may be assumed that they heard it all, it is not erroneous to refuse to permit the testimony to be read to the jury." See, also, *Lister* v. *State,* 3 Tex. App. Rep. 17, and *People* v. *Harris,* 169 Calif. 53, 145 Pac. 520. In the last-cited case the Supreme Court of California, in affirming the action of the trial court in denying a motion to restate the testimony just as was made in the case at bar, said:

"This motion was made in the presence of the jury and they were told that if they desired the testimony of these witnesses read, the court would have it done; that if they were satisfied that they had heard it no purpose could be subserved by reading it again. None of the jury expressed any desire to hear it re-read, and it must be assumed that they heard it all and did not need to have any part of it re-read to them."

We have examined all of the assignments contained in the motion for new trial and find none to possess merit, so the judgment is affirmed.

KENDRICK *v.* BOWDEN.

4-8073 199 S. W. 2d 740

Opinion delivered February 24, 1947.

E. L. Hollaway, for appellant.

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

MCHANEY, Justice. Appellees are the heirs at law of L. T. Bowden who died intestate on March 26, 1931,

and who was the owner of the 20 acres of land here involved as a part of his homestead. Ina Louise Bowden, a daughter of L. T. Bowden, one of the appellees, is a minor and is represented in this action by her guardian, appellee C. M. Bowden.

The 20-acre tract forfeited in 1931 for the 1930 taxes, (as also 72 other acres belonging to L. T. Bowden, all constituting his homestead, not here involved) and was sold to the State under the following description: "Part northeast quarter of the southeast quarter of section 4, township 7 north, range 9 west, containing 20 acres." The taxes became delinquent after the death of L. T. Bowden. On February 7, 1938, appellant, Joe Chenowith, purchased said 20-acre tract from the State, receiving a deed therefor describing the land as set out above. He thereafter sold same to appellant Kendrick. Chenowith and Kendrick have been in the possession of said tract since the purchase from the State.

Appellees brought this action to cancel the deed from the State to Chenowith and his deed to Kendrick. The answer denied that appellee's ancestor was the owner of said tract at the time of his death, or that it was a part of his homestead. They admitted that Chenowith purchased from the State under said description and the deed from Chenowith to Kendrick. They plead their possession as a bar to the action. Chenowith entered this additional plea, according to their abstract: "States that the plaintiffs and each of them are estopped from the record from claiming the said tract of land now owned by the defendant, Joe Lyle Kendrick, is the homestead of the said L. T. Bowden."

Trial resulted in a decree for appellees, holding that the land is a part of the homestead of their father and that she (Ina Louise) being a minor was entitled to redeem from the forfeiture and sale to the State; that the rents and profits should be offset against the taxes paid; that the land should be charged with a lien for $21, the amount paid the State, with 6 per cent. interest from February 7, 1928, a total of $31.08 at the date of trial;

and that she recover the possession of said tract. This appeal followed.

We think the trial court correctly treated the action as one to redeem by the minor and properly permitted a redemption. We are not unmindful of the rule that one cannot consistently petition to redeem from a tax sale and at the same time question the title of the purchaser. *Sparks* v. *Farris,* 71 Ark. 117, 71 S. W. 255, 945. Here, complainant made no particular allegation of the invalidity of the tax forfeiture and sale, and the allegation made, that "each and everything done by all the officers connected with the delinquency, the sale, and report of sale were all done unlawfully, and are void and of no effect," is so general as to "cover everything and touch nothing," as has been said of the mother hubbard. It was insufficient to raise or charge any particular invalidity in the forfeiture and sale.

Nor can we agree with appellants that, because § 8925 of Pope's Digest has no saving clause in favor of infants, their possession of said tract since 1938 has ripened into title and that she is barred under the two-year statute provided by said section. This because of §§ 8939 and 13860 of Pope's Digest. Two of our recent decisions construing §§ 8939 and 13860 are *Schuman* v. *Westbrook,* 207 Ark. 495, 181 S. W. 2d 470, and *Reynolds* v. *Haulcroft,* 209 Ark. 266, 189 S. W. 2d 930.

It is also argued that the court erred in holding that the 20-acre tract was the property of appellees. The complaint alleged that appellees are the heirs of and the owners by inheritance from T. L. Bowden, and that the land was a part of the homestead of said Bowden. The answer denied these allegations. We do not think appellees were required to deraign the title prior to T. L. Bowden. They alleged that he owned the land at his death and that they are all his heirs at law. The evidence is undisputed that such is the fact. Appellant Chenowith testified that this land was the homestead of T. L. Bowden when he died and that the minor heir, his daughter, was living on the land with her father and mother. The case was not defended on the theory that the land was

not T. L. Bowden's homestead, but on the theory of adverse possession and *res judicata.* The title of appellees was, therefore, sufficiently established.

A further argument for reversal is that their plea of *res judicata* should have been sustained. We have copied above the exact language of this alleged plea, as set out in appellants' abstract. We think this so-called plea is wholly insufficient to raise the question of a former adjudication of the same subject-matter between the same parties. This court follows the general rule, supported by the weight of authority, "that one relying on the doctrine of *res judicata* must plead the prior adjudication." 30 Am. Jur., p. 984, § 255. In *Bolton* v. *Mo. Pac. Rd. Co.,* 148 Ark. 319, 229 S. W. 1025, we said: "The plea of former adjudication is one which, to be available, should be pleaded by answer as a defense. *Adams* v. *Billingsley,* 107 Ark. 38, 153 S. W. 1105. The answer tendering that plea should set out the facts upon which it is based, and the issue is not properly raised by a motion to dismiss which does not recite the facts upon which the plea is based." In the *Adams* v. *Billingsley* case, *supra,* this court held, by McCulloch, C. J., that a demurrer to a complaint, "Because the matters and things complained of by the plaintiff herein have been fully adjudicated by the court in another action in this court by and between the same parties, and in the same cause," that these matters did not constitute a ground for demurrer, "but should have been pleaded by answer as a defense."

Here, the plea is too indefinite to be a good plea of *res judicata.* It merely alleges a conclusion of the pleader that the appellees are estopped by the record from claiming the land as a homestead. Appellants would be required to allege the facts which they claim constitute the alleged estoppel.

We find no error, and the decree is accordingly affirmed.

SCHULTE *v.* SOUTHERN BUS LINES.

4-8075 199 S. W. 2d 742

Opinion delivered February 24, 1947.

[redacted]

Ward Martin, for appellant.

Henry Donham and *Smith & Sanderson,* for appellees.

ROBINS, J. This is an appeal from a judgment of the circuit court affirming an order of the Arkansas Public Service Commission which denied to appellant a certificate authorizing him to operate a motor passenger transportation line over State Highway 81 and U. S. Highway 65 from Hamburg (via a detour of about two and one-half miles off State Highway 81 to Ladelle) to Pine

Bluff, with a "shuttle" service from Star City to Gould and return.

The application of appellant was opposed by two other motor carriers, who asserted that existing facilities, provided by previously licensed carriers, were sufficient to handle traffic along the proposed route.

The highways of the state are constructed and maintained by the public and the convenience of the public is always the paramount consideration in determining the right of any carrier to use the highways. No carrier may have any vested right, by reason of its license, to the exclusive use of the highways for any given period. The General Assembly in the Act authorizing the issuance of certificates of authority for use of highways by carriers specifically provided (§ 9, sub-division (d), Act 367, approved March 26, 1941) that "no certificate issued under this Act shall confer any proprietary or property rights in the use of the public highways." See *Santee* v. *Brady,* 209 Ark. 224, 189 S. W. 2d 907. But a carrier who has been granted a license to operate over a given route has the right, under the law, when another carrier asks for a permit to operate over the same route, to oppose the granting thereof, and to show, if possible, that the existing service is adequate and that a duplication thereof by another carrier would not serve public convenience.

In the case at bar twenty witnesses testified on behalf of appellant and twenty-seven testified for appellees. The testimony on behalf of appellant indicated a need for additional service, while the effect of the evidence on behalf of appellees was to show that the existing service was entirely adequate. It may be said, however, that much of the criticism of the existing facilities by witnesses for appellant was directed to a period when abnormal conditions, brought on by the war, prevailed. It was shown that the city council of Monticello, a city on the route of the proposed line, had adopted a resolution asserting that the new service was not needed. The mayor of Star City, another town located on this route, testified that he considered the existing service adequate.

We try cases of this kind *de novo,* but it is the duty of the courts to accord due deference to the finding of the Commission, since it is the agency upon which the General Assembly has placed the duty to investigate and determine, in the first instance, the need for any proposed motor carrier service. 9 Am. Jur. 494; 51 C. J. 77; *East Tennessee, Virginia & Georgia Railway Company* v. *Interstate Commerce Commission,* 181 U. S. 1, 21 S. Ct. 516, 45 L. Ed. 719; *Louisville & Nashville Railroad Company* v. *Behlmer,* 175 U. S. 648, 20 S. Ct. 209, 44 L. Ed. 309; and *Illinois Central Railroad Company v. Interstate Commerce Commission,* 206 U. S. 441, 27 S. Ct. 700, 51 L. Ed. 1128.

A determination of the propriety of granting an application such as is here involved must always be governed by the peculiar facts shown; and a decision in such a case does not control consideration of another similar application on a subsequent occasion if a materially different fact situation may be proved. *Missouri Pacific Transportation Company* v. *Gray,* 205 Ark. 62, 167 S. W. 2d 636. A careful review of the evidence convinces us that the finding of the Commission, and of the circuit court, that public convenience would be best served by the denial of appellant's application is supported by a preponderance of the testimony.

Accordingly the judgment appealed from is affirmed.

LILLIE *v.* NUNNALLY.

4-8079 199 S. W. 2d 751

Opinion delivered March 3, 1947.

A. D. Chavis, for appellant.

Francis W. Wilson and *J. Bruce Streett,* for appellee.

McHaney, Justice. Appellants, other than Jewell Jones, are the heirs at law and beneficiaries under the will of their mother, Caroline Milner who died testate some 16 years ago and left to them the 160-acre tract of land here in controversy.

All of the appellants, except Dilsa Lillie and Caroline Billingsly, were defendants in the same court in a cause involving the same land, wherein appellees in this action were the plaintiffs in that, and which resulted in a decree on February 7, 1945, in favor of appellees, holding that they are the owners of 18 acres in a square in the southeast corner of the said 160-acre tract and a writ of assistance was granted to put appellees in possession of said 18-acre tract. No appeal was taken from said decree. This action was numbered 5527 on the chancery docket.

This present action was brought in August, 1945, by Dilsa Lillie and Caroline Billingsly against appellees and the complaint was later amended to include all the appellants as plaintiffs, including Jewell Jones. They sought to cancel the decree in case No. 5527, dated February 7, 1945, because "erroneous and fraudulent" and prayed that their title to said 160-acre tract be quieted, and for other relief.

Trial resulted in a decree dismissing the complaint for want of equity. As to appellants, Dilsa Lillie and Caroline Billingsly, the court found that they had each

conveyed their undivided interest in said 160-acre tract to appellees in 1932 in satisfaction of an indebtedness secured by mortgage to C. H. Bartlett given in 1930. C. H. Bartlett thereafter died and appellees are his heirs. As to the other appellants, including Jewell Jones, the court found that the former decree in case No. 5527 precluded any right of recovery by them on the plea of *res judicata* by appellees, because either the questions now raised were raised in that action and decided against them, or that they could and should have been raised and adjudicated in that action.

This appeal questions the correctness of this decree. We think the trial court was correct in so holding.

The first suit was filed by appellees on February 23, 1944. They alleged that, as grantees of Dilsa and Caroline, they were the owners of an undivided interest in the Milner 160-acre tract as tenants in common with the rest of the Milner heirs. The only question in dispute in that case was the location of the 18-acre tract claimed by appellees who asserted it was to be in the southeast corner of the quarter section, whereas the defendants in that action claimed it should be in the northeast corner. Dilsa and Caroline were not parties to that action because they had conveyed all their interest to appellees in 1932, and had no further interest in said 160-acre tract. In the present action they deny executing a deed to the appellees. They both admit execution of a mortgage to C. H. Bartlett in his lifetime and the original mortgage executed by Dilsa with her admitted signature thereon, and the deed executed by both are before us, and we have compared the signatures and find them to be the same. Moreover, the evidence given by the notary who took the acknowledgments of both and that of Mr. Nunnally who was present preponderate in favor of the court's finding that they both signed the deed.

As to Jewell Jones who claims one acre of the land awarded to appellees, when this suit was filed by appellants, appellees caused the writ of assistance theretofore authorized by the court in the original decree in No. 5527, to be issued by the clerk and to be served on Jones

by the sheriff. Jones thereupon applied to the court for a temporary injunction, and Jones appealed to this court and we affirmed. *Jones* v. *Bartlett,* 209 Ark. 681, 191 S. W. 2d 967. In his petition for injunctive relief, Jones alleged he did not appeal from the decree in 5527, "because all the heirs and interested parties in said lands were not made parties to this suit; that a new suit has been filed and is now pending in this court, involving the same land and the same issues, together with some new issues." But, as we have shown, "all of the heirs and interested parties" were made parties in the former suit, and it is conceded that the "same land and the same issues" were involved, "together with some new issues." But there are not any new issues involved in the case at bar, or, if there are, they could and should have been litigated in the former suit. So, the doctrine of *res judicata* applies and prevents appellants from maintaining this action. In *Ogden* v. *Pulaski County,* 189 Ark. 341, 71 S. W. 2d 1052, we said: "It is the general rule, which has been frequently announced by this court, that the parties to an action are bound to make the most of their case or defense and that a judgment of a court of competent jurisdiction operates as a bar to all questions in support of the cause or the defense, either legal or equitable, which were, or could have been interposed in the case."

The decree is correct and is accordingly affirmed.

AUCOIN *v.* AUCOIN.

4-8085 200 S. W. 2d 316

Opinion delivered March 3, 1947.

Rehearing denied April 7, 1947.

Kermit B. Duidroz and *M. P. Matheney,* for appellant.

John M. Shackleford, for appellee.

MINOR W. MILLWEE, Justice. Appellee, Glen Aucoin, instituted suit in the Union Chancery Court on November 14, 1945, against appellant, Ivy Aucoin, for divorce and for the custody of two children allegedly born of the marriage of the parties. The children are boys and, when suit was filed, were of the ages of three years and five months, respectively. As a ground for divorce, appellee alleged personal indignities and cruelty on the part of her husband.

Appellant filed an answer containing a general denial of the allegations of the complaint, but admitting appellee's residence in Union county and jurisdiction of the court. He also filed a cross-complaint in which he sought a divorce from appellee on the grounds of desertion and adultery. Appellant denied paternity of the

younger child, but asked for custody of both children in the event the court should find that the younger child was born of their marriage. Thereafter, appellee amended her complaint to ask for alimony *pendente lite,* support money for the children and attorney's fee.

A lengthy hearing in which 26 witnesses testified was concluded on April 3, 1946. The trial court made extensive findings in which it was determined that appellee had failed to sustain her charge of cruelty and indignities by sufficient evidence and her prayer for divorce was denied. On his cross-complaint, appellant was granted a divorce from appellee for desertion. The custody of both children was awarded to appellee, with the right of visitation in appellant at all reasonable times and places. Appellant was directed to pay $30 per month for the support and maintenance of the children. Appellee's prayer for alimony and attorney's fee was denied and each party was directed to pay their own costs. Both parties have appealed from a decree based on these findings.

The parties were living in Baton Rouge, Louisiana, when they were married on August 27, 1941. They continued to reside in Baton Rouge until after the first child was born on August 30, 1942. Appellant enlisted in the Coast Guard on October 8, 1942, and was stationed in Florida until he was transferred to the west coast in December, 1943. Appellee and the older child resided with appellant in Florida until he was transferred, when she returned to live with her mother in Baton Rouge.

Appellant was in and out of west coast ports until his discharge from military service on October 25, 1945. He obtained furloughs and visited in Baton Rouge in April, November and December of 1944, and in June, 1945. The parties cohabited as man and wife in April, 1944, although appellee testified that she advised appellant on this visit that she could no longer bear his ill treatment and wanted a divorce. This cohabitation was resumed on the night of November 7, 1944, which was the date of his next visit. Appellant left the following day and spent the rest of his November leave with his parents

who resided near Baton Rouge. He testified that he left at her request and upon her representation that the doctor had advised that she had only a short time to live and that she wanted to spend this time with the child. This was denied by appellee who testified that she could no longer endure his drinking and abusive treatment. This testimony is typical of the irreconcilable conflict in the evidence of the parties as well as that of many of their supporting witnesses who displayed much bias and partisanship in giving their testimony. We agree with the trial court that the character of most of the testimony is such that, "Solomon with all his wisdom would not know just what the truth is."

On her cross-appeal appellee argues that the trial court erroneously denied her prayer for divorce on account of cruel treatment by appellant, it being insisted that her action in refusing to cohabit with him after November 7, 1944, was justified by such treatment. Appellee testified that appellant struck her on several occasions and this testimony was corroborated by her mother and other witnesses. It is true that this testimony, standing alone, might warrant a decree in her favor, but these instances of ill treatment were denied by appellant and his witnesses. We think the preponderance of the evidence supports the chancellor's finding in favor of appellant on this issue, and that it would serve no useful purpose to detail this testimony.

Appellee also contends that the chancellor erred in refusing her prayer for costs and attorney's fee. When the appeal was lodged in this court we directed appellant to pay $50 attorney's fee and costs of printing appellee's brief, and appellant complied with this order. Under our statute (§ 4388 of Pope's Digest, as amended by Act 274 of 1945) the matter of the allowance of attorney's fees and suit money pending a divorce action is in the sound discretion of the court. *Kincheloe* v. *Merriman,* 54 Ark. 557, 16 S. W. 576, 26 Am. St. Rep. 60; *Hodge* v. *Hodge,* 161 Ark. 299, 255 S. W. 1090. Since the trial court correctly found that appellee was at fault in the separation of the parties and denied her prayer for divorce, we cannot say

there was an abuse of discretion in the court's refusal to allow attorney's fee and all costs to appellee. Nor can we say that the trial court was in error in the allowance of only $30 per month for support and maintenance of the two children. It is true that appellant has a good job and, while the allowance may not be termed a liberal one, we are unable to say that it is too small when all the circumstances are considered.

In granting appellant a divorce on the ground of desertion, the trial court made the following finding: "As to the allegation of desertion, she asserts that the reason she wanted a divorce was because she was tired of his cruel treatment, but it is an admitted fact on her part that she made up her mind to divorce him in November, 1944, more than one year before her complaint was filed and more than one year before the cross-complaint was filed. It is undisputed, when all the testimony is considered, that they did not live together as husband and wife after that time, and that was more than a year before the suit for divorce was filed, and under that view, and under the evidence, there is no question but that defendant has established in his cross-complaint the right to a divorce on the grounds of desertion." This finding is fully supported by the evidence.

The real question in the case involves the right to the custody of the three-year-old child. Appellant earnestly insists that the charge of adultery was well established and that this fact alone entitles him to the custody of the older child. Having determined that the charge of desertion made by appellant was well established, the chancellor found it unnecessary to determine whether appellee was also guilty of adultery. The trial court also decided that even though appellee was guilty of some infidelity, such determination would not change the award of custody to the mother in view of the child's tender age and the other circumstances in evidence. While there was some circumstantial evidence tending to show misconduct on the part of appellee, it was stoutly denied by her. Since we agree with the chancellor that the charge, if proved, would not necessarily change the award of

custody in the instant case, we think it would be better for all concerned that the unsavory evidence adduced on this issue be left out of this opinion.

In *Oliphant* v. *Oliphant,* 177 Ark. 613, 7 S. W. 2d 783, upon which appellant relies, this court indicated that it would have changed the custody of an eight-year-old daughter from the mother to the father if the latter had proved the charge of adultery against his wife. However, different results have been reached in other cases where misconduct of the wife has been definitely established, but other circumstances in the case have been held to warrant the award of custody of a child of tender years to the mother. *Longinotti* v. *Longinotti,* 169 Ark. 1001, 277 S. W. 41; *Blain* v. *Blain,* 205 Ark. 346, 168 S. W. 2d 807; *Thompson* v. *Thompson,* 209 Ark. 734, 192 S. W. 2d 223. We agree with appellant that each case must be adjudged on its own peculiar facts and, since no two cases are alike, there is no direct precedent for or against custody in cases of this kind. The child's best interest and welfare is always the primary and controlling consideration. *Kirby* v. *Kirby,* 189 Ark. 937, 75 S. W. 2d 817.

At the time of the trial the older child was only three years of age. Appellant, if awarded custody of the child, has indicated his intention of placing it with his father and mother, who are 78 and 56 years of age, respectively. The grandparents reside on a small farm 21 miles from the city of Baton Rouge where appellant is employed. They are good people and would, no doubt, furnish a good home for the child, but they are practically strangers to him. The child has had the care and attention of appellee since its birth. Several witnesses testified to the good character of appellee and it is undisputed that she has given splendid attention and care to her children who, because of their tender years, need the solicitude and affection of a mother. As pointed out by the trial court, the decree as to custody is only final as to conditions existing at the time of its rendition and may be altered in the future under changed conditions. Because of the child's tender age, we are unwilling to say that

the chancellor erred in awarding its custody to appellee under the conditions existing at the time of the trial.

The decree is accordingly affirmed.

ROBINS, J., dissents.

ROBINS, J. (dissenting). Appellee, who was plaintiff below, admits that, being a non-resident of Arkansas, she came into this state for the sole purpose of instituting a divorce action against appellant, a resident of Louisiana, where she also resided. There is no testimony to show that she ever acquired a domicile in Arkansas. Therefore, the lower court had no jurisdiction of her suit. It is true that in the case of *Squire* v. *Squire,* 186 Ark. 511, 54 S. W. 2d 281, we used language indicating that one who comes into this state solely for the purpose of obtaining a divorce may nevertheless properly institute such a suit here after the lapse of the required time. But, if that opinion means that a party may come into this state without intending to become a resident of Arkansas, but only for the purpose of utilizing our facile machinery for destruction of the marriage status, we ought to overrule it now for the excellent reasons set forth in Justice Knox's dissenting opinion in the case of *Tarr* v. *Tarr,* 207 Ark. 622, 182 S. W. 2d 348.

Since, as I view the record, the lower court had no jurisdiction of the appellee's complaint, because she was a non-resident, it could not acquire jurisdiction of the cross-complaint of appellant, who was likewise a non-resident. "It is generally held that a non-resident defendant may obtain a decree for divorce upon a cross bill only in those cases where the plaintiff has satisfied the residential requirements necessary to invest the court with jurisdiction." 17 Am. Jur. 288.

The question as to custody of the child in the case at bar was merely incidental to the divorce proceedings in which its parents were involved. We do not have here a habeas corpus proceeding involving custody of a child found in this state; and, as the lower court did not have jurisdiction of the divorce proceedings it should not

have assumed jurisdiction of any phase of this domestic dispute of two residents of a sister state.

In my opinion this entire controversy ought to be dismissed for want of jurisdiction, and these parties should be remitted for their relief, if they are entitled to any, to the courts of their domicile. We should not, by decision of this court, contribute to making Arkansas a sort of laundry for dirty matrimonial linen from other states.

DIALS *v.* BRYANT.

4-8082 199 S. W. 2d 753

Opinion delivered March 3, 1947.

Charley Eddy, for appellant.

J. B. Moore, for appellee.

ROBINS, J. Appellants, who are the children and heirs at law of Berry Dials, deceased, instituted suit in the court below to enjoin trespass by appellee on an 80-acre tract claimed by them and to quiet their title thereto. They asserted ownership by adverse possession and by inheritance from their father who had acquired an undivided two-sevenths interest from heirs of W. C. Kemp, original patentee of the land from the United States Government.

Appellee claimed title by conveyance from A. J. DeLong, who bought same from a purchaser at a sale for delinquent taxes. From a decree awarding the land to appellee, appellants prosecute this appeal.

In the trial below it was stipulated that the land forfeited for non-payment of taxes of 1919 and was sold at the delinquent tax sale on June 14, 1920, to E. A. Wolverton, to whom the county clerk issued his two deeds conveying the land in separate parcels of 40 acres each; that Wolverton sold and conveyed same on February 8, 1926, to A. J. DeLong; that taxes on the land were paid by Wolverton and DeLong from 1920 until 1934, at which time the land was sold to the state for non-payment of taxes; that DeLong conveyed the land to appellee on October 21, 1944, and appellee redeemed same from the state on October 24, 1944; that appellee also secured a deed to the land from Fred Mason, who had bought same from the Conway County Bridge District.

No question is raised by appellants as to the validity of the tax title acquired by appellee; and appellants' only defense against this title is their claim of long continued peaceable and adverse possession.

The testimony showed that the land involved was, for the most part, in timber, not enclosed by fence. It was shown that a wire fence was for a time maintained around part of the land by Fred Mason, who conveyed his interest to appellee. While some of the witnesses stated that the dwelling house occupied by appellants was located on the land in controversy, this was disputed by appellee's testimony, and a witness for appellants, who seemed to be more familiar with boundaries than other witnesses, testified that this dwelling house was located on an adjoining 40-acre tract, which was owned by appellants.

Appellants insist that adverse possession by them of the land involved herein was shown by testimony that they cultivated crops thereon each year. But it seems not to be disputed that the greater part of the land was never in cultivation; and witnesses on behalf of appellee testified that only small patches of the land were culti-

vated by appellants and this was not done regularly, though there was testimony on behalf of appellants to the effect that some of this land was worked by them each year. Appellants proved that they had been obtaining their firewood from this land, but it was also shown that appellee's grantor had, without objection from appellants, cut and removed a quantity of timber from this land.

Where actual possession is relied upon to support a plea of limitation or to establish title to land by limitation it must be shown that such possession was continuous, as well as notorious, adverse and exclusive. Mere fitful or intermittent possession is not sufficient. *Greer* v. *Vaughan,* 128 Ark. 331, 194 S. W. 232; *Driver* v. *Martin,* 68 Ark. 551, 60 S. W. 651; *Scott* v. *Mills,* 49 Ark. 266, 4 S. W. 908; *Brown* v. *Bocquin,* 57 Ark. 97, 20 S. W. 813; *Sanderson* v. *Thomas,* 192 Ark. 302, 90 S. W. 2d 965; *Norwood* v. *Mayo,* 153 Ark. 620, 241 S. W. 7; *Boynton* v. *Ashabranner,* 75 Ark. 415, 88 S. W. 2d 566, 1011, 91 S. W. 20.

The question as to whether appellants have been in the notorious, peaceful and adverse possession of this land for more than seven years, so as to defeat appellee's title, was one of fact. When all the evidence adduced is considered, we cannot say that the appellants' claim of title by adverse possession was supported by a preponderance of the testimony.

Since in equity cases we do not reverse the finding of the lower court on a fact question unless it appears to be against the weight of the testimony, it follows that the decree appealed from must be affirmed.

SUMLIN *v.* WOODSON.

4-8076 and 4-8077 (consolidated) 199 S. W. 2d 936

Opinion delivered March 3, 1947.

W. W. Shepherd and *Henry E. Spitzberg,* for appellant.

Talley & Owen and *Robert L. Rogers II,* for appellee.

ED. F. MCFADDIN, Justice. Appellee, Woodson, sued appellant, Sumlin, for unlawful detainer (§ 6035, *et seq.*, Pope's Digest), and recovered damages which are challenged by this appeal.

Woodson owned a stock of groceries and fixtures and a building located at 716 West Third Street, Little Rock. He did not own the land on which the building was situated, but had a ground lease (paying therefor $20 per month), and had the right to remove the building. Woodson had operated a grocery store in the building from November, 1943, to March, 1944, when, for a cash consideration of $1,750, Woodson sold to Sumlin the stock of groceries and the fixtures, and also rented Sumlin the building for $27 per month. In October, 1944, Woodson demanded rent of $40 per month. After some negotiations Sumlin agreed to pay rent at $30 per month, and also to give Woodson and his family a discount of 20 per cent. on all groceries that they purchased from Sumlin. This rental agreement continued until November, 1945, when Woodson duly notified Sumlin to vacate the building on January 1, 1946.

Sumlin refused to vacate, and in January, 1946, Woodson, after giving statutory notice, brought this action of unlawful detainer. Sumlin gave cross bond, and retained possession of the building until the trial below (April 17, 1946), which resulted in a judgment for Woodson for (1) possession of the building; (2) rent at $60 per month from January 7, 1946; and (3) $300 as damages for unlawful detention. Sumlin has appealed to this court. Originally, there were two appeals, one based on the trial of April 17, 1946, and the other based on the refusal of the court to grant a new trial on the ground of newly-discovered evidence; but, with becoming candor, Sumlin's counsel have limited the issues on these appeals to two assignments. Appellant's counsel thus states his contentions:

"The issues on appeal having been confined solely to the award of damages, appellant will discuss only his assignments of error dealing with that phase of the case. Two general topics present themselves: (1) the award

of rentals at $60 per month; and (2) the verdict of $300 as damages for loss of profits."

We proceed, therefore, to ascertain whether the evidence is sufficient to support the jury's verdict for (a) rental value and (b) damages.

I. *Rental Value.* The jury fixed the rent at $60 per month from January 7, 1946, and appellant says there is no competent evidence to sustain such a figure.

Appellee testified that, beginning January 1, 1946, the amount he paid for ground rent was increased from $20 per month to $42 per month. So, the rental fixed by the jury ($60 per month) only netted appellee $18; whereas, before January 1, 1946, appellee (paying ground rent of $20 per month, and receiving from appellant $30 per month) had netted $10 per month, plus 20 per cent. discount on groceries. We mention this as tending to show that appellee was not receiving any appreciable net increase at the $60-per-month figure fixed by the jury for rent after January 1, 1946.

But the cogent evidence is found in the fact that the appellee testified that he had been offered $60 per month as rent for the building occupied by the appellant, and that $60 per month was a reasonable rent. Appellee did not have to qualify as an expert in matters of realty rentals in order to state what he had been offered as rent for the building. In *Reeves* v. *Romines,* 132 Ark. 599, 201 S. W. 822, Mr. Justice HART, in discussing rental value and how it could be ascertained in an unlawful detention action, said:

"By rental value is meant, not the probable profits that might accrue to the tenant, but the value, *as ascertained by proof of what the premises would rent for,* or by evidence of other facts from which the fair rental value may be determined." (Italics our own.)

It is thus clear that "what the premises would rent for" is not the only way, but is at least one way, of ascertaining the rental value in an unlawful detainer action. The appellee stated what he had been offered as rent for

the premises, and he was not disproved on the point. His testimony, with the other facts as previously mentioned, is sufficient to support the jury's verdict fixing the rent at $60 per month from January 7, 1946.

II. *Damages for Loss of Profits.* In addition to the rents, Woodson sought $500 as damages for the unlawful detention of the premises. The only element of damages that Woodson attempted to prove was the profit that he claimed he would have made from operating a grocery store in the building from the date of the filing of the action to the time of the trial; and the jury awarded him $300 for such damages. The appellee says that § 6050, Pope's Digest, lists "profits" as an item of damages; and this statute is urged by appellee to sustain the verdict for damages. To ascertain and determine the purpose and effect of § 6050, Pope's Digest, we need to consider it historically.

This section is § 5 of Act 8 of 1891. Prior to this Act of 1891 this court held that damages for the detention of the premises could not be recovered by the landlord in the unlawful detainer action. Some of the cases so holding are *Keller* v. *Henry* (1867), 24 Ark. 575; *Walker* v. *McGill* (1882), 40 Ark. 38; and *Poe* v. *Bradley* (1884), 44 Ark. 500. To overcome the effect of these cases, and to allow the landlord to receive his rents and damages in the unlawful detainer action, the Legislature enacted § 5 of Act 8 of 1891; and this section stated that the landlord could recover as damages in the unlawful detainer action:

(1) "rent . . . up to the time of rendering judgment, . . ." or

(2) "value of the use and occupation" of the premises; or

(3) "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

(4) "damages to which said plaintiff may be entitled on account of the forcible entry and detainer of

such premises, . . ." This § 5 of Act 8 of 1891 was discussed by Mr. Justice HUGHES in *Richardson* v. *Harrell,* 62 Ark. 469, 36 S. W. 573.[1] It must be remembered that the action for unlawful detainer lies for a farm, or a residence, or a store building, or other kind of property; and that the damages to the landlord are to be ascertained and determined, depending on the type of property, etc. It is therefore evident that the purpose of the 1891 act was to point out the methods of determining damages, and then to allow the court to direct the jury as to the measure of damages applicable to the particular case on trial: the main idea being that the landlord was entitled to the damages which he proved with reasonable certainty, as flowing directly and proximately from the unlawful detention.

Whether "profits" as used in § 6050, Pope's Digest, means (a) profits from the rents, or (b) profits from the building, or (c) profits from the business carried on in the building, is a question we do not now decide; because, in the case at bar, the plaintiff's loss of profits is entirely speculative. In each of the various cases decided by this court in which losses of profits have been allowed as damages, it has been expressly or impliedly stated that such profits must be capable of proof with reasonable certainty, and that no recovery can be had for loss of profits where it is uncertain or speculative whether there would ever have been any profits. See *Black* v. *Hogsett,* 145 Ark. 178, 224 S. W. 439. This is but another way of saying that damages cannot be based upon conjecture and speculation.

[1] Paragraph 6050, Pope's Digest, deals with damages the landlord may claim against a tenant who has unlawfully withheld possession. *Coley* v. *Westbrook,* 206 Ark. 1111, 178 S. W. 2d 991, is a case dealing with the landlord's damages. Also, there is an annotation in 39 A. L. R. 386 on "Measure of damages for tenant's failure to surrender possession of rented premises," which shows the holdings of courts of other states, but based on statutes somewhat different from our own. Section 6052, Pope's Digest, deals with the damages the tenant may recover from a landlord who has unlawfully evicted him. The difference in the wording of these two sections is worthy of note. The following cases deal with the tenant's damages under § 6052: *Brockway* v. *Thomas,* 36 Ark. 518; *McElvaney* v. *Smith,* 76 Ark. 468, 88 S. W. 981, 6 Ann. Cas. 458; *Byers* v. *Moore,* 110 Ark. 504, 163 S. W. 147; *Wakin* v. *Morgan,* 165 Ark. 234, 263 S. W. 783.

In *Harmon* v. *Frye,* 103 Ark. 584, 148 S. W. 269, in speaking of loss of profits as an element of recoverable damages, Mr. Justice KIRBY, speaking for this court, said:

"Such damages 'must be certain both in their nature and in respect to the cause from which they proceed. It is against the policy of the law to allow profits as damages, where such profits are remotely connected with the breach of contract alleged, or where they are speculative, resting only upon conjectural evidence or the individual opinions of the parties or witnesses.' 13 Cyc. 53. *Spencer Medicine Co.* v. *Hall,* 78 Ark. 336, 93 S. W. 985; *Beekman Lbr. Co.* v. *Kittrell,* 80 Ark. 228, 96 S. W. 988; *Hurley* v. *Oliver,* 91 Ark. 433, 121 S. W. 920." To the same effect, see, also, *St. L.-S. F. Ry. Co.* v. *Spradley,* 199 Ark. 174, 133 S. W. 2d 5; and *S. W. Tel. & Tel. Co.* v. *Memphis Tel. Co.,* 111 Ark. 474, 163 S. W. 1153, and earlier cases there cited. See, also, West's Arkansas Digest, "Damages," § 40, 124, 176, listing other cases from this court. See, also, 17 C. J. 758, 788 and 910 for general discussion. (25 C. J. S., Damages, §§ 28, 43, 90.) In 15 Am. Juris. 560, after giving the general statements from leading cases, this rule is deduced:

"It has been said that the most definite rule that can be drawn from the cases would seem to be that if by any chance or under any condition of affairs then existing the profits might not have accrued though the wrongful act had not intervened, there can be no allowance of profits lost as damages; but if, except for the wrongful act, there must have been profits, notwithstanding any other circumstances existing at the time of the perpetration of the wrong, the question of their speculativeness and contingency is absolutely negatived."

Tested by our own cases, as well as the general rule above stated, we are convinced that the profits, claimed by Woodson in this case, were never removed from the realm of conjecture and speculation, because it is uncertain from the evidence whether any profit would ever have accrued to him. Woodson claimed that he would have operated a grocery store in the building if Sumlin had surrendered possession, and that Woodson would

have made a gross profit of 25 per cent. on all sales. In his attempt to show what these sales might have been, Woodson showed: (a) his own gross sales in this building in January and February, 1944, to have been $1,074 and $1,042.97, respectively; and (b) Sumlin's gross sales in this building for January and February, 1946, to have been $3,807.54 and $3,242.69, respectively.

If we take Woodson's gross sales of January and February, 1944, as the basis of calculation for showing net profits, we get a gross profit of approximately $250 each month; and from this last-mentioned figure must be deducted utility bills, taxes, extra help and a reasonable amount for the value of Woodson's own time and services. No figures are in the record showing any of these deductible items: so it was not shown that Woodson would have had any net profits based on his own previous operations, even if such operations were not too remote in time to be used as a standard.

If we take Sumlin's gross sales for January and February, 1946, as the basis of calculation, to support Woodson's claim of net profits, we are beginning the calculation with the rankest sort of conjecture and speculation, because no one testified that Woodson was as good a merchandiser or salesman as Sumlin. Sumlin's record of gross sales affords not the slightest indication as to what Woodson might have sold. Sumlin had a volume of sales treble that of Woodson; but Sumlin had a meat market in the store, he paid a butcher $55 a week; and the record is silent as to what part of Sumlin's gross sales came from the grocery business, as distinct from the meat market. Woodson never testified that he intended to operate a meat market.

We have pointed out sufficient of these matters to indicate the conjecture and speculation on which the verdict was necessarily based. The testimony, regarding loss of profits, in the case at bar is no more definite than was the testimony on the same question in the case of *Beasley* v. *Boren,* 210 Ark. 608, 197 S. W. 2d 287, and in that case we said:

"The testimony introduced by appellees as to loss of profits which appellees thought they suffered . . . 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 appellee's 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."

The context of the above quotation applies with equal force to the case at bar. When a party embarks on the enterprise of recovering anticipated profits, he must present a reasonably complete set of figures, and not leave the jury to speculate as to whether there would have been any profits. Woodson failed to fulfill his burden in this regard; and the verdict of $300 for loss of profits is based on conjecture and speculation, and cannot be allowed to stand.

We, therefore, modify the circuit court judgment by vacating the judgment of $300 for damages, and in all other respects we affirm the judgment of the circuit court, with the appellant to recover his costs in his court.

BAUGH *v.* HOWZE.

4-8081 199 S. W. 2d 940

Opinion delivered March 3, 1947.

House, Moses & Holmes and *Horace Jewell,* for appellant.

Moore, Burrow, Chowning & Hall, for appellee.

HOLT, J. Dr. Enoch Howze died testate January 6, 1944. By the terms of his will, the validity of which is in no way questioned, he left all of his property to his widow, appellee here. Dr. Howze and appellee were married in March, 1943. In addition to appellee, two sisters, one of whom is the wife of appellant, Stanley T. Baugh, a Methodist minister, and two brothers survived Dr. Howze. A very close relationship had, for many years, existed between the Baughs and Dr. Howze, and Dr. Howze's confidence in, and friendship for them, were of the highest order, and on one occasion after Dr. Howze and Mr. and Mrs. Baugh had returned from a vacation trip, which they had made together, Dr. Howze made Mrs. Baugh a present of $5,000.

In July, 1939, Dr. Howze placed in the hands of his brother-in-law, Mr. Baugh, then pastor of a Pine Bluff church, $5,000 with directions that he deposit it to Baugh's credit in a bank in that city and take care of it. In August of this same year, Dr. Howze gave Mr. Baugh another $5,000 with directions to deposit it in a Pine Bluff bank in the name of Thomas Baugh, one of Mr. Baugh's children, and take care of it for him, Dr. Howze. Mr. Baugh complied with both requests. At the time this $10,000 was entrusted to Mr. Baugh and deposited in the Pine Bluff bank, nothing was said by Dr. Howze as to its disposition other than the admonition to take care of it.

In the latter part of December, 1940, after Mr. Baugh had moved to a church in Prescott, Mr. Baugh testified that while he and Mrs. Baugh were visiting Dr. Howze, and were in his office: "A. Of course I kept wondering what Doctor Enoch wanted to do with that (meaning the $10,000). So after we moved from Pine Bluff to Prescott, in his office the last of December—I think it must have been right after Christmas—he took us back in his office again and closed the door to the outer waiting room and he said, 'I want that ten thousand dollars you hold on deposit in Pine Bluff for my brothers and sisters. I want you to take it out of the bank and put it in a lock box and hold it and deliver it to them at my death.' . . . And when he said, 'I give it to you for my brothers and sisters,' he said, 'nobody knows a thing about that, but we three,' and Mrs. Baugh, he and I were standing there. 'Nobody knows about it but we three,' and after that he cautioned about that, 'Nobody knows a thing about this, and nobody is to ever know it but we three.' "

Following these instructions from Dr. Howze, Mr. Baugh removed the $10,000 in currency from the Pine Bluff bank, and on December 22, 1941, placed it in a lock box in the Worthen bank, Little Rock. The box was procured in the names of Mr. and Mrs. Baugh.

Following the marriage of appellee and Dr. Howze in March, 1943, Dr. Howze spent several thousand dollars

in remodeling and improving his residence, and in April, 1943, Dr. Howze, according to the testimony of both Mr. and Mrs. Baugh, asked Mr. Baugh to loan him $1,000 of the $10,000 in the lock box and promised to repay it in the fall. Mr. Baugh promptly delivered this $1,000 to Dr. Howze. No note or other evidence of this transaction appears. December 12, 1943, Dr. Howze told Mrs. Baugh to have Mr. Baugh get $5,000 additional from the lock box and place it to Dr. Howze's account in a Malvern bank. Mr. Baugh, without question, immediately complied with this request, no loan being mentioned in connection with this transaction.

After the delivery of the $6,000 to Dr. Howze, there remained in the lock box $4,000, which remained in the box until Dr. Howze died, January 6, 1944, and shortly thereafter Mr. Baugh distributed this $4,000 by giving to each of Dr. Howze's sisters and two brothers $1,000.

The present action was brought by Dr. Howze's widow, appellee, against Mr. Stanley Baugh and the other appellants to recover the $4,000 and any other property that appellants might have that belonged to Dr. Howze.

From a decree in favor of appellee, Dr. Howze's widow, for $4,000 comes this appeal.

The sole question presented, say appellants, "is whether or not Dr. Enoch Howze made a gift to his brothers and sisters of $10,000 in December, 1940, when he instructed Brother Stanley T. Baugh to hold that money for them." In other words, was it a valid gift *inter vivos?*

Appellants earnestly contend that a valid gift was made. It is our view, however, that no gift was effected and that the decree of the trial court must be upheld.

The material facts, which are practically undisputed, are in effect as above detailed.

To constitute a valid gift *inter vivos* certain essential elements must be present, these include actual deliv-

ery of the subject-matter of the gift to the donee or to some one as agent or trustee for the donee, with a clear intent to make an immediate present and final gift beyond recall, and at the same time unconditionally releasing all future dominion and control by the donor over the property so delivered.

As we view the record before us, Mr. Baugh was acting as the trusted agent of Dr. Howze in caring for and handling the $10,000 in question, which had been entrusted to his care, was not the agent of the donees, and Dr. Howze never relinquished dominion and control over this money. In fact, all the alleged donees, with the exception of Mrs. Baugh, were kept in ignorance of this alleged gift until after the death of Dr. Howze. That he did not relinquish control and dominion, a necessary requisite to a completed gift, is, we think, clearly evidenced by Dr. Howze's actions in demanding, and receiving, as above noted, 60 per cent. of this $10,000 after Mr. Baugh had placed it in a lock box in the Worthen bank, and without any objections on the part of his agent, Mr. Baugh.

In *Ragan* v. *Hill,* 72 Ark. 307, 80 S. W. 150, this court in deciding whether a gift had been completed from W. M. Rees to B. C. Rees through delivery and directions to John C. Hill & Son, said: "In Thornton, on Gifts and Advancements, it is said: 'In all gifts a delivery of the thing given is essential to their validity; for although every other step be taken that is essential to the validity of a gift, if there is no delivery, the gift must fail. Intention cannot supply it; words cannot supply it; actions cannot supply it; it is an indispensable requisite, without which the gift fails, regardless of the consequences. . . . The reason for the rule . . . is obvious; it is based upon 'grounds of public policy and convenience, and to prevent mistake and imposition.' Such gifts open the door for fraud and perjury; and as these gifts are usually claimed upon parol evidence, it is difficult to meet and overthrow such claims when the alleged donor is dead, unless a delivery to the donee is made an absolute and requisite test in determining

whether or not a gift was actually consummated—not intended but consummated.' Thornton on Gifts and Advancements, pp. 105-108, and cases cited.

"In every case a delivery is necessary to constitute a gift. In this case, W. M. Rees loaned the money to John C. Hill & Son. He never parted with dominion over it in his lifetime. It was not delivered to B. C. Rees, or to anyone for him. In the language of witness John C. Hill, "it was to go" to B. C. Rees at the death of W. M. Rees. The directions of the latter (W. M. Rees) in this respect were testamentary in character, and were not effective, because not made and proved as a will."

See, also, 38 C J. S., Gifts, § 25.

The applicable rule is properly stated in *Chambers* v. *McCreery,* 106 Fed. 364, in this language: "A gift *inter vivos* goes into immediate effect, is absolute and irrevocable, and to render it complete there must be an actual delivery of the subject-matter of the gift—the manner of the delivery being to a great extent governed by the character of the thing delivered—but without such delivery the title does not pass. The effect of the delivery is that the donor parts, not only with the possession, but with dominion over, and control of, the property so delivered."

In 24 Am. Jur., § 30, pp. 747, 748, the text writer on the question of agency said: "While delivery may be made by an agent of the donor, delivery to the agent is not enough. The gift is not complete until there is an actual delivery to the donee or to someone for him, and until the gift is completed by delivery, the donor may reassert title to the property. Moreover, since the authority of an agent is revoked by the death of his principal, the death of the donor before the actual delivery of the property to the donee terminates the authority of the agent to make such delivery, and works a revocation of the gift"; and in 28 C. J., § 31, p. 640, we find this language: "While a delivery may be made to a third party in order that the latter may deliver the subject of the gift to the donee as agent of the donor, the gift is not

complete until there is an actual delivery to the donee, and until the gift is completed by delivery the donor can revoke the agent's authority and resume possession of the gift. As the authority of an agent is revoked by the death of his principal, the death of the donor before the actual delivery of the property to the donee terminates the authority of the agent to make such delivery, and the gift, therefore, fails for want of delivery. So, also, the delivery of property to an agent to be delivered to an intended donee after the donor's death is not sufficient to sustain a gift *inter vivos,* and such a disposition is void as being in contravention of the statute of wills." See, also, 38 C. J. S., Gifts, § 25.

On the question of agency, this court again said in *Newton* v. *Snyder,* 44 Ark. 42, 51 Am. Rep. 587: "Delivery to a third person for a donee is as effective as delivery to the donee, but delivery to an agent in the character of an agent for the giver, to perform the act or make the delivery only after the giver's death, would amount to nothing. (2 Redf. Wills, chapter 12, §§ 42, 45.)"

As indicated above, the question here simply stated is, do the facts show a gift of the $10,000 to Dr. Howze's brothers and sisters? Conceding that Dr. Howze wanted this money to go to his sisters and brothers after his death, still unless he took proper or legal steps to carry out such intention, this court cannot act for him and give legal effect to the donor's wishes when the donor himself has failed to comply with the essential requirements necessary to effectuate the gift.

Finding no error, the decree is affirmed.

ROBINS and MILLWEE, JJ., dissent.

TILGHMAN, ADMINISTRATOR *v.* RIGHTOR.

4-8078 199 S. W. 2d 943

Opinion delivered March 3, 1947.

A. D. Whitehead and *A. M. Coates,* for appellant.

Dinning & Dinning, for appellee.

SMITH, J. Appellees, Mrs. Rightor and Mrs. Thompson, own a plantation 12 miles south of the City of Helena, and appellee Conners was employed by them to operate

a truck and trailer used for general plantation purposes. On the morning of February 23, 1945, Conners was returning in the truck from Helena with a load of cinders for use on the plantation, when he overtook three boys who were going to the home of one of them. Louis Tilghman, Jr., the youngest of the boys, was seven years old, and his brother, Donald, was nine, and the other boy, Lloyd Franklin, to whose home they were going, was about 14 years old.

The boys were walking south on Highway 20, when the truck overtook them just south of the city limits. On a signal from the oldest boy the truck stopped, and the boys got on the trailer, the youngest being assisted by the others in doing so. They took a position on the front end of the trailer bed, sitting on the cinders, with their feet hanging down between the front edge of the trailer bed and the cab of the truck. There is some conflict in the testimony as to the speed at which the truck proceeded down the highway, but this is unimportant, as the speed was not the proximate cause of the incident which occurred, resulting in the death of the youngest boy and which occasioned this law suit.

Conners' son, a young boy, was on the driver's seat, seated between his father and a colored man, so that there was no room for any of the boys to ride on the driver's seat, and for that reason the three boys who were picked up rode on the trailer loaded with cinders.

Conners knew one of these boys, and knew where they would leave the trailer, and as he approached that point, the speed of the truck was reduced until it had all but stopped, and the truck was driven off the road so that only the left wheels of the truck and trailer remained on the road. Without waiting for the truck to come to a full stop, the boys began climbing down from the truck. The youngest boy moved over to the edge of the trailer bed, just behind the cab and fell, or was thrown from the trailer. His jacket caught in the lugs of the wheel, and he was thrown to the pavement, and the front wheels of the trailer passed over his body, inflicting injuries from which he died in about 30 minutes.

The boy's father brought this suit against the owners of the truck, and the driver, to recover damages, and at the trial before a jury, there was a verdict in favor of the defendants, and from the judgment rendered thereon is this appeal.

An answer was filed denying negligence on the part of the driver and denying liability also under the provisions of § 1304 of Pope's Digest commonly referred to as the guest statute, and we think the verdict of the jury is fully supported on either theory.

According to the undisputed testimony the truck did not travel more than two feet after the boy had been run over, and some of the witnesses placed the distance even less. It therefore conclusively appears that the truck was not moving rapidly and the prior speed is therefore unimportant, and the jury might well have found that the truck driver was guilty of no negligence.

The court gave all the instructions requested by appellant except one, which, if given, would have told the jury that appellees "would be liable provided it was found from a preponderance of the evidence that the driver of the defendants' vehicle was guilty of ordinary negligence, provided it was found that such negligence was the proximate cause of the death of the plaintiff's intestate." On the contrary, after refusing this instruction, the jury was instructed that mere negligence, however gross, would not authorize a recovery, unless it was such negligence as to show a willful and wanton disregard of the consequences. Our construction of § 1302, Pope's Digest, another guest statute in the case of *Edwards* v. *Jeffers,* 204 Ark. 400, 162 S. W. 2d 472, and other cases there cited, fully warranted that instruction.

In this connection the court read § 1304, Pope's Digest, which reads as follows: "NO CAUSE OF ACTION BY PERSON RIDING IN MOTOR VEHICLE AS A GUEST. No person transported or proposed to be transported by the owner or operator of a motor vehicle as a guest, without payment for such transportation, nor the husband, widow, executors, administrators

or next of kin of such person, shall have a cause of action for damages against such owner or operator, or other persons responsible for the operation of such car, for personal injury, including death resulting therefrom, by persons while in, entering, or leaving such motor vehicle, unless such injury shall have been caused by the willful misconduct of such owner or operator. And in no event shall any person related by blood or marriage within the third degree of consanquinity or affinity to such owner or operator, or the husband, widow, legal representative, or heirs of such person, have a cause of action for personal injury, including death resulting therefrom, against such owner or operator while in, entering, or leaving such motor vehicle, provided this Act shall not apply to public carriers."

The preceding § 1303 provides that, "The term guest as used in this Act shall mean self-invited guest or guest at suffrance." Unquestionably the boys were guests within the meaning of this statute. The oldest of them "flagged" the truck, thereby soliciting a ride, and there is no contention that any charge was made or expected. The truck was a motor vehicle within the meaning of § 1304, Pope's Digest, as defined in § 6656, Pope's Digest.

An exception was saved to the action of the court in reading § 1304, Pope's Digest, but there was no error in doing so. It is the law and is unambiguous, and it was the duty of the court to declare the law, and reading the statute was the method employed in doing so. *L. & A. Ry. Co.* v. *Woodson,* 127 Ark. 323, 192 S. W. 174; *Kansas City So. Ry. Co.* v. *Whitley,* 139 Ark. 255, 213 S. W. 369; *Graves* v. *Jewell Tea Co.,* 180 Ark. 980, 23 S. W. 2d 972; *St. L. S. F. Rd. Co.* v. *Ransom,* 182 Ark. 701, 32 S. W. 2d 436.

It will be observed that in defining a guest the statute makes no exception in favor of minors and we have no authority to write that exception into the statute. *Sims* v. *Cumby,* 53 Ark. 418, 14 S. W. 623.

In the case of *Shiels* v. *Audette,* 119 Conn, 75, 174 Atl. 323, 94 A. L. R. 1206, the Supreme Court of Errors of Connecticut construed a guest statute somewhat similar to our own, which exempted the driver of a motor vehicle from liability for the injury of a guest except in cases of heedless or reckless negligence, while our statute exempts from liability except for an injury caused by willful or wanton misconduct. In that case, as in this, a father sued for injury to an infant son, but it was held that the statute applied to an infant and many cases were cited to support the statement that "If the injury occurs under such circumstances as do not give the child the right of action for the personal injury, the father cannot recover." In that case the court said: "There was evidence to the effect that the truck was being operated at an average speed of fifteen to twenty miles an hour over a fairly smooth road on a clear day. There was no evidence that the speed was excessive or that the truck was being operated in a dangerous manner. The only possible claim of fault was that the defendant ought to have been aware of the presence of the boys upon the running board and to have compelled them to either get off or to get on top of the load. This is at most but a claim of negligence." So here. However, in the instant case the boys were seated on the load and the child was not injured until he attempted to get off the truck before it had come to a full stop.

The testimony warranted the jury in finding that there was no evidence of willful or wanton negligence, and the judgment must be affirmed and it is so ordered.

HEARN *v.* STATE.

4439 200 S. W. 2d 513

Opinion delivered March 3, 1947.

Boyd Tackett, for appellant.

Guy E. Williams, Attorney General and *Arnold Adams,* Assistant Attorney General, for appellee.

Griffin Smith, Chief Justice. Hearn has appealed from a judgment that he serve five years in prison. The verdict found the defendant guilty of voluntary manslaughter; but, following supplementary instructions given the second day after the jury's deliberations began, that body (as the law permits) did not designate the prison term. The Court supplied the deficiency.

Observing the jury's seeming difficulty in reaching its verdict, the Judge said:

"Gentlemen, it is dinner time! How do you stand?" Answer by a juror: "Ten and two". The Judge: "Ten for guilty of some degree of homicide and two for not guilty?" Answer by a juror: "Yes, Sir". The Judge: "The Court [thinks] you are making some progress, even though it is slow. We are not asking anybody to bring in a verdict, but I feel it is your duty. . . . If you don't decide this case it will have to be tried again, and that is expensive to the taxpayers of Pike County. It is a trying ordeal for the defendant and his family, and also a trying ordeal for the family of the deceased. If you can do so, I hope you will remember the testimony and reach a verdict".

It was held in *Murchison* v. *State,* 153 Ark. 300, 240 S. W. 402, that where the jury in a criminal case was recalled to the courtroom—and in response to the inquiry "how do you stand?" the reply was "eleven to one"—it was not error for the Judge to comment, "I see no reason why there should be no verdict in this case, one way or the other". But, said Chief Justice McCulloch, in such circumstances the language must be considered in connection with other remarks or instructions.

Judge McCulloch, who wrote the opinion in *Thomas* v. *State,* 107 Ark. 469, 155 S. W. 1165, emphasized the

constitutional provision that a trial court has no right, either directly or indirectly, to express to the jury an opinion respecting the weight of evidence. In that case the holding in *Sharp* v. *State*, 51 Ark. 147, 10 S. W. 228, was mentioned, including the quotation: ". . . it was natural for [the jurors] to seize upon and adopt any opinion which they understood the Judge to have expressed or intimated upon the questions they are required to decide".

By this it was not meant that when a Judge is apprehensive of mistrial because of natural misunderstandings, all discretion is denied in the matter of elucidation; the restriction is that what is said must not amount to comment on the weight of evidence. See *Phares* v. *State,* 158 Ark. 156, 249 S. W. 551. Nor is it error for the Court to ask jurors how they are divided as to numbers, "without indicating how they stand as to parties". *Eady* v. *State,* 168 Ark. 731, 271 S. W. 338. In *Evans* v. *State,* 165 Ark. 424, 264 S. W. 933, it was held that reversible error was not committed when the Court asked a question similar to that mentioned in the Eady case. The decision appears to have been predicated upon the proposition that there was nothing to indicate a desire by the Judge to know the nature of the jury's division; hence the answer was harmless error.

A different result attended our consideration of an instruction intended to be "cautionary". It was held to be "involved and argumentative, and an entreaty to [the jurors] to change their minds and reach a verdict". *Stockton* v. *State,* 174 Ark. 472, 295 S. W. 397.

In the case at bar the Judge (after having been told—in response to his own question whether ten were for conviction and two for acquittal) said:—"The Court thinks you are making some progress, even though it is slow".

It is not improbable that the two jurors who until then had been unyielding, concluded that the Judge believed evidence warranted conviction. This would amount to comment in the factual field reserved exclusively for

jurors in cases at law. For this reason the judgment must be reversed. Remanded for a new trial.

BURBRIDGE, TRUSTEE *v.* REDMAN.

4-8080 200 S. W. 2d 492

Opinion delivered March 10, 1947.

Miles & Amsler, R. W. Launius, Francis W. Wilson and *J. Bruce Streett,* for appellant.

L. B. Smead and *J. B. Dodds,* for appellee.

GRIFFIN SMITH, Chief Justice. The action was for personal injuries and property damages following a collision between appellee's automobile and appellant's bus, July 3, 1945. The complaint alleged that Redman sustained damages to his person and property in the sum of $50,900. The jury was instructed that there was no legal proof that the plaintiff's automobile was damaged, hence if a verdict should be returned it should not include compensation for property loss. Appeal is from judgment for $12,000, principally to compensate a knee injury. There is evidence of complete recovery; but on the other hand medical witnesses testified to partial impairment. If this were the only issue plaintiff would prevail and judgment for an appropriate sum would be

affirmed. Venue, however, was challenged; and on this point appellants are correct.

Redman, thirty-five years of age, was born in Izard County. At an early age he was taken by his parents to White County, where his mother still lives at Searcy. After marriage in 1938 Redman worked for Arkansas Pipe Line Company at various places in the State. In 1942 he accepted employment in electrical construction incident to war plants and moved with his wife and two children to Hot Springs. There he rented a home and remained until December, 1943.

Redman's next move was to Tennessee. In December, 1944 (having spent approximately a year at Oak Ridge, living with his family in a trailer) he returned to White County, Arkansas, accompanied by Mrs. Redman and the two children. Early in December he obtained work with a sub-contractor who assisted in building the naval ordnance plant near Camden, in Ouachita County. During the same month he purchased a home in Hattieville, Conway County. The warranty deed recites that the property includes a dwelling house, barn, and garage. Redman assessed this property, household goods, and other effects, for 1945 and 1946. Furniture stored in Hot Springs was moved to Hattieville. Thereafter appellee's wife and two children, and his wife's mother, occupied the property. The question is whether appellee was a resident of Ouachita County in July, 1945, within the meaning of Act 314 of 1939.[1]

When the mishap resulting in Redman's injury occurred he was en route from Hattieville to Searcy. The collision was on Highway 67, two and a half miles from Jacksonville, in Pulaski County. Redman's wife had spent the week end with him in Ouachita County. He had taken her home, and was on his way to Searcy to get his mother-in-law, ultimate destination being Camden.

[1] The statute in part reads: "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."

While working at the ordnance plant Redman was assigned to quarters in the naval barracks, but when his wife came on visits the couple procured hotel accommodations at Smackover. Their eldest child (seven years of age) was in school at Hattieville.

J. B. Dodds, one of appellee's attorneys, happened to be driving on Highway 67 when the wreck occurred. After bringing Redman to North Little Rock Dodds took him to a hospital at Searcy, where he remained six days. The institution's records show that appellee gave his address as 211 South Oak St., Searcy. This was his mother's home.

November 17, 1944, Redman applied to the Arkansas Revenue Deppartment for a driver's license. The Supervisor's certificate, admitted in evidence, shows that Redman's address was given as Hattieville, " . . . and the information contained in the application upon which said license was issued was supplied by the person to whom the license was issued". After the driver's license was issued (appellee says it was procured by his mother-in-law) he applied for license to operate his automobile. The application was made Dec. 4, 1944: Question: "Did you make that application?" Answer: "Yes, Sir". Question: "In person?" Answer: "In person. I traded a car off that had Tennessee tags: when I did that I had to buy [new ones in Arkansas"].

The home purchased by appellee at Hattieville was the only one he had ever owned. He went "nearly every week" from Camden to Conway County to be with his family. He had never voted or paid a poll tax in Ouachita County; nor, seemingly, had he ever participated in a primary, although he thought "maybe" he had paid a poll tax in Tennessee.

Another circumstance emphasized by appellants bearing upon Redman's residence is an official report by the State Police. On cross examination questions were: "You don't know who advised the State Patrolman that your name was Doyle Redman, and your address was Hattieville, do you?" Answer: " I did that in North Little Rock". Question: "You told [the patrolman]

that your name was Doyle Redman, and your address was Hattieville?" Answer: "Yes, Sir".

After the collision appellee was required to go to North Little Rock, where he was charged with reckless driving. Bail was supplied by a professional bondsman. After being released Dodds took him to Searcy, where hospitalization began. Prosecution did not follow the arrest.

In the face of explicit answers given to the direct questions just quoted, the following is reflected by redirect examination:

Question: "When you went back to North Little Rock did you, or not, give your address to the patrolman as Hattieville?" Answer: "I wouldn't say, but I don't think so". Question: "What is your best judgment?" Answer: "I would say 'no'. I don't know whether I did, or Mr. Dodds did. I don't have any recollection of it".

Appellee relies upon *Norton* v. *Purkins, Judge,* 203 Ark. 586, 157 S. W. 2d 765, where it was said that "reside", as used in Act 314, does not necessarily mean one's permanent abode "or legal residence or domicile". Undisputed evidence in the Norton-Purkins case was that the plaintiff went to Ouachita County to engage in work Norton-Wheeler Stave Company was having done there. Hudson (the plaintiff) was accompanied by his wife and children and lived at Bearden, estimated by various witnesses as a minimum of a few months and a maximum of two years. One of Hudson's children was in a Bearden school and had been attending the institution for approximately four months when the injury resulting in litigation occurred. The opinion, written by Mr. Justice Greenhaw, contains the statement that "Even though Hudson claimed Cleveland County as his legal domicile with the fixed intention of ultimately returning there, still we are constrained to hold, from the facts in evidence, that he was a resident of Ouachita County on the date of his alleged injury within the meaning of the Venue Act".

The case affords an excellent example of the Court's determination that a plaintiff's contentions in respect of residence must be considered in connection with his conduct, from which an intent will be deduced.

In the Norton-Purkins case Hudson had some household effects in Cleveland County, and had a temporarily rented residence; but by actions he had very definitely shown a purpose to reside elsewhere.

So, in the case at bar, Redman—insofar as family life was concerned—had settled in Hattieville. It is true he continued working at the ordnance plant; but, almost concurrently with accepting the employment, he bought a home in Conway County, took his furniture out of storage at Hot Springs, shipped it to Hattieville as soon as the residence became available, and even before possession could be acquired he moved his wife, children, and mother-in-law to the town to await occupancy. The act of buying this property would not of itself be conclusive. If thereafter Redman had disclosed a purpose to remain a resident of Ouachita County and had, by substantial conduct, evidenced this decision of mind, a different situation would be presented.

Another case in point is *Twin City Coach Co.* v. *Stewart, Adm'r.,* 209 Ark. 310, 190 S. W. 2d 629. There was no disagreement as to the majority opinion that venue was in Logan County; but, since this opinion held that an instructed verdict for the defendant should have been given, facts connected with the decedent's actions affecting the contention that she had chosen Fort Smith as her residence were not detailed. The dissenting opinion, while expressing the majority's view that venue was in Logan County, elaborated upon evidence touching venue, and disagreed with the general result. (*Shephard* v. *Hopson,* 191 Ark. 284, 86 S. W. 2d 30.)

The judgment is reversed and the cause is remanded with directions to sustain the defendants' motion to quash service.

BROWN *v.* BROWN.

4-8096 200 S. W. 2d 488

Opinion delivered March 10, 1947.

W. A. Leach, for appellant.

Virgil R. Moncrief and *John W. Moncrief,* for appellee.

GRIFFIN SMITH, Chief Justice. The appeal is from a decree wherein Sec. 8222 of Pope's Digest was relied upon. The statute is discussed at length in *Davis* v. *Cullums,* 205 Ark. 390, 168 S. W. 2d 1103.

In 1932 John Oliver Brown married Martha, a widow with two sons and a daughter. July 15, 1941, John left Martha and his step-children in Stuttgart and went to Chicago. October 21 following John wrote the letter shown below.[1]

September 15, 1943, Martha sued for divorce. Appropriate jurisdictional steps were taken, including ap-

[1] "Mrs. Martha Brown. Dear one: Holly greeting to you in Jesus name. I am savte from sin. an in prayzing Jesus I am well. and hope you are the same. I am writing to let you no that I am not going to be your no more. So if you will get you some one, and forget all about me and I will forget you and do not come looking for me. for it is nothing doing for you. Yours truly, John O. Brown, 7535 W. 64th St., Argo, Ill." [Argo is a suburb of Chicago, about twelve miles from the city proper].

pointment of an attorney *ad litem.* John received notice that the suit was pending, but in the proceedings from which this appeal comes he claimed that the attorney's letter was not received in time for defense to be made. In other parts of his testimony John says that he remarried in October, 1943, "shortly" after receiving the attorney *ad litem's* letter giving information that Martha had filed suit. As a matter of fact, the divorce decree was not rendered until November 22, 1943. For the purpose of this opinion it will be assumed that John's Chicago marriage occurred after November 22d.[2]

Martha died May 27, 1944, in consequence of a homicidal act.

When John left Stuttgart he was owner of a residence and certain rental property. They were mortgaged for $550. The record is unsatisfactory regarding value of the equities in 1941. Appellant contends the three lots with buildings were worth $3,000. Evidence adduced at the hearing on motion for retrial was that the property was worth between $700 and $800.

August 7th, 1944, appellant moved for a new trial. This was followed by an answer to the original divorce action. Appellant admitted that after marrying Martha the realty in question was acquired. It was mortgaged, but appellant denied there was an agreement with Martha that if she would discharge the indebtedness the estate should become hers. There was denial that Martha paid appreciably on the debt, but to the contrary, John says he sold other holdings and reduced the obligation to less than $100. The prayer was ". . . that the complaint of the plaintiff be dismissed for want of equity, and for all other relief".

In appellant's motion for a new trial it was alleged that because of constructive service, he had no knowledge prior to final decree that the action was pending.

John returned temporarily to Stuttgart. His deposition was taken in Arkansas County November 21, 1944.

[2] Admission by counsel for appellant. [Tr. 53].

The record shows that a letter to him (which he admitted receiving) was written October 23, 1943—a month before the decree was rendered.

Chief contention is that there must be a new trial, irrespective of the divorce, and that ancillary to this proceeding property rights should be determined. We agree with appellant, as expressed by counsel, that he was entitled to file an answer, ". . . setting up his defense, and may offer any evidence competent to establish such defense. The plaintiff may offer such evidence as may be preserved in the record and such additional competent evidence as may be desired. The Court can then award such relief as is justified by the pleadings and the proof. It may vacate, modify, or set aside the former judgment".

Appellant contends that the complaint filed by Martha was limited specifically to the matters enumerated: (a) Decree of absolute divorce; (b) reasonable sums payable monthly for support; (c) vesting, quieting, and confirming in Martha a fee simple title to the real property, and (d) "all costs herein expended, including suit money and attorney's fee, and all other proper relief".

Counsel has carefully traced from Chapter 51 of the Revised Statutes the section now appearing in Pope's Digest as 4393, showing amendments, etc. The benefits or relief mentioned in § 4393 define a limit, says counsel, beyond which the Court may not go; and, since alimony is not assessable in a gross sum, Martha's support and maintenance should not have been computed from July 15, 1941, when the act of desertion is alleged to have occurred.

In *Walker* v. *Walker,* 147 Ark. 376, 227 S. W. 762, it was held that an action for divorce against a nonresident where the service was constructive could not result in a personal judgment, and that a decree for alimony and attorney's fee is personal. But see *Smith* v. *Haltom,* 177 Ark. 790, 8 S. W. 2d 437, where it was held that the request of the plaintiff in a divorce proceeding that domestic funds of her nonresident husband

(constructively served) be held amounted to an equitable garnishment from which alimony might be paid.

The holding in *Strickland* v. *Strickland,* 80 Ark. 451, 97 S. W. 659, is that while death terminates a divorce suit, yet where property rights depend upon correctness of the decree and an appeal has been taken, it is the duty of this Court to entertain jurisdiction in order to settle such rights, notwithstanding death of the husband *pendente lite.* Chief Justice Hill, who wrote the opinion, said: "This is not a divorce suit now in the proper sense of the term, but a mere review of a divorce decree to ascertain its correctness in order to fix property rights. The reasons usually appealing to a court in favor of [allowances] do not appear here, and the usual means of enforcing such order no longer exists".

Corney v. *Corney,* 97 Ark. 117, 133 S. W. 813, illustrates the equitable principle that if a plea of laches has been made it will be sustained in the interest of justice where because of changed conditions the complaining party can lose nothing but costs and if sustained may profit substantially.

Appellant, in his brief, mentions the matters that should have been retried, but says " . . . they were not, since the Court found that John, by his remarriage, had estopped himself".

While the property was not, in its entirety, subject to the claim of Martha as dower, (and that part of the original decree is erroneous but now harmless) the Chancellor did not underestimate the weight of evidence in finding—in consequence of the second trial—that appellant willingly attempted to part with his equity before leaving Stuttgart in 1941; that he told Martha the property would be hers if she paid it out; that she, with the assistance of the children, did make payments, and that during the twenty-eight months between abandonment of Martha and her divorce John treated the mortgage of $550 as non-existent, and neglected to pay taxes. Nor do we agree with appellant that the hearing on John's motion for a new trial was not in fact a trial. Witnesses were heard, statements of ac-

counts were submitted, and John's deposition covers twenty-two pages of the transcript.

Martha's two sons were in the military service and from their allotments payments on the property were made. After Martha was killed the children employed private counsel to assist the Prosecuting Attorney in procuring a conviction. For this purpose a mortgage on the lots was executed and $350 procured.

The decree appealed from expressly finds that there was a trial. The opening sentence is, "Now on this day regularly comes on to be heard this case, same having been duly submitted in term time, and . . . all parties duly and properly agreeing and consenting to a trial hereof in vacation, and at this time, and all parties announcing ready for trial, the Court doth proceed to a hearing hereof on the original pleadings, complaint, . . . the original decree rendered by the Court on November 22, 1943, . . . depositions of John Oliver Brown, Elizabeth Ice, Rosie Lee Phillips, Theodore W. Montgomery, O. J. Miller, D. T. Oaksmith, and John W. Moncrief, together with exhibits thereto; and the Court, after hearing the evidence and argument of counsel, . . . doth find . . . that the decree of November 22, 1943, should not be vacated". Form of the decree was approved by the indorsement of appellant's counsel.

It can be argued, of course, that refusal to vacate the old decree with its award of the property to Martha as dower is demonstrative error calling for a reversal; and so it would be if this were the only ground upon which the transaction could rest. But it must be remembered that a little more than three months after John left Stuttgart he wrote concerning his spiritual regeneration. So enraptured was he that no mention was made of worldly commodities recognized in law as real property; there was no overture of cooperation looking to preservation of the houses for mutual benefits. When John Oliver Brown left Martha, he quit with a finality not easily misunderstood, and with the inscribed admonition, "It is nothing doing for you".

Although John, by his own repeated assertions, married Chicago's Geneva Williams in October 1943 while Martha was still his wife, he must, in the case at bar, abide the date stipulated by deposition, effect of which is to postpone until after divorce the new relationship. Without the decree of November 22 there could have been no lawful union with Geneva. When all transactions under consideration are appropriately appraised, the conclusion is inescapable that John did not intend to reassert any claim to the property. His temptation to recover appears to have been transmuted into action when death removed Martha and erased the facts with which she was familiar; but in the meantime—and because of the divorce, as John says—he was enabled to acquire a new wife and by absenteeism be relieved of the "heavy load he was carrying" at Stuttgart.

Although appellees are the heirs of Martha Brown, evidence preponderates that each of the three children had worked—the boys in particular—and that their earnings were turned over to the mother and presumptively became a part of the fund with which the mortgage debt was paid. In addition, the boys, relying upon their stepfather's conduct as evidence that the property had been turned over to their mother, made payments from money earned in the armed service; and finally $350 was borrowed in reliance upon the decree. In these circumstances appellant, while entitled to the trial because of statutory provisions, will not be permitted to avoid the divorce Martha obtained from him on virtual invitation; nor may he prevail over the equities of others.

Affirmed.

SMITH *v.* TREADWELL.

4-8088 200 S. W. 2d 514

Opinion delivered March 10, 1947.

Rehearing denied April 14, 1947.

Gaughan, McClellan & Gaughan, for appellant.

L. Weems Trussell, for appellee.

McHANEY, Justice. Appellant, R. L. Smith, was the husband of Sarah G. Smith, and the other appellants are her children and heirs at law, she having died intestate

on October 4, 1945, and being the record owner of the 220-acre tract of land here involved.

Said tract was returned delinquent and sold to the State for the non-payment of the taxes thereon in 1933 for the 1932 taxes. After the expiration of the two-year period of redemption, said lands were certified to the State. On July 21, 1946, the Commissioner of State Lands sold and conveyed same to C. D. Vandergrift who thereafter paid the taxes for 1936 to 1941, inclusive, and then sold and conveyed same to Oliver Anthony who later sold and conveyed the same tract to J. D. Treadwell, who has paid the taxes thereon for 1942 to 1945, inclusive, claiming to be the owner.

On May 22, 1936, the State sought to confirm its title to these and other lands under the provisions of Act 119 of 1935. On November 2, 1936, appellants filed an answer and intervention in the State's confirmation suit, alleging a right to redeem. About eight years later, an amendment to the intervention was filed by appellants, which reasserted the right to redeem by reason of their minority, a claim which was not relied on and not now asserted. It also asserted the invalidity of the tax sale held by the Collector on June 17, 1933, on a number of grounds, two of them being that the delinquent list was not filed and notice given by the Collector within the time and in the manner prescribed by law; and because said delinquent list was never recorded by the Clerk as required by law. Appellees were made parties to the intervention. Vandergrift and Anthony appeared and disclaimed any interest in said lands, except certain tax payments made by them. Treadwell moved to dismiss the intervention because appellants made no deposit to cover taxes, penalty and costs, as provided by Act 119 of 1935. In response to this motion the Court made an order requiring appellants to make such deposit which they did in the sum of $312.48.

Treadwell answered the intervention, claiming to be the owner of said lands, and that the tax sale was made in substantial compliance with the statute, and

plead the curative provisions of Act No. 142 of 1935 in bar of the action.

Trial resulted in a decree dismissing the intervention for want of equity, the Court finding and holding that Act No. 142 of 1935 cured the defects in the sale. This appeal followed.

The sale of the land here involved in 1933 for the 1932 taxes was held under the provisions of Act 250 of 1933, approved March 20, 1933. The sale was begun on June 12 and ended on June 17, 1933, the land here involved being sold on the latter date. Act 250 was amended by Act 16 of the extraordinary session of 1933, approved August 25, 1933, but the sale here involved occurred prior to the passage of Act 16. A portion of said Act 250 was held unconstitutional in *Smith* v. *Cole* and *Brown* v. *Pennix,* 187 Ark. 471, 61 S. W. 2d 55. Sections 5 and 6 of said Act 250, which were amendatory of §§ 10084 and 10085 of Crawford & Moses' Digest, were sustained in *Matthews* v. *Byrd,* 187 Ark. 458, 60 S. W. 2d 909. Section 5 of Act 250 of 1933, now § 13846 of Pope's Digest, provides: "The clerks of the several counties of this State shall cause the list of delinquent lands in their respective counties, as corrected by them, to be entered in a well-bound book, appropriately labeled, which book shall be a permanent public record, and open to the inspection of the public at all times."

Section 6, of said Act 250 amended § 10085 of Crawford & Moses' Digest so as to eliminate the necessity of publishing the delinquent list in full as described on the tax books, and provided a short form of notice to be published by the Clerk, all of which is set out in *Matthews* v. *Byrd, supra.*

It is undisputed in this record that there was a total failure of the Clerk to comply with § 5 of said Act 250. The list as filed by the Collector was not signed or certified by him, nor attested by a Notary or other officer. The delinquent list as filed was not corrected by the Clerk and was not "entered in a well-bound book, appropriately labeled, which book shall be a public

record, and open to inspection of the public at all times.'' The only semblance of compliance with this § 5 was that the Collector filed a list of delinquent lands with the Clerk, consisting of several large sheets, pinned or fastened together at one corner. The list was never corrected nor was it recorded in a book as expressly required. We think these requirements must have been substantially complied with in order to constitute notice to property owners.

In *Hirsch and Schuman* v. *Dabbs and Mivelaz,* 197 Ark. 756, 126 S. W. 2d 116, we said: ''If this delinquent list had not been entered upon a permanent record, usually referred to as the record of lands returned delinquent, the sale was void for that reason.'' This case involved a sale to the State in 1934 for the taxes of 1933. The curative provisions of Act 142 of 1935 do not appear to have been pleaded or relied upon, and the decision was based on §§ 5 and 6 of said Act 250 as amended by Act 16 of the extra session of 1933, held in August of that year. As above stated these amendatory provisions of said Act 16 do not apply to the sale here involved, but § 5 of Act 250, which required the delinquent list to be corrected and recorded by the Clerk, was not changed, except in the last paragraph of § 5 of Act 16 it is provided: ''The list of delinquent lands recorded as provided in § 5 hereof shall be attached thereto, by the County Clerk, a certificate at the foot of said record, stating in what newspaper said notice of delinquent land sale was published and the dates of publication, and such record, so certified, shall be evidence of the facts in said list and certificate.'' As to this amendatory legislation we said, in the Hirsch and Schuman case, *supra*: ''We perceive, in this amendatory legislation, no intention to dispense with the requirement that a permanent record be made and kept of lands returned delinquent, nor as to the time of making such record, that is, prior to the sale.

''The effect of this amendatory § 6 is to make such a record more important than ever; indeed, under the amendatory section, such a record becomes indispensable. This amendatory section dispenses with the necessity of

publishing the list and description of the delinquent lands. A six-inch, double column notice advises that delinquent lands will be sold, but does not describe the land to be sold. That information cannot be obtained from the published notice, but can only be had by examining the permanent record in which the delinquent list of lands has been copied. If the continued keeping of that record is not required, then there was no permanent record where anyone might look to ascertain what lands were returned delinquent. The notice for which the act provides refers to the record where the delinquent lands are described, and the last paragraph of this § 6 requires that a certificate be made at the foot of that record stating in what newspaper the notice was published."

So, without at least a substantial compliance with said Act 250, in this respect the sale is void, unless cured by Act 142 of 1935, as the learned trial court held. The applicability of this Act is premised on two conditions: (1) "Whenever the State and County taxes have not been paid upon any real or personal property," and (2) "Publication of the notice of the sale has been given under a valid and proper description, as provided by law." The first condition is conceded—the property was delinquent—but the second condition is strenuously denied. The notice of the sale was the short form provided by Act 250 and did not describe any property. It referred to a "list or record on file in the office of the Clerk of the County Court." Assuming without deciding that a corrected list, properly recorded by the Clerk in a well-bound book, as required by the Act, would be sufficient to constitute notice to the taxpayers, we are of the opinion that what happened here, as set out above, was not sufficient and that Act 142 of 1935 has no application to this sale.

We do not overlook our case of *Sanderson* v. *Walls,* 200 Ark. 534, 140 S. W. 2d 117, where an invalid tax sale for the same years, as here involved, was held to be cured by said Act 142, but the question there involved was the time of publication of the notice of sale, and it was held, "the fact being that the notice of sale was published in a local paper in its issues of May 24th and

May 31st, 1933, and the sale occurred on June 12th. The notice was, therefore, published for the time and in the manner required by law." The question here involved was not there raised or decided. Here there was no record made of the delinquent list and there was, therefore, no legal method whereby any person could determine whether his property was delinquent. The delinquent list was not published because of Act 250, and it was not recorded as definitely required by the same Act. Therefore, there was no notice as required by law, and Act 142 of 1935 has no application according to express condition No. 2, set out above.

The decree is, accordingly, reversed and the cause remanded with directions to enter a decree in accordance with this opinion, but requiring appellants to refund to appellees all taxes paid by them together with interest at 6 per cent from the times of payment to the date of tender made by them. Each party will pay his own costs of this appeal.

GRIFFIN SMITH, C. J., SMITH AND MCFADDIN, JJ., dissent.

CHAVIS *v.* TAYLOR & COMPANY.

4-8098 200 S. W. 2d 507

Opinion delivered March 10, 1947.

A. D. Chavis, for appellant.

A. F. Triplett, for appellee.

ROBINS, J. This appeal presents a controversy as to the ownership of 36 feet off of the north end of the west half of lot No. 3, block 25, of Tannehill and Owen's Addition to the City of Pine Bluff, Arkansas. Appellant, a minor, through her next friend, instituted suit in the lower court alleging that she was the owner of this property by virtue of a warranty deed from E. N. Crawford and by virtue of having redeemed same from the State of Arkansas for the taxes of 1930 and also for taxes for the year 1938. She also alleged that she and her predecessors in title had been in the actual possession of said property from 1937 to 1944. Appellee was made party defendant and the prayer of appellant's complaint was that she be permitted to redeem said property from certain foreclosure sales through which appellee claimed title and that her title to the property be quieted and confirmed.

Appellee denied appellant's claim of ownership and possession, and alleged title in itself by virtue of a sale of the property to Paving District No. 35, in foreclosure proceedings to collect delinquent taxes of said district, and a subsequent conveyance from the district to appellee.

By the decree of the lower court appellant's complaint was dismissed for want of equity, and title to said property was quieted in appellee. To reverse that decree this appeal is prosecuted.

It was stipulated in the trial below that in 1926 E. N. Crawford and wife conveyed the tract involved herein to W. A. Kientz by deed which had been duly recorded; that the property was forfeited and sold to the State of Arkansas for taxes of 1930; that in 1936 E. N. Crawford executed a deed conveying this tract to A. D. Chavis, who, in 1939, conveyed it to A. D. Chavis, Jr., and in 1940 A. D. Chavis, Jr., conveyed it to appellant; that on January 25, 1937, A. D. Chavis obtained a redemption deed from the State Land Commissioner and that he obtained another redemption deed from the state in 1944 covering the sale to the state for delinquent taxes due for the year 1938; that the property having been sold to Paving District No. 35, through foreclosure proceedings in chancery court for delinquent assessments, Paving District No. 35, on October 13, 1944, sold and conveyed the property by deed duly recorded to appellee.

The tract in question is a vacant lot originally enclosed with a picket fence, but this fence long ago rotted down and parts thereof were removed by different people. There was no proof that appellant or any one through whom she claimed title had ever been in actual possession of the land. At one time a small portion of the lot was cultivated in a garden by a woman who lived near the tract in controversy, but it was not shown that she rented the property from or attorned to appellant or any of her predecessors in title.

For reversal it is argued that A. D. Chavis became the owner of this property because "he bought same from the State of Arkansas." But this contention is not borne out by the record. Mr. Chavis did not buy this land from the State of Arkansas and he did not acquire any title from the State of Arkansas by virtue of the two redemption deeds which be obtained. The effect of a redemption from the state of land forfeited for delinquent taxes is not to vest in the person making redemption the title which the state obtained by virtue of the delinquent tax sale, but merely to extinguish any right or lien of the state growing out of the said de-

linquent tax sale proceedings. Nor does the fact that the Commissioner of State Lands permits a redemption of lands sold to the state for non-payment of taxes establish that the person redeeming the land is the owner thereof. In the case of *Meyer* v. *Snell,* 89 Ark. 298, 116 S. W. 208, this court said: "Nor can we sustain appellee's contention that the State's redemption deed to him established the fact that he was the true owner of the land. The most that can be said of this is that the action of the Commissioner of State Lands in allowing him to redeem and executing a deed to him establishes merely his right to redeem from the tax sale; but it cannot be held to be an adjudication of his ownership of the land in litigation with another person."

Appellant obtained no title to the land by reason of the conveyance from E. N. Crawford to A. D. Chavis, because E. N. Crawford had previously conveyed the land to Kientz. Appellant fails to show any such adverse possession of the land by her or her predecessors in title as would vest title in her by limitation. Since the redemption deeds from the state conferred no ownership of the property, it is apparent that she had no title whatever.

"In an action to quiet title the plaintiff must rely upon the strength of his own title and not upon the weakness of his adversary's." *Gibbs* v. *Pace* (headnote 1), 207 Ark. 199, 179 S. W. 2d 690. See, also, *Greer* v. *Vaughan,* 128 Ark. 331, 194 S. W. 232. Since appellant shows no title whatever in herself, the lower court properly denied her relief; and it is unnecessary for us to consider any of the contentions as to invalidity of appellee's title that are urged by appellant.

The decree of the lower court is affirmed.

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE *v.* FIKES, ADMX.

4-8087 200 S. W. 2d 97

Opinion delivered March 10, 1947.

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

William H. Glover and *Joe W. McCoy,* for appellee.

HOLT, J. Harriett Fikes, Administratrix of the estate of Percy Fikes, deceased, brought this action to recover damages to compensate for the death of her husband, Percy Fikes, a Negro, who was struck and killed, south of the Main Street crossing in Malvern, Arkansas, by one of appellant's trains at about 4:30 p. m., September 26, 1945. She alleged in her complaint that appellant and its employees, in operating the train, negligently and carelessly failed to keep a lookout, and, after discovering the peril of deceased, failed to use ordinary care to prevent injuring him, and that they failed to warn him by giving the statutory signals. She sought damages for the benefit of herself as widow and for next of kin in the amount of $2,500, and for damages to the estate in the sum of $500. A jury awarded her $1,265 on her own account and for next of kin, and in a separate verdict assessed "her damage for the benefit of the estate in the sum of $235."

This appeal followed.

The testimony was to the following effect. At the time appellee's husband was killed, he was regularly employed at a canning plant near appellant's yards in Malvern. He was about 56 years of age and earning $25 to $30 per week. In a previous accident, he had lost a leg and was wearing a "peg leg," at the time he was fatally injured. At about 4:30 p. m., the deceased, when he had started home from his place of work, for his own convenience, walked along a well beaten path between appellant's main line track and a side track, for some distance, with his back to the oncoming train. This path led across the main line track. While in this situation and approaching the track, he was struck by the outer edge of the front end of the engine and killed instantly. At the time he was struck, he was not at a regular crossing, but was more than 300 feet from the Main Street crossing over which the train passed. The appellant's employees saw the deceased when he was about 15 feet from the track and approaching it, while the train

was about 400 feet away, and there is evidence that they could have seen him for approximately 500 feet or more before he was struck. Appellant's engineer testified: "Q. What part of your engine hit him? A. The pilot. Q. He wasn't walking into the side of the engine? A. He didn't walk into the side of it, no. Q. You hit him with the extreme part next to him? A. The corner of it."

In these circumstances, appellant argues that there was no substantial evidence to take the case to the jury. It is our view, however, after a review of all the testimony, and giving to it its strongest probative force in favor of appellee and the jury's verdict, that a case was made for the jury on appellee's claim for damages for the benefit of herself and the next of kin, and these damages were recovered under the provisions of the Lookout Statute, § 11144 of Pope's Digest.

While we agree with appellant that appellee's intestate at the time he was struck and killed was a trespasser, or a licensee, on the property of appellant, it does not follow in the circumstances that there could be no recovery.

As to the rule governing in such cases, we said in the recent case of *Missouri Pacific Railroad Company, Thompson, Trustee* v. *Merrell,* 200 Ark. 1061, 143 S. W. 2d 51: "The fact is that appellee was either a trespasser or a licensee on the track of appellants. . . . It can make no difference which, as appellants owed him no more duty as a licensee than they did as a trespasser, which was not to injure him willfully or wantonly after discovering his peril, or if his peril could have been discovered 'in time to have prevented the injury by the exercise of reasonable care after the discovery of such peril.' The lookout statute, § 11144 of Pope's Digest, requires all persons running trains to keep a constant lookout for persons and property on the track, and if any person or property is killed or injured by neglect to keep such lookout, the railroad company shall be liable to the person injured 'for all damages resulting from neglect to keep such lookout, notwithstanding the contributory negligence of the person injured, where, if

such lookout had been kept, the employee or employees in charge of such train of such company could have discovered the peril of the person injured in time,' etc., as above quoted,'' and in *Missouri Pacific Railroad Company, Thompson, Trustee* v. *Farman,* 208 Ark. 133, 185 S. W. 2d 91, we said:

''We have had frequent occasion to consider the applicability of the lookout statute as applied to the various circumstances recited in the different opinions, and the law of the subject was summarized in the recent opinion in the case of *Mo. Pac. Rd. Co.* v. *Severe,* 202 Ark 277, 150 S. W. 2d 42, as follows: '. . . the mere finding of the body of a trespasser, apparently killed by a train, near or on the track, does not, of itself, make a case for the jury. It must be further shown, by testimony sufficient to raise a reasonable inference, that the danger might have been discovered and the injury averted by the trainmen, if a proper lookout had been kept. When testimony has been offered, sufficient to sustain the reasonable inference that the danger could have been discovered had the efficient lookout required by law been kept, then the burden devolves upon the railroad company to show, by a preponderance of the evidence, that such a lookout had been kept, and it is liable when it fails to do so.' ''

In the present case, we are unable to say that there was no substantial evidence from which a reasonable inference could have been drawn by the jury that the danger might have been discovered and the death of appellee's intestate averted by the trainmen had a proper lookout been kept.

Appellant also insists that the case should be reversed on account of improper and prejudicial argument of one of appellee's attorneys. The record discloses the following: ''If the court please, we object to that statement, that the Missouri Pacific has a heart as cold as steel and would not pay the funeral expenses of the deceased for the reason we don't feel any liability in this case, and are not supposed to pay it and ask the court to reprimand Mr. Glover. *The Court.* Mr. Ryan

proceed, you have 25 minutes to answer. *Mr. Ryan.* Note our exceptions to the ruling of the court."

We agree that this argument was improper and should not have been made. However, since the award of damages by the jury to the appellee for herself and next of kin, on account of her husband's death, was not excessive, we cannot say that appellant's rights have been prejudiced by the use of the above language. Obviously, we think the modest verdict would indicate the absence of passion or prejudice in the minds of the jury, and that they were not influenced by it.

Appellant next complains: "Because the court erred in refusing defendant's motion to declare a mistrial in this cause, after the jury had been empaneled and after the testimony had been taken because of the relationship, as employer, of the juror, Mrs. Matthews, to the plaintiff." We find this contention to be without merit. It appears that the appellee had on occasions, but "not lately," done some work for Mrs. Matthews as well as for a number of "other white people." We think the fact alone that the appellee had worked for Mrs. Matthews would not disqualify Mrs. Matthews as a juror. The record does not disclose that Mrs. Matthews was questioned on this point and appellant's complaint comes too late.

Appellant also argues that the verdict of the jury for the benefit of the estate of the deceased in the amount of $235 and the judgment for that amount was erroneous, and that this judgment should be reversed and this cause of action dismissed. We think this contention must be sustained.

At the close of all the testimony, the appellant requested an instructed verdict on both causes of action, which the court denied. It is undisputed, in the instant case, that appellee's intestate was killed instantly. There could, therefore, have been no recovery for the benefit of his state in the absence of conscious pain and suffering on the part of the deceased.

In *Brundrett* v. *Hargrove, Administratrix,* 204 Ark. 258, 161 S. W. 2d 762, this court held: (Headnote 5.)

"Since appellee's son was killed instantly, his head being crushed and the evidence showed that he gasped only once, a verdict for pain and suffering is not justified."

Finally, complaint was made about certain instructions relating to appellee's right to recover for herself and next of kin. It would serve no purpose to set out these instructions. It suffices to say that after reviewing them, we think the court fairly and correctly declared the applicable law in the circumstances and that this contention is without merit.

Accordingly, the judgment for $1,265 in favor of appellee in her own right and for the next of kin, is affirmed, but the judgment for $235 for the benefit of the estate is reversed and the cause dismissed.

MORRISON, ADMINISTRATRIX *v.* NICKS.

4-8147 200 S. W. 2d 100

Opinion delivered March 10, 1947.

Joseph Morrison, for appellant.

W. A. Leach, for appellee.

SMITH, J. This case is a proceeding brought under the authority of Act 297 of the Acts of 1945, to have declared who are the heirs at law of G. W. Nicks. The following facts were either stipulated to be true, or were shown to be true by the evidence. Nicks died intestate August 25, 1934, and was survived by his wife, who died in 1945, and by four daughters and a son, named Lacie W. who departed this life in Chicago, Illinois, January 12, 1943.

Lacie married Elsie G. Watkins in Chicago on October 24, 1938. Elsie had previously been married to Eugene Watkins, and she married Lacie without obtaining a divorce, although the application for the marriage license which Lacie prepared, recited that she was a divorcee. She and Lacie lived together before their marriage, and two children were born to Elsie after her marriage to Lacie, while they were living together as husband and wife.

Birth certificates covering Elsie's first two children recite that Eugene Watkins was their father. These children were born while Elsie and Lacie were living together, but before their marriage. Birth certificates covering the two children born after Elsie's marriage to Lacie recite that Lacie was the father of those children. A fifth child was born to Elsie 13 months and 17 days after Lacie's death, and its birth certificate named Lacie as its father.

Elsie and Lacie lived together as man and wife until the time of Lacie's death, and they were living together as man and wife at that time, although she

testified that they had separated several times. The period of time of these separations is not shown.

The court found that G. W. Nicks' heirs were his four daughters and the two grandchildren who were born after Lacie's marriage, and from that finding and decree the administratrix of Nicks' estate and his four daughters have appealed. There is no cross-appeal.

To reverse this decree it is insisted that the two children declared to be heirs were born as the result of a bigamous marriage, inasmuch as Elsie married Lacie without being divorced from Watkins, her living husband, and it is urged that the law will presume that Watkins was the father of these children and not Lacie, inasmuch as Watkins' impotency or non-access was not shown.

There is a presumption, said to be one of the strongest known to the law, that children born to a couple lawfully married are the children of the husband, and that this presumption continues until overcome by the clearest evidence that the husband was impotent or without access to his wife, and the controlling question is whether that proof was made.

Appellant concedes under the authority of the case of *Evatt* v. *Miller,* 114 Ark. 84, 169 S. W. 817, L. R. A. 1916C, 759, that children born of a bigamous marriage may inherit from the father as well as from the mother. Section 4342, Pope's Digest, so provides. It reads as follows: "The issue of all marriages deemed null in law, or dissolved by divorce, shall be deemed and considered as legitimate." The State of Illinois, where the children were born, has a statute substantially the same as our § 4342, Pope's Digest, it being § 17a, Ch. 89, Marriages, Revised Statutes of Illinois, 1945.

The case of *Cooper* v. *McCoy,* 116 Ark. 501, 173 S. W. 412, reaffirmed the holding in the case of *Evatt* v. *Miller, supra,* the holding in each case being that children of a marriage void because the husband had a prior living wife, are legitimate and entitled to inherit from the

father, but that the statute shields only children born to parents whose marriage for any cause is null in law.

In the case of *Jacobs* v. *Jacobs,* 146 Ark. 45, 225 S. W. 22, Justice Hart said: "In the case of *Kennedy* v. *State,* 117 Ark. 113, 173 S. W. 842, L. R. A., 1916B, 1052, Ann. Cas. 1917A, 1029, which was a bastardy proceeding, the court held that where a child is born in wedlock it is presumed to be legitimate, but that this presumption may be rebutted by sufficient evidence showing that the husband was impotent or entirely absent at the period in which the child in the course of nature has been begotten so that he could not have had access to the child's mother. The rule is about the same on the subject of descent and distribution. The question of the legitimacy or illegitimacy of the child of a married woman is one of fact, resting upon decided proof as to the nonaccess of the husband. 2 Kent Comm. (14th Ed.) § 211."

It was held in the case of *Kennedy* v. *State, supra,* cited by Justice Hart that: "In the absence of a statute in express words making the mother competent to testify to the nonaccess of her husband, we hold that she can not do so. Under our statute, as we have seen, the mother is a competent witness. She may testify to facts which tend to prove that access on the part of her husband within the period of gestation was impossible, and if she testified to facts of that character there would be a question for the court or jury trying the issue to determine as to whether or not the presumption of legitimacy had been overcome. But, in this case, there is no such testimony. She does not testify to any fact that would warrant the conclusion that her husband did not have access within the period of gestation."

It was stipulated that if called as a witness, Elsie would testify that a short time after she and Watkins were married they separated, and that they did not thereafter live together, and when her deposition was taken she so testified and she further testified that Lacie was the father of all her children, but this, in the

course of nature could not have been true as to her fifth child.

Now while under the authority of the Kennedy case, *supra,* Elsie could not have testified as to non-access by Watkins, yet it was competent for her to testify as to facts and circumstances from which non-access by Watkins appears to be conclusively shown. It is true that Watkins and Elsie lived in Chicago when they separated, but it is not shown what became of Watkins, except that it is not contended that he is dead, or that he ever obtained a divorce from Elsie, but there is no contention that Elsie and Watkins ever lived together after their separation.

Elsie was first married to one Visminsky, from whom she was divorced, and on January 21, 1936, she married Watkins, but they soon separated and that separation was permanent. On October 24, 1938, she married Lacie W. Nicks in apparent conformity with the laws of Illinois. At that time she was the mother of two children, and she testified that Lacie was the father of both of them, and it is undisputed that after this marriage she continued to live with Lacie as his wife, except for several separations, the duration of which is not shown, until the time of his death.

The birth certificate of Elsie's children recite that Lacie was the father of the three youngest, but in the course of nature this could not be true as to her fifth child. However, as to the third and fourth child, the undisputed testimony is that they were born while Lacie and Elsie were living together as man and wife, they having been previously married, and these third and fourth children were given the names of members of Lacie's family.

No issue is presented as to the paternity of Elsie's first, second and fifth child, but we think the court was warranted in finding that Lacie was the father of the third and fourth children, and as they were born in wedlock, they are legitimate under the laws both of this State and the State of Illinois, and the decree will, therefore, be affirmed.

SOUTHWESTERN STATES TELEPHONE COMPANY *v.* BIGGER.

4-8095 200 S. W. 2d 90

Opinion delivered March 10, 1947.

[redacted]

House, Moses & Holmes and *Horace Jewell,* for appellant.

Schoonover & Steimel and *Ponder & Ponder,* for appellee.

MINOR W. MILLWEE, Justice. Appellant, Southwestern States Telephone Company, filed this action in the justice of the peace court of Demun township, Randolph county, Arkansas, on September 19, 1944, to recover $72.49 from appellee, Tom Bigger. The complaint alleged this amount to be due for exchange service furnished appellee in the use of a telephone in his store at Biggers, Arkansas, from January 1, 1942, to July 31, 1944. Trial in justice court on October 6, 1944, resulted in a judgment for appellee. The cause was appealed to circuit court where judgment was again rendered in favor of appellee on May 18, 1946. This appeal is prosecuted from the circuit court judgment.

The circuit court judgment recites that the cause was submitted to the court, sitting as a jury, upon the pleadings and stipulation of facts submitted by counsel for the respective parties. There is a stipulation of facts in the record which was filed with the clerk on July 25, 1945. It appears from this stipulation that appellee's defense to the action was based upon his contention that he was entitled to free exchange service which he and

his father had received in connection with the use of the telephone in question since 1903. This alleged right to free service was involved in several conveyances of the telephone system. The stipulation mentions a conveyance of the system from Ozark Telephone Company to Charles M. Conway and recites that a copy of this instrument is marked "Exhibit C" and made a part of the stipulation, but no such exhibit is found in the record. There is no bill of exceptions in the record and the stipulation of facts filed by the clerk is not incorporated in the judgment, or otherwise authenticated by the trial court. We are at the outset, therefore, confronted with the question whether this stipulation of facts can be considered as a part of the record.

The state of the record in the instant case is almost identical with that involved in the case of *Coonrod* v. *Anderson,* 55 Ark. 354, 18 S. W. 373, where the court followed the rule announced in the early case of *Lawson* v. *Hayden,* 13 Ark. 316, as follows: "An agreed statement of facts, signed by the counsel of the parties, filed in the cause, and the filing noted of record, does not thereby become part of the record, not being made so by bill of exceptions or order of the court; and the court below, sitting as a jury, having determined the case upon such agreed statement, and it not having been made part of the record, this court will not look into it for the purpose of reviewing the decision, but the presumption of law being in favor of the correctness of the judgment of the court below, will affirm it."

This rule has been adhered to in many subsequent cases. Chief Justice McCulloch, speaking for the court in *First National Bank of Fort Smith* v. *Thompson, Administrator,* 124 Ark. 161, 186 S. W. 826, said: "The case was tried below on an agreed statement of facts, which was merely filed with the clerk and referred to in the judgment of the court, but is not brought in the record by a bill of exceptions. Therefore we cannot consider it on this appeal. *Coonrod* v. *Anderson,* 55 Ark. 354, 18 S. W. 373. The mere reference in the judgment entry to the agreed statement of facts does not make it a

part of the record when the case is brought here for review, and in order to bring it upon the record it must be in the bill of exceptions or must appear in full of the record entry of the judgment." Other cases to the same effect are, *Ashley* v. *Stoddard, Jr. & Co.*, 26 Ark. 653; *Boyd* v. *Carroll*, 30 Ark. 527; *Kinnanne* v. *State*, 106 Ark. 280, 153 S. W. 583; *Satterfield* v. *Loupe*, 160 Ark. 226, 254 S. W. 489; *Great Southern Fraternal Union* v. *Stroud*, 169 Ark. 509, 275 S. W. 753. The rule has been changed by statute (Act 196 of 1945) in equity cases, but is still applicable in cases at law, and was reaffirmed in the recent case of *Royal* v. *State, ante*, p. 141, 199 S. W. 2d 744.

There is also found in the transcript a "Statement by the Court on Rendering Judgment" which was filed by the clerk. Conceding, without deciding, that this statement was properly brought into the record, the judgment of the court is not inconsistent with such findings of fact as are made in this statement by the trial court.

Since the stipulation of facts upon which the case was tried has not been properly brought into the record, we cannot consider it on this appeal and must assume the correctness of the judgment of the trial court.

Affirmed.

TURNAGE *v.* GIBSON.

4-8083 200 S. W. 2d 92

Opinion delivered March 10, 1947.

John R. Thompson, for appellant.

John D. Thweatt and *Cooper Thweatt,* for appellee.

ED. F. MCFADDIN, Justice. This appeal concerns the stock law in Prairie county.

Appellants, claiming to be a majority of the qualified electors residing in Des Arc township, Prairie county, Arkansas, filed their petition in the county court, on December 3, 1945, to have their township declared exempt from the general stock law of that county. They claimed that compliance with § 346, Pope's Digest, gave them the right to have such exemption. Appellee appeared as a remonstrant against the petition. The county court made the exemption order sought by appellants; and appellee appealed to the circuit court, where the county court order was reversed, and the appellants' petition was dismissed. This appeal, here, challenges the judgment of the circuit court; and presents for our consideration three points: (1) Judicial notice of county stock laws; (2) the validity of the 1944 stock law of Prairie county; and (3) the efficacy of § 346, Pope's Digest, to appellants' situation. We consider these points.

I. *Judicial Notice of County Stock Laws.* The circuit court, without requiring any evidence, took judicial notice of the fact that Prairie county had enacted a county-wide stock law at the general election in November, 1944, and that the voters of the county in that election were acting under the powers and provisions of Act 4 of 1935 and Amendment No. VII to the Constitution (which amendment was adopted November 2, 1920, and

declared adopted by the special Supreme Court in *Brickhouse* v. *Hill,* 167 Ark. 513, 268 S. W. 865). In thus taking judicial notice of the county stock law, the circuit court was correctly applying and following the holdings of this court in the cases of *Skiles* v. *State,* 150 Ark. 300, 234 S. W. 721; *Crumbley* v. *Guthrie,* 207 Ark. 875, 183 S. W. 2d 47; and *Hughes* v. *State,* 209 Ark. 125, 189 S. W. 2d 713. In *Crumbley* v. *Guthrie,* we said:

"In the decree the Chancellor said: 'Prairie Township . . . is part of a stock law district wherein it is unlawful for stock to run at large.' There was no proof to support this finding. On rehearing in *Skiles* v. *State,* 150 Ark. 300, 234 S. W. 721, there was answer to the appellant's contention that no proof had been introduced showing that a stock law enacted by the Legislature had been put into operation by vote of the people, as prescribed by that statute. The Court, speaking through Chief Justice McCulloch, concluded that adoption of the terms of a statute by election '. . . is a matter of which the Court should take notice judicially. It is a law in operation in a locality which was within the jurisdiction of the Court, and the Court should take cognizance of it without the necessity of it being brought to the attention of the Court by proof.' We think the defendant below had a right to rely upon this opinion and to rest the matter on allegation, in the absence of proof that the law was not adopted."

To aid a court in applying judicial notice, it is proper to call attention to the place where the fact or law may be found which is to be judicially noticed—as we said in *J. R. Watkins Med. Co.* v. *Johnson,* 129 Ark. 384, 196 S. W. 465:

"Being required to take notice of those laws, it is our duty to pursue inquiries sufficient to make that knowledge real as far as possible."

In 20 Am. Jur. 52, in speaking of how the court may actually know the matters of judicial notice, this is said:

"If they are proper subjects of judicial knowledge, the judge may inform himself in any way which may seem best at his discretion, and act accordingly."

To aid this court in actual knowledge of the matter of judicial notice, the appellee has filed here a duly certified copy of the order of the county court of Prairie county of November 14, 1944, declaring the result of the election on the county-initiated stock law; and the order has the full text of the law, and the vote thereon. Section 13301, Pope's Digest, (being § 7 of Act 4 of 1935) requires such a record to be kept by the county clerk. The authenticity of this certified copy is not challenged by appellants, so we take it to be correct. Thus, we know actually the matter of which we take judicial notice; and we know that the voters of Prairie county by vote of 1,091 to 433 adopted, at the general election on November 7, 1944, a county-wide stock law which provided (in part):

"All of Prairie county, Arkansas, is hereby made a livestock restricting area, and it shall be unlawful for horses, mules, . . . cattle . . . or any other animals of like kind to run at large in said county; . . ."

Neither the sufficiency of the vote nor the legality of the procedure leading up to the election is here attacked; so we take the measure as duly adopted.

II. *The Validity of the 1944 Stock Law of Prairie County.* The appellants claim that the 1944 stock law of Prairie county applied to the entire county, and that only part of the county had a stock law prior to 1944; and therefore—appellants claim—the county-initiated act was an attempt to amend previous laws, and consequently was void under that provision of Constitutional Amendment No. VII, which reads:

". . . but no local legislation shall be enacted contrary to the Constitution or any general law of the State, . . ."

Our holding in the case of *Smith* v. *Plant,* 179 Ark. 1024, 19 S. W. 2d 1022 is a complete answer to appellants' contention in this regard. Appellants admit that, prior to the 1944 general election, only the south part

of Prairie county had a stock law.[1] This admission, even if we did not know that fact judicially, makes the facts in the case at bar "on all fours" with the facts in *Smith v. Plant, supra,* where—in denying the same contention as is here made—we said:

"But, since the electors of White county have not exercised the option of putting into effect a general law in White county prohibiting livestock from running at large, we are of the opinion that the provisions of Initiative Act No. 1 of White county are not in conflict with any general law in force and effect in White county."

We, therefore, conclude that the county-wide initiated stock law of Prairie county of 1944 is constitutional, as against the attack here made; and we proceed to determine whether appellants' petition entitled them to the relief prayed against the county-wide stock law.

III. *The Efficacy of Section 346 Pope's Digest to Appellants' Situation.* This section of Pope's Digest is § 2 of Act 258 of 1919, which act amended Act 156 of 1915 (see § 335, *et seq.,* Pope's Digest, where some of these sections are codified). The 1915 act allowed 25 per cent of the qualified electors of three or more townships in a county to petition for an election to determine whether the stock law would be in effect in such townships. The 1919 act (by § 2 thereof, which is now § 346, Pope's Digest) promulgated a method whereby one township could secure exemption from the stock law voted by the other townships.

It will thus be seen that § 346, Pope's Digest, applies only to a situation where the stock law was put into effect in a county by the procedure set forth in Act 156 of 1915 as amended by Act 258 of 1919. The stock law of Prairie county as voted in 1944 did not go into effect by the method set forth in these sections, but became

[1] The appellants' brief says: "Many years ago a law was enacted which made a great majority of the southern district of Prairie county into a stock law. Thereafter, other townships of the county, under the general law existing, availed themselves of the right, and by majority, either through petition or election, created stock law districts in much more of the county until the point had been reached where probably more than half of Prairie county was in a stock law."

effective by the method outlined in Amendment No. VII to the Constitution which specifically authorized county-initiated acts.

We have examined the county-initiated stock law of Prairie county as adopted at the 1944 general election, and find no provision in that law which authorizes any proceeding—such as is here attempted—to exempt a township from the county-wide law; and since § 346, Pope's Digest, does not apply to a county-initiated act, it follows that the appellants' petition was improperly brought and was therefore correctly dismissed by the circuit court.

Affirmed.

JONES *v.* HARDIN, ADMINISTRATOR.

4-8102 200 S. W. 2d 95

Opinion delivered March 17, 1947.

D. L. Grace and *I. S. Simmons,* for appellant.

Hardin, Barton & Shaw, for appellee.

SMITH, J. This suit was brought by appellant to recover the value of a half interest in the estate owned by J. E. Hickey at the time of his death, which date is left blank in his complaint. His right to recover is predicated upon the following paragraphs of the will of the said Hickey.

"I will and bequeath to my dearly beloved wife Celia Hickey all of my estate both real and personal property (except as mentioned above) to have and to hold forever.

"I hereby appoint and constitute my beloved wife Celia Hickey as administratrix of my estate and request that she be appointed as such administratrix without bond.

"It is desired that after my wife Celia Hickey's death that one-half of the remaining estate be divided equally between her brothers and sisters then living.

"It is my desire that after my wife Celia Hickey's death, that one-half of the remaining estate be divided equally between my brothers and sisters then living."

In this connection it may be said that Mrs. Hickey, the testator's widow, not only did not consume the estate in her support, but appears to have augmented it.

At the testator's death he was survived by only one sister, and no brother. This sister died subsequent to the testator's death, and appellant is the sole and only heir of this sister, and the contention of appellant, this heir, is that the will of his uncle devised to his wife only a life estate in his property, with the remainder over, one-half thereof to his surviving brothers and sisters, and the other half to the surviving brothers and sisters of his wife.

On the other hand, the administrator of the estate of Celia, the wife of the testator, contends that the estate of her husband was devised to Celia in fee simple, and that she thus acquired the title to the entire estate. Her administrator insists also that the provisions of paragraphs five and six relating to any portion of the estate remaining at her death are precatory only.

A difference of opinion has arisen among the members of the court as to which of these contentions is correct, but we are all agreed that for the reason presently to be stated appellant is estopped from raising this question, and we therefore dispose of the case upon the ground on which we are all agreed.

The will of Hickey was duly probated and his wife administered upon his estate as if she were the sole devisee. She died testate in November, 1942. Her will was dated December 13, 1938.

Mrs. Hickey's will made no reference to any real estate and her estate consisted largely, if not entirely of personal jewelry, government war bonds, and cash in a safety deposit box at a bank in which she had on deposit a small sum of money.

Upon Mrs. Hickey's death the safety deposit box was opened and an inventory made of its contents, which inventory was made an exhibit to appellant's complaint. In this box were a number of envelopes, some containing money, others containing bonds, and some contained both money and bonds. On the envelopes there were such notations as these, "Mrs. Celia Hickey, payable on death to Mrs. Katie Hickey Jones, Route 1, Box 32, Dawn, Missouri." Mrs. Jones was appellant's mother.

Appellee Hardin qualified as administrator of the estate of Hickey's widow and being uncertain as to the proper construction of Mrs. Hickey's will, and the disposition she had made of her estate, he took the precaution to file a suit, making all persons interested parties, in which he prayed that the will be construed and directions be given as to whether the will had created a trust, which

offended the rule against perpetuities. There was a question also as to the ownership of the government bonds, which comprised the major portion of the estate. These questions were put at rest in the case of *Myers* v. *Hardin, Adm.*, 208 Ark. 505, 186 S. W. 2d 925, the opinion having been delivered April 16, 1945.

The inventory attached to appellant's complaint as an exhibit thereto, shows that there were a large number of bonds, none being for a larger amount than $1,000, and the opinion in the case of *Myers* v. *Hardin, supra,* recites that they were of the total value of $23,000. In that opinion it was said, referring to these bonds, "Each of these bonds was issued as follows: 'To Mrs. Celia Hickey payable on death to' ..... a named beneficiary, some of whom were legatees under the will, but a large number were not mentioned in the will."

It was held in the Myers case, *supra,* ". . . that each and all of the beneficiaries named in the bonds in question who survived the testatrix became the absolute owners of such bonds immediately upon the testatrix's death and that any legacy under the will to any of these bondholders is in addition to such bond and unaffected by it."

Appellant was not named in Mrs. Hickey's will, but his mother through whom he claims, was mentioned in it, and the sum of $2,000 in cash was devised to her. Appellant was not named as a beneficiary in any of the bonds, but his mother was named in bonds of the value of $2,000.

The complaint filed by appellant alleges the fact to be that practically all of Mrs. Hickey's estate had been derived from her husband, but no question of her ownership was raised in the suit to construe the will. The decree in that case, as stated, was rendered April 16, 1945, while the present suit was not filed until January, 1946. In that interval the administration on Mrs. Hickey's estate proceeded, and appellant admits that the administrator paid him the $2,000 devised to his mother, and delivered to him the bonds found in the safety box, in

which his mother was designated as beneficiary. Evidently Mrs. Hickey's estate has been substantially distributed in accordance with the provisions of her will.

Now appellant was not a party to the suit referred to above, brought to construe Mrs. Hickey's will, but his mother was a party, and such interest as he has was derived from her. If it be true, as appellant now alleges, that the bulk of the estate left by Mrs. Hickey on her death was derived from her husband, and that she had only a life estate therein, this question should have been raised in the suit to construe her will, where all parties in interest were present, and before there had been any distribution of the estate. No one of the many heirs who were parties to the case of *Myers* v. *Hardin, Adm., supra,* raised the question that Mrs. Hickey had taken only a life estate under the will of her husband, and the decree construing her will is predicated upon the theory that she had the fee title, and under that decree the estate has been distributed, in part at least, and the administrator paid to appellant as the heir of his mother the $2,000 devised to her, and delivered to appellant the $2,000 of bonds which named his mother as alternate payee.

Any other heir of Mr. Hickey would have the same right to raise the question here presented, as has appellant, but none have done so, and we think no one of them now has that right.

Appellant insists that the doctrine of estoppel has no application here for the reason that the administrator in distributing the assets of the estate was not influenced by any act of appellant. But even so, the administrator was influenced by the inaction of appellant's mother. She did not speak when she should have spoken, and her heir may not now be heard to speak, inasmuch as the administrator has made at least partial distribution of the assets of Mrs. Hickey's estate, and, so far as appellant is concerned, has made full distribution. Cases without number have announced and applied the equitable principle here invoked, and the decree of the court below must be affirmed, and it is so ordered.

WALSH *v.* SERRETT, ADMINISTRATOR.

4-8106 200 S. W. 2d 323

Opinion delivered March 17, 1947.

[redacted]

U. J. Cone, for appellant.

Thomas Compere and *George Norman,* for appellee.

McHANEY, Justice. In *George* v. *Serrett, Adm.,* 207 Ark. 568, 182 S. W. 2d 198, we held that the appellants, who had received a distributive share of the estate of B. F. George and had executed a receipt or release in full to the administrator, were barred from maintaining an action, in the chancery court, probate court, or any other court, seeking to compel the administrator to account, in the absence of fraud by the administrator in the procurement of such release. We there said: "Five years, lacking only a few days, intervened between the date appellants executed the receipt and release and the date of the institution of this suit. In the meantime, to-wit, on January 16, 1941, G. Percy George died. During the four years and six months which intervened between the execution of the releases and the death of G. Percy George, appellants took no action to set aside the release or reopen the case." It was conceded in that case that "the allegations of fraud are directed against G. Percy George and not against Serrett," he being a brother of decedent, B. F. George. It was there further said: "Certain it is that no fact was developed by this belated investigation,

and offered here in support of the allegation of fraud, which could not have been as readily developed by a similar investigation made at any time between the date of the release and the date of the death of G. Percy George.

"Jurisdiction of a court of equity is here invoked to relieve against fraud alleged to have been committed by a man four and one-half years before his death. During all that time appellants remained silent although every fact which is now offered in evidence was known, or could have been easily ascertained long prior to such death. It appears that G. Percy George was the only person connected with appellees who was familiar with the entire matter. The loss of testimony is a material circumstance in enforcing the equitable doctrine of laches." Citing cases. The decree was accordingly affirmed.

The present action seeks, in the probate court, an accounting and distribution by the administrator. Appellee pleads this former adjudication in bar of the action. The trial court sustained the plea, dismissed the action.

The parties to this action are the same as in the former appeal. The same relief is sought here as there, or it could and should have been. In the very recent case of *Lillie* v. *Nunnally, ante,* p. 202, 199 S. W. 2d 751, we quoted the following from *Ogden* v. *Pulaski County,* 189 Ark. 341, 71 S. W. 2d 1052: "It is the general rule, which has been frequently announced by this court, that the parties to an action are bound to make the most of their case or defense and that a judgment of a court of competent jurisdiction operates as a bar to all questions in support of the cause or the defense, either legal or equitable, which were, or could have been interposed in the case."

The judgment so held, and is, accordingly, affirmed.

McLane *v.* Chancey, Administrator.

4-8090, 4-8091 (consolidated) 200 S. W. 2d 782

Opinion delivered March 17, 1947.

Rehearing denied April 21, 1947.

[redacted]

Carter & Taylor and *J. M. Smallwood,* for appellant.

Mark E. Woolsey, for appellee.

Holt, J. Two causes of action, consolidated here, are presented on this appeal from separate judgments in the Franklin Probate Court, Ozark District, construing the separate wills of William C. Bill, deceased, and Ada May Bill, deceased, who were husband and wife. Mr. Bill died May 20, 1945, and Mrs. Bill, his widow, died May 22, 1945. Each was approximately 70 years of age at the time of death and had resided in Ozark approximately 50 years. No issue survived.

Their separate wills were, in effect, almost identical, that of Mrs. Bill having been executed May 30, 1940, and that of Mr. Bill, December 8, 1942.

That part of Ada May Bill's will, material here, is as follows: "To Bertie Walker McLane, I give, devise, and bequeath my home place together with all the personal property therein, located on lots 7, 8, 9 and 10, all in block 16, in the Town of Ozark, Arkansas.

"Then after all expenses are paid, if anything remains, real estate, personal property, or mixed, money or any other valuable assets, shall be gathered together by a trustee, selected by the parties interested and named in this will and approved by the court having jurisdiction and shall be equally divided between the following persons and institutions: The First Methodist Church of Ozark, Arkansas. Mrs. Louella Rice. Mrs. Bessie Hail Travis."

That part of William C. Bill's will, material here, is identical with the above provisions of Mrs. Bill's will except that the word "place" after the words "my home" is omitted in his will so that it reads "my home, together," etc.

The appellant, Bertie Walker McLane, is in no way related to either Mr. or Mrs. Bill.

When appellant, Bertie Walker McLane, took charge of the home given to her under both wills, following the deaths of Mr. and Mrs. Bill, she found in a lock box in the home six Postal Savings Certificates in the aggregate amount of $1,800 and an insurance policy in the amount of $2,000 on the life of William C. Bill. There was in the garage on the place a Chevrolet automobile. There was also discovered a contract of sale for a portion of the home place, "part of lot 6 and all of lots 7 and 8, block 16, Town of Ozark, Arkansas," that had been entered into during the life of William C. Bill with Ernest Moore and Lou Ollie Moore, and their note in the amount of $700 given for the purchase price of this property.

J. P. Chancey, administrator of Mrs. Bill's estate, filed petition, with her will annexed, in the probate court for directions as to disposition of the proceeds from the life insurance policy on the life of William C. Bill, payable to his wife, Ada May Bill, "if she should survive him, otherwise to insured's administrator." He alleged that appellant, Mrs. McLane, was claiming all the proceeds from this policy, and each of the residuary legatees, the church, Mrs. Travis and Mrs. Rice, who had been made parties, were each claiming a third interest in the proceeds from said policy.

Following a trial, the probate court found that the proceeds from this policy of insurance should be divided equally among the three residuary legatees, the First Methodist Church of Ozark, Mrs. Katherine Hail Travis and Mrs. Louella Rice, share and share alike. From the judgment of the court, Mrs. McLane has appealed.

On the same date that the administrator filed the petition, *supra,* in the Ada May Bill's estate, he also filed a separate petition in the William C. Bill's estate for instructions and directions from the probate court, (1) to whom he should pay the proceeds from the Postal Savings Certificates, (2) who was entitled to the automobile found in the garage, and (3) who was entitled to the $700 promissory note.

It appears that in 1939, Mr. Bill opened a Postal Savings account with the Post Office in Ozark and at the time of his death, as above indicated, six certificates evidencing this account in the Post Office were found in the home.

All of this property was claimed by appellant, Mrs. McLane, under the will, *supra.* The three residuary legatees were made parties to this action also.

Upon a trial of this cause, the probate court found that the proceeds from the Postal Savings Certificates should be divided equally among the three residuary legatees, the church, Mrs. Rice and Mrs. Travis, one-third to

each, but that appellant should have the automobile and the $700 note.

From this judgment, Mrs. McLane has appealed. The appellees, the three residuary legatees, have cross-appealed from that part of the judgment awarding the car and note to appellant.

In short, it is the contention of Mrs. McLane here that under the terms of the wills, *supra,* since she was given the "home place, together with all the personal property therein," this provision carried with it not only the home, but that "personal property" included the proceeds from the insurance policy, the Postal Savings Certificates, the automobile and the promissory note. She was, as above noted, awarded the automobile and the note, but denied any interest in the insurance policy and the Postal Savings Certificates.

Was the term "personal property therein," broad enough to include, as appellant contends, not only the note and the automobile, but the proceeds from the Postal Savings Certificates and the insurance policy which were choses in action? We do not think it was, in the circumstances here, and it is our view that the judgment of the trial court was in all things correct. The insurance policy and the Postal Savings Certificates were choses in action purely.

One of the cardinal rules in construing a will is to ascertain the intention of the testator. This must be done from all the language within the four corners of the will according to the meaning of the words used, as was said by this court in *Wooldridge* v. *Gilman,* 170 Ark. 163, 279 S. W. 20: "The primary rule of construction in the interpretation of a will is to ascertain 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," and as expressed in *Lockhart* v. *Lyons,* 174 Ark. 703, 297 S. W. 1018: "The

true rule in the construction of wills, which can be said to be paramount, is to ascertain or arrive at the intention of the testator from the language used, giving consideration, force and meaning to each clause in the entire instrument.'' (Citing many cases.)

In the very recent case of *Quattlebaum* v. *The Simmons National Bank, Administrator,* 208 Ark. 66, 184 S. W. 2d 911, we said: ''In the recent case of *Dickens* v. *Tisdale,* 204 Ark. 838, 164 S. W. 2d 990, we said: 'All the cases are to the effect that the primary purpose of construing a will is to arrive at the testatrix's intention in making it, and the rule of construction applicable in all cases is that the will should be read in its entirety, from its four corners, as many cases express the thought;' . . . and in *Duensing* v. *Duensing,* 112 Ark. 362, 165 S. W. 956, this court said: 'The cases all agree that the testator's intention can be gathered only from the will itself and that extrinsic evidence is not admissible to prove an intention in regard to the disposition of the property not expressed in the will.' ''

Again, in the case of *Wilson* v. *Storthz,* 117 Ark. 418, 175 S. W. 45 (headnote 1), the court held: ''The testator's intention must be gathered from the will, and, while evidence may be received to explain any ambiguity in the designation of a beneficiary, yet neither the scrivener, nor anyone else, however closely related to the testator, can be permitted to testify that the testator meant or intended any disposition of his property not expressed in the will.''

When the wills of Mr. and Mrs. Bill are considered in their entirety, giving full meaning, purpose and effect to every part thereof, we think they are clear and unambiguous, and manifest the intention of these two fine old people to give to appellant, related to them in no way, the home place where they resided, together with all ''personal property'' in the home, which ''personal property'' in its usual sense and common meaning, carried only the usual and ordinary household effects, and did not include the insurance policy and the Postal Savings Certificates

which were choses in action, or evidences of the right to claim the actual money or property, not in the home, which they represented.

In 17 C. J. S., p. 175, under the phrase, "contents of the house not otherwise hereinafter bequeathed," under reference to footnote 15, we find this language: "15. Choses in action not included. In determining whether or not a bequest couched in the language of the quoted phrase passed the contents of a small safe, found in the house and containing jewelry, savings bank books, and insurance policies, having a surrender or transfer value, the court held the articles of jewelry embraced by the phrase, but not the savings bank books or insurance policies, since choses in action, are not to be considered as contents of a house. *Old Colony Trust Co.* v. *Hale,* 302 Mass. 68, 18 N. E. 2d 432."

In *Webster* v. *Wiers,* 51 Conn. 569, the court there said: "The question presented by this case is with regard to the construction to be given to a clause of the codicil to the will of Lucy Churchill which is as follows:

" 'I give and bequeath to my grand-nephew, Milton W. Woodford, all my household effects, books and papers of value, and everything the house contains, the same to be taken by him without inventory or appraisal, to be his and his heirs' forever.' . . .

"It would be a very unnatural thing that a testator should describe such property, and of such value, merely as household effects and as a part of all the house contained, or even as books and papers of value. It is hardly credible that a particular allusion to them should not have been made if she had intended to embrace them in the bequest. We are of the opinion that the note and savings bank book, with the deposits represented by the latter, did not pass by the codicil to Milton M. Woodford, but that they became a part of the residue provided for in the original will."

In 3 Page on Wills, 3d (Lifetime Ed.), § 970, we find the rule stated as follows: "Sec. 970. Money and Choses

in Action described by Location. . . . Choses in action have no locality, although the ecclesiastical courts had held that their presence gave jurisdiction for administration. They are only evidences of obligations. For these reasons, it has been held that a gift which is, by its terms, broad enough to include choses in action, and which describe the property as located in a certain place, does not pass choses, although the written evidence thereof is situated in such place. A gift of 'securities' in a certain vault does not pass a bank account, although the bank book was kept in such vault," and in Rood on Wills, 2d Ed., § 517, under the subject of Personal Property Described by Location, "Securities Found in the Place," the text writer said: "The danger of describing personal property by location has often been observed. It may comprehend much today and nothing tomorrow; and the effect may be changed by honest or fraudulent removals without the testator's knowledge or consent. A gift of the contents of a house will seldom if ever pass choses in action evidenced by notes, bonds, or other securities found there; and all the more clearly land would not pass by reason of a deed of it being found there. But coins and current paper money have generally been held to pass. And a gift of the contents of some place where such valuables are usually put for safe keeping, such as the contents of a safety deposit box, would include not merely the pen, pencils, and jewelry there found, but all choses in action evidenced by securities found there, though not transferable without indorsement."

In the case of *Old Colony Trust Company* v. *Hale,* Mass., 302 Mass. 18 N. E. 2d 432, 120 A. L. R. 1207, decided in 1939 by the Supreme Court of Massachusetts, it was said: "The first clause of the will of the testatrix provides as follows: 'I give to Mrs. Harriet C. Hale, my cousin, now of 22 Arnold Street, Northampton, Massachusetts, two hundred thousand dollars ($200,000); also my house and land situated at 10 Beech Road, Brookline, Massachusetts, and the contents of the house not otherwise hereinafter bequeathed; also my silver now in the vaults of the Bay State Trust Company; also all my rugs

now stored in the Boston Storage Warehouse not otherwise hereinafter bequeathed; also my large bar pin with eleven diamonds; and also my diamond semi-neckless with a diamond heart attached.' . . .

"After the death of the testatrix there were found in a small safe in her house at 10 Beech Road, 'among other items of personal property,' three savings bank books representative of total deposits of $8,433.36, fire and other insurance policies covering the premises and its contents and having a transfer value of $228.48, policies of automobile insurance which were surrendered by the petitioners, who received $53.62, the surrender value thereof, and articles of jewelry appraised at $471. The jewelry that was specifically bequeathed to the respondent by the will was not in the house at 10 Beech Road when the testatrix died, but was in a safe deposit vault.

"The sole question for decision is whether the contents of the safe pass under the devise and gifts of the 'house and land situated at 10 Beech Road . . . and the contents of the house not otherwise hereinafter bequeathed' to the respondent. . . .

"Where, as in the case at bar, the bequest is simply of the 'contents of the house' not otherwise disposed of in the will, the word 'contents,' being a word of comprehensive meaning, must receive its full import unless some very distinct ground can be derived from the context, and a consideration of the will as a whole in accordance with the settled rule governing its construction . . . for regarding it as used in a special and restricted sense. . . . It is the general rule, however, that choses in action will not pass under a bequest of the contents of a house. (Citing cases.) . . .

"In *Popham* v. *Aylesbury,* 1 Ambl. 68, 69, also cited in *Stuart* v. *Marquis of Bute,* 11 Ves. 657, 662, a bequest of 'my house and all that shall be in it at my death,' was held to pass cash and bank notes found in the house, but not to pass promissory notes and securities, as they were evidence of title to things out of the house and not things in it."

As to the automobile found in the garage, we think little need be said. We think the trial court correctly held that this was personal property within the home, within the meaning of the language used in both wills.

We also think that the $700 note was properly awarded to appellant. It appears that W. C. Bill, subsequent to the execution of the wills, entered into a contract to sell a part of the real property, which he had devised to appellant, to Everett Moore. No deed was ever executed, but a bond for title and the note for the balance of the purchase price had been. The legal title, therefore, to the property sold to Moore passed to appellant, Bertie Walker McLane, subject to the right of Moore, who, when he paid the purchase price to appellant, would be entitled to a conveyance of the legal title, the devise of this property to her under the wills never having been revoked. Such is the effect of § 14522, Pope's Digest, which provides:

"*Devise while testator under contract to convey.* A bond, agreement or covenant, made for a valuable consideration by a testator to convey any property devised or bequeathed in any last will and testament previously made, shall not be deemed a revocation of such previous devise or bequest, either in law or equity, but such property shall pass by the devise or bequest subject to the same remedies, on such bond, agreement or covenant, for the specific performance or otherwise against the devisees or legatees as might be had by law against the heirs of the testator or his next of kin, if the same had descended to them."

Finding no error, the judgment is affirmed both on direct and cross-appeal.

4-8097 200 S. W. 2d 768

Opinion delivered March 17, 1947.

Rehearing denied April 21, 1947.

Chas. B. Thweatt, Fred A. Isgrig and *H. B. Stubblefield,* for appellant.

E. R. Parham, for appellee.

HOLT, J. October 6, 1945, Earl Page brought suit against his wife, Minnie A. Page, for divorce. He attached to, and made a part of his complaint, a complete written property settlement made between him and his wife on October 5, 1945, which was duly signed by both parties. Summons was duly served on Minnie A. Page on the date the suit was filed and on this summons, she noted her entry of appearance and waiver. A decree of divorce and the confirmation of the property settlement was rendered by the court October 9, 1945. The property settlement was embodied in and made a part of the decree.

Subsequent to the entry of this decree, on January 10, 1946, Earl Page died testate without surviving issue. By the terms of his will, he gave all the property that he then owned to appellee, Maude Woodson, a sister, and to others.

On January 16, 1946, less than a week after Mr. Page's death, appellant, Minnie A. Page, filed suit against appellees in which she sought to set aside the property settlement on the ground that she entered into the settlement under duress, consisting of threats by Mr. Page to take her life if she contested the divorce action or refused to execute the property settlement; that the duress continued to exist until shortly before Mr. Page's death, and that he had agreed to remarry her.

On February 11, 1946, Mrs. Page filed another suit in which she sought to vacate the decree of divorce on the grounds of fraud and duress, and in addition, alleged that she had a meritorious defense to the divorce action which she was prevented from exercising by threats of Mr. Page, and that Mr. Page had no grounds for divorce.

Appellees interposed a general denial to the complaints in both actions; and the two causes, after having been consolidated, proceeded to trial. After a prolonged and patient hearing, the chancellor found the issues in favor of appellees and dismissed both complaints for want of equity.

This appeal followed.

The record in this case is voluminous, containing approximately 800 pages. Much of the testimony is conflicting and some incompetent.

While the cause comes here for trial *de novo,* under our well settled rule, we must affirm unless we can say that the findings and decree of the trial court were against the preponderance of the evidence.

We think no useful purpose would be served in an attempt to detail and analyze the testimony to determine where the preponderance lies. It suffices to say that, after reviewing the evidence and giving consideration to what we deem to be the competent testimony, as the trial court no doubt did, we are unable to say that the findings of the chancellor, and the decree based on those findings, are against the preponderance of the testimony.

The trial court heard much of the evidence presented direct from the witness stand and was therefore in a much better position to determine its truth and where the preponderance lay, than we could possibly be.

Earl Page had been a cripple since birth. His lower limbs were withered and drawn up so as to make them useless. He moved about by the use of his arms propelling himself on two wooden blocks, which he grasped in his hands. At times, he used a wheel chair.

Through strenuous effort and determination, and with the help of appellant, whom he had married approximately twenty years prior to his death, he had accumulated substantial property and acquired a prominent place in State politics, having held state office for approximately sixteen years. He truly was a typical example of a man who, under the severest physical handicaps and hardships, by determination and will power, lifted himself "by his own boot straps."

Mrs. Page testified that her husband threatened her with a pistol and that he would kill her if she refused to accede to a divorce and property settlement. She had had business experience and worked along with her husband.

Before appellant could prevail, in the present case, it devolved upon her to establish, by a preponderance of all the testimony, that the decree of divorce, and the property settlement which was embodied in that decree, were obtained through duress or fraud and this, as indicated, we think she has failed to do. During negotiations leading up to the property settlement which does not appear to be unfair or inequitable, appellant consulted able counsel as to her property rights, and this attorney, not of present counsel, testified that he advised her fully relative thereto, that the contract was carefully reviewed and certain changes which she desired were made, and as to whether Mrs. Page appeared to be acting under threat or duress from her husband at the time, the attorney testified: "I did not believe, with the energy, push and intelligence that Mrs. Page had, that anybody could make —could force—her to do anything she didn't want to do."

There is still another reason why the appellant cannot prevail in this action, and that is, that she has been estopped by conduct amounting to laches.

It appears certain from the evidence that the duress claimed by appellant grew out of alleged threats of Earl Page to take her life prior to and leading up to the divorce decree and property settlement.

Immediately following the divorce decree, Mr. Page went to Yell county where he remained until December 13th, when he suffered a heart attack. He was in a Little Rock hospital from December 14th to December 24th, and soon after Christmas, he went to Carlsbad, New Mexico, where he remained until his sudden death January 10, 1946.

We find no evidence of any duress or threats subsequent to the property settlement and divorce decree. In these circumstances, Mrs. Page waited more than three months after the decree of divorce, and for approximately a week following Mr. Page's death, and when he could no longer speak for himself, before bringing the present suit. Certain it is that, for practically the entire time subse-

quent to the divorce until Mr. Page died, Mrs. Page was not threatened by her husband and was beyond the range of possible physical violence. It was during this time that the law required prompt action on her part, and this she failed to take.

Under the heading of "Duress and Undue Influence" in 17 Am. Jur., p. 902, § 25, the text writer says: "*Generally.*—A contract entered into under duress being, as has been seen, generally considered not void, but merely voidable, it is, like other voidable contracts, valid until it is avoided by the person entitled to avoid it. A contract entered into under duress may be ratified after the duress is removed. Such ratification results if the party entering into the contract under duress accepts the benefits growing out of it or remains silent or acquiesces in the contract for any considerable length of time after opportunity is afforded to avoid it or have it annulled. This is particularly true where such transaction has operated to alter legal rights by transferring them to another. While a contract voidable for duress may be ratified, either by express consent, or by conduct inconsistent with any other hypothesis than that of approval, still the intention to ratify is an essential element, and is at the foundation of the doctrine of waiver or ratification. It is essential that the influence of the duress must be removed before conduct becomes voluntary. The fact that the act which was done under duress is not repudiated for a long time will not amount to a ratification where it appears that at no time during such period of time was the duress removed."

"The law requires promptness in repudiating an agreement alleged to have been induced by duress." *Maisel et al.* v. *Sigman et al.*, 205 N. Y. S. 807, 123 Misc. 714.

No certain or definite period of time is necessary to establish laches. Each case must depend on its own peculiar facts. On this question, we find in 19 Am. Jur., p. 345, § 499, this language: "The period establishing laches is not 'one which can be measured out in days and months as though it were a statute of limitations.' The determi-

nation of the question as to laches *vel non* proceeds in the light of the circumstances of the case. What might be inexcusable delay in one case would not be inconsistent with diligence in another."

In *Bauer, Executor,* v. *Brown,* 129 Ark. 125, 194 S. W. 1025, this court said: "It is well established, and this court is committed to the principle that a party seeking to cancel a decree of divorce for fraud, irregularity or deceit must proceed with diligence after discovery of the fraud. Such relief will not be granted if the complaining party is guilty of laches or unreasonable delay in seeking the remedy," and in *Neal* v. *Stuckey,* 202 Ark. 1119, 155 S. W. 2d 683, we find this language:

"The doctrine of laches which is a species of estoppel rests upon the principle that, if one maintains silence when in conscience he ought to speak, equity will bar him from speaking when in conscience he ought to remain silent. (Citing cases.) Under these and many other decisions of this court which might be cited, the general rule of the doctrine of laches is that equity may in the exercise of its own inherent powers refuse relief where it is sought after undue and unexplained delay, and where injustice would be done in the particular case by granting the particular relief asked. Each case must be governed by its own facts; what would be an unreasonable delay in one case might not be in another."

In *Cartier* v. *Hengstler,* 166 Ark. 303, 266 S. W. 304, this court said: "Appellee and cross-appellant is also barred by laches. He is seeking affirmative relief in a court of chancery. Inasmuch as fraud renders a transaction voidable at the election of the person defrauded, the law requires that the exercise of this election shall be in a reasonable time after the discovery of the fraud. 'A party who sets up a fraudulent misrepresentation of fact as a ground of relief or defense must not be guilty of laches.' "

We think under these well settled rules of law, and on the facts presented here, that the decree was in all things correct, and accordingly is affirmed.

SOUTHWESTERN GREYHOUND LINES, INC., *v.*
MISSOURI PACIFIC TRANSPORTATION CO.

4-8092 200 S. W. 2d 772

Opinion delivered March 17, 1947.

Rehearing denied April 21, 1947.

Smith & Sanderson, for appellant.

Henry Donham, for appellee.

ROBINS, J. Appellant challenges the correctness of the judgment of the lower court affirming an order of the Arkansas Public Service Commission by which appellant was granted a temporary certificate authorizing it to operate a motor transportation line as a common carrier of passengers from Little Rock to Fordyce and return over U. S. Highway No. 167 up until January 1,

1947, but was denied authority to operate said line permanently.

On April 22, 1940, L. N. Gray, doing business as Eagle Transportation Company operating a bus line over U. S. Highway No. 167 between El Dorado and Fordyce under authority of a certificate issued by the Arkansas Corporation Commission, predecessor of the Arkansas Public Service Commission, filed petition with the Commission asking that his bus route be extended from Fordyce to Little Rock over U. S. Highway No. 167. The Commission on November 21, 1940, made an order over the protest of the Missouri Pacific Transportation Company, hereinafter designated as "Missouri Pacific," extending Gray's permit so as to authorize him to operate with closed doors over the extension requested by him. This order was reversed by this court on January 11, 1943. See *Missouri Pacific Transportation Company* v. *Gray,* 205 Ark. 62, 167 S. W. 2d 636. While this litigation was pending the Southwestern Greyhound Lines, Inc., hereinafter designated as "Greyhound," acquired the rights of Gray under the certificate issued to Gray by the Corporation Commission.

Shortly after the decision in the Gray case was rendered Greyhound filed another application for certificate to authorize it to operate over U. S. Highway No. 167 between Fordyce and Little Rock. On May 19, 1943, over objection of Missouri Pacific, the Commission authorized Greyhound to operate with open doors between Little Rock and Fordyce on Highway No. 167, but the certificate was limited to a period of one year. By supplemental orders of the Commission this certificate has been extended from year to year, the last certificate expiring on December 31, 1946.

To support its final application, from the order on which this appeal is being prosecuted, appellant offered the testimony of 24 witnesses. These witnesses lived at El Dorado, Hampton, Calion, Fordyce and Sheridan, and included city officials and representatives of commercial organizations. The effect of this testimony was to show that traffic over bus lines between El Dorado

and Little Rock had greatly increased in the years following 1941; that the buses on both lines were generally well filled with passengers and in some cases crowded in spite of the fact that after the Greyhound service was instituted Missouri Pacific added a number of buses to its line. In 1940, Missouri Pacific operated two round trip schedules daily between Little Rock and Fordyce and in 1945 it was operating five round trips daily, and Greyhound in 1945 was operating three round trips daily. Appellee's entire revenues from the operation of this route in 1941 was $37,834.34 and its revenue over the same line for the first nine months of 1945 was $181,-452.73. Appellee offered no testimony except that of some of its officials and employees, who testified as to traffic and revenue on the line in question.

These two questions are presented on this appeal:

(1). Is the decision of this court in the case of *Missouri Pacific Transportation Company* v. *Gray, supra, res judicata* on the question of the propriety of granting the certificate of authority asked for by appellant herein?; and,

(2). Has there been made a sufficient showing of public necessity and convenience to require the granting of certificate of authority to appellant?

I.

The decision in the *Missouri Pacific Transportation Company* v. *Gray* case, *supra,* necessarily dealt with the traffic situation at the time the application of Gray was filed with and acted upon by the Commission, and this court, in its opinion, recognized the possibility of the future need of the additional service offered by appellant and expressly authorized the granting of certificate for such service whenever such need might arise.

In the case of *Schulte* v. *Southern Bus Lines,* ante, p. 200, 199 S. W. 2d 742, we said: "A determination of the propriety of granting an application such as is here involved must always be governed by the peculiar facts shown; and a decision in such a case does not control con-

sideration of another similar application on a subsequent occasion if a materially different fact situation may be proved."

After the Commission acted on Gray's application the United States became engaged in history's greatest war, a conflict that required the speedy mobilization of our manpower and industrial resources to an extent never before known. The movement of men and women of the armed forces between homes and encampments, and the assembling of vast numbers of workmen in factories and arsenals brought on unprecedented traffic conditions.

In the case at bar, there has been shown an enormous increase in bus traffic over the route involved. While some of the causes of increased traffic have ended with the close of hostilities, there is nothing in the testimony to indicate that there has been so far, or that there will be in the future, a marked diminution of such traffic.

Furthermore, when this court was dealing with the matter of the *Gray* case, *supra,* it appeared from the record that Gray had only limited facilities to offer, while in the case at bar it is conceded that appellant is one of the important motor passenger carriers of the nation and affords up-to-date, safe and comfortable buses to the traveling public.

We conclude that the traffic conditions, as shown by the record, at the time of the filing of the application involved herein, are so materially different from those reflected by that of the *Gray* case and the facilities of appellant are so unlike those of Gray that the decision in that case is not conclusive of the issues here.

II.

By the service afforded under the certificates granted to appellant and to appellee the traveling public is afforded two excellent motor transportation lines from El Dorado to Little Rock—that of the Missouri Pacific Transportation Company via Camden and Fordyce

through Sheridan to Little Rock and that of Greyhound through Calion, Hampton, Fordyce and Sheridan.

The advantage to the public of the additional line through Hampton and Fordyce, as operated by appellant, is obvious and is pointed out in the testimony of numerous witnesses. The record also reflects that since the Greyhound line has been in operation the Missouri Pacific Transportation Company line has added to and improved the facilities provided by it for travelers. At the time the application involved herein was filed, there was evidently sufficient traffic to justify the operation of both lines.

In the case of *Schulte* v. *Southern Bus Lines, supra,* it was said that the paramount consideration in disputes of this kind is always the convenience of the public, and in that case we called attention to the fact that the legislature, in authorizing the issuance of certificates of authority to public motor carriers, had specifically provided that no such certificate should confer any proprietary or property rights for the use of the public highway.

We said in the case of *Lienhart* v. *Bryant,* 209 Ark. 764, 192 S. W. 2d 530, in referring to a proceeding of this kind: "By clear implication the public is an interested party. This is true because its convenience and necessity are subjects of first concern." See, also, *Santee* v. *Brady,* 209 Ark. 224, 189 S. W. 2d 907, and *Camden Transit Company* v. *Owen,* 209 Ark. 861, 192 S. W. 2d 757.

In view of the great convenience to the traveling public afforded by the motor carrier line being operated by appellant and the further fact that, so far, the operation of this line has not been destructive of the business of appellee, we conclude that the Commission should have granted a certificate authorizing appellant to continue to give the service heretofore authorized under the temporary permit.

But the certificate to be granted to appellant should contain a limitation (authorized by § 10 of the "Arkansas

Motor Carrier Act, 1941, Act No. 367'') to the effect that, should in the future a showing be made that the continued operation of appellant over the route in dispute would entail a destructive rather than a healthy competition and that public convenience would be best served by the operation of only one carrier over the route in controversy, the Commission might cancel appellant's certificate, and, in determining whether this should be done, the fact that appellee pioneered the route would be a factor in the situation to be considered by the Commission.

The judgment of the lower court is reversed and this cause is remanded with directions to the lower court to enter judgment directing the Public Service Commission to issue certificate of authority to appellant in accordance with what has been said in this opinion.

GIBSON *v.* LEE WILSON & COMPANY.

4-8094 200 S. W. 2d 497

Opinion delivered March 17, 1947.

James B. Roleson, J. F. Gautney, John F. Gautney, Jr., and *Ivie C. Spencer,* for appellant.

Chas. D. Frierson and *Charles Frierson, Jr.,* for appellee.

ED. F. MCFADDIN, Justice. A suit filed in the chancery court—by the Bank of Wilson to recover judgment against appellant and appellee, and to foreclose a crop and chattel mortgage—has been converted into a damage suit between the appellant and the appellee who were defendants below; and thus reaches us on appeal and cross-appeal: appellant claiming the damages (awarded by the chancery court) are too small, and appellee claiming there should be no damages. The facts are complicated, and the evidence is in hopeless conflict.

FACTS

On March 6, 1944, the appellee, Lee Wilson & Company (a trust estate acting by J. H. Crain, trustee), and

hereinafter referred to as "Wilson," entered into a lease agreement with appellant, W. I. Gibson, as follows:

"LEASE AGREEMENT

"This lease agreement made and entered into by and between Lee Wilson & Company, of Wilson, Arkansas, lessor, and W. I. Gibson of Cash, Arkansas, lessee.

"1. Lessor hereby leases unto the lessee rice land located in Craighead county, Arkansas, for a term beginning January 1, 1944, and ending December 31, 1944, for agricultural purposes only. The terms of rental shall be as follows:

"2. Lessor agrees to furnish 200 acres of land suitable for growing rice, described as follows: East 200 acres of E½ section 18-13-2.

"3. Lessor agrees to equip said land with a suitable irrigation plant, either electric or power unit, said plant to have sufficient capacity to properly irrigate the above stated acreage of rice.

"4. Lessor agrees to furnish 50 per cent. the cost of electricity or fuel oil for irrigation purposes. Lessee to furnish all the rest necessary.

"5. Lessor agrees to furnish all the cost of seed rice and will secure the rice seed to be planted on the above described land.

"6. Lessee agrees to furnish all labor, machinery, oil, and twine to plant, cultivate, harvest and thresh said rice crop and all other labor necessary to produce the crop. Lessor agrees to pay one-half the cost of rental on thresher and agrees to buy his own sacks if that becomes necessary.

"7. Lessor shall receive one-half of all crops grown on the above described land, and lessee shall receive the other one-half.

"8. Lessee will, at all times, expedite his farming operations and the planting, cultivating, irrigating and harvesting of crops as to reasonably insure proper re-

sults; and should he fail or refuse to properly perform the duties at the proper times, or fail or refuse to comply with the other provisions of this agreement, then first party shall have the right to take immediate possession of said lands and premises, and to plant, cultivate, irrigate and harvest the crops, and do such other work in connection therewith as lessor may deem proper. All work done by lessor shall be a direct charge against the one-half interest ordinarily due lessee.

"9. Lessor shall at all times have ingress and egress over the above described premises.

"10. Lessee agrees to deliver after threshing, to the nearest shipping point or mill at Jonesboro, Arkansas, (or elevator or granary in the event an elevator or granary is installed on or near the above described lands), rice grown on the above described lands and belonging to lessor, and also that on which lessor has lien.

"11. It is further agreed between the parties that the lessee shall at his own expense, mow or cut and burn the weeds, grass and other growth along the fence rows, roads, ditch and canal banks contingent to the rice field, and this shall be done at least once, and if necessary twice, during the crop season, in order to prevent said weeds and other growth from going to seed.

"12. It is further agreed that in the event it is necessary to pull or pick noxious weeds or other growth other than excessive growth of water grass, then the expense of this special work shall be borne equally by the parties hereto.

"13. It is agreed that while this contract is entered into in good faith between the lessor and the lessee, in the event that conditions develop which are beyond human control, such as the securing of pumps or electricity or a power unit or the Government's withdrawal of prisoner of war labor now engaged in clearing land, or any other thing or item beyond the control of either party hereto, then this contract shall be automatically voided as a whole or in part. And in the event lessee has expended monies

in preparing land, in planting the seed, or has done any other work in preparing lands, then the lessor shall reimburse the lessee to the full amount of such expenses by the lessee.

"14. Lessor will loan to the lessee an amount of money equivalent to $20 per acre contracted for to help lessee in his operations. Lessor retains landlord's lien for rent and all loans or advancements and on demand shall execute a chattel mortgage on any chattels where necessary or advisable in addition to landlord's lien. Advances on loans will be made monthly during season as needed."

Under § 14 of the aforesaid agreement Wilson was to loan Gibson $20 per acre to finance the crop. Instead of making the loan direct to Gibson, Wilson, on March 28, 1944, signed Gibson's note to the Bank of Wilson (hereinafter called the Bank) for $4,000. Then on October 26, 1944, Gibson obtained from the Bank $250 additional to pay part of the harvesting expenses. Both notes were secured by crop and chattel mortgages executed by Gibson to the Bank under date of April 1, 1944.

Gibson planted, cultivated and harvested a rice crop on about 160 acres of the land, and delivered to two rice mills (Jonesboro and Arkansas Cooperative) a total of 3,680.88 bushels of rice. The time and manner of planting, cultivating and harvesting the rice constitute sharply disputed matters and will be discussed in the opinion. At all events Gibson held certain uncashed checks (to himself and Wilson), but had neither paid the rent to Wilson nor delivered the checks to the Bank when this suit was filed.

On June 8, 1945, the Bank filed this suit against Gibson, Wilson and the two rice mills seeking (a) judgment for $4,250 and interest on the notes, (b) foreclosure of the crop and chattel mortgage, and (c) accounting as to the proceeds of the rice crop. On the same day (and that is significant), Wilson filed answer to the Bank's complaint and a cross-complaint against Gibson for Wilson's

part of the crop rent. On July 5, 1945, Gibson answered the Bank's complaint and Wilson's cross-complaint and also cross-complained against Wilson on these items: (1) that Wilson had delivered to Gibson only 160 acres for farming instead of 200 acres, and the damages of $2,256 were claimed for this deficiency in acreage; and (2) that Wilson breached paragraph 3 of the lease agreement (regarding furnishing of water for irrigation), and damages of $10,264 were claimed for this breach. To this cross-complaint Wilson filed answer and thus issue was joined between Gibson and Wilson. So far as the Bank was concerned, no one seriously denied its rights; and Gibson and Wilson (by stipulation to prevent prejudice) deposited with the Bank $4,574.19, which lacked only $40.21 of paying the Bank in full. This money deposited with the Bank represented checks from the two rice mills, which were part of the proceeds of the Gibson rice crop.

The trial in the chancery court resulted in a judgment (1) awarding the Bank of Wilson the $4,574.19 on deposit, and judgment against Wilson for the balance of $40.21 and all costs; and (2) decreeing such award and judgment to be complete satisfaction of all claims of the Bank against Gibson on the note and chattel mortgage and also (3) decreeing such payment to be full settlement of all claims of Gibson against Wilson and Wilson against Gibson. The net result of the decree was to allow Gibson damages against Wilson in a sum equal to Wilson's total rent in the rice crop that Gibson produced, plus the $40.21 required to pay the balance of the Bank's note.

From the decree of the chancery court, Gibson has appealed as against Wilson, and Wilson has appealed as against Gibson. Appellant Gibson claims the decree is erroneous because it fails to award him sufficient damages for land deficiency and irrigation deficiency. Appellee Wilson claims the decree is erroneous because it allowed appellant damages to which he was in no wise entitled and thereby deprived appellee of rents.

OPINION

We discuss the issues under suitable topic headings.

I. *Appellant's Contention as to Land Deficiency.* The lease agreement stated that lessor (appellee) would furnish "suitable for growing rice" the east 200 acres of the east half of section 18. Appellant claims that he was only furnished 160 acres, and was damaged by the appellee's failure to furnish the entire 200 acres. The chancery court disallowed this contention of the appellant; and we affirm the chancery court.

The preponderance of the evidence shows that the appellant received the land agreed to be furnished, and that the parties understood the land by reference to drainage ditches and physical monuments, rather than by reference to the land description contained in the written instrument. If Gibson had received the east 200 acres of section 18, he would have cultivated a strip 550 yards wide —east and west—along the entire east side of section 18. But the proof shows that Gibson intended to receive and did utilize a strip that was more than 880 yards wide—east and west—at one point, and considerably more than 550 yards wide—east and west—at other places. A map —introduced in evidence without objection—showed (a) a drainage lateral on the entire east side of section 18, and (b) a bayou which entered the west half of section 18 from the south, and extended northeast in an irregular course to the approximate center of the northeast quarter of section 18, and then divided into two forks, one going northwest and the other northeast. The proof shows that Gibson intended to receive and did utilize the land in section 18 that lay west of the drainage lateral and south and east of the bayou, and that some of this land extended over into the west half of section 18. The land that Gibson utilized appears to be approximately 170 acres.

The shape of the tract of the land that Gibson utilized is so at variance with the description of the land as contained in the lease, that it must be presumed that the parties misdescribed the land in the lease. Gibson makes

no contention that he received land *other* than what he was to receive. His sole contention is that he did not receive *all* the land that he was to receive. Cooksey, a witness called by Gibson, testified that Gibson never made any complaint to him about not getting the land he contracted to receive; and Meyer, a witness called by appellee, testified that Gibson was satisfied with the tract he actually received and put into cultivation.

From all the evidence in the record we conclude (a) that Gibson received the land actually intended by both parties, and (b) that the description in the lease was not only a mutual mistake, but was reformed and corrected by the conduct of all parties, and (c) that the evidence is sufficient to support such actual reformation of description. See *Cherry* v. *Brizzolara,* 89 Ark. 309, 116 S. W. 668, 21 L. R. A., N. S. 508; see, also, cases collected in West's Arkansas Digest "Reformation of Instruments," § 13 and § 19; and see 45 Am. Jur. 604.

II. *Appellants' Contention as to Irrigation Deficiency.* Under paragraph 3 of the lease agreement Wilson agreed to furnish an irrigation plant with "sufficient capacity to properly irrigate" the rice acreage. The overwhelming preponderance of the evidence is to the effect that Wilson breached this provision in the contract. The chancery court so found, and we affirm the finding.

Gibson completed planting his rice crop on May 15th —agreed by all to be the correct time for such completion. The rice was four inches high on June 4th, and should have been irrigated on that date, and certainly not later than *June 12th.* Yet, sufficient water was not obtained for irrigation until after *July 12th*; and this delay caused severe damage to the rice crop. Against this claim for damages, appellee interposes two defenses: (a) that Wilson was honestly trying all the time to get the required irrigation plant into operation and was prevented by unfortuitous circumstances, and (b) that on account of the war and other unavoidable casualties Wilson is enti-

tled to relief under § 13 of the lease agreement. We notice these defenses:

As regards (a)—"honest effort"—no amount of such evidence can justify Wilson's breach of the positive agreement to furnish sufficient irrigation. In *Harrington* v. *Blohm,* 136 Ark. 231, 206 S. W. 316, the landlord, in leasing land to the tenant for rice production, agreed to furnish suitable irrigation. There, as here, the landlord sought to excuse the breach by showing an *honest effort* to perform and prevention by a variety of circumstances. We denied the landlord's defense, saying:

". . . it is argued that it could not have been contemplated that appellant would be required to do more than to make an honest effort, in good faith, to furnish the necessary pumping machinery, and that he had 'used his best endeavors to get said well and machinery installed before June 1, of said year, and that the failure to do so was no fault of defendant's.' But appellant did not contract merely to use his best endeavors. His contract was to install the machinery by June 1, and the agreed statement of facts recites the disastrous effects to the rice crop from a failure in this respect, and these consequences were necessarily in the contemplation of the parties when the contract was executed." See, also, *Ingham Lumber Co.* v. *Ingersoll,* 93 Ark. 447, 125 S. W. 139, 20 Ann. Cas. 1002; and *Kelley Trust Co.* v. *Zenor,* 159 Ark. 466, 252 S. W. 39. We shall again refer to this case of *Harrington* v. *Blohm,* as it is strikingly similar to the case at bar.

As regards appellee's defense (b)—war conditions, etc.: Wilson urged § 13 of the lease agreement as a defense against the deficiency in irrigation. This § 13 was quoted in full in the lease agreement in the statement of facts. The special chancellor, in his written opinion denying Wilson's defense on this point, said:

"Section 13 of the contract applies only to those conditions arising from circumstances beyond human control which would result in an automatic termination of

the contract, either in whole, or in part. I do not find that either party asked for, or attempted to invoke an automatic termination of the contract in any part at an appropriate time."

