[redacted]

LEO N. LEVI MEMORIAL HOSPITAL ASSOCIATION *v.* CARUTH, ADMINISTRATOR.

4-8462 208 S. W. 2d 983

Opinion delivered March 8, 1948.

Scott Wood and *Leland F. Leatherman,* for appellant.

Mallory, Rasmussen & Johnson; Wootton, Land & Matthews and *Fulcher & Fulcher,* for appellee.

GRIFFIN SMITH, Chief Justice. From a judgment in favor of Jack Caruth, administrator of the estate of Joseph Bailie, directing Leo N. Levi Memorial Hospital Association at Hot Springs to surrender designated securities, the defendant has appealed.[1]

Bailie, seventy-four years of age, died at the Hospital February 16, 1947—six days after entering. Although a native of Georgia, the patient had for many years resided in Arizona at Mesa.

Litigation resulting in this appeal had for its purpose determination of ownership in respect of $91,000 in United States bonds.

When Bailie reached Hot Springs by bus he had two suitcases; and he carried a paper carton containing food and table utensils. After engaging in arguments with a taxicab driver regarding the fare, he was taken to police headquarters and booked for the night as a vagrant. The following morning Bailie called upon the proprietor of a local pharmacy—a man he had known for many years. The two went to Dr. E. R. Browning's office, where Bailie's illness was diagnosed as asthma, with coronary complications. Following futile efforts by telephone to procure hotel accommodations, a taxicab was called. Wilbur Ragsdale, the driver, was first directed to take Bailie to the bus station. Through use of two baggage checks the suitcases were recovered, then considerable time was spent in an endeavor to find lodging in acceptable quarters where charges would not exceed $1.50 per day.

Ragsdale as a witness said that after several discouraging experiences Bailie asked where the Hospital was, then directed that he be taken there. He had formerly written the Chamber of Commerce, and the letter had been referred to the Hospital, resulting in a communication from Bailie to the institution in which he stated that he would like to get "some dope on your hospital".

Upon arriving at the Hospital Bailie told Miss Regina Kaplan, the superintendent, that he wanted to stay there two days and see how the Hospital was con-

[1] By answer and cross complaint it was shown that the bonds were held by the Arkansas Trust Co., a local banking institution.

ducted. He understood that it was operated in the interest of charity. Import of Bailie's statements is that if satisfied regarding nature of the Hospital's humanitarian purposes, he would assist it financially. Several young lady employees overheard some of the comments made by Bailie. Their versions of what was said vary but slightly. Expressions were, (1) "He wanted to give us some of his money"; (2) "Let me give you my money first"; (3) "He said he had a lot of money he wanted to leave with the Hospital"; (4) "I want to stay here several days, and if I like it I will give you some of my money"; (5) "If you will take care of me I will take care of you"; (6) "I want to leave my money with the Hospital"; (7) "You have a fine institution here. . . . If I should give you all that property of mine you now have, would you use it for the poor? . . . I like how you treat these poor people: take it—I want you to go on with your work".

All of the witnesses who mentioned the subject agreed that Bailie was somewhat deaf and talked loudly; hence snatches of what he said were overheard, although none of the interested parties or those later used as witnesses had any idea at the time Bailie was speaking that he actually possessed wealth or that he intended to make a donation.

Bailie was taken to a room in the fifth ward. Miss Imogene Word, student nurse, took the patient's history and made an inventory of personal belongings. Her testimony was that these included a large black suitcase and a smaller one; also "lots of bundles that contained old food that I threw away". The large suitcase contained a bathrobe and other clothing. Miss Word observed a brown envelope upon which had been written "U. S. Bonds", or something to that effect. The envelope was not opened, nor was any further attention given to it when Bailie said he wanted it taken to the office. Another nurse assisted in an examination of the small suitcase, after which both containers were taken to the baggage room on the third floor; and the bonds went with them.

Miss Word testified that she did not mention to the superintendent that one of the cases contained an en-

velope marked bonds. On cross examination she was asked, "Did you make an inventory of [the patient's] effects?" She replied, "I didn't put the bonds down there". Her first actual information regarding content of the envelope came after Bailie died.

Miss Kaplan testified that while administering professionally to the patient, Bailie remarked, "I have come here for you to take care of me. I have got my money here and I want to give you money".

The following day Miss Kaplan again visited Bailie. He had been bathed, and appeared to be in better condition. In response to the salutation, "How do you feel?" the patient is quoted as having said, "I am feeling better. I see how you are treating these poor people. I feel good that I have given you that money: you will be able to do a lot with it". Miss Kaplan said she replied, "Yes, that is the nicest gift we ever had", and Bailie's response was to the effect that he had been wanting to do it for a long time.

The patient's death occurred Sunday morning. Miss Kaplan had an engagement in Little Rock, but before leaving the Hospital she gave instructions that Bailie's body be sent to Caruth's Funeral Home to be embalmed and prepared for shipment. Miss Kaplan knew the suitcases were in the Hospital baggage room, but testified that "All I knew about [anything] of any value was the $368: I thought the gentleman was referring to that during all of the time, and I thought that represented a fortune to him, and so far as we were concerned I thought it was a generous gift on his part".

Caruth's hearse was sent to the Hospital. Bailie's body was found in a room where oxygen had been administered. The suitcases were in the same room. Miss Kaplan was present when the body was removed. A nurse in charge directed that the undertaker's employees "be sure to take everything". Miss Kaplan assured the attendants she would communicate with Caruth the following day and make such arrangements as might be necessary for disposal of the corpse. After the body had been embalmed, Caruth and two of his aids opened the

suitcases and found the bonds. An attempt was made to communicate with Miss Kaplan, but she was not found until Monday afternoon. She then went to Caruth's office, received the securities, and signed a receipt for a "List of bonds belonging to Joseph Bailie, deceased".

It is intimated, but not asserted, that someone connected with or interested in the Hospital altered the receipt prepared by Miss Word, although no suspicion attaches to her; nor was there any purpose by appellee to identify a particular person, there being no proof that any of the immediate personnel—nurses, superintendent, etc.,—was a party to an improper transaction. However, when the receipt was taken from Hospital files there had apparently been added to the inventory these words: "One package containing papers and bonds. Patient requests that these be given to Administrator". Bailie's name had been written twice. One signature showed evidence of erasure, or a "marking through".

Appellee's witnesses thought the interlined words were so closely written as to disclose an afterthought. Since Miss Word, in identifying the inventory, testified that she "did not put the bonds down there", and because Miss Kaplan did not (during Bailie's lifetime) know that the bonds existed, responsibility for the reference to them was not traced to any conscious act of Bailie, hence there is no showing that he authorized the writing. Neither have we the benefit of physical inspection. Unfortunately the inventory was misplaced, and only a typewritten copy appears. When attorneys for appellee discovered the loss, testimony was taken in support of a motion to postpone approval of the bill of exceptions until the lost document could be restored or its significance made a matter of record. That part of the motion proposing postponement was overruled, but not until testimony had been heard. It is incorporated in a supplemental bill of exceptions.

To show that Bailie had a general intent to leave his property to a charitable institution like Levi Memorial Hospital, the plaintiff introduced a will executed January 4, 1947. It had been admitted to probate in Rich-

mond County, Georgia. Certain small bequests (the largest being for $1,000) were made to individuals. Then there was direction that "all the rest and residue" be entrusted to Citizens and Southern National Bank, two cousins, and a friend. These, as trustees, were told to select, as soon as practicable, but not later than five years after the testator's death, ". . . the particular hospital or hospitals [the trustees], in the exercise of their uncontrolled discretion, shall [think] best fitted and equipped to receive, manage, and utilize the property of the trust estate for the charitable purposes herein expressed. . . ."

In addition to the bonds, Bailie owned considerable property, but appellant does not contend that the so-called gift passed anything but the money, and securities itemized by Caruth.

The motion for a new trial lists seventeen mistakes the Court is alleged to have made. These are summarized by counsel for appellant in their contention that, although there were factual questions for the jury's consideration, erroneous instructions were prejudicial.

Whether the rule applicable to gifts *inter vivos* or to gifts *causa mortis* is applied, appellant insists it should prevail to the extent of a reversal of the judgment with an order that the cause be retried.

It is first argued that Bailie effectively delivered the property by surrendering all dominion over it; also that there was acceptance by Miss Kaplan as agent of the Hospital Association. "Having", as appellant's attorneys have expressed it, "sampled the generosity, kindness, and efficiency of appellant's nurses and physicians, [Bailie] may have figured that he could find no safer haven. The charts in the envelope made exhibits to Miss Kaplan's testimony show that he received all the attention that a millionaire would have received at Johns Hopkins Hospital". It is then contended that the transaction contained all of the elements to support a gift *causa mortis*. But, it is said, Miss Kaplan construed the gift as having been made in anticipation of death, for her testimony was that if Bailie had recovered, or if he

had left the hospital in any circumstances and had requested return of the suitcases, they would have been given to him, and so would the money. Cases cited in support of appellant's theory are listed in the margin.[2]

Appellant conceded that three of the instructions "correctly and fully" stated the law, but thinks error was committed when certain expressions were used in Instructions 2, 3, 4, 5, 6, and 7. In substance the jury was told that *actual* delivery was essential to a completed gift, made in anticipation of death, and that intent to presently pass title must exist at the time of delivery. Again, it is argued that if the subject matter of a donor's bounty is knowingly placed within a container, and physical delivery of the container is consummated, it is not essential to a completed gift subsequently made that the property be again delivered.

Instruction No. 5 is the principal target of appellant's attack. It alternatively deals with gifts *causa mortis,* and *inter vivos.* After mentioning and defining, the instruction says that in either case designation must be with distinctness, ". . . and it must also be established that the property was presently to pass, and that the intention was carried into effect by an actual or effective delivery. Delivery before death is as essential to a gift *causa mortis* as it is to a gift *inter vivos,* and the same rules as to delivery are applicable to both".

Essentials of a gift *causa mortis* were stressed in *Newton et al.* v. *Snyder, Adm'x.,* 44 Ark. 42, 51 Am. Rep. 587, where Chief Justice Cockrill, in speaking for the Court, said that in order to establish such a gift it is essential the evidence show "not only that the person *in extremis* designated with proper distinctness the thing

[2] *Ammon* v. *Martin,* 59 Ark. 191, 26 S. W. 826; *Hatcher* v. *Buford,* 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507; *Lowe* v. *Harb,* 93 Ark. 548, 125 S. W. 630; *Gordon* v. *Clark,* 149 Ark. 173, 232 S. W. 19; *Carter* v. *Greenway,* 152 Ark. 339, 238 S. W. 65; *Ellsworth* v. *Carnes,* 204 Ark. 756, 165 S. W. 2d 57; *Anderson* v. *Lord,* 87 N. H. 474, 183 Atl. 269, 103 A. L. R. 1108, note at p. 1111; *Northern Trust Co.* v. *Swartz,* 309 Ill. 586, 141 N. E. 433; *In re Mills Estate,* 172 App. Div. 530, 158 N. Y. S. 1100, affirmed 219 N. Y. 642, 114 N. E. 1072; *Laig* v. *Pelus,* 198 Miss. 185, 22 So. 2d 239; *Burt* v. *Second National Bank,* 241 Mich. 216, 217 N. W. 71; *Champney* v. *Blanchard,* 39 N. Y. 111; *Caylor* v. *Caylor,* 22nd Ind. App. 666, 52 N. E. 465, 72 Am. St. Rep. 331; *Cain* v. *Moon,* (1896) 2 Q. B. 283.

to be given and the person who is to receive it, but it must establish also that the property was presently to pass, and that the intention was carried into effect by an actual or effective delivery. In this respect there is no difference between gifts *inter vivos* and *causa mortis.*"

In *Hatcher* v. *Buford,* 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507, the two classes of gifts were considered. It was held that a husband's attempt to convey property *causa mortis* was subject to the widow's right of dower. The opinion holds the better rule to be that although delivery has been made, property rights do not become vested until the donor's death, ". . . that is, the donor's death is a condition precedent to the vesting of title." The same rule was mentioned in *Ammon* v. *Martin,* 59 Ark. 191, 26 S. W. 826—two of the cases cited by appellant. Both are referred to in *Harmon* v. *Harmon,* 131 Ark. 501, 199 S. W. 553, also cited by appellant.

Of the instructions complained of, only No. 5 expressly mentions gifts *causa mortis.* Nos. 4 and 6 use the term "*inter vivos*", and Nos. 2, 3 and 7 employ other words.