We agree with the chancery court. This § 13 of the lease agreement is what is generally referred to as "an-option-to-terminate clause." In *Wertheimer* v. *Citizens Bank Building Company,* 117 Ark. 50, 173 S. W. 841, and in *Citizens Bank Building Company* v. *Wertheimer,* 126 Ark. 38, 189 S. W. 361, Ann. Cas. 1917E, 520, we had occasion to consider a lease contract containing "an-option-to-terminate clause." In Ann. Cas. 1916B, 306, there is an extensive note on option-to-terminate clauses. It is there stated (p. 310): "An option to terminate a lease can be exercised only by complying with the provisions granting it." Cases are cited to sustain this state. ment. In 32 Am. Jur. 709, the rule is stated: "Occurrence of and compliance with conditions and terms is prerequisite to the exercise of an option to terminate a lease . . ." See, also, 35 C. J. 1052. In the case at bar the option-to-terminate clause required the lessor to reimburse the lessee for moneys expended, etc. The lessor did not pursue that procedure, but allowed the lessee to cultivate and harvest the crop. Claiming § 13, at this late date, appears to be a mere afterthought or a sort of "grasping at a straw" of defense. We, therefore, hold, as did the chancery court, that Wilson breached the contract in the matter of irrigation deficiency, and has presented no valid defense against such breach.

III. *The Damages Awarded Appellant.* We come now to appellant's contention that the chancery court's judgment (for damages) was too small, and to appellee's contention that the judgment was too large. As to the law on the measure of damages in a case like this, there is no uncertainty. *Harrington* v. *Blohm,* 136 Ark. 231, 206 S. W. 316, states the applicable rule, and is directly in point, because in that case the tenant recovered damages from the landlord who failed to furnish irrigation for a rice crop.

Before discussing the rule of *Harrington* v. *Blohm,* we dispose of some of the cases claimed by Wilson to modify that rule. They do not; because they deal with situations entirely different. *Morrison* v. *Weinstein,* 151 Ark. 255, 236 S. W. 585, involved the measure of damages claimed by a tenant kept out of possession of the land. *Layne-Arkansas Company* v. *Seeman,* 173 Ark. 1062, 294 S. W. 382, involved the damages claimed by a purchaser from a seller for alleged failure to repair a pump. It is obvious that the facts in these cases distinguish them from the case at bar.

Harrington v. *Blohm, supra,* held that when a landowner breaches his contract to furnish suitable irrigation for a rice crop and the tenant is damaged thereby, then the tenant's measure of damages is the tenant's part of the difference between (1) what the land would have produced if the irrigation had been furnished, and (2) what the land actually produced; deducting from this difference the amount it would have cost to produce, harvest and market the crop that would have been produced if irrigation had been furnished. That is the rule of *Harrington* v. *Blohm.* The same rule is stated in 30 Am. Jur. 629 in these words:

"Where a growing crop has been damaged as a result of failure to furnish sufficient water for irrigation purposes, it has been held that the measure of damages, in case of liability, should be the value of the crop which would have been raised had it been properly watered, or the grower's share thereof, less the value of the damaged crop, and what would have been the expense of raising, harvesting, and marketing such additional crop." See, also, Annotation in 108 A. L. R. 1174.

The question of the tenant's lack of due diligence in harvesting and marketing the crop actually produced was not mentioned in *Harrington* v. *Blohm* because there was no claim of lack of due diligence on the part of the tenant in that case. There is such a claim in the case at bar. Of course, it is the tenant's duty to harvest in a husband-like way the crop actually produced. This is an applica-

tion of the rule that the plaintiff must use due diligence to minimize his damages. See *Wisconsin & Ark. Lumber Co.* v. *Scott,* 167 Ark. 84, 267 S. W. 780, and *St. Louis S. W. Ry.* v. *Tucker,* 161 Ark. 140, 255 S. W. 553. In 15 Am. Jur. 426, the rule is stated:

"One deprived of the fruits of a contract must use the efforts of a reasonably prudent man to put himself in as good position as he would have been if the contract had not been violated. He must do nothing to aggravate his loss, but must do all he reasonably can to mitigate or reduce it. He cannot recover for that which he might reasonably have avoided."

The tenant cannot recover from his landlord damages from loss of the crop when such loss came about through the fault of the tenant. So, where it is shown that the tenant failed to use due diligence to harvest the crop actually produced, then he will be charged with what was lost occasioned by his lack of due diligence in harvesting. The tenant, in such case, would recover his part of the difference between (1) what the land would have produced if the irrigation had been furnished, and (2) what the land would actually have produced (without contracted irrigation) if the tenant had used due diligence in harvesting and marketing the crop actually produced; deducting from this difference the amount it would have cost to produce, harvest and market the crop that would have been produced if irrigation had been furnished as agreed.

So much for the rules of law: now for the application of these rules to this case. We quote from the opinion of the special chancellor:

"The raising of rice is unquestionably a hazardous undertaking. The determination of what amount might have been produced, or should have been produced, is an element of speculation, and something about which there can be no mathematical formula. Based on the experience of others in similar circumstances, however, courts and juries are permitted to reach a conclusion. It is my

opinion that the crop was damaged by failure to receive water at the proper time; that this damage consisted in part of making the maturity later than it would otherwise have been; that on account of the late maturity less rice was harvested than would have been if the crop had matured at the time it would have ripened had the field been irrigated at the early date that was desirable.

"The contract provided for lessor receiving 50 per cent. of the crop as rent. If the crop had produced twice as much as it did, or had amounted to $9,000, Lee Wilson & Company would have been entitled to $4,500 as rent. As it was, the crop lacked a small amount of paying for the cost of production. In view of the uncertainty about making and harvesting a rice crop, and especially that uncertainty which prevailed during 1944, as shown by the evidence in this case, I think a fair and equitable determination of this matter will be to let Lee Wilson & Company pay the balance of $40.21 due to Bank of Wilson, and the cost of the case, and recover nothing on its cross complaint for rent. I think this is fair to Mr. Gibson because I do not think the evidence would permit a finding that more than twice as much rice would have been harvested under the best possible performance by Lee Wilson & Company, and as above stated, with such additional crop the rent going to lessor would have consumed all of the additional return from the crop."

A large portion of the testimony in this record is concerned with (a) estimates of how many bushels of rice per acre would have been raised if the irrigation had been proper; (b) the cost of cultivating and harvesting a rice crop; (c) the late maturity of this crop due to irrigation deficiency; (d) the abnormal weather conditions existing in the harvesting season of 1944; (e) the equipment used by Gibson in harvesting and threshing his rice; and (f) Gibson's delay in, and suspension of, his harvesting operations and his refusal to accept aid for a more rapid completion. These are some of the factual forces that entered into the determination of the damages as decreed by the chancery court; and it is the interplay of these factors

that makes it impossible for us to say that the award of the chancery court is against the preponderance of the evidence. Gibson was guilty of delay and suspension in his harvesting operations, and we are unable to say how much his delay contributed to the loss of that part of the crop that was never harvested and marketed.

Since we are unable to say that the finding of the chancery court is against the preponderance of the evidence, we therefore affirm the case on both direct appeal and cross appeal. We adjudge that the costs of the appeal be divided equally between appellant and appellee.

BRYSON *v.* ELLSWORTH.

4-8108 200 S. W. 2d 504

Opinion delivered March 17, 1947.

W. S. Atkins, for appellant.

McRae & Tompkins, for appellee.

MINOR W. MILLWEE, Justice. Appellees, 19 residents of the City of Prescott, Arkansas, instituted this suit in chancery court to abate a nuisance which they alleged appellants were maintaining in the use of a 13-acre tract of land situated directly across the street from, and in front of, the homes of appellees. Appellants acquired the 13-acre tract in 1941 and constructed a large barn on the lot which they inclosed with a wire fence. The barn was used by appellants for storage of feed crops gathered from their several farms. Appellants live several miles from the tract which was left in charge of a tenant, and was used as a feeding lot and pasture for cattle kept within the inclosure.

The complaint of appellees alleged the manner of operation and use of the barn and lot by appellants in detail, and charged that same constituted an intolerable nuisance. The prayer of the complaint was that appellants be permanently restrained from keeping cattle upon said lands. In their answer appellants admitted that they kept cattle in the inclosure, but denied the other allegations of the complaint.

The cause was heard on April 15, 1946, and taken under advisement until April 18, 1946, when the chancellor rendered a written opinion which was incorporated in the decree, and contains the following findings:

"The plaintiffs are people who reside across the street from this pasture and the testimony discloses that there is an average of about sixty head of cattle kept on the premises and among the cattle are two bulls. It is shown that for a long period of time water was permitted to run constantly from a hydrant across the street from some of the plaintiffs and as a result, it became a loblolly and was infested by mosquitoes and a large number of flies. It was the general congregating place

of the cattle and the droppings, together with the mud, created an odor that was very offensive to all of the plaintiffs. The testimony also discloses that breeding was carried on in the pasture and that a number of calves were born in the open in front of the residences of the plaintiffs; also that joint efforts had been made by the people asking to abate the nuisance, but all to no avail, and as a result, this action was brought.

"The court further finds that the plaintiffs have fully sustained the allegations of their complaint and that the use of the premises for such purposes not only makes the conditions surrounding the place almost unbearable, but endangers the lives and health of the plaintiffs and that the defendant should be enjoined from further use of said property for the purposes aforesaid.

"It is therefore by the court considered, ordered and adjudged that the defendants, and each of them, be and they are hereby perpetually enjoined and restrained from:

"(a) Keeping or maintaining more than 10 cattle at any one time upon said lands, the evidence disclosing that this is all the stock the pasture will support.

"(b) Keeping or maintaining a bull or bulls in said pasture at any time when cows are therein.

"(c) Permitting cattle to breed upon said lands or calves to be born thereon.

"(d) Permitting water to overflow upon said lands and cattle to congregate therein and to create a loblolly or muddy area.

"(e) Permitting the waste and droppings from such cattle as are maintained on said lands to accumulate in such manner as to become a breeding place for flies or mosquitoes or to create an offensive odor . . ."

Appellants concede that appellees were entitled to a decree in their favor embodying paragraphs (b) to (e), inclusive, of the above decree and only appeal from that part of the decree embraced in paragraph (a), which

limits to 10 the number of cattle they are permitted to keep and maintain within the inclosure.

It is the contention of appellants that, since the keeping of cattle in an inclosure is not a nuisance *per se,* the court was without power to enjoin appellants from keeping more than 10 cattle in their lot and only had the power generally to restrain appellants from maintaining cattle on the lands in such a way as to constitute a nuisance. It is true that the keeping of cattle is not a nuisance *per se,* but it may, nevertheless, become a nuisance in fact, depending upon the proof.

The distinction between the two types of nuisances is stated in 39 Am. Jur., Nuisances, § 11, p. 291, as follows: "The difference between a nuisance *per se* and a nuisance in fact lies in the proof, not in the remedy. In the case of a nuisance *per se,* the thing becomes a nuisance as a matter of law. Its existence need only be proved in any locality, and the right to relief is established by averment and proof of the mere act. But whether a thing not a nuisance *per se* is a nuisance *per accidens* or in fact depends upon its location and surroundings, the manner of its conduct, or other circumstances. In such cases, proof of the act and its consequences is necessary. The act or thing complained of must be shown by evidence to be a nuisance under the law, and whether it is or is not a nuisance is generally a question of fact." In *Lonoke* v. *Chicago, R. I. & P. Ry. Co.,* 92 Ark. 546, 123 S. W. 395, this court said: "The act done or the structure erected may be a nuisance *per se,* or the act or use of the property may become a nuisance by reason of the circumstances or location or surroundings. In the one case the thing becomes a nuisance as a matter of law; in the other it must be proved by evidence to be such under the law."

This distinction has been recognized in many of our cases, and nuisances in fact have been absolutely abated in some of these cases, while in others, permission has been granted to continue operation of the business or use sought to be enjoined under certain conditions and limitations prescribed by the court. See,

Durfey v. *Thalheimer,* 85 Ark. 544, 109 S. W. 519; *The Gus Blass Dry Goods Company, et al.* v. *Reinman and Wolfoot,* 102 Ark. 287, 143 S. W. 1087; *Ft. Smith* v. *Western Hide & Fur Company,* 153 Ark. 99, 239 S. W. 724; *Huddleston* v. *Burnett,* 172 Ark. 216, 287 S. W. 1013; *Bickley* v. *Morgan Utilities Company, Inc.,* 173 Ark. 1038, 294 S. W. 38; *Jones* v. *Kelley Trust Co.,* 179 Ark. 857, 18 S. W. 2d 356.

In *Durfey* v. *Thalheimer, supra,* it was held that a livery stable was not a nuisance *per se,* but that it might become so by the manner in which it is constructed or conducted. Mr. Justice BATTLE, speaking for the court in that case, said: "It is the duty of every one to so use his property as not to injure that of another; and it matters not how well constructed or conducted a livery stable may be, it is nevertheless a nuisance if it is so built or used as to destroy the comfort of persons owning and occupying adjoining premises, creating an annoyance which renders life uncomfortable; and it may be abated as a nuisance."

In the Bickley case, *supra,* defendants were enjoined from erecting and operating an ice plant in a residential section of the City of Texarkana, and the court quoted with approval from the case of *Yates* v. *Mo. Pac. Rd. Co.,* 168 Ark. 170, 269 S. W. 353, 38 A. L. R. 1434, as follows: "The maxim, 'use your own property so as not to injure another,' is peculiarly applicable in nuisance cases. If one does an act, in itself lawful, which yet, being done in that place, necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act, where it will be less offensive. . . . That is a nuisance which annoys and disturbs one in possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrongdoer, and, when the causes of annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance." In *Jones* v. *Kelley Trust Co., supra,* the court said: "The chancery

court had authority to issue a permanent injunction, but he also had authority to permit the operation under the conditions named."

In a discussion of the form and scope of injunctions to be issued in nuisance cases in 39 Am. Jur., Nuisances, § 172, pages 443-4, it is said: "Where the injury complained of results from acts that are not a nuisance *per se,* but only such by reason of the manner in which they are done or the surrounding circumstances, the court will not grant an injunction in such form as absolutely to prohibit the defendant's use of his property, if it is possible to frame a decree which in another form will give the plaintiff the relief to which he is entitled." And, in § 171 of the same work and volume, the textwriter says: ". . . . a decree enjoining a nuisance should specifically point out the things which the defendant is required to do and to refrain from doing in order to abate the nuisance which is found to exist. It should be as definite, clear, and precise in its terms as possible, so that there may be no reason or excuse for misunderstanding or disobeying it, and, when practicable, it should plainly indicate to the defendant all the acts which he is restrained from doing, without calling upon him for inferences or conclusions about which persons may well differ."

The decree in the instant case was rendered in conformity with the rules just announced. It did not restrict the use of the barn by appellants as a storage for their feed crops, nor did it absolutely prohibit them from keeping cattle upon their lands. The chancellor found from the evidence that keeping as many as 10 cattle at one time within the inclosure—which was equivalent to its use as a pasture only—did not constitute a nuisance, while the maintenance of a larger number of cattle upon the lands did constitute an intolerable nuisance to appellees. This disputed question of fact was determined by the trial court after hearing all the evidence. Appellants have not favored us with an abstract of the testimony of the several witnesses who testified in behalf of appellees on this issue. We are not required to explore

the record to ascertain whether this evidence was sufficient to support the decree rendered by the trial court, and will presume its sufficiency for that purpose. *Velvin* v. *Kent,* 198 Ark. 267, 128 S. W. 2d 686; *Norden* v. *DeVore,* 207 Ark. 1105, 184 S. W. 2d 585; West's Arkansas Digest, vol. 2, Appeal & Error, § 592, and cases there cited.

The decree is accordingly affirmed.

MURPHY *v.* OSBORNE.

4-8107 200 S. W. 2d 517

Opinion delivered March 17, 1947.

Kaneaster Hodges, for appellant.

Claude M. Erwin, for appellee.

ED. F. MCFADDIN, Justice. From a decree, adjudging a foreclosure and refusing to cancel certain instruments, appellant prosecutes this appeal.

On November 8, 1944, the appellant, Jim Murphy, executed a note to the appellees James and John Osborne for $1,000, due October 15, 1945, and secured by a mortgage on 40 acres of land. The mortgage was duly

acknowledged and recorded. On November 1, 1945, the note being past due and unpaid, the Osbornes filed this suit for judgment and foreclosure. Murphy filed an answer and cross compaint: (1) he admitted executing the note and mortgage but claimed he had received only $100 instead of $1,000; he offered to confess judgment for $100 and interest, and pleaded failure of consideration for the remaining $900; (2) by way of cross complaint he listed several other instruments (a deed and some mortgages) shown by the record in the Circuit Clerk's Office to have been executed by him to the Osbornes; and he claimed these were all fraudulent and should be cancelled. The Chancery Court rendered a decree in favor of the Osbornes; and Murphy has appealed.

The evidence in this case is as sharply contradictory as is imaginable. Either the appellees have grossly swindled the appellant or he is trying to use his age and professed ignorance to defraud the appellees. If neither of these conclusions is correct, then the parties must have had many dealings which they would not admit at the trial. We agree with the Chancery Court in the statement that the full truth may never be known about the dealings between the parties in this case. But the law has certain well established rules which are used to weigh the evidence and reach the result in a case such as this, both in the lower court and in this court on appeal. We proceed, therefore, to apply these rules to this case.

I. *The Burden Was on Murphy to Defeat the Note.* Murphy admitted signing the $1,000 note sued on. Section 10182, Pope's Digest, says "Every negotiable instrument is deemed *prima facie* to have been executed for a valuable consideration . . ." Even though the above section comes to us from § 24 of the Uniform Negotiable Instruments Law, adopted by Act No. 81 of 1913, it is declaratory of what has been the law in Arkansas ever since Statehood. *Gage* v. *Melton,* 1 Ark. 224, holds that (a) a negotiable instrument is presumed to be based on a valid consideration, and (b) the burden of showing want or failure of consideration is on the defendant when

he admits executing the note. The scores of cases affirming and following that case are collected in West's Arkansas Digest "Bills and Notes," § 493. So, when Murphy admitted executing the note, the law placed on him the burden to prove failure of consideration of the $900 as he claimed.

With all the conflicting evidence, we are unable to say that Murphy discharged that burden in the trial court. Some circumstances support Murphy, while others strongly belie his words and indicate the contrary to be true. It would serve no useful purpose to review all the evidence. It is sufficient to announce our conclusion: which is, that Murphy failed to prove failure of consideration of $900 on the note. He failed to prove this by even a mere *preponderance of the evidence,* which he claims is the applicable rule. Certainly, he wholly failed in the burden on him to offer *"clear, cogent and convincing evidence"* to have the deeds and mortgages cancelled; and that, undoubtedly, is the applicable rule in a case seeking cancellation of deeds and mortgages such as Murphy sought by his cross complaint in this case. See the many cases collected in West's Arkansas Digest "Cancellation of Instruments," § 47.

II. *The Finding of the Chancery Court will not be Reversed on Appeal unless such Finding is against the Preponderance of the Evidence.* Some of the scores of cases recognizing and reiterating this long established rule are collected in West's Arkansas Digest "Appeal and Error," § 1009. In the case at bar the chancellor saw each witness when he testified. The chancellor observed the demeanor on the witness stand, the inflection in the voice and the hesitancy or rapidity of the words flowing from the mouth of the witness. The chancellor thus had an opportunity to see more than the mere words on the printed page which, alone, come to this court. With the testimony in this case in hopeless conflict, we cannot say that the Chancery Court decided against the preponderance of the evidence.

AFFIRMED.

NORTH LITTLE ROCK SPECIAL SCHOOL DISTRICT *v.* KOPPERS COMPANY, INC.

4-8112 200 S. W. 2d 519

Opinion delivered March 17, 1947.

Rehearing denied April 14, 1947.

John M. Rose, for appellant.

Armistead, Rector & Armistead, Henry Donham and *Thos. S. Buzbee,* for appellee.

ROBINS, J. North Little Rock Special School District and Pulaski County filed a petition with the Tax Division of the Arkansas Public Service Commission ask-

ing the Commission to direct the Assessor of Pulaski county to assess for taxation for the year 1946 and each year thereafter against Koppers Company, Incorporated, all poles, piling and crossties, regardless of ownership thereof, at the plant of said company located three miles east of North Little Rock; or to require the Assessor of said county to assess for taxation, as property not used for utility purposes, all of said property owned by the Missouri Pacific Railroad Company or the Chicago, Rock Island & Pacific Railroad Company; or that the Commission apportion to the said county and district the assessed value of such part of said property as had a *situs* therein on January 1, 1946.

The Commission refused to grant any of the relief prayed in said petition and on appeal the Commission's order was affirmed by judgment of the circuit court. To reverse that judgment this appeal is prosecuted.

The establishment of Koppers Company, Inc., is known as a "wood preserving plant," and there timbers, such as poles, piling and crossties are dried and treated with preservative chemicals. At all times a large amount of these timbers are on hand at this plant, and the company itself owns part of the stock on hand, which it treats and sells on its own account. It is conceded that all such stock owned by the company has been duly assessed. However, most of these timbers belong to customers of the company; and the principal portion thereof is owned by the Missouri Pacific Railroad Company and the Chicago, Rock Island & Pacific Railroad Company. These railroad companies purchase from various persons along their lines suitable timbers, ship them into Koppers Company plant, have them treated, and then distribute the treated timbers throughout their respective systems where needed. These timbers belonging to the two railroad companies, on hand at the plant for treatment, furnish the basis for the controversy, appellants insisting that by one of the three methods set out in their petition these timbers should be assessed for the benefit of the local taxing units, while the con-

tention of appellees is that the railroad companies have already included them in their assessments.

In limine, we must dispose of the contention by appellees that no appeal to the circuit court from an order of the Commission such as the one questioned here is authorized by law. In support of this contention appellees cite our decision in the recent case of *Little Rock Special School District, et al.* v. *Arkansas Public Service Commission,* 210 Ark. 165, 194 S. W. 2d 874. In that case, referring to the provisions of law under which appeals from the Commission's findings are authorized, we said: "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 sections 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." In the proceeding at bar the Commission was asked to make an order affecting the assessment of a substantial amount of property belonging to two railroad companies, and as to the allocation of the tax derived therefrom. It appears, therefore, that the order complained of by appellants is one made in the exercise of the Commission's regulatory powers over public utilities, and that an appeal thereform to the circuit court may be properly prosecuted for that reason, if for none other.

I.

It is first argued by appellants that Koppers Company, Inc., was required to assess the timbers belonging to these railroad companies under the provisions of § 13728, Pope's Digest, which is as follows:

"Every person who shall purchase, receive or hold personal property of any description for the purpose of adding to the value thereof by process of manufacturing, refining, rectifying, or by combination of different materials, with a view of making a gain or profit by so doing, shall be held to be a manufacturer, and he shall make out and deliver to the assessor a sworn

statement of the amount of his other personal property subject to taxation also including in his statement the average value estimated, as provided in § 13726, of all articles purchased, received, or otherwise held for the purpose of being used, in whole or in part, in any process or operation of manufacturing, combining, rectifying or refining, which, from time to time, he shall have on hand during the year next previous to the time of making such statement, if so long he shall have been engaged in such manufacturing business, and, if not, then during the time he shall have been so engaged. Every person owning a manufacturing establishment of any kind and every manufacturer shall list, as a part of his manufacturer's stock, the value of all engines and machinery of every description used or designed to be used for the aforesaid purpose."

This statute is of no avail to appellants because, as to timbers sent in to it by its customers for preservative treatment, appellee, Koppers Company, Inc., was not a manufacturer within the meaning of this statute. *Anheuser-Busch Brewing Association* v. *United States,* 207 U. S. 556, 28 S. Ct. 204, 52 L. Ed. 336; *Indiana Creosoting Company* v. *McNutt,* 210 Ind. 656, 5 N. E. 2d 310. In the last cited case the Indiana Supreme Court said: "The process of creosoting the ties cannot in any sense be considered manufacturing." Furthermore, by the plain language of this section, the property that a manufacturer is required thereunder to assess is limited to that which is owned by the manufacturer himself. Therefore the Commission did not err in refusing to require the listing for assessment in Pulaski county of the timbers belonging to the railroad companies, on hand for treatment at the creosoting plant. This conclusion obviates any discussion as to the contention, raised by appellees, that appellant's remedy, if any, was the prosecution of an appeal from the action of the Assessor in failing to assess the property.

II.

Under the laws of this state the property, real and personal, of railroad companies is assessed for taxation

as a whole by the Commission and the valuation thereof apportioned on a mileage basis to the various counties, cities and school districts of the state traversed by the lines of such companies. Section 2048, Pope's Digest. See *Arkansas Tax Commission* v. *Crittenden County,* 183 Ark. 738, 38 S. W. 2d 318.

It is urged by appellants that the timbers involved herein ought to be assessed in Pulaski county, under the provisions of § 2051, Pope's Digest, as property "not used in the utility operation." We cannot agree with this contention. These railroad companies were not dealers in crossties or timbers. They bought only such as they required in the maintenance and operation of their rail lines; and the statute referred to was not intended to apply to material acquired solely for the purpose of maintaining the utility operation.

A somewhat similar question was presented in the case of *Philadelphia & Reading Railroad Company* v. *Woodbridge Township,* 91 N. J. L. 180, 102 Atl. 392. In that case the township in which a creosoting plant was located insisted that crossties belonging to the railroad company and sent to the plant for treatment should be assessed for taxation in that township. Denying the township the relief sought by it, the New Jersey court said: "That the ties in question were not *actually* in use for railroad purposes on the taxing date is apparent from what has already been stated. The primary question, therefore, is what is the scope to be given to the words 'used for railroad purposes', as this phrase appears in section 1 of the Railroad Tax Act? That question, however, is no longer an open one. . . . It has been consistently held, whenever the matter has come up for judicial consideration, that property owned by a railroad corporation, which has been acquired and is held for a railroad use to which it is intended to be subjected in the near future, is property used for railroad purposes within the meaning of the Railroad Tax law, although such use has not actually been begun; and, therefore, is taxable under that Act, and not under the general tax law of the state."

We conclude that the ties involved in this litigation were not embraced in the category made locally assessable under the provisions of § 2051 of Pope's Digest.

III.

It is finally argued by appellants that the Commission, in making apportionment of the valuation of these two railroad companies, as required by law, should assign and apportion to appellants the entire assessed value of the timbers in controversy, for the reason that this property (or a certain part thereof) had a "fixed *situs*" in the said county and school district and was assessable therein under the provision of § 2048 of Pope's Digest.

But this property, under the record here, did not have a fixed *situs* in Pulaski county. It was sent there to be "treated" and to be withdrawn and sent out over the lines of the two railroad companies after the treating process was completed. It was not to be put in use in Pulaski county alone, or to be kept permanently in that county, but was to be used throughout the system. Therefore it was proper for the Commission to apportion its value to the various taxing units of the state traversed by the lines of these railroad companies.

The order of the Commission denying relief to appellants was correct; and the judgment of the circuit court is accordingly affirmed.

THOMASON *v.* LEDGERWOOD.

4-8084 201 S. W. 2d 14

Opinion delivered March 17, 1947.

Rehearing denied May 5, 1947.

A. T. Davies and *Scott Wood,* for appellant.

Earl J. Lane and *Richard M. Ryan,* for appellee.

GRIFFIN SMITH, Chief Justice. Elizabeth Dennis executed a will September 30, 1938. She died April 9, 1945, and the will was offered for probate the following day. Because the subscribing witnesses (Sidney McMath and Clyde H. Brown) were in military service and could not be reached immediately, the order of probate was not made until July 26, 1945. In the meantime (April 1945) letters of administration were issued Dewell Jackson, who executed bond for $10,000 with U.S.F. & G. as surety.

January 24, 1946, Mary E. Thomason and Mrs. S. B. Caldwell, filed on behalf of themselves and "all other heirs of Elizabeth Dennis" what they termed a complaint. It was alleged that the so-called testatrix was predeceased by her husband, mother, and father; that she died childless, and that the plaintiffs (her sisters) were entitled, with other relatives, to participate in the estate according to laws of descent and distribution. Specifically it was asserted that on two occasions subsequent to September 30, 1938, Elizabeth Dennis had executed separate wills, legally revoking the instrument admitted to probate under the Court's order of July 26, 1945.

Under the will recognized by the Court, Ledgerwood received a farm or plantation consisting of 240 acres in St. Francis County, and was named as residuary legatee. A. T. Davies, one of the attorneys for appellants, was bequeathed sixty shares of "Bethlehem Steel Common." Katherine Jackson (daughter of Dewell Jackson) was named devisee in respect of a residence in Hot Springs; and other dispositions were made.

Act 401, approved March 27, 1941, provides that a will probated without notice to the testator's heirs may be contested within six months, but not thereafter. The statute gives this right to any heir. It requires that a complaint be filed, setting up the grounds upon which legality of the will is to be challenged, ". . . and making defendants to the complaint all heirs and legatees of the deceased testator not joined as plaintiffs, and causing notice to be served upon all defendants for the time and in the manner required by law for service upon defendants in chancery cases."

Appellees contend that inasmuch as heirs and legatees were not made defendants when Mrs. Thomason and Mrs. Caldwell filed their complaint January 24th, the omission could not be cured by amending more than six months after letters had been issued. Appellants insist that Act 297, approved March 20, 1945, became effective June 7, and that its provisions control. But, they say, even if Act 401 is applicable, they must prevail because of this Court's decision in *Sowell* v. *Houseman,* 207 Ark. 929, 183 S. W. 2d 511. The opinion in that case contained the matter shown in the margin.[1]

It will be observed that there is an express finding by the Supreme Court that in the circumstances of the case decided no prejudice could have resulted to anyone.

[1] "It is conceded that notice of the motion [to amend the complaint in a material manner] was given to appellee, whose interest alone was adverse to appellants. The other heirs could not be prejudiced by failure to join them, and any defect of parties could have been remedied by an order of the Court requiring the heirs not joined in the motion to be made parties and have notice of the proceeding".

In the case at bar an intervention was filed March 4, 1946, by fifteen persons who declared themselves to be lawful heirs of Elizabeth Dennis, and who approved the action of Mrs. Thomason and Mrs. Caldwell in undertaking to contest the will. On the same day an amendment to the complaint by the original parties alleged that they represented all of the heirs except James Riley Griffith, (brother of the decedent) and that he had declined to join in the suit. In this amendment seven living brothers and sisters were named, and twelve nieces and nephews—sons and daughters of deceased brothers and sisters; a total of nineteen.

Including Ledgerwood and Davies, five devisees and legatees were named in the will. Act 401 provides that "heirs and legatees"[2] must be parties to any suit contesting a will.

If Act 297 of 1945 controls, there is a different procedure. But this Act, by its terms, provides (Sec. 26) that "Sections 1, 2, 3, 13, 15, 16, 17, and 18 [of Act 297] shall apply only to those estates of decedents on which letters testamentary or of administration are granted subsequent to the effective date of this Act."

In the case at bar the Clerk issued letters of administration, and he approved a bond that has not been questioned. In *Steen* v. *Springfield,* 91 Ark. 73, 120 S. W. 408, it was held that Sec. 13 of Kirby's Digest (now Sec. 14 of Pope's Digest) was designed [solely] "to provide for a temporary administrator to take charge of and preserve [an] estate until the will can be admitted to probate and letters testamentary issued to the executor, if qualified." Continuing, the opinion says: [The statutory provision] "is merely for the protection of the estate, and not to provide for neutrality towards both contestants and beneficiaries under the will."

Here, of course, the will could not be admitted to probate because the two attesting witnesses were in foreign military service; and in the meantime those in possession

[2] Presumptively by analogy and construction, devisees would be included in the phrase "legatees".

of the property could have committed waste and dissipated the personalty; hence the necessity for court control. See *Turley* v. *Evans,* 109 Ark. 115, 158 S. W. 1080.

The testimony as to information in possession of the plaintiffs is that Davies, on two occasions, talked with J. R. Griffith, one of Mrs. Dennis' brothers. Mrs. Caldwell and Mrs. Thomason lived in or near Hot Springs. It is inconceivable that some information regarding kinships should not have come into possession of those who instituted the contest; and this is true if it be conceded, as argued, that some of the interested parties were not on good terms. Certainly notice could have been given by publication, "and in the manner required by law for service upon defendants in Chancery Court cases."

The character of proof intended to be offered had the contestants prevailed is this: An attorney, since dead, told someone that he had prepared a will or wills subsequent to that executed by Mrs. Dennis in 1930, and that in consequence of these transactions she revoked the former will. While (presumptively) in his last illness the attorney's deposition was taken.

The Court correctly held that the Act of 1941 was applicable. There was (a) failure to make all heirs, devisees, and legatees parties plaintiff or defendant—a condition precedent to the right of adjudication; (b) that the omission of Griffith as either plaintiff or defendant was with full knowledge of the relationship: brother of Mrs. Chandler and Mrs. Thomason. Substantial compliance with the statute required, at the least, that publication be made as substituted service.

Affirmed.

CHANDLER *v.* CHANDLER.

4-8100 200 S. W. 2nd 508

Opinion delivered March 17, 1947.

[redacted]

Yingling & Yingling, for appellant.

Harry Neelly and *P. A. Lasley,* for appellee.

GRIFFIN SMITH, Chief Justice. Ernest and Agnes Chandler lived together until 1938, following their marriage in 1930. Ernest was committed to a hospital, where after a period of treatment it was found that he was incurably insane. September 10, 1946, on the wife's complaint, (and following proceedings in respect of which regularity is not questioned) a decree of divorce was granted. Custody of the couple's twelve-year-old daughter was given Mrs. Chandler. A monthly sum of $50 was ordered paid from Chandler's estate for support of the child. Chandler owned a funeral home, operated jointly by himself and wife. Following the husband's insanity Mrs. Chandler continued the business as guardian, and seemingly intends to do so. The Court found she was entitled to a third of the defendant's personal property payable presently, including cash on hand. The order further directed that, upon termination of the guardianship, appraisers should be appointed to evaluate "said remaining personal property," a third of which should go to the plaintiff. An attorney's fee and costs were made charges against Chandler.

Jones and Joel Chandler, brothers of Ernest, filed interventions as next friends, alleging the Court was without jurisdiction to make the property order. Specifi-

cally, it was charged that Mrs. Chandler had paid herself $748.23, presumptively representing a third of the cash she held as guardian. Refund of this sum was demanded.

Act 428, which became a law April 1, 1943, without the Governor's approval, amends Sec. 4381 of Pope's Digest. The eighth section makes incurable insanity a ground for divorce in the circumstances contemplated. It is copied in the footnote.[1]

Appellants insist Section Eight is not, in fact, an amendment to existing statutes relating to divorce, but is a new law, complete in all respects, and independent of reënacted sections; hence, nothing can be read into it but what is expressed.

Act 428 is captioned, "An Act to amend Sec. 4381 of Pope's Digest. . . ." The title is not controlling; but where intention of the lawmakers is doubtful it may be looked to in order to ascertain what purpose was in mind. *Western Union Telegraph Co.* v. *State,* 82 Ark. 302, 101 S. W. 745. There are many other cases recognizing this rule. Further evidence of legislative intent to amend existing laws and to *add* insanity as a ground for divorce is seen in Sec. 1 of Act 428, where Act No. 20 of 1939—passed subsequent to publication of the Digest—is 'picked up" and referred to as an amendment to Sec. 4381, making the provisions, "as amended," to "read as follows." It should also be observed that Section Eight

[1] "In all cases where a husband and wife have lived separate and apart for three consecutive years, without cohabitation, by reason of the incurable insanity of one of them, the Court shall grant a decree of absolute divorce upon the petition of the sane spouse; provided the proof shows that the insane spouse has been confined in an institution for the care and treatment of the insane for three consecutive years; and provided that such proof be supported by the evidence of two reputable physicians, one of which shall be a staff member or the Superintendent of the institution wherein the insane spouse is confined, and one a regularly practicing physician in the community wherein such husband and wife reside. In all decrees granted under this subsection in actions in which the husband is plaintiff, the Court shall require the plaintiff to provide for the care and maintenance of the insane defendant as long as she may live, and the trial Court will retain jurisdiction of the parties and the cause, from term to term, for the purpose of making such further order as equity may require to enforce the provisions of the decree requiring plaintiff to furnish funds for such care and maintenance."

reads in part, "In all decrees granted under this subdivision."

By Act 88 of 1873, pp. 213-222, permanent and incurable insanity occurring subsequent to marriage was the seventh ground for divorce. Other causes appeared in the Act substantially as they are now printed in Pope's Digest. By Act 62 of 1895, p. 76, the seventh subdivision of Sec. 2505 of Sandels & Hill's Digest was repealed, leaving other statutory divorce grounds intact. This was the situation until 1943, when the Act now in question became effective; but this did not occur until the General Assembly of 1939 had added Act 20; hence the provision of Act 428 of 1943 shown in the first footnote to this opinion necessarily became a new cause, but one fitted into and made a part of existing laws, just as Act 88 of 1873 (being "An Act to amend the code of practice in civil cases") set up the seven causes heretofore mentioned, in the sequence there shown; and just as Act 62 of 1895, without disturbing other applicable laws, took away the seventh ground as it then existed.

White v. *White,* 196 Ark. 29, 116 S. W. 2d 616, deals with Act 167 of 1937. The Act added to Sec. 3500 of Crawford & Moses' Digest, by way of amendment, a provision that courts of chancery should grant a divorce to either party upon proof that husband and wife had lived apart for three consecutive years with cohabitation.[2] In the White case it was held that no changes had been made in Sec. 3500 of the Digest, other than the added provision. It was then said that the new matter was "an amendment to the original law." See also *State* v. *Sewell,* 45 Ark. 387. The language of Chief Justice COCKRILL is impressive. "The statute," said he, "is not to be construed as though it stood alone on the subject. 'A statute is a fresh drop added to the yielding mass of the prior law to be mingled by interpretation with it.' "

[2] When Act 167 was held ineffective to accomplish the purposes those interested in the measure had in mind, the succeeding General Assembly (1939) passed Act 20, now the seventh subdivision of Act 428 of 1943. However, the 1937 enactment appears in Pope's Digest, p. 1270.

So, in the case at bar, the eighth ground appears in the statute free of any express or implied purpose to have it construed other than as the enacting clause says: an amendment. Treated as such it takes its place with the whole.

Our conclusion is that the so-called "Eighth Ground" was subjoined to the preceding causes with no thought that it would be regarded as independent, self-sufficient, and free from the incidents attaching to decrees based upon prior law.

Affirmed.

ALLEN *v.* ALLEN.

4-8114 200 S. W. 2d 324

Opinion delivered March 17, 1947.

R. C. Waldron, for appellant.

Blackford & Irby, for appellee.

GRIFFIN SMITH, Chief Justice. An order finally dismissing the plaintiff's cause for want of jurisdiction is appealed from. The question is whether Joseph Allen, who had lived at Hot Springs (making occasional visits to other States) was a resident of Lawrence County

within the meaning of our statutes authorizing divorce. See "Venue," Pope's Digest, Sec. 4383.

The Allens were married at Malvern in March 1943. The complaint alleges separation without cohabitation for more than three years. Act 20, approved January 27, 1939, 7th subdivision; Pope's Digest, Sec. 4381.

Testimony by the parties is that they lived together less than three months. In October 1943 the husband sought a divorce in Garland County, alleging indignities. Mrs. Allen's answer contained similar charges against the plaintiff. In amended and substituted pleadings it was alleged that Mrs. Allen deserted her husband May 11, 1943. At the December 1944 term Chancellor Garratt dismissed the complaint for want of equity. No appeal was taken. In the meantime a part of Allen's pension as a Spanish War Veteran had been deducted by the Administration and sent monthly to Mrs. Allen.

Although appellant insists he was a resident of Lawrence County within the meaning of divorce statutes, and supplements this claim with testimony of his boarding-house landlady who says he maintained quarters and took meals in the establishment for six weeks or more, and supporting witness (the landlady) says she had seen Allen in Hoxie continuously for several weeks, force of this evidence was largely destroyed by the plaintiff's answers to questions by the Court. Effect of the interrogation was to show that Allen left Hot Springs and went to Lawrence County for the purpose of getting a divorce, "because justice could not be procured at Hot Springs." There is nothing in the record to indicate that appellant was denied any of his rights by the Garland Chancellor. In the light of admissions, the Court from which this appeal comes properly held that it was without jurisdiction. *McLaughlin* v. *McLaughlin,* 193 Ark. 207, 99 S. W. 571; *Hillman* v. *Hillman,* 200 Ark. 340, 138 S. W. 1051.

There is another reason the divorce should not have been granted on the testimony presented. Allen alleged separation for three years, and Mrs. Allen, while denying

other parts of the complaint, admitted separation without cohabitation for the period mentioned. There was no corroboration of the plaintiff's testimony that the period of separation was three years. The evidence is not sufficient. *Pryor* v. *Pryor,* 151 Ark. 150, 235 S. W. 419.[1] In *Davis* v. *Davis,* 163 Ark. 263, 259 S. W. 751, this statement appears: "So, even if the appellant had admitted all that appellee charged against her, we could not grant him a divorce upon his uncorroborated testimony." Mr. Justice MEHAFFY's opinion in *Bell* v. *Bell,* 179 Ark. 171, 14 S. W. 2d 551, cited *Scales* v. *Scales,* 167 Ark. 298, 268 S. W. 9, and said: "That case also holds that the rule is well settled that divorces will not be granted upon the uncorroborated testimony of either party, even if admitted to be true by the other party."

The decision in *Goodlet* v. *Goodlet,* 206 Ark. 1048, 178 S. W. 2d 666, copies from *Scales* v. *Scales,* where it is said: "The cases are agreed that the purpose of the rule requiring corroboration is to prevent procuring divorces through collusion, and that where it is plain there is no collusion, the corroboration may be comparatively slight." Other decisions are consonant.

Affirmed.

MILNER *v.* NEW EDINBURG SCHOOL DISTRICT.

4-8128 200 S. W. 2d 319

Opinion delivered March 24, 1947.

[1] In the Pryor case, Mr. Justice Wood, who wrote the Court's opinion, said: "Divorces are not granted upon the uncorroborated testimony of the parties and their admissions of the truth of the matters alleged as grounds thereof". Citations were *Sisk* v. *Sisk,* 99 Ark. 94 136 S. W. 987; *Rie* v. *Rie,* 34 Ark. 37; *Kurtz* v. *Kurtz,* 38 Ark. 119; *Brown* v. *Brown,* 38 Ark. 324; *Scarborough* v. *Scarborough,* 54 Ark. 20, 14 S. W. 1098; *Kientz* v. *Kientz,* 104 Ark. 381, 149 S. W. 86; *Shelton* v. *Shelton,* 102 Ark. 54, 143 S. W. 110; *Johnson* v. *Johnson,* 122 Ark. 276, 182 S. W. 897.

DuVal L. Purkins, for appellant.

Max M. Smith, for appellee.

Ed. F. McFaddin, Justice. This appeal presents for determination: (1) whether land previously deeded to a school district had reverted; and (2) whether the building reverted with the land. Some of our cases on reversion of school property are: *Steele* v. *Rural Special School District,* 180 Ark. 36, 20 S. W. 2d 316; *McCullough* v. *Swifton Consolidated School District,* 202 Ark. 1074, 155 S. W. 2d 353; *Williams* v. *Kirby School District,* 207 Ark. 458, 181 S. W. 2d 488; *Rose* v. *Marshall School District,* 210 Ark. 211, 195 S. W. 2d 49; *Vandale Special School District* v. *Feltner,* 210 Ark. 743, 197 S. W. 2d 731.

The factual situation in the case at bar is somewhat different from that existing in any of the adjudicated cases. The facts here are:

A. In 1915, Mr. J. H. Hollis conveyed by warranty deed 2½ acres of land to the Hollis Special School District, with this clause of reversion in the deed: "This deed is made with the understanding that in case the property ever ceases to be used for public school purposes that the land, but not the improvements thereon, is to revert to the grantor herein."

B. The Hollis Special School District erected a school building on the 2½ acres, and used the same for school purposes. In 1930, the Hollis Special School District was consolidated with the appellee school district (which is hereinafter called the "district"); but the consolidated district continued to have school for the lower grades in the Hollis school building until May, 1940. Since then, there has been no school in the Hollis building. In 1940, the district canceled the fire insurance on the building, and allowed the building to be used as a meeting place for the ladies of the Hollis community. The only school property remaining in the building was a stove, some blackboards, and a few desks; and all of this property was moved on April 26, 1946, when the district sold the building to J. L. Brown, who was to raze it, and remove the materials. Brown agreed to pay the district $1,500 for the materials.

C. When J. H. Hollis executed the deed to the Hollis School District in 1915 as aforesaid, he owned a total of 240 acres, of which the 2½ acres was a part. After the death of J. H. Hollis, his heirs conveyed to N. T. Hollis the entire 240 acres by deed dated August 16, 1944. Then, on October 2, 1944, N. T. Hollis conveyed to the appellant, Mrs. Milner, the 237½ acres by deed, which also contained this language in the granting clause: "Also, the reversion of the J. H. Hollis estate in and to the following parcel of land (but not the buildings thereon) described as follows: . . ." (then follows the description of

the 2½ acres conveyed by J. H. Hollis to the Hollis Special School District in 1915, as aforesaid.)

Mrs. Milner had the 2½ acres placed on the tax books, and paid taxes thereon. She cut pulpwood timber from the 2½ acres, and exercised other acts of ownership over the land (but not the building) from the date of her deed until the filing of this suit. The school district tried to purchase from Mrs. Milner one acre (where the building was located) out of the 2½-acre tract. One of the school directors testified in this regard: "Q. Did you, after she had bought it, ask her if she would consider selling one acre of the land back to the school district? A. Yes, sir. Q. You had that conversation? A. Yes, sir. Q. At that time you evidently didn't think you owned the land or the building either, did you? A. I didn't know about the land. I thought she had the land, but there never was any doubt about the building. Q. Why did you want to buy an acre back? A. So we wouldn't have to move the building."

D. Such was the condition of affairs when, on April 26, 1946, the school district sold the building to J. L. Brown as aforesaid. Then, on April 30, 1946, the appellant filed the present action against the appellee school district and J. L. Brown to enjoin the removal of the building: appellant claiming the building to be attached to the real estate, and therefore belonging to her under her deed from N. T. Hollis as aforesaid. Pending the litigation, the parties agreed, by stipulation to avoid prejudice, that the $1,500 might be deposited in court in lieu of the building, and that Brown might (and did) remove the building. As a result of the trial, the chancery court entered a decree holding (1) that the school district was the owner of the building, and (2) that the school district was the owner of the 2½ acres, and that it had not reverted to Mrs. Milner. To reverse that decree, there is this appeal.

I. *The Building.* We affirm the decree of the chancery court in finding against Mrs. Milner's claim to the building or the proceeds thereof. In the deed from J. H. Hollis to Hollis Special School District (predecessor of

appellee school district) it was definitely stated that the improvements would not revert with the land. Likewise, in the deed from N. T. Hollis to Mrs. Milner, it was stated that the building would not revert to Mrs. Milner. The effect of these conveyances was to prevent the building from becoming, or passing as, a part of the realty. The presumption of a structure becoming realty (as was held in *Waldo Fertilizer Works* v. *Dickens,* 206 Ark. 747, 177 S. W. 2d 398) was overcome by the recitals in the said deeds in this case. In 22 Am. Juris. 780 the general rule is stated: "Generally a building erected on the land of another by his consent or license does not become part of the realty, but remains the property of the person annexing it. The same results will be achieved if the owner expressly consents or agrees that the building shall remain personalty; . . . This rule certainly holds when there is an express reservation of a right to remove the building; . . ." See, also, 42 Am. Juris. 199, "Property," § 18.

We dispose of appellant's contentions:

(a) *Building as a fixture.* Appellant cites the majority and concurring opinions in *Williams* v. *Kirby District, supra,* wherein were cited statements from 42 Am. Juris. 199 and 22 R. C. L. 59, to the effect that a building permanently fixed to the freehold became a part of the realty, and passed with it. But appellant evidently overlooked that portion of the text in 42 Am. Juris. 199 which, after stating the above rule, adds this significant language, which is applicable to the case at bar, to-wit: "The general rule is otherwise, however, where the improvement is made with the consent of the landowner, and pursuant to an understanding, either expressed or implied, that it shall remain personal property."

Likewise, appellant evidently overlooked, from 22 R. C. L. 59, the following portion of the text, which, after stating the general rule urged by the appellant, then states the following as an exception: ". . . but it is otherwise as to a building . . . erected with the consent of the landowner and with the understanding either

expressed or implied that it shall remain personal property." The building in the case at bar comes within the scope of the quotation just recited. It was excepted from the Hollis conveyances, and did not become a part of the realty. The language in the reverter clause in this case specifically excepts the building from reverting with the land. Such language did not appear in the reverter clause in the case of *Williams* v. *Kirby District, supra.*

(b) *Limitations.* Mrs. Milner's deed was dated October 2, 1944; and on April 26, 1946, the district sold the building to Brown. We are cited to no statute of limitations that could have ripened Mrs. Milner's possession into title in that short period, even assuming that she had possession of the building during all of such time—which the proof shows she did not.

(c) *Estoppel.* It was not until after Mrs. Milner had purchased the Hollis land that she ever had any conversation with any representative of the school district, so she presents no facts to make a claim of estoppel by representation. See *Rogers* v. *Galloway Female College,* 64 Ark. 627, 44 S. W. 454, 39 L. R. A. 636; and also 19 Am. Juris. 653. In view of what has been stated, it is unnecessary for us to consider the district's claim as to whether Mrs. Milner is herself estopped by the recitals in her deed from claiming the building. In this connection, see 19 Am. Juris. 627, "Estoppel," § 29; 16 Am. Juris. 610, "Deeds," § 301; and annotation in 39 A. L. R. 128. We therefore affirm the chancery court in refusing Mrs. Milner's claim for the building or its proceeds.

II. *The Land.* We reverse that portion of the decree of the chancery court which found against Mrs. Milner's claim for the 2½ acres of land, because we hold that there had been an abandonment of the land for school purposes within the purview of the reverter clause, as contained in the deed from J. H. Hollis to the school district. The following facts appear in this case:

(1) No school had been held on this land since 1940.

(2) The building had ceased to be used for school purposes, and had become a community center.

(3) The land had been placed on the tax books in the name of Mrs. Milner, and she had paid the taxes.

(4) A representative of the school district had attempted to buy one acre of land from her (being the acre on which the building was situated).

(5) Finally, the district had contracted for the removal of the school building; and the directors testified that they had no intention of ever erecting another classroom building on the land.

The concurrence of all five of these unexplained facts presents a case in which the preponderance of the evidence shows an abandonment of the land. It is true that the directors testified that they intended that a small building should be erected on the land for children to use while waiting for the school bus; but the transcript does not disclose a single instance where school children had used the building as a waiting station in the entire period between 1940 and 1946. On the contrary, the record shows that the school children congregated on the porch of a building across the road from the school. Furthermore, the declaration as to future intentions to erect a bus station on the land was also dependent on several contingencies, and was never removed from the realm of abstract speculation. Without lengthening this opinion by commenting on each bit of evidence, it is sufficient to say that the facts in this case are more similar to those which existed in the case of *Steele* v. *Rural District, supra,* than to the facts which existed in the cases of *McCullough* v. *Swifton District, supra,* and *Rose* v. *Marshall District, supra.*

We conclude that the decree of the chancery court should be, and is, affirmed insofar as the building and its proceeds were awarded to the school district; but the decree is reversed insofar as concerns the 2½ acres of land, and that part of the cause is remanded to the chancery court with directions to enter a decree adjudging to Mrs. Milner the 2½ acres of land and the possession thereof. Since Mrs. Milner instituted this suit primarily

to recover the building, and has never succeeded in that regard, we therefore adjudge the cost of all courts against her.

MORRIS *v.* BELAND.

4-8118 200 S. W. 2d 309

Opinion delivered March 24, 1947.

Sherrill, Cockrill & Wills, for appellant.

Hill, Fitzhugh & Brizzolara, for appellee.

HOLT, J. Mary F. Raymond died testate in Fort Smith, Arkansas, and her will was probated there September 25, 1945. She left an estate of the approximate value of $160,000. She made certain bequests in the amount of approximately $15,000, and in addition, under section 2, she devised "to Cousin Mary Brogan Hart, of Rock Island, Illinois, $75 per month during her natural life to be paid by executors and to be a first charge upon the estate. In the event of the death of Mary Brogan Hart, I devise to my cousin, Catherine Brogan, the aforesaid sum of $75 per month to be paid

to her during her natural life," and in a codicil, was this provision: "I ratify and confirm my last will in every other respect except that the trust in said will shall continue only for 10 years after the death of my two cousins named in this will, or my death, if they both die before I do; then trust estate to vest in the bishop for said purposes." These cousins are approximately 65 years of age.

Louis Beland, Will T. Reynolds and Tom Brogan were named "as executors and trustees" of her estate.

The will further provided: "Eighth: Devise the rest and residue of my property to the executors, as trustees, and expressly in trust for the following purposes: Ninth: To be held in trust by the trustees with authority in the trustees to hold said residue in the form I die leaving it, or to sell under sanction of the court any part of said residue for cash, except the property located at Garrison Avenue and Towson Avenue in Fort Smith, as in the judgment of said trustees with the approval of the court a sale seems best for the interest of the trust estate. The net income of the trust estate to be held by the trustees until such time as the bishop shall decide it is proper to establish said school and then pay to such persons as the bishop shall designate and annually thereafter the income of said trust estate shall be paid to him. Said income shall be used for the establishment or aid in establishing and maintaining at Fort Smith, Arkansas, a white Catholic high school operated with approval and under the direction of the Roman Catholic bishop of Little Rock, to be available to Catholics of all parishes in Fort Smith and vicinity on equal basis as to tuition."

The inventory of the estate showed real property of the approximate value of $130,490, and $30,267.88 of personal property.

July 20, 1946, the executors and trustees filed a petition in which they alleged that Mary F. Raymond, at the time of her death, owned "Lots Four (4), Five (5), Seven (7), Eight (8) and the South Half of Lot Nine (9) in Block Five Hundred Sixty-three (563),

Reserve Addition to the City of Fort Smith, Arkansas;" "that this property had been appraised by three real estate men, R. T. Little, M. C. Mansker and R. E. Patterson, to be of the value of $34,000; that under the terms of the will, specifically section 9 thereof, *supra,* that they were of the opinion that it would be for the best interest of the estate to sell said property at private sale" and prayed: "The Court for an order authorizing empowering and directing them to sell said property for cash at private sale for the best price obtainable, provided that in no event shall said property be sold for less than $34,000."

Appellant, John B. Morris, Roman Catholic bishop of Little Rock, filed his response in which he denied that it would be to the best interest of the estate to sell the property and prayed that the petition of the trustees be denied.

Upon a hearing, two of the trustees, Mr. Beland and Mr. Reynolds, gave oral testimony before the court to the effect that they had had the property appraised by three reputable and prominent real estate men in the City of Fort Smith, who appraised the property at $34,000; that real estate values in Fort Smith were abnormally high and that it was their judgment, a sale of the property for $35,000 cash would in the circumstances be for the best interest of the estate.

They further testified that the property is located approximately two and one-half blocks from Garrison Avenue; that Mrs. Raymond had never realized more than $500 net, annually, from the property and that it could be rented for $65 a month to a filling station. If permitted to sell, they would convert the $35,000 received from the sale into Government Bonds drawing 2½% interest per annum, which would amount to approximately $875 a year.

Bishop Fletcher, on behalf of respondents, testified also orally that it was the policy of the Catholic Church to hold real estate for a long term and improve the property, and in his judgment, it would be to the best

interest of the estate to retain the property in the form of real estate rather than convert it into cash.

At the conclusion of all the testimony, the court found, among other things: "The opinion of the trustees has weight with the court. They are three men who live in this community and are acquainted with the property values and trends within the city. She said in her will, 'I am trusting this to you, and when, in your judgment, you think the property should be sold, you should sell it, providing it meets the approval of the court.' If you attempt to sell it without regard to whether it is bringing the best price possible, then the court will stop you. You are getting a very high price for the property. I don't think we will get back to the level we had before the war and property will get back as cheap as in the twenties, but there will be a leveling out and the property of less value over a period of 20 years than it is now—of considerably less value. It is true that much property in Fort Smith is selling at twice or three times its normal value. This is on account of the war and on account of inflation, and that isn't normal. You probably have a chance of getting nearly twice what its value would be in normal times. . . .

"Undoubtedly the testator desired that the trustees do the best possible with her estate to derive as much money as possible for the purposes she had in mind. None of us can say which is best—to sell it now or hold it. It might be worth twice that 40 years from now. I know two of the trustees are Catholics. They are pretty hard-headed businessmen too and I think men of excellent judgment. They think it is a propitious time to sell this property and I am inclined to agree with them. The order will be made for this property to be sold."

This appeal followed.

Appellant says: "The only question in this appeal is whether or not it would be more in keeping with the will and better carry out its terms to retain the property at Towson Avenue and Eleventh Street in the form of real estate than to convert it into cash and invest it in government bonds at 2½%."

That part of the will, *supra,* with which we are primarily concerned, is the following sentence: "To be held in trust by the Trustees with authority in the Trustees to hold said residue in the form I die leaving it, or to sell under sanction of the court any part of said residue for cash, except the property located at Garrison Avenue and Towson Avenue in Fort Smith, as in the judgment of said Trustees with the approval of the court a sale seems best for the interest of the trust estate."

It appears to us that the meaning of this language is so clear and unambiguous that it needs no judicial construction.

It was the intention of the testatrix to confer upon her executors and trustees the power to sell the property in question for cash when in their judgment, with the approval of the court, a sale might seem "best for the interest of the trust estate."

It is only in a case where there is some ambiguity or doubt as to the meaning of the language of the will that any recourse to judicial interpretation or construction is justified. The law, long approved and followed in many decisions of this court, is to the following effect: "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." *Thompson on Wills,* (2d Ed.) § 210.

In 65 *Corpus Juris,* p. 736, we find this language: "In accordance with the rules relating to powers of sale generally, the scope and extent of the power of a trustee to sell and convey trust property is to be determined from the instrument by which the power is created," and in this same volume at page 741, we find: "A condition that the grantor or the *cestuis que trustent* request or consent to a sale by the trustees is frequently attached to power of sale. In the absence thereof the trustee may exercise the power without consent of the beneficiary."

In the present case, as indicated, the trustees were given the unqualified power to sell the property in question when, in their judgment and with the court's approval, it seemed to the best interest of the estate to make the sale.

We think the findings and decree of the lower court are not against the preponderance of the testimony; in fact, we think the great preponderance of the testimony supports his findings. (*Ellis* v. *Blankenship,* 207 Ark. 739, 182 S. W. 2d 756.)

Accordingly, the decree is affirmed.

OWEN *v.* UMBERGER.

4-8120 200 S. W. 2d 311

Opinion delivered March 24, 1947.

H. E. Proctor, Jr., for appellant.

Giles Dearing, for appellee.

ROBINS, J. This appeal presents a controversy as to boundary between property of two adjoining landowners. Appellee, owner of the northeast quarter of the southwest quarter of section twenty-four, township nine north, range three east, instituted suit in the lower court against appellant, asking for an injunction against appellant, who holds conveyance for the southeast quarter of the northwest quarter of said section, to restrain appellant from trespassing upon and removing timber from appellee's land.

Appellant in his answer denied that the fence, which appellee alleged was on the line between the two tracts, was in fact so situated. Appellant asserted that the fence was intentionally built as much as 150 feet, at some points, north of the true boundary line, and that the land in dispute belonged to him.

The cause was submitted to the lower court on the depositions of appellee and nine witnesses in his behalf, and on the depositions of appellant and six witnesses in his behalf. Appellant seeks to reverse the decree of the lower court by which it was adjudged that the fence referred to in the pleadings and proof was the true boundary between the two tracts and that the land in dispute, lying south of this fence was the property of appellee.

It is undisputed that the fence claimed by appellee, and held by the court, as being on the dividing line between the two tracts, was built by Mr. Lewis, appellant's grantor, in 1925, and has since remained in the same location. The land north of the fence, belonging to appellant, has for many years been in cultivation. The strip south of the fence, the land in dispute, is and has been "in the woods." Appellant bought his land in 1927.

Appellee testified that he purchased his land in 1922, and obtained a deed for it in 1923 and during the same year had a surveyor named McElroy run his north line, and that he (appellee) blazed the trees along the line as established by the survey. Appellee further testified that when the fence was built by Lewis in 1925 it was built along the line which appellee blazed out under directions of the surveyor, and that he had been in possession of the land in dispute under claim of ownership ever since the fence was built. His testimony as to this was corroborated by that of other witnesses.

Lewis denied that he built the fence as a boundary, but stated that he purposely built it north of the true line, so that the fence would be located entirely on his land.

Neither side offered the testimony of a surveyor, nor was there any map, showing measurements and distances, introduced in evidence.

Appellant testified as to a survey he had made in 1928, which showed the true line from 150 to 2 feet south of the fence, and his testimony was corroborated by that of other witnesses. There was also testimony to show that another survey had been made which established the line as being north of the fence.

Two questions of fact are presented in this case: First, as to the true location of the boundary line between the two tracts; and, second, as to whether appellee had acquired title by adverse possession, assuming that the boundary line was where appellant claimed it to be.

The lower court found that appellee had been holding the land in dispute "in open, adverse, continuous and hostile possession," and decreed that the fence erected by Lewis was the true boundary line.

From a careful review of the testimony we cannot say that the finding of the lower court is against the weight of the evidence; nor can we say that the location of the boundary along the line as contended for by appellant was established by a greater weight of the testimony.

We do not reverse a decree of the chancery court unless it appears to be against the preponderance of the evidence. *Benton* v. *Southern Engine & Boiler Works*, 101 Ark. 493, 142 S. W. 1138; *Dyer* v. *Dyer*, 116 Ark. 487, 173 S. W. 394; *Morrow* v. *Merrick*, 157 Ark. 618, 249 S. W. 369; *Venable* v. *Vance*, 167 Ark. 678, 266 S. W. 70; *Bush* v. *Bourland*, 206 Ark. 275, 174 S. W. 2d 936; *Burnett* v. *Clark*, 208 Ark. 241, 185 S. W. 2d 703.

Accordingly the decree of the lower court is affirmed.

LOCAL UNION NO. 858 OF THE HOTEL AND RESTAURANT EMPLOYEES INTERNATIONAL ALLIANCE *v.* JIANNAS.

4-8123 200 S. W. 2d 763

Opinion delivered March 24, 1947.

Rehearing denied April 21, 1947.

Rainberger & Eilbott, Joseph A. Padway and *Herbert S. Thatcher,* for appellant.

Bridges, Bridges, Young & Gregory and *Rowell, Rowell & Dickey,* for appellee.

SMITH, J. Appellees who operate a restaurant in the business section of the city of Pine Bluff, brought this suit against the officers of Hotel and Restaurant Workers Union No. 858, and certain members of the Union who were, or had been, employees, to enjoin the alleged illegal picketing of their place of business. A temporary restraining order was granted, and a motion was filed praying that this order be dissolved, it being denied in the motion that defendants were picketing in an unlawful manner. The court granted the relief prayed by the appellees and refused to modify the restraining order, and from that decree is this appeal.

Appellees, plaintiffs below, offered the testimony of twenty-one witnesses, these being the two owners of the restaurant, eight employees and eleven members of the general public, the latter apparently had no personal interest in the litigation. The testimony on behalf of appellants was to the effect that they had employed no force or violence or coercion.

A number, less than a majority, of the plaintiffs' employees, were on strike, and to promote their demands for the enforcement of which they were striking, they began picketing plaintiffs' place of business which was a building fronting twenty-five feet on the principal street of the city, which had only one entrance from the street, a door five feet wide. Only two members of the Union were on picket duty at any one time, and these carried banners announcing that the place they were picketing was unfair to union labor. These pickets walked back and forth in front of the restaurant. They frequently walked within a few feet of the door, and in some in-

stances patrons desiring to enter had to push the pickets aside to do so. A crowd usually stood milling around the front of the building varying from ten to thirty in number.

One Wilson testified that on three occasions he was stopped by the pickets and their sympathizers from going into the building and was told not to do so, but he pushed by them and went in. On one occasion as he left the dining room a large man who was identified as one of the persons who hung around the door, asked him why he had gone into the building. He told the man it was none of his business, whereupon he was knocked down with a pair of brass knucks and severely injured. A number of witnesses testified that they and others were stopped by persons who congregated in front of the door, and were urged not to enter and there is abundant testimony that the pickets and their sympathizers did congregate near the door and did urge people who were about to enter, not to do so, and they thus deterred many people from entering. Plaintiffs testified that during the progress of the strike their business declined about ninety per cent.

Another witness testified that as a lady and her escort, who was carrying a baby, attempted to enter, the entrance was blocked and that witness did not attempt to enter as he did not want to have any trouble. Another witness testified that as he left the building a hand was placed on his shoulder, and he was asked why he had gone into the building, and when he answered that was his business, he was told not to get too smart or he might get hurt. This witness testified that he saw many others stopped as they attempted to enter. A lady testified that as she attempted to enter with her brother, one Landreth, to whom reference will be made shortly, remarked, "There go some sons of bitches now," and another man remarked, "Nobody but whores would go into that cafe." The court might well have found that such remarks were calculated to cause breaches of the peace, although they did not cause them in this instance. Only a bold man, or possibly a foolish one, would have been willing to antag-

onize the crowd then present, and when the witness was asked if the statement was resented, replied, "Certainly, but you would not want trouble with that bunch."

Another witness testified that she heard a picket call a man a son of a bitch. It was shown that one Jack Johnson, who while not a member of the Union on strike, was a sympathizer and was rather regular in his attendance on the picketing, and that he opened the door and shook his fist at employees who were working and had not gone on a strike and said, "I'll get you for it." Witness did not say what Johnson meant by the remark, but it would be difficult to misinterpret it. Another witness testified that persons who braved the remonstrances and entered were told they would be sorry for having done so.

The proprietor testified that the crowds, always large, grew larger on Saturday night, and that he was scared and closed his place of business and went home at 7 p. m. It was testified that a picket, a young woman, was intoxicated and that she brushed people with the banner she carried as she paraded in front of plaintiffs' place of business.

A waitress who did not join the strike, testified that she could see from within what happened without, and that the crowd in front of the cafe interfered with people who wanted to come in, and that the crowd stopped a number of people who otherwise would have come in; that the pickets walked up and down in front of the door, from one side of the door to the other, and that they walked in front of the door most of the time, and that it was hardly possible for people to enter the door without bumping into the pickets, and that she heard the pickets tell people "You don't want to go in there"; that some of the people actually had their hands on the door when someone would yell, "Hey, you don't want to go in there," and that most of these people left without entering.

One C. E. Landreth to whom reference has already been made, appears to have been in charge of the strike.

He testified that he was an organizer for the Union, and admitted that he sat in his automobile near the restaurant during much of the day, and that after 6 p. m. he parked his car in front of the restaurant. It was he who referred to the ladies about to enter the restaurant as whores.

A number of the persons who congregated in front of plaintiffs' restaurant were not members of the Union, probably most of them were not, but they were present aiding and abetting the strikers, and if their participation resulted in unlawful acts each through their concerted action was responsible for the acts of all the others done in the accomplishment of a common purpose. In the case of *Guerin* v. *State,* 209 Ark. 1082, 193 S. W. 2d 997, we quoted the following statement from the case of *Butt* v. *State,* 81 Ark. 173, 98 S. W. 723, 118 Am. St. Rep. 42, that "when a conspiracy has been shown, then the acts and declarations of one conspirator in the furtherance of the common design may be shown as evidence against his associates."

To attempt a review of the innumerable cases, both state and federal, which have discussed the right to employ picketing in aid of a strike in progress, and the limitations on that right, would be an interminable task, and to do so would be a work of supererogation so far as this case is concerned as our own cases on the subject have announced the principles which control the decision of the questions here presented. In one of these, that of *Local Union No. 313* v. *Statkakis,* 135 Ark. 86, 205 S. W. 450, 6 A. L. R. 894, we said: "It is recognized, and this court has expressly decided, that the laborers have the right to organize into unions for the purpose of bargaining collectively for the betterment of their condition and, as an incident thereto, to strike collectively. *Meier* v. *Speer,* 96 Ark. 618, 132 S. W. 988, 32 L. R. A., N. S. 792. They have the right to say for whom and upon what terms they will work, and may act through their unions in the decision of these questions, provided, of course, no contracts of employment are broken. And when they fail, acting thus collectively, to agree with any employer and

have gone upon a strike, they have the right to apprise the public of that fact and to solicit the support, not only of members of the union, but of the public generally in any legitimate attempt to prevail in their controversy. Against the law as thus stated there appears to be no dissent. On the other hand, it is equally as well settled and as uniformly held by the courts that the labor unions have no right to resort to force, intimidation or coercion. Publicity as well as other means of persuasion may be used; but force, coercion and intimidation may not be used."

This case was referred to in the brief of counsel for certain employees on strike in the later case of *Riggs* v. *Tucker Duck & Rubber Co.,* 196 Ark. 571, 119 S. W. 2d 507, as ancient law now obsolete, but we adhered to our former holding and the opinion of the majority has not changed.

The effect of these cases and an innumerable number of others is that the employee may strike when and if he pleases, and he has the right to solicit support in and aid of his strike by urging other employees to strike, by giving publicity to the fact that he is on strike, by urging that support and patronage be withheld by the public generally from the employer against whom he is striking. In doing so, he may inflict great injury upon himself, his former employer and the public as well, but he is nevertheless acting within his rights when he does so. We do not hold or intend to decide anything which abridges these rights, but he must exercise them in a lawful manner. He may not employ force, violence, threats or intimidation, because in so doing he is interfering with the rights of others as sacred, and as much entitled to the protection of the law, as are his own rights.

We reaffirm and reiterate our holding that the right to strike is one of which the employee may not be deprived, and he may solicit support by any lawful means he chooses to employ, but in the recent case of *Smith and Brown* v. *State,* 207 Ark. 104, 179 S. W. 2d 185, we said: ". . . but even picketing when accompanied by force, violence, intimidation or coercion cannot find any protec-

tion under the constitutional guaranties of freedom of speech and freedom of the press."

Here there was actual violence. One man was knocked down, and there was the constant threat of the repetition of violence, at least the court might have so found. The size of the crowd interfering with persons who sought to enter did not diminish and we think the court was warranted in finding that these conditions not only had not improved, but were not likely to do so, and under these circumstances it was not error to make the temporary injunction permanent.

In the Chapter on Labor, 31 Am. Jur., § 249, p. 955, it is said: "Permissible activities on the part of pickets do not include obstruction of access of customers. Pickets may not aggressively interfere with the right of peaceful ingress and egress to and from the employer's shop, or obstruct the public thoroughfares. Picketing is not peaceful where the sidewalk or entrance to a place of business is obstructed by pickets parading around in a circle or lying on the sidewalk."

At § 242 of the same chapter it was said: "Picketing a place having direct dealings with the public, such as a restaurant, has been condemned in some cases because of its tendency to deter prospective patrons of the business by intimidation from entering the place of business. Thus, it has been decided that employees of a restaurant keeper who are on a strike, have no right to congregate about the entrance of his place of business and there, either by persuasion, coercion, or force, prevent his patrons and the public at large from entering his place of business or dealing with him."

At § 240 of the same chapter it is said: "Force threatened is the equivalent of force exercised. In many cases, it has been observed, it is difficult to draw the line of demarcation between intimidation and inoffensive persuasion. But even when the acts of the strikers, although unaccompanied by violence or threats, are such an annoy-

ance to others as to amount to coercion or intimidation, they are unlawful."

A large number of cases, many of them annotated, are cited in the notes to the text quoted, which fully sustain the text, and reference is made to them for the use of anyone who would pursue the subject further.

Reference is made in the brief of counsel for appellants to a motion in which the court was asked to dissolve the restraining order to permit peaceable picketing, but this motion was predicated upon the following allegation. "Defendants (appellants) further state that the picketing and patrolling performed by them against the plaintiffs and the business of the plaintiffs was peaceable picketing within the laws of the State of Arkansas, and that no illegal act had been performed by them." The implication is inescapable from the allegations of this motion, that it was the intention to continue such picketing as had been practiced, and if so it was not error to have made the injunction permanent under the justifiable belief that future picketing would likely result in the continuance of intimidation and coercion previously employed.

In the case of *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836, 132 A. L. R. 1200, an opinion of the Supreme Court of Illinois upholding a permanent injunction was affirmed. It was there said: "We cannot say that such a finding (that the picketing should be wholly enjoined) so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct. Cf. *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 60 S. Ct. 618, 84 L. Ed. 852."

That case gives an interpretation of the effect of a permanent injunction in cases of this kind which we adopt as follows: "The injunction which we sustain is 'permanent' only for the temporary period for which it may

last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation. Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted. Here again, the state courts have not the last say. They must act in subordination to the duty of this Court to enforce constitutional liberties even when denied through spurious findings of fact in a state court. Compare *Chambers* v. *Florida,* 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716. Since the union did not urge that the coercive effect had disappeared either before us or, apparently before the state court, that question is not now here."

The acts of violence and coercion in the instant case are not as great as those recited in the Drivers-Meadowmoor case, but they are of the same character, done and performed for the same coercive purposes and differ only in degree, and with such systematic persistence as to warrant the finding that they would have continued unless restrained.

The decree of the court making the injunction permanent as defined in the Meadowmoor case is affirmed.

Mr. Justice ROBINS and Mr. Justice MILLWEE dissent; GRIFFIN SMITH, Chief Justice, dissents from that part of the opinion which holds that the decree should not have been modified.

ROBINS, J. *(dissenting).* In my opinion, the decree of the lower court should be so modified as to permit peaceful picketing by appellant union. The right of workers to organize, to strike, and to picket peacefully in order to obtain higher wages or better working conditions is basic and is protected by constitutional guarantees. The power of a state to forbid peaceful picketing was expressly denied by the Supreme Court of the United States in two comparatively recent cases. See *Carlson* v. *People of the State of California,* 310 U. S. 106, 84 L. Ed. 1104, 60 S. Ct. 746; and *Thornhill* v. *State of Alabama,* 310 U. S. 88, 84 L. Ed. 1093, 60 S. Ct. 736. In these cases our

highest court held that this right of peaceful picketing was protected by the federal constitution.

We recognized and sanctioned this right in our opinion in the case of *Riggs* v. *Tucker Duck & Rubber Company,* 196 Ark. 571, 119 S. W. 2d 507, where we said: "The right of laborers to organize for the purpose of collective bargaining, or to improve the conditions under which they work, is unquestioned; and so also is their right to go on strike if these demands are not met, and, as a means of enforcing their demands, they have the right, among others, to peaceably picket."

In that case this court refused to modify the injunction of the lower court against all picketing, but gave as a reason for doing so that the lower court was not requested to modify the injunction so as to prohibit only picketing conducted in an unlawful manner.

In the case at bar appellants did just what this court said was not done in the *Riggs* case, *supra.* The record shows that appellants filed in the lower court a motion asking for such a modification of the injunction as would permit peaceful picketing, and that the lower court denied this motion.

"In general, any injunction granted in an action involving a labor dispute should not be so broad as to include peaceful persuasion or peaceful picketing where such picketing is regarded as legal, unless such acts are being done in furtherance of a strike or combination for an unlawful purpose." 31 Am. Jur. 998.

While the evidence showed that one fist fight (in which neither participant was a member of appellant union) occurred, and that on several occasions opprobrious language was used during the picketing, no such state of continued violence as would show concert of unlawful action on the part of the strikers or as would negative the possibility of peaceful picketing was proved. While an injunction may properly be granted against picketing where wrongful acts on the part of the strikers are "not episodic and isolated but of the very texture and

process'' of the picketing *(Milk Wagon Drivers Union of Chicago* v. *Meadowmoor Dairies, Inc.,* 312 U. S. 287, 85 L. Ed. 836, 61 S. Ct. 552, 132 A. L. R. 1200), the right to picket should not be taken away from appellants because of isolated incidents—especially when it was not proved that the striking waitresses were in any respect responsible for the lone act of violence shown. *Cafeteria Union* v. *Angelos,* 320 U. S. 293, 64 S. Ct. 126, 88 L. Ed. 58.

I am authorized to state that Mr. Justice MILLWEE concurs in the views above expressed.

JOSLYN MANUFACTURING & SUPPLY COMPANY *v.* WHITE.

4-8113 200 S. W. 2d 789

Opinion delivered March 24, 1947.

J. F. Quillin, for appellant.

Boyd Tackett and *M. M. Martin,* for appellee.

GRIFFIN SMITH, Chief Justice. Appellee has moved this Court to strike from the bill of exceptions appellants' motion for a new trial, made orally, and subsequently reduced to writing, on the ground that it was not filed in time. Trial with judgment was concluded April 17, 1946, at which time a docket notation is that motion for a new trial was made and overruled. The defendants were granted an appeal, with 120 days for bill of exceptions. Appellants filed their written motion August 26, 1946. It was not presented to the Judge. The Clerk's indorsement shows filing as of April 17th. August 28th appellee moved to strike. Court convened September 13th to hear the motion, and after argument entered an order overruling appellee's prayer.

A majority of the Court is of opinion that appellee is without standing here because he himself failed to ask for a new trial on the issue touching the trial Court's refusal to strike the motion. *Martin* v. *Pierce Petroleum Corporation,* 174 Ark. 1161, 298 S. W. 494.[1]

Henry Roth, one of the defendants below and an appellant here, was local manager in Polk County for the Joslyn Company, a foreign corporation with its home office in Chicago. Small sawmills were owned and operated, in consequence of which lumber was delivered to yards in Mena. White, the appellee here, supervised one of the mills until August 24, 1945, and was compensated

[1] Dec. 23, 1946, this Court made the following order: "8113—*Joslyn Mfg. & Supply Co., et al.* v. *Kermit F. White,* from Polk Circuit: Appellee's motion to strike bill of exceptions is passed for consideration when appeal is submitted. The Chief Justice thinks the motion should be granted".

$9 per thousand board feet. The lumber was cut and stacked near the White-managed mill, where it was picked up by trucks operated by appellants and taken to Mena. All labor incident to mill operations was paid for by White. It is not clear whether at times some of the mill workers assisted in loading lumber onto the trucks. Appellee argues that all loading was done by the Joslyn Company. Inferences to be drawn from appellants' contentions are that in some manner White was responsible for the way trucks were loaded.[2]

This appeal is from a judgment for $3,225 based on a jury's verdict that Roth, in his capacity as general manager, accused White of short-stacking the lumber; that is, it was placed on the trucks in such manner that "dead spaces" were left in a way not noticeable if the load were only casually examined; hence, when the usual method of measuring length, breadth, and depth was applied in the process of determining the number of board feet carried, an erroneous result attended, in consequence of which White was overpaid.

Specifically, it is charged that on the occasion complained of Roth made an inspection of the mill, accompanied by a "trouble-shooter" who had been sent as assistant. Roth's testimony is that the mill's production was not satisfactory because, inferentially, the logs supplied, and resulting lumber, were so far out of balance as to indicate a diversion.

On the day in question Carl Howard was hauling from the rural mill to Joslyn's Mena Yards. Checking was done "near the cemetery on the Dallas Road." White's version of the transaction is that Roth (in the presence of Howard and other mill workers) asserted he had caught him "short-stacking in order to get more scale." To this statement Roth is alleged to have added: "You are running it and are bound to be doing it. We will

[2] Roth testified that when he went to the mill Aug. 24 he found "his" (presumptively White's) employes stacking lumber on a truck, and that it was being stacked so as to leave a "hole" immediately back of the cab; that a dimension measurement of this load would have shown "more lumber scale than was actually on the truck".

shut down and get a new crew." Orders were given to discontinue operations.

On cross-examination White reinforced his complaint of ill use by testifying that Roth said, "You are stealing lumber scale, and I cannot use you any longer." Although Roth denied having used the word "steal," or a term of similar import, and insists that his entire conversation was directed to the purpose of calling attention to results from which suspicion of shortage might arise, there was sufficient proof to go to the jury; and whether Roth did, or did not, say the things he is now confronted with, witnesses were supplied by White who corroborated his assertions that the slanderous expressions not only were used August 24th, but were repeated when mill workers went to Joslyn's office the following Monday to inquire why operations had been discontinued.

In short, whether Roth has been quoted correctly or incorrectly, there was substantial testimony upon which liability could be predicated, and in that respect appellants' argument that there should have been a directed verdict for the defendants cannot prevail; nor, in the light of testimony given by witnesses for the plaintiff, can it be said as a matter of law that the communication —when coupled with an accusation of theft—was privileged, or qualifiedly so. It was not a part of Roth's duty to inform White's employes of the accuser's beliefs, expressed in the manner testified to. The applicable rule was discussed by Mr. Justice FRAUENTHAL in *Bohlinger* v. *Germania Life Insurance Co.,* 100 Ark. 477, 140 S. W. 257, 36 L. R. A., N. S. 449, Ann. Cas. 1913C, 613. See also *Polk* v. *Missouri Pacific Railroad Co., et al.,* 156 Ark 84, 245 S. W. 186, 29 A. L. R. 220. In the Polk case the railroad company's superintendent said in the presence of certain persons who testified: "Mr. Polk, are you prepared to reimburse the company for the time you defrauded them out of? Unless they are reimbursed you stand liable to criminal prosecution by the company." The trial court's directed verdict for the defendant was affirmed on appeal. *Contra,* see *Sinclair Refining Com-*

pany v. *Fuller,* 190 Ark. 426, 79 S. W. 2d 736; *Hathcox* v. *Stewart,* 178 Ark. 235, 10 S. W. 2d 362. Other cases are referred to in the decisions cited.

Was the verdict for an excessive amount? The Joslyn Company argues that even though Roth be liable, the corporation as such had nothing to do with the immediate transaction; that Roth was not authorized to make charges such as we are dealing with, and if he did so the action was not within the scope of his agency or representative capacity. The position is not tenable. Roth was vice-principal in so far as dealing with the product of White's mill was concerned.

It is conceded that the inspection August 24th was to ascertain why losses should occur. It is true Roth testified he did not accuse White of stealing, nor in express words say the company was being "short-stacked"; but against this evidence there are appellee's witnesses who say Roth used the slanderous language, and that he further said White's employes participated in loading the trucks and all must have known of and taken part in the deceit. In the light of Roth's position and the duties assigned him, his actions in commenting upon activities of the kind in question could not well be disassociated from his duty to the employer. Joslyn must answer to the extent of any injury inflicted by the charges the jury found he had made.

It does not follow, however, that appellee has been damaged to the extent of $3,225; on the contrary, there is nothing substantial to show that any (other than the plaintiff) considered the injury as one affecting White's standing or reputation in the community, or elsewhere. In short, assuming that Roth went farther in his characterization than the facts warranted, still the disagreement and its incidents were the result of impulses arising from what appeared on the one hand to be deliberate infractions designed to irregularly increase appellee's income, and on the other hand Roth's condemnation of the practices he believed were being engaged in. It is significant that appellee, on direct examination, did not say that

Roth, in precise language, accused him of stealing. Referring to an alleged conversation "in the back of the mill" before the defamatory language is supposed to have been used, White was asked:

"Did Henry Roth make any statements to you in the presence of others, and, if so, who were the others?" Answer: "Carl Howard, Randolph Jenkins, 'Dad' H. L. Holsom, Herman Holsom, Louis Holsom, Bill Marshall, Arthur Holsom, Bud Hogan, W. S. Marshall, Noah Highland, and Sam Lee." Question: "Now, in the presence of these men, and in your presence, what statements did Roth make at that time?" Answer: "Well, he said, 'I caught the lumber hauler short-stacking lumber in order to get more lumber scale; and you are running it, and you are bound to be doing it.' Then he said, 'We will shut this down and get a new crew'."

On cross-examination this testimony was amplified by the assertion, "He said I was stealing lumber scale. Then he said he couldn't use me any more."

It may be deduced from the evidence that the first conversation quoted by White, wherein the word "steal" was not used, and the assertions on cross-examination regarding what was said, occurred at different places. But, in any event, the charge that White was stealing had reference to short-stacking and not to physical appropriation of lumber belonging to the company. All of the circumstances contradict the idea that Roth's actions were malicious.

In *Murray* v. *Galbraith,* 86 Ark. 50, 109 S. W. 1011, 126 Am. St. Rep. 1078, a decision by the Supreme Court of New York was quoted with approval, containing this statement:[3] "Where a libelous article is published before the commencement of an action, a separate action cannot be maintained on such republication. The repetition of the publication may be pleaded and shown on the trial as bearing upon the malice of the defendant and the extent of the injury and damage to the plaintiff." In

[3] See *Murray* v. *Galbraith,* 95 Ark. 199, 128 S. W. 1047.

writing the Murray-Galbraith opinion Chief Justice HILL said: "The law seems well settled that a repetition of an identical libel is not a new cause of action, but an aggravation of the preëxisting cause, and is always competent evidence tending to prove malice."

White testified that the accusations "hurt his feelings," and that he had been refused employment by mills and lumbermen. On behalf of appellants there were witnesses who testified that the statements imputed to Roth did not in any manner influence them against White, and if there had been denial of employment it was because he was not needed.

In testifying regarding Roths' accusation, White was asked: "All Roth told you was that he had discovered that lumber coming from your mill into the Mena yard had been short-stacked, and therefore the company was paying you for lumber you hadn't been sending?" Answer: "No, sir." Question: "What did he tell you?" Answer: "He said I was bound to know about it because I was running the job." Question: "If one of those truck loads had been short-stacked you would be paid for that, wouldn't you?" Answer: "Yes, sir." Question: "Then, if that is true, you had been receiving money you hadn't earned: is that right?" Answer: "That's right."

After testifying that he had applied to Mena Lumber Company (subsequent to August 24th) for work and that the manager, Vic. Crane, "didn't give him a job," White was asked: "What did he tell you?" Answer: "He told me he couldn't use me." Question: "Did he tell you why?" Answer: "No, sir." And yet, farther on in the record, and while still discussing Crane's refusal to employ him, White testified that Crane told him the Mena Lumber Company could not employ him "until I got this straightened up."

In response to other questions White unhesitatingly conceded that if the lumber had been short-stacked as alleged, he would have received more than a just credit.

It is quite clear, therefore, that even under appellee's testimony there was no showing of willful, wanton, or

reckless conduct. It follows that Instruction No. 7 ought not to have been given. By it the jury was told that if it should find the slanderous words alleged in the complaint were spoken wantonly, recklessly, "and with an utter disregard as to whether they were true or false, . . . the plaintiff is entitled to recover exemplary and also compensatory damages." Substantially the same statement of law was made in Instruction No. 10. Both were objected to, although not specifically. The jury's finding is merely "in favor of the plaintiff," without indicating whether punitive damages were added to a sum allowed as compensation.

Our conclusion is that the instructions were of a character to warrant the jury in believing it had at least been impliedly told that punitive or exemplary damages could be awarded. The amount of the verdict indicates this was done.

This error can be cured by a reduction. If a remittitur of $2,225 is entered within fifteen days, the judgment will be affirmed for $1,000; otherwise it will be reversed and the cause remanded for a new trial.

Justice MILLWEE not participating.

BAILEY *v.* CARTER.

4-8117 200 S. W. 2d 313

Opinion delivered March 24, 1947.

John R. Thompson and *Bailey & Warren,* for appellant.

Buzbee, Harrison & Wright, for appellee.

HOLT, J. Appellant, Carl E. Bailey, in September, 1945, had prepared by a firm of Little Rock architects complete plans and specifications for a business building which he contemplated erecting in North Little Rock. Mr. Eichenbaum, one of the members of the firm of architects, submitted these copies of the plans and specifications to a number of building contractors, including the appellee, Carter Contracting Company, with an invitation to each to submit a sealed bid for the construction of the proposed building. These invitations to the contractors to bid were based upon the plans and specifications, contract documents and information contained therein, and provided that all bids were to be received in sealed envelopes and opened at 2 o'clock p. m., October 9, 1945, by appellant. The invitations to the bidders contained in the specifications the following restriction:

"No modifications of bids already submitted will be considered unless such modifications are received prior to the hour set for opening."

The sealed bid of appellee, Carter Contracting Company, was mailed to appellant on October 8th, and received by him in the morning of October 9th. Accompanying this bid was a bid bond executed by appellee, Central Surety & Insurance Corporation of Kansas City, Mo., in the amount of 5% of the bidder's proposal or bid, which was received in lieu of a cash deposit to secure the bid.

In the specifications upon which bids were made was the following provision: "CERTIFIED CHECK OR BID BOND: Bidders are required to use the proposal form attached to and made a part of the contract documents. Each proposal must be accompanied by a certified check, cashier's check, or bid bond acceptable to the owner in an amount equal to at least 5% of the proposal, payable without condition to the owner as a guarantee that the bidder if awarded the contract will promptly execute such contract in accordance with the proposal and in manner and form required by the contract documents, and will furnish good and sufficient bond for the faithful performance of the same. The bid security of the three lowest bidders will be retained until the contract is awarded or other disposition is made thereof. The bid security of all bidders except the three lowest will be returned promptly after the canvass of bids."

At 2 o'clock, October 9th, all bidders, with the exception of appellee, Carter Contracting Company, assembled in Mr. Bailey's office where the bids were opened as provided in the notice and invitation to bid. The bid of the Carter Contracting Company in the amount of $31,700 was lowest, whereupon appellant announced to the bidders present his acceptance and award of this bid to the Carter Contracting Company, whereupon the unsuccessful bidders or contractors took their respective bids and departed.

On October 10th, the day following the opening of the bids, Mr. Eichenbaum, one of the architects, received

the following telegram from Forrest City, Arkansas, signed by appellee, Carter Contracting Company: "Raise our Bid Carl Bailey Building Twenty Eight Hundred Dollars." This message was marked "October 9th, 7:30 p. m."

There was dispute as to whether the Carter Contracting Company was notified by Mr. Eichenbaum the afternoon of the 9th after the bids were opened or on the morning of the 10th (after the receipt of the telegram) that its bid had been accepted as the low bid.

Some days later, the Carter Contracting Company, through its Mr. V. N. Carter, a member of the company, after his return from Forrest City, conferred with appellant and refused to execute the contract to construct the building on its bid of $31,700, but offered to execute the contract for the sum of $34,500, the amount of its sealed bid plus $2,800. Appellant refused to accept the modification and made demand for the penalty of 5%, amounting to $1,585, set forth in appellee's proposal and as provided in the bid bond of appellees hereinafter referred to.

Upon appellee's refusal to comply with appellant's demand for the penalty as liquidated damages, the present suit was instituted, which resulted in a verdict in favor of appellees. This appeal followed.

The material facts are undisputed. It was the theory of appellees below, and the theory upon which the cause appears to have been submitted to the jury, that before Mr. Bailey could recover, he must not only show that he opened the sealed bid or offer and accepted and awarded same at the hour specified, but that he must go further and show that thereafter such acceptance on the part of Mr. Bailey was communicated to the Carter Contracting Company, and before the receipt by Mr. Bailey of the modification telegram, *supra.*

It was appellant's contention that when he opened the sealed bids at the appointed hour in the presence of the bidders present and immediately announced to them that appellee, Carter Contracting Company, was the low

bidder and that the award of the contract would be made to it, the Carter Company bid then became irrevocable and it became bound to execute a contract to carry out the award made to it for the construction of the building in question on its bid of $31,700, regardless of the telegram which was not received until after the bids were opened.

It is our view that appellant's contention is correct and must be sustained and on the undisputed facts here, the trial court erred in refusing to give appellant's request for an instructed verdict in his favor.

The proposal of the Carter Contracting Company above referred to to make a contract to construct the building for $31,700 is as follows: "CARL BAILEY COMPANY, North Little Rock, Arkansas, Gentlemen: The undersigned, in compliance with your invitation for bids for general construction, including plumbing and heating for a building to be erected in North Little Rock, Arkansas, having examined the plans and specifications with related documents and the site of the proposed work, and being familiar with all the conditions surrounding the construction of the project, hereby propose to furnish all labor, materials, and supplies, and to construct the project in accordance with contract document, within the time set forth herein, and the prices stated below. These prices are to cover all expenses incurred in performing the work required under the Contract Documents, of which this proposal is a part.

"We acknowledge the receipt of the following addenda: One (1), Two (2) and Three (3). PROPOSAL: For all work described in the specifications for the general construction, including plumbing and heating, for a building to be erected in North Little Rock, Arkansas, and shown on the plans for same, we agree to perform all the work for the sum of Thirty-One thousand seven hundred & No/100 Dollars ($31,700). We propose to complete all of the work under this contract in 150 consecutive calendar days, from and including the date of 'Notice to Proceed.'

"Upon receipt of notice of acceptance of this bid, we will execute the formal contract attached within ten days, and will deliver a Surety Bond for the faithful performance of this contract. The bid security attached, without endorsement in the sum of 5% of proposal, is to become the property of Carl Bailey Company, North Little Rock, Arkansas, in the event the contract and bond are not executed within the time above set forth, as liquidated damages for the delay and additional work caused thereby. Respectfully submitted, CARTER CONTRACTING COMPANY, By V. N. Carter (Signed) Partner. Arkansas License No. 24. Phone Forrest City No. 497."

The "bid security attached" to the proposal in the form of a "bid bond" contained the following provision: "The conditions of this obligation are such, that if any awards made by said obligee to the above bounded principal under a public invitation for construction of building on East Broadway, North Little Rock, Arkansas, shall be accepted by said principal and said principal shall enter into a contract for the completion of said work, and give Bond with the Central Surety & Insurance Corporation, as surety, or with other surety or sureties to be approved by the obligee, for the faithful performance thereof, then this obligation shall be null and void; otherwise to remain in full force and effect."

As we interpret this provision of the bid bond, it means that the Central Surety & Insurance Corporation became bound at the time the obligee, Mr. Bailey, opened the bids and announced the award to the successful or low bidder, to the bidders present, to pay the penalty of 5%, in the event the Carter Company failed to enter into a contract to construct the building for the amount of its bid, which bid among other things, provided that "no modifications of bids already submitted will be considered unless such modifications are received prior to the hour set for opening." The telegram came too late to constitute a modification.

The obvious purpose behind the submission of sealed, written bids is to induce bidding contractors to submit the lowest possible bid without any knowledge as to the

amount that other contractors might bid. Unless sealed bids are held to be irrevocable after they are opened and the low bidder announced, then certain it is that the customary procedure followed by builders, as in the instant case, in calling for written, sealed bids and accompanied by security, would be a vain and futile thing.

Carter had the right at any time before the bids were opened to modify or withdraw his bid, but he was required to do so before they were opened. The opening of the bids in the presence of the other bidders and the ascertainment and declaration by Mr. Bailey that the Carter Company had been the lowest and had been accepted as such, constituted an award and any modification of the bid that Carter thereafter made came too late. It is undisputed that Carter's telegram was not sent or delivered until after the bids were opened and Carter's bid accepted and the award made to him.

The general rule announced in 43 Amer. Jur., Title Public Works and Contracts, § 62, p. 804, is in this language: "As a general rule, at law a bidder for a public contract cannot, in the absence of special circumstances, either withdraw his bid or proposal or recover the deposit made, pursuant to the requirements of the advertisement for bids, at the time of the submission of his bid, although in equity the bidder will be protected where it would be inequitable to compel him to perform the contract or forfeit the deposit in the case of his refusal or failure to perform, and there are numerous exceptions and qualifications to the rule at law."

In *Northeastern Construction Company et al* v. *City of Winston-Salem,* 83 Fed. 2d 57, 104 A. L. R. 1142, referring to the general rule, the court said: "The weight of authority is to the effect that bids of this nature are irrevocable and cannot be withdrawn, especially after the opening of the bids. Note in L. R. A. 1915A, 225."

Appellees did not ask for a transfer of this case to chancery court, so as to be afforded forum in which it could assert an equitable defense, based on the alleged

mistake in the calculation of its bid; but, if it had properly asserted such a defense, the showing made by it was not sufficient to entitle it to such relief. Such was the effect of the decision in the case of *William M. Crilly* v. *The Board of Education of the City of Chicago,* 54 Ill., App. 371, which we think sound.

For the error indicated, the judgment is reversed, and judgment will be entered here in appellant's favor for the amount sued for, $1,585, with interest and costs.

TURNER, GUARDIAN, *v.* MARTIN.

4-8122 200 S. W. 2d 495

Opinion delivered March 24, 1947.

Bernard Whetstone, for appellant.

Gaughan, McClellan & Gaughan, for appellee.

McHaney, Justice. Solomon Turner, for whom appellants are guardians in this litigation, on January 13, 1938, conveyed to appellee, Annie M. Newton, sister of and trustee for the other appellee, Martin, by warranty deed, an undivided one-half interest in and to the oil, gas and other minerals in a described 80 acres of land in Ouachita county for a "consideration of the sum of $10 and other lawful considerations." On the same date said Turner conveyed by warranty deed, for the same recited consideration, an undivided one-fourth interest in the minerals in a described 40 acres of land in said county.

On December 5, 1945, nearly eight years after said conveyances by Solomon Turner and his wife, appellant William Turner was appointed guardian of the person and estate of his father and, on the same day, brought this action as guardian against appellees to cancel and set aside said deeds and the record thereof on the grounds of fraud on the part of appellee Martin in their procurement and the alleged insanity and incompetency of Solomon on, prior and subsequent to January 13, 1938, the date of said deeds. The Turners are Negroes, and the complaint alleged that Solomon was 77 years old at the time of said conveyances and was incompetent; that appellee Martin is a white man, a lawyer, and is well versed in business matters in general and particularly in mineral interests, values and trading; that the consideration for the conveyance of an interest in the 40 acre tract was a conveyance by Martin to Solomon of an undivided interest in the minerals in a 40 acre tract in Columbia county, owned by Martin, which was of less value than that conveyed by Solomon; that the conveyance of the minerals in the 80 acre tract by Solomon was without consideration; and that both conveyances by the latter were made when he was mentally incompetent.

Appellees admitted the conveyances as alleged, but denied all allegations of fraud and incompetency of Solomon, or lack of consideration.

It developed that, during the pendency of the action, William Turner, guardian, attempted to settle and dismiss the action he had brought without the knowledge or consent of his counsel and the court thereupon appointed appellant, James Harvey Rumph, the clerk of the court, as substituted guardian for Solomon Turner, and the action was thereafter continued in his name.

Trial resulted in a decree for appellees dismissing the complaint for want of equity. In its decree the court found that Solomon Turner owned only a one-third interest in the minerals in the 80 acre tract at the time of his conveyance to appellees, although his deed recited the conveyance of a one-half interest therein, and that on April 20, 1938, appellee Newton conveyed to Solomon an undivided one-sixth interest of the minerals therein, and that this deed "was given merely for the purpose of conveying back to Solomon Turner" the difference between what he attempted to convey and what he actually owned. The court also found that, on January 13, 1938, Solomon Turner was of sound mind and not incompetent and that appellants were barred by the seven year statute of limitations from maintaining the action; and that there was no fraud or lack of consideration.

Counsel for appellants assigns seven reasons for a reversal of the decree, and argues all of them, in the face of his admission in his brief "that it is the personal opinion of counsel for appellant that the learned Chancellor who tried this case actually committed no error which would affect the results of this suit on any of the first six points raised." We agree with counsel that this is true. We do not set them out and comment on them separately. They relate to the admissibility of certain evidence offered and refused or admitted over objections, the refusal of the court to permit a non-suit to be taken after submission of the case and after the court had indicated what the decision would be, and the finding that Solomon Turner was not mentally incapacitated or defrauded when he executed the deeds or that they were without consideration. The matter of the request to be non-suited, coming

when it did, rested in the sound discretion of the court, there being no cross complaint. *Watts* v. *Watts,* 179 Ark. 367, 15 S. W. 2d 997. No abuse of discretion is shown. As to the mental capacity of Solomon, fraud and absence of consideration, the evidence was in dispute and, after carefully examining same, we agree that the preponderance of the evidence is in favor of the court's finding,—at least we cannot say it is against the weight of the evidence.

The only other argument made relates to the action of the court in its ruling on the effect of the deed of appellees to Solomon Turner of April 20, 1938, conveying to him an undivided one-sixth interest in the minerals in the 80 acre tract, heretofore referred to. The fact is that Turner owned only one-third of the minerals in the 80 acre tract, but through error conveyed a one-half interest to appellees by warranty deed. When Martin discovered the error some weeks later, he called on Turner to make good the difference of one-sixth either by an additional interest in the 40 acre tract or a cash consideration. Turner preferred the latter, paid the cash, according to Martin, who on April 20, 1938, caused his sister to execute a deed to Turner to an undivided one-sixth interest in the 80 acre tract, as Martin says, to clear the record. The court accepted Martin's explanation of the transaction, which is undisputed, and we think correctly so. Turner owned only a one-third interest. While he conveyed one-sixth more than he owned, Martin acquired only a one-third interest and still has only a one-third interest. It appears to us to be to Turner's interest to get that one-sixth interest over-conveyance back to relieve himself of liability on his warranty and for protection under our after-acquired title statute, § 1798 of Pope's Digest.

The complaint did not raise this question. The evidence regarding it was brought out on cross-examination of Martin, over his objections, and the court was asked by appellant to treat the complaint as amended to conform to the proof. We think the court correctly held that the deed of April 20, 1938, was a part of the original

transaction between the parties and should be construed along with the deeds of January 13, 1938.

We find no error and the decree is, accordingly, affirmed.

MARSHALL *v.* STATE.

4445 200 S. W. 2d 491

Opinion delivered March 24, 1947.

Frederick U. Andres, for appellant.

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

McHANEY, Justice. Appellant was charged by information with unlawfully and willfully operating a taxicab for hire as a common carrier in the transportation of passengers by motor vehicle, beyond the corporate limits of the City of North Little Rock, Arkansas, and without the confines of a zone adjacent to and extending

more than five miles beyond the corporate limits of said city, and over State Highways 64 and 22 to Paris, Arkansas, without first having obtained a certificate of convenience and necessity from the Public Service Commission, authorizing such operation, in violation of Act 367 of 1941. He was tried in the justice court in Paris, was convicted and appealed to the circuit court, where he was again convicted, fined $25 and has appealed to this court.

The facts were stipulated in the circuit court and are as follows: 1. On September 28, 1946, the defendant, Virgil Marshall, a taxicab driver in the employ of the North Little Rock Transportation Company, picked up a passenger for hire in Pulaski county in a cab operated by the company, and transported the passenger to Paris, Arkansas, a distance of approximately 120 miles, without having obtained a permit from the Public Service Commission of the State of Arkansas.

2. The cab so used is regularly operated as a taxicab in the City of North Little Rock and had appended to it a regular State (For Hire) license.

3. The North Little Rock Transportation Company is engaged in the business of operating a taxicab in North Little Rock.

4. On October 3, 1946, the defendant was found guilty before J. B. Nicholas, justice of the peace of Short Mountain township, Logan county, of violating Act 367 of 1941, in not having a permit of the Public Service Commission to operate outside the limits of North Little Rock, and said conviction was appealed to this (Logan Circuit) Court.

Section 6 (a) of said Act 367, generally referred to as the "Arkansas Motor Carrier Act, 1941," prescribes the "general duties and powers of the Commission. Subsection (5) of § 6 (a) makes it the duty of the Commission "To administer, execute and enforce all other provisions of this act; to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration." Section 22 (a)

is the penalty section for unlawful operations, and provides that: "Any person knowingly and willfully violating any provision of this Act, or any rule, regulation, requirement, or order thereunder—shall, upon conviction thereof, be fined not more than $100—."

The Commission has made no "rule, regulation, requirement or order" attempting to regulate taxicabs in rendering service, such as is here involved, or in any other respect, a fact of which we take judicial notice. In *K. C. S. Ry. Co.* v. *State,* 90 Ark. 343, 119 S. W. 288, we held: "When a statute authorizes executive officers to make general rules for the conduct of public business, and such rules are duly made and published, the courts will take judicial notice of them." Citing cases. In fact the Commission has held that it had no jurisdiction in such cases, under § 9 (a) of said Act. Whether the Commission was right or wrong in so holding we do not now determine. If wrong, a judicial review could have been had under the last proviso of § 7 (a) of said Act which is: "And provided further that where the Commission, in respect of any matter arising under this Act, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint in the Chancery Court of Pulaski county, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction."

But whether the Commission was right or wrong in this respect, certainly appellant cannot be convicted of "Knowingly and willfully" violating the Act, "or any rule, regulation or order thereunder," when the Commission has made no rules, regulations or orders regulating taxicabs and has itself disclaimed jurisdiction to do so.

Criminal and penal statutes must be strictly construed, and no case may be brought by construction within the statute unless it is completely within its terms. *Giles* v. *State,* 190 Ark. 218, 78 S. W. 2d 70. Here appel-

lant has been convicted of driving a taxicab and fare paying passenger from North Little Rock to Paris, Arkansas, without a certificate of convenience and necessity, when it is shown that he could not have procured such certificate from the Commission had he applied therefor. We do not think he can be penalized under the facts here presented.

The judgment is, therefore, reversed and the cause dismissed.

REYNOLDS *v.* STATE.

4441 200 S. W. 2d 806

Opinion delivered March 31, 1947.

H. K. Toney and *E. W. Brockman,* for appellant.

Guy E. Williams, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

HOLT, J. Appellant, Tommy Reynolds, by information, was charged with the crime of murder in the first degree, for the unlawful killing of "Othel Lee Ashley by striking and beating the said Othel Lee Ashley over the head and body with his fists," on August 31, 1946. A jury found him guilty of involuntary manslaughter and assessed the maximum punishment of twelve months in the State penitentiary (§ 2994, Pope's Digest). From the judgment comes this appeal.

For reversal, appellant argues (1) insufficiency of the evidence, (2) error in instructions, and (3) improper argument by the prosecuting attorney.

1.

The deceased, Othel Ashley, was killed while engaged in a fight with appellant from blows inflicted from appellant's fist, on the night of August 31, 1946. The record discloses that Roy Cossey and Jim Dempsey, both intoxicated, were evicted from a picture show in Redfield, Arkansas, by the owner, Joe Smith, who was mayor of the town and also justice of the peace. Shortly thereafter, the difficulty was renewed by Cossey with Joe Smith in front of Smith's home, a short distance from the theater. Smith called a deputy sheriff to assist him in subduing Cossey and also deputized Othel Ashley, the deceased, to assist. It appears that Ashley had his arms around Cossey's neck and upon Cossey's complaining of being choked, Cossey's wife came up and managed to separate them. At this point, Mrs. Cossey testified that Ashley said: "Gertrude, I will slap hell out of you," and that appellant stepped between her and Ashley and told him not to hit her. Mr. Cossey was finally subdued and taken to the rear of Smith's home.

Vernon Oates, a witness for the State, gave his version of what thereafter transpired, in substance, as follows: "Tommy (meaning appellant) was there, yes. . . . A. He wanted to know if they were going to take Mr. Cossey and Mr. Dempsey to jail and Othel spoke up and said, 'anybody that got drunk ought to go to jail,' and Albert Reynolds made the remark, 'you don't have to break a man's neck taking him to jail,' and Othel said, 'I still say that anybody that gets drunk ought to go to jail,' and when Othel said that Tommy hit him. The first time he knocked him down then he got up, I guess half straightened up, and Tommy hit him again. Q. Then what happened? A. Then Othel fell and he never moved. Q. Was Othel Ashley doing anything to Tommy Reynolds? A. No. Q. Just prior to striking him? A. No, sir, not that I know of. . . . A. He never spoke to Tommy, no, sir. He was talking to Albert."

Another State's witness, Eugene H. Tucker, testified, (quoting from appellant's brief): "Tommy (appellant) and Albert came walking up the path, and Albert went to my left and Tommy went to my right, and he walked around there and hit him. Mr. Ashley was at the time standing by the fence. No one said anything or spoke a word. Mr. Ashley got up about straight and he hit him again and said, 'Stay there.' He wasn't hardly straight when Tommy hit him the second time. The first time he struck him on the chin and the second time on the neck."

S. E. South, an undertaker, testified that he examined the body of Othel Ashley and that his neck was broken.

Appellant testified that he struck Ashley in self-defense after Ashley had called him a vile name and was advancing toward him, and in appellant's own words: "A. Because when he walked over there I had seen him in fights before and I knew how he fought, and when he walked over there with doubled-up fists he was just fixing to hit me and he was a much bigger man than I was, and I didn't want him a holt of me so I hit him and I knocked him down, and he got back upon his feet in a

crouching position and come at me again and I hit him again."

Appellant denied that he said "stay down" after striking Ashley the second time.

Whether the death of Ashley resulted from the unlawful acts of appellant as charged in the information, or whether it was justified, as appellant insists, on the grounds of self-defense, was clearly a question for the jury to determine.

It is our duty here to consider the evidence in the light most favorable to the State and the jury's verdict, and when so considered, if we find it substantial, we must affirm. *Higgins* v. *State,* 204 Ark. 233, 161 S. W. 2d 400.

The weight to be given the testimony and all reasonable inferences to be drawn therefrom were questions for the jury to determine. *Griffin* v. *State,* 210 Ark. 388, 196 S. W. 2d 484.

Here, the jury evidently found that appellant did not kill Othel Ashley in self-defense, as claimed, and we think there was substantial testimony to support their verdict.

2.

Appellant next objected to the following instructions given by the court: "No. 11—The defendant in this case pleads self-defense in justification of his act in killing the deceased. Self-defense is a legal defense, and one which would entitle the defendant to an acquittal if you find from the evidence that he acted in self-defense at the time of the killing; and it need not appear, in order that he may plead self-defense, that the defendant was actually in danger of losing his life or of receiving great bodily harm at the hands of the deceased, but if you believe from the evidence in the case that the defendant, acting in good faith, and without fault or carelessness on his part, honestly believed, at the time he struck the deceased, that he was in danger of losing his life or of receiving some great bodily harm at the hands of the deceased, then he would be entitled to an acquittal, even though

you should further find that he was in no actual danger of losing his life or of receiving some great bodily harm at the hands of the deceased at the time he struck the deceased."

"No. 12—If you believe from the evidence in the case that the defendant by accident, or misadventure, not intentionally, struck and killed Ashley, and that he had no evil design against him, he would not be guilty of unlawful homicide and you will acquit him unless you find from the evidence beyond a reasonable doubt that he killed the deceased either in the commission of an unlawful act, or in the commission of a lawful act without due caution and circumspection."

And he argues that the following instruction, No. A, which appellant requested, should have been given by the court: "If you believe from the evidence in this case that the defendant, acting without carelessness on his part, honestly believed that the deceased, Ashley, against whom defendant had no evil design, was about to make an unlawful assault on him, and that defendant, acting under such belief, struck the said Ashley with his fist, he would not be guilty of unlawful homicide, and you will acquit him."

We cannot agree that any error appears when instructions No. 11 and No. 12 are read together. They fairly and clearly declared the law applicable to the facts disclosed by this record. *Slim and Shorty* v. *State,* 123 Ark. 583, 186 S. W. 308.

While Instruction A requested by the appellant was, we think, not incorrect, it was fully covered by the two instructions, *supra,* and there was no error in the court's refusal to give it since the court was not required to multiply instructions on any particular issue. *Wallin* v. *State,* 210 Ark. 616, 197 S. W. 2d 26.

3.

Finally, appellant says: "The following argument by counsel for the State was prejudicial, to-wit: 'The defendant just wanted to impose his mean disposition

on the man he killed.' '' The record discloses that upon appellant's prompt objection to this argument, the trial court said: ''The court can't pass on that, Mr. Brockman,'' whereupon appellant's exceptions were noted.

After considering all the testimony in this record, we cannot say that this statement of the prosecuting attorney was not a fair and reasonable deduction therefrom. It was but an expression of an opinion from the facts, and as was said by this court in *Maxey* v. *State,* 76 Ark. 276, 88 S. W. 1009: ''Still, the facts upon which he predicated his opinion were before the jury, and, as sensible men, we must assume that they gave the opinion of the attorney as to these facts no more or greater consideration than the facts themselves justified.'' We are unable to see how these remarks could have prejudiced appellant's rights in the minds of sensible and fair-minded jurors.

As said in *Lemuels* v. *State,* 113 Ark. 598, 166 S. W. 741: ''The control of the argument was within the discretion of the court, and the judgment ought not to be reversed unless there was a manifest abuse of the court's discretion in that regard.'' We find no abuse of discretion here.

The judgment is affirmed.

HIRSCH *v.* PERKINS.

4-8121 200 S. W. 2d 796

Opinion delivered March 31, 1947.

Dinning & Dinning, for appellant.

John C. Sheffield, for appellee.

SMITH, J. A decree was rendered March 22, 1943, foreclosing a deed of trust executed by Salena Coleman and her husband to appellants, who do business under the firm name and style of A. Hirsch & Company. Salena was the owner of the mortgaged land. There was a sale by a commissioner, appointed to make it, at which Hirsch & Company became the purchaser. The commissioner's report of the sale was confirmed and his deed to the purchaser was approved, and about two years later suit in ejectment was filed to recover possession of the land described in the deed of trust which had been foreclosed.

Salena filed a suit in which she alleged that the decree had been rendered without service upon her, and that the debt which the deed of trust secured had been paid before the institution of the foreclosure suit. Salena died before the trial from which is this appeal, and the cause was revived in the name of Mattie Perkins, her daughter, and sole heir at law.

The case appears to have been treated, and to have been tried as a proceeding under §§ 8248, 49, and 50 of

Pope's Digest. The complaint filed by Salena upon which process issued and was served complies with § 8248, Pope's Digest, which reads as follows: "The proceedings to vacate or modify the judgment or order on the grounds mentioned in the fourth, fifth, sixth, seventh, and eighth subdivisions of § 8246 shall be by complaint, verified by affidavit, setting forth judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On the complaint, a summons shall issue and be served, and the proceedings had as in an action by proceedings at law."

Hirsch & Company filed an answer to Salena's complaint which denied that the foreclosure decree had been rendered without service of process for a debt which had been paid. After hearing much testimony it was decreed, ". . . that the plaintiff has brought herself within the statutes, entitling her to have vacated and set aside the decree of foreclosure as prayed in the complaint. It is therefore considered, ordered, adjudged and decreed that the decree of foreclosure, heretofore made and had in the case of Ludwig Hirsch and Edmund Hirsch, doing business as A. Hirsch & Company, against Salena Coleman, be and the same is hereby vacated, set aside and held for naught; from all of which defendants except and pray an appeal to the Supreme Court, which exceptions are noted of record and the prayer for appeal granted."

No findings of fact were made in the decree, but we assume that two findings were made: first, that the decree was rendered without service, and second, that Salena had a meritorious defense in that she did not owe the debt, or all of it, for which the decree rendered judgment. Sections 8249 and 8250, Pope's Digest, required these findings before granting the relief prayed and these findings must have been made to confer authority to vacate the decree.

The first question, whether there had been service is a close question of fact, and we are unable to say that the chancellor's finding is contrary to a preponderance of the evidence.

The return upon the summons reads as follows: "I have this the 16th day of March, 1942, duly served the within by delivering a true copy of same to the within named Squire Coleman and Mattie Perkins, daughter of Salena Coleman, who is over the age of 16 years, and lived in the house with Salena. 'Signed, F. F. Kitchens, by W. H. Shotts, Deputy Sheriff.' "

Shotts, the deputy sheriff who served the summons and made the return thereon, testified that he had no recollection of the age or appearance of Mattie Perkins. He asked the person to whom he delivered the copy of the summons who she was, and received the answer that she was a daughter of Salena Coleman, and that the person served was living in Salena's house. This makes a *prima facie* showing that the summons was served as required by law.

But the testimony sustains the finding which the court must have made before granting the relief prayed that the summons had not been served upon Mattie Perkins, but upon Mattie's daughter, a young girl, and that the place of service was not then Salena's usual place of abode. This testimony is to the following effect. Salena and her husband separated the last of February, or the first of March, 1939, and Salena did not cultivate the land after that time, but turned the place over to Frank Perkins, who was her daughter's husband, with the understanding that he would pay her $65 per year rent, and would pay the balance due on the debt secured by the deed of trust which Salena had given to Hirsch & Company. Salena moved to Clarendon that year, and remained there about four years. She took her household furniture and personal effects with her to Clarendon, but left everything else on the farm, including the farm implements, a mule, wagon, feed, seed, etc., and remained in Clarendon thereafter except for two visits, each of only a few days duration, made during the Christmas holidays.

Without reciting the testimony in detail of the several witnesses who testified as to Salena's residence after 1940, it will suffice to say that it is sufficient to

support the finding that she did not live on her farm at the time the summons was served. In other words, while the farm belonged to Salena it was not her home or usual place of abode at the time the summons was served according to the return thereon. This return is *prima facie* evidence of service, but it is not conclusive where the testimony shows it to be false. *Karnes* v. *Ramey,* 172 Ark. 125, 287 S. W. 743.

Mattie testified that neither she nor Salena knew anything about the foreclosure suit until the ejectment suit was filed, and that they supposed the debt had been paid inasmuch as Hirsch & Company took possession and removed all the personal property from the farm which was of a value greater than the balance due according to a statement which had been furnished her and her husband by Hirsch & Company's bookkeeper. Hirsch & Company took possession of all the personal property after a controversy had arisen between Hirsch & Company and Frank Perkins over certain A.A.A. allotments. This was done under a chattel mortgage which Frank had given on all the personal property Salena owned and had left on the farm. Mattie and Frank testified that when this chattel mortgage was given it was with the understanding that Frank had assumed payment of Salena's debt and that Frank executed the mortgage with Salena's consent. Mattie testified that the bookkeeper for Hirsch & Company gave her a statement of Salena's account which she produced in court showing a balance due of $164.82.

The decree of foreclosure is not in the record, but there is in the record a document purporting to be a statement of Salena's account at the end of 1938, showing a balance due of $487.72, and Salena's complaint or petition to vacate the foreclosure decree alleges that the judgment rendered against Salena in that decree was for the sum of $510.03.

The finding which must have been made that there was no service of process as required by law is not contrary to the preponderance of the evidence, and the decree of foreclosure was therefore properly vacated

provided the showing was made that there was a meritorious defense.

We think this showing was also made. The court did not find whether any debt was due which the deed of trust secured, and we are unable to do so from the record before us. It is insisted that the entire account against Salena was void for the reason that it included certain usurious charges of interest, and so it does. But this does not invalidate the entire account inasmuch as no agreement to pay the usurious interest was shown. The record does not show whether the court found the debt was void because of the usurious charge of interest. If the court so found, this was error. *Cammack* v. *Runyan Creamery,* 175 Ark. 601, 299 S. W. 1023.

But even so, there was a meritorious defense in that Salena did not owe all the debt for which the mortgage was foreclosed, and may not have owed any of it. Perkins may or may not have paid all the debt which he said he assumed. Of course his agreement to assume the debt did not discharge it unless there was a novation, whereby it was agreed that Salena should be discharged and it may be true that the personal property belonging to Salena which Hirsch & Company took possession of was of sufficient value to discharge the debt. The record does not show whether this is true or not.

We have copied the ordering part of the decree, and as we understand the decree, its effect is to vacate the order of foreclosure and leaves that suit pending for the determination of the question whether Salena's debt has been paid, and if not, how much was unpaid. It is not urged that the appeal is premature, and we decide only the questions which are presented by the record and argued in the briefs.

The decree from which is this appeal vacating the foreclosure decree will be affirmed, but the cause must, nevertheless, be reversed for the decision of the issues which apparently have not been decided, that is, whether Salena's debt has been paid in full, and if not, what balance was due.

DEADERICK, MAYOR, *v.* PARKER.

4-8127 200 S. W. 2d 787

Opinion delivered March 31, 1947.

E. J. Butler, for appellant.

Olman H. Hargraves and *Buzbee, Harrison & Wright,* for appellee.

McHaney, Justice. Appellant Deaderick is the mayor and the other individual appellants are officials and aldermen of the city of Forrest City, Arkansas, and appellant, Duncan Meter Company, is a foreign corporation, organized under the laws of Illinois and engaged in the installation of parking meters for said city under contract with the other appellants.

Appellee is a resident, citizen, legal voter and taxpayer of said city and brought this action on behalf of himself and all others similarly situated, to enjoin the further installation of parking meters in said city and to compel the removal of those already installed. The complaint alleged the invalidity of Ordinance No. 589, adopted by the city council on April 16, 1946, the ordinance which authorized the installation of parking meters, because, as passed by the city council, it is in direct violation of the statutes of Arkansas, Act No. 309 of the Acts of 1939, p. 757, and that their installation is an encroachment on public property and constitutes a public nuisance.

Appellants appeared specially and objected to the jurisdiction of the court, and, without waiving that question, filed general denials. The court granted a temporary injunction on July 24, 1946, restraining the operation of the meters and from paying out any money for their purchase or for labor and materials in their installation.

The case was submitted to the court on the pleadings and stipulation as to the facts. It is agreed that, prior to the adoption of said Ordinance 589, no petition of voters of the city was filed invoking the initiative upon said ordinance and no referendum petition was filed in 90 days after its adoption, nor did the ordinance by its terms call for a vote of the people on the question. Most of the

meters to be installed were in fact installed before this suit was filed, but their operation was never begun because of the temporary restraining order. On September 26, 1946, the court made its temporary order permanent, and directed appellants to remove the meters and standards to which they are attached from the streets in 120 days from that date. The decree was based on two grounds: (1) that said Ordinance 589 is in contravention of said Act 309 of 1939, and (2) the emergency clause on the ordinance was not properly adopted. This appeal followed.

Act No. 309 of 1939 is entitled "*An Act* to prohibit Cities of the First and Second Class and Incorporated Towns from installing devices commonly known as parking meters." Section 1 is as follows: "Hereafter cities of the first and second class and incorporated towns are prohibited from installing devices, commonly known as parking meters or other devices, designed to require automobile owners to pay for the privilege of parking on the streets of said cities or towns. Provided, however, that any city of the first or second class or incorporated town desiring to install such devices may do so after adopting a local measure, authorizing such installation, in accordance with the provisions of the Initiated and Referendum Amendment to the Constitution of 1874. And provided further that this act shall not apply to any city where parking meters were installed prior to January 1, 1939."

For a reversal of the decree it is first contended that the court was without jurisdiction because there was an adequate remedy at law. This contention is based on the fact that Ordinance No. 589 sets out penalties for its violation and that the only way provided therein for its enforcement is by arrest and criminal prosecution. It is a familiar rule in this state that courts of equity will not interfere by injunctions to prevent anticipated criminal prosecution. *Rider* v. *Leatherman,* 85 Ark. 230, 107 S. W. 996; *Gordon* v. *Smith,* 196 Ark. 926, 120 S. W. 2d 325. The object of this suit was not merely to enjoin the enforcement of the criminal provisions of the ordinance, but went further and sought to enjoin its enforcement as

an illegal exaction, such as is set out in Art. XVI, § 13, of the Constitution. One of the early cases arising under that provision of the Constitution of 1874 is *Taylor, Cleveland & Co.* v. *City of Pine Bluff,* 34 Ark. 603. Judge Eakin there said: "Equity is chary of all interference with criminal or penal prosecutions for violations of state or municipal law. . . . Art. XVI, § 13, of the Constitution provides: 'Any citizen of any county, city or town may institute suit, in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exaction whatever.' For this purpose, a bill in chancery is most appropriate.

"This widens the range of equity jurisdiction, and will sustain this bill, to the extent of giving the court power to inquire into the validity of the exactions, and if found void, so to declare it, and restrain the city authorities from its collection. After such a decree, its collection by any process whatever would be a contempt. But when ordinances are simply to prohibit and punish acts, they stand upon a different footing." See, also, *Rose* v. *Brickhouse,* 182 Ark. 1105, 34 S. W. 2d 472, where a number of our previous cases on the subject are cited. We conclude that the chancery court correctly held that it had jurisdiction of the subject-matter.

It is next argued that Act 309 of 1939 above quoted, is unconstitutional and void because violative of amendment No. 14, the local Act Amendment, and § 18 of Article II, which prohibits the General Assembly from granting to any citizen "privileges or immunities which upon the same terms shall not equally belong to all citizens." Since appellants made no attempt to comply with said Act 309, by submitting the question to a vote of the people, as required, we take it as conceded that said ordinance is void, if the Act is valid.

We think said Act is a valid exercise of legislative power, and that it does not offend against either provision of the Constitution, as contended by appellants. The Act, by its express terms, is prospective in its operation, and not retroactive. It begins with the word "Hereafter" certain municipalities are prohibited, etc., and it

therefore does not apply to any municipality which had already installed parking meters, and the second proviso therein might just as well have been left out of the Act. The proviso, therefore, did not have the effect of rendering the Act local and in violation of Amendment 14. We think the cases cited by appellants, such as *Webb* v. *Adams,* 180 Ark. 713, 23 S. W. 2d 617, are not controlling here.

No cases are cited to support the contention that Art. II, § 18, of the Constitution is violated. This provision refers to "citizen or class of citizens." A corporation is not a citizen. *State* v. *So. Sand & Material Co.,* 113 Ark. 149, 167 S. W. 854. A levee district is not a citizen. *St. L., I. M. & S. Ry. Co.* v. *Board Dir. Levee Dist., No. 2,* 103 Ark. 127, 145 S. W. 892. We conclude that a city is not a citizen within the meaning of said provision. Municipalities have no power except those granted expressly or by necessary implication by the legislature. *Bain* v. *Traction Co.,* 116 Ark. 125, 172 S. W. 843, L. R. A. 1915D, 1021; *Willis* v. *Ft. Smith,* 121 Ark. 606, 182 S. W. 275; *Argenta* v. *Keith,* 130 Ark. 334, 197 S. W. 686, L. R. A. 1918B, 888. Here the legislature has expressly prohibited all municipalities from installing parking meters without first "adopting a local measure authorizing such installation, in accordance with the provisions of the Initiated (Initiative) and Referendum Amendment to the Constitution of 1874." The ordinance in question and the contract of the city with the Duncan Meter Company based thereon are, therefore, void, and the court correctly directed the removal of the equipment from the streets and enjoined the operation of the meters.

The decree is, accordingly, affirmed.

JOHNSON *v.* WILMUTH.

4-8136 200 S. W. 2d 779

Opinion delivered March 31, 1947.

Gordon Armitage, for appellant.

John D. Thweatt and *Cooper Thweatt,* for appellee.

ROBINS, J. On October 23, 1944, the Commissioner of State Lands sold and conveyed to appellant lots 5, 7,

and 9, of the southwest quarter of section 6, township 4 north, range 5 west, 136.72 acres, which, according to the commissioner's record, had been sold to the State for nonpayment of taxes of 1925.

Thereafter appellant filed suit in the lower court against appellees, alleging that he was the owner of the said land, by virtue of his deed from the State Land Commissioner, that he had "the right of possession," that appellee, Wilmuth, was claiming lots 5 and 9 under a deed to him executed on February 5, 1940, by Emmett Vaughan but that Vaughan did not own the land; that appellee, Milligan, was claiming without right some title to lot 7. The prayer of appellant's complaint was for confirmation of his title and for injunction against interference by appellees with appellant's possession of the land.

In their answer appellees denied ownership of the land by appellant, and asserted title in themselves by virtue of the conveyance from Vaughan to appellee, Wilmuth, and a conveyance from Wilmuth, for part of the land, to Milligan; and that since the execution of the deed from Vaughan to Wilmuth they had been in the adverse possession of the land. They further alleged that the land was redeemed in June, 1928, from the forfeiture for taxes of 1925, and was erroneously certified to the State Land Commissioner. Appellees prayed for cancellation of the deed executed by the State Land Commissioner to appellant.

The lower court found the issues in favor of appellees and rendered decree canceling appellant's deed and quieting title of appellees. To reverse that decree appellant prosecutes this appeal.

It was stipulated that Emmett Vaughan was the owner of this land in June, 1928.

The record of lands sold for delinquent taxes for the year 1925, kept by the clerk, was introduced in evidence. This record showed that the land in question, assessed in the name of E. Vaughan, was sold to the State, and on the line showing this tract, in the last column of the book under the heading "When Redeemed" this appeared:

"6/ /1928 E. Vaughan," and in the same line, under the heading "Clerk's Signature," appeared the signature "Chas. C. Tunstall, Clerk."

There was also introduced in evidence the county treasurer's register of redemption certificates, and this record did not show that any certificate for redemption from the forfeiture of the land involved had been issued.

It was also shown that the title of the State to this land was confirmed by decree of the chancery court rendered in 1930.

The tax records showed that the land in question was not assessed for taxation for the years 1926, 1927, 1928, 1929, 1930 and 1931, but that it was put back on the tax books and the taxes for 1932 and subsequent years were regularly extended each year and these taxes were paid by Emmett Vaughan, until he sold it to Wilmuth, and thereafter by Wilmuth and Milligan, until the year 1944, the taxes for which were paid by appellant.

Section 13862 of Pope's Digest is as follows: "*Record of Redemption.* Where any tract or portion of land, town or city lot, or any part thereof, shall be sold for taxes and afterward redeemed, it shall be the duty of the clerk of the county court to insert a minute of such redemption on the record of lands sold for taxes, the date thereof, and by whom made, and sign the same officially."

While in other portions of the law provision is made for registration of redemption receipts by the county treasurer, we think it obvious that the record directed to be kept by the county clerk under § 13862, *supra,* is the record which the legislature meant to evidence the fact of redemption or a failure to redeem. *Cook* v. *Jones,* 80 Ark. 43, 96 S. W. 620. Appellant asserts that this redemption record is incorrect, as to the land involved herein, because there was no record of such a redemption on the treasurer's register and because the land, after the date of the redemption shown, was certified by the clerk to the State Land Commissioner as not having been redeemed. But, since there is a conflict between these records, the recitals of the record authorized by the legislature for the

purpose of affording notice to all interested persons, in absence of proof destroying the presumption of genuineness and verity that attaches to public records, must be accepted as true. This apparent contradiction in the county records would be a fact to be considered if we were dealing here with a direct attack upon the clerk's record. "Under direct attack a [public] record does not import verity. . . . However, a record so far denotes absolute verity that it is not subject to collateral attack unless it is nullity. This general rule applies only to such records as are required by law to be made and kept." 45 Am. Jur. 423. "A public record imports absolute verity. Every public record is presumed to be correct and cannot be collaterally attacked. An investigator may rely on the truth of specific recitals contained in a public record; and one relying upon public records is protected not only by the natural equities of his position, but also by the special equities arising from the protection afforded everyone who relies upon the records." 53 C. J. 622.

We do not regard as material the failure of the clerk to show the day of the month on which redemption occurred. It must be presumed that the clerk would not have made the entry showing redemption unless such redemption was effected within the time allowed by law therefor. "It is not the policy of the law to nullify records where substance is found, and clerical errors and technical omissions should be disregarded." 53 C. J. 621.

Since the land had been redeemed in 1928, the State was not the owner thereof when it conveyed same to appellant in 1944.

It is not contended that the confirmation proceeding added anything to the strength of the State's title, because, that proceeding being had under Act 296 of 1929, the confirmation cured only "informality or illegality in the proceedings" to sell the land for delinquent taxes. Here, the State's title is attacked, not on the ground that the sale was void, but because the owner redeemed within the period provided by law.

The lower court properly held that appellant had no title to the land; but, conformably to the provisions of

Act 269, approved March 10, 1939, a decree should have been rendered in favor of appellant for all taxes on said land paid by appellant, with interest thereon, and with lien on the land therefor, as provided by said Act. *Barton* v. *Meeks,* 209 Ark. 903, 193 S. W. 2d 138.

Accordingly, so much of the decree of the lower court as dismisses appellant's complaint, in so far as title to the land is concerned, for want of equity, and as quiets the title thereto in appellees is affirmed; and that part of the decree denying recovery to appellant for taxes paid by him is reversed, with directions to enter judgment, in accordance with this opinion, in favor of appellant, for the amount of taxes paid on the land by him, together with interest as provided by law, and declaring a lien therefor in favor of appellant, in accordance with said Act; the costs of the lower court to be assessed against appellant and each party to pay one-half of the costs of this court.

KILLOREN ELECTRIC COMPANY *v.* HON.

4-8093 200 S. W. 2d 775

Opinion delivered March 31, 1947.

Bailey & Warren, for appellant.

Bates, Poe & Bates, for appellee.

ED. F. MCFADDIN, Justice. In this case, lightning is claimed to have traveled over electric wires, and inflicted personal injuries on appellee; and he seeks to hold appellant liable, claiming appelant's negligence concurred with the lightning within the rule of the cases collected and cited in West's Arkansas Digest, "Negligence," § 61(1). Here are the facts:

In 1942, Killoren Elec. Co. constructed a transmission line for the Arkansas Valley Electric Co-op. in and near the community of Hon, Arkansas. The transmission line was designed to carry 7,200 volts of electricity. Included in the said construction work was the placing of a transformer on a pole near the home of the plaintiff (the transformer being to reduce the voltage from 7,200 to 110), and the running of service wires (to carry 110 volts) from the transformer to the wall brackets located on the southwest corner of the Hon home. That was the extent of the work of the Killoren Elec. Co. in so far as the Hon home was concerned. The wiring of the Hon home, the installation of a meter near the wall brackets, etc., were matters not performed by appellant company.

The Ark. Valley Elec. Co-op. accepted the Killoren Elec. Co.'s work as completed and satisfactory in every respect on March 17, 1943. Later Ed Hon (plaintiff and appellee here) began using electricity from the Ark. Valley Elec. Co-op., and was a member of said cooperative and user of its electricity on June 5, 1944, when he received the injuries here involved. On the afternoon of

that day, Hon was standing in the kitchen (the northeast room of his home) looking out the door, and with his right hand resting on the wall a few inches from the electric switch, when "a blinding flash of lightning" knocked him to the floor and inflicted the injuries here claimed. There was a burned print of his hand on the wall. The sockets and receptacles in the downstairs rooms were burned, and the wall around the sockets was damaged; the refrigerator was burned out; the circuit breaker was tripped; the entire wiring inside the house was clearly damaged.

Ed Hon sued the Killoren Elec. Co. for damages for his personal injuries, claiming that he was injured by a charge of lightning which reached him through, and because of, the defective wiring negligently installed by Killoren Elec. Co. at the transformer on the pole near the Hon home. The Killoren Elec. Co. answered by general denial, and also pleaded that it was an independent contractor in the work for the Arkansas Valley Elec. Co-op.,[1] and therefore was not liable to Ed Hon.

Upon issues joined, there was a trial to a jury, and a verdict for Hon against Killoren Elec. Co. for $1,000. To reverse that judgment, there is this appeal.

We have several cases involving persons injured by high voltage, either of electricity or lightning (which is electricity of enormous voltage). Some of these cases are: W. 2d 503; *S. W. Tel. & Tel. Co.* v. *Abeles,* 94 Ark. 254, 126 S. W. 724, 140 Am. St. Rep. 115, 21 Ann. Cas. 1006; *Hope Basket Co.* v. *Thomasson,* 190 Ark. 956, 82 S. W. 2d 241; *Ark.-Mo. Power Corp.* v. *Powell,* 200 Ark. 309, 139 S. W. 2d 383; *S. W. Tel. & Tel. Co.* v. *Bruce,* 89 Ark. 581, 117 S. W. 564; *S. W. Gas & Elec. Co.* v. *Bianchi,* 198 Ark. 996, 132 S. W. 2d 375; and *Ark. Gen. Utilities Co.* v. *Wilson,* 197 Ark. 351, 122 S. W. 2d 956. The present case differs from the cited cases in this: in each of the cited cases the wires and electrical installations

[1] The Ark. Valley Elec. Co-op. could not have been held liable to Hon because of the rule announced in the decision of this court in the case of *Ark. Valley Elec. Co-op.* v. *Elkins,* 200 Ark. 883, 141 S. W. 2d 538. But see Act No. 362 of 1947. This act is mentioned only for information; obviously it has no effect on this present case.

were, at the time of the injury, under the control and maintenance of the company claimed to be liable, while here the company claimed to be liable had no control over the wires or installations at the time of the injury. The plaintiff's (appellee's) theory of liability in this present case is, that the defendant company had been negligent in the original construction, and was therefore liable to the plaintiff as the injured party. Some of the cases and texts cited and relied on by the plaintiff are: *Monroe* v. *San Joaquin L. & P. Corp.,* 42 Calif. App. 2d 641, 109 Pac. 2d 720; *Payton's Adm'r* v. *Childers Electric Co., et al.,* 228 Ky. 44, 14 S. W. 2d 208; *Smith* v. *St. Joseph Ry. Co.,* 310 Mo. 469, 276 S. W. 607; *So. Tel. & Tel. Co.* v. *Evans,* 54 Tex. Civil App. 63, 116 S. W. 418; *Appal. Power Co.* v. *Mitchell,* 145 Va. 409, 134 S. E. 558; *Colbert* v. *Holland Furnace Co.,* 333 Ill. 78, 164 N. E. 162. For texts, see 14 R. C. L. 107, 45 C. J. 885, 20 C. J. 366. The following Arkansas cases are cited by plaintiff as indicating the trend of our holdings indicating liability: *Stanton-White Dredging Co.* v. *Braden,* 137 Ark. 127, 208 S. W. 598; *Foohey Dredging Co.* v. *Mabin,* 118 Ark. 1, 175 S. W. 400; *Wood* v. *Drainage District,* 110 Ark. 416, 161 S. W. 1057.

We shall not be obliged to determine the correctness of the plaintiff's theory of the defendant's legal liability, because—as we see the case—it must be reversed and dismissed because of plaintiff's failure to make certain essential proof. This will be discussed in detail later. To reach the verdict that it did, it was necessary for the jury to find from the evidence, at least, the concurrent existence of these two points: (1) that the lightning traveled over the transmission lines of the Ark. Valley Elec. Co-op.; and (2) that there was no proper ground wire and lightning arrester ever installed by the Killoren Elec. Co. at the transformer where the electrical current was reduced from the transmission line voltage of 7,200 to the service line voltage of 110.

We reverse and dismiss this case because of the plaintiff's failure to prove the second point as above listed. That point was, "that there was no proper ground wire and lightning arrester ever installed by Killoren

Elec. Co. at the transformer . . ." Such alleged failure was "the act of negligence" claimed to have been committed by the defendant. On that act of alleged negligence was predicated the plaintiff's contentions that the Killoren Elec. Co., even as an independent contractor, was liable to the plaintiff for the injury. Since Killoren Elec. Co. was not in charge of the power line and installations at the time of the defendant's injuries, Killoren Elec. Co. could not be charged with negligent maintenance; so the plaintiff, in order to recover, had to prove (even under his theory of the case) the negligent installation by Killoren Elec. Co. The failure to prove such point is fatal to the plaintiff's case. Let us examine the evidence on that point:

Killoren Elec. Co. entered into a contract with the Ark. Valley Elec. Co-op. to construct the transmission line, install the transformer on the pole near the Hon home, and run the service line to the outside of the Hon home. This contract was completed by the Killoren Elec. Co.; and, on December 12, 1942, J. D. Long, the inspector of the Rural Electrification Administration, inspected the entire work done by the Killoren Elec. Co., and made a written report, which reads in part:

"The construction throughout the project is good . . . Transformers and services are properly and uniformly installed and the project throughout shows a good quality of workmanship."

Hugh Lassiter, engineer for the Ark. Valley Elec. Co-op., testified that, on December 8, 1942, he inspected the entire work done by the Killoren Elec. Co., and advised the Arkansas Valley Elec. Co-op. that the work was complete in every respect. Lassiter said that he personally inspected the transformer on the pole near the Hon home. He testified:

"Q. Was the transformer a standard transformer? A. Yes, sir. Q. Did it have a lightning arrester? A. Yes, sir. Q. Was it a suitable lightning arrester? A. Yes, sir. Q. Who put it on there? A. It was put on by the manufacturer. Q. Was it a standard factory adjusted transformer? A. Yes, sir. Q. Did you inspect the grounds?

A. Yes, sir. Q. Was that transformer grounded properly? A. Yes, sir. Q. How? A. The ground wire from the transformer was attached to a rod driven in the ground. Q. Do you know of any way to ground a transformer any more completely than that? A. No, sir."

Based on these two inspection reports, the Ark. Valley Elec. Co-op., on March 17, 1943, accepted Killoren Elec. Co.'s work as complete, and Killoren Elec. Co. *never* had any further control over the transformer in question. Then, more than 14 months later, the plaintiff was injured. Was it through the fault of Killoren Elec. Co. that he was injured? The only testimony Hon offered to establish the negligence of the Killoren Elec. Co. in the installations of the transformer and lightning arrester was the evidence contained in the two items which we now list:

(a) The witness Helms testified that several months *after* Hon was injured, Helms examined the transformer on the pole near the Hon home, and that part of the lightning arrester was then missing from the transformer. But it will be noted that Helms testified as to the condition of the lightning arrester, which condition existed more than 15 months after Killoren Elec. Co. had surrendered all control over the transformer and lightning arrester. Helms' statement as to conditions that existed in 1944 raises no presumption that those same conditions existed in 1943. In *S. W. Gas & Elec. Co.* v. *May,* 190 Ark. 279, 78 S. W. 2d 387, a witness named Cunningham testified as to the condition of the electric wires two or three months after an injury occurred. Of that testimony, this court said:

"There was no evidence to show that the condition of the wires when observed by Cunningham was the same as when appellee's accident occurred. This testimony was therefore incompetent. *L. R. & F. S. R. Co.* v. *Eubanks,* 48 Ark. 460, 3 S. W. 808, 3 A. S. R. 245; *St. L., I. M. & S. R. Co.* v. *Thurman,* 110 Ark. 188, 161 S. W. 1054." See, also, *B. L. F. & E.* v. *Cole,* 108 Ark. 527, 158 S. W. 153.

In 20 Am. Juris 208 the rule is stated:

"The presumption of the continued existence of . . . a state of things is prospective, and not retrospective. Such a presumption never runs backward; the law does not presume, from proof of the existence of present conditions or facts, that the same facts or conditions had existed for any length of time previously."

So, the evidence of Helms as to the condition of the transformer and lightning arrester in 1944 is no evidence as to its condition on March 17, 1943, when Killoren Elec. Co. surrendered all control to the Ark. Valley Elec. Co-op.

(b) The plaintiff was asked this question, and answered as follows:

"Q. Would you say, as far as you know, the transformer there on the pole on the day you got injured was in the same condition it was when left there by the Killoren Electric Company A. Yes, sir."

The above question and answer were neither preceded, nor followed, by any evidence showing any examination that Hon ever made—prior to his injury—of the transformer and lightning arrester. In fact, there was no evidence that he had ever noticed these articles prior to his injury. So, the quoted question and answer do not constitute any substantial evidence going to show that a portion of the lightning arrester was actually omitted from the transformer at the time Killoren Elec. Co. surrendered all control of the line to the Ark. Valley Elec. Co-op. in March, 1943. This is true, because: (1) the witness did not so testify; (2) his knowledge of the transformer and lightning arrester was not shown; (3) his sufficient and continued observation of the pole and transformer was not shown. In the question, there appear the words, "as far as you now." These words were discussed in the case of *Wells* v. *Shipp,* 1 Miss. 353. In that case a witness had testified that "as far as he knew" certain property belonged to the plaintiff. With the quoted words in the answer, the Mississippi Supreme Court said of the testimony of the witness: "This proves

no fact negatively or affirmatively, and was wholly immaterial and, . . . properly rejected by the court."

The answer of Hon that, "*as far as he knew,*" the transformer and lightning arrester were in the same condition when he was hurt as when left by Killoren Elec. Co. was not a mere qualifying of his testimony with such words as "I think" or "I believe" to express indistinct observation or recollection (see annotation in 4 A. L. R. 979); but was a distinct limitation on the source and extent of his knowledge and amounted to no evidence on the point at issue. Any person, if asked the same question, could—in all truth—have made the same answer as Hon made, and still have known nothing whatever about the conditions of the transformer and lightning arrester in March, 1943. In short, the question and answer did not rise to the level of evidence.

Aside from these items (a) and (b) as just discussed, the record is devoid of any attempt to prove that the Killoren Elec. Co. was negligent in the installation of the transformer and lightning arrester. These items (a) and (b), for the reasons we have shown, do not constitute evidence of any such negligence; so no negligence was shown. Since the plaintiff's case is dependent on proving that the defendant was guilty of negligence in the installation, and since no such evidence is in the record, it follows that the verdict of the jury is without evidence to support it. Therefore the judgment of the circuit court is reversed, and the cause dismissed.

GOCIO *v.* HARKEY.

4-8158 200 S. W. 2d 977

Opinion delivered March 31, 1947.

Rehearing denied April 28, 1947.

[redacted]

John W. Atkinson and *Rowell, Rowell & Dickey,* for appellant.

Y. W. Etheridge, for appellee.

MINOR W. MILLWEE, Justice. On September 30, 1946, appellee, Glenn Harkey, and 716 other persons, claiming to be more than 15 per cent. of the qualified electors of Lincoln county as shown on the county poll tax records, filed a petition in county court praying that a countywide election be called under 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. Pursuant to an order of the County Court, a public hearing was held on October 7, 1946, to determine the sufficiency of the petition.

The County Court found that the petition contained 717 signers, which number constituted more than 15 per cent. of the 2,638 qualified electors as shown by the poll tax records of the county, and ordered a special election to be held on October 29, 1946, in accordance with the prayer of the petition. The record reflects that appellants, Joseph Gocio and J. R. Prewitt, appeared as protestants at the hearing in County Court, but filed no written pleadings or exceptions to the order made.

On October 14, 1946, appellants filed an affidavit and prayer for appeal to the circuit court which was granted. Prior to the trial in circuit court each side, with the court's permission, named a checker and these checkers were appointed by the court to canvass the petition of appellees and examine all available records bearing on the qualifications of the persons signing the petition. After a thorough investigation, the two checkers filed their report which was by stipulation made an exhibit in the hearing in circuit court, with the understanding that either side might challenge any part thereof. The qualifications of 283 of the 717 signers of the petition were found questionable in this report, but

one of the checkers refused to agree to paragraphs 5 and 8 of the report which involved the validity of 42 of the signatures considered questionable by the other checker.

It was also stipulated at the trial in circuit court that there were 2,638 names on the official poll tax list filed by the collector in the county clerk's office for the year 1944. Under the proof offered by appellants, 57 names were stricken from the petition for various reasons and the court refused to strike 116 other names challenged by appellants in pursuance of the investigation and report of the checkers. The court found that the petition contained 660 valid signatures, which number was in excess of 396 required by law. The appeal of the protestants (appellants) was dismissed and the County Court was directed to proceed with the election in accordance with the provisions of the Initiated Act.

Appellants have waived all but two of the 17 assignments of error set out in their motion for new trial. The first assignment now relied upon for reversal is that the trial court erred in placing the burden of proof on appellants. Section 2918 of Pope's Digest provides that the circuit court shall try all appeals from the county court *de novo* as other cases at law. In construing this statute this court has held that the circuit court on appeal must try the cause as if it had been originally brought in that court in the first instance. *Batesville* v. *Ball,* 100 Ark. 496, 140 S. W. 712, Ann. Cas. 1913C, 1317; *Carpenter* v. *Leatherman,* 117 Ark 531, 176 S. W. 113. Appellants rely on this statute and both parties rely on § 5122, Pope's Digest, which provides: "The burden of proof in the whole action lies on the party who would be defeated if no evidence were given on either side."

After the appeal was lodged in circuit court, appellants filed a motion alleging generally that the petition did not meet the requirements of the Initiated Act; that numerous signatures were not genuine; and that 15 per cent. of the qualified electors of the county did not sign the petition. This motion did not suggest any particular requirement of the Initiated Act which the petitioners

had not complied with, nor did it challenge any particular signature as being invalid for any reason. Under this state of the record, it is insisted by appellants that it was incumbent on appellees to identify the 35 sections of the petition by the testimony of the respective canvassers and to show by them that all the signatures were genuine and executed in their presence. We do not agree with appellants in this contention.

It may first be pointed out that a proceeding under Initiated Act No. 1 of 1942 for calling a local option election does not necessarily partake of the nature of an adversary proceeding such as is involved in an ordinary lawsuit. In enacting this law the people merely provided a method whereby a certain percentage of the qualified electors as shown on the poll tax records of a county might call an election to determine the sentiment of the voters on the liquor question. The election machinery is set in motion by an *ex parte* petition of electors and the proceeding may, or may not, become an adversary one.

We agree that the burden of proof is on petitioners in both the county court and the circuit court, on appeal, but this burden is discharged and a *prima facie* case made when a petition has been circulated, signed and filed in the form and manner shown in the instant case. There is attached to each section of the petition filed in the case at bar an affidavit of the circulator, or canvasser, in the following form:

"STATE OF ARKANSAS }
COUNTY OF LINCOLN } ss.

"I, H. G. Gassoway of Gould, Ark., being first duly sworn, state that Glen Harkey, (and 29 other persons) 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 Lincoln County, Arkansas.

"Subscribed and sworn to before me this 11th day of March, 1946.

"H. G. Gassoway,
Canvasser.

"John G. Fish

N. P. Clerk Judge J.P.

"(NOTARIAL SEAL)"

We have held that Initiated Act No. 1 of 1942 is complete in itself and that it is not necessary that a petition thereunder comply with the I. & R. Amendment to the Constitution and the enabling acts carrying it into effect. *Johnston* v. *Bramlett,* 193 Ark. 71, 97 S. W. 2d 631; *Mondier* v. *Medlock,* 207 Ark. 790, 182 S. W. 2d 869. In *Winfrey* v. *Smith,* 209 Ark. 63, 189 S. W. 2d 615, the petition was not verified to comply with the provisions of § 13285, *et seq.,* Pope's Digest, which are parts of the enabling act to the first I. & R. Amendment. We there held that it was unnecessary to verify the petition where the canvasser came into open court and testified to the genuineness of the signatures.

However, in those cases where the petition is verified by the circulator, as in the case at bar, we think the situation is analogous to that presented in the case of an initiative petition filed under the I. & R. Amendment and the enabling acts thereto. In discussing the effect to be given the affidavit of the circulator of an initiative petition in such cases in *Sturdy* v. *Hall, Secretary of State,* 201 Ark. 38, 143 S. W. 2d 547, this court said: "The circulator of a petition is of the nature of an election official. The elector directs, by signing the petition, that the proposed Act shall be submitted to the people, and he must sign his own name, as held in *Hargis* v. *Hall,* 196 Ark. 878, 120 S. W. 2d 335, and he must do so in the presence of the circulator of the petition, in order that the circulator may truthfully make the affidavit required by both the Constitution and the statute. In many instances no one is present except the circulator of the petition and the

signer, and when the circulator makes the required affidavit, the *prima facie* showing has been made that the elector signed the petition."

It is true that the presumption of verity that attaches upon the making of the affidavit by the circulator of a petition is not a conclusive one, but it is sufficient to make a *prima facie* case in favor of the petitioners and places the burden of showing invalidity upon those who challenge the petition. The 35 sections of the petition of appellees show on their face to have been duly circulated, signed and verified. Appellants have not attacked the verity of the affidavits attached to the petition. There was no showing of fraudulent conduct on the part of the circulators of the petition. We hold that the verification of the petition by the canvassers was sufficient to make a *prima facie* case and shift to appellants the burden of going forward with the evidence. The trial court correctly so held.

Appellants' second contention for reversal is: "Because the court erred in holding that the sole question for determination . . . is whether or not the petitions filed in this proceeding do or do not contain fifteen per cent. of those persons whose names appear upon the certified poll list filed by the Collector in the Clerk's office, and it is not proper . . . to inquire into the qualifications of any of those persons to determine whether or not they are, or are not *qualified electors*. . . ." We find it unnecessary to determine whether the circuit judge misconstrued the effect of the decision in *Samuels, et al.*, v. *Robins, et al.*, 209 Ark. 614, 192 S. W. 2d 109, in making the above ruling for the reason that, if this contention of appellants were upheld, the petition filed in the instant case would, nevertheless, be sufficient. This is true because appellants simply have not challenged sufficient names to destroy the sufficiency of the petition even if all their challenges were sustained. *Tollett* v. *Knod*, 210 Ark. 781, 197 S. W. 2d 744.

The parties stipulated that 2,638 names appeared on the certified poll tax list of Lincoln county for 1944. At appellants' request the trial court ruled that this list

represented the criterion for determining whether 15 per cent. of the qualified electors signed the petition. Fifteen per cent. of 2,638 would be 396 names, the number required to call an election. The report of the checkers listed as questionable 283 names and appellants challenged 273 of this number. The petition contained 717 signatures. If all the names challenged by appellants had been stricken there would still remain 444 names which is more than the 396 required. Appellants made no showing, or offer to show, that names other than the 273 challenged by them were ineligible. It was certainly incumbent on them to, at least, offer to show the invalidity of a sufficient number of signatures to destroy the sufficiency of the petition, before they can claim to have been prejudiced by the court's ruling.

We find no prejudicial error in the record, and the judgment is affirmed.

McMorella *v.* Greer.

4-8152 200 S. W. 2d 974

Opinion delivered April 7, 1947.

Ezra Garner, for appellant.

Wade Kitchens, for appellee.

MINOR W. MILLWEE, Justice. On February 19, 1944, appellant, Elizabeth McMorella, instituted suit in the Columbia chancery court against appellee, Lizzie Walker Greer, to quiet her title to certain lands and to cancel an oil and gas lease executed by appellee in 1943. Appellant claimed title to the lands by virtue of a sheriff's sale under execution in 1927.

The case remained on the docket until March 13, 1946, when appellee filed a cross complaint alleging her ownership and possession of the 12 acre tract and asking that her title thereto be quieted against appellant. Appellee claimed title to the lands from her father through a division of her father's estate and alleged that she and her predecessors in title had been in adverse possession of the lands and paying taxes thereon for 70 years. After the cross complaint was filed, but on the same day, appellant dismissed her complaint against appellee.

On March 14, 1946, the cause was continued by the chancellor and set for trial the first day of the next term of court which was May 27, 1946. The order setting the case for trial also authorized the taking of testimony by depositions. Appellant made no objection to the court's order, and, by agreement of the parties, depositions of witnesses on behalf of appellee were taken on April 5, 1946. The record reflects that counsel for appellant participated in taking these depositions by cross-examining the witnesses and serving as notary public for the occasion. Appellant filed her answer containing a general denial of the allegations of the cross complaint on May 25, 1946.

When the case was called for trial on May 27, 1946, appellant filed an unverified motion for continuance with a letter attached thereto as follows:

"May 27, 1946.

To Whom it may concern:

Due to the physical condition of Miss. Elizabeth McMorella she will be unable to attend court as of this date or any other time during this week.

Thanking you very much I remain

Yours very truly,

Joe F. Rushton, M. D.

By Ruthie Kelley,
Secretary."

The chancellor overruled the motion for continuance and the cause was submitted to the court upon the depositions of the witnesses, and other oral and documentary evidence, on behalf of appellee, resulting in a decree quieting her title to the lands in controversy. After the chancellor announced his decision, appellant orally moved for a new trial on the grounds that the court erred in (1) refusing to grant her motion for continuance, and (2) forcing a trial when the issues had not been joined for 90 days. These two assignments of error are relied upon for reversal of the decree.

Appellant offered no proof on her unverified motion for continuance other than the so-called doctor's certificate which is a statement purporting to have been signed by a secretary to Dr. Joe F. Rushton that appellant would be unable to attend court May 27, 1946, or any other day during that week. The motion does not allege that appellant's presence was necessary to a defense of the suit on the cross complaint, or that she would be a witness if she were present. There is nothing in the motion or purported statement of the doctor indicating that the nature of appellant's physical ailment was such that she was unable to testify by deposition, which counsel for appel-

lant admitted he had agreed to take. Appellant's answer was a general denial and she offered no testimony in defense of the cause of action. It was not contended in the trial court and is not suggested now that she has any defense to the suit on the cross complaint.

A motion for continuance is ordinarily addressed to the sound discretion of the trial court, and this court will not attempt to control that discretion unless it has been manifestly abused. In the early case of *Watts* v. *Cohn,* 40 Ark. 114, Justice W. W. SMITH, speaking for the court, said: "Questions as to the trial or continuance of causes rests so much in the sound discretion of the trial court that it must be a very capricious exercise of power or a flagrant case of injustice that the appellate court will interpose to correct." *Spear Mining Company* v. *Shinn,* 93 Ark. 346, 124 S. W. 1045; *Dent* v. *People's Bank of Imboden,* 99 Ark. 581, 139 S. W. 533; West's Arkansas Digest, vol. 4, Continuances, § 7, and cases there cited. There was no manifest abuse of discretion on the part of the chancellor in refusing to grant a continuance under the circumstances disclosed here.

Appellant's second contention for reversal is that she was entitled to 90 days after the issues were joined on the cross complaint by the filing of her answer on May 25, 1946, to prepare for trial. This contention is based on § 1512 of Pope's Digest, which reads: "Actions prosecuted by equitable proceedings shall stand for trial on any day that the court meets in regular or adjourned session, where the issues have been joined for ninety days, but where they have not been so joined though by the provisions of §§ 1430 and 1432 they should have been, the party in default, as to time, shall not be entitled to demand a trial; provided, however, that in all actions now pending or hereafter brought, upon application of any party, after issues joined, the court or chancellor in vacation may, on notice to opposing counsel or guardians *ad litem,* set the action for trial, or if the court finds that the proof has been completed it may try the action, on any earlier date."

Appellant relies on such cases as *Harnwell* v. *Miller,* 164 Ark. 15, 259 S. W. 387, and *Phillips* v. *Baker,* 174 Ark. 403, 295 S. W. 384, in support of her second contention. These cases were decided under § 1288 of Crawford & Moses' Digest and prior to amendment of that statute by Act 37 of 1929 to include the proviso now contained in § 1512 of Pope's Digest, *supra.* In *Sisk* v. *Becker Roofing Company,* 183 Ark. 101, 34 S. W. 2d 1078, this court held that, under the provisions of § 1512, *supra,* it was not necessary to wait 90 days after the issues are joined to have a trial in a chancery case. It was there said: "The act under consideration was passed for the purpose of eliminating delay, and making it possible for either party to get a trial without waiting 90 days after issue joined. This will be readily seen to be one of the purposes of the act by reading the emergency clause, § 3." This interpretation of the statute was reaffirmed in *Burks* v. *Cantley,* 191 Ark. 347, 86 S. W. 2d 34.

The suit filed by appellant had been pending over two years when appellee filed her cross complaint on March 13, 1946. Appellant knew of the filing of the cross complaint and made no objection when the cause was set down for trial for May 27, 1946. She cooperated in the taking of depositions which had been authorized by the court in setting the date of trial. Appellant thus treated the issues as having been joined even though the filing of formal answer containing a general denial was delayed by her until May 25, 1946. There is no intimation that she was not fully apprised of the nature of appellee's claim of title to the lands in controversy. The objection that the case was prematurely tried was not made in her motion for continuance, but was suggested for the first time in the oral motion for new trial made after the chancellor had announced his decision. Under these circumstances, the trial court correctly held that appellant had waived the question whether the issues had been joined for a sufficient length of time under the statute.

Affirmed.

WILSON *v.* CAVANAUGH.

4-8155 200 S. W. 2d 972

Opinion delivered April 7, 1947.

[redacted]

Ed E. Ashbaugh, for appellant.

House, Moses & Holmes, W. Horace Jewell and *Thomas C. Trimble, Jr.,* for appellee.

Philip B. Fleming, A. A. White, Leonard M. Cox and *W. R. Herring, amici curiae.*

SMITH, J. Appellee recovered judgment in a suit in unlawful detainer for the possession of a house and lot in the city of Little Rock and for the rent thereon, from which is this appeal. Two questions are presented for decision: (1) whether proper notice to vacate had been served, and (2) whether appellee had met the requirements of the Office of Price Administration Rent Control by showing that she had an immediate, compelling necessity for the possession of the property.

Appellee served notice May 21, 1946, upon appellant to vacate the premises on or before July 2, 1946. The property had been rented upon a monthly basis for a rental of $50 per month, payable semi-monthly in advance. There had been no default in the payment of the rent.

The rent was usually paid to one Mattingly, as appellee's agent, and the testimony is in irreconcilable conflict

as to the circumstances and conditions under which rent was paid and accepted after the expiration of the time given in the notice to vacate. The cause was heard by the court sitting as a jury, by consent of the parties, and the judgment from which is this appeal recites that the court "doth find all such issues of fact and law in favor of the plaintiff and against the defendant." In accordance with settled rules of practice, we must give to the testimony of appellee its highest probative value in testing its sufficiency to support the judgment of the court. When thus viewed it is to the following effect:

On the first rent paying period after the notice to vacate had matured, appellant tendered to Mattingly a half of a month's rent in advance, which Mattingly declined to accept. An appeal was made by appellant to appellee for a two weeks' extension of time, which was given under the assurance that the property would be vacated at the end of that time. The property was not vacated as promised at the expiration of the two weeks' extension, when a tender of two additional weeks' rent was made to Mattingly, who was assured, that while appellant had not found a place, he was about to find one and would surrender possession at the end of two weeks if given that additional time, and Mattingly accepted the rent upon the promise and assurance that possession would be surrendered at the end of the extended time.

Possession was not surrendered as promised and on August 3d a second notice to vacate was served, and this suit was thereafter brought when possession was not delivered as required by the notice to vacate.

The rent attorney for the local rent control office testified that the first notice to vacate was submitted to and approved by his office, but that his office was not advised of the second notice and had not approved it. The attorney introduced and identified certain rules and regulations which had been promulgated by the Price Control Administration with an interpretation of Regulation 6 (a) 6, which interpretation and construction reads as follows:

"Interpretation 6 (a) (6)—VIII Meaning of 'Immediate Compelling Necessity.'

Under section 6 (a) (6), as amended by Amendment 67, a landlord, other than a member of the services during the war, desiring to secure possession of a dwelling unit owned by him prior to October 20, 1942, or the effective date of the rent regulations in this particular area, whichever is later, must establish to the satisfaction of the court (1) that he in good faith desires to occupy the premises as his home and (2) that he had an immediate compelling necessity to obtain possession. If he can establish (1) but not (2) he must apply to the area office for a certificate of eviction which will in proper cases be issued conditioned upon an appropriate waiting period.

"The criteria to determine whether an immediate compelling necessity exists should be strictly applied. Since the only difference between a proceeding under section 6 (a) (6) and a petition under section 6 (a) (1) is that in one case a landlord obtains immediate possession and in the other must wait for a time before the tenant is dispossessed, the need for possession must be real, immediate and urgent. 'Compelling necessity' imports more than desire or convenience. The prejudice to the landlord by imposing delay on his ability to obtain immediate occupancy must be of a character that would demonstrate very real hardship."

In the case of *Bowles, Price Adm.,* v. *Seminole Rock & Sand Co.,* 325 U. S. 410, 65 S. Ct. 1215, 89 L. Ed. 1700, the Supreme Court of the United States discussed the behalf and in that connection said: "But the ultimate effect of departmental interpretation of its rules in this criterion (in the interpretation of these rules) is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

It is insisted that the demand for possession contained in the first notice which apparently was approved by the Administration was waived inasmuch as rent was accepted after the notice to vacate had been given, and

in support of that contention appellant quotes from 32 Am. Jur., § 944, of the chapter on Landlord and Tenant, a statement to the effect that very slight acts on the part of the landlord suffice to sustain the finding that the landlord has consented to an extension of the rental contract. But in view of the court's findings as to the facts, appellant could not have supposed that appellee intended to abandon the demand for possession inasmuch as the testimony shows that the rent accepted after the service of the notice was accepted with the express understanding that the demand for possession was not being waived and upon the promise that the demand would be complied with if a short indulgence of time was given. We conclude therefore that there was a notice to vacate which complied with the law in that behalf, and that the second notice was not required.

It is argued that appellant may not be evicted for the reason that the Rent Control Administration has not acted upon the second notice to vacate, and that there was no showing of the immediate compelling necessity for appellee to have possession of her property which Regulation 6 (a) (6) requires to evict a tenant without this permission.

We think, however, that the court was warranted in finding that this showing of necessity was made. It is to the following effect. Appellee, an elderly lady, lived with her nephew in an old house which had been the family homestead. The house had so deteriorated that extensive and expensive repairs were required, and she did not have the means to make them. So she sold the house in which she was living on an agreement to deliver possession on or about August 3, 1946.

Appellee testified that through sympathy she had agreed to permit appellant to retain possession for the extended period, but with the distinct understanding that the house here in litigation, a five room cottage, would be delivered in time for her to move into it after surrendering possession of her old home, and when this was not done she had to place her household effects in storage,

and she now has no home. She also testified that the bedrooms in her old house, which she sold, were all upstairs, and that it was difficult for her to climb the stairs.

We think this testimony supports the finding of an immediate, compelling necessity which authorizes appellee to recover possession without the consent of the Price Control Administration, if a renewal of this consent is required, and the judgment of the court below is therefore affirmed.

BOYLES *v.* KNOX.

4-8115 200 S. W. 2d 966

Opinion delivered April 7, 1947.

Merle Shouse and *J. Loyd Shouse,* for appellant.

V. D. Willis and *W. S. Walker,* for appellee.

MINOR W. MILLWEE, Justice. This is an action by appellee, Howard Knox, against appellants, James Boyles and wife, to recover a real estate broker's commission alleged to be due appellee for his services in finding a purchaser for appellants' tourist court located in Harrison, Arkansas.

Appellants listed the property with appellee and Tom Brown, another broker, jointly, in July, 1945, with the understanding that the two brokers would share a 5% commission equally if a buyer were found by either of them. Appellants placed a price of $24,000 on the property and agreed to extend credit for a part of the purchase price if the buyer was unable to pay all cash. Through the efforts of appellee, Herman W. Bush of Lubbock, Texas, became interested in purchasing the tourist court. Appellee introduced Bush to appellants and the property was inspected. Bush made an offer to purchase on the basis of a cash payment of $8,000 with the balance of $16,000 payable according to a definite schedule of monthly payments. Appellee apprised appellants of this offer and conducted further negotiations between the parties which culminated in the execution of the following agreement:

"OFFER AND ACCEPTANCE

Aug 15 1945

To *Howard Knox* Agent

You are hereby authorized to offer for my account the sum of

Two Hundred Dollars

for the following described property: *City View Camp consisting of 15 cabins & equip and 4 Room House unfurnished Balance of down payment in 30 days*

This amount is to be paid in the following manner:

Cash or trade as per statement below *down*	$ *8,000.00*
Loan to be assumed or placed for my account	
Balance payable	
$150.00 per month summer	$*16,000.00*
100.00 per month winter	$.....
Total *Interest at 5%*	$*24,000.00*

TRADE OR OTHER SPECIAL CONDITIONS

May June July Aug Sept Oct
summer months

Nov Dec Jan Feb March April
winter months

GENERAL CONDITIONS

It is understood that the owner or owners shall furnish complete abstract showing good title, or policies of title insurance, pay all taxes now due or delinquent, and make conveyance to me or my order by warranty deed, date of which shall fix time for dating of notes, adjustment of rents, interest and insurance.

Possession given *Possession sept 15*

Attached hereto is check for the sum of $*200.00* to become part of payment on acceptance of this offer and if for any reason the offer is finally rejected said sum is to be returned without expense to me. This offer is to hold good if accepted within *at once* days from date.

Signature *Herman W. Bush*

Phone *29969* Address *Lubbock Texas*

THE ABOVE OFFER IS HEREBY ACCEPTED this *15* day of *Aug* 19*45*. We agree to pay a broker's commission of *$1200.00*.

Jas. Boyles

Fleetie D. Boyles

Owners."

The above instrument was prepared by appellee upon a printed form shown to have been in general use by real estate brokers in that locality. We have italicized that portion of the agreement which was written in by the parties. After execution of the agreement, Bush returned to his home in Texas for the purpose of making arrangements for the balance of the cash payment of $8,000. Several days later he returned to Harrison and according to his testimony, was ready, willing and able to complete the down payment of $8,000 and execute a mortgage to secure payment of the balance of the purchase price under the written agreement.

In the meantime an "escrow contract" was prepared at the suggestion of appellants providing for payments as set out in the agreement of August 15, 1945. This contract provided that a deed to Bush be placed in escrow to be delivered upon full payment of the purchase price; that default in any payment of principal or interest for 90 days should result in a termination of the contract, and all sums previously paid should be considered as rentals and forfeited as liquidated damages for breach of the contract. The contract also prohibited Bush from transferring or selling his interest in the property until the unpaid indebtedness had been reduced to $8,000. Bush had the proposed escrow contract examined by a competent lawyer and declined to accept those provisions relating to forfeiture and limitation upon Bush's right to transfer his equity in the property.

Bush also had a mortgage drafted providing for payments according to the schedule set out in the agreement of August 15, which he offered to execute as security for the unpaid balance. Appellants refused to accept a mort-

gage or any arrangement to secure payment of the $16,000 balance other than that provided in the escrow contract. Appellee refunded the $200 earnest payment made by Bush, who refused to accept the escrow arrangement. Appellee then brought this action for recovery of a broker's commission of 5% in the sum of $1,200.

The issues were tried before a jury resulting in a verdict and judgment in favor of appellee for $600. Both parties have appealed from the judgment.

The first contention of appellants for reversal is that the evidence is insufficient to sustain the verdict because the written agreement between appellants and Bush of August 15, 1945, did not constitute an enforceable contract. It is argued that the agreement is so indefinite and incomplete that an action for specific performance of its terms could not be sustained. Appellants cite a number of cases involving actions for specific performance of contracts for the sale of lands and insist that the agreement of August 15, 1945, must have been sufficient to sustain such an action before appellee is entitled to recover his commission. While the agreement between appellants and Bush may not have been skillfully drafted, it fixes the sale price at $24,000 and provides for a cash payment of $8,000 to be made in 30 days. It also provides a definite schedule of monthly payments of $150 for six months of each year and $100 for the other six months of the year to discharge the unpaid balance of $16,000 and interest thereon at 5 per cent. Under § 9398, Pope's Digest, the specification of "interest at 5%" in the agreement would require calculation of interest at the rate of 5 per cent. "per annum." It is true that the agreement did not specify the method by which payment of the unpaid balance was to be secured. According to the testimony on behalf of appellee, it was the insistence of appellants that payment of the unpaid balance could be secured by the method specified in the proposed escrow arrangement, and in no other way, that caused the sale to fall through.

However, if it be conceded that the agreement of August 15th was not sufficiently definite in its terms to sustain an action for specific performance, this would not preclude appellee from recovering a commission, if he, in fact, produced a buyer who was ready, willing and able to take the property on terms which were satisfactory to appellants at the time the agreement was made.

In *Dillinger* v. *Lee,* 158 Ark. 374, 250 S. W. 332, it was the contention of appellant, as here, that his contract with the purchaser, Haskins, did not constitute an enforceable contract. Chief Justice McCulloch, speaking for the court in that case, said: "Conceding that no enforceable contract was entered into between appellant and Haskins, still this does not affect the right of appellees to a commission, for they had complied with their part of the contract by producing a bargainer ready, willing and able to take the property on terms which were satisfactory to appellant. In other words, appellant's contract with appellees was not that they must sell or exchange the land in order to earn a commission, but that they should have a commission for finding a purchaser or bargainer who was ready, willing and able to take the property on the specific terms."

In *Moore* v. *Irwin,* 89 Ark. 289, 116 S. W. 662, 20 L. R. A., N. S., 1168, 131 Am. St. Rep. 97, this court said: "The business of a real estate broker or agent is only to find a purchaser, and the settled rule as stated by the courts is that, in the absence of an express contract between the broker and his principal, the implication generally is that the broker becomes entitled to the usual commission whenever he brings to his principal a party who is able and willing to take the property and enter into a valid contract upon the terms then named by the principal, although the particulars may be arranged and the matter negotiated and completed between the principal and purchaser directly." In *Poston* v. *Hall,* 97 Ark. 23, 132 S. S. 1001, the court said: "Where a real estate broker produces a purchaser who is ready, willing and able to purchase the property upon the terms under which

the agent is authorized to negotiate the sale, and the owner refuses to convey, the agent is entitled to his commission." See, also, *Reeder* v. *Epps,* 112 Ark. 566, 166 S. W. 747; *Lasker-Morris Bank & Trust Co.* v. *Jones,* 131 Ark. 576, 199 S. W. 900; *Emerson* v. *E. A. Strout Farm Agency,* 161 Ark. 378, 256 S. W. 61.

In *Branch* v. *Moore,* 84 Ark. 462, 105 S. W. 1178, 120 Am. St. Rep. 78, this court held (headnote 3): "In an action by a broker to recover compensation for effecting a sale of defendant's land, it was no defense that the land constituted defendant's homestead, and that he could not lawfully sell the land without his wife's consent, as plaintiff was not seeking to enforce a contract to sell land, but to recover compensation for services rendered."

In the case at bar appellee was not seeking to enforce the contract to sell the tourist court, but was asking compensation for his services. The controlling question for determination by the jury was whether appellee produced a purchaser who was ready, willing and able to buy the property on terms which were satisfactory to appellants at the time of their agreement with Bush. This question was presented to the jury under conflicting evidence. In testing the legal sufficiency of the testimony to sustain the verdict on this issue, we must view it in the light most favorable to appellee. Appellants testified that the provisions of the proposed escrow contract were discussed and agreed upon prior to, and contemporaneously with, the agreement of August 15, 1945, but they were unable to explain why these provisions were not incorporated in that agreement. Testimony on behalf of appellee was to the effect that the unpaid balance was to be secured by a mortgage and that the escrow arrangement was an afterthought on the part of appellants and insisted upon in order to prevent completion of the sale under the agreement previously made. In this connection there was testimony that appellants found a cash buyer for their property after their agreement with Bush and sought to discourage Bush from going ahead with the sale. Bush de-

nied that any mention was made to him of the escrow arrangement until several days after the agreement of August 15, 1945.

Under this evidence the jury could have reasonably concluded that completion of the sale was prevented through the fault of appellants in insisting upon terms which had never been previously proposed to the purchaser. If appellants considered the provisions of the escrow method of security for payment of the unpaid balance indispensable to a sale, they should have incorporated these provisions in the written agreement with the purchaser. The early case of *Beebe* v. *Ranger,* 35 N. Y. Super. Ct. (3 Jones & Spence) 452, involved facts similar to those in the instant case. There an owner of real estate placed it in the hands of brokers for sale stating his terms to be a certain sum and a certain proportion payable in cash. The brokers procured a purchaser who agreed to those terms. When the contract of sale was being prepared the seller insisted on the insertion of a forfeiture clause therein which had not been previously proposed to the purchaser, and the sale, on account thereof, fell through. In holding the brokers entitled to a commission the court said: "If the defendant had wished to protect himself from liability for the services rendered by the plaintiffs, he should have stated as part of his terms of sale, when asked what they were, that he would require this forfeiture clause to be inserted in the contract of sale.

"From the willingness of the purchaser to complete the contract, in case the forfeiture clause was not insisted on, and his finding the contract satisfactory in all other respects, there is not much force in the seller's objection, that their minds had not met on the interest and insurance clauses, or the kind of mortgage to be given."

We, therefore, conclude that the question whether appellee earned his commission by producing a purchaser who was ready, able and willing to buy the tourist court upon the terms authorized by appellants has been settled by the verdict which is supported by substantial evidence.

Appellants also contend that the trial court erred in giving certain instructions requested by appellee. We deem is unnecessary to set out these instructions, but have carefully examined them and find that the declarations of law contained therein have been approved in those cases which we have heretofore discussed. Other cases to the same effect are collected and discussed in *Nelson* v. *Stolz,* 197 Ark. 1053, 127 S. W. 2d 138. It is insisted that these instructions conflicted with certain instructions given at the request of appellants and were misleading to the jury. It is sufficient to say that appellants did not raise this objection at the trial.

On his cross appeal, appellee contends that the trial court erred in refusing to direct a verdict in his favor for $1,200. Under the joint listing of the property with appellee and Tom Brown, another broker, the two agents were to share the commission equally in the event of a sale by either broker. Brown testified that he declined to join in the suit with appellee for recovery of his (Brown's) part of the commission. Under these circumstances we think the jury was warranted in concluding that Brown had waived the right to recover his share of the commission and correctly rendered a verdict for only that part which appellee was claiming.

Finding no error, the judgment is affirmed on both the direct and cross appeals.

LONDON *v.* MONTGOMERY.

4-8105 201 S. W. 2d 760

Opinion delivered April 7, 1947.

Rehearing denied May 26, 1947.

Virgil R. Moncrief and *John W. Moncrief,* for appellant.

W. A. Leach, for appellee.

GRIFFIN SMITH, Chief Justice. The action was begun in Circuit Court as a suit in ejectment, with the plaintiffs alleging that they were entitled to possession of forty-six and two-thirds feet "off of the south side of Lots Seven and Eight in Block Thirty-six in Flood's Addition to the City of Stuttgart." The action was transferred to Chancery.

The lots forfeited for 1930 taxes and were duly certified to the State. In 1936 the State's title was confirmed under Act 119 of 1935, and in September, 1942, the Land

Commissioner conveyed to appellees. Appellants contend (a) that the original sale and subsequent confirmation were void; (b) there was an illegal assessment of road taxes for 1930 and there were other void assessments, with confusion as to valuation; (c) a recital in the decree shows that certain redemptions had been effectuated, and the decree does not point with certainty to the property so redeemed; and (d) appellees' acts in collecting rents amounted to a redemption.

It is conceded by appellants that the lots are 50 x 140 feet, and if considered as a unit they occupy an area 100 x 140 feet. The description in all of the proceedings prior to the decree was "Forty-six and two-thirds feet S. Side L. 7-8," etc. Insistence is that "side" must be construed to mean *half*. There is this contention:

"Exclusive of ten feet for alley right of way on the north end and twenty-five feet for street right of way on the south end, each of these lots is 140 feet in length; and exclusive of thirty feet for street right-of-way on the east side, each of these lots is fifty feet wide. The south end of the two lots (combined as a body) has 70 x 100 feet, exclusive of public right-of-way. Therefore, forty-six and two-thirds feet could not be a description of the entire south 'end' or south 'side,' and this necessarily results in having a smaller or lesser body to be taken somewhere out of a larger body."

We think the references to streets and alleys is more confusing than revealing. A drawing will show that if forty-six and two-thirds feet should be taken from the south end, the amount remaining in the south half of each lot would be twenty-three and a third feet. This would leave two lots of the same size north of the severed area, and it seems that the purpose was to divide the lots north and south so that each would have equal areas. The question is, Does south side mean south half, or should it be construed with such meticulous exactness that an ordinary person would be uncertain in respect of the intent?

While as a general proposition the word "side" has reference to the longer dimension of a rectangle, we think

the Chancellor was justified in taking a practical view of the obvious and holding that the result intended would direct a purchaser to either the southwest corner of Lot Seven, or the southeast corner of Lot Eight. From these points the measurement would be north 46 2/3 feet; or, if the words "south side" alone be considered, then 46 2/3 feet would extend entirely across, otherwise the two lots would not be reached, for the description clearly covers "L. 7-8."

Records of the Quorum Court show that for 1930 a tax of three mills was levied "for district road purposes." Appellant's contention is that because the Constitution only authorizes a three-mill "county road tax" there was failure to make a valid levy, hence inclusion of ninety cents in the amount for which the property sold will avoid the sale. In *Berry* v. *Davidson,* 199 Ark. 276, 133 S. W. 2d 442, Mr. Justice BAKER said that where taxes have been levied against land, "however defectively that may have been done," the power to sell for non-payment exists, and confirmation under Act 119 of 1935 cures all defects. To the same effect is *Faulkner* v. *Binns, Trustee,* 202 Ark. 457, 151 S. W. 2d 101.

Contending that there is no power to levy a *district* road tax, appellants say: "Road districts are created in various ways and with various and different functions and with officers or overseers having different powers —some, we believe, being created by local acts prior to the anti-local amendment."

Assuming there could have been locally created districts, there is no suggestion that such was true: nothing more than a possibility. Again, the result represents merely an irregularity. Undoubtedly the tax was for county road purposes, and this being true, there was no illegal exaction.

Taxes were extended pursuant to Act 172 of 1929 as follows: "Value of lot, 300; value of improvements, 200; total value, 300." Because 300 and 200 do not make 300, it is insisted the assessment is void on its face; and for want of a decimal point appellants do not know whether the figures represent dollars, cents, or mills.

Schultz v. *Carroll,* 157 Ark. 208, 248 S. W. 261; *Carter* v. *Wesson,* 189 Ark. 942, 75 S. W. 2d 819; and *Mixon* v. *Bell,* 190 Ark. 903, 82 S. W. 2d 33, are cited. The Schultz-Carroll case involves the levy of school taxes. After listing District No. 103, the extension was, "Amount tax voted, 7; for what purpose, 5 gen. 2 bldg." Mr. Justice HUMPHREYS, in writing the Court's opinion, said that these figures, standing alone, were meaningless. In a dissenting opinion Chief Justice McCULLOCH said: "The Constitution authorizes the school tax in mills, and we should indulge the presumption that the figure in the record was intended to refer to the amount of tax thus authorized. It could not have had reference to dollars or cents, therefore it must have meant mills. The omission was a mere clerical error."

In the Wesson case the sale was for $7.32 "more than the entire quarter should have sold for."

The Bell case involved failure to make extensions; but, instead, blank lines were left.

While we think the dissenting opinion by Judge McCULLOCH announced a better rule than the majority holding, there is a distinction between the Schultz-Carroll decision and facts in the case at bar. It is so highly improbable that a lot would be assessed at $3 and improvements at $2, with an extension of $3 to cover the two, that judicial construction in favor of the objecting party should not be invoked. Applying common experience to the transaction, we know that dollars were meant; and failure to utilize a decimal point was nothing more than an irregularity. See *Sawyer* v. *Wilson,* 81 Ark. 319, 99 S. W. 389; *Beasley* v. *Bratcher,* 114 Ark. 512, 170 S. W. 249; *Evans* v. *Dumas Stores, Inc.,* 192 Ark. 571, 93 S. W. 2d 307.

The decree recites that some of the tracts covered by the confirmation had been donated, sold, or redeemed, and "It is adjudged that none of the findings or judgments herein shall be adverse to such donee, purchasers, or persons redeeming, but that on the contrary same shall inure to the benefit of said persons, their heirs or assigns."

We think appellees correctly state the case when they say that had appellants redeemed, "such redemption could have been interposed as a defense to this proceeding, and the fact that no such plea was interposed is conclusive that there had been no redemption."

The record shows that the Quorum Court had before it a certificate from the County Board of Education designating the millage voted. For District No. 22 (Stuttgart) the amount was written "18." It is argued that this is indefinite. We do not think the taxpayer was in any respect deceived; nor was there an overcharge. Clearly the figures did not refer to eighteen dollars, or eighteen cents.

In their insistence that the valuation of "300 for the lot and 200 for improvements" shows error on the face of the assessment, appellant says that the total valuation was $500 if failure to use dollar marks did not render the entry vague; hence when the total rate of 42.4 mills is multiplied by $300 the tax is $12.72. If extended on $500 the item would be $21.20; therefore the sale was for *less* than the correct sum by $8.48. They seek to invoke the rule adopted in *Hires* v. *Douglas,* 198 Ark. 559, 129 S. W. 2d 959. It was there held that sale of land in an improvement district by a commissioner on order of the Chancery Court where the record affirmatively showed that interest was not included ". . . has the effect of avoiding such sale," the Court being without jurisdiction to act where the foreclosure was on part of the obligation only.

The writer of this opinion wrote the opinion in *Hires* v. *Douglas.* We think that part of the decision holding that the Court was without power to order a sale for less than the total obligation, including interest, was wrong. It was error not to require all of the debt elements to be adjudicated, but this did not deprive the Court of jurisdiction as to the foreclosure. The first ground for reversal—that the Commissioner's report showed sale of several tracts *in solido*—was substantial, and the decision should have rested on that point. That was a judicial sale, while in the instant case a tax forfeiture

is involved. Different rules are applicable, but it is not improper to say here that the jurisdictional holding in *Hires* v. *Douglas* is overruled.

Facts incident to appellees' conduct in collecting rents (upon which appellants predicate their contention that redemption was effectuated) were presented by *ex parte* affidavits and filed directly with the Clerk of this Court, and cannot be considered. But even if such supplemental record were allowed, appellants would be met with the showing that time for redemption had expired.

Affirmed.

KOONCE *v.* WOODS.

4-8119. 201 S. W. 2d 748

Opinion delivered April 7, 1947.

Rehearing denied May 26, 1947.

W. A. Leach, for appellant.

John B. Moore and *Mann & McCulloch,* for appellee.

GRIFFIN SMITH, Chief Justice. The appeal involves title to 14.42 acres in the northwest quarter of section twenty-seven, 1-N, 3-W, Monroe County. An agreed statement is that in 1920 and prior thereto the fractional east half of the west half of the section was assessed for general taxation. This tract forfeited for non-payment of 1923 taxes, but the record shows that an assessment was extended in 1927 against "Pt. E½ W½ Sec. 27, Twp. 1-N, R. 3-W, 14.42 acres." It was further agreed that for 1927 and subsequent years taxes were paid on this tract "in the manner provided by law." These payments were by Woods Lumber Company and its predecessor, White River Lumber Company.

February 13, 1933, White River Lumber Company delivered to Eugene Woods its warranty deed conveying ". . . a part of the north part of fractional northwest quarter of section twenty-seven, . . . commencing at an iron post on the east bank of the White River, which marks the southwest corner of Private Survey No. 2309 and the northwest corner of fractional section twenty-seven; thence north 88 degrees east 910 feet; thence south nine degrees west 916 feet; thence north 81 degrees west 980 feet to the east bank of White River; thence in a northerly direction following the meanderings of bank to the point of beginning, which point of beginning is north 15¾ degrees east, 735 feet from the last mentioned point, containing 14.42 acres, more or less."

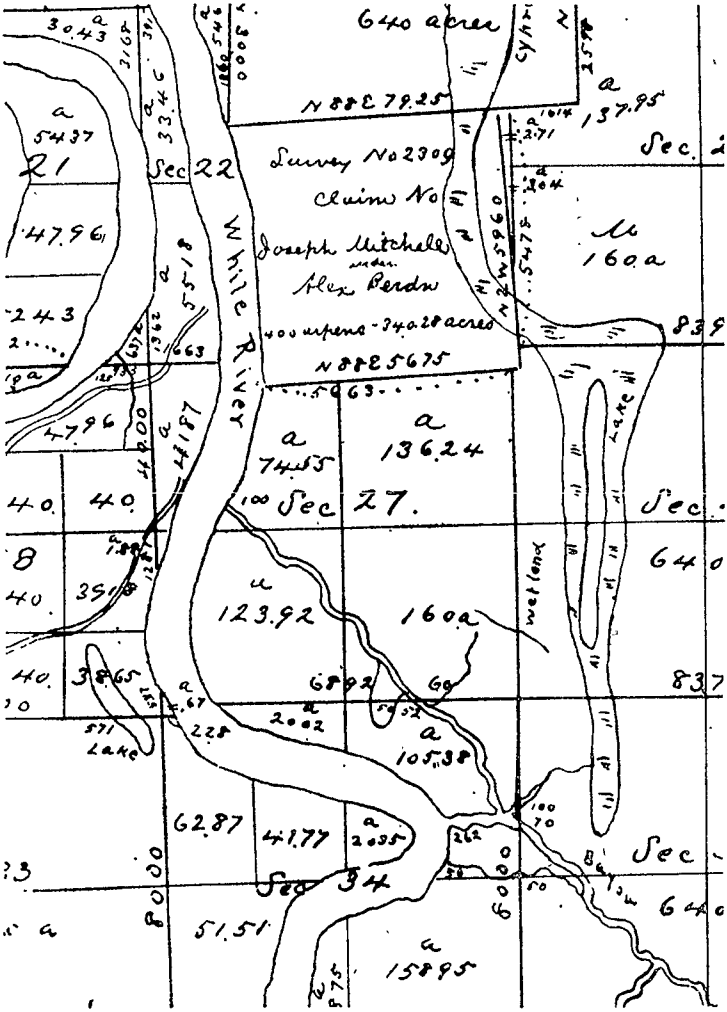
This deed was recorded April 5, 1933. It was agreed that a portion of the land described had been and is being used by Eugene Woods as part of the yard of Woods Lumber Company. April 6, 1931, the State's title to "Frl. E½, W½ Sec. 27, Twp. 1-N, R. 3-W, 198.47 acres" was confirmed under Act 296 of 1929, by reason of forfeiture for 1923. July 24, 1940, the State Land Commissioner delivered to H. F. Koonce what was designated a correction deed, conveying "Fractional NE¼ NW¼ Sec. 27, T. 1-N, R. 3-W, containing 34.53 acres."

Some time before September 26, 1944, Koonce undertook to enclose the property he had purchased from the State, and in so doing encroached upon Woods' land. Woods procured a restraining order. On final hearing the decree was that the deed of July 24, 1940, was void "insofar as it affects the title of [Woods] to the land [described by metes and bound"]. The injunction was made permanent, and this appeal followed.

Section twenty-seven, township one north, range three west, is irregularly formed. The government plat and field notes show that the survey of the east side was made in 1856 and that it started at the southeast corner and ran north a distance of 74.76 chains. But the southeast quarter contains 160 acres, hence the deficiency of 5.24 chains must relate to the northeast quarter, with a measurement of 34.76 chains on the east. A reference to the insert map discloses that this east line intersects the south boundary of Spanish grant No. 2309 at a point twelve links S. 88 degrees west of the southeast corner of the grant, surveyed by N. Rightor in 1817 and subsequently approved as the property of Joseph Mitchell, who claimed in right of Alexander Bridoute.

That portion of section twenty-seven lying West of White River was surveyed by H. B. Allis in 1842 and resurveyed by P. B. Starbuck in 1854-55, beginning at the southeast corner of section twenty-eight, thence north. The north line of the northwest quarter of section twenty-seven lying west of the river is 16.63 chains, but this line is not parallel with the south line of the Spanish grant. The north line of the northeast quarter, and the north

line of that part of the northwest quarter of section twenty-seven lying east of the river, are the south line of the grant, and the distance from intersection of the east line of the northeast quarter with the grant, to its terminus on the river, is 56.63 chains. If this line should be projected across the river it would be approximately seven chains south of where the north line of that part



of the northwest quarter west of the river touches the stream.

Appellee argues that the decree should be affirmed (a) because description in the deed under which Koonce holds is indefinite, requiring judicial construction, and (b) that some one with a redeemable interest in the forfeited land had effectuated redemption prior to 1927, an assessment having been extended against the 14.42 acres that year. Appellant contends that the presumption of redemption was not sustained by showing the assessment and payment of taxes on "Pt. NW¼ Sec. 27, T. 1-N, R. 3-W."

First — (a) — The description "Fractional NE¼ NW¼ Sec. 27, T. 1-N, R. 3-W, containing 34.55 acres," is valid under many decisions of this Court. Mr. Justice McCulloch, in the opinion on rehearing in *Little* v. *Williams,* 88 Ark. 37, 113 S. W. 340, said that Courts take cognizance judicially of the general system of government surveys, and that terminology employed in relation to them is necessarily a reference to the plats of official surveys; otherwise the terms would be meaningless. See *Chestnut* v. *Harris,* 64 Ark. 580, 43 S. W. 977, 62 Am. St. Rep. 213; *Crill* v. *Hudson,* 71 Ark. 390, 74 S. W. 299; *Rucker v. Arkansas Land & Timber Co.,* 128 Ark. 180, 194 S. W. 21; *Turner* v. *Rice,* 178 Ark. 300, 10 S. W. 2d 885; *Alphin* v. *Banks,* 193 Ark. 563; 102 S. W. 2d 558; *State* v. *Guthrie,* 203 Ark. 60, 156 S. W. 2d 210. Other cases are to the same effect. The fact that the land embraced within the description is less than forty acres is of no importance. It follows that, *prima facie,* Koonce took all of the area within the fractional description.

Second—(b)—At the time Koonce procured his correction deed, Woods owned the land described by metes and bounds, and it was definitely within the description set out in the Koonce deed, for the point of beginning is "an iron pipe on the east bank of the White River, which marks the southwest corner of Private Survey No. 2309."

Was Koonce charged with notice of what Woods claimed, occupied, and upon which he had been paying taxes for seventeen years?

Appellant, as the State's grantee, has no better position than the grantor. When he procured his deed he obtained only what the State owned. The confirmation decree of 1931 did not vest title if the State's right to sell for taxes were lacking. In *Stringer* v. *Conway Bridge District,* 188 Ark. 481, 65 S. W. 2d 1071, Mr. Justice MEHAFFY said: "If taxes on a tract of land had already been paid, the sale would be void," and confirmation would likewise be void. This holding was cited in *Kirk* v. *Ellis,* 192 Ark. 587, 93 S. W. 2d 139.

Does the agreed statement in this case call for application of the rule announced in *Townsend* v. *Bonner,* 205 Ark. 172, 169 S. W. 2d 125? The opinion discusses *Wallace* v. *Hill,* 135 Ark. 353, 205 S. W. 699, where it was held that, after a lapse of thirty-four years during which time the State, through its officers, had assessed, levied, and collected taxes in the names of the listed owners, ". . . it will not be heard to say that the acts of [such] officers were unauthorized, and that the lands had not been redeemed as authorized by the overdue tax act." In the Townsend-Bonner case it is said that the property could only have gotten on the tax books through action of officers charged with that duty.

The principle with which we are concerned was emphasized by Judge MARTINEAU in *State of Arkansas* v. *Rust Land & Lumber Co.,* 51 Fed. 2d 555. He mentioned *State of Iowa* v. *Carr,* 191 Fed. 257, where Judge WALTER H. SANBORN said: "In a controversy between the rights of a State and those of a citizen, while the State is not barred by mere delay, its rights are measured and adjudicated by the doctrine of estoppel, and the other principles and rules of law and equity applicable to the like rights of a citizen under similar circumstances. . . . The plaintiffs and their grantors had been in possession of the land in controversy for more than twenty years. *During this time the State levied and collected taxes upon this land as theirs and had acquiesced in their posses-*

sion, and the plaintiffs had paid taxes and made costly improvements upon the land. There was no equity in the claim of the State, and it was estopped from maintaining this claim by these facts." There was this quotation from Lord Camden in *Smith* v. *Clay,* 3 Brown, Ch. 639: "Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence."

In *Carter* v. *Goodson,* 114 Ark. 62, 169 S. W. 806, the subject matter was land sold by the State to Carter. It was held that a prior grant would be presumed. The following language from an opinion by Mr. Justice SHIRAS in *United States* v. *Chaves,* 159 U. S. 452, 16 S. Ct. 57, 40 L. Ed. 215, was quoted with approval: ". . . By the weight of authority, as well as the preponderance of opinion, it is a general rule of American law that a grant will be presumed upon proof of adverse, exclusive, and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure* wherever, by possibility, a right may be acquired in any manner known to the law."

In *Carter* v. *Stewart,* 149 Ark. 189, 231 S. W. 887, 232 S. W. 936, Carter claimed under a patent dated in 1917. In writing the opinion Mr. Justice HART said: "Under its sovereign power, a State imposes a burden upon all its citizens to pay taxes on the property owned by them for the purpose of supporting the government. It is the duty of the officers of the State to place the land in the State on the tax books for that purpose as soon as the State has parted with its title to them. Hence when the State has for a long time demanded and collected taxes on property and the property-owner has acquiesced therein by paying taxes, there arises a presumption that there was a legal liability to pay the taxes, and this furnishes a strong circumstance from which the court may infer a grant from the State. Of course, from the very nature of the thing, the person paying the taxes must be in the uninterrupted and continued possession of the land in order to warrant the court in finding a grant from the State. In such cases the possession of the adverse claimants could have had a legal inception, and the doctrine of presumption of a

grant from the State under such circumstances is recognized in many cases."

With no facts other than the agreed statement that for 1927 and succeeding years taxes were paid by Woods "in the manner provided by law," it must be presumed that there had been a redemption from the 1923 forfeiture. It is just as reasonable to say that records upon which the Land Office predicated its right to sell were erroneous as it is to say that Monroe County taxing officers improperly assessed the tract containing 14.42 acres; nor is the result necessarily based upon estoppel. When one presumption is balanced against another, there is no logic in the contention that Woods' rights are inferior, and that Koonce must prevail because the acreage in controversy fell within the area described in the correction deed.

In applying to the case at bar the principles announced in the Townsend case we are not disregarding the difference between possession and tax payments for 30 years, 66 years, 34 years, and 17 years. The period of time goes to the matter of good faith of a two-fold character: faithful conduct by the State's officers on the one hand, and good faith upon the part of the taxpayer. The difference in time can have no effect on the legal principle.

We do not have a statute establishing a period directly applicable to the facts here; but by analogy certain legislative acts should be considered. *Schmeltzer* v. *Scheid,* 203 Ark. 274, 157 S. W. 2d 193, emphasizes the State's policy of protecting rights of one who in good faith pays taxes on real property. By Act 66 of 1899, Pope's Digest, § 8920, payment of taxes on unimproved and unenclosed land under color of title for a period of seven consecutive years constitutes an investiture of title. *Townsend* v. *Denson,* 74 Ark. 302, 86 S. W. 661, and other cases cited in *Schmeltzer* v. *Scheid.* By subsequent legislation (Act 199 of 1929, Pope's Digest, § 8921) one who pays taxes on wild and unimproved land for a period of fifteen years has color of title as a presumption of law. These statutes, of course, are not limitation

measures. They establish, in the one case, an investiture of title, and in the other there attaches color of title as a legal presumption.

A presumption of law, or a fact, or a condition, is just as binding on the State as on individuals; and the State, by acceptance of a taxpayer's money, as in the instant case, should be bound in a court of equity by analogous conditions which the lawmakers saw proper to declare as public policy. By this we do not mean that the State can be estopped by acts of its officials they were not authorized to consummate. On the contrary, the same principle heretofore promulgated is given effect, and it is this: After a long lapse of time a grant or conveyance by the State or its officials will be presumed—not as a matter of fact, but one of law.

The result cannot affect redemption rights of those under disability, conferred by Pope's Digest, §§ 8666 and 13860. The right is not an estate in the land, but a statutory privilege contrived to defeat the tax title. Pope's Digest, § 13860; *Harris* v. *Harris,* 195 Ark. 184, 112 S. W. 2d 40.

The right to redeem runs with the land, and any person who would otherwise acquire title takes with notice. *Schuman* v. *Westbrook,* 207 Ark. 495, 181 S. W. 2d 470. No action of the State or its officials can destroy the statutory right of minors, or others under disability, to redeem. This right is not affected by a deed executed by the Land Commission.

The decree permanently restraining appellant from interfering with appellee's possession is affirmed.

Mr. Justice MILLWEE not participating.

[See *Deniston* v. *Langsford, infra* p. 780, where comment on this case is made.]

CROWNOVER *v.* ALREAD SCHOOL DISTRICT No. 7.

4-8150 200 S. W. 2d 809

Opinion delivered April 7, 1947.

Charley Eddy, for appellant.

J. F. Koone and *Opie Rogers,* for appellee.

ED. F. MCFADDIN, Justice. The question for determination on this appeal is: was there sufficient evidence introduced to take the case to the jury, on the issue of whether the school district had adequate cause to discharge the schoolteacher?

FACTS

On September 17, 1945, the appellee, Alread School District, entered into a written contract with the appellant, Miss Crownover, whereby the district employed her to teach school for eight months at a salary of $100 per month. The contract was on the regular form used by school districts in this state. Miss Crownover com-

menced teaching the same day the contract was signed, and continued until January 11, 1946, when she received from the school board a written notice of discharge. She was paid for the four months she had taught, but was denied payment for the remaining four months. She filed this action against the school district for $400 as the balance claimed by her under the contract. The school district defended on the ground that it had the right to discharge Miss Crownover for adequate cause, which cause will be discussed herein. The case was tried to a jury under instructions admitted to be correct; and there was a verdict and judgment for the school district. For a reversal, Miss Crownover brings this appeal, and urges here only one assignment of error, to-wit, that the trial court erred in refusing to direct a verdict in her favor.

OPINION

At the outset, we state two general rules of law applicable to this appeal:

(1) When the appellant claims that the trial court erred in refusing an instructed verdict for appellant, then on appeal this court must give the evidence for the appellee its highest probative value. *Benefit Assn.* v. *McKamey,* 205 Ark. 949, 171 S. W. 2d 937, and cases there cited. See, also, *Ross* v. *Alexander,* 205 Ark. 663, 169 S. W. 2d 863.

(2) A teacher, although employed for a fixed term, may be discharged by the school board at any time for incompetency, negligence in the discharge of duties, or willful refusal to obey lawful and proper orders. 47 Am. Juris. 387, "Schools," § 126. Every contract made with a teacher includes the implied power of the board to dismiss for adequate cause. 47 Am. Juris. 386, "Schools," § 125. Our own cases have recognized and applied the rules stated in this paragraph. Some of our cases are: *School District* v. *Maury,* 53 Ark. 471, 14 S. W. 669; *Argenta School District* v. *Strickland,* 152 Ark. 215, 238 S. W. 9; *Ottinger* v. *School District,* 157 Ark. 82, 247 S. W. 789; *Gardner* v. *North Little Rock School District,* 161

Ark. 466, 257 S. W. 73; *Berry* v. *Arnold School District,* 199 Ark. 1118, 137 S. W. 2d 256. See, also, West's Arkansas Digest, "Schools and School Districts," § 141; and see annotation in 49 A. L. R. 482, where cases are collected on the right of a school board to discharge a teacher at any time for incompetency or negligence in the discharge of duties.

With these recognized principles of law to guide us, we revert to the question: Was there sufficient evidence introduced to take the case to the jury on the issue of whether the school board had adequate cause to discharge the teacher? Disinterested witnesses testified as to Miss Crownover's quick temper and sharp language. The school principal detailed a series of incidents going to show that Miss Crownover was unable to maintain discipline in her room, and was negligent in the discharge of her duties. The school principal testified that Miss Crownover had (a) refused to obey the orders of the school principal; (b) insulted him, and otherwise shown him disrespect in the presence of the pupils; (c) failed to keep order in her schoolroom; (d) humiliated the pupils; and (e) engaged in a snowball fight during school hours. In addition, it was testified by the president of the school board that he personally visited her classroom, and observed the complete lack of discipline and order there existing. The secretary of the school board testified that on January 10, 1946, when the principal attempted to resign because of his inability to have Miss Crownover obey the rules of the principal, the secretary went to Miss Crownover and asked her to meet with the directors and school principal to see if the existing differences could be settled; and the secretary testified that Miss Crownover absolutely refused to meet with the directors and school principal.

From the evidence already mentioned, it is our opinion—in the light of the cases and authorities cited—that a fact question was made for the jury. Of course, there was evidence offered by Miss Crownover that she was not at fault; but the weighing of the evidence is not for

this appellate court. We emphasize that, in all of the evidence there is not the slightest indication or intimation that Miss Crownover was guilty of any act touching her character or integrity. This was her first effort as a schoolteacher; it is possible that she did not possess, at that time, the poise, patience, fortitude and equilibrium so essential to a teacher of children in the seventh and eighth grades. Her experience at the Alread School District will undoubtedly tend to increase her efficiency, for experience is a good teacher. But under the record before us, there was sufficient evidence to carry the case to the jury, and so the judgment of the circuit court is in all things affirmed.

Coca-Cola Bottling Company of Fort Smith *v.* Reeves.

4-8131 200 S. W. 2d 811

Opinion delivered April 7, 1947.

Pryor, Pryor & Dobbs, for appellant.

Partain, Agee & Partain, for appellee.

Ed. F. McFaddin, Justice. Appellee, Mrs. Ruby Reeves, was plaintiff in the circuit court. She claimed that she drank a Coca-Cola bottled by appellant, and that the bottled drink contained small particles of glass, some

of which she swallowed, and which caused her to suffer pain, discomfort, injuries and loss of time from her work. She recovered judgment for $500; and appellant brings this appeal. Two questions are argued, which we list and discuss.

I. *The Sufficiency of the Evidence.* The appellant says: "There is a total failure to prove, either by direct or circumstantial evidence, that the plaintiff in this case swallowed any particle of glass, or that her condition was the result of swallowing any glass." This quoted contention necessitates a review of some of the evidence. Appellee was a lady living near Mulberry. On March 5, 1946, she purchased a bottle of Coca-Cola at the store of Jack Jordan. The cap was removed by the clerk, and the bottle handed to the appellee, and she drank all of the contents except about "two good swallows." Then, as she continued to drink the remaining contents, she felt a glass particle in her mouth, which particle, she claimed, came out of the bottle. She removed the glass particle from her mouth, and showed it to several people in the store. Some of these witnesses saw other glass particles remaining in the bottle. The exact statement by Mrs. Reeves on cross-examination was: "I had drunk all but about that much, and I was going to make two good swallows out of the rest. I took a good swallow, and a little sliver stuck in the roof of my mouth, I pulled that out." Appellee immediately consulted a physician, who examined the glass in the bottle, and prescribed for Mrs. Reeves. At the trial, the bottle, with the remaining glass particles therein, was exhibited to the jury.

It is urged by appellant that Mrs. Reeves did not testify that she swallowed any of the Coca-Cola after she felt the glass in her mouth, and therefore—appellant argues—there is no proof that Mrs. Reeves ever swallowed any glass. But we cannot agree with appellant's contention, because the evidence made a question for the jury. Mrs. Reeves testified that she drank all of the contents of the bottle except "two good swallows." If the evidence had stopped at that point, then appellant would

have had a much stronger case. But the evidence shows that Mrs. Reeves immediately called a doctor, and told him that she had swallowed glass. He examined the glass remaining in the bottle, and prescribed for her a diet for one who might have swallowed glass. Her suffering took the same pattern and exhibited the same symptoms as the doctor said one would experience who had swallowed glass. She testified that she had never been ill previously; that she became ill, and suffered severe pain, passed blood; experienced loss of considerable weight; and was some time recovering from her illness and regaining her weight. The doctor's testimony, in effect, was that medical experience would support the inference that the pains and attending symptoms were the result of swallowing glass.

All of this testimony, when placed before the jury, presented a factual question as to whether appellee swallowed any of the glass from the bottle before she discovered the particle of glass in her mouth. The jury's verdict settled this factual issue; and we have sketched only enough of the testimony to demonstrate that there was sufficient evidence to sustain the verdict. In this connection, we call attention to the following cases, each of which involved injuries alleged to have been caused by a party drinking glass particles, alleged to have been contained in a bottled beverage, to-wit: *Coca-Cola Bottling Co.* v. *Raymond,* 193 Ark. 419, 100 S. W. 2d 963; *Coca-Cola Bottling Co.* v. *Massey,* 193 Ark. 423, 100 S. W. 2d 681; *Coca-Cola Bottling Co.* v. *Langston,* 198 Ark. 59, 127 S. W. 2d 263; *Coca-Cola Bottling Co.* v. *Spurlin,* 199 Ark. 126, 132 S. W. 2d 828; *Coca-Cola Bottling Co.* v. *Mooney,* 204 Ark. 281, 161 S. W. 2d 753.

II. *Excessiveness of the Verdict.* The plaintiff suffered considerable pain, and passed some blood. She was confined to her bed for three weeks, and temporarily lost considerable weight. She was treated by a doctor for ten days, and paid $18 for medical attention. It was six weeks before she was able to return to her work, and her loss of earnings during that period exceeded $100. From

these facts, we cannot say that the $500 verdict was so grossly excessive as to shock the conscience and call for a remittitur. The five cases heretofore cited in this opinion, and the cases cited therein, indicate the course that this court has charted and pursued as regards verdicts in such situations. Affirmed.

BARTON *v.* WALKER.

4-8124 200 S. W. 2d 801

Opinion delivered April 7, 1947.

J. F. Quillin, for appellant.

Abe Collins, for appellee.

SMITH, J. This suit was brought to recover the value of certain property alleged to have been sold by the defendants to the plaintiffs, which the defendants did not own. There was a verdict and judgment for the defendants from which is this appeal. A reversal of this judgment is asked upon the grounds that the court erred in giving certain instructions and in refusing to give certain others.

The defendants, Marvin and Lona Walker, husband and wife, owned a lot in the town of Cove, Polk county, on which there was a filling station. They had given a lease on this lot to one Yahraus, who was the distributing agent for the Conoco Oil Company in that territory, which was recorded, but which did not describe or refer to the property in question. After procuring this lease Yahraus and the Walkers entered into a contract providing for the use of certain filling station equipment which Yahraus owned, with the right to remove upon the termination of the contract. Yahraus testified that the custom in that area was almost universal for the oil companies, or their distributing agents, to own the equipment, the purpose being to control the sale of oil and gas used in the station.

At the time of making the contract, out of which this litigation arose, Walker was in the naval service, stationed in Oregon, and his wife resided there with him.

The Walkers had employed one Jim Ross to operate the station, and Ross was operating it when the plaintiff Barton applied to Ross to purchase it. Ross had no authority to sell, but there was a discussion of the terms upon which it was thought a sale could be made, and a telegram was prepared which was dictated by Barton, but written and paid for by Ross reading: "B. H. Barton offers $5,000 inside and out less clothing." There was a room in the station which appears to have been used as living quarters. Ross took the telegram to the telegraph office, but before sending it struck out the

words "less clothing" and inserted the words "less personal property."

Upon receipt of the telegram, Walker obtained a leave of absence and returned home to close the deal upon the terms as he understood the telegram. Upon his arrival at Cove he learned that Barton had not sent the telegram which he received. There was a discussion which continued over until the following day. Mrs. Walker announced that she would not sell unless certain things which she had in the building were excepted from the sale, and that concession appears to have been made.

The Walkers removed their personal effects, and there appears to have been no objection to this action, but Barton testified that Walker removed certain other articles without his knowledge or permission, including an electric fan and certain aluminum ware. Barton testified that they finally agreed on everything which was being reserved and not sold except a refrigerator and a bedroom suite, and this difference was finally settled when Walker proposed and Barton agreed that Walker might retain the refrigerator and the bedroom suite provided Walker would order and pay for 200 gallons of a high grade of gasoline to be placed in one tank, and 250 gallons of a lower grade of gasoline to be placed in another tank. The gasoline was delivered as agreed and was paid for by Walker. Barton testified that he gave Walker a check for $5,000 upon the assumption that he had acquired title to everything in and connected with the filling station, which had not been reserved, and that there was never at any time any intimation that the filling station equipment, including tanks, pumps, etc., were not being sold.

Walker testified that when the difference in the telegram which Barton authorized Ross to send and the one which Ross did send was discovered, the deal was called off. Ross candidly admitted that he had made the change without Barton's knowledge or consent. Walker testified that the day after he had called the deal off, Barton came to the station, sat down at a table and asked, "What I

would have to keep and make a trade, so when I put in some personal things that wasn't supposed to go according to the deal before and he said yes and traded." Walker further testified, "Before we finally traded we were walking around and he was just looking, and I told him all that was there was mine except the company equipment. He never asked any questions and I presumed that he knew what the company equipment was. I told him the company equipment did not go in the deal, and he did not ask any questions whatever."

This testimony was categorically denied by Barton, who testified nothing was said about company equipment, and that he had no knowledge that anything was not being sold except those items which it was agreed should be reserved, and that the protracted discussion of these items could have left no doubt that Walker knew he thought he was buying everything that had not been reserved from the sale.

After operating the station about a month, Barton learned that certain equipment which he thought he had bought was the property of Yahraus, whereupon he brought this suit. At the trial Walker proposed to refund the money paid him and to rescind the sale, but when the proposition was accepted, Walker refused to carry through his proposition.

Plaintiff asked an instruction to the effect that if Walker "permitted the plaintiff to believe, or lead the plaintiff to believe he was obtaining property from the defendant which the defendant did not own" there was liability for the value of the property sold which the defendant did not own. The court modified the instruction by striking out the phrase "permitting the plaintiff to believe" and gave the instruction as modified, and an exception was saved to the modification. We think the instruction as modified correctly declared the law applicable to the facts in issue. It declared the defendants liable if they "lead the plaintiff to believe." This might have been done by action, or by inaction, which lead the plaintiff to believe that he was buying property which the seller did not own, or did not intend to sell,

in which event there would be a liability as declared in the instruction given as modified. But unless by some action or inaction on Walker's part, Barton was misled as to what was being sold, there was no liability.

These principles are discussed in the annotated case of *Donovan* v. *Aeolian Co.*, 270 N. Y. 267, 104 A. L. R. 549, 200 N. E. 815. In that case a piano was purchased under the impression it was new when in fact it was second-hand. The seller made no direct affirmation that the piano was new or unused. In the body of that opinion it was said: "If the seller does not know that the buyer is acting under the belief that the article is new and unused, and has done nothing to induce that belief, the buyer cannot complain. There is no duty upon the seller to speak where silence does not constitute deception. Silence may, however, constitute fraud and deception where the seller has notice that the buyer is acting upon a mistaken belief as to a material fact. It depends upon the circumstances of each case whether failure to disclose is consistent with honest dealing. Where failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative misrepresentation is tenuous. Both are fraudulent."

An instruction was given, however, which we think was error requiring reversal of the judgment. It reads as follows:

"You are instructed that the plaintiff was charged with notice of all matters appearing of record and affecting the title to the property in controversy as well as the rights of the parties in possession of same other than the defendants."

As has been said, Walker had given Yahraus a lease on the property, which was of record, but there is no controversy about the title to the lot. This lease makes no reference to the personal property which Yahraus allowed Walker to use. There was a written agreement between Yahraus and Walker as to the use of this property which was offered in evidence, but which had not been recorded, and the instruction charges the jury with

notice of the rights of the parties in possession of same other than the defendants, and the specific objection was made that there was no testimony that anyone other than Walker was in possession of the property. The instruction was confusing and may well have been misleading, and we think it was error to give it.

When the suit was brought a writ of garnishment issued which tied up $2,500 of money Walker had on deposit in a bank. When the verdict was returned in favor of the defendant, the garnishment was discharged and without submitting the question of damages to the jury, the court rendered judgment in the sum of $100 as damages. While this was irregular and did not conform to the proper practice, we cannot say that it was erroneous, if a cause of action did not exist, as was found by the jury, for the reason that the money was impounded for eight months, and the interest thereon for the time it was impounded at six per cent. would be $100.

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

Mr. Justice MILLWEE not participating.

DEPRIEST *v.* PEIKERT.

4-8130 200 S. W. 2d 804

Opinion delivered April 7, 1947.

W. F. Reeves, for appellant.

Wm. T. Mills and *N. J. Henley,* for appellee.

ROBINS, J. Appellant leased a small tract on U. S. Highway 65, on the south side of Buffalo River, to appellees for a term of five years. The lease provided that "all improvements on the buildings, or lands" made by lessees "shall become a part of the realty and remain on the lands." Situated on the leased tract were three cabins and a large building used for a store and for preparing and serving food. On taking possession appellees rebuilt the kitchen and did considerable repair work on the buildings. They bought and installed a butane gas system which consisted of a tank buried five feet deep in the ground and metal pipes laid 18 inches underground leading therefrom. These pipes enter the buildings through holes bored in the walls. The water system installed by appellees consisted of a jet pump, operated by electric motor, with pressure tank, all set on a concrete slab and held by bolts imbedded in the slab. From the pressure tank water is conducted into the different buildings through pipes which are laid from 8 to 12 inches deep.

This suit was brought by appellant, lessor, about ten months after the lease was executed, to cancel the lease on the ground that its provisions had been breached by appellees in several particulars. After the filing of her complaint, appellant asked for and obtained a temporary restraining order to prevent appellees from removing the heating plant and the waterworks system. Appellees, though denying any breach of the lease, averred that they were willing for same to be canceled, but they joined issue on the question of their right to remove the gas and water systems. On trial the lower court canceled the lease, but decreed that appellees might remove the water and gas

systems which it held were trade fixtures. This appeal followed.

Appellees testified that it was necessary, in order to operate the tourist camp, to install water and gas systems, and that they did not intend for same to become part of the realty.

These parties reduced their agreement to writing, and, if the terms of the written contract cover the matter in dispute, same must control the controversy. *Bache, Receiver,* v. *Central Coal & Coke Company,* 127 Ark. 397, 192 S. W. 225, Ann. Cas. 1918E, 198.

Here, appellant and appellees agreed in the lease that all "improvements" on buildings or land, made by appellees, should "become a part of the realty and remain on the lands at the end of the lease."

The exact question posed by this appeal—whether property of the kind in dispute here may be classified as improvement to land or buildings—has not been heretofore decided by this court, though somewhat similar questions have frequently been before us. Some of these cases are cited below.

In *Greenwood* v. *Maddox,* 27 Ark. 648, a portable engine placed on land for motive power for a gin was held not to be an "improvement" within the meaning of a constitutional provision for homestead exemptions.

We held in *O'Neill* v. *Lyric Amusement Company,* 119 Ark. 454, 178 S. W. 406, that electric lighting wires and fixtures in a theater constituted an "improvement" within the meaning of the mechanic's lien law.

In the case of *Waldo Fertilizer Works* v. *Dickens,* 206 Ark. 747, 177 S. W. 2d 398, we were asked to decide whether a wagon scales apparatus, consisting of a platform mounted over a concrete lined pit, with a rod running into a house through a small hole in the floor, became a part of the realty so as to pass to the purchaser of the realty as against one who held an unrecorded agreement from the owner authorizing removal of the

scales. We held in that case that the purchaser of the realty took title also to the scales apparatus; and we called attention to the fact that removal of the scales would leave an unsightly and potentially dangerous hole on the premises, and that removal of the rod would leave a hole in the floor of the house. In that case we cited our decision in *Dent* v. *Bowers,* 166 Ark. 418, 265 S. W. 636, where we held that the purchaser of a "filling station" took title to the underground gasoline tank and pump, as against one who had previously obtained from the owner a bill of sale for these articles.

Questions similar to those involved here were considered by us in the case of *Evans* v. *Argenta Building & Loan Association,* 180 Ark. 654, 22 S. W. 2d 377. In that case, a plumbing company sought to remove water fixtures placed by it in a mortgaged building under a contract, with one in possession of the property under contract to purchase, by which it was agreed that these fixtures until they were paid for should remain the property of the plumbing company. The purchase money of these fixtures not having been paid and suit having been brought by the loan company to foreclose a mortgage on the building, the plumbing company intervened and asked leave to remove the fixtures. Dealing with this phase of the matter, we said: "Here the testimony shows that, under the conditional sale whereby the title was reserved, the company installed certain lines of pipe by which pure water might be furnished and sewerage connections afforded, and there was also put in place in the bathroom a 'closet combination, consisting of bowl, tank and seat.' The testimony is to the effect that these articles were attached to the floor and walls with screws, and might be removed without material damage to the building or the premises; but the testimony also shows that to remove the pipe would leave holes in the floor and walls of the building, and would require the excavation of the premises adjacent to the house, as the pipe had been placed in the ground. This latter work would disfigure the building and damage it, as well as the ground adjacent to it, and the right to remove the pipe does not exist. We

perceive no reason, however, why the closet combination, consisting of the bowl, tank and seat, may not be removed, as their removal will cause no material damage to the property."

In the case at bar the water pipes and gas pipes, as well as the gas tank, have been laid underground, and the pipes have been conducted into the buildings through small holes. To take up the pipes and gas tank would necessitate digging up of soil covering them. The removal of the pipes from the buildings would inevitably inflict some damage on these structures.

We conclude that, as to the water and gas distribution lines and the gas tank, these articles were so affixed to the real estate as to become "improvements" within the meaning of this word as used in the lease; and that appellees therefore do not have the right to remove same.

A different situation as to the water pump, motor and water tank is shown. This machinery is fastened by bolts to a concrete foundation and may be removed readily and without any damage to the realty. It did not under the circumstances shown become an improvement to a building or to the land as the terms were used in the contract.

It follows that the decree of the lower court is reversed and the cause remanded with directions to enjoin appellees from removing any water and gas pipes and also the gas tank, but appellees to be given permission, within a reasonable time, to remove the water pump, motor and water tank; and each side to pay one-half of the costs of both courts.

MILLWEE, J., not participating.

4-8148 200 S. W. 2d 799

Opinion delivered April 7, 1947.

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

Frank C. Douglas, for appellee.

HOLT, J. June 16, 1930, appellee, O. W. Knight, secured a judgment against appellant, Hattie Fisher Riales, for $232.72, in a justice court in Osceola, Arkansas. An execution was issued and a *nulla bona* return made. September 6th thereafter, a transcript of this judgment was filed in the office of the circuit clerk in Osceola. December 8, 1937, a *scire facias* writ was issued, and by proper proceedings, judgment of revivor secured and entered January 4, 1938, at a regular term of the circuit court at Osceola. May 8, 1938, proper transcript of this revived judgment was filed with the circuit clerk at Blytheville, Arkansas (Mississippi county is divided into two districts, Osceola and Chickasawba, Blytheville being the situs for the courts in the latter district).

February 11, 1939, Mrs. Riales purchased "Lots 1 and 2, Block 4, Davis Third Addition to the city of Blytheville, Arkansas." Each of these lots, adjoining, measured 50 x 150 feet.

December 12, 1944, Mrs. Riales conveyed to her son, appellant, Hartwell Edwin Fisher, for "$1.00 and other good and valuable consideration," the property. The deed of conveyance contained the following provision immediately following the description of the property: "I hereby expressly reserve the right to manage, control and receive all the uses and benefit of the aforesaid property during my lifetime."

April 2, 1945, appellee, Knight, caused execution to issue out of the circuit court at Blytheville and in due course, the sheriff, appellee, Hale Jackson, levied upon the following described property: "The south forty-one (41) feet of lots 1 and 2, block four (4), Davis Third Addition to the City of Blytheville, Arkansas," and advertised its sale for June 15, 1945.

On June 12th, appellants filed suit to enjoin the sale, and as grounds, alleged that Mrs. Riales had sold the property to her son, reserving to herself, a life estate, that the property was her homestead and not subject to execution. A temporary injunction was obtained.

Thereafter, on June 18, 1945, Knight caused a second execution to issue from the Osceola District and the property was advertised for sale under the same description as in the first execution, *supra.*

July 30th, appellants filed an amendment to their complaint in which they alleged that the lots in question did not belong to Mrs. Riales but to her son and again sought injunctive relief from the execution and sale. Another temporary injunction was granted.

Thereafter, on September 1st, appellees answered with a general denial and filed a cross complaint in which they sought to cancel the deed from Mrs. Riales to her son as a fraud upon appellant's creditors.

Upon a hearing on August 20, 1945, the trial court found that the deed from Hattie Fisher Riales to her son was a valid conveyance, not fraudulent, and dismissed Knight's cross complaint for want of equity. There was a further finding that Mrs. Riales had reserved a life estate in the property and that said life estate was subject to sale under execution, dismissed appellant's complaint for want of equity and further "that the defendants (appellees) are directed to proceed with the sale under execution as if no restraining orders had been issued herein."

From the decree comes this appeal.

We think the trial court correctly held that the deed from Mrs. Riales to her son dated December 12, 1944, was valid and without fraud. There was no showing that Mrs. Riales was insolvent at the time she executed this deed and appellees' revived judgment in 1938 did not constitute a lien on these lots at the time the deed was executed, more than six years thereafter.

Appellants argue that the property in question constituted the homestead of Mrs. Riales and therefore was not subject to sale under execution to satisfy her debt to appellee, Knight.

It was stipulated at the trial that the two lots exceeded in area one quarter of an acre. The record reflects that there is a large residence on "the north end of these two lots," which has been converted into two apartments and Mrs. Riales and her son occupy one and rent the other for $20 per month. There are also two other houses on the property, each of which Mrs. Riales rented for $20 per month.

On October 5, 1939, Mrs. Riales borrowed $2,500 from the Georgia State Savings Association, and out of this money it appears the two rent houses were constructed on the property and improvements made. A mortgage on the property was given to the Association as security for the loan, which was to be repaid in 96 monthly install-

ments of $34.37 each, and on the date of trial approximately $1,000 remained unpaid.

While Mrs. Riales put in issue her homestead, we think the court's finding that she failed to establish the right to claim the property as exempt on this ground was not against the preponderance of the testimony. The burden was upon her and she failed to meet it. *Pace* v. *Robbins,* 67 Ark. 232, 57 S. W. 213.

Finally, appellants say: "It is our contention that the reservation in the deed does not constitute a life estate" in Mrs. Riales. They concede, however, that "a life estate is a free hold estate in the land; and, of course, is subject to sale under execution for the debts of a life tenant."

We cannot agree that a life estate was not reserved to Mrs. Riales in the deed to her son, *supra.* The language used by Mrs. Riales, we think, clearly and expressly reserved to her during her life, "the right to manage, control and receive all the uses and benefit of the aforesaid property." This expressed reservation covered and described the entire property and reserved to Mrs. Riales individually for her own use, gratification and benefit, an estate for life.

We cannot agree with appellants that the present case is controlled by *Drennen Adx.* v. *Ross et al.,* 21 Ark. 375. That case is clearly distinguishable on the facts. The language there used was held not sufficient to reserve a life estate, but there is the implication that had language similar, in effect, to that used in the present case been employed, a life estate would have been reserved—in that case.

Finding no error, the decree is affirmed.

MAGNOLIA PETROLEUM COMPANY *v.* DUDNEY.

4-8144 200 S. W. 2d 793

Opinion delivered April 7, 1947.

Arnold & Arnold, Armistead, Rector & Armistead, T. B. Vance and *Philip G. Alston,* for appellant.

Shaver, Stewart & Jones, for appellee.

SMITH, J. W. C. Dudney filed a complaint containing the following allegations. Plaintiff is engaged in selling and distributing gasoline and oil products in the Texarkana, Arkansas, territory. The Magnolia Petroleum Company, a defendant, referred to throughout the record and in the briefs as Magnolia, which designation we adopt, is engaged in manufacturing, selling and distributing gasoline and oil products in the Texarkana and other areas. The city of Texarkana was the other defendant. The court at one time dismissed the case as to the city, but by appropriate pleadings and with the consent of the court, the city was again made a party defendant. Before submission one Howard E. Webb became a party on his own intervention, and he became a central figure in the lawsuit.

It was alleged and admitted that on August 25, 1936, the city which owned an airport known as the Texarkana Municipal Airport entered into a written lease contract with Howard E. Webb, leasing its buildings, hangar and equipment to Webb for a period of twenty years. This contract gave Webb the exclusive right to sell gasoline and motor oils at the airport. On May 26, 1938, Webb, with the consent of the city, assigned this contract to plaintiff Dudney. This assignment was executed as security for a debt due Dudney by Webb. This assignment contains the recital "that in further consideration of the financial assistance rendered to me by the said W. C. Dudney, he shall have the exclusive right to market and furnish to me gasoline, and other oil and gasoline products necessary for the operation of the Texarkana Municipal Airport for and during the period and life of said original lease contract, provided further that such gasoline and other materials or products shall be on a competitive basis."

To obtain a loan, which the city desired, it was necessary to cancel this lease and this was done with the consent of all parties concerned, and a second lease was given to Webb by the city similar to the first, but which required Webb to pay the city a certain per cent. of the

proceeds of the sale of all gasoline and oil sold at the airport.

This second lease was likewise assigned by Webb to Dudney by way of security for a debt due Dudney by Webb, and like the first assignment gave to Dudney "the exclusive right to market and furnish to me gasoline and other oil and gas products necessary for the operation of the Texarkana Municipal Airport, and necessary for the carrying out of my lease for and during the period and life of said original lease," with the same provision as to a competitive price basis.

Dudney owned no oil or gasoline and had no equipment for its distribution. He was the agent of the Gulf Refining Company, and as such negotiated sale contracts between Webb and the Gulf Company, whereby the Gulf Company undertook to furnish Webb oil and gasoline as required. Webb enlisted in the Army and during his absence his wife operated the airport under a power of attorney, which he gave her. She testified that the Gulf Company did not furnish the gasoline and oil as required and that she entered into a contract with Magnolia to do so, and this suit was brought to enjoin that operation, and from the decree awarding that relief is this appeal.

A great many interesting questions are discussed in the excellent briefs of opposing counsel, but we do not find it necessary to discuss all of them.

The suit while ostensibly one to enjoin the breach of a contract and to prevent interference with what Dudney calls his franchise, it is nevertheless in effect a suit for specific performance of a contract. This is true because if Webb cannot buy from Magnolia, he cannot buy from any other company, and must of necessity buy from Dudney as the agent of the Gulf Company if the airport is operated.

In the first place Dudney had no franchise from the city giving him exclusive right to sell oil and gasoline at the airport. Even if the city had the right to grant such a franchise it was not granted to Dudney. He had no contract whatever with the city, but insists that Webb

had a contract which was assigned to him by Webb, with the consent of the city, and that he thus acquired all the rights which Webb possessed.

Now the lease from the city to Webb "does hereby grant to the lessee the exclusive right to sell on said leased premises merchandise, including gasoline and oil, to furnish food, refreshments and lodging. . . ." It is upon the recital contained in the assignment of the lease that Dudney predicates his right to the relief prayed for and granted to him, but the record does not show that the consent of the city was given to these recitals. In fact, the contrary is shown. The record of the meeting of the city council shows that the city consented only to the assignment of the lease as security for a debt due Dudney and there is nothing in the record to indicate that the city was aware of or had consented to the recitals contained in the assignment of the lease giving Dudney the exclusive right to furnish oil and gasoline to Webb.

The case of *City of Paragould* v. *Arkansas Utilities Co.*, reported in 70 Fed. 2d 530, originated in this state and was decided by the Circuit Court of Appeals, Eighth Circuit. It was there held that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which government or public has an interest, and the record here does not support the finding that the city did anything more than consent to the assignment of the lease given as security for a debt which had been paid before the suit was filed. Petition for certiorari in the Paragould case was denied by the Supreme Court of the United States, 293 U. S. 586, 55 S. Ct. 101, 79 L. Ed. 682.

Mrs. Webb testified that she found it necessary to make a contract with Magnolia to secure the oil and gasoline required and we think the testimony shows that she was justified in doing so. She testified there were frequent delays in delivering the oil and gasoline required, varying from one to six hours, and that these delays in servicing the planes using the airport would be reported, that the airport serviced an average of fifty planes a day for the Ferry Command; that this delay caused a loss

of this business except in emergency cases, and that those delays continued during all the time she operated the air port, and she felt constrained to make the contract with Magnolia, the performance of which is enjoined by the decree from which is this appeal. She testified also that she had been charged in excess of the competitive prices for gasoline, but that this excess was refunded after making the contract with Magnolia.

If the agreement recited in the assignment constituted a contract, the specific performance of which would ordinarily be enforced, which we do not decide, the breach thereof by Dudney would defeat his right to ask its specific performance. Moreover, the contract lacks the mutuality which the law requires to justify a decree for specific performance. The recitals of the assignment obligate Webb to buy from Dudney, but do not require Dudney to sell. He had no oil or gasoline of his own for sale, and could only have furnished the oil and gasoline through the company for which he was an agent, and which was not a party to this suit. The assignment gave Dudney the right or option to furnish oil and gasoline but did not require him to do so. We held in the case of *Duclos* v. *Turner,* 204 Ark. 1000, 166 S. W. 2d 251, that a contract which leaves it entirely optional with one of the parties as to whether he will perform is not binding upon the other.

It is conceded that the debt due from Webb to Dudney which a chattel mortgage and the assignment of the lease were given to secure was paid in full before the institution of this suit, and there appears to have been no other valid consideration for the recital contained in the assignment. This and other reasons are argued for the reversal of the decree, but without passing upon them, we think the decree must be reversed for the reasons herein stated, and it is so ordered.

The decree is, therefore, reversed and the cause is dismissed.

Mr. Justice McFaddin concurs.

YARRINGTON *v.* JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

4-8139 201 S. W. 2d 763

Opinion delivered April 14, 1947.

Rehearing denied May 26, 1947.

[redacted]

Lee Seamster and *Buzbee, Harrison & Wright,* for appellant.

House, Moses & Holmes and *W. Horace Jewell,* for appellee.

GRIFFIN SMITH, Chief Justice. The appeal by Yarrington is from a decree dismissing his complaint against John Hancock Mutual Life Insurance Company and Robert M. Williams, the plaintiff's allegations being that Williams as general agent for the Insurance Company contracted with him July 12, 1943, for the procurement of applications for retirement participating annuity policies covering members of the Extension Service, University of Arkansas College of Agriculture.

The insurance was initially predicated upon a letter from T. C. Carlson, business manager for the University, in which he stated that the Board of Trustees had author-

ized a special committee to enter into an agreement with the John Hancock Company, and that the committee on June 9th "voted to approve and adopt the plan submitted by your Company. . . . Under authority of this action of the committee, you may proceed."

This plan as originally drawn provided that contributions in favor of employees of the Extension Service would be made by the University to the extent of five percent of the salary of employees who were eligible to participate, but not in excess of an annual salary of $1,500—such contribution to be from Federal funds administered by the University.

In July 1943 the insurance plan was embodied in a pamphlet termed the Red Book; and in July, 1945, the Blue Book, containing modifications and liberalization of the undertaking, appeared. The Red Book was compiled through joint efforts of the Insurance Company, the University, R. M. Williams, and Yarrington. It carried a facsimile print of President Harding's letter of July 7, 1943, addressed to members of the staff of the Agricultural Extension Service. It is printed in the footnote.[1]

The Red Book was mailed to Extension Service employees. At approximately the same time Williams sent to the listed eligible employees blank application forms to obtain the employee's authorization that the University might deduct from monthly salaries the amount so made available to match the Federal contribution. These applications were mailed by the employees directly to the Extension Service. They were in turn forwarded to Wil-

[1] President Harding's letter: "Following a practice adopted by many educational institutions, the University of Arkansas inaugurated several years ago a plan of retirement benefits for members of its faculties and administrative officers. This annuity plan has now been extended to cover the members of the staff of the Agricultural Extension Service. Under the University plan the policyholder makes a monthly payment and the University matches this payment up to a fixed maximum from any funds that have been appropriated for that purpose. It is to be hoped that the protection of this annuity policy may be received in the same spirit of appreciation as it is given and that the spirit of mutual helpfulness may be of great benefit to the University."

liams, who inserted Yarrington's name as the procuring agent or broker. There was no "master" or group policy —only the individual contracts, with the Extension Service named as employer.

Under Yarrington's contract with appellees, which "tied in" with the Red Book, he was to receive as a commission 20% of the first year's premium, and thereafter for nine years 3% per year.

Anticipating that at some time the State would appropriate funds for contributions similar to those made by the Federal government, Article 14, Sec's 3 and 4, provided: "Since State appropriated funds cannot be used as employer contributions, . . . amendment to [the general provisions of Article 14] will be made to remove the $1,500 limitation if and when authority is provided for the use of State appropriated funds as employer contributions."

Yarrington was paid all he claims was due him for policies issued in 1943 and 1944, and neither Williams nor the Company contends that he will not be entitled to commissions on premiums paid during the full period—that is, three percent annually for nine years.

In 1945 the General Assembly, by Act 83, approved February 21, authorized use of State funds as contributions, to be matched by employees of the Extension Service, such contributions not to exceed five percent of the employee's salary. The $1,500 limitation was not included in the Act; whereupon the Blue Book was issued. Like the Red Book, it carried facsimile of President Harding's letter of July 1, with this statement: "A recent appropriation by the General Assembly makes it possible for members [of the staff of the Agricultural Extension Service] to participate [in the annuity insurance] no matter whether they are paid by State funds or by Federal funds. Under the University plan the policyholder makes a monthly payment and the University matches this payment."

Yarrington construed his contract with Williams and the Insurance Company to be that when State funds became available for contribution purposes, to be used in a manner similar to use of Federal funds, the general plan of insurance was merely enlarged, and that he is entitled to commissions on the business originating subsequent to the Blue Book, and upon increased or enlarged policies in effect July 1, 1945, where the increase came about by reason of Act 83, and by removal of the $1,500 limitation.

While conceding that he did not contribute to preparation of the Blue Book, Yarrington testified that he collaborated with the Extension Service faculty in getting information regarding annuity contracts. The Extension Service was at that time headed by Dean Dan T. Gray, who said to appellant: "Yarrington, we are interested in a retirement annuity for Extension Service employees. They ought to be interested in the best contract that can be written, and I wish you would see what you can do."

Yarrington was agent at Fayetteville for Guardian Life Insurance Company, but it did not write annuities. This conversation occurred early in the fall or late summer of 1940. Thereupon Yarrington took the matter up with Bob Williams, and Williams in turn referred the subject to John Hancock Company. E. H. Thompson was head of the Extension Service at Little Rock. The information collected by Yarrington, Williams, and others who assisted, was sent to Thompson, but for some reason the policies could not be written at that time. Thompson was replaced by Aubrey Gates. In 1942 Yarrington wrote Gates, asking that the information he had supplied Thompson be returned for further consideration. In this connection Yarrington had direct correspondence with the Hancock Company. The Company responded July 14, 1942, stating that it regretted its inability to accept the business at that time because underwriting restrictions would not enable "the case to qualify." The letter closed with this statement: ". . . Our only hope would be that the employer do not take action until after

we have had an opportunity to modify our present underwriting restrictions. It is conceivable this may be done in the fall, but I am dubious that such modification will take place before then.'' The modification mentioned in this later was made, and the Company accepted the business.

During the session of the 1945 General Assembly, Williams and Yarrington worked together, and with the Extension Service, to procure State appropriations. Williams and Yarrington, according to appellant's testimony, considered that if an appropriation should be made the new business would be a continuation of Red Book plans. February 2, 1945, Williams wrote Yarrington as follows: ''I have your letter of the 31st, and will certainly do the necessary in connection with the Milum Bill when it comes up in the House. You needn't worry about that business going elsewhere, as we sewed it up when we entered into contract with the University, as you know. Keep the eagle eye on the situation; and if anything happens, we will get together.''

March 1, 1945, Williams wrote W. H. Chatfield, manager of the Salary Savings and Pension Trust Division of the John Hancock Company (Boston). He expressed delight that the Legislature had made statutory provision for state contributions, and added: ''We are at work with the local office toward assembling additional data, with a view of making these additions as of July 1, 1945.'' He then stated that much to his surprise Sam Watkins, agent of another insurance company who appeared to speak with authority, had told him (Williams) that the University desired that commissions, formerly received by Yarrington, should go to Watkins—who, it appears, was threatening to have the business taken from John Hancock and placed with another company unless the commission arrangements should be changed. Williams stated that he was under the impression that ''we'' had a contract with the University covering the business—and, inferentially, the business was a continuation of the old. He asked that photostatic copy of the contract be

sent him. There was this significant statement: "My feeling in the matter is that we are duty bound to the original agent, C. C. Yarrington, and I do not see how we could go around him. We were named the insurer to begin with; and, off-hand, I do not see how the Board of Trustees could give the business to anyone else but the John Hancock unless they construe it in the light of an entirely new contract."

March 5, 1945, Williams wrote Yarrington, stating that he had talked with one of the University Trustees, "who feels as we do, that the contract was awarded the John Hancock Company for the retirement annuity plan to cover the employees of the Extension Service. It was not awarded just on the basis of taking care of the Federal fund angle, but was so set up to take care of that feature immediately, and hook in with the State angle when the Legislature made the necessary appropriation." There was reference to pressure that might be exerted, with identification of those whom he thought could be of service. He was convinced that these parties, "once they saw the light, will have a change of heart." The concluding sentence was: "Just stay in there and pitch until the very last minute; then, if we see there is no other way in the world but to work out a deal [with Watkins], you and he can get together and try to come to some satisfactory conclusion."

Williams wrote another letter, in which he referred to Act 83, and in part said: "There seems to be considerable misinformation about the status of an existing contract between our Company and the University of Arkansas. . . . Back in 1942 the John Hancock Company was awarded the retirement annuity plan [covering Extension Service employees], and in the Legislature of 1943 we attempted to get the same bill passed which has just been enacted. The Board of Trustees gave our Company the specifications for the plan, and after some six months of negotiations the details were satisfactorily worked out. One of the main details was the manner in which additions to the plan would be handled when and if the State Legislature passed an Act to take care [of

contributions]. Under these pension plans the specifications are rather complicated and it would not only be impractical, but almost impossible, for another Company to write a plan to take care of these additions which would dovetail in with the present plan." There was much more in the letter emphasizing Williams' belief that the contract "we had entered into" was valid, that the business was created in good faith, and in effect that it was generally understood that if the State acted, then the newly available funds would be in the nature of a supplement to the business then resting upon Federal money.

Other letters and conversations—not denied by Williams—conclusively establish the proposition that he dealt with Yarrington on the basis of a general agent authorized by his Company to hold out the inducement that a valid contract had been entered into by himself and the Company upon the one hand, and the University Board of Trustees on the other, to write the policies. Williams' letter to the home office stresses this belief; and certainly Williams caused Yarrington to think that valid contractual relationships were a fact. Acting upon these assurances, Yarrington became a motivating agency for procurement of the policies, beginning in 1943 and continuing through June 30, 1945.

Williams did not, in his testimony, seek to conceal his belief that Yarrington was entitled to the business. He testified very frankly regarding conversations, gave Yarrington credit for working up the plan, and explained that the University contract "was not awarded just on the basis of taking care of the Federal fund angle"; but, as he insistently declared, "it was set up to take care of the [Federal feature *immediately*], and to hook in with the State [appropriation] when the Legislature had acted."

In writing the home office Williams told Chatfield they were "duty bound to the original agent, Yarrington, and I do not see how we could go around him." Williams talked with one of the University Trustees, who felt the same way. And he said to Yarrington, "You needn't

worry about the business going elsewhere. We sewed it up when we entered into contract with the University."

It is argued that, when the extended or enlarged service matured, the University designated the agent who should receive commissions; hence appellees were powerless to interfere. But, as a matter of fact, the University Board did not name Watkins. There were letters and conferences and conversations between Williams, individual Trustees, and others who were interested because of personal relationships; but the University did not, by resolution or other official act, bestow any of the business upon Watkins. Williams himself made the designation—and he did this at a time when his best judgment was that Yarrington was entitled to the commissions. Finally he abandoned Yarrington when attorneys told him that use of the State fund and elimination of the $1,500 limitation should be construed as a new undertaking. When asked regarding indirect instructions he thought he had received to "cut" Watkins in as broker —that is, when asked whether the directions were official or unofficial, Williams replied:

"No, [they were not official]. But when you find out what's going on, it's very helpful. When you know what's going on, and somebody who is sitting there is helping out, then you would feel more at liberty to say it had come by word of mouth, rather than by anybody coming out and telling it to you. I thought it was being made pretty plain:—*they* were told, and they told me." And again: "You, instead of the Board of Trustees, designated Mr. Watkins, didn't you?" Answer: "Oh, if you want to get it down to a needle-point, yes!"

In their brief appellees construe the right they contend for by saying it became evident the John Hancock Company would not retain the business unless Watkins should be permitted to receive the commissions. Therefore, in order to hold a profitable contract (and it was a contract Williams says *was not new),*—in order to retain this business Williams acquiesced in the unofficial representations he was persuaded to believe had come from an authoritative source; and in doing so he severed his

relationship with Yarrington as to policies issued subsequent to June 30, 1945, and as to increases in outstanding policies; and on May 26th he consummated arrangements with Watkins. This he could do insofar as Watkins was concerned, and Yarrington may look only to appellees for compensation.

Appellees say in their brief that "The sole interest of the University in the policies was its agreement to contribute from funds provided by the Federal government"; for, as was said in a preceding sentence, "No contract was made with the University of Arkansas. Each employee made a separate application to the Company for an annuity, in an amount determined by him, and by him alone." Yet, under the same contract, arrangement, understanding, or set-up, the 1945 applications, according to appellees, "were mailed to the employees by Watkins, and he signed his name to the application as procuring agent. . . . He was the broker—not only by virtue of appointment by State officials and the Board of Trustees of the University of Arkansas, but he was also the broker who in fact solicited and procured the applications for each annuity in 1945." Finally it was said that if Yarrington was prevented from soliciting applications, "It was by the Board of Trustees, and not by Williams."

It must be remembered that Williams conceded that he, and not the Board of Trustees, appointed Watkins. It is true, of course, that Williams says the pressure was too great to be resisted; but, in failing to meet the issue at the risk of losing his own business, he assumed whatever liability attached to this choice of action, even though the choice was not one he relished.

The real root contract was made when Carlson wrote Williams in 1943 that the Hancock Company had been selected, that its plan had been approved, and that "Under authority of [this selection by the special committee] you may proceed." Williams and the Company did proceed, and they contracted with Yarrington. The University Board of Trustees (June 11, 1945) passed a resolution providing for expansion of the annuity plan,

and in the resolution said: "Be it resolved that the John Hancock Mutual Life Insurance Company of Boston *be continued* as the underwriting institution."

The contract between Williams and Yarrington (July 12, 1943) was indorsed by the John Hancock Company and signed, "J. H. Ward, Second Vice-President." Williams subscribed as general agent. A contractual provision was that the agreement might be terminated upon thirty days written notice, "but such termination alone shall not impair the broker's right to receive [commissions] if any shall accrue on policies issued on applications procured prior to such termination." Notice of termination must be served personally, or sent by registered mail.

No such notice was given Yarrington. His suit was filed November 20, 1945. He prayed for an accounting, payment of all sums due, and for a decree of specific performance.

The John Hancock Company demurred December 10, 1945, asserting that the complaint failed to affirmatively show a contract to which it was a party. The complaint was amended March 13, 1946, by alleging the joint liability of Williams and his Company. There was a motion to require the plaintiff to make his complaint more definite and certain; and there were other pleadings. Williams' answer was filed May 27, 1946. It contained a definite disclaimer of liability; and it was, we think, sufficient notice to Yarrington that he would no longer be dealt with as a broker in respect of the annuity contracts.

It is a general rule of construction, applicable to ambiguous contracts, that where the parties have acted in a definite way, and have by such conduct said, in effect, that a particular purpose was contemplated from the very beginning, then courts will give great weight to what the accepted meaning was. *Powell* v. *Baker Ice Machinery Co.*, 8 Fed. 2d 125; *Sternberg* v. *Drainage District No. 17 of Mississippi County, Ark.*, 44 Fed. 2d 560; *Kahn* v. *Metz*, 88 Ark. 363, 114 S. W. 911, and other similar deci-

sions. See "Contracts," West's Arkansas Digest, Fifth Volume, § 170.

It would be difficult to find a clearer case of construction by the parties than the one we are called upon to adjudicate in the appeal before us. The complete frankness of Mr. Williams leaves little to be supplied by inference. He and his Company contracted with Yarrington, and it was intended that when the State appropriation became effective the 1943 arrangement would continue and the supplemental business merged into it. The University's resolution of June 11, 1945, shows the influence of this contract:—"the John Hancock Company *shall be continued as the underwriting institution.*"

The decree is reversed with directions that an accounting be had, and that Yarrington have judgment for the commissions he is entitled to on business resulting until May 27, 1946, the date of Williams' answer.

FRENCH *v.* OLIVER, MAYOR.

4-8149 200 S. W. 2d 778

Opinion delivered April 7, 1947.

W. D. Davenport, for appellant.

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

ROBINS, J. On March 28, 1946, the mayor of the city of Searcy, Arkansas, found appellants guilty of misdemeanors and assessed fines against them. They promptly filed affidavits and bonds for appeals. The appeals not having been lodged in the circuit court, appellants, on October 21, 1946, filed in that court a petition for mandamus against appellee, as mayor, to require him to file the appeals. In the petition, the essential recitals of which are conceded, it is set forth that from time to time unavailing demands for filing of the appeals were made by appellants upon the mayor.

Under the provisions of Act 323 of 1939 it is made the duty of one appealing from an inferior court, such as that of mayor, to file the transcript in the office of the clerk of the circuit court within thirty days from the rendition of the judgment appealed from. We construed this Act in these cases: *Lytle* v. *Hill,* 205 Ark. 789, 170 S. W. 2d 684; *Chavis* v. *Pridgeon,* 207 Ark. 281, 180 S. W. 2d 320.

In both of these cases we held that it is mandatory on the person taking the appeal to see that the transcript is lodged with the clerk of the circuit court within the thirty day period.

It is argued that the allegations in the petition filed below by appellants were sufficient to show fraudulent conduct on the part of the mayor; but we do not find them so. Therefore it is unnecessary for us to discuss the effect of a showing of fraud on the part of a magistrate in a matter of this kind.

The law plainly imposed on appellants the duty of filing the appeals within thirty days after their conviction; and, if they were unable to obtain the transcript from the mayor within that time, they should have, before the lapse of the thirty day period, applied to the circuit court for a rule on the mayor to require him to deliver the transcript to appellants for filing.

The petition of appellants not having been filed until more than thirty days after the date of the judgment against them did not entitle appellants to the relief prayed, even if all its allegations are true.

The judgment of the lower court is accordingly affirmed.

PURCELL *v.* VINCENT.

4-8160 200 S. W. 2d 970

Opinion delivered April 14, 1947.

Verlin E. Upton, for appellant.

Arthur Sneed, for appellee.

ROBINS, J. On September 22, 1941, Willis H. Whitaker borrowed from Miss Lottie Earl $500, and executed to her his promissory note therefor, due one year after date, bearing interest at the rate of ten per cent. per

annum. In order to secure this indebtedness Whitaker on the same day signed and acknowledged a real estate mortgage conveying to Miss Earl certain real estate in Rector, Arkansas. This mortgage was filed for record on September 26, 1941, and was duly recorded. On the day the note was executed Miss Earl endorsed and transferred it to appellee, Miss Emeline Vincent. Miss Earl died on August 9, 1942.

On February 23, 1942, Whitaker sold and by warranty deed conveyed to appellants, J. L. Purcell and Maud O. Purcell, his wife, the real estate which he had previously mortgaged to Miss Earl.

Nothing having been paid on the said note, appellee instituted suit on September 5, 1945, in the lower court against Whitaker and appellants, asking for judgment for the amount of said note and interest and for foreclosure of the mortgage given to secure same.

Appellants answered, alleging that they were the owners, by virtue of their deed from Whitaker, of the land described in the mortgage; that they had tendered the amount of said note to Lottie Earl in her lifetime and to her executors after her death, which tenders were refused; that there had been no valid assignment of the mortgage; that appellee was not a *bona fide* holder of the note nor authorized to release the mortgage; that they had tendered appellee payment; and they tendered into court the sum of $550 in settlement of the entire indebtedness. They prayed for cancellation of the lien of the mortgage.

The lower court found that the note and the mortgage sued on had been duly transferred by endorsement and delivery to appellee, who was the owner and holder thereof; that the conveyance from Whitaker to appellants was subject to the mortgage given by Whitaker to Miss Earl; that no payment had been made on said note and that $802.81 was due thereon. The decree was that the sum paid into court by appellants be applied on the indebtedness, leaving $252.81 due thereon, for which sum foreclosure of the mortgaged premises was ordered.

For reversal of this decree it is argued by appellants: (1) That "cancellation of the mortgage was a condition precedent to ordering and directing payment of the money." (2) That appellee, by assignment of the note, did not become assignee of the mortgage. (3) That appellee is estopped from foreclosing the mortgage because of "misrepresentations, statements and declarations, and because she has accepted . . . the money."

I.

It was not necessary for the court to require a cancellation of the mortgage before payment of the debt secured thereby was ordered; indeed, it would not have been proper for the court to have so decreed. The mortgage and lien thereof were merged into the foreclosure decree and satisfaction of this decree would automatically work a release and satisfaction of the mortgage. Appellee was the holder and assignee for value of the note, and payment to her at any time after maturity would have extinguished the debt. Section 10209, Pope's Digest.

But, if, prior to the filing of the instant suit, appellants were in doubt as to the person to whom payment of the debt should have been made they had an adequate remedy. At any time after maturity of the note they might have brought bill of interpleader, tendering into court the amount due on the note, making defendants therein appellee and Miss Earl, or, after her death, her executors, and asking that the court award the money tendered to the party entitled to receive it and that the mortgage be canceled in appropriate manner. They did not see fit to exercise this remedy, and, when the instant suit was filed, they did not tender the full amount due.

II.

There is no foundation for the contention that by transfer of the note to her appellee did not obtain assignment of the mortgage. We have often held that an assignment of a promissory note carries with it a transfer to the assignee of all security to the note held by the assignor. *Fullerton* v. *Storthz,* 182 Ark. 751, 33 S. W. 2d 714; *Rock-*

ford Trust Company v. *Purtell,* 183 Ark. 918, 39 S. W. 2d 733; *Lehman* v. *First National Bank in St. Louis,* 189 Ark. 604, 74 S. W. 2d 773.

III.

No representations, statements or declarations by appellee tending to mislead appellants were shown by the testimony. It appears from the record that after the rendition of the decree the attorney for appellee collected from the clerk the sum of $550 which had been paid into the registry of the court. This was done in accordance with the provisions of the decree, and receipt of this sum by appellee did not in any way bar collection of the remainder due to appellee under the decree.

No error appearing, the decree of the lower court is affirmed.

CASSELL *v.* CASSELL.

4-8145 200 S. W. 2d 965

Opinion delivered April 14, 1947.

N. J. Henley, for appellant.

William T. Mills, Jr., and *William T. Mills,* for appellee.

McHaney, Justice. This was an action for divorce brought by appellee against appellant on the ground of general indignities. A cross-complaint by appellant charged appellee with misconduct in keeping company with another man. Appellant was inducted into the armed forces of the United States in April, 1944, and was discharged in May, 1946, a goodly portion of his service being rendered overseas, in the E. T. O. They have a young son, about six years of age at the time of trial, whose custody is here involved. They had acquired a homestead in the city of Marshall, due to their joint efforts, title to which is in appellant. The possession and use of this homestead is also here involved, as also that of a 1940 Chevrolet car.

Due to an admitted act of condonation which occurred shortly before the trial in the lower court, the complaint and the cross-complaint were dismissed as being without equity, in so far as each sought a divorce from the other. The court found that appellee is the owner of the car and is entitled to its possession. Also that she is entitled to the temporary custody of the child, and the custody of the dwelling property, used and occupied as their homestead. A decree was entered in accordance with these findings, from which comes this appeal.

For a reversal of this decree appellant contends first that the court erred in granting appellee the possession of the homestead, and was without power to award her the car, the family bankroll and all the furniture in the home. We think the decree as to the homestead and its contents did not amount to an order of permanent distribution. It vested no title thereto in her. It gave her only "the custody of the dwelling property, used and occupied as their homestead." She and their child had been residing therein all the time appellant was away in the armed services, except such time as she spent with him at army camps where he was undergoing training before going overseas. We think the trial court had the jurisdiction to make the order here made. *Austin* v. *Austin,* 143 Ark. 222, 220 S. W. 46; *Sheppard* v. *Sheppard,* 181 Ark. 367, 26 S. W. 2d 88. As to the 1940 Chevrolet car awarded to appellee, the proof shows she bought the

car in her own name and received a bill of sale thereto, so we think the court correctly awarded the car to her as her own.

It is also argued that the court erred in giving appellee temporary custody of their infant son. We do not agree. Appellant is not in a very good position to argue appellee's unfitness to have the custody of their six-year-old child. Whether his charge of unfitness is real or fancied, the proof fails to show such depravity as would justify us in upsetting the finding of the trial court in this regard, even though appellant's act of condonation had not occurred. But such an act did occur, after he had filed his answer and cross-complaint.

We think it would serve no useful purpose to set out the evidence in this regard or to further publicize charges which have been condoned. We express the hope that the love of each for their little son and their evident attachment for each other may bring them back together in a reunited and happy home.

Affirmed.

CARVILLE *v.* SMITH.

4-8167 201 S. W. 2d 33

Opinion delivered April 14, 1947.

Adams & Willemin, for appellant.

Roy Penix, for appellee.

HOLT, J. Appellants compose the Board of Plumbing Examiners in the city of Jonesboro. Appellee, James A. Smith, was an applicant for "Certificate of Competency" to engage in the plumbing business in that city. The Arkansas General Assembly, in 1941, passed Act 321, to regulate the practice of plumbing in cities of the first and second class. Section 1 provided: "That § 9739 of Pope's Digest be amended as follows: 'Any persons now or hereafter engaged in or working at the business of plumbing in a city of the first or second class within the State of Arkansas having a system of sanitary sewerage, either as master plumber or journeyman plumber, or any person installing or placing any plumbing fixtures or materials, shall first receive a certificate of competency in accordance with the provisions of this Act,' " and § 4 is as follows:

"That § 9743 of Pope's Digest be amended to read as follows: Persons who have been engaged in the active practice and business of plumbing as a master plumber or journeyman plumber continuously *for a period of ten years next before making application for plumbers' license to practice or follow the business of plumbing in his respective city* shall not be required to stand an examination of his qualifications, provided that he make affidavit of his actual continuous practice as master plumber or journeyman plumber, as the case may be, for the time provided by this Act and that said affidavit shall be

attested by two supporting witnesses of the truth of same, the said Plumbers Board shall issue a certificate of competency to said applicant granting him the right and privilege to practice and follow the business of plumbing in said city, provided all persons, either master plumbers or journeyman plumbers not having had said ten years continuous practice and experience as a plumber, as herein provided by this Act shall be required to stand an examination given by the said Board testing *applicant as to his practical knowledge of plumbing, and house drainage.* Such examination must not be conducted in an arbitrary manner but given in such a manner only as to test the applicant's practical ability to perform the duties of a plumber, and after being satisfied as to each applicant's ability, shall thereupon issue a certificate of competency to such applicant authorizing him to work in the business of plumbing, and to place and install plumbing fixtures and materials. It shall be unlawful for any plumber to work in this capacity either as master plumber or journeyman plumber, and install plumbing fixtures or materials unless he shall first obtain a certificate of competency as provided by this Act. The Board shall keep and preserve a record of all plumbers examined by them and to whom a certificate has been issued."

In conformity with this act, the city council of Jonesboro enacted Ordinance No. 704, which, in effect, contains the same provisions as Act 321, *supra.*

July 11, 1946, appellee filed with the examining board an affidavit, attested by two witnesses, in which he sought a certificate of competency as provided by the act and ordinance. His affidavit recited that: "James A. Smith, being sworn, states upon oath, that for more than ten years prior to this day he has been engaged in the active business of plumbing as a Master Plumber continuously in the State of Arkansas, and, as such, is entitled to a Certificate of Competency as provided by Act 321 of the General Assembly of the State of Arkansas for the year 1941 and pursuant to the ordinances of the City of Jonesboro, Arkansas, he submits this affidavit to the City Clerk pursuant to said Act and the ordinances

of the City of Jonesboro, and tenders herewith a fee of $5 provided for by said Act and said ordinance. This July 1st, 1946. (Signed) James A. Smith."

The board refused to grant a certificate of competency on the affidavit, but offered to give appellee an examination in accordance with the provisions of the Act and ordinance. Appellee refused to take the examination, whereupon he was denied a certificate of competency.

Following this action of the board, appellee brought appropriate mandamus proceedings against the board to compel it to issue to him a "Certificate of Competency," in accordance with the provisions of the Act and ordinance.

Upon a hearing, the trial court sustained appellee's prayer and ordered the issuance of a certificate of competency to appellee.

From that order comes this appeal.

Appellant says that there are but two points in issue: "First, upon filing the affidavit, even though it were not true, was appellee entitled to Certificate of Competency as a matter of right? Second, has the Board acted in an arbitrary manner, even though appellee refused to accept examination offered?"

Appellee argues that it was the duty of the Board of Plumbing Examiners to issue to appellee, Smith, the certificate of competency upon his filing the attested affidavit, *supra,* and that the board was without discretion in the matter. He further contended: "The plumbing board acted in the most arbitrary manner, thoroughly contrary to the provisions of the plumbing act, when it informed Smith, at the time he appeared to take his examination, that the sole test of his ability to pass the examination as a plumber would be based upon his ability to wipe a lead joint in a smooth and efficient manner."

The constitutionality and legality of the Act and ordinance, *supra,* are not in question here.

The purpose of such legislation is discussed under the title, "Plumbers, Electricians, and other Artisans,"

in 41 Am. Jur., p. 661, and in § 7, pages 667 and 668, we find this language: "While there are some authorities to the contrary, it is now generally recognized to be a legitimate exercise of the police power in the interest of the public health, safety, and welfare for the state or a municipal subdivision acting under delegated powers from the state to require registration, examination, and licensing of those who install plumbing or who do electrical installation for others.

"Although the business and trade of a plumber may not require the same training and experience as some other pursuits in life, yet a certain degree of training is absolutely necessary to qualify one as a competent and skillful workman, and it is within the legislative police power to require examination or licensing, or both, of those engaging in the plumbing business as master plumbers, employers of plumbers, or journeymen plumbers, for the protection of the public from the incapacity or ignorance of such persons. Important plumbing work calls for plans and designs and requires skilled supervision, and it is some guaranty of the fulfillment of these requirements if the public authorities require that the plumber employed upon the particular work and his assistants in carrying out the work engaged upon be competently certified and therefore held out to be skilled and capable in that business. Prohibiting any but registered plumbers who have received a certificate of competency from a state board to engage in the business of plumbing does not violate any constitutional rights of individuals. . . . When the legislature provides a local examining board to pass upon the qualifications and fitness of persons to engage in the plumbing business, and provides the board with personnel capable of exercising intelligently the duties imposed, and outlines in a general way the scope of the examination, fixing penalties for those who undertake to engage in business without complying with the act, no objection can be taken on the ground that there is an unlawful delegation of legislative power. . . . If the board acts unfairly or oppressively, such conduct may call for a remedy against the persons who

compose the board, but it does not furnish ground for assailing the validity of the statute. . . .

"The purpose of such legislation is to protect the public from incapacity, ignorance, want of skill, or fraud in those who, to engage in the actual work of plumbing with safety to the health of the people, must have skill and technical knowledge not possessed by the public generally, and if those who—because they are plumbers at the time the law is enacted, or have been engaging in the business for several years—are incompetent to be safely trusted to do plumbing are exempted from the operations of the law, the purpose of the law will not be attained. There is no vested right in anyone to follow an occupation in a way which is inimical to the health of the people, when the legislative authority exercises its right to regulate the occupation. A license to a plumber does not create a vested right to continue to carry on that vocation if there is reasonable ground for requiring new proof of competency by re-examination."

On the question of the examination of plumbers as to their fitness and qualifications to ply their trade, the Supreme Court of Montana, in the case of *State* v. *Stark*, 42 Pac. 2d 890, 100 Mont. 365, said: "Some states have more explicit rules and regulations to govern the examination than Montana, but the function of carrying out such rules and regulations is invariably delegated to local authority and usually to the examining board. In Arkansas, Connecticut, Indiana, Iowa, Maine, and a number of other states, municipal authorities are vested with practically absolute authority to determine qualifications and fitness."

With these general principles in mind, we think the board was justified in refusing to issue to appellee a certificate of competency on the affidavit which he offered.

As we view it, by its very terms, or on its face, it did not comply with the requirements of the Act and ordinance. Each contains the specific provision that before appellee would be entitled to the certificate, with-

out first taking an examination, he must present an affidavit, attested by two witnesses, to the effect that he has "been engaged in the active practice and business of plumbing as a master plumber or journeyman plumber continuously for a period of ten years *next* before making application, etc."

Here, the application which appellee presented recites "that for more than ten years prior to this day he has been engaged in the active practice of plumbing, etc." He does not state that he had been so engaged for ten years *next* before making the application, in fact, it is undisputed that he had not been so engaged. It is also undisputed that he followed the plumbing trade at various places in Arkansas and other states from 1921 until 1932 or 1933. From 1933 until 1941, quoting from appellee's brief, "Smith spent most of his time as a keeper of a hunting lodge in the bottoms of Craighead county," and "from 1941, after the war boom came on and there began to be a great demand for plumbers, Smith began to work regularly at the plumbing trade at Fort Worth, Kansas City, Camp Chaffee, Waco, California Air Base, Goodyear Plant in Texas, Oak Ridge, Tennessee. He came back to Jonesboro in October, 1945, and went to work as a plumber."

"Q. Then, until you came home in October of 1945, you have never done any plumbing work in Jonesboro? A. No, not until I went to work for Reese and Micklish. Q. That was in the spring of 1946? A. Yes, sir. Q. Then you have not been engaged in the business of plumbing in the city of Jonesboro from the time you left up until this spring? A. No, sure haven't. Q. In the last ten years have you worked any at all in the state of Arkansas? A. Not much."

We think, therefore, that, as indicated, that the board was justified in refusing to grant the certificate of competency on the affidavit.

Did the board abuse the power conferred and act in an unreasonable, unfair and arbitrary manner in the examination of appellee? The Act and ordinance required that the board should offer appellee an examination

"testing applicant as to his practical knowledge of plumbing, and house drainage. Such examination must not be conducted in an arbitrary manner but given in such a manner only as to test the applicant's practical ability to perform the duties of a plumber, etc."

It appears that appellee offered himself for examination; that the first question asked was whether he knew how "to wipe a lead joint," and, quoting from appellee's testimony, "they just wanted me to wipe a lead joint and I told them I hadn't done that since 1929. I told them I was out of practice and they said, well, that would be all.

"Q. And the board of examiners did offer to give you an examination, did they not? A. They offered to give me a lead-wiping examination. Q. Did they not offer to give you an examination? A. Like I told you, they offered to give me an examination, but they wanted me to wipe a lead joint the first thing and I told them I wasn't in practice; that I would have to practice up a little. Q. You admit that you are not capable of wiping a lead joint, do you not? A. Lead is about a thing of the past. Q. Just answer my question, sir? A. I told them I wasn't in practice. Q. And you refused to attempt to complete the test? A. I refused to wipe a lead joint. Q. Then you refused to be examined? A. I refused on the lead joint. Q. You did refuse to do that? A. I refused to do the lead work. Q. Are you aware of the fact that the ordinance regarding the installation of sewage systems specifically requires that certain joints be wiped? A. No, I didn't know that."

Ordinance 574 of the city of Jonesboro, "An Ordinance to regulate the Business of Plumbing in the City of Jonesboro," requires in four separate sections, 9, 14, 24 and 29, the "wiping of lead joints."

Appellee testified that wiping lead joints was now obsolete.

We think, however, that the great preponderance of the testimony was just to the contrary. It appears from appellee's own admissions that with a little practice,

he could again wipe lead joints as he had been able to do and had done in the past, but he refused to go on with the examination because he was required to demonstrate to the satisfaction of the board that he could wipe a lead joint.

On the facts presented, we think that under the broad powers given to the board, appellee was offered that character of an examination which would fairly test his practical knowledge of "plumbing and house drainage."

We find no unreasonable and arbitrary action on the part of the board in connection with the offered examination in question. Having offered appellee an examination in accordance with the provisions of the Act and ordinance, as we construe them, and appellee having in effect refused to take the examination, we think the board properly refused to issue to appellee a certificate of competency.

We conclude, therefore, that the trial court erred in ordering the issuance of a writ of mandamus directing appellants "as the Board of Examiners of Plumbers" to issue to appellee a "Certificate of Competency," and accordingly the judgment is reversed, and the cause remanded with directions to proceed in a manner consistent with this opinion.

WHITE *v.* SIMS.

4-8169 201 S. W. 2d 21

Opinion delivered April 14, 1947.

W. M. Lee, for appellant.

J. J. Screeton, Cooper Thweatt and *John D. Thweatt,* for appellee.

ROBINS, J. Appellants, injured in a collision between the automobile in which they were riding and a truck owned by appellee, which was parked on the highway, brought separate suits against appellee, alleging that their injuries were caused by appellee's negligence and seeking recovery of damages therefor. The complaints were substantially the same and the suits were consolidated by the lower court.

On demurrers of appellee the lower court held that the complaints did not set forth facts sufficient to show liability of appellee, and, appellants refusing to plead further, judgment dismissing the complaints was entered. To reverse that judgment this appeal is prosecuted.

The portion of the complaints by which, as appellants urge, liability is asserted against appellee is: That when

the collision occurred "one Charlie Boy Thompson was in a drunken stupor and under the steering wheel of said truck; that said driver of said truck was obviously in an intoxicated condition and was unaware, due to his drunkenness, of any of his actions; that said driver of said truck was taken into custody by law enforcement officials and a partially emptied bottle of whiskey was taken from beside said driver of said truck while he was still in said truck.

"That the said Charlie Boy Thompson, driver of said truck, was a known and habitual drunkard and was also at the time of the accident crippled to such an extent that he had to use crutches to walk; that the said Charlie Boy Thompson was the son of Oat Thompson and was staying in the house with Oat Thompson at the time of this accident and was working during the day, when weather permitted, for the defendant herein. Said Charlie Boy Thompson was employed by said defendant herein as his agent, servant or employee to drive the truck for said defendant during rice harvesting season; that the said Oat Thompson was employed by said defendant herein and placed in charge of harvesting defendant's rice crop; that said Oat Thompson knew and was well acquainted or should have known and been acquainted with the habits of his son, Charlie Boy Thompson, and that his negligence while in the employment and in the course of his employment of said defendant in placing the defendant's truck in such a place and in such a manner that he knew or should have known that his son would take said truck was the proximate and a contributing cause of this accident between plaintiff and defendant's truck; that said Oat Thompson kept said truck at his home and had access to and was in charge of said truck at all times, both day and night, and that he negligently, carelessly and unlawfully and without regards of the rights of others, and while in the employment of said defendant left said truck accessible to his son, Charlie Boy Thompson, whom he knew or should have known would take said truck while in an intoxicated condition.

"That the defendant through his agent, servant or employee was negligent and that such negligence was the

direct and proximate cause of damages below mentioned suffered by this plaintiff."

It will be seen that the negligence asserted in the complaints, upon which recovery against appellee was sought, was the negligence of appellee's servant, Oat Thompson, in leaving the truck "accessible" to his son, Charlie Boy Thompson, when he should have known that Charlie Boy would drive said truck while intoxicated.

Principal reliance of appellants is our decision in the case of *Chaney* v. *Duncan,* 194 Ark. 1076, 110 S. W. 2d 21. The doctrine of that case is epitomized in headnote 5 as follows: "If any one permits another to drive his car, knowing such one to be a reckless or careless driver, or knowing that he is in the habit of becoming intoxicated and driving in that condition, he will be liable for any injury caused by the negligence of such driver."

We have no such situation in the case at bar. In that case the owner of the car was held liable for permitting his drunken son to drive the car to another's injury. In this case the owner is not charged with having permitted a drunken person to drive his car, but we have here an effort to hold the owner liable for the alleged negligence of the owner's servant in making the truck "accessible" to a drunken driver.

It is axiomatic that before a master may be held liable for the negligent act of his servant such act must be in the scope of employment of such servant. We have frequently held that the owner of a car is not liable for an injury negligently inflicted by the owner's servant while driving the car on a mission of his own. The basis of the holding in such cases is that the servant, at the time of the injury, is not doing work which the master has authorized him to do, and, therefore, for the time being, is not in reality the master's agent. "The act of the servant for which the master is liable must pertain to something that is incident to the employment for which he is hired, and which it is his duty to perform, or be for the benefit of the master." *Sweeden* v. *Atkinson Improvement Company,* 93 Ark. 397, 125 S. W. 439, 27

L. R. A., N. S. 124; *Carter Truck Line* v. *Gibson,* 195 Ark. 994, 115 S. W. 2d 270.

In the case of *Healey* v. *Cockrill,* 133 Ark. 327, 202 S. W. 229, we held that where a chauffeur, being directed by the owner to drive her car from her garage to the front of the owner's residence, drove the automobile on a mission of his own a distance of several blocks and while returning to his master's residence negligently injured another person, the owner was not liable for such injury; and we quoted from our opinion in the case of *Sweeden* v. *Atkinson Improvement Company, supra,* as follows: " 'The mere fact that he was in the service generally of the master or that the servant was in possession of facilities afforded by the master in the use of which the injury was done would not make the act attributable to the master. The act must have been done in the execution of the service for which he was engaged.' "

We held in the case of *Thomas* v. *Magnolia Petroleum Company,* 177 Ark. 963, 9 S. W. 2d 1, that the lower court properly sustained a demurrer to a complaint against an oil company which alleged that the driver of one of the company's trucks, on a trip for the company, invited appellant, a boy, to ride with him and by negligent operation of the truck injured appellant. We said in that case that, since it was not alleged that the driver had authority from the company to invite appellant to ride, no liability against the company was shown.

In the case of *Hough* v. *Leech,* 187 Ark. 719, 69 S. W. 2d 14, the appellee had been awarded in the lower court a judgment against J. D. Hough and H. M. Hough for the negligent shooting of her husband. J. D. Hough owned a store and his son, H. M. Hough, worked for him therein. While J. D. Hough had gone to lunch H. M. Hough secured a pistol and negligently shot appellee's husband. In denying recovery against the elder Hough the court, in that case, said: "In the instant case the act was committed during the existence of the employment, but it was certainly not committed in the prosecution of the master's business. It had no connection with the master's business."

Holding, in the case of *Reid* v. *Woods,* 192 Ark. 884, 95 S. W. 2d 637, that a sheriff who loaned his automobile to his deputy, to be used in making a visit to the deputy's sister, and having no connection with his business as deputy sheriff, was not responsible for an injury caused by negligent operation of the car, we quoted with approval the following from Blashfield's Cyc. of Automobile Law, § 3025: " 'Under the general rule a loan of a machine does not carry with it responsibility for the negligence of the borrower, where a servant, while not engaged in the master's business, and during a time when he is free to engage in his own pursuits, uses the master's automobile for his own purposes, and while so using it negligently injures another by its operation, the master is not liable, no statute so prescribing, although such use is with the knowledge and consent of the master.' "

We stated, in the case of *Lindley* v. *McKay,* 201 Ark. 675, 146 S. W. 2d 545, (headnote 4) the applicable rule as follows: "The act of the servant for which the master is liable must pertain to something that is incidental to the employment for which he is hired and which it is his duty to perform or be for the benefit of the master."

Even where the servant, in whose charge the master had placed a truck to be used by the servant as a driver-salesman, took the truck, driving it, while he was drunk, on a mission of his own, and negligently injured another, it was held in *Fooks* v. *Williams,* 205 Ark. 119, 168 S. W. 2d 193, that the owner was not liable for such injury.

If we should hold that the allegations of the complaints were sufficient to charge that appellee's servant impliedly permitted Charlie Boy to drive the truck, there is nothing in the complaints from which it may be deduced that either granting of such permission by Oat Thompson or making the truck "accessible" to Charlie Boy was within the scope of Oat's employment.

An automotive vehicle is not an inherently dangerous instrumentality. *Hunter* v. *First State Bank,* 181 Ark. 907, 28 S. W. 2d 712. Therefore, no liability could be

imputed to appellee merely because he or his servant did not take precautions to prevent the improper use of his truck by an unauthorized and incompetent person.

The complaints did not charge appellee himself with any actionable negligence, and the acts or omissions charged as negligence against appellee's servant were not acts or omissions occurring in the scope of the servant's employment so as to render appellee answerable therefor. The lower court properly sustained demurrers to the complaints.

Affirmed.

WALTERS *v.* MEADOR.

4-8138 200 S. W. 2d 24

Opinion delivered April 14, 1947.

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

Frank C. Douglas, for appellee.

ED. F. MCFADDIN, Justice. This is a boundary line dispute between neighbors. An exemplification of the

Golden Rule on both sides of the boundary would, undoubtedly, have prevented this expensive litigation; but until the Golden Rule is practiced universally, courts do afford a better redress for grievances than did the old method of "self-help."[1] So, humanity is making some progress. But—Back to the case at bar:

Lot 10, block C of Morris' Addition to Blytheville has a frontage of 75 feet on Fifth Street, and a depth of 140 feet. Originally, Mr. Langdon owned the entire lot; but in 1916 he conveyed the south 35 feet to Weems, through whom appellant, Walters, claims by *mesne* conveyances. Later, Langdon conveyed the north 40 feet to some other person, through whom appellee, Meador, claims by *mesne* conveyances. In short, appellant, Walters, has a deed to the south 35 feet, and appellee, Meador, has a deed to the north 40 feet.

Appellee brought action in ejectment, claiming that he was the owner of the north 40 feet, and that appellant was encroaching on appellee for a driveway and garage site amounting to a strip about four feet wide for the depth of the lot. Appellant defended the ejectment suit, and claimed the disputed strip (a) by adverse possession, and (b) by agreed boundary. The cause was tried to a jury, and resulted in a verdict and judgment for appellee; and appellant is appealing. Three questions are presented in the brief of appellant. They are: (1) the correctness of the appellee's survey; (2) appellant's claim of adverse possession; and (3) appellant's claim of agreed boundary.

We hold that all three of these questions were disputed issues of fact, and that the verdict of the jury settled each and all of these questions adversely to appellant, and that there was sufficient evidence to sustain the verdict. This opinion might well stop with the above

[1] Webster's Dictionary says of "self-help" in law: "the right or fact of redressing or preventing wrongs by one's own action without recourse to legal proceedings."

Blackstone's *Commentaries*, Vol. III, p. 3, discusses the redressing of private wrongs by act of the parties. One such method of redress is "by entry on lands and tenements, when another person without any right has taken possession thereof."

statement, but we discuss each question more fully to indicate the reasons compelling our conclusion.

I. *Correctness of Appellee's Survey.* Appellee purchased the north 40 feet of lot 10 from Mrs. Shonyo in 1944. Appellant had purchased the south 35 feet of lot 10 from a Mr. Thomas in 1941, but appellant had been away in the Navy. About the time appellee moved into his house in 1944, the appellant returned from the Navy, and resumed possession of his house. Between the houses there was a driveway which appellant refused to allow appellee to use. Thereupon, appellee secured the services of a surveyor (Mr. Cobb), who undertook to establish the property line between the parties. Cobb indicated the boundary by stobs, which appellant promptly removed. At the trial, Cobb told the jury of his experience as a surveyor; he detailed where he started with his survey, and how he determined the line between the litigants. It was not shown that Cobb was the county surveyor, so appellant contends that Cobb's survey was inadmissible as evidence because of § 2418, Pope's Digest, which reads in part:

"No survey made by any person except the county surveyor or his deputy shall be considered as legal evidence in any court of law or equity, . . ."

We hold against appellant's contention; and, for authority, quote what was said in *Reeves* v. *Jackson,* 207 Ark. 1089, 184 S. W. 2d 256, in regard to the same argument as appellant is here making:

"This court has ruled adversely to the appellants' contention. In the case of *Smith* v. *Leach,* 44 Ark. 287, it was held that a county surveyor's record of the survey made by him is only *prima facie* evidence of the correctness of the survey, and parol evidence of other surveys is admissible. To the same effect, see *Jeffries* v. *Hargis,* 50 Ark. 65, 6 S. W. 328; *Russell* v. *State,* 97 Ark. 92, 133 S. W. 188; *Buffalo Zinc & Copper Co.* v. *McCarty,* 125 Ark. 582, 189 S. W. 355; *Sherrin* v. *Coffman,* 143 Ark. 8, 219 S. W. 348."

II. *Adverse Possession.* Appellant insists that those through whom he claims have been in actual and adverse

possession of the driveway and ground on which the garage is located ever since 1916. Many witnesses testified to the actual possession; but there was sharp dispute as to whether the appellant's predecessors in title had occupied the strip *adversely* or *by permission* of the appellee's predecessors in title. Mrs. Anna Shonyo owned the appellee's property from 1933 to 1944; and she testified that, during those years the driveway was used by the occupants of both houses by common consent. She was interrogated, and made answer as follows:

"Q. Tell the jury if there was any question raised at any time, from the time you acquired the north 40 feet and claimed it, by any owner or tenant of the owner of the south 35 feet? A. No, there was never any objection. . . . Q. State what the tenants in the two properties, from your own knowledge and observation, did with that piece of ground? A. I suppose they both used it as a driveway. I know I did. I used that drive up there and turned in the place where the concrete is."

The testimony of Mrs. Shonyo, and other testimony in the record, made a jury question as to whether the possession of appellant and his predecessors in title was *permissive*. Credibility of the witnesses was also for the jury. So we hold that there was substantial evidence to sustain the jury's verdict against appellant on the issue of adverse possession.

III. *Agreed Boundary.* Finally, appellant contends that the adjoining owners, many years ago, agreed on a boundary line, and—based on that agreement—appellant's predecessors in title constructed and have continued to use the garage; and appellant, therefore, contends that the north side of this garage building establishes the line. To support his contentions on the issue of agreed boundary, appellant cites *Sloan* v. *Ayres,* 209 Ark. 119, 189 S. W. 2d 653; *Hoyer* v. *Edwards,* 182 Ark. 624, 32 S. W. 2d 812; *Miller* v. *Farmers' Bank & Trust Co.,* 104 Ark. 99, 148 S. W. 513; *Cox* v. *Daugherty,* 62 Ark. 629, 36 S. W. 184; and *Jordan* v. *Deaton,* 23 Ark. 704.

In *Sloan* v. *Ayres, supra,* we quoted from *Peebles* v. *McDonald,* 208 Ark. 834, 188 S. W. 2d 289, as follows:

" 'Where there is a doubt or uncertainty, or a dispute has arisen, as to the true location of a boundary line, the owners of the adjoining lands may, by parol agreement, fix a line that will be binding upon them, although their possession under such agreement may not continue for the full statutory time.' "

As an abstract proposition, the rule of law is as the appellant states; but the appellee offered sufficient evidence to take this case out of the quoted rule. The testimony of Mrs. Shonyo was to the effect that from 1933 to 1944 there was no agreed boundary line. Mrs. Mattie E. Watts testified that from 1939 to 1942 she occupied, as a tenant, the property now owned by Walters, and that this was during the time that Mrs. Shonyo still owned what is now the Meadors property. Mrs. Watts testified:

"A. There is not a thing I could say about the driveway. Everybody used the drive while I was there—for both houses. Q. Tenants from both houses? A. Tenants from both houses, and I didn't know who the driveway belonged to. Q. Did Mr. Thomas own the property while you lived there? A. Mr. Thomas owned the property while I lived there. I rented from him for four years. Q. And Mrs. Shonyo owned the other? A. Yes, sir. Q. Tell the jury if there was any fence between the two properties during the time you lived there? A. No, sir."

This testimony supports Mrs. Shonyo's testimony, and shows that there was neither an established and agreed boundary line, nor a claim to any clearly marked or designated line. In *Peebles* v. *McDonald, supra,* in discussing one of the essentials of an agreed boundary, we said:

"In 8 Am. Juris. 797, there is this additional statement: 'It is essential to the validity and binding effect of such an agreement that the boundary line fixed by the agreement be definite, certain, and clearly marked, and that it be made by the adjoining landowners with reference to an uncertain or disputed boundary line between their lands.' See, also, *Furlow* v. *Dunn,* 201 Ark. 23, 144 S. W. 2d 31; and see, also, Annotations in 69 A. L. R. 1430, and in 113 A. L. R. 421."

It is, thus, clear that the appellee offered evidence sufficient to support the jury's verdict, which was against the appellant's claim of an agreed boundary.

The judgment of the circuit court is affirmed.

SWAN *v.* ATTAWAY.

4-8164 201 S. W. 2d 27

Opinion delivered April 14, 1947.

Cecil E. Johnson, Jr., for appellant.

Shaver, Stewart & Jones, for appellee.

SMITH, J. Appellant Swan filed suit to recover damages for loss by fire of certain garage equipment and other personal property. For his cause of action he alleged that appellee, the defendant, had brought upon appellant's premises a tank, containing gasoline, and had negligently permitted gasoline to escape from the tank, and spread over the concrete floor and negligently permitted said gasoline to become ignited thereby destroying the property, the value of which is here sued for. There was a verdict and judgment for the defendant, from which is this appeal.

Appellant and appellee entered into a verbal contract to the effect that appellee would furnish for appellant's use in a garage which appellant operated, a five hundred gallon, three and one-half feet by eight feet, galvanized iron gasoline storage tank owned by appellee. The tank had previously been in use and appellee wished to paint it, and to dry it under cover, so he put the tank on the inside of the garage. He took out the foot valve to see what was in the tank, and some gasoline spilled out on the floor. Appellee testified that about a gallon of gasoline ran out and covered about six or seven feet of the concrete floor. According to appellant, as much as two or three gallons ran out and covered a much larger area than that admitted by appellee.

According to appellant's testimony, appellee was smoking a cigarette when he came into the garage, but no one testified that he was smoking at the time the gasoline was ignited. However, appellant testified that appellee admitted the day after the fire that he was to blame, and two witnesses testified that appellee told them that he struck a match to light a cigarette, and that the gasoline went up in flames.

Appellee denied this testimony and stated that he did not strike a match and did not do anything else to set the gasoline afire, although he admitted that he had a cigarette holder in his mouth, but he testified there was

no cigarette in the holder, and that he quite commonly carried a cigarette holder in his mouth which had no cigarette in it. A witness testified that appellee was in one end of the building owned by himself, and that he noticed when he came in that appellee had spilled gasoline on the floor and that about five minutes later he saw fire all over the back end of the building.

Appellant requested the court to give an instruction, numbered one, reading as follows:

"You are instructed that gasoline when exposed to air is volatile and is easily ignited when it comes in contact with a flame of fire. In view of its highly dangerous character it is the duty of every one handling it to use a degree of care to prevent its escape in proportion to the dangers which is his duty to avoid, and failure to use such degree of care is negligence and renders such person liable for consequent damages proximately due thereto.

"So in this case you are instructed that if you find from a preponderance of the evidence that the defendant, M. J. Attaway, negligently permitted or allowed gasoline to escape from his tank and flow over, upon or adjacent to premises occupied by plaintiff as alleged and that such gasoline became ignited (through the negligence of defendant) and thereby destroyed plaintiff's property as alleged, then your verdict should be for the plaintiff."

The court gave the instruction after modifying it by inserting the phrase enclosed in parenthesis reading, "through the negligence of defendant," and an exception was saved to the modification.

The modification is defended upon the ground that its effect was only to require a finding that appellee's negligence had caused the fire. But it does more than that. It will be observed that the modifying phrase immediately follows the phrase, "and that such gasoline became ignited," so that the modification required a finding not only that appellee was negligent in spilling the gasoline, but also that it was ignited through his negligence.

In this connection the court gave, over appellant's objection, an instruction, numbered two, reading as follows:

"You are instructed that you cannot presume negligence on the part of the defendant from the mere facts that he allowed gasoline to pour or escape from the tank which he was installing and that said gasoline caught afire from some cause and that said fire damaged or destroyed property of plaintiff (if you do find such facts). The mere happening of an accident is not proof of negligence and does not in and of itself entitle the plaintiff to recover."

We will consider this instruction, numbered two, and the modification of instruction numbered one, set out above, together. Their effect when read together is to tell the jury that they could not presume, which means find, negligence on the part of appellee from the mere fact that he had allowed gasoline to pour out, or escape from the tank which he intended to install. The fair intendment of instruction No. 2 is that mere proof that appellee spilled gasoline on the floor would not support a finding of negligence. Whether spilling the gas and not removing it was negligence, was a question which should not have been withdrawn from the jury. If this was negligence, the concurring negligence of another, if there was concurring negligence, would not have operated to excuse both, but would rather have had the effect of rendering both liable. The existence of negligence would depend upon the finding whether appellee should have anticipated the probable consequence of spilling the gasoline and not removing it. It is familiar law that where the concurring negligence of two or more persons operates to cause an injury, all are liable, although the negligent act of no one of them alone would have caused the injury.

Now the instruction, numbered two, read in connection with instruction No. 1, as modified, eliminates any question of liability for concurring negligence by requiring the finding that the gasoline was ignited through the negligence of defendant—appellee.

It cannot be said as a matter of law that appellee was guilty of no negligence contributing to the damage. Whether he was guilty of any negligence contributing to the injury was a question of fact which should not have been withdrawn from the jury.

It was held in the case of *Taggert* v. *Scott,* 193 Ark. 930, 104 S. W. 2d 816, that one is not liable for a result which could not by the exercise of ordinary care have been foreseen or anticipated. But the converse of the proposition is equally true. One is liable for a result which, in the exercise of ordinary care, would have been foreseen and anticipated.

In 45 C. J. 935, Chapter—Negligence, the statement appears that "Where the intervening agency was of such a nature that it could not reasonably have been anticipated, such agency becomes the proximate cause, even though the injury would not have occurred except for the original negligence."

We think the record presents the question whether the damage should have reasonably been anticipated, and if so, a case was made for the jury.

Such is the effect of the opinion in the case of *Gibson Oil Co.* v. *Sherry,* 172 Ark. 947, 291 S. W. 66. There the owner of an automobile had his tank filled at a filling station with what was supposed to be gasoline. When it was discovered that the tank had not been filled with gasoline, the car was towed back to the filling station, and the filling station operator began draining off the fluid which contained enough gasoline to ignite. The tank was drained out on the floor, and its contents flowed on the floor into a gutter into the street about twenty feet away. The car owner knew they were draining the gasoline out of the tank of his car, but he did not know it would run out across the sidewalk into the gutter, and while the gasoline was being drained out of the tank, the car owner walked out on the sidewalk and lit his pipe with a match. He then threw the lighted match into the street, and it ignited the gasoline. The flames followed the track of the gasoline and destroyed the plaintiff's car. A judg-

ment was rendered for the value of the car, which was affirmed in the case cited.

It was there said that in view of the highly dangerous character of gas and its tendency to escape, a gas company must use a degree of care to prevent the escape proportionate to the dangers which it is its duty to avoid, and that if it fails to exercise this degree of care, and injury results therefrom, the company is liable, provided the person suffering the injury, either in person or in property, is free from contributory negligence. It was there said further that "the defendant should have anticipated that someone passing by might throw a lighted match into the gutter, which would ignite the vapor formed by the gasoline coming in contact with the air and thereby destroy the plaintiff's automobile. Thus it will be seen that the negligence of the defendant was the proximate cause of the destruction of the plaintiff's property."

So, here, we think there was a question for the jury, whether, under the circumstances stated, appellee should have anticipated that if he allowed the gasoline to spread out over the floor, and did not remove it, someone else might ignite it. In the case cited it was held that the owner's contributory negligence was also a question for the jury, and that question was submitted to the jury. Here there is no question of contributory negligence.

For the errors indicated, the judgment must be reversed, and it is so ordered.

EVERETT *v.* COLEMAN, JUDGE.

4-8142 201 S. W. 2d 30

Opinion delivered April 14, 1947.

Chas. F. Cole, for appellant.

W. M. Thompson and *Dean R. Lindsey,* for appellee.

MINOR W. MILLWEE, Justice. On different dates in April and June, 1946, appellants, C. E. Everett, Archie Reves, Harrison Ballard and Dial Bowers, were tried and convicted of certain misdemeanors before appellee, Hon. Dene H. Coleman, judge of the municipal court of Batesville, Arkansas.

Immediately following his trial and conviction, each appellant prayed, and gave notice of, an appeal to circuit court and filed an appeal bond in an amount fixed by the court. On July 29, 1946, which was more than 30 days after entry of the respective judgments of conviction against appellants, commitments were issued by appellee directed against each of the appellants and placed in the hands of the chief of police of the city of Batesville for execution.

On July 30, 1946, appellants filed their several petitions for mandamus in the circuit court to require appellee to prepare and lodge transcripts of the respective municipal court proceedings in the office of the circuit clerk of Independence county. Upon filing of the petitions, the trial court directed that action upon the commitments be held in abeyance until final determination of the causes.

Appellee filed his response to the several petitions alleging that the time for appeal had expired when the respective commitments were issued; and that none of the appellants had requested that a transcript be pre-

pared or filed within 30 days of their respective convictions.

By agreement of the parties, the causes were consolidated for trial which was held on August 6, 1946, upon the pleadings and a stipulation of facts. In this stipulation it was agreed that appellee had not filed a transcript with the clerk of the circuit court in any of the cases; and that none of the appellants, nor their respective counsel, had taken any steps to perfect an appeal other than filing the notice and bond for appeal heretofore mentioned. The trial court found that appellants had failed to perfect their appeals by lodging transcripts in the office of the circuit clerk within 30 days of their respective convictions, as required by law, and denied the petitions for mandamus. This appeal follows.

For reversal of the judgment, appellants contend that, by praying an appeal and posting an appeal bond in municipal court, they did all that was required of them under the law to perfect their appeals; and that it then became the duty of the municipal judge to prepare and file transcripts of the municipal court proceedings in the office of the circuit clerk. In support of this contention, appellants rely on § 4226 of Pope's Digest which required the presiding officer of an inferior court to file a transcript of the record in the office of the circuit clerk when an appeal was prayed from a conviction in misdemeanor cases.

The municipal court of the City of Batesville was established under Act 60 of the Acts of 1927, which appears, as amended, in §§ 9897-9912, Pope's Digest. Section 7 of said act, which is § 9903 of Pope's Digest, is identical with § 6 of Act 203 of 1921, and was construed by this court in *Johnson* v. *State,* 200 Ark. 969, 141 S. W. 2d 849. It was there held that § 9903 of Pope's Digest, *supra,* was applicable to all appeals from municipal courts and did not require the municipal judge to file the transcript. The court also held that § 9903, *supra,* repealed § 4226 of Pope's Digest, upon which appellants now rely.

The Legislature of 1939 passed Act 323 which provides that a party who appeals from a judgment of a justice of the peace, common pleas court, or municipal court, must file the transcript thereof in the office of the circuit clerk within 30 days after rendition of the judgment. This act is controlling here, and imposes the duty upon a party appealing from a judgment in municipal court to file the transcript within 30 days after rendition of the judgment. Although this act was in effect at the time of the decision in *Johnson* v. *State, supra,* its provisions were not invoked in that case and the opinion makes no reference to the act. In later cases the act was construed as giving finality to judgments of inferior courts where the transcript of the judgment is not filed in the office of the circuit clerk within 30 days after rendition of the judgment, and the duty of filing the transcript was held to be imposed upon the party appealing from the judgment. *Bridgman* v. *Johnson,* 200 Ark. 990, 142 S. W. 2d 217; *Tucker* v. *Batesville Motor Company,* 203 Ark. 553, 157 S. W. 2d 492; *Lytle* v. *Hill,* 205 Ark. 789, 170 S. W. 2d 684; *Chavis* v. *Pridgeon,* 207 Ark. 281, 180 S. W. 2d 320.

In the recent case of *French et al.* v. *Oliver, Mayor, ante,* p. 484, 200 S. W. 2d 778, Act 323, *supra,* was held applicable in an appeal from a criminal conviction in a mayor's court, and we there said: "The law plainly imposes on appellants the duty of filing the appeals within thirty days after their conviction; and, if they were unable to obtain the transcript from the mayor within that time, they should have, before the lapse of the thirty day period, applied to the circuit court for a rule on the mayor to require him to deliver the transcript to appellants for filing." Appellants might have also brought mandamus proceedings to compel the filing of the transcript within 30 days after rendition of judgment. *Lytle* v. *Hill, supra.*

Appellants also invoke the provisions of Act 280 of 1941, which amended § 9903 of Pope's Digest, *supra,* and contend that the effect of the amendment was to repeal that portion of § 9903, *supra,* affecting appeals in crim-

inal cases. Act 280 relates to procedure on appeals from municipal court in civil cases only. But Act 323 of 1939 is unaffected by the provisions of Act 280 of 1941 insofar as the applicability of the former act to appeals in criminal cases is concerned. Since we hold the 1939 act applicable here, it is unnecessary to determine what effect the passage of Act 280 of 1941 had upon § 9903 of Pope's Digest.

Appellants did not file their respective petitions for mandamus until more than 30 days after the date of their convictions in municipal court. Under the agreed statement of facts they did not request the municipal judge to prepare and file the transcripts within 30 days after the judgments; nor did they apply for a rule on said judge to require him to deliver the transcripts to appellants for filing within 30 days after rendition of the judgments. Under these circumstances, appellants were not entitled to the relief prayed and the trial court correctly denied their respective petitions for mandamus.

The judgment is affirmed.

DISHEROON *v.* DISHEROON.

4-8157 201 S. W. 2d 17

Opinion delivered April 14, 1947.

H. G. Leathers and *Shouse & Shouse,* for appellant.

Festus O. Butt, for appellee.

HOLT, J. March 4, 1946, appellee sued appellant, Leveta Disheroon, for divorce on the alleged grounds of cruel treatment, such as to render his life intolerable (5th subdivision of § 4381, Pope's Digest). He also asked for the care and custody of their only child at that time — a boy about two and one-half years old, named Donald Joe. Appellant entered a general denial, prayed that appellee's complaint be dismissed for want of equity and for all proper and equitable relief.

When the cause came on for trial, August 26, 1946, a second child, a boy, had been born to appellant, which was then about two months old. The trial court granted a divorce. The care and custody of the older child, Donald, was divided between the parties, the father to have its custody for six months of each year, and the mother for the remaining six months, with visitation privileges to each. The care and custody of the second child was given to the mother with the privilege to the father to

visit the child at reasonable times. The appellant, mother, was awarded $5 per week for the support of the younger child, and $10 per month additional for the older child while in her custody, but was not awarded anything for her own support.

From the decree comes this appeal.

For reversal, appellant says: "(1) The evidence is wholly insufficient to support decree for divorce; (2) appellant should have, during his tender years, the exclusive custody of Donald Joe subject to visitations of the father; (3) the allowances for the support of the infants are inadequate; (4) appellant should have some provisions for her own support, and (5) appellant was entitled to reasonable allowance for attorney fees."

After a careful review of the record before us, we have reached the conclusion that all of appellant's contentions must be sustained.

1.

Briefly stated, the facts are: The parties to this action were married October 24, 1942, each at the time being eighteen years of age. They lived in various places in and near Green Forest, Ark., until appellee was inducted into the Naval Service, November 9, 1943. Appellee, after his induction and shortly after the birth of their first baby, was located on the west coast. He returned home on furlough and at his wife's request took her and the baby with him to the home of his uncle at Glenns Ferry, Idaho. Later, Mrs. Disheroon took the baby to California where they lived with her sister. Both appellant and her sister secured employment. Their working hours were different and they were able to care for the baby. While thus employed, Mrs. Disheroon suffered a nervous breakdown and spent some time in a hospital there and later was transferred to the State Hospital in Little Rock, and after a complete recovery, she was discharged from this institution September 12, 1945, returned to Green Forest, where she was soon joined by appellee, her husband, and as above noted, they separated February 23, 1946. The characters of these two

young people are unquestioned. Appellee says in his brief: "Happily no suggestion has entered this case reflecting even remotely on the character of either party. Either or both may be foolish or immature, but the unanimous voice of every witness giving expression is that she was—is—'a good girl'; that he was—and is—in the words of Rev. Powell, 'an exceptionally good boy'."

The effect of appellee's own testimony was that his young wife was discontented, fretful and hard to please; that she neglected their little boy, sometimes quarreled with him, and on one occasion after he had lingered in a pool room, playing pool with his brother, longer than she thought proper, upbraided and slapped him when he came to their truck in which she was waiting. He further testified that after they resumed their marital relations following her nervous breakdown, she was not good to him, was a careless housekeeper; that there was another expected baby at the time; that she wanted a car and other things which he was unable to buy for her; that he didn't think that she helped him as much as she should; that she caused him to move from place to place, and "She was an expectant mother, and I knew that. I knew we were expecting a baby. She wanted to go with me (meaning the west coast). . . . I think any married man would rather have his wife here at home. . . . I am not alleging her nervous breakdown as a sole ground of divorce, but I think it should be considered as part of the grounds for divorce."

On cross-examination, there is this testimony from appellee: "Q. What is its name (meaning the second child)? A. I don't know. Q. You have not cared enough to find out? A. I have not found out. Q. Have you seen it? A. Yes, I have seen it once. Q. When was that? A. At her place over there. Q. Did you make a trip to see it? A. Yes, they wrote and asked me to bring Donnie over to see it. Q. Did you see it? A. Yes, I did. Q. This baby, you don't know its name? A. No. Q. You never asked her or anyone what its name was? A. No. Q. What are you working at now? A. Helping my dad in the canning factory, hauling tomatoes. Q. You are an ex-service

man? A. Yes. Q. Drawing anything from the Government? A. Yes, self-employment. Q. How much? A. $100 a month. Q. Did you make application for this self-employment, listing your wife and child as dependents? A. I did. Q. Have you contributed anything to their support since the last term of court here? A. What I was required to, I did. Q. It is your intention to continue to support them? A. If the court requires me to, yes. Q. And if the court does not require you to support them? A. I think that I should have custody if I support them. Q. In case you do not have custody, you don't intend to support them? A. I do not feel like I should have to."

The parents of the parties are good people and do not appear to have encouraged their separation. Appellee lives with his father and stepmother and proposes to take Donald into their home. Appellant and the younger child now live with her father.

Appellant testified that she always tried to make a good housekeeper, that she continued to love appellee and still loves him; that she had lost some affection for him because of the manner in which he had treated her, but that if he would do right, she would continue to love him and make him a good wife; that for the sake of the children they ought to live together.

We think it clear from the above and the other testimony which we do not think it necessary to abstract here, that appellee has fallen far short of producing testimony of that character required to secure a divorce on the grounds of cruel treatment. As we read and analyze the evidence, the effect of it amounts to nothing more than petty quarrels and misunderstandings, not infrequent among even happily married couples, and certainly it does not rise to the dignity and of that kind of evidence constituting cruel treatment as contemplated by the statute and in the numerous decisions from this court.

This court in *Kientz* v. *Kientz,* 104 Ark. 381, 149 S. W. 86, said: "In order to constitute cruel treatment, which our law recognizes as ground for divorce, there must be proof of willfulness or malice on the part of the offend-

ing spouse, and the effect of that treatment must be to impair or threaten the impairment of the complaining party's health or such as to cause mental suffering sufficient to make the condition of the complaining party intolerable. Mere incompatibility of temperament or want of congeniality and the consequent quarrels causing unhappiness are not sufficient to constitute that cruelty which, under our statute, will justify divorce. The marriage state can not be considered as one of convenience, but it is one which has been entered into 'for better or for worse,' and must continue for life unless sundered for the grounds named in the statute justifying its dissolution, which must be proved by clear evidence. As is said in the case of *Cate* v. *Cate,* 53 Ark. 484, 14 S. W. 675: 'It must be shown at least that there is something that makes cohabitation unsafe to move the courts to interfere,' '' and in *Meffert* v. *Meffert,* 118 Ark. 582, 177 S. W. 1, Judge HART, speaking for the court, said:

"Unhappiness sufficient to render the condition of both parties intolerable may arise from the mutual neglect of the conjugal duties; but when the parties are thus at fault the remedy must be sought by them, not in the courts, but in the reformation of their conduct. The remedy is in their own hands, and, until it has been tried without effect by the party complaining, the court will not give effect to the complaint. Until this home remedy has been tested and failed, the condition of each may be said to be due to his or her own acts, and one must bear the consequences of his own misconduct. See, also, *Arnold* v. *Arnold,* 115 Ark. 32, 170 S. W. 486.

"So it may be said that the remedy of absolute divorce contemplated by this clause of our statute is for evils which are unavoidable and unendurable and which can not be relieved by any exertions of the party seeking the aid of the courts."

We think the small differences that have arisen between these two young people can be easily adjusted by them, and with the proper effort and encouragement on the part of the parents, this fine little family should, and can be held together.

2.

As indicated, we think it was also error to divide the custody of the older child. These two children, especially at the present time, and during their tender years, need a mother's care, guidance and attention, and she should have their care and custody, with the right of the father to visitation at all reasonable times. Our first and primary consideration is the best interest of these children, or as sometimes expressed, what would be least harmful to them in the circumstances. No reason is shown why these children should be separated.

This court in *Gibson* v. *Gibson,* 156 Ark. 30, 245 S. W. 32, on this question, said: "These children are now of the ages, respectively, between four and five years and between two and three years, the younger one of the two being a girl. At this age children should have a mother's care and attention, and the proof does not justify a decree depriving them of that care and transferring their custody to the father. The reason for this conclusion is given in many decisions of this court, and it is unnecessary now to repeat. *Beene* v. *Beene,* 64 Ark. 518, 43 S. W. 968; *Meffert* v. *Meffert,* 118 Ark. 582, 177 S. W. 1. These established principles are peculiarly applicable to the matter of the custody of the younger child, who is a girl, and, even if the boy were old enough to justify removal from his mother, there is no good reason shown why the children should be separated," and in the recent case of *McCourtney* v. *McCourtney,* 205 Ark. 111, 168 S. W. 2d 200, we said:

"Without reviewing the conflicting testimony, we announce our conclusion to be that the welfare and best interests of the children, which is, of course, the primary consideration, require that they be kept together, and, in view of the fact that the children are all girls and the youngest only 10 years old, we think the chancellor properly awarded the custody of all the children to their mother."

3 and 4.

On the question of support, it appears that appellee receives $100 a month from the Government, and is work-

ing and earning additional money. It is the duty of a father to support and provide a home for his family. The appellant is now living with her father and, obviously, the care of these two children will require most, if not all, of her time. It appears that she has very little property and is not earning anything. In the circumstances, we think appellant should be allowed $30 per month for the support of the two children, and in addition $20 for her own support, or a total of $50 per month.

5.

Appellant is also entitled to a reasonable attorney's fee which the trial court will award to her upon the remand of this cause.

For the errors indicated, the decree is reversed, and the cause remanded with directions to enter a decree not inconsistent with this opinion. Appellee is to pay all costs in both courts.

GARST *v.* GENERAL CONTRACT PURCHASE CORPORATION.

4-8163 201 S. W. 2d 757

Opinion delivered April 21, 1947.

Rehearing denied May 26, 1947.

[redacted]

T. J. Gentry, for appellant.

Guy B. Reeves and *Barber, Henry & Thurman,* for appellee.

GRIFFIN SMITH, Chief Justice. March 3, 1946, Garst signed Consolidated Motor & Aviation Company's conditional sales contract covering a Studebaker automobile. The "*bona fide* cash delivered price, including sales tax and extra equipment," was $843, with a cash payment of $300. At the same time Garst signed a retail buyer's order. It shows "cash delivered price in Little Rock, $843; cash on delivery, $300; net balance due, $543." Supplementing these entries the following appears: "Special notes, $45.99; balance, 15 monthly notes of $45.99 each; balance due, $543; rec. fee, etc., $146.85; grand total, $689.85." The purchaser signed a buyer's statement in which it was noted that the obligation would be carried by Commercial Credit Corporation.

Attached to the conditional sales contract, perforated for easy detachment, was Garst's negotiable note for $689.85 payable to Consolidated, providing for payment in fifteen monthly installments of $45.99, beginning April 6, 1946. This note was sold to General Contract Purchase Corporation.

March 26 following execution of the note and contract, Garst replied to a letter from Purchase Corporation. He acknowledged receipt of the Corporation's "outline of time payment contract," saying, "I am paying a usurious and unlawful rate of interest upon the balance of $543."

Purchase Corporation responded April 2d, stating that the note was for $689.85. The "rates charged," it said, "were certainly within reason for a fifteen-months contract, for, as you know, this covers a considerable amount of insurance. . . . You may be quite certain that these charges are in no way unlawful."

Garst refused to pay the note maturing April 6th. In a letter dated April 10th Purchase Corporation told Garst it was not required to define the term "time price differential; [for], as we stated previously, this figure represents insurance, investigation charges, bookkeeping and legal cost of setting up your account." When the May note was not paid it was explained that the insurance premium was $36.25, finance company service charge $43.44, and that $67.16 was set up as a dealer's reserve fund "which is authorized as a protection against any loss due to repossession or damages to this collateral."

May 14 Purchase Corporation, invoking an acceleration clause contained in the note, declared all installments due; and on May 18 it brought an action of replevin, executed bond, and procured possession of the automobile, value of which was alleged to be $700.

In an answer and cross-complaint Garst alleged that his agreement was to pay $843 for the car; that interest charged exceeded the legal rate; that he had offered to pay the balance of $543; that the contract and note he signed were in blank, and that he relied upon the seller to fill in the agreed amount, but that instead of doing so an item of $146.85 was fraudulently inserted. He alleged that Consolidated had damaged him in the sum of $1,000; that Purchase Corporation's action in repossessing the car had injured him to the extent of $5,000, and he prayed judgment against U. S. F. & G. for $1,400, amount of the bond it had executed.

Appeal is from directed verdicts (1) for the plaintiff, Purchase Corporation, and (2) for the defendants named in the cross-complaint, Consolidated, and U. S. F. & G.

First.—The Court correctly directed the jury to find for Purchase Corporation. The note was negotiable, and there is no evidence that the assignee had knowledge of any infirmities. Garst admitted signing it, but insists that the monthly installment items of $45.99 were not on the document when he subscribed. He also signed the buyer's statement, in which it was said that the obligation would be carried by Purchase Corporation; hence he had actual notice that it would be transferred. This, however, was not controlling, since the note was negotiable.

Before usury can be sustained it must be shown that there was an agreement upon the part of the lender to receive, and on the part of the borrower to give, a greater rate of interest than ten percent for the use of money. *Citizens Bank* v. *Murphy*, 83 Ark. 31, 102 S. W. 697. In *Perry* v. *Shelby*, 196 Ark. 541, 118 S. W. 2d 849, it was held that while it is not necessary that both parties be informed as to the facts constituting usury, it is necessary that the lender have an intention to charge an illegal rate of interest, or that he be cognizant of the facts constituting usury. It was said in *Harper* v. *Futrell*, 204 Ark. 822, 164 S. W. 2d 995, 143 A. L. R. 235, that a conditional sales contract was not void because computations on an interest basis showed a greater charge than ten percent per annum. The carrying cost was not based on a loan of money, but was "a part of the purchase price which the purchaser agreed to pay."

The rule would be different if in fact the finance company actually advanced money to the purchaser and by subterfuge added items to disguise the transaction in order to realize more than the maximum permissible contract rate.

There is nothing in the testimony here sustaining appellant's position that Purchase Corporation knew there had been an unauthorized addition to the contract; hence as to it the judgment must be affirmed, notwithstanding a contention that form of the verdict and judgment was improper. It was, "We, the jury, find for the

plaintiff for possession of the automobile . . . or its value." It is argued that under this verdict, Purchase Corporation has a judgment for possession of the car and for the value. No objection to form was made when the jury was directed to return the verdict October 3d. Nothing was said in protest until October 14 when motion for a new trial was filed. The objection came too late, but judgment must be construed as one for possession; and not, in addition, for the value. Appellant has not been injured by failure of the jury to ascertain the value. Purchase Corporation alleged it was $700, and this was not denied.

Second.—It is urged in the brief that the entire transaction was void because, under OPA appraisement, $843 was the top price. Violation of the so-called "ceiling" was not alleged in the answer and cross-complaint. However, there was evidence that the maximum *cash* price was $843. It was not shown other than by appellant's unsupported assertion that no more could be charged if installment payments were allowed; nor is appellant in position to take advantage of this alleged overcharge. The point was not raised in the motion for a new trial.

Third.—Appellant's testimony, and that of his wife, present a question of fact in respect of the assertion that the price, whether cash or credit, was $843. While we know that in general practice time contracts with installment payments are higher than cash sales, yet in a particular case we do not have judicial notice that cash and credit price were not the same.

It is possible, but highly improbable, that Consolidated told Garst the sale price, whether for cash or on time, would be $843. Garst admits having discussed payments—whether the contract would run for twelve or fifteen months. He was told what the monthly payments would be—"forty, or perhaps forty-one dollars." This was for fifteen-months. If we should accept the maximum figures authorized by appellant, the balance would be $615—not $543, as he contends. It is therefore self-

evident that some authorization was given for completion of the contract through insertion of a definite amount.

Still, it cannot be said that a factual question was not presented. It follows that the judgment in favor of Consolidated must be reversed and the cause remanded with directions to permit this part of the controversy to be submitted to a jury.

[redacted]

JAMES *v.* JAMES.

4-8134 201 S. W. 2d 14

Opinion delivered April 14, 1947.

[redacted]

Claude F. Cooper and *Gene E. Bradley,* for appellant.

Frank C. Douglas, for appellee.

McHANEY, Justice. Appellee and appellant were married in 1933. They lived together on appellee's 80-acre farm in Mississippi county since 1934, until a separation in December, 1945. Appellee brought this action for divorce in January, 1946, on the ground of habitual drunkenness and abusive treatment and for the possession of said 80-acre farm. They are each 74 years of age. Trial resulted in a decree for appellee as prayed, and in the dismissal of a cross-complaint of appellant which sought, not a divorce from appellee, but a money judgment against her for sums he claimed to have expended in reducing the mortgage indebtedness against said farm.

For a reversal it is argued that the decree is not supported by a preponderance of the evidence, and that appellee failed to prove the statutory requirement,

§ 4386, sub-division Third, "That the cause of divorce occurred or existed within five years next before the commencement of the suit."

We think appellant must fail on both points. The proof abundantly shows that appellant is addicted habitually to the use of intoxicating liquors to excess, in fact to such extent that he gets drunk regularly and has been doing so for many years and up to and after the separation took place; that particularly when intoxicated he is abusive of appellee, using vile and profane language to her; and that on some occasions he has struck her. It is also true that appellee will, on occasions, take a drink with appellant and that she can swear back at him with some expertness and vehemence, but the evidence is to the effect that he often over-persuaded her to thus yield to temptation.

Both have been previously married and divorced from their respective spouses on several occasions. We think the evidence sufficient to support the decree, and it is accordingly affirmed.

SAMMONS *v.* STATE.

4443 201 S. W. 2d 37

Opinion delivered April 21, 1947.

J. F. Quillin and *Boyd Tackett,* for appellant.

Guy E. Williams, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

ROBINS, J. Appellant, charged by information with assault with intent to kill, was by a jury found guilty of aggravated assault and his punishment was fixed at a $500 fine and imprisonment in jail for sixty days. He has appealed from a judgment entered on the verdict.

The following assignments of error are urged as grounds for reversal:

(1) That the trial court erred in giving instruction No. 3 at the request of the State.

(2) That the court erred in refusing to give instruction No. 13 requested by appellant.

I.

Instruction No. 3, given at the request of the State, was incorrectly worded in that certain portions necessary to complete the meaning of same were apparently omitted. But only a general objection to this instruction was made. If the omission of the appropriate words had been called to the attention of the trial court a correction thereof would have no doubt been made. Since the instruction was not inherently wrong, a general objection thereto was not sufficient. *Burnett* v. *State,* 80 Ark. 225, 96 S. W. 1007; *Bell* v. *State,* 93 Ark. 600, 125 S. W. 1020; *Banks* v. *State,* 133 Ark. 169, 202 S. W. 43; *Markham* v. *State,* 149 Ark. 507, 233 S. W. 676; *Guerin* v. *State,* 150 Ark. 295, 234 S. W. 26; *Graves* v. *State,* 155 Ark. 30, 243 S. W. 855; *Poymer* v. *State,* 158 Ark. 643, 244 S. W. 17; *Williams* v. *State,* 156 Ark. 205, 246 S. W. 503; *Miller* v. *State,* 160 Ark. 469, 254 S. W. 1069; *Wilkerson* v. *State,* 180 Ark. 280, 21 S. W. 2d 183; *Atwood* v. *State,* 184 Ark. 469, 43 S. W. 2d 70.

II.

Appellant's requested instruction No. 13 was as follows:

"You are instructed that if you find from the evidence that the defendants had the right to be at the place where they were found by the prosecuting witness, and if you further find that the cause of the altercation, if any, between defendants and the prosecuting witness was the result of the attempt, if any, of the prosecuting witness to prevent the defendants from carrying on their lawful occupation or from being at the place where they were then located, then the defendants and each of them had the right to defend themselves against a threatened assault and that in so doing, if you find that they did so defend themselves, they would not be guilty of any violation of law, and if you find from the evidence that they did so defend themselves without provoking such altercation, if any, then you will find the defendants not guilty of any charge."

The court gave the following instruction which embodied all the declarations of law, contained in the above instruction, which appellant was entitled to have made to the jury, to-wit:

"You are instructed that the defendant, Pete Sammons, had the right, if he was engaged in a lawful occupation at a place where he had the lawful right to be, to defend himself against an unlawful assault and to use all means which a reasonably prudent person would deem necessary under the circumstances as then appearing to him, acting without fault or carelessness in arriving at such conclusion to protect himself against such unlawful assault, if any was committed upon him by Marvin Walker."

We have frequently held that it is not error for a trial court to refuse a requested instruction where the declaration of law contained therein is given to the jury in other instructions. *Hicks* v. *State,* 193 Ark. 46, 97 S. W. 2d 900; *Denton* v. *State,* 189 Ark. 284, 71 S. W. 2d 197;

Hannah v. *State,* 183 Ark. 810, 38 S. W. 2d 1090; *Wallin* v. *State,* 210 Ark. 616, 197 S. W. 2d 26.

Numerous other instructions, in which the necessary elements of the offenses charged in the information were properly explained, and in which the law of self-defense was correctly set forth, were given to the jury. The instructions, taken as a whole, fairly and fully presented the principles of law applicable.

It is not urged by appellant that the evidence was not sufficient to sustain the verdict. However, we have carefully reviewed the testimony and find that it abundantly supports the jury's finding.

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

BOWIE *v.* TEMPLE COTTON OIL COMPANY.

4-8156 201 S. W. 2d 32

Opinion delivered April 21, 1947.

George F. Hartje, for appellant.

John W. George and *Clark & Clark,* for appellee.

McHaney, Justice. The appeal on behalf of Bowie has been abandoned, and only that of Brockinton is here considered.

Bowie operated a cotton gin at or near Holland in Faulkner county in 1941 and 1942 and was financed for the purpose of buying cotton and seed by appellee. At the close of the 1941 season Bowie was in debt to it in the sum of $2,800. This account was closed with a promissory note dated May 27, 1942, due on or before October 15, 1942, with 6 per cent. interest from January 1, 1942, and signed by Bowie and Brockinton. At the time of signing said note by Brockinton, appellee gave him the following receipt: "Received of L. S. Brockinton one note for $2,800 in form Temple Cotton Oil Company signed by N. E. Bowie and co-signed by L. S. Brockinton. It is agreed and understood that the said note is to be paid by M. E. Bowie out of his first cotton seed the fall of 1942, and if not paid by M. E. Bowie will be agreeable for to pay in cash."