If it be conceded that *Hatcher* v. *Buford, Ammon* v. *Martin,* and *Harmon* v. *Harmon* modified the rule announced in *Newton* v. *Snyder,* and that error would have been committed if "immediately", or "simultaneously", or "at once" had lent emphasis to Instruction No. 5, the fact remains that this was not done. Instead, the jury was told it was incumbent upon the plaintiff ". . . to establish that the property was *presently* to pass, and that the intention was carried into effect by an actual or effective delivery".

Word references disclose that "presently" has two meanings: (1) "Now, at the time spoken of"; (2) Immediately; by and by; in a little time". See Century Dictionary. "Him therefore I hope to send presently, so soon as I shall see how it will go with me".—Paul's Epistle to the Philippians, 2:23.

Appellant's specific objection to Instruction No. 5 is not a contention that "presently" was an improper

expression because it meant *now,* or *immediately;* therefore, since the use of the word as a period of time is not of necessity limited to the restricted construction appellant contends for, it cannot be said that the jury was misinformed.

If the jury regarded as genuine the matter relating to bonds, interlined on the inventory prepared by Miss Word, it had a right to determine the sense in which "Administrator" was used, the request being that " . . . these [bonds] be given to the Administrator". If mentally capable of making testamentary decisions at that time, Bailie knew, of course, that he had recently executed a will, and that his affairs would pass through administration. Appellant introduced witnesses who testified that Miss Kaplan, the superintendent, was spoken of as Administrator, and that perhaps Bailie knew this and had her in mind when the wish was expressed—if in fact the act was a conscious one. But in any event construction of the language was a disputed question. If Bailie intended that the bonds should go to a legal representative—"Administrator"—after his death, that purpose was in conflict with appellant's contentions that either a completed or conditional gift was made.

While the case presents many unusual phases, our view is that appellant was not prejudiced by the instructions. Factual issues were adversely determined by a jury, and we are unable to say that appellant was denied its legal rights.

Affirmed.

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY *v.* FRIEDMAN.

4-8475 209 S. W. 2d 102

Opinion delivered March 8, 1948.

Hugh M. Bland, for appellant.

Hill, Fitzhugh & Brizzolara, for appellee.

HOLT, J. Appellee brought this action to recover for loss of personal property belonging to his minor son, Benno S. Friedman, in the amount of $428.95, on a Floater Insurance Policy issued to appellee by appellant company, on July 20, 1946, in the principal sum of $5,000, for which appellee paid a premium of $155. Appellant denied liability.

A trial before the court sitting as a jury resulted in a judgment for appellee for the full amount claimed, for attorneys' fees and 12% penalty. This appeal followed.

Appellant says there are only two questions for decision: "1. Was Benno S. Friedman, at the time of the thefts of his personal property, a member of the insured's family of the same household within the terms and provisions of the policy of insurance? 2. Did the court err in permitting the plaintiff to introduce incompetent, irrelevant and hearsay testimony and to consider the same in making its findings of fact and conclusions of law?"

Mr. I. J. Friedman, Benno's father, testified: "My name is I. J. Friedman. I live at 722 South 24th Street, Fort Smith, Ark., and I have a policy of insurance with The Central Manufacturers' Mutual Insurance Company of Van Wert, Ohio. (The policy was produced and introduced in evidence). My son, Benno S. Friedman, was drafted into the Army in the spring of 1946. At that time he was 18 years of age. He is not married and was living at my home at the time he was drafted. He is now 19 years of age."

Over appellant's objection and exceptions, Mr. Friedman was further permitted to testify that his son, Benno, would be discharged from the Army when his 18 months were up, that he did not have a separate home of his own, that he was subject to Army orders wherever he was located, that his son attended Ohio State College three or four months before he was drafted, attended Officers Training School and received a commission, that he was paying his son's expenses at Ohio State, that he intended to send him back to school after his discharge and that his son was coming back home after his discharge.

It was stipulated "that on February 1st to 8th, 1947, there was stolen from Benno S. Friedman, from locked room by picking lock, in Billeting Officers Quarter, No. 804, Room No. 18, at Fort Eustis, Virginia, the following articles," (naming them), of the value of $238.45, and "that on January 22, 1947, there was stolen from said Benno S. Friedman, from locked suitcase from Building 2309, Fort Eustis, Virginia, the following articles," (naming them), in the amount of $252.50, "and that if

the plaintiff is entitled to recover he should recover in the amount of $428.95 for the loss of the articles."

The policy in question provides: "Property Covered: 1. Personal property owned, used or worn by the persons in whose name this policy is issued, hereinafter called the Insured, and members of the Insured's family of the same household, while in all situations, except as hereinafter provided. . . . 4. With respect to the unscheduled personal property ordinarily situated throughout the year at residences other than the principal residence of the Insured, the Company shall not be liable in excess of ten per cent of the amount of insurance set forth in Item (a) Paragraph 3," or ten per cent of $5,000."

At the time of the property loss here, Benno was a minor and it was the duty of the parent to support and educate him so long as he remained a member of his family. *Biggs* v. *St. Louis, Iron Mountain & Southern Railway Company;* 91 Ark. 122, 120 S. W. 970, and *Frauenthal & Schwarz* v. *Bank of El Paso,* 170 Ark. 322, 280 S. W. 1001, 44 A. L. R. 871.

The domicile of Benno was with his father, *Landreth* v. *Henson,* 116 Ark. 361, 173 S. W. 427. Domicile includes residence and place of abode. Webster defines "domicile": "A place of residence, either of an individual or a family; a dwelling place; an abode, a home or habitation." Residence and place of abode are synonymous. *Husband* v. *Crockett,* 195 Ark. 1031, 115 S. W. 2d 882. The Constitution of this state provides: Art. XIX, § 7: "Absence on business of the state or of the United States or on a visit, . . . shall not cause a forfeiture of residence once obtained."

The evidence is undisputed that Benno was unmarried, a minor, was living with his father at the time of his induction into the Army, and intended to return to the parental home in Fort Smith when discharged. He did not intend to change his domicile or residence and had made no change unless his military service alone brought about such change. In the circumstances here,

Benno's military service did not bring about any change in his domicile or residence.

In the very recent case of *Kennedy* v. *Kennedy,* 205 Ark. 650, 169 S. W. 2d 876, we said: "In the Conflict of Laws, vol. 1, p. 155, Professor Beale discusses the 'domicile of a soldier or sailor' and the capacity of a sailor or soldier to acquire a 'residence' notwithstanding his service in the Army or Navy, and it was there said: 'It is, of course, possible for him (soldier) to provide a house of his own, off the post, where his family may live, if this is allowed by superior officers; and it is possible for him to change his domicile by the proper proceedings while on leave. But he cannot acquire a domicile in an Army Post.'

"At p. 157 of the same text it is said: 'This does not mean, of course, that the soldier or sailor in any way loses his personality or ceases to be *sui juris.* He is as able as anyone to acquire a new domicile so far as conditions allow. He cannot acquire it by any act done under military orders since, as has been seen, he has no choice but obedience. His orders would, so long as he remained in the Army, be enforced by all the powers of the state, and if he were permitted to leave the Army he could no longer remain in the Army quarters. He may, however, like anyone else, change his domicile by acquiring a residence outside an Army Post with the intention of making it his home. . . .

"The domicile of a soldier or sailor in the military or naval service of his country generally remains unchanged, domicile being neither gained nor lost by being temporarily stationed in the line of duty at a particular place, even for a period of years. A new domicile may, however, be acquired if both the fact and the intent concur."

Here, there is no evidence that Benno acquired a residence outside of the Army post with the intention of making it his home.

We think the word "household" as used in the section of the policy, *supra,* meant domicile, residence or place of abode. "Household" is defined in Bouvier's

Law Dictionary, Rawle's Third Revision, vol. 2, page 1462, as follows. "Those who dwell under the same roof and constitute a family. Webst. But it is not necessary that they should be under a roof, or that the father of the family be with it, if the mother and children keep together so as to constitute a family; *Woodward* v. *Murray,* 18 Johns. (N. Y.) 400."

We hold that Benno Friedman was a "member of the insured's family of the same household" and was therefore protected by the policy when the theft occurred, and that the further provision in the policy, "while in all situations" covered the stolen property regardless of its location. That such was the intended meaning of this latter phrase, by the insurer, company, is emphasized by the provisions of section 4, *supra,* which limits the amount of the company's liability to 10% of all articles located away from the insured's residence. The face of the policy was for $5,000 and under this section 4, the most that could be recovered on articles kept away from the home was $500. Had the insurer, company, desired to restrict the geographical boundaries of its coverage, it could have very easily so provided in the policy.

The rule is well settled that policies of insurance must be construed, in case of any ambiguity, most strongly in favor of the policy holder, and against the insurer who wrote the insurance contract.

Appellant's contention that the evidence of I. J. Friedman, *supra,* to which it objected, was incompetent and should not have been admitted is, we think, untenable for the reason that such evidence does not come within the hearsay rule. This testimony was within the knowledge of Benno's father. Benno being a minor, was subject to the control of his father, during his minority, and there was no evidence that he had acquired, or intended to acquire, any other domicile or residence, than that provided by his father in Fort Smith.

Finding no error the judgment is affirmed.

SPEARS, EXECUTOR *v.* SPEARS.

4-8472 209 S. W. 2d 105

Opinion delivered March 8, 1948.

Wilson & Starbird, for appellant.

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

McHANEY, Justice. George W. Spears died testate on January 20, 1947. Appellant, a son, is the executor of his father's estate. Appellee is the widow of George W. Spears and was his third wife. The testator owned real and personal property of substantial value, but in his will he made no provision for appellee to have any part of his estate. They had no children as a result of this marriage, but he had children by both his former wives.

On March 24, 1947, appellee filed separate petitions for her statutory allowance of $300 and $150, as widow under §§ 80 and 86 of Pope's Digest, the latter being conditioned on the estate's solvency. On the same date appropriate orders were made by the court granting both allowances, a specific finding in the $150 allowance was that the estate was solvent.

On March 31, 1947, appellant filed a motion to set aside said orders of allowances on the grounds that appellee had executed a receipt for certain money paid to her by testator in full satisfaction of all her rights in his estate, and that in consideration of $100 cash paid to her by testator she joined with him in the execution of deeds conveying all the real estate of testator to his several children. A receipt for $100 was attached to said motion, dated December 19, 1946, and recited that it was "in full for all her rights in said property of said estate," and purportedly signed by her. Her response to said motion was a general denial, and particularly denying that she executed said receipt.

Trial on the motion resulted in a judgment overruling the motion as to the $300 allowance under § 80 and granting it as to the additional allowance of $150 under § 86 of Pope's Digest, and the former order of allowance of $150 was set aside. Both parties being dissatisfied have appealed to this court, so we have here a direct appeal by the executor and a cross appeal by appellee.

The trial court gave no reason for setting aside its former allowance of $150 under § 86. There was no additional finding by the court on the solvency of said estate, which had previously been found to be solvent. In fact it appears to be undisputed that said estate is solvent. There were no debts of any consequence and the personal and real property was of the value of several thousand dollars.

We do not think the receipt relied on precluded appellee's right to claim such statutory allowances, and neither did the trial court. She executed the deeds to the real estate and released her dower and homestead therein, but the widow does not take these statutory allowances as dower. It was so held in *Costen* v. *Fricke,* 169 Ark. 572, 276 S. W. 579, where it was said: "The widow does not take the homestead as dower; neither does she take these statutory allowances as dower. They are in addition to dower, and the widow is not put to an election in regard thereto unless the language of the will makes it clear that the property devised to her is to be

in lieu of these statutory allowances as well as that of dower."

She denied that she signed said receipt dated as above and said she received only $80 of the $100 mentioned. Be that as it may, the receipt does not purport to be a release of these statutory allowances to the widow. It seems to be more reasonable that she signed the receipt for $100 and was paid this sum to get her to execute deeds of conveyance to the children of the testator named in said deeds, and that she was releasing all her rights in the real property so conveyed, and nothing more. In any event nothing was said in the receipt about her statutory allowances.

In *Stokes* v. *Pillow,* 64 Ark. 1, 40 S. W. 580, cited and quoted from in *Costen* v. *Fricke, supra,* it was said: "But the presumption is that the testator did not intend to deprive the widow of any estate given her by law, and that the provisions of the will were intended as a bounty in addition to that which she already had (homestead). The widow is therefore in such cases entitled to claim both the homestead as well as the benefits conferred by will, unless its provisions are so repugnant to the claim of homestead that the same cannot stand together." So here, the presumption is that appellee did not release her statutory allowances. She did not do so expressly either in the deeds or the receipt, and even though she released all her dower interest, she did not release these allowances which are in addition to dower given her by law.

On the direct appeal the judgment is affirmed. On the cross appeal, it is reversed and remanded with directions to allow the widow $150 under § 86 of Pope's Digest.

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

4-8477 209 S. W. 2d 106

Opinion delivered March 8, 1948.

[redacted]

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

W. H. Glover, for appellee.

ED. F. MCFADDIN, Justice. Appellee filed action against appellant for damages, claiming that a train had killed his horse. A circuit court jury verdict was for appellee; and this appeal ensued.

Appellee lived adjacent to the right of way and main line track of the railroad, and a wire fence along the right of way was the accepted division line. Appellee's horse was in good condition one afternoon, and some time during the night one of appellant's trains was heard to give the stock alarm signal, and the next morning the horse was found dead about 12 feet *outside* of the right of way fence and near the public highway. Appellee's

theory was that the horse went under the fence at a water gap, and then onto the track, where it was hit by a train. The explanation is not very clear as to how the horse again went under the fence and off of the right of way to the spot by the highway where the body was found. No witness testified that any tracks or other markings showed that the animal, after being struck by the train—if, in fact, it was so struck—dragged itself under the fence and to the spot where it died. Appellant defended on the theory that the horse was hit by a truck on the highway, rather than by appellant's train.

The trial court, at the request of the appellee, gave the following instruction as plaintiff's instruction No. 3:

"You are instructed that if you find from the facts and circumstances as testified to in this case that the animal in question was permitted to enter the defendant's right of way on account of the negligence of the defendant, if any, in failing to keep the fences in proper repair, and was struck by one of the defendant's trains, then you are told and instructed that the defendant would be liable in this case and you will find for the plaintiff."

To this instruction appellant objected generally and specially. The special objection was that:

". . . there has been no proof whatever that the animal was killed by the operation of a railroad train, and the mere fact that the fence was down, if it was, would not be sufficient to return a verdict against the railroad company in this case."

The special objection pointed out a serious and fatal defect; and the judgment must be reversed because of this erroneous instruction.

It will be observed that this was a binding instruction [1]—*i. e.*, it told the jury that, if only the conditions stated in that one instruction existed, then the jury would return a verdict for the plaintiff. Under this instruction

[1] In *Reynolds* v. *Ashabranner*, 212 Ark. 718, 207 S. W. 2d 304, we discussed a "binding instruction" and cited other cases using that expression.

No. 3, the jury was told to return a verdict for the plaintiff, if it found these conditions to exist:

(1) that the horse entered the railroad right of way on account of the appellant's negligence; and

(2) that the horse was struck by a train.

The effect of this instruction was to make the railroad company an insurer of the safety of the animal, if once the animal entered the right of way because of the railroad's negligence in permitting the fence to be in bad condition. The mere statement of such effect shows the inherent vice.

In *Fenton* v. *DeQueen & E. Ry Co.,* 102 Ark. 386, 144 S. W. 192, the plaintiff asked as instruction No. 2 which read:

"If the jury believe from the evidence that the animal in question was injured by defendant's train, you will find for the plaintiff."

Of that instruction, we said:

"Instruction number 2, as requested, was properly refused, since it directed a finding against the defendant if the animal in question was injured by one of its trains, without regard to whether it was negligently done. . . ."

Mr. Justice KIRBY also said in that case:

"Instruction No. 4 was subject to like objection, in that it . . . told the jury that if . . . the animal was injured by a train, the presumption would arise that it was negligently done, and (the instruction) directed them to find for the plaintiff. The direction was not proper, since it had the effect to declare the presumption of negligence conclusive."

Likewise, in the case at bar, plaintiff's instruction No. 3 "had the effect to declare the presumption of negligence to be conclusive."

Assuming it to have been the duty of the railroad company to maintain the fence[2], what the plaintiff evi-

[2] See *Railway Co.* v. *Ferguson,* 57 Ark. 16, 20 S. W. 545 and *St. L. I. M. & S. Ry. Co.* v. *Wilson,* 116 Ark. 163, 171 S. W. 471.

dently had in mind in requesting instruction No. 3, was to tell the jury that, if (1) the horse entered the right of way because of the negligence of the railroad company, and (2) was struck by a train, *then the burden would be on the railroad company to show itself free of negligence in* striking the horse. The reason we think appellee intended to conclude as italicized above is, because in his brief he has cited us to *Mo. Pac. R. Co.* v. *Green,* 172 Ark. 423, 288 S. W. 908, and *Little Rock, etc. Ry. Co.* v. *Wilson,* 66 Ark. 414, 50 S. W. 995. In the Green case we held that, when it was proved that the animal was killed by the train, then the burden was on the railroad company to show itself free from negligence. In the Wilson case, after detailing the facts, we said:

". . . there was a *prima facie* case of injury by the railway company, and, in the absence of proof to the contrary, it will be presumed that it was caused through the company's negligence."

These cited cases clearly indicate that the presumption of negligence is not conclusive, but is rebuttable; yet plaintiff's instruction No. 3 made the killing of the animal proof conclusive of the railroad's negligence.

Since the body of the horse was found outside the right of way fence, it was incumbent upon the appellee to establish that the horse was killed by the train before the statutory presumption fixed by § 11152, Pope's Digest, would apply.[3] But if such presumption arises, still, it is one thing to say that the railroad has the "burden of showing that such animal was not negligently killed" (as said in the Green case, *supra*), and quite a different thing to tell the jury to "find for the plaintiff" as plaintiff's instruction No. 3 said in the case at bar.

The judgment is reversed, and the cause remanded.

[3] Cases construing the statutory burden on the railroad company to disprove negligence for stock killed by a train appear in West's Arkansas Digest "Railroads," § 441.

BINIORES *v.* WALTHOUR-FLAKE COMPANY, INC.

4-8644 209 S. W. 2d 93

Opinion delivered March 8, 1948.

Rehearing denied March 29, 1948.

[redacted]

Carmichael & Hendricks, for appellant.

Brooks Bradley and *Gerland P. Patten,* for appellee.

GRIFFIN SMITH, Chief Justice. Six vacant lots in Block Four, Hollenburg Addition to Little Rock, owned by Frank Biniores and his wife, were listed with Walthour-Flake Company, Inc., under a contract dated September 21, 1945. On its face the printed form provided for a commission of $50 for the sale of any lot if the amount should be less than $1,000. The words "Gross Price" were permissively altered by pen, with the result that there was authority to sell the property at "a net price [of] $1,150". On the reverse side the writing was, "Owner wants $1,150 net, purchaser to pay for abstracts—owner will pay taxes due".

Some time in January 1946 the Agency informed Biniores a purchaser had been found. Biniores was sup-

plied with a deed appropriate to the transaction, which he and Mrs. Biniores executed on the 25th. With its delivery Walthour-Flake gave Biniores the Company's check for $932.21; also a typewritten statement showing, (a) "Cash received, $1,150; (b) disbursements, [itemized] $217.79; (c) balance, $932.21".

It developed that in preparing this statement for Walthour-Flake, J. W. Purdom, an employe, overlooked tax items amounting to several hundred dollars. The discrepancies were called to the Agency's attention by the grantees, C. E. and Vera M. Hutchinson, who relied on the grantors' warranty. Thereupon Purdom conferred with Biniores respecting payment of the obligations. Testimony relating to what was said at this meeting is in sharp conflict. Biniores insists he did not know the property had sold for $1,500, or at least this information was withheld until the deed was prepared; and then, before delivering the instrument, he asked Purdom whether "everything was cleared" by the deduction of $217.79. He was affirmatively assured, and relied upon Purdom's statement that $932.21 was net, and that the difference between $1,500 and $932.21 accounted for taxes, abstract fee, commission, etc.

Biniores asserts that when confronted with the additional demands he said to Purdom: "I don't know anything about it. I settled with you according to your check and asked you if that included everything". The witness then added, "I offered to give him his money back, but he wouldn't take it".

Effect of Purdom's testimony is that when the property was listed at $1,150 net, Biniores spoke of delinquent taxes and said that when they were paid he probably would have not more than four hundred dollars left. This was emphatically denied.

Purdom testified that in consequence of discussions regarding omitted taxes Biniores suggested preparation of a new statement, showing that $1,500 was received. Accompanying this proposal assurance was given that in return for the Agency's act in reducing commissions to $150, "all the items would be paid". Purdom is alleged

to have told Biniores that he did not have authority to make this arrangement, but that it would be referred to Walthour-Flake for ratification or rejection.

Soon after this conversation took place the Agency paid some of the taxes. Later (inferentially) Purdom told Biniores that J. D. Walthour had approved the tentative settlement. When Biniores declined to reimburse the Agency, suit was brought on the theory that because necessity required payment by Hutchinson, Walthour-Flake is subrogated to the primary debtor's rights. From a decree in favor of the plaintiff and judgment for $490.83, Biniores and his wife have appealed.

Appellants contend, (a) that in listing the property at a *net* figure it was understood that this amount was to be realized by the owners, and the agreement to pay taxes meant State and County assessments as distinguished from improvement districts where betterments accrue; (b) in accepting the check for $932.21 based on a sale for $1,150 and in not holding out for $1,500, a reluctant compromise was made because of threats implying legal action. The deed was delivered because of the assurance that the settlement was final; (c) in making direct payment of taxes additionally claimed without presenting accurate statements to appellants, Walthour-Flake became a volunteer, and the right of subrogation does not exist.

The statement submitted to Biniores January 25th showing that but $1,150 was received listed disbursements as follows: Recording State deed, $1.75; revenue stamps on deed, $1.65; Broadway Bridge and Little Rock-Spring Lake Highway taxes 1933 to 1939, $10.36; Districts 113, 472, and 473 1945 taxes, $204.03. These were the items composing the difference between $1,150 and $932.21.

The subsequent statement, dated "as of" January 25—but admittedly prepared at a substantially later date—contains the following: Abstract fee, $50.50; State of Arkansas, $1.75; revenue stamps on deed, $1.65; sewer [district] No. 113, taxes for 1936 to 1940, $242.19; same district, taxes 1941 to 1945, $236.39; same district, taxes

for 1946, and Districts No. 472 and 473 for 1945, $204.03; Bridge and Spring Lake Highway tax 1932 to 1940 inclusive, $10.36; State and County taxes for 1945, $12.25; sales commission, $150. Total expense, $909.12. Difference between sales price of $1,500 and allowable deductions, $590.88. Refund due, ($590.88 from $932.21) $341.33.

In the complaint filed during March 1946 it was alleged that Biniores and his wife "had agreed" to accept $1,500 for the property and to pay an agent's commission of ten percent; also that the defendants had "agreed" to pay general and special improvement district taxes, "and other items chargeable to the sellers". Paragraph four of the complaint then asserts that "From said sum of $1,500 there was deductible the following items, . . . or a total of $909.12, leaving a balance due the said Frank and Dora Biniores of $590.88."

The items listed, for some reason not apparent, do not total $909.12, but only $430.54. In paragraph six there is the allegation that the plaintiff, upon request of the *then owner* of the lots, issued three checks, each dated February 18, 1946; one for $242.19, another for $236.39, and the third for $12.25. These items amount to $490.83 —the sum for which judgment was rendered. But the complaint asked $341.43, or $149.40 less than the amount recovered. The complaint was amended May 5th by adding, immediately preceding a prayer for relief, the matter shown in the footnote.[1]

When checks presumptively given for tax items were offered in evidence, they were objected to on the ground that the receipts would be the best evidence. The Court permitted the checks to be filed as exhibits to testimony that payments had been made, but ruled that if the receipts were insisted upon, they should be produced.

[1] Matter contained in the amendment: "That after the sale of the property and demand had been made upon the plaintiff by the purchaser . . . to pay taxes, . . . the plaintiff offered with the defendants by way of compromise a settlement of the transaction on the basis of the figures and computations contained in the statement [showing that the sale was made for $1,500]; that a settlement was refused by the defendants and the offered compromise was rejected. The amount of taxes paid by the plaintiff at the request of the purchasers . . . amounted to $490.86, [?] and this is the sum now owing. . ."