This note not having been paid, appellee brought this action in the circuit court on January 1, 1945, against the makers to recover judgment against them on the note and against Bowie for an additional sum on open account accruing in 1942 and 1943, subsequent to the date of said note. The account was composed of hundreds of items, and the court, on its own motion and without objection, transferred the action to chancery. Brockinton's defense to the action on the note was that Bowie had delivered to appellee cotton seed in the fall of 1942, in accordance with the receipt above quoted, of a value in excess of the principal of and interest on said note, and that, instead of giving credit on said note, as agreed, it credited Bowie's subsequent open account with the proceeds, thereby discharging him from liability. He also defended on the ground that he was a surety on said note without consideration.

Trial resulted in a decree against Bowie and Brockinton on account of said note for $3,542 with interest from May 31, 1946, at 6 per cent. and costs. This appeal followed.

Appellant's first and chief contention for reversal is that he was not a surety for hire, but was an accommodation surety only, and that under the agreement or receipt above quoted to the effect that the note was to be paid by Bowie out of the cotton seed delivered by Bowie to appellee in the fall of 1942, it was appellee's duty to apply the proceeds of the seed to the extinguishment of said note, and not to Bowie's open account. It is argued that Bowie delivered to appellee more than 304 tons of cotton seed in the fall of 1942, and at the prevailing price the value of the seed was more than three times the amount of the note.

Assuming without deciding that Brockinton was a surety only, the result claimed does not follow. The receipt implies that Bowie would deliver his own seed in order to extinguish the note, but the record fails to show that Bowie did actually deliver any cotton seed of his own to appellee in the fall of 1942. On the contrary, the evidence shows that Bowie did not own any cotton seed that fall, but that he purchased both cotton and seed as agent for appellee with appellee's money. Bowie's evidence was to the effect that he bought for appellee and that the latter was due him a commission and drayage fee for buying and hauling. It is undisputed that appellee furnished all the money to buy cotton and seed. Since Bowie delivered no seed of his own to appellee in the fall of 1942, but only such seed as belonged to appellee, it follows that no credits accrued that should have been applied on said note.

Another argument made is that appellant's signature on said note was procured by fraud, but we fail to find any evidence to support the contention.

The decree is accordingly affirmed.

Robins, J., not participating.

CARROLL *v.* SCHNEIDER.

4-8170 201 S. W. 2d 221

Opinion delivered April 21, 1947.

J. Fred Jones, for appellant.

J. B. Reed, for appellee.

SMITH, J. This is a petition for a writ of mandamus, and as grounds for its issuance the following facts were alleged: Petitioner, a resident citizen of Lonoke county, is an independent candidate for the office of County Judge of Lonoke county, and the defendants constitute the Board of Election Commissioners for that county. Pursuant to, and in compliance with, § 4705, Pope's Digest, he filed a petition with the said Board of Election Commissioners, praying that he be certified as an independent candidate for the office of County Judge of Lonoke county. The petition addressed to the Election Commissioners was filed with them October 21, 1946, and contained the names of seventy-seven alleged electors of that county. On October 25, 1946, petitioner was advised by the Election Commissioners that his name would not appear on the ballot as an independent candidate at the election to be held on November 5, 1946, because thirty-four of the seventy-seven signers of the petition were not electors for the reason that they had failed to sign their assessment blanks when their poll taxes were assessed, and eight of said signers had paid no poll tax at all, and that his name would not be placed on the ballot as a candidate for the reasons stated. This action of the Election Commissioners was alleged to have been arbitrary and unauthorized and it was prayed that a writ of mandamus issue, requiring the Election Commissioners to place petitioner's name on the ballot as a candidate pursuant to the petition filed by him.

A demurrer to the petition for mandamus was sustained and the petition dismissed, and from that order is this appeal.

Section 4705, Pope's Digest, pursuant to which the original petition was filed, provides that: "The nominations of candidates shall be certified in the following

manner: By the chairman and secretary of any convention of delegates, or of the canvassing board of any primary election, held by authority of an organized political party in the State, or subdivision thereof, in which such convention or primary election is held; and also, by electors of the State, district, county, township, ward of a city or incorporated town, for which the nomination is made. Provided, the number of signatures of electors so required shall not be less than fifty, nor more than one thousand, for the State or any district or county, and not less than ten, nor more than fifty, for any township, or ward of a city or incorporated town."

The statute does not prescribe how, or in what manner Election Commissioners shall determine the sufficiency of the petition of one who wishes to become a candidate by petition. But of necessity, they have the right to determine the *prima facie* sufficiency of the petition. For instance, they may and should count the number of signers and if it were found that there were less than fifty of these, the petition should be dismissed. But here the Election Commissioners exercised a power which the law did not confer upon them. After ascertaining that eight persons who signed the petition had not paid their poll taxes, leaving sixty-nine who had paid, they proceeded to determine the validity of the poll tax receipts of thirty-seven signers who had paid their poll taxes. After deducting the names of the eight signers who had not paid their poll taxes, there remained on the petition the names of sixty-nine persons, who had paid, and a *prima facie* showing of compliance with the law had been made, and the power and authority of Election Commissioners was at an end.

The duties of the Election Commissioners are ministerial and not judicial. They have the power to determine whether a *prima facie* showing of a sufficient petition has been made, but they have no other function.

Now the ballot cast at an election by one not eligible to vote may be discarded, although he possesses a poll tax receipt. In other words, a poll tax receipt does not qual-

ify one to vote, who is not otherwise qualified. Provision is contained in § 4730, Pope's Digest, for challenging the right to vote of one who is not eligible. The statute just cited provides that: ". . . when the ballot of any voter is thus challenged, it shall be the duty of the judges and clerks in said election precinct to make and retain a list of the names of all such persons so challenged and the ballots of all such persons shall be counted, preserved and separated from the remaining ballots to the end that the right of any such person to vote may be later determined either by the county central committee or the court in which an election contest may thereafter be filed." There a practice is prescribed and a power is conferred to determine the elector's qualifications. But here this is not true after a *prima facie* showing has been made of the sufficiency of the petition to have one's name placed on the ballot.

It will be remembered that this is not an election contest, nor is it a proceeding to enjoin the Election Commissioners from certifying the name of one as a candidate who had petitioned that action. Those would be judicial proceedings in which the facts could be inquired into and determined. Here the Election Commissioners, after determining that holders of sixty-nine poll tax receipts had signed the petition, then proceeded to adjudge also the question whether those persons had properly assessed their poll taxes. The law confers no such authority, and their determination cannot be given a judicial effect.

The opinion in the case of *Irby* v. *Barrett,* 204 Ark. 682, 163 S. W. 2d 512, is decisive of this question. There the Chairman and Secretary of the Democratic State Committee had refused to certify the name of Irby as a candidate for the State Senate from the district in which he resided, as required by the rules of the Democratic party. It was conceded that Irby had complied with the rules of the party to become a candidate, but the Chairman and Secretary of the party committee refused to certify Irby's name as a candidate for the reason, as

found by them, that Irby was ineligible to serve if elected, inasmuch as he had been convicted of a felony, to-wit: the crime of embezzling public money. In awarding the writ of mandamus directing that Irby's name be certified as a candidate, we held that the Chairman and Secretary were without power to refuse to certify the candidacy of one who had complied with the rules of the party in that behalf. In so holding we said: "Certainly no law of this state confers that power and we are cited to no rule of the party conferring it. Certain it is that the chairman and secretary of the state committee are clothed with no judicial power. Their duties are purely ministerial, . . ."

In that connection, it was there further said: "If the chairman and secretary of the committee have the right to say that because of the decision of this court petitioner is ineligible to be a candidate for office, they may also say, in any case, that for some other reason a candidate is ineligible. For instance, it has been held by this court in many election contests that one must pay his poll tax; that he must do so after proper assessment in the time and manner required by law; and that otherwise he is not eligible even to vote, and unless he were a voter he could not hold office. So with other qualifications, such as residence. May this question be considered or decided by the chairman and secretary of the committee? It may be that such power can be conferred upon them by laws of this state or the rules of the party; but it is certain that this has not yet been done. If this can be done, and should be done, the door would be opened wide for corrupt and partisan action. It might be certified that a prospective candidate has sufficiently complied with the laws of the state and the rules of a political party to become a candidate, and, upon further consideration, that holding might be recalled; and this might be done before that action could be reviewed in a court of competent jurisdiction and reversed in time for the candidate to have his name placed on the ticket. It would afford small satisfaction if, after the ticket had been printed with the

name of the candidate omitted, he have a holding by the court that the name should not have been omitted."

That opinion cited a case from Kentucky, and another from Louisiana which fully sustained our holding, and we are now cited to an opinion by the Supreme Court of Nevada in the case of *State* v. *Glass,* 44 Nev. 234, 197 Pac. 472. There a circuit court had upheld the action of a county clerk in striking from his files a certificate of nomination for a public office, for the reason that signers of the petition to have the petitioner's name placed on the ballot as a candidate had neglected to add to their signatures their places of residence as required by law. A strong opinion discussed the power of officers who have only a ministerial duty to perform, and in reviewing the action of the circuit court it was said: "We do not think that the legislature intended to vest in a mere ministerial officer such important power as to pass upon the validity of a nomination certificate before accepting and filing it." Nor do we.

It is urged, however, that the case is now moot, and should be dismissed for that reason. It is moot in the sense that we cannot now afford appellant petitioner any relief, but it is not moot in the sense that it is important to decide a practical question of great public interest, which may arise in any future election.

The question presented is one which may arise at any election hereafter held where ministerial officers usurp a judicial function. There is here a question of practical importance and of great public interest, and if not now decided, some other candidate may be deprived of the right to run for a public office and his right to do so may become a moot question before it could be decided, on account of unavoidable delay in the law.

A consideration of such a possibility induced the Supreme Court of Oklahoma, in the case of *Payne* v. *Jones,* 146 Pac. 2d 113, to decide a question which would otherwise have been dismissed as being a moot question, and gave as the reason for so doing that the case was of a type which soon becomes moot, and it would be difficult

to get a decision before it also became moot when the question again arose.

The Supreme Court of Pennsylvania, in the case of *Werner* v. *King,* 310 Pa. 120, 164 Atl. 918, dealt with a case which, under the facts stated, had become moot, but the court said: "These facts render moot the question raised. Ordinarily this would be stated, without more, and the appeal dismissed. We have, however, dealt with the substantial question involved, because it is one which can be raised any year hereafter, when the lists are about to be advertised, unless settled by us; but, having done this, we must enter an order appropriate to the existing situation. The appeal in this case is dismissed." Nevertheless, for the reason stated, the question presented was decided. See *Brown* v. *Anderson,* 210 Ark. 970, 198 S. W. 2d 188.

So here, we have a question which may arise at any future election and under the circumstances which would prevent a decision until the question had likewise become moot. We hold, therefore, that the Election Commissioners were without authority to refuse to certify appellant's name as a candidate, although the decision profits him nothing, and his appeal must now be dismissed for the reason that we are powerless to render him any assistance in the enforcement of a right wrongfully denied him.

It is insisted that the demurrer was properly sustained for the reason that the petition for the writ was not verified. This was a question which should have been raised by a motion to require verification or to dismiss for the refusal to verify and not by demurrer. *Hardwick* v. *Campbell & Co.,* 7 Ark. 118; *Mayor* v. *State Bank,* 8 Ark. 227; *Loring* v. *Flora,* 24 Ark. 151; *Greenfield* v. *Carlton,* 30 Ark. 547; *Clarke* v. *Wanamaker,* 184 Ark. 73, 40 S. W. 2d 784.

It was error to have sustained the demurrer to the petition, but as no relief can be afforded, the cause is dismissed. Having jurisdiction to determine this question, it is ordered that all costs be assessed against appellees.

ROBINS, J. (dissenting). I respectfully dissent. The controversy involved in this case has become moot, and the appeal, in my opinion, should be dismissed for that reason. "It is not the policy of our law with respect to litigated cases to decide questions which have ceased to be an issue by reason of facts having intervened rendering their decision of no practical application to the controversy between the litigants." *Quellmalz Lumber & Manufacturing Company* v. *Day,* 132 Ark. 469, 201 S. W. 125. In the case of *Kays* v. *Boyd,* 145 Ark. 303, 224 S. W. 617, we said: "In a case note to Ann. Cas. 1912C, at page 247, it is said that the current cases have held that a court in reviewing a decision upon an application for a writ of mandamus will not disturb the judgment of the lower court, where, pending the appeal, an event occurs whereby the question litigated and determined below has ceased to be of any practical importance, but is academic merely." See, also, *Blakely* v. *Newton,* 157 Ark. 351, 248 S. W. 907; *Huff* v. *Freeman,* 181 Ark. 312, 26 S. W. 2d 77.

If the case is to be determined on its merits, we ought not to censure election commissioners for complying with the rulings of this court as to what constitutes a qualified elector. Assuredly, when a nominating petition is presented to election commissioners they ought not to act on it blindly, without determining whether it is signed by persons who are qualified under the law to sign it. Public officers such as election commissioners should not be held as mere automatons. They ought to be permitted to exercise their ability to read public records and to act upon knowledge so gained in performing their official duties.

The majority seems to concede that the commissioners may investigate and find out what signers of such a petition have poll tax receipts, but the majority says the commissioners should go no further. In other words, the election commissioners may find from the record that the poll tax receipts held by signers of the nominating petition are, under our decisions, absolutely void, but, says the majority, the election commissioners must disregard what the records show as to failure of the

poll tax holder to assess and also disregard what this court has said as to the effect of such failure. Under the ruling of the majority an independent candidate may be nominated by a petition signed by persons none of whom would be qualified to vote for such candidate in the election.

Since the decision, rendered in 1932, in the case of *Collins v. Jones,* 186 Ark. 442, 54 S. W. 2d 400, this court has consistently held, to use the language of the majority in the recent case of *Stephens* v. *O'Neel,* 210 Ark. 570, 196 S. W. 2d 917, "that to be a qualified elector one must both *assess* and pay his poll tax in the manner provided by law." (Italics supplied). *Henderson* v. *Gladish,* 198 Ark. 217, 128 S. W. 2d 257.

Now, in the case at bar, the election commissioners apparently found from the public records that certain signers of the nominating petition had not assessed their poll tax in the manner provided by law and they disregarded their signatures because this court has frequently said that such persons were not qualified electors. For following the plain mandate of this court these commissioners are now criticised by this court. The majority seems to hold that the commissioners could look at the poll tax record, but that they ought not to look at the assessment record—this in the face of the oft repeated declaration of this court that assessment for poll tax is as essential a requisite of eligibility of a voter as payment of poll tax.

(I have heretofore taken occasion to say that I disagree with the above decisions because, as it appears to me, they have added requirements to the eligibility of voters not authorized by the constitution. See dissenting opinion in *Stephens* v. *O'Neel, supra.* The General Assembly of 1947 undertook by Act No. 220, approved March 18, 1947, to legislate out of existence the pronouncement of *Collins* v. *Jones, supra,* and other cases holding that a proper assessment was essential to a valid poll tax. That Act, however, by its terms, does not become effective until October 2, 1947.)

The rule promulgated by this court in the Collins case and other cases cited above is now and was, when the election commissioners acted on appellant's petition, the law in this state; and surely public officials ought not to be judicially condemned for following the decisions of the state's highest court.

JACKSON *v.* JACKSON, TRUSTEE.

4-8166 201 S. W. 2d 218

Opinion delivered April 21, 1947.

Smith & Ponder, for appellant.

Chas. F. Cole, for appellee.

MINOR W. MILLWEE, Justice. Appellant, Mattie Jackson, is the widow of R. M. Jackson who died testate at Hardy, Sharp county, Arkansas, in January, 1929. Appellees are two sons, a daughter and grandson of R. M. Jackson, deceased, and Addie M. Jackson, trustee of his estate.

The will of R. M. Jackson was construed by this court in *Hastings* v. *Jackson,* 201 Ark. 1005, 148 S. W. 2d 305. It was there said: "We think it certain that the testator's first and foremost thought was to provide a home for his elderly wife and to provide her with sufficient means to live in comfort and without financial embarrassment the remainder of her life. To this end he impounded all of his estate, both real and personal, provided same should not be sold but should be kept intact, and operated by his son, R. A. Jackson, in whom he had implicit trust and confidence. . . . When the will is considered as a whole, we think the conclusion is inescapable that it was the testator's intention to give his wife $100 per month net, and that she should not be charged with the cost of necessary improvements to the homestead or the taxes thereon, as to do so would deprive her of a portion of the $100 per month which the testator was so solicitous that she have, as evidenced by its frequent repetition in the will. The provision made for her in paragraph four as to the mansion house is not the ordinary life estate where the life tenant is chargeable with taxes and improvements. It was given to her for life, it is true, but it was coupled with a legacy of $100 per month and other provisions for the executor to pay the taxes and other necessary expenses on the whole estate, all of which, including the homestead, should be held intact for the lifetime of the widow. The heirs or other legatees were not to share in any net income until all expenses and taxes and the $100 per month to her were paid."

Appellant continued to reside in the home place at Hardy until October, 1945, when a fire extensively damaged the house and destroyed most of appellant's per-

sonal and household effects. In August, 1944, appellant procured a policy of fire insurance on the dwelling house in the amount of $1,500 for a term of three years. The property was insured in her name and the premium paid from her own funds.

On March 21, 1946, the insurance carrier filed a bill of interpleader in the Sharp Chancery Court pursuant to the provisions of Act 141 of 1943. It admitted liability for the face value of the policy, but alleged that it was unable to make payment thereof because of the conflicting claims of appellant and appellees over the right to the proceeds of the policy. The company deposited $1,500 in the registry of the court and prayed that it be discharged from further liability, and that the parties in interest be required to settle the right to the proceeds of the policy between themselves. Appellant and appellees then filed their respective petitions in which each party claimed the right to receive the amount deposited to the exclusion of the other, and the insurance company was discharged from further liability.

A trial of the issues on September 12, 1946, resulted in a decree in favor of appellees and the clerk of the court was directed to pay the insurance proceeds to the trustee, for the use and benefit of the estate of R. M. Jackson, deceased. The trustee was directed to refund to appellant the premium of $43.87 which she paid on said policy. The court further directed the trustee to repair the house as speedily as possible.

Appellant testified that she procured the policy of insurance for her own benefit and understood that both the house and furniture were covered by the policy, which insured the dwelling only. The loss of her household goods alone exceeded $1,500. She has resided in the home of a son since the fire, but was receiving rents from rooms on the second floor of the dwelling which had been repaired at the time of the trial. It was her intention to move back to the home place as soon as repairs to the first floor were completed.

The trustee of the R. M. Jackson estate testified that at no time prior to the fire had she procured insurance on the property and she did not know whether appellant had a policy. She had been serving as trustee for three years at the time of the trial. At the time of her appointment the estate was heavily involved and without funds to purchase insurance on the dwelling. As trustee, she proceeded to repair the damaged dwelling in the early part of 1946 and had expended $1,538 for such repairs at the time of the trial. The complete repair bill would amount to approximately $2,000.

We think the trial court erred in holding the trustee of the estate of R. M. Jackson, deceased, entitled to the proceeds of the policy procured by appellant. The question does not seem to have been heretofore decided by this court. In those cases where an ordinary legal life tenancy is involved the rule followed in most jurisdictions is stated in 33 Am. Jur., Life Estates, Remainders, etc., § 332, p. 838, as follows: "It is clearly the general rule that where a legal life tenant insures the property in his own name and for his own benefit and pays the premiums from his own funds, he is, at least in the absence of a fiduciary relationship between him and the remainderman existing apart from the nature and incidents of the tenancy itself, or of an agreement between him and the remainderman as to which of them shall procure and maintain insurance, entitled to the proceeds of the insurance upon a loss; and the fact that the insurance was for the whole value of the fee is not generally regarded as affecting the right of the life tenant to the whole amount of the proceeds."

In an extensive annotation on the subject in 126 A. L. R. 336, many cases are reviewed in support of the above rule. One of the leading cases on the subject is that of *Harrison* v. *Pepper,* 166 Mass. 288, 44 N. E. 222, 33 L. R. A. 239, 55 Am. St. Rep. 404. In that case the plaintiff, a remainderman of real property, sought to compel the life tenant to place the sum received by her for insurance on the property in trust for plaintiff until

the life tenant's death, with income payable to the life tenant during her life. In denying the relief sought by the plaintiff, the Massachusetts court said: "It is plain that the plaintiff is not entitled to recover unless she has some claim upon the funds in the hands of the defendant. In the absence of anything that requires it in the instrument creating the estate, or of any agreement to that effect on the part of the life tenant, we think that the life tenant is not bound to keep the premises insured for the benefit of the remainderman. Each can insure his own interest, but, in the absence of any stipulation or agreement, neither has any claim upon the proceeds of the other's policy, any more than in the case of mortgagor and mortgagee, or lessor and lessee, or vendor and vendee. . . . The contract of insurance is a personal contract, and inures to the benefit of the party with whom it is made, and by whom the premiums are paid."

In the case of *Blanchard* v. *Kingston,* 222 Mich. 631, 193 N. W. 241, Chief Justice WIEST, speaking for the court, said: "All authorities hold that a life tenant has an insurable interest. The authorities are not in harmony upon the extent to which such insurance may be taken out by the life tenant, some holding it cannot go beyond the interest of the life tenant, and others that it may go to the full value of the property. If there is no obligation to insure for the benefit of remaindermen, either in the instrument creating the tenancy or under agreement with the remaindermen, then the life tenant may be the full beneficiary. By the great weight of authority insurance received by the life tenant under his own permitted contract is not impressed with any trust for the benefit of remaindermen but wholly belongs to the life tenant."

In 31 C. J. S., Estates, § 46, p. 59, it is said: "It has been stated, as a general rule, that the life tenant is not bound to keep the premises insured for the benefit of the remainderman or reversioner, unless there is an agreement that he shall do so, or a provision to that effect in the instrument creating the estate; but that either may

insure for his own benefit, the tenant for life and the remainderman paying insurance for their respective interests. Ordinarily this is what is done, and it has been held that neither the life tenant nor the remainderman will be benefited by the other's policy."

In Restatement of the Law of Property, vol. I, § 123, sub-sec. 2, the rule is thus stated: "When a policy of insurance against the destruction of, or damage to, land or structures thereon, exists only for the protection of the interest of the owner of the estate for life, the owner of the estate for life has a privilege to retain, as against all claims of owners of future interests in the same land or structures, all moneys received by such owner as the proceeds of such policy of insurance."

A few courts have adopted a so-called minority rule to the effect that a life tenant, in procuring fire insurance, acts as a trustee for the remaindermen, and that public policy requires that the proceeds of such policy should be used in rebuilding, or go to the remaindermen, reserving merely the interest for life for the life tenant. *Green* v. *Green,* 50 S. C. 514, 27 S. E. 952, 62 Am. St. Rep. 846; *Clark* v. *Leverett,* 159 Ga. 487, 126 S. E. 258, 37 A. L. R. 180.

Under the will of R. M. Jackson, deceased, as construed by this court in *Hastings* v. *Jackson, supra,* appellant was given a life estate in the homestead free from the obligation ordinarily imposed upon a life tenant to pay taxes, improvements and other expenses necessary to the proper preservation of the property. The trustee of the estate had the legal right and it was her duty, under the will, to maintain reasonable insurance on all the trust property, including the homestead. There was no obligation resting upon appellant, in procuring insurance, to protect the interest of the remaindermen under the terms of the will. On the contrary, any fiduciary duty resting on the parties in this respect was owing from the trustee and remaindermen to the life tenant. So, if we were disposed to follow the so-called minority rule adopted by the courts of South Carolina and Geor-

gia, the basic reason upon which the rule rests, *i. e.*, that the life tenant acts as trustee for the remaindermen in procuring insurance, would appear to be lacking under the peculiar provisions of the will in the instant case.

There was no agreement on the part of appellant to keep the premises insured for the benefit of the estate or the owners of future interests in the property. Appellant procured the insurance in her own name and for her own benefit. The premium was paid from her own funds under a personal contract of indemnity with the insurance company. The trustee failed to insure the property and was not a party to the insurance contract. She testified that the estate was heavily involved at the time of her appointment as trustee and that no funds were available to purchase insurance on the property, but the evidence fails to disclose whether this condition existed either at the time appellant procured the policy or when the loss occurred. The R. M. Jackson estate was estimated by this court to be of the value of $50,000 when the case was here on the former appeal in 1941.

Since appellant insured her own interest in the premises at her own expense and was under no obligation under the will to insure for the benefit of the remaindermen, and having made no agreement to do so, she is entitled to the proceeds of her policy of insurance free from the claims of appellees. It follows that the decree of the trial court must be reversed and the cause remanded with directions to the trustee of the R. M. Jackson estate to pay the proceeds of the policy to appellant. It is so ordered.

TINSMAN MANUFACTURING COMPANY, INC., *v.* SPARKS.

4-8172 201 S. W. 2d 573

Opinion delivered April 21, 1947.

M. J. Harrison, for appellant.

J. R. Wilson, for appellee.

ED. F. MCFADDIN, Justice. This appeal challenges an award made by the Workmen's Compensation Commission. The principal question is: Did the death of the employee (Sparks) arise out of and in the course of his employment? An incidental question concerns interest on compensation awards.

The facts—viewed in the light most favorable to the commission's award—may be summarized as follows: The Tinsman Manufacturing Company employed crews to go into the woods and cut timber to be hauled to the mill. The superintendent in charge of the timber-cutting crews was called the "woods superintendent." W. E. Sparks was employed as a saw filer by the Tinsman Manufacturing Company. He lived about 2½ miles west of Tinsman, Arkansas, and his duties placed him under the "woods superintendent." Sparks was transported on a company bus or truck from his home to his place of work, and return. He was paid by the hour, and his pay-time began when he left home in the morning, and continued until he returned at night. In addition, he sometimes took saws home and filed them at night, keeping his own time, and being paid for this work.

On the morning of September 29, 1944, W. E. Sparks entered the company bus at his home, to be transported to a tract of timber located about 15 miles south of Hampton, where he and the other employees in the bus were to work that day. The bus driver was directed and authorized by the woods superintendent to stop the bus at any place, either going to or returning from work, on the request of any employee, and to wait until such employee made personal purchases, such as groceries, tobacco, etc. This was on company time, and was authorized and permitted by the woods superintendent. On the day in question the journey necessitated going through

the town of Hampton. Mr. Sparks was a constant user of smoking tobacco; and that fact was well known. When the bus reached Hampton, Mr. Sparks asked the bus driver to stop long enough for Sparks to purchase some smoking tobacco. The bus driver stopped in front of a cafe in Hampton, and Sparks alighted to cross the highway to make his purchase. As he was crossing the highway, he was struck and killed by a vehicle owned and operated by a third person not a party to this present appeal.

Appellees (claimants) are the widow and dependents of W. E. Sparks. They filed claim for compensation under the Workmen's Compensation Law. Appellants are the employer and its workmen's compensation insurance carrier. Appellants resisted the claim on the contention that Sparks' death did not arise "out of and in the course of employment" as those words are used in our Workmen's Compensation Law (see § 2(f) of Act 319 of 1939). After an extensive hearing, the Workmen's Compensation Commission made an award for the claimants. It is for this reason that we review the facts in the light most favorable to support the award. See *J. L. Williams & Sons* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82; *Elm Springs Canning Co.* v. *Sullins,* 207 Ark. 257, 180 S. W. 2d 113, and other cases collected in West's Arkansas Digest, "Workmen's Compensation," § 1939. The circuit court affirmed the award; and the employer and its insurance carrier have appealed to this court.

I. *Did Sparks' Death Arise Out of and in the Course of His Employment?* Appellants admit that, if Sparks had suffered casualty while on the bus, the appellants would have been liable; but appellants urge that, when Sparks left the bus to cross the highway to purchase smoking tobacco, then he deviated from his employment and his death did not arise "out of and in the course of his employment." To support their position, appellants have furnished us with a splendid brief, listing and discussing the following cases claimed to sustain their contention: In re *Betts,* 66 Ind. App. 484, 118 N. E. 551; *Cas-*

ualty Indemnity Exchange v. *Industrial Commission,* 190 Calif. 433, 213 Pac. 257; *Morgan* v. *United Taxi Co.,* 105 Ind. App. 304, 14 N. E. 2d 736; *Toombs* v. *Liberty Mutual Ins. Co.,* 173 Tenn. 38, 114 S. W. 2d 785; *Clark* v. *Voorhees,* 231 N. Y. 14, 131 N. E. 553; *Southern Surety Co.* v. *Galloway,* 89 Okla. 45, 213 Pac. 850; *Gardner* v. *Employers' Liability Assurance Corp.,* 247 Mass. 308, 142 N. E. 32; *Free* v. *Indemnity Ins. Co.,* 177 Tenn. 287, 145 S. W. 2d 1026; *Hornby's case,* 252 Mass. 209, 147 N. E. 577; *Carlestrom's case,* 264 Mass. 493, 162 N. E. 893; *Dubbert* v. *Beucus,* 96 Ind. App. 390, 185 N. E. 311; *Hill* v. *Dept. of Labor,* 173 Wash. 575, 24 Pac. 2d 95; *Labbe* v. *American Brass Co.,* 132 Conn. 606, 46 At. 2d 339; *Hayes* v. *Industrial Commission* (Ohio), 60 N. E. 2d 492.

We have studied each of these cases, and—aside from Hornby's case, *supra,* and the case of *In re* Betts, *supra*—we find two decisive facts present in the case at bar that were not present in any of the cases cited by the appellant. It is the concurrence of these two decisive facts that distinguish the case at bar from the cases relied on by the appellant. These facts are: Not only was Sparks "on company time," but the appellant (acting through its woods superintendent) had all the time, and with full knowledge, permitted Sparks and other employees to stop the bus and make individual purchases. In so doing, the employer permitted Sparks and the other employees to pursue a course of procedure that cannot be held to be such a deviation from the employment, as to remove Sparks from the protection of the Workmen's Compensation Law. In other words, whatever deviation there might have been, was too slight to release the appellants from the coverage afforded Sparks as an employee.

In Horovitz on Workmen's Compensation, p. 112, this appears:

"Must the injury arise out of the main work which produces the employee's wages? If hired to cut wood, or run a machine, does the protection cease when he goes for a drink of water to a near-by water-cooler placed there for that purpose? Or does the right to an award cease

if, acting on an impulse of nature, he goes to the toilet and is injured on the way thereto or because of a defect in that room? Or if he is eating an employer-provided lunch, as permitted or required by the employer or by the nature of the employment, and he suffers food poisoning—does that arise 'out of' his employment?

"These acts of personal ministration are universally recognized as *incidents of the employment.* Incidents of the employment, say most states, are as well protected as the injuries on the main job; and so saying, the courts begin to disagree as to what are incidents."

Then, after citing numerous cases, in some of which the acts of personal ministration were recognized as incidents of the employment, and in others in which the acts of personal ministration were considered as turning aside from the employment, the text (Horovitz) continues:

"So, too, getting fresh air, smoking, resting, eating food or ice cream, quenching thirst, . . . have been held compensable incidents ('contractual,' 'reasonable,' or just plain 'incidents') of one's employment; . . .

"But slight *deviations* are no defense under most state decisions. Thus a slight deviation to get a chew of tobacco, or to ask a fellow employee the time, or to throw away a cigarette, is harmless, and awards were upheld where the injury occurred during the deviation."

The paragraph last quoted above is the one that applies directly to the case at bar.

In the case of *Ry. Express Agency* v. *Lewis,* 156 Va. 800, 159 S. E. 188, 76 A. L. R. 350, the Virginia Supreme Court of Appeals had before it a case involving facts somewhat similar to the case at bar. There, Lewis was a truck driver for the express agency, and obtained the consent of his employer to make a short deviation from the truck route so that Lewis might engage in a personal errand. This deviation was so slight that the Virginia court held that the injuries Lewis sustained arose "out of and

in the scope of his employment," even though it was while he was on the personal errand that he was killed.

There is an annotation in 76 A. L. R. 356 on the subject, "Workmen's Compensation: Deviation on personal errand as affecting question whether injury to employee on street or highway arose out of and in the course of employment." It is there stated that liability ultimately depends upon the facts and circumstances of each case. Among cases allowing compensation, there is listed in the annotation the following: *Beaudry* v. *Watkins* 191 Mich. 445, 158 N. E. 16, L. R. A. 1916F, 576, in which a delivery boy, by permission, stopped at home for lunch on his way to collect a package; *Stratton* v. *Interstate Fruit Co.,* 47 S. D. 452, 199 N. W. 117, in which a truck driver by permission drove to his home for lunch, and was injured while returning to his place of business; *Rachels* v. *Pepoon,* 5 N. J. Misc, 122, 104 N. J. L. 183 and 139 At. 923, in which a helper on a newspaper distribution truck obtained his employer's consent to attend to personal business, and was injured while returning; *Zeier* v. *Boise Transfer Co.,* 43 Idaho 549, 254 Pac. 290, in which an employee en route to a freight depot stopped for lunch, and was injured after resuming his journey; *Sztorc* v. *James H. Stansbury, Inc.,* 189 App. Div. 388, 179 N. Y. S. 586, where the employee was in the immediate vicinity of the employer's truck which had stopped but momentarily. It is interesting to note that this last-cited case was cited with approval of the New York Court of Appeals in the case of *Younger* v. *Motor Cab Transp. Co.,* 260 N. Y. 396, 183 N. E. 863. Other cases are listed and discussed in the annotation, but we mention the above to indicate that the courts and commissions have decided each of these cases on its peculiar facts; and in the various adjudications there is an ever-growing tendency to construe the acts liberally to allow compensation.

There is an annotation in 51 A. L. R. on street risks incurred in the course of employment; and it is there stated (p. 511):

"Taking the view that the compensation acts do not authorize an award in case of injury or death from a peril which is common to all mankind, or to which the public at large is exposed, the earlier cases developed what is known as the doctrine of street risks, and very generally held that an employee was not entitled to compensation for an injury occurring in the public street unless it could be shown that the workman's employment involved peculiar exposure to the perils of the street."

Then, on page 514 of the same annotation this appears:

"The tendency of the later cases towards a more liberal construction of the term 'arising out of and in the scope of the employment' is reflected in the view now most generally taken as to street risks. The majority of the jurisdictions, . . . permit the recovery of compensation where the employee received a street injury while in the course of his employment, although the employment may not have required his presence on the street continually, but only occasionally, or even on the one occasion on which he was injured; Massachusetts apparently being the only jurisdiction recently passing upon this question, to take a *contra* view." See, also, annotation on the same subject in 80 A. L. R. 126.

We quote these statements to show the present tendency towards a liberal application of the term "arising out of and in the course of employment." Of course, if a servant should go away on a private mission without the consent or permission of his employer, there would be no liability. But in the case at bar, the trip of Sparks across the street was with the consent and permission of his employer, and was a mere momentary journey to obtain smoking tobacco which would tend to increase his satisfaction in the discharge of his duties. It is almost the same situation as if he had stopped the bus to get a drink of water or answer a call of nature. It was not a great distance, nor did it consume much time, and under the facts in this case we hold that Sparks' death arose out of and in the course of his employment.

In discussing the cases cited by the appellant, we withheld discussion of *In re* Betts, *supra,* and Hornby's case, *supra.* We now advert to these cases. Hornby's case, 252 Mass. 209, 147 N. E. 577, was decided in 1925. In that case a workman, while on a journey at the express direction of his employer, received a street injury. The Massachusetts court denied him compensation in accordance with the previous Massachusetts holdings, saying:

"It has been held that an injury resulting from a collision with an automobile, moving on a public street, is not an injury which under ordinary circumstances arises out of the employment; although at the time the employee is engaged in the employer's business."

Our case of *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579, announces a result contrary to the Massachusetts holding; so Hornby's case is not persuasive to the question here under consideration.

We come, next, to *In re* Betts, *supra.* There, the employee, while returning to work in the master's wagon, obtained the master's permission to stop to get some tobacco. While on that errand he was killed, and the appellate court of Indiana, in its opinion of January 18, 1918, held that the death of Betts did not arise out of and in the course of his employment. The facts in that case are so similar to the facts in the case at bar that no sound distinction can be drawn, but our Workmen's Compensation Law justifies a more liberal interpretation than is reflected in the case of *In re* Betts. There is abundant authority holding contrary to the Betts case, on facts almost identical. We discuss these.

In 71 C. J. 675, in discussing what acts do or do not constitute substantial deviation from employment, this appears:

"An injury sustained by an employee while procuring tobacco for his own use, being an act for his personal comfort and convenience but ultimately for the benefit of

the employer, may arise out of and in the course of the employment."

Some of the cases which sustain the above-quoted text are:

(a) *Wickham* v. *Glenside Woolen Mills,* 252 N. Y. 11, 168 N. E. 446: An employee, after carrying spools from the spinning room, stopped on his return to ask a fellow employee for tobacco, and this request took him a few feet out of his direct course, where he slipped on a greasy floor when he started to leave his fellow-employee, and sustained injuries. It was held that his injury arose out of and during the course of his employment within the meaning of the New York Workmen's Compensation Law.

(b) *Springer* v. *North,* 205 App. Div. 754, 200 N. Y. S. 248: A teamster, delivering wood to his employer's customer, stopped in front of a store to purchase tobacco for his own use, and—while reaching for the tobacco and with one foot on the wagon wheel—he was injured by the sudden starting of the horses. The injury was held incidental to his employment, justifying an award under the workmen's compensation law.

(c) *Richards* v. *Creamer,* 267 App. Div. 928, 46 N. Y. S. 2d 769: An employee of a carnival, riding on the employer's truck in the course of moving, asked the driver to stop at a roadside so that the employee might purchase cigarettes, and, while the employee was crossing the highway, he was struck by a passing automobile and received injuries, and it was held that the injuries arose out of and in the course of his employment. Motion for leave to appeal to the court of appeals was denied in 267 App. Div. 1007, 48 N. Y. S. 2d 685, and in 293 N. Y. 937, 55 N. E. 2d 757.

(d) *McLauchlan* v. *Anderson,* decided by the English Court of Sessions, February 1, 1911, and involving the Workmen's Compensation Act of England, and reported in 1911 Session Cases 529 and 4 B. W. C. C. 376: A workman, whose duty it was to load and accompany a train of

wagons drawn by a traction engine, fell while he was in the act of dismounting from the wagon in order to recover his pipe which he had dropped, and he was run over by the wagon. The court held that, if there was any deviation from the duties of employment, such deviation was too slight to be considered, saying:

"In one sense anything a man does in connection with his own body is done for his own purpose; eating and drinking are illustrations; but these are none the less things a workman is perfectly entitled to do in the course of his employment. The Lord Chancellor (Lord Loreburn) in the course of his opinion in the case of *Moore* v. *Manchester Liners, Limited,* said this—'I think an accident befalls a man "in the course of" his employment if it occurs while he is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing.' Now, this man's operation of getting down from the wagon to recover his pipe seems to me to satisfy all those conditions."

In concurring, Lord MacKenzie said: "The workman was at his work, and his attempt to get down to pick up his pipe was merely an incident in the day's work."

A rational construction of our workmen's compensation statute requires a holding that a short deviation, permissively made, as to obtain tobacco, is not a "turning aside," but a mere incident in the day's work. Such is the text in Corpus Juris and the holdings in the cases discussed above, and we think such holdings are more consonant with the purpose of our compensation law than the rule announced in the case of *In re* Betts, *supra.*

We list also recent cases, in some of which the courts have held that slight deviations do not exclude the employee from the coverage of the Workmen's Compensation Law, to-wit: *Alabama Concrete Pipe Co.* v. *Berry* 226 Ala. 204, 146 S. 271; *Cal. Casualty Indemnity Exchange* v. *Industrial Accident Commission,* 21 Cal. 2d 751,

128 Pac. 2d 116 and 135 Pac 2d 158; *Western Pipe & Steel Co.* v. *Industrial Accident Commission,* 49 Cal. App. 2d 108, 121 Pac. 2d 35; *Gagnebin* v. *Industrial Accident Commission,* 140 Cal. App. 80, 34 Pac. 2d 1052; *Cardillo* v. *Hartford Accident & Indemnity Co.,* 71 App. D. C. 303, 109 Fed. 2d 674; *Macon Dairies* v. *Duhart,* 69 Ga. App. 91, 24 S. E. 2d 732; *Guenther* v. *Industrial Commission,* 231 Wis. 603, 286 N. W. 1; *Karl* v. *Fair Shoe Repair, Inc.,* 55 N. Y. S. 2d 1; *Fritsche* v. *O'Neill,* 147 Pa. Super. Ct. 153, 24 At. 2d 131; *Whitham* v. *Gellis,* 91 N. H. 226, 16 At. 2d 703; and *Oram* v. *Moon Co.,* 285 N. Y. 42, 32 N. E. 2d 785. See, also, annotations in 32 A. L. R. 806 and 59 A. L. R. 370, discussing workmen's compensation coverage in the case of an employee temporarily leaving the vehicle or place of employment for reasons personal to himself.

II. *Interest.* As previously stated, an incidental question argued on this appeal is, whether interest should be allowed on compensation payments, from the time the payments should have been made. W. E. Sparks died September 29, 1944, and claimants filed claim shortly thereafter. The award of the commission was not made until March 18, 1946. In view of this delay, the appellees (claimants) have, by cross appeal, asked this court to render judgment for interest on each weekly payment from the time the payments should have been made (beginning in October, 1944) until the payment be actually made.

We bypass this cross appeal, because we hold that the question is not properly presented. Here is the reason: when the commission announced its award, on March 18, 1946, no such interest (as here claimed by appellees) was awarded. Appellees did not prosecute any appeal or cross appeal to the circuit court on this question of interest. Therefore, they are in no position to raise the question in this court.

The circuit court judgment affirmed the award of the Workmen's Compensation Commission "with interest at 6% from date of final award by the commission." The appellants, in their motion for new trial in the circuit

court, did not claim that the circuit court judgment (allowing the interest as above stated) was erroneous; so, likewise, appellants cannot raise the interest question in this court. The judgment of the circuit court is in all things affirmed.

DUREN *v.* ARKANSAS STATE BOARD OF OPTOMETRY.

4-8173 201 S. W. 2d 573

Opinion delivered April 21, 1947.

Rehearing denied May 19, 1947.

Claude E. Love, for appellant.

J. S. Brooks and *Carl Langston,* for appellee.

HOLT, J. April 4, 1946, proceeding under the authority of Act 94 enacted by the General Assembly of 1941, appellee, the State Board of Optometry, instituted this action in the Union chancery court to enjoin appellant from the practice of optometry "within the City of El

Dorado, Arkansas," or within the court's jurisdiction. As grounds for the relief prayed, it was alleged that appellant was practicing the profession of optometry without having procured a license as required by the act.

A general denial was interposed by appellant.

Upon a hearing, the trial court granted appellee's prayer, and entered a permanent injunction against appellant. From this order and decree comes this appeal.

For reversal, appellant says that the evidence was not sufficient to show that appellant had no license under the provisions of the act and therefore it was error to grant the injunction. We cannot agree with this contention.

The act is constitutional and valid, *Melton* v. *Carter*, 204 Ark. 595, 164 S. W. 2d 453, and reaffirmed in *Ritholz* v. *Arkansas State Board of Optometry*, 206 Ark. 671, 177 S. W. 2d 410.

Among its provisions are the following: "Section 3. The Board shall meet at least twice each year; and at its first regular meeting shall elect a President, a Vice-President, a Secretary-Treasurer. A record of its proceedings shall be kept which shall be open for public inspection at reasonable times; and said Board shall make a report annually to the Governor showing all receipts and disbursements of moneys, and a summary of all business transacted during the year. . . . Section 5. No person, except those already duly licensed by the Board, shall practice Optometry until he shall have passed an examination conducted by the Board. . . . All persons making application for examination and for registration shall be required to pay to the Treasurer of the Board a fee of Twenty-five Dollars. . . . Section 6. All registered Optometrists shall annually pay Ten Dollars to the Treasurer of the Board as a renewal license fee. . . . Section 8. The Board shall have the following powers in addition to those already conferred above: . . . (5) to bring suit in its proper name to enforce or restrain the violation of any provision of this Act. . . . Section 12. The following Acts are hereby

declared to be unlawful Acts: . . . (4) for any person, firm or corporation or partnership not having a license to engage in the practice of optometry. . . .

"Section 15. The violation of any provision of this Act may be enjoined by the State Board in the Chancery Courts of this State, even though such violation may be punishable by fine, the intention of this Act being to provide a speedy means of protecting the public which has not heretofore existed."

The material facts were to the following effect: Appellant maintained an office in the city of El Dorado in which he maintained optical equipment, such as charts, with which to test eyes, trial lenses, frames and other scientific instruments, which he used in fitting eye glasses. Three witnesses testified that they went to appellant, had glasses fitted, and paid him for these professional services.

Dr. George H. Brown testified that he was secretary-treasurer of the Arkansas Board of Optometry. He was first appointed in 1935 to this position and served until 1938, when he resigned. He was reappointed in April, 1945, and was in charge of the board's files and records. He had searched these records and files since the board's organization in 1913 to the present, and appellant had never made any application for a license, and no license authorizing him to practice had been issued. He exhibited to the court a book containing a roster of all men licensed to practice optometry in Arkansas. The board's records and files were kept by its secretaries in succession up to date, and were turned over to them under oath. Licensed optometrists pay dues to him as treasurer and appellant has never paid any dues. A man may go thirty days without paying dues and is then suspended. The record book itself was not introduced in evidence. Appellant did not testify and offered no testimony.

As we view the evidence, it supports the finding of the chancellor that appellant was practicing optometry without a license, contrary to the act, *supra,* and that appellee was entitled to the injunctive relief prayed.

While the evidence of Dr. Brown, secretary-treasurer of the board, principally relied upon by appellee here to show that appellant had no license to practice the profession of optometry, as the act required, was of a negative nature, it was, we think, sufficient. Dr. Brown as secretary-treasurer of the board had the care and custody of its files and records and was thoroughly familiar with them.

This court in *Thomas* v. *Spires,* 180 Ark. 671, 22 S. W. 2d 553, said: "While matters of record must be proved by exemplification of the record, negative matter may be proved by those familiar with the record and papers. *Hendry* v. *Willis,* 33 Ark. 833."

Our holding in this case is also in accord with the general rule as announced in 32 C. J. S., p. 736, § 807, subdivision (d): "Parol evidence is generally admissible to prove a negative, that is, that facts or documents do not appear of record. Where it is sought to prove a negative, that is, that facts or documents do not appear of record, or that as to certain acts or proceedings the record is silent, parol evidence is admissible as primary proof; the record is not higher evidence."

Finding no error, the decree is affirmed.

STEARNS *v.* STEARNS.

4-8174 201 S. W. 2d 753

Opinion delivered April 28, 1947.

Rehearing denied May 26, 1947.

Karl Greenhaw, G. T. Sullins and *Rex W. Perkins,* for appellant.

John W. Nance, for appellee.

HOLT, J. July 12, 1946, appellant sued appellee for divorce. She alleged indignities and cruel treatment such as to render her condition intolerable, (5th subdivision, § 4381, Pope's Digest) and in addition to divorce, she prayed for a property settlement, separate maintenance, attorneys' fees, costs and all equitable relief.

Appellee answered with a general denial and in a cross complaint sought divorce from appellant on the same grounds on which she sought a divorce from him.

The trial court, after hearing the testimony, which was presented orally, denied the divorce to both parties, dismissed their complaints for want of equity, denied appellant anything for support, allowed her $200 for attorneys' fees, and a Ford truck held by appellee, and ordered each party to pay his own costs.

Both parties have appealed.

(1)

The record shows that appellant and appellee were married November 7, 1941, and separated July 12, 1946, on the day the present suit was filed. Appellee was a widower, 52 years old, with an adopted, married daughter. Appellant was 45 years of age, had not been married, and was caring for her two aged parents, her mother being 83 and her father 96. Following the marriage, these

two old people, upon appellee's invitation, moved into his home where they lived with appellant and appellee until the present suit was begun. Appellee was good to them.

For several years prior to the death of appellee's first wife in August, 1940, Mrs. Verucchi, a near neighbor, and the mother of two little girls, had worked for appellee in his home, as housekeeper, and in caring for his invalid wife, and her husband had worked on appellee's farm.

Shortly after appellee's marriage to appellant, she discovered two endowment insurance policies of $1,000 each on her husband's life. He had named the Verucchi children as his beneficiaries. He also, at the same time, had procured a third policy for $1,000 on his life in which he named his adopted daughter as beneficiary. For some time appellant did not question the first two policies, *supra,* and made premium payments on them for her husband, but for some reason, which the evidence does not disclose, she rather suddenly became suspicious and accused her husband of being the father of these two little girls. Appellee vehemently denied his wife's accusations, or any misconduct on his part with Mrs. Verucchi. He testified that it was necessary to name beneficiaries in the policies, that he had become attached to the little girls, their mother and father had been good to his former wife and himself over a number of years, and, especially for these reasons, they were chosen as his beneficiaries.

Appellant became jealous and testified that quarrels were frequent, that appellee abused and mistreated her, and on occasions struck her. Appellee denied that he had abused or mistreated appellant, but admitted that they quarrelled when she falsely charged him with being the father of the two little girls. The testimony of appellant and appellee is in irreconcilable conflict. Both appear to be equally at fault.

We think it would serve no useful purpose to detail all the evidence, or set forth its substance. It suffices to say that we have reviewed it and conclude that neither the testimony of appellant nor that of appellee is sufficiently corroborated to warrant a decree of divorce to either.

As was said by this court in *Kientz* v. *Kientz,* 104 Ark. 381, 149 S. W. 86: "While the husband and wife are both competent to testify in divorce proceedings between them, yet it has been held that a decree of divorce will not be granted upon the uncorroborated testimony or admissions of either party. *Rie* v. *Rie,* 34 Ark. 37; *Kurtz* v. *Kurtz,* 38 Ark. 119; *Brown* v. *Brown,* 38 Ark. 324; *Scarborough* v. *Scarborough,* 54 Ark. 20, 14 S. W. 1098."

We conclude, therefore, that the trial court did not err in denying a divorce to both parties.

(2)

We think, however, that there was error in denying to the wife, appellant, alimony for her support. According to the evidence, appellee owned real estate and personal property of the approximate value of $20,000. He was in good health and a successful farmer and grape grower with a substantial income. His farm consisted of 130 acres, including an 18 acre vineyard, which was very productive. Appellant, on the other hand, owned no property except the Ford truck, *supra,* two $25 bonds, less than $50 in cash, and no home or income. In these circumstances, we think that she should be allowed $75 per month for her support.

As we said in the recent case of *Bonner* v. *Bonner,* 204 Ark. 1006, 166 S. W. 2d 254: "It was and is the duty of appellant to support his wife according to the station in which they live. This duty would not rest upon him if he were entitled to a divorce, but it does rest upon him as long as they are married unless she had abandoned him without just cause. He is as much to blame as she for the separation, and it is his bounden duty to support

her as long as the bonds of matrimony exist between them." See, also, *Boniface* v. *Boniface,* 179 Ark. 738, 17 S. W. 2d 897.

(3)

Appellant's request for additional attorneys' fees here will be granted. The record comprises more than 260 pages and appellant's brief, 115 pages. Obviously appellant's counsel have performed a great amount of work in this case, and when we take into account the amount of labor, skill and industry required, we think appellant's attorneys should be allowed an additional fee of $200. All costs in both courts to be paid by appellee.

So much of the decree as denies a divorce to either party is affirmed. That part of the decree denying alimony to appellant and requiring her to pay costs in the chancery court is reversed, and the cause remanded with directions to enter a decree consistent with this opinion.

BRACKEN *v.* HENSON.

4-8153 201 S. W. 2d 580

Opinion delivered April 28, 1947.

Arthur Sneed and *L. V. Rhine,* for appellant.

Verlin E. Upton, for appellee.

SMITH, J. Appellee, Marie Henson, filed this suit to recover possession of a lot containing slightly less than an acre, which she described in her complaint as follows: "Part of the northwest fourth of the northeast fourth of section 26, township 19 north, range 7 east; more particularly described as lot 4, of Lafflar's survey to the city of Rector, Arkansas." An answer was filed raising the issues herein discussed, and on motion of the defendant the cause was transferred to equity, where a decree was rendered in plaintiff's favor, from which is this appeal.

By an unbroken chain of conveyances defendant, appellant here, deraigned title from the United States Government under identical descriptions in the numerous deeds in the chain of title, to a certain parcel of land, reading as follows: "A part of the west half of the northwest quarter (NW ¼) of the northeast quarter (NE ¼) of section twenty-six (26), township nineteen (19) north, range seven (7) east, described as follows, to-wit: Commencing at the northwest corner of the northeast quarter (NE ¼) of said section twenty-six (26) running thence east 40 rods, thence south fifty-eight (58) rods, to the true place of beginning thence west 210 feet;

thence north 210 feet, thence east 210 feet; thence south 210 feet to the place of beginning."

It appears there had been a survey of an addition to the town of Rector, the plat of which described four certain lots as lots 1, 2, 3, and 4 of block 3 of Bolton's Addition to the town of Rector, but that survey did not include the lot here in litigation. This lot last referred to, was assessed for taxation under the description, "Pt. northwest quarter, northeast quarter, section 26, township 19 north, range 7 east, 1 acre," and forfeited to the state under that description for the nonpayment of the 1930 taxes assessed against it.

On October 13, 1944, the State Land Commissioner for the recited consideration of $171.69 issued a redemption deed to Barbria Bracken, appellant here, which recited that, "This deed is issued in accordance with the description contained in the quitclaim deed from Minnesota Yates, an unmarried person, to Barbria Allen Bracken on November 14, 1939." This deed employed the description appearing in all the deeds in the chain of title and recited that it covered "the taxes, penalty and costs due thereon and for which the same was sold, and expenses incurred by the state amounting to the sum of $14.13, and the taxes that would have accrued thereon subsequent to said sale (to the state) from the date of such sale to the present time, making in the aggregate the sum of $171.69 from which amount no dollars and no cents of such subsequent taxes is deducted, the same having been paid heretofore to the proper officials of said county. . . ."

The lot here in question, was assessed under the description of "Part of section." Under many decisions of this court this was a void description, and no valid sale for taxes could ever be had under that description. Accordingly a survey was made by the county surveyor for the purpose of putting this and other property on the tax books under a valid description.

This survey referred to as the Lafflar survey was made under the authority of § 13695, Pope's Digest, and

a plat thereof was duly recorded with the explanatory field notes, as authorized and required by other sections of the statute.

The relevant portions of § 13695, Pope's Digest, read as follows: "It shall be the duty of each assessor to make out, from such sources of information as shall be in his power, a correct and pertinent description of each tract or lot of real property in his county, so that the same can be identified and distinguished from any other tracts or parts of tracts, and he shall place a value on each subdivision of a block and the improvements thereon in cities and towns, or additions thereto, notwithstanding the fact that one individual owns the whole block. And when he shall deem it necessary to obtain an accurate description of any separate tract or lot in his county, he may require the owner or occupier thereof to furnish the same with any title papers he may have in his possession, and if such owner or occupier, upon demand made for the same, shall neglect or refuse to furnish a satisfactory description of such parcel of real property to such assessor, he may employ the county surveyor to make out a description of the boundaries and location thereof, and a statement of the quantity of land therein, and the expense of such survey shall be returned by such assessor to the clerk of the county court, who shall add the expense of such survey to the tax assessed upon such real property, and it shall be collected by the collector of the county with such tax, . . ."

A tax sale based upon a description contained in the Lafflar Survey was upheld in the case of *Holt* v. *Reagan*, 201 Ark. 1101, 148 S. W. 2d 155, but it was not shown in that case that the description of the property sold for taxes was not properly identified and described by the survey.

The purpose of this statute is to furnish descriptions of lands and lots assessed for taxation so that they may be identified by reference to the plat of the survey which has become a public record. The survey is to be made of the lands and lots in place, and to that end the landowner

may be required to exhibit his title papers so that an accurate map thereof may be made. The surveyor has no right or authority to ignore the existing boundary lines. On the contrary, it is his duty to make a survey conforming to the boundary lines and to make and have recorded a plat showing the survey thereof.

For some reason the surveyor ignored the existing boundary lines of appellant's lot which had been described in numerous deeds in her chain of title, all of which were of record. These conveyances described her lot as set out above. The survey should have conformed to this description, and the lot thus surveyed should have been given a number on the plat of the survey. Had that been done the lot thus numbered should have been placed on the tax books, and an assessment of the taxes thereon and a sale for the nonpayment of the taxes under that description would have been valid. Such was the holding in the case of *Holt* v. *Reagan, supra.*

The plat of the Lafflar Survey and the field notes accompanying it ignore the valid description of appellant's lot. A line projected south 58 rods from the northwest corner of the northeast quarter of section 26, would extend into what was surveyed as lot 4, but would not include it all or reach to its south boundary. Moreover, the survey of the west boundary of lot 4, as shown by the plat thereof, extends into and slices off 50 feet of lots 1, 2, 3, and 4 according to an outstanding survey.

When the Lafflar Survey was made, lot 4, according to that survey, was placed on the tax books, and was sold for the nonpayment of the taxes assessed against it for the year 1935. This forfeiture was certified to the state, and, on January 3, 1944, the State Land Commissioner, for the consideration of $5.39, including the cost of the deed, executed a deed to appellee, Mrs. Henson, for lot 4, which recited its forfeiture to the state for nonpayment of the 1935 taxes assessed against it. This suit is based on that deed.

This deed and the sale on which it was based are void as to the lot here in litigation for the reason that the

survey was made in a manner not authorized by law. There is authority which we sustained in the case of *Holt* v. *Reagan, supra,* to make a survey of the lands and lots owned by each and every landowner in an area which cannot be properly assessed for want of a valid description, but there is no authority to change the description of a person's land so that it cannot be identified by reference to his title papers.

We do not hold that an error in one respect would invalidate the survey of other lots properly surveyed, and which would not confuse or render uncertain the description of other lots; but a survey is invalid which ignores the boundaries as defined in the title papers of the property owners. In other words, the property must be surveyed as it exists and is found to be.

The decree will, therefore, be reversed, and the Commissioner's deed to lot 4 will be canceled for the reason that it is based upon invalid survey, and the cause will be remanded with directions to enter a decree in accordance with this opinion.

RAYMOND *v.* YOUNG.

4-8183 201 S. W. 2d 583

Opinion delivered April 28, 1947.

Ernie E. Wright, for appellant.

Harrell Simpson and *Oscar E. Ellis,* for appellee.

MINOR W. MILLWEE, Justice. This is an appeal from a decree of the Baxter Chancery Court vacating a final decree rendered in appellant's favor at a former term of court.

On November 1, 1945, appellee, Rena Young, instituted suit against appellant, W. H. Raymond, to quiet title to a 40 acre tract of land and to cancel a clerk's tax deed issued to appellant in 1944 under a forfeiture and sale of the tract for the taxes of 1941. Appellant filed a general demurrer and answer denying the allegations of the complaint and claiming ownership of the land in controversy by virtue of his tax deed.

The cause was heard before Hon. J. M. Shinn, the regular chancellor of the 11th Chancery District, on January 21, 1946, which was an adjourned day of the October, 1945, term of court. Appellee offered the testimony of two witnesses in support of the allegations of her complaint. Appellant, relying upon the failure of appellee to establish the invalidity of the tax deed, declined to offer testimony. After argument of counsel, the chancellor took the case under advisement for a decision in vacation with the privilege of counsel to submit written briefs in support of their respective contentions.

On July 23, 1946, an adjourned day of the April, 1946, term of court, Hon. Garner Fraser, Judge of the 14th circuit, presiding on exchange with the chancellor

of the 11th Chancery District, entered a decree dismissing the complaint of appellee for want of equity. This decree recites that the cause had been previously argued and submitted for decision upon the pleadings and evidence taken on January 21, 1946. The following findings are embraced in the decree: "That the evidence introduced on behalf of the plaintiff, Rena Young, fails to establish legal or equitable grounds for voiding the tax deed of the defendant, W. H. Raymond, covering the SW¼ of the NE¼ of section 3, township 17 north, range 12 west, in Baxter county, Arkansas. The Court further finds that the plaintiff is not entitled to a transfer of this cause to the Circuit Court because the evidence had been concluded and the case argued and submitted to the Court for a decision prior to the request for a transfer and further that the plaintiff is not entitled at this time to a non-suit of the cause for the same reason."

No appeal was prosecuted from the decree of July 23, 1946, but on a subsequent date, which is undisclosed by the record, appellee filed a motion to vacate said decree. The motion alleged that about three months after the trial on January 21, 1945, former counsel for appellee forwarded a motion and brief to the regular chancellor by mail requesting the court to grant appellee a non-suit; that about 30 days later one of her present counsel talked with the chancellor by long distance telephone and requested that a non-suit be granted and was advised by the chancellor that court would reconvene in Baxter county on July 15, 1946; that present counsel then stated that his duties as prosecuting attorney required his presence in Pocahontas on that date; that appellee and her counsel had no notice that court would be held on July 23, 1946, but thought the motion for non-suit had been granted on July 15, 1946, as had been previously requested. The prayer of the motion was that the decree of July 23, 1946, be vacated, and that appellee's motion for non-suit be granted. The motion was unverified and appellee did not offer testimony to support it.

The motion to vacate was sustained by the regular chancellor on October 21, 1946, which was the first day of the October, 1946, term of court and the cause was set for hearing in January, 1947. This appeal is from the order of October 21, 1946, vacating the decree of July 23, 1946.

We first consider the contention of appellee that the decree of October 21, 1946, vacating a decree rendered at a former term of court is not a final and appealable order. It is insisted that the decree did not dispose of the issues since the case was set down for a new hearing, and that the appeal is, therefore, premature. This court held to the contrary in *Ayers* v. *Anderson-Tully Co.*, 89 Ark. 160, 116 S. W. 199. It was there said: "The proceeding, under the statute, to have a judgment set aside which was rendered at a former term is equivalent to an independent action instituted for that purpose, and the order of the court either vacating the judgment or refusing to do so is final in the sense that it determines the rights of the parties under the judgment; even though, after vacating the judgment, it leaves the original action still pending for further proceedings." See, also, *Knights Honor of the World* v. *Epps*, 123 Ark. 371, 185 S. W. 470; *Robinson* v. *Citizens Bank*, 135 Ark. 308, 204 S. W. 615. The subsequent decree vacating the former decree in the instant case was final and appealable even though the chancellor failed to grant appellee's prayer for a non-suit and left the cause pending for further hearing.

We think it is clear from the recitals of the decree of July 23, 1946, that the chancellor on exchange had before him the evidence upon which the cause was heard by the regular chancellor and the motion for a non-suit and brief which had been mailed to the chancellor in vacation. According to the allegations of the motion to vacate, appellee's motion for non-suit was not made until over three months after the cause had been heard and taken under submission for final decree in vacation. Under the first subdivision of § 1485 of Pope's Digest, it is within the discretion of the court to permit a plaintiff to take a non-suit where a case has been finally submitted to the

chancellor for decision, and this court will not reverse unless it appears that the court has abused its discretion. *St. L. S. W. Ry. Co.* v. *White Sewing Machine Co.*, 69 Ark. 431, 64 S. W. 96; *Watts* v. *Watts*, 179 Ark. 367, 15 S. W. 2d 997. Appellee contends that the case was not finally submitted until the written briefs had been filed and relies on the case of *Carpenter* v. *Dressler*, 76 Ark. 400, 89 S. W. 89, where the motion for non-suit was made during the course of the oral argument before the chancellor. It was held that the court abused its discretion in refusing to grant a non-suit under facts entirely different from those involved in the case at bar. We think there was no abuse of discretion on the part of the chancellor on exchange in refusing appellee's request for a non-suit under the circumstances of the instant case.

The court lost control over the decree of July 23, 1946, with the ending of the April, 1946, term of court and was without authority to vacate that decree at a subsequent term except in the manner, and upon the grounds, specified in §§ 8246 and 8248, Pope's Digest, or by bill of review under the chancery practice. *Turner* v. *Vaughn*, 33 Ark. 454; *Mitchell* v. *Fowler*, 181 Ark. 857, 28 S. W. 2d 66. Section 8248 provides that the proceeding to vacate or modify the judgment or order on the grounds mentioned in subdivisions 4-8 of § 8246 shall be by a verified complaint setting forth the judgment or order and the grounds to vacate or modify it. The requirement that the complaint be verified has been held to be jurisdictional and one that must be complied with. *Merriott* v. *Kilgore*, 200 Ark. 394, 139 S. W. 2d 387; *Pattillo* v. *Toler, et al.*, 210 Ark. 231, 196 S. W. 2d 224. However, if we treat that requirement as one that could be waived, the allegations of the motion to vacate do not set up any of the grounds specified in the statute. Appellee did allege that she and her counsel "thought" that a non-suit would be entered on July 15, 1946, upon the request previously made, but sufficient facts were not alleged to demonstrate that they were warranted in reaching this conclusion. When counsel for appellee made the oral request for a non-suit in vacation, the chancellor merely

advised counsel the date court would next be in session and in no manner indicated that the motion would be granted.

It follows that the chancellor erred in granting appellee's motion to vacate the decree rendered in favor of appellant on July 23, 1946. The decree from which this appeal comes is, therefore, reversed, and the cause will be remanded with directions to dismiss appellee's motion to vacate the decree of July 23, 1946, and to reinstate said decree dismissing the complaint of appellee for want of equity, and for such further proceedings as may be necessary in accordance with the principles of equity and not inconsistent with this opinion.

CASSEN *v.* CASSEN.

4-8179 201 S. W. 2d 585

Opinion delivered April 28, 1947.

Quinn Glover and *Carl Langston,* for appellant.

Price Shofner and *Lee Cazort,* for appellee.

ED. F. MCFADDIN, Justice. In this divorce suit, appellant is the wife, and appellee, the husband. They were married in Massachusetts in 1929, and have two children. In 1942, appellee filed a suit for divorce in Florida on the ground of cruelty. The divorce was denied by the Florida Circuit Court, and that holding was affirmed by the Supreme Court of Florida on March 23, 1945, in the case of *Cassen* v. *Cassen,* 155 Fla. 768, 21 So. 2d 458.

The appellee came to Arkansas for a divorce. He arrived here on January 3, 1946, and rented a room by the week at a hotel in Little Rock. His suit for divorce was filed on March 6, 1946; and, until after his suit had been filed, he did not evidence by affirmative acts any intention to reside permanently in Arkansas. The appellant, a resident of Massachusetts, was summoned by warning order and notified by attorney *ad litem.* She appeared specially for the sole purpose of challenging the jurisdiction of the Arkansas court; and she claimed that the appellee was not a *bona fide* resident of Arkansas.

From a decree finding appellee to be a *bona fide* resident, and granting him a divorce, there is this appeal, which necessitates a re-examination of our holding in *Squire* v. *Squire,* 186 Ark. 511, 54 S. W. 2d 281, in the light of subsequent cases which likewise involved the question of *bona fide* residence as essential to jurisdiction of the court to grant a divorce.

In *Squire* v. *Squire, supra,* in speaking of a party who was granted a divorce, we said:

"She frankly admitted that she came to this State to obtain a divorce; that she would remain here if she could secure employment to support herself and child. Even though she moved to this State to bring a divorce suit and had the intention of leaving after the divorce was granted, this would not deprive the court of jurisdiction,

if she were actually and in good faith a *bona fide* resident for the period prescribed by the statute."

Before a person can become a resident of this state so as to have his marital status determined by the courts of this state, he must, in truth and in fact, be a *bona fide* resident of the state, as hereinafter defined. The following cases attest that this court had repeatedly indicated that the Squire case should be thus modified. In *Barth* v. *Barth,* 204 Ark. 151, 161 S. W. 2d 393, in denying a divorce, we held that *bona fide* residence was required. In *Gilmore* v. *Gilmore,* 204 Ark. 643, 164 S. W. 2d 446, we said: "In the instant case there was a want of jurisdiction if appellee were not a *bona fide* resident of Arkansas." In *Feldstein* v. *Feldstein,* 208 Ark. 928, 188 S. W. 2d 295, in denying a divorce, we said: "The evidence in this case is not sufficient to show that appellee ever became a *bona fide* resident of Arkansas."

In *O'Keefe* v. *O'Keefe,* 209 Ark. 837, 192 S. W. 2d 556, we quoted from *Mohr* v. *Mohr,* 206 Ark. 1094, 178 S. W. 2d 502, as follows: " 'Without lengthening this opinion to analyze the holdings of other courts, we hold that there must be overt acts sufficient to demonstrate a real and *bona fide* intent to acquire residence here before the State of Arkansas—as a silent third party to every divorce suit here—will allow its courts to be used as the haven of the transient and dissatisfied spouse.' "

In *Porter* v. *Porter,* 209 Ark. 371, 190 S. W. 2d 440, we expressly stated that *Squire* v. *Squire* had become a controversial holding. In *Tarr* v. *Tarr,* 207 Ark. 622, 182 S. W. 2d 348, Mr. Justice KNOX, in his splendid dissenting opinion, pointed to the conclusion we are now reaching in the present case.

A divorce decree in this state, to fulfill all the requirements for full faith and credit under the United States Constitution, can determine status only when there is a *bona fide* residence in this state. We quote from § 111 of the American Law Institute's Restatement of the Law on Conflict of Laws: "A state cannot exercise

through its courts jurisdiction to dissolve a marriage when neither spouse is domiciled within the state."

So, now, we overrule *Squire* v. *Squire, supra,*[1] insofar as it holds that a person who comes to this state for the purpose of obtaining a divorce and who does not have the *animus manendi* (which has always been held an essential ingredient of residence), may be said to be a *bona fide* resident of this state; and by "*bona fide* residence," we mean the same as domicile.[2] We quote from, and adopt as our own and as ruling in this state, the language of the United States Supreme Court in *Williams* v. *North Carolina,* 325 U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A. L. R. 1366:

"Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile. *Bell* v. *Bell,* 181 U. S. 175, 21 S. Ct. 551, 45 L. Ed. 804; *Andrews* v. *Andrews,* 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this court nor any other court in the English-speaking world has questioned it. Domicile implies a *nexus* between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicile of one spouse within a state gives power to that state, we have held, to dissolve a marriage wheresoever contracted."

This essential as to *bona fide* residence, must exist, not only at the time the decree is rendered, but also must have existed at the time the suit was filed. *Parseghian* v. *Parseghian,* 206 Ark. 869, 178 S. W. 2d 49; *Porter* v. *Porter,* 209 Ark. 471, 190 S. W. 2d 440; *O'Keefe* v. *O'Keefe,* 209 Ark. 837, 192 S. W. 2d 556.

[1] An interesting discussion of the Squire case may be found in § 134, *et seq.*, "Arkansas Conflict of Laws," a volume published in 1938 by Dr. Robert A. Leflar, now Dean of the Law School of the University of Arkansas.

[2] See 17 Am. Juris. 278 and 279, "Divorce and Separation," §§ 249-50; 27 C. J. S. 644, *et seq.*, "Divorce," § 76; annotations in 106 A. L. R. 6 and 159 A. L. R. 496, "What Constitutes Residence or Domicile Within State for Purpose of Jurisdiction in Divorce." See, also, the article on "Extraterritorial Divorce" by Prof. Ernest G. Lorenzen in Yale Law Journal, Vol. 54, p. 799.

Tested by the rule of these cases, the appellant failed to prove that he was a *bona fide* resident of Arkansas at the time his suit was filed; and his subsequent affirmative acts, in an endeavor to establish such residence, cannot be allowed any retroactive effect. So, the decree of the chancery court is reversed, and the cause dismissed, with appellee to pay all costs of the chancery court and this court.

McHaney, J. (dissenting). Appellee was granted a divorce from appellant by decree of June 27, 1946, on the ground of three years' separation without cohabitation, § 4381, sub-section seventh of Pope's Digest. That they have lived separate and apart, without cohabitation, for more than three consecutive years prior to this action is undisputed in this record. Appellant did not testify, in the action, either as to appellee's residence in this State, or as to the three years separation without cohabitation, and she offered no evidence in her behalf. It is also undisputed, in my judgment, that he has been a *bona fide* resident of this State for more than three months next before the decree herein and for two months next before the commencement of his action. Section 4386 of Pope's Digest so provides in this language: "The plaintiff, to obtain a divorce, must prove, but need not allege, in addition to a legal cause of divorce: First, a residence in the State for three months next before the final judgment granting a divorce in the action and a residence for two months next before the commencement of the action."

Appellee was asked on cross-examination the question, "When you left Florida, you came here entirely for the purpose of getting a divorce, didn't you?" and answered, "Not entirely, I intended to stay here." And again he was asked, "If you obtain a divorce in this court, what are your intentions? Are you going back to Florida, in other words?" and answered, "My intentions are staying here and going into the hotel business, as I have prospects of getting one of the hotels here in Little Rock to operate." He had been engaged in the hotel business in Florida prior to coming to Little Rock.

It is undisputed that he came to Little Rock on January 3, 1946. His suit for divorce was filed March 6, 1946, and the undisputed proof shows that he has resided here continuously from January 3, 1946. He has been living at the Gleason Hotel. Shortly after coming here he became a member of the Little Rock Lodge of Elks by transferring his membership in another lodge to this and was at the date of trial an officer in said Elks lodge, being night manager and is regularly employed. He has assisted the U. S. Marshal's office in the handling of prisoners and accompanied Deputy McBurnett on trips to several points in this State, being paid therefor by the Government.

I think this evidence is sufficient, in the absence of any showing to the contrary, that appellee is a *bona fide* resident of this State and has been for the period of time required by said statute. We have so held in several cases where the showing of *bona fide* was no greater, if as great, as here. *Carlson* v. *Carlson,* 198 Ark. 231, 128 S. W. 2d 242; *Brickey* v. *Brickey,* 205 Ark. 373, 168 S. W. 2d 845; *Buck* v. *Buck,* 205 Ark. 918, 171 S. W. 2d 939. In the Buck case, last cited, we said: "After a careful review of the record, we think it practically undisputed that appellee was a *bona* fide resident of this state, within the meaning of the statute (§ 4386, Pope's Digest) at the time he filed his suit, and at the time the decree was rendered. He came to this state on June 20, 1942; his suit was filed August 21, following, and the decree was rendered on November 2, 1942. The suit was filed in the Fort Smith District of Sebastian county. Immediately after coming to Fort Smith appellee established his residence at 717 North 13th street, secured employment and remained in Arkansas until after the decree was rendered.

"We think it clear, therefore, that appellee established his residence within the requirements of the statute."

In the Buck case we quoted from the Brickey case the following: "The ground chiefly relied on for the re-

versal of the decree here appealed from is that appellee was not a *bona fide* resident of Benton county at the time of its rendition . . . He testified that he had become a resident of this state, and expected to reside here permanently, a condition which our ninety-day divorce law does not require, it being sufficient under this statute that he was a resident of the state for two months before filing suit for divorce and for one month thereafter before the rendition of the decree. Section 4386, Pope's Digest."

Squire v. *Squire,* 186 Ark. 511, 54 S. W. 2d 281, the case now overruled by the majority opinion, about which more will hereinafter be said, and *Carlson* v. *Carlson, supra,* were cited to support the statement above quoted from the Brickey case.

In all the cases this court has held that actual and not constructive residence is essential. We so held when the residence requirement was one year. *Wood* v. *Wood,* 54 Ark. 172, 15 S. W. 459; *Vanness* v. *Vanness,* 128 Ark. 543, 194 S. W. 498; *Wood* v. *Wood,* 140 Ark. 361, 215 S. W. 681. We have continued to so hold in all the cases arising under the statute here involved. The Squire case, *supra,* so holds, where we held that the plaintiff must be "actually and in good faith a *bona fide* resident for the period prescribed by the statute." In that case the trial court, while of the opinion that the evidence was sufficient to establish a cause of divorce, dismissed the complaint on the ground "that the plaintiff had no permanent intention on November 4, 1931, (the date she moved to Texarkana) and has no permanent intention at this time of making Arkansas her permanent home." In reversing that holding, by a unanimous decision, we held that the learned trial judge misconstrued the effect of the Act (71 of 1931, § 4386, Pope's Digest); that said Act does not provide that the plaintiff must have a "permanent intention . . . of making Arkansas her permanent home." We also said: "The law of divorce is purely statutory, and the General Assembly has enacted the statute under consideration. Whether it be good or bad

is not a question for the courts," and so we there said: "Even though she (appellant) moved to this State to bring a divorce suit and had the intention of leaving after the divorce was granted, this would not deprive the court of jurisdiction, if she were actually and in good faith a *bona fide* resident for the period prescribed by the statute."

It is this holding in the Squire case that is overruled by the majority, as I understand it, and not the holding that matters of divorce are purely statutory. It could not be the latter, because the writer of the majority opinion, to which I subscribed, in *Young* v. *Young,* 207 Ark. 36, 178 S. W. 2d 994, 152 A. L. R. 327, said: "While we as individuals may personally disapprove of the grounds of divorce as fixed by the Legislature and may view with alarm the passage of such a law as the one in question which is tending to make our state a haven for unfaithful spouses, still as judges we must remember that the divorce laws are made by the Legislature and until the Legislature repeals these laws the courts must interpret them in the words and spirit written."

That statement is entirely correct. The courts ought to "interpret them (these laws of divorce) in the words and spirit written." The Legislature has said, in plain and unambiguous language, that the plaintiff must prove, but need no allege "a residence in the State for three months . . . and a residence of two months next before the commencement of the action," and we have construed that to mean actual and not constructive residence. *Wood* v. *Wood, supra.* In other words, that the plaintiff must actually reside here, be a *bona fide* resident for the time prescribed. Divorce being purely statutory, as we are all bound to concede, the Legislature had the power to fix the time of the residence at whatever term it saw fit. For many years a residence of one year was required. In 1931, the Legislature changed the time from one year to two months to bring the action and three months before final decree. Our decision in the Squires case, *supra,* was rendered November 21, 1932.

Since the decision in that case there have been eight regular sessions of the Legislature, and no law has been enacted to change our interpretation of said Act, and, so far as I know, no bill has been introduced in an attempt to change it, and I think the sole power to change the law lies with the Legislature, and that this court has no power to do so. Yet it appears to me that the majority opinion amounts to judicial legislation. It is said therein that appellee "did not evidence by affirmative acts any intention to reside permanently in Arkansas." The Act does not require that he evidence any intention to reside permanently in Arkansas, but only for the time prescribed therein, and the requirement that he evidence an intention to reside here permanently is simply legislation.

The majority opinion states that "by *bona fide* residence, we mean the same as domicile." While the two terms are often used synonymously, in law they are entirely different. Webster gives the "law" definition of "domicile" as, "A residence at a particular place accompanied with an intention to remain there for an unlimited time; a residence accepted as a final abode; a home so considered in law. Under modern civilized systems, a person's civil status is determined by his domicile." It is then said, "A man can have but one domicile for one and the same purpose at any one time, though he may have numerous places of residence." Citing 37 N. J. Law, 492-495. Under the definition of "residence" it is said, "A person's place of residence may or may not be identical with his domicile, though the term *residence* is ordinarily used and legally construed as merely implying the fact of actual abode without reference to the intent necessary to constitute that abode as one's domicile." The Legislature used the word "residence" and not the word "domicile," and by holding that they mean the same, the majority opinion has amended the Act by judicial construction or legislation, which the Legislature for 16 years has by its silence declined to do. So, the law of divorce is no longer to be considered "purely statu-

tory," no longer to be interpreted "in the words and spirit written" by the Legislature.

Therefore, I am compelled to dissent from the majority holding. I think the decree should be affirmed. I am authorized to say that Mr. Justice FRANK G. SMITH and Mr. Justice HOLT concur in this dissent.

STATE, EX REL. ATTORNEY GENERAL, *v.* BETTS.

4-8200 201 S. W. 2d 590

Opinion delivered April 28, 1947.

Guy E. Williams, Attorney General, and *Abe Collins,* for appellant.

J. F. Quillin, George E. Steel and *Hal L. Norwood,* for appellee.

GRIFFIN SMITH, Chief Justice. The right of A. F. Betts and John Faulkner to serve as directors of Rich Mountain Electric Cooperative, Inc., was challenged by a proceeding in the nature of *quo warranto.* Cooperative intervened. It adopted the answer of Betts and Faulkner.

Correctness of the judgment appealed from must be tested by Act 342 of 1937. Pope's Digest, §§ 2315-2351.

The trial Court found that in promulgating Act 342 the State waived any right to regulate the corporation. A temporary order restraining the two directors from acting was dissolved and the cause dismissed.

Section 31 of Act 342 exempts the corporations from jurisdiction of the Department of Public Utilities, now Public Service Commission.

"Member" is defined as one of the incorporators of a rural electrification corporation and each person thereafter lawfully admitted to membership. (§ 2(3). Any three or more natural persons 21 years of age, residents of the State, may act as incorporators. (§ 5). "Rural area" is a territory not included within the boundaries of an incorporated city, town, or village, having a population of 2,500, "and includes both the farm and non-farm population thereof." (§ 2(8). All persons in rural areas intended to be served by such corporation, who are not receiving central station service, shall be eligible to membership, and no person other than the incorporators "shall be, become, or remain a member of the corporation unless such person shall use or agree to use electric energy; or, as the case may be, the facilities, supplies, equipment, and service furnished by the corporation." (§ 12). But (§ 18), the business of the corporation shall be managed by a board of directors, not less than three in number, "which shall exercise all the powers of the corporation except such as are conferred upon the members by this Act, by the articles of incorporation or by the by-laws of the corporation. The by-laws may prescribe qualifications for directors."

The by-laws in effect at the time Betts and Faulkner were elected provided that no person should be eligible

[1] By-laws adopted May 26, 1945, provided for annual meeting of members on May 26th of each year, "in such place in Mena . . . as shall be designated in the notice of the meeting". By amendment of May 25th, 1946, these meetings were directed to be held the third Saturday of each May, beginning with 1947. An amendment of November 2, 1946, provided that directors should be bona fide residents of Polk County, "or within any other County served by the Cooperative". Judgment in the case at bar was rendered October 26, 1946; hence the amendment of November 2 was not in effect at that time.

"to become or remain a director or hold any position of trust . . . who is not a member and *bona fide* resident of the area served or to be served by the Cooperative."[1]

Rich Mountain Cooperative embraces the greater part of Polk County, but excludes the City of Mena. Betts and Faulkner own rural lands served by Cooperative, but reside in Ward Three of Mena. They were among the original nine incorporators and served as directors until May 25, 1946.[2]

Assuming, without deciding, that the Attorney General had official authority to question appellees' status, and that Circuit Court was wrong in holding otherwise, we then deal with merits of the controversy and hold that the two directors were not usurpers.

While a literal construction of the by-laws would, as appellant contends, exclude the two appellees, Act 342 is somewhat broader. It does not expressly or by necessary implication restrict eligibility of directors to *bona fide* residents of a particular part of the area served by Cooperative. It is true that Mena may not be served by the corporation; but the territorial district assigned to Cooperative by Public Service Commission's certificate of convenience and necessity surrounds Mena, leaving it an insular area to be served by another.

The Act is sufficiently comprehensive to permit directors to be selected from members who use electricity rurally. We think area, as used in the by-laws, should be construed to mean the territory immediately affected by Cooperative's enterprise, if the member is in fact a user of facilities provided by Cooperative. Certainly the Act, as distinguished from the by-laws, primarily contemplates that the member shall be interested in the undertaking, conveniently situated geographically, and a patron of the service. It is significant that by-laws authorize annual meetings to be held in Mena; yet it is argued that directors living in the City are illegally serving.

[2] Cooperative was incorporated May 2, 1945.

It is true that Section 18 authorizes adoption of by-laws prescribing qualifications of directors; but it was not intended to confer upon members a legal right to impose limitations beyond scope of the Act.

It is immaterial that the lower Court failed to reach the conclusions expressed in this opinion. Upon the record before us we must find, as a matter of law, that the two appellees were qualified to serve as directors, and the mandate will so state.

Affirmed.

COLEMAN *v.* VOLENTINE.

4-8185 201 S. W. 2d 592

Opinion delivered April 28, 1947.

S. L. Richardson, for appellant.

Ras Priest, for appellee.

ROBINS, J. The circuit court sustained a demurrer to appellants' complaint and upon their refusal to plead further entered judgment dismissing same. Appellants seek to reverse that judgment.

Appellants (husband and wife) alleged in their complaint that they were the owners of 2,164.15 acres, a large part of which was farmed in rice and other crops, said land being, at the time of the transactions referred to in the complaint, of the value of $90,000; that there was a first mortgage on 1,777 acres of said tract to secure an indebtedness of $16,620, due to an insurance company, and a second mortgage on the same land to secure an indebtedness of $8,700, due to Marion Dickens; that appellee had acquired both these debts and the liens securing same; that appellants had borrowed the additional sum of $7,000 from appellee and had mortgaged to appellee the remainder of their land to secure same; that appellants owed White River Production Credit Company slightly more than $16,000, which indebtedness had been purchased by appellee; that there was claimed by appellee to be due on all said indebtedness the sum of $46,250 on February 26, 1946; that in the fall of 1945, appellee induced appellants to apply for a loan of $40,000 on said lands, to be used in discharging the debt to appellee, appellee agreeing to take a chattel mortgage on crop, farming equipment and other personal property of appellants to secure the remaining $6,250 of appellants' debt to appellee and also $20,000, which appellee was to furnish appellants to enable them to make and harvest the 1946 crop; that in the meantime suits had been filed against one of appellants for sums aggregating $17,000, and that appellee sought to induce appellants to convey the lands to him by stating to appellants that adverse judgments in said suits might prevent them from obtaining the $40,000 loan; that on February 26, 1946, at the insistence of appellee, appellants executed and delivered their warranty deed, conveying all said lands to him,

appellee stating that the deed would be merely security for the $40,000 debt until the said loan could be completed, at which time all claims of appellee against the land would be released; that on the same day there was executed by appellant, R. E. Coleman, and appellee a written agreement, the material provisions of which were: That appellants had conveyed their 2,164.15 acre farm to appellee, and appellant, R. E. Coleman, had "for an agreed balance of $6,250" transferred all his farm implements to appellee; that appellee would finance the making of rice crop on 700 acres by said appellant, provided said appellant would properly cultivate said crop; that the one-fourth of the proceeds of said crop was to be paid to appellee as rent, the expense of planting, cultivating and harvesting the crop to be repaid to the credit association, which was to lend the money for such expenses, the appellee to be paid his loan of $6,250, and any other advances, and thereupon title to all the personal property to re-vest in said appellant and said appellant to have all the remainder of said crop; the agreement further providing that the deed to the land executed by appellants to appellee should be withheld from record for ten days, "upon the understanding that if, within that time, party of the second part [appellant] is able to refinance said farms to the amount of $40,000 to be paid to the party of the first part, said deed will be destroyed, and not recorded, and shall become null and void; but this condition shall become void at the end of ten days."

It was further alleged in the complaint that at the time this instrument was executed it was understood that it was executed only as security for debt, and that "the only time limit thereon was stated to be in the fall of 1946"; that at the time of entering into said contract it was not the intention of appellee to carry out his agreement, but it was his intention then to sell said land, crops and farming equipment to third parties; that after he obtained said deed and contract appellee did sell and convey said land and did transfer said written agreement to Harry Ward and K. L. Kramer and their wives, on April

15, 1946; that when appellants learned that appellee was attempting to sell the property they brought a suit in chancery court against him and his vendees, seeking to enjoin the sale, and asking that the deed executed by them to appellee be declared a mortgage; that upon learning that the sale had already been consummated by appellee they took a nonsuit as to appellee and continued the suit against the vendees; and that upon final hearing appellants' said suit was by the chancery court dismissed for want of equity.

The prayer of the complaint in the instant case was that appellants recover from appellee $50,000, the difference between $90,000, the alleged value of the lands formerly owned by appellants, and the $40,000 indebtedness due by appellants to appellee.

For reversal it is first argued by appellants that the deed to appellee and the agreement contemporaneously made ought to be construed as a mortgage and that, this being done, there was stated in the complaint a good cause of action for damages, on the theory that appellee, as mortgagee, had sold mortgaged property as his own to the damage of the mortgagors.

We have frequently held that equity will look through the form of a transaction to ascertain the reality thereof and that where a deed or other contract, in form an absolute conveyance, is shown to have been intended by the parties thereto as mere security for debt, it will be so treated by a court of equity and title to the property quieted in the grantor, subject to the lien of the grantee for his debt. *Clark-McWilliams Coal Company* v. *Ward,* 185 Ark. 237, 47 S. W. 2d 18; *Buffalo Stave & Lumber Company* v. *Rice,* 187 Ark. 731, 62 S. W. 2d 2; *Sturgis* v. *Hughes,* 206 Ark. 946, 178 S. W. 2d 236.

But here appellants are not attempting to exercise their equitable right to redeem their property. They did that in the case in chancery court and it resulted in a decree, from which no appeal was taken, adjudging that appellants did not have the right to redeem the land from

appellee's grantees, who had full notice of the contract between the parties to this suit.

Even if their right to assert that the transactions with appellee amounted only to a mortgage is not barred by the chancery decree, appellants are met in a court of law by the fact, appearing from their complaint, that under the written agreement the deed was to be withheld from record so as to enable them to refinance, for only ten days, and that after that time "this condition [the requirement for withholding of deed from record and destruction thereof if the sum of $40,000 was paid to appellee within ten days] shall become void." When, at the end of the ten-day period, appellants had failed to pay this sum, under the plain terms of the agreement, any right of appellants as to the lands, enforceable in a law court, was lost. *Snell* v. *White,* 132 Ark. 349, 200 S. W. 1023; *Inman* v. *Rynearson,* 167 Ark. 238, 267 S. W. 576; *Matthews* v. *Stevens,* 163 Ark. 157, 259 S. W. 736; *Bailey* v. *Frank,* 170 Ark. 610, 280 S. W. 663.

Appellants further contend that the complaint states a cause of action for fraud and deceit. No misrepresentation by appellee as to a past or existing fact is set up in the complaint, but appellants say that fraud is alleged in that part of the complaint by which it is charged that appellee led appellants to believe they would be permitted to redeem the land when all the time he had the intention (concealed from appellants) not to allow appellants to do so.

Ordinarily an action for fraud and deceit may arise only from false representation as to a past or existing situation, but there is authority for the holding that where one makes a false promise, knowing at the time that it will not be kept, the person injured thereby may have relief in action for fraud. However, in the instant case it appears from the complaint that the parties saw fit to commit their agreement for redemption to writing and any oral promise or representation made by appellee was merged in this agreement. "All antecedent propo-

sals and negotiations become merged in a written contract, which cannot be varied by parol testimony." (Headnote 1) *Zearing* v. *Crawford, McGregor & Camby Company,* 102 Ark. 575, 145 S. W. 226; *Harrower* v. *Insurance Company of North America,* 144 Ark. 279, 222 S. W. 39; *American Southern Trust Company* v. *McKee,* 173 Ark. 147, 293 S. W. 50; *Lane* v. *Smith,* 179 Ark. 533, 17 S. W. 2d 319. Hence no liability against appellee may be predicated on any promise not set forth in the written agreement.

Since it is not charged in the complaint that appellee violated any part of the written agreement between the parties, it follows that the complaint did not state a cause of action at law.

The judgment of the lower court is affirmed.

ROWLAND *v.* MCALESTER FUEL COMPANY.

4-8177 201 S. W. 2d 742, 202 S. W. 2d 204

Opinion delivered April 28, 1947.

A. A. Thomasson and *Wade Kitchens,* for appellant.

Keith & Clegg and *McKay, McKay & Anderson,* for appellee.

McHaney, Justice. This appeal involves the title to one-fourth of the oil and gas royalty in and to 60 acres of land in Columbia county, described as SW NE and S½ SE NW, 15-18-22. The land was owned by James H. Atkinson who died intestate February 5, 1892, and who was the owner of 300 acres of other land in said county, not here involved. He left surviving him five children and three grandchildren, appellee Charlie Menshew being one of such grandchildren. One of his daughters, Mattie M., had married A. B. Rowland and, prior to her father's death, he had either given or planned to give to his said daughter, Mattie M., or to her and her husband, A. B. Rowland, the 60 acres of land here involved, and he put them in the actual possession thereof, but never gave them a deed to said land. Just when they took possession is not shown in the record, or whether they made any improvements or paid the taxes thereon in his lifetime, but they were in possession for some time prior to his death. On November 18, 1893, all the other heirs of James H. Atkinson, except appellee Menshew who has no interest in this litigation, conveyed said 60 acre tract to "A. B. & M. M. Rowland" in consideration of "a deed release all claims in the real estate of J. H. Atkinson, deceased." On the same date said "A. B. Rowland & M. M. Rowland" conveyed to "the remaining heirs of the estate of J. H. Atkinson, Dec.," the other 300 acres of land belonging to said estate. Thus the 60 acre tract was carved out of the whole and conveyed to "A. B. and M. M. Rowland" who conveyed to the other heirs their interest in the 300 acres, and who later or at the same time partitioned it among themselves. The deed to A. B. and M. M. Rowland was not recorded until April 2, 1927, while their deed to the other heirs was not recorded until August 10, 1939.

Appellants C. A., R. A. and J. W. Rowland are the only children of A. B. and Mattie M. or M. M. Rowland.

Their mother died intestate May 17, 1917. They brought this action March 6, 1943, against Charlie Menshew and wife, McAlester Fuel Company, A. B. Rowland and his second wife, and a number of others not concerned in this appeal, including Charlie Menshew. They alleged their ownership of said 60 acre tract by inheritance from their mother, subject to the right of curtesy of their father, A. B. Rowland, and set out the facts above stated, claiming an agreed partition among themselves as a result of said conveyances. They also allege that on July 5, 1939, A. B. Rowland and his present wife executed to appellee, McAlester Fuel Company, a deed conveying a portion of the minerals in said land to it, and that their right to said lands, royalties, rentals and gas payments should be determined, quieted and confirmed against appellees, subject to the admitted life estate of A. B. Rowland and those claiming under him, for which they prayed.

McAlester Fuel Company answered with a general denial of all allegations not admitted, but admitting the conveyance to A. B. and M. M. Rowland of the 60 acre tract in 1893 by the other heirs of James H. Atkinson, the death of M. M. Rowland in 1917, the subsequent second marriage of A. B. Rowland to his present wife, and the conveyance by them to it of an undivided one-fourth royalty interest in said 60 acre tract for a cash consideration of $2,000, after a confirmation decree which quieted the title thereto in A. B. Rowland and his former wife, then dead, and which action was brought and decree secured at the instance of appellant, J. W. Rowland. They plead estoppel as to all appellants and particularly as to J. W. Rowland, who, it was further alleged, negotiated and participated in the sale and conveyance to it by his father and his then wife of said royalty interest, representing to it that the title was good in his father, having previously been confirmed and quieted in him. Laches, limitations and innocent purchaser were also interposed in bar of the action.

Trial resulted in a decree dismissing the complaint for want of equity, the court finding that James H. Atkin-

son made a verbal gift of the 60 acres to his daughter, M. M. Rowland, and her husband, A. B. Rowland, and put them in possession; that the heirs of James W. Rowland, in recognition of such verbal gift, executed to them the deed of November 18, 1893; that such gift and deed created an estate by the entirety; that J. W. Rowland is estopped because of his participation in the action to quiet the title in his father and in securing the decree to this effect, and by assisting in and encouragement of the sale by his father to McAlester; and that all the plaintiffs are barred by laches and limitations, the land having been in the actual possession of A. B. and M. M. Rowland since 1892 under a claim of title and that he paid the taxes thereon all these years under color of title, and that the land has been wild and unimproved for more than seven years. This appeal followed.

For a reversal of this decree, appellants contend that the findings of the trial court to the effect that James H. Atkinson made a verbal gift of the 60 acres to his son-in-law and daughter, A. B. and M. M. Rowland, and put them in possession, and that the deed of the other heirs to them of November 18, 1893, was in recognition and confirmation of such gift, creating an estate by the entirety, are erroneous and without evidence to support them. We do not agree with appellants in this contention. They say that S. W. Atkinson, son and only surviving heir of James H. Atkinson, who testified as a witness for appellants, did not testify there was a verbal gift of this land to A. B. Rowland. While the witness, S. W. Atkinson, was 88 years old at the time of trial, it is not shown that he is not sound mentally. On direct examination he testified that his father "was aiming to give it to her, that was the understanding," referring to the 60 acres and his sister, M. M. Rowland. On cross-examination, he testified that his father gave 60 acres of land to his sister, Mrs. Rowland, put her in possession of it and she was living on it prior to her father's death. In answer to the question, "He had already given it to her?" he answered: "We supposed he was going to give it to her; I don't think he

ever made any deed to her to it." He said he supposed the only reason the deed of the heirs was made to Mrs. Rowland was because his father had given it to her, she asked for it and all the heirs agreed, she was living on it and it did not interfere with the main part of the farm anyway. While this testimony does not in terms state there was a verbal gift of this land to A. B. Rowland, the fact that the witness and all the other heirs joined in a deed conveying the land to A. B. and M. M. Rowland is strong corroboration of the fact that M. M. Rowland wanted it that way and that the ancestor intended for both of them to have the 60 acres, and the witness was certain that the heirs were carrying out the intention of their father. There is no other explanation of the insertion of the name of A. B. Rowland in the deed, except appellants say in their complaint that "without any reason or explanation therefor, the name of A. B. Rowland, the then husband of Mattie M. Rowland, appeared in the deed as a grantee." A. B. Rowland was present at the trial, but did not testify. Perhaps he could have explained it, but he did not. Nevertheless he was a grantee in this deed and his title as surviving tenant by the entirety cannot be taken away on the assertion that there is no reason or explanation therefor. We think the court, under the circumstances, had the right to presume that parties to the instrument, particularly M. M. Rowland, wanted it in the deed. Had the deed been made to her alone and she had conveyed to a third person who conveyed to her and her husband jointly, there could be no question that they held by the entirety. Instead she, no doubt, had the deed made to them both, which constituted a voluntary settlement. *Hannaford* v. *Dowdle,* 75 Ark. 127, 86 S. W. 818; *Evans* v. *Wells,* 138 Ark. 454, 212 S. W. 328.

We do not overlook the case cited by appellants, *McGraw* v. *Berry,* 152 Ark. 452, 238 S. W. 618, which holds, to quote headnote 1, "An estate by entireties is not created by a conveyance to husband and wife, for purposes of partition, of an interest in real estate which had

descended to the wife by inheritance." But that decision was based on a commissioner's deed in an ordinary partition suit. Perhaps the same rule would apply in a voluntary partition, which is defined by Bouvier's Law Dictionary as that "made by the owners by mutual consent. It is effected by mutual conveyances or releases to each person of the share which he is to hold, executed by the other owners." Here, there was no partition in the ordinary sense of that term. All the other heirs conveyed to A. B. and M. M. Rowland and they in turn conveyed their interest in the balance of the estate to all the other heirs. The fact that the other heirs thereafter executed deeds to each other among themselves, we think, does not bring this case within the rule stated in *McGraw* v. *Berry, supra.* This case is further distinguished therefrom by the fact that the ancestor made a parole gift of the land to his daughter in his lifetime. The division of land here made was not a partition thereof within the rule of the *McGraw* v. *Berry* case.

Other questions are discussed in the briefs of the parties, including that of estoppel. We agree that appellant J. W. Rowland estopped himself to maintain this action, but since we hold that A. B. Rowland was the surviving tenant of an estate by the entirety in said 60 acres, and that his deed to McAlester Fuel Company to a royalty interest therein conveyed the title, it becomes unnecessary to discuss this or other questions.

Affirmed.

Ed. F. McFaddin, J. (dissenting). My study of this case leads me to these conclusions:

(1) J. W. Rowland has lost his interest by reason of estoppel, so, as to him, I agree that the case should be affirmed.

(2) C. A. Rowland and R. A. Rowland should recover, since there was no parol gift of the lands to A. B. Rowland and M. M. Rowland; and an estate by entirety never came into existence. This second conclusion is the

reason for my dissent; and I now discuss this second conclusion:

Some of our cases concerning a parol gift of land are: *Young* v. *Crawford,* 82 Ark. 33, 100 S. W. 87; *Bostleman* v. *Henkle,* 152 Ark. 628, 239 S. W. 30; *Akins* v. *Heiden,* 177 Ark. 392, 7 S. W. 2d 15; and *Coop* v. *Johnson,* 190 Ark. 550, 80 S. W. 2d 70. Other cases are collected in West's Arkansas Digest, "Gifts," § 25. In *Young* v. *Crawford, supra,* Mr. Justice Wood quoted from Pomeroy as follows: " 'A parol gift of land' says Professor Pomeroy 'will not be enforced unless followed by possession and by valuable improvements made by the donee, or unless there are some special facts which would render the failure to complete the donation peculiarly inequitable and unjust.' "

It will be observed that, before a parol gift will be enforced, there must be shown either (a) possession and valuable improvements; or (b) facts which render the failure of the donation *peculiarly* inequitable and unjust. Let us examine the evidence in this case by these two tests.

As regards (a)—possession and valuable improvements—there is not the slightest scintilla of evidence that A. B. Rowland ever made any improvements on the land; so, A. B. Rowland is in no position to enforce a parol gift against C. A. Rowland and R. A. Rowland, who are the heirs of their mother.

As regards (b)—failure peculiarly inequitable and unjust—there is no evidence that A. B. Rowland and M. M. Rowland ever claimed to own the land as a gift from J. H. Atkinson. In fact, the evidence shows rather clearly that they did not so claim. I refer to the recitals in the deed that A. B. Rowland and wife made to the other heirs of J. H. Atkinson on November 18, 1893, when the heirs of J. H. Atkinson (of whom M. M. Rowland was one) divided the estate of J. H. Atkinson. This deed from A. B. Rowland and M. M. Rowland (as first parties) to the other heirs of J. H. Atkinson (as second parties) recites (as consideration): "Witnesseth that

the said parties of the first part, for, and in consideration of the sum of sixty acres of land as their part of said estate by said parties of the second part, . . ."

It will thus be observed that A. B. Rowland and M. M. Rowland were taking the sixty acres of land here involved as M. M. Rowland's part of the estate of J. H. Atkinson. This recital in the deed clinches the argument that there was no parol gift by J. H. Atkinson to A. B. Rowland and M. M. Rowland.

Due to this recital, and to the absence of the essential elements of a parol gift, I think the case at bar falls squarely within the rule announced by this court in *McGraw* v. *Berry,* 152 Ark. 452, 238 S. W. 618. The application of that case to the case at bar would result in C. A. Rowland and R. A. Rowland each owning an undivided one-third interest in the land and mineral rights subject to the life estate of their father, A. B. Rowland.

Because of the views herein expressed, I respectfully dissent from the majority.

HUNTER *v.* CARPENTER.

4-8165 202 S. W. 2d 188

Opinion delivered May 5, 1947.

Rehearing denied June 9, 1947.

Claude B. Crumpler, J. A. O'Connor, Jr., and *Robert C. Knox,* for petitioner.

R. H. Peace, for respondent.

GRIFFIN SMITH, Chief Justice. Dorothy U. Hunter has asked that we review the Court's action in refusing to award her the custody of an only child, Robert E. Hunter Jr., now six years of age.

The child's father, prior to his marriage to petitioner, and later, was enlisted as a soldier in the regular U. S. Army. Petitioner lived with her parents at Chattanooga, Tenn., until her mother's death in 1933. She continued to reside with her father, Z. R. Umbarger, until 1937. In 1925 Mrs. Hunter became seriously ill. It is contended by respondents that she did not fully recover, and that because of physical and mental handicaps she is not a proper person to care for the child. The Chancellor took this view. We determine whether he was supported by a preponderance of the evidence.

Mrs. Hunter's mother inherited property through a sister. By will the mother devised and bequeathed to the daughter an estate of considerable value, the income from which was approximately $300 per month when the case at bar was tried. However, the property did not vest until the beneficiary became twenty-one years of age in 1934. About four years later she married, but in the meantime had spent an appreciable part of the estate. This was before she learned how to handle money.

According to Robert E. Hunter Sr., he and petitioner corresponded before they met. Hunter was stationed at Marfa, Texas. Petitioner wrote to a "marriage bureau," where she procured Hunter's address. As a consequence she went from Mississippi to Marfa. The wedding occurred in May, 1938. Robert Junior was born September 2, 1940. It appears, however, that discord began before 1940. Mrs. Hunter testified that she became pregnant shortly after her marriage, and in October her condition was such that she thought it best to make arrangements for her confinement. Her husband was drinking, and

had not been at home for two weeks; so Mrs. Hunter went to the home of an aunt in Georgia, remaining about six weeks. She wrote her husband, asking what his intentions were, and saying they should be together on account of the child. In reply a telegram was received in which Hunter admitted having done wrong.[1] There are references by Mrs. Hunter to a visit to Concord, Tenn., for six weeks, and a return to Texas.

Mrs. Hunter remained at Marfa a short time, but left in 1941. Her husband was transferred to Fort Sill, Okla. This occurred a short time after Mrs. Hunter left in January. On the way to Tennessee Mrs. Hunter stopped in Arkansas for a visit with her husband's mother, Mrs. Fannie Carpenter (one of the respondents) and spent six weeks. She was with Mrs. Carpenter again in 1942. In November 1944 she again went to Georgia. At that time she disclosed a highly nervous condition. A year later her father, Z. R. Umbarger, was informed by neighbors that Mrs. Hunter appeared to be mentally affected. Following an examination she was placed in Madison Sanatorium near Nashville, Tenn. The child was left with Mrs. Hunter's father. Robert E. Hunter Sr. was in Germany with the army. He was notified by the Red Cross that petitioner was incapacitated. The suggestion was made that he should arrange for Robert Junior's care. However, the father did not return to the United States until September 1945. After being discharged from the army he reënlisted. This occurred November 17, 1945. At that time he filed with the County Clerk of Union County, Arkansas, an affidavit reciting his marriage to petitioner, birth of the child, a declaration that he and his wife had been divorced; that custody of Robert Junior had originally been left with Mrs. Hunter, but asserting that the mother had voluntarily surrendered custody to him, and that during absence in the army he (the father) desired that the child should remain with its paternal grandmother, Mrs. Carpenter. An allotment of $30 per month was made in favor of the child, and $37 per month for Mrs. Carpenter.

[1] The child referred to by Mrs. Hunter died.

July 27, 1946, Mrs. Hunter petitioned Union Chancery Court for a writ of *habeas corpus,* alleging that Robert Junior was illegally held by Mrs. Carpenter. The father intervened. The case is here on certiorari.

In summing up, Chancellor Speer found that according to the "great weight of authority" Robert Junior had not enjoyed the benefits of a permanent home until October, 1945, when he was placed with Mrs. Carpenter. Mrs. Hunter, said the Judge, "was suffering from psychosis"; and, said he, "the pitiful thing is that the child has gotten on the nerves of its mother. This is the decided weight of testimony, not only by the doctors, but by laymen." It was then found as a matter of fact that it was for the best interest of the mother, as well as of Robert Junior, that Mrs. Hunter be relieved of the care and custody, for "It is apparent that if the child is placed with its mother the same thing may happen again."

Was this finding correct?

Respondent Hunter procured the decree of divorce in Union County, Arkansas, alleging three years separation without cohabitation. He subsequently married another. Army base pay is $100 per month, with $15 extra. The government allotment in favor of Mrs. Carpenter and $22 of the allotment for Robert Junior is not deducted from appellee's pay. He proposes to increase the child's allowance to $50 per month. The present Mrs. Hunter is allotted $22 per month, paid by the government, while $34.40 is deducted from the item of $115 to pay premiums on insurance. Policies are payable to Hunter's mother and son.

Although petitioner complains of her husband's treatment before and after she left Texas, a letter written by Hunter February 9, 1941, contains expressions of en-

dearment and solicitude. It is printed in the margin.[2] Another letter was written February 22, and is also copied below.[3]

Hunter testified that when his wife left, it was with the explanation that she was going to Tennessee to look after business matters, saying she was tired of paying ten percent for people to attend to it for her.

Because while on guard duty he failed to report, or, as it was expressed, "for omitting to call in every hour," Hunter was court-martialed while at Marfa. He did not know when the first allotment was made in favor of wife or child; but, after being transferred to California, he directed payment of $10 per month. Later he was advanced in rank and increased the amount to $40.

Mrs. Hunter, in testifying, said that she was thirty-three years of age and lived at Lakeview, Georgia. She owns a house in Chattanooga and another in Knoxville, purchased with money that came through her mother. The inheritance included oil interests.

Mrs. Carpenter and the child's father "came over to my house to 'take out' *habeas corpus* proceedings. I was not physically able to go through with the suit; had low

[2] "Dear Dorothy: Hope you and Junior are O.K. I sent your trunk to El Dorado, general delivery. I don't know lots and street address. Honey, they sent your mail to a fellow named Hunter in D. Battery and he said it was opened by mistake. You had a check and letter, and I am enclosing them. Dear, I sure have been missing you and Junior. I'll sure be glad when we get to Ft. Sill. Sweetheart, I'll have to quit and mail this. Kiss Junior for me and write real soon. Tell Lois and all the folks hello for me and for them to write me. All my love to you and Junior. Robert."

[3] "Dear Dorothy and Junior: Hope you are feeling fine. I received your letter a few days ago. I kept putting off writing because we've been expecting the order to go to Ft. Sill any day. The order came in yesterday and we are going to leave next Thursday. . . . Don't know if we will get paid before we leave, or not. I will try to find an apartment soon as we get there and come after you and Junior some time next month. I'll come just as soon as I can get a pass. We'll be pretty busy for a while after we get there because we will have to organize a new outfit. Yes, Honey, I met Wheeler's wife the other night. She seems to be a nice woman. I haven't been able to sell the baby bed yet, but am going to town Monday morning and try to sell it to some one. Nobody wants one, and it is awfully hard to sell it. Will write you on my arrival at Fort Sill. Kiss Junior for me. Love, Robert."

blood pressure and had just had a blood transfusion. Was trying to rest and regain my strength; so I agreed that Junior's father and grandmother could take him home with them for a while. I did not agree to let them have the child permanently. When I recovered my health I came out here to get my child, but Mrs. Carpenter refused to let me have him, so I thereupon filed this suit."

While in the Sanatorium Mrs. Hunter left Junior with her father. Upon leaving she took the boy home with her. After a while petitioner placed the boy with a Mrs. Berkhart, and then with a Mrs. West.

Mrs. Carpenter testified that after Mrs. Hunter left the Sanatorium she (Mrs. Carpenter) spent a short time with the child's mother. Together they went to the Berkhart home, where Mrs. Hunter was paying $7.50 per week for the child's keep. This trip was made in June 1945. The witness says she told Mrs. Hunter the Berkhart place was unsuited to the boy's needs because of a lack of cleanliness. There was this testimony by Mrs. Carpenter: "When we left [Dorothy's] home I thought we were going to town, but we wound around and finally got to Mrs. Berkhart's. It was 'kinder' a back alley way and [Dorothy] seemed to be lost. . . . It was a four-room house with a screened porch—a nasty place. It looked like a Negro settlement. [Junior's] bed was dirty. When we got back home I said, 'Dorothy, don't keep that child in that nasty place. . . . If you can't keep him I can take him back home with me.' Dorothy said the place had been recommended to her."

With reference to the West home Mrs. Carpenter testified that she went there to get the child, but was not allowed to see him. Mrs. West would not let her in. The [yard] was "all grown up in weeds. It was not a place for a child. The little ones there were 'tough.' Junior's father was with me, and he said, 'It is a pretty come-off not to let the child's father and grandmother see it.' Mrs. West replied, 'I can use a gun.' She said she had been in one kidnapping." When asked specifically what she

knew about Mrs. West, Mrs. Carpenter replied, "Nothing, except that she was a mighty rough customer."

Apparently Mrs. Carpenter then went to Mrs. Hunter, who called her father, Z. R. Umbarger, and told him to get the child:—"I asked if it would be all right for us to get [Junior] and [Dorothy] said 'Yes, it will be all right for [the father] to have the child part of the time.' [Junior's father] then said she (Dorothy) could come to see the boy at any time. I then brought Junior home with me. We live in a long building divided into three rooms and a bath." When asked if it was a comfortable home Mrs. Carpenter replied, "Yes. There are nicer homes, but we live there. My son Frank lives with us."

Testimony regarding petitioner's mental condition is in sharp conflict. Dr. Jesse Hill, psychiatrist at Eastern State Hospital [for the insane] at Knoxville, examined Mrs. Hunter at his office February 17, 1945. She gave her address as Rossville, Ga.:—"I found that she had a psychosis. The type was undetermined, but it was of a depressing nature. She had many delusions, such as . . . an impulse to put poison in the food of others; said she had nothing to live for; also had 'spells' when she did not know what she was doing. I sent her home and advised that she be put in a mental institution." The witness would not say whether at the present time (September, 1946) Mrs. Hunter was competent to have custody of the child: this because his examination was in February, 1945, and he had not seen her since.

Dr. Hill's testimony was concurred in by Dr. F. O. Pearson, who examined Mrs. Hunter in February 1945. Dr. Hill thought she was suffering "from a definite psychosis and was mentally unfit to properly rear her child."

Another witness (Mrs. Ruby Drummonds) testified that when the boy was very small Mrs. Hunter would not take care of him:—"She would play with him until he began crying, then she would leave him. Later she came back and was worse than before. Instead of using a switch she would get a stick of stovewood. She told peo-

ple she had to do this or she would have to put him in an orphans' home." On cross-examination the witness (who was a daughter of Mrs. Carpenter and appellant's sister-in-law) was asked if she had ever seen Mrs. Hunter whip the boy with a stick of stovewood. She replied, "Yes, but my mother got the baby and went into the house with him."

Against the medical testimony offered by the petitioner and intervener were statements by El Dorado doctors, and by non-professional witnesses, who thought that Mrs. Hunter was fully competent to care for the child. Some of the lay-witnesses were non-residents who had known Mrs. Hunter for a long time and who had not observed any abnormal conditions. The El Dorado physicians expressed opinions that if Mrs. Hunter had at one time suffered from any cause there had been complete recovery.

Perhaps the most striking testimony came from Mrs. Hunter's father. Umbarger, a citizen of Whitehall, Tenn., who had formerly lived at Chattanooga, detailed at some length the circumstances attending Mrs. Hunter's conduct and her mental and physical status. Her attitude toward her father and brother, he said, had always been peculiar, and "we never knew where we stood with her." Her unusual conduct began shortly after 1925 when an attack of scarlet fever left certain adverse results. In 1945 Mrs. Hunter seemed to have undergone a complete physical breakdown. Neighbors called and suggested that she might be deranged. "I made investigations," Umbarger said, "and Dorothy seemed to realize there was something wrong with her mentally and insisted that she be taken to an institution—this at her own request. She was to have stayed there three months, but at the end of half that time she caused such trouble to get out, and the doctor wrote me about her condition in every way, stating that her case, as he called it, was not a complete mental case, but an extreme case of nerves.

"She claimed her boy when she got out, and I knew it would cause the same old trouble. She went home after

she got the child and went to Mrs. West's place. It seems she and the boy got on each other's nerves. She had no control over him. The child, being in her custody and care, made her condition worse; and it was not right for the child. She explained that her memory was bad; that she would get on a street car and not know where she was going. [She also explained] that once she used washing powder instead of flour in making bread. We were afraid that if there should be any poison around she might endanger her life and that of the child. Her nervous condition has not been so bad since she was relieved of the child. I have seen her very little, but her friends have remarked on her improvement. She seems to pride [herself] on doing just what she pleases, without any interference. You can never tell how she will react to any proposition. . . . . I am acquainted with Mrs. Carpenter. I think she is a proper person to have the care and custody of this child and I think the child is very fortunate to have a grandmother to give him a home. I know very little about the child's father, but I believe he is devoted to the little boy, and as far as I know he is the proper person to have the care and custody. I do not think my daughter should have the custody, [and] I hate so bad to say it! I go to church and Sunday School. I am affiliated with the Presbyterian Church of Chattanooga, and have been since 1916. I am not addicted to strong drink."

In testifying further, Umbarger said he knew very little about the marital relationship of his daughter and her husband, but "When she came to my home she did not say anything about her husband having left her. Dorothy has an independent income—enough to maintain a good living standard. I know [this] from the fact that her mother left her money, and her brother has increased his holdings.[4] I know that she prides herself on the fact that no one knows how much money [she has], 'and noth-

[4] In appellant's abstract this sentence reads, ". . . and her brother has increased *her* holdings." The inference would be that Mrs. Hunter's brother handled her estate. However, the transcript shows that "*his*" was used, indicating that each inherited from the mother.

ing about her.' She has no feeling for us, and as far as I am concerned she can handle her own affairs." Question: "You don't care much about what your daughter does, do you, Mr. Umbarger?" Answer: "No, I don't. She does not want anyone to know anything about her business, and the best I can do is to respect her wishes."

Later Mr. Umbarger testified that he saw Mrs. Hunter "five or six months ago about a business proposition. She seemed able to transact business at that time, and I settled the business with her. The administration of Dorothy's property has never been taken away from her."

March 13, 1945, Mrs. Hunter wrote to her son from Madison Sanitorium, addressing him as "Dearest Bobbie," and closing with the expression, "Write Mother, and be good. With love, Mother." This letter is printed in full in the margin.[5]

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[5] "I want to thank you for the good old box of cookies you sent me. One of the nurses comes in my room and eats some of them with me. She likes your cookies too.

"Sonny boy, I went to Vanderbilt yesterday for a fluoroscope, I believe it is called, and the Dr. told me this morning that it showed up many things wrong with me, that I had a form of epilepsy. I had known it a long time, but knowing there was no insanity in our family I hated to ever give in to it, but had gone so long that I got in condition I had to, but your crying caused me some kind of spells I never had before, but I had everything so hard on top of being up so much every night with you, but am satisfied that with other troubles I had had when single and still have that there were other causes too, sonny.

"How you did cry when you were a little baby, and on up till after three years old. My condition since you were born has given me much concern. I realized that you needed mother to live to raise you, but couldn't see my way clear to holding out, so I could live to raise you, I wonder just how much longer I can live. You need me very much, but as I think of how hard you made yourself on me all the time I kept you when you could have been good to mother and played out in the yard, and entertained yourself instead of staying inside right at my feet all the time, dictating to me the whole time and fussing and finding fault with me, and I see how much better you do for other people than you ever did for me, I feel like it will be better for me not to even be worrying about living to raise you, since you seem to make more out of yourself without me, that it wasn't intended for me to live to raise you, but if you had made things easier on me I believe I could have held out, and never would have landed here. I'm going to have to look out for myself from now on and make other arrangements for your care when I come home. I had in mind a home like Aunt Susie worked in where you would have children to

It is suggested that the Chancellor, in weighing the evidence, did not give appropriate consideration to the probability of improvement during the lapse of time between examination and observation of Mrs. Hunter by physicians called by Mrs. Carpenter and the child's father; that Mrs. Hunter's testimony, given orally in open court, discloses a rational mind and logical conclusions; that Umbarger's attitude was not that of a natural father; that he had been disappointed because the daughter insisted upon handling her estate, to his exclusion, and that selfishness colored the testimony to such an extent as to render it of little probative value.

All of this *may* be true. It must be conceded that credible witnesses—both physicians and laymen—gave direct testimony tending to support Mrs. Hunter's contention that whatever disability may have impaired her capacity to care for the child in 1945 had been removed, and that her condition at the time the hearing was had was that of a sound and normal person. But to accept this analysis of the evidence we must believe (as the Chancellor seemingly did not) that Mrs. Hunter fully recovered after 1945, and that her father was mistaken and highly prejudiced. If Mrs. Hunter's father's conduct was singular, hers also was unusual. In her letter to the son who was at that time but four and a half years old, the entire tone is one of self-pity, and throughout the communication there is accusation. "I think," said she, "how hard you made yourself on me all the time I kept you, when you could have been good to Mother and played out in the yard and entertained yourself instead of staying inside right at my feet all the time, dictating to me the whole time, and fussing and finding fault with me."

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play with all the time and I can come by and get you and bring home on week ends. Maybe there is a place in Chattanooga for you.

"I regret very much my inability to raise you honey, but I did the best I could, under the circumstances. I'm making you a quilt for your little bed.

"I miss you so much. I wish you were close, where I could see you often. Bless your little heart, sonny, I've only made you a piece of a mother, but would have done better if I could have."

It seems preposterous that a normal mother would believe that a child less than five years of age would be "dictating" to her. And again:—"Since you seem to make more out of yourself without me, . . . it wasn't intended for me to live to raise you; but if you had made things easier on me I believe I could have held out, and never would have landed here. I'm going to have to look out for myself from now on and make other arrangements for your care when I come home."

The doctors at Vanderbilt had told Mrs. Hunter, according to her letter to the boy, that many things were wrong with her, and "I had known this for a long time, but knowing there was no insanity in our family I hated to ever give in to it, but had gone so long that I got in condition I had to; but your crying caused me some kind of spells I never had before."

The evidence indicates that under Mrs. Hunter's mother's will Umbarger had the discretion to turn the estate over to Mrs. Hunter when she attained the age of twenty-one years, or he could continue to administer it.[6] The clear inference is that Umbarger chose to relieve himself of the responsibility involved in handling the estate; hence he did not, as might be inferred in respect of one interested in self-profit, attempt to retain the money. Yet, another construction might be that the father was indifferent to his daughter's welfare and availed himself of the first opportunity to wash his hands of the transaction.

We think the Chancellor, who had many of the witnesses before him, (as was the case in *Tilley* v. *Tilley*, 210 Ark. 850, 198 S. W. 2d 168), was in better position to judge the motives pertaining to the controversy than are we. The decision now reached is by a divided

[6] As reflected by the transcript, p. 109, Mrs. Hunter was asked by one of her attorneys: "I believe your mother stated in her will that the property was to be turned over to you at twenty-one, unless your father saw fit to do otherwise?" Answer: "He did turn it over to me, and I spent a good deal of it before I found out how to make the proper investments." Question: "He had turned the money over to you, and he had to make a settlement, and you have handled it since?" Answer: "Yes."

Court. Three of the Judges entertain views sharply opposed to those of the majority; and, if the trial Court had found that the child's best interests would be served by taking custody from Mrs. Carpenter and again investing Mrs. Hunter with a mother's responsibilities, perhaps all of us would agree. But to reach that conclusion we would be required to say that after patiently listening to all that was said; after observing the witnesses, and considering testimony given in Mrs. Hunter's behalf by physicians living in El Dorado, and after a judicial admeasurement of depositions and a balancing of sentimental ties and the boy's welfare—to reach a conclusion favorable to Mrs. Hunter we would be forced to say that the Chancellor was wrong in his appraisement, and that we, with only the printed record before us, are better prepared to evaluate the facts and to turn the scale to another balance. This the majority cannot do.

The order will be affirmed without prejudice to Mrs. Hunter's right later, by appropriate procedure, to establish her right to share in custody of the child if changed conditions are to her advantage. Affirmed.

SMITH, J. (dissenting). This is not in fact a lawsuit between the father and mother of their child over its custody. In litigation of that character neither parent is preferred over the other, but as has been said in many cases, the welfare of the child in those cases is the chief and controlling consideration. On the contrary, as will presently very conclusively appear, the litigation is between Mrs. Carpenter, the father's mother, and the mother of the child, and in litigation of that character there is a preference in law. The parent who wishes to keep the custody of his or her child has the right to do so, unless for good reasons, and for the child's protection and benefit it should be given to a grandparent or to some other person.

Here the parents of the child were married May 13, 1938. At that time the father was a soldier in the regular army, and after his marriage, he was sent over-

seas. Upon his return and discharge, he re-enlisted after the conclusion of hostilities and is in that service now.

On January 24, 1944, he obtained a divorce from his wife on the ground of no cohabitation for a period of more than three years. The divorce was obtained upon publication of a warning order, and Mrs. Hunter testified that she was unaware of the pendency of the suit until after the divorce decree had been rendered, and her husband had remarried. This was his third marriage. She testified that her husband knew her address, but that she received no notice of the suit, and that she only learned of the divorce through the War Department.

According to the undisputed evidence, Mr. Hunter, the father, has never at any time had the care and responsibility of the child for a single moment, and he does not claim ever to have spent one dime of his own money in its support as the government allotments for the child were supplementary to his base pay. He now has a wife and presumably a home, but he did not ask for the custody of the child when he obtained his divorce, and he does not now ask that he be allowed to take the child into his own home.

Mr. Hunter, the husband, was stationed at Marfa, Texas, and his wife lived there with him for a short time before he was transferred to Ft. Sill, Oklahoma. He testified that he told his wife that he was going to be transferred, and that he directed her to go to his mother's home, but she said she would go to her own home, although before doing so she made a visit of some six weeks to two months at her mother-in-law's home. She testified that when she left her husband did not give her the money to pay her bus fare.

After leaving Marfa, Mr. Hunter wrote a letter dated February 22, 1941, in which he stated he was expecting to be transferred to Ft. Sill at any time, and that he would send for her after his transfer, when he had found a home, but he never sent for her. On the contrary, Mrs. Hunter testified that although she wrote Mr. Hunter

a number of times to send for her, advising him that she was ready to go when he said come, she never received that invitation. He did write several letters indicating an intention to send for her, but he never did fix a time for her to come.

When Mrs. Hunter left Marfa she was unable to take her baby bed with her, and in the letter above referred to, Mr. Hunter wrote appellant that he had not been able to sell the baby bed, but that he expected to do so. Evidently he did not contemplate that he would have any further use for it.

Mrs. Hunter lived for a few months in the home of her father, but conditions were not congenial there. She had inherited some property from her mother, which, as required by her mother's will, was turned over to her by her father. This property was not well invested and much of it was lost. Mrs. Hunter took her child and placed it in the hands of a Mrs. Burkhart. She and Mrs. Carpenter, her mother-in-law, visited the child at Mrs. Burkhart's home, and both concluded that this was not a suitable place for the child, and she took it from Mrs. Burkhart's home and placed it in the home of a Mrs. West. Mrs. Carpenter testified that this was not a suitable place for the child, although she had never been in it. She testified that she went there but was refused admission by Mrs. West. Further reference will be made to this home and its character.

There is no question but that Mrs. Hunter developed a serious nervous condition, of which she was fully aware, and she went to a Sanitorium for treatment. While there she wrote the letter copied in the majority opinion, which appears to have largely controlled the decision of this case. This letter was written in a good firm hand, as appears from the photostatic copy thereof appearing in the record. It was well composed, properly punctuated, and does not contain a single misspelled word, although it is three pages in length. In referring to her illness she used in this letter the word "epilepsy," which is correctly spelled, rather than the word "psychosis," which

she may not have been able to spell. But neither word would have conveyed any meaning to the child except to advise him that the writer, his mother, was not then in physical condition to have him with her. The word "psychosis" appears frequently in this record, and was employed by all the doctors who testified in the case, and no one of them used the word "epilepsy," or indicated that she had that affliction, but all employed the word "psychosis" in one connection or the other.

The testimony of Mrs. Hunter's father appears to have been given great weight by the majority, and so it should have been, if it were only true. With apparent candor, but I think only to give it greater weight, he testified that he regretted to say that he did not think his daughter should have the custody of the child. It is suggested that Mrs. Hunter labored under hallucinations, one of these being that her father was not friendly to her. I think the testimony shows that was no hallucination, but is a fact. Mrs. Hunter did not denounce her father, or speak unkindly of him, but the testimony develops certain facts which dissolve the hallucination theory. Mrs. Hunter's mother left her some or all of her estate. The record does not show what part or the value thereof. But whatever its value may have been, the father surrendered it to her as he was required to do under the will of his wife. Later, and after Mrs. Hunter left the Sanitorium where she wrote the letter to her son, above referred to, she inherited property from which she derives an income of $300 per month. This inheritance came from a relative of her mother. She did not permit her father to have control of this property.

Her father testified that his daughter appeared to be normal until about 1945, when she contracted scarlet fever, and was given a treatment which affected her physically almost immediately, and that she had never been the same since, and at her own request he took her to the Sanitorium. While she was there the doctor in charge wrote him that his daughter "was not a mental case but an extreme case of nerves." After leaving the

Sanitorium Mrs. Hunter took her child and placed him with Mrs. West. Mrs. Hunter's father and Mr. Hunter went to Mrs. West's home to see the child, without advising Mrs. Hunter that they were going to do so. He stated that it was only about 7:20 in the evening, when he went there. Mrs. West placed the time much later. At any rate the child had retired and was asleep. Mrs. West denied him admission for the reason stated by her that she had been in one kidnapping case. Mrs. West had served as a missionary to China for some years.

Mrs. Hunter's father admitted that after Mr. Hunter was again inducted into the army the child lived with its mother except for short intervals, and the time and number of these intervals will be detailed. He tried to discredit Mrs. West's home by saying that soldiers went there, but he admitted that all he knew was mere rumor, and it was shown that the soldiers who did go there were the husbands of two women who were boarding with Mrs. West. He stated that the child was fortunate to have a grandmother who would give him a home, although he knew that his daughter was making every effort to get this child into a home which she owned.

Mrs. Hunter's mother died in 1933, and her father remarried in 1937. He stated that when Mrs. Hunter married it was published in the newspaper that he had announced the marriage, when he had not done so. Mrs. Hunter admitted that her father had not authorized the announcement, but she thought this the best way to make the announcement. He stated that Mrs. Hunter took pride in the fact that no one knew how much money she had, which she had inherited from her uncle, and stated that "So far as I am concerned she can handle her own affairs." He was asked: "You don't care much about what your daughter does do you?", and he answered, "No, I don't. She does not want anyone to know anything about her business, and the best I can do is to respect her wishes."

Other testimony of the father shows, I think, the deepest animosity and not a mere hallucination.

But the crowning piece of animosity, not to say mendacity, was the production of the letter from Mrs. Hunter to her son, written at a time when she was distracted over her financial inability to provide her son as she wished to do, the lack of sympathy of her father, and her then debilitated physical condition. Her father went voluntarily to El Dorado, where his depositions were taken." Counsel for appellees say, "He was caught up by appellees and his deposition taken."

The present wife of Mrs. Hunter's father gave the hearsay testimony that Dr. Pearson and another doctor had told her that it was not advisable for Mrs. Hunter to keep the child with her and Mrs. Drummond, a daughter of Mrs. Carpenter, testified that Mrs. Hunter used a stick of wood in correcting the child.

I should not dissent in this case if the testimony showed the state of Mrs. Hunter's health to have been unchanged since the date of her letter to her son. But it shows a change.

Two doctors testified as medical experts on behalf of appellees. One of these, a Dr. Hill, testified that he could not say whether Mrs. Hunter is now a competent and fit person to have the custody and responsibility of rearing her child, as he had not seen her since February, 1945. He did say that if her condition is the same now as it was then, she would not be a fit person to have the custody of the child. He testified that when he examined Mrs. Hunter in February, 1945, she had a psychosis type undetermined, but of a depressed nature and that it was on his advice that Mrs. Hunter was sent to the Sanitorium.

Testimony somewhat stronger was given by Dr. Pearson, a physician employed in a mental institution in Tennessee. He testified that he examined Mrs. Hunter on February 12, 1945, and had seen her twice since, and he thought her mentally unfit to rear a child, and that he saw no reason why her mental condition could be improved.

Opposed to this testimony was that of three other physicians. One of these, Dr. Fincher of El Dorado, who had done post-graduate work in a number of leading colleges and schools, testified that he had just completed an examination of Mrs. Hunter, and except for being a bit anemic, he found her in good physical condition, with no evidence of any organic disease. When shown the answer of Dr. Pearson taken on interrogatories, that Mrs. Hunter was suffering from a definite psychosis and was not then mentally fit to properly raise a child, he was asked what he would say of Mrs. Hunter's present condition, and he answered: "I am satisfied that she is fully recovered at this time and does not have any psychosis now." A Dr. Horton residing in Chattanooga, Tennessee, near which city Mrs. Hunter now resides, testified that he was a graduate of Yale Medical School and the University of Edinborough, and that he had actively engaged in the practice of his profession for thirty-five years. He testified that he had known Mrs. Hunter for six or eight months and that during that time examined her on different occasions at intervals of two or three weeks, and that at no time did he find any evidence of her being mentally incompetent or of unsound mind. That she seemed to be in good health physically and mentally, and that he found nothing to give her treatment for, and that his last examination was the same as the first, and that basing his opinion on his acquaintance with her and his examination of her, he was convinced that she was competent and a fit person to have and discharge a mother's responsibilities in rearing a child. He further testified that Mrs. Hunter appeared to be very intelligent, and he saw no evidence of nervousness whatever, and that he found her to be a fine, high type woman.

Dr. Wharton of El Dorado gave testimony equally as convincing. He had examined Mrs. Hunter for forty-five or fifty minutes the day before he testified. He stated that her memory was adequate and that there was then no evidence of psychosis and nothing to suggest neurosis. That Mrs. Hunter reads well, has had eleven

years of public school work, and two years of vocational school; that she has transacted her business satisfactorily, and gave no impression of illness, and that he found no evidence whatever of true psychosis, and that she remembered too much about her condition to be insane or to have been insane at any time. That if she had psychosis in 1945, due to her nervous condition, the trouble had entirely cleared up, and that while that condition might return, it might as likely occur in anyone else who had never had it. This is the woman who largely through the testimony of her father, has had her child taken away from her yet she indulged in no criticism of her father except to say that he wanted control of her property.

Sufficient to provoke a frenzy on the part of Mrs. Hunter, were questions of the most brutal nature, one of these being, if she had attempted to have sexual intercourse with her son when he was five years old, and while she answered the question with the scorn it deserved, she preserved her equilibrium.

Three ladies, friends and neighbors of Mrs. Hunter, accompanied her to the trial to give evidence in her behalf. A Mrs. Williams who is the secretary to one of the leading law firms of Chattanooga, testified that she had known Mrs. Hunter for twenty-two years and had lived within a few doors of her for several years. She recalled Mrs. Hunter's illness, but stated that the trouble had cleared up, that Mrs. Hunter was a christian lady and that her reputation was good, and that she attended church and Sunday school, and carried her son with her.

Another witness, named Mrs. Williams, but not related to the other, testified that she had lived across the street from Mrs. Hunter in the town of Rossville, Georgia, near the city of Chattanooga, and that she saw Mrs. Hunter nearly every day. That Mrs. Hunter was deeply interested in her child, and made him mind as well as any child does. That Mrs. Hunter played the organ at a mission church which they both attended, and that her reputation was not only good, but was very good. She

recalled Mrs. Hunter's illness and her stay in the Sanitorium, and stated that after conferring with an outstanding judge in Chattanooga, she advised placing the child with Mrs. West. At Mrs. Carpenter's suggestion she had told Mrs. Hunter that Mrs. Burkhart's home was not a good place for the child, and Mrs. Hunter removed him. She further testified that Mrs. Hunter had been a mental case, "But she is all right now. I am with her every day and if there is anything wrong with her I have not seen it."

Another neighbor had known Mrs. Hunter for nine years but did not see her during the period of her illness, but had seen her frequently during the past six months and stated, "I certainly think she is physically and mentally capable of rearing her own child."

The opinion of the Chancellor delivered in this case reflects that the decree was based upon what I think was a misapprehension of the testimony, and the majority have fallen into the same error. In this opinion it is stated, first, that this was a suit between the father and the mother of the child. Second, that the mother was suffering from psychosis. Third, that if the child was returned to the mother "the primary condition might return." And finally, "The child has not had a permanent home and did not have one until October, 1945, was just shifted about." And upon these findings it was adjudged that it was best for mother and child to leave the custody of the child undisturbed.

When the testimony has been correctly analyzed, I think the findings stated are contrary to the preponderance of the evidence.

First, this is in fact a suit between the mother and the grandmother, originating when the mother brought *habeas corpus* to recover possession of her child. It is true that after the suit was filed the father was made a party, upon a motion of his mother, and with more loyalty to his mother than Mrs. Hunter's father has shown to her, he joined in the defense of the suit. But in this connection there are certain facts which should not be

ignored or left out of account. The father married after being divorced, and had made no attempt to take the child into his home, and he does not now ask its custody for himself, but only for his mother. After re-enlisting in the army he prepared a statement to the effect that the custody of the child had been voluntarily given him by its mother, and that his own mother now had the permanent custody of the child, and he directed that allotments be made his mother on that account, these amounted to $30 per month for the support of the child, and $37 per month for its care. So that Mrs. Carpenter will receive not from the father, but from the government, the sum of $67 per month, so long as she retains the custody of the child. She is now living in a cottage with three rooms, and a bath, paying $10 per month rent, with another grown son and the child. The affirmance of this decree will not give the custody of the child to the father. He does not even ask it.

Many cases have announced the law applicable to this situation. A quite recent one being the case of *Hazelip* v. *Taylor,* 209 Ark. 510, 190 S. W. 2d 982, which was a contest over the custody of a child between the father and the child's foster parents. In reversing the judgment which had awarded the custody of the child to the foster parents we there said: "So, in the instant case, Taylor will not be deprived of his legal and natural rights unless it be convincingly shown (a) that as a father he has forfeited his claim or that circumstances make it impossible for him to fulfill the parental obligation, and (b) that the child's welfare requires alienation."

There is no real testimony that Mrs. Hunter ever abandoned the child, the only testimony to that effect being that of Mr. Hunter that Mrs. Hunter had voluntarily given him the permanent custody of the child. This testimony is contradicted by Mrs. Carpenter whose testimony was that Mrs. Hunter agreed that Mr. Hunter might have the child a part of the time and that testimony corroborates the testimony of Mrs. Hunter on that question. She stated she thought a temporary change might be beneficial both to her and to her son. If the

removal of the child from the state of Georgia to this state was not intended by the mother to be a transfer of custody but was only a temporary arrangement, the child continued in the constructive custody of its mother.

In a controversy of this character the law shows no preference to one parent over another, but considers primarily the welfare of the child. But this is not the rule in a controversy between a parent and one otherwise claiming the custody of the child. In holding that the right of the parent is preferred, it is said in the case of *Lipsey* v. *Battle,* 80 Ark. 287, 97 S. W. 49, that: "This right is founded on the fact that the natural love and affection of a mother for such a child would probably be greater than that of anyone else, and that the best interest of the child will generally be subserved by allowing it to remain in her custody."

Now the finding that Mrs. Hunter was suffering from psychosis might be true if it had read that she had suffered from that ailment, although it appears from what has been said, this may not be true. That Mrs. Hunter was severely ill at the time she wrote the ill fated letter to her child is not denied, although there is a doubt as to the nature of her ailment. No one of the doctors stated that she was thus afflicted at the time of the trial, and three doctors expressed a definite opinion to the contrary. There is at least some doubt on the subject, and that doubt should have been resolved in Mrs. Hunter's favor and not against her. This is true for two reasons, the first being that she was the natural custodian of the child, her husband not asserting that right in himself.

But there is a second reason equally as potent. It is this. Decrees awarding custody of children are final unless and until it be shown that a change has occurred in conditions which induced the award of custody. If Mrs. Hunter's illness, whatever it may have been, should return, although it was the opinion of three doctors that this was improbable, it would then be in the power of the court to change the custody of the child and place it in

the care of someone who would give it the attention and protection which its infancy required. On the other hand, if this decree is not reversed, Mrs. Hunter has permanently lost the custody of her child and her heroic efforts to regain her health and recover custody of the child will be at an end, for the reason that in any future suit she would be confronted with the fact that she was once psychopathic, and that that condition might return.

But the law is that a part illness, no matter how severe, or long continued, will not, after complete recovery, deny a mother the right to have her child with her. *Loewe* v. *Shook,* 171 Ark. 475, 284 S. W. 726; *Herbert* v. *Herbert,* 176 Ark. 858, 4 S. W. 2d 513; *Holmes* v. *Coleman,* 195 Ark. 196, 111 S. W. 2d 474.

In the case last cited the facts were that the mother was suffering from nephritis when her child was born and it was decided that the mother should be placed in a hospital for treatment, and that the care of the baby should be intrusted to a neighbor, who after keeping the baby for three years asked to be allowed to adopt it, which request was denied. The mother was so appreciative of the service rendered to the child, that she refrained from taking it into her custody, although she had asked for its return, until the child was seven years old, when she brought *habeas corpus* as Mrs. Hunter had done. It was there held, to quote a headnote: "Where the mother, sick at the time the child was born, was unable to care for it, and appellants graciously took it and cared for it while the mother was in the hospital; where there was no abandonment of the child nor a gift of it; and there was no question about the parents being proper parties to care for the child, an award of the child to its natural parents was proper."

No doctor who had recently examined Mrs. Hunter testified that the child would, if returned to its mother, again get on her nerves, and the great preponderance of the lay testimony is to the contrary. The unnatural father gave this as an explanation of his attitude, but on his cross-examination he was forced to admit that in the

past five years he had seen mother and son together only five or six times, and had to admit that his testimony on lack of control of the child was based on hearsay and finally added, "I don't know anything."

Nor is the finding that the child had no home until given one by Mrs. Carpenter supported by the preponderance of the evidence. The undisputed evidence is to the effect that he had been continuously with his mother except on five occasions. First, the six weeks or two months visit to the grandmother in 1942. Second, the stay with the maternal grandfather in 1945, when the mother was in the sanitorium. Third, the six weeks visit to the paternal grandmother in the summer of 1945. Fourth, the few weeks spent in the home of Mrs. Burkhart, and fifth, the short time spent in the home of Mrs. West. And the testimony shows that while the child was with Mrs. Burkhart and Mrs. West it was constantly visited by its mother, and it was also undisputed that at the end of each of these periods the mother reclaimed her child.

It may be said that the child should not have been placed with Mrs. Burkhart or Mrs. West, but in view of Mrs. Hunter's then financial condition, her distractions and her illness, it was the best she could do under the circumstances. However, since then both her physical and financial conditions have improved, and she now proposes to take the child to one of the two homes which she now owns, which is within three blocks of the school the child may attend.

Mrs. Hunter does not ask for the child because of the $67 per month allotment which the government pays Mrs. Carpenter, but because it was born to her and the hope of having it at last as her very own has been the inspiration leading to the recovery of her health, and her own health should be taken into account. If the child is taken from her she may again have psychosis, as the loss of a child under the circumstances here stated might cause psychosis in a mother who had never been so afflicted.

I think the decree should be reversed and the child restored to the custody of its mother for the reason stated in the summation of the case in the brief of her counsel as follows:

"Instead of shifting the little fellow about, this mother, through trial and disappointment, with no personal, and little financial, help on the part of the father was doing her very best to maintain a home for him. For some five years without hope of reward, but following blindly the mother instinct, she clothed and fed him, provided a roof over his head, nursed him and trained him. The father admits that he left the care of this child to her. His interest in the matter must have been very slight for he admits that during this time he didn't 'know how she got along taking care of the child.' And the grandmother didn't know where mother or child was. Neither the father nor grandmother was greatly interested then, but fortunately the mother was. She was providing a home for the boy, and giving him her personal care and attention. But for her effort doubtless there would have been no little boy for the father and grandmother to claim now."

I am authorized to say that Justices HOLT and MILLWEE are of the opinion that the custody of this child should be awarded to its mother.

FLOYD, GUARDIAN, *v.* ISBELL.

4-8175 201 S. W. 2d 755

Opinion delivered May 5, 1947.

Northcutt & Northcutt and *Oscar E. Ellis,* for appellant.

P. C. Goodwin and *Ponder & Ponder,* for appellee.

HOLT, J. November 4, 1935, Hugh Isbell, appellee's husband, by appropriate proceedings, was declared mentally incompetent, and a guardian duly appointed. Shelby E. Floyd is the guardian in succession.

August 28, 1945, appellee, Fay Isbell, sued her husband for divorce. The grounds alleged were cruel treatment, or indignities, § 4381, Pope's Digest, 5th subdivision. Summons was served on the guardian of Hugh Isbell, Shelby E. Floyd, September 19, 1945. September 7, 1945, Hugh Isbell executed a waiver of service and entry of appearance. A decree of divorce was granted Fay Isbell January 16, 1946, and certain orders were made relative to property rights and the custody of a minor child.

On April 6, 1946, the present suit was filed by Lee Wells, as next friend of Hugh Isbell, to vacate and set aside the divorce decree, *supra,* of January 16, 1946, on the ground, among others, that no process was ever served on him (Hugh Isbell) in the divorce action and that the trial court was without jurisdiction to render the decree of divorce against him. When the cause came on for trial the name of appellant, guardian, was substituted for that of Lee Wells as next friend.

From a decree denying appellant's prayer to vacate the divorce decree, this appeal is prosecuted.

Appellant earnestly insists that the trial court was without jurisdiction to render the divorce decree of January 16, 1946, for the reason that no process was ever served on Hugh Isbell. We think appellant's contention must be sustained.

It is undisputed that Hugh Isbell was declared mentally incompetent November 4, 1935, and was under guardianship at the time the divorce suit, *supra,* was filed in August, 1945, and the decree rendered January 16, 1946. It is also undisputed that no process was ever served on Hugh Isbell in the divorce action, *supra.* He did, however, execute a waiver and entry of appearance.

Section 1371 of Pope's Digest provides in part: "Where the defendant is a person judicially found to be of unsound mind, the service must be upon him and upon his guardian; etc." This provision of the statute is mandatory that service "must" be both upon Hugh Isbell and his guardian. We so held in the recent case of *Wilder* v. *Wilder,* 208 Ark. 521, 186 S. W. 2d 933. There we said: "So far as we have been able to find this court has never construed said § 1371, (Pope's Digest), but we have, in a number of cases, construed § 1370, relating to service upon infants and which section is quite similar to or substantially the same as § 1371. It is the rule in this court that there can be no valid decree against an infant without personal service on the infant, even though he appears and defends by his guardian. . . . The same holds true as to defense by insane persons."

In 28 Amer. Jur., p. 743, § 112, the general rule is announced as follows: "Where the insane person has been so adjudicated, and a guardian appointed for him, it is generally provided that service is to be made on both the committee or guardian and the incompetent."

In this case, Hugh Isbell could neither acknowledge nor waive service of process upon him.

This was the effect of the holding of this court in *Moore* v. *Wilson,* 180 Ark. 41, 20 S. W. 2d 310. While the

court was dealing there with the service of process on an infant, the principle announced applies with equal force here where we are dealing with one who is mentally incompetent. In the Moore-Wilson case, we quoted with approval the rule announced in 14 R. C. L. 284, as follows: "An infant can neither acknowledge nor waive the regular service of process upon him, though in some instances a regular service of summons slightly irregular in form was held to be a substantial compliance with the statute, and sufficient to give jurisdiction. . . . It is held in most of the cases that the lack of service of (on) the infant is a fatal, because jurisdictional, defect, and cannot be cured by the appointment of a guardian *ad litem* and his making actual defense for the infant; and this ruling seems consistent with the lack of power on the part of the guardian to bind the infant by his admissions or stipulations."

Appellee's petition for reasonable attorney's fee and suit money is denied for the reason that the present action is not the kind of action contemplated under § 4388, Pope's Digest, as amended by Act 25 of the General Assembly of 1941, p. 54, which reads as follows: "During the pendency of an action for divorce or alimony, or during the pendency of an action involving the care and/or maintenance of the children, the court may allow the wife maintenance for herself and/or children, as the case may be, and a reasonable fee for her attorneys, and enforce the payment of the same by orders and execution and proceedings as in cases of contempt."

The present suit is not one for divorce, alimony or one involving the care or maintenance of children, but is an action to vacate a divorce decree, and is not governed by the quoted section of the statute.

Accordingly, the decree is reversed and the cause remanded with directions to vacate the divorce decree of January 16, 1946, and for further proceedings consistent with this opinion.

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

4-8171 201 S. W. 2d 768

Opinion delivered May 5, 1947.

Hays, Wait & Williams, for appellant.

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

McHANEY, Justice. This appeal is from a judgment entered on an instructed verdict for appellee at the conclusion of appellant's evidence.

Appellant brought the action to recover damages for the alleged wrongful and negligent death of her 13-year-

old daughter, Elizabeth, who was struck by a fast passenger train in Atkins, Arkansas, about 11:30 a. m. on May 18, 1946, and who was instantly killed. The negligence alleged and relied on here related, first, to the speed of the train; second, failure to give the statutory signals; third, failure of the operatives to keep a lookout; and fourth, failure to apply the brakes. The insistence here is that the proof on the part of appellant made a case for the jury, and that the court, therefore, erred in directing a verdict for appellee.

On the day of the accident a street carnival was being held in Atkins, on the south side of the railroad tracks, partly on the right of way and partly in the street. The tracks run east and west through Atkins. The deceased and another girl, both colored, wanted to cross from the south side of the tracks to the north side. At that time a freight train was slowly running east on the passing or side track. Both of the girls approached the track about opposite the depot which is located on the north side, about the center of a block between two public crossings. They waited for the freight to pass, and, when the caboose thereof went by, they ran from behind it and directly in front of a fast passenger train going west. The other girl narrowly escaped, but Elizabeth was killed. The distance between the main line and the switch tracks was 9 or 10 feet. There is no dispute in the evidence as to how the accident happened. Pardie Parker, son-in-law of and witness for appellant, testified that he saw the accident, saw the girls run from behind the freight train and on to the main track, immediately in front of the engine of the passenger train, and saw the engine strike the deceased; that he halloed to them in an attempt to keep them from running across in front of the passenger train, the front of which was close to the back end of the caboose of the freight; that they leaped across the track and one of them got killed; and that there was no crossing at that place.

As to the speed of the passenger train, it was alleged that it was traveling at about 70 miles per hour and the proof tended to establish this speed, much in

excess of the speed limit for trains fixed in an ordinance of the city introduced in evidence. We think it was not established that the speed of the train was the proximate cause of the accident, and that the little girl would have been killed had the train been running much slower. It is undisputed that she darted out from behind the caboose of the freight immediately in front of the engine of the passenger train, not at a crossing, not at a point where even a foot path led across the tracks, but where she was either a trespasser or a bare licensee, to whom the Company owed no duty except not to willfully or wantonly injure her and to exercise ordinary care under the circumstances to avoid injuring her after the discovery of her peril. *Cato* v. *St. L. S. W. Ry. Co.*, 190 Ark. 231, 79 S. W. 2d 62; *C. R. I. & P. Ry. Co.* v. *Caple, Admr.*, 207 Ark. 52, 179 S. W. 2d 151.

■ As to the failure to give the statutory signals, several of the witnesses for appellant testified that the whistle was sounded and others testified negatively that they did not hear it. We think the failure to sound the whistle or ring the bell, if there were such failure, is unimportant under the circumstances here presented. The freight train was running, the noise of which as well as the noise from the passenger train, may have drowned out to the girls the noise of the whistle. In any event the noise of the oncoming passenger train must have been much greater than that of the slowly moving freight and could have been heard had the slightest attention been given to it, or if the girls had glanced to their right they could and would have seen the train which was practically on them when they darted across the track in front of it. Under these circumstances signals cease to be factors since the danger was apparent from the noise of the train and its nearness. *St. L. & S. F. Ry. Co.* v. *Ferrell*, 84 Ark. 270, 105 S. W. 263; *Mo. Pac. Rd. Co.* v. *King*, 200 Ark. 1066, 143 S. W. 2d 55. Moreover, being trespassers or licensees appellee owed them no duty to give the statutory signals under the cases cited in paragraph 1, above.

As to the alleged failure to keep a lookout and to apply the brakes, it is undisputed that the deceased could not have been seen by the operatives in time to avoid striking her had a lookout been kept or in time to apply the brakes and check the train sufficient to permit her to escape. Moreover, she was a trespasser or a licensee under the rule stated in the Cato and Caple cases, above cited, and many others, to whom appellee owed no affirmative duty of care, and only the duty not to willfully or wantonly injure her after the discovery of her peril. In *St. L.-S. F. Ry. Co.* v. *Williams,* 180 Ark. 413, 21 S. W. 2d 611, it was held that it is the duty of one complaining of personal injuries, caused by the running of a train, to show that the injuries were received at such a place or under such circumstances that her presence would have been discovered had a lookout been kept. Here there was no attempt to show such facts. On the contrary, the proof shows that her presence could not have been discovered in time to avoid striking her.

The judgment is, accordingly, affirmed.

LINGO *v.* MYERS.

4-8184 201 S. W. 2d 745

Opinion delivered May 5, 1947.

Rains & Rains, for appellant.

C. E. Izard and *Wilson & Starbird,* for appellee.

Robins, J. Appellee brought unlawful detainer proceedings in the circuit court to recover possession of certain real estate, with a dwelling house thereon, which appellee had rented by the month to appellant, and to recover the sum of $30 rent thereon. Default in payment of rent and service of notice to quit was alleged in appellee's complaint. Possession was delivered to appellee under writ issued by the clerk.

Appellant filed demurrer to the complaint, and on overruling thereof answered, denying the material allegations of the complaint, and in cross complaint asked damages for improper ouster.

A trial jury returned a verdict in favor of appellee for possession of the property and for $30 rent. From judgment on the verdict this appeal is prosecuted.

I.

It is first contended by appellant that the circuit court had no jurisdiction because under Act 28 of the General Assembly of Arkansas, approved February 6, 1941, exclusive jurisdiction of unlawful detainer suits, where the rent involved does not exceed $200, was vested in the municipal court and justice of the peace court. The portion of that Act material to this controversy is as follows: " 'When Writ to Issue. When any person to whom any cause of action shall accrue under this act shall file in the office of the clerk of the circuit court of the county in which the offense shall be committed, or, if the rent involved does not exceed two hundred ($200) dollars, in the office of the clerk of the municipal court of any city in said county, or before any justice of the peace of the township where the lands lay, a complaint or statement in writing signed by him, his agent or attorney, specifying the lands, tenements or other possessions so forcibly entered and detained, or so unlawfully detained over and by whom and when done, and shall also file the affidavit of himself or some other creditable person for him, stating that the plaintiff is lawfully entitled to the possession of the lands, tenements, or other possessions mentioned in the complaint, and that the defendant forcibly entered upon and detains the same, or unlawfully detains the same after lawful demand therefor made, such clerk, or justice of the peace, shall issue a writ of possession directed to the sheriff, where the action is commenced in the circuit or municipal court, or the constable, where the action is commenced before a justice of the peace, commanding him to cause (if the plaintiff give

security according to law) the possession of the lands, tenements or other possessions in the complaint mentioned to be delivered to the plaintiff without delay, and to summon the defendant to appear in court on the return day of the writ and answer the plaintiff in the premises.' "

The Constitution of Arkansas (§ 40 of Art. VII) thus prescribes the jurisdiction of justices of the peace: "They shall have original jurisdiction in the following matters: First, exclusive of the circuit court, in all matters of contract where the amount in controversy does not exceed the sum of one hundred dollars, excluding interest, and concurrent jurisdiction in matters of contract where the amount in controversy does not exceed the sum of three hundred dollars, exclusive of interest; second, concurrent jurisdiction in suits for the recovery of personal property where the value of the property does not exceed the sum of three hundred dollars, and in all matters of damage to personal property where the amount in controversy does not exceed the sum of one hundred dollars; third, such jurisdiction of misdemeanors as is now, or may be, prescribed by law; fourth, to sit as examining courts and commit, discharge or recognize offenders to the court having jurisdiction, for further trial, and to bind persons to keep the peace or for good behavior; fifth, for the foregoing purposes they shall have power to issue all necessary process; sixth, they shall be conservators of the peace within their respective counties, *provided a justice of the peace shall not have jurisdiction where a lien on land or title or possession thereto is involved.*" (Italics supplied.)

Authority for creation of municipal courts is found in § 43 of Art. VII of the Constitution as follows: "Corporation courts for towns and cities may be invested with jurisdiction concurrent with justices of the peace in civil and criminal matters, and the General Assembly may invest such of them as it may deem expedient with jurisdiction of any criminal offenses not punishable by death or imprisonment in the penitentiary, with or without indictment, as may be provided by law, and, until the General

Assembly shall otherwise provide, they shall have the jurisdiction now provided by law."

Under the plain language of the Constitution a justice of the peace "shall not have jurisdiction where a lien on land or title or possession thereto is involved"; and the Constitution authorized the creation of municipal courts with only "jurisdiction concurrent with justices of the peace in civil . . . matters . . ."

Now the right of the respective parties to possession of the rented premises is the very essence of an action for unlawful detainer.

It follows that, insofar as it purports to vest jurisdiction in justices of the peace and municipal courts to hear and determine actions for unlawful detainer, Act No. 28 of the General Assembly of 1941 is contrary to the Constitution and void. The circuit court did not err in retaining jurisdiction.

II.

Appellant next urges that his demurrer should have been sustained because the complaint fails to show that notice to quit was served on appellant for the proper time. In support of this contention our cases holding that a tenancy from month to month may be terminated only by notice for thirty days are cited. But in the case at bar nonpayment of rent when due was alleged. Under § 6035, Pope's Digest, it is provided: "Every person . . . who shall fail or refuse to pay the rent therefor when due, and after three days' notice to quit and demand made in writing for the possession thereof by the person entitled thereto, his agent or attorney, shall refuse to quit such possession, shall be deemed guilty of an unlawful detainer." So, under the allegation of the complaint (found true by the jury) that there was a default in the rent, it was necessary to allege and prove service of notice to quit for only three days. *Parker* v. *Geary*, 57 Ark. 301, 21 S. W. 472; *Lindsey* v. *Bloodworth*, 97 Ark. 541, 134 S. W. 959.

Nor is the contention of appellant as to the insufficiency of the description in the notice well founded. The property was described in the notice as "the premises owned by me but now occupied by you situated on the 'Logtown Hill' road just outside of Van Buren, Arkansas." It is not disputed that appellant was in possession of a small dwelling house owned by appellee in the named locality. The notice could not have referred to any other property and therefore was not misleading. "Generally speaking a description of the premises in a complaint for forcible entry and detainer is sufficient if it enables identification of the property." 36 C. J. S. 1178. "Great strictness and accuracy of description is not required in complaints in forcible entry and detainer." *Fink* v. *Schmidt* (Mo. App.), 245 S. W. 566.

III.

It is next urged by appellant that the complaint was defective in that it was not alleged therein that appellee had ever been in possession or was entitled to the possession of the property. It was alleged in the complaint that the plaintiff was the owner of the property, had rented it to the defendant (appellant) for a stipulated rent, which had not been paid, and that notice to quit had been served on the defendant for three days. This was sufficient.

IV.

For reversal it is further argued by appellant that his name is not P. A. Lingo, as he was designated in the notice to quit, the complaint and the summons. He does not deny that the notice to quit and the summons were both served on him and that he in fact was renting appellee's house. Under the circumstances the mistake, if any, as to his name did not affect his substantial rights, and such a defect must be disregarded under the provisions of § 1466, Pope's Digest.

Furthermore, appellant did not in any pleading raise this question until after the trial, when he incorporated

his contention relative thereto in the motion for new trial. It was too late then to make such an objection, even if it would have been available in any event.

V.