Thereupon appellant's attorney moved to strike from the record all of the checks except one for $12.25.

In procuring factual information essential to an accurate statement of the case, testimony and exhibits as abstracted have been checked. This has been supplemented by comparison with the record. Some of the payments claimed to have been made are not substantiated by original receipts or official copies.

If the abstracted statements are disregarded and the record proper is dealt with, it is disclosed that Sewer District No. 113 was paid $242.19 for "years 1936 to 1940, inclusive". For 1941 through 1945, the payment made February 20, 1946, was $236.06. There is testimony, but no receipt in support, that for 1946 the payment was $41.49. An undated card bearing the printed name of Roy Beard, City Collector, is notice that taxes on the lots "lying in Street-Sewer Districts Nos. 472 and 473 are due". A penciled notation reads, "1946 taxes paid". The payor is not identified. Amounts in each are $81.27, or $162.54 for the two districts.

In appellee's first settlement with Biniores, Sewer District No. 113, and "472-473 taxes" for 1945, were charged as $204.03. In the second statement the same item appears, but District No. 113 taxes are said to have been for 1946. Purdom testified that Districts 472-473 were each paid $81.27 for 1945, and that District 113 was paid $41.49 for 1946, and this, added to $162.45, would account for the charge of $204.03 appearing in each of the statements.

It would seem, therefore, that payments aggregating $519.74 were made to District No. 113 for 1936 to and including 1946; and, *prima facie,* Districts 472 and 473 were paid $162.54 for 1945.

Among the checks tendered by appellee was one for $242.19. This item was listed in the second statement and is shown to have been paid to the receiver of District No. 113.

In the second statement $12.25 is charged for 1945 State and County taxes. Purdom testified that 1945

taxes were $12.25. Receipts by Collector Gus Caple show that Lots 1 and 2 were assessed together on a valuation of $90 and that taxes were $8.82. Lots 3, 4, 5, and 6 were assessed on a valuation of $160, with taxes of $15.68. The two items total $24.50. There is probably some explanation, but it is not clearly indicated.

We are unable to even measurably harmonize statements of appellee's witnesses with the amount sought as a recovery in the original and amended complaints, and with receipts. Appellant had a right to insist upon primary evidence of payments and did not waive his objection to introduction of the checks. This right was recognized by the Chancellor, who indicated that the receipts should be filed. Some, purporting to be originals, are not identified as such. If the judgment should stand, appellant would have received $441.38 from a $1,500 sale, or $149.50 less than that claimed before the amendment was filed.

It would seem that at some time between January 25th and March 12th those who allege they made payments would have been able to determine the extent of expenditures, and to have presented appellant with primary evidence.

The procedure adopted in dealing with appellant is detailed for the purpose of showing how the payments are alleged to have been made, the attending circumstances, and the equitable theory of subrogation upon which the claim rests. Since this Court is unable, from the evidence or exhibits, to determine what appellants would owe according to appellee's various demands, it follows that necessary information was withheld. It was not given for one of two reasons: either appellee did not know, or it elected to negotiate with Biniores for settlement yielding a commission greater than ten percent of $1,500. The contract, if construed as listing the lots separately, (and if the sale of each was for less than $1,000) provided commissions of $50 each, or $300. If considered as a group listing authorizing sale of the six lots for $1,150, the commission would have been $115. While appellant knew, before delivering the deed, that

the property had brought $1,500, clearly he was confused regarding obligations; and in his confusion appellant relied upon the Agency to supply essential facts.

It must be conceded that Purdom was honestly mistaken when the first settlement was made. Still, in view of subsequent dealings, appellant was entitled to information of an accurate nature, and this ought to have been given him before the second commitment was proposed.

In the circumstances, appellee owed double duties: one to the purchasers, and another to Biniores. Its duty to the buyer was discharged, but this was done before Biniores had been given an opportunity to examine evidences of the obligations he was called upon to pay. Having failed in this respect, appellee, after the agency relationship had ended, made certain payments. In doing this it assumed a voluntary part, and is not entitled to subrogation.

Appellants filed cross-complaints, alleging that Walthour-Flake was bound under the contract to sell the property to the best advantage, and that in disposing of the lots for $1,500 the price was shockingly low, and there was a breach of an implied condition to act reasonably in protecting appellants' interests. We think this position was not well taken and that the Chancellor correctly dismissed the cross-complaint.

That part of the decree wherein judgment was rendered for $490.83 is reversed. The cause is dismissed.

MOLL *v.* MAIN MOTOR COMPANY.

4-8435 210 S. W. 2d 321

Opinion delivered March 8, 1948.

Rehearing denied May 10, 1948

W. A. Leach, for appellant.

M. F. Elms, for appellee.

MINOR W. MILLWEE, Justice. William Moll was plaintiff in the circuit court in an action of unlawful detainer against Main Motor Company. The cause was tried before the court, without a jury, on oral testimony and a stipulation of facts which, in part, reads as follows:

"In the latter part of the year 1944 the property described and set forth in plaintiff's complaint was owned by J. H. Martin who was a resident of Los Angeles, California. The defendant rented said property from the said J. H. Martin on a month to month basis at the rate of $65 per month payable in advance. The defendant is a corporation organized under the laws of the State of Arkansas and its business consists of the sale of automobiles, electrical boxes or frigidaires, gas cooking stoves or ranges and many other articles and also has a large repair department for automobiles and machinery.

"On or about the first of November, 1945, the plaintiff purchased the property in question from J. H. Martin. The defendant at all times after renting said property paid its monthly rent in advance at the rate of $65 per month and continued to pay the same to the plaintiff until January 1, 1946. In the latter part of November, 1945, the plaintiff served a written notice upon defendant that its tenancy would be terminated on January 1, 1946,

and it was demanded that defendant quit and deliver up possession of said property to plaintiff as he wished to occupy the same himself.

"The defendant was engaged at the time in constructing a large building on Main Street wherein it proposed to house its business. The defendant on January 1, 1946, had not been able to complete its building because it was impossible to obtain materials in sufficient quantities because of the great shortage and delay in procuring same for it to have its building near completion or in condition so it could move into it. It was also impossible for the defendant to rent other quarters in Stuttgart in which to move its business. For these reasons the defendant did not vacate the building belonging to the plaintiff.

"On December 29, 1945, the defendant delivered to the plaintiff through United States mail its check for $65 in payment of the January, 1946, rent. On January 2, 1946, the plaintiff returned the check to defendant with the following letter, to-wit:

" 'This will acknowledge receipt of your check for $65 as payment for rent for the month of January, 1946.

" 'I had previously given you the statutory notice that your lease contract was terminated at the end of the monthly period beginning December 1, 1945, as I desired to occupy the premises myself at the earliest possible date.

" 'Not wishing that your tenancy longer continue, I am returning you herewith the check and again request that you deliver the possession of the property over to me.'

"On January 22, 1946, the plaintiff wrote the defendant the following letter:

" 'You may disregard the notice heretofore served upon you to vacate the property in which you are now located and operating, and let me have check to cover the rent for the month of January.

" 'You are hereby notified that the rent on said premises which you are now occupying beginning with

February 1, 1946, will be two hundred dollars per month, payable monthly in advance. So if you desire to occupy the premises after February first, let me have your check for two hundred dollars covering that month's rent.'

"Following this letter on January 22, 1946, defendant returned its check for $65 to plaintiff for the January rent which he accepted and cashed.

"On January 31, 1946, the defendant sent to plaintiff a check for $65 for payment of the February rent, but the plaintiff refused to accept same and returned it to defendant with the following letter:

" 'I am returning herewith your check dated 1-31-1946, No. 1004, in the sum of $65 which you say is rent for the month of February.

" 'During the month of January you were notified that the rent for the building which you are now occupying would be $200 per month. Evidently you have overlooked that letter. The amount due is $200, and its payment will for the time being prevent the institution of eviction proceedings.'

"On February 5, 1946, the plaintiff caused the following notice to be served upon the defendant:

" 'To Main Motor Company:

" 'You are hereby notified that the monthly rental on the following described property lying in the City of Stuttgart, County of Arkansas, State of Arkansas, to-wit: (property described) remains due and unpaid and that therefore I am terminating your tenancy.

" 'You are further notified to quit and deliver the possession of said property up to me immediately after the expiration of three days from the date this notice is served upon you.'

"On February 12, 1946, this suit was filed to oust the defendant from the property. . . ."

It was further stipulated that defendant mailed its check to plaintiff for $65 for the use and occupancy of the premises, in advance, for the months of March, April,

and May, 1946, but plaintiff returned and refused to accept these checks; and that defendant had completed its own building to the extent that it could be occupied on May 28, 1946, when defendant moved and surrendered possession to plaintiff.

In his complaint filed February 12, 1946, plaintiff alleged that defendant failed and refused to pay rent of $200 for the month of February, 1946, after being given due notice on February 5, 1946, that its tenancy was terminated. It was further alleged that defendant refused to quit and deliver possession of the premises within three days after service of said notice, and was unlawfully detaining the property. In addition to his prayer for possession, plaintiff asked judgment for $200 rent for February, 1946, damages of $1,000 for detention of the property, and such further rents and damages as might accrue pending suit.

The answer of defendant was a general denial of the allegations of the complaint and a specific denial of any agreement on its part to pay a monthly rental of $200. Defendant also tendered with its answer the sum of $260 (being the sum of $65 per month for the months of February to May, 1946, inclusive) and such costs as had accrued to the date of the answer. The tender was refused by plaintiff. Defendant also alleged that a termination of its tenancy on February 5, 1946, would make it liable as a trespasser for only a reasonable sum monthly for the use and occupancy of the building.

Oral testimony was introduced by defendant showing the reasonable rental value of the building to be $65 per month; that the building was in a dilapidated and run-down condition and defendant was compelled to make extensive repairs at its own expense in order to occupy it; and that the premises remained unoccupied from the time defendant surrendered possession until November. 1946, when plaintiff began extensive repairs on same.

At the conclusion of the hearing the trial court, after making certain findings of fact, made the following declaration of law at defendant's request: "The Court declares as a matter of law that no contract, express or

implied, ever existed between plaintiff and defendant whereby plaintiff was entitled to charge and collect from defendant rentals of $200 per month for the months of February, March, April and May, 1946; but, on the other hand, declares as a matter of law that plaintiff is entitled to a reasonable compensation for defendant's use and occupancy of said building for said months; that under all the circumstances $65 per month or a total of $260 is a reasonable compensation; that defendant at the outset of this trial offered to confess judgment for said sum. Therefore, the recovery should be for $260 and costs up to that time." Judgment was entered accordingly and the court overruled plaintiff's motion for treble damages claimed under Act No. 373 of 1947.

For reversal of the judgment it is contended that the trial court erred in refusing to hold that a new contract was entered into whereby defendant became obligated to pay rents at the rate of $200 per month beginning with the month of February, 1946. Plaintiff argues that defendant manifested no objections to the rental stipulated in the letter of January 22, 1946, and by its action and conduct after receipt of such letter accepted plaintiff's demand for increased rent at the rate of $200 per month.

The authorities generally are not in harmony on the effect incidental to a tenant's holding over after expiration of a rent period and notice by the landlord of an increase in rent. In 32 Am. Jur., Landlord and Tenant, § 950, it is said: "In about half of the jurisdictions wherein the question has arisen, the view has been taken that by holding over beyond the term, after having been seasonably notified that there will be an increase in rent after the term, the tenant becomes liable for the increased rent, notwithstanding his distinct refusal to agree thereto. In the other half of the jurisdictions wherein the question has arisen, the view has been taken that a notice of an increase in rent does not bind the tenant thereafter holding over beyond the term if, within proper time, he expresses his nonassent to the terms of the notice."

In the case of *Colyear* v. *Tobriner*, 7 Cal. 2d 735. 62 P. 2d 741, 109 A. L. R. 191, the tenant was renting the prem-

ises for $45 per month and the landlord gave notice that the month to month tenancy would terminate on a certain date and if the tenant continued in possession beyond that date, he would be liable for rental at the rate of $750 per month. The California court held that the tenant had not expressly or impliedly consented to the increased rent, independently of a state statute which authorized an increase in rent upon service of a 30-day notice. Many cases from other jurisdictions are reviewed in the annotation to this case. In a discussion of the reasons forming the basis for conflicting holdings on the question, the author of the annotation, at pages 198-199, says:

"The doctrine, as recognized in some of the cases, that a tenant who holds over after being notified of an increase in rent for the succeeding term, or rent period, becomes liable to pay the increase demanded, whether he actually assents thereto or not, and notwithstanding his objections and protests, is founded on the idea that a landlord is absolutely entitled to fix the terms upon which his property may be held by another. The contrary view is founded upon the idea that the law should not imply a promise contrary to obvious reality, and that justice is done by permitting the landlord to recover the reasonable value of the tenant's unauthorized occupancy, where he does not desire, or may not be permitted, to hold the tenant for a new term, or period, at the formerly established rent. It seems clear that the latter doctrine is the safer one, as applied to all cases, since under the former a court will sometimes find itself called upon to enforce demands which are wholly exorbitant and ruinous to the tenant. . . .

"It is of some significance that the cases are few in which a claim for excessive rent, pursuant to notice, has been sustained. The writer suggests that even though a tenant by continuing in possession beyond the term, or rent period, may, notwithstanding his actual nonassent, be treated as assenting to an increase in rent of which he received seasonable notice, such assent ought not to be legally inferred where the new 'rent' demanded is not intended as a reasonable charge for the use of the prem-

ises, but in fact represents an attempt to impose a harsh penalty for continued occupancy."

In 52 C. J. S., Landlord & Tenant, § 506, the applicable rule is stated as follows: "A notice by a landlord to a tenant that, if he continues to occupy the premises beyond the present term, he must pay an increased rent, naming the sum, will not bind the tenant, although he holds over, unless the tenant expressly or impliedly consents to such increase of rent. If, however, the tenant remains in possession and holds over after receiving notice from the landlord that a greater rent will be required than that stipulated in the lease or required by the terms of the prior tenancy, his assent to the changed terms will be implied, and the rent will be increased, even though the tenant objects to the new condition, provided the holding over is voluntary and not unavoidable. If the tenant protests against the increase and explicitly refuses to pay it, he may not be held liable therefor merely by the act of holding over, since no new agreement may be implied, but he is liable for reasonable use and occupation. Also, the tenant is not liable for the increased rent where a tenancy exists governing the amount of rent and such tenancy is not terminated in the statutory manner."

When the facts and circumstances of the instant case are viewed in the light of the above rule, we think there was substantial evidence to support the finding of the trial court that defendant did not, either expressly or impliedly, consent to the increase of rent to $200 per month. In the letter of January 22, 1946, plaintiff revoked the 30-day notice that he had previously given and notified defendant that the rent would be $200 per month beginning February 1, 1946. The mere return of the $65 check for the January rent by defendant did not in itself amount to an acceptance of the stipulated increase for future rents. On January 31, 1946, and prior to the commencement of the February term, defendant mailed its check for $65 to plaintiff for the February rent. This action was taken within nine days of the notice of increase in rent and was inconsistent with an acceptance of the proposal made by plaintiff. It was a

clear manifestation of defendant's refusal to be bound by a new contract and was repeated each month thereafter until defendant vacated the property.

In addition to the dissent from the proposal for increased rentals, defendant's holding over was involuntary and unavoidable. A serious shortage of materials and labor had prevented it from completing its own building by January 1, 1946, and there were no other quarters available for rent in the City of Stuttgart. The inability to find other premises for rent on account of a serious housing shortage brought on by war was held to prevent the implication of acceptance of the landlord's demand for increased rentals in the case of *Kleinman* v. *Field,* 110 Misc. 111, 179 N. Y. S. 748.

The trial court overruled plaintiff's motion for treble damages under Act 373 of 1947. This act, if valid, amends § 6050 of Pope's Digest and did not become effective until a short time prior to the trial of this action on June 17, 1947. By the terms of the act it is only applicable to cases where the "finding or verdict" is for the plaintiff. The defendant tendered the sum of $260 and accrued costs before trial and this offer was refused. Since the trial court did not incorrectly find that defendant was not bound on a new contract for increased rentals, and only sustained a recovery in an amount which defendant offered to pay before trial, the "finding" was against the plaintiff. Inasmuch as the act, if valid, would be inapplicable here, we find it is unnecessary to determine its constitutionality.

We find no error, and the judgment of the circuit court is affirmed.

LOGAN *v.* HARRIS.

4-8464 210 S. W. 2d 301

Opinion delivered March 8, 1948.

D. B. Bartlett and *W. J. Morrow,* for appellant.

Linus A. Williams and *J. H. Brock,* for appellee.

MCHANEY, Justice. Appellant is a justice of the peace in the City of Clarksville. Appellee was the mayor of said city, and, under ordinances 375 and 376, which undertook to establish a municipal court for said city, he was named therein as the judge of said court. After the adoption of said ordinances, the first on June 30, 1947, and the second on July 17, 1947, appellant issued a warrant against appellee for his arrest on a charge of misdemeanor and assumed jurisdiction to try him on said

charge. Appellee sought a writ of prohibition from the circuit court on the ground that after the establishment of a municipal court by said ordinances, appellant's justice court had no jurisdiction of misdemeanors committed in the city. Appellant answered denying the validity of said ordinances, the establishment of a municipal court and attacking the qualifications of appellee to be the judge of said court, if established, on the grounds that appellee is not a lawyer, as required by general statutes, and that as mayor, he was a member of the city council and could not accept appointment to an office, or compensation, under an ordinance passed while he was such mayor or member of the council.

Trial resulted in a judgment awarding the writ against appellant and he has appealed.

Appellee moves to dismiss the appeal because the motion for a new trial was not filed in 30 days after judgment. The judgment was filed and entered August 8, 1947, and the motion for a new trial was filed on September 4, well within the 30 days allowed by § 1539 of Pope's Digest.

On the merits, all the facts are stipulated. Ordinance 375 provides for the establishment of a municipal court in Clarksville "under the provisions of Act No. 60 of the General Assembly, for the year 1927, and all acts amendatory thereto." Appellee, Sam Harris, was found to possess the necessary qualifications and was declared elected "to serve as such municipal judge until the next regular election." Ordinance 376 does the same thing as ordinance 375, except it establishes a municipal court under the provisions of Act No. 128 of 1947, and provides in § 3, that: "A citizen qualified elector, residing within the corporate limits of the City of Clarksville, who has served in the capacity of mayor or justice of the peace for one year or more, shall be deemed eligible for appointment as municipal judge by the city council for the term provided by this ordinance." Appellee was elected to said office "until the next regular city election."

It is stipulated that appellee did not qualify under ordinance 375, but did under ordinance 376. Neither

ordinance expressly repeals any other ordinance. It is appellant's contention that No. 376 repeals No. 375 by implication and that No. 376 is void because passed under the provisions of Act 128 of 1947.

We agree with appellant that ordinance 376 was not effective to establish a municipal court in the City of Clarksville under Act 128 of 1947, because it became a city of the second class in 1920, and, under the express provisions of Act 128 of 1947, it applies only to county seat municipalities that become cities of the second class under the provisions of § 9484 of Pope's Digest, as amended by Act No. 211 of 1939. Section 9484 was § 1 of Act 334 of 1937, and, since Clarksville was made a city of the second class in 1920, as it is stipulated, it could not have been made such under § 9484. So, we conclude that Ordinance 376 was ineffectual to establish a municipal court under the provisions of Act 128 of 1947.

We do agree that Ordinance 375 did create and establish a municipal court in said city, under the authority of Act 60 of 1927, and amendatory acts. The ordinance conferred on said court: "All the authority, duties, responsibilities, jurisdiction and limitations as provided for such courts under the laws of the State of Arkansas." It abolished the mayor's court then in existence. One of the matters of exclusive jurisdiction over that of justices of the peace of the township in which the municipal court is situated is that of misdemeanors committed therein. Section 9905, Pope's Digest. So, the trial court properly granted the writ of prohibition here, unless it may be said that the election of appellee as judge of said court is void, because he was, and is ineligible for election or appointment by the city council. It is stipulated that appellee is not a lawyer. Section 9900 of Pope's Digest sets out the qualifications for such a judge, but we do not determine the question of appellee's title to the office in this proceeding. If the court was created, and we so hold, under Ordinance 375, appellant's jurisdiction of the misdemeanor case before him terminated and became vested in the municipal court, as the trial court properly held. Appellant, a private litigant, had no right to question appellee's title to the office of municipal judge in

this proceeding. *Cherry* v. *Webb,* 196 Ark. 17, 115 S. W. 2d 865; *Vanhoose* v. *McGregor,* 172 Ark. 1012, 291 S. W. 422. These cases hold that, under the usurpation statute, Chap. 164, Pope's Digest, whenever a person usurps an office to which he is not entitled, it is the duty of the prosecuting attorney, if a county office, and of the attorney general, if any other office, or the person entitled to the office, to institute an action to prevent the usurper from performing the duties of the office. "The statute does not confer authority upon a private citizen to bring the suit." *Cherry* v. *Webb, supra.*

In *Smith* v. *State, ex rel. Duty,* 211 Ark. 112, 199 S. W. 2d 578, we held that the prosecuting attorney could bring an action under said statute for a county office only, and could not bring suit to oust one from office of municipal judge, since it was a municipal and not a county office, but that the attorney general could. See, also, *Scott* v. *McCoy,* 212 Ark. 574, 206 S. W. 2d 440.

The distinction between this case and the recent cases of *Howell* v. *Howell* and *Stevens* v. *Stevens, infra,* p. 298, 208 S. W. 2d 22, involving the second division of the Pulaski Chancery Court, is that in those cases the court held the act attempting to create the second division of said court was unconstitutional and void and, therefore, the incumbent's title to the office could be questioned collaterally by a litigant in said court, while in the case at bar ordinance No. 375 did create a municipal court in Clarksville, and the fact that it named a judge of said court who was ineligible to serve because not a lawyer, or for any other reason, cannot be raised in this proceeding.

The judgment from which is this appeal held that the municipal court was created under said ordinances, prohibited appellant from proceeding further in the criminal case before him and ordered appellant to transfer said case and the record thereof to said municipal court and filed therein. No judgment was entered as to the competency of appellee to serve as municipal judge.

We agree with this judgment and it is accordingly affirmed.

Justice McFaddin, concurs.

Ed. F. McFaddin, Justice (concurring). I concur in order to particularly call attention to the fact that I can see no real distinction between the holding in the case at bar and the majority holding in *Howell* v. *Howell* (opinion of January 12, 1948, *infra,* p. 298, 208 S. W. 2d 22). If there is no real distinction between the two cases, then the effect of the instant opinion is to cast a grave doubt on the ruling effect of *Howell* v. *Howell;* and this—I hope—is true.

In *Howell* v. *Howell* those of us in the minority insisted that Act 42 of 1947 created a court; and that the court was *de jure* and the appointee was *de facto.* But the majority held that the Act creating the court was void in its entirety, since the Act undertook to appoint the judge by an unconstitutional procedure. Here is the language of the majority in *Howell* v. *Howell*:

Argument that the creative sections—1, 2 and 3—would not have been enacted had it been known the vacancy could be filled only by executive appointment or election, finds support in the fact that the three sections lead logically into § 4. It is our view that the Act was intended as a whole. It was a new departure. Legislators must have been cognizant of the unusual power they were attempting to exercise and unquestionably there was doubt regarding constitutionality of the method adopted; and yet, in spite of this, no alternative was expressed—only the provision for an election to be held more than twenty months in the future."

Ordinance No. 375 of Clarksville, Arkansas (upheld in this present case) undertook to do exactly the same thing as regards the creation of a municipal court that Act 42 of 1947 attempted to do towards the creation of a second division chancery court. The ordinance No

375 is copied in its entirety in a footnote to this concurring opinion.* In *Howell* v. *Howell* the majority struck down the entire legislative enactment, whereas here we are sustaining all of the ordinance except the appointive section, which is § 3 of the ordinance. I submit that § 3 of the ordinance is similar in all respects to § 4 of Act 42 of 1947, and that the holding in the present case cannot be reconciled with the holding of the majority in *Howell* v. *Howell.*

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* Ordinance No. 375 reads: "An Ordinance Establishing a Municipal Court in the City of Clarksville, Johnson County, Arkansas, Under the Provisions of Act No. 60 of the Acts of the General Assembly of Arkansas for the Year 1927, and all Acts Amendatory Thereto, Fixing the Salary of the Municipal Judge and the Salary of the Clerk of the Municipal Court and Naming the Person to Serve as such Judge Until the Next General City Election, and for Other Purposes. Be it Ordained by the City Council of the City of Clarksville, Arkansas:

"Section 1. There is hereby created a Corporation Court for the City of Clarksville, Johnson County, Arkansas, to be styled 'Municipal Court of Clarksville, Arkansas,' which said Court shall be a Court of record, having a seal with the name of the State in the center and the words 'Municipal Court of Clarksville, Ark., around the margin. This court is hereby created under the provisions of Act No. 60 of the General Assembly of the State of Arkansas for the year 1927, and all Acts amendatory thereto, and shall have all the authority, duties, responsibilities, jurisdiction and limitations as provided for such Courts under the laws of the State of Arkansas, and the Mayor's Court heretofore existing in said City is hereby abolished.