It is finally urged that the lower court erred in permitting counsel for appellee to ask appellant if he had paid a fine for being drunk. As to this the transcript shows: "Q. You say your name is James L. Lingo? A. Yes, sir. Q. You are the Lingo that occupied the house of Jim Myers on Logtown Hill and got evicted? A. It says P. A. Lingo. Q. You are the same man? A. My name is James L. Q. You are the same man that was ejected from that house? A. Yes, sir. Q. You are the same man that they had in jail down here last week? Mr. Rains: I object, that was after this suit was filed. The court: He has a right to ask him if he has been in jail. Mr. Rains: The rule is to ask the man if he has been convicted. The court: He may state. Mr. Rains: Save our exceptions. Mr. Starbird: Q. You paid a fine in municipal court for drunkenness about a week ago, is that right? A. Yes, sir, it is right. I paid a fine of $23.50, I have got a receipt in my pocket, I pay my bills."

It will be noted that no objection was made to the question as to payment of fine for drunkenness; and appellant did not answer the question as to his being in jail. Under the circumstances no prejudice could have resulted from the first question; and no objection was made to the last one.

No error appearing the judgment is affirmed.

ARKANSAS ASSOCIATED TELEPHONE COMPANY
v. BLANKENSHIP.

4-8191 201 S. W. 2d 1019

Opinion delivered May 5, 1947.

Barrett & Wheatley and *Berl S. Smith,* for appellant.

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

MINOR W. MILLWEE, Justice. Appellee, E. M. Blankenship, was plaintiff and appellants, Arkansas Associated Telephone Company and W. L. Bryant, were defendants in the circuit court in an action for slander. Trial before a jury resulted in a verdict and judgment in favor of plaintiff for $500 actual damages against the defendants.

Plaintiff was employed by defendant, Arkansas Associated Telephone Company, as a repair helper at Monette, Arkansas, from July, 1945, until February, 1946, when he was discharged by defendant, W. L. Bryant. Plaintiff alleged in his complaint that said W. L. Bryant, while acting within the scope of his employment as district manager of the telephone company, made slanderous statements to and concerning plaintiff in the presence of M. E. Blankenship, father of plaintiff, as follows: "What did you do with the key you took last night after you robbed this No. 40 pay station? You went in the office and took it out of her cash box and robbed this pay station and stole the money; now what did you do with the money? I don't want you in the office any more, you might steal something; I don't care how it sounds, you stole it. I found out you lied about how much a man charged you for pulling the truck out of a mud hole, he said he charged you two dollars and you turned in a voucher for four dollars, so this is two more dollars you have stole."

It was further alleged that W. L. Bryant subsequently repeated the substance of said statements in the presence of five other persons whose names were set out in an amendment to the complaint. The prayer of the complaint was for $1,500 actual damages, and $1,400 punitive damages.

In their answer defendants admitted the discharge of plaintiff, but alleged that it was for just cause. They

denied making the statements contained in the complaint and alleged that any statements made by W. L. Bryant, on the occasion mentioned, were true. In an amendment to the answer, defendants further alleged that any statements made to or about plaintiff were made in good faith, without malice and under circumstances constituting a qualified privilege.

Plaintiff is 27 years of age, married and has resided in Monette, Arkansas, most of his life. He testified that he and his father started to the telephone office on Sunday, February 24, 1946, to talk with W. L. Bryant about a paint job which the father was trying to secure with the telephone company. They met Bryant on the street in front of the telephone office and discussed the paint job and the prospects of a promotion for plaintiff with the company. In response to counsel's questions, plaintiff gave the following account of the conversation that then took place in the presence of his father: "Well, we talked about different things and as I started off, Mr. Bryant said, 'Wait a minute, Pete,' and I said, 'What is it?' and he said, 'How are you getting along with the operators now?' and I said, 'As far as I know, all right,' and he said, 'You are not having any trouble with them?' and I said, 'No, sir,' and he said to me, 'What did you do with the cash after you robbed the pay station?' and I said, 'I don't have the key to the pay station.' He said, 'You went in the office and went in the operator's cash box and got the key to the pay station and opened the pay station and got the money out and then put the key back in her cash box.' I said, 'That's a little bit thick; do you think if I was going to steal money from the pay station I would put the key back in her cash box?' He said I was fired. That was about all that was said. Then I asked him to go in the office and see if he could prove these things, and he said, 'No, you are not going back in the office. You might steal something else,' and he told me he didn't want me in the office any more and I came down for my tools the next morning. Q. What did Mr. Bryant say about the Huddleston business? A. He said he also found out that I lied to him about Mr. Huddles-

ton's charges for pulling me out of the mud. . . . Q. What did he say about you lying? A. He said he had found out that I lied about what I had paid Mr. Huddleston and he said, 'That's two more dollars you've swindled the telephone company out of.' Q. What did you tell him? A. I told him I didn't do that."

Plaintiff also testified that he later sought other employment from three or four Monette businessmen who refused to hire him after consulting W. L. Bryant about the circumstances of plaintiff's discharge by the telephone company. These prospective employers also testified that they either declined to hire plaintiff or dismissed him after consulting Mr. Bryant. However, the trial court instructed the jury to disregard all statements made by Bryant to these men and the issues were confined to a consideration of the statements made by Bryant in the presence of M. E. Blankenship on the date plaintiff was discharged.

According to his testimony, plaintiff earned $60 every two weeks working for the company, but, following his discharge, was only able to secure such odd jobs as mowing yards, at which he earned only $15 to $25 in a two-week period. He also testified that the accusations made by W. L. Bryant were false, and that he had suffered humiliation and embarrassment as a result thereof.

The testimony of M. E. Blankenship concerning the statements made by Bryant was substantially the same as that of his son. The statements were made in the father's presence and Bryant did not indicate that he desired a private conversation with plaintiff.

The defendant, W. L. Bryant, admitted having a conversation with plaintiff and his father on the street near the telephone office on the Sunday in question, but denied making the statements set out in the complaint. He testified that, acting upon information furnished by the telephone operators and others, he sought an explanation from plaintiff relative to his alleged possession of the key to the pay station coin box and an alleged overcharge of $2 to the company of the amount plaintiff paid

for having the company truck pulled out of a mud hole; that plaintiff denied having the key and making the overcharge; that he then informed plaintiff that the latter had not explained these transactions to his satisfaction and suggested that plaintiff "lay off" until the matter could be adjusted. Plaintiff was told to stay out of the office when he threatened to make trouble for the operators.

One of the operators testified that she saw plaintiff place a key to the pay station in a cash box on Saturday afternoon before the conversation on Sunday and so informed another operator who testified that she checked the coin box which contained only 15 cents although $4 had been deposited in the box a short time before the check was made. Plaintiff stoutly denied having the key to the coin box. There was also a sharp conflict in the testimony of plaintiff and C. B. Huddleston as to the amount paid the latter on February 9, 1946, for his services in pulling the truck out of the mud. Huddleston testified that plaintiff paid him only $2 at the time of the incident and an additional $2 some time in April when a receipt was issued to plaintiff at his request. A receipt was introduced in evidence which was signed by Huddleston and dated February 9, 1946, showing payment of $4. While Huddleston testified that the entire writing appeared to be in his hand, he did not recall placing the date of February 9, 1946, on the receipt.

For reversal of the judgment, defendants contend that the court erred in refusing to instruct a verdict in their favor at the conclusion of the testimony. It is earnestly insisted that the evidence was insufficient to take the case to the jury. It is argued that the defendant Bryant was acting within the scope of his employment as general manager of the telephone company, when the alleged slanderous statements were made to plaintiff, who was also an employee of the company and working under the defendant, Bryant. Under these circumstances, defendants insist that any statements made were qualifiedly privileged in the absence of express malice, which they contend has not been proven.

Defendants rely on the case of *Bohlinger* v. *Germania Life Ins. Co.*, 100 Ark. 477, 140 S. W. 257, 36 L. R. A., N. S. 449, Ann. Cas. 1913C, 613. That case involved an action for libel where the alleged libelous matter was contained in a communication between a life insurance company and its local agents concerning the availability of plaintiff as a risk for life insurance and his qualifications to be an insurance agent. It was held that the question whether a communication complained of as being libelous is one of qualified privilege becomes a question for the court where the facts adduced in evidence are undisputed. Mr. Justice FRAUENTHAL, speaking for the court in that case, said: "If the statements are published by one in good faith to another in order to protect his own interest or to protect the corresponding interest of the other in the matter in which both parties are concerned, then such statements are privileged when the subject-matter of the publication makes it reasonably necessary under the circumstances to accomplish the purpose desired. . . . But the communications containing defamatory statements thus made should not, in any event, go beyond what the occasion required. If it is shown by the writing itself, or by evidence outside of the communication, that the occasion therefor was abused, or that the statements were not relevant to or went beyond the subject-matter or purpose of the agency or business, or that the statements were made from malice proved, then no protection will arise against the prosecution of an action for libel, although there may exist a common interest or duty of the parties between whom the communication passes. Such intrinsic or extrinsic evidence would show a want of good faith, and would repel the inference that there was no malice." Since the undisputed testimony in that case showed that the confidential report was sent by the defendant in perfect good faith and without malice, it was held that the trial court correctly directed a verdict for the defendant.

In the case of *Sinclair Refining Co.* v. *Fuller*, 190 Ark. 426, 79 S. W. 2d 736, this court approved the following statements from Newell, Slander and Libel,

(Fourth Ed.) p. 450: "A defamatory communication when necessary to protect one's own interest is privileged, when made to persons who also have a duty or interest in respect to the matter. In such case, however, it must appear that he was compelled to employ the words complained of. If he could have done all that his duty or interest demanded without libeling or slandering the plaintiff, the words are not privileged." In the same case this court also approved the rule stated in 36 C. J., p. 1248, as follows: "The protection of the privilege may be lost by the manner of its exercise, although the belief in the truth of the charge exists. The privilege does not protect any unnecessary defamation. In order for a communication to be privileged, the party making it must be careful to go no farther than his interest or his duties require. Where the party exceeds his privilege and the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessarily defamatory of plaintiff, he will not be protected, and the fact that a duty, a common interest, or a confidential relation existed to a limited degree is not a defense, even though he acted in good faith."

In Restatement of the Law, Torts, Vol. 3, § 604, it is said: "One who, upon an occasion conditionally privileged for the publication of false and defamatory matter to a particular person or persons, knowingly publishes such matter to a person to whom its publication is not otherwise privileged thereby abuses the privilege unless he reasonably believes that such publication is a proper means of communicating the defamatory matter to the person to whom its publication is privileged." A publication may also be excessive if the defendant purposely selects an occasion when a person outside the privilege is present, to make the slanderous statements. 33 Am. Jur., Libel and Slander, p. 179.

According to the testimony on behalf of plaintiff, the words used by defendant, W. L. Bryant, amounted to a charge that plaintiff had been guilty of larceny and such words are actionable *per se*. Section 3021, Pope's

Digest; *Gaines* v. *Belding,* 56 Ark. 100, 19 S. W. 236; *Safeway Stores, Inc.,* v. *Rogers,* 186 Ark. 826, 56 S. W. 2d 429.

In actions for libel or slander a *prima facie* presumption is ordinarily indulged that defamations which are actionable *per se* are malicious. 33 Am. Jur. Libel & Slander, § 266, p. 247. "The fact that a publication is qualifiedly privileged simply relieves the publication from the presumption of malice otherwise attendant and does not change the actionable quality of the words published." 36 C. J., Libel & Slander, p. 1241-2. A publication loses its character as privileged and is actionable if it is motivated by express or actual malice. 33 Am. Jur., Libel & Slander, § 113, p. 115.

In the instant case we think the trial court did not err in refusing to find as a matter of law that the statements attributed to Bryant were made upon a conditionally privileged occasion and that the occasion was not abused; nor do we agree that the undisputed evidence demonstrates that the statements were made in good faith and without malice. If the testimony on behalf of plaintiff is credited, the court was warranted in finding that the occasion was abused and the publication excessive. The statements were made on the streets of Monette when plaintiff was not on duty. They were made in the presence of the father who was not asked to withdraw. The character of the language and the manner of its use as related by testimony on behalf of plaintiff was sufficient to warrant the conclusion that the defendant, W. L. Bryant, went farther than his interest or duties required. Under these circumstances the jury may also have inferred that defendant Bryant was motivated by actual malice.

The recent case of *Joslyn Manufacturing & Supply Company* v. *White, ante,* p. 362, 200 S. W. 2d 789, involved statements made by Roth, local manager of the manufacturing company, to White, a supervisor of a sawmill engaged in producing lumber for the company. The statements were made in the presence of White's employees. In discussing the contention that a verdict should have been directed for defendants, this court said: "In

short, whether Roth has been quoted correctly or incorrectly, there was substantial testimony upon which liability could be predicated, and in that respect appellants' argument that there should have been a directed verdict for the deefndants cannot prevail; nor, in the light of testimony given by witnesses for the plaintiff, can it be said as a matter of law that the communication—when coupled with an accusation of theft—was privileged, or qualifiedly so. It was not a part of Roth's duty to inform White's employees of the accuser's beliefs, expressed in the manner testified to."

It follows that the trial court did not err in refusing to instruct the jury that the alleged slanderous statements were conditionally privileged as a matter of law, as requested in defendants' instruction No. 3. In instruction No. 2 given at the request of defendants, the jury was told that the burden was upon plaintiff to prove by a preponderance of the evidence that the alleged slanderous statements were made by the defendant Bryant; that such statements were untrue, and made with malice on the part of Bryant.

Defendants also insist that error was committed in the refusal of the trial court to give their requested instruction No. 5 as follows: "You are told that even though you find from a preponderance of the evidence that the alleged slanderous statements were made in the presence of the plaintiff's father, Mert Blankenship, and you further find that the presence of the father at the time and place such statements were made was with the permission, or at the instance of, or with the connivance of the plaintiff, there was not such publication as would entitle plaintiff to recover." We think the evidence did not warrant the giving of this instruction. All the testimony is to the effect that plaintiff and his father went to W. L. Bryant on a mission for the father and to discuss the prospect of the father obtaining a paint job with the company. W. L. Bryant testified that such discussion took place and that the Blankenships were about to depart when he, Bryant, brought up the matter which led to the making of the alleged slanderous statements.

The father was not asked to withdraw from the conversation and the evidence did not warrant a conclusion by the jury that the presence of the father was at the instance, or with the connivance, of the plaintiff when the alleged slanderous statements were made.

We find no prejudicial error, and the judgment is affirmed.

PETREE *v.* PETREE.

4-8110 201 S. W. 2d 1009

Opinion delivered May 5, 1947.

Graham & Graham and *Warner & Warner,* for appellant.

Partain, Agee & Partain, for appellee.

ED. F. MCFADDIN, Justice. This appeal grows out of an unsuccessful effort to have equity set aside a contract and conveyance, on the claim that the plaintiff was suffering from senility, and was overreached and defrauded by the defendant.

Chester Petree died intestate, a resident of Alma, Crawford county, Arkansas, on May 28, 1942, survived by (1) his wife, Mrs. Hays Petree (defendant below and appellee here); (2) his mother, Mrs. Anna Petree (the original plaintiff); and (3) a brother, Felix Petree. Chester Petree owned real estate and personal property appraised in excess of $70,000. On June 22, 1942, Mrs. Anna Petree conveyed to Mrs. Hays Petree all of Mrs. Anna Petree's interest in the estate of Chester Petree, in consideration of Mrs. Hays Petree's agreement to support Mrs. Anna Petree as long as she should live. This contract will be discussed later.

Some time in October, 1945, Felix Petree (son of Mrs. Anna Petree) learned of the contract made by his mother to Mrs. Hays Petree. He then persuaded his mother to file this suit against Mrs. Hays Petree on November 13, 1945. The complaint alleged: that plaintiff's interest in Chester Petree's estate exceeded $50,000; that on June 22, 1942, the plaintiff was 87 years of age, infirm and suffering from senility, and incapable of transacting any business; that Mrs. Hays Petree occupied a fiduciary relationship towards the plaintiff; that Mrs. Hays Petree was guilty of fraud practiced on Mrs. Anna Petree in obtaining the execution of the conveyance and the contract; that the consideration in the contract was grossly inadequate; and that the conveyance from Mrs. Anna Petree to Mrs. Hays Petree should be set aside. The prayer of the complaint was for relief in keeping with the allegations. The answer denied all material allegations of the complaint, affirmatively pleaded fair dealings be-

tween the parties, alleged that the conveyance and the contract were executed to carry out the wishes of Chester Petree, and pleaded laches and limitations.

With issues thus joined, the cause proceeded to trial on May 23, 1946. All the witnesses appeared in person before the chancellor except the plaintiff, Mrs. Anna Petree, who—because of age and infirmity—testified by deposition taken at her home in Clarksville on December 10, 1945. After the evidence was completed, the chancery court allowed both sides to file written briefs, and—in deciding the case—the chancellor rendered a written opinion, which is in the transcript, and which has proven helpful to this court. The chancery court denied the plaintiff's complaint for want of equity, and this appeal challenges the correctness of that decree. While the appeal was pending in this court, Mrs. Anna Petree departed this life intestate; and, by consent, the cause has been revived in the name of Felix Petree, sole heir, and J. J. Montgomery, special administrator, as the appellants. The appellee is Mrs. Hays Petree. For convenient identification, we will refer to the parties by real name, rather than by legal designation.

The rules of law applicable to a case such as this one are well settled by numerous decisions of this court:

(a) In *Hawkins* v. *Randolph,* 149 Ark. 124, 231 S. W. 556, Mr. Justice HART quoted from *Kelly's heirs* v. *McGuire,* 15 Ark. 555: " 'If a contract is freely and understandingly executed, by a party, with a full knowledge of his rights, and of the consequences of the act, it must stand. This court disclaims all jurisdiction to interfere on account of the improvidence or folly of an act done by a person of sound though impaired mind.' "

(b) In *Pledger* v. *Birkhead,* 156 Ark. 443, 246 S. W. 510, Mr. Justice WOOD said: "If the maker of a deed, will, or other instrument has sufficient mental capacity to retain in his memory, without prompting, the extent and condition of his property, and to comprehend how he is disposing of it, and to whom, and upon what considera-

tion, then he possesses sufficient mental capacity to execute such instrument. Sufficient mental ability to exercise a reasonable judgment concerning these matters in protecting his own interest in dealing with another is all the law requires. If a person has such mental capacity, then, in the absence of fraud, duress, or undue influence, mental weakness, whether produced by old age or through physical infirmities, will not invalidate an instrument executed by him. *McCulloch* v. *Campbell,* 49 Ark. 367, 55 S. W. 590; *Seawell* v. *Dirst,* 70 Ark. 166, 66 S. W. 1058; *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405; *McEvoy* v. *Tucker,* 115 Ark. 430, 171 S. W. 888."

(c) In *Cain* v. *Mitchell,* 179 Ark. 556, 17 S. W. 2d 282, Chief Justice HART said: "Mental weakness, although not to the extent of incapacity to execute a deed, may 'render a person more susceptible of fraud, duress, or undue influence, and, when coupled with any of them, or even with unfairness, such as great inadequacy of consideration, may make a contract voidable, when neither such weakness nor any of these other things alone would do so.' *Pledger* v. *Birkhead,* 156 Ark. 443, 246 S. W. 510, and cases cited; and *West* v. *Whittle,* 84 Ark. 490, 106 S. W. 955. See, also, *Phillips* v. *Phillips,* 173 Ark. 1, 291 S. W. 802; *Campbell* v. *Lux,* 146 Ark. 397, 225 S. W. 653."

(d) In *Young* v. *Barde,* 194 Ark. 416, 108 S. W. 2d 495, Mr. Justice BUTLER quoted Mr. Justice EAKIN's words in the case of *Gillespie* v. *Holland,* 40 Ark. 28, 48 Am. Rep. 1, as follows: " ' . . . it has been the well-established doctrine in equity that contracts, and most especially gifts, will be scrutinized with the most jealous care, when made between parties who occupy such a confidential relation as to make it the duty of the person benefited by the contract or bounty to guard and protect the interest of the other and to give such advice as would promote those interests. And this is not confined to cases where there is a legal control, . . . They are supposed to arise wherever there is a relation of dependence or confidence; especially that most unquestioning of all confidences which springs from affection on one side,

and a trust in a reciprocal affection on the other. The cases for the application of the doctrine cannot be scheduled. They pervade all social and domestic life. . . . ' ''

As heretofore stated, the rules of law as announced in the above cases are well settled, as all parties to this appeal agree. The difficulty arises when we measure the evidence in this case by these rules in order to determine on which side of the line this case falls—that is, whether Mrs. Anna Petree was (a) mentally infirm and, in fact, overreached, or (b) entirely mentally competent and free from undue influence or any other species of fraud. Appellants claim the former—*i. e.*, mental incapacity—and that the facts in the case at bar are similar to the facts in the cases of: *Cain* v. *Mitchell,* 179 Ark. 556, 17 S. W. 2d 282; *Morton* v. *Davis,* 105 Ark. 44, 150 S. W. 117; *Hawkins* v. *Randolph,* 149 Ark. 124, 231 S. W. 556; *Barnett* v. *Morris,* 207 Ark. 761, 182 S. W. 2d 765; *Barner* v. *Handy,* 207 Ark. 833, 183 S. W. 2d 49; *Campbell* v. *Lux,* 146 Ark. 397, 225 S. W. 653; *Luther* v. *Bonner,* 203 Ark. 848, 159 S. W. 2d 454; and *Young* v. *Barde,* 194 Ark. 416, 108 S. W. 2d 495. Appellee claims the latter—*i. e.*, full mental competency—and cites these cases: *Pledger* v. *Birkhead,* 156 Ark. 443, 246 S. W. 510; *Pernot* v. *King,* 194 Ark. 896, 110 S. W. 2d 539; *Smith* v. *Smith,* 209 Ark. 546, 191 S. W. 2d 956; *Atwood* v. *Ballard,* 172 Ark. 176, 287 S. W. 1001; *Rogers* v. *Cunningham,* 119 Ark. 466, 178 S. W. 413; *Cullins* v. *Webb,* 208 Ark. 631, 187 S. W. 2d 173; *McKindley* v. *Humphrey,* 204 Ark. 333, 161 S. W. 2d 962; *Johnson* v. *Foster,* 201 Ark. 518, 146 S. W. 2d 681; *Hawkins* v. *Gray,* 128 Ark. 143, 193 S. W. 509.

We reach the conclusion that Mrs. Anna Petree, though of ripe years, was, nevertheless, in full possession of all her faculties and entirely capable of transacting any and all matters of business when she executed the contract and conveyance on June 22, 1942, and that no fraud or overreaching was practiced on her. This conclusion necessitates that the decree of the chancery court should be affirmed; and, now, we discuss the evidence impelling such conclusion:

Chester Petree's home was in Alma. He died May 28, 1942. In June, 1942, Mrs. Hays Petree went to Clarksville to visit Mrs. Anna Petree; and at the conclusion of the visit Mrs. Anna Petree accompanied Mrs. Hays Petree to the latter's home in Alma, and remained there for about a week. It was during this week in Alma that they entered into the contract previously mentioned; and they were influenced largely by a letter signed by Chester Petree in August, 1941. We mention that letter:

In August, 1941, Chester Petree and his wife were contemplating an extended automobile trip; and before leaving Alma they signed a letter to Mr. and Mrs. Crenshaw, brother and sister-in-law of Mrs. Hays Petree. This letter was in the handwriting of Mrs. Hays Petree, and was signed by her and her husband. It was testamentary in character, but failed as a will, insofar as Chester Petree was concerned, because (1) it was not witnessed as required by § 14512, Pope's Digest; and (2) because the signature is the only part of the letter in the handwriting of Chester Petree, and thus the letter was not his holographic will under § 14512, Pope's Digest. The letter contained extensive references to the property accumulated by Mr. and Mrs. Chester Petree. It said in part:

"Alma, Arkansas, August 3, 1941

"To Mamie and Mr. Crenshaw:

"If it should happen that neither of us return from our trip or at any time we should both die, it is our desire that you please see that these instructions are carried out as to the distribution of our property. Of course, if one of us is left everything is to go to that one.

"Chester wants his mother to live in our home furnished as it is, as long as she lives if she would like to. If she would rather live at Clarksville, then the house is to go to the Methodist Church, here, for a parsonage. If she wishes to live in it—at her death it is to be given to the church to be used as a parsonage. Our interest in the canning factory amounts to fifty thousand dollars. Be-

sides this we have eleven thousand dollars in money in bank, due from factory on note, which is being used by the factory, and drawing interest. We have the stock in Mulberry store and seventeen or eighteen hundred dollars in bank there to credit of store. The Alma Cash Store stock and building belong to us and some money in bank to credit of that store. The home, and there is five thousand dollars life insurance made to me (Hays). We would like for Mrs. Petree (Chester's mother) to have twenty thousand dollars in money. First, to use as she needs it and at her death, after all expenses are paid, if there is anything left it is to go to a fund for the church to keep the house (parsonage) in repair."

The entire estate of Mr. and Mrs. Chester Petree had been accumulated through their joint efforts. When they were married in 1913, he was the railroad agent at Alma (receiving a monthly salary of $75), and she was a music teacher. Without worldly goods they started life together. Through their joint industry and effort they accumulated this estate; and during all the intervening years they had provided for Mrs. Anna Petree. This letter to Mr. and Mrs. Crenshaw stated that if either of them (Chester or Hays Petree) should survive, the entire estate would go to such survivor; and, then, based on the assumption that Chester and Hays Petree should perish in a common disaster, they made provision for Mrs. Anna Petree.

So much for the contents of the letter. In June, 1942, when Mrs. Anna Petree was visiting Mrs. Hays Petree at Alma, Mrs. Hays Petree gave this letter to Mrs. Anna Petree to read. It was a full disclosure of the extent and value of the Chester Petree estate. It cannot successfully be said that Mrs. Hays Petree concealed the extent of the estate. Based on this letter, Mrs. Hays Petree and Mrs. Anna Petree entered into the written contract here attacked, by the terms of which Mrs. Anna Petree conveyed to Mrs. Hays Petree all of the former's interest in the estate of Chester Petree; and, in return, Mrs. Hays Pe-

tree agreed to support Mrs. Anna Petree just as Chester and Hays Petree had done for the preceding 29 years. The contract provided, in part:

"The party of the second part, Hays Petree, upon her part agrees and binds herself to continue to provide for the support and maintenance of the party of the first part, Anna Elizabeth Petree, throughout the remainder of her natural life in a style and manner fully equal to that in which she has been provided for by her husband and herself during the past few years, and further agrees to and does hereby bind her estate, heirs, executors and administrators to continue such maintenance, support and provision in like manner throughout the life of the said party of the first part, Anna Elizabeth Petree, in the event the said party of the second part should precede her in death, and her heirs, executors, administrators and assigns are specifically directed and instructed to see that the provisions of this contract in that respect are fully carried out and that such maintenance and provision for care of the party of the first part be made a prior claim upon her estate and any and all property and moneys with which she may die seized and possessed.

. . . . . .

"It is further agreed and understood that payments to the party of the first part, Anna Elizabeth Petree, by party of the second part, Hays Petree, of sums for support and maintenance shall be made in the same manner in which they have customarily been made during the past few years preceding the death of the said Chester Petree, and that in the event of any dispute as to the amount required for such maintenance and support of the said party of the first part, then the highest amount contributed during any one year of the last five years shall be deemed controlling and the amount to be paid and contributed during any given year.

"As a further consideration for this contract, it is also agreed that in the event she may at any time desire during her life, the party of the first part, Anna Eliza-

beth Petree, may live in and make her home in the home of the party of the second part, Hays Petree, but that in the event she desires to make her home at Clarksville or elsewhere, then contributions to her maintenance and support will be made as herein set out."

For years, Mrs. Anna Petree had been furnished with a checkbook and had drawn a check of $5 per week regularly, and checks for other amounts as she desired. These other checks had been few in number, and small in amount, but she had the right to draw them as she desired. This checkbook arrangement continued, after the execution of this contract, without any change or interruption; and each week from June, 1942, until November, 1945, Mrs. Anna Petree wrote and cashed a check, signing the same, "Mrs. W. C. Petree account, by Mrs. A. E. Petree." These checks were not written by someone else and signed by Mrs. Anna Petree; the entire check was filled in by her, date, payee, amount and full signature as above.

The contract of June 22, 1942, was signed and acknowledged by Mrs. Anna Petree. Did she freely and understandingly execute the contract with full knowledge of her rights and of the consequences of her acts, and without compulsion or undue influence of any kind being exerted on her? We answer this question in the affirmative. In addition to the testimony of Mrs. Hays Petree, the record discloses the following:

(1) The notary public who took the acknowledgment to the instrument testified that he had known Mrs. Anna Petree for some time, that he talked with her about other matters as well as the acknowledgment, and that she talked in the usual normal manner, and said she had read the contract and thoroughly understood it.

(2) Three days after the execution of the contract, Mrs. Anna Petree went to Fort Smith to consult an optometrist, Dr. William H. Hunt, about her eyes. He testified that she was extremely alert mentally. He said:

"Q. You talked to her at that time? A. Yes, sir. Q. Do you have any idea how long she was in your office, and how long you talked to her? A. I remember we visited quite a little while. I have an idea, 30 or 40 minutes, or longer; 15 or 20 minutes testing; and I remember we discussed current events and floods on the Arkansas River. Q. What did you observe about her physical appearance and her mental attitude in talking with her? A. I made a notation on my record, 'Physical condition good for her age,' and she was very alert mentally—'very alert mentally.' In fact, we discussed current events and the floods on the Arkansas River, and I found out she knew lots more about it than I did, and I had been reading the newspapers and listening to the radio every day."

(3) One week after the execution of the contract, Mrs. Anna Petree returned to her home in Clarksville. Mrs. Hattie Petree (divorced wife of Felix Petree) lived with Mrs. Anna Petree; and, immediately upon the latter's return from Alma, Mrs. Hattie Petree interrogated Mrs. Anna Petree as to the estate of Chester Petree. Here is Mrs. Hattie Petree's testimony:

"I said, 'Well, what did you get?' And she (Mrs. Anna Petree) said: 'I get a living.' That is the way she said it—said 'I get a living out of it.' That is all she told me."

(4) Other disinterested witnesses testified that they observed Mrs. Anna Petree on June 22, 1942, and that she was entirely competent to transact business.

As against all this, the appellants offered evidence which we now mention:

(a) The deposition of Mrs. Anna Petree taken in December, 1945, in which she said she did not read the papers before she signed them, and did not know what the papers contained. But we point out that, even in that deposition Mrs. Anna Petree disavowed any desire to sue Mrs. Hays Petree in this case. Mrs. Anna Petree further said:

"Q. At the time you wrote these letters, or at any time, you didn't know that this complaint had been filed up in the court against her? A. No, sir. Q. In which you claimed that at the time Chester died and when this statement was signed, that you were feeble and weak and infirm, and incapable of transacting business and that she falsely told you that Chester didn't leave anything much, and things like that? A. Why, no. I never heard of anything like that. Q. And you never told anybody anything of that kind, either, did you? A. No, sir. Q. At any time? A. No, sir."

(b) The testimony of Dr. Hunt was offered by the appellants in an effort to show that Mrs. Anna Petree was not capable of transacting business on June 22, 1942. But we point out that Dr. Hunt first examined Mrs. Anna Petree in September or October of 1942, and stated that he then found her suffering from senility and deterioration of mental faculties caused by arteriosclerosis. Dr. Hunt said that this condition had not come on suddenly; but he never gave it as his opinion, that she did not have sufficient mental capacity on June 22, 1942, to enter into the contract here involved. He did say (to copy from appellant's abstract):

"People will become feeble and sometimes their mental faculties become weaker, but some people of advanced age hold high places and conduct business."

(c) There was offered testimony of Felix Petree and his divorced wife, Mrs. Hattie Petree, that Mrs. Anna Petree was not able to transact business in June, 1942.

The above is substantially the evidence; and of this evidence the learned chancellor said: "After studying carefully the testimony of the plaintiff as given by deposition and that of all other witnesses, who appeared in open court, the court is of the opinion that plaintiff, at the time she executed the contract and deed in question, was fully capable of understanding what she was doing, was able to perceive and know the extent and purpose of the entire transaction, and that it all met with her hearty

approval. There is no substantial testimony of any character that any fraud whatever was practiced upon the plaintiff."

We cannot say that this finding of the chancellor is against the preponderance of the evidence; in fact, we think the evidence shows that the chancellor reached the correct decision; and we conclude that Mrs. Anna Petree, in executing the contract and conveyance, and in her dealings with Mrs. Hays Petree, was carrying out the wishes of Chester Petree as evidenced by the letter previously referred to. While the letter did not have sufficient legal formality to constitute a will, still Chester Petree's mother respected it as his wishes; and the contract and conveyance were of her own free will, and were executed at a time when Mrs. Anna Petree was in full possession of her mental faculties, and she was acting without any undue influence exerted on her by her daughter-in-law, or anyone else. Mrs. Hays Petree performed her part of the contract. From June, 1942, until after this suit was filed (and it was filed through the instigation of Felix Petree), Mrs. Anna Petree drew her checks regularly as heretofore noted, and by her letters and otherwise she expressed love and affection for Mrs. Hays Petree, and never did desire to have the contract rescinded.

Affirmed.

SMITH, J., dissents.

TRANNUM *v.* GEORGE.

4-8197 201 S. W. 2d 1015

Opinion delivered May 12, 1947.

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

Robins, J. Appellant, Clem Trannum, seeks by this appeal to reverse a judgment of the circuit court affirming an order of the juvenile court of Saline county by which four sons of appellant, aged nine, seven, five and one and one-third years, respectively, were declared to be "dependent children." By the same order the custody of these children of appellant was taken from him and vested in "Miss Ruth Johnston as child welfare consultant, Welfare Department, located at 400 West Markham street, Little Rock."

This proceeding was begun by the filing in juvenile court of petitions by Mrs. Margaret George, "child welfare worker," in which it was alleged that these children were "neglected" children. After the juvenile court made the order depriving him of the custody of his children appellant prayed an appeal to the circuit court.

The children were thereupon taken from appellant and placed in what is designated as a "supervised foster home" in Pulaski county. The location of this home has never been disclosed to appellant, but he was told that,

by taking the matter up with the Welfare Department, he could have the children brought to the office where he could visit them. When the case reached circuit court appellant moved to have the children brought into court so that the court and he, as the father of these children, might have an opportunity to observe their physical condition; but this motion was denied; and the lower court refused to compel the officers of the Welfare Department to disclose to appellant where his children were.

To sustain the order taking these children away from their father there was offered the testimony of Mrs. Margaret B. George, Mrs. Bessie Rommel, Warren Bumgarden, Leo Herzfeld and Miss Ruth Johnston.

Mrs. George testified that she was doing child welfare work for the Arkansas Department of Public Welfare; that she had an A.B. degree, majoring in social work. She introduced in evidence, over the objection of appellant, the record of her office involving the Trannum children. This record consisted of memoranda as to conversations had by welfare workers with various persons not witnesses at the hearing and also contained correspondence had with appellant's wife, who had left him and had gone to New Jersey to live with her relatives. Mrs. George testified that she made two visits to appellant's home, once before removal of the children and once afterwards; that the house was not filthy, but was dusty and cluttered, with no sheets on the beds; that there were beans and peas spread out for drying on the floor in one room; that appellant was not there the first trip and the children were not receiving proper parental care; that from the conversations with the neighbors the children never had a "stable" home; that neither the father nor the mother had been with these children all the time; that the oldest child (whose custody is not involved here), Richard, is a practically grown-up young fellow; that she could not state as to the moral and educational training of these children; that they seemed bright and presented themselves very well; that she had spent about thirty or thirty-five minutes in the home; that she was twenty-nine years old, married, but had no children herself.

Mrs. Rommel testified that she was in the welfare work, but not in the child welfare department; that she went to appellant's home with Mrs. George twice; that Mrs. Trannum had never asked her for money or support.

Warren Bumgarden, twenty-six years old and unmarried, testified that he was employed as "county visitor," working principally with the old and indigent; that when the Trannum children were brought in for the hearing in juvenile court he took them to a rest room and cleaned them up; (other testimony showed that some of the children were working out in the field when the officer came for them) that the children were in fair physical condition, but that Clement had a sore place on his head and scratches on his neck; that there were no stripes or other scratches on them; that Clement didn't look to be in good health, but the other children appeared to be in good physical condition and they had been fed properly; they had marks of perspiration on them and didn't look like they had been bathed in a month.

Leo Herzfeld, circuit clerk, introduced in evidence copy of a divorce decree, entered in 1944 by the chancery court, by which appellant's wife was granted a divorce from him, for indignities, and given the custody of their five children and $20 a week for support money, she being forbidden to take the children out of the state.

Miss Ruth Johnston testified that she was supervisor of Child Welfare and it was her duty to "study cases that they have under investigation and assist in arriving at a decision"; that she had been in the state two years, but had been in this work six years; that from the testimony she had heard and from the record of the department and her own knowledge she thought the foster home was better for the children than their father's home; that a foster home is a normal, average family home, *supported by a state fund* (italics supplied); these homes are investigated by welfare workers, and after children are put there regular visits are made; that she was willing to describe the home (where appellant's children were placed) but not at liberty to give the name; that it is a rural home and the board only pays the children's

expenses; that the children attend a consolidated school and are given the best of care; that parents are not permitted to visit the children there, but if a parent wants to see them the children are brought to the office; that all she knows about the Trannum family is what the records read in court say.

Henry Riffle, a witness for appellant, testified that he lived close to the Trannum family and knew them; that about a week after Mrs. Trannum went away he and his wife took the baby, Douglas, who was slightly ill, and that they were keeping him when the sheriff came and took him away; that they took good care of the child; that he had raised a family; that the child was in good health when the sheriff came; that he had seen the other children all along and they were "well and husky," and had nothing wrong with them except the one who had suffered from infantile paralysis; that appellant always treated witness "all right" and they had never had any trouble; that when they (witness and his wife) took the baby his bowels were "tore up some, not bad for a baby, he had a diaper rash"; that he went to appellant because of some talk and asked him to let him take the baby home for his wife to doctor, and that appellant insisted over the protest of witness on paying $5 a week for the care of the baby; that he (witness) had heard some of the neighbors say appellant was peculiar and some of them said he was a good fellow; that appellant kept his place as well as a man could keep it, not cluttered up; that witness would like to keep the child, Douglas; that Mr. and Mrs. Thompson are now living with appellant and his boy.

Mrs. Henry Riffle testified that appellant agreed, when Douglas was sick, for witness and her husband to take him; the child was teething, not real sick; that she had raised six children; that this baby was in good health while they had him; that it was like taking one of her babies when they took it away, and that she still would take care of it; that she didn't think a boy fourteen years old was capable of taking care of a baby; that appellant was then and is now working regularly and was too busy to care for it himself.

Mrs. Albert Thompson, aged eighteen, testified that she and her husband were living with appellant; that she had finished the eleventh grade and was reared in a family with small children; that she was there for the purpose of keeping house and caring for the Trannum children; that she felt qualified to do the work; that there are four rooms in the Trannum home; that they had plenty to eat.

Albert Thompson testified that appellant had employed him and his wife to stay with the children; that his wife does the cooking and he is helping appellant in his truck patches; that he had finished the eighth grade and worked at logging and other things.

Appellant testified that even when his wife was at home he had to cook and wash the clothes, including diapers; that his wife was an only child and was raised as a "pet"; that they had plenty of food; that he had punished the children at times; that he worked at the mines underground and drew $25.87 from the government as an ex-marine; that he also was a truck farmer and did this to earn additional money because his wife had been "quite a spender"; that he raised potatoes, peanuts, peas and corn; that his home was a four-room house with screen porch, with a barn and potato house; that he owned four horses; that "we do good with the children picking peas and beans"; that his wife had been going away at different times all during their married life; that he had never been fined nor sent to prison; "I work all the time and pay for what I use"; that nobody ever made any complaint to him about his family until the welfare officer came over; that he had employed Mr. and Mrs. Thompson to take care of his children, paying them $65 and all they want to eat; that he got along well on his income; that his wife and he couldn't get along; that his children obeyed him and were willing to help work; that Clement got the marks on his neck by falling in some briers and not by appellant whipping him; that appellant received an injury using a hand grenade in Nicaragua; that he shot powder all day in the mines; that his wife nearly twisted his finger off and called him some bad names

and he then slapped her with a boot; that he had been working for the Reynolds Mining Company for three years, handling the underground blasting; that he had sent his wife in New Jersey $119 at one time and had sent her money many other times.

Richard Trannum testified that he was thirteen years old; that he had plenty to eat; that his father was good to him; that he went to school and was in the fifth grade; that he chopped corn, gathered peanuts and peas; that when the sheriff came and got him and the other children they were out in the field picking peas; that the sheriff took them out of the field without letting them clean up; that "my mother was not as good to me as my daddy; my daddy, he is O.K."; that he was not in the room at the trial in juvenile court; that his daddy was always working.

Mr. J. B. Milham testified as to the good character of appellant.

This case might well be disposed of by sustaining the technical contention raised by appellant to the effect that the order of the juvenile court is void because it fails to recite the required jurisdictional facts. *Jackson* v. *Roach,* 176 Ark. 688, 3 S. W. 2d 976; *Ex Parte Kelley,* 191 Ark. 848, 88 S. W. 2d 65. But, since such a disposition of the case would be only a temporary one, we deem it proper to review the case on its merits, so that the question as to the custody of these children may be settled.

The General Assembly has not authorized courts in proceedings of this kind to receive in evidence documents such as that designated by witnesses in the trial below as the "record" of the Welfare Department. This "record" is chiefly a narrative report by the welfare worker of conversations she had concerning the case of the children with various parties and it also contains correspondence had with the mother of the children. All this was "hearsay" and should not have been admitted in evidence. Certainly the custody of a man's children ought not to be taken away from him on unsworn statements made out of court. *Title Guaranty & Surety Company* v.

Bank of Fulton, 89 Ark. 471, 117 S. W. 537; 33 L. R. A., N. S. 676; *Tipler-Grossman Lumber Company* v. *Forrest City Box Company,* 148 Ark. 132, 229 S. W. 17; *Spencer Lumber Company* v. *Dover,* 99 Ark. 488, 138 S. W. 985; *Shelton* v. *Shelton,* 102 Ark. 54, 143 S. W. 110; *Roberson* v. *Roberson,* 188 Ark. 1018, 69 S. W. 2d 275.

When this so-called "record" is eliminated from consideration, as it must be, there is practically no evidence indicating that the father of these children is unfit to care for and rear them. He has a fairly comfortable rural home, and had, before the trial in circuit court, employed a man and his wife, apparently competent to do so, to assist him in keeping the home and the rearing of these children. Appellant is a hard worker and earns good wages as a miner, in addition to what his farming operations pay. No charge of dishonesty, laziness or moral turpitude was made against him. There was no proof that he was cruel to his children or indifferent to their welfare. The most that could be said against him was that he was a bad house-keeper and that his duties as a miner and a farmer prevented him from giving his children as much attention as they should have. He has now, by the employment of a man and his wife to stay in the home and assist in the housekeeping and looking after the children, eliminated the principal objections to his home and to the care for the children that was urged by the Welfare Department.

It is true that in the "record" of the Welfare Department introduced in evidence there was some more serious criticism of him, but, even if all the hearsay and gossip set forth in this "record" were weighed in the scales against him, it would not be sufficient to overbalance the fact that he is the father of these children and shown by the evidence to be an honest, law-abiding and hard-working man.

Justice Wood, in the case of *Baker* v. *Durham,* 95 Ark. 355, 129 S. W. 789, correctly stated the rule applicable in a case of this kind when he said: "It must be an exceptional case, where the evidence shows such lack of

financial ability or such delinquencies in character of the father as to imperil the present and future welfare of his child, before a court . . . will deprive him of the duty and the privilege of maintaining and educating his child, and of the pleasure of its companionship." This was said by Judge EAKIN in the case of *Verser* v. *Ford,* 37 Ark. 27: "It is one of the cardinal principles of nature and of law that, as against strangers, the father, however poor and humble, if able to support the child in his own style of life, and of good moral character, cannot, without the most shocking injustice, be deprived of the privilege by any one whatever, however brilliant the advantage he may offer."

When the evidence as to the industry, financial ability and moral character of appellant is analyzed in the light of the holdings in the above-cited cases, it is apparent that the testimony was not sufficient to authorize the court to take these children away from their father, who seeks to retain them and who has been doing his best, under great difficulties, to care for them.

The judgment of the lower court is accordingly reversed, and judgment will be entered here awarding the custody of the said children to appellant, and an immediate mandate is ordered.

NICHOLS *v.* KESSELBERG.

4-8193 201 S. W. 2d 997

Opinion delivered May 12, 1947.

W. A. Leach, for appellant.

Harve Thorn and *J. F. Koone,* for appellee.

Ed. F. McFaddin, Justice. This appeal comes from an unsuccessful effort to annul a state deed of certain land in Prairie county.

The landowner, Union Planters National Bank & Trust Company, suffered the lands to be sold to the state for the taxes for the year of 1933. In 1938, the state's title was confirmed under Act 119 of 1935; and in July, 1941, the appellee purchased the land from the state, and has paid all taxes subsequently due. In October, 1941, appellant received a quitclaim deed from Union Planters National Bank & Trust Company; and in February, 1946, filed this suit to have canceled the deed from the state to the appellee, which deed was based on the 1933 tax sale, and the 1938 confirmation decree. The complaint alleged a tender of all taxes.

The appellee defended the validity of the tax sale, and the confirmation and the state deed; and a trial in the chancery court resulted in a decree dismissing appellant's complaint. This appeal challenges that decree.

In this court, appellant urges only one ground of attack on the validity of the tax sale for 1933 taxes, and that is the claim that the school tax had not been legally levied for the year of 1933, in that the record of the quorum court fails to show that the justices in the quorum court ever voted to levy a school tax in keeping with § 2526, Pope's Digest. It is conceded that the quorum court duly and legally convened at the time and place fixed by law, and that a majority of the justices of the peace was present; but it is argued that the proceedings

of the quorum court fail to show that the justices ever voted to levy a school tax. Here is what the quorum court record shows, as regards the levy of school tax:

"SCHOOL TAX LEVIED

"Now on this day is takened up by the Court the matter of the levy of School Tax for the various school districts, motion was made by T. C. Ballowe and seconded by S. S. Conder that the tax be levied on the school districts as certified to the clerk by the various school districts of the County as follows:

"School District No.	Mills
1	18
2	18
3	18"

(Then follows each of the remaining 54 school districts, with a millage figure opposite each such number.)

Appellant argues that the record, as above quoted, shows that a motion was duly made and seconded, but that the record does not show that the motion was ever put to a vote, or the names of those who voted for the motion. On this alleged absence of a showing of the putting of the question to a vote, and the names of those voting for or against the motion, the appellant bases his entire appeal in this case; and he cites such cases as *Alexander* v. *Capps,* 100 Ark. 488, 140 S. W. 722; *Morris* v. *Levy Lumber Co.,* 103 Ark. 579, 148 S. W. 252; and *Blakemore* v. *Brown,* 142 Ark. 293, 219 S. W. 311. To these might well be added *Porter* v. *Ivy,* 130 Ark. 328, 197 S. W. 697.

If the appellant's attack had been made prior to a confirmation proceeding, then there might be merit to his position, because § 2526, Pope's Digest, (requiring the names of those members of the quorum court voting for and against the motion) does not appear to have been strictly followed. The words in the quorum court record, "school tax levied," when read with the rest of the record, do show that the school tax was levied for each dis-

trict, even though the record does not show the names of the justices voting on the motion. The quorum court record, here, shows a "school tax levied on . . . motion . . . made by T. C. Ballowe and seconded by S. S. Conder . . . on the school districts as certified to the clerk by the various school districts of the county as follows . . ."

But in the case at bar there was a tax confirmation proceeding in 1938 (under Act 119 of 1935), and that confirmation proceeding cured the irregularity, informality or omission of the county clerk to literally obey and observe § 2526, Pope's Digest. In *Kansas City Life Insurance Company* v. *Moss,* 196 Ark. 553, 118 S. W. 2d 873, there was presented the identical contention as is here made by the appellant, and Mr. Justice BAKER, speaking for this court, said:

"The second contention made is that the county clerk did not keep a record of the voting of the members of the quorum court showing the affirmative and negative votes of those constituting that court upon the levying of taxes.

"There is no doubt about the soundness of this contention, if it were made otherwise than in the face of the curative statute the effect of which has been heretofore declared in the cases cited, nor have we any controversy with the contention of learned counsel as to the benefits intended to be guaranteed by the statute under consideration.

"We are not unaware of the numerous decisions of this court in regard to the duties of the clerk in this respect, nor the declaration in the several decisions as to the wholesome purposes to be served in the matter of a record of the affirmative and negative votes of the members of the quorum court. However mandatory this language should appear, we think it should be remembered that these duties were required by statute only. Such statutes so enacted by the Legislature, it had ample power to repeal. This particular statute did not go to the capacity or power of the court to levy the taxes, but

relates solely to the evidence of the fact that a levy had been made and that evidence is lacking only in its proper certification. The objection cannot be made under the record relied upon in this case that the taxes were not in fact levied, but the objections must be urged, if at all, that there was an omission to certify properly the manner in which the tax was levied. It was mere omission of an officer to do a positive duty required by statute, but not so potent was that defect or irregularity as to destroy the power to sell."

It is true that in the above case the court cited Act 142 of 1935 as curing the irregularity, and it is also true that Act 142 of 1935 was repealed by Act 264 of 1937; but, here, the 1938 confirmation proceedings (under Act 119 of 1935) had the same effect in the case at bar as Act 1942 of 1935 had in *Kansas City Life Ins. Co.* v. *Moss, supra,* so the reasoning in that case is clearly applicable to the situation here—that is, the confirmation proceeding cured the omission in the minutes of the quorum court, since such omission did not go to the power to sell.

The identical question here argued by appellant was decided in *Plant* v. *Sanders,* 209 Ark. 108, 189 S. W. 2d 720, wherein we said:

"Appellee on cross-appeal also contends that the sale of all the lands first above described is void because the levying court did not vote or levy a tax against said lands for the year 1930. We think the record of said court contradicts appellees in this contention. It recites the following: 'On motion of C. E. Quick, seconded by A. F. Porter, a levy of five mills on the taxable property of Johnson County to defray the expenses of the general county expenses for the fiscal years 1930 and 1931 was made.' It is argued that the motion of Quick was not submitted to a vote of the members, no vote taken, or the record does not show the motion was carried by a majority or unanimously. See § 2526, Pope's Digest. The record affirmatively shows that the levying court met at the proper time and place with a majority of all the justices of the peace present, and it affirmatively recites that 'on the motion of Quick a levy of 5 mills on all

taxable property . . . was made.' We think this recitation necessarily implies that a vote was taken with a majority or all of the justices voting for it. Certainly after confirmation of the sale to the state this question is foreclosed against appellees. The same thing is true with reference to the other levies made for bond, road, municipal and school tax.''

So, under the authority of the cases of *Kansas City Life Ins. Co.* v. *Moss, supra,* and *Plant* v. *Sanders, supra,* we affirm the decree of the chancery court on the point argued by the appellant in this court. We deem it advisable also to state that the chancery court had other sufficient grounds for its decree, but we have not lengthened this opinion by detailing these other grounds, since the decision here rendered disposes of the sole contention urged by the appellant before this court.

Affirmed.

CERNAUSKAS *v.* FLETCHER.

4-8204 201 S. W. 2d 999

Opinion delivered May 12, 1947.

Brooks Bradley, for appellant.

Sherrill, Cockrill & Wills, for appellee.

McHaney, Justice. Appellee, as Catholic Bishop of the Diocese of Little Rock, is the owner of block 299, original city of Little Rock. It is bounded on the north by Garland street, on the east by Cross, on the south by Markham and on the west by Pulaski. This block has never been platted into lots. An alley-way runs east and west through the middle of said block, but there are no abutting improvements on said alley. Appellant resides on the west side of Pulaski street, between Markham and Garland, and he has used said alley for many years as a convenient, but not necessary, passage-way to get to and from his property in his automobile. While Pulaski street is not available to him from Markham, due to a deep cut in Markham as it goes west to the Union depot, it is available to him from Garland.

At appellee's instance, the Little Rock city council, on August 6, 1946, passed Ordinance No. 7087, closing said alley. The ordinance recites that a manufacturing concern desires a location in the city of a size sufficient to house its various branches and that the owner of block 299 is willing to construct a building thereon of sufficient size to accommodate the business of said concern, provided said alley is closed so that a large enough building may be constructed to accommodate said concern. Later Ordinance No. 7147 was passed which reclassified said property to that of class "K" heavy industrial district.

Appellant brought this action to enjoin appellee from closing said alley. The complaint alleged the facts set

out above and also that appellee's petition to close said alley was not filed in accordance with Act 17 of 1945, in that the petition did not have attached a certified or photostatic copy of any plat showing said alley to be vacated. It further alleged that no plat of said property has ever been filed in the recorder's office of Pulaski county. Also that he had a prescriptive right thereto. Appellee demurred to the complaint. The court sustained the demurrer and, appellant electing to stand on his complaint, it was dismissed for want of equity. Hence this appeal.

We think the court correctly sustained the demurrer. Act 17 of 1945 has no application here. By it, cities of the first and second class and incorporated towns, in § 1, are "given the power and authority to vacate public streets and alleys—under the conditions and in the manner herein provided." One of the conditions set out in § 2 is that the owner of the property has dedicated a portion thereof to the public use as streets or alleys "by platting such property and causing such plat to be filed for record." Here, there was no plat of said block into lots and no dedication of the alley ordered closed. So the act does not apply. The repealing clause reads: "All laws and parts of laws, and particularly Act 311 of the Acts of 1941, are hereby repealed." Section 8. No doubt the legislature meant to repeal all laws in conflict with that act, and, by error of the author or the typist, left out the usual words, "in conflict herewith," which we will imply by necessary construction. When so construed this act does not repeal § 9944 of Pope's Digest, subsection Third, which provides: "To alter or change the width or extent of streets, sidewalks, alleys, avenues, parks, wharves and other public grounds, and to vacate or leave out such portions thereof as may not for the time being be required for corporate purposes . . ."

It was held in *Helena* v. *Wooten,* 98 Ark. 156, 135 S. W. 828, construing sub-section "Fourth" of said section, that: "This section contemplates that municipalities shall have control over their streets," although it had previously held in *Beebe* v. *Little Rock,* 68 Ark. 39,

56 S. W. 791, that the city had no authority to sell, exchange or give away streets. See, also, *State ex rel. Latta* v. *Marianna,* 183 Ark. 927, 39 S. W. 2d 301.

We conclude that the city had the power and authority to close said alley under the facts here presented.

As a second and final ground of reversal, appellant argues that by prescription he has acquired an easement over the alley which cannot be revoked by the city council. A sufficient answer to that contention is that the complaint did not allege the length of time he has continuously traveled over said alley. The complaint as abstracted alleges that "for many years he has used the alley to reach his home." "Many" may mean more or fewer than seven years, the minimum time to establish a prescriptive easement. *McLain* v. *Keel,* 135 Ark. 496, 205 S. W. 894.

Words and Phrases defines the word "many" as "a word of very indefinite meaning, and, though it is defined to mean 'numerous' and 'multitudinous,' it is also recognized as synonymous with 'several,' 'sundry,' 'various' and 'divers'." So, he did not allege that he had used the alley for more than seven years, and thereby established a prescriptive right to its use.

The decree is, accordingly, affirmed.

ABBOTT *v.* BUTLER.

4-8161 201 S. W. 2d 1001

Opinion delivered May 12, 1947.

Harrelson, Harrelson & Cannon, for appellant.

E. J. Butler, for appellee.

SMITH, J. Appellees filed a petition, designated as a complaint, on July 30, 1943, in which they prayed confirmation of their title to a certain eighty-acre tract of land in St. Francis county. They alleged that W. J. Lanier had acquired title to the land under a sale to him for delinquent taxes to the St. Francis Levee District, and that Lanier had conveyed this title to them. They alleged also that they had acquired a title once owned by Edward Starks through deed from the heirs at law of Starks, now deceased, and that one Evans Starks, an heir at law of Edward Starks, who did not join in the deed to them, removed to the state of California about thirty years ago, and that his present whereabouts is unknown.

It was alleged also that the land was sold for the non-payment of the 1920 general taxes to one Charles Lewis, but that neither Lewis nor his heirs had ever had possession of the land, and that the heirs of Lewis were unknown. It was alleged also that the land was sold to the St. Francis County Road Improvement District No. 1, for the non-payment of the 1921 taxes due the road district, but that the district had never had possession of the land, and that any claim of the district or its assigns was barred by the title and possession of petitioners, it being alleged that they had been in possession of the land continuously for eleven years.

It was prayed that the interests, if any, of all the persons named and of all other persons, be canceled and removed as clouds upon their title, and that their title be quieted and confirmed.

Notice of the filing of this petition was published for six weeks in the time and manner required by § 3 of Act LXXIX of the Acts of 1899, entitled, "An Act to Provide for the Confirmation of Title to Real Estate," which appears as § 10962, *et seq.*, Pope's Digest, in the chapter entitled "Quieting Title."

In due course petitioners' title was quieted as prayed and within less than three years from the date of the decree, which had been rendered in compliance with this Act LXXIX, aforesaid, appellant, Ida Starks Abbott, filed a motion to vacate and set it aside, and she prayed that she be permitted to file an answer to the confirmation petition.

A response to this motion was filed objecting to the jurisdiction of the court to hear it for the following reasons: (1) The decree was not subject to the attack except upon the grounds and in the manner provided by §§ 8246, 8248, 8249, Pope's Digest, or by a bill of review, and no facts were alleged to warrant relief in either manner. (2) That the petitioner, Ida Starks Abbott, was constructively served by publication as an unknown heir of her grandfather, Edward Starks, deceased, and her motion had not been filed within the two years limited

by law. (3) That the confirmation decree confirmed a tax title and operated as a complete bar under § 10987, Pope's Digest, and that petitioner does not have the right to vacate the confirmation decree.

The motion to dismiss was sustained, and in the decree so ordering it was recited that the court "has lost control of the parties and the subject-matter . . . ," and from that decree is this appeal.

No testimony was heard although the pleadings and decree in the confirmation proceeding were exhibited, but appellant's motion to vacate the confirmation decree after reciting the manner of its rendition alleges: "That she has a good and meritorious defense to the complaint herein in that she is a granddaughter of Edward Starks, deceased, and is the owner of an undivided interest in the lands described in said complaint, which interest she inherited from her father, Amos Starks, deceased, who was the owner and in possession of said lands at the time of his death; that she is one (1) of the grantors in a certain trust deed or mortgage, executed to the plaintiffs, which trust deed or mortgage is now recorded in Book 116 at page 383 of the records of St. Francis county, Arkansas; that the interest of said lands owned by her at the time of the execution of said trust deed or mortgage has never been conveyed to the plaintiffs herein, and that said trust deed or mortgage has never been foreclosed."

Before considering the issue upon which the case was disposed of in the court below, we consider a preliminary matter not presented below, which is that Mrs. Abbott did not allege a meritorious defense against the confirmation decree.

It must be said that the allegations upon this issue are not as definite and specific as they should have been, but it will be remembered that the motion to dismiss did not raise the issue that a meritorious defense had not been alleged. Had this question been raised, the allegations would no doubt have been more specific. But it was alleged that the decree had been rendered upon constructive service, and that petitioner owned an interest in the

land which she had inherited and that she had given original petitioners a mortgage on this interest, and that those petitioners as mortgagees had entered into possession without foreclosing the mortgage. If this allegation is true, title by adverse possession had not been acquired. It was held in the case of *Swift* v. *Ivery,* 147 Ark. 141, 227 S. W. 600, that a mortgagee in possession, while occupying that position could acquire no title adverse to the mortgagor, and that holding was reaffirmed in the case of *Norris* v. *Scroggins,* 175 Ark. 50, 297 S. W. 1022.

This is not a petition for a bill of review, and relief is not prayed under provisions of §§ 8246, 8248 and 8249 of Pope's Digest. The controlling question is the applicability of § 10966, Pope's Digest, which reads as follows: "Any person may appear within three years and set aside the decree if he shall offer to file a meritorious defense, and every person laboring under the disability of infancy, lunacy, idiocy, married woman under the disability of coverture and those claiming under them may set aside the decree at any time within three years after the removal of such disability."

Appellees say that their petition for confirmation was a proceeding for the confirmation of a tax title and the quieting of title generally in the petitioners, but upon the authority of *Lawyer* v. *Carpenter,* 80 Ark. 411, 97 S. W. 662, we hold that § 10966, Pope's Digest, is the applicable statute which controls here. We think it apparent that the confirmation decree was rendered under the authority of Act LXXIX of 1899, § 7 of which appears as § 10966, Pope's Digest, and this Act and not the general statute must be applied.

It was held in the case just cited that a general law does not apply where there is a specific statute covering a particular subject-matter, irrespective of the date of their passage, and the effect of the confirmation decree must be construed with reference to the act under which it was rendered. The following cases are to the same effect: *Dunn* v. *Ouachita Valley Bank,* 71 Ark. 135, 71 S. W. 265; *Mills* v. *Sanderson,* 68 Ark. 130, 56 S. W. 779;

Ex-parte Morrison, 69 Ark. 517, 64 S. W. 270; *Chamberlain* v. *State,* 50 Ark. 132, 6 S. W. 524; *Saline County* v. *Kinkead,* 84 Ark. 329, 105 S. W. 581.

It was held in the case of *Dalton* v. *Lybarger,* 152 Ark. 192, 237 S. W. 694, to quote a headnote, that, "As a decree confirming a tax title does not become impervious against attack until three years have expired, under Crawford & Moses' Digest, § 8370 (now appearing as § 10966, Pope's Digest), until that period has expired, such a decree does not have the effect of perfecting a record title."

In the case of *Champion* v. *Williams,* 165 Ark. 328, 264 S. W. 972, a confirmation decree rendered under the authority of § 8362, *et seq.,* C. & M. Digest, now appearing as § 10958, *et seq.,* Pope's Digest, taken from Act LXXIX of 1899, was attacked upon the ground that the bond had not been given required by § 6261, C. & M. Digest (8217, Pope's Digest), which prescribes the requirements for rendering judgment against a defendant constructively summoned, one of these being the execution of a bond. In holding that the bond was not required in the confirmation proceeding, Chief Justice McCulloch said: "Again it is contended that the decree (of confirmation) is void because no bond was given pursuant to the statute, which requires bond in case of judgment against nonresident defendants. Crawford & Moses' Digest, § 6261. The statute just referred to does not apply to confirmation decrees, and no bond was required. The statute prescribing the procedure for confirmation of title (Crawford & Moses' Digest, § 8370) provides that any person interested in the land which is the subject-matter of a decree of confirmation may appear within three years and set aside the decree upon showing a meritorious defense, and that persons under disability of infancy, lunacy, idiocy or coverture may appear and set aside the decree at any time within three years after the removal of such disability. The lawmakers, in framing the statute, manifestly determined that this section gave all the protection that interested parties were entitled to; at least there is no provision in this statute for the giving of a

bond, and we cannot read any such provision into the statute by applying the provisions of the general statute with reference to adversary litigation against non-residents.''

We conclude, therefore, that it was error to have dismissed appellant's motion to vacate the confirmation decree, and the decree from which is this appeal will be reversed, and the cause will be remanded for further proceedings as provided by law.

ROGERS *v.* HOSKINS.

4-8196 201 S. W. 2d 1004

Opinion delivered May 12, 1947.

Sullins & Perkins, for appellant.

Price Dickson and *Karl Greenhaw,* for appellee.

MINOR W. MILLWEE, Justice. Plaintiff, Nettie Hoskins, is a daughter and one of the heirs at law of J. J. Rogers, deceased, who died intestate at Elkins, Washington county, Arkansas, in December, 1945. Defendants are four sons, three daughters and eight children of a deceased son of J. J. Rogers, deceased, and are his other heirs at law. Two of the sons were made defendants in their capacity as administrators of the J. J. Rogers estate, and the wives of the four sons are also defendants.

Plaintiff alleged in her complaint that several years before his death J. J. Rogers orally offered to purchase a home for plaintiff if she and her family would move from their home at Japton, Madison county, Arkansas, to Elkins in Washington county and keep house for him; that the offer was accepted and the family moved to Elkins and plaintiff performed the household duties in full reliance upon the oral offer to purchase a home for her; that thereafter her father, after ascertaining that the place was suitable to plaintiff, purchased the prop-

erty in controversy and agreed that same should become plaintiff's property at his death; that in recognition of his promise, J. J. Rogers executed and acknowledged a warranty deed conveying the property to plaintiff; that plaintiff faithfully performed her part of said agreement and did the cooking, washing, ironing and other household duties for her father for several years until his death in 1945, and was entitled to specific performance of said contract. The prayer of the complaint was that plaintiff be decreed to be the owner of the property and that her title thereto be quieted and confirmed against the defendants.

The defendants, except Amanda Johnson, a daughter of J. J. Rogers, deceased, answered and denied the allegations of the complaint. It was admitted that J. J. Rogers was the owner of the lands described in the complaint and that he obtained title thereto in the manner set forth in the complaint. The answer further alleged that if a deed was executed to plaintiff, same was void because it was never delivered and that J. J. Rogers died seized and possessed of the lands in controversy. The statute of frauds was also pleaded in bar of the alleged contract.

The cause was heard on oral testimony before the chancellor and a decree entered in favor of plaintiff directing specific performance of the contract. Defendants were ordered to execute and deliver a deed to plaintiff within 30 days and, upon their failure to do so, the clerk was appointed commissioner and directed to execute and deliver the deed to plaintiff. All costs were taxed against the estate of J. J. Rogers, deceased.

The defendants, except Amanda Johnson, prosecute this appeal to reverse the decree for specific performance. Plaintiff and defendant, Amanda Johnson, have cross-appealed from that part of the decree taxing all costs against the J. J. Rogers estate.

The testimony on behalf of plaintiff tends to establish the following facts:

J. J. Rogers lived at Japton, Madison county, Arkansas, for many years, where he and his wife reared a large family. In 1929, he sold and conveyed to plaintiff and her husband, Chester Hoskins, a 23-acre farm where the Hoskins made their home until 1934. At that time J. J. Rogers had acquired business and farming interests, including a canning factory, at Elkins in Washington county, Arkansas. These interests required his presence in Elkins, and it became necessary to have someone keep house for him there. Mrs. Rogers preferred to live in her home and remain among friends and relatives at Japton and declined to move to Elkins. In 1934, J. J. Rogers proposed to plaintiff and her husband that, if they would reconvey their Madison county home to him and move to Elkins and keep house and care for him the rest of his life, he would purchase a more suitable place for them at Elkins. Plaintiff and her husband reconveyed the Madison county land and the family moved to Elkins with her father.

Plaintiff and her family lived with her father in Elkins and she performed the household duties until 1937 when her young daughter died. Her parents thought it would be better for plaintiff to leave Elkins for a while and the Hoskins family moved to Gentry where the husband worked with his brother in the timber business. Mrs. Rogers, who had undertaken the household duties in Elkins, became dissatisfied and returned to Japton. In 1938, plaintiff and her family moved back to Elkins with J. J. Rogers at the request of both parents, after the father had renewed the offer to buy a home for plaintiff at Elkins.

After the return to Elkins, J. J. Rogers offered to purchase one place for plaintiff, but did not do so when it proved unsuitable to her. Mrs. Rogers died in 1942. In November, 1942, Mr. Rogers had an opportunity to buy the property in controversy, which was known as the Race property, and did purchase it after plaintiff viewed the place and stated that it was suitable. They lived in the Race property for about five months when J. J. Rogers purchased a larger place which was more con-

venient to the canning factory. They resided at this place and rented the Race property until his death in 1945, except for a period of three months in 1944.

On November 29, 1943, J. J. Rogers executed a warranty deed conveying the property in controversy to plaintiff, "subject to my lifetime estate." This conveyance recites a consideration of one dollar paid by plaintiff. It was placed in J. J. Rogers' box at the bank on the date it was executed and remained there until the grantor's death.

In January, 1944, a difficulty arose between plaintiff's father and husband and the latter was asked to leave. Hoskins went to Fayetteville where he was later joined by plaintiff and their children, except the two oldest sons who remained in Elkins with their grandfather. During the three months they resided in Fayetteville, plaintiff continued to do the laundry and to prepare and send food to her father. Mr. Rogers made several trips to Fayetteville and requested his daughter to return to Elkins. On several occasions he threatened to destroy the deed to plaintiff unless she returned and resumed housekeeping for him. Plaintiff and her family returned to Elkins in April, 1944, and plaintiff continued to keep house and care for her father until his death in December, 1945.

There was other testimony from witnesses who apparently had no interest in the suit to the effect that J. J. Rogers told them he bought the property in controversy for plaintiff and had deeded it to her.

Amanda Johnson, a sister of the plaintiff, lived in Japton where she served as postmaster for 12 years. She was made a party defendant to the suit, but declined to contest it. She testified against her own interest as an heir, that her father told her that plaintiff was the only one he could get to stay with him; that he had deeded the Race property to plaintiff and had said: "I am to have say-so of this deed all my life and then it is to go to her." After plaintiff moved to Fayetteville, Mr. Rogers requested Mrs. Johnson to go there and tell plaintiff that

he would destroy her deed if she did not come back and take care of him. Mrs. Johnson talked with plaintiff and she returned to Elkins. Mrs. Johnson, and other witnesses, testified that plaintiff was attentive to her father and worked hard doing the housework for her father and cooking for several of his farm hands.

Opposed to the evidence on behalf of plaintiff was that of several of the defendants who testified that they heard nothing of an agreement between plaintiff and her father until after the latter's death. There was other evidence that J. J. Rogers bought most of the groceries while plaintiff and her family lived with him. Two of the defendants, a brother and sister of plaintiff, testified that about the time their father was taken to a hospital in November, 1945, he told them in the presence of plaintiff and others that he wanted the bank cashier to come and write deeds conveying all his property to two of the sons so that it could be sold, the debts paid and the proceeds divided equally among the heirs. They also testified that plaintiff was present and stated that she did not want the Race property. This testimony was strongly refuted by plaintiff and other witnesses. J. J. Rogers did not die at the hospital, but returned home and improved in health to the extent that he made a trip to town and the bank where the deed to plaintiff was kept. He was in full possession of his mental faculties and there is no evidence that he attempted to make deeds to the two sons after he left the hospital.

The rule is well settled that before a court of equity may grant specific performance of an oral contract to convey lands the evidence of such agreement must be clear, satisfactory and convincing. In some of the cases it is said that it must be so strong as to be substantially beyond reasonable doubt. *Williams* v. *Williams,* 128 Ark. 1, 193 S. W. 82; *Walk* v. *Barrett,* 177 Ark. 265, 6 S. W. 2d 310; *Kranz* v. *Kranz, et al.,* 203 Ark. 1147, 158 S. W. 2d 926.

Defendants earnestly insist that the testimony in the case at bar does not meet the test of the above rule and that there is such indefiniteness and uncertainty as to

both the terms of the contract and its performance as to render it unenforceable in equity. It is first contended that there is no evidence that the offer of J. J. Rogers was accepted by plaintiff. In 17 C. J. S., Contracts, § 41, p. 374, it is said: "An acceptance of an offer may be by act, as where an offer is made that the offerer will pay or do something else, if the offeree shall do a particular thing. In such a case performance is the only thing needful to complete the agreement and to create a binding promise, as where a person proposes to another to work for him and the other enters on the work." See, also, *Southern Surety Co.* v. *Phillips,* 181 Ark. 14, 24 S. W. 2d 870, which is cited in support of the statement of the textwriter. There was abundant evidence of performance by plaintiff which was sufficient to constitute an acceptance of the offer made by her father in the absence of a formal statement showing such acceptance.

It was shown that in May, 1945, J. J. Rogers mortgaged his property, including the property in controversy, for a loan of $5,000. Defendants insist that the giving of the mortgage indicates that Rogers did not intend for plaintiff to have the property in controversy. The giving of this mortgage was not inconsistent with either the grant in the deed to plaintiff or the contract with her father. In *Walker* v. *Eller,* 178 Ark. 183, 10 S. W. 2d 14, this court held that it was not inconsistent for the owner of land to lease it for a term of years after he had executed a will devising it to someone other than the lessee. The giving of the mortgage when considered with the other facts did not amount to an attempt by J. J. Rogers to renounce his contract with plaintiff.

It is also contended that plaintiff is barred by the statute of frauds. In *Fred* v. *Asbury,* 105 Ark. 494, 152 S. W. 155, the court held that where an intestate verbally agreed that, if plaintiffs would give up their employment, change their residence and care for him the rest of his life, he would leave them all his property at his death, and plaintiffs complied with the agreement, their conduct was such as would take the contract out of the statute of frauds. In reaching this conclusion the court

quoted the language of Mr. Justice HEMINGWAY in *Hinkle* v. *Hinkle,* 55 Ark. 583, 18 S. W. 1049, as follows: "But the defendant pleads the statute of frauds, and the question is, if the statute applies, whether there has been such performance as to take the case out of its operation. Martin did everything he agreed to do. He gave up his employment, changed his residence, assisted in caring for his mother and in managing and conducting the business, moved upon the land and expended money in improving it. If the statute could defeat his claim, it would become a means of fraud, not of its prevention." Defendants contend that this rule is inapplicable here because plaintiff was not placed in possession of the Race property. The evidence discloses that the parties to the contract resided in the Race property about five months, but were not living there at the time the father died. Although possession is one of the elements that eliminates the statute of frauds, the above rule was applied in *Fred* v. *Asbury, supra,* where the parties who were granted specific performance lived in their own home and were not in possession of property which it was orally agreed should be given them upon the death of the donor.

In 49 Am. Jur., Statute of Frauds, p. 695, it is said: "Although an undelivered deed is deemed insufficient to take the contract out of the statute, it may be of importance for the purpose of showing a recognition by the vendor of the purchaser's contractual rights under which the latter has taken possession, made improvements, or performed other acts which will take the contract out the statute under the equitable doctrine of part performance."

In *Naylor* v. *Shelton,* 102 Ark. 30, 143 S. W. 17, Ann. Cas. 1914A, 394, a father agreed to will or deed a certain place to his daughter if she and her husband should take care of him the rest of his life. The father executed a will, but later destroyed it. It was held that the contract was taken out of the statute of frauds by full performance and by the making of the will. The court said: "As we have seen the contract was taken out of the statute of

frauds by the acts of the parties; but, as the will could only take effect after Trundle's death, his revocation by the destruction thereof left appellee to resort to the contract. The will was destroyed, but that did not destroy the contract by which the father bound himself to make a will of the land to appellee." The deed made by J. J. Rogers under the circumstances in evidence tends to show his recognition of the contract with plaintiff and is a strong circumstance that the contract existed.

Defendants also argue that plaintiff breached and forfeited her contract by leaving twice. It is undisputed that plaintiff left the first time at the sugggestion of her parents, after the loss of her child, and that she returned when the parents made that request. When plaintiff went to Fayetteville her father did not treat the contract as rescinded, although he threatened to do so unless she returned and continued to perform the contract. Plaintiff did return and continued the performance of her duties under the contract for more than 18 months and until her father died. Any breach of the contract on her part was waived by the father.

Defendants rely strongly on the case of *Lay* v. *Lay*, 75 Ark. 526, 87 S. W. 1026. We think the facts in that case are distinguishable from those in the case at bar. In the Lay case the court emphasized the fact that no deed was made and that plaintiff never claimed the property as his own, but always referred to it as his father's land. The father likewise claimed the land as his own until his death, although the contract was alleged to have been made some five years prior thereto.

We conclude that the chancellor was correct in holding that plaintiff established the agreement with her father by clear, satisfactory and convincing evidence, and that there was full performance of the terms of the contract by plaintiff. Having reached this conclusion, it is unnecessary to determine whether error was committed under § 5154, Pope's Digest, in refusing to allow plaintiff to testify concerning transactions and conversations with her father, while defendant brothers and sisters were permitted to do so.

Plaintiff and her sister, Amanda Johnson, appealed from that part of the decree which adjudged all costs against the estate of J. J. Rogers, deceased. Amanda Johnson was made a party defendant, but did not resist the suit and recognized the validity of the contract between plaintiff and her father. Plaintiff having won her suit and Amanda Johnson not having resisted it, their proportionate parts of the estate should not be charged with the court costs.

It follows that the decree will be modified so as to tax all court costs against the individual defendants who resisted the suit. As thus modified, the decree is affirmed.

COX *v.* DANEHOWER.

4-8218 202 S. W. 2d 200

Opinion delivered May 19, 1947.

Norton & Norton, for appellant.

Harrelson, Harrelson & Cannon, for appellee.

MINOR W. MILLWEE, Justice. John Cox, Sr., died testate in St. Francis county, Arkansas, and his will was regularly admitted to probate on October 16, 1911. The testator made provision for each of his six children, and the tract of land involved in this suit was devised to his son, Joseph Cox, as follows: "I give and devise to my son, Joseph Cox, the following land lying and being in the county of St. Francis and State of Arkansas, to-wit: The southwest quarter of the northeast quarter (SW¼ of NE¼) of section seven (7) in township four north (4N) and range three east (3E), to have and to hold unto the said Joe Cox for and during his natural life and at his death to the heirs of his body, but should said Joseph Cox die without heirs of his body then and in that event the land herein willed to him for his natural life shall be and become the property of brothers and sisters and the heirs of their bodies."

Joseph Cox was never married and held possession of the tract under the above devise until his death, without issue, on September 10, 1946. The six children of the testator, John Cox, Sr., survived him. Three of these children survived their brother, Joseph Cox, and are plaintiffs in this suit. The other two children of John

Cox, Sr., were Thomas Cox and John Cox, Jr., who died in the years 1929 and 1940, respectively. Thomas Cox left, surviving him, eight children and John Cox, Jr., left, surviving him, five children. The surviving children of Thomas Cox and John Cox, Jr., are now living and claim an interest in the land in controversy. Plaintiffs, the three living children of John Cox, Sr., also have children who are plaintiffs' potential bodily heirs.

On January 23, 1947, plaintiffs filed this suit alleging that defendant, James E. Danehower, contracted to buy said 40 acre tract for $1,600 payable upon delivery of a deed conveying good title; that plaintiffs tendered such deed, but defendant had refused to receive the deed and pay the purchase price. Plaintiffs tendered their deed into court and prayed for specific performance of the contract.

In his answer defendant admitted all allegations of the complaint except the allegation that plaintiffs owned the land and that their deed would convey good title under the contract. The answer alleged that the surviving children and bodily heirs of Thomas Cox and John Cox, Jr., were claiming an interest in the land; and that they had also agreed to convey the land to defendant jointly with plaintiffs for the agreed price of $1,600, which defendant was ready and willing to pay for clear title to the land. Defendant asked that he be placed in lawful possession of the land upon payment of $1,600 into the registry of the court; that the complaint be dismissed for want of equity, or in the alternative, that all claimants of the land be required to assert their respective rights and interests therein.

The children and bodily heirs of Thomas Cox and John Cox, Jr., adopted the answer of defendant and filed a cross complaint against plaintiffs and defendant alleging they were able and willing to join plaintiffs in a deed to defendant, but that plaintiffs refused to acknowledge their interest in the land, and that defendant refused to accept a deed or pay the purchase price unless a deed be executed by all parties. The cross complainants prayed

that their interest in the land be determined, and that defendant and plaintiffs be required to perform the contract of sale.

Plaintiffs filed a demurrer alleging that the answers and cross complaint did not state a defense to the complaint. The demurrer was overruled. Plaintiffs declined to either plead further or offer proof and their complaint was dismissed.

On consideration of the cross complaint and other pleadings, the Chancellor found that upon the death of Joseph Cox on September 10, 1946, the fee simple title to the land in controversy became vested, under the will, as follows: a one-fifth interest to each of the three plaintiffs, the surviving brother and sisters of Joseph Cox, deceased; a one-fifth interest to the eight bodily heirs of Thomas Cox, deceased, collectively and in equal shares; and a one-fifth interest to the five bodily heirs of John Cox, Jr., collectively and in equal shares. The court decreed specific performance of the contract. Plaintiffs and cross complainants were directed to convey the land to defendant who was ordered to make payment of the $1,600 purchase price according to the several interests declared. Plaintiffs and defendant have appealed.

At the outset we are confronted with the fact that an interpretation of only one item of a will is sought by the parties and the whole will is not before us. The entire will is not set forth in the pleadings and does not appear in the record. One of the cardinal rules in the construction of wills is that it is the court's duty to ascertain the intent of a testator, and in doing so such intent is not to be determined by one clause only, but must be gathered from a full consideration of the entire will. In the case at bar, however, the parties seem willing to assume that a consideration of the other portions of the will would not aid their respective contentions, and are content to rest their case upon the devise above quoted. Acting upon this assumption, we proceed to determine whether the language of this devise alone supports the conclusion reached by the Chancellor.

It is the contention of plaintiffs that the Chancellor erred in holding that they must share with the children and bodily heirs of Thomas Cox and John Cox, Jr., on a *per stirpes* basis. Plaintiffs insist that they, being the only brothers and sisters of the life tenant, Joseph Cox, at the time of his death, are the sole beneficiaries of the devise over and take the title in fee. It is contended that the words "and the heirs of their bodies," immediately following the designation of brothers and sisters as a class, do not include the bodily heirs of brothers and sisters previously deceased. This question was decided against the contention of plaintiffs in the case of *Bell* v. *Gentry*, 141 Ark. 484, 218 S. W. 194, and we think that decision is controlling here. In that case the testator was survived by his widow, who was also his executrix, and by several children. The devise was to the widow "as long as she shall remain unmarried and my widow with remainder thereof on her decease or marriage to my said children and their bodily heirs." The widow died without having remarried and it was held that the children took the fee as remaindermen. It was there said: "The will created a remainder and provided when it should vest, and that was on the decease or remarriage of the widow. In defining the heirs who should then take, the testator employed words of procreation so that only those heirs special, rather than the heirs general, took under the will; but the rights of these heirs became fixed when the remainder was cast, which event proved to be the death of the widow, as she died without having remarried. *Harrington* v. *Cooper*, 126 Ark. 53, 189 S. W. 667.

"At the death of the widow, when the remainder was cast, the son, Dennis, and the daughter, M. F. Smith, survived her and they, therefore, took the fee as remaindermen. Had they, or either of them, died in the lifetime of their mother, their bodily heirs would have taken the fee; and these bodily heirs would have taken as devisees under the will (and not by descent from Dennis or M. F.), they being the heirs special, or bodily heirs, *in esse* when the event happened upon which the remainder was to vest, that is the death of the testator's widow."

The effect of the devise under consideration was to create contingent remainders in the alternative following the life estate of Joseph Cox. In 33 Am. Jur., Life Estates, Remainders, etc., § 85, it is said: "More than one estate in remainder may be limited after a single particular estate if the limitation is in the alternative so that one may take effect if the other does not." See, also, Simes, Law of Future Interests, vol. I, §§ 78 and 79. The first alternative, *i. e.*, to the heirs of Joseph Cox's body, has failed, and the second alternative, to the brothers and sisters of Joseph Cox and the heirs of their bodies, vested upon the death of the life tenant, unmarried and without issue. At the time of the testator's death, the five brothers and sisters of Joseph Cox were living. Under the authority of *Bell* v. *Gentry, supra,* the bodily heirs of the deceased brothers of Joseph Cox take the share of their respective fathers *per stirpes,* as held by the Chancellor.

The next question for determination is whether plaintiffs and cross complainants take only a life estate followed by a fee in their bodily heirs under § 1799 of Pope's Digest, or a fee simple estate. In *Pletner* v. *Southern Lumber Co.,* 173 Ark. 277, 292 S. W. 370, John C. Gillis devised a homestead to his wife, Artemus F. Gillis, for life with remainder to Mary Elmira Godfrey and her bodily heirs. It was held that the devise created a fee simple estate in Mary Elmira Godfrey after the wife's death and that § 1799 of Pope's Digest relating to *fees tail* was inapplicable. The court said: "This court has often ruled that, where land is conveyed, or devised, to a person and the heirs of the body, children, or issue of such person, such conveyance or devise creates an estate tail in the grantee or devisee, which under out statute (§ 1499, C. & M. Digest) becomes an estate for life only in the grantee or devisee and a fee simple absolute in the person to whom the estate tail would first pass, according to the course of the common law, by virtue of such devise, grant or conveyance. . . .

"But this familiar doctrine cannot have application here, for the reason that the estate is not devised to Mrs.

Mary Elmira Godfrey and her bodily heirs, creating a life estate in her and a fee simple estate in her bodily heirs under the statute, *supra.* The life estate, as we have seen, was prviously devised to Mrs. Artemus F. Gillis, and the *remainder* of the estate after such life estate, was devised to Mary Elmira Godfrey and her bodily heirs." The court held that Mary Elmira Godfrey took the fee, and not a life estate, saying: "To construe the will so as to vest the life estate in Mrs. Gillis and a life estate also in Mrs. Elmira Godfrey would be to make these clauses of the will repugnant and inconsistent. This could not have been the intention of the testator, and such construction must therefore be avoided in order to effectuate his purpose."

The statute (§ 1799, Pope's Digest) was likewise held inapplicable in the case of *Bowlin* v. *Vinsant,* 186 Ark. 740, 55 S. W. 2d 927, under a devise by the testator to "my wife during her life, at her death, or should my said wife not survive me, unto my daughter, Gertrude Vinsant, and unto the heirs of her body." The wife survived her husband and the daughter (appellee) survived her mother. The court in construing the will said: "While the testator did not use the word 'remainder' in this connection as was the case of *Pletner* v. *Southern Lumber Co.,* 173 Ark. 277, 292 S. W. 370, it was in fact the remainder conveyed. . . . We think the real intention of the testator was that, if appellee were living at the time of his wife's death, she should take the fee, but, if she were not living then, the heirs of her body would take the fee."

The holding in the Pletner and Bowlin cases, *supra,* was reaffirmed and followed in *Adams* v. *Eagle,* 194 Ark. 171, 106 S. W. 2d 192. Under the rule of construction followed in these cases, plaintiffs, the surviving brother and sisters of Joseph Cox, and cross complainants, children of the two deceased brothers of Joseph Cox, took a fee simple rather than a fee tail estate upon the death of the life tenant. This being true, they can now convey a clear title to the defendant purchaser, and the trial court correctly so held.

The decree for specific performance is accordingly affirmed.

STATE, EX REL. ATTORNEY GENERAL, *v.* AUTEN, JUDGE.

4-8260 202 S. W. 2d 763

Opinion delivered May 19, 1947.

Rehearing denied June 30, 1947.

Guy E. Williams, Attorney General, and *Arnold Adams,* Assistant Attorney General, for petitioner.

Franklin Wilder and *Grant & Rose,* for respondent.

ROBINS, J. The Attorney General of Arkansas, in his petition herein, prays for a writ of prohibition to the Pulaski Circuit Court, Second Division, and to Honorable Lawrence C. Auten, as judge thereof, to restrain any further action by the said court on a petition for writ of *habeas corpus* filed therein by Jack McAllister. On April 14, 1947, we issued a temporary writ, staying further proceedings in said matter until we could hear and determine the Attorney General's petition.

The Attorney General, whose demurrer to McAllister's petition had been overruled by the lower court, asserts that said court has no jurisdiction in said matter; and, to exemplify his contention, he attaches to his petition copies of the pleadings and orders in the lower court. From these it appears that informations were filed against Jack McAllister in the circuit court of Sebastian county, charging him with the offenses of assault with intent to kill and burglary. On trial before a jury McAllister was convicted of both offenses and judgment was entered imposing upon him in each case a sentence of two years imprisonment in the penitentiary, the sentences running concurrently. His motion for new trial being overruled, he prayed and was granted an appeal to the Supreme Court, and was given fifty-eight days within which to file bill of exceptions.

McAllister's appeal was lodged in this court in apt time, but the transcript did not contain the bill of exceptions, because, as McAllister asserts, the attorneys who represented him at the trial and employed also to prosecute the appeal failed to have the bill of exceptions prepared and filed within the proper time. Subsequently, and before the case was reached for hearing in this court, another attorney had a bill of exceptions prepared (but not filed within the proper time) and brought up to this court by writ of certiorari. When the appeal was submitted to us, we sustained the Attorney General's motion to strike the bill of exceptions; and, finding no error reflected by the remainder of the record, we affirmed the judgment of the lower court. See *McAllister* v. *State, ante,* p. 140, 199 S. W. 2d 751.

In his petition for writ of *habeas corpus* McAllister, after reciting the circumstances of his conviction in the circuit court and the affirmance thereof by this court, and the dereliction of his attorneys in failing to have a bill of exceptions filed in time and incorporated in the appeal record, further set forth that, if his attorneys had filed bill of exceptions in time to become a part of the record, "the Supreme Court would have reviewed said case and

considered the evidence and facts proven in the case, and would have reversed the convictions and released the petitioner, or ordered a new trial for errors committed at the trial. The petitioner is not guilty of either of the charges aforesaid, and his convictions have been illegally and unconstitutionally affirmed."

The petition concludes with the averment that the judgment of the circuit court and of the Supreme Court, as well as the mandate and commitment (on which he was being held at the time he instituted *habeas corpus* proceedings) issued by this court upon affirmance of the judgment of the lower court, are void because these proceedings against him violate Art. II, § 8 of the Constitution of Arkansas, and the Fifth and Fourteenth Amendments to the federal Constitution. The prayer of the petition was for the issuance of a writ of *habeas corpus* and for discharge from custody.

McAllister did not allege in the petition filed by him in the lower court that the court in which he was convicted did not have jurisdiction; nor did he in said petition challenge the regularity of the commitment. The sole ground on which he asked the Pulaski circuit court to award him relief by way of *habeas corpus* proceedings was that he has been denied "due process" in that through fault of his lawyers he was prevented from presenting a complete record to the Supreme Court.

In the case of *State* v. *Martineau,* 149 Ark. 237, 232 S. W. 609, application was made to this court by the State for writ of prohibition to prevent the chancellor of the Pulaski chancery court from proceeding with hearing on a writ of *habeas corpus* issued to review the legality of the death sentences imposed on Hicks and five others. Their convictions had been affirmed, but various grounds (not appearing on the face of the record) were urged as establishing the illegality of the judgment. This court granted the writ of prohibition, the applicable rule in the case being thus stated (headnote 6): "If a petitioner for *habeas corpus* is in custody under process regular on its

face, nothing will be inquired into save the jurisdiction of the court whence the process came."

This rule was reiterated by us in the case of *Abbott* v. *State,* 178 Ark. 77, 10 S. W. 2d 30. See, also, *Ex Parte Byles,* 93 Ark. 612, 126 S. W. 94, 37 L. R. A., N. S. 774; *Ex Parte Williams,* 99 Ark. 475, 138 S. W. 985.

Chief Justice McCulloch, in his opinion in the Martineau case, *supra,* was careful to point out that the provisions of the federal statute (Act of February 5, 1867, Rev. St., § 753 *et seq.,* 28 U. S. C. A., § 453 *et seq.*) by which federal courts were authorized in *habeas corpus* proceedings to go behind the face of the documents authorizing commitment of the petitioner do not extend to such cases in state courts.

The pronouncement of this court in the Martineau case, *supra,* repeated in the Abbott case, *supra,* has not been modified or overruled, and it is controlling here. Since no question as to the jurisdiction of the Sebastian circuit court to try petitioner on the charges of which he was therein convicted or as to the regularity of the commitment on which he was being held, the petition stated no ground on which the lower court could assume jurisdiction or award petitioner any relief in *habeas corpus* proceedings.

The views expressed above make it unnecessary for us to consider whether in any event negligent failure of counsel, selected and employed by the accused, to complete a record for appeal could be properly made the basis of a claim that the accused had been denied "due process," and whether one who surrenders voluntarily to an officer may by writ of *habeas corpus* challenge the legality of his detention.

The temporary writ of prohibition heretofore issued herein will be made permanent.

BUTLER *v.* EMERSON.

4-8209 202 S. W. 2d 599

Opinion delivered May 19, 1947.

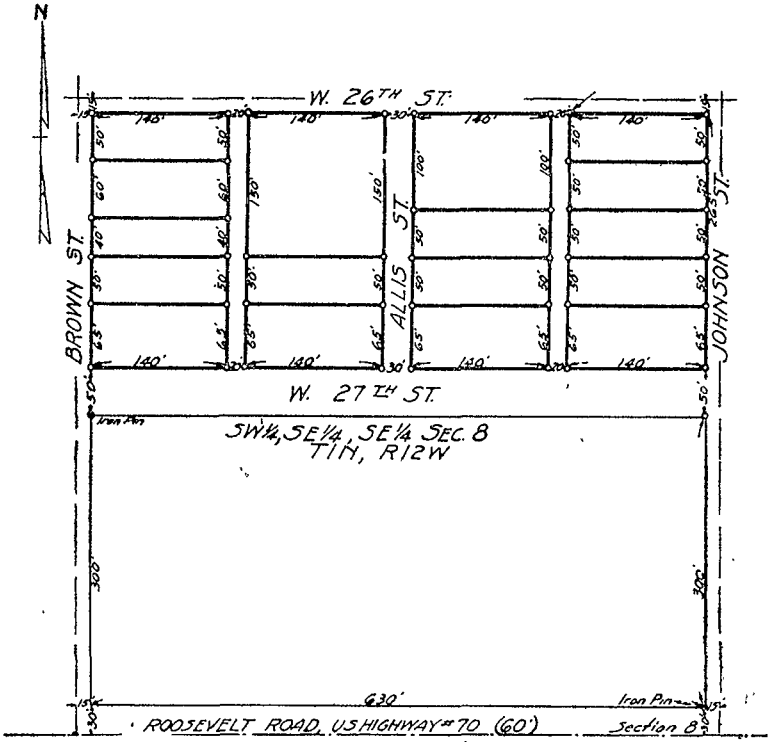
Rehearing denied June 23, 1947.

John R. Thompson, for appellant.

T. J. Gentry, for appellee.

ED. F. MCFADDIN, Justice. The question for decision is, whether there was such a dedication of a street as to irrevocably bind the grantor against a subsequent claim of individual ownership.

In the early part of 1946, the appellee, Mrs. Alice G. Emerson, being the owner of certain acreage, platted the same into lots and blocks, and sold some of the lots to various parties, among whom were the appellants. When Mrs. Emerson made the sale to the appellants, she gave them a plat which showed the streets, alleys, lots and blocks, as follows:



The warranty deed from Mrs. Emerson to appellants (J. L. and Hassie E. Butler), dated April 30, 1946, recited a cash consideration of $2,000, and described the property as follows:

"A tract of land being 265 feet north and south on Johnson Street, and 140 feet east and west, between West 26th and West 27th streets, described as follows: Beginning at a point on the southwest corner of West 26th Street and Johnson Street, . . . thence south along

the west side of Johnson Street, 265 feet to the northwest corner of West 27th and Johnson streets; thence west along the north side of West 27th Street, 140 feet to a point on the east side of the alley, thence north along the east side of the alley 265 feet to the south side of West 26th Street; thence east 140 feet along the south side of West 26th Street to the point of beginning, in Pulaski county, Arkansas."

It will be observed, by reference to the plat, that the property conveyed to appellants consisted of 5 lots bounded on the north by West 26th Street, on the east by Johnson Street, on the south by West 27th Street, and on the west by an alley. We will refer to this conveyed property as "the Butler lots." At the time of the said conveyance, Johnson Street was open and in use. The alley west of the Butler lots was subsequently opened and placed in use; but so much of West 27th Street as lay south of the Butler lots was not then, and has never subsequently been, graded or used by the public.

On May 10, 1946, the City Planning Commission of Little Rock advised Mrs. Emerson that the City of Little Rock did not then desire to have West 27th Street opened from Johnson Street west to Allis Street, and also did not then desire to have opened the alley immediately west of the Butler lots. The Planning Commission also designated a "turn-around" on West 27th Street at the end of Allis Street, and designated as a "playground" all that part of West 27th Street immediately south of the Butler lots. Acting on these decisions from the Little Rock City Planning Commission, Mrs. Emerson claimed the alley and "playground" as her own; and she was negotiating a sale thereof to a third person, when, on June 17, 1946, appellants filed the complaint herein, in which they sought (1) to enjoin Mrs. Emerson from selling any of the property shown on the plat as West 27th Street, and also (2) to enjoin her from closing and claiming the alley west of the Butler lots. The prayer of the complaint was:

"That the court enter an order declaring the street and alley above described as public property and enjoin-

ing the defendant from transferring the title thereto or attempting in any wise to claim private ownership to said street and alley or in any wise closing or molesting same; . . . ''

The defendant, by answer, said:

'' . . . that she previously had had this and other property surveyed into lots, and purposed to dedicate a certain part of said property to the public for streets and alleys. At the time of the sale of the property to the plaintiffs, the defendant stated to the plaintiffs that she intended to dedicate the fifty (50) feet immediately south of the property purchased by the plaintiffs from the defendant, to the public for use as a street, but that such property has never been used as a street, way or otherwise by the public.

''The defendant attempted to make this dedication according to the statutes of the State of Arkansas, but the City Planning Commission of the City of Little Rock refused to accept the dedication as shown upon the plat filed with the City Planning Commission.''

At the trial it was agreed that Mrs. Emerson had given the appellants a plat similar to the one shown here, and had, in fact, intended to file a formal deed of dedication covering West 27th Street and the alley, but had never opened the said street. Mrs. Emerson claimed that she had the right to revoke her attempted and intended dedication of the street, since West 27th Street had not in fact been opened, and the city did not want to accept so much of said street and alley as lay adjacent to plaintiff's property. The chancery court enjoined Mrs. Emerson from blocking or closing or claiming the alley, but denied the plaintiffs any relief as to the property described as West 27th Street, saying:

''It is further adjudged and decreed that there is no street immediately south of the property purchased by the plaintiffs from the defendant and that the title to the land south of such property is vested in the defendant in fee and the plaintiffs have no interest therein.''

From that decree the plaintiffs (Butlers) have appealed. The defendant, Mrs. Emerson, has not appealed from the decree regarding the alley, so we consider only the appellants' prayed relief as to West 27th Street. There are two questions: (1) was there a dedication; and, if so, (2) was such dedication irrevocable? There are many cases of this court that deal with various phases of dedication. Some of these cases are: *Moore* v. *Little Rock,* 42 Ark. 66; *Holly Grove* v. *Smith,* 63 Ark. 5, 37 S. W. 956; *Hope* v. *Shiver,* 77 Ark. 177, 90 S. W. 1003; *Davies* v. *Epstein,* 77 Ark. 221, 92 S. W. 19; *Dickinson* v. *Ark. City Imp. Co.,* 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170; *Brewer* v. *Pine Bluff,* 80 Ark. 489, 97 S. W. 1034; *Stuttgart* v. *John,* 85 Ark. 520, 109 S. W. 541; *Paragould* v. *Lawson,* 88 Ark. 478, 115 S. W. 379; *Frauenthal* v. *Slaten,* 91 Ark. 351, 121 S. W. 395; *Matthews* v. *Bloodworth,* 111 Ark. 545, 165 S. W. 263; *Balmat* v. *Argenta,* 123 Ark. 175, 184 S. W. 445; *Mebane* v. *City of Wynne,* 127 Ark. 364, 192 S. W. 221; *Porter* v. *Stuttgart,* 135 Ark. 48, 204 S. W. 607; *Holthoff* v. *Joyce,* 174 Ark. 248, 294 S. W. 1006; *McGee* v. *Swearengen,* 194 Ark. 735, 109 S. W. 2d 444; *Jennings* v. *Russell,* 209 Ark. 71, 189 S. W. 2d 656; *Gowers* v. *Van Buren,* 210 Ark. 776, 197 S. W. 2d 741. We list these as "background cases" to the particular questions here under consideration; and now, in proceeding with the questions, we will refer to the parties as they were styled in the trial court—*i. e.,* plaintiffs and defendant.

I. *Was There a Dedication?* The defendant did not record the plat, but she furnished a copy to the plaintiffs when she delivered to them their deed and received their money; and furnishing a copy of the plat, under the facts herein, was just as effective, between the parties, as recordation would have been. The deed made reference to West 27th Street as being south of the property conveyed to the plaintiffs. These acts by the defendant constituted a dedication. In *Moore* v. *Little Rock, supra,* Mr. Justice W. W. SMITH said: "No doubt, causing the land to be laid off as an addition and subdividing it into lots and blocks, was a dedication of the intervening streets

and alleys, so far as McDonald or any title derived from him, is concerned."

In *Hope* v. *Shiver, supra,* Mr. Justice RIDDICK said: " . . . for it is well established that when the owner of land makes a plat thereof, or adopts one made by someone else, and sells lots by reference to the maps, this amounts to a dedication of the streets and public ways shown on the map. 9 Am. & Eng. Enc. Law, 57, 59, and cases cited."

In *Mebane* v. *City of Wynne, supra,* Chief Justice MCCULLOCH said: "This court has steadily adhered to the rule that 'an owner of land by laying out a town upon it, platting it into lots and blocks intersected by streets and alleys, and selling lots by reference to the plat, is held to have dedicated to the public use the streets and alleys and other public places marked on the plat and such dedication is irrevocable.' *City of Hope* v. *Shiver,* 77 Ark. 177, 90 S. W. 2d 1003; *Davies* v. *Epstein,* 77 Ark. 221, 92 S. W. 19; *Dickinson* v. *Arkansas City Improvement Co.,* 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170; *Brewer* v. *Pine Bluff,* 80 Ark. 489, 97 S. W. 1034; *Stuttgart* v. *John,* 85 Ark. 520, 109 S. W. 541; *Paragould* v. *Lawson,* 88 Ark. 478, 115 S. W. 379; *Balmat* v. *City of Argenta,* 123 Ark. 175, 184 S. W. 445."

Defendant says that reference to a street as boundary of property does not constitute a dedication of the street, and cites—to support that contention—these cases: *Fordyce* v. *Hampton,* 179 Ark. 705, 17 S. W. 2d 869; *McGee* v. *Swearengen,* 194 Ark. 735, 109 S. W. 2d 444; *Plumer* v. *Johnston,* 63 Mich. 165, 29 N. W. 687; *Talbert* v. *Mason,* 136 Ia. 373, 113 N. W. 918, 14 L. R. A., N. S. 878, 125 Am. St. Rep. 259; *Lankin* v. *Terwilliger,* 22 Ore. 97, 29 Pac. 268; *King* v. *Trustees,* 102 N. Y. 172, 6 N. E. 395; and 11 C. J. S. 584. But in the case at bar, not only did the deed from the defendant to the plaintiffs refer to West 27th Street, but the defendant also gave to the plaintiffs the plat that showed West 27th Street, and on the strength of the plat the plaintiffs purchased the lots. These facts clearly constituted a dedication by

estoppel; and we hold that the defendant, Mrs. Emerson, is estopped to deny that there was a dedication of West 27th Street.

II. *Was the Dedication Irrevocable?* In *Brewer* v. *Pine Bluff, supra,* Mr. Justice RIDDICK said: "The making and recording of the plat by Morris showing his land divided into streets and alleys and the subsequent sale of a number of these lots was a dedication of the streets shown on the plat which he could not revoke. The sale and conveyance of a part of the street to Carroll did not revoke the dedication of this land as a public street because, as we have said, the dedication had then become irrevocable by a previous sale and conveyance of lots to other parties. 13 Cyc. 455, 463; 9 Am. & Eng. Ency. of Law (2 Ed.), 57."

In *Stuttgart* v. *John, supra,* Mr. Justice MCCULLOCH said: "It is well settled by the decisions of this court that where owners of land lay out a town or an addition to a city or town . . . , platting it into blocks and lots, intersected by streets and alleys, and sell lots by reference to the plat, they thereby dedicate the streets and alleys to the public use, and that such dedication is irrevocable. *Brewer* v. *Pine Bluff,* 80 Ark. 489, 97 S. W. 1034; *Davies* v. *Epstein,* 77 Ark. 221, 92 S. W. 19; *Hope* v. *Shiver,* 77 Ark. 177, 90 S. W. 1003; *Dickinson* v. *Arkansas Improvement Assn.,* 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170."

In *Frauenthal* v. *Slaten, supra,* Chief Justice MCCULLOCH 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. He will also be held to have thereby dedicated to the public use squares, parks and other public places marked as such on the plat. The dedication becomes irrevocable the moment that these acts concur. *Hope* v. *Shiver,* 77 Ark. 177, 90 S. W. 1003;

Davies v. *Epstein, Id.* 221, 92 S. W. 19; *Dickinson* v. *Ark. City Imp. Co., Id.* 570, 92 S. W. 21, 113 Am. St. Rep. 170; *Brewer* v. *Pine Bluff,* 80 Ark. 489, 97 S. W. 1034; *Stuttgart* v. *John,* 85 Ark. 520, 109 S. W. 541."

Applying the rule of these cases to the case at bar, it is clear that the dedication of West 27th Street was irrevocable. See, also, note in Ann. Cas. 1917A, 1190 on "Revocability of land to public use."

Mrs. Emerson called certain witnesses who testified that, after the City Planning Commission declined to open West 27th Street, these witnesses discussed the matter with plaintiff, Mr. Butler, and he remarked that he did not care whether the street was opened. On this testimony Mrs. Emerson sought to predicate her claim to her own private ownership of the street. But, even giving the remarks of Mr. Butler their most cogent force and effect, they only establish that it was immaterial to him whether the property south of his lots be opened as a street, or be held for public use; and the latter is the relief that he is seeking in this case. If the dedication failed, then Mrs. Emerson would not own all of West 27th Street. *Matthews* v. *Bloodworth, supra,* is in point in this regard. See, also, annotation in 18 A. L. R. 1008 on "Reversion of title upon abandonment or vacation of public street or highway." The plaintiffs are not seeking to claim and occupy the half of West 27th Street that is immediately adjacent to their property. They are merely seeking to prevent the public from losing all of West 27th Street. We hold that they are entitled to an injunction preventing the defendant from claiming to own individually West 27th Street as shown on the plat. The defendant testified that she "left the fifty feet there as public property in case it was not opened as a street." We hold that such is the correct disposition of West 27th Street here in dispute. The city may not want to grade and open it now, but it remains public property to be opened as a street when desired by the city.

Therefore, the decree of the chancery court is reversed, and the cause is remanded with directions to enter a decree consistent with this opinion.

MACK *v.* MARVIN.

4-8188 202 S. W. 2d 590

Opinion delivered May 19, 1947.

Rehearing denied June 23, 1947.

Charles D. Atkinson and *Chas. W. Atkinson,* for appellant.

G. T. Sullins, Rex W. Perkins, O. E. Williams, Karl Greenhaw, Peter G. Estes and *Price Dickson,* for appellee.

ROBINS, J. The instant suit is an effort on the part of appellant, Miss Isabella Mack, aged 82, to recover $5,000 for balance of purchase money admittedly due to her on the sale of her home, a forty acre tract near Fayetteville, Arkansas. Having been denied any relief in the lower court, she has appealed.

In her complaint, which named as defendants the appellees, R. H. Marvin and his wife, Mabel J. Marvin, Fulbright Investment Company, George F. Caudle and his wife, Thelma Caudle, appellant alleged that she sold the land on March 20, 1946, to appellee R. H. Marvin, acting as agent for appellees Fulbright Investment Company and George F. Caudle and wife, for $7,800, of which she was paid $2,800, and for balance she received two checks drawn by appellee Marvin on a Fayetteville bank, each for $2,500 and dated, respectively, May 15, and June 15, 1946; that when she accepted these post-dated checks appellee Marvin showed her a statement of his bank account, reflecting that at the time he had about $9,000 on deposit in the bank on which the checks were drawn; that when she presented the checks for payment the bank refused to pay same because appellee Mabel J. Marvin, wife of R. H. Marvin, had withdrawn all balance in said account, it being payable to either appellee Marvin or his wife; that in 1944, appellees R. H. Marvin and Mabel J. Marvin had acquired a forty-five acre tract, described in the complaint, in Washington county, conveyance having been made to both of them; that after appellee Marvin

obtained deed from appellant for her property he, for the purpose of cheating and defrauding appellant, conveyed said jointly owned tract to his wife.

Appellant prayed for judgment against all of the appellees for $5,000, asked that same be declared a lien on the lands sold by appellant to appellee Marvin, and she also prayed that the deed executed by appellee Marvin to his wife be set aside and a lien declared on the land therein described in favor of appellant for the amount of her judgment. Notice of *lis pendens* was filed by appellant.

In their answers appellees Caudle and wife and Fulbright Investment Company denied that appellee Marvin was their agent in purchasing the property from appellant, and alleged that they, without any notice that appellee Marvin had failed to pay the purchase money to appellant, bought the land from him and paid him therefor.

Appellee Marvin entered his appearance, but filed no answer. His wife's answer was a general denial.

To sustain the issues on her part appellant offered the testimony of appellee Marvin, herself, Berry Vaughn and Richard B. Greer.

Appellee Marvin testified that he obtained the deed (which recited payment of consideration in full) from appellant, paying a total of $2,800 in cash and bonds and turning over to her the two checks referred to in the complaint; that he sold thirty-five acres of the property to appellee Fulbright Investment Company and five acres to appellee Caudle; that he conveyed his interest in the forty-five acre tract (purchased by him and his wife) to his wife; that the transaction with appellant was "individual"; that the checks were post-dated "because the wife and I needed the money to use on the place"; that he did have on deposit at that time enough money to pay the checks; that the principal part of the money obtained from appellant's property went to pay for construction of the house he and his wife were building; that after spending this money he borrowed $14,400 and deposited

that in the joint account, but his wife, without his knowledge, drew out the amount of the account, thus causing the checks given to appellant to be dishonored; that in selling appellant's property to Caudle and Fulbright Investment Company he made a profit of $900; that he was not the agent of Fulbright Investment Company and Caudle; that appellee Mabel Marvin was a bookkeeper before her marriage; that the property where he and his wife lived was their homestead; "that there was no part of this transaction that Mrs. Marvin was not totally familiar with"; that the homestead of himself and wife was worth $65,000; that Miss Mack didn't need the money and we did; that his wife knew all about these transactions. This witness introduced in evidence copies of the conveyances involved, including the deed executed by appellee Marvin to his wife, filed for record on July 19, 1946, by which he conveyed the forty-five acre home place to her. (An estrangement between appellees Marvin and his wife, with consequent suit for divorce by her, seemed to have occurred after the transaction with appellant.)

Appellant testified that when appellee Marvin gave her the post-dated checks and obtained the deed from her he told her the checks would be paid and at the same time showed her a bank statement showing he had on deposit in the bank on which these checks were drawn between eight and nine thousand dollars; that the checks were returned to her unpaid by the bank.

Berry Vaughn, vice-president of the bank on which the checks were drawn, introduced ledger sheets showing the account of appellees R. H. Marvin and wife. This account showed deposits of $7,500 and $1,200 on March 21, 1946, these deposits presumably covering proceeds of purchase money obtained from appellees Fulbright Investment Company and Caudle; and also showed subsequent withdrawals which reduced the balance to $396.23 on May 8, 1946, after which the account continued to show a small balance until June 29, 1946, when a deposit of $14,400 was made, which was all withdrawn by July 5,

1946; that, judging from endorsements on the two $2,500 checks drawn in favor of appellant by appellee Marvin, these checks were presented to his bank on July 13, 1946.

Richard B. Greer, circuit clerk, identified the deeds involved and testified as to the time of recording same.

Appellant, being recalled, testified that appellee Marvin had given her his promissory note for $5,500 in lieu of the checks, but that she returned the note to Marvin and kept the checks.

At the conclusion of the testimony on behalf of appellant, appellees Mabel J. Marvin, George F. Caudle and wife and Fulbright Investment Company filed demurrers to the testimony and asked for dismissal of the complaint. The lower court sustained these demurrers and rendered decree dismissing appellant's complaint.

We have heretofore, on motion of appellant, dismissed her appeal as to appellee George F. Caudle and wife.

There is no testimony indicating that appellee Fulbright Investment Company, in buying the thirty-five acre tract from appellee Marvin, after he had obtained from appellant conveyance to himself reciting full payment of purchase money, was other than an innocent purchaser for value. The lower court therefore properly dismissed the complaint as to it.

The action of appellees in filing demurrers to the testimony introduced by appellant was, under our opinion in the case of *Kelley* v. *Northern Ohio Company,* 210 Ark. 355, 196 S. W. 2d 235, equivalent to a submission of the case for final decision on the testimony offered by appellant. In the Kelley case, *supra,* we construed Act 257 of 1945 and considered the effect of a demurrer by defendant to evidence offered by plaintiff in a chancery case. We there said "that the appellees [defendants] waived the right to introduce proof by moving for a decree." Therefore, we treat the case between appellant and appellees Marvin and wife as having been fully heard and finally disposed of by the court below.

The net effect of the testimony in this case is:

Appellant delivered to Marvin a deed, reciting payment in full of purchase money, conveying to him property worth $7,800, and receiving therefor $2,800 in cash and bonds and post-dated checks for $5,000 which proved worthless. When Marvin, a few days after obtaining the deed from appellant, conveyed this property to Caudle and Fulbright Investment Company he collected from them in cash $8,600. Instead of using this money, which arose from appellant's property, to pay her the balance of $5,000 on the purchase money which he owed her, he and his wife used this money in improving real estate jointly owned by them, the interest of appellee Marvin therein having been conveyed to his wife before the due date of the post-dated checks. Mrs. Marvin had full knowledge of all these transactions. She was not ignorant of business affairs, having been an accountant before her marriage.

If the decree of the lower court is affirmed it means that Miss Mack has irretrievably lost $5,000 and that appellee Marvin and his wife have been unjustly enriched at Miss Mack's expense in the same amount.

Appellee Marvin and his wife did not deny this unjust enrichment. He filed no answer, but in his testimony sought to justify his conduct on the ground that his wife was to blame for the situation, because she withdrew from the bank the funds from which the post-dated checks could and should have been paid; and it is urged on behalf of appellee Mabel J. Marvin that she did not owe appellant anything and that she was within her rights when she, with full knowledge of the obligation to pay appellant the amount of the post-dated checks, withdrew the balance in the bank; and it is further argued in her behalf that the property into which this money was diverted was her homestead and therefore exempt from any claim of appellant. Such specious defenses may not be sustained in a court of equity.

When appellant turned over to Marvin the deed conveying her home to him without receiving as much as half of the purchase money therefor, she made it possible for Marvin to deal with this property as his own, and, in view of her age, her evident lack of experience in business affairs and her blind confidence in Marvin, and in view of the fact that, though he had taken from Miss Mack a conveyance acknowledging full payment by him to her when in truth he had at that time paid her only $2,800 of the purchase money, Marvin immediately after collecting it converted to his own use the money obtained by him from Caudle and Fulbright Investment Company for appellant's property, we think there arises naturally an inference that Marvin intended, when he obtained her deed, to defraud appellant, and that therefore a constructive trust in favor of appellant, as to her property and its proceeds, arose when appellee Marvin received his deed which enabled him, without paying appellant her purchase money, to sell the property; in good conscience his relation to her was something more than that of mere debtor. *Lilly* v. *Barron*, 144 Ark. 422, 222 S. W. 712. Under the circumstances appellee Marvin in a sense became appellant's agent *pro hac vice,* and when he collected the purchase money from Caudle and Fulbright Investment Company honesty and good faith demanded that he use these funds to pay his unsecured obligation to appellant. Instead of doing this, he used this trust fund to improve his own property.

"One of the most common cases," says Judge STORY, "in which equity acts upon the ground of implied trusts, *in invitum,* is where a party has received money which he cannot conscientiously withhold from another party." Story, Eq. Jur. (13th Ed.), § 1255. "A constructive trust is substantially an appropriate remedy against unjust enrichment. It is raised by equity in respect of property which has been acquired by fraud, or where, although acquired originally without fraud, it is against equity that it should be retained by the person holding it." 54 Am. Jur. 169; Restatement of the Law, Title "Restitution," p. 639.

"An abuse of confidence rendering the acquisition or retention of property by one person unconscionable against another suffices generally to ground for equitable relief in the form of the declaration and enforcement of a constructive trust, and the courts are careful not to limit the rule or the scope of its application by a narrow definition of fiduciary or confidential relationships protected by it. . . . The origin of the confidence reposed is immaterial." 54 Am. Jur. 173.

While appellant in her complaint asked that a lien in her favor be declared on the land conveyed by appellee Marvin to his wife, she did not allege specifically the existence of the trust relationship between her and said appellees. But, in equity, pleadings may be considered as amended to conform to the proof. *Fidelity & Deposit Co. of Maryland* v. *Cowan,* 184 Ark. 75, 41 S. W. 2d 748; *G. H. Hardin & Co.* v. *Nettles,* 192 Ark. 610, 83 S. W. 2d 315. Since the evidence in this case shows the existence of the trust the lower court should have treated the complaint as amended to conform to the proof in this regard.

A trustee may not defeat a trust by investing the trust fund in other property. In such a case equity will permit the *cestui que trust* to follow the misapplied fund into the property which it purchased or improved. *Remchard* v. *Renshaw,* 102 Ark. 309, 143 S. W. 1092; *Humphreys* v. *Butler,* 51 Ark. 351, 11 S. W. 479.

The fact that the property of Marvin has been conveyed to his wife does not alter the situation, because, under the testimony, she was fully aware of her husband's transaction with Miss Mack and knew that money that in good conscience belonged to Miss Mack was used in improving the property which her husband conveyed to her; and according to the undisputed testimony it was Mrs. Marvin's act in withdrawing all the money from the joint account which caused the two checks payable to appellant to be dishonored.

"As a general rule, provided the property can be traced or identified, any third person who has obtained

trust property or its product, by a transfer made in violation of the trust, and who is not a *bona fide* purchaser for value without notice, stands in the same position as the original trustee and takes the property . . . subject to the beneficiary's right to reclaim it and impress it with the trust.'' 65 C. J. 986. *Pindall* v. *Trevor,* 30 Ark. 249; *Fidelity & Deposit Co. of Maryland* v. *Cowan,* 184 Ark. 75, 41 S. W. 2d 748.

There is nothing in the record to indicate that Mrs. Marvin asserted in the lower court a homestead right in the property held by her. But such a claim, even if properly and seasonably made, would not be availing. Trust funds may be traced into a homestead, and a lien in favor of a wronged *cestui que trust* may be impressed on the homestead into which trust money has been diverted.

This is not an attempt to subject, by execution or other process, a homestead to payment of debts due by the owner thereof. In such cases there is a constitutional exemption in favor of the owner except as to liabilities growing out of purchase money, mechanics' liens, and conversion of funds by a trustee of an express trust. But here we are concerned with tracing into a homestead, and recovering out of same, funds wrongfully obtained by the owner and used to improve the homestead; and in such a case the wrongdoer may not avail himself of the homestead exemption to defeat the claim of one whose funds have, in violation of a trust, been used to improve or purchase the homestead.

While most of the adjudicated cases deal with the purchase of homestead with trust funds, there is no difference between the effect of use of such funds to buy a homestead and the use thereof to improve a homestead; and the courts do not hesitate to grant an equitable lien in favor of one whose money is used by a trustee *ex maleficio* to improve a homestead. *Smith* v. *Green,* 243 S. W. 1006; *Jones* v. *Carpenter,* 90 Fla. 407, 106 So. 127, 43 A. L. R. 1409.

Dealing with this question, the Supreme Court of Tennessee in the case of *Preston* v. *Moore,* 133 Tenn. 247,

180 S. W. 320, L. R. A. 1916C, 578, said: "May a trustee *ex maleficio* prevail upon a claim to right of homestead in the realty produced by the avails of his fraud on the *cestui que trust,* against the latter, when the fund is followed into the realty? An affirmative response would shock one's sense of what is equitable, and it is not the response the law gives. Thompson in his work on Homesteads, § 338, says: 'If B has purchased a homestead with the money of A, under such circumstances as would make him a resulting trustee for A, of course he can assert no right of homestead as against A; since, in the eye of a court of equity, A is the owner of the property, and not B.' This court in *Gordon* v. *English,* 3 Lea, 634, referred to the text of Mr. Thompson with approval, and held that not only in cases of resulting trust proper, but also in a case which involved 'a trust which has all the qualities and effects of a resulting trust proper,' was the rule applicable. The wrongdoer, it was there said, 'cannot acquire a homestead right as against the person whose money has been used. The money due the beneficiary is in reality purchase money, against which the homestead exemption cannot prevail.' "

In the case of *Kemp* v. *Enemark,* 194 Cal. 748, 230 P. 441, the Supreme Court of California held that where a husband by deceit obtained funds with which to purchase and improve land which was traded for other land as to which the wife attempted to assert a homestead right against the claim of the person deceived, such homestead right could not be maintained, and in its opinion the court quoted this language from an earlier opinion, *Shinn* v. *MacPherson,* 58 Cal. 596: "There is no provision of the homestead law that affords a cloak for such a transaction. That law was enacted for beneficent purposes, designed to secure home for the family, but . . . was never intended 'to be a secure and impregnable asylum in which to deposit peculations from others.' "

We conclude that, since a trust relation, with appellant as the beneficiary and appellee Marvin as the trustee, was shown by the testimony, appellant had the right to

trace the trust fund into the property (owned at that time by appellees Marvin and wife) which it was used to improve and that a lien may be impressed thereon for the benefit of appellant, even though it has been conveyed to appellee Mabel J. Marvin.

It follows from what has been said that the decree of the lower court, in so far as it dismissed appellant's complaint against appellee Fulbright Investment Company for want of equity, is affirmed; and, in so far as it dismissed the complaint against appellees R. H. Marvin and Mabel J. Marvin, the decree of the lower court is reversed and the cause remanded to the lower court with directions to render decree against appellees R. H. Marvin and Mabel J. Marvin for $5,000 with interest on $2,500 thereof from May 15, 1946, and on $2,500 thereof from June 15, 1946, at the rate of six per cent. per annum, and to declare a lien therefor in favor of appellant on the land described in the above mentioned conveyance executed by appellee R. H. Marvin to appellee Mabel J. Marvin, and providing for foreclosure of said lien and sale of said land in accordance with the practice for foreclosure of mortgages in chancery court; and all costs of both courts to be adjudged against said last named appellees.

WILLIAMS *v.* DAVIS.

4-8210 202 S. W. 2d 205

Opinion delivered May 19, 1947.

Clark & Clark, for appellant.

J. Wendell Henry, for appellee.

HOLT, J. Appellees, Virgil Davis and wife, brought this action against A. P. Williams and Mary W. Williams, his wife, residents of Montana, for specific performance of a contract to sell and convey a 200 acre farm in Faulkner county, Arkansas. A. P. Williams filed no answer and did not appear. Appellant, Mary W. Williams, defended on the ground that she was the owner of the farm in question, and had never authorized anyone to enter into a contract to purchase with appellees.

From a decree against appellant, Mary W. Williams, in favor of appellees, ordering specific performance, comes this appeal.

The record discloses that appellees had rented and cultivated the land involved from H. W. Williams of Rockford, Illinois, for the years 1942 to 1945, inclusive, through Williams' agent in charge, C. W. Manar of McAlester, Oklahoma.

H. W. Williams died in February, 1945. He was the brother of A. P. Williams.

In August, 1945, appellee, Davis, while still in possession of the farm as tenant, began negotiations with Manar to purchase it. An offer of Davis by letter September 4, 1945, to Manar to purchase the farm for $2,500 was conveyed to A. P. Williams by Manar in a letter to Williams dated September 25, 1945, in part as follows: "I have been the agent for Mr. H. W. Williams for Oklahoma and Arkansas for several years, and regret very much his passing away in February.

"I am advised by Mrs. Taylor that the farm in Faulkner county, Arkansas, known as the Bartley Farm, belongs to you. Mrs. Taylor wrote me some time ago that she was sending you the papers on this farm and giving you my name. I now have an offer to purchase this farm for $2,500 payable as follows: $1,000 cash and $500 per year for 3 years with the deferred payments bearing 6% interest per annum. . . . Our charges would be 5% sales commission. . . . Should you be interested in this offer, you can advise me and I will draw the deed and mail to you to be executed and will attend to the drawing of the notes and mortgage and closing the matter up, etc."

Mr. A. P. Williams answered this letter October 19, 1945, and accepted the offer of Davis to purchase, as follows: "I will accept the offer on the Bartley farm for $2,500, $1,000 cash and $500 per year for three years with deferred payments bearing 6% per annum. When you send the deed, notes and mortgage, I will return the executed deed promptly. My brother always spoke highly of you and said his business dealings with you were always satisfactory."

Appellant, Mary W. Williams, admitted that this letter was in her handwriting. She testified that she wrote it at the direction of her husband.

October 22nd following, Manar, by letter, informed Davis that A. P. Williams had accepted his offer to purchase, if it still stood, whereupon Davis answered by letter: "In regard to your letter I will say that I will take the place. You fix the papers and send to the First National Bank at Conway, Arkansas, and your $1,000 dollars will be sent at once. My wife's name is Lottie Davis."

Following the receipt of this letter, Manar on October 26th wrote A. P. Williams: "I am enclosing deed for you to execute and return, you and Mrs. Williams will both sign. Please mail me the abstract as soon as you get this letter. I am mailing Mr. Davis the three $500 notes and mortgage to execute and return to me, etc."

November 26th following, A. P. Williams wrote Manar: "I have just received an offer of $3,000 cash for the Bartley farm which I would like to accept. It seems to me this is nearer what the farm is worth than the former offer of $2,500."

This letter was also admitted by appellant to be in her handwriting. She testified that it was written at the direction of her husband.

November 30th, Manar answered A. P. Williams, in part: "On September 25, 1945, I submitted to you his offer setting out what the expense would be in closing the deal up and on October 19, 1945, you wrote me accepting the offer and on October 22, 1945, I wrote to Mr. Davis that his offer had been accepted, and that if the offer still stood for him to advise me his wife's name and I would make out the necessary papers and order the abstract. I had letter right back telling me his wife's name and I made out the deed on October 26, 1945, and mailed to you to be executed and returned and had been expecting it ever since. I have Mr. Davis' notes and mortgage in my office awaiting the return of the deed and abstract and I see no way around the matter. Mr. Davis has taken out

insurance on this property and had mortgage clause attached which I am enclosing. I am also enclosing a mortgage for $1,500, and 3 notes for $500 each due November 1, 1946-1947 and 1948, etc."

January 22, 1946, an attorney for A. P. Williams wrote Manar: "On January 9, 1946, for the first time Mr. Williams saw the abstract of title and title papers concerning the farm involved, and he thereupon learned that title to the property does not stand in his name, etc."

Thereafter, appellant, Mary W. Williams, and her husband, A. P. Williams, refused to carry out the contract to sell the farm to appellees and the present suit was begun December 28, 1945.

January 15, 1946, Mary W. Williams filed for record in Faulkner county, a deed conveying the land here involved to her. This deed had been executed by H. W. Williams and his wife November 20, 1937, and Mary W. Williams testified that she had no information about the execution of this deed until January 9, 1946, when she found it in her safe deposit box. We quote from her testimony (taken by deposition): "When did you first see and examine said deed, or instrument, and assert your title to said lands? Explain. Ans. January 9, 1946. It was placed in my safe deposit box in Rockford, Illinois, by H. W. Williams during his lifetime, but I did not know of this deed until I examined the contents of the box on January 9, 1946."

The original deed was in evidence and the Chancellor found that it bore "unmistakable evidence of having been handled many times." Only a copy of the deed appears in the record here.

Appellant also testified that in December, 1945, she visited the farm in question in Faulkner county and made a partial inspection. She made no further explanation of her purpose in visiting the farm.

We quote from the Chancellor's findings: "Mrs. Williams testified that she had no knowledge of her ownership of the land until January 9, 1946, when she exam-

ined the contents of her lock box in which, she says, the deed had been placed by her brother-in-law during his lifetime. Acting upon the theory that her husband was the owner of the land, and that she had only an inchoate right of dower, she appears to have been willing to join her husband in a conveyance of the land which he, with her knowledge and consent, had contracted to sell to Davis on the terms agreed upon. She did all the correspondence, and thereby participated in the negotiations for the sale of the land regardless of whether it belonged to her husband or to her, and while her testimony is undisputed by any direct testimony that she was acting under a misconception of the fact that she was the owner, her testimony is strangely contradicted by the fact that the deed under which she asserts title was executed, on November 20, 1937, and that she knew nothing about it until January 9, 1946. . . . Her participation in the negotiations of her husband to accomplish a sale of the land, and the fact that she must have known during these negotiations that the title rested in her amounts to an estoppel on her part to avoid the contract of sale."

After a review of all the testimony, we are unable to say that these findings of the trial court are against the preponderance of the testimony. It must be remembered that since Mary W. Williams was a party to this action and interested in the result, her testimony cannot be regarded as undisputed. *Bell* v. *Lackie,* 210 *Ark.* 1003, 198 S. W. 2d 725.

It seemed unreasonable to the Chancellor, as it does to us, that this deed under which appellant claims the title to this farm could have been placed in her safe deposit box, without her knowledge, some time between 1937, the date of its execution, and January 9, 1946, when she claims she first discovered it. According to her own testimony, this deed "was placed in my safe deposit box." Just how H. W. Williams, or anyone else, could get into this box, she does not explain. She makes no contention that the box was held jointly by her and H. W. Williams. She knew of the negotiations with appellees leading up to

the agreement to sell the farm from the very beginning. All was done with her knowledge and consent. She did part of the correspondence.

In the circumstances, as indicated, we think the Chancellor's finding that she was estopped to assert that she did not know she owned the land is not against the preponderance of the testimony.

This court in the very early case of *Jowers* v. *Phelps, ad.,* 33 Ark. 465, had this to say on the question of estoppels *in pais*: "Estoppels *in pais,* depend upon facts, which are rarely in any two cases precisely the same. The principle upon which they are applied is clear and well defined. A party who by his acts, declarations, or admissions, or by failure to act or speak under circumstances where he should do so, either designedly, or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed, afterwards, to come in and assert his right, to the detriment of the person so misled. That would be a fraud. But it is difficult 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. . . . The leading idea is that a person shall not do, or omit to do, anything regarding his rights, which if taken advantage of by him, would work a fraud upon another; but, in this as in all other cases involving fraud, the exact limits and boundaries of fraudulent conduct are left undefined, to be applied by the Chancellor to the facts before him. . . . To stand by and see a sale to an innocent purchaser would be, however, a breach of moral duty, unless the owner meant to abide by it."

Appellant argues here, however, that appellees could not avail themselves of the defense of estoppel for the reason that it was not specially pleaded. It is true that, as a general rule, estoppel must be pleaded to be available as a defense to a claim; however, there is a well defined

exception that arises, as in the present case, when "the estoppel or waiver is admitted in evidence or becomes an issue without objection at the time that it was not pleaded, this objection that it was not pleaded is waived and the estoppel is as conclusive as if pleaded specially, whether it is an estoppel *in pais,* a waiver, etc." 19 Am. Jur., p. 850, § 197.

In this case there were no objections to the evidence bearing on the question of estoppel, on the ground that it had not been pleaded, and therefore it was within the sound discretion of the trial court to treat the pleadings as amended to conform to such proof.

This court in *Brotherhood of Railroad Trainmen* v. *Long,* 186 Ark. 320, 53 S. W. 2d 433, held: (Headnote 6) "Where no objection was made to proof of an estoppel on the ground that it had not been pleaded, it was not an abuse of discretion to treat the pleadings as amended to conform to such proof." See, also, *Anglin* v. *Marr Canning Company,* 152 Ark. 1, 237 S. W. 440.

While the two cases just referred to were suits at law, estoppels *in pais* may be set up the same in law as in equity.

In *Thomas* v. *Spires,* 180 Ark. 671, 22 S. W. 2d 553, we said: "As a general rule an estoppel *in pais* may be set up in actions at law as well as in suits in equity."

Finding no error, the decree is affirmed.

GAMBILL *v.* WILSON.

4-8198 202 S. W. 2d 185

Opinion delivered May 19, 1947.

Barrett & Wheatley, for appellant.

Foster Clarke and *Roy Penix,* for appellee.

SMITH, J. This is a suit in ejectment involving an eight-acre tract of land lying between the adjoining farms of appellant Gambill, defendant below, and appellee, Wilson, the plaintiff below. Inasmuch as the cause was heard with the consent of the parties by the court sitting as a jury, we must give the testimony tending to support the court's finding its highest probative value in determining the question of fact upon which the cause was decided, that is whether plaintiff was estopped to assert title. The court below held that he was not, and rendered judgment accordingly, and from that judgment is this appeal.

We, therefore, state the case as Wilson, the plaintiff, testified. He purchased a 200-acre tract of land and under a misapprehension as to its south boundary took possession of the land in litigation, cleared and cultivated it for a period of 10 years under claim of title, but he never at any time paid any taxes thereon. The land in question was assessed for taxation under the description: Pt. southwest quarter, northwest quarter, section 20, township 15 north, range 5 east, and was sold under that description for the non-payment of the 1928 general taxes. The land was certified to and purchased from the State by one Burton, and the deed to him employed the same defective description under which it had been sold for taxes, but Burton conveyed the land to Gambill under a correct description. Wilson knew nothing of the tax sale and the deed from the State until in February preceding the trial. He attempted to buy the land from Burton, who asked $400 for his deed, a price he was not willing to pay. Prior to this tax sale Gambill, who like Wilson was unaware of the correct line between their adjoining farms, attempted to buy the eight acres from Wilson, who declined to sell.

Gambill knew nothing about the tax deed until Wilson told him about it, and Wilson said to Gambill, "I'll see John [Burton]. If he won't let me have it you get it if you can. I ain't going to pay him $400 for it."

Gambill and Wilson had agreed to build and to divide the cost of a fence on the south side of the land, and this fence, if built, would have enclosed the land as a part of Wilson's farm. There had been no dispute as to the boundary line between Gambill and Wilson, but Wilson admitted that the tract in litigation was not a part of the land which he had purchased, and for which he had a deed, and he was aware of the fact "that it was cut off of Gambill's forty acres" before the occurrence of the incidents on which Gambill bases his plea of estoppel. Wilson admitted that he told Gambill that he was unable to trade with Burton, and that "for him

to go ahead and get it'' and Gambill then bought it from Burton for $300 and he had an abstract of the title made which cost him $25.

Now before either party was aware that Burton had obtained the deed from the State, they had bought the material to build a fence on the south side of the eight-acre tract. Gambill did obtain a deed from Burton and so advised Wilson, and they together proceeded to build a fence, not on the south line as originally intended, but on the north line, the result being that the eight-acre tract was enclosed and became a part of Gambill's farm.

Wilson testified that when he learned that the land to which he had no record title had been sold to the State for taxes, which he had not paid, he supposed he had lost the land and that as he was unable to trade with Burton he so advised Gambill, and that at his suggestion Gambill bought it. Later he was advised that he had not lost his title. This opinion was no doubt based upon the correct assumption that the deed from the State to Burton was void because of the defective description of the land and Wilson, after being so advised, brought this suit to recover possession of the land which had become a part of Gambill's farm by building the fence referred to. As has been said Wilson assisted Gambill in building the fence.

Wilson was correctly advised under the facts stated, that he had acquired title to the eight-acre tract by reason of his adverse possession, and further that the deed from the State was void because of the defective description of the land in that deed.

The judgment should therefore be affirmed unless under the facts stated Wilson has estopped himself to question the validity of the title, which according to his own admission he had induced Gambill to buy.

Numerous cases are cited and quoted from in the briefs of opposing counsel, and among others *Thomas* v. *Spires,* 180 Ark. 671, 22 S. W. 2d 553, and *Lacey* v. *Humphres,* 196 Ark. 72, 116 S. W. 2d 345, and it is upon

the second of these cases that Gambill chiefly relies. Each of these cases recognized and stated the law to be that the plea of estoppel *in pais* is available in actions at law as well as in suits in equity.

There is some similarity of facts in each of these cases to the instant case, in that one person had induced another to buy land. The plea of estoppel was sustained in the case last cited, but not in the first, and it is upon the case first cited that Wilson chiefly relies for affirmance of the judgment here appealed from.

In both cases there had been a forfeiture to the State for the non-payment of the taxes due thereon, and while it is true that the land owner in each case thought he had lost his land by reason of the forfeiture, there is a distinction between the case of *Thomas* v. *Spires, supra,* and the instant case. In the first case it was said that the testimony was sufficient to raise a question for the jury whether the land owner had induced the purchaser to buy upon the representation that he had abandoned all claim to the land, inasmuch as he had testified that it was his intention to keep the land if he could get someone to redeem it for him.

Here the testimony is undisputed that Wilson abandoned the land and placed Gambill in possession of it. He did this by assisting in building a fence which enclosed the land as a part of Gambill's farm. In this connection it may be said that according to the undisputed testimony, Wilson was advised soon after obtaining a deed to the 200 acres which he now owns, that his deed did not cover the eight acres here in litigation, and that it was in fact a part of the tract of land to which Gambill had title.

One Darr, a neighbor and friend of Wilson, was called by Wilson as a witness, and it was Darr who told Wilson that Burton had a deed to the eight-acre tract. Darr testified that he told Wilson about the deed and "He [Wilson] said he would as soon Burton had it [the land] as anybody else, as it was not his." Wilson admitted that he knew that the eight-acre tract was, as

he expressed it, "cut off before Gambill bought it," but that Gambill had made no claim to it. In other words, the eight-acre tract had been a part of the land described in the deed under which Gambill acquired title to the land adjoining that of Wilson.

Wilson attempts to identify this case with the case of *Thomas* v. *Spires, supra,* and to distinguish it from the case of *Lacy* v. *Humphres, supra,* by saying that "Wilson never at any time indicated that he was abandoning the land, and was not going to pay the taxes on it." But Wilson admitted that he never at any time paid the taxes on it, this for the reason, no doubt, that it was not included in the description of the land to which Wilson had a paper title. And the undisputed testimony shows that Wilson did abandon the eight-acre tract, and he did this by assisting in building a fence which separated the eight acres from his land and enclosed it as a part of Gambill's farm. After Gambill had purchased the eight acres from Burton, he and Wilson were uncertain as to the boundary line of this tract and they called Darr in to assist in locating the line, and the new fence was located in accordance with this survey.

The undisputed testimony shows that after telling Darr that the eight acres did not belong to him, and that he would as soon Burton had it as anyone else, Wilson advised Gambill that he had lost this land, and that it could be purchased by anyone willing to pay the price which Burton asked, but which he was unwilling to pay.

This is not a case where Gambill acted independently of Wilson, or where there was mere silence on Wilson's part when he should have spoken, but it is a case where Wilson induced Gambill to buy the land and this conduct on Wilson's part was voluntary and originated with Wilson and not with Gambill. Certainly Gambill did nothing to mislead Wilson, who was in full possession of all the facts and acted on his own judgment in suggesting that Gambill buy the land.

The briefs of opposing counsel cite many cases dealing with the question of estoppel *in pais* and a number

are cited in the case of *M & P Bank* v. *Citizens' Bank,* 175 Ark. 417, 299 S. W. 753. Chief Justice HART there quoted and approved the following statement from the case of *Trapnall* v. *Burton,* 24 Ark. 371: "A man is estopped when he has done some act which the policy of the law, or good faith, will not permit him to gainsay or deny; and when the principle of estoppel is understood, and unwise legislation or decision does not push the doctrine beyond reasonable limits, it is one of the wisest and most just and righteous doctrines of the law. The whole principle of equitable estoppel is that, when a man has deliberately done an act or said a thing, and another person, who had a right to do so, has relied on that act or word, and shaped his conduct accordingly, and will be injured if the former can repudiate the act or recall the word, it shall not be done; but, of whatever things the act was evidence, in the nature of things, and on ordinary principles, it shall be taken to be conclusive evidence; and what was said, the party shall not deny to have been true."

We conclude in the application of these legal principles to the facts herein recited that the judgment should have been rendered in appellant's favor. The judgment from which is this appeal will therefore be reversed, and the cause remanded with directions to set aside the judgment from which is this appeal, and dismiss the case.

DARNELL *v.* SMITH.

4-8206 202 S. W. 2d 362

Opinion delivered May 19, 1947.

Merle Shouse and *J. Loyd Shouse,* for appellant.

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

McHaney, Justice. Appellant and his former wife were married in this State in 1938. A girl child, Juanita Elaine, was born to them in 1939. Appellant divorced his former wife by decree of a Florida court on February 2, 1943, the ground thereof being adultery, and the custody of their little girl was awarded to him. He was then and had been for some time serving in the U. S. Navy. The former wife had left the baby with appellees, her stepfather and her mother who lived in Searcy county, and had gone to Key West, Florida, where appellant found her living in adultery with another man whom she later married. Appellant left the child with appellees and returned to his service in the Navy, sending her about $100 per month for her support. In July, 1944, appellant took the child to his own home, he having married again. In December, 1945, he established his home on a farm in Boone county where he is now living with his present wife, a child by her, and Juanita Elaine.

This action for the custody of Juanita Elaine was brought by his former wife. On May 10, 1946, the court entered a decree awarding its custody to appellant, its father, with the privilege of visitation on the part of the mother; that the grandparents be permitted to visit with said child and have it visit with them at reasonable times,

especially in the school vacation in the summer it should be permitted to visit in their home for as much as three weeks. In this decree is this clause: "All parties hereto are enjoined from removing said infant beyond the jurisdiction of this court without permission of the court."

On October 31, 1946, appellees filed an intervention in the cause for the modification of said decree, praying that they be permitted to have the child visit in their home from Friday afternoon to Sunday afternoon one week end per month, at least one-half of the Christmas holidays and for the entire summer vacation. Appellant contested their right to this division of the custody of his child on the grounds that there was no change in conditions to justify same, and that as her father and in her best interests he ought to have the eclusive right to direct her social and educational life without interference from third persons.

After an extended hearing and on November 13, 1946, the court granted appellees, interveners, the right to have the custody of said child in their home from Friday afternoon to Sunday afternoon the last week end of each month during the school term. From this order comes this appeal which was filed here February 6, 1947.

Thereafter, on April 21, 1947, appellant filed in the trial court a petition to modify the decree of November 13, 1946, in so far as it provides that said child visit with appellees during the last week end of each month and the former decree restraining him from removing said child from the jurisdiction of the court. He set up changed conditions, not necessary here to enumerate, which require him to remove to Farragut College and Technical Institute for a training course in forestry, to qualify him for a position with the Forestry Service of the U. S., available to him under the G. I. Bill of Rights, at government expense. It is an emergency situation that requires immediate acceptance. Provision is made for his family including the child here involved. The court declined to "pass upon said motion at the present time while the cause is pending on appeal in the Supreme Court: that

the motion should be taken under advisement until the cause is reached and determined by the Supreme Court." An appeal therefrom was allowed by the clerk of this court on April 30, 1947, and has been consolidated for consideration with the former appeal.

We think the court erred in modifying its decree of May 10, 1946, wherein the exclusive custody of said child was given to its father, appellant. By that decree appellees were given all the right over said child to which they were entitled, to visit it and have it visit with them in their home at reasonable and convenient times. There is no showing here that appellant is an incompetent or unfit person to have the exclusive custody of his own child. There is no showing that he is unable to provide for her physical, mental or moral training essential to her well being. On the contrary it is shown that he is living in a comfortable rural home, providing for her and his family the comforts and many of the conveniences of life, including the sending of her to school, church and Sunday school. He provided for her when she was living with appellees, while serving his country, to an extent far in excess of her needs.

As between the father and the grandparents, it was held, in *Baker* v. *Durham*, 95 Ark. 355, 129 S. W. 89, that "by statute, as well as at common law, the father, unless incompetent or unfit, is the natural guardian of his minor children, and entitled to have their custody and the care of their education," headnote 1. See, also, *Verser* v. *Ford*, 37 Ark. 27; *Herbert* v. *Herbert*, 176 Ark. 858, 4 S. W. 2d 513. Appellant is, therefore, entitled to the unrestricted custody of his child Juanita Elaine and the trial court erred in modifying the original decree so as to give appellees her custody a part of the time.

While there was no thought on appellant's part that a condition might arise in the near future that would necessitate his and his family's removal from the jurisdiction, and the consequent removal of said child therefrom, at the date of the original decree, May 10, 1946, we think the appeal from the modification decree of Novem-

ber 13, 1946, brings the whole record before us, including the decree of May 10, and we think under the peculiar and extraordinary circumstances that have arisen since November 13, the injunction against her removal by appellant, if so intended, should be dissolved.

The appeal on appellant's motion to modify which has been consolidated with the original appeal is not from a final and appealable order. We treat it as a motion to advance and for an immediate mandate.

The decree of November 13 is reversed with directions to enter a decree in accordance with this opinion, to dissolve the injunction as to appellant, and an immediate mandate is ordered.

ED. F. MCFADDIN, Justice, dissenting. My dissent goes to those parts of the majority opinion which hold: (1) that the appeal from the order of November 13, 1946, brings up also for review the order of May 10, 1946; and (2) that the injunction provision in the order of May 10, 1946, can now be set aside by this court in its present opinion. I discuss these points.

I. The chancery court entered an order on May 10, 1946, awarding custody of the child to the father. No appeal was prosecuted; and time for appeal lapsed. Then, on November 13, 1946, the chancery court entered an order modifying the order of May 10, 1946; and this appeal is from the November order. Such appeal can give this court no authority to vary the May order: yet that is exactly what the majority is doing in this case.

II. In the order of May 10, 1946, the father was enjoined from removing the child from Arkansas. Because of a situation arising even after the November, 1946, order, the father now wants to take the child to Idaho. So the father filed in the chancery court on April 21, 1947, a petition to strike out from the order of May 10, 1946, the injunction against removal of the child from the State of Arkansas. The chancery court postponed consideration of this motion until the Supreme Court had decided the appeal involving the November decree. From

the order of the chancery court of April 30, 1947 (postponing consideration of the motion of April 21, 1947), the father has appealed to this court. The majority holds (and correctly) that the chancery court order of continuance is not appealable; but the majority then grants the father the same full relief from the injunction against removal of the child from this state, as the father prayed in the chancery court motion, which was not appealable. So, the majority of this court—in granting the father such relief—must have done so on the theory that the father could have filed an original proceeding in this court. The Supreme Court is an appellate court, not a court for original proceedings in child custody cases. I think the majority should have left to the chancery court the right to hear and determine the father's request for permission to remove the child from Arkansas, and the Supreme Court should have taken no action on that issue until the chancery court had acted, and had made an appealable order, which had been duly appealed.

For the reasons herein stated, I dissent from those parts of the majority opinion contrary to the views herein expressed; and I am authorized to state that Mr. Justice MILLWEE joins me in this dissent.

MYERS *v.* MYERS.

4-8187 202 S. W. 2d 596

Opinion delivered May 26, 1947.

D. D. Panich, for appellant.

Chas. B. Thweatt, H. B. Stubblefield and *Cooper Thweatt,* for appellee.

HOLT, J. Ed. I. Myers, father of appellee, Lyla Myers, died testate in February, 1938. He left surviving his widow, Effie M., and three children, Rhea B., Correze and Lyla, appellee. Under his will, he left practically all of his property, including a business operated under the name of Ed. I. Myers Company, to his widow, Effie M. Myers.

Mrs. Effie M. Myers took over the business, which she found in debt, and after acquiring and adding a beer distributing business and putting some personal funds into it, she, with the help of her son, Rhea, and Lyla, operated it profitably.

On January 1, 1941, Mrs. Effie M. Myers, Rhea and Lyla entered into the following contract or agreement: "That Ed. I. Myers departed this life in February, 1938, leaving his entire estate, including the business of Ed. I. Myers, to Effie M. Myers, his wife; that she continued the operation of the business and R. B. Myers devoted his entire time and attention to the operation of the business for himself, Effie M. Myers, his mother, and Lyla M. Prather, his sister, who also assists him there.

"That it is desirable to enter into a memorandum for the purpose of dividing any profits from the operation of

the business. That it is mutually agreed that R. B. Myers serve as manager of the business. Lyla M. Prather agrees to perform such services as she may be called upon; that all profits derived from the operation of the business, after paying all expenses, shall be divided as follows: 35 per cent. to Effie M. Myers, 40 per cent. to R. B. Myers, 25 per cent. to Lyla M. Prather.

"That accurate statements of the business shall be furnished to Effie M. Myers at any time she may request such information, and annually; that Ernest E. Long be retained as bookkeeper; that drawing accounts for each of the parties be agreed upon from time to time, to be charged against their respective distribution from the profits; that the agreement remain in full force for a period of five years from date, and thereafter, until rescinded in writing, by one or more of the parties.

"The agreement is dated January 1, 1941, and is signed by Effie M. Myers, R. B. Myers, and Lyla M. Prather (now Lyla Myers)."

They operated under this instrument, dividing all profits as provided therein, until the death of Effie M. Myers July 29, 1944.

Mrs. Myers died testate and under the terms of her will, with the exception of $10 devised to each of her two sons, Rhea B. and Correze, and $1,000 to E. E. Long, a relative and bookkeeper of the company, Lyla Myers was her sole beneficiary.

Following their mother's death, Rhea and Lyla operated the Ed. I. Myers Company until Rhea's death May 1, 1945, under an oral agreement or contract, to operate it on a 50-50 partnership basis.

For approximately one month after Rhea's death, appellant, Grace Myers, Rhea's widow, took charge of the business and operated it until June 1, 1945, when she procured, in her own right, the beer distributing franchise, took over and asserted ownership of all the assets of the Ed. I. Myers Company, and began operating under the name of "Country Club Distributing Company."

Mrs. Ed. I. Myers on July 1, 1943, signed and delivered a bill of sale reciting a transfer to Rhea B. Myers of all her right and interest in the Ed. I. Myers Company for a recited consideration of $10 "and other good and valuable consideration."

Prior to the filing of the present suit the parties, in an effort to settle their interests in the Ed. I. Myers Company, entered into a written contract whereby Grace Myers placed $30,000 in a Little Rock bank to secure appellees' interests. It was agreed that an audit of the books and records of the company should be made and to this end, an accountant was employed and paid a fee of $1,050, out of this $30,000 fund, which left a balance of $28,950. The audit dated September 14, 1945, showed the interests of the parties as of May 31, 1945, to be as follows: "Estate of Mrs. Ed. I. Myers—$8,999.81, Estate of R. B. Myers—$31,605.92, Lyla Myers—$32,906.49, Total —$73,512.22."

Following this audit, the parties were still unable to agree upon a settlement of their interests and this suit was filed August 30, 1945, by Lyla Myers, individually and as sole devisee (except $1,020) and as executrix of the estate of her deceased mother, Mrs. Ed. I. Myers, against Grace Myers individually and as sole devisee (except $200) and as executrix of the estate of her deceased husband, Rhea B. Myers, to recover appellees' interests in the assets of the Ed. I. Myers Company.

Appellees sought an accounting, the appointment of a receiver, payment of all debts, division of assets and for all proper relief. Appellants answered with a general denial. After an extended hearing, the trial court found, in effect, that the instrument signed by Mrs. Effie Myers, Rhea B. and Lyla on January 1, 1941, was a contract creating a partnership arrangement under which they operated until Mrs. Effie Myers' death July 29, 1944; that the bill of sale, *supra,* was canceled by mutual agreement of Mrs. Effie Myers and her son, Rhea, soon after it was signed; that they never operated under it and that it never went into effect, and "that the sole consideration

for said bill of sale was a note for $3,500 signed by Rhea B. Myers, payable to Mrs. Ed. I. Myers, 120 days after date, which note was not paid, was treated of no effect and destroyed"; that following Mrs. Effie Myers' death, Lyla and Rhea entered into an oral partnership agreement under which they owned and operated the Ed. I. Myers Company, each receiving one-half of the profits, until Rhea died May 1, 1945, and thereafter that Grace Myers operated said business until June 1, 1945.

The court further found that the parties on June 2, 1945, entered into the contract as above, wherein appellants placed $30,000 in a local bank for the purpose of securing appellees' interests; that thereafter the parties agreed that appellants might retain all assets of the Ed. I. Myers Company, except the $28,950, *supra,* and that appellants would pay in cash any amounts adjudged to be the value of appellees' interests and fixed a first lien on the assets of the business in appellees' favor.

It further found the interests of the parties to be as that found by the auditor and set out in his report, *supra.*

Accordingly, the court decreed that Lyla Myers, as executrix of the estate of Mrs. Effie Myers, deceased, have judgment against appellants in the amount of $8,999.81, and that Lyla Myers, in her own right, have judgment against appellants in the amount of $32,906.49, and that appellees "have a specific lien on the fund of $28,950 and on all assets of the business, to secure the payment of the judgments."

From the decree comes this appeal.

Appellants say that "the sole question presented is whether or not there existed a partnership between R. B. Myers, during his lifetime, and his sister, Lyla Myers, in the operation of the business known as 'Ed. I. Myers Company.' "

They argue that no partnership existed and in support thereof "that R. B. Myers purchased the business of Ed. I. Myers Company from his mother, Mrs. Effie M.

Myers, on July 1, 1943, by bill of sale, for a valuable consideration," and that appellants owned the business thereafter.

The trial court found from the competent testimony before it that there was a partnership, first among Mrs. Effie Myers, Rhea and Lyla, and between Rhea and Lyla after Mrs. Effie Myers' death, and that this bill of sale, upon which appellants rely, was rescinded by Rhea and his mother by mutual agreement and never became effective.

A large amount of testimony was introduced by the parties on the question of a partnership and whether this bill of sale had been rescinded. Much of this testimony was conflicting, and some incompetent, as was held by the court and admitted for the record only. However, the following significant acts of the parties, which in the circumstances speak louder than words, are undisputed:

After the bill of sale was executed July 1, 1943, Mrs. Effie Myers, Rhea and Lyla continued to operate the business under the contract of January 1, 1941, until Mrs. Effie Myers' death, July 29, 1944, dividing the profits among them on a basis of 35 per cent., 40 per cent. and 25 per cent., as the contract provided, and following Mrs. Myers' death, Rhea and Lyla continued to operate the business on an oral partnership basis of 50 per cent. of the profits to each.

There was no change in the method by which the books and records of the Ed. I. Myers Company were kept following the date of the bill of sale.

From the date of the January 1, 1941, contract until Rhea B. Myers died May 1, 1945, returns for Federal income tax purposes were made to the Government by Rhea B. Myers on a partnership basis.

When these facts, along with the remaining testimony, are considered, we cannot say that the findings of the Chancellor that the bill of sale in question was rescinded and never became effective and that the parties

operated as a partnership are against the preponderance of the testimony.

In *Afflick* v. *Lambert,* 187 Ark. 416, 60 S. W. 2d 178, this court said: "It is well settled that the parties to a contract may at any time rescind it in whole or in part by mutual consent, and the surrender of their mutual rights and the substitution of new obligations is a sufficient consideration," and in the more recent case of *Ferguson* v. *C. H. Triplett Company,* 199 Ark. 546, 134 S. W. 2d 538, we said: "The law is settled in this state that while parol testimony cannot be received to vary the terms of a written contract, parol testimony is admissible to show that the written contract has been rescinded and an oral contract made. It is frequently impossible to show that a contract had been abandoned and a new one made, except by oral testimony."

We conclude, therefore, that on the whole case the findings of the court are not against the preponderance of the testimony and accordingly, the decree thereunder should be, and is, in all things affirmed.

OZARK PACKING COMPANY *v.* STANLEY.

4-8176 202 S. W. 2d 352

Opinion delivered May 26, 1947.

Jeta Taylor, for appellant.

Yates & Yates, for appellee.

McHaney, Justice. Since the appeal in this case was lodged here, the death of appellee is suggested and conceded, and, by agreement the cause has been revived in the name of Jean Casey as administratrix of his estate.

Intestate brought this action against appellants to recover damages for the death of two of his dairy cows and the illness of other dairy cows caused, as alleged, by their eating of deleterious sweet potatoes dumped on his farm by appellants' employees without his permission, consent or knowledge, in a place where said cows could

and did get access to them. The potatoes were alleged to be decaying and rotten, that the cows did eat thereof, became sick, from which two of them died. The answer was a general denial. Trial resulted in a verdict and judgment against appellants in the sum of $250. This appeal followed.

For a reversal of the judgment, appellants first contend that the court erred in refusing to direct a verdict for them at their request which was made when intestate rested and again at the conclusion of all the testimony. When we view the evidence in the light most favorable to intestate as we do, we cannot say, as a matter of law, there was no substantial evidence to support a verdict in his favor. It is undisputed that about two tons of cull sweet potatoes were dumped on his land, in his enclosure, by the employees of appellants, and the proof is substantial that many of them were decaying and rotten. It is also undisputed that this dumping was done, without intestate's knowledge or consent, at the request of another employee of appellants, Doyle Seels, who was renting from and living in a house belonging to, or under intestate's control, and about 50 yards from said house, on enclosed land not under the control of Seels. The cows were in an adjoining pasture and gained access to the potatoes and ate some of them some ten or twelve days after they were dumped in the field. The cows broke out of the pasture during a rain and thunder storm. Our statute, § 3206 of Pope's Digest, makes it "unlawful for any person to dump or unload any trash, junk or waste of any kind upon the premises or property of another person or persons without written consent from owner of such premises or property . . . " Violation is declared to be a misdemeanor and subject to a fine of from $10 to $500. Section 3207.

This statute was violated. It is not contended that intestate consented to the dumping either orally or in writing. It is argued that he learned that the potatoes were there a day or two after they were dumped in his field and should have removed them or because he failed

to do so he was guilty of contributory negligence. We cannot agree that such a result should follow from the wrongful and unlawful act of appellants in dumping the potatoes on intestate's land. He might have required them to remove the potatoes, or he might have removed them himself at their expense. He did remove some of them and intended to remove them all, but the damage was done before he could do so.

We think a case of liability was made for the jury, and that the cases cited by appellants are not in point. They are personal injury cases.

Another argument against the right to recover is that there is no substantial evidence that the loss of his cattle was due to eating the potatoes. We cannot agree. Intestate testified that one of the cows became sick the next day after he saw them eating the potatoes (after the storm) and one the next evening. We think the jury had the right to draw the inference that eating the rotten potatoes caused the damage, especially in the absence of any suggestion of other causes. The cows got to the potatoes only one time and were sick shortly afterwards. Also it is argued that the dumping of the potatoes where they were dumped was not the proximate cause of the injury. This question was submitted to the jury in instruction No. 1, as modified by the court, and we think properly. In *Hook, Admr.*, v. *Reynolds*, 203 Ark. 259, 156 S. W. 2d 242, we held that to constitute proximate cause of an injury, "it must appear that the injury was the natural and probable sequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." The fact that the cattle broke out of the pasture during a thunder storm some days after the potatoes were dumped and ate of them is not such an intervening cause as to justify the court in holding, as a matter of law, that the wrongful act was too remote.

Error of the court is also argued in the failure to define "proximate cause." A sufficient answer is that appellants did not request the court to define the term.

There is also the contention that instruction No. 2, as modified, is erroneous, on the measure of damages, in directing the jury "to take into consideration the value of the dairy products, if any, lost by plaintiff by reason of the sickness, if any, of his other dairy cows." We consider this in connection with appellants' contention that the verdict and judgment are excessive. There was a verdict and judgment for $250. Intestate's testimony would justify a verdict for $200 for the death of the two cows and $7 for doctor and medical bills. We think the evidence as to the value of the dairy products lost is too indefinite and uncertain to establish a loss of $43. His testimony as to the loss of dairy products was that before they ate the potatoes he was getting about $50 per month from all his cows and that the two that died were his best cows. After their death he got from $15 to $18 per month. The proof does not establish that the decline in production was caused by the sickness of the other cows. It was no doubt caused by the loss of the two best cows that died. This part of the judgment cannot be sustained.