"Section 2. All provisions of the laws of the State of Arkansas, relative to such Courts are hereby adopted, and the salary of the Judge of the Municipal Court shall be $1,800 per year, payable in equal monthly installments, and the salary of the Clerk of said Court shall be $600 per year, payable in equal monthly installments. The Municipal Judge shall have the privilege of acting as his own clerk, and when so doing, his salary shall be $2,400 per year payable in equal monthly installments while so acting.

"Section 3. Sam Harris, a citizen and qualified elector of the City of Clarksville, Arkansas, having been found to possess all the qualifications in compliance with the law to serve as Municipal Judge, is hereby elected to serve as such Municipal Judge until the next regular city election.

"Section 4. If any part of this ordinance shall be held to be unconstitutional or void for any reason, the same shall not affect the remainder of said ordinance not so held.

Section 5. Whereas it is found by the City Council that confusion exists by reason of present methods of law enforcement in the City and County, and by reason of the present set-up of Courts, an emergency is hereby declared, and this ordinance being deemed necessary for the preservation of the public health, peace and safety of the City of Clarksville, in Johnson County, Arkansas, shall take effect and be in force immediately from and after its passage and approval and publication.

"Passed and approved this 30th day of June, 1947."

In the present case the majority attempts to make this distinction:

"The distinction between this case and the recent cases of *Howell* v. *Howell* and *Stevens* v. *Stevens,* involving the second division of the Pulaski Chancery Court, is that in those cases the court held the Act attempting to create the second division of said court was unconstitutional and void and, therefore, the incumbent's title to the office could be questioned collaterally by a litigant in said court, while in the case at bar ordinance No. 375 did create a municipal court in Clarksville, and the fact that it named a judge of said court who was ineligible to serve because not a lawyer, or for any other reason, cannot be raised in this proceeding."

I submit that the foregoing distinction is not a sound one, and that the effect of the holding in the case at bar is to cast grave doubt on the ruling effect of *Howell* v. *Howell,* insofar as concerns those portions of the opinion relating to (a) the severability clause and (b) the *de facto* court. Believing that *Howell* v. *Howell* is wrong on these two points, I am happy to concur in the present opinion.

MILLS *v.* PENNINGTON.

4-8293 209 S. W. 2d 281

Opinion delivered March 15, 1948.

J. R. Wilson and *E. B. Kimpel, Jr.*, for appellant.

L. Weems Trussell, for appellee.

GRIFFIN SMITH, Chief Justice. Ownership of 240 acres is involved. George J. Williams, by separate purchases, acquired the lands in 1902. In the controversy with which we are dealing the decision affects 160 acres constituting a homestead, and 80 adjoining acres charged with dower, each parcel being a unit of the original acquisition.[1]

George J. Williams married Abagail Anderson in 1868. She died without issue living or dead. Ellana Jane Anderson was Abagail's first cousin, and married Williams in 1882. To this union six children were born, five of whom died before maturity. Joseph Albert Williams was born in 1890 and died while in the military service in 1918, unmarried and without issue.

[1] The litigation resulting in this appeal was started in September 1944 when Hon. Paul Johnson, Prosecuting Attorney, acting for the State, alleged, *prima facie*, facts in support of his assertion that the Williams lands had escheated. By various pleadings, including interventions, rights contended for by appellants and appellees were asserted.

In 1894 George J. Williams married Myra Mills. At that time Mrs. Mills had two sons by a former husband. These boys were named Walsh and John. It will therefore be seen that when George Williams married Myra Mills, the united family consisted of husband and wife, and the three boys: Joseph Albert, then four years of age, and his two stepbrothers whose ages are not emphasized.

Two years after George and Myra married a daughter was born—Amelia Victoria. A son was subsequently born, but died in infancy.

When Myra's sons by the former marriage became of age they left the Williams home. Albert and Amelia, brother and sister by the half blood, were living when their father died in 1913.

W. M. Mills, a grandson of Myra Williams, became a member of the Williams household and resided with the family when his grandmother's husband, George Williams, died. He was in the home when Joseph Albert Williams entered the armed forces of World War No. 1. Amelia became an invalid. When Albert went to war, W. M.—who will hereafter be referred to as Mills—continued his relationships, according to appellants' contentions, caring for Amelia and his grandmother. Amelia died in 1924, intestate and without issue. Myra Williams died in March 1941.

During a period of more than twenty years Mills is alleged to have devoted himself to the farm and to personal wants of his grandmother. He built fences, outhouses, repaired main buildings, and in other respects contributed to the orderly and progressive work of farming. In 1925 Mills married Loretta Jenkins, who was invited by Myra to join the household. There is testimony that she said to her grandson, "Bring Loretta here; I am getting too old to do the work". It is contended that at that time, or soon after, Myra told Mills and his young wife that if they would assume responsibility for property upkeep and farm the lands she would "give them everything she had". Under this arrangement, and with other assurances from Myra, they oc-

cupied the property not only during the sixteen remaining years of Myra's life, but were in possession when suit was brought, although not personal occupants.[2] Additional testimony on the question of an intended gift related to Mills' actions "during the early 30's" in executing contracts with the U. S. government in respect of federal bounties, his grandmother having said, "Take the property and use it as you would use your own".

Based upon the facts that have been recited, and other conduct of a similar nature, Mills and his wife contended, (a) that the property had been given to them by Myra; or, (b) if this was not effective, they initially believed Mrs. Williams owned the property, hence their claim was adverse and had ripened into title.

A collateral issue mentioned by appellants, but of no controlling importance here, is that when Joseph Albert Williams died it was ascertained that his half sister, Amelia, was the beneficiary of a $10,000 war risk insurance policy, payable in monthly installments. Following Amelia's death Myra Williams claimed the remainder of $8,069.66 and a probate judgment awarded it to her "as the lawful and only heir and distributee of the said estate". Appellants stress the point that when Myra Williams died, leaving substantial portions of the insurance money, William and Loretta Mills were questioned by attorneys representing the heirs of Walsh Mills. To such questions they replied that an interest in the personal property was not advanced because they were satisfied with assurances of Mills' grandmother—that is, Myra's agreement to give them the land.

There is testimony that Walsh Mills predeceased Myra Williams, but that his heirs disputed Mills' claim to the lands. Appellants think it is significant that the lands were taxed in the name of George J. Williams until 1925, then assessed as the property of Mrs. [Myra] E. Williams, and taxes were paid by Mills, except for the years 1944-45. Mills says he knew in 1945 that the state

[2] Mills testified that although necessity compelled him to accept temporary employment elsewhere, he left his household effects, farming implements, and other property on the premises, and did not leave with the intention of abandonment.

was claiming by escheat, and thought the suit would determine the various rights.

The trial court found (a) that when George Williams died his property went to the two children, Albert and Amelia, subject to Myra's dower and homestead rights; (b) with Albert's death his interest went to Amelia, subject to the mother's statutory rights, but (c) when Amelia died the line of descent was at an end, hence rights would ascend to the collateral heirs of George Williams, subject to Myra's homestead interest in 160 acres and dower rights in 80 acres.

On this phase of the litigation the Court said the issues were: (1) Did title, after terminating by descent to Amelia and ascending to the heirs generally, remain in them; or, (2) did Myra E. Williams take by adverse possession? (3) If it should be held that Myra took under the adverse claim, did she legally pass title to Mills and his wife?

A summary of facts bearing upon these contentions, as stated by the Court, is printed in the margin.[3]

Substance of these findings is that acts of the life tenant upon which adverse possession is predicated are (a) actual possession of the property; (b) payment of taxes under assessments changed in 1925 from Myra Williams' husband to herself; (c) execution of oil and gas leases pertaining to the property; (d) execution of mineral deeds; and, (e) sale of standing timber.

The law is well settled that a life tenant is entitled to possession of premises to which the estate pertains, and it is the tenant's duty to pay taxes. Appellees concede this to be true, but think that when oil leases and

[3] "It is alleged by all of the Mills heirs . . . that the Williams heirs knew of [the existence] of the land, and knew that [George J. Williams died in 1913, and that they have] stood by for thirty-three years and [did not] assert or claim any interest, . . . hence they have abandoned any [interest] they may have once had. From 1913 to March 16, 1941—date of the death of Mrs. Myra E. Williams—they failed to ask that the dower and homestead be set aside; [nor did they] exercise any claim whatsoever. Since March 16, 1941—a period of almost five and a half years (although they had been notified of this litigation by every known means)—they have completely failed to appear and claim any interest . . . and since the death of Amelia Williams . . . Myra E. Williams punctually paid the taxes on the

mineral deeds were executed and delivered, and when substantial sales of timber were made, the dower and homestead interest were repudiated and a claim of ownership hostile to all was asserted.

Ogden v. *Ogden,* 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151, mentions the rule that the statute of limitation does not begin to run against a remainderman until death of the life tenant. See *Killeam* v. *Carter,* 65 Ark. 68, 44 S. W. 1032; *Collins* v. *Paepcke-Leicht Lumber Co.,* 74 Ark. 81, 84 S. W. 1044; *Stricklin* v. *Moore,* 98 Ark. 30, 135 S. W. 360; *Davis* v. *Neal,* 100 Ark. 399, 140 S. W. 278, L. R. A. 1916A, 999; *Lesieur* v. *Spikes,* 117 Ark. 366, 175 S. W. 413; *Hayden* v. *Hill,* 128 Ark. 342, 194 S. W. 19; *Smith* v. *Maberry,* 148 Ark. 216, 229 S. W. 718; *Sadler* v. *Campbell,* 150 Ark. 594, 236 S. W. 588. The last cited case contains this expression: "It is well established by the decisions of this court that 'neither the possession of the lift tenant nor his grantee by any possibility can become adverse to the reversioner or the remainderman for the reason

land in her name for the years 1923 [and through 1926 and 1940], a period of sixteen years. All of the Mills heirs alleged in their pleadings that she acquired title by adverse possession. Therefore they evidently believed she was the owner at the time this suit was begun. On July 10, 1926, she executed an oil and gas lease on the land, and on the same date executed a mineral deed to the land. On March 6, 1931, she executed a timber deed to the land. All of these instruments appear of record, and no one objected for a period of over twenty years. By reason of said acts [Mrs. Williams] completely repudiated any right of homestead or dower, and thereby set up what she thought was her own title, and for twenty years openly, notoriously, and adversely held, claimed, and asserted right and title thereto. Since her death in March 1941 not a Williams heir has appeared and asserted any claim whatsoever or paid any taxes on said lands. From [these] facts the Court is driven to the conclusion that all of the George J. Williams heirs, and those of Myra E. Williams, including Mrs. Myra E. Williams herself, actually believed that the lands ascended to Mrs. Myra E. Williams upon the death of Amelia Williams. Mrs. Myra E. Williams took possession, claiming ownership, and exercised complete control, openly and adversely, from 1924 to . . . 1941. That status thereby vested complete title in her long before her death". The trial Court cited and relied upon the following cases: *Roberts* v. *Burgett,* 209 Ark. 536, 191 S. W. 2d 579; *Clark* v. *Wilson,* 174 Ark. 669, 297 S. W. 1005; *Cullins* v. *Webb,* 207 Ark. 407, 180 S. W. 2d 835; *Brinkley* v. *Taylor,* 111 Ark. 305, 163 S. W. 521; *Fletcher* v. *Josephs,* 105 Ark. 646, 152 S. W. 293; *Hayden* v. *Hill,* 128 Ark. 342, 194 S. W. 19; *Stricker* v. *Britt,* 203 Ark. 197, 157 S. W. 2d 18; *Jones* v. *Morgan,* 196 Ark. 1153, 121 S. W. 2d 96.

that such possession is not an interference with the latter' ".