The judgment will, therefore, be reduced by $43 and affirmed for $207 with interest from June 29, 1946, at 6%.

STROUD AND FOREHAND *v.* STATE.

4444 202 S. W. 2d 354

Opinion delivered May 26, 1947.

Boyd Tackett and *Thomas M. McCrary,* for appellant.

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

ED. F. MCFADDIN, Justice. Separate informations were filed by the prosecuting attorney in the Polk Circuit Court charging each of the appellants with the crime of grand larceny. The information against Stroud read in part: "The said defendant N. B. Stroud, on the 6th day of August, A. D. 1946, in Polk County, Arkansas, did unlawfully, willfully and feloniously steal, take and carry away a certain yearling calf, the property of Amond Hamby, . . ."

The information against Forehand read in part: "The said defendant Marvin Forehand, on the 6th day of August, A. D. 1946, in Polk County, Arkansas, did unlawfully, willfully and feloniously steal, take and carry away a certain yearling calf, the property of Amond Hamby, . . ."

Over the objections and exceptions of the defendants, the trial court consolidated the two informations and tried the defendants jointly. The objections and exceptions of each and both of the defendants were duly and seasonably made and preserved of record. The defendants were both convicted; and in the motion for new trial they assigned as error the action of the court in making the order of consolidation. The motion for new trial contained a total of 37 assignments; but we discuss only those assignments involving the order of consolidation.

The circuit court committed reversible error in consolidating the informations, and trying the defendants jointly. What we said in *Morton and Ashcraft* v. *State,* 207 Ark. 704, 182 S. W. 2d 675, is directly in point. There, separate informations were filed against Morton and Ashcraft, and the trial court consolidated the cases over the defendants' objections and exceptions duly and seasonably made. We said: "We think it was error to have consolidated and tried these informations together, over the objections of appellants." And, again, we said: "The electors did not, by Initiated Act No. 3,* confer the

* (Acts 1937, p. 1384.)

discretion to order the consolidation for trial of indictments against defendants separately indicted.''

We reversed the judgments of conviction against Morton and Ashcraft because of the consolidation, and that holding is ruling in the case at bar; so, because of the consolidation, made over the seasonably offered and duly preserved objections and exceptions of the defendants, the judgments in this case are reversed, and the causes remanded.

MORGAN *v.* COOK, COMMISSIONER OF REVENUES.

4-8211 202 S. W. 2d 355

Opinion delivered May 26, 1947.

Shaver, Stewart & Jones, for appellant.

Bruce T. Bullion, for appellee.

MINOR W. MILLWEE, Justice. This is a suit by appellant, Harmon Morgan, to enjoin appellee, Commissioner of Revenues for the State of Arkansas, from the collection of taxes on appellant's income for the year 1943.

On October 10, 1946, appellee notified appellant in writing that he had failed to file an income tax return for the year 1943; that information coming to the Revenue Department revealed that appellant had earned a net income of $12,737.73, upon which there was due the State of Arkansas taxes, penalty and interest in the sum of $370.49, payment of which was demanded. Appellant protested the demand and a hearing before the Commissioner resulted in rejection of appellant's claim of exemption and a renewal of the demand for payment of the tax. Appellant then filed this suit in the Miller Chancery Court to enjoin appellee from enforcing the demand for payment of any part of the tax, penalty and interest assessed against him.

Appellant alleged in his complaint that he was a resident and citizen of Texarkana, Arkansas, and derived his entire income from the operation of a clothing store in Texarkana, Texas; that appellee sought collection of the tax under and by virtue of the provisions of Act 162 of 1943; that said act is unconstitutional and void in its entirety because of the proviso contained in § 2 which states that no income arising from the use, production or sale of real estate, situated in another state, but owned by a resident of Arkansas, should be included in the income of such resident for income tax purposes; that said proviso rendered said Act 162 unconstitutional for numerous reasons set forth in the complaint.

In his answer appellee admitted most of the allegations of the complaint. He denied that the tax against appellant was sought to be assessed and collected under Act 162 of 1943 and specifically alleged that such tax was assessed and sought to be collected pursuant to the provisions of Act 118 of 1929 as amended. The answer also denied the allegations of the complaint relating to the alleged unconstitutionality of Act 162 of 1943.

The cause was heard by the Chancellor upon the pleadings and a stipulation in which it was agreed that appellant at all times mentioned was a resident and citizen of Texarkana, Miller county, Arkansas, and during 1943 and subsequent years has derived his entire income from the operation of a clothing store located in Texarkana, Texas, which is his sole place of business; that it is the duty of appellee to administer the Income Tax Act (Act 118 of 1929) as amended and supplemented by Act 162 of 1943, and by other statutes; that during 1943 appellant received a net taxable income of $12,737.73 from the aforesaid business conducted in the State of Texas and this amount was his only income for that year; that in 1943 appellant paid a poll tax and personal and real property taxes, including taxes on his home, in Miller county, Arkansas; and that he paid personal property taxes in Texas on the aforesaid store merchandise and fixtures, including taxes imposed by the state, county and municipal authorities of that state. The written notice and demand for payment of the tax, penalty and interest together with the rejection of appellant's claim of exemption were attached to and made a part of the stipulation.

A decree was entered dismissing the complaint of appellant and ordering payment of the delinquent tax, penalty and interest due the State of Arkansas in the sum of $370.49. The decree contains the following findings made by the trial court:

"1. That plaintiff is now, and was during the entire year of 1943, a citizen and resident of the City of Texarkana, Miller county, Arkansas;

"2. That plaintiff now receives, and received during the year of 1943, his entire income from the operation of a clothing store which is located in Texarkana, Texas;

"3. That no part of plaintiff's income for the year 1943 was derived from the use, sale or production of real property located outside the State of Arkansas;

"4. That under this set of facts the plaintiff owes and should pay to the State of Arkansas an income tax

on his entire net income for the year of 1943, from whatever source and wherever derived, pursuant to the provisions of Act 118 of 1929."

The primary contention of appellant for reversal of the decree is that Act 118 of 1929 does not authorize the collection of a tax from a resident individual on income earned in another state, and that the first legislative attempt to grant such power was made in Act 162 of 1943. In Art. II, § 3(a) of Act 118 of 1929 it is provided: "A tax is hereby imposed upon and with respect to the entire income of every resident, individual, trust or estate, which tax shall be levied, collected and paid annually upon such entire net income as herein computed, at the following rates, after deducting the exemptions provided in this Act; . . . ."

Article III, § 8 (1) of Act 118, *supra,* provides: "The words 'gross income' include gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, royalties, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

The Chancellor held that the language of the above sections of the statute empowered the State of Arkansas to tax its resident citizens on their total income, whether derived from inside or outside this state. It is insisted by appellant that the reference to "entire net income" of an individual resident in § 3(a) of Act 118, *supra,* means entire net income derived from property located or business transacted within this state. It is also contended that the term "from any source whatever" used in Art. III, § 8(1), *supra,* does not relate to the place where the revenue is obtained, but applies solely to the revenue agencies listed in the paragraph in which the term is used. We cannot agree with appellant's interpretation of the

meaning of the language employed by the Legislature. While the statute does not specifically assert that the foreign income of an individual resident is subject to the tax, there is no exception which may be construed as exempting income earned outside the state, and the Act is clearly made applicable to the entire income of every resident regardless of the source of such income.

In *Dunklin* v. *McCarroll, Commissioner,* 199 Ark. 800, 136 S. W. 2d 675, it was held that this state was empowered by Act 118 of 1929, *supra*, to tax the income derived from sources outside the state by an individual resident. In that case Dunklin was a partner in a mercantile business which operated both in Arkansas and Oklahoma. The Arkansas business of the partnership was conducted separately from the Oklahoma business and the income derived from the operation of the business in each state was separable. Dunklin paid a tax to Arkansas on the income of the partnership business in this state and paid to Oklahoma a tax on the income from the Oklahoma business. The Commissioner of Revenues of this state made an assessment upon the unreported Oklahoma income, contending that all of Dunklin's income, no matter where earned, should have been reported to the State of Arkansas and a tax paid thereon. To avoid payment of the tax Dunklin, as does appellant here, relied on the case of *McCarroll, Commissioner,* v. *Gregory-Robinson-Speas, Inc.,* 198 Ark. 235, 129 S. W. 2d 254, 122 A. L. R. 977, which held that a domestic corporation doing business both within and without the state was exempt from the payment of an income tax upon the income derived outside the state because domestic corporations doing business wholly outside the state were exempt by Act 220 of 1931. This court, in holding Dunklin liable for the tax upon the income earned in Oklahoma, discussed the right of the state to tax its citizens upon income earned outside the state, saying: "A number of state courts have held that a state may tax its resident citizens on their total income, no matter from what source derived. *State* v. *Weil,* 232 Ala. 578, 168 So. 679; *Featherstone* v. *Norman,* 170 Ga. 370, 153 S. E. 58, 70 A. L. R. 449; *Maguire* v. *Tax*

Commissioner, 230 Mass. 503, 120 N. E. 162, aff'd 253 U. S. 12, 40 S. Ct. 417, 64 L. Ed. 739; *State* v. *Gulf, M. & N. R. Co.,* 138 Miss. 70, 104 So. 698; *Crescent Mfg. Co.* v. *Tax Commission,* 129 S. C. 480, 124 S. E. 761; *Village of Westby* v. *Bekkedal,* 172 Wis. 114, 178 N. W. 451."

While the decision in the Dunklin case was based primarily upon the right of the lawmakers to classify individuals separately from corporations in the imposition of income taxes, the effect of the decision was to enforce payment by a resident individual of this state of a tax upon income earned in another state. The conclusion reached is in harmony with the principles of construction approved in the earlier cases of *Wiseman* v. *Madison Cadillac Co.,* 191 Ark. 1021, 88 S. W. 2d 1007, and *Wiseman* v. *Gillioz,* 192 Ark. 950, 96 S. W. 2d 459. In the last mentioned cases this court adopted the following statement from Cooley on Taxation (4th ed.) Vol. 2, § 672: "An intention on the part of the Legislature to grant an exemption from the taxing power of the State will never be implied from language which will admit of any other reasonable construction. Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used, for it is a well-settled principle that, when a special privilege or exemption is claimed under a statute, charter, or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed, and cannot be made out by inference or implication, but must be beyond reasonable doubt. In other words, since taxation is the rule and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing is upon him who claims it."

Appellant relies on the case of *State ex rel. Attorney General* v. *Burnett,* 200 Ark. 655, 140 S. W. 2d 673, in support of his contention that the state may only tax the income of a resident which is earned here. That case involved the power of this state to impose a tax on the income of a nonresident derived from sources outside Arkansas. The only question for decision was the right of the state to combine income earned inside the state by one nonresident spouse with income earned outside the state by the other nonresident spouse in determining the exemption of the former under § 16 of Act 118, *supra.* The right to tax the income of residents of this state was in no manner involved and the case is clearly distinguishable on the facts from the Dunklin case and the case at bar.

The second, or alternative, contention of appellant is that if the power to tax foreign income of resident individuals was granted by Act 118 of 1929, then that act was rendered unconstitutional by Act 162 of 1943 to the extent that it attempts to impose such tax. It is insisted that the proviso contained in § 2 of Act 162 of 1943 rendered that act unconstitutional in its entirety and that Act 118 of 1929 is likewise unconstitutional when read and construed with Act 162, *supra.* The record fails to disclose that appellant urged the unconstitutionality of Act 118 of 1929 in the chancery court. If it be conceded that Act 162 of 1943 is unconstitutional (which we do not decide), we do not agree that the right and power to impose the tax on appellant conferred by Act 118 of 1929 would be thereby destroyed.

Act 162 of 1943 is entitled "An Act to Prevent Double State Income Taxation of Individual Residents of Arkansas." In § 1, it is provided that an individual resident of Arkansas whose gross income includes income derived from sources outside the state shall be entitled to a credit for the amount of income tax which such taxpayer owes to another state for the same year. Section 2 establishes the procedure for obtaining the credit allowed in § 1 and contains the further proviso that no income which arises from the use, production or sale of real estate situated

outside this state shall be included in the income of the resident individual for income tax purposes. Section 3 is the emergency clause and declares: " . . . that Arkansas residents are being prevented from engaging in business and owning property in other states because of double income taxation on the same income . . . "

It will be observed that Act No. 162, *supra,* is in no sense a taxing act, but is an act designed to create an exemption in favor of a resident individual taxpayer whose income from business or property in another state was already taxable under Act 118 of 1929. The State of Texas has not levied a tax against the income derived from appellant's business located there, nor is appellant's income derived from the use, sale or production of real property situated in that state. However, if it be assumed that appellant is in position to attack Act 162 of 1943, and that said act is unconstitutional and void, this would leave the taxing provisions of Act 118 of 1929 unaffected and unimpaired thereby. The general rule is that an unconstitutional statute is a nullity and in legal contemplation is as inoperative as if it had never been passed. In 11 Am. Jur., Constitutional Law, § 154, p. 841, it is said: "It has even been held that if a portion of an act which is an amendment of another act already in force is invalid and is inseparable from the remainder of the amendment, the entire amending act may be declared inoperative without in any way affecting the original act." In *Merritt* v. *Gravenmier,* 169 Ark. 779, 277 S. W. 526, it was held that, where a special act of 1919 had been declared valid in a previous decision of this court, it was error to hold that the act was invalidated by reason of an amendment thereof by an act of 1921 since, if the amendatory act was invalid, it left the former act unimpaired.

We conclude, therefore, that the taxing provisions of Act 118 of 1929 are still in force and effect, irrespective of the validity of Act 162 of 1943, in so far as appellant's liability for the tax in question is concerned. The Chancellor was correct in so holding and the decree is accordingly affirmed.

LEACH *v.* COOK, COMMISSIONER OF REVENUES.

4-8223 202 S. W. 2d 359

Opinion delivered May 26, 1947.

Ohmer C. Burnside, Carneal Warfield and *Ben Wilkes,* for appellant.

Bruce T. Bullion, for appellee.

GRIFFIN SMITH, Chief Justice. Liquor in transit from Louisiana to Mississippi was taken from two motor trucks in Chicot County by agents of the State Revenue Department. Its value is said to be in excess of thirteen thousand dollars. When the contraband was brought to Little Rock it was placed in storage. The Commissioner instituted an action in Pulaski Circuit Court to procure an order of confiscation, and Leach intervened. The sole question is whether venue was in Chicot or Pulaski County.

It was stipulated that the transporters were apprehended with two trucks between Lake Village and Eudora. The vehicles were being driven by W. A. Lunceford and Jake Turnbull. Lunceford and Leach were joint owners of the shipment. It is conceded that the transaction was unlawful and that Act 357 of 1941 was not in any respect observed. It is unnecessary, therefore, to enumerate the

several concurring acts or omissions that rendered the transaction illegal. Drivers of the trucks were arrested for trial under Act 219 of 1943.

We agree with the intervener as appellant that Turnbull and Lunceford cannot be tried in Pulaski County on the misdemeanor charge. Venue would lie in any County through which they passed or into which they entered with the liquor. Act 357 subjects to confiscation intoxicants such as those here involved, but before an owner's rights can be divested there must be proper order of a court of competent jurisdiction. The proceeding is *in rem* and the Court's action is independent of criminal charge, made so by the statute. But it is contended by appellant that the liquor was wrongfully taken from Chicot County, hence an action against it in Pulaski County cannot be maintained.

The applicable Act of 1941 has not been construed and the controversy presents an issue of first impression. Since condemnation must be by a court of competent jurisdiction, answer to appellant's challenge of the judgment must rest upon a determination that the statutory language is susceptible of but one meaning; or, if ambiguous, the intent may be deduced from the sentence when read in connection with the purpose sought to be attained.

Section three of the Act is a mandate that confiscated liquors be turned over to the Commissioner of Revenues.[1] The Commissioner's duties are state-wide, and his action in detaining Lunceford and Turnbull and holding the consignment was not an abuse of power. It is reasonable to believe that if the General Assembly had intended to

[1] Duties of the Commissioner in respect of enforcement of laws affecting alcoholic beverages are found in § 6 of Act 7 of the Extraordinary Session of August, 1933, Pope's Digest § 14198; §§ 5, 11, and 12 of Act 69 of 1935, Pope's Digest §§ 14227, 14233 and 14234; § 8 of Act 109 of 1935, Pope's Digest § 14180. [The printed volume of the Acts of the Extraordinary Session of 1933 and 1934, p. 20, shows the following paragraph in § 2 of Act 7 of the August 1933 Session "The term 'light wine' means the fermented liquor made from malt or any substitute therefor and having an alcoholic content of not in excess of 3.2 percent by weight." The original engrossed bill reads: "The term 'light wine' means the fermented juice of grapes or other small fruits, including berries, and having an alcoholic content of not in excess of 3.2 per cent by weight." But see Act 108 of 1935].

restrict venue to the County where the liquor was taken, it would have said so. As to condemnation Circuit Court has general jurisdiction. Whether Pulaski Circuit was a court of "competent" jurisdiction as contemplated by the Legislature when Act 357 was passed depends upon venue. The term is defined by Webster as the place or county in which the alleged events from which an action arose took place.

The legal fiction is that the event or action or conduct justifying confiscation and condemnation of liquor inheres to the commodity. Its offense is against the people as a whole as distinguished from those in a particular county, judicial circuit, or subdivision of the State. The situation is somewhat analogous to a nuisance which may be abated by destroying the thing that offends, or enjoining those responsible for maintaining it.

The Court did not err in its findings, and the judgment must be affirmed. It is so ordered.

HARRIS *v.* MOYE'S ESTATE.

4-8208 202 S. W. 2d 360

Opinion delivered May 26, 1947.

John B. Moore and *U. A. Gentry,* for appellant.

W. W. Sharp, for appellee.

ROBINS, J. Appellant instituted suit in the lower court against W. H. Moye, on December 19, 1942, alleging that Moye had, for valuable consideration, sold to appellant his equity in certain bales of cotton, but had failed to deliver same. An accounting and judgment for value of Moye's equity in the cotton was prayed.

On October 9, 1944, the following order in that case was entered: "Now on this the 9 day of October, 1944, the same being a regular day of the October term of the court, this cause coming on to be heard upon the motion of the plaintiff [*sic*] filed at the last term of court to dismiss for the want of prosecution, the court, after being well and sufficiently advised as to all matters of law and fact arising herein, doth find: That the plaintiff has failed, neglected and refused to prosecute his action and the same should be dismissed with prejudice. It is therefore by the court considered, ordered and decreed that this cause be, and it is hereby, dismissed with prejudice, for want of prosecution."

On October 8, 1945, appellant filed a complaint in the instant case, identical with the one filed by him on December 19, 1942, except that in this case "Estate of W. H. Moye, Deceased" was designated as defendant.

To this latter complaint there was filed a motion to dismiss, which was a plea of *res judicata,* copy of the complaint in the previous case and the order of dismissal therein being attached as exhibits.

The motion was heard on this stipulation: "It is stipulated and agreed by and between the attorneys of record for the plaintiff and the attorney of record for the

defendant, that the following is a correct statement of facts, and this stipulation shall be filed as a part of the record in this cause, and may be used by either party at any hearing thereof: That the plaintiff filed his complaint in the Monroe County Chancery Court against W. H. Moye on December 19, 1942, being cause Number 9042, which is identical with the complaint filed in this action, Number 9488. Both complaints allege the same facts and pray for the same relief; that the complaint in cause Number 9042 was filed in this court on December 19, 1942, and on August 7, 1944, the defendant filed a motion to dismiss for want of prosecution; that on October 9, 1944, this court entered an order in cause 9042 dismissing the plaintiff's complaint with prejudice. The precedent for the order was approved by the plaintiff's counsel of record at that time, and a copy of the same is attached hereto and made a part hereof. The present suit (No. 9488) was filed (in the legal sense) on October 8, 1945."

The lower court sustained appellee's motion to dismiss and rendered decree accordingly. This appeal followed.

For reversal appellant cites decisions of this court to the effect that in case of a non-suit, or of an ordinary dismissal for want of prosecution, the plaintiff may, under the provisions of § 8947 of Pope's Digest, commence his action anew within one year after the order dismissing same. But in none of the cases cited was there involved an order of dismissal similar to the one involved in the case at bar. Here the order dismissing appellant's suit reflected something more than a voluntary non-suit or an involuntary non-suit for failure to prosecute. In the order under consideration the court made a finding that the appellant's cause ought to be dismissed "with prejudice," and made an order dismissing it "with prejudice."

The words "with prejudice," when used in an order of dismissal, have a definite and well known meaning; they indicate that the controversy is thereby concluded. Discussing the meaning of these words, when used in a

judgment of dismissal, Judge BUTLER said in the case of *Union Indemnity Company* v. *Benton County Lumber Company,* 179 Ark. 752, 18 S. W. 2d 327: "This term has a well recognized legal import; it is the converse of the term 'without prejudice,' and is as conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff. 4 Words and Phrases (2d Series) p. 1333." Hence, the order of dismissal entered by the court on October 9, 1944, showed a complete adjudication of the controversy and was a bar to the subsequent action by appellant.

It is not contended that the order of dismissal did not reflect what the court really intended—in fact, it is stipulated that appellant's counsel approved the form of this order. If the order as entered did reflect the intention of the court, but was made erroneously, appellant's remedy was by way of appeal. Appellant has taken no appropriate steps—either by application for order *nunc pro tunc* or by appeal—to correct this order, but he is in effect asking, in another action, that the order of dismissal in the original suit be changed in an important particular, or that a material part thereof be disregarded. It is obvious that the lower court could not grant this relief. *McKnight* v. *Smith,* 5 Ark. (5 Pike) 409; *Cassady* v. *Norris,* 118 Ark. 449, 177 S. W. 10; *Whorton* v. *Hawkins,* 135 Ark. 507, 205 S. W. 901.

The decree of the lower court is affirmed.

4-8220 202 S. W. 2d 765

Opinion delivered June 2, 1947.

Rehearing denied June 30, 1947.

Richard W. Hobbs and *William G. Bouic,* for appellant.

Curtis L. Ridgway and *James R. Campbell,* for appellee.

Robins, J. The chancery court of Garland County on May 12, 1942, in a suit instituted by appellants, Tom McGuire and T. D. Short, against appellee, Ida Levi, and others, rendered decree enjoining appellee, Ida Levi, and other defendants, and their "assigns," from "operating any boating businesses of any kind or character

along Stokes' Creek'' within the limits of the shore line on this stream owned by Ida Levi at the time she sold and conveyed to appellant, McGuire, a portion of her land bordering on Stokes' Creek.

Appellee, Ida Levi, originally owned land extending for more than a mile along Stokes' Creek. She conveyed to appellant, McGuire, one acre with a frontage of 467 feet on the creek and at the same time executed a written agreement whereby she covenanted with McGuire that McGuire should have exclusive ''commercial boating privileges'' along the shore line of the land retained by Mrs. Levi, so long as McGuire should remain the owner of the land sold to him by Mrs. Levi. This contract appears to have been recorded, but whether it was acknowledged, so as to entitle it to record, is not shown in the transcript before us. Alleged violation of this agreement was the basis of the original suit, and of the injunction granted therein.

On October 8, 1946, appellants filed a petition, in the same suit, alleging that the appellees, L. Clayton, White Wood Lodge, Mary Bessler, Wig Wam Lodge, W. D. Smithey, Circle L. Ranch, T. J. Housley and Edgewater Lodge, who, it was averred had, since the rendition of the above decree, become the ''assigns'' of Mrs. Levi, were engaged in commercial boating in violation of said decree; and citation for contempt against all of said named appellees was prayed.

Responses were filed by said appellees, and the response of appellees, Smithey and Housley, in addition to a denial of violation of the injunction by them, contained a prayer that the original decree be vacated. The court heard the matter on oral testimony and, finding that the injunction had not been violated, dismissed the contempt proceedings, but did not vacate the injunction.

Appellants, McGuire and Short, have appealed from that part of the decree by which the appellees were absolved from the contempt charge; and appellee, Smithey, has cross-appealed and urges error in the failure of the court to set aside the injunction.

We have carefully reviewed the testimony and we cannot say that the finding of the lower court that violation of the injunction was not established is against the weight of the evidence. That part of the decree must therefore be upheld under our long established rule that we do not reverse the finding of a chancery court on a fact question unless the finding is against the weight of the testimony.

Appellee, Smithey, in support of his cross-appeal, argues that the agreement entered into by his grantor, appellee Ida Levi, by which she bound herself and her assigns not to engage in commercial boating in the named area, was not such a covenant as would run with the land and therefore was not binding upon appellee, Smithey, and that the original injunction, granted in the decree of May 12, 1942, in so far as it affected assigns of Mrs. Levi, was erroneous and should be vacated as to him.

Smithey was not a party to the original proceeding, but enforcement against him was sought on the ground that the injunction was against Ida Levi *and her assigns,* and that Smithey, having purchased land in the affected area from Ida Levi, was bound by its provisions. Assuming that Smithey was thus bound by the decree, he could not have it vacated now solely on the ground that it was erroneous—it has become final as to him as well as to all the other defendants. If Smithey is not thus vicariously bound by the original decree, he has no right to attack it. So, in either view of the matter, the lower court properly refused his prayer that the decree be vacated as to him.

Decree of the lower court is affirmed on direct appeal and on cross-appeal.

HARRISON *v.* MOBLEY.

4-8135 202 S. W. 2d 756

Opinion delivered June 2, 1947.

W. W. Bandy and *H. R. Partlow,* for appellant.

L. V. Rhine, Adrian Coleman and *Marcus Feitz,* for appellee.

SMITH, J. Appellee, plaintiff below, brought suit in ejectment to recover possession of a tract of land in Greene county, which suit, on motion of appellant, defendant below, was transferred to equity, where upon a trial, possession was awarded as prayed, and from that decree is this appeal.

Through mesne conveyances appellee acquired the State's claim of title to the land based upon a decree confirming the sale of the land to the State for nonpayment of the taxes due thereon for the year 1938. This confirmation decree was rendered November 2, 1942, and within less than a year from the date, appellant filed, pursuant to and in compliance with § 8719, Pope's Digest, as amended by Act 423 of the Acts of 1941, p. 1227, a petition praying that the confirmation decree be set aside, and that he be permitted to redeem the land from the tax sale. Appellant testified that the clerk of the court accorded him this right upon paying the taxes for which the land had sold, and those which had subsequently accrued up to the date of his redemption.

In his petition to redeem, appellant alleged his lack of knowledge of the confirmation proceeding until after

the rendition of the confirmation decree, and he alleged that the tax sale which had been confirmed was invalid for the reason that the clerk of the county court had failed to attach to the record of the 1938 delinquent tax list the certificate required by § 13848, Pope's Digest. That allegation was shown to be true and is not questioned and this omission rendered the tax sale invalid. *Cecil* v. *Tisher,* 206 Ark. 962, 178 S. W. 2d 655; *Devore* v. *Beard,* 208 Ark. 476, 187 S. W. 2d 173.

In the case of *Redfern* v. *Dalton,* 201 Ark. 359, 144 S. W. 2d 713, we said that under the provisions of § 9 of Act 119 of the Acts of 1935, pursuant to which the confirmation decree had been rendered, a landowner might within one year after the rendition of the confirmation decree, make the showing that he had no knowledge of the pendency of the confirmation proceedings, and also that he had meritorious defense against the rendition of the decree, in which event he would have the right to redeem from the tax sale which had been confirmed. And it was there further held that a showing that the sale was invalid for any reason was a meritorious defense within the meaning of this statute.

Appellant has therefore made the requisite showing of a right to redeem, provided he owned or had such an interest in the land as entitled him to question the confirmation decree. This is the controlling question in the case.

It was said in the case of *McMillen* v. *E. Ark. Inv. Co.,* 196 Ark. 367, 117 S. W. 2d 724, quoting from the case of *Woodward* v. *Campbell,* 39 Ark. 580, that: "Statutes providing for redemption from tax sales always receive a liberal construction. Almost any right, either at law or in equity, perfect or inchoate, in possession or in action, or whether in the nature of a charge or incumbrance on the land, amounts to such an ownership as will entitle the party holding it to redeem. Certainly a party claiming the land under an executory contract to purchase it is the owner within the meaning of the act." A number of later cases have reaffirmed that holding.

It is conceded that the original title to the land had been acquired by the New England Securities Company and that this title was conveyed to Securities Savings Circle "D" by the New England Securities Company. This Securities Savings Circle "D" was formed by employees of the New England Company and there was some question as to whether it was a corporation or a partnership. At any rate, this Circle, acting through J. W. Ramsey, Jr., its trustee, entered into a "contract of sale and rent" on October 1, 1927, with appellant, whereby the Circle contracted to sell appellant the land in question for the sum of $600, to be paid in annual installments of $100 each, the first of which was due in 1928. The contract provided that upon failure to pay any installment it should "from the date of such failure be null and void and that any rights acquired under the contract shall cease, and that the premises should revert to and revest in the Circle without any act of reëntry." And further that if occupancy continued after default, rent should be paid at the rate of $45 per year.

Appellant Harrison testified that he took possession of the land upon the execution of this contract, and that he has since continuously been in possession either personally or through someone holding under him. He admitted that he had not made the payments required or any of them, but testified that he had paid the taxes every year until 1938, and the land was sold for nonpayment of the taxes for that year, and that he had paid no taxes subsequent to that date.

After such testimony had been taken, appellee procured a quitclaim deed executed in the name of Savings Circle "D," an unincorporated association, signed and acknowledged by "J. W. Ramsey, Jr., surviving officer" and by "M. S. Gibson, Member of the Board of Directors." This deed was dated October 17, 1944, and its validity is questioned upon the ground that appellant claims also to have a deed from Circle "D" dated August 23, 1938, executed by J. W. Ramsey, Jr., whose acknowledgment of the deed recited that it was executed "under

authority conferred by resolution of its Board of Directors."

Appellee apparently is relying upon this deed for the purpose of showing that appellant acquired no title under his deed from the Circle as her deed from the Circle represents a title which she acquired after filing this suit. *Percifull* v. *Platt,* 36 Ark. 456; *Dickinson* v. *Thornton,* 65 Ark. 610, 47 S. W. 857.

Appellant paid $100 for his deed, while appellee paid $250 for hers.

The decree from which is this appeal finds that appellant had no title or interest in the land as he had forfeited his rights as purchaser under his original contract with Circle "D," for the reason that he had made none of the payments which his contract required, and that through this failure he forfeited all interest in the land, and it was further found by the court that the deed to appellant from Ramsey and Hall above referred to, conveyed no title for the reason that they had no title to convey, and had executed the deed in the name of the Circle without authority.

We reverse the decree for the reason that we think the court was in error in holding that appellant had no such interest in the land as would entitle him to intervene in the confirmation proceedings and to redeem from that decree. Unquestionably appellant entered into the possession of the land in 1927 as a purchaser, and he paid the taxes thereon until 1938, and he testified that he had remained in possession since the date of his contract. The court correctly held that through failure to make the payments required by the contract of purchase, appellant had forfeited his rights under the contract. But this right to assert a forfeiture was for the benefit of appellant grantor in the contract to sell, and we think the testimony shows that this right was waived. Appellant testified that for several years after taking possession of the land he received many letters from the Circle demanding payment of the purchase money notes, to which he did not respond for the reason that he had no money and for that

reason also he failed to pay the taxes. He testified further that he finally received a letter from the Circle in which he was directed to remain on the land and take care of it. Although the contract of sale gave the Circle the right to demand payment of rent at the rate of $45 per year, no rent was demanded and none was paid.

Considerable correspondence took place between appellee and persons professing to represent the Circle, concerning the purchase of the land from the Circle. We copy from this correspondence certain statements which show that the right to assert the forfeiture was never claimed. In one of these letters it was said that while appellant had not paid all the taxes and none which had recently accrued, he had paid some of them for his own protection, and that "otherwise possession of the property would have been questioned long before this." In another letter it was stated that "by the terms of the contract of sale, we hold Mr. Harrison owes $600 plus 17 years interest, he having paid nothing on the contract during all these years." It was said in this letter that "an assignment of our sale contract with Harrison might be a help to you in getting possession, as it is certain that Harrison would not want to pay the purchase money notes and the interest which had accrued on them." This letter mentioned also the deed to appellant from Circle "D" and referred to it as fraudulent. Finally for a consideration of $250 paid to persons claiming to be lawful representatives of Circle "D" these persons executed a quitclaim deed to appellee, and assigned their interest in the sales contract executed to appellant.

It will be observed that these persons as representatives of Circle "D" asserted and assigned a claim for 17 years interest and not rent. Certainly if appellant owed the interest due under the contract, he had an interest in the contract. It appears to be undisputed that Circle "D" never at any time collected or attempted to collect any rent, but did make demands for payment of principal and interest. Although the Circle had the right under the contract of sale to declare the contract had terminated, it did not do so. On the contrary, the Circle permitted

appellant to remain in possession. Indeed, appellant testified that he was directed to remain in possession and that testimony is not denied. Appellant's testimony is also undisputed that payment of rents was never demanded. The testimony also shows that long after the right to assert a forfeiture had arisen, the Circle made demand not for the payment of rent, but for the principal and interest. In the meanwhile from time to time appellant made various repairs including the building of a fence. These repairs were neither extensive or expensive, but it cannot be said that they were trifling or unsubstantial.

In correspondence between appellee and the persons who executed the deed in the name of the Circle, it was stated that appellant owed $600 "plus 17 years interest" and it was proposed to assign this claim, not for rent, but for principal and interest, and this was done when the deed was executed. To induce appellee to buy the land from the Circle the person who executed the deed wrote appellee: "By the terms of the contract of sale we hold, Mr. Harrison owes $600 plus 17 years interest, he having paid nothing on this contract during all these years. To substantiate your tax title, it would seem that an assignment of our sale contract with Harrison, to you might help in getting possession. With this contract you could make a demand on him for payment of his notes and it is certain that he would not be disposed to pay you the principal and interest due on them. This might be of more value in getting possession than our deed, which under the circumstances can only be a quitclaim; executed by Mr. J. W. Ramsey who is the only surviving officer of the organization holding our title."

The date of this letter was September 15, 1944, and the quitclaim deed and the assignment to appellant's contract were executed a few days later. The suit in ejectment had been filed November 16, 1942.

We conclude, therefore, that the right to claim a forfeiture had been waived inasmuch as the Circle assigned the right to collect the interest due under it. If a forfei-

ture had been claimed, rent would have been due, but not interest. *Hanson* v. *Brown,* 139 Ark. 60, 213 S. W. 12; *Wade* v. *Texarkana B. & L. Assn.,* 150 Ark. 99, 233 S. W. 937.

Appellant's right to intervene may be sustained not only under his contract to purchase, but through his possession of the land under a deed from persons claiming the right to convey the title of Circle "D." The court found this deed invalid as fraudulent, but while it may have been void, it was not fraudulent so far as appellant was concerned. He employed the services of an abstracter of land titles to procure it. This abstracter testified that he had prepared numerous abstracts of title to lands owned by the New England Securities Company and that the records showed that the title of the New England Securities Company had been conveyed to Securities Savings Circle "D," and he was advised that the Savings Circle "D" had divided its assets among its members and was operating under that name both in Kansas City, Missouri, and in Little Rock, and that in the division of its assets the Little Rock branch had been given lands in both Mississippi and Greene counties, in which latter county the land in litigation is located. This witness testified that he purchased the land for appellant from persons operating the Little Rock office, and obtained the deed to appellant above referred to.

Appellant testified that he had possession both under this deed and under the contract of purchase above referred to. The court found, however, that the deed to appellant was executed by persons having no authority to do so, and we cannot say that that finding is contrary to the preponderance of the evidence.

But appellant had a claim of title to the land which he was entitled to have adjudicated, and this claim of title was such an interest in the land as entitled him to intervene in the confirmation proceedings and to redeem from the decree.

The state of the record is, therefore, that appellee now has title to the land acquired after the institution of

this suit in ejectment under her deed from the authorized representatives of Circle "D," but she does not have title under the deed based upon the confirmation decree, the title upon which she based her suit from which decree appellant has redeemed.

The decree will, therefore, be reversed and the cause remanded with directions to adjudge what title appellant now has under his original contract of purchase from Circle "D" and the cause is remanded for that purpose.

DENISTON *v.* LANGSFORD.

4-8199 202 S. W. 2d 760

Opinion delivered June 2, 1947.

A. D. Chavis, for appellant.

Max M. Smith, for appellee.

GRIFFIN SMITH, Chief Justice. Deniston sought to eject Garland and Lillie Mae Langsford from Lots Five and Six, Block Nineteen, Niven's Addition to the City of Rison. The defendants' motion to transfer to equity was overruled and exceptions were saved.

Deniston's claim of ownership rests upon the State's deed executed by the Land Commissioner May 16, 1945.

It is conceded that title was in Lula Culpepper who permitted the property to forfeit for the 1931 taxes. At the Collector's sale in 1932 the lots were struck off to the State, with certification in 1934. They were included in a confirmation decree rendered October 11, 1943, under authority of Act 119 of 1935.

It is stipulated that Lula Culpepper, notwithstanding the forfeiture for 1931 delinquencies, paid taxes for 1932 and her husband paid for 1933. Taxes for 1934 were not paid. George Holmes purchased at the Collector's sale, in 1935, but the Bank of Rison as mortgagee redeemed and thereafter paid taxes through 1939. A third forfeiture occurred when taxes for 1940 were not paid. B. W. Thomasson became the purchaser and paid assessments for 1941, 1942, and 1943. The Langsfords procured a special warranty deed from Thomasson January 22, 1944. The County Clerk's deed to Thomasson evidencing his purchase for the 1940 delinquencies is dated December 31, 1943. The Bank of Rison quitclaimed to Thomasson July 3, 1945, after its mortgage had been foreclosed. Taxes for 1944 and 1945 were paid by appellees.

Circuit Court, after overruling the motion of appellees to transfer to equity, found from the documents introduced, the stipulation of counsel, and the testimony of the County Clerk, that action of County taxing officials in reassessing the lots for 1932 and in collecting taxes and permitting redemptions from subsequent forfeitures created a legal presumption that Lula Culpepper redeemed after failing to pay the 1931 taxes, hence the State was without power to confirm in October 1943, and the Clerk's certificate to the Land Commissioner in 1934 was without effect as to the lots in question. Judgment in the ejectment suit from which this appeal comes was rendered in August, 1946. The decision in *Koonce* v. *Woods, ante,* p. 440, 201 S. W. 2d 748, was rendered April 7, 1947. It deals with presumptions arising from assessment of real property and payment of taxes for a protracted period of time after forfeiture—in that case seventeen years—and the legal effect of such payments.

Appellees think the instant appeal is controlled by certain expressions in the Koonce-Woods opinion. In commenting upon *Wallace* v. *Hill,* 135 Ark. 353, 205 S. W. 699, and *Townsend* v. *Bonner,* 205 Ark. 172, 169 S. W. 2d 125, and in comparing the period there involved with the period of payment in the controversy then before us, it was said: "The period of time goes to the matter of good faith of a twofold character: faithful conduct by the State's officers on the one hand, and good faith upon the part of the taxpayer. The difference in time can have no effect on the legal principle." A petition for rehearing in the Koonce-Woods case was considered, and overruled May 26th. The opinion as a whole, we think, clearly reflects what the Court had in mind—that the presumption under discussion would never attach unless tax payments of the character in question had been made for a full fifteen-year period.

It does not imperatively follow that because appellees cannot invoke the presumption of redemption, reinstatement of assessments, and subsequent tax payments, that they are without a possible remedy. The delinquency for 1931 came when depressed financial conditions had resulted in forfeitures generally throughout the State. This status was dealt with by the Forty-Ninth General Assembly. Act No. 2 of the First Extraordinary Session was approved August 18, 1933. Sec. 2 of Act 2 permitted redemption at any time prior to January 1, 1934, by the payment of taxes due at the time the same became delinquent plus all cost of the sale, but without penalty or interest. Act No. 2 of the Second Extraordinary Session was approved January 8, 1934. Sec. 2 contains the same language found in § 2 of Act 2 of the First Extraordinary Session, but by § 1 the period of redemption is extended to April 10, 1934. Act 2 of the Third Extraordinary Session, approved April 12, 1934, contains provisions similar to those of the First and Second Extraordinary Sessions, but permits redemption at any time before October 1, 1934. Act 16 of the First Extraordinary Session deals (among other things) with installment payment of taxes. See also Acts 170 and 282 of 1935.

Since it is stipulated that Lula Culpepper or her husband paid taxes on the lots in 1933 for the assessment of 1932, and in 1934 for the assessment of 1933, the question is, Did either of these payments have the effect of redeeming from the 1931 forfeiture under either of the emergency Acts?

Redemption under these laws must have been effectuated (if locally) through the County Clerk as distinguished from regular payment to the Collector; but there might be circumstances under which payment to the Collector on direction of the Clerk would in equity be equivalent to payment to the Clerk. Whether the purpose in making payment in 1933 and 1934 was to redeem in the special manner provided is not shown by any testimony; nor does the case appear to have been tried on that theory. In the motion to transfer to equity it was said (and the allegation was not denied) that the confirmation suit remained on the Court's docket "and passed several terms without an order of continuance. It was removed from the docket and replaced [presumptively] at the time the decree of confirmation was rendered." It is urged that the landowner was misled and therefore failed to intervene. While these were matters within the Court's discretion in the absence of substantial evidence of injury, we think that in view of all the facts that have been shown in the action against appellees the case should have been transferred to equity where it could have been fully developed. Reversed and remanded with directions to certify such transfer.

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

4-8222 202 S. W. 2d 365

Opinion delivered June 2, 1947.

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

William H. Glover, for appellee.

GRIFFIN SMITH, Chief Justice. Each plaintiff sued for $3,000 to compensate personal injuries and each procured a judgment for $2,000. Each was seventy-eight years of age when the trial was had, and each, by substantial evidence, proved that he sustained serious injuries.

Van Veneer Company operates a plant at Malvern. Missouri Pacific, by contract, entered the premises with its spur track, over which logs for the mill and the materials it required, together with finished products, were transported. This track was laid near the veneer company's boiler room. Ross and Launius were standing on a concrete walk close to the boiler structure and approximately eight feet from the railway. They were talking with Ralph VanDusen, president of the veneer company, when the injuries occurred. A train, carrying supplies for an extension of the spur, backed in from a connecting line. The new construction was not a requirement of the veneer company, but was being built by Missouri Pacific as facilities for business beyond VanDusen's plant. Witnesses testified to a practice of placing strong planks across the railroad for the convenience of veneer company employes. These were under control of mill workers, but would sometimes be removed by railroad crewmen.

The day appellees were injured the engine with cars attached had backed into the siding or spur. The engine went eighty or eighty-five feet farther than it did when serving the veneer company. When the mission had been completed the train headed out, but in passing the point where Ross, Launius, and VanDusen stood, some part of the engine or tender struck one of three planks stacked near the track. This plank, according to VanDusen, was lying at an angle of about twenty-three degrees in respect of the rail nearest Ross, Launius, and VanDusen. It was on the fireman's side. The plank was shoved or pushed a short distance, (one witness said eight or ten feet) and precipitated against the bystanders with sufficient force to throw Ross and Launius to the concrete. VanDusen was struck and slightly injured, but did not fall.

The Railroad Company insists (1) that the verdicts were contrary to the law, contrary to the evidence, and contrary to the law and the evidence. In the manner presented this raises the question of sufficient evidence. It is argued that appellees—particularly Ross—were tres-

passers. Ross testified that he went to the plant to buy veneer for use in making a blackboard; Launius claimed he was seeking employment and that he had spoken to VanDusen concerning the matter.

The defendant did not prove any veneer company rule requiring applicants for work, or customers, to present themselves at a particular place; nor was there any attempt to show that it was not reasonable for these men to engage in conversation with VanDusen at the point where the three met, or to remain there as they did. It was shown that the boards (two inches thick, twelve inches wide, and twelve- or seventeen feet long) were not moved after the train backed in; hence, inferentially, appellant argues that some one connected with VanDusen's plant, or an independent agency, must have changed position of the top plank—otherwise it would have been hit when the train passed the stack on its inbound trip. The railroad company thinks that this inference necessarily arises from the fact that no one was known to have touched the boards during the interim in question.

Appellees advance what they think is a tenable explanation by pointing to that part of VanDusen's testimony where it is said that the top plank was at an angle of twenty-three degrees; that it was physically impossible for engine or tender-projections (such as steps, etc.) to have brushed by the board if but slight contact was made with its side and when direction of travel was toward the short end of the board; but on the return trip contact was such as to put pressure against the obstruction, forcing it from its position and hurling it against the plaintiffs.

There is no drawing or chart illustrating the physical situation upon which this inference rests. Personal testimony does not, in exact words, establish the concurring events in sequence precisely as we have presented them. Still, reasonable inferences deducible from pertinent evidence justified the jury in finding that some one negligently placed the planks too close to the railroad, and that their position should have been seen if an appropriate lookout had been kept. Therefore, when negli-

gence of the agency responsible for placement materially supplemented negligence of the appellant, and when injury resulted, Missouri Pacific cannot escape responsibility on the ground that its operatives did not in fact see the danger. It is true the engineer and fireman testified they were keeping a lookout; but it is equally true that the plank was not suddenly and unexpectedly put in the position from which it was dragged. It must have been on top of the two others, and it was bound to have extended far enough toward the track for some part of the engine to have struck it.

The second contention for reversal is that the Court erred in refusing to permit appellant to introduce in evidence the contract it had with the veneer company, wherein there are obligations as to maintenance. The Court was correct. Appellant could not contract against its negligence to the exclusion of rights accruing in favor of third parties. But even if this were legally possible the contract would not have a place in this record because at the time of injury the railroad company was extending the line for its own purposes.

It is next insisted that the Court acted prejudicially in requiring Dr. Hodges to answer the question, (asked by the appellees' attorney) "Isn't it reasonably possible that from this injury, this man may have a stroke?" Following an objection the Court ruled that the witness should answer. An exception was saved.

The answer was not of importance. The Doctor said, "I don't know." He then added: "I don't know, [but] I would say this: He does have "autorokosis" and could have any time." Assuming that the Doctor said *arteriosclerosis* and that the stenographer erroneously transcribed "autorokosis," the answer was but an assertion that a condition existed, from which the physician believed that paralysis might result. Preceding the question just quoted, Dr. Hodges was asked: "From an injury to the brain to the extent of a ruptured blood vessel, and to such an extent that you were required to draw blood off his spine on two occasions, (and you say you

saved his life) is it reasonable to infer from that injury that this man may have a stroke of paralysis?" Answer: "Any man 77 years old with hardening of the blood vessels and a hypertensive heart is liable to have [a stroke] any time. Mr. Ross' blood pressure was never high, though; in fact it was low: 110 over 80 the hospital record showed. The other day I took his blood pressure and it was 130 over 90." Question: "Doctor, let's get back to the question, please: isn't it reasonably possible that this man from this injury may have a stroke?" Answer: "Now, Bill, I don't know about that, except that I do think the blood vessel healed where it ruptured."

These questions and answers were not objected to. It was only when plaintiffs' attorney insisted upon a yes or no response that the objection was interposed.

It is quite clear that Dr. Hodges thought the primary injury had healed and that the hypertension spoken of was not caused by the blow Ross received.

The fourth and fifth assignments relate to instructions regarding negligence, and were not erroneous.

Appellant thinks it was error for the Court to tell the jury that the law furnishes no definite rule by which physical pain and suffering may be measured for the purpose of assessing damages, and "this must be left to the sound discretion and judgment of the jury, based upon the evidence in the case." It is contended that the instruction was misleading and that it created in the minds of the jurors a belief that "a large amount of damages might be found." The instruction was not erroneous. The objection as shown by the record was based in part upon appellant's contention that the jury could infer it had a right to compensate for mental pain and anguish. This phase of the instruction is not carried forward in the assignments.

Argument is made in respect of other instructions asked, and as to some refused. It is our view that no prejudice resulted and that the objections are not sound.

The judgments were not excessive. Ross was knocked to the concrete paving and suffered a brain concussion. He was unconscious for five or six days, but this condition did not immediately follow the injury. The patient, when taken home, complained of headaches, requiring hospitalization. Dr. Hodges made a spinal puncture. It disclosed a ruptured blood vessel. Blood was in the spinal fluid. Glucose was administered intravenously as nourishment. Spinal punctures were made on three occasions, after which Ross regained consciousness and began to improve. He still complains of headaches and dizziness.

Launius sustained a fracture of the pelvis bone on the left side. He was hospitalized one day and was directed to remain in bed a month. The patient complained of other injuries.

The testimony shows that each appellee suffered injuries other than those here detailed.

The record is free of prejudicial errors, and the judgments must be affirmed.

DOTSON *v.* RITCHIE.

4-8203 202 S. W. 2d 603

Opinion delivered June 2, 1947.

Sullins & Perkins, for appellant.

Lee Seamster, for appellee.

SMITH, J. John Robert Dotson, who was the nominee of the Republican Party for the office of Sheriff of Madison county at the general election held in that county on November 5, 1946, was opposed for that office by Berry Denney, the Democratic candidate. Lester Keck, W. J. Ledford and Elmo Ritchie were the election commissioners having supervision of the election. The first named was the representative of the Republican Party, while the two latter were the Democratic election commissioners.

After the election had been held and the commissioners began to count and compile the returns of the election, and after compiling all the returns except the absentee ballots, it was found that only a few ballots separated the candidates, and that the absentee ballots, of which there were about two hundred, would be decisive of the election. They counted and have certified fifty-one of these, of which the Republican candidate received thirty-one votes, and the Democratic candidate, twenty votes, but they made no count and filed no certificate as to the remaining one hundred fifty absentee ballots. The Republican election commissioner demanded that the remaining ballots be counted and certified and when that demand was refused Dotson filed suit in the circuit court praying that a writ of mandamus issue, requiring the commissioners to count and certify all the regular absentee ballots. The Republican commissioner filed an answer in which he admitted the truth of all the allegations contained in the complaint, and specifically admitted that the Democratic election commissioners "are refusing to consider, count or certify said legal ballots in said ballot box." The Democratic commissioners filed an answer in which they averred that "all the legal ballots cast are now in the Absentee Ballot Box for Madison county, Arkansas, have been counted and the tabulation is now complete; that they are now ready to certify said legal ballots in said Absentee Ballot Box, that they have complied with the law and are ready and willing to further comply with the law and certify said count of all *true and legal ballots* as the true returns of all the legal votes cast and now in the Absentee Ballot Box in and for Madison county, Arkan-

sas; that their tabulation of said election is now complete, that they are now ready to certify the result of said election."

After the writ of mandamus was denied they did certify to the Secretary of State that fifty-one absentee ballots had been cast. According to the undisputed testimony there were two hundred ballots in the absentee ballot box. Section 4780, Pope's Digest, requires the county election commissioners to prepare ballots for the use of absentee voters, and § 4781 prescribes the affidavit which the voter must execute to accompany his ballot, and § 4782 provides how the ballot may be transmitted to and be returned by the voter to the county clerk of the county in which the voter resides, who does not personally cast his absentee ballot. These sections were amended in 1941 in respects unimportant here to recite. By § 4797, Pope's Digest, it is made perjury to willfully swear falsely as to any statement required to be made in those sections of the statute.

Section 4783, Pope's Digest, reads as follows: "All such ballots as provided in §§ 4781 and 4782 shall be by the county clerk given to the county election commissioners in cases of general elections; said ballots shall be opened and if found regular, shall be counted as cast and registered as a part of the total vote for or against all candidates or measures submitted in any special or general election."

This section defines the duties and limits the power of the election commissioners in counting those ballots which have not been challenged, as authorized by § 4795, Pope's Digest, which reads as follows: "The vote of any absent voter may be challenged for any cause, and the board of election commissioners, canvassing board of said primary party or chairman and secretary shall have all the power and authority by law as judges of election of primary to hear and determine the legality of such ballot."

Their duty where no ballot was challenged, and none was challenged here, except by the commissioners themselves, who held no hearing to determine that question, is defined by § 4783, Pope's Digest, which has been copied above.

Election commissioners thus serve a dual capacity. First and primarily as a canvassing board, and where no voters have been challenged, as in this case, their duties are purely ministerial. They have the duties of election commissioners in canvassing absentee ballots and while acting in that capacity they have the power and authority of election judges to hear and determine the legality of the challenged ballots. They have and are given no power to arbitrarily disfranchise an elector who has cast a ballot, regular on its face, and may do so only after a hearing and determination of its legality.

The elector has the right to be heard in defense of his ballot before he is disfranchised, and the commissioners did not accord that right. It was proposed that the ballots, which were at hand, be examined in open court. This request was denied. This hearing and determination should have been held there, or at some other place, before a qualified elector was denied the highest and most valuable right of his franchise, that of exercising the right to vote and to have his vote counted. As has been said, this was not done. The commissioners refused this hearing and for reasons which they did not disclose except to say they were satisfactory to themselves, they counted and certified only fifty-one of the absentee ballots.

Now the testimony shows that some of the ballots in the absentee ballot box were not "regular," that is they had not been prepared as required by the section of the statute above cited, but it does not appear how many of such ballots there were. These were properly excluded from the count as only regular ballots of qualified electors may be counted, but all regular ballots of such electors should have been counted. The commissioners were without authority to exclude any regular ballots of qualified electors. What are regular ballots? The obvious answer

is that they are those which are prepared and cast as substantially required by law. Did the commissioners count all the regular ballots? The undisputed testimony is that they did not.

Commissioner Ledford was the principal witness for himself and his Democratic associate, and when asked why he had not counted the one hundred fifty ballots which were rejected he answered, "Well there are several reasons, some being illegal on their face." When asked in what respect, he answered, "Well probably the affidavit was not properly signed or made out. Others had not been signed. There are a number of reasons that those were rejected." In other words, the majority of the commissioners passed upon the question of the legality of the ballots as well as their regularity in an *ex parte* manner. The law gave them the power to pass upon regularity from the face of the ballot, but did not give them the power to pass on their legality without a hearing and determination of that question.

The testimony of the Republican election commissioner was not denied that a considerable number of the ballots were rejected and not counted because of some opinion of the other commissioners "not based on the formality of the face of the ballot, or of the affidavit." The commissioners therefore failed to discharge a ministerial duty which the law imposed on them, as they should have counted all the ballots which were regular, and not challenged, in as much as they were without power to pass upon their legality, without a hearing on the question, which decision would require a consideration of such questions as the age and place of residence of the voter, etc.

The trial court was evidently of the opinion that the commissioners had the power to pass upon the question of the legality as well as the regularity of the ballots in an *ex parte* manner. That this is true is reflected by the order of the court denying mandamus, which reads as follows: "The court's order will be to the effect that the commissioners will be required to certify the results of

the election within the time prescribed by law. As I understand it, there is no dispute about that part of it. They can certify what they consider to be the legal ballots in this particular instance, along with all the other matters that they have before them as commissioners, the absentee ballots being the only matter of dispute here." Pursuant to this decision the commissioners certified to the Secretary of the State fifty-one ballots which they determined were legal ballots, but made no count or certificate as to the remainder, and from that action, approved as above stated by the court, is this appeal.

This case is somewhat similar to the recent case of *Carroll* v. *Schneider, ante,* p. 538, 201 S. W. 2d 221, in that we are deciding a question which has become moot. In that case it was said: "It is urged, however, that the case is now moot, and should be dismissed for that reason. It is moot in the sense that we cannot now afford appellant petitioner any relief, but is not moot in the sense that it is important to decide a practical question of great public interest, which may arise in any future election." For the reason stated we there decided the question presented, although the case was moot, and for the same reason we now decide the question here involved.

This is not an election contest, nor was the case of *Carroll* v. *Schneider, supra.* It is a suit to compel the election commissioners to perform a ministerial duty which they failed to perform, when without hearing or detemination of the legality of the ballots they refused to count them for "various reasons" which were not stated.

It has been many times held that mandamus is an appropriate remedy to require an officer to perform a duty purely ministerial. It does not lie to control the discretion of the officer, nor does it lie to correct an erroneous decision already made. But he may be directed to perform his duty and to do so in the manner required by law.

Here the commissioners had not certified the results of the election when the suit was filed, although they testified that they were ready and prepared to do so.

The request was made and denied that all the ballots which were at hand be examined in open court, and that the legal ballots be counted in the presence of the court. There may have been no authority for counting the ballots in the presence of the court, but there was full authority for requiring the commissioners to count and certify all the regular ballots cast by qualified electors. This they had not done and did not offer to do, as they asserted the right to pass upon questions other than that of the regularity of the ballots without a hearing and determination of the facts, and that action was approved by the court.

There being no challenge of any absentee ballot as contemplated by § 4795, Pope's Digest, the duties of the election commissioners were those merely of a canvassing board and were purely ministerial and these duties they neglected and refused to perform as required by law.

That the duties of canvassing boards are purely ministerial has been definitely and frequently decided by this court. *Howard* v. *McDiardmid,* 23 Ark. 100; *Patton* v. *Coates,* 41 Ark. 111; *Willeford* v. *State,* 43 Ark. 62; *Wheat* v. *Smith,* 50 Ark. 266, 7 S. W. 161; *Pitts* v. *Stuckert,* 111 Ark. 388, 163 S. W. 1173.

This is not a case where the validity of any absentee ballot has been challenged, which might have been done under the authority of § 4795, Pope's Digest, in which event the election commissioners would have had the power and authority of election judges to hear and determine the legality of the ballot challenged; but is a case where without challenge, the commissioners have for reasons largely undisclosed, but satisfactory to themselves, counted only a fourth of the absentee ballots. In the absence of a challenge the ballots should have been counted, if found regular, the duty of the commissioners in that circumstance being that of a canvassing board.

The time for filing an election contest is regulated by statute and the result of this opinion cannot extend, or enlarge the time for filing such contest. If this election

has not been contested, the decision of the question here presented would be moot, as it was in the Carroll case, except for the public interest and importance of declaring the correct practice to be followed in holding future elections.

Having jurisdiction to decide the question here presented, although no relief may inure to appellant, it is ordered that all costs be assessed against appellees.

McHaney, Robins and Millwee, JJ., dissent.

Robins, J., dissenting. I respectfully dissent. In my opinion the lower court properly dismissed appellant's petition.

Mandamus is an extraordinary remedy and is never granted unless the party applying therefor has a clear right thereto and has no other adequate remedy in the premises. *Ex Parte Trapnall,* 6 Ark. 9, 42 Am. Dec. 676; *Basham* v. *Carroll,* 44 Ark. 284; *Cotton* v. *Steel,* 95 Ark. 623, 129 S. W. 1198; *Snapp* v. *Coffman,* 145 Ark. 1, 223 S. W. 360; *Jones* v. *Adkins,* 170 Ark. 298, 280 S. W. 389.

As I view the matter, appellant failed to show any right to mandamus, because he was, in effect, asking that the writ be used to control the discretion of the election commissioners.

The county clerk receives ballots of absentee voters, but does not count the ballots. He is required to turn them over to the election commissioners, who, under the provisions of § 4783, Pope's Digest, must open them and count them if they are "found regular." Who, under the statute, is vested with discretion, in the first instance, to say whether a given absentee ballot is regular and should be counted? Manifestly, only the election commissioners have this discretion and authority.

In the case at bar it was shown that they had exercised this discretion and had refused to include in their tabulation certain ballots which they found to be irregular. That this was done is shown by the testimony. Mr. Ledford, one of the commissioners, testified: "We re-

jected them [the ballots in dispute] for several reasons, some being illegal on their face, probably the affidavit not properly signed or made out. Others had not been signed. There are a number of reasons that those were rejected." Mr. Ledford and Mr. Ritchie, another member of the board, both testified that all votes had been canvassed and the board was ready to certify the result. This testimony is corroborated most convincingly by the fact that the official returns from this county, signed by all three election commissioners, now on file in the office of the Secretary of State, of which we take judicial notice, show the result in the sheriff's race, including votes in the absentee box, exactly as Ledford and Ritchie testified that they ascertained it to be.

It is apparent that the sole purpose of the petition for mandamus was to control the discretion of these election commissioners, acting, as to the absentee box, in the capacity of election judges, and to compel them to count ballots which they had found to be irregular and which they were not, under the plain letter of the law, required to count. Mandamus never lies to control discretion of a public official. *Rolfe* v. *Spybuck Drainage District No. 1,* 101 Ark. 29, 140 S. W. 988; *Robertson* v. *Derrick,* 113 Ark. 40, 166 S. W. 936; *Village Creek Drainage District* v. *Ivie,* 168 Ark. 523, 271 S. W. 4; *State ex rel.* v. *City of Marianna,* 183 Ark. 927, 39 S. W. 2d 301; *Watson* v. *Gattis,* 188 Ark. 376, 65 S. W. 2d 911; *Garland Power & Developing Company* v. *State Board of Railroad Incorporation,* 94 Ark. 422, 127 S. W. 454; *Miller* v. *Tatum,* 170 Ark. 152, 279 S. W. 1002; *Huie* v. *Barkman,* 179 Ark. 772, 18 S. W. 2d 334; *Democrat Printing & Lithographing Company* v. *Parker,* 192 Ark. 989, 96 S. W. 2d 16; *Jackson* v. *Collins,* 193 Ark. 737, 102 S. W. 2d 548; *Southern Cities Distributing Company* v. *Carter,* 44 S. W. 2d 362; *Satterfield* v. *Fewell,* 202 Ark. 67, 149 S. W. 2d 949; *Hardin* v. *Cassinelli,* 204 Ark. 1016, 166 S. W. 2d 258; *Better Way Life Insurance Company* v. *Graves,* 210 Ark. 13, 194 S. W. 2d 10.

In the case of *State ex rel.* v. *Deane,* 23 Fla. 121, 1 So. 698, 11 Am. St. Rep. 343, a candidate sought to compel election inspectors to count a certain ballot for him. The writ was denied, the court saying: "In this proceeding we cannot control their discretion or judgment or substitute ours for theirs."

A similar holding is to be found in the case of *Arberry* v. *Beavers,* 6 Tex. 457, 55 Am. Dec. 791.

Likewise, a mandamus against election inspectors was denied in the case of *People* v. *Hanes,* 44 Misc. 475, 90 N. Y. S. 61. There the court said: "In determining what ballots shall be counted for or against any candidate, . . . or what ballots shall be rejected, they act judicially. . . . The inspectors have performed the judicial act complained of. They may not have reached a correct conclusion, but they have acted and exercised their judgment, and the conclusion reached by them cannot be reviewed herein."

If the election commissioners failed to count any legal ballots in his favor, appellant had a complete, adequate and effective remedy, under the statute (§§ 4833 to 4838, Pope's Digest) providing for election contests, to right this alleged wrong. For that reason, if for no other, mandamus did not lie. In the annotation shown at p. 1259 of vol. 1912C, Ann. Cas., this appears: "Where a statute provides an adequate and complete remedy for the correction of errors or mistakes occurring in an election . . . by contest . . . , mandamus will not lie to compel canvassers of an election to recanvass the returns."

The impropriety of substituting the writ of mandamus for an election contest is forcibly shown in the instant case. In this case the successful candidate for sheriff—now duly certified and commissioned—was not made a party. Under the holding of the majority that election officials may be required to count votes which they, in the exercise of their discretion, have found to be invalid, it may occur that a candidate will be denied an office which

he has fairly won by illegal votes being counted for his adversary, in a court proceeding to which he is not a party. The inevitable effect of the majority opinion, as I see it, will be to complicate and confuse administration of our election laws.

I am authorized to state that Mr. Justice McHaney and Mr. Justice Millwee concur in the views above expressed.

Nance *v.* McDougald.

4-8217 202 S. W. 2d 583

Opinion delivered June 2, 1947.

John F. Park, for appellant.

Paul Johnson, for appellee.

McHaney, Justice. Appellants operate a brokerage agency in the City of Little Rock, and buy, sell and trade in real and personal property as agents and brokers for others. Appellee is a resident of Monticello, in Drew county, Arkansas, and owns and operates two moving picture theaters there, known as the "Drew" and "Amuse-U."

On July 1, 1946, appellee listed his two theaters with appellants for sale at a gross price of $85,000, and entered into a written agreement with them which gave them the exclusive agency to sell said theaters for 30 days for said sum, and appellants were to be paid a commission of 10% of said sum by appellee, or a commission of $8,500, if a sale thereof resulted in said 30 days. No real estate was involved.

Based on the allegation that, on July 17, 1946, appellants secured a purchaser for said theaters "who was, and is, ready, able and willing to purchase such properties, upon the terms and for the consideration set out in said agency contract," such purchaser being one John W. Lowery of Russellville, Arkansas, who had paid them $10,000 as a down payment on said purchase price and agreed to pay the balance of $75,000 in cash upon the completion of the sale, appellants brought this action to recover the commission of $8,500 which would have been due them had a sale been completed. It was also alleged that appellee, without reason therefor, notified them that his property was not for sale at any price and refused to consummate said sale. They prayed judgment for said sum.

The answer was a general denial and a plea that on July 2, 1946, by telephone communication with an agent of appellants, he rescinded the agreement of July 1, 1946, relied on by appellants.

Trial before the court sitting as a jury resulted in a judgment for appellee. This appeal followed in due course.

We think an extended recital of the evidence produced by the parties is unnecessary in view of the determination we make of the case. Appellee testified that on July 2, 1946, the next day after entering into the contract, he called Mr. Hampel, agent of appellants and who signed the contract for them, by telephone and canceled the agency agreement with them. He said: "I told him to disregard the listing, that I didn't care to sell out and for him not to bother to get a buyer, the sale wouldn't be completed" etc. Appellants' abstract. That appellee did call Hampel and have a conversation by 'phone with him July 2 was shown by the telephone company records and admitted by Hampel. The court found as a fact that appellee "effectively terminated the agency" on said date, and being supported by substantial, if not conclusive evidence, this finding is as binding here as the verdict of a jury. Appellee, therefore, repudiated the agency contract and breached it on July 2. Thereafter, on July 17, appellants say they procured a purchaser in one Lowery who went to Monticello, inspected the properties very briefly, had a conversation with appellee and was told by him that he would not sell and that he had already canceled the agency of appellants. He returned to Little Rock, reported to appellants that appellee would not sell, and yet he agreed with them to buy and put up with them his check for $10,000. This and other evidence led the court to make a finding that it was impossible to believe that Lowery actually intended to go through with the purchase. Whether this finding was justified we do not determine.

The fact is that whatever action appellants took looking to a sale after July 2 was unauthorized as their agency under said contract had been terminated by appellant on said date. The fact that the contract was in writing did not preclude appellee from verbally revoking appellants' authority to sell at any time, even though the contract provided that they should have the exclusive authority to sell for 30 days. *Gibson* v. *Greene,* 174 Ark. 1010, 298 S. W. 209, and *Novakovich* v. *Union Trust Co.,* 89 Ark. 412, 117 S. W. 246, cited and quoted

from in the Gibson case, *supra*. In this Gibson case, we said: "The law does not compel one to continue an agency which he desires to terminate, but it does provide a remedy for the agent whose agency has been wrongfully terminated."

Appellants did not sue for damages as for a breach of the contract. They neither alleged nor proved any damages which accrued to them between the date of the contract and the date of its revocation. They sued for a commission of 10% on a sale that was never consummated and which was made, if made at all, after the revocation of the contract. Let it be assumed that appellants found a person on July 17 who was ready, able and willing to buy, and who deposited $10,000 with them to apply on the purchase price named in the agency contract, still they had no authority to act for appellee at that time, same having been revoked and canceled 15 days prior thereto.

The judgment is correct and is, therefore, affirmed.

Justice McFaddin concurs.

Cross *v.* Manning.

4-8221 202 S. W. 2d 584

Opinion delivered June 2, 1947.

Terrell Marshall, for appellant.

Rose, Dobyns, Meek & House, for appellee.

Ed F. McFaddin, Justice. Mr. Sam V. Bracy, Sr., executed his last will and testament on August 26, 1942. He departed this life on August 7, 1946, and his will was admitted to probate on August 27, 1946. Various interested parties filed this suit on January 11, 1947, seeking a construction of paragraph 11 of the will. All persons who could possibly take under any construction of the will were joined either as plaintiffs or defendants. The prayer of the complaint was:

"(a) That paragraph eleven of the will of Sam V. Bracy, Sr. be construed by this court; (b) that if it be found that a valid trust was created by said will, said trust be terminated, the property be sold, and the proceeds of sale be divided among the beneficiaries of the trust in proportion to their respective interests as determined by the court; (c) that if it be found that a

valid trust was not created by the said will, title to said property be quieted in the owners thereof as determined by the court; (d) for all other relief to which the parties hereto may be entitled."

After hearing the evidence, the chancery court found that paragraph 11 was "void as violating the rule against perpetuities"; and entered a decree reading:

"That paragraph eleven of the will of Sam V. Bracy, Sr., deceased, be and it is hereby declared to be void and of no effect. It is further ordered that the title to the above-described property be and it is hereby quieted in the heirs at law of Sam V. Bracy, Sr., as follows: An undivided one-third interest in Sam V. Bracy, Jr., an undivided one-third interest in Mary Bracy Manning, an undivided one-sixth interest in Alfred M. Bracy, and an undivided one-sixth interest in Nancy Bracy."

Appellants are parties who would take under paragraph 11 if it be valid either as a trust or as a fee simple devise. Appellees are those four heirs at law to whom the chancery court awarded the property. The will of Mr. Bracy (evidently prepared by himself without the aid of legal counsel) contains 16 numbered paragraphs. Paragraph 1 directs payment of debts; paragraph 2 appoints executors; paragraphs 3-10, inclusive, and 13, 14 and 16 make various bequests and devises to (a) his son, Sam V. Bracy, Jr., (b) his daughter, Mary Bracy Manning, and (c) his two grandchildren, Nancy Bracy and Alfred M. Bracy, II (who are the children of testator's deceased son, Alfred M. Bracy, I). There is no residuary clause in the will.

Paragraphs 3 and 14 each use this language in making the disposition: "It is my desire that . . ." (name of beneficiary) ". . . inherit . . ." Most of the other paragraphs use this language: "I direct that . . ." (name of beneficiary) ". . . inherit . . ." We mention this to show that the language "it is my desire that ——— (beneficiary) inherit" is used in the will to constitute a devise; but the use of the word "de-

sire'' without the word ''inherit'' does not appear as intended to constitute a devise.

Paragraph 11 of the will—which is the one here involved—reads:

''Eleventh, Now it is my desire that my own parental family and descendants inherit the 'White Oaks Home', twenty acres, my nieces and nephews and their children, the same to be used for reunion purposes or at times rental property. I desire that this property be kept in good condition and beautified with trees and flowers. I further desire that my nieces as listed below act as committee in charge of same.

''Gladys Cross, Chairman, and title in her name as trustee,

''Mrs. Helen Cockrill

''Miss Carolyn Baird

''The executive committee will cooperate with them.''

Appellees urge here—as they did in the chancery court—that this paragraph was an attempt to create a trust for the benefit of all the ''parental family'' of the testator (we shall subsequently notice the expression ''parental family''), and that the attempted trust violates the rule against perpetuities; and therefore (they say) the entire paragraph is void and the 20 acres referred to in that paragraph descend to the appellees as the heirs at law, since there was no residuary clause; and they cite, *inter alia, Bernstein* v. *Bramble,* 81 Ark. 480, 99 S. W. 682, 8 L. R. A., N. S. 1028, 11 Ann. Cas. 343; *Combs* v. *Combs,* 172 Ark. 1073, 291 S. W. 818; *First National Bank* v. *Marre,* 183 Ark. 699, 38 S. W. 2d 14; *Cockrill* v. *Armstrong,* 31 Ark. 580; *Thomason* v. *Phillips,* 192 Ark. 107, 90 S. W. 2d 228; *Moody* v. *Walker,* 3 Ark. 147; American Law Institute's Restatement of the Law of Trusts, §§ 24 and 32; Prof. Gray's work, ''The Rule Against Perpetuities,'' Fourth Ed., §§ 629, 202, 246, 214, 215, 373, 332.

Appellants offer a number of alternate suggestions for the construction of the will: one of which is that no trust was created, but only a fee simple devise to the "parental family," and that any reference to a trust is merely precatory; another is that, if a trust was created, it can be terminated at any time, and thereupon the property would descend to all of the "parental family." Appellants cite, *inter alia, Union Trust Co.* v. *Madigan,* 183 Ark. 158, 35 S. W. 2d 349; *Combs* v. *Combs, supra; Ramseur* v. *Belding,* 206 Ark. 415, 175 S. W. 2d 977; *Cribbs* v. *Walker,* 74 Ark. 104, 85 S. W. 244; *Martin* v. *Gray,* 209 Ark. 841, 193 S. W. 2d 485; Thompson on Wills, §§ 174, 192, 194, 282, 296, 357; 69 C. J. "Wills," §§ 1269, 1204, 1300, 1678, 1150, 1312, 1496, 1504, 1506, 1517, 1526, 1757, 1681, 1780, 1831, 1523; American Law Institute's Restatement of the Law of Property, § 375; 48 C. J. "Perpetuities," § 90.

Undisputed evidence shows that it is impossible to keep the property for "reunion purposes" as referred to in paragraph 11 of the will. Gladys Cross, Helen Cockrill and Carolyn Baird are parties appellant, not only individually, but also as trustees, if there be a trust. We are therefore not required to decide whether the trust (if there be one) should be continued. The rule of cypres is not invoked. If appellants prevail, they want the property sold, and the proceeds divided. If appellees prevail, they will determine their own method of disposition.

In construing this will, certain rules must be remembered:

1. "The paramount principle in the construction of wills is that the general intention of the testator, if not in contravention of public policy or some rule of law, shall govern." *Union Trust Co.* v. *Madigan, supra.*

2. "That intent must be ascertained from the whole will taken together; and no part thereof to which meaning and operation can be given, consistent with the general intention of the testator, shall be rejected. Where the words of one part of a will are capable of a two-fold construction, that should be adopted which is most consistent

with the intention of the testator, as ascertained by other portions of the will. And where the intention of the testator is incorrectly expressed, the court will effectuate it by supplying the proper words." *Cox* v. *Britt,* 22 Ark. 567, and *Union Trust Co.* v. *Madigan, supra.*

3. "Where the language used by the testator is doubtful in its meaning, rules of construction are invoked to enable the courts to arrive at the intention, and, in cases of ambiguous provisions, certain presumptions must be indulged." *Union Trust Co.* v. *Madigan, supra.*

4. "The intention of the testator to dispose of his entire estate will be presumed, unless the language of the will shows to the contrary . . . This presumption, though not controlling, must always be taken into account when the language employed is so ambiguous as to require construction." *Id.*

5. "Wills are liberally construed, and every legitimate conclusion is indulged in order to reach a just and equitable result. . . . and in cases of doubt the construction should be in favor of the first taker because it is against the policy of the law to tie up property . . ." *Id.*

6. "Courts, in arriving at the true meaning and intent of the testator, incline against any construction of the will which would double portions to the partial exclusion of others equally meritorious." *Id.*

7. "Whether precatory words impose an imperative obligation on legatees, or are but the expression of a hope or recommendations, 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." *Wooldridge* v. *Gilman,* 170 Ark. 163, 279 S. W. 20.

8. "When the expression which a testator uses is really ambiguous, and is fairly capable of two constructions, one of which would produce a legal result, and the other a result which would be bad for remoteness, it is a

fair presumption that the testator meant to create a legal rather than an illegal interest . . . and therefore the fact that a provision would be too remote, if construed in a certain way, is a reason for supposing that it was not intended to be construed in that way, which, although it cannot avail against a clear form of wording, may well be held to govern when the expression is ambiguous." Prof. Gray's work, "The Rule Against Perpetuities," 4th Ed., § 633.

We do not lengthen this opinion by listing other rules and citing other cases. Counsel have cited us to no case where language exactly like that found in paragraph 11 has ever been construed; and a discussion of the reasons impelling our conclusions would serve no useful purpose. We reach these conclusions:

I. The property should be sold, and the proceeds divided *per stirpes* to the "parental family" of Mr. Sam V. Bracy, Sr.

II. The "parental family," as that expression is shown by the proof in this case, means that we consider the parents of Mr. Sam V. Bracy, Sr., as the stem of descent; and the proceeds of the property in paragraph 11 will be divided into nine equal parts and distributed *per stirpes,* one part each to the following: (1) heirs at law of Sam V. Bracy, Sr.; (2) heirs at law of Mary Bracy Benson; (3) Anibel Bracy Hudson, or her heirs at law; (4) heirs at law of Adele Bracy Cross; (5) heirs at law of India Bracy Buchanan; (6) Eugene Daniel Bracy, or his heirs at law; (7) heirs at law of Clara Bracy Cross; (8) Junius T. Bracy, or his heirs at law; (9) heirs at law of W. F. Bracy. The persons who will take in each instance are to be determined as of the time of the distribution.

In reaching our conclusions we have examined numerous adjudicated cases and text writers, some of which are: *In re Keegan's Estate,* 37 N. Y. S. 2d 368; *Magill* v. *Magill,* 317 Mass. 89, 56 N. E. 2d 892; annotation in 154 A. L. R. 1411, entitled "Who included in term 'family' in be-

quest or devise''; annotations entitled ''Taking *per stirpes* or *per capita* under will'' found in 16 A. L. R. 15, 31 A. L. R. 799, 78 A. L. R. 1385, and 126 A. L. R. 157; and annotation on ''Precatory Trusts'' in 49 A. L. R. 10; 70 A. L. R. 326; and 107 A. L. R. 896.

It follows that the decree of the chancery court is reversed, and the cause is remanded with directions to enter a decree, and proceed in keeping with this opinion.

A. KARCHER CANDY COMPANY *v.* HOPKINS.

4-8219 202 S. W. 2d 588

Opinion delivered June 2, 1947.

William R. Arendt and *Josh W. McHughes,* for appellant.

Ben D. Rowland and *Philip McNemer,* for appellee.

HOLT, J. July 31, 1946, appellant, A. Karcher Candy Company, filed complaint in the Municipal Court of the City of Little Rock, in which it alleged: ''That plaintiff (appellant) on the 14th day of April, 1941, obtained judgment in the Municipal Court of the City of Little Rock, Pulaski County, Arkansas, against the said defendant (appellee) in the amount of $42.47, plus court costs expended; that said judgment is now of record in the Municipal Clerk's Record Book, page No. 46975; that there is now due on said judgment the sum of $42.47, plus

six per cent interest amounting to $13.33, plus court costs in the amount of $4.40, aggregating a total of $60.20. Plaintiff further states that said judgment has not been reversed, set aside, and that it is not paid; plaintiff further states that he has no adequate remedy at law except this action and that he is entitled to judgment against the defendant, Ewell Hopkins, in the amount of Sixty and 20/100 Dollars ($60.20),'' and prayed for judgment in this amount.

Appellee, Ewell Hopkins, filed demurrer in which he alleged: ''That the complaint of the plaintiff (appellant) does not state sufficient facts to constitute a cause of action against the defendant, Ewell Hopkins, for the reason that it shows upon its face that the plaintiff's cause of action is barred by the Statute of Limitations.''

The Municipal Court overruled the demurrer and entered judgment for appellant as prayed.

On appeal by appellee to the Circuit Court, appellee's demurrer was sustained, whereupon, appellant declined to plead further and its complaint was dismissed.

This appeal followed.

We think the trial court erred in sustaining the demurrer.

The present suit was on a judgment which appellant had obtained against appellee in the Little Rock Municipal Court April 14, 1941. Under the plain terms of § 8937, Pope's Digest, appellant had 10 years within which to maintain this action after the cause of action accrued. The cause of action accrued on the date the judgment was rendered. *Koontz* v. *LaDow,* 133 Ark. 523, 202 S. W. 686.

Section 8937 provides: ''*On Judgments.* Actions on all judgments and decrees shall be commenced within ten years after cause of action shall accrue and not afterward.''

The early case of *Hicks* v. *Brown,* 38 Ark. 469, is controlling here. In that case the facts were that on the 23rd day of August, 1880, Hicks sued Brown in the Circuit Court in Greenwood, Sebastian County, upon a judgment which had been recovered against Brown before a justice of the peace in that county on August 24, 1870, for $200. The defense was that the cause of action sued upon had not accrued within five years next before the institution of the suit, and was therefore barred under § 3791, Gantt's Digest—now § 8443, Pope's Digest, which provides: "*When issued.* Executions for the enforcement of judgments in a justice's court, except when filed in the clerk's office of the circuit court of the county in which the judgment was rendered may be issued by the justice before whom judgment was rendered, on the application of the party entitled thereto, at any time within five years from the entry of the judgment, but not afterward."

There, this court said: "The statute makes no distinction as to the limitation of actions between judgments of the circuit courts and justices of the peace. Its language is: 'Action on all judgments and decrees shall be commenced within ten years after the cause of action shall accrue, and not afterwards,' § 4128, Gantt's Digest, (now § 8937, Pope's Digest). There is no necessary relation between this section and § 3791, limiting the time in which executions may be issued on judgments of justices of the peace, and it is not required to be construed in *pari materia* with it. . . . The plea of the Statute of Limitations of five years was, therefore, no bar or defense to the action."

But, says appellee: "Now it is upon this section 8443, Pope's Digest, that we contend that limitation on the life of such justice of the peace judgment is five years only, *when not filed* in a circuit court."

We think this contention untenable.

The fact that the present suit was brought in a municipal court, and not in a circuit court, on a judgment that had been previously obtained in the municipal court

does not affect its validity for the reason that since the amount involved did not exceed $100, the exclusive jurisdiction of the action was limited to the municipal court. Section 9905, Pope's Digest, on jurisdiction of municipal court, provides: "Concurrent with Justices of the Peace and exclusive of the Circuit Court in all matters of contract where the amount in controversy does not exceed the sum of One Hundred Dollars ($100.00) excluding interest."

The judgment here is in effect a contract within the meaning of § 9905, *supra,* and must be so treated.

The Supreme Court of California in the case of *Stuart* v. *Landor,* 16 Cal. 372, 76 American Decisions 538, had this same question before it in circumstances similar, in effect, as here. There, an action had been brought in a justice's court on a judgment that had been obtained in a court of a justice of the peace and the jurisdiction of the justice's court in an action on the prior judgment was questioned. The California court there held: (Headnote 2). "Action will lie on judgment obtained in justice's court in California, even when the time within which an execution could be issued on such judgment has expired, judgments being contracts within the meaning of the act conferring on justices' courts jurisdiction over actions on contracts, where the amount in dispute does not exceed the constitutional limits."

For the error indicated, the judgment is reversed and the cause remanded with directions to overrule the demurrer.

LUTTERLOH *v.* PATTERSON.

4-8224 202 S. W. 2d 767

Opinion delivered June 9, 1947.

Rehearing denied June 30, 1947.

[redacted]

Barrett & Wheatley, for appellant.

H. M. Cooley and *Ponder & Ponder,* for appellee.

ROBINS, J. Appellants as lessors and appellee as lessee executed a written lease, whereby appellants

leased to appellee a certain tract in Jonesboro, Arkansas, used as a filling station.

The provisions as to term and rental were as follows:

"Term: To have and to hold for the term of five years, from and after the fourteenth day of June, Nineteen Hundred Forty-one to June 14, 1946.

"Rental: Lessee agrees to pay the following rent for the premises: $50 per month payable in advance for two years, then $60 per month for the additional three years, with option for renewal of five years, with the understanding that price of rental is fixed at the termination of rent contract as of June 14, 1946."

The lease also contained provisions for maintenance of the property by appellee, and for permitting lessors to have certain parking space on the rented tract.

This suit was instituted against appellee by appellants on July 3, 1946, to recover possession of the property, it being alleged that the appellee was holding over, after termination of lease, without right, and that he had breached the lease in several particulars.

Appellee answered with a general denial, and alleged that he had exercised his option under the lease to retain the property for five years beginning June 14, 1946.

On trial before a jury appellants offered to prove that when the lease was executed there was a discussion between the parties as to rental to be paid on the last five-year optional period, and that it was agreed, because of the uncertainty as to what property values might be at the end of the first five-year term, that the rent for the optional period would not be fixed in the lease, but would be left open for agreement, if the option were exercised, and they also offered to prove acts and statements of the appellee indicating that the interpretation put on the lease by the parties was that the amount of rental for the final five-year period was not fixed in the lease, but was to be agreed upon on the expiration of the

first five years. The court refused to permit this testimony to be introduced, but did allow Dr. Stroud, husband of one of the appellants, to testify that appellee called him a short time before June 14, 1946, and said: "What about renewing my lease? What do you want to charge me for a renewal?", and that appellee was by Dr. Stroud referred to Dr. Lutterloh, husband of the other appellant.

Also admitted was the testimony of Frank Macon, brother of appellee's sub-lessee, who stated that he (the witness) was in charge of the property under appellee from August, 1941, to February, 1944, and from July, 1944, to June 9, 1946, and that witness asked appellee if he was going to renew the lease and appellee said "the thing was going to cost him more than it was worth and he wasn't interested in it and he didn't want it," that appellee said that if he renewed the lease it would cost him more than it was worth.

There was testimony by witnesses for appellants tending to show that appellee breached certain provisions of the lease and that appellants notified appellee that the term of the lease would not be extended for that reason.

At the conclusion of appellants' testimony the court, holding that the lease was unambiguous and that under the terms thereof appellee was entitled to hold the premises for the additional five-year term at a rental of $60 per month, instructed the jury to return a verdict in favor of appellee. From judgment in accordance with the verdict this appeal is prosecuted.

The language of the provision in the lease for renewal for a term of five years is fairly susceptible of two interpretations.

As appellee points out, the recital "with the understanding that price of rental is fixed at the termination of rent contract as of June 14, 1946," may well be construed as meaning that the rental for the additional five-year term "is fixed" or agreed upon as being $60

the same as the rental in force at the end of the first five-year period.

On the other hand, it may be said that the language in dispute meant only that the rental for the additional five years *was to be* "fixed," or agreed upon, at the time of the termination of the first five-year period, and that, if the parties had intended to "fix" the rental for the additional term at $60 they could and would have simply, and without circumlocution, provided in the lease that the rental for the optional period would be $60 per month. If this construction should be sustained it would result in the provision for the option being void for uncertainty. *Beasley* v. *Boren,* 210 Ark. 608, 197 S. W. 2d 287.

The fact that each of these two different interpretations may be urged with plausibility shows that this language is ambiguous.

Therefore the lower court should have admitted the testimony as to the circumstances surrounding the execution of the contract and as to the construction the parties themselves, by their words and actions, put upon it; and should have permitted the jury, upon a consideration of all the competent testimony, to say what was intended by this uncertain language. *Wisconsin & Arkansas Lumber Company* v. *Fitzhugh,* 151 Ark. 81, 235 S. W. 1001; *Agey* v. *Pederson,* 191 Ark. 497, 86 S. W. 2d 930; *Walden* v. *Fallis,* 171 Ark. 11, 283 S. W. 17, 45 A. L. R. 1396; *Bailey* v. *Sutton,* 208 Ark. 184, 185 S. W. 2d 276.

One rule to be observed in construing an ambiguous contract is that "in the interpretation of an agreement, the surrounding circumstances at the time it was made should be considered for the purpose of ascertaining its meaning, but not for the purpose of adding a new and distinct undertaking." 12 Am. Jur. 784. *Arlington Hotel Company* v. *Rector,* 124 Ark. 90, 186 S. W. 622; *Dewey Portland Cement Company* v. *Benton County Lumber Company,* 187 Ark. 917, 63 S. W. 2d 649.

Equally well settled is the rule that, in construing a contract the meaning of which is doubtful, the construction placed thereon by the parties to it, as reflected by their words and acts, must be given consideration. *Kahn* v. *Metz,* 88 Ark. 363, 114 S. W. 911; *Edgar Lumber Co.* v. *Cornie Stave Co.,* 95 Ark. 449, 130 S. W. 452; *Keopple* v. *National Wagonstock Company,* 104 Ark. 466, 149 S. W. 75; *Continental Insurance Company* v. *Harris,* 190 Ark. 1110, 82 S. W. 2d 841.

"In the determination of the meaning of an indefinite or ambiguous contract, the interpretation placed upon the contract by the parties themselves is to be considered by the court and is entitled to great, if not controlling, influence in ascertaining their understanding of its terms." 12 Am. Jur. 787.

The issue raised by the testimony introduced by appellants tending to show that appellee had failed to carry out certain undertakings on his part set forth in the lease, and that appellants had refused to consent to extension of the lease on this ground, as well as the others relied on by them, should also have been submitted to the jury. Even if appellee were otherwise entitled to the extension as claimed by him, still, if he had breached material covenants of the lease without waiver of such breach by appellants, this would authorize a denial of the additional term. *Jones* v. *Epstein,* 134 Ark. 505, 204 S. W. 217; *Felder* v. *Hall Brothers Company,* 151 Ark. 182, 235 S. W. 789.

The lower court erred in peremptorily instructing the jury in favor of appellee, and for that error the judgment is reversed and the cause remanded with directions to grant appellants a new trial and for further proceedings not inconsistent with this opinion.

The Chief Justice and Mr. Justice McHaney regard as ineffective that part of the lease in which there was attempt to extend an option to renew for five years. It failed because there was no agreement respecting the rental; nor was the language susceptible of the construction that $60 per month was intended. Effect of this

view would be a reversal, with judgment here for appellants. They therefore dissent from the opinion of the majority.

THURMAN *v.* STATE.

4449 204 S. W. 2d 155

Opinion delivered June 9, 1947.

Rehearing denied September 22, 1947.

G. T. Sullins and *Rex W. Perkins,* for appellant.

Guy E. Williams, Attorney General and *Arnold Adams,* Assistant Attorney General, for appellee.

MINOR W. MILLWEE, Justice. Appellant, Bertis F. Thurman, was charged by information with the crime of first degree murder in the killing of Charles M. Roller on January 1, 1946. The jury found appellant guilty of murder in the second degree and fixed his punishment

at 10 years in the penitentiary. This appeal is prosecuted from the judgment rendered on the jury's verdict.

Viewed in the light most favorable to the state, the testimony reveals the following facts: Appellant and Charles M. Roller resided about eight blocks apart in Lincoln, Washington county, Arkansas. On the day in question the Roller family had finished their evening meal and retired to their living room. The Roller home faces west and there is a door leading to a west front porch from the living room. This door had a window in it and there were two other windows on the west side of the living room. The front porch was enclosed by lattice work with an opening at the point of entrance to the front door and two other diamond shaped openings on the west side. It was dark and lights were on in the living room and dining room which was east of, and adjacent to, the living room. Blinds on the windows were up.

Roller's dog began barking about 6:15 p. m. Roller arose from a couch upon which he was lying and walked to the front door to investigate. He opened the door and walked outside. As he closed the door behind him, or shortly thereafter, a shot was fired and Roller staggered back into the living room. After he was laid on the floor by a son, Roller said to his wife, "Vernie, meet me in heaven." Mrs. Roller asked him if he was going to heaven and he said, "Yes," and then stated, "It was Thurman, Bertis Thurman." Shortly thereafter Roller stated to the men who accompanied an ambulance that had arrived to take him to the hospital, "Don't take me away. I want to die at home, and I haven't got long." Before Roller was removed to the hospital, Cecil Remington, a night marshal and deputy sheriff, asked Roller if he knew who shot him and Roller replied, "Yes, it was Bertis Thurman—I wasn't over five or six feet from him and looked him directly in the face." Roller died at 7:19 p. m. from the effects of a shotgun wound in his left side about one inch above the twelfth rib.

About two weeks before the killing appellant called at the Roller home in the afternoon. He identified him-

self and told Mrs. Roller that he had caught her husband prints in a field or garden within 20 feet of the south with his (appellant's) wife that morning. When Mrs. Roller said she was sorry but could not help that, appellant replied: "I can. I got my gun this morning, but my wife knocked it out of my hand. Just remember there is always another time." Mr. Roller informed her husband of this conversation. Three days prior to the killing appellant's wife filed suit for divorce.

Officers went to appellant's home shortly after the shooting and took him into custody. A single barrel shotgun with a loaded shell in it was found in appellant's house. The gun had an odor of "freshly fired" gunpowder. Appellant informed the officers that the gun had not been fired for months. He also stated that the loaded shell was the only one he had possessed for months. The next day the officers found the metal end of an empty shell in appellant's stove. One end of the shell had been burned and it was the same type and brand as the shell found in the gun. The gun and shells were turned over to a ballistics expert with the state police who testified that the burned shell was fired from appellant's gun according to certain tests made by the witness.

On January 2, 1946, the sheriff found some footside of the Roller home. A wooden box was placed over one of the prints to preserve it. Two or three days later the sheriff secured appellant's shoes and placed one of them in the track which had been preserved. The sheriff and an attorney who assisted in the investigation testified that the shoe exactly fit the track.

Appellant denied that he shot deceased and offered an alibi which was corroborated by several witnesses who testified that appellant was either at his home or a filling station across the street at the time of the killing. Two of these witnesses accompanied appellant on a trip to the country on the afternoon in question and testified that appellant wept about his family troubles and was in a hurry to get back to Lincoln. There was a conflict in

the testimony as to the time it would take to walk from appellant's home to the Roller home. The evidence was also in dispute as to whether light would radiate through the windows and front door of the Roller home sufficiently to permit identification of a person near the front porch under the conditions existing at the time the fatal shot was fired.

Appellant's first contention for reversal of the judgment is that there was no valid information filed in the case. The information is dated January 2, 1946, and signed, "Jeff Duty, Prosecuting Att'y, by Glen Wing, Deputy Pros. Att'y." Appellant made no objection to the information before going to trial. The record discloses that appellant waived arraignment and pleaded not guilty without challenging the form or sufficiency of the information. The jury was impaneled and sworn and the state had rested its case when appellant moved for an instructed verdict of not guilty "for the reason that evidence has been introduced that there was no proper information filed in this case in the time and manner and by the person required by law." There was evidence that the prosecuting attorney was out of the county and that his deputy, who purportedly signed the information, was ill on the date the information was filed. The sheriff testified that he enlisted the assistance of another attorney in making his investigation of the case, but there was no showing that this attorney had anything to do with filing the information or that it was not actually signed and filed by the deputy prosecuting attorney. This attorney and the circuit clerk, before whom the information was filed, testified before the state rested its case and neither was questioned about the filing of the information.

The objection to the information came too late. Section 3882 of Pope's Digest provides: "Upon the arraignment, or upon the call of the indictment for trial, if there is no arraignment, the defendant must either move to set aside the indictment or plead thereto." In *Whitted* v. *State,* 188 Ark. 11, 63 S. W. 2d 283, this statute was construed as requiring a defendant to present his

objections to the validity or regularity of the indictment on arraignment, or call of the indictment for trial, except where the question of the sufficiency of the indictment to charge a public offense is involved. It was there said: "This statute contemplates that, before the trial of the cause, the accused shall present such objections as he cares to make to the return of the indictment." See, also, *Carpenter* v. *State,* 62 Ark. 286, 36 S. W. 900; *Ware* v. *State,* 146 Ark. 321, 225 S. W. 626; *Holt* v. *State,* 171 Ark. 279, 284 S. W. 1.

In *Geoates* v. *State,* 206 Ark. 654, 177 S. W. 2d 919, the objection was that the information was not sworn to by the deputy prosecuting attorney. The court held that the objection should have been tested by motion to quash before trial, saying, "It is contemplated that, before trial, the defendant shall present such objections as he cares to make where there is want of formality in bringing the accusation." It was further said in that case, "In the absence of statutory mandates relating to an information, laws pertaining to indictments are applicable when not inconsistent with the nature of the process." Under the authorities cited appellant waived the objection to the information and the trial court did not err in overruling the motion for an instructed verdict on this ground.

It is next argued that error was committed in the admission of dying statements of deceased, the contention being that it was physically impossible for deceased to have seen his assailant, and that his statements constituted a mere expression of opinion on his part that appellant was the assailant. Appellant relies on the case of *Jones* v. *State,* 52 Ark. 345, 12 S. W. 704. In that case deceased was sitting by his fireside at night when he was shot by someone who fired from the outside through a crack in the house. It was held that a declaration by the deceased that a person other than defendant shot him was inadmissible because a mere opinion and the court 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."

The facts in the Jones case, *supra,* are clearly distinguishable from those in the instant case. We cannot say, as a matter of law, that it was physically impossible for the deceased to have observed and recognized appellant at the time of the shooting. We think the trial court properly submitted to the jury the question whether the statements attributed to the deceased were in fact made, and, if made, whether same were true or false. *Burns* v. *State,* 155 Ark. 1, 243 S. W. 963; *Gray* v. *State,* 185 Ark. 515, 48 S. W. 2d 224. In this connection the court gave instruction No. 20 at the request of appellant which reads in part: "The Court has permitted some evidence to go to the jury as to a statement said to have been made by the deceased after he was shot. This testimony should not be considered by the jury in arriving at a conclusion as to whether the defendant did the shooting unless the jury first finds beyond a reasonable doubt that the deceased knew that it was the defendant who shot him. If the jury finds that such a statement was made upon the mere suspicion or belief that it was the defendant who shot him they should disregard it. All the facts and conditions surrounding the parties at the time of the shooting should be taken into consideration by the jury in arriving at a conclusion." This instruction was more favorable to appellant than he was entitled to, under the law.

It is next contended that the court erred in permitting the sheriff and his assistant to testify concerning the comparison of the footprint found near the Roller home with the shoe of appellant. It is earnestly insisted that the taking of appellant's shoe while he was a prisoner and making the comparison with the track found near the Roller home in the absence of appellant, or his counsel,

violates the rule against self-incrimination. The testimony reflects that appellant voluntarily removed his shoes and gave them to the sheriff at the latter's request. There is no evidence of force being used, and, as stated by the Iowa court in *State* v. *Arthur,* 129 Iowa 235, 105 N. W. 422: "It is not enough to say that defendant had reason to believe that his shoes would be taken from him by force if he did not voluntarily surrender them."

This court has uniformly held testimony concerning tracks and footprints discovered near the scene of a crime admissible if a connection with defendant by means of comparison is shown. *Easter* v. *State,* 96 Ark. 629, 132 S. W. 924; *Trimble* v. *State,* 150 Ark. 536, 234 S. W. 626; *Penton* v. *State,* 194 Ark. 503, 109 S. W. 2d 131; *Hendrix* v. *State,* 200 Ark. 973, 141 S. W. 2d 852; *Nolan and Guthrie* v. *State,* 205 Ark. 103, 167 S. W. 2d 503. In *Hendrix* v. *State, supra,* the court quoted with approval a headnote to the case of *Biggs* v. *State of Indiana,* 201 Ind. 200, 167 N. E. 129, 64 A. L. R. 1085, as follows: "The taking of his shoes from one arrested for stealing corn, to show the tracks made by them were like tracks near the crib from which the corn was stolen, does not violate a constitutional provision that one shall not be compelled in a criminal case to bear witness against himself." In *People* v. *Breen,* 192 Mich. 39, 158 N. W. 142, defendant's shoes were taken by an officer for the purpose of comparing them with footprints and the officer was permitted to testify that the shoes seemed to fit the footprints. The Michigan court held that the testimony was not objectionable as requiring defendant to give testimony against himself although he was not present when the shoes were being compared with the footprints. We conclude that there was no violation of the rule against self-incrimination in the admission of the testimony concerning the footprint and the comparison made with the shoe of appellant.

It is also contended that error was committed in the trial court's refusal to grant a new trial on account of newly discovered evidence. *Ex parte* affidavits of Grace Funk and Calvin Thomas were attached to the motion

for new trial. The affidavit of Grace Funk details suspicious behavior of her former husband, Charlie Hinkle, before and after the killing and concludes with the opinion that Roller was killed by Hinkle. It is also stated in the affidavit that the facts set forth therein were related to counsel for appellant and others at a conference in affiant's home in Lincoln on the day before the trial. Evidence, to be newly discovered, must be found out since the trial, and it must appear that it could not have been known at the time of the trial by the exercise of reasonable diligence. *Reeder* v. *State,* 181 Ark. 813, 27 S. W. 2d 989. It is apparent from the affidavit of Grace Funk that her testimony, if admissible, was not newly discovered.

The affidavit of Calvin Thomas is to the effect that appellant was at the filling station across the street from his home when Thomas visited there about 6 p. m. on the day of the killing and when he left, "which was some time after 6 o'clock p. m." This evidence was merely cumulative to the testimony of several other witnesses who testified in support of the alibi offered by appellant. There was no abuse of the broad discretion abiding in the trial judge in refusing to grant a motion for new trial based on this evidence. *Carter* v. *State,* 174 Ark. 871, 298 S. W. 7.

It is finally insisted that the conviction for second degree murder does not reflect a proper verdict, since appellant should have either been convicted of first degree murder, or acquitted, under the evidence. The trial court gave instructions defining the lower degrees of homicide at the request of appellant. It is true that the jury might have found appellant guilty of the higher degree of homicide under the evidence, but he cannot complain of their failure to do so. *Roberts* v. *State,* 96 Ark. 58, 131 S. W. 60; *McGough* v. *State,* 113 Ark. 301, 167 S. W. 857.

Other assignments of error set out in the motion for new trial are not argued by appellant. We have care-

fully considered these and find them to be without merit. No error appearing in the record, the judgment is affirmed.

SYKES *v.* CARMACK.

4-8195 202 S. W. 2d 761

Opinion delivered June 9, 1947.

J. H. Brock and *Linus A. Williams,* for appellant.

Bates, Poe & Bates, for appellee.

SMITH, J. This is a suit in replevin to recover possession of an automobile, and the controlling question in the case is the one of fact, whether the title to the car had been reserved when it was sold.

This issue of fact was submitted to a jury under instructions of which no complaint is made. There was a verdict and judgment against plaintiff, from which is this appeal, and for the reversal of that judgment it is insisted that the jury's verdict was contrary to the undisputed evidence.

The testimony in plaintiff's behalf was to the following effect. He was a licensed automobile dealer, and operated a garage in the city of Clarksville. He sold the car in question to a man who said his name was George Young, for the cash consideration of $1,023, and he detailed this transaction as follows: "He (Young) wanted to give me a check when I thought it (the sale) was to be for cash. When I took the check I told him we would not make up the papers until tomorrow when the check cleared, and I would go to the bank the first thing in the morning and get the money. He told me he had to get his men and take them to work at his mill, and that is the reason he wanted the car because he needed transportation." The court asked the witness, "Is that all?" Plaintiff answered, "He was supposed to come back the next morning and we were supposed to make out the papers. The only thing said about title was that I would deliver title when the check cleared. I took the check and if it had been good and the man had not come back I would have considered the car sold, and would have delivered title to it. I did retain title to the car." The sixteen year old son of plaintiff, who was employed at his father's garage, gave testimony to the same effect.

The check was drawn on a bank in Russellville, a city about twenty-five miles from Clarksville, and was presented for payment there the following morning, when payment was refused for the reason that drawer of the check had no account in the bank on which it was drawn.

The purchaser drove the car to Mena, sold it to a dealer there, and defendant purchased the car from this dealer and received a bill of sale therefor. Defendant had no information that there was any question about the title of the car.

It was held in the case of *Home Fire Ins. Co.* v. *Wray,* 177 Ark. 455, 6 S. W. 2d 546, that a contract reserving title to an automobile in the seller until payment of the purchase price thereof need not be in writing, but may rest wholly in parol, and the seller may deliver possession to the buyer on such condition, and a subsequent purchaser without notice of such reservation acquires no title as against the original seller.

Appellant relies upon this case for the reversal of the judgment from which is this appeal. But there must have been a contract in which title is reserved and this is the question of fact which was submitted to the jury. To make such a contract it is essential that the reservation of title must have been agreed upon and assented to by both buyer and seller, and the testimony is not very definite that the buyer had assented. Moreover the jury may not have credited the testimony that there was a reservation of the title. The interest of appellant and his son is such that their testimony may not be treated as undisputed, and this interest makes the truth of their testimony, although not disputed by any witness, a question of fact for the jury. In the case of *Skillern* v. *Baker,* 82 Ark. 86, 100 S. W. 764, 118 Am. St. Rep. 52, 12 Ann. Cas. 243, it was held that the general rule that where an unimpeached witness testified distinctly and positively to a fact and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to by the witness can be drawn, the fact may be taken as established and a verdict directed accordingly, is inapplicable where the witness is interested in the result of the suit, or facts are shown which might bias his testimony, or from which an inference might be drawn unfavorable to his testimony or against the fact testified to by him. That holding has been reaffirmed in numerous subsequent cases.

The circumstances of this sale are such that we cannot say that the jury acted arbitrarily in not crediting the testimony of appellant and his son. The car was being repaired and was evidently sold for all it was worth, possibly much more. There is no question but that the check

was accepted and the car delivered. Now it is true that appellant testified that he did not intend for the title to pass until the check had been cashed, but that as a matter of accommodation he permitted the purchaser to use the car in carrying certain employees to his mill. He made no inquiry about the location of this mill or where the employees were who were to be transported to it. The jury may have found that appellant made himself too credulous to be believed. The sale was supposed to be for cash, and there was no occasion for a reservation of title in any papers to be prepared the next day after cashing the check. Appellant admitted that he would have considered the deal closed if the check had been cashed, whether the purchaser returned or not.

The jury heard the witnesses testify, and saw their manner of doing so, and their narrative did not carry conviction, and required a question by the court to clarify it. These facts together with the interest of the witnesses in the case prevent us from holding that there was no question of fact upon which the jury had the right to pass, and the judgment must therefore be affirmed and it is so ordered.

COOK, COMMISSIONER OF REVENUES *v.* SOUTHEAST ARKANSAS TRANSPORTATION CO.

4-8202 202 S. W. 2d 772

Opinion delivered June 9, 1947.

[redacted]

O. T. Ward, for appellant.

Rowell, Rowell & Dickey, for appellee.

SMITH, J. The essential and controlling facts in this case are covered by stipulation of opposing counsel, and may be stated as follows: Appellee, a transportation company, bought certain busses, the number not being stated, from a manufacturer or dealer in St. Louis, Missouri, a completed sale being made in that city. The busses were shipped to appellee at Pine Bluff, Arkansas, and the State Revenue Commissioner is demanding and endeavoring to collect from appellee a tax of two per cent of the purchase price of the busses under the provisions of paragraph (e) of § 3 of Act 386 of the Acts of 1941. This attempt of the Commissioner was enjoined in the decree from which is this appeal. For the reversal of this decree the contention is made that the tax levied upon new automobiles under the statute referred to is a use tax and not a sales tax, and the correctness of this contention is the question presented for decision.

The purpose of Act 386 as reflected by the title is "To Provide for Raising Revenue to Sustain the Common Schools; to Provide Free Text Books for the First Eight Grades Thereof: to Substitute Homestead Exemption Taxes and to Provide Funds for State Charitable Institutions, for Library Services and for the Objects of the Welfare Commission," and to provide these funds "by Prescribing and Levying Specific Taxes Upon Gross

Receipts Derived From Sales," and to provide for the ascertainment, assessment and collection thereof.

If the Act authorizes the collection of a use tax, that fact is not revealed by its title, but rather is concealed. The title of an act is not controlling in its construction, although it may be considered in determining its meaning when in doubt. *Matthews* v. *Byrd,* 187 Ark. 458, 60 S. W. 2d 909.

Section 1 of this Act 386 reads: "This Act shall be known and cited as 'The Arkansas Gross Receipts Act of 1941.' Authority for the levy and collection of the tax is found in § 3 of the Act, the first paragraph of which reads as follows; 'There is hereby levied an excise tax of two (2%) per centum upon the gross proceeds or gross receipts derived from all sales to any person subsequent to the effective date of this Act, of the following: . . .".

Sub-paragraphs of this section of the Act (a), (b), (c), (d), and (e) enumerate the property, service, etc., upon which the tax is imposed, and the second paragraph of sub-paragraph (e) reads as follows: "The tax levied by this Act in respect to the sale of new automobiles shall be paid by the user or consumer to the Commissioner of Revenues instead of being collected by the dealer and the Commissioner shall be required by this Law in issuing automobile license for new cars to require payment of the two per cent tax levied hereby before issuing said licenses."

It is upon the paragraph just quoted that the Commissioner relies for his authority to collect the tax here in question.

This Act 386 of 1941, by which number it will be hereinafter referred to, superseded Act 154 of the Acts of 1937, hereinafter referred to by that number.

Act 154 has a section, number 4, corresponding to § 3 of Act 386 and paragraph (F) of Act 154 reads as follows: "Every person, as defined in this Act, shall report to the Commissioner as a retail sale the use or

consumption by him of anything on which the sales tax has not been paid under this Act which would have been levied had it been sold at retail in this state, and shall pay the sales tax thereon."

Under the authority of paragraph (F) of § 4 of Act 154 it was sought in the case of *Mann* v. *McCarroll*, 198 Ark. 628, 130 S. W. 2d 721, to collect a use tax on certain gin and other machinery bought in another state, and used in this state, just as the Commissioner of Revenues is attempting to do in the instant case. But it was there said: "There is no controversy about these several sub-divisions (A), (B), (C), (D), and (E), but (F) is the questioned provision. Now it is contended by the appellee that sub-division (F) in itself levies or imposes the use tax. We have just called attention to the imposition of the sales tax in a quoted portion of § 4. The only tax, therefore, that is imposed is a sales tax. We seek in vain for any language that lays or imposes a 'use tax'. We may not so amend an act of the Legislature to levy and collect a tax apparently not even contemplated by the law-making body. If sub-division (F) be given any interpretation or construction at all, it must be such interpretation or construction as will relate to the only tax that is imposed by said Act 154, and that is the retail sales tax."

It was also said in the Mann case, *supra,* "The quoted first part of § 4 above set out indicated clearly that the Legislature knew a tax had to be levied or imposed before it could be collected and there can be no question that it levied a sales tax. There is no language whereby a use tax was levied or by which such fact might be determined by actual or necessary implication. In fact, the very provisions which the appellee now argues are sufficient to levy a use tax and provide for its collection designate such tax as was levied as the sales tax levied in the first part of this section."

It was there further said: "The purpose of the said sub-division (F) aforesaid, is valid beyond question if it be treated purely as part of the machinery to aid in

the collection of a sales tax, and not in fixing liability upon property not subject thereto."

So, also, the second paragraph of sub-section (e) of section 3 of Act 386 must be construed as the method of collecting the sales tax when such tax is due, and not as imposing another and a different tax, to-wit, use tax.

The concession is frankly made in the state's brief that a sales tax may not here be collected, as a completed sale was made in another state, unless Act 386 has imposed a use tax. The case of *McLeod, Commissioner* v. *J. E. Dilworth Co.,* 205 Ark. 780, 171 S. W. 2d 62, (affirmed by the Supreme Court of the United States, 322 U. S. 327, 64 S. Ct.. 1023, 88 L. Ed. 1304) is decisive of the question that a sales tax may not be collected in this case. It was also held in effect in the Dilworth case, *supra,* that the tax imposed by Act 386 is in reality a retail sales tax such as was imposed by Act 154.

In a very recent case of *State ex rel. Com. of Revenues* v. *Hollis & Co.,* 209 Ark. 455, 190 S. W. 2d 986, it was said: "The tax sought to be collected by appellant is based on Act 386 of 1941, p. 1056, the short title of which is "The Arkansas Gross Receipts Act of 1941." It is a sales tax and not a use tax act, and has been so treated by this court in all cases subsequent to its enactment. See *McLeod, Commissioner* v. *J. E. Dilworth Co., et al.,* 205 Ark. 780, 171 S. W. 2d 62."

It is not without significance that following the decision in the Dilworth case, *supra,* in which the opinion was delivered April 26, 1943, that the General Assembly at its ensuing 1945 session passed a bill imposing a use tax in certain cases, which was vetoed by the Governor.

We conclude therefore, that Act 386 does not authorize the collection of a use tax and the decree enjoining the attempt to collect it will therefore be affirmed.

COLE, JONES AND BEAN *v.* STATE.

4448 202 S. W. 2d 770

Opinion delivered June 9, 1947.

Rehearing denied June 30, 1947.

[redacted]

Ross Robley and *Elmer Schoggen,* for appellant.

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

GRIFFIN SMITH, Chief Justice. The appellants here were appellants in the case decided October 7, 1946. In the former proceeding they were tried on an indictment charging that by the use of force and violence they prevented Otha Williams from engaging in work as a laborer. The charge was based upon a part of § 1 of Act 193 of 1943. *Cole et als.* v. *State,* 210 Ark. 433, 196 S. W. 2d 582. The judgments were reversed and the causes remanded for a new trial because testimony was erroneously admitted.

On remand the indictment was quashed and the defendants went to trial on information filed by the Prosecuting Attorney. The verdicts were that each should serve a year in the State Penitentiary.

For reversal it is argued (a) that evidence does not support the verdicts; (b) Act 193 cannot be construed to apply to facts presented; (c) Section 2 of Act 193 is unconstitutional and its validity has not been determined; and (d) the defendants' plea of former jeopardy should have been sustained.

First.—(d)—This contention cannot be maintained. The defendants were convicted when tried on the indictment—an indictment they alleged was void because of alleged irregularities in the selection of grand jurors. When the causes were remanded the Prosecuting Attorney elected to proceed by information. In so doing he disregarded the indictment: a result the defendants had sought. The principles announced in *State of Arkansas* v. *Clark,* 32 Ark. 231, are in point. See also *Johnson* v. *The State,* 29 Ark. 31, 21 Am. Rep. 154. It is cited in the Clark case. *Fox* v. *The State,* 50 Ark. 528, 8 S. W. 836, was an appeal from a conviction under an indictment charging false imprisonment. Fox had formerly been indicted for robbery, and acquitted. This Court held that in the circumstances of that case false imprisonment was an ingredient of the robbery charge for which Fox had stood trial and as to which he had been found not guilty; hence there could be but one prosecution. *Lee* v. *The State,* 26 Ark. 260, 7 Am. Rep. 611, is not contrary. That case was decided when the Constitution of 1868 was in effect, its provision being that " . . . no person, after having been once acquitted by a jury, for the same offense shall be again put in jeopardy of life or liberty." The Constitution of 1874 is: " . . . and no person, for the same offense, shall be twice put in jeopardy of life or liberty." Effect of the case is that dismissal of a valid indictment against one who insists upon trial before a jury then sworn amounted to an acquittal, and a plea of former jeopardy was good against a second indictment for the same offense.

Second.—(c)—We have heretofore construed applicable provisions or sections of Act 193 as cases involving the legislation were presented. In *Smith and Brown* v. *State,* 207 Ark. 104, 179 S. W. 2d 185, it was said that the

Act was not open to constitutional objections. That statement, of course, was intended to apply to the facts of the appeal then being considered. In *Gurein* v. *State,* 209 Ark. 1082, 193 S. W. 2d 997, the provisions of the Act formerly dealt with were treated as constitutional upon authority of the Smith-Brown case. To the extent that judicial construction of a Legislative Act would deprive an accused person of equal protection of the law, Amendment Fourteen to the Federal Constitution would be violated; but that question is not involved in the dispute with which we are dealing. Our consideration in this respect is directed to the single proposition that force and violence were employed by two of the defendants.

A literal construction of that part of § 2 of Act 193 making it a felony for any person "acting either by himself, or as a member of a group or organization, or acting in concert with one or more persons, to promote, encourage, or aid [in the character of unlawful assemblage there prohibited"] would, it is said, prevent peaceful picketing. The Act does not have this purpose in view, and if it did that part would be struck down by the Courts. *Riggs* v. *Tucker Duck & Rubber Co.,* 196 Ark. 571, 119 S. W. 2d 507.

Information in the instant case, while charging that Cole, Bean, and Jones violated the quoted provision of § 2 of the Act, also accused them of using force and violence to prevent Williams from working. The use of force or violence, or threat of the use of force or violence, is made unlawful by § 1.

Third.—(b)—In view of the fact that the judgments as to Cole and Jones are affirmed without invoking any part of § 2 of the Act, it is not necessary to discuss the construction appellants think the facts do not sustain.

Fourth.—(a)—It is admitted that a labor dispute existed and that while the defendants were not "walking picket" they were striking against Southern Cotton Oil Company in Little Rock. Facts incident to the difficulty between Campbell and Williams are set out in the opinion of October 7, 1946. There is substantial testimony in the

record before us that Cole was on the scene where a group of strikers had gathered to await exit of Williams and others from the mill, five of the employes having remained at work. Cole carried a club, or walking stick. He told Willie Brown to go ahead, that "they" were not after him—but, inferentially, were waiting for Williams. Jones said, "Come on, boys," and the strikers "flew up like blackbirds and came fighting." No witness testified to any activity by Bean. Willie Johnson merely saw him standing across the street. Brown "never did see Bean." Elvie Washington merely "saw" Bean, but did not say what he was doing. Bishop Jackson said "Bean had been there on the corner, but had gone and was about half a block away."

These were the material witnesses who testified for the State. References to time and place were directed to the assault upon Williams by Campbell. Williams in defense used a pocket knife, inflicting wounds from which Campbell died.

While it is probable that Bean was associated with Cole and Jones in their undertaking, Act 193 is highly penal, and we feel that evidence to sustain a conviction should not rest upon any but a substantial basis.

The judgments as to Cole and Jones are affirmed; as to Bean the judgment is reversed with directions that the cause be dismissed.

Mr. Justice Frank G. Smith and Mr. Justice McHaney think the evidence was sufficient to affirm as to all of the defendants, and therefore dissent as to the reversal of the judgment against Bean; Mr. Justice Robins dissents on the ground that the evidence was insufficient as to all three of the defendants.

DEDMON *v.* HAWKINS.

4-8207 203 S. W. 2d 183

Opinion delivered June 9, 1947.

Sam M. Levine, for appellant.

Reinberger & Eilbott, for appellee.

McHANEY, Justice. This action was brought by appellant in the Circuit Court in ejectment to recover the possession of lots 1 and 2, block 15 of E. J. Waters Addition to Pine Bluff, and in the alternative to recover betterments. On the motion of appellee and by consent the cause was transferred to the Chancery Court, where an amended complaint was filed alleging that appellant acquired the title to said lots by deed from the State to J. M. Shaw, one of her attorneys, on July 1, 1936, and by deed from Shaw to her and her then husband, Sam

Dedmon, on July 6, 1936, and by deed to her from her former husband, Sam Dedmon, on May 1, 1942, from whom she had been divorced. She also alleged that after thus acquiring the title to said lots she made improvements thereon to the extent of $1,000; that Sam permitted the appellee who is his daughter by a former wife, which former wife died intestate prior to appellant's marriage to Sam, to live with them on said lots as a member of the family; that he then began to be cruel to appellant, ran her off, leaving Sam and appellee in possession, and finally Sam left, leaving appellee in possession of the property which she refuses to surrender to her. The prayer was for possession and rent, but in the alternative for the reasonable value of the improvements.

Appellee answered with a general denial. She alleged also that she is the owner of said lots, first, because she secured a deed thereto from Sewer and Water District No. 6 of Jefferson County on October 29, 1945; and, second, that she and the four other heirs at law of their mother, Mattie Simmons Dedmon, inherited said property from their mother who died intestate in 1930, and who had inherited same from her father, Abner Simmons, and who was the owner thereof at her death. She further alleged that Sam Dedmon, her father, was living with her mother at the time she died, and that he permitted said property to forfeit and sell to the State for the taxes at a time when he was living thereon with her and his four other minor children, and that the purchase by Shaw from the State and the conveyance by Shaw to Sam and appellant amounted to a redemption from the tax sale only and conveyed no title, and that appellant well knew that the forfeiture and sale to the State and its purchase from the State were designed to defeat appellee and her brothers and sisters in their title to said property.

Trial resulted in a decree dismissing appellant's complaint for want of equity. The court found that appellee and her four brothers and sisters inherited the property from their mother on her death in 1930; that

Sam Dedmon permitted the property to forfeit for taxes (in 1932 for the 1931 taxes) at a time when he was living on said property with said children; that the deed from the State to Shaw and his deed to appellant and Sam Dedmon "was merely a redemption from tax forfeiture and amounted to only payment of the taxes by Sam Dedmon, who had the duty to pay such taxes, being in possession at the time in question and receiving the benefits therefrom; that such redemption gave Sam and Eula Dedmon no color of title at all—and that any subsequent deed from Sam Dedmon to Eula Dedmon passed no title to the property;" that on October 29, 1945, appellee secured a deed from Sewer and Water District No. 6, which had acquired it under foreclosure for nonpayment of assessments due it; and that the betterments claimed to have been made to the property by appellant were not made by her, but by Sam Dedmon. This appeal followed.

We think the court correctly held that the deed from the State to Mr. Shaw and his deed to appellant and Sam Dedmon, amounted to a redemption from the 1932 tax sale to the State for the 1931 taxes, and therefore conveyed no title to either or both of them. The parties are all Negroes. At the time of the forfeiture and sale to the State, Sam Dedmon and his five children were living in the house on these lots. On the death of his first wife Mattie who had inherited the property from her father, the title thereto passed to her children by Sam, subject to his curtesy interest therein, if any. At least he was the natural guardian of his minor children. He was occupying the property, receiving all the benefits therefrom and it was his duty to pay the taxes. Being under this duty, a court of equity would not permit him to profit by his own wrong by acquiring title to his own children's property. The fact that he had the deed from Mr. Shaw so drawn as to include appellant as one of the grantees and his deed to her in 1942 do not vest her with any title based on said tax sale, since the whole transaction was merely a redemption.

We think it was Sam Dedmon's duty to pay the taxes under § 13808 of Pope's Digest, as construed in *Smith* v. *Davis,* 200 Ark. 547, 140 S. W. 2d 126. This case also points out the distinction between it and *Wilkins* v. *Maggard,* 190 Ark. 532, 79 S. W. 2d 1003, relied on by appellant here, in that one Turner, son-in-law of Davis, was not a *bona fide* purchaser of the tax title from the State of Arkansas; but his deed from the State was merely a redemption thereof for his father-in-law, Bob Davis who was the life tenant, whereas, in the *Wilkins* v. *Maggard* case, the tax purchaser was a *bona fide* one. So, here, the tax purchaser, Sam Dedmon, was not a purchaser at all, but simply took a circuitous route to redeem the property.

As to the betterments claimed by appellant, the court correctly denied same because the improvements she claims to have made were not made under color of title as required by § 4658 of Pope's Digest. Neither the deed from Shaw to her and Sam nor his deed to her based on said forfeiture and sale to the State, constituted color of title. On this point appellant again relies on *Wilkins* v. *Maggard, supra,* but, as we said in *Smith* v. *Davis, supra,* "the statute invoked by appellant and construed in the case of *Wilkins* v. *Maggard* (§ 10120, C. & M. Digest, now § 13884 of Pope's) has no application to one who has redeemed tax forfeited land from the State," and, therefore, appellant is not protected by the terms of that statute.

Moreover, it appears to us, as it did to the trial court, that the deed of Sewer and Water District No. 6 of Jefferson County to appellee, of October 29, 1945, title to said lots having been previously acquired by said District by foreclosure sale in the Chancery Court for delinquent assessments for the years 1934 to 1940, inclusive, and for 1942 and 1943 due to said District, conveyed as against appellant a good title to appellee free of all claims of appellant. No question is raised about the regularity or validity of the foreclosure sale, or of the District's title and right to convey to appellee. The

consideration paid by appellee, as expressed in the deed, is $284.40. As between appellee and her co-tenants, brothers and sisters, not parties to this action, no question is presented.

The decree is, accordingly, affirmed.

WITHERSPOON *v.* THE LUMBERMEN'S MUTUAL INSURANCE COMPANY.

4-8212 203 S. W. 2d 185

Opinion delivered June 9, 1947.

A. F. House, for appellant.

Glenn F. Walther, for appellee.

HOLT, J. April 25, 1946, appellant, Lawrence Witherspoon, brought this suit, and in his complaint alleged: "The defendant is a mutual insurance company authorized to do business in Arkansas. On the 21st day of July,

1944, it issued to the plaintiff its policy No. LA38849. A copy of said policy is attached, made a part hereof, and marked Exhibit 'A.' The half ton truck described in the policy was being operated by an agent of the plaintiff on or about December 25, 1945, when such agent was blinded by the headlights of another car, went off the road, and turned over in a ditch. The accident occurred on Hays Street north of Roosevelt Boulevard. The truck was placed back on the highway and the agent of the plaintiff continued to operate it. Due to the fact that the oil had been drained out when the truck overturned, the motor was burned out, and by reason thereof the plaintiff sustained damages in the amount of $250.31.

"On the face of the policy there is a column entitled 'Coverage.' Beneath that in parentheses appear the words 'as hereinafter defined.' Immediately following such words is the following definition of 'Coverage': 'Comprehensive: Loss of or damage to the automobile, except by collision, but including fire, theft and windstorm. Limits of liability, $500.' In another portion of the policy there is fine print which undertakes to restrict the coverage as hereinabove described, but said fine print is in conflict with the provisions hereinabove quoted."

The pertinent provisions of the insurance policy were: "Item 3. In consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy, the company agrees to pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, sustained during the policy period, with respect to such and so many of the following coverages as are indicated by specific premium charge or charges:

Coverages (as hereinafter defined)		*Limits of Liability* (Insert Amt. or 'Actual Cash Value')	*Net Rate*	*Premium*
A	Comprehensive—Loss of or Damage to the Automobile, Except by Collision but including Fire, Theft and Windstorm	$500.00	$4.80	$24.00
B-1	Collision or Upset	* * *		$.....
B-2	Convertible Collision or Upset, Additional Payment $.....	Actual Cash Value		$.....
C	Fire, Lightning and Transportation	$.....	$.....	$.....
D-1	Theft (Broad Form)	$.....	$.....	$.....
D-2	Theft (Deductible Form)	$.....	$.....	$.....
E	Windstorm, Earthquake, Explosion, Hail or Water	$.....	$.....	$.....
F	Combined Additional Coverage	$.....	$.....	$.....
G	Towing and Labor Costs	$10 for each disablement	$.....	$.....
		TOTAL PREMIUM		$24.00 * * *

"INSURING AGREEMENTS (Subject to the limits of liability, exclusions, conditions and other terms of this policy.) INSURANCE COVERAGES DEFINED. COVERAGE A—COMPREHENSIVE—Loss of or Damage to the Automobile, Except by Collision. Any loss of or damage to the automobile except loss caused by collision * * * or by upset of the automobile, etc."

Appellant prayed for damages in the amount of $250.31, penalty and attorney's fee.

Appellee, insurance company, filed demurrer, in which it alleged: "Defendant demurs to the complaint of the plaintiff for the reason that said complaint does not state facts sufficient to constitute a cause of action in that the damage sustained by the plaintiff is not covered by the policy of insurance upon which the suit is based."

The court sustained the demurrer, and upon appellant's refusal to plead further, dismissed his complaint. This appeal followed.

Appellant contended below, and argues here, that the insurance contract covered all damages to his truck resulting from an "upset." The trial court found against this contention, and we think correctly so. "It is also a well-settled rule in construing a contract that the intention of the parties is to be gathered, not from particular words and phrases, but from the whole context of the agreement. In fact, it may be said to be a settled rule in the construction of contracts that the interpretation must be upon the entire instrument, and not merely on disjointed or particular parts of it. The whole context is to be considered in ascertaining the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause," *Fowler* v. *Unionaid Life Insurance Company,* 180 Ark. 140, 20 S. W. 2d 611; and in *National Life Insurance Company* v. *Gregg,* 168 Ark. 80, 269 S. W. 62, this court held (headnote 1): "As it is the duty of the court to give effect to all of the clauses of a policy of insurance, a clause defining the insured's liability and containing no stipulation against liability will be construed not to conflict with another clause containing a clear and unambiguous stipulation against liability for injury from specified causes."

While it is true that an insurance contract must be strictly construed against the insurer who prepared it, where no ambiguity or uncertainty appears, no place is found for the operation of the rule. We are unable to find any ambiguity or uncertainty in the language used in the policy before us. It seems to be in standard form.

It appears certain that the insured here did not intend to pay for, nor did the company intend to accept the risk for damages which arose from an "upset" of the truck. Item 3, *supra,* of the insurance contract definitely limited the insurance to the "Coverages as hereinafter defined," for which appellant, the insured, paid a "specific premium charge" in the amount of $24.

His total annual premium, as shown in Item 3, was $24 for "Coverage 'A'—Comprehensive—Loss of or Damage to the Automobile, Except by Collision but including Fire, Theft and Windstorm," and Coverage "A" as "Defined": "Any loss of or damage to the automobile except loss caused by collision * * * or upset of the automobile, etc."

Appellant paid no premium for Coverage "B-1, Collision or Upset," or for "B-2, Convertible Collision or Upset." Since he paid no premium for "upset" coverage, and since such coverage is expressly excepted from the policy coverage for which he did pay, we think it clear that the parties intended, and without ambiguity, expressed their intention that damages to the truck resulting from an "upset" were excluded and not covered.

Accordingly, the judgment must be, and is, affirmed.

VANDERGRIFF *v.* VANDERGRIFF.

4-8227 202 S. W. 2d 967

Opinion delivered June 9, 1947.

[redacted]

Heartsill Ragon and *Paul E. Gutensohn,* for appellant.

A. A. McCormick, for appellee.

ED F. MCFADDIN, Justice. Appellee, Kenneth Vandergriff, brought suit against the appellant, Grace Iva Vandergriff (his stepmother) to obtain judgment on a note, and to foreclose a mortgage. The chancery court rendered a judgment and decree of foreclosure, as prayed in the complaint; and this appeal ensued. In the briefs many interesting questions are presented, but we find it unnecessary to discuss or decide them; because we reverse the decree of the chancery court, and remand the cause, with directions to dismiss the suit without prejudice to any claims of any and all parties. We reach this conclusion (1) because of the failure to introduce the original note, or to account for its absence; and (2) because the proof does not show that, at the time of the filing of the suit, there had been any breach of any condition in the mortgage.

FACTS

On November 10, 1945, Kenneth Vandergriff filed complaint against his father, G. W. Vandergriff, and the appellant, Grace Iva Vandergriff. The complaint alleged that, on January 30, 1942, the defendants, for value received, executed their promissory note to Edgar Covey for $3,000 with interest at 8% from date until paid; and, to secure the note, the defendants on the same day executed, acknowledged, and delivered to Edgar Covey a mortgage on certain real estate here involved, which mortgage was duly recorded. The complaint also alleged that on November 30, 1942, the said Edgar Covey, for value received, assigned the said note and mortgage to the plaintiff, Kenneth Vandergriff; and that the indebtedness secured by the mortgage was past due and unpaid; and that the plaintiff was entitled to judgment on the note, and foreclosure of the mortgage. The com-

plaint also alleged that copies of the note and mortgage were attached to the complaint; but no such copies are in the transcript in this court.

The defendant, G. W. Vandergriff, defaulted, and testified on behalf of Kenneth Vandergriff. The defendant, Grace Iva Vandergriff, filed a general denial, and also, *inter alia,* claimed that the indebtedness recited in the mortgage had been fully paid, and that the assignment from Edgar Covey to Kenneth Vandergriff was a part of a fraudulent scheme planned and executed by G. W. Vandergriff and Kenneth Vandergriff for the purpose of defeating Grace Iva Vandergriff of her entirety estate and homestead rights in the mortgaged property.

At the trial Kenneth Vandergriff attempted to introduce a copy of the note sued on, but Grace Iva Vandergriff objected. The following occurred:

"By Mr. McCormick: Q. Is that the original mortgage you bought from Covey? A. Yes, sir. Q. Was there a note attached, and did he deliver you a note with that mortgage? A. Well, yes, sir. There was a note attached to it. Q. There was, when you bought it? The Court: Listen! He hasn't really said so yet; have you? A. Well, I remember there was a note, but it is not attached to this. I kept all my papers over at the Jefferies Amusement Company—in a safe over there. The Court: Q. Where is that note? A. I don't know. It must have been lost."

. . . . .

"By Mr. McCormick: Q. Is that a copy of the note you received from Covey? A. Yes, sir. Q. And that note accompanied the mortgage at the time you bought it from Covey? A. Yes, sir. Q. How much did you give Mr. Covey for that note and mortgage? A. If I remember right, three thousand and something. $3,215, I believe. Mr. McCormick: You have looked at this, and it is already introduced in testimony. Mr. Ragon: Of course, we objected to the introduction of the copy of the note originally, and we do so now. The Court: The

objection should be sustained, unless there is proof of the existence of the original note, and proof that it has been lost."

The original note was never introduced, nor was there any further attempt made to account for the loss of the original note. No copy appears in the record. On the witness stand, Grace Iva Vandergriff denied that she had ever signed any such note.

The original mortgage was introduced in evidence. It was dated January 30, 1942, and recited the following as to indebtedness and maturity:

"The foregoing conveyance is on condition: That, whereas, the said mortgagors are justly indebted to the said mortgagee in the sum of three thousand dollars ($3,000), for borrowed money, evidenced by 1 promissory note of even date herewith with interest thereon at the rate of 8% per annum, and due 5 years from the date hereof."

There were other provisions in the mortgage concerning payment of taxes and insurance premiums, and allowing an acceleration of maturity on default of the performance of these provisions; but no such default was alleged or proved as to taxes and insurance. The entire basis of the foreclosure was the maturity of the mortgaged indebtedness. We point out that, by the terms of the mortgage, there was no acceleration clause for failure to pay interest, on annual dates; and that the indebtedness was not due until five years from January 30, 1942; and that this suit was filed on November 10, 1945; and the decree was rendered by the chancery court on November 20, 1946.

OPINION

In view of the facts recited, we hold:

I. There could be no judgment on the alleged note, because it was not introduced in evidence, nor was its absence explained as a foundation for proof of its contents. What we said on this point in *Clark* v. *Shockley*, 205 Ark. 507, 169 S. W. 2d 635, applies here:

"It is a fundamental principle that, in order to sustain a judgment, the note sued on must be introduced in evidence or its absence explained.

"In 8 C. J. 1058, the rule is stated as follows: 'The bill or note sued on must in general be produced at the trial before a verdict and judgment can be rendered thereon, or an axcuse shown for its nonproduction. . . .'' Cases from many jurisdictions are cited to sustain the text, and the rule is given in the same language in 11 C. J. S. 199.

"In 8 Am. Juris., 1121, the rule is in the following language: 'Where a note sued on is in the possession of the plaintiff, he must produce it, as it is the best evidence. Nonproduction, however, is excused, and secondary evidence of the execution and contents of the instrument is admissible, where by reason of the facts and circumstances of the particular case its production by the plaintiff is prevented, . . .'

"In the case of *Sebree* v. *Dorr,* 9 Wheaton 558, 6 L. Ed. 160, the Supreme Court of the United States, speaking by Mr. Justice STORY, in 1824, said: 'There is another objection, which is equally decisive of the case. It is, that there was no production of the original notes, nor any excuse offered to account for the nonproduction of them at the trial. It is a general rule of the law of evidence, that secondary evidence of the contents of written instruments is not admissible, when the originals are within the control or custody of the party. Here no proof was offered to show that the original notes were impounded, or that they were not within the possession of the party, or within the reach of the process of the court.' "

II. There could be no foreclosure of the mortgage until there had been a breach of the condition of the mortgage, and no breach was shown. The plaintiff failed to show either (1) that the indebtedness was past due; or (2) that the mortgage allowed foreclosure for default in any annual interest payment; or (3) that the defendant had failed to pay taxes or insurance premiums. In short,

no breach of any condition of the mortgage was shown. On the contrary, it was affirmatively shown that the indebtedness would not have been due until January 30, 1947, which was more than a year subsequent to the filing of the suit: so, this present suit was filed prematurely. In *Winn* v. *Collins,* 207 Ark. 946, 183 S. W. 2d 593 we said:

"In 1 Am. Juris. 451 the rule is stated: 'A cause of action must exist and be complete before an action can be commenced; the subsequent occurrence of a material fact will not avail in maintaining it. The rights and liabilities of the parties—that is, their rights to an action or to judgment or relief—depend upon the facts as they existed at the time of the commencement of the action, and not at the time of the trial.'

"And in 1 C. J. S., § 125, p. 1391, the general rule is stated: 'In equity, if there is no cause for equitable relief at the time the bill is filed, it cannot be maintained upon a cause accruing thereafter, . . .'

"Our own cases are in accord with this general rule. In *Hornor* v. *Hanks,* 22 Ark. 572, this court said in an equity case: 'The law is expressly written, that the right of a plaintiff must be adjudicated upon as it existed at the time of the filing of his bill. Adams Eq. 413; *Barfield* v. *Kelly,* 4 Russ. 359. And this court has decided that where a bill disclosed a good cause of action, but which had not accrued when the bill was filed, the bill could not be maintained. *Phebe* v. *Quillin,* 21 Ark. 490.' To the same effect, see *Shreve Chair Company* v. *Manufacturers' Furniture Company,* 168 Ark. 756, 271 S. W. 954. See Annotation in 125 A. L. R. 612."

CONCLUSION

It therefore follows that the decree of the chancery court is reversed, and the cause is remanded with directions to enter an order dismissing the present suit, but without prejudice to the rights and claims of any and all parties touching any of the matters involved in this suit. Costs of all courts in the present suit are adjudged against appellee.

CUMMINGS *v.* J. J. NEWBERRY COMPANY.

4-8239 203 S. W. 2d 187

Opinion delivered June 16, 1947.

[redacted]

Curtis L. Ridgway and *J. R. Long,* for appellant.

Wootton, Land & Matthews, for appellee.

ED. F. MCFADDIN, Justice. The question is, whether the Arkansas Workmen's Compensation Law affords the exclusive remedy allowed a minor employee against the employer for compensation for injuries sustained by the minor in the course of employment, when the minor was employed in violation of the Arkansas Child Labor Law. We answer the question in the affirmative.

On October 15, 1946, the appellant, Gloria L. Cummings (a minor, acting by her father and next friend, Howard Cummings), filed this action in the circuit court against appellee, J. J. Newberry Co. The complaint alleged that appellee operated a store in Hot Springs; that Gloria L. Cummings was a minor, and under the age of 16 years; that on August 14, 1946, the minor was employed by appellee in a dangerous and prohibited

occupation, and without the consent of the parents of the minor, and without anyone having obtained an employment certificate as required by Arkansas Child Labor Law (see § 9067, *et seq.,* Pope's Digest); that the employer required the minor to empty boiling hot grease from a container into a doughnut cooking machine; that on August 17, 1946, the hot grease spilled from the container upon the legs and thighs of the minor, inflicting third degree burns; that the minor suffered serious, painful and permanent injuries, and also mental anguish, all brought about through the negligence and unlawful conduct of the employer (appellee). The prayer of the complaint was for $3,000 damages.

Appellee filed a pleading entitled "Motion to dismiss," which was in reality a demurrer, and which stated: "That the circuit court has no jurisdiction to hear and determine the cause of action set forth in the plaintiff's complaint for the reason that the Constitution of the State of Arkansas and Act 319 of 1939 entitled 'Workmen's Compensation Law,' has vested in the Arkansas Workmen's Compensation Commission sole jurisdiction to hear and determine the matters and facts set forth in the plaintiff's complaint and being founded upon an injury alleged to have been sustained in the course of employment while the relationship of employer and employee existed between the plaintiff and the defendant. . . ."

The circuit court sustained appellee's pleading, and the appellant stood on the complaint. A judgment was entered, dismissing the complaint, and appellant has appealed, challenging here the correctness of the said judgment; and citing us to the following statutes, adjudicated cases and texts: section 9067, *et seq.,* Pope's Digest, being the Arkansas Child Labor Law; *Cox Cash Stores* v. *Allen,* 167 Ark. 364, 268 S. W. 361; Annotation entitled "Applicability and effect of workmen's compensation act in cases of injury to minor" found in 14 A. L. R. 818, 33 A. L. R. 337, 49 A. L. R. 1435, 60 A. L. R. 847, 83 A. L. R. 416, and 142 A. L. R. 1080; *Green* v. *Anwyll,* 86 Pitts-

burgh Law Journal (Pa.) 543; *Cox* v. *Hooven,* 250 Ky. 690, 63 S. W. 2d 914; *Lee* v. *Kansas City Publishing Co.,* 137 Kan. 759, 22 Pac. 2d 942; *Ortega* v. *Salt Lake Wet Wash Laundry Co.,* 108 Utah 1, 156 Pac. 2d 885; and *Lucas* v. *Industrial Commission of Utah,* 108 Utah 25, 156 Pac. 2d 896.

Appellant says in her brief: "To hold that a minor is limited to the remedy as now provided by workmen's compensation law, would place the minor on the same footing as an adult and virtually render ineffective our Child Labor Law. In this case the employer failed to obtain the employment certificate as required by § 9074 of Pope's Digest, and had the appellant working in a dangerous occupation; . . . On account of the failure of the employer to comply with the law, there was no valid contract with said minor. We submit that the provision of § 2(b) of the Workmen's Compensation Law—making the act cover minor employees, whether lawfully or unlawfully employed—is for the benefit of the worker and not the employer; in other words, a minor employee, as in this case, should be permitted to pursue either the remedy provided under the Workmen's Compensation Law or to pursue her remedy at law as appellant has elected to do."

The case of *Odom* v. *Arkansas Pipe & Scrap Material Co.,* 208 Ark. 678, 187 S. W. 2d 320, is a holding directly opposite to the appellant's argument. In the Odom case, the mother of the deceased minor filed suit at law to recover damages for the death of her son. The complaint alleged that the son was under 18 years of age at the time of his death, and had been employed by the appellee without the mother's consent, and that—while working for appellee at an oil well—received fatal injuries through the negligence of the appellee. By demurrer to the complaint, the Arkansas Pipe & Scrap Material Co. challenged the jurisdiction of the court on the ground that the Arkansas Workmen's Compensation Commission, by paragraph 2(b) and paragraph 4 of Act 319 of 1939, had sole jurisdiction. The circuit court dismissed

the complaint of Mrs. Odom. We affirmed the judgment of the circuit court, saying:

"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. We quote below the pertinent provisions of the Workmen's Compensation Law:

"Subdivision (b) of § 2: ' "Employee" means any person, including a minor whether lawfully or unlawfully employed, in the service of an employer. . . . '

"Section 4: '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, . . . ' "

The case of *Odom* v. *Arkansas Pipe & Scrap Material Co., supra,* was cited as a precedent, and as ruling in *Hagger* v. *Wortz Biscuit Co.,* 210 Ark. 318, 196 S. W. 2d 1. In short, this court has already decided, adversely to the appellant, the question now presented.

We comment, briefly, on the cases cited by the appellant, and as previously listed:

(a) *Cox Cash Stores* v. *Allen, supra,* was decided in 1929. The Arkansas Workmen's Compensation Law (Act 319 of 1939) was passed by the General Assembly of 1939, and sustained by referendum vote of the people at the 1940 election. The effect of this new law was to change radically the old law—regarding the employee's right to recover from the employer—in all cases coming within the purview of the compensation law; so the language in *Cox* v. *Allen, supra,* is not applicable to the case at bar, particularly in light of § 2(b) of the present com-

pensation law, which specifically states that an "employee" includes a minor, whether lawfully or unlawfully employed.

(b) The cases from Kansas, Kentucky, Pennsylvania and Utah cited by appellant, and previously listed, are, each, based on a statute substantially different from our statute, since, as already noted, under our statute "employee" includes a minor, whether lawfully or unlawfully employed.

Those interested in studying the statutes of the various states, as regards workmen's compensation law coverage of minors unlawfully employed, may well examine Schneider's Workmen's Compensation Text, (Permanent Ed.), vol. 4, pp. 290-376, inclusive, where the statute of each state is analyzed as regards the particular question here under consideration. A clear summation of the holdings may be found in 71 C. J. 503, *Workmen's Compensation Acts,* § 229: *"Acts with express provisions as to illegality of employment*:

"Under a statute which expressly so provides, a minor is included within the Workmen's Compensation Act, even though he is employed contrary to laws regulating the employment of minors. Such a statute does not conflict with the child labor laws, for the compensation act deals with civil rights and remedies while the labor law deals only with the criminal penalty."

It follows that the minor employee in this case cannot proceed in an action at law for damages, but is relegated to the remedies afforded by the Arkansas Workmen's Compensation Law. The judgment of the circuit court is in all things affirmed.

ROEDENBECK *v.* SCOTT.

4-8232 204 S. W. 2d 160

Opinion delivered June 16, 1947.

Rehearing denied September 22, 1947.

Pryor, Pryor & Dobbs, for appellant.

Hugh M. Bland, for appellee.

ROBINS, J. Appellees, Nelson Scott and American Insurance Company, Scott's insurer, were awarded verdict for $1,700 in their suit against appellant for damages inflicted by automobile driven by appellant when it struck a filling station owned by Scott. From judgment entered on the verdict this appeal is prosecuted.

Appellee Scott was the owner of a filling station situated in the fork of Highway 71 and Highway 45, in Fort Smith, Arkansas. Shortly after midnight on March 10, 1946, the Buick sedan, owned and driven by appellant, struck the filling station, knocking down two pillars, pulling the roof loose, and inflicting other damage.

Appellant's answer to complaint of Scott, asking damages in the sum of $2,115, was a general denial and a plea of contributory negligence. By way of cross complaint, appellant asked judgment against appellee Scott for $700 for damage to his car, which he alleged was caused by said appellee having erected the pillar, struck by the car, in the right-of-way of the highway.

Appellant and his friends were driving to a night club and prior to the accident appellant had drunk two bottles of beer. There were two bottles of whiskey in the automobile, but occupants of the car denied that they had opened the whiskey. They testified that the breaking of the whiskey bottles in the collision caused the odor of whiskey noticed immediately after the accident. One of the young ladies in appellant's car claimed to be the owner of the whiskey, stating she had purchased it to give to her father and a friend. Appellee Scott testified that the seal on one of the whiskey bottles had been broken. He also testified that immediately after the accident appellant promised to reimburse him for the damage. This statement was not denied by appellant. There was no dispute in the testimony as to the amount of damage to Scott's building, nor is it contended here that the verdict is excessive.

Appellant's version of the occurrence was that he was meeting two cars and one of them attempted to pass the other, forcing appellant from the concrete slab onto the gravel, which caused his automobile to skid and strike the pillar. He testified that he was driving at a speed of from 35 to 40 miles an hour.

An employee of the State Highway Department testified that the right-of-way of Highway 71 at this point

was shown by the map on file with the department to be seventy feet wide, and that his measurement disclosed that from the center of the highway to the pillar struck by appellant was a distance of only thirty-two feet.

The lower court refused to submit appellant's claim against appellee Scott, for damage to appellant's automobile, to the jury, and, in effect, told the jury that, if they found that appellant was negligent in the driving of his car, and the damage to appellee Scott's property was caused by this negligence, they should return a verdict for appellees.

Several contentions for reversal are urged by appellant, but they are all based on his argument that since Scott's pillar was three feet over in the right-of-way of the highway it amounted to a nuisance, and that the maintenance of this nuisance by Scott was the proximate cause of the damage to the building, as well as to appellant's car.

It is argued by appellant that our opinion in the case of *Arkansas Fuel Oil Company* v. *Downs,* 205 Ark. 281, 168 S. W. 2d 419, wherein we upheld a judgment against the oil company for injuries sustained by Downs when he fell into an excavation caused by removal of a gasoline tank in the right-of-way of a highway, authorizes a holding here that appellee Scott was negligent in maintaining the pillar in the right-of-way.

The facts in that case are not similar to those in the instant case. In that case it appeared that Downs was injured by falling into the open pit (the existence of which he had knowledge) while walking in the dark. There was no contention that Downs was negligent in anything he did. Here the jury found that appellant was negligent in his driving. Nor can it be said that the menace of an open excavation is the same as that created by a pillar supporting a filling station.

There was no testimony indicating that the maintenance of the pillar interfered with traffic over the highway. English cases, such as *Rex* v. *Bartholomew* (1908),

1 K. B. 554, and *Reg.* v. *Lepine,* 15 L. T. (N. S.) 158, lay down the rule that even though a building may encroach on the right-of-way of a public highway such building does not constitute a nuisance unless it obstructs traffic to an appreciable extent. We do not find such a rule expounded in any of the decisions in this country, nor do we deem it necessary to determine in this case its correctness.

The testimony showed that the pillar in question had been in the same location for seventeen years. There was no evidence tending to establish that Scott, before the accident, knew that the pillar was located on the right-of-way, or that there had ever been any complaint made by the Highway Department, or by anyone, as to its location. Scott did not build the pillar. It was a part of the building when he bought the property. Appellant admitted that he knew of the pillar being located where it was. The evidence showed that there was room enough, between the pillar and the concrete slab, for two—and possibly three—cars to pass.

We conclude that, under all the circumstances shown, Scott was not guilty of maintaining such a nuisance as to absolve appellant from liability for negligently damaging the building or to render Scott liable for damage to appellant's car.

If it be conceded that the pillar was such a purpresture that its maintenance could have been enjoined or abated by the proper authorities, this would not authorize an individual, without notice and without complaint, to destroy it negligently. Even in those cases where it is permissible for a private citizen to abate a nuisance, the abatement must (except in an emergency) be effected only after notice to the owner and it must be done in such a manner as to cause the least damage. 46 C. J. 757. It is not even suggested that there had been any complaint from appellant as to the pillar, which doubtless could have been moved out of the right-of-way at comparatively small expense and with little damage to the building.

We conclude that the lower court ruled properly as to the respective liability of the parties.

The jury by their verdict found that the damage was caused by the negligence of appellant. There was substantial testimony to support this finding.

The judgment appealed from must, therefore, be affirmed.

SCHUMAN *v.* RILEY.

4-8192 204 S. W. 2d 162

Opinion delivered June 16, 1947.

Rehearing denied September 22, 1947.

Wm. J. Kirby, for appellant.

L. H. Chastain, for appellee.

GRIFFIN SMITH, Chief Justice. Vacant lots in Fort Smith forfeited for 1938 taxes and in due course were certified to the State Land Office. Suit to confirm was filed March 13, 1942, under authority of Act 119 of 1935. The decree was rendered seven months later.

Appellee acquired title to the property in 1937 by quitclaim deed from Peoples Building & Loan Association of Little Rock. Tax assessments continued in the Association's name. Manie Schuman purchased from the State in 1946.

J. G. Riley (appellee) enlisted with the armed forces July 13, 1942, and was discharged February 17, 1946. In May 1946 he brought suit against Schuman, praying that the Court make an order permitting redemption upon payment of taxes, etc. In addition it was asked that Schuman be required to execute an appropriate conveyance. Other pleadings were filed, with final decree November 26th.

Proof is conclusive that the tax sale was not void for want of power, but that irregularities rendered it voidable. Result is that had Riley intervened within the year permitted by Act 119 sale as to the lots in question could have been set aside. The Chancellor construed the Soldiers' and Sailors' Civil Relief Act, Title 50 U. S. C. A. App. 501, *et seq.*, to confer upon Riley as a service man the right to intervene in the State's suit of March 13, 1942. It was also found that time within which Riley could act in self-protection under the Soldiers' and Sailors' Relief Act had not expired when suit against Schuman was filed.

A majority of the Judges agree with the Chancellor that the Federal statute supplemented the period allowed by Act 119 within which an intervention could be filed. Affirmed.

4-8294 202 S. W. 2d 964

Opinion delivered June 16, 1947.

W. B. Alexander, for appellant.

Guy E. Williams, Attorney General, *Cleveland Holland,* Assistant Attorney General, *Clifton Wade* and *Rose, Dobyns, Meek & House,* for appellee.

McHANEY, Justice. Appellant, a citizen and taxpayer of the State, brought this action against appellees who are the members of the Board of Trustees of the University of Arkansas to enjoin them from issuing $400,000 of bonds for the purpose of aiding in the con-

struction of two dormitories on the campus of the University of Arkansas, as authorized by Act No. 62 of 1947.

The complaint alleged that appellees had adopted plans and specifications for the construction on the campus of the University of two dormitories, one for men and one for women, at a cost of $600,000 each, or a total of $1,200,000; that to finance the cost of construction, they plan to use $800,000 of State funds appropriated for the University by the General Assembly, and to provide $400,000 additional by a bond issue of that amount payable solely from and secured by a pledge of revenues to accrue from rentals of the rooms of the dormitories to be paid by the students. A copy of a resolution adopted by the Board and hereinafter referred to, evidencing this purpose, was made part of the complaint. It was also alleged that, under Amendment No. 20 to the Constitution, the Board is prohibited from issuing bonds pledging the faith and credit of the State or any of its revenues, with certain exceptions, not material here, except when approved by a vote of the electors at an election; that the revenues from the dormitories to be pledged will be revenues of the State; and that the proposed bonds have not been approved by a vote of the electors, and that, therefore, the bonds will be issued contrary to said amendment and void.

To this complaint a demurrer was interposed, sustained, and, appellant declining to plead further, the complaint was dismissed. This appeal followed.

Section 1 of Act No. 62 of 1947 authorized the Board of Trustees of the University of Arkansas, and also several other educational institutions of the State, "as a public agency of the State of Arkansas to (a) construct buildings or structures which are of the character known as self-liquidating projects in that they are financed in whole or in part from revenues of the project collected for that purpose—including, but not limited to, dormitories . . . " The Board is authorized to enter into contracts to borrow all or any part of the funds that it may determine will be required to finance such projects

and to issue notes or bonds "with a specific pledge, for the payment of the principal and interest thereof, only of the gross tolls, fees, rents," etc., "to be derived as income from the project; provided, such bonds or notes shall be obligations only of such Board of Trustees, and in no event shall they be considered a debt for which the faith and credit of the State of Arkansas or any of its revenues are pledged." The members of the Board are exempted from personal liability, except for action "with a corrupt intent."

Section 2 of said Act relates to the broad powers of the Board in fixing maturities, the form of the bonds, terms of redemption, the rate of interest not to exceed 4 per cent. per annum, agreements as to maintenance of maximum percentage of occupancy of such dormitories, fixing of minimum rates for occupancy to provide for payment of said bonds and interest and other details with this proviso: "provided, no mortgage or other lien shall be executed on any of the lands or buildings belonging to the State of Arkansas." Power is conferred on the Board "to fix rents, tolls, fees and other charges to be imposed in connection with any such building or service to be thereby furnished and to make and enforce rules and regulations with reference to the use thereof as it may deem desirable for the welfare of the institution or its student body." Other sections of said Act are not relevant here.

The Legislature, at the same 1947 session, passed Act 377, making an appropriation of $1,000,000 from the University of Arkansas Fund for each of the two fiscal years ending June 30, 1948 and 1949, "For construction and equipment of new buildings, additions, repairs and other permanent improvements, retirement of bonded indebtedness, labor and other necessary expenses incidental to the above for the benefit of the University and all of its branches."

The Board, on April 30, 1947, adopted a resolution in conformity with said Act 62, authorizing the issuance and sale of $400,000 of negotiable dormitory revenue

bonds at not less than par and accrued interest, to be dated as near the date of sale as possible, to bear interest at a rate not to exceed 3 per cent. per annum, payable semi-annually, and to mature serially in the years 1948 to 1973 inclusive. It further provided: "The bonds shall be obligations only of the Board of Trustees, payable from and secured solely by a specific pledge of the revenues to be derived from rentals of the rooms of the two dormitories to be paid by the students who occupy them, which shall be plainly recited on the face of the bonds. In no event shall they be considered a debt for which the faith and credit of the State of Arkansas or any of its revenues are pledged, and no mortgage or lien on the dormitories or any lands or buildings belonging to the State shall be given as security, which also shall be plainly recited on the face of the bonds."

To reverse the decree appellant contends that the issuance of the bonds, as provided in said Act 62 and the resolution of the Board above set out, will be contrary to Amendment No. 20, which provides, with certain exceptions not relevant here, that "the State of Arkansas shall issue no bonds or other evidence of indebtedness pledging the faith and credit of the State or any of its revenues for any purpose whatsoever, except by and with the consent of the majority of the qualified electors of the State voting on the question at a general election or at a special election called for that purpose." Adopted at the November 6, 1934, general election.

It is argued that the bonds proposed to be issued, no matter how worded, will in fact be obligations of the State and will be secured by a pledge of revenues of the State; "that the effort to justify their issuance under the 'special fund doctrine' as revenue bonds from a self-liquidating project is but an effort to evade the direct limitation placed on the issuance of such bonds by Amendment No. 20."

We cannot agree with this argument. The State will not issue these bonds and the faith and credit of the State will not be pledged. Only the State is prohibited

from issuing "bonds or other evidence of indebtedness pledging the faith and credit of the State or any of its revenues," except by a majority vote of the electors.

The bonds to be issued will bear none of the indicia of State bonds. They will not be executed by any State official and will not bear the Great Seal of State. They will distinctly state on their face that they will be obligations only of the Board of Trustees, shall be payable from and secured solely by a specific pledge of the revenues to be derived from rentals of the rooms in said dormitories to be paid by the students who occupy them, and "in no event shall they be considered a debt for which the faith and credit of the State of Arkansas or any of its revenues are pledged, and no mortgage or lien on the dormitories or any lands or buildings belonging to the State shall be given as security, which shall also be recited on the face of the bonds." On the contrary, these bonds will be signed in the name of the Board by the Chairman and Secretary of the Board and the seal of the University will be affixed.

Moreover the Board of Trustees is a body politic and corporate, made so by the Act of March 30, 1887. now § 13142 of Pope's Digest, which provides: "Said board is made a body politic and corporate, and shall have all the powers of a corporate body, subject to the Constitution and laws of the State of Arkansas, and possess all the power and authority now possessed by the Board of Trustees of said University under existing laws, and shall make and subscribe an affidavit before entering upon their respective duties, to faithfully, diligently and impartially discharge the duties of their office." Whether this makes the Board a legal entity we do not determine. Act 62 refers to the Board as "a public agency of the State of Arkansas," and empowers it to issue these bonds in its own name with all the powers, restrictions, and limitations set out in said Act.

In *Davis* v. *Phipps,* 191 Ark. 298, 85 S. W. 2d 1020, 100 A. L. R. 1110, it was held that bonds issued by the State Board of Education under Act No. 333 of 1935,

which authorized the issuance of bonds to be secured by school district bonds which had been deposited with said Board as security for loans from the revolving loan fund, and which expressly provided that the faith and credit of the State are not pledged, did not violate Amendment No. 20. Also that the pledge of such school district bonds and the interest thereon was not a pledge of "revenues" of the State within said Amendment 20. The late Judge BAKER for the Court there said: "A bond is a written promise to pay money, and we have said, in the foregoing discussion, that the State is not issuing these bonds, and it would not be bound for their payment. Therefore these bonds, which the State Board of Education is about to issue, are not within the prohibited class." And again, it was said: "Finally, it may be suggested that the pledges contemplated by the State Board of Education are not within the forbidden class for another reason; that is, under Amendment No. 20 it would seem that pledges of revenue are forbidden only when such pledges are to secure State bonds. This seems to be in accordance with the language of Amendment No. 20."

Therefore, it appears to us to be certain that the bonds to be issued by the Board of Trustees are not State bonds and that the faith and credit of the State are not pledged. Not being the obligations of the State of Arkansas, Amendment No. 20 has no application to them and is not violated, because the prohibition therein relates only to State bonds.

A number of our cases on this and related subjects are cited and relied on by counsel for both parties. In addition to *Davis* v. *Phipps*, *supra*, such as *Carpenter* v. *McLeod*, 202 Ark. 359, 150 S. W. 2d 607; *Page* v. *Rodgers*, 199 Ark. 307, 134 S. W. 2d 573; *State ex rel.* v. *State Board of Education*, 195 Ark. 222, 112 S. W. 2d 18; *Jernigan* v. *Harris*, 187 Ark. 705, 62 S. W. 2d 5, and a number of cases citing it; and *City of Harrison* v. *Braswell*, 209 Ark. 1094, 194 S. W. 2d 12, 165 A. L. R. 845. To discuss in detail all these cases herein would be a useless task and we refrain from doing so. None of them are exactly in point

here, but many of them approve bond issues for which the revenues of the projects are pledged as the sole security therefor.

Our conclusion is that the Board of Trustees, appellees, is not prohibited by Amendment No. 20 from issuing the bonds contemplated and the decree is, accordingly, affirmed. An immediate mandate is hereby ordered.

GRIFFIN SMITH, C. J., and MCFADDIN, J., concur.

SELIGSON *v.* SEEGAR.

4-8215 202 S. W. 2d 970

Opinion delivered June 16, 1947.

Johnson & Johnson, for appellant.

U. A. Gentry, for appellee.

HOLT, J. May 11, 1946, W. F. Seegar, appellee, intervened in the suit of the State of Arkansas, wherein the State sought to confirm its title to certain tax forfeited lands in Little River county. Included in the State's complaint were the following tracts involved here: "NE¼ of NE¼ and SE¼ of NW¼ of section 15, township 11 south, range 32 west," which appellee alleged he owned by purchase from the original owner. He further alleged that this property forfeited for nonpayment of taxes for 1942, was sold to the State and certified to it on June 2, 1945, but that the sale was void for several reasons, among them being: "The record of the levying court is indefinite, ambiguous and is not properly authenticated and the proceedings thereunder are null and void. . . . There was included in the cost of sale 25 cents for each 40 acre tract as cost of publication of the delinquent land list. Said property was all assessed in the name of R. A. Spence, was in the same section and contiguous and under the law constituted one tract and the amount of 25 cents charged as costs for publication of each 40 acre tract in the delinquent land list was excessive and renders the tax sale void."

He further alleged that appellant and cross complainant, Sam Seligson, purchased said lands from the State by deed dated January 18, 1946, that the State had no title to convey, that the sale was void and prayed accordingly.

Appellant, Seligson, denied generally all the allegations that the sale was void, but admitted his purchase of the property from the State after proper appraisal. He further alleged that he paid the State $300 for the two tracts, plus expenses of deed and costs.

The trial court found the tax sale void, that the State had no title to convey, that appellee owned the land and entered a decree November 18, 1946, accordingly.

This appeal followed.

At the outset we are met with appellee's earnest contention that the decree must be affirmed for the reason that the oral evidence taken in the case was not properly preserved and brought into the record and, therefore, it must be presumed that the evidence was sufficient to support the Chancellor's findings and decree. In support of this contention, he says: "There is no order of the Court approving the bill of exceptions and ordering the same filed, neither is there any verification as to the correctness of the bill of exceptions by the judge of the trial court."

It is true that the Court did not sign or approve a bill of exceptions. However, as we shall presently point out, the court's failure so to do, in the circumstances here, was not essential to preserve the testimony nor was a bill of exceptions necessary.

The decree recites that "the cause is submitted to the court upon the complaint of the plaintiff, the answer and cross complaint of intervener, the answer of the cross defendant to the intervener, the stipulation of the parties hereto, the oral evidence taken *ore tenus* before the court and the exhibits introduced in said cause."

At the beginning of the trial, in taking of testimony following the pleadings, the record recites: "Be it remembered that on this the 18th day of November, 1946, the same being a regular day of November, 1946, term of the Little River Chancery Court, comes on for hearing and to be heard the above numbered and entitled cause,

the Honorable A. P. Steele, the regular Chancellor for the Sixth Chancery District of Arkansas, present and presiding, and the following proceedings were had and done:

"The testimony of the witnesses taken by the Little River Chancery Court on the 18th day of November, 1946, and by the court ordered to be reported by Norma H. Sain, the official reporter of this Court, and upon application of either party to the suit to be transcribed and filed as depositions in this action."

There follows interrogation of witnesses, stipulation and exhibits and at the conclusion the certificate of the court reporter in the following form:

"I, Norma H. Sain, official court reporter for the Sixth Chancery District of Arkansas, do hereby certify that the foregoing pages, numbered from 1 to 21, inclusive, contain a true and correct transcription of my shorthand notes taken at the trial of the within numbered and entitled cause, in the Little River Chancery Court on the 18th day of November, 1946, and covers all oral testimony and exhibits (such part as pertains to School District 22) introduced in said trial.

"Witness my hand as such official reporter on this 25th day of January, 1947. (Signed) Norma H. Sain, Official Court Reporter, Sixth Chancery District of Arkansas."

The record further discloses that the twenty-one transcribed pages of the official court reporter's shorthand notes of the proceedings at the trial were properly filed with the Circuit Clerk, W. W. Bishop, on February 5, 1947. The record on page 7 recites: "Little River County, Arkansas, Filed 2/5/47, W. W. Bishop, Circuit Clerk."

It is conceded that the applicable statute governing appeals from the Sixth Chancery District is Act 202 of 1927, the pertinent provisions of which are: "Section 2. It shall be the duty of said reporter to attend all regular

and adjourned terms of the Chancery Courts of the 6th Chancery District and, upon request of the Court or counsel for either party, shall make a complete and accurate stenographic report of all oral testimony or proceedings had before the Court which stenographic notes shall be filed with the Clerk of the Court of the county wherein said cause is pending as a permanent record. . . . Said stenographer shall transcribe the notes so taken at the request of the Court or counsel for either party and shall make an original and two carbon copies thereof, and the original shall be delivered to the Clerk of the Court to be used in the transcript of said record on appeal to the Supreme Court, etc. . . .

"Section 3. The original copy of said transcribed notes when filed with the Clerk of the Court, as herein directed, within the time provided by law for appeals to the Supreme Court, shall be treated as depositions filed in said cause as fully and completely as if filed within the term of the court."

It will be noted that under the plain terms of this act, the original copy of said transcribed notes when filed with the clerk of the Court as therein directed, within the time provided by law for appeals to the Supreme Court, shall be treated as depositions filed in said cause as fully and completely as if filed within the term of the court.

We think there was a literal compliance with the statute in this case. The Court Reporter filed with the Circuit Clerk an original copy of her transcribed notes well within the six months period for an appeal and, in accordance with the court's order, said copy became depositions in this case and a part of the record on appeal without the signature or verification of the trial judge.

Such was the effect of the holding of this court in the case of *Lemay* v. *Johnson,* 35 Ark. 225. There, this court said: "In equity cases, all papers properly filed in the cause become, on appeal, parts of the record, to

be included in the transcript. No motion for a new trial is essential, nor is a bill of exceptions necessary, except where oral evidence has been used, and not taken down and filed as depositions, or interlocutory transactions have occurred which would be otherwise excluded from the record," and in *Chicago Title & Trust Co.* v. *Hagler Special School District No. 27,* 178 Ark. 443, 12 S. W. 2d 881, we said: "Under our practice, depositions, when filed, or oral evidence ordered to be reduced to writing and filed as depositions, become a part of the record in a chancery court. *Fletcher* v. *Simpson,* 144 Ark. 436, 222 S. W. 710; *Harmon* v. *Harmon,* 152 Ark. 129, 237 S. W. 1096; *McGraw* v. *Berry,* 152 Ark. 452, 239 S. W. 618; *C. A. Rees & Co.* v. *Pace,* 156 Ark. 473, 246 S. W. 491; *Rose* v. *Rose,* 9 Ark. 507; *Lemay* v. *Johnson,* 35 Ark. 225; and *Casteel* v. *Casteel,* 38 Ark. 477."

Appellee contended below, and argues here, that the tax sale was void because 25 cents for each of the two 40 acre tracts, or a total of 50 cents, was charged for publication, when the two tracts under the law, Act 170 of 1935, were contiguous, constituted but one tract, and but one charge of 25 cents should have been assessed. The trial court sustained this contention, and we agree with appellant that it erred in so doing.

The rule announced in the very recent case of *Moses* v. *Gingles,* 208 Ark. 788, 187 S. W. 2d 892, applies with equal force here. There, it was held that since the three tracts of land there involved were contiguous within the meaning of Act 170 of 1935, *supra,* they should have been advertised and sold as one tract, at a total cost of 25 cents, and that their sale as three separate non-contiguous 40 acre tracts, at a total cost of 75 cents, invalidated the sale. Obviously the inference is that had the three tracts been in fact non-contiguous, as in the present case, the sale in that case would have been declared valid. We there said: "Section 2 requires the clerk to publish such delinquent list, as corrected by him, with this 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.' Section 9 provides: 'The legal fees for the publication of delinquent real property shall be twenty-five cents per tract. . . .'

"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."

In the present case, the two 40 acre tracts, we think, are obviously by their calls, non-contiguous, in fact, they do not even touch each other, their nearest corners being approximately one-fourth mile apart. Webster defines contiguous as "in actual contact; touching," and Bouvier's Law Dictionary (Rawle's Third Revision), p. 655, defines contiguous: "In close proximity, in actual close contact, *Arkell* v. *Ins. Co.,* 69 N. Y. 191, 25 Am. Rep. 168; as, contiguous proprietors are those whose lands actually touch."

Appellee next argues that the tax sale was void because "the record admittedly shows that the certificate of the County Board of Education, composed of the County Judge, the County Clerk and the County Supervisor, showed the vote of the amount of tax in District No. 22, in which the land was located, to be 'eighteen' without designating whether the word eighteen referred to mills, dollars or cents."

We cannot agree with this contention.

It is undisputed that the levying court met November 16, 1946, for the purpose of levying taxes . . . making appropriations, etc., and the minutes or record of the proceedings kept by the county clerk, as was his duty, reflect the following: "The several justices of the peace of Little River county as hereinafter set out, were present and answered to their names on roll call by the County Clerk as follows, to-wit: (Naming twenty-two.) There were 22 justices of the peace present. The County Judge, D. W. Lowry, declared a quorum present and ready for the dispatch of business when the following proceedings were had, to-wit: . . .

"School Tax Levies: Upon a motion by L. F. Wheelis, and seconded by Nathan Furlow, the following levies were made on all real, personal and mixed property within the respective school districts of Little River county, Arkansas, subject to taxation for the year 1942, and as hereinafter set out and voted by the voters of the several school districts at the regular school elections in Little River county, Arkansas, in the 1942 as fixed by law and certified by the several school districts, in the time and in the manner required by law, and which levies are in words and figures as follows, to-wit:

School Dist.	Total Mills	Voted for General Fund	For Building Fund
No. 22	18	18	

"Upon roll call the above levies for school purposes were adopted by unanimous vote.

"Upon a motion made by F. K. Davis and seconded by J. M. Weatherspoon the adjournment order was made and there being no further business the motion carried by a unanimous vote.

_____

County Judge."

While it is true the word "mills" does not follow the figure "18," the millage voted by the people of School District 22, the order of the levying court, *supra*, levying this tax, definitely shows that 18 mills were levied against this property, as voted by the district, and

we think this levy valid. This identical question was decided against appellee's contention in the very recent case of *London* v. *Montgomery, ante,* p. 434, 201 S. W. 2d 760, wherein we held: (Headnote 5.) "With certificate from the County Board of Education that District No. 22 (Stuttgart) had voted '18' as a tax, the quorum court assessed '18.' Held, that the assessment was in mills, not dollars, or cents; hence not ambiguous or uncertain."

Finally, appellee argues that the record, or minutes, of the proceedings of the levying court, *supra,* reciting that a tax levy of eighteen mills was made, was not signed by anyone, or properly authenticated, and this invalidated the tax sale here involved. We think this contention also untenable. This court, in the case of *Hilliard* v. *Bunker,* 68 Ark. 340, 58 S. W. 362, held that (Headnote 4) "the proceedings of the levying court are not invalid because the record was not signed by the members of the court present and participating," and in the opinion, said: "The objection that the record of the day's proceedings were not signed by the members of the court present and participating does not go to the validity of the proceedings so noted by the clerk as shown in the record. In the first place, the authorized officer having written up the minutes upon the record, and their verity not having been called in question, the county court having general jurisdiction of the subject-matter, and being a superior court, the truth of the minutes could be established by parol."

Having concluded that the tax sale was in all things valid, the decree is reversed and the cause remanded, with directions to enter a decree not inconsistent with this opinion.

4-8234 203 S. W. 2d 190

Opinion delivered June 23, 1947.

[redacted]

Geo. M. LeCroy, for appellant.

J. V. Spencer and *J. V. Spencer, Jr.,* for appellee.

SMITH, J. On September 18, 1934, Broma C. Towns filed suit for divorce from his wife Era, on the ground of indignities. She filed an answer and cross complaint denying appellant's right to a divorce. She did not ask a divorce in her cross complaint, but did pray an allowance of alimony *pendente lite.* Thereafter the suit progressed as one for separate maintenance.

On January 11, 1935, the court entered an order requiring appellant to pay $15 costs, $35 attorney's fee, and $15 per month for appellee's support, and on June 3, 1935, the allowance was increased from $15 to $30 per month. The alimony was not paid as directed, and on September 7, 1936, another hearing was had and appellant was directed to pay $592.25 due under the previous

orders and to pay $30 per month and $100 attorney's fee and it was further ordered that execution therefor might issue, or that appellant be proceeded against for contempt. It does not appear whether the execution was issued or not.

On June 30, 1939, a petition was filed in which it was alleged that appellant was in arrears in the payment of alimony to the extent of $1,939.80, and it was prayed that judgment therefor be rendered and that an order be entered directing the issuance of an execution. Hearing was set for November 27, 1939, and was re-set for March 5, 1940. Appellant was in the Army and this fact probably accounts for the delay which had occurred, but on March 5, 1940, the motion came on for further hearing on appellant's petition that he be relieved from the payment of any alimony then remaining unpaid. Oral evidence was heard and the court made the finding that there was due as of October 3, 1939, under prior orders the sum of $2,107.40.

On October 3, 1939, appellant filed a motion asking to be relieved from the further obligation to pay alimony or maintenance, it being alleged that he was not financially able to make further payments and that his physical condition would not permit him to do work, by which he could earn an income. It was ordered that appellant be relieved from making further payments until such time as he had recovered sufficiently to earn an income. But it was ordered and decreed at the March 5, 1940, hearing that appellee have judgment for the unpaid balance due her in the sum of $2,107.40 for which execution might issue and "That all future payments of maintenance be suspended pending further orders of the court." No appeal was prayed or taken from this order.

A petition for *scire facias* was filed August 17, 1945, to renew this judgment to which a response was filed containing the following allegations. Subsequent to the rendition of the judgment and decree above referred to on March 5, 1940, appellee obtained a divorce from appellant, on September 6, 1940, in the State of Louisiana, and

on September 14, 1940, married one Joe Taylor. It was prayed that the former orders for payment of alimony be vacated and set aside.

It was alleged that appellant's physical condition had not changed since March 5, 1940, at which time he had been relieved from future payments. It appears from his response that he had continued to serve in the army until May 17, 1943, when he was honorably discharged on account of an existing disability. It was alleged also that respondent owned no property upon which an execution could be levied.

The petition for *scire facias* and the response (to which there were attached exhibits showing appellee's divorce and subsequent re-marriage, and appellant's discharge from the army) was heard on September 25, 1946, upon which hearing it was ordered that the judgment of March 5, 1940, be renewed, it being wholly unpaid.

This order recites all the pleadings filed and orders entered in relation to the alimony, and maintenance money, and it was adjudged and decreed on September 25, 1946, "that said judgment (of March 5, 1940) be and the same is hereby revived and that the lien thereof be and the same is hereby renewed for a period of three years from the rendition hereof and that the amount due under said judgment is $2,918.75 * * *," and this appeal is from that decree.

This increase in the judgment results from the addition of the interest on the judgment of March 5, 1940, and not from the charge of any additional alimony after that date.

For the reversal of this decree it is first insisted that the decree of March 5, 1940, relieved appellant from the payment not only of the current alimony, but also from the payment of accrued alimony then unpaid because of the finding as to his then existing physical condition. But the decree did not relieve him from the payment of accrued alimony. It is expressly to the contrary. This

was a final decree and if erroneous or improper an appeal should have been taken from it.

In the case of *Green* v. *Green,* 168 Ark. 937, 272 S. W. 655, it is said: "A decree rendered for an accrued sum becomes final with the end of the term and cannot be set aside at a subsequent term, even though found to be erroneous. In that respect it is the same as any other judgment or decree of a court of record." This language was quoted and the holding reaffirmed in the case of *Erwin* v. *Erwin,* 179 Ark. 192, 14 S. W. 2d, 1100.

It will be noted that the judgment does not include any alimony accruing subsequent to March 5, 1940, nor does it include any alimony which accrued since appellee's divorce and re-marriage. Cases are cited by appellant holding that the right to collect alimony terminates with re-marriage of the wife and this is a rule of universal application, but we have been cited no case holding that the re-marriage of the wife extinguishes her claim for alimony which had previously accrued and we shall not so hold. The pertinacity of the husband in refusing to comply with the order of the court might reduce the wife to the necessity of borrowing money from family or friends and such a loan might be made upon the strength of the decree requiring the husband to pay, and upon the faith that the decree would eventually be enforced when the loan might and would be repaid.

It was held in the case of *Calhoun* v. *Adams,* 43 Ark. 238, that errors or irregularities in obtaining a judgment cannot be set up by demurrer or plea to a *scire facias* to revive, and it was there also stated that *scire facias* is not the institution of a new suit, but is a continuation of the old one and that its object is not to procure a new judgment for the debt but execution of the judgment that has already been obtained.

In the case of *Kurtz* v. *Kurtz,* 38 Ark. 119, Justice Eakin said that it was not a convenient practice to grant permanent alimony during the natural life of the wife, and that a greater inconvenience would be incurred by

making future payments of alimony liens upon real estate, but he also said that "As for all sums ordered to be paid at once, and for which execution may issue, they are already general liens, without being so expressed."

Here there was no allowance of a lump sum nor for any definite period, but a monthly allowance, which is a practice many times approved by this court, but final judgment was rendered for all the accrued unpaid alimony. If this was error, and we do not so hold, that judgment was final and no appeal was ever prosecuted and it is not now subject to review.

Appellant did apply to the court in October, 1939, to be relieved from future payments, but prior to that time he had filed no pleadings setting out that he was physically or financially unable to make the payments ordered by the court, nor had he appealed from such orders, nor did he appeal from the judgment and decree of March 5, 1940.

In the case of *Sneed* v. *Sneed,* 172 Ark. 1135, 291 S. W. 999, Dr. Sneed, the husband, was ordered to pay his wife alimony in the sum of $40 per month. He made the payments for two years and thereafter made no payments until his default amounted to $4,800. Dr. Sneed was left a legacy of $1,000 which his divorced wife sought to impound and apply on this debt. Mrs. Sneed recovered judgment and pending the appeal therefrom she died. Revival of the case was resisted, but revival was ordered by the court. Mr. Justice HART in upholding the right to garnish this legacy there said: "The law is that a wife who secures a judgment for alimony in a suit against her husband for a divorce is a creditor, and a conveyance made in fraud of her rights as such may be set aside or the property subjected to the lien of the judgment, provided that the rights of purchasers without notice and for a valid consideration have not intervened." (Citing cases). Among the cases there cited was the case of *Austin* v. *Austin,* 143 Ark. 222, 220 S. W. 46, in which case it was held that in a suit for divorce where decree was in favor of the wife, the court had

authority to declare a lien in favor of the attorney for his fee upon the real estate conveyed by the husband to defraud his wife.

It is argued that a judgment for past due alimony is not such a judgment as may be revived by *scire facias,* but that contention cannot be sustained. In the chapter, *Scire Facias,* 47 Am. Jur. § 14, p. 471, it is said: "Strictly speaking, *scire facias* is a proceeding at law, and hence not available for the enforcement of decrees and other determinations of other courts. Where, however, a statute authorizes writs of execution to issue for the enforcement of decrees of probate, chancery, and other courts, such decrees are substantially placed on the same footing as a judgment of a court of law, and the power to prosecute proceedings thereon by *scire facias* is impliedly conferred."

No contention is made that the judgment of March 5, 1940, which long since became final has been satisfied, in whole or in part, and that judgment was properly revived and the decree so holding is affirmed.

MUEX *v.* HAWKINS.

4-8226 204 S. W. 2d 171

Opinion delivered June 23, 1947.

Rehearing denied September 22, 1947.

Claude F. Cooper, for appellant.

George W. Barham, for appellee.

ROBINS, J. On April 28, 1942, appellant and appellees entered into the following contract:

"Know All Men By These Presents:

"That Charley Meux, first party and J. F. Hawkins and Ludella Hawkins, his wife, second party, do hereby contract as follows: The first party agrees to sell and the second party agrees to buy from the first party, the following described real estate situate in the City of Blytheville, Arkansas, and under the terms and condition hereinafter set forth.

"Property

"Lot Twelve (12) in Block Two (2) of the West End Subdivision of Town of Blytheville.

"Terms

"The second party pays $50 cash in hand, the receipt of which is hereby acknowledged, by the first party, and commencing June 1, 1942, the sum of Six Dollars and Six Dollars on the first day of each succeeding month until the sum of $250 is paid, together with 10 percent interest from date until paid. The second party as part of the consideration for said property is to keep all taxes and assessments paid and the insurance on said property in favor of the first party, sufficient to protect him against loss on said property.

"The second party is to keep said property in good repair, natural wear and tear excepted, and when the conditions above set forth are complied with the first party will execute and deliver to the second party a good and sufficient deed to said real estate, warranting the title of said property in the second party. First party to pay improvement district assessments.

"Time is the essence of this contract and should the second party fail or refuse to comply with same, then all rights of the second party cease and become null and void in this agreement.

"In witness whereof we have hereunto set our hands and seals this April 28th, 1942.

"/s/ Chas. Muex
Evelyn Muex
First Party

"/s/ J. F. Hawkins
Ludella Hawkins
Second Party"

This suit was filed on February 26, 1944, by appellants against appellees. In their complaint appellants alleged that appellees had failed to comply with any of the terms of said contract, and they prayed that all rights of appellees by reason of said contract be foreclosed and that the contract be canceled and appellants be placed in possession of the land.

The answer contained a denial that appellees had failed to comply with any of the terms thereof, and alleged that appellees had made all payments due up to December 1, 1943, and had on that date tendered the payment due, which tender had been refused by appellants; and they offered to pay all balance due, with interest. By way of cross-complaint appellees set up that prior to the sale to appellees, appellants had permitted the property to forfeit for the taxes for 1937, and that, in order to protect themselves, appellees had been forced to purchase the property from the state, and they prayed judgment against appellants for expense of obtaining the state's title.

Appellants contended in the lower court and urge here that under the contract appellees were required to pay each month, not only $6, but also the interest thereon, and that, since the appellees had paid or tendered

only $6 each month, there had been such a failure on the part of appellees to comply with the contract as to work a forfeiture thereof.

Appellees interpreted the contract as requiring a payment each month of $6, which included interest, until the entire amount of purchase money was paid—that interest accruing up to maturity of each payment was to be deducted from the $6 payment each month, and the balance of said payment, after such deduction, was to be applied on the principal debt until it was discharged.

It was not seriously contended by appellants that appellees had not promptly made, up to the time the dispute arose, the six dollar monthly payments, or that, if not made punctually, the payments were nevertheless accepted by appellants under such circumstances as estopped them from invoking a forfeiture. But the most serious dispute arose from the different constructions placed by the parties on the provisions of the contract relating to interest.

The lower court upheld appellees' interpretation of the contract, and by a calculation, the correctness of which is not challenged, found that the sum of $183.29, which appellees tendered into court, was the balance due from appellees to appellants under the terms of the contract. Finding that there had been no breach of the contract by appellees, the lower court entered decree directing that the sum tendered be paid to appellants upon execution of deed by appellants conveying the property to appellees, dismissed appellants' complaint for want of equity and rendered judgment against them for costs.

From this decree appellants prosecute this appeal.

The lower court correctly construed the contract. To give the contract the meaning contended for by appellants it would be necessary to transpose the phrase "together with 10 per cent interest from date until paid" from the position in the sentence where the parties placed it and put it immediately following the words "Six Dollars and Six dollars." The language of the contract being

plain and unambiguous courts have no power, in construing it, to change the arrangement of its words. Dealing with a similiar question, Judge WOOD, in the case of *Clouston* v. *Maingault*, 105 Ark. 213, 150 S. W. 858, said: "The court can neither eliminate nor supply nor rearrange the words and sentences in the unambiguous contract, but must construe it as the parties have made it."

The decree of the lower court is affirmed.

HARRIS *v.* CITY OF HARRISON.

4450 204 S. W. 2d 167

Opinion delivered June 23, 1947.

Rehearing denied September 22, 1947.

W. F. Reeves, for appellant.

J. Smith Henley, for appellee.

GRIFFIN SMITH, Chief Justice. E. B. Harris has appealed from a judgment based upon the charge of possessing intoxicating liquor for sale in dry territory. He was first tried before Harrison's Mayor in City Court. From conviction he appealed and was fined $350 in Circuit Court. In the motion for a new trial errors as-

signed were (a) inadmissibility of evidence; (b) want of substantial evidence that the liquor found in the defendant's home was intended for sale; (c) a verdict should have been directed when the City conceded there was no municipal ordinance prohibiting the conduct complained of; (d) the jury ought to have been instructed in a manner consistent with § 14152 of Pope's Digest. Other matters are argued, but they were not assigned in the motion for a new trial—such, for instance, as the introduction of records showing payment of a fine in 1945 for a conviction in 1944, where the charge was possession of untaxed liquor.

First.—(a). The evidence admitted and excepted to was that of officers and others who were allowed to testify that the defendant's reputation for engaging in the illegal sale of liquor was bad. The Court, by Instruction No. 3, told the jury the State was permitted to show the general reputation of the defendant "with refernce to illegal sale of liquor within recent times, [but such testimony] can be considered only as tending to show the nature of the business in which the defendant is or was engaged at the time of the alleged offense".

It is argued here, as it was in *Hughes* v. *State,* 209 Ark. 125, 189 S. W. 2d 713, that, because the defendant did not testify, his reputation for illegally selling liquor could not be injected into the trial. In the Hughes case we cited Art. VI, Sec. 7, Act 108 of 1935, where it is provided that in any prosecution or proceeding involving violation of the Act, the general reputation of the defendant for being engaged in the illicit manufacture of or trade in intoxicating liquor may be shown. There was no error, therefore, in admitting the testimony of those who said the defendant's reputation was bad.

Second.—(b). The officers procured a search warrant and went to Harris' home in Harrison where three fifth-gallon bottles of whiskey were found, in addition to some empty bottles. The officer had observed unusual activities at the Harris home, indicating that liquor was being dispensed. On one occasion the Police Chief followed a cab after the occupants had stopped at the Harris

home. When the officer stopped the cab Leland Cole "took about a half of a fifth [of whiskey] out of his pocket and laid it on the [cab] seat".

While this testimony and other facts brought out at the trial might be construed to indicate that the accused had obtained the intoxicants for personal consumption, there is no assertion by witnesses for Harris that this was the case. He elected to rely upon weakness of the State's position. We cannot say there was no substantial evidence to sustain the verdict.

Third.—(c). Appellant conceded that Secs. 9798-9 confer upon Mayors of Incorporated Towns and of Cities of the Second Class jurisdiction in criminal matters concurrent with Justices of the Peace where the crime occurs within the municipal corporation; but, says appellant, if the City acts through its Mayor process must run in the name of the State if there is no ordinance covering the subject matter. According to this construction the case should have been styled, "*State of Arkansas* v. *E. B. Harris*", where the record discloses the City of Harrison to be the complaining party.

Marianna v. *Vincent,* 68 Ark. 244, 58 S. W. 251, held that an affidavit executed by the Marshal, and a warrant issued by the Mayor directed to the Marshal, was ample authority for the arrest of Vincent on a charge of selling whiskey, although the town did not have the power to prohibit sale of intoxicants. The opinion by Chief Justice BUNN says: "The affidavit for the warrant and the warrant itself, taken together, determined the jurisdiction of the Mayor, not what he or the Circuit Court said in the rendition of these respective judgments. There is no mention of an ordinance, nor reference to one, in the affidavit or warrant. The crime alleged in them was, at all events, a violation of the State law. . . . The Mayor of a town has the same jurisdiction to hear and determine cases under the criminal laws of the State as has a Justice of the Peace."[1] To the same effect are *Watts* v. *State,*

[1] Act 284 of 1941 amends Sec. 9798 of Pope's Digest (applicable to incorporated towns) and Sec. 9809 (applicable to cities of the second class) by inserting a proviso relative to justices of the peace and the disposition of fines. The question is not raised in the instant appeal.

160 Ark. 228, 254 S. W. 486, and *Sharp* v. *Booneville,* 177 Ark. 294, 6 S. W. 2d 295. A more recent case is *Thompson* v. *City of Little Rock,* 194 Ark. 78, 105 S. W. 2d 537. In the Thompson case it was said that existence of an ordinance prohibiting a person from carrying concealed weapons was unimportant, since the subject was covered by State laws. Other decisions are cited in the ones we have mentioned. [See the fourth subdivision of § 3679 of Pope's Digest].

Fourth.—(d). Finally it is urged that an instruction that if guilty the defendant could be fined in a sum not less than $250 nor more than $500 was erroneous, the contention being that § 14152 of Pope's Digest is the applicable statute. It authorizes a fine of not less than $50 nor more than $100, *and* imprisonment for not less than ten days nor more than fifty "for any person to sell, lend, give, procure for, or furnish to another" any intoxicating liquors. This provision is a part of Art. VII, Sec. 6, Act 108 of 1935, and it imperatively requires, upon conviction, that a jail sentence of not less than ten days be imposed for the character of violation contemplated. We have held, however, that § 14134(c) of Pope's Digest, fixes the punishment of "Any person who shall by himself or his employee, or servant, or agent for himself, or any other person, keep or carry around on his person, or in any vehicle, or leave in a place for another to secure, any intoxicating alcoholic liquors with intent to sell the same in violation of [Act 108], . . . shall be deemed guilty of a misdemeanor [and] shall be fined not less than $250 nor more than $500 for the first offense." *Joy* v. *State, ante,* p. 185, 199 S. W. 2d 745. The penalty was not mentioned in the Joy case, but the fine affirmed was $250. The charge was that the defendant possessed beer for the purpose of selling it, and that the offense occurred in a territory voted "dry" under Initiated Act No. 1 of 1942-43. There is no distinction in principle between the transaction at bar and the Joy case.[2]

[2] Act 356 of 1941 amended art. 6, Sec. 1 (c) of Act 108 of 1935 by fixing the penalty at not less than $500 nor more thon $1000. Act 218 of 1943 amended Sec. 1 of Act 356 of 1941 (subdivision "c"- by fixing the fine at not less than $250 nor more than $500, as in Act 108.

Specific objections were made in respect of the instruction which told the jury that evidence regarding the defendant's reputation for selling whiskey was admissible, and to the Court's action in informing the jury that the applicable statute was § 14134(c) of Pope's Digest. Only general objections were interposed to the other four instructions.

Although appellant in his brief argues that there is no authority of law for the City of Harrison to receive proceeds of the $350 fine, the matter was not included in the motion for a new trial, and hence is not subject to review.

Affirmed.

CLAYTON, STATE TREASURER *v.* CITY OF LITTLE ROCK.

4-7956 204 S. W. 2d 145

PAVING IMPROVEMENT DISTRICT NO. 1, OF BRINKLEY *v.* CLAYTON, STATE TREASURER.

4-8059

CITY OF JONESBORO *v.* CLAYTON, STATE TREASURER.

4-8205

Opinion delivered June 23, 1947.

Rehearing denied September 22, 1947.

4-7956

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

Cooper Jacoway, Marcus Fietz, T. J. Gentry, Jr., and *Wm. J. Kirby,* for appellee.

A. M. Coates, Marvin B. Norfleet, Mann & McCulloch, Daggett & Daggett, Burke & Burke, Norton & Norton, W. W. Sharp, Caudle & White and *O. E. Westfall, amici curiae.*

4-8059

Cooper Jacoway, Marcus Fietz, Wood & Smith, W. W. Sharp, M. B. Norfleet, Norton & Norton, Mann & McCulloch, Daggett & Daggett, Burke & Burke, A. M. Coates and *O. E. Westfall,* for appellant.

4-8205

Cooper Jacoway, Marcus Fietz and *Wood & Smith,* for appellant.

Reece Caudle, Robt. J. White, W. W. Sharp, A. M. Coates, O. E. Westfall, M. B. Norfleet, Norton & Norton, Mann & McCulloch, Burke & Burke and *Daggett & Daggett,* for appellee.

Ed F. McFaddin, Justice. In this court, three cases (Nos. 7956, 8059 and 8205), have been consolidated, and will be decided in this opinion. We will refer to the cases by the number in this court, and will refer to the parties by convenient designations, and leave for footnote the detailing of the parties. First, we will give a

brief history of each case and the questions therein which we find necessary to decide; and then we will decide the questions.

Case No. 7956

The City of Little Rock was the original plaintiff, but a number of cities and counties[1] later joined as plaintiffs in the Pulaski Chancery Court against Vance Clayton as State Treasurer and J. Oscar Humphrey as State Auditor, to require the state officers to pay over certain moneys to the plaintiffs. The suit was filed August 28, 1945. We will at all times refer to these plaintiffs as the "cities and counties"; and we will at all times refer to the said state officers, as "state officials." In the complaint and interventions, the cities and counties alleged that the state officials had been keeping the books of, and disbursing, the highway funds on a "bond-year" basis of April 1 to March 31, rather than on a "fiscal-year" basis of July 1 to June 30; that the recasting of the highway accounts for the two fiscal years, July 1, 1943, to June 30, 1945, would result in the

[1] The intervening cities which joined as plaintiffs were: Ashdown, Augusta, Berryville, Biggers, Brinkley, Buckner, Calico Rock, Camden, Cammack Village, Clarendon, Cotton Plant, Crossett, Decatur, DeValls Bluff, Earle, Edmondson, El Dorado, Fayetteville, Fordyce, Forrest City, Fort Smith, Fulton, Gentry, Green Forest, Harrisburg, Helena, Hope, Hughes, Joiner, Leachville, Lepanto, Levy, Lewisville, Lincoln, Lockesburg, Malvern, Marianna, Marvel, Mayflower, Mena, Monticello, Mt. Ida, Nashville, Newport, Norphlet, North Little Rock, Osceola, Palestine, Paragould, Paris, Pea Ridge, Pocahontas, Rogers, Russellville, Searcy, Siloam Springs, Springdale, Stuttgart, Strong, Success, Texarkana, Walnut Ridge, West Memphis, Wynne, Van Buren, Jonesboro, Parkin, Dumas, Eudora, Murfreesboro, Huntington, Hartford, Humphrey, Charleston, Okolona, Dierks, Coal Hill, Waldron, Huntsville, Emerson, Arkansas City, Newark, Mansfield, Piggott, Hampton, Eureka Springs, England, Atkins, Clarendon, Stephens, Bald Knob, Hardy, Western Grove, Corning, Salem, New Rocky Comfort (called "Foreman"), Smackover, Nettleton, Marked Tree, Mountain View, Pangburn, Hoxie, Monette, Manila, Sheridan, Rison, Stuttgart, Mammoth Springs, Gould, Hazen, Dyer, McCrory, Gurdon, Melbourne, Benton and Lake City. The intervening counties which joined as plaintiffs were: Craighead, Grant, Lincoln, Ashley, Sharp, Saline, Scott, Calhoun, Izard, Sevier, Miller, Benton, St. Francis, Nevada, Pope, Sebastian, Stone, Ouachita, Perry, Yell, Independence, Lawrence, Dallas, Arkansas, Drew, Jackson, Marion, Little River, Hot Springs, Greene, Crittenden, Cleburne, Clay, Boone, Hempstead, Pike, Washington, Franklin, Chicot, Crawford, Bradley, Desha, Van Buren, Lee, Cleveland, Fulton, Conway, Jefferson, Johnson, Prairie, White, Pulaski, Searcy, Clark, Newton, Mississippi, Garland, Howard, Poinsett, Faulkner, Cross, Randolph, Madison, Columbia, Woodruff, Monroe, Union, Polk and Phillips.

cities and counties receiving certain funds under Act 4 of 1941 and Act 385 of 1941, which funds would be withheld from the cities and counties under the calculation of the "bond-year" basis. The complaint detailed the funds and beneficiaries so affected, and prayed for relief in keeping with the allegations of the complaint and interventions. The state officials (being the only defendants) answered by general denial; and a trial resulted in a decree in favor of the cities and counties. From that decree, the state officials appealed to this court. Here, certain municipal improvement districts[2] sought to intervene. We will refer to these at all times hereinafter as "municipal improvement districts." Their attorneys did in fact file a brief *amici curiae* in this court. The municipal improvement districts sought to urge in this court that Act 288 of 1943 was the reason why the cities and counties should not prevail. This last-mentioned act had evidently been overlooked by all parties in the trial of case 7956 in the chancery court. One question to be decided in this case 7956 will be discussed in topic heading I, *infra, i. e.,* "Bond-Year v. Fiscal Year." Another question is discussed in topic heading II, *infra, i. e.,* "Time of the Distribution of the Gratuity Money." Apprehensive lest the urging of Act 288 of 1943, in this court for the first time in case 7956 might be a "changing of the issues on appeal," the municipal improvement districts secured a delay of the submission of case 7956, in order to commence another action (which they did, and which is case No. 8059).

Case No. 8059

In this case, the municipal improvement districts, as plaintiffs, filed a mandamus action in the Pulaski Circuit Court on August 9, 1946, against the state of-

[2] Paving Improvement District No. 1 of Brinkley, North & South Washington Street Improvement District No. 1 of Forrest City, East Jackson Street Improvement District No. 1 of Forrest City, Paving Improvement District No. 4 of Marianna, Street Improvement District No. 3 of West Helena, Paving Improvement District No. 5 of Camden, Paving Improvement District No. 6 of Camden, Street Improvement District No. 11 of Russellville, Street Improvement District No. 11, Annex No. 1, of Russellville, Street Improvement District No. 11, Annex No. 2 of Russellville, West Jackson Street Improvement District No. 2 of Forrest City.

ficials, to require payments of certain amounts claimed to be due to the municipal improvement districts under Act 288 of 1943. The state officials filed answer, stating that they had been ordered by the Pulaski Chancery Court (in the case now 7956 in this court) to pay the said moneys to the cities and counties. To this answer, the plaintiffs filed a demurrer which was overruled, and the plaintiffs stood on their demurrer, and final judgment was rendered sustaining the answer and dismissing the complaint. This appeal ensued. So, the municipal improvement districts are appellants in case 8059, and the state officials are appellees. In the circuit court, the cities and counties sought to intervene, but such intervention was denied them, and they have appealed as "appellants-interveners." Case 8059 will be disposed of in the disposition of the issues in the other two cases.

Case No. 8205

In this case, the cities and counties filed suit in the chancery court on August 30, 1946, against the state officials, alleging that the state officials would distribute the state funds under Act 288 of 1943 unless enjoined and restrained; that such distribution would be injurious to the cities and counties; that said Act 288 of 1943 was null and void, and the state officials should be enjoined from proceeding under said act. The municipal improvement districts intervened in the suit, and claimed that the Act 288 of 1943 was valid, and that the state officials should make distribution under said Act 288. The case was tried in the chancery court on a stipulation of facts, and resulted in a decree upholding Act 288 of 1943. From that decree, the cities and counties have appealed, and the municipal improvement districts are the real appellees. One of the questions to be decided in this case is discussed in topic heading III, *infra,* "Validity and Effect of Act 288 of 1943." Another question to be decided in this case is discussed in topic heading IV, *infra,* entitled "Sufficiency of 1945 Appropriation Act." All three of these cases—in the final analysis—are controversies between the cities and the counties, on the one side, and the municipal improvement districts, on the other side.

OPINION

I. *Bond Year* v. *Fiscal Year.* The decision of this point requires a thorough study of Act 4 of 1941 (commonly known as the 1941 Refunding Act), and also of the cases construing that act, particularly: *Fulkerson* v. *Refunding Board,* 201 Ark. 957, 147 S. W. 2d 980 and *Page, Treasurer* v. *Street Improvement Dist. No. 11 of Russellville,* 203 Ark. 657, 158 S. W. 2d 905.

Section 12 of Act 4 of 1941 (as subdivided by capital letters A to D, inclusive), reads:

"When all the outstanding obligations eligible for refunding hereunder have been redeemed or exchanged, or funds have been set aside in the state treasury for their redemption or payment, all the bonds issued under this act shall be on a parity as to security, and in all other respects except as may be provided in the face of the bonds, and shall be governed by the following provisions and by the provisions of Act No. 11 not inconsistent therewith:

"A. The first $10,250,000 of highway revenue as it comes into the State Highway Fund in each fiscal year shall be set aside for highway maintenance and debt service, in the proportion of 30% for highway maintenance and 70% exclusively for current debt service and the redemption of bonds;

"B. after provisions of § 3 of Act No. 11, approved April 1, 1938, have been fulfilled, then, the next $2,500,000 shall be set aside for the construction of new roads and maintenance of State highways;

"C. and the next $750,000 shall be set aside for the payment of bridge improvement bonds and interest thereon which come under Act No. 330 of 1939; the payment of road district bonds and interest thereon which come under Act No. 325 of 1939; the payment of outstanding bonds and interest thereon issued by the municipal paving districts organized prior to January 1, 1939, which represent the cost of paving, gutters, curbs and aprons on streets and intersections forming a continuation of state

highways through such municipalities; the payment of outstanding bonds and interest thereon issued by improvement districts for the construction of bridges across navigable streams in the state; and for aid to cities and towns for the construction, repair and maintenance of streets and county roads in and immediately adjacent to such cities and towns—as the Legislature may from time to time prescribe.

"D. The highway revenues coming into the State Highway Fund in any fiscal year not specifically allocated to the foregoing purposes may be used for the construction of new roads, for maintenance, or for calling in and redeeming bonds under section 5 of this act, as the Legislature shall determine."

The paragraphing and adding of the capitalized letters A to D in the above quotation are for convenient reference to subdivisions of this section in the subsequent discussions contained in this opinion.

No party in any of these cases is attempting to claim or touch in any way the $10,250,000 in subdivision A, above, or the $2,500,000 in subdivision B, above. This litigation concerns the distribution of the $750,000 per annum referred to in subdivision C of § 12 above; and we will hereinafter refer to this $750,000 as the "gratuity money," and this subdivision C as the "gratuity section," since the beneficiaries of any and all of the $750,000 receive the same as a gratuity from the state after subdivisions A and B have been achieved and satisfied.

When are subdivisions A and B achieved and satisfied? That is, when, each year, does the state begin calculating the $10,250,000 for subdivision A and the $2,500,000 for subdivision B in order to see how much—if any—will remain in any such year for subdivision C? That is the question. Section 24 of Act 4 of 1941 says:

"It has been found, and is hereby declared by the General Assembly . . .; that an opportunity to take advantage of this favorable market will be afforded on April 1, 1941, upon which date a large amount of the bonds eligible for refunding under the provisions of this

act may be called for redemption according to their terms; that the refunding under this act will confer rights upon the state which it does not now possess and will release funds for use in the maintenance and construction of state highways which are badly needed; . . ."

This quoted language indicates rather clearly that the Legislature intended that on April 1, 1941, bonds would be issued and sold under Act 4, and that the proceeds of said bonds could be used to the state's immediate advantage. Section 4 of Act 4 of 1941 says:

"The bonds shall be in such form and denominations; shall have such dates and maturities; . . . and shall contain such provisions as to registration of ownership as the board shall determine . . ."

Section 3 of Act 4 says:

"The bonds issued under this act shall be the direct obligations of the State of Arkansas, for the payment of which, both principal and interest, the full faith and credit of the state and all its resources are hereby irrevocably pledged."

Section 8 of Act 4 provides, in part:

"The highway revenue shall be provided and shall remain pledged as a trust fund as provided in Act 11, and such covenant and pledge, and all provisions, limitations and covenants of that act, except as provided in § 12 hereof, shall innure to the bonds issued under this act, . . ."

Section 13 of Act 4 provides:

"The state expressly covenants that so long as any of the obligations authorized by this act are outstanding, it will not permit the present laws to be repealed or amended so as in any manner to reduce the *annual* revenue coming into the state highway fund below $10,250,000." (Italics our own).

These quoted sections from Act 4 of 1941 demonstrate that the Refunding Board had the right to date the bonds

as it desired; and that when the bonds were issued, the highway revenue stood as a trust fund for the bonds—saving only the gratuity payments in subdivision C of § 12 and any other provisions in § 12 of said Act 4; and that the "annual revenue coming into the state highway fund" was to be calculated in accordance with § 12 of that act. It is shown in this case that the Refunding Board—acting under its broad powers contained in said Act 4—adopted a resolution in March, 1941, and, acting on that resolution, issued, under said Act 4, bonds in the amount of $136,330,557.29; that the bonds were dated April 1, 1941; and that the Refunding Board fixed April 1 to March 31 as the year on which the annual revenue was to be calculated and determined under said Act 4. The Refunding Board's resolution specifically said that "fiscal year" as used by the Refunding Board in the issuance of the bonds meant April 1 of one year to March 31 of the following year.

When we consider all of these facts, we reach the conclusion that, to place a construction on said Act 4 that would change the year from the bond year (April 1-March 31) to the fiscal year (July 1-June 30) would (a) certainly be at variance with the original intent of the Legislature to leave the determination of the year to the Refunding Board, and (b) might, in letter if not in spirit, be considered a breaking of faith with the creditors of the state who hold the refunding bonds. No party to this litigation indicates—much less claims—that such latter eventuality is to be even remotely considered. In determining how much revenue comes, each year, into the gratuity fund of $750,000 under subdivision C of § 12 of said Act 4, we must use as the time for calculation, the year beginning April 1 and ending the following March 31. That year, which we call the bond year, must be used to fix the period in which the revenue arises to go into the gratuity fund of $750,000; because, until subdivisions A and B of § 12 have been reached and accomplished, there is nothing to go into subdivision C. Since the year of April 1 to March 31 following is the "annual revenue year" for subdivisions A and B in § 12, it necessarily follows that the same period of time must

be used in calculating the "annual revenue" for subdivision C of § 12. Thus, the gratuity money *arises* in the period from April 1 of one year to March 31 following.[3]

But that year (which we call the bond year) does not determine when the gratuity fund shall be distributed, because the distribution requires a separate appropriation act. The distribution may be made by the Legislature by an appropriation act based on the bond year, or the fiscal year, or any other year that the Legislature may determine, within Constitutional limitations. But from March 31 of any year until distributed, or until the end of the legislative power under the Constitution, the money going into the gratuity fund remains in the treasury awaiting a valid appropriation act. This will be observed later, and this time of distribution will be discussed in topic heading II, *infra*.

The cities and counties contend that the fiscal year—July 1 to June 30—should be used in determining the period in which the annual revenue arises under the refunding act; and, since our holding on this point is adverse to the cities and counties, we notice their contentions.

A. The cities and counties urge that a decree of the Pulaski Chancery Court rendered in 1943 makes the question *res judicata* in favor of the cities and counties. In 1943, the City of Little Rock brought a class suit in the Pulaski Chancery Court against Earl Page, Treasurer of the State of Arkansas. We refer to this as the "1943 suit," and the decree rendered in that suit as the "1943 decree." The complaint in that suit alleged that, under § 12 of Act 4 of 1941 the amount of $750,000 was set aside for various state uses, and that by Act 385 of 1941, an allocation was made of this $750,000; and that under the said allocation the $750,000 was to be distributed as follows:

[3] Act 234 of 1947 obviously has no effect on the decision of these cases, and was not cited in the briefs or suggested in the oral argument. It is mentioned here merely to show a legislative recognition of the fact that Act 4 of 1941 established a bond year.

the first $200,000 to the bridge-bond retirement fund;

the next $140,000 to the road bond redemption account;

and all remaining amounts to go 45.12% to the municipal bond retirement fund, and 54.88% to the municipal turnback fund. The complaint also alleged that, under Act 192 of 1941 the municipal turnback fund should have received certain amounts; and the suit also involved the transfer of certain funds to the highway fund by virtue of Acts 418, 419, 420 and 427 of the 1941 General Assembly. In other words, the various phases of the refunding program under Act 4 of 1941 were consummated by these acts in the transfer of other funds to the highway fund. The complaint alleged that in the period from July 1, 1941, to June 30, 1943, the amounts credited to the municipal turnback fund were incorrectly calculated and determined, and that additional amounts should have been credited by the state treasurer to that fund and disbursed to the municipalities and counties.

A decree was entered in the suit on July 21, 1943, which recited in part:

"Wherefore, it is considered, ordered and decreed that the claim of the plaintiffs for any portion of the highway revenues coming into the State Highway Fund in any fiscal year not specifically allocated as provided in § 12 of Act 4 of 1941 is hereby dismissed for want of equity.

"It is further considered, ordered and decreed that the defendant, Earl Page, as Treasurer of the State of Arkansas, transfer the sum of $40,000 from the Bridge Bond Retirement Fund to the Municipal Turnback Fund for the two fiscal years ending June 30, 1943, and that he immediately disburse that amount, as prescribed by Act No. 385 of 1941, . . ."

No appeal was prosecuted by the state treasurer from this decree; and the cities and counties now claim that this 1943 decree definitely determined that the fiscal year—*i. e.,* July 1 to June 30—governs in all matters of

the ingathering of the highway revenue. In other words, the cities and counties claim that the 1943 decree is *res judicata* on the question of "bond year v. fiscal year."

We do not agree. It will be observed that the 1943 decree (1) was concerned only with the matters *prior* to July, 1943; (2) came about because of the augmenting of the highway fund by the transfer of certain funds to it by 1941 acts Nos. 418, 419, 420 and 427 to supplement and complement Act 4 of 1941. In the present case we are concerned with highway revenue originating *since* July 1, 1943. The 1943 suit could not be *res judicata* on the distribution of revenue originating in subsequent years. In *Mo. P. Hosp. Assn.* v. *Pulaski Co., ante,* p. 9, 199 S. W. 2d 329, in discussing the plea of *res judicata* in matters of taxation, we said:

"The great weight of authority is to the effect that an adjudication upon liability for taxes of one year is no bar to an action for taxes for a subsequent year. In *Keokuk & W. R. Co.* v. *State of Missouri,* 152 U. S. 301, 14 S. Ct. 592, 597, 38 L. Ed. 450, the U. S. Supreme Court said: 'A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action.'

"In *City of Newport* v. *Commonwealth,* 106 Ky. 434, 50 S. W. 845, 51 S. W. 433, 45 L. R. A. 518, the Kentucky Court of Appeals said: 'An adjudication upon a liability for taxes for one year is no bar to an action for taxes for a subsequent year.'

"In *Bank* v. *City of Memphis,* 101 Tenn. 154, 46 S. W. 557, the Tennessee Supreme Court said: 'The plea of *res judicata* is limited in its effect, in tax cases, to the taxes actually in litigation, and is not conclusive in respect of other taxes assessed for other and subsequent year.'

"In *Lake Shore & M. S. Ry. Co.* v. *People,* 46 Mich. 193, 9 N. W. 249, the Supreme Court of Michigan said: 'The result of a suit for the taxes of particular years is not *res judicata* in subsequent suits between the same

parties for taxes of other years, and the decisions upon legal questions arising in the first case are important only as precedents'."

The rationale of the above quotation, as applied to the present case is that the 1943 decree did not involve the matter of tax distribution for the years after July 1, 1943, so the plea of *res judicata* is without merit.

B. The cities and counties contend that the Legislature, by § 10444, Pope's Digest, has fixed as "fiscal year," and that the Refunding Board is powerless to change the fiscal year. By Act 7 of 1921 (now § 10444, Pope's Digest) it was provided:

"Section 1. That there is hereby established and fixed a definite fiscal year for all offices, departments, institutions and other agencies of State government. Said fiscal year shall begin on July 1 and end on June 30. July 1, 1921, shall be considered the beginning of the first fiscal year under the provisions of this act."

The above was a legislative enactment of 1921, and any subsequent Legislature had the power to fix another term for a fiscal year, either for all state funds or for any particular part thereof. As regards revenue coming into the state highway fund, Act 4 of 1941 did change the year to the period beginning April 1, and ending March 31, following. That this was done has been demonstrated in discussing the provisions of said Act 4. So, the argument of the cities and counties based on § 10444, Pope's Digest, is without merit.

To conclude this topic of the opinion: we hold (1) that in fixing the period in which revenue arises under Act 4 of 1941, the Legislature fixed the year beginning April 1 and ending March 31 following; (2) that in such year the first $10,250,000 is governed by subdivision A of § 12 of Act 4; (3) that the next $2,500,000 is governed by subdivision B of said § 12; (4) that the next $750,000—referred to herein as the gratuity money—is governed by subdivision C of § 12 of Act 4; (5) and that, as to the said gratuity money, the Legislature may act "as

the Legislature may from time to time prescribe" (to quote the exact language of said section); and (6) this suit concerns only this gratuity money.

II. *Time of the Distribution of the Gratuity Money.* It will be observed from what we have said in I, *supra,* that, until after March 31 of each year there can be no definite and final determination as to how much gratuity money, if any, is to be distributed. We elucidate by illustration: On March 31, 1945, it was determined that there was $201,457.77 to go to the gratuity fund for the bond year ending that day; and, then, that amount became subject to distribution on any basis "as the Legislature may from time to time prescribe" (to quote the exact language found in § 12 of Act 4 of 1941). But none of that amount came into the gratuity fund until April 1, 1945. The Legislature, by Act 231 of 1943, used the term "fiscal year ending June 30, 1945" in making the appropriation from the gratuity fund. Construing the last-quoted language in the light of what has been said in Topic I, *supra,* we reach the conclusion that disbursement under the said appropriation act (1) could not be made before April 1, 1945, because until that date there was no fund; and (2) must be made before June 30, 1945, otherwise, the appropriation would expire. Article V, § 29 of the Constitution says:

"No money shall be drawn from the treasury except in pursuance of specific appropriation made by law, the purpose of which shall be distinctly stated in the bill, and the maximum amount which may be drawn shall be specified in dollars and cents; and no appropriations shall be for a longer period than two years."

In *Moore* v. *Alexander,* 85 Ark. 171, 107 S. W. 395, we held that there could be no continuing appropriation, and that any appropriation beyond two years was void. See, also, *Lund* v. *Dickinson,* 126 Ark. 243, 190 S. W. 428.

We use this specific year, ending June 30, 1945, and the 1943 appropriation act to illustrate the meaning and effect of our holding in reconciling the "bond year" of Act 4 of 1941 with the "fiscal year" used in the various appropriation acts.

III. *Validity and Effect of Act 288 of 1943.* In order to appreciate the effect of this act on this litigation, it is well to review the situation before us:

(a) Act 4 of 1941, by subdivision C of § 12, set aside $750,000 as gratuity money to be distributed "as the Legislature may from time to time prescribe."

(b) Act 385 of 1941 was entitled "An act to provide for distribution of amounts received from the $750,000 allocation referred to in § 12 of Act 4 of the Acts of 1941 . . .: to prescribe the manner of payment of such funds so distributed . . ." The effect of this act was to make the said gratuity money payable as follows:

by section 2, to the bridge bond retirement fund, the first $200,000;

by section 3, to the road bond redemption account, the next $140,000;

by section 4 (after the above $340,000 had been disbursed) the balance was to go 45.12% to the municipal bond retirement fund, and 54.88% to the municipal turnback fund.

The municipal improvement districts in this case claim to be the beneficiaries of the municipal bond retirement fund, and the cities and counties in this case claim to be the beneficiaries of the municipal turnback fund.

(c) By Act 385 of 1941 the only municipal improvement districts which would receive any part of the municipal retirement fund were those districts which qualified under said act.

(d) Section 4 of Act 385 of 1941 provides in part:

"The Treasurer of State shall also credit the Municipal Turnback Fund, at the end of each fiscal year, with the amount that the allocation to the Bridge Bond Retirement Fund exceeds the debt service requirements of such fund; with the amount that the allocation to the Road Bond Redemption Account exceeds the debt service requirements of such account; and with the amount that

the allocation to the Municipal Bond Retirement Fund exceeds the debt service requirements of such fund."

In this case the cities and counties claim that *all* of the municipal improvement districts entitled to receive aid under Act 385 of 1941 have been paid in full, so that *all* of the municipal bond retirement money accruing in 1943 and subsequent years should go to the municipal turnback fund under the section last quoted above.

(e) But the municipal improvement districts claim that Act 288 of 1943 increased the amount of gratuity to go to the municipal improvement districts so that they are entitled to continue to receive aid from the municipal bond retirement fund. In answer to that argument, the cities and counties say that Act 288 of 1943 is void.

The above poses the issue. We hold that Act 288 of 1943 is valid. The points urged by the cities and counties against the said act may be summaried and answered as follows:

1. The cities and counties say that Act 4 of 1941 is a contract between the state and the bondholders, and that Act 288 of 1943 attempts to change the act by increasing the basis of distribution of the gratuity money; and to that extent Act 288 is void. The answer is obvious: Act 4 of 1941, § 12, subdivision C reserves $750,000 for the state to distribute as gratuity money "as the Legislature may from time to time prescribe." The said Act 4 did not mention counties except in these words, "county roads adjacent to such cities and towns"; yet Act 385 of 1941 created the municipal turnback fund, and allowed counties to participate in the gratuity money; and in *Page* v. *State Improvement District No. 11 of Russellville,* 203 Ark. 657, 158 S. W. 2d 905, we upheld the validity of Act 385 of 1941. No beneficiary has a vested interest in the gratuity to be received from the state funds. *Cone* v. *Hope-Fulton-Emmet Road Improvement District,* 169 Ark. 1032, 277 S. W. 544. So, here, the cities and counties have no vested interest in the gratuity under either Act 4 or Act 385 of 1941, and the Legislature may grant or withhold the gratuity "as the Legislature may

from time to time prescribe." It is obvious that we consider this last-quoted clause as modifying all of the provisions of subdivision C, § 12 of Act 4 of 1941.

2. The cities and counties contend that Act 4 of 1941 was referred to the people and approved, and so, by force of paragraph 8 of Constitutional Amendment VII (the initiative and referendum amendment), the Legislature could not amend said Act 4 except by 2/3rds vote of each house, and that Act 288 of 1943 failed to receive such a vote. But the answer to that contention is likewise obvious: Act 385 of 1941 did not *amend* Act 4 of 1941, but only designated the beneficiary funds which the Legislature then desired to receive a part of the gratuity money under subdivision C of § 12 of said Act 4. Likewise, Act 288 of 1943 did not amend Act 4 of 1941, but only amended Act 385 of 1941; and this last-mentioned act was not a referred act, and could therefore be amended by an act receiving only a majority vote in each house; and Act 288 of 1943 did receive such majority vote.

We conclude, therefore, that Act 288 of 1943 is valid as against the attacks here made on it. The effect of this holding is to allow the municipal improvement districts an increased participation under the act; but it yet remains to be seen if the Legislature has made a valid appropriation for such increased participation. This point we now proceed to consider.

IV. *Sufficiency of the 1945 Appropriation Act.* Act 288 of 1943 declared the rights of the municipal improvement districts to additional aid, but that act was not an appropriation act. The appropriation act was Act 231 of 1943, captioned "An act to make appropriations of amounts received from the $750,000 allocation referred to in § 12 of Act 4 of the Acts of 1941 . . ." Section 5 of said Act 231 reads:

"There is hereby appropriated to be payable from the municipal bond retirement fund for the purpose of paying principal of and interest on municipal paving

bonds, *as now or as may hereafter be provided by law,* for the biennial period ending June 30, 1945, the following: . . ." (Italics our own).

The italicized words show that the appropriation was clearly sufficient to include the increased participation allowed by Act 288 of 1943. So, for the biennium ending June 30, 1945, there was a sufficient appropriation act.

But when we came to the biennium beginning July 1, 1945, and ending June 30, 1947, we find the appropriation act is not as broad as the previous act. Act 104 of 1945 is the appropriation act for the said biennium, and § 4 of that act reads: "There is hereby appropriated to be payable from the municipal bond retirement fund for the purpose of paying principal of and interest on municipal bonds, *under the provisions of Act 385 of 1941,* the following . . ." (Italics our own).

It will be observed instantly that this act appropriates money from the municipal bond retirement fund only to pay items allowable under Act 385 of 1941, and does not include—directly or by implication—Act 288 of 1943 or any other act except Act 385 of 1941. It follows, therefore, that for the biennium beginning July 1, 1945, and ending June 30, 1947, said Act 104 of 1945 makes no appropriation to carry into effect Act 288 of 1943. See *Moore* v. *Alexander, supra,* and *Jobe* v. *Caldwell,* 93 Ark. 503, 125 S. W. 423, 99 Ark. 20, 136 S. W. 966. Article XVI, § 12 and Article V, § 29 of the Constitution of the State of Arkansas concern the necessity for sufficient and definite appropriations. Commenting on these provisions in *Ark. G. & F. Commission* v. *Page,* 192 Ark. 732, 94 S. W. 2d 107, we said:

"Peculiarly applicable to the instant case is the announcement in *Dickinson, State Auditor* v. *Clibourn,* 125 Ark. 101, 187 S. W. 909.

" 'All moneys must be specifically appropriated and specifically applied.' *Lund* v. *Dickinson, State Auditor,* 126 Ark. 243, 190 S. W. 428. These provisions of the Constitution are mandatory and must be enforced."

For all that is shown in the record in the cases before us, the additional aid to the municipal improvement districts under Act 288 of 1943 cannot be paid during the biennium beginning July 1, 1945, and ending June 30, 1947, for want of a valid appropriation act.

CONCLUSION

To summarize and conclude:

In Case No. 7956 the decree of the chancery court is reversed and the cause remanded, with directions to dismiss the complaints and interventions of the cities and counties, and to enter a decree in keeping with this opinion.

In Case No. 8059 the judgment of the circuit court is cancelled, and the cause dismissed as moot, because of the order here directed in Case No. 8205.

In Case No. 8205, the decree of the chancery court is affirmed, insofar as it upholds the validity of Act 288 of 1943, but the cause is remanded to the chancery court so that a decree may be entered in keeping with the other provisions of this opinion.

As regards costs: each party will bear all costs already paid by such party, but any unpaid costs will be paid equally, one-half by the cities and counties and one-half by the municipal improvement districts.

The Chief Justice and Mr. Justice MILLWEE voluntarily disqualified in these cases, and did not participate in the consideration or determination of the appeals; nor did they attend the conferences at which the cases were discussed.

Mr. Justice ROBINS dissents as to that portion of the opinion which sustains the validity of Act No. 288 of 1943.

SANDERS *v.* PLANT.

4-8241 204 S. W. 2d 323

Opinion delivered June 23, 1947.

Rehearing denied September 22, 1947.

Linus A. Williams, Joe D. Shepherd and *J. J. Montgomery,* for appellant.

George O. Patterson and *J. M. Smallwood,* for appellee.

MINOR W. MILWEE, Justice. The facts out of which this litigation arose are stated in the opinion on a former appeal and will not be repeated, *Plant* v. *Sanders,* 209 Ark. 108, 189 S. W. 2d 720. As appears from that opinion, there was involved the validity of the sale of the lands

there described for the non-payment of the taxes due thereon for the year 1930, which sale had been confirmed by the state. The opinion in that case sustained the title of Plant, who had purchased from the state, as to certain of the lands, but held the sale of others void because of defective descriptions.

Upon the remand of the cause Mrs. Louise Plant Eads, Plant's successor in title, applied for a writ of assistance praying that she be awarded possssion of the lands to which her title had been upheld. L. H. King acquired this title and made himself a party. He adopted the pleadings which Mrs. Eads had filed and without reciting them it may be said that the question presented for decision in the trial court was that of the ownership of the 60 acres of accretions to the northeast quarter (NE¼) and the northwest quarter (NW¼) of section 20, township 8 N, range 22 west, Johnson county, Arkansas.

The chancellor held that in as much as the intervenor's grantor had purchased all these lands from the state and had received the deed of the State Land Commissioner therefor, and in as much also as the former opinion upheld the sale of the northeast quarter, section 20, containing 58.87 acres, and the sale of the northwest quarter of that section, containing 98.30 acres, the sale thereof carried the title to the 60 acres of accretions to these two fractional quarter sections. Upon that finding the court awarded the writ of assistance as prayed for and from that decree is this appeal.

For the affirmance of this decree appellee cites and relies upon the case of *Towell* v. *Etter*, 69 Ark. 34, 59 S. W. 1096, 63 S. W. 53, and later cases which have approved and followed that case. In this Towell case it was held, to quote a headnote, that "A purchase at commissioner's sale for delinquent levee taxes of a tract of land described as the southwest quarter of a certain section, containing 151 acres, will carry title to 35 acres of land which had previously been added to such land by accretion." The sale in that case was for delinquent levee

taxes, but the same rule was applied in the case of *Crill* v. *Hudson,* 71 Ark. 390, 74 S. W. 299 where the sale had been made for the non-payment of the general taxes.

Apparently and *prima facie* it would appear that since appellee had acquired title to the northeast quarter and the northwest quarter of section 20, he had also acquired title to the accretions to these two quarter sections. He correctly contends that, "Unless there has been a severance of the riparian rights from the platted land, a conveyance of the platted lands carries all of the riparian rights and a separate conveyance of the riparian rights, among which are accretions, is wholly unnecessary." The case of *Mobbs* v. *Burrow,* 112 Ark. 134, 165 S. W. 269, sustains this contention.

However, the record before us on the former appeal shows there had been a severance of the riparian rights from the platted land.

It appears that in May, 1917, the county surveyor, at the request of Mrs. Sanders who had acquired a life estate in the lands here in litigation under the will of her husband, made a survey of the accretions to these two quarter sections of section 20 in order to have the land placed on the tax books. A map or plat of this survey was duly filed in the office of the circuit clerk on July 10, 1917, which was long prior to the assessment and sale of the land for the taxes for the non-payment of which they were sold, and from and after that date the 60 acres have been carried on the tax books and assessed separately and apart from the platted quarter section.

This survey by the county surveyor was authorized by § 13695, Pope's Digest, the purpose of that section being as was said in the recent case of *Bracken* v. *Henson, ante,* p. 572, 201 S. W. 2d 580, to secure a proper description of the land to be assessed so that it might be identified by reference to the plat of the survey which had become a public record. A prudent owner would prefer to pay his taxes under a description which identified his land so that there would be no question but that he had paid his taxes. This is what Mrs. Sanders did

when she had the survey made and the plat thereof recorded as provided by § 13697, Pope's Digest.

Since this survey, the accretions have been carried on the tax books as a separate tract of land. It was separately advertised for sale for the delinquent taxes and was separately sold. It was separately certified to the state and was sold by the land commissioner to Plant under a separate description. This sale by the land commissioner, as stated in the former opinion, was made under the authority of Act 331 of the Acts of 1939 for the sum of $1 per acre, the minimum value required by said Act 331, and the recited consideration in the land commissioner's deed for the accretions was $60, there being 60 acres.

We conclude, therefore, that there had been a separation of the accretions from the land to which the accretions formed for the purpose of taxation. Now Plant, through whom appellee claims, did buy the accretions from the state and would have acquired title thereto under his purchase if the sale thereof for the taxes had been made under a valid description which could have been employed by a reference to the survey hereinbefore referrd to in *Bracken* v. *Henson, supra.* But this 60-acre tract appears to have been described only as "Accretions, section 20," which was not definite in as much as these accretions had been formed to two separate quarter sections of that section.

The former opinion treats the northeast quarter, section 20, as one description and the northwest quarter of section 20 as another description, both being separate and distinct from the accretions. This is shown by the reference to northeast quarter as containing 58.87 acres and the northwest quarter as containing 98.30 acres and neither dscription takes into account the 60 acres of accretions. In other words, the holding of the former opinion was that the tax title to both the northeast quarter and the northwest quarter was good, having been confirmed under valid descriptions, but title confirmation of the sale of the accretions was insufficient because a defective description thereof had been employed.

The result of the views here expressed is that it was error to include the accretions in the writ of assistance and that part of the decree will be reversed, and the cause will be remanded for further proceedings not inconsistent with this opinion; these proceedings to be predicated upon the holdings herein made that appellants have the original title to the accretions, whereas appellee has a deed from the state for the accretions based upon a tax sale void for the lack of power to make it.

ED F. MCFADDIN, Justice, dissenting. In the opinion on the first appeal in this case (see *Plant* v. *Sanders*, 209 Ark. 108, 189 S. W. 2d 720), in discussing the so-called "accretions of 60 acres to section 20," we said: "We agree that the last tract set out above and described as 'accretions in section 20, 60 acres,' is void for indefinite description and was properly canceled by the court in Plant's deed."

On remand to the chancery court, no additional evidence was heard, and the problem before the chancery court was to "enter a decree in accordance with" the opinion. The chancery court undoubtedly reasoned that if the description, "accretions in section 20, 60 acres" was void,—as we had said it was—then the accretions had never been legally severed or separated from the land to which the accretions adhered, and would pass with a conveyance of the main-land. Evidently, on this reasoning the chancery court held that the "accretions" to the northeast quarter of section 20 passed with the northeast quarter of section 20, and the "accretions" to the northwest quarter of section 20 passed with the northwest quarter of section 20. I think the chancery court was correct in so interpreting our former opinion. The majority in the present opinion says:

"Apparently and *prima facie* it would appear that since appellee had acquired title to the northeast quarter and the northwest quarter of section 20, he had also acquired title to the accretions to these two quarter sections. He correctly contends that, 'Unless there has been a severance of the riparian rights from the platted land,

a conveyance of the platted lands carries all of the riparian rights, and a separate conveyance of the riparian rights, among which are accretions, is wholly unnecessary.' The case of *Mobbs* v. *Burrow,* 112 Ark. 134, 165 S. W. 269, sustains this contention."

But immediately following the above quotation, the majority adds: "However, the record before us on the former appeal shows there had been a severance of the riparian rights from the platted land."

It is this last-quoted sentence that impels this dissent. Based on the same record and plat as in the former appeal, how can this court be consistent in saying, in the first opinion, that the description of the accretions was void, and then saying, in the present opinion, that there had been a valid severance of the accretions, when the validity of the severance depends on the sufficiency of the map? Until a valid and definite map was shown to have been filed, certainly there was no valid severance of the accretions. I have carefully examined the map in the transcript containing the so-called survey of July 10, 1917, and it is my considered opinion that the survey map is absolutely worthless, because it fails to show the length and width of the accretions, is not drawn to scale, and has no legend to show any distances.

Furthermore, if we assume that the river part of the map of the so-called survey of July 10, 1917, is drawn to scale, and if we superimpose that part of the said July 10, 1917, survey on the official government survey as found in the transcript (which I have done), it is clearly apparent that the so-called accretions in the map of July 10, 1917, are all a part of the lands in section 20 shown as part of the government survey. In short, the majority is using an abortive and illegal map as the foundation for the so-called "survey" under section 13697, Pope's Digest; and thereby the majority is taking unsevered accretions from the true riparian owner. In the first opinion we in effect held that the 1917 survey was void. Now in the second opinion the majority is allowing the void survey to be valid.

For this reason I respectfully dissent. I mention also (but forego any discussion of it) the fact that by this abortive survey a life tenant has in effect destroyed all the title of the remaindermen.

FRANKS *v.* FRANKS.

4-8214 204 S. W. 2d 90

Opinion delivered June 23, 1947.

[redacted]

W. F. Denman and *Tom W. Campbell,* for appellant.

J. N. Saye and *Graves & Graves,* for appellee.

McHaney, Justice. Appellee brought this action for divorce against appellant on February 27, 1946, on the grounds of habitual drunkenness and cruel and inhuman treatment, general indignities, and for the custody of their then six year old girl child and for property rights as claimed in her complaint. She alleged that she and appellant were married September 7, 1938, and lived together as husband and wife until February 18, 1946, when she left because of his mistreatment of her, during which time she made appellant a good wife and gave him no cause to mistreat her. On motion of appellant, the indignities mentioned in her complaint were made more definite and certain by an amendment which alleged that they consisted in part by his staying away from home all or part of the night, drinking and gambling, nearly every week, leaving her and the little girl alone using profane language, in their presence, and personal violence to her on two occasions.

The answer was a general denial. He alleged that she had left him on three previous occasions, without cause, and that her leaving him on February 16, 1946, was again without cause. He prayed that her complaint be dismissed for want of equity, but in the alternative if a divorce be granted her, he be given the custody of said child.

Trial was had before the court on June 25 and 26, 1946, and a number of witnesses for each party testified orally, at the conclusion of which the court took the matter under advisement and continued the case to September 10, 1946, but ordered appellant to pay to appellee $150 on or before July 5, August 5, and September 5, for the support and maintenance of appellee and their daughter whose temporary custody had previously been awarded her with certain exceptions. On September 17,

after hearing further oral testimony, the court granted appellee a divorce from appellant, also the custody of said child for nine months of each year, with the right of visitation by him, granted appellant her custody for the months of June, July and August of each year, with the right of visitation by her, and ordered him to pay appellee $60 per month for the support, education and maintenance of said child during the nine months appellee had her care and custody. He was further ordered to pay appellee's attorneys $300 additional for their services in the Chancery court and $150 more, in the event of an appeal to this court; to deliver to appellee a certain Chevrolet automobile which he had theretofore given to her as a birthday present and which he had repossessed without her knowledge or consent, and one-third of all household goods and furniture. The decree provided that no further alimony or monthly allowance should be awarded appellee for her support. The cause was continued as to the property rights as between appellant and appellee, and as to the rights of property, claimed by appellant's father, J. W. Franks, who intervened in the action, claiming certain interests in property said to belong to appellant who was enjoined from disposing of any of his property.

Appellant has appealed from so much of this decree as gives appellee a divorce from him. Appellee has taken a cross-appeal from the refusal of the court to grant her temporary alimony pending adjudication of the property rights between her and appellant.

For a reversal of this decree on the direct appeal, appellant makes three contentions: 1. Because appellee's evidence is not sufficiently corroborated; 2. because of her own misconduct; and 3. because she condoned his misconduct.

1. We cannot agree that appellee's evidence is not sufficiently corroborated. While the court did not base the decree on the ground of habitual drunkenness, but on the ground of indignities and mistreatment, we think her evidence that such indignities and misconduct to-

ward her frequently followed his excessive drinking and all night gambling parties indulged in by him weekly or oftener was sufficiently corroborated. There is no suggestion here of collusion between the parties, and it is not contended that her testimony, if corroborated, is not sufficient. She reviewed their married life since 1938 and testified to many matters of mistreatment, including some personal violence. We do not review this evidence in detail, as to do so would serve no useful purpose. But we think some of the incidents related by her were corroborated sufficiently to justify the court in treating the whole of her testimony as to such mistreatment as being fully corroborated. In *Goodlet* v. *Goodlet,* 206 Ark. 1048, 178 SW. 2d 666, we quoted from an annotation in 65 A.L.R. 169, which says: "In cases of cruelty or other mistreatment, there is a tendency to hold that independent proof of conduct of the defendant of the sort complained of, at least where more than one instance of it is established, is sufficient corroboration of the whole of plaintiff's testimony as to mistreatment." It was there further said: "The cases are agreed that the purpose of the rule requiring corroboration is to prevent procuring divorces through collusion, and that where it is plain there is no collusion, the corroboration may be comparatively slight." So, we conclude the corroboration was sufficient to justify the decree. This is true without taking into consideration appellant's conduct subsequent to the beginning of the action relating to the custody of the child, the automobile which he clandestinely took from her and other matters. See *Greer* v. *Greer,* 193 Ark. 301, 99 S. W. 2d 248.

2. As to appellee's misconduct, the argument is largely based on a finding made by the court that: "Both of them have done things that should not have been done and neither of them was free from blame for their troubles, but upon the whole case, the court is of the opinion that the indignities caused by the defendant were such that would entitle the plaintiff to a divorce, especially since it has been very clearly proven to the court that a reconciliation is impossible." Counsel for appellant

have cited a number of our own cases, and others, to the effect that divorce is a remedy provided for an innocent party, except as otherwise provided by Statute, including our recent case of *Widders* v. *Widders,* 207 Ark. 596, 182 S. W. 2d 209. But this Widders case, as we think the others so holding, refers to conduct of the complaining party which caused the mistreatment of the plaintiff by the defendant, or of conduct by plaintiff that would be a ground of divorce by the defendant. In using the language above quoted, the court did not make any finding that appellee had been guilty of any indignities to appellant and none are claimed by him, and the court, no doubt, had reference to the fact, freely admitted by her, that she had on social occasions partaken of intoxicants in small quantities with her husband and others, but never to excess, and that she had played cards for small stakes, such as penny ante poker.

We agree with the trial court that this kind of conduct should not have been indulged in by either of them, especially by appellee. The playing of cards or dice for money is gambling and is made unlawful by statute. No doubt the court thought, as we do, that appellee, being under the dominating influence of appellant, engaged therein because he had desired her to do so. He taught her to play poker and shoot dice, and it appears that her drinking began with the night of their marriage in 1938, under his influence. We think the court was warranted in finding that appellee's indiscretions and misdeeds in these respects were not sufficient to justify a denial of the decree, and that the rule relied on by appellant, stated in the Widders Case, and a number of others cited, is not here violated.

3. The final reason urged for a reversal of the decree by appellant is condonation by appellee. This contention is based on the fact that, just before Christmas, 1944, she left him on account of his cruel treatment and indignities. She returned to him on January 1, 1945, upon his promise that he would not mistreat her again, and that he would quit drinking, gambling, and staying away from home at night. Upon her return they again

resumed their marriage relationship and co-habited as husband and wife, under said promise. For a time, about two months, he kept his promises, but then relapsed into his old habits and she says, for the remainder of 1945, his conduct was worse than it had been before. She went away again about Christmas, 1945, and again returned to him on similar promises of good behavior, which he kept until February 16, 1946, when she testified he told her he would not be further bound by his promises, and that if she thought he was going to live as he had for the last few weeks, she was crazy, and that he stayed out the next night and she left him. She testified she did not quit him at Christmas, 1945, but, if we assume she had that intention when she left, she returned under the same promise of reformation. Assuming, without deciding that her acts in returning and resuming the marital relation, based on his promises not to repeat the offense, constituted condonation for past mistreatment, still it was only conditional condonation. If the condition is broken by future misconduct, condoned past conduct may then be relied on in support of an action for divorce on the subsequent misconduct or both. In *Longinotti* v. *Longinotti,* 169 Ark. 1001, 277 S. W. 41, we said: "The law is well settled that either spouse may condone conduct of the other which, but for the condonation, would entitle the innocent spouse to a divorce. But it is equally as well settled that condonation does not deprive the aggrieved spouse of the right to a divorce on account of the subsequent misconduct of the offending spouse. On the contrary, subsequent misconduct will generally operate to revive the right to a divorce for the condoned offense." See, also, *Denison* v. *Denison,* 189 Ark. 239, 71 S. W. 2d 1055, where it was said that "the doctrine of condonation has no application to the facts of this case," which were that the parties continued to cohabit as man and wife after the more violent outbreaks of temper on the part of the wife. We conclude that the doctrine of condonation has no application here.

As to the cross-appeal of appellee, claiming the court erred in refusing to award temporary alimony to her for

her support and maintenance from September 17, 1946, the date of the decree, until final determination of the property rights between the parties, but little need be said. The court did order appellant to pay $60 per month for the support, maintenance and education of their child during the nine months in each year she is in appellee's custody. In addition, appellee has been paid for herself and the child $75 from May 23 to the first Monday in June, 1946, and $450 subsequently ordered. Appellee is employed and draws a salary from such employment. We do not feel justified in granting the relief prayed, in view of the trial court's refusal to make an allowance, pending final determination of the property rights.

The decree is accordingly affirmed, on both the direct and cross-appeal.

McFaddin, J. not participating.

Boyland *v.* Boyland.

4-8168 203 S. W. 2d 193

Opinion delivered June 23, 1947.

Harrelson, Harrelson & Cannon, for appellant.

Norton & Norton, for appellee.

Holt, J. Appellants sought to probate a written instrument, alleged to be the last will of Dr. J. F. Boyland, who died April 24, 1944. Appellees contested its probation on the ground that its execution had been procured by the undue influence of appellant, Bessie May Sanders, one of the beneficiaries, who claimed to be the

widow of the testator, and on the additional, and principal, ground that the testator lacked testamentary capacity. The parties here are Negroes.

Some evidence was offered by appellees to support the allegation of undue influence in procuring the execution of the will, but the greater part of the testimony was offered to show a lack of testamentary capacity.

Upon a consideration of all the evidence, the trial court found "that the paper writing filed in this Court on May 1, 1944, and purporting to be the last will and testament of Dr. J. F. Boyland, deceased, is void and not entitled to be probated," and from the decree comes this appeal.

While the decree does not specifically so recite, it appears from the briefs of counsel to be admitted that the primary ground on which the will was declared void by the court was because of the testamentary incapacity of the testator at the time it was alleged to have been executed.

Appellants say that there are three questions presented, which are: "1. Was the will duly executed in accordance with the statute? 2. Was the will, or paragraph six thereof, procured by undue influence? 3. Did the Testator at the time of the execution of the will (if it was duly executed) have the necessary testamentary capacity?"

The cause comes to us for trial *de novo.*

The conclusion we have reached in this case makes it necessary to consider only appellants' third question, *supra,* that is whether the testator lacked testamentary capacity.

Dr. Boyland had been married three times before he attempted, at the approximate age of 74, to marry appellant, Bessie May Sanders, in November, 1942. His first wife died in 1899, the second divorced him in 1908, and the third, appellee, Mary L. Boyland, whom he married in 1912, and who lives in Ellendale, Tenn., is his

present lawful widow, they never having been divorced. Bessie May Sanders was at the time of her alleged marriage to Dr. Boyland thirty-six years of age, and had, but a short time before, secured a divorce (for which Dr. Boyland furnished the money) and had deserted her three children,—the oldest being six years of age, and the youngest, "just a baby",—in order to become, in effect, Dr. Boyland's mistress.

In June, 1943, Dr. Boyland prepared a typewritten instrument in the form of a will, which he signed some time between this date and April 4th or 5th, 1944. Appellants alleged that he completed its execution by having Rev. W. L. Purifoy and W. L. Purifoy, Jr., sign the instrument, as attesting witnesses, in his presence, at his home on April 4th or 5th, 1944, and it is this alleged will that is in question here.

Much of the testimony on the testamentary capacity of the testator is in irreconcilable conflict, and it would serve no purpose to set it out in detail.

In addition to the testimony of the interested contestants (appellees) some eight or nine other and disinterested witnesses testified in effect that Dr. Boyland lacked testamentary capacity for some time prior to March 18, 1944, when he was admitted to Mercy Hospital in Forrest City, until his death on April 24th, a little more than a month later. It appears to be undisputed that Dr. Boyland, for some time prior to his admission to the hospital in Forrest City, was suffering from cancer which continued to grow worse and was the principal, if not the direct cause of his death April 24, 1944.

Among the above disinterested witnesses were Dr. Roy, who owned and operated Mercy Hospital and who treated Dr. Boyland in his hospital from March 18th to March 30th, and his chief nurse who had Dr. Boyland in charge and saw him four or five times daily, both of whom testified that in their opinion Dr. Boyland lacked testamentary capacity during the time he spent in Mercy Hospital, and thereafter until his death, April 24th. They

testified that he grew worse from day to day after his admission to the hospital.

Dr. Roy further testified that he was insane, would have to be committed to an institution, that his physical condition was deteriorating very rapidly and that he did not possess recuperative power to improve to the point where he would be capable of executing a will or transacting other business, and that when he came to the hospital he had been taking drugs to alleviate his constant pain and suffering to the extent of a fourth of a grain of morphine, but after "being admitted to the hospital it would not relieve him and therefore it was necessary to increase it to a half grain * * * every two or three hours."

Dr. Roy had a degree from the medical college of the University of Tennessee and interned in St. Joseph's Hospital in Memphis following which he had been in practice for more than two and one-half years and operating a clinic and his own Mercy Hospital in Forrest City.

Of the above disinterested witnesses who testified in effect that Dr. Boyland was mentally incompetent, Delilah LaFlore, after Dr. Boyland was moved to his home on March 30th, went to his home "from three to four times a week," and would go "at night about 8, and stay until 11, 12 or 1 o'clock;" another, Benjamin Hadley, assistant pastor of Dr. Boyland's church, visited him "two or three times a week" during this period; a neighbor who lived across the street "was over there every day" and "stayed there several nights for company with the family," and the first day that he was home from Mercy Hospital, she tried to talk to him, but "he talked so random, I didn't bother him any more. He didn't know what he was talking about; said somebody was trying to kill him or rob him, random talk like that; Henry Porter was there "about every other day;" Horace Davis who lived next door "hardly missed a day" seeing Dr. Boyland; witness, L. B. Wilson, lived in the same house with Dr. Boyland, Horace Davis next door,

and Mattie Neely just across the street, and these witnesses, from related acts that continuously occurred, thought Dr. Boyland insane when the will was attested on April 4th or 5th, and most of them that he was insane at all times after he came home from Mercy Hospital on March 30th until his death, April 24th.

As against the above testimony of appellees, appellants rely primarily upon the testimony of appellant, Bessie May Sanders, the two attesting witnesses, W. L. Purifoy and his son, W. L. Purifoy, Jr., Dr. Banks and Rev. I. L. Pitts and his wife, all of whom testified, in effect, that in their opinion Dr. Boyland possessed testamentary capacity on April 4th and 5th, and for some time prior thereto.

With reference to the testimony of Bessie May Sanders, in the circumstances here, we think it deserves, and we give to it, no credit.

In considering the force to be given the testimony of Rev. Purifoy, Sr., we think it noteworthy that while Dr. Boyland and Bessie May Sanders were admittedly both members of his church, the effect of his testimony was that he knew they were living together, though unmarried, and in effect, approved rather than condemned their reprehensible conduct.

His son testified positively that the will, which he and his father attested as witnesses on April 4th or 5th, was in the handwriting of the testator, Dr. Boyland, or was holographic, when in fact the will in question was typewritten.

According to the testimony of Rev. I. L. Pitts, he visited Dr. Boyland, once at Mercy Hospital, four or five days before he was taken home on March 30th, and again on April 9th in company with eight or nine members of his church, he went to the testator's home for a prayer service. His wife saw him only once, which was at this service. They both testified that he talked normally and seemed to be in his right mind. The other eight or

nine members who were at the service appear not to have testified in this case.

Dr. Banks testified that he graduated from Meharry College, Nashville, Tenn., in 1910, and had been a practicing physician in Forrest City since June, 1915; that he visited Dr. Boyland five times while he was in Mercy Hospital, but not as his physician, and after he returned to his home, he made five more visits, in a professional capacity, April 13, 14, 16, 21 and 24. He always found him "in pain" but able to carry on an intelligent conversation and on all of these visits until about the 16th of April, he considered Dr. Boyland mentally capable of transacting business and making a will.

This is one of those cases wherein the trial court was in a much better position to weigh and consider the testimony, than we could possibly be. Our conclusion, after consideration of all the competent testimony, is that the finding of the chancellor is not against the preponderance thereof and the decree is therefore affirmed.

MONTGOMERY COUNTY CANNING COMPANY *v.* BATES.

4-8250 203 S. W. 2d 195

Opinion delivered June 23, 1947.

Wootton, Land & Matthews, for appellant.

C. H. Herndon and *Witt & Witt,* for appellee.

MINOR W. MILLWEE, Justice. Appellees are five citizens of Montgomery county, Arkansas, and instituted this suit in equity on behalf of themselves and 66 other former stockholders in the Montgomery County Canning

Company to enjoin appellants, E. L. Peterson and the canning company, from dismantling and removing a canning plant from Montgomery county and to require specific performance of a contract to continue operation of the plant at Mt. Ida, Arkansas.

In the complaint filed October 7, 1946, it is alleged that on February 19, 1946, Montgomery County Canning Company, an Arkansas corporation, through its duly authorized officers executed a contract with appellant, E. L. Peterson, whereby it agreed to sell Peterson all the assets of the corporation including the canning plant, equipment and the lands upon which the plant was located in Mt. Ida for $7,000 and the further consideration that Peterson would improve and expand the plant to better serve the farmers of the surrounding territory; that on February 21, 1946, all of the stockholders of the canning company sold, transferred and delivered their respective shares of stock in the canning company to appellant, Peterson, under a written assignment as follows: "E. L. Peterson of Salisaw, Oklahoma, has agreed to pay the mortgage indebtedness now existing against the Montgomery County Canning Company aggregating Seven Thousand Dollars if the stockholders of said company will transfer and assign all of the stock owned by each and for and in consideration of such transfer of stock, the said E. L. Peterson agrees to pay Two Thousand Dollars on the past due indebtedness of the Montgomery County Canning Company as evidenced by his check in that amount, dated February 19th, 1946, and to assume indebtedness of Five Thousand Dollars which is the balance due by said Company for money borrowed, and he also agrees to improve and expand said Canning Plant in such way that it will be enabled to serve the farmers, berry and vegetable growers in this territory and to operate the plant in the town of Mount Ida, Arkansas."

The complaint further alleged that, at the time of the sale and transfer of the stock to Peterson, it was represented to the shareholders that Peterson was an experienced and successful manager and operator of

canning plants, and the sole consideration and motive in transferring their stock was to establish and secure to the farmers in the surrounding territory a canning plant that would furnish a local market for the vegetable and berry growers in said territory; that it was agreed that the canning plant would remain and be operated at its present location as a permanent industry; that none of the shareholders who transferred his stock to Peterson received any consideration in money or property, but said transfer was made under the agreement and belief that the plant would remain at its present location and be operated for the benefit of the people in the territory; that soon after acquiring the stock, Peterson transferred some of the shares to other parties, elected new officers and continued to operate under the name of Montgomery County Canning Company; that during the spring canning season of 1946 appellants canned 11 car loads of blackberries which were purchased from local farmers.

It was further alleged that on October 4, 1946, appellant canning company, under the management of appellant Peterson and in violation of its agreement with appellees, began dismantling and removing the canning plant and equipment to Mansfield, Sebastian county, Arkansas; that under present market conditions it is impossible for appellees to secure canning equipment of similar type, and they will suffer irreparable injury by removal of the machinery and equipment from its present location; and that appellees have no full and adequate remedy at law for the damages they will suffer if appellants be allowed to proceed with the dismantling and removal of the plant and equipment.

The prayer of the complaint is that appellants be enjoined from proceeding to dismantle or remove the buildings and equipment of the canning plant, and from selling the lands upon which the plant is located; that a temporary injunction be granted, restraining appellants from dismantling and removing the buildings and equipment of the plant, and upon final hearing that the injunction be made permanent; and that appellants be required to comply with their contract with appellees

and to continue operating the canning plant at Mt. Ida, Arkansas. A temporary injunction was granted restraining appellants from dismantling or removing the plant and equipment upon execution and filing of bond by appellees in the amount of $500.

Appellants filed a motion to dismiss the complaint alleging that the suit was one to require them to specifically perform an executory contract, and that the chancery court was without jurisdiction; that the relief sought is such that obedience to the decree could not be compelled by ordinary processes of the court; that there was a lack of mutuality of obligation, and that appellees have an adequate and complete remedy at law. Although the motion did not contain a prayer for damages, appellant, E. L. Peterson, testified that damages in the sum of $8,911.51 were sustained by appellants as a result of the issuance of the temporary injunction on October 7, 1946.

The motion to dismiss, which was in reality a demurrer and apparently treated as such by the chancellor was sustained on November 7, 1946, and a decree was entered dismissing the complaint of appellees and denying damages to appellants on account of the issuance of the temporary injunction. Appellants have appealed from that part of the decree denying damages against appellees for wrongful issuance of the temporary injunction. Appellees have cross-appealed from the order of the court sustaining the motion to dismiss the complaint.

We first consider the cross-appeal which involves the correctness of the trial court's action in sustaining the motion to dismiss the complaint. Appellants say the trial court correctly applied the doctrine laid down in *Leonard* v. *Board of Directors of Plum Bayou Levee District*, 79 Ark. 42, 94 S. W. 922, 9 Ann. Cas. 159, in dismissing the complaint. In that case the levee district brought suit against Leonard alleging that he had agreed to complete construction of a levee and had abandoned the work. The district prayed that Leonard be enjoined from removing his teams and that he be compelled to proceed with the work. This court held the suit one to require specific per-

formance of the executory contract to construct the levee and that equity was without jurisdiction, the district having an adequate remedy at law. The court said: "Equity will not decree specific performance of an executory contract to do work, for the obvious reason that there is no method by which its decree could be enforced.

"The jurisdiction of equity will not be exercised to decree a specific performance, however inadequate may be the remedy for damages, where the contract is of such a nature that obedience to the decree could not be compelled by the ordinary processes of the court."

The rule announced in the Leonard case, *supra,* was reaffirmed in later decisions. *Caldwell* v. *Donaghey,* 108 Ark. 60, 156 S. W. 839, 45 L. R. A., N. S. 721, Ann. Cas. 1915B, 133; *Nakdimen* v. *Atkinson Imp. Co.,* 149 Ark. 448, 233 S. W. 694. Under this rule appellants could not be required to continue operation of the canning plant at Mt. Ida by a decree of specific performance, but it does not necessarily follow that appellees would be thereby precluded from injunctive relief to restrain an attempted breach of the contract by the dismantling and removal of the plant. *Warmack* v. *Major Stave Co.,* 132 Ark. 173, 200 S. W. 799. A contract cannot be rescinded merely because it is of such a character that specific performance cannot be demanded. 17 C. J. S., Contracts, § 417. In 28 Am. Jur., Injunctions, p. 273, it is said: "It was formely thought that an injunction would not be granted to restrain the breach of any contract, unless the contract was of a character that the court could specifically enforce. But the fair result of the authorities may be said to be that where the case is one in which the negative remedy by injunction will do substantial justice between the parties by compelling the defendant to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason or policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce specific performance of it." The case of *Pitcock* v. *State,* 91 Ark. 527, 121 S. W. 742, 134 Am. St. Rep. 88, is cited in support of the statement of the textwriter. If

the complaint in the case at bar stated a good cause of action for injunctive relief, the chancellor erred in dismissing the suit even though the court was without jurisdiction to grant specific performance of the contract.

It is true that equity will not restrain a breach of contract where the remedy at law is adequate and complete. *McDaniel* v. *Orner,* 91 Ark. 171, 120 S. W. 829. It appears from the complaint in the instant case that the parties affected by a breach of the contract are numerous so that redress at law would require a multiplicity of suits. It further appears that it would be difficult to accurately measure pecuniary damages that appellees might suffer as a result of the breach of the contract by appellants. It is also alleged that it is impossible to secure equipment of the type sought to be removed. Under these circumstances, we are unwilling to say the remedy of law is adequate.

Appellees alleged in their complaint that appellant Peterson agreed to improve, expand and continue operation of the canning plant at Mt. Ida and that this agreement was the primary consideration for the transfer of the stock in the corporation to Peterson. The complaint further alleges that appellants breached this contract by proceeding to dismantle and remove the plant in October, 1946. It is also alleged that Peterson agreed to operate the plant at Mt. Ida as a permanent industry, but the written assignment set out in the complaint does not provide for a definite period of operation. However, the agreement is not fatally indefinite for that reason since it will be implied that performance is to be for, or within, a reasonable time. As this court said in *Merrill* v. *Sypert,* 65 Ark. 51, 44 S. W. 462, what would be a reasonable time "will depend upon the facts and circumstances surrounding the parties and influencing their conduct in entering upon the contract."

The agreement relied upon by appellees in the instant case is somewhat analagous to a contract between a railway company and a landowner whereby the latter conveys land in consideration of an agreement by the railway company to erect and maintain a depot, or other

appurtenance, at a particular place. In an annotation in 7 A. L. R., p. 817 the rule adopted by the majority of jurisdictions in such cases is stated as follows: ". . . in the absence of a specified term of years or of express and suitable words showing an intention that performance shall be perpetual, a covenant or condition subsequent for the maintenance of a railroad or its appurtenances is sufficiently complied with by a performance covering a term of years, varying in the cases which have so held from five to sixty years." The case of *Railway Company* v. *Birnie,* 59 Ark. 66, 26 S. W. 528, is cited in support of this rule. There the defendant railway company agreed to erect and maintain a depot upon certain lots in consideration of the deeding of the lots to the company by the plaintiffs. This court held it to be a question for the jury whether the maintenance of the depot for 11 years was a sufficient compliance with the agreement. In determining whether the depot was maintained for a reasonable time this court said it was for the jury "to say whether the time was reasonable in the sense that it gave the plaintiffs 'full opportunity' to substantially realize the benefits they at the time of the donation 'reasonably expected to accrue to them from the location of the depot'."

By reference to the rule prevailing in the railway cases we do not mean to suggest that the term of performance held sufficient to constitute a reasonable time therein would be likewise applicable here. It may develop that appellants have already maintained the plant at Mt. Ida for a reasonable period of time under the proof that may be adduced on this issue. They should not be enjoined from removing the plant if its maintenance in Montgomery county is shown to be an impossible or impractical undertaking for them under proper management.

We conclude that the complaint of appellees stated a cause of action for injunctive relief and that the trial court erred in sustaining the motion to dismiss. It necessarily follows that the temporary injunction should not have been dissolved until appellees were afforded an opportunity for a hearing to determine whether the writ

had been wrongfully issued. That part of the decree which, on direct appeal, denies damages against appellees for wrongful issuance of the temporary injunction is, therefore, affirmed. On the cross-appeal, the decree will be reversed and the cause remanded with directions to overrule the motion to dismiss the complaint, and for further proceedings not inconsistent with this opinion.

O'KANE *v.* MCLEAN BOTTOM LEVEE & DRAINAGE DISTRICT NO. 3.

4-8303 203 S. W. 2d 392

REED *v.* MCLEAN BOTTOM LEVEE & DRAINAGE DISTRICT NO. 3.

4-8316 203 S. W. 2d 392

Opinion delivered June 30, 1947.

[redacted]

Ray Blair and *E. B. White* for appellant O'Kane.

Bruce Shaw, Chas. I. Evans and *J. M. Smallwood,* for appellant Reed.

D. P. McKenzie, Reece Caudle and *Robt. J. White,* for appellee in both cases.

HOLT, J. These three causes, numbered 8303, 8304 and 8316, have been consolidated here, and this appeal in No. 8303 and No. 8316 comes from a judgment of the Logan Circuit Court, Northern District, finding and declaring that the McLean Bottom Levee & Drainage District No. 3, Logan County, Arkansas, created by order of the Logan County Court May 7, 1947, was in all things a valid district. (Section 4455, *et seq.,* Pope's Digest, including all amendments thereto, and specifically Act 279 of the Acts of 1909 and Act 177 of the Acts of 1945.)

The record reflects that on February 3, 1947, a petition, signed by eight property owners, for the creation of the above district was duly filed in the Logan County Court, alleging the purposes to be the construction of a canal, ditches and levees therein. An attempt was made to describe the property included therein, engineers were appointed, their bond filed, their report made, and on March 6, 1947, after due notice of the filing of the petition and the proposed boundaries of the district, upon a hearing the County Court entered an order creating said District No. 3.

Thereafter, on April 2, 1947, during the same term of County Court at which the March 6th order, *supra,*

was made, a second order was entered by the County Court for the primary purpose, it appears, to correct erroneous descriptions of the lands sought to be embraced in the district by the March 6th order, and 20 days were allowed for an appeal to the Circuit Court from this April 2nd order.

Appellants, Reed, Shaw and Mitchell, appealed from this order to the Circuit Court on April 19, 1947.

Prior to this appeal to the Circuit Court from the April 2nd order appellees filed in the County Court of Logan county their second petition praying for the creation of the above district embracing approximately 15,000 acres of land, incorrectly described, in the two orders of March 6th and April 2nd, *supra,* but under descriptions alleged to be correct descriptions of all lands embraced within the proposed district.

The County Court, on May 7, 1947, upon a hearing on this last petition, made and entered its third order creating the district, *supra,* McLean Bottom Levee and Drainage District No. 3.

From this latter order of the County Court, appellants appealed to the Circuit Court of the Northern District of Logan County, and upon a hearing the Circuit Court, as indicated, found said district valid and properly formed, and the appeal here is from this order.

No. 8303

We consider first, Case No. 8303 of W. S. O'Kane, who was the appellant and a land owner in the district. His contentions are: (1) That the lands embraced within the proposed district are not properly and definitely described. (2) That the persons selected as engineers to make proper survey of the lands involved in the district were incompetent and incapable of performing the duties assigned. (3) That the County Court order establishing the district in question was arbitrarily made without any proof as "to the need, value, or benefits of said improvement." (4) "Did the County Court have the right to make an order creating the second McLean Bot-

tom Levee & Drainage District No. 3 on the 7th day of May, 1947, said district to embrace the identical lands, to serve the same purpose, and to proceed under the same identical plan, as the first McLean Bottom Levee & Drainage District No. 3, established under its order of April 2, 1947, and in the same order creating said second district under date of May 7, 1947, did the County Court have jurisdiction and the right to cancel and void its order of April 2, 1947, establishing the first district, with an appeal then pending in the Circuit Court of Logan county, Arkansas, Northern District, from its order of April 2, 1947, creating said first McLean Bottom Levee & Drainage District No. 3?"

We proceed to consider first appellant's fourth, and what appears to be the primary contention of all appellants.

It is undisputed that when the County Court entered its third order on May 7, 1947, an appeal from the second order, April 2, 1947, had previously been properly filed in the Circuit Court, on April 19th, and was pending at the time the third order was made by the County Court on May 7th, and principally on the authority of *Taylor* v. *Bay St. Francis Drainage District,* 171 Ark. 285, 284 S. W. 770, appellants earnestly insist that the County Court was without authority to enter the order of May 7th creating the district and that all proceedings thereunder were void. We think, however, that the present case is not controlled by the above case and is distinguishable.

In the present case, the court's order of May 7th was made on a new petition filed April 15, 1947, prior to the appeal on April 19th from the April 2nd order and on its May 7th order, the County Court ordered: "That all petitions, orders, bonds, reports and other matters incident to the formation of McLean Bottom Levee & Drainage District No. 3, Logan County, Arkansas; filed since January 1, 1947, be withdrawn and cancelled of record as of the 12th day of April, 1947," and as we shall presently point out, the first two orders

of the County Court, the one of March 6th and the other of April 2nd, were made on the first petition filed prior to February 3, 1947, and which petition failed to describe and locate any lands sought to be embraced in the district. The descriptions describe nothing. The Court, therefore, had no jurisdiction over the *res*.

In the present case, the orders stem from two different petitions. The first two orders, as indicated, on the first petition which failed to describe the land, and the order of May 7th from the second and a new petition filed April 15th, 1947, *supra,* which petition, as we shall point out, correctly described the lands embraced in the district and therefore the County Court acquired jurisdiction, having cleared the field for entirely new proceedings in the formation of the district. In the Taylor case, it appears that both proceedings there sprang from the same original petition and the first order there made was void because the *order* misdescribed the land. Apparently the *petition* upon which the order was based did correctly describe the land and the second order was based on the same petition. Since the petition correctly described the land, jurisdiction of the case was conferred on the County Court. In the present case, the appeal being taken in another and different proceeding on a new petition did not oust jurisdiction of the County Court in the second proceeding, which resulted in the May 7th order. Since the first petition, as indicated, on which the first two orders, *supra,* were based, described nothing, we have no way of knowing that the two proceedings were for the same purpose or that the first proceeding preempted jurisdiction. See, also, *Smith* v. *Lawrence,* 175 Ark. 712, 300 S. W. 386.

The order of March 6th as above noted describes nothing. On its face it wholly fails to describe the property to be included in the district or to set forth the boundaries of the district. The purported description of the boundaries of the district attempted to be created in that order reads: "Beginning at a point which is four hundred fifty (450) feet north of quarter section line between the northeast quarter (NE¼) and the southeast

quarter (SE¼) of section sixteen (16), township eight (8) north, range twenty-six (26) west . . ."

Obviously, there is no such point because such beginning could be anywhere on a line running east and west for one-half mile, and further: "Running thence west four hundred (400) feet between sections sixteen (16) and fifteen (15) for place of beginning; . . ."

It is again obvious that the line between sections 15 and 16 lies north and south and that section 15 lies east of section 16, and further: "Thence south five thousand seven hundred seventy-five (5775) feet along the east boundary line of the new levee . . ."

There is as yet no new levee.

The description continues: "Thence north two thousand three hundred (2300) feet long the west boundary line of the drainage structure . . . Thence in a westerly direction along the south boundary line of the levee."

The drainage structure and levee referred to are still to be located and constructed.

The March 6th order was therefore void and of no effect.

Likewise, the order made April 2, 1947, on the same petition on which the March 6th order was made was void and of no effect since it failed to describe properly the property to be included in the district.

This description, having set forth the beginning point, 450 feet north of the southeast corner of the northeast quarter of section 16, township 8 north, range 26 west, continues west and south to the high water mark of Six Mile Creek, and continues with the high water mark for a distance and then uses this language: "Thence north along the landside toe of the proposed levee 2,300 feet; thence in a westerly direction along the landside of the proposed levee for a distance of 40,000 feet to point of beginning."

We think it obvious that this description is defective since the "proposed levee" was not in existence and it

fails to locate definitely the lands within the district where the improvements were contemplated. We hold, therefore, that appellants' fourth contention cannot be sustained.

We think appellants' first contention, *supra,* untenable for the reason that the description of the lands within the proposed district appearing in the petition for the formation of the district, the engineers' report with the vicinity map of the district attached, and the order of May 7th appear to be complete descriptions by metes and bounds, beginning at a point certain and terminating at the same point. All descriptions appear to be the same, and were sufficient.

"Where a deed described the lands conveyed by metes and bounds, and other description that can be made certain by evidence *aliunde,* it is sufficient." *Cooper* v. *White,* 30 Ark. 513, (headnote); *Dorr* v. *School District No. 26,* 40 Ark. 237.

Appellants' second contention was that the engineers, Walters and Dunn, were incompetent. This was a question to be determined by the trial court, was one of discretion, and since we find no evidence that he abused this discretion or that these men were not fully competent, the contention is without merit.

As to appellants' third assignment that the order establishing the district was hastily and arbitrarily made, we find nothing to support this contention. This was also a matter within the trial court's discretion, and in the circumstances here, we think the matter had been thoroughly developed in the proceedings both in the County Court and the Circuit Court, and that the action of the court was warranted.

"On appeal from a judgment establishing a drainage district it was within the trial court's discretion, after the matter had been thoroughly developed, to refuse to hear further testimony." *Jacks Bayou Drainage District* v. *St. Louis Iron Mountain & Southern Railway Company,* 116 Ark. 30, 171 S. W. 867, (Headnote 3).

Appellants, Reed, Shaw and Mitchell, in addition to the contentions of appellant, O'Kane, *supra,* say: (1) "No statutory authority to construct channel outside the boundaries of the district to divert waters falling outside of the district before the same has reached the district." (2) "Notice published and used as a basis for order May 7, 1947, contains description which is unintelligible and does not furnish notice contemplated by statute to be furnished to property-owners in proposed District." (3) "John M. Willems, A. O. Featherston, and Orlando Hixson have not qualified to act as Commissioners."

(1)

In the present case the "plan" reported by the engineers for the district was: "A drainage canal which will divert the flow of Six Mile Creek along the western boundaries of the district should be constructed for a distance of about 7,500 feet, of an average width of 80 feet at the top, 14 feet at the bottom, and an average depth of 22 feet, with slope of one foot on one and a half feet, and a levee should be constructed almost parallel with the drainage canal a distance of approximately 5,700 feet, and a levee should be constructed for a distance of 47,980 feet along the northern boundary line of the proposed district approximately parallel with the meanderings of the Arkansas River to a point at the lower end of the proposed district where Six Mile Creek now empties into the Arkansas River."

Act 83 of 1939 granted to levee and drainage districts the power to "acquire flowage and storage rights, and other servitudes, upon, over and across any lands in the construction, operation and maintenance of any floodway, reservoir, emergency reservoir, spillway or diversion," and further provides the procedure by which such districts could acquire "flowage and storage rights, and other rights of servitudes over, upon and across any lands embraced in any floodway, reservoir, emergency reservoir, spillway or diversion."

As a part of the plan for the control of the Mississippi River, the Arkansas River and other tributaries, Congress, in 1936, enacted the original Overton Flood Control Bill, 33 U. S. C. A., paragraph 701a, and with amendments thereto, declared the policy of the federal government to lend levee and drainage districts financial aid such as proposed here.

In construing such federal and state legislation, this Court had a similar question to that presented here before it in the case of *Drainage District No. 18, Craighead County* v. *Cornish,* 198 Ark. 857, 131 S. W. 2d 938, and there we held: (Headnote 1) "Under § 32 of Act 279 of 1909 as amended by § 5, Acts of 1913, p. 738 (Pope's Dig., § 4489), a drainage district may construct a levee where necessary to prevent the overflowing and filling up of its ditches; and although a portion of the proposed levee lies outside the drainage district, it is not ultra *vires* the district to construct the levee nor to acquire the right-of-way therefor," and (Headnote 4) "A drainage district may, under Pope's Dig., § 4480, condemn lands for a right-of-way for a levee lying in part without the district when such levee is necessary to protect the drainage system."

We conclude, therefore, that this contention is untenable.

(2)

Appellants' second contention, *supra,* that the public notice used as a basis for the order of May 7, 1947, contains insufficient descriptions of the land involved, is, we think, untenable. The notice itself contains, among other things, this language: "In the matter of the formation of McLean Bottom Levee & Drainage District No. 3, Logan County, Arkansas. Notice of hearing to establish McLean Bottom Levee & Drainage District No. 3, Logan County, Arkansas."

It further provides that: "Beginning at a point 500 feet west and 3,300 feet north of the southwest corner of section 15, township 8 north, range 26 west." From

that point the boundaries of the district are set out in detail, as to direction, distance, degrees and minutes, specifically encircling the area comprising the district, and "to the point of beginning."

The description in this published notice is not at variance with the report of the enigneers, the survey which they made, the order of the County Court and that of the Circuit Court on appeal establishing the district and its boundaries. Also in the engineers' report appears this statement: "A plat showing the area to be protected, and the location of the canal project and levee structure is attached."

In *Voss* v. *Reyburn,* 104 Ark. 298, 148 S. W. 510, we said: "The object of designating the boundaries of the district was to enable the property owners included therein and affected thereby to easily ascertain what property was included in the district," and in *Mahan* v. *Wilson,* 169 Ark. 117, 273 S. W. 383, it was said: "Indulging the presumption that the lawmakers intended to require a description of the property in the notice, it necessarily follows that description should be in accordance with the report of the engineers in the case of an original district, or with the report of the commissioners in the case of the creation of a subdistrict, for the report is the thing which forms the basis of the court's action in determining whether or not the district or subdistrict should be created. Crawford & Moses' Digest, § 3650.

"Counsel fail to satisfactorily make it appear to us from the record that there is a variance between the description in the notice and that contained in the report of the commissioners. They refer to a map in the record, but the map to which they refer has not been made a part of the report, but was merely introduced in evidence, and we do not discover any discrepancy between the description in the notice and that in the map filed with the report. These maps were before the trial court who examined them and heard the evidence with reference thereto, and we do not feel at liberty to disturb the finding of the trial court that there is no discrepancy in the

notice and the report. We must indulge the presumption that the court found that there was no such discrepancy."

We think, therefore, that the notice was sufficient to warrant the action of the court in creating the district.

(3)

Finally, appellants argue that the three commissioners, John M. Willems, A. O. Featherston and Orlando Hixson, have not qualified as required by § 4458 of Pope's Digest and § 20, Art. 19 of the Constitution of Arkansas. We cannot agree with this contention. The three original and identical oaths in question are before us. They were each signed by the respective commissioners and each oath was administered by the County Clerk, T. C. Wingfield, on the 7th day of May, 1947. The oath of A. O. Featherston is as follows:

"In the County Court of Logan County, Arkansas, Northern District, in the matter of the formation of McLean Bottom Levee & Drainage District No. 3, Logan County, Arkansas.

Oath of Office.

"I, A. O. Featherston, do solemnly swear that I will support the Constitution of the United States and the Constitution of the State of Arkansas, and that I will faithfully perform and discharge the duties of the office of member of the Board of Commissioners of McLean Bottom Levee & Drainage District No. 3 of the Northern District of Logan County, Arkansas, on which I am about to enter; that I will not directly or indirectly be interested in any contract made by said Board; and that I will well and truly assess all benefits resulting from said improvement and all damages caused thereby. (Signed) A. O. Featherston.

"Subscribed and sworn to before me, County Clerk, in and for the County of Logan, State of Arkansas, this 7th day of May, 1947. (Signed) T. C. Wingfield. (Seal).

"Filed in my office this 7th day of May, 1947. (Signed) T. C. Wingfield, County Clerk within and for the Northern District of Logan County, Arkansas."

As noted, the other two oaths which were signed by the remaining commissioners respectively are the same. We think there has been a substantial, if not a literal, compliance with the statute and Constitution by these commissoners.

We conclude that No. 8303 and No. 8316 must be, and are, affirmed.

No. 8304

Disposition of Case No. 8304 is made by a *per curiam* opinion of this date. See *infra,* p. 950.

An immediate mandate is ordered.

McLEAN BOTTOM LEVEE & DRAINAGE DISTRICT No. 3
v. CHAMBERS, CHANCELLOR.

4-8304 203 S. W. 2d 397

Per curiam opinion delivered June 30, 1947.

[redacted]

D. P. McKenzie, Reece Caudle and *Robt. J. White,* for petitioner.

J. M. Smallwood, Chas. I. Evans and *Hardin, Barton & Shaw,* for respondent.

PER CURIAM. This is a companion to causes Nos. 8303 and 8316, consolidated.

The Chancellor issued an order to the effect that if certain named defendants should deposit in the registry of Logan Circuit Court at Paris the sum of $42,500 on or before May 31, 1947, conditioned to pay damages recovered by plaintiffs for whose protection the deposit was made, in condemnation proceedings, then the order restraining entry upon the lands involved would be dissolved. Thereafter petition was filed in this Court praying that the chancery court be prohibited from interfering with orders of Logan Circuit Court as they affected the district. On June 27, 1947, the deposit of $42,500 was made. See opinion in causes Nos. 8303 and 8316, *O'Kane* v. *McLean Bottom Levee & Drainage District No. 3, ante,* p. 938, this day delivered.

The petition for prohibition is dismissed. The injunction is dissolved, and the proceedings upon which it rests are dismissed.

The Court's mandate will issue at once.

FARM BUREAU LUMBER CORPORATION *v.* MCMILLAN.

4-8233 203 S. W. 2d 398

Opinion delivered June 30, 1947.

Sidney J. Reid and *Rowell, Rowell & Dickey,* for appellant.

Curtis Duvall, for appellee.

ED. F. MCFADDIN, Justice. An instruction, concerning the measure of damages for the destruction of a hay crop, is claimed to be erroneous.

The landowner, McMillan (appellee), brought action against the Farm Bureau Lumber Corporation (appellant) for damages for the alleged destruction of a "20-acre meadow . . . which could have been harvested at a profit of $20 per ton." Damages for $400 were claimed. The jury verdict was for $300. McMillan claimed that his meadow had been planted to lespedeza in 1945, and that the lespedeza reseeded itself in 1946, and would have produced a crop of hay, except that, in late April or early May of 1946, cattle (trespassing because of appellant's alleged negligence) consumed and otherwise destroyed the growing hay crop. He testified

that the fair cash market value of the crop at the time the hay was destroyed was $400. Other witnesses testified how much the hay crop would have been, except for the destruction thereof by the cattle. The trial court gave plaintiff's instruction No. 4, which reads, in part: "If you find from a preponderance of the evidence that the hay meadow was destroyed as alleged in plaintiff's complaint the measure of damages would be the actual cash value of such hay meadow at the time of its destruction . . . "

Defendant (appellant) offered a general objection to the above instruction; and the giving of this instruction No. 4 is the only point argued on appeal. The appellant has this statement in its brief: " . . . all errors allegedly committed by the court below in the trial of this cause are now waived by the appellant except the instructions given by the court below as to the measure of damages to appellee's hoped-for hay crop, . . . " This quoted statement—as well as the failure to argue any other points in the brief—constitutes an express waiver of all other assignments. See *Plunkett-Jarrell Grocer Co.* v. *Freeman,* 192 Ark. 380, 92 S. W. 2d 849, and cases there cited. We proceed therefore to consider this one point.

To support the correctness of the instruction No. 4, as given by the trial court, appellee cites and relies on these cases: *Mo. Pac. R. Co.* v. *Nichols,* 170 Ark. 1194, 279 S. W. 354; *Railway Co.* v. *Lyman,* 57 Ark. 512, 22 S. W. 170; *St. L. I. M. & S. Ry. Co.* v. *Hoshall,* 82 Ark. 387, 102 S. W. 207; *Railway* v. *Yarborough,* 56 Ark. 612, 20 S. W. 515; *L. R. & F. S. Ry. Co.* v. *Wallis,* 82 Ark. 447, 102 S. W. 390; *Brown* v. *Arkebauer,* 182 Ark. 354, 31 S. W. 2d 530; *Mo. Pac. R. Co.* v. *Benham,* 192 Ark. 35, 89 S. W. 2d 928. To support its contention that instruction No. 4 was erroneous, appellant cites and relies on these cases: *St. L. I. M. & S. Ry. Co.* v. *Saunders,* 85 Ark. 111, 107 S. W. 194; *Dilday* v. *David,* 178 Ark. 898, 12 S. W. 2d 899; *Lamkins* v. *International Harvester Co.,* 207 Ark. 637, 182 S. W. 2d 203.

Under the facts in this case we hold that the instruction given by the trial court was not erroneous, since: (1) there was no proof of injury to the land, but only proof as to the injury to the hay crop, and (2) witnesses testified as to the fair cash market value of the hay at the time of its destruction, and (3) it was shown that the hay crop was then actually growing and had a value. What Mr. Justice BUTLER said in *Mo. Pac. R. Co.* v. *Benham, supra,* is apropos:

"From our own cases and the great weight of authority, the correct rule for the measurement of damages in ordinary cases for the destruction of grass or other perennial plants used on lands for meadow or pasture seems to be this: The damage recoverable is the value of the grass or crop at the time of its destruction where no permanent injury is suffered to the soil by the destruction of the roots of the grass or plants. *Atlanta & B. Airline, etc.,* v. *Brown,* an Alabama case, reported in 158 Ala. 607, 48 So. 73; *Risse* v. *Collins,* 12 Idaho 689, 87 Pac. 1006; *Evans* v. *Highland, etc., Co.,* 27 Utah 475, 76 Pac. 1135; *Byrne* v. *Minneapolis, etc., Co.,* 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668; *International & G. N. R. Co.* v. *Saul,* 2 Willson, Civ. Cas. Ct. App. 612; *Thompson* v. *Chicago, B. & Q. R. Co.,* 84 Neb. 482, 121 N. W. 447, 23 L. R. A. (N. S.) 310."

In addition to the cases and texts cited in the above quotation, attention is also called to the following: *L. R. & F. S. R. Co.* v. *Wallis, supra; Railway Co.* v. *Yarborough, supra; Crumbley* v. *Guthrie,* 207 Ark. 875, 183 S. W. 2d 47; Annotations on "Measure of Damages for Destruction of Perennial Crop" in 23 L. R. A., N. S. 310 and 37 L. R. A., N. S. 976; and see, also, 15 Am. Juris. 258 and 260.

The case of *St. L. I. M. & S. Ry. Co.* v. *Saunders, supra,* most strongly relied on by appellant, inferentially points out the distinction between the "annual rental value of the land" and the "fair cash market value of the crop" (as announced in *Railway* v. *Yarborough, supra,* and given by the trial court in the case at bar):

if the total destruction of the crop was at a time when the crop was too young to have a market value and when it was too late to plant another crop, then the "rental value of the land" is the rule that governs; but if the destruction of the crop was at a time when the market value could be determined, then the "market value of the crop" is the rule to govern. This distinction is directly made in *Brown* v. *Arkebauer, supra.* In the case at bar there was proof that the hay was growing and had a market value, so the giving of instruction No. 4 was not erroneous.

On the assignment argued, we affirm the judgment of the circuit court.

[redacted]

TRICKETT *v.* LEWIS.

4-8240 203 S. W. 2d 400

Opinion delivered June 30, 1947.

[redacted]

Longstreth & Longstreth, for appellant.

Will G. Akers, for appellee.

GRIFFIN SMITH, Chief Justice. Lots Two and Three of Block Five, C. H. Taylor's Addition to the City of Little Rock, front east on Brown St., Lot Two being north. When appellant purchased Lot Two in 1920 that part west of a residence was separated from Lot Three by a fence extending to a storage room on the southwest corner. The fence and storage room were blown down by a storm in 1937. Thereafter a garage was erected on

the site formerly occupied by the store room, but the fence was not rebuilt.

In 1944 appellees purchased Lot Three without knowing that five feet of the lot had been cut off by the fence destroyed in 1937; nor were they aware that a part of the reconstruction then used as a garage extended more than three feet south beyond the original line separating Lots Two and Three. Trees had grown up on the five-foot strip upon which former owners of Lot Two had encroached, two of which were cut by appellant in January 1946. When appellees—who had purchased Lot Three just two years before—observed their neighbor's actions in cutting the trees, they had their property surveyed, and for the first time ascertained that the controverted strip was originally part of Lot Three. Appellant placed a line of small stakes along the course of the old fence, determining the position by postholes that had not entirely filled with dirt and debris. The stakes were removed by one of the appellees; whereupon appellant sued to restrain appellees from interfering with her possession of the area in question. It was stipulated that appellees had the record title. The only question is whether appellant's conduct in respect of the appropriated property was such as to give title by adverse possession.

Appellant testified that during her entire ownership of Lot Two she paid taxes on the fenced portion of Lot Three thinking it belonged to her. We think, however, that a rational construction of what she intended to say is that Lot Two was assessed as such, and payment was under a description that did not include the five-foot strip; nor did she think, in making the original purchase, that a greater area was covered by the deed than that pertaining to Lot Two as platted when laid out. Appellant's sitaution is somewhat similar to that of Winston, who claimed land belonging to Martin in Lot Seven, Block Five, C. F. Stifft's Addition. In the opinion it was said that "One who purchased a city lot and later built on it, but who, through mistake as to the southern boundary, used for driveway purposes a small strip of

the continguous lot, (then vacant) did not thereby 'raise the flag' his grantee could later take advantage of, the grantor having testified it was not his intention to sell anything not appropriately a part of his possession". *Martin* v. *Winston,* 209 Ark. 464, 190 S. W. 2d 962.

While it is true that appellant in the case at bar testified she intended to purchase the land under fence, she also testified it was not her purpose to buy anything but the lot. It is not contended that she did not receive the full front footage pertaining to Lot Two. Appellant did not, at any time before 1944, mention to anyone the claim she now advances. Her sole reliance is upon the fact that the area was under fence ten years ago, that the garage or a building preceding it extended onto Lot Three when she bought the property, and that prior to 1937 she built a sidewalk along the full length of Lot Two and over the five-foot strip.

Appellant testified very positively that the buildings heretofore referred to " . . . marked the southwest corner of the ground purchased in 1920 . . . and the fence was a part of that building". At another time she said that the building was twelve or fourteen inches "inside of where the original fence line was". It follows that if the buildings were fourteen inches north of the line claimed as the old fence row, and the new construction occupied the same area, it is now three feet and ten inches south of the true line, and not five feet as the contention seeks to establish.

Inasmuch as appellant has all of the land she actually purchased, and has not at any time, by word, (or by action other than occupancy by tenants) asserted an intention to appropriate the land, and since the property was not fenced when appellees bought Lot Three in 1944, we think the controversy is resolved into a situation where the relationship of adjacent homeowners shifted from one of mutuality to hostility, and that in the course of litigation circumstances and physical facts have been construed beyond warrant. It would be manifestly inequitable to require appellees to surrender five feet of the lot they purchased when it is quite clear from the

pleadings that they contemplated ownership of the full lot; nor does the testimony imperatively require that the law applicable to adverse possession be applied in order to defeat a just determination of the issues. Value of the so-called garage appears to be comparatively small and its removal will not involve appreciable cost.

Affirmed.

ROGERS *v.* PARKER, COUNTY JUDGE.

4-8305 203 S. W. 2d 401

Opinion delivered June 30, 1947.

McKay, McKay & Anderson, for appellant.

Searcy & Searcy and *Pat Robinson,* for appellee.

ROBINS, J. Appellant, a taxpayer of Lafayette county, Arkansas, seeks to reverse a decree of the lower court, by which appellant's suit, to enjoin the issuance and sale of bonds for the purpose of building a county hospital, was dismissed for want of equity.

In his complaint appellant alleged that appellee, as county judge, was about to sell bonds in the sum of $150,000 to be issued by the county, and that the proposed bond issue was illegal for the following reasons:

1. The county court had failed to prescribe the correct form for the ballot that was used in the election held to authorize the bond issue, in that the amount of tax to be levied was not shown thereon.

2. The sheriff's proclamation for said election was defective because it did not show that a bond issue was to be voted on or the millage necessary to be levied to pay principal and interest of said bonds.

3. The ballots used in said election did not show that a bond issue was being voted on nor did they show the amount of building tax to be levied.

4. The order approving the plans and calling the election was not sufficient because the location of the hospital was not stated therein.

5. A building tax "similar" to the one to be levied for the construction of the hospital had already been levied for the construction of a courthouse, authorized at an election held in 1940.

6. The county judge was without authority to advertise and sell the bonds for the hospital construction until after the levying court had levied a special building tax for said purpose, and that such levy had not been made.

Appellee, in his answer, did not dispute the allegations in the complaint, but denied that the legal consequences of the facts alleged were as averred by appellant; and appellee also alleged in the answer: "That it does not require the full five-mill tax to pay off the balance of the courthouse bonds, . . . and that the proposed issue for the county hospital, . . . will never require more than a mill and half to a two-mill tax, so that the county has not exhausted its power under Amendment No. 17 to the Constitution as amended by Amendment No. 25, to issue hospital bonds, by the issuance of the outstanding courthouse bonds."

Appellant demurred to the answer and the case was tried on the pleadings by the lower court, which made findings sustaining each of the contentions of appellee.

The objection of appellant to the form of the ballot used is not well founded. Amendment No. 17, as amended by Amendment No. 25, does not require that the ballot set forth the rate of tax to be levied. Dealing with this identical question in the case of *Turnbow* v. *Talkington,* 191 Ark. 492, 86 S. W. 2d 940, we said: "It was not contemplated that the electors should vote for the levy of any particular rate of taxation." The provisions of Act No. 294 of 1929, requiring that the amount of the proposed bond issue (for refunding) and the amount of the tax to be levied therefor be shown on the ballot, do not apply to an election called to determine whether the proposed courthouse, jail or hospital shall be built. It does not vitiate the election for the rate of tax that it is proposed to levy to be stated on the ballot; and we have said that when this is done, a levy exceeding the amount stated on the ballot may not be made. *Cisco* v. *Caudle, County Judge,* 210 Ark. 1006, 198 S. W. 2d 992.

Nor is it necessary that the election proclamation or the ballot contain information apprising the voter that a bond issue to pay the cost of construction is contemplated. Under Amendment No. 17, after the plans for the building and estimate of the cost are approved by order of the county court, the questions as to whether the building shall be constructed and as to whether the tax shall be levied must be submitted to the voters. If the voters favor both the construction and the tax this authorizes the levy of the tax and the issuance of the bonds.

We conclude that the election proclamation and the ballot form were in substantial compliance with the provisions of the constitutional amendment.

There is nothing in Constitutional Amendment No. 17 that required the county court, prior to the holding of the election to ascertain the will of the voters as to the proposed construction and tax therefor, to designate the site of the proposed hospital. Therefore, the failure of the county court to make such designation did not invalidate the election and other proceedings involved herein.

We are unable to determine from the record before us the rate of the tax levied by the levying court of Lafayette county in 1940, under the authority of Amendment No. 17, for the purpose of building a courthouse. The complaint alleges that in pursuance of an election there was levied in 1940, to pay for construction of a courthouse, a tax "similar" to the one proposed for the construction of the hospital, but nowhere in any of the pleadings is there any statement of the amount of millage so levied. We said in the case of *Cisco* v. *Caudle, County Judge, supra*: "Unquestionably a tax, not exceeding five mills, may be authorized by the electors for the building of a courthouse, 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."

So, if a five-mill tax was levied in 1940 for the courthouse construction, the power of the county to levy any

further tax under the authority of Amendment No. 17 was thereby exhausted and no other such tax may be levied until all bonds issued to pay for construction of the courthouse have been retired. The fact that it may not be necessary, in order to pay such bonds, to collect the full amount of the levy as made by the levying court would not authorize any increase in the amount permitted to be levied for another building, because we may look only to the order of the levying court fixing the rate to be collected to ascertain the amount of the then authorized tax. Of course, if a tax of less than five mills was levied by the levying court for the construction of the courthouse, an amount of millage equal to the difference between the rate so levied and five mills would still be available for the construction of a hospital.

It is provided by § 5 of Amendment No. 17 that, if a majority vote in the election for the building and for the tax, "then the levying court at any regular, special or adjourned term thereafter held, may levy, . . . a special building tax . . . to pay for such improvements, . . ."

By § 6 of said amendment it is provided: "When such tax has been so voted and the amount thereof levied as shown above provided, *then* [emphasis ours] the county court or judge thereof may issue and sell interest-bearing negotiable bonds or notes . . ."

It will be seen that the amendment plainly requires that the *levy* of the tax should precede the issuance and sale of the bonds. It follows that the lower court erred in holding that the appellee was authorized to advertise and sell the bonds in advance of the order of the levying court making the levy of tax as authorized in § 5 of Amendment No. 17.

The decree of the lower court is reversed and the cause remanded with directions to sustain appellant's demurrer to appellee's answer and for further proceedings not inconsistent with this opinion.

McFarland *v.* Miller.

4-8243 203 S. W. 2d 404

Opinion delivered June 30, 1947.

[redacted]

A. R. Cheatham, for appellant.

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

Smith, J. On Aug. 7, 1913, J. L. McFarland conveyed to Martha, his wife, an 80-acre tract of land and three tracts of 40 acres each, one of the latter being the SW¼ of the SW¼ of section 11, township 16 south, range 19 west. Mrs. McFarland died intestate May 30, 1916, leaving her husband, two adult children, and six minor children. McFarland and the minor children continued to live on the said land, the exact part thereof not being shown, until some time in 1923, when he and all the children except a son named Edward, moved to Stephens, Arkansas, a town some three miles away. Edward continued to live on the land until 1927.

On February 23, 1921, Mr. McFarland, as guardian of the minor children, obtained an order from the Probate Court authorizing him to mortgage the 80-acre tract

of land, for the sum of $1,000, for the education and maintenance of his wards.

The indebtedness thus secured having matured, and not having been paid McFarland, as guardian, obtained on January 11, 1924, a Probate Order authorizing him to mortgage the 80-acre tract and the SW¼ of the SW¼ of section 11 in addition for the purpose of paying the 1921 mortgage above referred to, in the sum of $1,000, and an additional sum of $500 for the education and maintenance of his said wards. Five of the McFarland heirs who were then of age joined in the execution of the mortgage and signed the $1,500 note which it secured. The loan was made by R. B. Allen and the note which the mortgage secured was payable to Allen's order.

The mortgage empowered Allen to sell the land there described upon default of payment, at public sale, for cash, upon 20 days notice of the sale and to convey title to the land to the purchaser at such sale, by a deed the recitals of which should be taken as *prima facie* true.

The note last mentioned was not paid at its maturity and the SW¼ of the SW¼ of section 11 was sold pursuant to the power of sale contained in the mortgage, on April 8, 1927, to J. M. Miller. It does not appear from the record before us whether the 80-acre tract was also sold, or if so to whom. Miller bid $500 for the 40-acre tract, which he paid in cash to Allen, and received from Allen a deed dated April 8, 1927, this being the date of the sale.

The deed from Allen, as mortgagee, to Miller recited the authority under which the sale had been made and that the sale had been made in compliance with and in conformity to the provisions and requirements of the mortgage for more than three-fourths of its appraised value.

According to the undisputed testimony, Miller took possession of the land the day after the sale and has since been in the sole and exclusive possession thereof, at all times claiming to be the owner. There was an old

fence which he repaired. He caused this land to be assessed in his name, and paid all taxes in his own name up to and including the year 1946. He used a portion of the land for a pasture and began clearing the balance the year he purchased, and he cleared and put into cultivation 20 acres of this land. There was an old house unfit for occupancy, which he tore down and used for his own purposes, such of the lumber as had value. The house was a one-room building with a shed room, the roof of which had fallen in. Miller took possession of the land as owner, and no one questioned his right to do so, and he remained in the exclusive possession for 19 consecutive years without having his ownership questioned by anyone.

On August 20, 1946, Miller filed this suit against the McFarland heirs to quite his title to the land, in which he alleged in substance the facts herein recited. A number of the heirs had lived within a few miles of this property since Miller took possession of the land, but others had become non-residents of the state. An attorney was appointed for the non-resident defendants, and a warning order was published. The attorney appointed for the non-resident defendants wrote the non-residents advising them of this suit, and from E. F. McFarland, one of the heirs, he received a letter containing the following statement: "As the eldest of the heirs of Martha and J. L. McFarland I feel safe in saying that we have no claims on the land, whatever, and consider Mr. J. M. Miller a valued friend of the family, and please give him our regards. I will be glad to assist any way possible." This writer was one of the adult children who had joined in the execution of the mortgage to Allen.

The heirs filed an answer and cross complaint, in which they admitted Miller's continuous possession since April 9, 1927, but they alleged that Miller during all these years was a mortgagee in possession. The basis of this allegation is the contention that the original mortgage was void as the Probate Court was without jurisdiction to authorize the mortgage and that the fore-

closure proceedings were void, in that it was not conducted as required by the power of sale.

The case of *Flannigan* v. *Beavers,* 172 Ark. 28, 287 S. W. 755, is quite similar in several respects to the instant case, in that questions were raised there which are presented here, but we found it unnecessary to decide these questions in that case, and we find it unnecessary to decide them here. Indeed appellant says, "There is only one question in this case, and that is whether or not Miller is a mortgagee in possession. If he is not, then an affirmance is in order; if he is, then the decree of the trial court should be reversed." This contention is upon the theory that the power of sale was defectively employed and that Miller, the purchaser at the foreclosure sale, became a mortgagee in possession and the statute of limitations did not run in his favor while that relationship existed. The court confirmed the title as prayed, holding that the heirs were barred by the statute of limitations, by laches and by estoppel; and from that decree is this appeal.

The authorities on the subject were reviewed by Judge Wood in the case of *Norris* v. *Scroggins,* 175 Ark. 50, 297 S. W. 1022, and he there quoted and approved the following statement of the law from 2 Jones on Mortgages, page 881, § 1152 (page 964, § 1474 *ibid* 8 ed.): "Where a mortgagee enters into possession of the mortgaged premises under a void foreclosure, he is presumed to hold as mortgagee in possession, and limitation does not run in his favor, or in favor of his grantee, against a suit by the mortgagor. . . . The mortgage relation still continues between the purchaser at such void sale and the owner of the equity of redemption, the right of redemption continues, and the statute of limitations does not begin to run against the right until actual notice is given such owner by the party in possession under such void sale, that he claims to hold in some other right than that of mortgagee or assignee of the mortgage, or he clearly makes it known by his acts that he holds adverse to the mortgage."

Here the facts are undisputed that Miller took possession as owner, and for 19 years occupied the land in that capacity, the last 12 years of such occupancy being after the youngest McFarland heir became of age, and there appears no doubt that the heirs were apprised of this adverse holding. In other words, the fact is clearly established that Miller was holding adversely to the mortgage and the facts above recited must have apprised the heirs that Miller was holding adversely to the mortgage, and not as mortgagee in possession. During Miller's long occupancy no one of the heirs had ever asked an accounting to determine whether the rents had sufficed to pay the mortgage debt.

The holding in the Flannigan case, *supra,* applies here, for the heirs in this case, as in that one, must have known that the purchaser at the foreclosure sale was holding adversely to the mortgage. The court below so found and the testimony not only supports that finding but precludes any other, and the decree upholding the plea of limitations must be sustained. As stated, the court also found that appellants were barred by laches and estoppel, but it is unnecessary to consider those questions. The decree is affirmed.

LeCroy *v.* Cook, Commissioner of Revenues.

4-8244 204 S. W. 2d 173

Opinion delivered June 30, 1947.

Rehearing denied September 22, 1947.

George M. LeCroy and *Homer T. Rogers,* for appellant.

O. T. Ward, for appellee.

McHaney, Justice. Appellant brought this action against appellees, who are respectively the Commissioner of Revenues for the State of Arkansas and the Sheriff of Union county, to cancel a distraint warrant issued by the Commissioner for the collection of additional income taxes for the years 1939 and 1940 in the sum of $432.95, and which was delivered to the Sheriff for collection by levy as for an execution, and to enjoin them from the collection of any additional taxes. He alleged that, in the year 1911, he entered into a contract with his wife, Lizzie LeCroy, "whereby in selling all real property wherein the wife had an inchoate right of dower, and when she joined, released and relinquished same, she would receive one-third of the net proceeds derived from any and all sales in lieu of and in full compensation for her inchoate dower rights so released. Same to become her sole and separate prop-

erty, which contract has been fully complied with and fully performed.'' He sets out a number of real estate sales by him during 1939 and 1940 wherein his wife joined to release and relinquish her dower rights and in which she was paid one-third of the net proceeds of said sales. One such sale is particularly stressed, it being an oil lease sold to C. H. Murphy, Jr., on June 20, 1940, subject to the wife's dower rights and which rights were released to Murphy by her on September 30, 1940, by separate instrument and she received from Murphy $400 therefor. He alleged that, notwithstanding no part thereof was paid to or received by him, the Commissioner was holding that it all belonged to him and charged him with same contrary to law, and that he had paid all taxes on income properly chargeable to him.

Appellees answered denying appellant's right to claim credit on his net income for the amount of such sales of real property so delivered to his wife. They alleged that more than 30 days had expired after appellant had been notified by the Commissioner of the assessment of the additional tax, and that no hearing had been requested by appellant and no appeal taken therefrom, and that the court was without jurisdiction. A temporary restraining order was issued.

Trial resulted in a finding by the court that appellant and his wife entered into the oral agreement as alleged by him in 1911, and that said agreement was faithfully and fully complied with since said date, but also found that the temporary order should be dissolved and that the complaint should be dismissed for want of equity. A decree was entered to this effect and this appeal followed.

For a reversal appellant contends, first, that he has the right to contract generally with his wife in regard to her inchoate right of dower in his real estate and that any income accruing to her under such contract is not taxable income to him; and, second, in the absence of any such contract, where he sells property subject to her dower interest and she later, by a separate instrument,

releases her rights to such purchaser and receives pay therefor direct from the purchaser, the money paid to her is not taxable to him. These are the principal questions raised by this appeal.

We cannot agree with appellant on either contention. A wife is not endowed of her husband's real estate. Only the widow is so endowed. Section 4396 of Pope's Digest provides that: "A widow shall be endowed of a third part of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form." Until her husband's death the wife's right of dower is inchoate, that is, it is contingent upon his death during her lifetime. While it is a valuable contingent right, it is not such an interest in her husband's property as may be conveyed by her. It may only be "relinquished" by her to her husband's grantee in the manner and form provided by statute. Section 1815 of Pope's Digest provides: "A married woman may relinquish her dower in any of the real estate of her husband by joining with him in the deed of conveyance thereof, or by a separate instrument executed to her husband's grantee or any one claiming title under him, and acknowledging the same in the manner hereinafter prescribed." In § 1834 "manner hereinafter prescribed" is set out, in that by "voluntarily appearing before the proper court or officer, and in the absence of her husband declaring that she had of her own free will signed the relinquishinment of dower for the purposes therein contained and set forth without compulsion or undue influence of her said husband."

Act 27 of 1939 authorizes married women to relinquish dower and waive homestead in the husband's lands, minerals or timber to the husband's grantee by power of attorney properly executed.

There is no statute in this State which authorizes a wife to *convey* her dower rights to anyone. She can only relinquish such rights, not convey, and then only to her husband's grantee or one claiming title under him.

In *Smith* v. *Howell,* 53 Ark. 279, 13 S. W. 929, Judge HEMINGWAY for the court said: "The inchoate right of dower during the lifetime of the husband is not an estate in land—it is not even a vested right, but 'a mere intangible, inchoate, contingent expectancy'. The law regards it as in the nature of an incumbrance on the husband's title, and the statute cited provides a means whereby he may convey his title free from the incumbrance. She joins not to alienate any estate, but to release a future contingent right. The grantee must look alone to the husband's conveyance for his title. The relinquishment can be invoked for no purpose but to aid the title passed by his deed which contains it; therefore, when that title fails, the relinquishment becomes inoperative." See *Robbins* v. *Robbins,* 181 Ark. 1105, 29 S. W. 2d 278, where we held that dower does not ripen into an estate or an interest therein until the husband's death. In *Tatum* v. *Tatum,* 174 Ark. 110, 295 S. W. 720, 53 A. L. R. 306, in a suit to impound a portion of the proceeds of oil runs accruing to an undivided interest in lands formerly owned by her husband and conveyed by him in which she did not relinquish her dower right, we held that she had a contingent interest which should be protected if it could be done consistent with equity. This rule was reaffirmed in *B. H. & M. Oil Co.* v. *Graves,* 182 Ark. 659, 32 S. W. 2d 630. These and other cases hold that the right of dower is a valuable right. In *Hershey* v. *Latham,* 46 Ark. 542, it was held, headnote 1: "A wife's relinquishment of dower, or cession of any other rights of property, is a sufficient consideration for a settlement upon her by her husband out of his own property," in a suit by a creditor of the husband claiming a fraudulent conveyance to the wife. In *Skelly Oil Co.* v. *Murphy,* 180 Ark. 1023, 24 S. W. 2d 314, we held that, "Since the wife's inchoate right of dower is not a vested right in property, it is not protected from legislative impairment or destruction by the constitutional guarantees for the protection of property or the rights of citizens, and it is not an impairment of the obligation of a contract to change or abolish it before the right becomes vested." Headnote 1. This hold-

ing was made under Act 315 of 1923 which barred the wife's dower in certain cases.

So, we conclude that, while appellant had the right to contract with his wife to pay her a portion of the sale price of real property sold by him to induce her to relinquish her right of dower therein to his vendee, he did not thereby change the law of dower as enacted by the Legislature and construed by this court. His payments to her under such contract are nothing more than gifts. Of course, appellant could give to his wife all or any part of his income from such sales, but even so, the income would be taxable to him just as though he had not given it away.

The same thing is true with reference to the sale to Murphy, above mentioned. She executed a separate instrument to Murphy relinquishing her dower rights to him in exact conformity with the statute, some three months after appellant had executed the lease to Murphy, for a consideration of $400 cash. By this instrument she conveyed no estate in the land. Her husband had conveyed the title to the land by his lease. She simply released and relinquished her possibility of dower to his grantee. Therefore, the profits arising from the transaction must be held to be income accruing to appellant and the $400 paid to her as a gift from appellant.

Another question argued relates to the correctness of the amount of the additional tax levied. We think appellant lost his right to question the amount by not proceeding under the provisions of §§ 14054 and 14055 of Pope's Digest which provide an ample remedy for the taxpayer under the income tax law, and 14055 prohibits the issuance of any injunction, writ or order to prevent or stay the collection of income under said Act, which applies to the assessment of additional taxes also. Section 14049. See *McCarroll, Commissioner* v. *Gregory-Robinson-Speas, Inc.,* 198 Ark. 235; 129 S. W. 2d 254, 122 A. L. R. 977.

The decree is, accordingly, affirmed.

THE TEXAS COMPANY *v.* MATTOCKS.

4-8182 204 S. W. 2d 176

Opinion delivered June 30, 1947.

Rehearing denied September 22, 1947.

John C. Jackson, H. R. Wilson, Mahony & Yocum, Karl F. Steinmann, Edwin H. Brownley and *Davis & Allen,* for appellant.

Gaughan, McClellan & Gaughan, T. O. Abbott and *Claude Crumpler,* for appellee.

ROBINS, J. D. E. Armstrong and wife, owners of certain lands in Union county, on April 27, 1920, executed to Harley R. Hinton and P. R. Mattocks an oil and gas lease thereon. The lease was in ordinary form and reserved to the lessors an undivided one-eighth royalty.

Hinton and Mattocks, by written instrument dated March 8, 1921, assigned an undivided one-half interest in this lease to White Oil Corporation. The consideration of this assignment was $686,250, of which $274,500 was paid in cash, $274,500 was represented by notes (all of which have been paid) executed by White Oil Corporation to Hinton and Mattocks, and the balance of $137,250 was, under the terms of the assignment, to be paid if and when seven-eighths of the total production of oil from the land amounted to 900,000 barrels. This final installment of $137,250 is the subject matter of the instant case.

White Oil Corporation assigned this lease to United Central Oil Corporation on December 27, 1923, and in the assignment it was specifically provided that the latter corporation assumed the obligations of the former as to the lease. In 1925, United Central Oil Corporation changed its corporate name to Crown Central Petroleum Corporation.

On July 26, 1926, Crown Central Petroleum Corporation assigned its interest in said lease to The Texas Company.

Crown Central Petroleum Corporation, which was a Delaware Corporation, on September 20, 1937, became, under a consolidation agreement, Crown Central Petroleum Corporation of Maryland.

For brevity White Oil Corporation will be hereinafter referred to as "White," United Central Oil Corporation as "United," Crown Central Petroleum Corporation of Delaware as "Crown Central," Crown Central Petroleum Corporation of Maryland as "Crown," and The Texas Company as "Texas."

The exact date when oil production from the leased lands began is not shown, but a letter written by an officer of "Crown Central," dated September 1, 1926, to "Texas" stated that seven-eighths of the oil produced from these lands up to July 26, 1926, the date of the assignment by "Crown Central" to "Texas," amounted to 473,335 barrels.

It is admitted by "Texas" that from the time it took over the lease it produced therefrom 426,665 barrels of oil, up to sometime (exact date not shown in testimony) in September, 1940; so that on that date the 900,000 barrel production on the seven-eighths working interest was reached.

This suit was filed on March 27, 1941, against "Crown" and "Texas" by appellees, who had acquired the interests of Harley R. Hinton and P. R. Mattocks in the lease herein involved. In their complaint appellees set out their respective interests, alleged that seven-eighths of the total production of oil from the land covered by the assigned lease had already amounted to 900,000 barrels of oil and that therefore the balance of the consideration, namely $137,250, had become due. Prayer of appellees' complaint was for judgment against "Crown" and "Texas" for $137,250 and interest and for foreclosure of their lien against the one-half interest in said oil and gas lease.

After the filing of certain demurrers and motions not necessary to catalogue here "Crown" and "Texas" answered. Each of them denied any liability and each denied that production of 900,000 barrels of oil on the leasehold had been reached. A plea of limitation was asserted by each of them and in the answer of "Crown" there was a cross complaint against "Texas," in which

it was prayed that if any judgment for appellees should go against "Crown," "Crown" might recover all or a proportionate part thereof from "Texas."

The lower court found that the 900,000-barrel production of oil, required to mature the final installment of purchase money under the terms of the assignment of the one-half interest in the lease to "White," had been attained and rendered judgment against "Crown" and "Texas" for $137,250, with interest at the rate of six per cent per annum from October 1, 1940, until paid.

The lower court made no formal order on the cross complaint of "Crown" against "Texas." As to this phase of the case the decree recites: "The court declines to find for cross complainant over against The Texas Company for the full amount of the obligation sued on. The question as to whether the amount of the judgment and decree in favor of plaintiffs should be prorated between the two defendants on some equitable basis, is not presented to the court and no finding is made thereon."

Both "Crown" and "Texas" have appealed, and "Crown" has cross appealed against "Texas." Their contentions and arguments here are addressed to these questions:

I. Whether the evidence was sufficient, as against both appellants, to show that the 900,000-barrel production had been attained.

II. Whether, if the required production was shown, liability in favor of appellees against "Crown" was thereby established.

III. Whether, if the required production was shown, liability in favor of appellees against "Texas" was proved.

IV. Whether liability as between "Crown" and "Texas" was or should have been established by the decree.

I.

In the same paragraph of the assignment from Hinton and Mattocks to "White" that contains provision for payment of the final installment of $137,250, the subject matter of this litigation, this language appears: "The books and other papers relating to said operation and development shall be open to the reasonable inspection and examination of parties of the first part [Hinton and Mattocks]."

At the beginning of the trial appellees moved that "Crown" be required to "produce the record of oil produced from the Armstrong lease involved in this suit during the period of time when oil was produced therefrom by the United Central Oil Corporation, Crown Central Petroleum Corporation of Delaware and Crown Central Petroleum Corporation of Maryland."

To this motion "Crown" responded that it had made a diligent search for the records of United Central Oil Corporation and Crown Central Petroleum Corporation of Delaware pertaining to operations on the lease involved and had been unable to find same. It further averred that Crown Central Petroleum Corporation of Maryland had never had anything to do with operations on this lease, and that while "Crown Central" had transferred the lease to "Texas" in 1926, its consolidation with "Crown" of Maryland did not occur until in 1937. Several employees of "Crown" testified in support of the allegations in this response, and appellees, being unable to show that "Crown" had any of these records, the motion was overruled.

To sustain their contention that the final installment due them had been matured appellees introduced as a witness A. R. Carmody, president of appellee, North Central Texas Oil Company, which had purchased 32/64ths of the interest owned by Hinton and Mattocks. Mr. Carmody testified that during the time operations on the lease were being carried on by "White," "United," and "Crown Central," monthly statements, showing how much oil had been run were furnished to

him, and that similar statements were furnished after "Texas" took over the lease. He stated that on November 18, 1940, he wrote "Texas" a letter (copy of which he introduced) as follows: "D. E. Armstrong Lease . . . Your production figures indicate that the above lease has produced to the working interest (7/8ths) 901,680 barrels through October 31st, 1940. Under the terms of the above lease was included a payment to this Company of $68,625 payable as, if and when the working interest (7/8ths) production equalled 900,000 barrels. We shall appreciate having your check for the above payment."

The letter he received, in reply to his, from "Texas," which was introduced in evidence by Mr. Carmody, was as follows: "We acknowledge receipt of your letter of November 18th. The production from the Armstrong lease is now in excess of 900,000 barrels for the 7/8ths working interest. Our company does not feel it is personally liable or responsible for the indebtedness and we suggest that you look to the Crown Central Petroleum Corporation, whose address is Pasadena, Texas (suburb of Houston, Texas) for the payment to which you refer."

There was also introduced in evidence a letter written by the vice-president of "Crown Central" on September 1, 1926, to "Texas," in answer to an inquiry by "Texas" as to production from the Armstrong lease, which was as follows: "This will acknowledge your letter of August 27th *re* the above subject and in reply to same wish to state that as of 7 a. m., July 26, 1926, [date of assignment from "Crown" to "Texas"] 7/8 of the total production from this lease had amounted to 473,335 barrels."

J. C. Brooks, called as a witness by appellees, testified that he had been employed by "Texas" for 25 years and had been connected with the production accounting department since 1930, and that he was familiar with the records of production of the Armstrong lease. Mr. Brooks explained in detail the manner in which these records were made up from "run tickets" signed by representa-

tives of the pipe line company. He testified that these records showed a production by "Texas" from the working interest on the Armstrong lease of 474,954 barrels up to December 31, 1945, that they had obtained information as to the production prior to July 26, 1926, when "Texas" took over the lease, and that such production, according to this information, was 473,335 barrels; and that, if this information was correct, "the Armstrong lease had produced 900,000 barrels for the working interest only, the date was September, 1940." This witness introduced in evidence a memorandum attached to his record, which was as follows: "Statement of Gross (7/8 WI) Production on Armstrong Lease—When Production aggregates 900,000 Barrels Payment of $137,250 is to be made to P. R. Mattocks and N. C. T. Oil Co." This memorandum was followed by a detailed record of the production by dates of "run tickets."

In the face of this evidence, it is argued by "Crown" and "Texas" that the production of 900,000 barrels of oil from the working interest involved was not shown by competent testimony.

"Crown" contends that the letter written by "Texas" admitting attainment of the required production was not binding on or admissible against "Crown." "Texas" urges that its letter was necessarily based on information, as to oil production from the lease prior to "Texas" taking it over, contained in the letter written to "Texas" by "Crown," and that this letter being "hearsay" as to "Texas," the admissions based thereon contained in the letter written by "Texas" is not binding even on "Texas." It is also argued that the testimony as to what the books of "Texas" showed as to the oil production was not competent because the different persons who made the entries were not called as witnesses.

We do not deem it necessary to pass on these technical objections, because under the facts shown here the burden of proof was on appellants to show what the oil production from the lease was. The assignment under which both of them acquired their rights clearly showed

that all parties contemplated that books reflecting the "oil run" should be kept by the producer and that these books should be open to inspection by the appellees and their predecessors in title. No one but the producer could possibly know the amount of oil production. The principle applicable here was thus stated by Mr. Wharton (Evidence, § 367): "When a fact is peculiarly within the knowledge of a party, the burden is on him to prove such fact, whether the proposition be affirmative or negative.' *Hopper* v. *State,* 19 Ark. 143; *William* v. *The State,* 35 Ark. 430; *Fowler* v. *The State of Arkansas,* 39 Ark. 209; *City of Fort Smith* v. *Dodson,* 51 Ark. 447, 11 S. W. 687, 4 L. R. A. 252, 14 Am. St. Rep. 62.

Since the appellants had the *onus* at the trial to show what the true amount of the oil production was, they were not in a position, in a court of equity, to challenge facts reflected by their own admissions in writing and by the books of either of them. There was abundant proof to justify the findings of the lower court that the 900,000 barrels of oil had been produced from the 7/8ths interest in the lease involved.

II.

On behalf of "Crown" it is argued that since there was nothing in the assignment of the lease or in the lease itself which obligated "White" or its assignees to drill on the land embraced in the assigned lease, there was no obligation upon "Crown" to pay the delayed consideration sued for herein. But certainly under the original assignment there would have been an obligation on "White" to pay this installment if "White" had been operating the lease when the required amount of production was reached. Neither "White" nor any subsequent assignee could avoid this liability by simply transferring the lease to some one else. If this liability could be so evaded, a solvent producer working a lease under an agreement of the kind involved here, after producing 890,000 barrels might assign the lease to an insolvent person or corporation and, after the production of 900,000 barrels of oil was reached, defeat entirely the collection of the final installment.

"White," by accepting the assignment, obligated itself to pay the final installment of the consideration of the assignment. "United" specifically assumed the obligations of "White." By operation of law the liabilities of "United" were finally cast upon "Crown." It follows that "Crown," as far as the appellees are concerned, is liable for the $137,250 installment sued for herein.

III.

"Texas" argues that it was not a party to the original assignment and that it has never assumed or agreed to pay the indebtedness sued on here. The assignment to "White" was recorded. "Texas" therefore took the interest of "Crown" with notice that this obligation would become due when the required amount of production was reached.

A somewhat similar question was involved in the case of *Graysonia-Nashville Lumber Co.* v. *Saline Development Co.,* 118 Ark. 192, 176 S. W. 129. In that case it appeared that Saline Development Company had sold and conveyed to Nashville Lumber Company the merchantable timber on a large tract in Howard county. The consideration recited in the contract, which was referred to in the deed, was the payment of $5,298 which represented a calculation of $2 per thousand on an estimated 2,625,000 feet of timber, and it was provided in the contract that the purchaser should pay the further sum of $2 per thousand for all timber, in excess of said estimate, as same was cut. The Nashville Lumber Company sold the timber to Graysonia-Nashville Lumber Company, and, upon its refusal to pay the company for the amount of timber cut in excess of 2,623,000 feet, Saline Development Company sued and recovered judgment therefor in the chancery court. On appeal to this court, the decree of the lower court was affirmed, it being held that the Graysonia-Nashville Lumber Company was bound by the provisions in the contract between its vendor and Saline Development Company and had assumed the contingent balance of the purchase money.

Likewise, dealing with the liability of an assignee of an oil lease, we said, in the case of *Thurman* v. *Moore,* 178 Ark. 885, 13 S. W. 2d 22: 'The assignee simply stepped into the shoes of the lessee. He took his assignment subject to the payment of the purchase price out of the oil produced.'

We held in *Harvey* v. *Marr,* 173 Ark. 880, 293 S. W. 1005, (headnote 2): "The purchaser of an interest in an oil lease, who collected oil as provided for in the contract and received the benefits thereof, became liable according to its provisions."

In support of the contention that "Texas" is liable to appellees herein it is argued that the agreement to pay the final installment of purchase money, set forth in the assignment from appellees' predecessors in title to "White," is in the nature of a covenant running with the lease. Whether this contention is well founded we do not find it necessary to decide. "Texas" took over this assignment and, according to its own admission, produced nearly half a million barrels of oil therefrom, and thereby caused the final installment of purchase money to mature. Since "Texas" accepted the benefits accruing under the assignment, it must bear the burdens thereof. *Atlantic & North Carolina Railroad Company* v. *Atlantic & North Carolina Co.,* 147 N. C. 368, 23 L. R. A., N. S. 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363, 61 S. E. 185; *Union Pacific Railway Company* v. *Douglas County Bank,* 42 Neb. 469, 60 N. W. 886; *Kirby Lumber Company* v. *R. L. Lumber Company* (Tex. Civ. Ap.), 279 S. W. 546; *South* v. *Williamson Dealers Corporation,* 298 Ky. 557, 183 S. W. 2d 634; *C. V. Hill & Company* v. *Hadden's Grocery,* 299 Ky. 419, 185 S. W. 2d 681.

Furthermore, in the construction of the assignments herein involved, we have a right to resort to the construction the parties themselves have placed upon these agreements. It is a familiar rule that, when construing a contract, meaning of which is in doubt, a court may consider how the parties themselves have—by their words and acts—construed it. Chief Justice HILL, in the case of

Kahn v. *Metz,* 88 Ark. 363, 114 S. W. 911, quoted with approval this language of Lord Chancellor Sugden: " 'Tell me what you have done under a deed, and I will tell you what that deed means'." Other cases in which "practical construction" of a contract, as shown by the acts of the parties thereunder is upheld, are: *Edgar Lumber Company* v. *Cornie Stave Company,* 95 Ark. 449, 130 S. W. 452; *Keopple* v. *National Wagonstock Company,* 104 Ark. 466, 149 S. W. 75; *Continental Insurance Company* v. *Harris,* 190 Ark. 1110, 82 S. W. 2d 841.