The trial court was in error in holding that execution of the leases and deed and cutting timber were sufficient to start the statute of limitation in favor of the life tenant. Reliance was upon holdings in *Cullins* v. *Webb,* 207 Ark. 407, 180 S. W. 2d 835, and *Brinkley* v. *Taylor,* 111 Ark. 305, 163 S. W. 521. The Cullins-Webb Case dealt with the grantor's estate, as distinguished from a lease of severable interests or sale of timber. At page 412 of the Arkansas Report it is said: ". . . Possession was held by the widow; and under the authority of *Brinkley* v. *Taylor, Boyd* v. *Epperson,* 149 Ark. 527, 232 S. W. 936, and *Clark* v. *Wilson,* 174 Ark. 669, 297 S. W. 1008, the heirs had a right to assume that the widow's possession was under her marital right of unassigned dower until notice of her adverse holding was notorious."

In the Brinkley-Taylor case "[the widow], from time to time, executed various deeds, purporting to convey the fee to various lots, carved out of the land in question, and the title of all these purchasers, so far as the record shows, has been cured by possession. . . ."

While it may be true that conduct, such as that engaged in by Mrs. Williams in the case at bar, would constitute waste, that alone would not, *ipso facto,* work a forfeiture of the life tenant's rights, although it might be grounds for recompense. *Rutherford* v. *Wilson,* 95 Ark. 246, 129 S. W. 534, 37 L. R. A., N. S. 763.

We agree with the trial Court that acts of the life tenant in dealing with Mills and his wife did not establish an agreement by Mrs. Williams to give the land in exchange for its cultivation, maintenance, and for the support of herself and Amelia. On the issue of descent and distribution, however, (the title being ancestral and coming through the father) it follows that when Amelia died title ascended to George J. Williams' heirs, subject to the dower and homestead rights of Myra. Since these ended with her death in 1941, the life estate passes from consideration. The judgment is reversed, with directions

to enter orders not inconsistent with this opinion. This can be done by the Court, since matters of law only are involved.

PRICE *v.* CITY OF TRUMANN.

4478 209 S. W. 2d 284

Opinion delivered March 15, 1948.

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

ROBINS, J. On appeal from mayor's court, a trial jury in circuit court found appellant guilty of "accessory to assault and battery," fixing his fine at $100. He asks us to reverse the judgment entered on the verdict.

Appellant urges that the lower court erred in not instructing the jury to acquit him of assault and battery for the reason that the evidence did not show that appellant actually struck Meeker, the prosecuting witness. But Gardner, a companion of appellant, after appellant had alighted from the car in which appellant and Gardner were riding, with the announced intention of attacking Meeker, did strike and beat Meeker. As a result, Meeker's jaw was broken and his skull fractured.

While Gardner was beating Meeker appellant was standing nearby.

All persons concerned in the commission of a misdemeanor are guilty as principals. "All who procure, participate in, or assent to the commission of a misdemeanor, are punishable as principals." *Crocker* v. *State,* 49 Ark. 60, 4 S. W. 197. To the same effect are these decisions: *Hubbard* v. *State,* 10 Ark. 378; *Sanders* v. *State,* 18 Ark. 198; *Fortenbury* v. *State,* 47 Ark. 188, 1 S. W. 58; *Foster* v. *State,* 45 Ark. 361. And, since the adoption of Initiated Act No. 3 of 1936 (Acts of 1937, p. 1384), the distinction between principals and accessories in all criminal cases has been abolished.

The fact that the jury, in their verdict, somewhat ineptly described the offense as "accessory to assault and battery" is not material. It reflects, however, that the jury concluded that, though no blow was struck by appellant, appellant was standing by, aiding in or encouraging the commission of the assault by Gardner.

It is argued by appellant that the evidence was not sufficient to show appellant's guilt. The testimony disclosed that several young couples—among them appellant, Gardner and Meeker—had been going from one drinking place to another. Most of them, including the girls, acquired varying degrees of intoxication. One of the girls became offended at another girl in the crowd and offered to fight her. The quarrel was then taken up by the boys. The car in which appellant and Gardner were riding was stopped in front of Meeker, and appellant got out of the car, saying he was going to whip Meeker. Meeker protested that he did not know what the fuss was about. At this juncture Gardner came up and said that he could whip Meeker, which appellant allowed him to do.

Under this proof the jury was justified in finding that appellant was not merely a spectator, but was a participant in the fight. *Hunter* v. *State,* 104 Ark. 245, 149 S. W. 99.

Appellant contends that certain instructions given by the lower court were erroneous. We have examined them and find that they correctly stated the principles of law involved. However, appellant made no objection to any of these instructions below. Therefore, even if any of them was erroneous, objection relative thereto could not be raised for the first time in this court. *Baine* v. *State,* 132 Ark. 416, 200 S. W. 999; *Cegars* v. *State,* 150 Ark. 648, 235 S. W. 36; *Walker* v. *State,* 151 Ark. 394. 236 S. W. 627; *Medlock* v. *State,* 193 Ark. 1179, 101 S. W. 2d 787.

The judgment of the lower court is affirmed.

HOWZE *v.* HUTCHENS.

4-8480 209 S. W. 2d 286

Opinion delivered March 15, 1948.

Charles D. Atkinson and *Charles W. Atkinson,* for appellant.

Leonard F. Greenhaw, Karl Greenhaw and *Lee Seamster,* for appellee.

MINOR W. MILLWEE, Justice. W. P. Hutchens died testate in Washington county, Arkansas, in 1932 survived by his widow, P. E. Hutchens, and four children. Under the terms of his will, which was duly probated on July 7, 1932, W. P. Hutchens devised and bequeathed to his wife, P. E. Hutchens, his 104½ acre farm and the use of all personal property during her lifetime. The will further provided that upon the death of the life tenant, P. E. Hutchens, the remainder of the estate should be shared equally by the four children, but only after Edith Hutchens, the youngest child, was first given the sum of $3,000 out of such remainder.

Edith Hutchens was living on the 104½ acre farm with her parents at the time of her father's death. After the death of W. P. Hutchens, Edith Hutchens married appellant, Henry Howze, and they resided in Texas until her death, without descendants, on May 15, 1942. Mrs. P. E. Hutchens, the life tenant, who is now 80 years of age, has resided on the lands since the death of her husband. She has used up all the personal property left by the will and there only remains the 104½ acre farm.

Mrs. P. E. Hutchens and the three surviving children joined as party plaintiffs in this suit to partition and sell the lands. Appellant, Henry Howze, was made a party defendant. After setting out the facts above recited, the complaint of appellees alleged: "That all the interest of Edith Hutchens Howze in said real estate was an interest in remainder in said premises, and that she died before the death of the life tenant and was never at any time seized of an estate of inheritance in or to said lands; that the defendant, Henry Howze, her surviving husband, has no interest in said real estate by curtesy or in any other manner; that upon the death of the plaintiff, P. E. Hutchens, the owner of the life estate, the title to said real estate will vest and be owned by the other plaintiffs who are now the sole owners of the remainder therein."

In his answer, appellant admitted the facts as above stated, but denied that appellees were sole owners of the lands and alleged that under the terms of the will of W. P. Hutchens, deceased, he became the owner of an undivided one-third of the $3,000 bequest to his deceased wife and an undivided one-third interest for life in the remainder of said estate. Appellant also prayed that the lands be partitioned and sold, and that his share of the proceeds be paid to him.

The trial court found that appellant had no interest in the 104½ acre tract of land by curtesy, or otherwise, inasmuch as his deceased wife, Edith Hutchens Howze, was never seized of an estate of inheritance therein during her lifetime. A decree was entered quieting and confirming title to the lands in appellees and ordering sale of the property for the purpose of partition among appellees according to their respective interests.

The estate or interest of a husband in the property of his deceased wife, who dies intestate, is governed by Act 313 of 1939, which was in effect at the time of the death of Edith Hutchens Howze. Sections 1, 2, and 5 of said Act read as follows:

"Section 1. Section 4422 of Pope's Digest of the Statutes of Arkansas is amended to read as follows: 'Upon the death of a married woman, her husband shall be entitled to the following portion of her estate, undisposed of by her will: one-third of her [real] property for life and one-third of her personal property absolutely where she leaves descendants; one-half of her real property in fee and one-half of her personal property absolutely where she leaves no descendants; except that where she leaves no descendants, as to the lands in which her estate is ancestral the husband shall be entitled to one-third of her real property for life and also except where she leaves no descendants as against creditors, the husband shall be entitled to one-third of her real property for life and one-third of her personal property absolutely.

"Section 2. The rights of the surviving husband in his wife's estate shall be known as curtesy and shall be

assigned to him after death of the wife and at the time and in the manner provided by law of the assignment of dower to a widow. . . .

"Section 5. Legislative Intent. The purpose of this measure is to give a surviving husband the same interest in the deceased wife's estate as a widow now has in the estate of her husband, so far as § 7 of Art. 9 of the Constitution permits."

We have omitted copying §§ 3 and 4 for the reason that they deal with the effect on dower of murder of a spouse and the extension of dower to the surviving spouse of an alien. These sections in effect reënact §§ 4397-4399, Pope's Digest, to make them applicable to the husband as well as to the wife.

For reversal of the decree it is earnestly insisted that the trial court erred in construing Act 313, *supra,* as requiring seisin, or the right to possession of the remainder interest, in Edith Hutchens Howze as a prerequisite to appellant's right to take under the statute. It is argued that, since § 1 of the 1939 Act does not mention seisin or the words, "of which she died seized," it must be concluded that the Legislature intended to eliminate this requirement, which is an essential element of the right of curtesy at common law. If § 1 stood alone, we would agree with appellant's interpretation of the Act. The rule is well established that in construing a statute the legislative intent should be ascertained by construing every part of the Act and giving effect thereto if possible. *Nixon* v. *Allen,* 150 Ark. 244, 234 S. W. 45; *Ledbetter* v. *Hall,* 191 Ark. 791, 87 S. W. 2d 996.

In *Graves* v. *McConnell,* 162 Ark. 167, 257 S. W. 1041, the court said: "In construing a statute it is the duty of the court to construe it as a whole and give some meaning to every word, if possible, and, in order to effectuate the intent of the Legislature, the court may eliminate or correct errors in a statute, or reject certain words and substitute others, when, by so doing, it only reconciles apparent inconsistencies of language, and, on the whole, accomplishes the purpose which the Legislature had in mind in the enactment of the law. *Garland Power & Development*

Co. v. *State Board,* 94 Ark. 422, 127 S. W. 454; *Rayder* v. *Warrick,* 133 Ark. 491, 202 S. W. 831; *Kindricks* v. *Machin,* 135 Ark. 459, 205 S. W. 815; *Summers* v. *Road Imp. Dist.,* 160 Ark. 371, 254 S. W. 696."

In *Graves* v. *Burns,* 194 Ark. 177, 106 S. W. 2d 602, this court held that absence of the words "or their descendants" was an unintentional omission from a statute on descent and distribution and the words were supplied in order to carry out legislative intent.

It is observed that § 1 of Act 313, *supra,* amends § 4422 of Pope's Digest, which is Act 149 of 1925. The 1925 Act abolished curtesy in this state. *Ward* v. *Pipkin, et al.,* 180 Ark. 855, 22 S. W. 2d 1011. While curtesy was abolished by this Act, it was expressly recreated in the 1939 Act if effect is to be given to § 2, which specifically provides that the right of a husband to property of his deceased wife "shall be known as curtesy," thus bringing the common law term back into use. The right of the husband, therefore, is a curtesy right although the portion and amount he may take differs from the common law right just as dower, formerly operative as a common law doctrine, still remains dower under our statutes. Section 5 of the Act then states that its purpose "is to give a surviving husband the same interest in the deceased wife's estate as a widow now has in the estate of her husband, so far as § 7 of Art. 9 of the Constitution permits." If we accept the contention of appellant, this definite expression of legislative intent would be defeated because he would be given a greater right in his deceased wife's property than a widow is given as dower to property of a deceased husband under § 4421 of Pope's Digest.

This court has repeatedly held that actual seisin, or the right to possession, on the part of the husband at the time of his death is essential to dower. In *McGuire* v. *Cook,* 98 Ark. 118, 135 S. W. 840, the court said: "Where there is a life tenant, and the husband has only a remainder or reversion in the land, the seisin is in the life tenant; and therefore dower does not attach to realty in which the husband has only an interest in remainder or reversion, unless the particular estate terminates during the coverture. . . .