The undisputed evidence shows that as soon as "Texas" acquired its interest in this lease it wrote to "Crown Central" and ascertained the amount of production up to the time "Crown Central" assigned to "Texas." It was also shown that one of the production officials of "Texas" kept on his desk a memorandum calling attention to the fact that when 900,000 barrels were produced from the 7/8ths working interest under this lease the $137,250 payment would be due. If "Texas" had taken this assignment from "Crown Central" with the understanding or belief that no liability for this final installment would rest on "Texas," why would the amount of production up to the time "Crown Central" assigned have been of such importance to "Texas" as to require it to ascertain such production? And, if "Texas" had no obligation as to this installment, there could have been no valid reason for the memorandum as to the liability being kept on the production manager's desk. All these circumstances, about which there is no dispute whatever in the testimony, point strongly to the conclusion that "Texas" considered itself liable under the provisions of the assignment through which it claimed title.

"Texas" took over this lease with notice of the contingent liability for the final installment. It operated the lease, received the benefits conferred by the assignment to "White" and its production actually matured the final installment by producing the nine hundred thousandth barrel of oil from the working interest. It may not avoid liability for this payment.

IV.

"Texas" asked no relief as against "Crown." "Crown," in its cross complaint, prayed judgment against "Texas" for any amount that "Crown" might be compelled to pay appellees.

The lower court apparently determined that the question of the liability of appellants *inter sese* was not properly before it. While in the findings the court stated that it would not grant "Crown" "in full" the relief it prayed against "Texas," there was in the ordering part of the decree no disposition of "Crown's" cross complaint against "Texas." The lower court might have considered that, "Crown" not yet having paid appellees anything, its cross complaint was premature. We treat the decree below as not having in any manner disposed of the rights and liabilities of "Crown" and "Texas" as between themselves, and, so that this entire branch of the controversy may be left open for future settlement or adjudication, we modify the decree of the lower court so as to show that the cross complaint of "Crown" against "Texas" is dismissed without prejudice. With this modification, the decree appealed from is affirmed.

The Chief Justice, Mr. Justice McFaddin and Mr. Justice Millwee dissent as to that part of the opinion which authorizes judgment against The Texas Company for any amount in excess of $65,066.42 and interest.

WARD *v.* NIX.

4-8245 204 S. W. 2d 182

Opinion delivered June 30, 1947.

Rehearing denied September 22, 1947.

[redacted]

Hugh M. Bland and *L. H. Chastain,* for appellant.

Hardin, Barton & Shaw, for appellee.

ED. F. MCFADDIN, Justice. This appeal presents no question of law, but challenges the correctness of the factual findings made by the chancery court.

Appellants (Mr. and Mrs. Ward) owned a home near Alma, Arkansas, and in April or May, 1946, they entered into a contract with John T. Nix (one of the appellees) to have him construct two additional rooms to their home. The exact nature of the contract is one of the points in dispute. Nix was a contractor, and he obtained the materials and laborers, and the construction work was done under his supervision. In due time Roy Cromer (doing business as Fine Springs Lumber Company) filed a ma-

terialman's lien for $613.46; and Nix also filed a claim for a balance alleged to be due him in an amount in excess of $860.23.

Thereupon the appellants filed a suit in the chancery court naming the appellees, Nix and Cromer and others, as defendants. The complaint alleged that the appellants had entered into an oral contract with Nix whereby he agreed to furnish the materials and labor, and to construct the two rooms for a total contract price of $925; that appellants had paid $382.12 and only owed a final balance of $542.88. They tendered this amount to Nix and prayed that he be required to accept that sum and cause his claim and that of Cromer (as well as any other possible lien claims) to be satisfied in full. As a second cause of action against Nix, appellants alleged that the work done and the materials furnished by Nix were defective; and appellants prayed damages for $500.

By answer and cross complaint Cromer claimed the correctness of his lien claim for $613.46, and prayed foreclosure of his lien. By answer and cross complaint Nix (1) denied he had entered into any such $925 contract as claimed by appellants, (2) denied that his work and materials were defective, (3) alleged that his contract with the appellants was to do the work at the actual cost of the labor and materials plus fifteen per cent. for his supervision and profit—*i. e.*, a "cost-plus" contract, (4) alleged that the Cromer account was correct and that after all payments made by appellants had been credited, there was still due to Cromer and to Nix a total balance of $1,434.32, and (5) prayed judgment for the said amount and foreclosure of the respective liens of Cromer and Nix.

With issues thus joined the cause proceeded to trial; and the chancery court saw the witnesses and heard them testify. A decree was rendered, for Cromer for $613.46, and for Nix for a balance of $445.98. To reverse that decree appellants prosecute this appeal; and have grouped their arguments under these two topic headings:

(1) "The evidence conclusively established a contract between the parties."

(2) "The testimony of the defendant, John T. Nix, is self-contradictory, admittedly false in places, contrary to his pleadings, evasive, disingenious and contrary to common experience and authorizes no basis for the court to find that the construction was to be upon a cost-plus basis."

OPINION

At the conclusion of all the evidence the record reflects the following to have transpired:

"The court: This is just a question of fact, isn't it? Counsel: Yes sir. The court: There is no law involved? Counsel: No, sir. Mr. Barton: We are willing to submit it. Mr. Bland: I don't think we can assist the court by arguing it. The court: Well—I can pass on it eventually. I can't immediately, but I will take it under advisement."

A week later the Chancellor furnished each side a detailed, itemized statement (which is in the transcript), showing how he arrived at the figures in the decree, as previously stated. It would serve no useful purpose to set out, even in the briefest manner, the testimony of each of the witnesses. There were eighteen of them; and the case was a "swearing match" from beginning to end.

(a) On the issue of the $925 contract: Appellants introduced a copy of an estimate which they claimed was the basis of the oral contract; and they were substantiated by at least two witnesses. On the other hand, Nix testified, equally as positively, that the paper introduced was an estimate for a shedroom and not for the gabled addition actually made to the house. Nix was also supported by witnesses on this point. The Chancellor found that there was no contract whereby Nix was to do the work and furnish the materials for $925 as claimed by appellants; and the Chancellor allowed Nix to recover on a "cost-plus basis." The fact that the estimate called

for only six windows and that the rooms as built contained nine windows; the fact that a solid foundation was used instead of pillars; the fact that a new roof was placed on the entire house: these facts, and many others, not only negative appellants' claim of a $925 contract, but also show the correctness of the Chancellor's ruling on this point.

(b) On the appellants' claim for damages: Nix testified that the work and materials were the best obtainable, and he was supported by witnesses. Appellants testified to numerous defects, etc., and they were supported by witnesses. The Chancellor found that the appellants were damaged in the sum of $300; and, after allowing the appellants that amount, gave Nix a judgment for a balance of $445.98 as previously mentioned. Nix has not cross appealed on this damage award so we need not refer to the evidence supporting the Chancellor's findings on this point.

(c) On the amount of the materials and labor: Cromer's claim was supported by competent evidence, and the labor claims were verified by the personal testimony of the workers; so that angle of the case is clearly correct.

A careful study of the entire record and all briefs fails to convince us that the chancery court decided against the preponderance of the evidence. What we said in the recent case of *Murphy* v. *Osborne, ante,* p. 319, 200 S. W. 2d 517, applies exactly to the case at bar:

"The Finding of the Chancery Court Will Not Be Reversed on Appeal Unless Such Finding Is Against the Preponderance of the Evidence. Some of the scores of cases recognizing and reiterating this long established rule are collected in vol. 2 West's Arkansas Digest, 'Appeal and Error,' § 1009. In the case at bar the Chancellor saw each witness when he testified. The Chancellor observed the demeanor on the witness stand, the inflection in the voice, and the hesitancy or rapidity of the words flowing from the mouth of the witness. The Chan-

cellor thus had an opportunity to see more than the mere words on the printed page which, alone, come to this court. With the testimony in this case in hopeless conflict, we cannot say that the chancery court decided against the preponderance of the evidence."

Affirmed.

HARRIS *v.* HARRIS.

4-8249 204 S. W. 2d 169

Opinion delivered June 30, 1947.

Rehearing denied September 22, 1947.

Yingling & Yingling, Claude Duty and *F. O. Butt,* for appellant.

Vol T. Lindsey, Harry Neely and *John W. Nance,* for appellee.

GRIFFIN SMITH, Chief Justice. The appeal is from a decree dismissing appellant's complaint of September 24, 1946. The Chancellor found there was no merit in the contentions advanced—a conclusion with which we agree.

The marital history, and matters relating to continuing discord, interrupted now and then by periods of amity, are set out in this Court's opinion of January 7, 1946. *See Harris* v. *Harris,* 209 Ark. 528, 191 S. W. 2d 465. In that case Mrs. Harris took the initiative and procured the decree we reversed.

All of the substantial grounds relied upon in the case now before us were urged in the appeal considered in the January 7th opinion. It was there said: "Any cause of action which might have existed when the suit was filed was condoned, and none has occurred since, although the right to divorce may be maturing on the ground of desertion".

After Mrs. Harris' first complaint was filed August 22, 1944, it was not the husband's duty to urge his presence upon her when the circumstances were such that he knew of her desire for severance of the matrimonial bonds; but, if desertion had begun and the full period had not run when the complaint was filed, good faith on the part of the defendant required that he make known to the plaintiff a willingness to resume the relationship of husband and wife. The opinion of January 7th was to the effect that no valid reason was shown why the parties should not adjust their differences, which were referred to as petty.

February 5, 1946—slightly less than a month following reversal, and eight days after this Court's mandate was issued—appellee wrote his wife the letter set out in the footnote, to which she replied February 9th. Her letter is also copied.[1] Answering the wife's refusal of

[1] "Rogers, Ark., Feby. 5, 1946. Dear Helen: The Supreme Court, analyzing our case, arrived at the opinion that we should continue our marital relations, and since they think so I know they must be one hundred percent right. I wrote you many times that as soon as the house was completed I would come there to get you. Now the house, while not completed, is, I am sure, more comfortable than the one you are now living in, and I don't see why we can't make a home out of that empty farm house in the true meaning of the word home. I had little trouble with you in the past that wasn't caused by your drinking liquor, and I am glad to know that you have quit drinking. Write me when you are ready for me to come after you. If you agree with me, as a matter of good faith, write me so I can get things in order for your comfort. Knowing your state of mind in reference to public opinion, may I assure you your returning to live here shall cause you no humiliation, so don't let false pride prevent your decision in my favor. As ever yours, Earl A. Harris."

The reply. "Searcy, Ark., Feby. 9, 1946. Dear Mr. Harris: Your letter of the fifth reached me Thursday. It is true the court some weeks ago expressed the hope that we might be able to adjust our differences, and for a month I have waited some indication on your part that its suggestion had come to your notice. Before receiving your note I had instructed my counsel to proceed, and I suspect their presence and conference at Rogers on the 4th is the explanation of

conciliation, Harris wrote her again on February 14th, urging that she return. He closed with the expression, "I hope you will use *your mind* and reconsider this matter for the sake of our boy. Our consideration of him should be paramount".

We do not find anything to justify Mrs. Harris in thinking that her husband's letter "carried insult in its very content". It is true the communication of February 5th suggested inferentially that Mrs. Harris was acting upon the advice of others instead of consulting her own desires; but this could hardly be called insulting, even if untrue.

With no evidence other than appellant's hypersensitive conclusions that appellee was not acting in good faith, it cannot be said that the Chancellor's action in dismissing the complaint was erroneous.

Affirmed.

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your leisured message of the 5th. Be that as it may, your apparent reluctance, and warning that the home is still incompleted, only cautions me that this over-two-year-old and oft repeated excuse is still to perform service; when, as you know, many, many months ago I begged you to let us come home and assured you that I could and would make out with it without complaint. Your contemptuous treatment of me and of your baby, and particularly the baby ever since its birth, convinces me that any experiment with you would at best be unsuccessful; could result again in my being encouraged into faults to be regretted, and only create additional problems more important than ourselves. To meet such conditions one must have more than a will to experiment; your past attitude and this present approach, carrying insult in its very content, despite its carefully worded and legalistic form, make it impossible for me ever again to regard you as a wife should regard a husband. The kind hope of the court cannot be realized, however well-intentioned and high-minded its inspiration. Yours truly, Helen."

HARDY *v.* HILTON.

4-8251 204 S. W. 2d 163

Opinion delivered June 30, 1947.

Rehearing denied September 22, 1947.

O. E. Williams, for appellant.

C. D. Atkinson, Charles W. Atkinson, G. T. Sullins and *Rex W. Perkins,* for appellee.

MINOR W. MILLWEE, Justice. This is a suit by appellants, Martha Stone Hardy, Duncan B. Stone and Edythe F. Stone Walker, to cancel certain deeds to appellees, and others, to 16 acres of land situated in and adjacent to the City of Fayetteville, Arkansas. The cause was submitted to the trial court upon the pleadings which consist of a complaint and answer together with numerous exhibits, and a stipulation of the parties.

The record discloses that Stephen K. Stone, grandfather of appellants, died testate in 1909, and under the terms of his will a 34½ acre tract of land, including the lands in controversy, was devised to his son and daughter-in-law, A. B. Stone and Edythe F. Stone, parents of appellants, for life, with remainder to appellants. A. B. Stone conveyed his life interest to his wife in 1915. In May, 1925, A. B. Stone and wife, Edythe Stone, together with appellant, Martha Stone Hardy, filed a petition to sell the 34½ acre tract and to reinvest the proceeds of the sale in a more suitable home for the parties, or in revenue producing securities. Appellants, Duncan B. Stone and Edythe F. Stone, minors, were made parties defendant, and a decree was entered in accordance with the prayer of the petition, but there was no sale of the property under this decree.

On March 4, 1926, another decree was rendered in the cause again authorizing the sale of the property for reinvestment. This decree shows service of summons on the minor defendants, the appearance of the defendants in person and by guardian *ad litem* appointed by the court, and answer of said guardian *ad litem.* The decree was rendered after evidence was heard on the petition and contains the following findings: "The court further finds that said land is not a suitable home for the said plaintiffs and defendants or any of either the plaintiffs or defendants, that it will require the expenditure of a large sum of money on said land in order to provide a

proper residence for either said Edythe F. Stone or of either of the plaintiffs or of said defendants which expenditure of money neither of the plaintiffs or defendants is in a position to expend; that said land does not and cannot produce revenue sufficient for its upkeep and maintenance. The court further finds that it is to the best interest of both the plaintiffs and of all the defendants that the property above described be sold at private sale and that the money derived therefrom be properly invested in a suitable home for the parties hereto or that the same be invested in either income real estate, stocks, bonds, mortgages or other securities to be approved before investment by the court."

The decree further provided that the 34½ acre tract be sold as a whole, or in part, by L. B. Stone, who was appointed commissioner to conduct the sale and required to post bond for faithful performance of the decree. It was further ordered that the funds derived from the sale be impounded subject to investment under orders of the court for the use and benefit of Edythe F. Stone, as sole beneficiary of the life estate, and appellants, as remaindermen. The court retained jurisdiction for further proceedings that might be had in connection with any sale of the lands.

L. B. Stone failed to qualify and act as commissioner and on April 5, 1930, a decree was entered discharging him and appointing A. B. Stone commissioner to carry out the provisions of the 1926 decree. The 1930 order required A. B. Stone to make bond. On November 22, 1932, he filed a report of sale of the 16 acre tract in controversy to his sister, Amanda M. Stone, and submitted his deed as commissioner to the court for approval. On the same date an order was entered approving the sale and deed as follows: "On this day A. B. Stone, duly appointed, qualified and acting as commissioner in the above entitled cause having submitted to this court his report of sale of the west sixteen acres of a tract of land involved in the above entitled cause, and having also submitted to the court his deed of conveyance of said sixteen

acres to the said Amanda M. Stone for the sum of $1,500 said report and deed are hereby in all things by the court approved."

Amanda M. Stone held possession of the 16 acre tract from the date of her purchase until April 15, 1944, when she conveyed four acres of the tract to H. E. Parrish, trustee for the bondholders of two improvement districts in which the four acre tract was located. On April 21, 1945, H. E. Parrish conveyed said four acre tract to appellee, Bert S. Lewis, who redeemed the property from the state for delinquent taxes of 1932 and subsequent years.

Amanda M. Stone continued in possession of the remaining 12 acres and paid the taxes thereon until she died testate on March 12, 1945. The executor of her will was directed to sell all of her property, including the remaining twelve acre tract in controversy, and to distribute the proceeds of the sale among her brothers' children, including the appellants, in equal parts. Appellees, John M. Hilton and Mrs. Fannie Walker, purchased said 12 acre tract at the executor's sale on October 12, 1945, for $1,250. Appellants participated in a partial distribution of said estate as legatees under the will of their aunt, Amanda M. Stone. The funds distributed, and yet to be distributed, include proceeds of the sale of the 12 acre tract.

A. B. Stone died in 1945 and on April 8, 1946, Edythe F. Stone, his widow, conveyed whatever interest she had in the 16 acres in controversy to appellants who instituted this suit on May 23, 1946.

A decree was entered February 14, 1947, dismissing the complaint of appellants for want of equity and quieting the title of appellee, Bert S. Lewis, to the four acre tract in controversy; also quieting the title of appellees, John M. Hilton and Fannie Walker, to the 12 acre tract.

Appellants do not challenge the jurisdiction of the chancery court over the parties or the subject matter of the decree rendered in March, 1926, under which the sale

of the lands was made. They recognize the rule announced in *Bedford* v. *Bedford,* 105 Ark. 587, 152 S. W. 129, where this court held that equity had jurisdiction to order the sale of property for reinvestment in which there were different estates involved, including contingent remainders, notwithstanding the fact that one of the remaindermen is a minor. Chief Justice McCulloch, speaking for the court in that case, said: "This court held, in *Watson* v. *Henderson,* 98 Ark. 63, 135 S. W. 461, that courts of equity have no jurisdiction to order the sale of a minor's lands for reinvestment, the exclusive jurisdiction over the estates of minors being vested by the Constitution in probate courts.

"The fact, however, that one of the class of contingent remaindermen is an infant does not deprive the chancery court of jurisdiction, if jurisdiction is otherwise conferred. The fact that the probate court has exclusive jurisdiction over the estates of infants does not deprive the chancery courts of jurisdiction to sell parts of their estates, for instance, for the purposes of partition, or for the foreclosure of liens, or in other cases where, upon other grounds, jurisdiction is conferred upon chancery courts. The question in this case is not whether the jurisdiction is exclusively vested in some other court, but whether there is any authority to sell lands for reinvestment where there are different interests or estates, including contingent remainders." The court then affirmed the decree of the chancery court approving a private sale of the lands for the purpose of reinvestment, saying: "It is the duty of the chancery court, not only to safeguard the sale itself, but to follow up the reinvestment of the proceeds so as to see to it that the will of the original testator is carried out. This seems to have been done by the court in the present instance."

For reversal of the decree appellants earnestly insist that no bond was required of their father as commissioner in the sale of the lands to their aunt, and that the consideration for the deed was not impounded for the

purpose of reinvestment as provided in the 1926 decree. Appellants so alleged in their complaint, but these allegations were denied in the answer of appellees and the burden of proof was upon appellants on these issues. Appellants offered no proof in support of these allegations except the orders and records of the court. Under the decree appointing A. B. Stone commissioner to sell the lands, or a part thereof, for reinvestment he was required to make bond, and in the order approving the sale and deed he is designated as the "duly appointed, qualified and acting" commissioner. The chancery court is a court of general or superior jurisdiction and had jurisdiction of the parties and subject matter and all reasonable presumptions must be indulged in favor of the regularity and validity of the proceedings on collateral attack. In *Hooper* v. *Wist,* 138 Ark. 289, 211 S. W. 143, the court said: "It is well settled in this State that in a collateral attack upon a judgment of a court of general jurisdiction every presumption will be indulged in favor of the jurisdiction of the court and the validity of the judgment or decree."

While the decree under which the land was sold directed the reinvestment of the proceeds of the sale either in a more suitable home for the parties or revenue producing securities, the record is silent as to whether this requirement was followed up by the court. The contention of appellants is that the court was without authority or jurisdiction to confirm the sale without an affirmative showing in the record that the consideration was actually paid into court and reinvested for the benefit of the life tenant and remaindermen. This contention is contrary to the general rule that proceedings of a court of superior jurisdiction with respect to jurisdictional facts, as to which the record is silent, are presumed to be within the scope of its jurisdiction, until the contrary is shown. The case of *Flowers* v. *Reece,* 92 Ark. 611, 123 S. W. 773, involved a collateral attack on a judgment of the probate court, and this court said: "The rule is that where the record is silent with respect to any fact necessary to give the court jurisdiction, it will be

presumed that the court acted within its jurisdiction." Since appellants offered no proof to sustain the allegation of their complaint that the funds were not impounded for reinvestment, other than the mere silence of the record on this point, we must indulge the presumption that the chancery court was acting within its jurisdiction when it approved the commissioner's sale and deed to Amanda M. Stone.

Appellees pleaded the statute of limitations, laches and estoppel in their answer. According to the stipulation of the parties the youngest of the appellants, Edythe F. Stone Walker, was 33 years of age at the time of the trial and must have been 17 or 18 years of age at the time of the commissioner's sale of the lands in controversy. Although they were parties to the proceedings leading up to the commissioner's sale they have stood by for nearly 15 years since the youngest became of age and made no objection to the decree under which the sale was made and acquiesced therein by participating in the distribution of the estate of their aunt, Amanda M. Stone, which included the proceeds of the sale of 12 acres of the 16 acre tract in controversy. Moreover, appellants have not made any offer to refund any part of the funds arising from the sale of the lands under the will of their aunt, nor have they offered to restore to appellees the purchase price which they were induced to pay on account of the laches of appellants. Appellants rely upon the general rule set out in 33 Am. Jur., Life Estates, Remainders, etc., § 187, to the effect that laches, estoppel or limitations will not run against a remainderman prior to termination of the life tenancy, since the remainderman has no right of possession until the life estate is terminated. In a further treatment of the subject in § 189 of the same work and volume the textwriter says: "In contrast to this general view that laches cannot be invoked against a remainderman for omitting to assert his rights during the time that he was not entitled to possession, the courts may refuse to exempt him from the requirement of equity that a suitor be diligent, and hold that he

is barred by the staleness of his claim, where the circumstances make it inequitable to permit the claim to be enforced. A defrauded remainderman cannot, merely because the precedent estate has not fallen in, lie by for a long period of time and then file a bill to rescind his conveyance on account of the fraud." In a discussion of the general rule that the owner of real estate by his acts or conduct may estop himself from asserting title thereto, it is said in § 191 of the same work: "This rule applies to owners of an estate in remainder, and the owner of such estate, by consenting to a sale of the fee by the life tenant or by inducing such sale, thereby estops himself, as against a purchaser acting in good faith and without knowledge of the remainderman's title, to assert his title in remainder. And this is especially true where he has received a part of the purchase money."

In *Horn* v. *Hull,* 169 Ark. 463, 275 S. W. 905, this court said: "The doctrine of laches which is a species of estoppel rests upon the principle that, if one maintains silence when in conscience he ought to speak, equity will bar him from speaking when in conscience he ought to remain silent. *Gibson* v. *Herriott,* 55 Ark. 85, 17 S. W. 589, 29 Am. St. Rep. 17; *Jackson* v. *Becktold Printing & Book Mfg. Co.,* 86 Ark. 591, 112 S. W. 161, 20 L. R. A., N. S. 454; *Davis* v. *Harrell,* 101 Ark. 230, 142 S. W. 156; *Brownfield* v. *Bookout,* 147 Ark. 555, 288 S. W. 51; and *Stewart Oil Co.* v. *Bryant,* 153 Ark. 432, 243 S. W. 311." See, also, *Neal* v. *Stuckey,* 202 Ark. 1119, 155 S. W. 2d 683; *Pearl City Packet Company* v. *Thompson,* 201 Ark. 1043, 143 S. W. 2d 14; *Falls* v. *Jackson,* 208 Ark. 435, 186 S. W. 2d 787.

Under the facts and circumstances presented in this record we hold that it would be inequitable to permit appellants to challenge the validity of the sale held under the 1926 decree, and that they should be estopped from asserting their claim of title to the lands in controversy. It follows that the Chancellor correctly dismissed the complaint of appellants, and the decree is accordingly affirmed.

ANDREWS *v.* GROSS & JANES TIE COMPANY.

4-8258 204 S. W. 2d 783

Opinion delivered September 22, 1947.

Rehearing denied November 3, 1947.

P. L. Smith, for appellant.

J. Ed Morneau, for appellee.

McHANEY, Justice. Appellant filed a claim with the Workmen's Compensation Commission against appellees for an award of compensation for injuries sustained by him while allegedly in the employ of Gross & Janes as a timber cutter. After an extended hearing both before the referee and the whole Commission his claim was denied on the ground that he was not an employee of Gross & Janes, but that he was an employee of D. F. Tutt and that he suffered an injury arising out of and in the course of his employment with D. F. Tutt. An award was made in his favor against D. F. Tutt. An appeal was taken by appellant from the award of the Commission denying compensation as against Gross & Janes to the Pike Circuit Court, which resulted in the affirmance of the award of the Commission. This appeal followed in due course. D. F. Tutt did not appeal and the award against him is not before us.

The facts, briefly stated, are, as found by the Commission, that Gross & Janes either sold two sawmills to D. F. Tutt, or bought two sawmills for him, and took a

mortgage on them to secure the purchase price which was to be paid out of so much per tie cut by him. D. F. Tutt operated one of these mills and his brother, Emmett Tutt, operated the other for one-half the net profits, D. F. Tutt to receive the other half. Appellant was injured shortly after going to work with one McKinnon, both jointly cutting and sawing timber in the woods for ties and lumber to be manufactured at the Emmett Tutt mill, who paid all his employees by his own check. Gross & Janes did not pay any of the Tutt employees or exercise any control over them in the method or manner of doing their work. Appellant was paid his share of the earnings of himself and McKinnon for the short time he worked by the latter who collected it from Emmett Tutt. The ties made at the Tutt mills were sold to Gross & Janes by the Tutts for the published or market price. The lumber made in the operation of the mills was sold to others and not to Gross & Janes. No insurance was carried on Emmett Tutt's employees, but was on D. F. Tutt's employees, because the former was paid on a piece work basis, so much per stick, whereas the latter worked by the hour. It was thought the former were independent contractors.

To reverse the judgment appellant argues several points, the most serious one being that Gross & Janes were the real employers of all those ostensibly employed by the Tutts, and that the sale of the two mills to D. F. Tutt was but a sham or pretended sale to avoid responsibility for any injuries they might sustain. In some respects this case is similar to that of *Hobbs-Western Co.* v. *Craig,* 209 Ark. 630, 192 S. W. 2d 116, where Hobbs-Western undertook the financing of several individuals to operate tie mills to manufacture crossties and to deliver such ties to its tie yard for acceptance by the railroad company for its account. Craig was fatally injured while working for Lea, who carried no compensation insurance and who was financed by Hobbs-Western, and claim was allowed by the Commission under § 6 of the Workmen's Compensation Act, 319 of 1939, for his death. We affirmed the Commission's award. Here, the Commission did not find that Tutt was a subcontractor of

Gross & Janes, even though its field superintendent, Woodrow Epperson, filed what is called Employer's First Report of Industrial Injury with it, in which he stated that D. F. Tutt, contractor, was the employer, and Consolidated Underwriters was named as the insurance carrier for D. F. Tutt. In this he was in error as to the insurance carrier. Gross & Janes did not file the report of injury, but Epperson did file it for D. F. Tutt, or at least D. F. Tutt was reported as the employer, and he had no insurance carrier on Emmett's employees. Later, the adjuster for the insurance carrier, J. C. Elmore, filed a notice of intention to controvert appellant's claim in which he referred to the employer as "D. F. Tutt, subcontractor" and to the carrier as "Consolidated Underwriters, Insuror for Gross & Janes Company." This report was signed for the employer as "D. F. Tutt, subcontractor for Gross & Janes Company, by J. C. Elmore, Adjuster." Other hearsay testimony was to the effect that compensation had been paid two other employees of the Tutts by the insurance carrier. The witness did not know this to be a fact, but had heard that it was done. The Commission found and stated in its opinion that a search of their records had been made and they had been unable to find any record where Gross & Janes paid compensation to the two men the witnesses named, Thomas and Faire, as having received compensation.

These facts tended to show that D. F. Tutt was a subcontractor for Gross & Janes. But the testimony of appellant, McKinnon and both Tutts tended to contradict such relationship and to establish the contention of appellant and the Tutts that D. F. Tutt was not a subcontractor of Gross & Janes, but was the employer of appellant and all others who worked for either D. F. or Emmett Tutt.

The Commission, therefore, had substantial evidence before it to sustain its findings that appellant was not an employee of Gross & Janes, but that he was an employee of D. F. Tutt. The findings of the Commission on factual questions are as binding on the courts as are the verdicts of juries. *Ozan Lumber Co.* v. *Garner,* 208

Ark. 645, 187 S. W. 2d 181, and cases there cited. And we have held that the "Circuit Court on appeal from the Commission, and this court, on appeal from the Circuit Court, must weigh the testimony in the strongest light in favor of the Commission's finding." *Hughes* v. *Tapley, Admr'x.,* 206 Ark. 739, 177 S. W. 2d 429.

In the Hobbs-Western case, above cited, the Commission found that Hobbs-Western was the principal contractor and that Lea was a subcontractor for it, and we affirmed. Here, with very substantial evidence to support a contrary finding, we must again and do affirm the judgment of the Circuit Court which affirmed the award of the Commission.

Affirmed.

GLOVER *v.* STATE.

4454 204 S. W. 2d 373

Opinion delivered September 22, 1947.

Bruce Ivy, for appellant.

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

ROBINS, J. Appellant, charged by information with having committed murder in the first degree by striking and beating E. A. Sides with a bottle, was by a trial jury found guilty of voluntary manslaughter and his punishment fixed at imprisonment in the penitentiary for seven years. From a judgment imposing sentence in accordance with the verdict he has appealed.

For reversal it is first urged by appellant that the evidence was insufficient to establish that Sides died as a result of a blow inflicted by appellant.

The evidence tended to show that a group of negroes were gambling with dice on a sandbar or island in the Mississippi River when Sides and two other white men came up. Sides took part in the game and became angered at the manner in which some of the participants were handling the dice. Sides threatened violence, and appellant, who was standing by Sides at the time, but not playing, said "white folks, you won't hit me." Sides then pushed appellant, who pushed Sides, and Sides then slapped appellant. Appellant, who was left-handed, thereupon drew a "soda-water" bottle from his rear pocket and struck Sides on the right temple with the bottle. The blow staggered Sides, but he did not fall. He remained around the locality of the dice game for some time. He finally got someone to row him across the river and he was found unconscious on the river bank by searchers early the following morning. He died shortly thereafter.

The undertaker who handled Sides' body testified that there was a post-mortem examination which revealed a fracture and indentation of the skull on the side of Sides' head.

The difficulty occurred on June 19, 1938, but appellant was not found by the officers until shortly before the

trial which occurred on February 18, 1947. He was arrested in Chicago, where he had gone soon after the difficulty. He had assumed the name of "Will Jones," and denied his identity when first arrested.

In the case of *Outler* v. *State,* 154 Ark. 598, 243 S. W. 851, the evidence showed that on the night of December 24, 1921, Outler struck Blackburn on the head with a gun and that Blackburn walked out of the house where the difficulty occurred, went home and died early the following morning. There was no medical testimony to show the cause of Blackburn's death. This court, holding that the testimony was sufficient to justify the jury's finding that the blow inflicted by Outler caused Blackburn's death, sustained a conviction of murder in the first degree. Chief Justice McCulloch, in that case, said:

"There is nothing, however, in the record to show that there was any other cause for the death which resulted so soon after the infliction of the blow, and the jury were authorized, we think, in drawing the inference, even in the absence of direct proof on the subject, that death resulted from the blow." We cited and followed this holding in the Outler case in the recent case of *Jackson* v. *State,* 206 Ark. 611, 176 S. W. 2d 909.

In the case at bar it was shown that Sides, a strong, healthy man, received a blow, inflicted with a bottle, on his right temple. The blow staggered him. In less than twenty-four hours from the time he was struck he was found in an unconscious condition with a fracture and indentation in his skull. He died shortly thereafter. No other cause of his death was suggested, and appellant admitted that he was going under an assumed name because he had been told that he had killed a white man. Under all these circumstances the jury had a right to infer that the blow inflicted by appellant caused the death of Sides.

It is next urged by appellant that error prejudicial to him was committed by the court in not granting a mistrial because of questions by the prosecuting attorney as

to appellant's flight, as to his assumption of an alias in Chicago and as to the employment of his counsel by a civic organization. The objection of appellant to the question as to employment of appellant's attorney was sustained by the court, and other questions were made harmless by the answers. We do not find any such abuse of discretion by the lower court in denying a mistrial as would call for a reversal by us.

It is finally argued by appellant that the lower court erred in telling the jury that appellant would be eligible to apply for parole after he had served one-third of his sentence. This statement was made by the court in answer to an inquiry from the jury while they were deliberating. The court correctly answered the jury's query and committed no error in doing so. *Jones* v. *State,* 161 Ark. 242, 255 S. W. 876.

The judgment of the lower court is affirmed.

HODGE *v.* STATE.

4458 204 S. W. 2d 375

Opinion delivered September 22, 1947.

Claude F. Cooper, for appellant.

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

SMITH, J. By this appeal appellant seeks a reversal of a judgment sentencing him to the penitentiary for an assault with intent to rob D. L. Matthews. He alleges three errors for the reversal of the judgment: (a) That he was convicted upon the uncorroborated testimony of Eugene Belcher, an admitted accomplice; (b) that a requested instruction was erroneously refused; and (c) that certain incompetent testimony was admitted over his objection.

Belcher testified that he was a boarder in appellant's home, and that both had been employed for a week picking cotton for Matthews, and that appellant suggested that they make some easy money by robbing Matthews. The first plan was to entice Matthews to a tourist camp and rob him there, but that plan miscarried.

A second plan eventuated in the attempt to rob for which appellant was convicted. The details as testified to by Belcher were as follows: The assault was committed December 7, 1946, and appellant and Matthews spent much of that day together, and they drank both whiskey and beer, and Matthews admitted that he was considerably under the influence of this liquor, but denied being drunk. The plan was that appellant would drive Matthews' car home and that on the way he would stop the car at an appointed place where Belcher would be hidden in a ditch, and that when he and Matthews got out of the car, Belcher would appear armed with a pistol, and disguised with a mask, and would "stick up" both appellant and Matthews and rob them.

Belcher testified that he hid himself in the ditch as agreed, and that in about twenty minutes Matthews' car, driven by appellant, appeared and stopped at a place about fifteen feet from Belcher's place of concealment. There was a small mudhole in the road, and instead of driving around it as other cars had done, appellant stopped

his car in the mudhole and stated that he had to attend a call of nature, and both he and Matthews got out of the car, one on the right side, the other on the left. But appellant, who was driving, got out on the left-hand side and walked around the car and stood by the side of Matthews and was standing there when Belcher arose from the ditch and advanced, pistol in hand, demanding that appellant and Matthews hold up their hands. The command to "stick 'em up" was repeated, Matthews recognized Belcher's voice and when Belcher began feeling for Matthews' pockets the latter grabbed the pistol and a struggle ensued, and Matthews either tripped and fell or was knocked down to the ground with Belcher on top of him. Belcher testified that he saw appellant raise his hand and that he thought appellant struck Matthews, but he later testified that he had no recollection of having been struck.

While Matthews was on the ground he called on appellant for help, which was not given. Appellant may not have been as drunk as Matthews, or may have had less courage, but he gave Matthews no assistance. The lights on Matthews' car had been turned off, but before the robbery was completed a car drove by and Belcher desisted in his attempt to rob. He removed his mask and told Matthews that he was sorry for what he had done. Matthews responded, "Just forget about it and I will say nothing about it and you do the same," and appellant said, "That is the thing to do before it gets into court." Appellant cursed Belcher and said he wanted nothing more to do with him. The testimony is undisputed, however, that Belcher spent that night at appellant's home.

The pistol which Belcher had when the assault was made was produced at the trial, and there was testimony that on the afternoon of that day appellant exhibited a pistol in the place of business of one Flanagan who testified that the pistol which he there saw resembled the pistol which Belcher used in the assault, but Flanagan could not say that it was the same pistol.

Matthews testified that he did not remember that anyone had struck him, but that when he reached home he found a wound on his head and blood on his hat and in his hair. The admission of this testimony is one of the errors assigned, the ground therefor being that the hat produced at the trial on which there were blood stains, had not been properly identified, but Matthews did testify that the hat in question was the one which he was wearing when he was assaulted.

Appellant requested that the court instruct the jury: "That under the law the defendant is presumed to be innocent, and that that presumption attends him throughout the trial and is strong enough within itself to acquit the defendant, until and unless the State proves him guilty beyond a reasonable doubt." The refusal to give this instruction is assigned as error.

But the court had charged the jury fully and correctly as to the law in regard to a reasonable doubt, and had instructed the jury that "The defendant is presumed to be innocent until proven guilty and if upon the whole case there is a reasonable doubt of his guilt, then it will be your duty to acquit him."

The instructions had all been given before appellant requested the instruction set out above, and the court evidently thought that the subject had been sufficiently and correctly covered and that it was not necessary to multiply instructions. The instruction might well have been given, but we think it was substantially covered by those which were given, and that it was not error to refuse to repeat what had already been said.

The chief insistence for the reversal of the judgment is that the testimony of Belcher was without substantial corroboration. Upon this issue the court correctly charged the jury as to the necessity for, and the character and sufficiency of the corroboration of the testimony of an accomplice, which the law requires. It is urged that the only corroboration of Belcher's testimony connecting appellant with the commission of the crime is the fact

that appellant was present and refused, when requested, to render assistance to Matthews in his struggle with Belcher.

It may be conceded that such testimony alone would not suffice to corroborate appellant an accomplice, but the case does not rest upon that fact alone. Matthews testified that appellant in driving the car to his home, did not travel the route he usually employed, but that this fact did not arouse his suspicion as the route taken led to his home, but there is a significant circumstance which the jury may have found was not a mere coincidence, and that is that appellant did in fact stop the car at the place where Belcher testified that it was agreed the car would stop, this being the place where Belcher was in hiding in a ditch. It is true that after the assault appellant cursed Belcher and stated that he wanted nothing more to do with him, but it is also true that he joined in a suggestion that the matter be dropped before it got into court, and more significant is the undisputed testimony that after being "held up" by Belcher he permitted Belcher to spend the remainder of the night in his home. This testimony is corroborative of that of Belcher that the "hold-up" was a scheme whereby it would appear to Matthews that both he and appellant were being "held up," and that by calmly submitting to being "held up," Matthews would offer no resistance. This inference is, we think, reasonably deducible from the testimony in its entirety and furnishes the corroboration of Belcher's testimony which the law requires.

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

4452 204 S. W. 2d 376

Opinion delivered September 22, 1947.

[redacted]

Francis Wilson, J. Bruce Streett and *Floyd E. Stein,* for appellant.

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

HOLT, J. On a charge of assault with intent to kill, appellant, I. W. Coffer, was tried, found guilty and punishment of three years in the State Penitentiary assessed by the jury. From the judgment on the verdict comes this appeal.

Eight alleged errors were assigned in the motion for a new trial. The first seven, in effect, challenged the sufficiency of the evidence to support the verdict, and in the eighth assignment appellant alleged: "The Court erred in his oral instructions to the jury over the objections of the defendant."

(1)

The evidence was to the following effect:

Mrs. Harold Boggie testified that she left her automobile in a garage in Camden, Arkansas, and directed one of the employees, or mechanics, to make certain repairs. She then left in company with another lady and some hours later returned for the car. Appellant, I. W. (Bill) Coffer had attempted to make the necessary repairs which involved the wiring and lighting system. In the presence of herself and the other lady, another mechanic and employee, "Bookie" Lee, after examining Coffer's work said: "Bill, you haven't checked this all the way through and you told me you had, but you haven't and said 'we don't want to turn out anything like this' and he (Coffer) said 'you can fix it yourself,'" and Bookie said: "Well, I sure can do it and they backed the car out and put the car in an adjoining stall and another mechanic was there and he told him to help him, that I wanted the car out, and they were under the car checking the wires under there, and this friend and I walked away from the car when we heard the commotion. . . . I heard someone say 'Bill (meaning appellant) please don't do that,' and I looked around and Mr. Coffer was advancing toward Mr. Lee with a crowbar, I did not see Mr. Lee come up from under the car, but I saw him run with Mr. Coffer after him with the crowbar, and he ran up against a bench because there was no other way to get out of there, and that is where Coffer stopped him."

Appellant struck Lee from three to six times before he was stopped. Lee had nothing in his hands and was unarmed and tried to defend himself with his fists.

Bookie Lee, the victim of appellant's assault, testified that, as was his duty, he checked Mrs. Boggie's car after appellant had attempted to make the repairs and discovered, in effect, that the repairs were incomplete and "I called him to come back and let's fix it and he came over there and told me that I could fix the 'damn lights' myself. . . . I backed the car out of his stall

and gave it to Ray Mitchell in the next stall and I got in there and helped him and Bill said 'come here a minute' and I got up and went over there and he said 'you s-of-a-b, you have driven the last car out of my stall that you ever will' and he hit me with a bar on my head. . . . I was knocked blind. I tried to get away from him—I was barehanded, didn't have a thing—and I don't know what else happened." "I was hit across my head, across my shoulder and on my arm. I was knocked blind and addled." Lee was taken to the hospital where he remained from about Wednesday to Saturday. He later went to a Memphis hospital where he had an operation on his arm.

Dr. R. B. Robbins testified: "Q. This patient (meaning Bookie Lee) didn't have a concussion, did he? A. Yes, he had that and a contusion of the brain. Contusion of the brain is the same thing as a bruise,—it is a bruise of the brain."

It is undisputed that appellant struck his victim, Lee, with a steel bar about two feet long and one inch in diameter.

J. B. Jackson testified: "A. When I first noticed them they were standing behind a little truck and I turned around and I saw Mr. Coffer make a lick with something and he hit Bookie over the head and Bookie ran and he struck at him again and Bookie ran around the truck and Mr. Coffer went the other way and they met next to me and he struck at him again and Bookie threw his arm up and he hit him on the arm and they got in front of the truck and I got in between them and Mr. Coffer hit at him again with the bar and struck me. . . . Q. How many times did he hit him? A. Twice. Q. And do you know if he hit him before that? A. Twice before that I saw."

F. A. Sanders testified that he was present and at the time appellant hit Lee "Bill made the remark to me that 'I am going to whip hell out of him and take my tools and go to the house' and I said 'Bill, that is not the thing

to do, go smoke a cigarette and cool off.' Q. What was Bill's manner when he made that remark—whether he was mad or not? A. He was pretty mad—he seemed to be mad, yes, sir. . . . Q. What was Bookie's condition as to when they separated? A. He acted like he was about out." Sanders and another employee "carried him to the hospital."

There was other evidence on behalf of the State tending to corroborate the above testimony.

Appellant testified on his own behalf that he struck his victim, Lee, with a steel bar in self-defense and further testified: "He (meaning Bookie Lee) seemed to say that I didn't know what I was doing, and I got out from under the car and walked over to my bench. . . . I saw Shorty (meaning Witness Sanders) and he said 'you are mad, aren't you' and I said 'no.' I told him I ought to whip the hell out of him and quit for saying what he did to me before these ladies, and he told me to go smoke a cigarette and cool off, and I was cleaning up my tools, and while I was at the back door I made up my mind to quit, and when I called Bookie to tell him I was going to quit, he came at me with a screwdriver in his hand like he was mad because I didn't fix the car."

We think the above testimony was amply sufficient to warrant the jury's verdict and the judgment. On appeal, we are required to view the testimony in the light most favorable to the State, and the jury's verdict, when supported by substantial evidence, as here, is binding on us. *Brown* v. *State,* 208 Ark. 180, 185 S. W. 2d 274.

(2)

At the conclusion of all the testimony in the case, the trial court gave a number of unnumbered oral instructions which we have carefully examined and find to be proper declarations of law as applicable to the facts presented. Appellant made no specific objections to any of the instructions. We copy from the record the only reference to any objection by appellant. "Whereupon, the

court gave to the jury, over the general objections of the defendant, the following instructions, to-wit: . . . Whereupon, at the conclusion of the giving of the oral instructions, the court asked if any further instructions were requested by the State or the defendant, and Mr. Stein, attorney for the defendant, asked the court for an instruction to the jury on manslaughter, which was given as follows: . . . The above and foregoing are all of the instructions requested, given or amended, by the court in the trial of this cause."

Appellant's objection to the instructions at most was a general objection *en masse* to all of the instructions and cannot be sustained if any one of the instructions is good. "It has been repeatedly held that a general exception to several instructions will not be entertained on appeal, if any of them is good. *Owen* v. *State,* 86 Ark. 317, 111 S. W. 466; *Timer* v. *State,* 109 Ark. 138, 158 S. W. 1087; *Graham* v. *State,* 197 Ark. 50, 121 S. W. 2d 892"; *Massey* v. *State,* 207 Ark. 675, 182 S. W. 2d 671.

As indicated, we think none of the instructions given orally by the court was erroneous. Certainly all of them were not. Similar instructions have been many times given by trial courts and approved by this court.

From the record, appellant appears to have had a fair and impartial trial and no error appearing, the judgment is affirmed.

TAYLOR *v.* STATE.

4456 204 S. W. 2d 379

Opinion delivered September 22, 1947.

H. S. Grant, for appellant.

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

ED. F. MCFADDIN, Justice. Lucy Taylor was convicted of second degree murder on an information charging her with having killed Earl Sullivan by striking him over the head with a certain blunt instrument. From that conviction she has appealed. The only question that has given us serious concern is whether the evidence was sufficient to take the case to the jury. The defendant offered no evidence, but relied on the insufficiency of the State's case. Viewed in its most favorable light, the evidence offered by the State proved, or tended to prove, these facts:

The deceased was infatuated with the defendant. About noon of March 26, 1946, the deceased and the defendant were together in Augusta. The deceased was in an intoxicated condition, and opened his billfold and showed his money (said to be several hundred dollars), and the defendant made the remark, "We are getting away from here." On the same day the deceased and defendant, accompanied by Sam Taylor, Mrs. Sam Taylor and Cal Kaysinger, left Augusta about 2:00 p. m. to go to deceased's cabin on the shores of Taylor Bay, a journey of about 45 minutes. Shortly after 4:00 p. m. the defendant and the three others previously named returned to Augusta, and reported at the sheriff's office that the deceased had just drowned in Taylor Bay.* The defendant returned to Taylor Bay with the party, and pointed out to the officers the location where she said the deceased had gone down, and she helped recover the body, which was found in the water ten or fifteen feet from the place she had designated. The deputy sheriff testified

* Little Bay is a branch of Taylor Bay, and some of the witnesses referred to Little Bay.

that the defendant, and Sam Taylor and wife, and Cal Kaysinger showed the effects of recent drinking. An autopsy performed by Dr. McGuire, the coroner, established that the deceased did not die by drowning (no water in his lungs and no evidence of swimmer's cramp), and also that the deceased did not die from heart failure (the heart was normal). The autopsy revealed that the deceased had suffered a blow on his head over the right eye, which blow did not fracture the skull, but produced a hemorrhage of the brain, and Dr. McGuire testified that this hemorrhage was the cause of death. An oar was found near the deceased's cabin, several hundred feet or more from the shores of Taylor Bay, and witnesses said that the oar showed a "fresh break." When deceased's body was recovered, he was wearing only long underwear and a leather jacket. His other clothes—all wet—were found on the bank of Taylor Bay. The purse contained only sixty-five cents. The billfold was never found. Deceased's watch, with water under the crystal, was found in the road about 50 feet south of his clothes. It was testified that on March 26, 1946, the weather was a little cool for swimming. The depth of Taylor Bay was about 18 feet; there was no current.

On the facts as above recited, the State claimed that the defendant had killed the deceased by striking him with the oar—or aided and abetted others in such killing —and that deceased's body had been thrown into the bay to indicate drowning. Robbery was advanced as the motive for the murder.

The defendant offered no evidence, but the State introduced statements that the defendant made to the officers at the time of the recovery of the deceased's body, and also at the coroner's inquest. The substance of these statements was, that when the defendant and deceased and the others reached defendant's cabin on the bank of the bay, some of them went out in the boat, and that deceased fell out of the boat and struck his head on the side of the boat; that they pulled deceased out of the water and that they all started to go to the deceased's cabin

where they were to have a fish fry; that while the others were preparing to cook the fish, the deceased bantered the defendant for the two of them to swim across the bay and back, a total distance of about 140 feet; that they swam across the bay, and were about halfway back when deceased made an outcry and sank in the water; that the defendant was almost exhausted, but was able to swim to the bank and give the alarm; and that defendant and the others, after unsuccessfully trying to recover the body, then went to Augusta and reported deceased to have drowned.

In addition, the sheriff testified that, while the case was pending, the defendant told him that she would not have had to knock the deceased in the head, because he would have given her money; that the others might have taken the deceased's money, but that she had not done so.

We have detailed the evidence at considerable length to show that, in the final analysis, circumstantial evidence must be relied on to determine whether the deceased met his death at the hands of the defendant, or died through deceased's own act. The issue presented from the State's testimony was (1) whether the deceased was killed by a blow on the head inflicted by the defendant; or (2) whether the deceased struck his head on the side of the boat, and such blow caused his subsequent death while he was swimming. The State called the coroner, Dr. McGuire, to establish that the deceased died as a result of a blow on his head. The defendant's attorney asked the doctor, concerning the deceased: "Q. If he did fall and hit his head on the side of the boat, would that cause him to have the abrasion on the side of his head like that? A. If he was living when he fell, yes, sir. Q. How long does it take for the blood to get into the capillaries? A. It takes some time. Q. Say a man was hit in the back of the head with a beer bottle, won't the blood capillaries get into the brain? A. Yes, sir, you get that in the brain. Q. That is the way this condition was found, where the blood went in the brain? A. Yes, sir. . . . Q. If he had fallen on the boat and struck his head on the side of

the boat and made that abrasion, would that have caused it? A. If he was living at the time? Q. Yes? A. Yes, sir. Q. Could that have caused the death in this case? A. Yes, sir, it could have caused the death."

On redirect examination the prosecuting attorney asked the following question, and was answered as follows: "Q. Mr. Grant has asked you with reference to the deceased falling and striking his head against the gunwale of the boat, I will ask you if in your opinion, if the deceased fell out of the boat, whether he struck his head or not, and then he came out on the bank and walked down the bank three or four hundred yards and went in swimming, could he do that? A. Yes, sir, things like that happen. A few months ago a man went to the University Hospital and then he went back home and died the next day." Somewhat similar questions and answers appear repeatedly; but we give the above as typical.

The State did not attempt to explain away Dr. McGuire's testimony on this point, so that the record here before us presents a case where the State relied on circumstantial evidence, and yet did not negative circumstances tending to show that the deceased died by his own act. Such negation was vital to the State's case. We therefore have a chain of circumstances offered by the State with one vital link in the chain left unclosed, *i. e.*, the State did not show that the deceased could not have come to his death by his own involuntary act of striking his head on the side of the boat. Until the State offered testimony legally sufficient to establish the defendant's guilt beyond a reasonable doubt, the evidence was too slight to justify a conviction. The recent case of *Johnson* v. *State,* 210 Ark. 881, 197 S. W. 2d 936, is apropos; we quote: "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, 1052, 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.' "

We cannot do better than to paraphrase and apply to this case the language used by Mr. Justice FRAUENTHAL in the case of *Reed* v. *State,* 97 Ark. 156, 133 S. W. 604: It may be that the defendant is guilty of the crime, but a careful examination of the evidence shows that it was too slight to justify a conviction. It may be that on a future trial additional evidence may be introduced showing guilt.

The judgment of the lower court is therefore reversed, and the cause remanded for a new trial.

RICHARDSON *v.* STATE.

4460 204 S. W. 2d 477

Opinion delivered September 22, 1947.

Rehearing denied October 20, 1947.

P. L. Smith, for appellant.

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

MINOR W. MILLWEE, Justice. The Grand Jury of Pike county indicted appellant, Bones Richardson, for selling intoxicating liquor on Sunday in violation of § 2 of Act 257 of 1943. He was found guilty by a petit jury and his punishment fixed at the minimum fine of $100 prescribed by the Act.

Harvey Lancaster testified on behalf of the State that on Friday, preceding Sunday, March 16, 1946, he gave Homer Thomas $8 with which to procure whiskey. Thomas lives across the road from his uncle, the appellant, near the town of Antoine. On the Sunday in question Lancaster and a companion drove to the home of Thomas for the whiskey. Thomas told Lancaster he did not have the whiskey, but could get it within a short time, if they would drive down the road a short distance. As they drove away, Thomas went toward the home of appellant. Upon their return, Thomas delivered to Lancaster a pint of whiskey and the balance of the $8 previously advanced, after deducting the purchase price of $5.

Homer Thomas testified to the same facts as Lancaster. He also testified that, as Lancaster and his companion drove down the road, he went to appellant's place where he obtained the pint of whiskey from appellant for which he paid $5. Over appellant's objection, several

witnesses testified that his reputation for engaging in the illegal sale of liquor was bad.

For reversal of the judgment it is first insisted that the testimony of the witness, Homer Thomas, is uncorroborated and, therefore, insufficient to sustain a conviction under § 4017 of Pope's Digest. This statute provides that a conviction cannot be had in felony cases upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense. By the terms of the statute, the requirement of corroboration is not only confined to felony cases, but it is further provided that a conviction may be had upon the testimony of an accomplice, alone, in misdemeanor cases. Appellant was convicted of a misdemeanor and the uncorroborated testimony of Homer Thomas, if believed by the jury, was sufficient to sustain a conviction.

The second contention of appellant is that the trial court erred in the admission of evidence of appellant's reputation for illegally selling intoxicating liquor. Article VI, § 7, Act 108 of 1935 (Pope's Digest, § 14140), provides: "In any prosecution or proceeding for any violation of this Act, the general reputation of the defendant or defendants for moonshining, bootlegging, or being engaged in the illicit manufacture of, or trade in, intoxicating liquors, shall be admissible in evidence against said defendant or defendants."

It is argued that Act 257 of 1943, under which appellant was convicted, is an original act against Sunday sales of liquor; that the instant prosecution is not for a violation of Act 108 of 1935; and that the statute making evidence of reputation admissible is, therefore, inapplicable. We cannot agree with this contention. By Art. VI, § 1(b), Act 108 of 1935, the sale of intoxicating liquor on Sunday was made a misdemeanor and punishment for the initial violation is the same as that imposed by the act under which appellant was convicted. This subsection of the 1935 act was amended by § 1(b) of Act 356 of 1941 to make the offense of selling liquor on Sunday a

felony. The 1941 act was repealed by Act 257 of 1943, which is virtually a reënactment of Art. VI, § 1(b), Act 108 of 1935, in so far as the sale of intoxicating liquor on Sunday is concerned. Thus, the effect of Act 257 of 1943 was to reinstate the provisions of Act 108 of 1935 relating to Sunday sales of intoxicating liquor, and the instant proceeding should be construed as one for a violation of Act 108 of 1935, as amended by subsequent legislation on the subject.

Evidence of defendant's reputation for engaging in the illegal liquor traffic was held admissible, under the statute, where the charge was possessing liquor for sale, in the recent cases of *Hughes* v. *State,* 209 Ark. 125, 189 S. W. 2d 713, and *Harris* v. *City of Harrison, ante,* p. 889, 204 S. W. 2d 167. Appellant recognizes the force of these cases, but insists that the statute should be restricted in its application to cases involving possession only, and that it does not apply where the charge is selling liquor on Sunday. The statute, however, applies in any prosecution for any violation of Act 108 of 1935, and is applicable here.

We agree that § 14140, Pope's Digest, *supra,* should be restricted in its application. It will be noted that the statute does not attempt to make proof of reputation for engaging in the illegal liquor trade sufficient, in itself, to sustain a conviction, nor does it make it even *prima facie* evidence of guilt. To predicate criminality upon the proof of reputation alone would be violative of valuable rights secured by the due process clauses of both the state and federal constitutions. Amendment XIV, § 1, U. S. Constitution; Art. II, § 8, Ark. Constitution. The effect of such a statute would be the establishment of guilt solely by extrajudicial utterances of third parties, and a defendant would be thereby deprived of the protection of one of the strongest presumptions known to the criminal law, namely, that of innocence until guilt is established by competent evidence beyond a reasonable doubt. See Annotation, 92 A. L. R. 1228-1236.

We, therefore, construe the statute to mean that proof of recent reputation for engaging in the illegal sale of intoxicating liquors is competent proof thereof, but insufficient to sustain a conviction, unless corroborated by other substantial evidence which tends to establish the guilt of the accused. When thus restricted in its application, we think the statute comes within the constitutional powers of the Legislature.

Finding no error, the judgment is affirmed.

TERRELL *v.* STATE.

4453 204 S. W. 2d 473

Opinion delivered September 22, 1947.

Rehearing denied October 20, 1947.

Henry B. Whitley and *J. R. Wilson,* for appellant.

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

GRIFFIN SMITH, Chief Justice. Following the death of her husband in April 1945, Mrs. Stella S. Terrell continued operation of the small store they owned at Strong.

The appeal is from a judgment padlocking the place of business because liquor was kept there for sale, contrary to law. It is insisted that proof was insufficient to support the judgment, that the law was misconstrued; that the Court abused its discretion in refusing to grant an appeal from the defendant's plea of guilty in the Mayor's Court, and that in any event the direction to close, predicated upon disregard of the Court's prior injunctive order, should have been limited to one year. We agree with the last contention only.

April 27, 1946, on affidavit of Prosecuting Attorney Lamar Smead, a warrant was issued charging Mrs. Terrell with the illegal sale of intoxicating liquors. The case was docketed April 30th. When the defendant pleaded not guilty there was a continuance until the complaining officer and Mrs. Terrell's attorney could agree upon a date. Bond was set at $500.

Mrs. Terrell was promptly arrested on a second warrant in which she was charged with possession of intoxicating liquors "for the purpose of sale in her store building located in Strong, Arkansas." Although pleading not guilty she was fined $500.

A third warrant—issued April 30—charged Mrs. Terrell with possession of intoxicating liquors for the purpose of sale "in her home in Strong, Arkansas." Notwithstanding denials that the transaction occurred, the defendant was fined $500. A fourth and a fifth warrant were served, one charging illegal transportation of liquor for the purpose of sale in the store building, the other charging possession for the purpose of sale. In each of these cases a $500 fine was assessed.

May 29, 1946, Mrs. Terrell appealed from the convictions. The record indorsement appearing on the transcript of Case No. 162—possessing intoxicating liquors for the purpose of sale in the store—is, "Pleads guilty in Circuit Court, assessed $100 and cost by Gus W. Jones, Judge. Paid." The date is Sept. 11, 1946.

In the case before us the Prosecuting Attorney testified that in consequence of a discussion of all of the charges (Mrs. Terrell having been represented by Mr. Walter L. Brown, a highly reputable attorney) it was agreed that if the defendant would pay the single reduced fine and promise to not further violate the liquor laws, other cases would be dismissed. Prior to this time (May 3) Circuit Court had, on petition of the Prosecuting Attorney, enjoined Mrs. Terrell from operating the place in an unlawful manner in respect of possession or sale of liquor.

This brings us to a consideration of the permanent injunction and so-called padlock order.

February 22, 1947, a City Marshal and Constable of Strong observed appellant's fifteen-year-old son Damon and a boy named Fife as they came from the direction of Mrs. Terrell's home carrying a package. An hour later there was a second trip. The officer detained the boys in an alley back of Mrs. Terrell's store. Concealed in a bag were three bottles, each containing a fifth of a gallon of liquor; also three bottles of "half-pint" liquor. In the aggregate there was slightly less than a gallon of intoxicants.

When taken before the Mayor three days later the boys were accompanied by Damon's mother who testified the liquor was hers and that she had sent for it. Under this evidence the causes were transferred to Juvenile Court. Mrs. Terrell was promptly arrested, charged with "having intoxicating liquors in possession for sale." She entered a plea of guilty and was fined $150. This was promptly paid by check. The following afternoon a temporary restraining order directing that the store be closed was served upon Mrs. Terrell. On the return day (March 10) the cause was continued until March 15th. On that date there was filed in Circuit Court a prayer for appeal from the judgment of February 25th. Act 125, approved February 26, 1943. Acting, as he believed, within the discretion conferred, Judge Jones declined to grant the prayer; whereupon an appeal was asked. At

the same time response was filed to the proceeding designed to make the temporary injunction permanent.

At the hearings in this case and on the petition for appeal, testimony was taken regarding circumstances under which Mrs. Terrell entered her plea of guilty and paid the fine of $150. In determining whether the limited injunction of 1946 had been violated, the investigation was comprehensive. Prosecuting Attorney Smead testified that when the $100 fine was paid he and Mr. Brown, the latter representing Mrs. Terrell, agreed that a plea of guilty should be entered with a fine in one case, and upon the defendant's promise that she would not in the future violate the liquor laws, other pending criminal charges would be dismissed. In response to the Court's question, "In that petition in 1946, how much whiskey was involved?" Mr. Smead replied: "There was a great lot in the place at that time, and there were several times when the officers went there and found numbers and numbers of empty bottles, probably fifty: a hundred or more at various times."[1] Continuing, the witness said: "This whiskey was found secreted in a secret place."

Marshal Baskin testified that he had noticed various people "drinking and coming out [of the store]; I see them coming out of there drinking." On cross-examination this statement was modified with the explanation that he had not actually seen the persons mentioned taking whiskey, but had observed their conduct and demeanor. In 1946 two raids were made. This witness did not arrive until the whiskey had been found by two other officers, but he saw them bringing it out. A small hole, fourteen or eighteen inches square, "had been cut in the loft." As a result of two raids a total of "sixty some odd bottles," not including empties, were taken. There were probably seven "fifths," nine pints, and forty-four half pints.

The defendant insisted in the Court below, and argues here, that she was "tricked" into entering the pleas

[1] The Court sustained an objection that this testimony, in part, was hearsay, but substantially the same facts were established by an officer who had direct information.

of guilty, having been assured by officers that payment would end the matter; hence, she urges, there is no competent proof that she kept liquor for sale, or that she violated the 1946 injunction. It is further asserted that in sending her son for the whiskey February 22 Mrs. Terrell was preparing to go on a picnic with friends, and that she had been directed by a physician to take whiskey medicinally because of a heart condition. A further defense is that the quantity of intoxicants transported by young Terrell was less than a gallon, and under Acts 91 and 423 of 1947 possession of not more than a gallon of liquor in dry territory is lawful and there is no presumption it was intended for sale.

Act 423 was not approved until March 28th—more than a month after the alleged offense was committed. The printed volumes of the Acts of 1947 carry a purported emergency clause to Act 91, but records in the Secretary of State's office disclose that it failed of adoption. Result is that it could not become effective until ninety days after adjournment of the legislative session.

Evidence that Mrs. Terrell was imposed upon and that she entered pleas of guilty in ignorance of her legal rights is not sufficiently convincing to warrant us in reversing the trial court. The Judge carefully reviewed major transactions and stated his conclusions and gave reasons for his action. In determining that Damon Terrell's possession was the possession of his mother, the Judge considered the defendant's record, proximity of her car to the store, the reasonableness or unreasonableness that with a heart ailment she intended to take the quantity of liquor in question on a picnic for use of herself and friends—and he concluded the more rational inference was that the liquor had been obtained for sale. The defendant's evidence in contradiction is not sufficient to justify a reversal of this finding.

In *Futrell* v. *State,* 207 Ark. 452, 181 S. W. 2d 680, it was held that while the Court, in respect of a nuisance, might permanently enjoin, and that as punishment for

violation of an abatement injunction the place of business might be closed, such closing could not be for a period in excess of one year.

It will be presumed in the case at bar that the Court intended the word "permanently" to cover the maximum period allowed by law. Upon remand the judgment will be made to reflect this intent.

With this modification the judgment is affirmed.

PARNELL *v.* PARNELL.

4-8140 204 S. W. 2d 469

Opinion delivered September 29, 1947.

John W. Nance, for appellant.

Jeff Duty and *Rex Perkins,* for appellee.

ROBINS, J. By the lower court's decree appellee was granted an absolute divorce from appellant on the ground that appellant had been guilty of such indignities toward appellee as to render his life with her intolerable. Appellant seeks to reverse that decree.

These parties were married in 1918, and lived together until 1945, when appellee left his home because, as he averred, his wife's constant nagging and quarreling made it impossible for him longer to live with her. Seven children, six of whom are living, were born to them, the

youngest being thirteen years of age and the eldest twenty-eight years of age at the time of the trial.

Appellee testified that several years before the separation appellant began to quarrel at him and to make unjust accusations against him and that this conduct on her part continued until it injured his health and forced him to leave home.

Appellant and five of their children, in their testimony, denied appellee's version.

It is unnecessary for us to determine which account of this unfortunate controversy is supported by a preponderance of the evidence, because a careful reading of the entire record discloses that there was no sufficient corroboration of appellee's testimony.

The rule in this state, long established and uniformly adhered to in our decisions, is that in order to justify the granting of a divorce the testimony of the complaining spouse, as to the grounds for divorce, must be corroborated by that of some other witness. *Rie* v. *Rie,* 34 Ark. 37; *Kurtz* v. *Kurtz,* 38 Ark. 119; *Scarborough* v. *Scarborough,* 54 Ark. 20, 14 S. W. 1098; *Kientz* v. *Kientz,* 104 Ark. 381, 149 S. W. 86; *Arnold* v. *Arnold,* 115 Ark. 32, 170 S. W. 486; *Welborn* v. *Welborn,* 189 Ark. 1063, 76 S. W. 2d 98; *Calhoon* v. *Calhoon,* 209 Ark. 80, 189 S. W. 2d 644.

Appellee introduced four witnesses, but none of them testified to any such conduct on the part of appellant as would justify a decree of divorce against her. One of these witnesses was a physician, who testified as to appellee's bad health, and stated that he had concluded from appellee's "psychical history" that appellee's health had been adversely affected by domestic discord. Another was a neighbor who stated that on one occasion appellant told her that appellee had been keeping bad company; and appellee's other two witnesses testified merely as to the good character of appellee. None of these witnesses corroborated appellee as to any mistreatment of him by appellant.

Counsel for appellee argue that corroboration as to these alleged indignities is to be found in the testimony of appellant and that of their children, who testified on her behalf. Even if the testimony of appellant reflected any admission of appellee's charges against her—and we find no such admission in her testimony—this would not obviate the requirement that appellee's testimony be corroborated. *Pryor* v. *Pryor,* 151 Ark. 150, 235 S. W. 419; *Read* v. *Read,* 158 Ark. 643, 240 S. W. 410; *Scales* v. *Scales,* 167 Ark. 298, 268 S. W. 9. The children of these parties did testify that there had been some trouble between their parents, but they placed the blame therefor on appellee, saying that he was high tempered and that he began the arguments. They praised their mother and said that she had done her duty to appellee in every way.

Since there was no corroboration of the testimony of appellee, the lower court erred in granting the divorce.

So much of the decree of the lower court as awards a divorce to appellee is reversed and this cause is remanded with directions to dismiss appellee's complaint for want of equity.

WILSON *v.* WILSON.

4-8190 204 S. W. 2d 479

Opinion delivered September 29, 1947.

John A. Hibbler and *John L. Sullivan,* for appellant.

DuVal L. Purkins, for appellee.

MINOR W. MILLWEE, Justice. W. T. Wilson was a colored farmer and schoolteacher residing near Portland in Ashley county in 1916 when he married appellee, Annie Wilson, one of his former pupils. Wilson was 14 years older than appellee. They resided in Ashley county for about seven years where he continued to teach school three months of each year and conducted farming operations on rented lands. Appellee kept house, assisted in the farm work, and, at odd times, engaged in hairdressing for the colored women of the community. The husband transacted all their business affairs.

The couple moved to Warren in Bradley county, Arkansas, in 1923. In October, 1923, Wilson purchased two lots for $200 in block 5, Butler's Addition to the City of Warren, located near the mill of the Bradley Lumber Co. In 1924, a home was built on one of these lots where the parties resided until his death in 1944. In October, 1924, five lots were purchased in blocks 5 and 6, Butler's Addition, for $375. In November, 1926, five other lots were purchased in block 5, Butler's Addition. Construc-

tion of small three-room rent houses was begun in 1924 and by 1928 fifteen of these houses had been built on the lots in blocks 5 and 6 of Butler's Addition. In March, 1940, a purchase was made from Mattie Gould of lots 16 and 17, Bell's Subdivision of the E. N. Wilson Addition, and lot 10, block 4, Butler's Addition, to the City of Warren, upon which seven rent houses were located. In March, 1941, lots 7 and 8, block 6, Butler's Addition to the City of Warren were purchased from Leanna Winters for $300. There were two rent houses on these lots which were paid for from rentals. W. T. Wilson was made grantee in the deeds evidencing all these purchases.

W. T. Wilson continued to teach in the colored schools at Warren from 1924 until his retirement in 1937. His salary was $75 a month for eight months during most of this period. He also looked after the rental of the tenant houses. After his retirement from the teaching profession, he drew a small monthly retirement pay until his death in 1944. Appellee kept house and for several years engaged in hairdressing. She also kept a few boarders who were employed by the lumber company. She assisted her husband in the collection of rentals and the earnings of both were placed in a common fund administered by the husband.

W. T. Wilson inherited 40.17 acres of land in Ashley county from his father's estate following the death of his mother in 1936. In October, 1943, he executed a lease of this land to William Bozeman for the years 1944, 1945 and 1946. This lease provided for annual rentals of $200, payable to Wilson, and further stipulated that in the event of Wilson's death during the term of the lease such rentals should be paid to appellee.

W. T. Wilson died September 1, 1944, childless and intestate. He was survived by appellee, his widow, and the appellants who are the brothers and sisters and other collateral heirs of deceased. Appellants are all of age. The deceased owed no debts at the time of his death and owned little personal property. Appellee received $150

from one life insurance policy and another for $55 was payable to the estate of the deceased.

Efforts of the parties to effect an amicable settlement of their respective interests in the estate failed, and appellee brought this suit in chancery court alleging that she was entitled to the rentals due under the three-year lease of the 40 acres in Ashley county owned by her husband at the time of his death; that her husband was made sole grantee in all the deeds to the Warren properties without her knowledge until after his death; that one-half of the purchase price of these properties was furnished by appellee and purchase made with the intent and understanding between appellee and her husband that the property would belong to them jointly; and that a resulting trust should be declared in appellee's favor to the extent of her payment of one-half the purchase price in all the Warren property. Appellee prayed that she be adjudged the owner of the $600 rentals due on the lease of the Ashley county 40-acre tract and that her life estate be quieted in said lands. She also prayed that her title to a three-fourths undivided interest in fee in the Bradley county property be quieted and confirmed.

In their answer, appellants admitted that all the deeds to the Warren property were made to W. T. Wilson as grantee, and denied the other material allegations of the complaint. Appellants prayed for an accounting of rents, the appointment of a receiver, and for distribution of the respective interests of the parties according to the law of descent and distribution.

The cause was submitted to the chancellor upon the pleadings, stipulations and the depositions of numerous witnesses whose testimony comprises four of the six volumes of the transcript. A decree was entered on July 8, 1946, adjudging appellee to be the owner of the $600 rentals accruing under the lease of the Ashley county lands and quieting her life estate therein. In addition to the undivided one-half interest with which appellee became endowed as a widow in the three lots purchased from Mattie Gould, the court decreed a resulting trust in her

favor to an undivided one-half of the one-half interest owned by her husband at the time of his death in this property. The court denied appellee's prayer that a resulting trust be declared in her favor in the other Warren properties. Appellants were charged with 70 per cent. of the costs and appellee with 30 per cent. There were several other matters determined by the decree which are not involved in this appeal.

Appellants have appealed from so much of the decree as holds appellee entitled to the $600 rental and establishes a resulting trust in the property acquired from Mattie Gould. They have also appealed from that part of the decree which makes them liable for 70 per cent. of the court costs.

Appellee has cross appealed from that part of the decree which denies a resulting trust in her favor in the remainder of the Warren properties.

MOTION TO DISMISS

Appellee has filed with her brief a motion to dismiss the appeal for appellants' failure to properly abstract the record in compliance with Rule IX (b) of this court. There are several obvious defects in the abstract furnished by appellants. It is unnecessary to point them out since appellee has cured this deficiency and waived her motion to dismiss by supplying us with a correct abstract of the record. *Springfield* v. *Steen,* 99 Ark. 241, 138 S. W. 453; *Sears* v. *Scott,* 210 Ark. 392, 197 S. W. 2d 33.

In *Springfield* v. *Steen, supra,* the court said: "Where the appellee has made a proper abstract, which is accepted by appellant as correct, or to which no objection is made, and then asks us to affirm the judgment for noncompliance with Rule 9 by appellant, we have denied his motion, and have taxed appellant with the additional costs because appellee has performed the duty to the court which is required of appellant." So here appellants will be charged with the additional costs incurred by appellee in abstracting the record, and appellee's motion to dismiss is denied.

RENTALS

Appellants contend that the chancellor erred in finding appellee entitled to the $600 in rentals under the lease of the 40-acre farm in Ashley county, the ancestral estate of W. T. Wilson, deceased. This lease was executed by W. T. Wilson in October, 1943, and contains the following provision: "It is expressly understood and agreed by and between lessor and lessee that in the event of the death of lessor during the term of this contract, such rentals as may be due from lessee under the terms of this contract shall be paid to Annie Wilson, wife of lessor." Appellants insist that appellee is merely made the agent of her husband's estate for collection of the rental moneys in the event of his death before maturity of the lease. If such had been the intention of the parties, it would have been a simple matter to have added this restriction on the rights of appellee in the wording of the lease.

We think the trial court correctly construed the terms of this paragraph of the lease and that appellee became the owner of the rentals accruing after the death of her husband. The situation is analogous to that where a deed conveys property, but reserves its use and possession for the lifetime of the grantor. In *Hatcher* v. *Buford,* 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507, this court said: "We think the better doctrine upon the transfer of the title to gifts *causa mortis* is that which accords with Justinian's definition, and recognizes the subject-matter of the gift as becoming the property of the donee in the event of the donor's death, *i. e.,* the donor's death is a condition precedent to the vesting of the title to the thing given in the donee. This seems to be the rule adopted by the English courts of chancery, and is supported also by eminent American courts and text writers." See, also, *Ammon* v. *Martin,* 59 Ark. 191, 26 S. W. 826; *Gross* v. *Hoback,* 187 Ark. 20, 58 S. W. 2d 202.

Another clause of the lease provides that it should become inoperative at the discretion of the survivor in case of the death of either the lessor or his wife. When the lease is considered in its entirety, and in connection

with the congenial and cooperative relationship that existed between the lessor and appellee throughout their married life, it is susceptible of no other construction than that given by the trial court, and his finding on this issue will not be disturbed.

RESULTING TRUST

Appellee sought to have a resulting trust declared in her favor to the extent of one-half of the undivided one-half interest of her deceased husband in all the Warren properties. "Such a trust cannot be established by a slight preponderance of the testimony, nor anything short of evidence that is clear, convincing and satisfactory." *Keith* v. *Wheeler,* 105 Ark. 318, 151 S. W. 284. The applicable rule was stated by Chief Justice HART, speaking for the court, in *Kerby* v. *Feild,* 183 Ark. 714, 38 S. W. 2d 308, as follows: "In order to constitute a resulting trust, the purchase money or a specified part of it must have been paid by another or secured by another at the same time, or previously to the purchase, and must be a part of the transaction. In other words, the trust results from the original transaction at the time it takes place and at no other time, and it is founded upon the actual payment of money and upon no other ground." In *Kline* v. *Ragland,* 47 Ark. 111, 14 S. W. 474, this court held (headnote 1): "Where the purchase money for land conveyed to the husband is paid in whole or in part by the wife, she has an equity to have a trust declared and enforced against him to the extent of her payment."

Appellee alleged in her complaint and sought to prove that one-half the price of the lots first purchased in Bradley county was furnished by her from the proceeds of the sale of 13 head of cattle given to her by her father before the parties moved to Warren. She testified that she turned the cattle over to her husband who used the proceeds of the sale in purchasing the lots. She does not attempt to say how much the cattle sold for, or that she contributed any specified sum toward the purchase price of the lots. Her testimony relative to the sale of cattle was disputed by several neighbors of her father

who testified that the latter was a poor tenant farmer who never owned more than one or two head of livestock at any time.

There was a large volume of testimony on this issue and it would serve no useful purpose to attempt to detail it here. After a careful consideration of this evidence we are of the opinion that it fails to show clearly and convincingly that there was a payment made by appellee, or an agreement with reference thereto, at the time of the purchase, or prior thereto, in connection with the 1923, 1924 and 1926 purchases. Appellee relies upon such cases as *Gainus* v. *Cannon,* 42 Ark. 503; *Leslie* v. *Bell,* 73 Ark. 338, 84 S. W. 491; and *Eckles* v. *Whitehead,* 196 Ark. 680, 119 S. W. 2d 550. In the Gainus case the court refused to declare a resulting trust and, in an appraisal of the evidence offered to support the widow's claim, said in part: "An examination of the evidence, which has been made under a very natural tendency to support her claim against the collateral heirs of her husband, fails to disclose any definite, clear agreement, on his part, to exercise and hold this fund as her trustee for her separate use. . . . Much of it consists of casual expressions with regard to his wife's ownership, which are commonly used by husbands with regard to property obtained through the wife, or which has been furnished by the husband with a special view to the wife's comfort or gratification. It is the conventional language of domestic affection, and does not ordinarily mean to imply legal or equitable title. . . . The proof that the husband received the money under a self-imposed trust to convert it into a home for her separate use is too indefinite and unsatisfactory to warrant a reversal of the decree on this point." In the other cases cited by appellee it was clearly shown that either the husband purchased the property with funds derived from his wife's separate estate or that she actually paid a definite portion of the purchase price.

Appellants insist that the trial court erred in declaring a resulting trust in appellee's favor in the purchase from Mattie Gould in 1940. At the time of this purchase

both husband and wife had retired and their primary source of income was the rentals from the tenant houses. During the years intervening since 1926, appellee had engaged in dressing hair and keeping boarders and contributed regularly to the family earnings in an amount equal to or greater than her husband. She also assisted in the renting of the properties. The grantor in the deed, Mattie Gould, testified that she sold the property to both Wilson and his wife and it was understood that the deed would be made to both of them. She had the deed prepared and thought it had been made to both. They paid for the property with the proceeds of a loan from an association which was secured by the joint obligation of both parties. This loan was discharged by the rentals from tenants of the houses on the property. We think this testimony, when considered in connection with other evidence of statements made by the deceased about the time of the purchase, was sufficient to sustain the finding of the chancellor that appellee furnished one-half the purchase price of the property, and that a trust resulted to that extent in her behalf.

COURT COSTS

Appellants insist that the trial court erred in assessing 70 per cent. of the court costs against them and 30 per cent. against appellee. Appellants cite § 10530, Pope's Digest, relating to costs in partition suits which reads: "The costs of the division shall be apportioned among the parties in the ratio of their interests, and the costs arising from any contest of fact or law shall be paid by the party adjudged to be in the wrong." The instant suit involved not only a partition of the property, but the setting aside of dower and homestead and awarding statutory allowances. It also involved the right to rentals from the ancestral estate and the issue of resulting trust. We have uniformly held that the matter of taxation of costs in chancery cases is within the discretion of the chancellor and unless there is an arbitrary abuse of power on his part we will not disturb the award. *Mt. Nebo Anthracite Co.* v. *Martin,* 86 Ark. 608, 111 S. W.

1002; *Penix* v. *Pumphrey,* 125 Ark. 332, 188 S. W. 816. Appellants say they offered appellee what she was entitled to receive under the statutes of descent and distribution prior to the beginning of the suit. But they did not offer the $600 in rentals nor recognize her right to a resulting trust in a part of the property. Appellants have been "adjudged to be in the wrong" on these issues, and we cannot say that the chancellor abused his discretion in placing the greater burden of the costs upon them.

It follows that the decree of the trial court must be affirmed on both the direct appeal and cross appeal. The costs in this court will be apportioned as in the trial court and appellants will be taxed with the additional expense incurred by appellee in abstracting the record.

PHILPOTT *v.* CITY OF FORT SMITH.

4442 204 S. W. 2d 475

Opinion delivered September 29, 1947.

L. H. Chastain, for appellant.

Harrell Harper, for appellee.

SMITH, J. Appellant who operates a twenty-two room hotel in the City of Fort Smith was convicted of a violation of Act 110 of the Acts of 1945. The relevant portions as applied to the testimony of this case, appear in the second paragraph of § 5 of the Act and read as follows:

"Further, it shall be unlawful for any operator of a tourist camp, hotel or rooming house, or any employee of such operator to accept as a guest any person without requiring a full registration as provided in § 2 of this Act, or knowingly to accept as a guest a person who has registered under a false name or who has registered with another under a false representation as to their relationship, or who has falsely represented the current license designation of his automobile."

The testimony in this case is in irreconcilable conflict and it was the function of the jury to weigh and sift it and to determine what portions of it were credible and should be believed. The verdict of the jury, finding the appellant guilty, reflects that the testimony offered by the prosecution was believed, and if so the verdict was abundantly sustained by this testimony which was to the following effect.

One Walter Griffin was a guest at the hotel on the night of January 17, 1946. He was found in room number sixteen, with a woman named Ruby Orton at about 3:35 on the morning of January 18th. Both Griffin and the woman were undressed. Griffin had been assigned a different room. There appears on the hotel register the name of C. J. Johnson and wife, who had been assigned to room sixteen. Griffin and the woman found in the room with him were arrested and appellant was later arrested by the officers at about 3:35 a. m., and the officers testified that appellant told them at the time of his arrest that Griffin had registered as Mr. and Mrs. C. J. Johnson. Appellant was well acquainted with Griffin, who for a period of several years had from time to time been a guest at this hotel. Griffin, who was a railroad man, was a

guest at the hotel on the night in question, having been assigned room thirteen.

The officers testified that they went to room sixteen, which had been assigned to C. J. Johnson and wife, and when they entered the room they found Griffin and the woman, both undressed, and both officers testified that appellant told them he "had registered them in." If this testimony is true, appellant knew that Griffin had registered under a fictitious name, and the testimony is undisputed that the woman registered as his wife, was not his wife.

Griffin and the woman were taken to the police station and appellant was later brought there, and all three were released when appellant posted a hundred dollar cash bond for each of them. Griffin and the woman entered pleas of guilty in the municipal court, to the charge preferred against them, and Griffin paid both fines. Neither Griffin nor the woman testified at the trial from which is this appeal.

Appellant offered testimony to the effect that a man and woman who called themselves C. J. Johnson and wife, applied for accommodations. Appellant asked them if they were married, and the man produced his marriage license, and other testimony was offered to the effect that this man and not Griffin signed the hotel register. But the testimony of the officers as to appellant's statement to them when the arrest was made sharply conflicts with this testimony. One of the officers testified as follows: "Q. I will ask you if you know whether or not Mr. and Mrs. C. J. Johnson occupied a room in the Ozark Hotel and paid a fine? A. C. J. Johnson paid two fines, according to this check. W. M. Griffin and Ruby Orton. Q. You say they registered as Mr. and Mrs. C. J. Johnson, do you know her, and Walter M. Griffin and Ruby Orton? A. Yes, they plead guilty to it and said they did. Q. They told you they registered that way? A. Yes, and plead guilty and paid the fine. Q. You say Philpott told you that? A. Yes, sir. Q. And Griffin told you that? A. Yes, sir."

The testimony of the other officer was to the same effect, and if true it is sufficient to sustain the conviction and the judgment must be affirmed and it is so ordered.

[redacted]

TIPTON *v.* STATE.

4463 204 S. W. 2d 552

Opinion delivered September 29, 1947.

Rehearing denied October 27, 1947.

[redacted]

Reuben Chenowith, for appellant.

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

GRIFFIN SMITH, Chief Justice. Leo Tipton was convicted of arson and sentenced to serve a year in the penitentiary. In appealing he contends that the judgment should be reversed because (a) the Prosecuting Attorney was erroneously permitted to ask leading questions of State witnesses, (b) testimony of Leamon Dollar should have been rejected because he did not understand the nature of an oath, (c) it was improper for the State to

impeach the testimony of Mrs. Clyde Tipton, and (d) the defendant's requested Instruction No. 2 should have been given.[1]

Herman Stump, 33 years of age, owned a home in Russellville, with outbuildings, including a barn. A $2,000 policy of insurance was issued July 13, 1946, on the residence, but the contract provided that a sum not in excess of ten per cent. of the principal would extend as coverage to secondary structures, provided value equaled that amount. The barn was destroyed by fire December 18th and the following day appellant was arrested.

Leamon Dollar, whose use as a State witness is questioned, was 22 years of age and lived with his father, William Morgan Dollar. Tipton, according to Leamon, called at the Dollar home about seven o'clock the night of December 18th. The two drove for a short time in a truck and Tipton told Leamon he "had a barn to burn." Leamon was invited to join the enterprise, but declined. However, he admitted going with Tipton to a point near the Stump home, where the truck was parked. Tipton went into the barn, used a match to ignite some hay, then withdrew. Leamon had remained outside.

We do not think the questions complained of as leading are open to that objection. When asked by the Prosecuting Attorney "Where were you the first time you saw [Tipton] that night" the witness seemingly did not understand, and said, "That night he came up there?" The defendant's attorney interposed the remark, "I object to putting the answer into his mouth." Context of the examination does not show there was any prompting here.

Later, when Leamon was asked what time Tipton reached the Dollar home the night of December 18th and replied that it was about seven o'clock, appellant objected to the clarifying inquiry, "Was it after dark?" The next question was, "What did Leo [Tipton] want?", and again

[1] The instruction would have told the jury that "The information filed [against Tipton] is of itself a mere formal accusation . . . and is not of itself any evidence of the defendant's guilt, and no juror should permit himself to be, to any extent, influenced against the defendant because . . . of the information."

it was complained that the witness was being led. There were other questions and objections of a somewhat similar nature. None shows an intent to improperly develop the case.

Leamon was asked if he knew the meaning of an oath and replied, "Yes, I know some of it." This occurred on cross-examination conducted by the defendant's attorney, who continued to ask questions, some of which related to matters not touched by the Prosecuting Attorney. It was not until additional testimony had been given on redirect examination that appellant's attorney moved to have the jury directed to disregard all of Leamon's testimony because of the so-called infirmity of understanding. The Court properly ruled otherwise. Even if the defendant had not used the witness as his own by bringing in new matter on cross-examination, there was not sufficient showing of statutory disqualification in the answer by Leamon that, as to an oath, he knew the meaning of part of it. He might have understood all of the requisites. We cannot tell what the witness meant by his answer, and therefore must hold that the objection was waived.

Mrs. Clyde Tipton, the defendant's step-mother, testified that she was at home the night of December 18th and the accused did not leave the house. After the State had rested its case and the defendant's witnesses had been examined, Mrs. Tipton was recalled and was asked whether, shortly after the fire, certain officers came to her home to ask about it. When she replied in the affirmative the questions were asked, "Did you tell them that on the night of the fire Leo had borrowed Herman Stump's pickup truck and had gone to town?" And again, "Did you tell either of the officers that the only time Herman Stump left your home was when he went to look for Leo?" A negative answer was given to each question. Two witnesses were permitted to impeach Mrs. Tipton by testifying that she had made contradictory statements—that is, statements at variance with her testimony given on recall.

Appellant thinks the jury may have believed that the impeaching testimony was direct evidence, hence inadmissible for that purpose and prejudicial. The only purpose in recalling Mrs. Tipton and then having witnesses testify she had made contradictory statements was so obviously a test of verity or veracity that it is difficult to see how the jury could have been misled.

It was within the Court's discretion to refuse the defendant's requested Instruction No. 2. By Instruction No. 7 the jury was told that "The defendant starts out at the commencement of the trial with the presumption of innocence in his favor, and this presumption follows him throughout the trial, or until the evidence convinces you of his guilt beyond a reasonable doubt." This was sufficient.

Evidence was ample to warrant conviction. The defendant, in the presence of officers (including a deputy fire marshal) confessed he had burned the structure and said ten dollars was to have been paid him by Stump. There was testimony Stump was seen handing the defendant five dollars. He was overheard to say it was "to apply on that job." A nightwatchman saw Tipton and Dollar the night of December 18th. Tipton was running, and when questioned merely said, "I am just running." The time was 9:15. The watchman saw another boy, later identified as Dollar. He, also, was running and would not explain his hurry. Other witnesses testified to statements or admissions sustaining the State's case.

Appellant undertook to repudiate his confession, asserting he had been promised a suspended sentence. He also insisted that veiled threats had been made by the officers. The confession was submitted to the jury under proper instructions and it had a right to believe or disbelieve what the defendant was alleged to have said, and to reject his alibi.

Affirmed.

LESSENBERRY *v.* LITTLE ROCK-PULASKI DRAINAGE DISTRICT No. 2.

4-8311 204 S. W. 2d 554

Opinion delivered September 29, 1947.

Rehearing denied October 27, 1947.

[redacted]

Gerland P. Patten and *Rose, Dobyns, Meek & House,* for appellant.

Catlett & Henderson and *L. P. Biggs,* for appellee.

GRIFFIN SMITH, Chief Justice. The appeal is from a judgment of Circuit Court overruling protests of landowners that benefit assessments in the Drainage District were invalid because the method of assessing was unfair, arbitrary, and discriminatory. It is also insisted that the complaining parties were hampered in efforts to develop their case because of the Court's refusal to compel pro-

duction of data upon which damages for taking land for right-of-way purposes were based.[1]

Appellants' description of the District is that the western boundary is the Missouri Pacific-Rock Island railroads in the eastern part of Little Rock. The north and northeastern boundaries are the Arkansas River, and the eastern, southeastern and southern boundaries are Fourche Creek. The District is partly within and partly beyond city limits.

In their preliminary report Dickinson & White, engineers, who were appointed by the County Court in February 1946, mentioned that the area was within scope of local flood protection in the Arkansas River watershed, as disclosed by maps on file in the office of the U. S. engineer at Little Rock. The War Department had made a conditional allotment of $850,000 on a tentative estimate of $1,200,000 for the entire undertaking. Because of the requirement that a right-of-way be provided without cost to the Federal Government, and in view of further conditions that interior drainage and perpetual maintenance were local obligations, the District was formed as the only practicable means for supplying the difference between allotment and cost. Assessed benefits actually computed were $378,620, with interest at 6%.[2] It was estimated that more than $70,000 in betterments would be on property exempt from District taxation, leaving $300,000 in round figures. A bond issue of $190,000 is proposed.

[1] The District contract with Little Rock Real Estate Board to supply estimates of damages accruing to each property owner whose land would be taken as a right-of-way. There is testimony that approximately sixty representatives of the Board, working separately, made reports. These, seemingly, were compiled for use of the Board in supplying the information sought. A fee of $1,500 was paid for this service, but the individual workers were not compensated.

[2] Requirements of the Government were (a) that the District provide without cost to the United States all lands, easements and rights of way necessary for construction of the levee; (b) alter and construct all bridges required across water courses; (c) hold the United States from damages due to construction work; (d) maintain and operate all works after completion, in accordance with regulations prescribed by the Secretary of War, to include protection of flood-carrying capacity of the channel of the Arkansas River; (e) pay cost of construction and maintenance of interior drainage work necessary to remove surface water.

The District was created under authority of Act 279, approved May 27, 1909, and Acts supplemental or amendatory. It is inferentially conceded that if the exceptions upon which the appeal is predicated cannot be sustained, and if there is not want of due process of law, creation of the District and resulting assessments are legal.

The Commissioners [3] selected Oscar McCaskill and A. L. Wooten to assist in arriving at appropriate betterment assessments, and it is largely upon the testimony of these two that the allegation of arbitrary results is based. Their work was completed in November.[4]

Faced with the requirement that $300,000 be made available, the appraisers adopted the assessment rolls used for State and County purpose. From these records they found total valuations to be $1,090,712. Mr. McCaskill, in testifying, said he and Mr. Wooten " . . . arrived at a formula based upon approximately twenty-two per cent. of the State and County assessment as general benefits, plus special benefits, depending on the area and contour." He went on to explain that land higher in elevation than 260 feet was charged only with the general benefit of twenty-two per cent. Land between 250 and 260 feet was thought to be benefited $60 per acre, or $16 per lot, while the lower gradation between 240 and 250 feet was found to be improved to the extent of $80 per acre, or $24 per lot.

It is urged by appellants that effect of this testimony, when considered in connection with other statements by McCaskill, is that some of the land—depending upon contour—was *generally* assessed. This, exclusive of lands exempt, would yield $239,956. To produce the required difference, the property most frequently exposed to overflow was divided into classes and assessed according to what was believed to be protection from the risks of overflows—the lowest in elevation being taxed with a higher benefit than that in the medium contour classification.

[3] Commissioners are G. B. Oliver, Jr., Frank B. Gregg, Jr., and Fred J. Venner. They filed statutory oaths of office February 28, 1946.

[4] The work done by McCaskill and Wooten did not extend to right-of-way matters.

It is contended, therefore, that special benefits were added to general benefits in a manner contrary to law.

But *is* this the effect of Mr. McCaskill's testimony? Certainly that would be true if we disregarded other essential facts and decided the case on abstract statements. A somewhat different construction would apply if the testimony is read as a whole.

The basis, says McCaskill, was arrived at because the assessment rolls in question had been used (most of them) over a period of years. They had been "revamped time and again, accepted by the Board of Equalization and property owners," and in other respects more nearly reflected equality and uniformity than any other plan they could apply. Months were spent working on the lists. But, said the witness, "We took into consideration the improved methods of ingress and egress, improved health conditions, improved market facilities, and improved use of the lands. The assessments were made in proportion to benefits accruing to the property as we saw it, but we did not take into consideration future use of the land. This could not be done because it was impossible to tell what that use would be."

While it is true Mr. McCaskill said two bases were used for assessment purposes—general and special,—it seems conclusive that what he intended to convey was that there were two classes of special benefits, one general and amounting to twenty-two per cent., the other applicable especially to lands exposed in a more or less degree to overflows, according to elevation. This construction appears tenable when compared with testimony by the witness that all property in the area would be affected because of improved health conditions, facilitated ingress and egress, and those things of a related nature which attend the type of protection proposed.

The appraisers who testified were representatives of the Commissioners, and there is a legal presumption that the Commissioners, in adopting the report, were in possession of information necessary to determine whether

the methods were fair and the results uniform within the scope of due process.

Appellants cite *Kirst* v. *Street Improvement District No. 120,* 86 Ark. 1, 109 S. W. 526, and the Court's holding in an opinion by Hon. Ashley COCKRILL, Special Judge. "Consideration," he says, "should be given to all facts and circumstances tending to show special benefits received from the improvement not flowing to the community at large." This decision was handed down in March, 1908, before Act 279 of 1909 became law. But assuming that in purpose the objectives were similar, the holding by Judge Cockrill supports validity of methods used by the Commissioners in the case at bar. After stating that any exaction in excess of the special benefits is, to the extent of such excess, a taking of property without compensation, he added: "Notwithstanding these principles so firmly settled, and in spite of *Norwood* v. *Baker,* 172 U. S. 269, 19 S. Ct. 187, 43 L. Ed. 443, it has been repeatedly held by the Supreme Court of the United States and this Court that an Act of the Legislature providing for assessment of the cost of a local improvement according to the value of the property itself is not arbitrary, and is not in conflict with the Constitution. These decisions are based on the principle that it must be assumed that the Legislature, in adopting such a method, has determined that the amount of benefits will accrue in proportion to the value of the property itself, and thus the assessment is still according to benefits, within the meaning of the law."

The Act of 1909 directs Commissioners to assess "the value of the benefits to accrue to each tract" by reason of the improvement.

No point is made by showing that part of the land assessed is above overflow. *Oates* v. *Cypress Creek Drainage District,* 135 Ark. 149, 205 S. W. 293. In that case Mr. Justice HUMPHREYS quoted with approval from *Louisville & Nashville Ry. Co.* v. *Barber Asphalt Paving Co.,* 197 U. S. 430, 25 S. Ct. 466, 49 L. Ed. 819: "The amount of benefit which an improvement will confer upon

particular land, indeed whether it is a benefit at all, is a matter of forecast and estimate."

In *Carson* v. *St. Francis Levee District,* 59 Ark. 513, 27 S. W. 590, Chief Justice BUNN said that a tract of land embraced within the district might be above overflow and the district's levee would not change that status, "and yet in various ways it may be benefited." Testimony of complaining parties in the Oats case heretofore mentioned was that property of a number of landowners was above overflow from rain or backwater, that no lateral of the system would come in contact with their land, that drainage was not needed, that no health benefits would accrue, and there would be no enhancement in values because of the improvements.

The Oates case goes a step farther and in a sense upholds a general estimate of betterments, for we find this statement: " . . . The assessors adopted a uniform basis for making assessments on all lands. They uniformly used a benefit basis. For example, they ascertained that the total benefits to accrue to the lands in the Town of Perry would be $10,000, after taking into consideration every element going to make up the total benefit. In order to apportion equitably the total benefit on the town lands to the several tracts therein, a valuation basis was adopted. Likewise, they ascertained that the total benefit to accrue to the lands in the country would be $72,800. . . . A total assessment of the entire benefit to the whole property was entirely feasible and practical and an apportionment of the benefits on any basis was unnecessary.".

The principle upon which assessments are sustained is not one requiring that all of the elements of betterment be affirmatively or expressly shown. It is enough, under our decisions, if the Commissioners of a district, as reasonable men, and with essential information, conclude that probable result of the undertaking would especially benefit those within the district as a whole. The presumption is that A profits because most of the community will. "If it be essential or material for the prosperity

of the community, and if the improvement be one in which all the landowners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such cases the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit." *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, 17 S. Ct. 56, 41 L. Ed. 369. See *Less Land Company* v. *Fender,* 119 Ark. 20, 173 S. W. 407.

Chief Justice HART, in *Standard Pipe Line Company* v. *Index-Sulphur Drainage District,* 173 Ark. 372, 293 S. W. 1031, in referring to *Missouri Pacific Railroad Co.* v. *Sears,* 166 Ark. 104, 265 S. W. 653, said that the Court had expressly held [in that and other cases] that the fact that the special assessment is made upon the whole value of the property as assessed for State and County purposes does not imply that the assessment is not also according to benefits to be derived from the improvements, "Hence it is not an arbitrary method of ascertaining the amount of benefits to assume that they will accrue in proportion to the actual value of the whole property."

We think appellants' argument that assessments are void because they vary in different zones according to separate contours, is answered by Judge Hart in *Selz* v. *McGehee East & West Highway District,* 171 Ark. 423, 284 S. W. 733, where a zoning system was used to govern in assessing benefits against rural lands, and a percentage of the assessed valuation was used for assessing benefits to town property. "No proof appears," says the opinion, "to show that this made the action of the Commissioners arbitrary, and it cannot be said that this method of assessing the benefits to the property shows on its face that the assessment is arbitrary or discriminatory." See *Wilkinson* v. *Road Improvement District,*

141 Ark. 164, 216 S. W. 304; *Bulloch* v. *Dermott-Collins Road Improvement District,* 155 Ark. 176, 244 S. W. 327.

In *Memphis Land & Timber Co.* v. *St. Francis Levee District,* 64 Ark. 258, 42 S. W. 1093, the method used in assessing betterments was an issue. The president of the Board of Equalization testified:

"We took the assessed value of the lands as they appeared on the tax books for State and County taxes, without reference to betterments. Then, as a betterment, we added from five to four hundred per cent., in proportion to depth of overflow. We concluded that the land subject to the deepest overflow would derive the greatest benefit by a levee. We did not take into consideration improvements or cleared lands. The betterments would only be upon the lands, and not upon the improvements. [They] amounted to exactly $2 per acre. . . . We agreed that lands that were nearly or quite valueless received the greatest betterment. We did this from the depth of overflow, and we got the depth by the value for State and County purposes."

Whether, if not bound by our own decisions, we would now hold as a matter of first impression that methods used in the instant case were improper, is beside the point. The Commissioners and lawyers advising them had a right to assume that procedures judicially approved over a long period of time would not be overturned; nor should they.

If it be said that there should have been no objection upon the part of the District to making available to interested parties the figures compiled by agents of the Real Estate Board, still the fact remains that right-of-way payments are not issues here, and if the Commissioners thought that introduction of this extraneous record would tend to confuse, they had a legal right to insist that the work of sixty men and the memoranda they prepared were not essential to or factors in a determination of issues raised by the landowners.

Affirmed.

4455 204 S. W. 2d 559

Opinion delivered September 29, 1947.

Rehearing denied October 27, 1947.

[redacted]

Jeta Taylor and *Batchelor & Batchelor,* for appellant.

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

ED. F. MCFADDIN, Justice. Leon Pendleton was convicted of burglary, and sentenced to two years in the penitentiary; and he has appealed. The motion for new trial

contains 16 assignments, which we group and discuss in suitable topic headings.

I. *Sufficiency of the Evidence.* The evidence, viewed in the light most favorable to the State, tends to show the following facts: John Harbottle owned a liquor store in Altus, Franklin county. The store was in a small brick building which faced south, with one door on each of the south, east and west sides. There was a partition in the building; the liquor store was in the south room, and the north room was a bedroom occupied by E. W. Sublett, who operated the liquor store for Harbottle, and who was sleeping in the north room on the night in question. Some time between 2:00 a. m. and 3:00 a. m. on February 3, 1947, two men attempted to enter the liquor store. During the time the burglars were attempting to force entrance, Sublett was awakened by their noises; he loaded his gun with buckshot, and awaited their possible entrance. Sublett had opportunity to see the burglars, because of the moonlight, their flashlight, the street lights, and also the lights from two passing cars. The burglars tried the east door and then the south door before they succeeded in breaking open the south door. One of the burglars came into the store, and the other, remaining on the outside, said to his companion: "If you find anybody in there, knock them in the head and kill them." The burglar on the inside discovered Sublett and started toward him, and Sublett shot him—a man named Harris. The other burglar ran away, and is claimed to be the defendant, Leon Pendleton.

When Harris was shot, he fell to the floor, where he remained until a physician had him removed by ambulance, a few hours later, to Fort Smith. Harris died in a hospital in that city. Immediately after shooting Harris with the shotgun, Sublett, by firing a pistol, awakened Harbottle, who lived near by, and who summoned the officers. A small crowd soon gathered. While Harris was on the floor, he was heard to exclaim, "Come and get me, Leon"; and, again, "Leon, Leon, come and get me." These exclamations were held incompetent, and will be discussed in topic II.

Leon Pendleton was arrested the same day in Van Buren, where he lived. He was charged with burglary of the Harbottle store, and his plea of not guilty included the defense of an alibi. Sublett positively identified Pendleton as the companion of Harris in the burglary. Other witnesses supported Sublett by testimony tending (1) to identify Pendleton; (2) to place him near the liquor store the night in question; and (3) to show that he left the scene in haste. Without detailing all the evidence, we have sketched enough to show that a case was made for the jury.

II. *Harris' Exclamations.* In his opening statement the prosecuting attorney told the jury that Harris, while lying on the floor after being shot, called "Leon, Leon, come and get me." Pendleton's attorneys objected to the statement, and moved the court to declare a mistrial. The record shows this to have occurred:

"Mr. Batchelor: I move the court to discharge the jury for that statement that . . . at the time that the sheriff arrived at the scene of the robbery that Harris continued to call for 'Leon' to which statement the defendant now objects.

"The Court: Objection sustained and the jury admonished not to give that any consideration.

"Mr. Batchelor: Save our exceptions. Defendant contends that this does not remove the error and at this time asks the court to declare a mistrial and discharge the jury. Now I want the same objection to what Sublett said. We object to the statement of the prosecuting attorney that Sublett would testify that after the shooting or about the time of the shooting, the deceased, Harris, called for Leon to come and get him or words to that effect.

"The Court: Overruled. I don't believe I will admonish the jury at this time. After consideration, motion sustained and the jury is admonished not to give consideration to it. Gentlemen of the jury, there has been some statement inadvertently made not in response to the

question as to what Mr. Harris said. You will not give that consideration, gentlemen, as to what he said down at the place or on the way to the hospital."

It will be observed that the trial court admonished the jury to give no consideration to the exclamations made by Harris. But the appellant contends that the words of the prosecuting attorney could not be erased from the minds of the jurors; and claims that a mistrial should have been ordered under the authority of *Smith* v. *State,* 205 Ark. 1075, 172 S. W. 2d 248.

The situation in the case at bar is not identical to that in the Smith case. The distinction is this: In the Smith case the prosecuting attorney, in his opening statement and over the defendant's objections and exceptions, was permitted by the court to detail an alleged confession which was later held to be inadmissible. We said the error in allowing the confession to be detailed to the jury was not cured by the admonition of the court given the next day. In the case at bar the prosecuting attorney, in his opening statement, told the jury of the exclamations and remarks that Harris was alleged to have made; but just as soon as the defendant objected to the statement of the prosecuting attorney, the court told the jury to disregard the statement. Thereafter when any witness attempted to tell of Harris' exclamations or remarks, the court promptly stopped such witness, and directed the jury to disregard any such testimony. We therefore hold that in the case at bar the trial court did not abuse its discretion in refusing the defendant's motion for a mistrial.

A majority of the Court thinks the dying man's calls were a part of the *res gestae* and therefore testimony relating to them was admissible. What Harris exclaimed *at the time of the shooting* might have been such a spontaneous exclamation as to have been a part of the *res gestae* (see *Walker* v. *State,* 133 Ark. 517, 212 S. W. 319, and *Moss* v. *State,* 208 Ark. 137, 185 S. W. 2d 92); but we are not required to decide that issue, since the trial court excluded *all* exclamations made by Harris after Sublett shot him.

III. *The Jury's Recommendation of a Suspended Sentence.* After the jury had deliberated for some time the jurors returned into the court, and the following transpired:

"Juror: Judge, your honor, I am foreman. We want to ask you a question. If we find the man guilty, can we recommend a suspended sentence?

"The Court: You may make whatever recommendation that you see fit.

. . . . .

"The jury then retired to consider further their verdict. Immediately upon their retiring the following transpired:

"Mr. Batchelor: I want to object to the statement that the court made to the jury, then I want to request the court to state to the jury whether or not he will follow their recommendation. I ask the court to tell the jury that the court is not bound by their recommendation.

"The Court: That will be overruled for this reason: I may want to make an investigation as to the life that this man has lived in determining what I should do about it. I don't know what that investigation will reveal. That is overruled because I don't know what I will do after I learn what I may do about it.

"Mr. Batchelor: Save our exceptions."

The defendant most vigorously argues that the trial court erred in all of the foregoing copied proceedings; but we hold that the appellant's assignment is unavailing. The statement of appellant to the court, as just copied, covered three points in one statement. We proceed to list each of the three points, and discuss them, to-wit:

First, appellant objected to the court telling the jurors that the jury could make a recommendation of a suspended sentence. The court's action in that regard was not an error, because the statute (§ 4028, Pope's Digest) says the jury may ask the court about a point of law; and the statute (§ 4053, Pope's Digest, as amended

by Act 262 of 1945) says the court may suspend a sentence. Furthermore, we held in *Jones* v. *State,* 161 Ark. 242, 255 S. W. 876, that it was proper for the court to answer questions of the jury concerning the nature and place of confinement. That holding applies here.

Second, appellant asked the court to tell the jury whether the court would follow the jury's recommendation of a suspended sentence. The court was correct in refusing that request; it would have been error for the court to tell the jury that its recommendation would be followed. In *Bethel* v. *State,* 162 Ark. 76, 257 S. W. 740, 31 A. L. R. 402, the trial court told the jury under what conditions the sentence would be suspended; and that action was held to be reversible error.

Third, appellant asked the court to tell the jury that the court was not bound by any recommendation. That request was proper; and if that request had stood alone and severed from the other two points, then it would have been error for the court to refuse that request. But the correct request was coupled with (1) an invalid objection and (2) an erroneous request, as previously shown; and with the record in such condition, appellant is in no attitude to complain of the court's ruling.

In *Ward* v. *Sturdivant,* 86 Ark. 103, 119 S. W. 1168, in considering an objection *en masse* to instructions, we said: "The appellant, the record shows, 'excepted to all of said instructions, but the court gave same over the objections' of appellant. This presents no specific objection to any one of the instructions, and we find that some, if not all, of them are correct. *Atkins* v. *Swope,* 38 Ark. 528; *Neal* v. *Peevey,* 39 Ark. 337; *Quertermous* v. *Hatfield,* 54 Ark. 16, 14 S. W. 1096; *Fordyce* v. *Russell,* 59 Ark. 312, 27 S. W. 82; . . . " To the same effect, see, also, *Owens* v. *State,* 86 Ark. 317, 111 S. W. 466; *Tiner* v. *State,* 109 Ark. 138, 158 S. W. 1087; *Graham* v. *State,* 197 Ark. 50, 121 S. W. 2d 892; and *Massey* v. *State,* 207 Ark. 675, 182 S. W. 2d 671.

The rationale of the holding in those cases applies with equal force to the case at bar. The appellant in one

request joined three points, two of which were wrong. In joining the three points in one request, the appellant took the risk of the error in any of them. His exception to the court's ruling was an exception *en masse,* since his request was incorrect on two of the points as we have shown.

Conclusion: The jury returned a verdict of guilty, and fixed the punishment at two years in the penitentiary, and recommended a suspended sentence. It appears from the judgment that the court, after investigation, refused to suspend the sentence. The court had this power under the statute (§ 4053, Pope's Digest, as amended by Act 262 of 1945). We have examined all the assignments and find no reversible error. The judgment is affirmed.

MESSINA *v.* STATE.

4465 204 S. W. 2d 547

Opinion delivered September 29, 1947.

Rehearing denied October 27, 1947.

John C. Sheffield, for appellant.

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

HOLT, J. March 20, 1947, appellant was tried in the municipal court of the city of Helena, Arkansas, on a charge of selling whiskey on Sunday. He was found guilty and a fine of $100 assessed. An appeal was prayed and granted to the circuit court.

April 29, 1947, transcript of the record was filed in the office of the circuit clerk. During the May term of the circuit court following, on May 7th, on motion of the prosecuting attorney, the court dismissed the appeal on the ground that the transcript was not filed within the thirty day period as provided in Act 323 of the Acts of Arkansas for 1939, and remanded the cause to the municipal court for further proceedings. This appeal followed.

The question presented is one of law. Did Act 323, *supra,* apply? Appellant argues that it did not. It is our view that the Act applied and that the judgment of the court below was correct.

The Act in question provides: "Section 1. A party who appeals from a justice of the peace judgment or a common pleas judgment or a municipal court judgment must file the transcript of the judgment in the office of the circuit court clerk within 30 days after the rendition of the judgment. If the transcript of the judgment is not filed within 30 days after the rendition of the judgment, execution can be issued against the signers of the appeal bond. Section 2 All laws and parts of laws in conflict herewith are hereby repealed, etc."

The Act applies both to misdemeanor and civil cases.

In the very recent case of *Everett et al.* v. *Coleman, ante,* p. 515, 201 S. W. 2d 30, we said: "In the recent case of *French et al.* v. *Oliver, Mayor, ante,* p. 484, 200 S. W. 778, Act 323, *supra* (meaning Act 323 of 1939), was held applicable in an appeal from a criminal conviction in a mayor's court, and we there said: 'The law plainly imposed on appellants the duty of filing the appeals within thirty days after their conviction; and, if they were unable to obtain the transcript from the mayor within that time, they should have, before the lapse of the thirty-day

period, applied to the circuit court for a rule on the mayor to require him to deliver the transcript to appellants for filing.' ''

''This Act (323 of 1939) is not only mandatory, but is jurisdictional.'' *Lytle* v. *Hill,* 205 Ark. 789, 170 S. W. 2d 684.

The duty of filing the transcript in the office of the circuit clerk within thirty days after the rendition of the judgment in the municipal court, from which the appeal was taken, was imposed upon the party appealing from the judgment. (*French* v. *Oliver, supra.*)

Since the transcript of the record in the municipal court was not filed with the clerk of the circuit court until more than thirty days after the date of the judgment in the municipal court, the judgment must be, and is, affirmed.

[redacted]

ORR *v.* ORR.

4-8229 204 S. W. 2d 545

Opinion delivered October 6, 1947.

[redacted]

Northcutt & Northcutt, for appellant.

Green & Green and *Oscar E. Ellis,* for appellee.

GRIFFIN SMITH, Chief Justice. This Court decided in Orr v. *Orr*[1] that as to certain land Frank Orr was

[1] *Orr* v. *Orr,* 206 Ark. 844, 177 S. W. 2d 915; opinion delivered February 21, 1944.

trustee, and that his divorced wife Myrtle could look to it in satisfaction of a balance of $1,324.41 Chancery Court had found to be due her through failure of the former husband to deliver specific personal property or account for its value. When our mandate issued March 13, 1944, it was found that Frank Orr, joined by Alice, (to whom he was married after divorcing Myrtle) had attempted to convey the property to a brother, W. M. Orr. The deed is dated March 11, 1943, and contains a recited consideration of $1,600. W. M. Orr sold to Lester Blair. This transaction occurred September 17, 1943. The recited consideration was $2,000.

The suit resulting in the decision of April 21, 1944, began with Mrs. Orr's petition to require her former husband's specific performance of a property settlement. Notice that suit was pending and that it involved the particular land was filed February 3, 1942, the divorce decree having been rendered November 22, 1940. The *lis pendens* states that purpose of Mrs. Orr's petition was to create a lien on the land.

Lester Blair married Myrtle Orr's daughter.[2] W. M. Orr had moved to Oklahoma, but after purchasing the land from Frank he placed Lester on the property as a tenant. There is testimony that Frank Orr resided at Seligman, Mo.

In January 1945 Myrtle Orr brought an action to cancel Frank's deed to Walter (W. M. Orr) and Walter's deed to Blair. She also asked that the land be sold to satisfy the judgment of $1,324.41. This appeal is from a decree of September 12, 1946, directing that the deeds be cancelled unless within sixty days the indebtedness in Myrtle Orr's favor be paid with interest and cost. The Court's Clerk was appointed Commissioner to sell the land in the manner provided for judicial sales.

The decree is correct. *Lis pendens* notice had the effect of giving constructive notice to Walter Orr and

[2] The testimony does not clearly show whether Myrtle Orr had been married prior to her union with Frank. It is stated that Lester married "her" daughter, and that Frank is his father-in-law.

Lester Blair that Myrtle Orr claimed an interest in the land, and this was enough. We also think there was sufficient proof to show that each had actual knowledge that litigation was pending wherein it was sought to declare a lien; and they must have known the nature of the petitioner's claim. A holding in *Bailey* v. *Ford,* 132 Ark. 203, 200 S. W. 797, is that after the dismissal or abandonment of an action, without express reservation, the *lis pendens* does not continue as constructive notice so as to affect the rights of parties intervening "between dismissal or abandonment and reinstatement or commencement of the action anew."

Appellants' theory seems to be that because the lien decreed in 1943 was not sustained, its full purpose had been served and rights acquired by Orr and Blair would relate retroactively to the dates of their deeds. The technicality is such in fact and the alleged rights resting upon it must give way to the superior claims of Mrs. Orr. When the appeal was disposed of in February 1944 the cause was remanded with directions that the trial Court proceed in a manner not inconsistent with the opinion. There was no period between issuance of the mandate and the decree from which this appeal comes when the trust did not exist. It was substituted for a lien and merely defined the position occupied by Frank Orr. It gave full protection to the prevailing party. For that purpose Mrs. Orr's interests were as completely preserved as they would have been if the lien had been sustained.

Affirmed.

Opinion delivered October 6, 1947.

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

ED. F. MCFADDIN, Justice. Appellee, Wilhite, was indicted for violation of § 1 of Act 193 of 1943, it being alleged that Wilhite had "by the use of force and violence attempted to prevent W. C. Rogers from engaging in work . . . contrary to the statute . . ." Wilhite was tried under the indictment; and at the conclusion of the testimony offered by the State, the trial court announced that the evidence was insufficient to support a verdict of guilty as charged, and thereupon instructed the jury to return a verdict finding Wilhite not guilty of any violation of § 1 of said Act 193.* Because of this instructed verdict, the State has attempted to appeal to this court under the provisions of §§ 4253-4, Pope's Digest.

* The circuit court, in directing a verdict of not guilty of any violation of § 1 of said Act 193, at the same time directed a verdict of guilty of assault and battery. The jury fixed the fine at $50, and there is no appeal from that conviction of assault and battery.

At the threshold of this appeal, the State is faced with the fact that the record contains no motion for new trial. To overcome this deficiency, the Attorney General points to a sentence in the case of *State* v. *Gray,* 160 Ark. 580, 255 S. W. 304, in which sentence it is mentioned that there was no motion for new trial in that case, and nevertheless the court then proceeded to dismiss the appeal on another point. The full sentence to which the Attorney General points is this: "There was no motion for new trial, and no statement that the second count was intended to charge the same offense as the first count, but in a different mode, and no such statement is made in the record anywhere." The statement, that there was no motion for new trial, was clearly a surplusage, because the State's appeal was dismissed on another ground.

We have a number of cases decided by this court preceding and following the case of *State* v. *Gray*; and in each of these cases, now to be mentioned, it is clearly stated that there must be a motion for new trial filed in the circuit court as an essential to an appeal by the State, on any matter that does not appear on the face of the record.

In *State* v. *Smith and Longan,* 117 Ark. 384, 175 S. W. 392, the State attempted to appeal, but failed to include in the record any motion for new trial as against the appellee, Smith, and as to him we said: " . . . there is no motion for new trial in the record. The bill of exceptions agreed upon between Smith's counsel and the attorney representing the State shows that the court, at the conclusion of the introduction of evidence, gave a peremptory instruction in favor of the defendants, and it is necessary for a motion for new trial to have been filed in order to bring the ruling before us for review."

In *State* v. *Moore,* 166 Ark. 499, 266 S. W. 460, the State attempted to appeal without a motion for new trial, and we said: "It is a well-settled rule of this court that, where there is no motion for a new trial, only errors appearing on the face of the record will be considered on

appeal. *Smith* v. *Wallis-McKinney Coal Co.,* 140 Ark. 218, 215 S. W. 385; *Free* v. *Adams,* 148 Ark. 654, 228 S. W. 371."

In *State* v. *Neil,* 189 Ark. 324, 71 S. W. 2d 700, the State attempted to appeal in a case where the trial court had instructed a verdict of not guilty. The record did not show that the motion for new trial had been presented to the trial court within the proper time; and, in affirming the judgment, we said: "A motion for a new trial is essential to the review of an alleged error which does not appear upon the face of the record, and is essential in this case to a review of the action of the court in directing the jury to return a verdict of not guilty. The purpose of a motion for a new trial is to call the alleged errors occurring during the trial to the attention of the court, and to afford an opportunity for correction by granting a new trial if the errors may not otherwise be corrected. *Nordin* v. *State,* 143 Ark. 364, 220 S. W. 473."

These three cases are ruling. Since there was no motion for new trial in the case at bar, and since the only question raised is the sufficiency of the evidence to support the verdict, we hold that the failure to file the motion for new trial is fatal to the appeal. Affirmed.

ROBINS and MILLWEE, JJ., concur.

ROBINS, J. (concurring). I concur in the result reached, but not in the reasons given by the majority.

In the first place, in my opinion, the lower court correctly held that the evidence adduced was not sufficient to show that a felony had been committed.

Furthermore, the only question presented by the state's appeal is the sufficiency of the evidence, and we have heretofore laid down the rule that we would not entertain such an appeal. *State* v. *Smith,* 94 Ark. 368, 126 S. W. 1057; *State* v. *Spear and Boyce,* 123 Ark. 449, 185 S. W. 788; *State* v. *Gray,* 160 Ark. 580, 255 S. W. 304; *State* v. *Massey,* 194 Ark. 439, 107 S. W. 2d 527; *State* v. *Dixon,* 209 Ark. 155, 189 S. W. 2d 787.

But I do not agree that a motion for a new trial by the state was a prerequisite for an appeal such as this. Appeals by the state from judgments of the lower court are not governed by the procedure in other cases. Such an appeal is a special statutory proceeding authorized by §§ 4253 and 4254, Pope's Digest, not for the purpose of awarding a new trial to the state, but for the purpose of obtaining from this court a declaration of law, on the controverted question, that may be a precedent in future trials. The statute does not enjoin the filing of such a motion, and despite some previous declarations of this court, I do not think such motion should be required. Neither the circuit court nor this court can ever grant a new trial in a criminal case, where the punishment may be imprisonment and the accused is acquitted by a jury. In such a case the defendant has been put in jeopardy by the first trial, no matter how erroneously conducted by the judge; and a subsequent trial would violate the constitutional prohibition against double jeopardy.

The provisions of our statute authorizing appeals by the state (§§ 4253 and 4254, Pope's Digest) seem to have been borrowed almost literally from the Kentucky code. The Kentucky Court of Appeals, in the case of *Commonwealth* v. *Williams,* 230 Ky. 71, 18 S. W. 2d 881, construing these provisions of the Kentucky code, said: "In felony cases . . . in which appeals are allowed for certification of the law no motion . . . for a new trial is required."

Since there could be no new trial in a case of this kind, the state ought not, in order to appeal, be required to ask for a new trial. The law ought never require the doing of a vain and useless act.

I am authorized to state that Mr. Justice MILLWEE concurs in the views above expressed.

HARTFORD ACCIDENT & INDEMNITY COMPANY *v.* BRADLEY.

4-8225 204 S. W. 2d 792

Opinion delivered October 6, 1947.

Rehearing denied November 3, 1947.

Sherrill, Cockrill & Wills, for appellant.

Joe D. Shepherd, for appellee.

SMITH, J. The decree from which is this appeal rendered judgment against the Bank of Dover in favor of twelve sureties, upon the bond of J. T. Murphy, as treasurer, and it is now stipulated that the bank has paid these judgments and its appeal from those judgments is dismissed. There remains, however, the appeal of the Hartford Accident & Indemnity Company, hereinafter referred to as Hartford, from the judgment rendered against it in favor of the bank for $2,199.99.

This judgment was the result of litigation, the history of which is as follows: J. T. Murphy was the county treasurer of Pope county, and gave bond as such with the National Surety Corporation of New York, as surety. Reece Caudle and E. C. Bradley and other citizens of Pope county executed an indemnifying bond to the surety company as a condition precedent to that company executing the qualifying official bond of Murphy, who carried his accounts as treasurer with the Bank of Dover and with the Bank of Russellville and the Exchange Bank of Russellville. These banks had all been approved as county depositories for the public funds of that county.

Murphy carried three accounts with the Bank of Dover. One was his personal account, another was his County General Funds account, and the third, his School Fund account.

The master appointed in the decree from which is this appeal, found and reported that Murphy's official accounts with the Bank of Dover were to be inactive, and that his active accounts as treasurer should be and were

with the two banks in Russellville, on which banks checks were drawn in disbursing the public funds of his county. It was reported and found by the master that Murphy operated under an agreement whereby he was to keep a deposit of School Funds with the Bank of Dover in the sum of $3,500. The finding of the master that these official accounts with the Bank of Dover were intended to be inactive is sharply questioned, but we think the testimony supports that finding. A circumstance tending strongly to support the finding is that Murphy's School account remained constant. The representative of the State Auditorial Department who examined Murphy's account testified that the cashier of the Bank of Dover told him those accounts were inactive. He further testified that Murphy's School account remained constant at $3,500 and that the bank furnished him with statements of deposits to Murphy's credit on December 31, 1937, of $5,000 and again certified the balance to the credit of that account as of December 31, 1938, was $5,000. This auditor further testified that Murphy's active accounts as treasurer were kept at the two banks in Russellville.

An audit of Murphy's accounts was made by the same auditor on April 29, 1939, at which time the balance to the credit of the School Fund remained at $3,500, whereas, there was a balance to the credit of the County General Fund in the sum of $696.50 only, and the auditor concluded that Murphy was short to the extent of $4,303.50. This auditor further testified that J. L. Lemley, who was the cashier of the Bank of Dover, admitted that personal checks of Murphy had been paid out of this account.

A full audit of Murphy's accounts made by the chief county accountant of the State Auditorial Department showed that Murphy was short in his accounts in the sum of $3,995.54, for and during the year 1938, and in the sum of $2,126.03 for his term of office beginning January 1, 1939, to the date of his resignation. Murphy committed suicide and Lemley resigned as cashier of the Bank of Dover.

The personal sureties on Murphy's official bond recognized and admitted their liability, and they proceeded to liquidate it in part in the following manner: One Fay Price, a resident of Dover, was a depositor and stockholder in the Bank of Dover, and an arrangement was made whereby the Governor would be asked to appoint Price to succeed Murphy as treasurer for a small monthly salary to be paid Price, and that Price would apply the commissions and fees paid him as treasurer to the payment of Murphy's shortage. It was further arranged that Price, as trustee, should borrow from the Exchange Bank of Russellville the sum of $6,121.57 and should execute his note, as trustee, to the bank for that sum. To indemnify Price the sureties on Murphy's official bond executed their joint note to Price as trustee, for the sum borrowed from the Exchange Bank, and this note was deposited with the Exchange Bank as collateral security for Price's note to the Exchange Bank.

Three thousand nine hundred ninety-five dollars and fifty-four cents of the proceeds of this note were paid to Caudle, who in turn paid the money to Price, as treasurer, in settlement of Murphy's shortage for that amount in his 1937 and 1938 accounts. Pursuant to an order of the county court, Price executed a receipt to Caudle in settlement of Murphy's 1937 and 1938 shortage, and the court order recited that Caudle, who was acting for himself and the other makers of the note to Price, who were all sureties on Murphy's official bond, should be discharged from further liability to the county for those years.

From the proceeds of his note to the Exchange Bank of Russellville, Price paid the sum of $2,126.03 to E. C. Bradley, one of the makers of the collateral note and a surety on Murphy's official bond. Bradley, under the order of the county court, paid this sum to Price as treasurer, in satisfaction of Murphy's shortage, for his unexpired term.

Upon receipt of these payments the county court ordered Price, as treasurer, to execute his official receipt satisfying the claim of the county against the sureties on

Murphy's bond as treasurer, and further ordered that Caudle and Bradley and the other sureties be subrogated to the rights of the county. In making these payments Caudle and Bradley acted for themselves and the other sureties on Murphy's bond on the faith of whose credit the money had been raised, for the purpose to which it was applied.

Separate suits were brought by Caudle and Bradley against L. J. Lemley, the cashier of the Bank of Dover during all the time the transactions leading to Murphy's shortage occurred, and also against the Bank of Dover, and against the Hartford Accident & Indemnity Company. It is conceded that Hartford had executed to the Bank of Dover on July 27, 1936, a fidelity bond covering Lemley's conduct of the bank and that this bond formed a continuous contract, continuing until its termination in a manner set out therein, and was in full force and effect during all the happenings herein set out. It was alleged that Lemley, as cashier of the Bank of Dover, had connived and cooperated with Murphy, as treasurer, in converting various sums of money on deposit with the Bank of Dover from Murphy's credit as treasurer, to the personal account and benefit of Murphy, and that Hartford was liable under its bond for these conversions.

The official audit of Murphy's accounts developed that most of Murphy's shortage originated in what the auditor and the master found were Murphy's inactive accounts with the Bank of Dover, as treasurer, and that Lemley, as cashier, had permitted Murphy, as treasurer, to draw checks upon the inactive accounts by the use of counter checks, rather than official checks, and to deposit the proceeds to his personal account. It was shown that Lemley, as cashier, had falsely certified the balances in the treasurer's accounts to the State Auditorial Department, and had permitted Murphy, as treasurer, to indorse vouchers payable to Pope county, and to deposit them to Murphy's personal account and to check out the proceeds thereof, on his personal check for his personal use.

When these practices, and the shortage resulting from them, were discovered the president of the Bank of Dover wrote Hartford a letter reading as follows:

"BANK OF DOVER

"Dover, Arkansas, May 10, 1939.

"Hartford Accident & Indemnity Co.,

"Hartford, Connecticut.

"Gentlemen:

"There has been a shortage discovered in the accounts of J. T. Murphy, County Treasurer of Pope County, Arkansas, in the amount of $6,122.54. This is to inform you that the Bank of Dover is being held liable in this matter on account of the fact that there have been irregular activities in the County Treasurer's account as handled by Mr. Lemley, Cashier, and Mr. Murphy.

"Mr. G. S. Jernigan, State Bank Commissioner of Arkansas, has arranged a meeting with the Board of Directors of the Bank of Dover Friday morning, May 12th, to go into this matter. This is to advise you of this meeting that you may have a representative to see after your interests as they may appear in connection with Mr. Lemley's bond.

"Very truly yours,

"John E. Moore, President."

Hartford did not receive this letter in time to send a representative to the meeting referred to, but Caudle testified that prior to May 10th he notified Hartford's general agent for this state of this meeting and that one of the attorneys now representing Hartford did attend the meeting.

On May 13th, Hartford wired the president of the bank as follows: "Under no circumstances if you desire possibility benefit of bond admit any liability, to county as considerable question concerning bank's liability.

Matter has been referred to our attorney, John A. Sherrill, Little Rock, Arkansas, with instructions to make investigation immediately such investigation to be without prejudice to any of our rights liabilities and defense if any."

The bank, following this direction, never at any time admitted liability and upon this issue adopted the allegations of the answer filed by Hartford in this suit.

Under date of July 11, 1939, the attorney for the sureties wrote the attorney for Hartford, in which letter the facts were recited as the bases of the claims of the sureties against Hartford being fully stated, and Hartford was advised that suit would be brought if the claim of the sureties to the right of subrogation was not satisfied. It appears that Hartford sent its representative to the Bank of Dover to investigate the claim of liability. This representative admitted that he was afforded every facility for his investigation and that he pursued it with the assistance of Lemley's successor as cashier. This representative also admitted that he was permitted by the banks of Russellville where Murphy's active accounts were kept, to make such investigation as he wished of Murphy's accounts with those banks. Hartford was thus fully advised of the nature of the claim against it before suit was filed and appears to have given this claim a number in the correspondence relating to it.

The facts stated dispose of Hartford's contention that no claim against it was filed before the institution of the suit, as the bond on which the suit is based required. It may be said, however, that compliance with this requirement was not made a condition precedent before filing suit. However, we think full and sufficient notice of this claim was given. Moreover, Hartford's denial of liability would have rendered the giving of notice unnecessary. *Equitable Surety Co.* v. *Bank of Hazen,* 121 Ark. 422, 181 S. W. 279; *Home Indemnity Co.* v. *Banfield Bros. Packing Co.,* 188 Ark. 683, 67 S. W. 2d 203.

It is insisted that Hartford cannot be held liable because Lemley, its principal, was not pursued and no judgment was recovered against him, and further that it had been agreed that the sureties would make no attempt to collect any judgment which might be rendered against the Bank of Dover. The existence of this agreement is denied. As a matter of fact, both Lemley and the bank were sued, and while no judgment was rendered against Lemley, a judgment was rendered against the bank and there was filed, after this appeal had been perfected, a stipulation as previously stated, that the bank had paid to the sureties the judgment rendered against it in their favor.

It is not shown why no judgment was rendered against Lemley, but whatever the reason may have been, this failure would not exonerate Hartford. Its bond did not require that this should be done and the suit on the bond could have been maintained even though Lemley had not been sued at all. Hartford did not ask that it have judgment against Lemley for any amount for which judgment might be rendered against it, and when and if the judgment against it is satisfied it may then assert its right against Lemley. No contention is made that the plaintiff sureties did anything which impaired this right.

In the case of *Hawkins* v. *Mims,* 36 Ark. 145, 38 Am. Rep. 30, it was said: "Mere delay, then, or negligence on the part of the creditor to call upon or compel the principal debtor to pay gives the surety no defense. It is only acts which tend to prejudice him or to deprive him of the power of obtaining indemnity, which have that effect. Of course if the obligee releases any of his securities, or enters into a new contract with the principal, varying terms of the original agreement, or stays execution, after its levy on the property of the principal, whereby the lien is lost, or does any other act, the necessary effect of which is to discharge the principal from the debt or to lessen his responsibility, the non-assenting surety will be discharged, for such acts increase the surety's risk. (Citing cases.)"

It was there further said: "The remedy of a surety, who is dissatisfied with the degree of activity displayed by the creditor in the pursuit of his principal, is to pay the debt himself. This subrogates him to all the rights and remedies of the creditor, and he can then manage the affair to suit himself."

The theory of the plaintiffs' case is that they incurred a liability as sureties on Murphy's official bond, which resulted from and arose out of Lemley's infidelity to his trust as cashier of the Bank of Dover, against which infidelity the bank is insured by Hartford, and that they have the right by subrogation, having discharged this liability as sureties, to recover, not only from the bank, but also upon the fidelity bond which Hartford executed, having of course only one satisfaction.

The master found, and the court approved the finding, that this shortage as treasurer resulted from the misapplication of public funds in Murphy's custody, and that this application and misapplication resulted from Lemley's active participation in this conversion without which participation it would not have occurred. This opinion would be interminable if we were to discuss the manner in which the conversion of public funds occurred, but that it did occur is undisputed, and that it was done with Lemley's knowledge and participation is established by a preponderance of the evidence. For instance, Murphy received an official voucher from the State of Arkansas, payable to him as treasurer, in the sum of $2,186.52, and this warrant was placed to the credit of Murphy's personal account, the deposit slip having been signed by Lemley, the proceeds of which were credited to and used by Murphy in a manner which the auditor could not ascertain.

Now the law is that a bank has the right to presume, without making investigation, that the payee in a check, properly signed by the depositor, drawn against an account known to be trust fund, has the right to cash the check and convert the proceeds to his personal use, without liability therefor against the bank, unless the bank

knows, or is chargeable with knowledge, that the depositor has violated his trust in drawing the check, thereby participating in the wrongful conversion of the proceeds of the check. Here it is undisputed that Murphy deposited public funds to his personal account, and that he withdrew by check public funds for his private use, and we think the testimony shows that this was done with the knowledge and consent of Lemley.

In the case of *Drainage District No. 7 of Poinsett County* v. *Citizens Bank of Jonesboro,* 205 Ark. 435, 170 S. W. 2d 60, we quoted, with approval, the following statement from Chief Justice HART in the case of *Helena* v. *First National Bank,* 173 Ark. 197, 292 S. W. 140: "The general principle governing the bank's liability is that the officers of the bank, who know that a fund on deposit is a trust fund, cannot appropriate that fund to the private benefit of the bank, or, where charged with notice of the conversion of the trustee, participate with him in appropriating it to his own use, without being liable to refund the money, if the appropriation is a breach of the trust. *Allen* v. *Puritan Trust Co.,* 211 Mass. 409, 97 N. E. 916, L. R. A. 1915C, 518, and *Blanton* v. *First National Bank of Forrest City,* 136 Ark. 441, 206 S. W. 745."

It is urged that in the judgment rendered by the court below Hartford was not given credit for the payment made by Price above referred to. If it were not, it should be. The sureties did not make these payments, although they were made for their benefit, and they should not be given credit for payments which they did not make with their own funds. It appears, however, that twelve of the sureties on Murphy's bond paid each the sum of $183.33, and each was given judgment against the Bank of Dover for that amount, altogether totaling the sum of $2,199.99, with interest thereon from the date of their respective payments. This was the balance on account of the shortage which Price did not pay, so that the sureties have not been given credit for payments they did not personally make.

The stipulation hereinabove referred to is to the effect that the bank has now, by payment, satisfied these judgments against it in favor of the sureties. The bank was given judgment against Hartford for $2,199.99 in the decree, this being the net loss sustained through the peculations permitted and participated in by Lemley, so that this judgment would in fact allow credit for Price's payment, and Hartford will be required under the judgment to repay only what the sureties have personally paid. The judgment against Hartford requires that interest thereon be paid from March 2, 1943, this being the average date on which the sureties respectively made payments of which no complaint is made.

As thus interpreted we think the decree is correct and it is affirmed.

AMERICAN NATIONAL INSURANCE COMPANY *v.* KIDD.

4-8213 204 S. W. 2d 788

Opinion delivered October 6, 1947.

Rehearing denied November 3, 1947.

William V. Brown, William V. Brown, Jr., Will Steel and *Wayman, Dibrell & Greer,* for appellant.

George F. Edwardes, for appellee.

GRIFFIN SMITH, Chief Justice. The question is whether it was proper for the Court to direct a verdict for the plaintiff.

Essential facts, as shown by stipulation, are that on January 11, 1943, American National issued its policy of insurance on the life of Henagan A. Kidd for $2,000 with Mattie M. Kidd as beneficiary. The quarterly premium of $15.44 due January 9, 1946, was paid. However, there was failure to meet a similar obligation due April 9th, nor was it discharged during the grace period. At default the cash surrender or loan value was $38. The insured died May 19, 1946, from accidental injuries.

The trial Court's view was that a duty rested upon the insurer to apply and charge as a loan an amount equal to the delinquent premium. Terms of the policy, introduced as an exhibit, must control.

It provides that after premiums have been paid for three years loans will be made on security of the policy at the rate of $19 per one thousand of insurance. An option is that the Company may defer a loan (except where proceeds are to be applied in payment of premiums) for a period not in excess of ninety days after application is made.

In directing the jury to find for the plaintiff, the Judge held that "even though the contract does not mention it," a duty rested upon the Company to use any funds in its possession belonging to the insured "to extend the life of this insurance."

Correctness of this ruling depends upon what the contracting parties had agreed to when the policy was written.

Under the general heading "Non-Forfeiture Provisions" a subsection of the policy reads: "Paid-up Insurance. If the cash value [as heretofore defined] is not selected this policy shall automatically continue as non-participating paid-up life insurance payable in a single sum at the same time and under the same conditions as this policy, except as to premium payments, for the amount as shown in the 'Table of Guaranteed Values.' But any indebtedness on this policy will reduce the amount of paid-up insurance in such proportion as the indebtedness bears to the cash value at the due date of the premium default."

The table of guaranteed values then follows, printed and typewritten quite prominently, after which loan provisions appear as a part of the same sheet. We are not concerned with actual loans. It was stipulated that no application was made, nor was there an attempt to revive the policy. There was likewise an agreement that the fund conditionally available was sufficient to purchase $106 in paid-up insurance, and this amount was tendered prior to suit. Each side moved for a directed verdict and neither requested any other instruction.

Although the policy became effective January 9th, appellee treats the contract as one requiring "quarterly" premium payments, thus applying a policy year as distinguished from a calendar year. This is unimportant. From language creating loan privileges not in excess of the cash surrender value, appellee undertakes to rationalize that the term "default" has reference to the period beginning with expiration of the grace period rather than due date of the premium; hence, it is contended, the addition of thirty-one days to April 9th would carry the insurance to May 11th. Since death did not occur until May

19th, " . . . [the insured] had thirty-one days after default to exercise the available option."[1]

We think that a reading of all applicable phrases of the policy requires the construction that "default" means a failure to pay premiums when due. To this default was added a grace period of thirty-one days. Nor are we left to speculate on construction in this respect. Section 13 of Privileges and Provisions expressly states that "If any premium is not paid on or before the date it falls due, such premium is in default." Payment might have been made within thirty-one days from the default period, but it was not.

This presents the question, What was the status after the grace period had terminated as expressed by terms of the contract? The non-forfeiture provisions make answer. First, the policy may be delivered to the Company and it will pay the insured the cash surrender value. Secondly, a loan may be applied for. If proceeds are to be used in paying premiums it must be effectuated expeditiously, but if not intended for application in that manner, such loan may be deferred for ninety days after application is made. But, if the cash value is not selected —and, of course, application for a loan would exclude the presumption of such selection—" . . . this policy shall be automatically continued as non-participating paid-up life insurance." The amount of insurance (in this case $106 by agreement) is that purchasable under the terms of the particular policy when the loan or cash surrender value is applied as a single premium.

Extended insurance and paid-up insurance were discussed in *National Reserve Life Insurance Co.* v. *Cole,* 194 Ark. 433, 108 S. W. 2d 471, where it was said that although the two are distinct, each *is* paid up. Extended insurance carries with it the principal amount of the policy (less contractual deductions) for a determined

[1] The paragraph relied upon to support this argument is: "After three full years premiums have been paid hereon and within thirty-one days of default in the payment of any subsequent premium, one of the following equivalent options, subject to any indebtedness hereon, may be elected by filing a written request with the Company at its home office, accompanied by the policy."

period, while paid-up insurance is for the amount existing values will purchase, but it is in effect during the full period of the insured's life without payment of additional premiums.

The principal involved in the case at bar was presented in *Life & Casualty Insurance Co. of Tennessee* v. *Goodwin,* 189 Ark. 1073, 76 S. W. 2d 93. The provision construed was that if default in payment of premium should be made after the policy had been in force three years, it would "automatically at time of lapse be unconditionally commuted to non-forfeitable paid-up insurance. . . . " There was a subjoined option, referred to in language deleted from the preceding quotation, permitting the insured to receive the policy's cash surrender value or paid-up insurance, provided demand should be made within ninety days from commutation. Effect of the Goodwin decision is to say that where a contract creates options, but expressly provides that upon failure to exercise the right of selection a stipulated result attends and becomes binding upon the insurer, neither the insured nor his beneficiaries can thereafter complain that a different treatment should have been given, when circumstances disclose that action on the part of the insurer would in the particular case have been more advantageous to a beneficiary.

Appellee contends that it would be unjust and inequitable for a court to permit the Company to enforce the contractual language relating to *automatic* commutation, hence there can be no lapse or forfeiture. It is trite to emphasize the rule that equity *follows* the law; and where legally permissive relationships have been established between competent parties by a contract which defines reciprocal duties and obligations, we are not at liberty to substitute for these commitments a new obligation, and then impose it as an equitable variant merely because one of the principals neglected to do something that developments proved would have been more advantageous.

The judgment is reversed and the cause is remanded with directions to enter judgment for the item of $106 only.

JONES *v.* KING.

4-8228 204 S. W. 2d 548

Opinion delivered October 6, 1947.

Rehearing denied November 17, 1947.

Harvey L. Joyce and *J. M. Smallwood,* for appellant.

George O. Patterson and *Edward H. Patterson,* for appellee.

HOLT, J. Appellee, Carrie King, brought this action against appellant to recover damages in her own right, as widow of Harden A. King, deceased, and also as administratrix for the benefit of his estate, for alleged conscious pain and suffering of her intestate. She alleged that her husband's death resulted from a rear-end collision of two trucks on paved highway 64, about 1½ miles east of Piney, Arkansas, caused by the negligence of the driver of appellant's truck. A jury trial resulted in verdicts and judgments for appellee, in her own right for $20,000, and as administratrix in the amount of $7,000, or a total of $27,000.

This appeal followed.

For reversal, appellant says: "*First.* The court erred in refusing to direct a verdict at the conclusion of all of the testimony for appellant on the whole case, for the reason that the undisputed proof shows that the proximate cause of the injury was the failure of the driver of the pick-up to give the signal as required by law, and that the undisputed facts show no negligence on the part of appellant's driver. *Second.* That the court should have instructed a verdict for appellant in the case of Carrie King, widow of Harden A. King, for the additional reason that Harden A. King died from lymphatic leukemia, a disease not traumatic in origin, and a disease from which he would have died had he never received the injury and that the injury was not the cause of his death. *Third.* That the allowance for conscious pain and suffering by the jury is excessive and the result of passion and prejudice." It is also argued that the allowance of $20,000 to appellee in her own right was excessive.

(1)

Since appellant's first and second contentions, in effect, challenge the sufficiency of the evidence, we consider them together.

Briefly stated, the evidence tends to establish the following facts: December 19, 1944, at about 2:30 p. m., appellee's intestate, Harden A. King, was riding in a

truck driven by H. R. Pierce, the owner. They were traveling west on concrete highway 64, approaching a gravel road, known as the Hickeytown road, that turned off to their right at a 45-degree angle. For approximately 500 feet before they reached this side road the highway is downgrade. As Pierce and King, driving at about 30 miles per hour, reached a point approximately 100 feet from the side road, Pierce, the driver, reduced his speed to about 15 miles per hour and, at this rate of speed, began to turn off highway 64 onto the side road, and as his truck, with the exception of the rear wheels, left the concrete slab, appellant's truck, going about 35 miles per hour, struck the rear of Pierce's truck, turned it over twice, seriously injuring King.

The driver of appellant's truck testified that the overall length of his truck and trailer was 34 feet, that the gross weight, including freight he carried, was about 11 tons. He further testified that for about 150 feet east on highway 64, just before the collision, he had followed Pierce's truck at a distance of 50 feet to the rear and was within this distance when Pierce began to turn into the side road. Pierce admitted that he gave no signal to appellant's driver of his, Pierce's, intention to turn to the right on the side road.

Appellant's driver further testified that two automobiles about 100 feet apart were approaching from the opposite direction and that for this, and the additional reason that there was a "blind hill" in front of him, he could not go around the Pierce truck. There was, however, testimony on the part of appellee sharply denying that there were any cars coming from the opposite direction at the time as claimed by appellant.

We think it would serve no purpose to detail more of the evidence. It suffices to say that we have reviewed it all and after considering and weighing it in the light most favorable to appellee, as we must do under our long-established rule, we are unable to say that it is not substantial and insufficient to take the case to the jury.

Appellant earnestly argues that the proximate cause of the collision and injuries to appellee's intestate was the failure of Pierce, the driver of the truck in which appellee's intestate, King, was riding, to give any signal of his intention to turn off on the side road, as required by §§ 6725 and 6727 of Pope's Digest, and this was negligence preventing recovery. We cannot agree for the reason that the evidence also shows that appellant's driver was driving his heavily loaded truck at a speed of 35 miles per hour downgrade when it struck the rear end of Pierce's truck, and, as indicated above, for 150 feet before the collision he had been following Pierce's truck at a distance of only 50 feet. On this point, he testified: "Q. Traveling at 35 miles per hour, in what distance could you have stopped your truck? A. 35 miles an hour —between fifty and seventy-five feet." In these circumstances, the jury would have been warranted in finding, and evidently did find, that the proximate cause of the collision was the negligence of appellant's driver, in following too close to Pierce's truck and thereby was unable to stop or so manage his truck as to prevent the collision that followed.

This question of fact was submitted to the jury under instructions of which no complaint is made. The applicable rule of law is stated in the case of *Acco Transportation Company* v. *Smith,* 207 Ark. 70, 178 S. W. 2d 1011, where we said: "This case is more nearly like that of *Madison-Smith Cadillac Co.* v. *Lloyd,* 184 Ark. 542, 43 S. W. 2d 729, where we held that 'the law of the road is that the automobile in front has the superior right to the use of the highway for the purpose of leaving it on either side to enter intersecting roads,' and that a driver in the rear who fails to observe such rule is guilty of contributory negligence. While there is no question of turning off the highway into an intersecting road in the case at bar, we think the principle stated there applicable here with more force, since the truck was proceeding straight ahead on its own right side of the road, and the car in the rear must recognize the superior right of the truck

to so proceed on its own way, and so manage his own car as to cause no injury under the penalty of being chargeable with negligence.''

In his second contention, *supra,* appellant argues that appellee's intestate, King, died from what is known as lymphatic leukemia, a disease not traumatic in origin and from which he would have died had he never received the injuries alleged, and that such injuries were not the cause of his death. The evidence on this question was conflicting.

It appears that appellee's intestate was employed by H. R. Pierce Lumber Company at the time of the injuries complained of here and was a robust, able-bodied man. He was 51 years of age, with a life expectancy of 20.20 years, was married and lived on a farm near Clarksville with his wife.

Immediately following the collision he was taken to the office of Dr. Earle H. Hunt in Clarksville, a practicing physician and surgeon of some 38 years experience and of unquestioned ability. After leaving the doctor's office he went to his home and was confined to his bed for a period of about three weeks during which time he suffered intense pain in his neck and head which required frequent administration of sedatives. His neck became stiff and so remained until his death seven months and ten days later. His head was carried to the side and any effort to turn his head resulted in severe pain.

Dr. Hunt testified that he first examined appellee's intestate December 19, 1944, and again in March following. ''I made X-ray pictures in March and found that the deceased had what we call a broken neck, one of the cervical vertebra broken and crushed down. . . . I advised deceased to go to a bone specialist, Dr. Joe Shuffield. In my judgment this injury to his neck was caused from a traumatic hurt such as having been in a car wreck and would say that the cause of the leukemia and the man's death was the car wreck.''

Dr. Hunt further testified that he operated on appellee's intestate in August, 1944, four months before the accident in December, for appendicitis, and that he was not suffering from leukemia at that time.

From the period from June 4, 1945, to July 29, 1945, the date of his death, he was in the hospital under the exclusive care and observation of Dr. Hunt, and quoting from appellant's brief: "When he came back here to our hospital he came back to die and he did. He suffered with his neck continuously all of the time he was in the hospital, that is the only particular pain he suffered. The injury which he received in his neck is one that is calculated to have caused pain all of the time from the date of the injury until his death, that is my judgment. The pain would be constant and as it progressed it would get worse. During the last month of his life it took quite a bit of morphine to ease the man." There was other corroborative evidence, and also that appellee's intestate was suffering from leukemia at the time of his death.

In this connection, the court instructed the jury that although it might believe from the preponderance of the evidence that leukemia contributed to cause the death of deceased, King, yet if it further believed from the preponderance of the evidence "that deceased received an injury as alleged and that said injury was caused by the negligence of defendant's agent, servant, or employee as alleged, and that said injury, together with leukemia caused the death of deceased, and that but for said injury deceased would not have died, then your verdict should be for the plaintiff."

The court further instructed the jury that if it found from a preponderance of the evidence "that the injuries alleged to have been received by deceased, did not contribute to or hasten his death, but that he died from natural cause, separate and apart from any personal injuries alleged by plaintiff to have been sustained by him, then as to any claim for damages sought to be recovered by his death your verdict should be for the defendant."

We think these instructions correctly declared the law on the evidence presented on this phase of the case, and that the jury was warranted in finding, and evidently did find, that the injuries which appellee's intestate received from the collision contributed to or hastened his death, and that the court did not err in refusing to instruct a verdict for appellant. See *Lanier* v. *Trammell,* 207 Ark. 372, 180 S. W. 2d 818.

(2)

We are unable to agree with appellant's final contention that the total judgments in this case for $27,000, $20,000 for the widow in her own right and $7,000 for her as administratrix of her intestate's estate, are excessive, as a matter of law.

Appellee's intestate at the time of his injuries was a strong and able-bodied man, 51 years of age, with a life expectancy of 20.20 years. He was employed at a salary of $100 per month as a timber cruiser with the promise of his employer that his salary would be increased to $125 per month beginning with January 1, 1945. The increase was not given because of her intestate's injuries and his inability to perform the work. He also earned approximately $50 per month in addition to his salary by dealing and trading in livestock, so that at his death he was earning approximately $1,800 a year, most of which his wife testified he contributed to her support. There is substantial evidence that he suffered much conscious pain from the date of his injuries until his death, his suffering noticeably increasing during the seven months and ten days that he lived following his injuries, making it necessary to administer sedatives at times, and especially morphine, during the latter weeks of his illness.

There is no certain yardstick to measure recoverable damages in a case of this nature. The amount allowed must depend upon the particular facts in each case. Here, we are confronted with a death case, resulting from injuries, and where the conscious pain and suffering for

more than seven months following the injuries of appellee's intestate were intense.

We are unable to say, therefore, after giving a reasonable estimate as to the probable earnings of appellee's intestate had he lived, and his contribution to his widow's support, reduced to present value, that the allowance of $20,000 to the widow was excessive, nor can we say that an allowance of $7,000 for conscious pain and suffering, in the circumstances, was excessive.

On the whole case, finding no error, the judgments are affirmed.

WALKER *v.* CASE, EXECUTOR.

4-8230 204 S. W. 2d 543

Opinion delivered October 6, 1947.

Oscar E. Ellis, for appellant.

Northcutt & Northcutt, for appellee.

MINOR W. MILLWEE, Justice. Appellants are six grandchildren of W. S. Rand, deceased, and brought this action in the Fulton Probate Court against appellee, A. C. Case, executor of the W. S. Rand estate, seeking to establish their status as pretermitted children under the will of their grandfather.

W. S. Rand was a resident of Fulton county and the father of six children. A daughter, Bertha Rand, was twice married and died in 1934 survived by six children who are the appellants here. In November, 1945, W. S. Rand executed his last will and subsequently died being survived by three sons, two daughters and the appellants, as his only heirs at law.

After providing for the appointment of appellee as executor, the will contains the following bequest: "After the payment of all such debts, if any, and my funeral expenses, I give to my five grandchildren, who are children of my daughter Bert Rand Finley, deceased, the sum of $50 (fifty dollars) each; and to my daughter Tracey Rand Dillinger the sum of $100 (one hundred dollars). Such sums to be paid in cash." The testator then bequeathed his household goods to two daughters and a daughter-in-law, and further directed that his farm, livestock and farm tools be sold and the sale proceeds, together with cash in a bank, distributed among

his three sons, a daughter and a grandson, who were named in the will.

Appellants alleged in their petition that they were not mentioned in the will of their grandfather as required by law, and were, therefore, entitled to that portion of his estate which their mother would have taken had she survived the testator and he died intestate.

The executor filed a response denying the allegations of the petition and alleging that it was the testator's intention to bequeath $50 to each of the children of his deceased daughter; that the testator had not seen his grandchildren and did not know their total number, but was under the impression that there were only five at the time he made his will; and that the misstatement of the number of his grandchildren was an unintentional omission.

In support of the allegations of the response, appellee offered in evidence a part of the deposition of the scrivener who drafted the will. This deposition was taken in another suit to void the entire will, and that proceeding involved several parties who are not parties to the instant suit. The trial court sustained appellants' objection to this evidence, which appellee contends was admissible under the decision of this court in *Gulley* v. *Bache,* 98 Ark. 583, 136 S. W. 667. In that case the court held (headnote 2): "In order that a deposition taken in one suit may be admissible in another suit, it must appear that the latter suit is between the same parties and regarding the same issues." Since the instant suit is not between the same parties and regarding the same issues, as the suit in which the deposition was taken, there was no error in the exclusion of this testimony.

The trial court, in construing the will, held the bequest, "to my five grandchildren, who are children of my daughter Bert Rand Finley, deceased," to be a gift to the grandchildren as a class, and that it was the intention of the testator to bequeath $50 to each of the appellants. Judgment was rendered accordingly.

For reversal of the judgment appellants earnestly contend that, since only five grandchildren are mentioned in the bequest, it is impossible to identify the one meant to be excluded and the will is thereby rendered inoperative as to all the appellants under § 14525, Pope's Digest. This statute provides: "When any person shall make his last will and testament, and omit to mention the name of a child, if living, or the legal representatives of such child born and living at the time of the execution of such will, every such person, so far as regards such child, shall be deemed to have died intestate, and such child shall be entitled to such proportion, share and dividend of the estate, real and personal, of the testator as if he had died intestate; and such child shall be entitled to recover from the devisees and legatees in proportion to the amount of their respective shares, and the court exercising probate jurisdiction shall have power to decree a distribution of such estate according to the provisions of this and the preceding sections."

In construing this statute in *Brown* v. *Nelms,* 86 Ark. 368, 112 S. W. 373, this court held that a will in which the testator provides for his children as a class, without expressly naming them, is a sufficient mention of his children within the statute. The court, speaking through Justice McCulloch, said: "We think it is manifest that what was intended by the statute was to declare intestacy as to children of a testator, and thus provide compulsory provisions for them, unless the testator expresses a contrary intention in the will toward the children. Such an intention may be expressed by the testator in his will by providing for them as a class without naming them separately, or by naming them without providing for them. Either method is equivalent to the other, and either the one or the other clearly excludes any intention on the part of the testator to omit his children from the testament. It would, we think, be disregarding entirely the purpose of the statute, and would be putting form over substance, to say that the names of children must be individually mentioned in a will which provides substantially for each and all of them."

In *LeFlore* v. *Handlin,* 153 Ark. 421, 240 S. W. 712, the testatrix bequeathed, "Unto my son Louis LeFlore, of Stigler, Oklahoma, and to his children living at the time of my death, the sum of $100 each," and it was held that the bequest sufficiently designated the grandchildren of the testatrix and that the statute did not apply. The same rule was held applicable where the members of the class referred to were grandchildren in *King* v. *Byrne,* 92 Ark. 88, 122 S. W. 96. It was also held in *Powell* v. *Hayes,* 176 Ark. 660, 3 S. W. 2d 974, that a reference by a testator in his will to his "heirs" constituted a mention of his children who were his only heirs at law. See, also, *Taylor* v. *Cammack,* 209 Ark. 983, 193 S. W. 2d 323.

One of the leading American cases involving the question of class gifts is *Thomas* v. *Thomas,* 149 Mo. 426, 51 S. W. 111, 73 Am. St. Rep. 405, where a devise to "the six children of my son" was held to be a gift to the grandchildren as a class. In decisions from other jurisdictions the rule seems to be well established that where a testator misstates the number of legatees or devisees, who are entitled to take as a class under a particular bequest or devise, the estate devised will pass to the actual number falling within the class. In *McMasters* v. *Shellito,* 14 Pa. S. Ct. 303, where a testator overstated the number of those entitled to take as a class under a particular devise, it was held that the estate would pass to the smaller number who fell within the class. The court said: "Where a testator devises to the sons or daughters of a person named, and incorrectly speaks of them as being of a particular number, the number mentioned will be disregarded and all who fall within the class, whatever their actual number, will take under the devise: *Berkeley* v. *Palling,* 1 Russell, 496, and see note; *Thompson* v. *Young,* 25 Md. 450; *Lawton* v. *Hunt,* 4 Strobhart's Eq. (S. C.) 1; *Shepard* v. *Wright,* 5 Jones' Eq. (N. C.) 20."

In *Lockhart* v. *Lyons,* 174 Ark. 703, 297 S. W. 1018, this court said: "The true rule in the construction of wills, which can be said to be paramount, is to ascertain or arrive at the intention of the testator from the language used, giving consideration, force and meaning to

each clause in the entire instrument." When the entire will is considered we think the testator expressed his intention to include all of the appellants in the bequest to "my five grandchildren, who are children of my daughter, Bert Rand Finley, deceased" by providing for them as a class. We find nothing in the other provisions of the will to indicate that he intended to omit any of the children of his deceased daughter from the class named. The reasonable conclusion is that he merely misstated the number of the class and, under the aforementioned rule, the number "five" should be disregarded and all who fall within the class will take under the bequest. The testator did not, therefore, omit to mention appellants within the meaning of § 14525 of Pope's Digest, *supra.*

It follows that the trial court correctly construed the will, and the judgment is affirmed.

[redacted]