"The same character of seisin that was required by the common law in the husband is required by our statute in order to entitle the widow to dower. In *Tate* v. *Jay,* 31 Ark. 576, this court said: 'Seisin is either in deed or in law; seisin in deed is actual possession; seisin in law, the right to immediate possession. Unless such seisin existed during coverture, there can be no dower because it is an indispensable requisite to her right to dower, so declared by statute'." See, also, *Field, et al.,* v. *Tyner, et al.,* 163 Ark. 373, 261 S. W. 35; *Kirkpatrick* v. *Kirkpatrick,* 204 Ark. 452, 162 S. W. 2d 897; *Prall* v. *Prall,* 204 Ark. 1074, 166 S. W. 2d 1028.

Prior to our statutes on the question it was also held to be necessary that the wife be seized during coverture of an estate of inheritance in land to entitle a husband to an estate by the curtesy. *Bogy* v. *Roberts,* 48 Ark. 17, 2 S. W. 186, 3 Am. St. Rep. 311; *Owens* v. *Jabine,* 88 Ark. 468, 115 S. W. 383.

We are cited to authorities which hold that a vested remainder, even at common law, is an interest which may be conveyed by deed and descends to the heirs of the remainderman who dies before the termination of the particular estate. The husband, however, does not take as an heir of his deceased wife, but takes only by virtue of the statute which designates the right to take as "curtesy." *Robertson* v. *Adams,* 163 Ark. 290, 260 S. W. 37.

In 15 Am. Jur., Curtesy, § 21, p. 282, it is said: "As a general rule, a husband has no right of curtesy in lands in which his wife had an estate in remainder after a life tenancy if she dies before the expiration of the life tenancy and never has a right to possession. This rule, as in the case where lands are inherited by a wife subject to the dower rights of another and the wife dies before the dowress, is based upon the fact that she had neither seisin nor the right to seisin. The general rule, however, does not apply in at least one jurisdiction because of statutory provisions." By reference to the textwriter's note it is ascertained that the jurisdiction in which the general rule is held not to be applicable because of statutory provisions is the State of Maryland where the court in *Snyder*

v. *Jones,* 99 Md. 693, 59 A. 118, held that a state statute completely destroyed the common law tenancy by the curtesy. Appellant relies strongly on this case to support his contention that passage of Act 313 of 1939 produced the same result in this state. We have carefully considered this case and the statute which it construes. The Maryland statute is unlike our own and it contains no provisions comparable to §§ 2 and 5 of Act 313, *supra.*

It must be conceded that Act 313 of 1939 was not as carefully drawn as it should have been. The word "real" was unintentionally omitted in the fifth line of § 1. In view of §§ 2 and 5 we are unable to say that the Legislature deliberately and intentionally omitted words of seisin in § 1. To so hold, would defeat the very purpose and intent of the Act as expressed in § 5. We think it was clearly the intention of the lawmakers to give to the surviving husband the same rights in the estate of his deceased wife as a widow has in the estate of her deceased husband insofar as this is permissible under the Constitution.

Since appellant's wife died before the life tenant and never had the right to possession of the remainder interest in the lands involved, appellant has no right of curtesy in said lands under Act 313 of 1939. The trial court correctly so held, and the decree is, therefore, affirmed.

BROWN *v.* BROWN.

4-8485 209 S. W. 2d 289

Opinion delivered March 15, 1948.

Jameson & Jameson, for appellant.

Rex W. Perkins and G. T. Sullins, for appellee.

SMITH, J. Appellants are the children and heirs at law of R. T. Brown, and appellee is the widow of their father and is their step-mother. Appellants brought this suit to cancel a deed executed by their father on August 30, 1946, to appellee, and as grounds for that relief, alleged, (1) that the grantor was mentally incapacitated by illness to execute the deed, and (2) that the deed was not delivered. The relief prayed was denied, and from that decree is this appeal.

The grantor was a patient in the hospital in the City of Fayetteville, when he executed the deed, and testimony was offered tending to show that because of his illness he was mentally incapable of executing the deed. Testimony to the contrary was also offered, and as this testimony is not abstracted, it will be conclusively presumed that the testimony supports the finding of the Chancellor on this issue of fact. Indeed that finding is not questioned.

It is an undisputed fact that the deed was signed and acknowledged, but it is insisted that the deed was not delivered. On this issue, the notary who is also a practicing attorney, testified that he received a call to come to the City Hospital. On arriving there he met a lady who introduced herself as Mrs. Brown, who told him that she wanted him to take the acknowledgment of a deed to her from her husband.

Only Mr. and Mrs. Brown and a Mr. Curry were present. When witness went into Mr. Brown's room he found Mr. Brown in bed with his hands bandaged so that he could not write. The nurse released the bandages and Mrs. Brown handed witness the deed with the request that he read it to Mr. Brown, as Mr. Brown did not have his glasses. Mrs. Brown handed Mr. Brown his glasses. Witness read the deed to Mr. Brown several times as he did not understand the *habendum* clause. This he read the third time, and after some discussion Mr. Brown signed the deed. It was discussed that the deed conveyed Mr. Brown's farm. After Mr. Brown had signed the deed he handed it to witness, who took it out in the hall to complete the acknowledgment, and Mrs. Brown requested the witness to keep the deed until she came for it. Mr. Brown gave the witness no instructions. The deed was called for and delivered about two weeks later. Witness was in the room about 30 minutes and when the acknowledgment was taken Mrs. Brown paid him his fee. The deed was acknowledged August 30, 1946, and Mr. Brown died March 17, 1947.

Curry, the other party present when the deed was signed, testified that the notary explained the deed thoroughly and read it three times. He saw Mr. Brown sign the deed, but did not hear him give any instructions about it.

It is essential to the valadity of a deed not only that it be executed, but it is required also that it be delivered. In the case of *Cleveland* v. *Breckenridge,* 173 Ark. 387, 292 S. W. 377, Justice Wood cited a number of our earlier cases in support of the following statement of the law: "Whether or not there has been a delivery of a deed depends upon the intention of the parties as manifested by their acts and words. The grantor, by his acts or words, or both, must have manifested an intention to pass the title to the grantee and the grantee must have intended to accept such deed in order to constitute a valid delivery and conveyance of title."

Now while the grantor must have delivered the deed with intention of passing the title to the property which

it described, it is not essential that the delivery be made to the grantee personally. It suffices if the delivery is to another for the grantee's benefit.

When Mr. Brown signed the deed he gave it to the notary, who was told in the presence of Mr. Brown, by Mrs. Brown, to keep the deed until she called for it. We think the testimony warranted the finding that there was a delivery of the deed after its execution, to the notary for Mrs. Brown, and if this is true there was a valid delivery of the deed, and the decree must be affirmed, and it is so ordered.

MEE *v.* CUSINEAU, EXECUTRIX.

4-8468 209 S. W. 2d 445

Opinion delivered March 15, 1948.

Rehearing denied April 12, 1948.

Wootton, Land & Matthews and *James L. Byrd,* for appellant.

Mallory & Rasmussen, for appellee.

SMITH, J. Bertha J. Busch died testate December 5, 1946, and her will, dated June 11, 1945, was duly probated. The executrix named in the will duly qualified, and this litigation arose over the disbursement of the assets which she had reported in her inventory.

The will consisted of 10 paragraphs. The first of these directed the payment of her debts, and the second gave directions as to her funeral. The third and fourth paragraphs made bequests of $100 to each of two persons named. The fifth paragraph reads as follows:

"I hereby give, bequeath and devise to my niece, Bertha Kirchgraber Cusineau, of Hot Springs, Arkansas, all of my personal property of whatever kind and character, including household and kitchen furniture, wearing apparel and jewelry, and all moneys of which I may die seized and possessed, excepting, however, the specific bequests hereinbefore made."

The sixth paragraph named Bertha Kirchgraber Cusineau, her niece, as executrix, and the seventh paragraph devised to this niece "all of the lots owned by me, or in which I have an equity or interest at the time of my death in the Busch Park Addition, . . ."

The eighth paragraph reads: "I give, devise and bequeath the real estate owned by me, or in which I have an equity or interest at the time of my death, known as the 'McClendon Springs Property' (which is described) to the following parties and persons and in the following proportions, to-wit:" (a) One-fourth to St. John's Catholic Church, (b) one-eighth to the Sisters of St.

John's Place, (c) one-eighth to the Good Shepherd's Convent, (d) one-fourth to Ada Busch Harrison, a niece, (e) one-fourth to Mrs. Mary Louise Busch Mee, the legally adopted daughter of the testatrix deceased sister.

Paragraph nine devises small sums of money to numerous persons and concludes with this statement: "It being my intention to except in this instance Bertha Kirchgraber Cusineau for whom I have made separate provision in this will."

Paragraph 10 contained provisions designed to circumvent a contest of the will, which has not been contested as this litigation involves not its validity, but its construction. When all of these paragraphs are read together, the entire estate is disposed of.

The McClendon Springs property was a 230-acre tract of land about five miles east of the City of Hot Springs, on which there were a number of springs, the water from which had been sold over a long period of time. Miss Busch had constructed a few houses on the property, which she rented to visitors and in one of which she resided with her niece, Miss Cusineau, who had lived with Miss Busch for a period of 17 years before the execution of the will. Miss Busch owned another tract of land which she had sub-divided into blocks and lots, which she sold under contracts providing that when the last payment of purchase money had been made, deeds would be executed to the purchaser. Some of these contracts had been fully paid, and deeds made prior to Miss Busch's death, and there are a number of contracts on which payments are still being made. This litigation does not involve those lots.

On January 14, 1942, Miss Busch entered into a contract with one Gecks for the rental, with the option to purchase, the McClendon Springs property, which eventuated in the litigation reported in the case of *Busch* v. *Gecks,* 209 Ark. 431, 190 S. W. 2d 625. This contract was rescinded on June 19, 1946, and on the same day Miss Busch conveyed the property to Rayow, Young and Colish by warranty deed, reserving for herself a life estate in one acre of the land on which she had a home.

The consideration for this deed was the sum of $21,190, evidenced by notes for that amount for the security of which the grantees executed to Miss Busch a mortgage on the land.

On the same day the grantees executed two warranty deeds, by one of which they conveyed 20 acres of the land, and 50 acres by the other, and on the same day Miss Busch executed releases of these two tracts of land from the mortgage.

The court found on the hearing of the exceptions to the settlement of the executrix, that by these conveyances executed subsequent to the date of the will there had been an ademption of the devises of the McClendon Springs property, and that the unpaid purchase money notes became the property of Miss Cusineau under paragraph five of the will.

At § 341, 28 R. C. L. 345, appears statements of the law to the following effect. The distinctive characteristic of a specific legacy is its liability to ademption. If the identical thing bequeathed is not in existence, or has been disposed of so that it does not form a part of the testator's estate, at the time of his death, the legacy is extinguished or adeemed, and the legatee's rights are gone. The rule is universal that in order to make a specific legacy effective the property bequeathed must be in existence and owned by the testator at the time of his death, and the nonexistence of property at the time of the death of a testator which has been specifically bequeathed by will is the familiar and almost typical form of ademption. Many cases supporting this text are found in the annotation to the case of *Eddington* v. *Turner,* 38 Atl. 2d 738, 155 A. L. R. 562; *Brady* v. *Paine,* 391 Ill. 596, 63 N. E. 2d 721, 162 A. L. R. 138.

In the body of the opinion last cited it was held that a disposition by testator in his life time, of property specifically devised operates as a revocation of the devise; and a conveyance of a part of such property operates as an ademption of the devise to the extent of the lands conveyed.

The reason for this rule as stated in the numerous cases cited in the note to § 543, 68, C. J. 844, is that as the testator no longer owns the property specifically devised, there is no property for the devisee to take, and also that subsequent conveyance of the property by the testator after having made a specific devise of it indicates conclusively a change of testimentary intent as to that property.

None of the appellants claim any interest in the fifty-acre tract, nor in the twenty-acre tract above referred to, for the obvious reason that Miss Busch did not own that land at the time of her death, having conveyed it away by warranty deed in her life time. But she also has conveyed away the remainder of the McClendon Springs property by warranty deed, and there would appear to be but little doubt that the court was correct in holding that the devise of the McClendon Springs property was adeemed, but for the recital in the eighth paragraph that "I give, devise and bequeath the real estate owned by me, or in which I have an equity or interest at the time of my death, known as the 'McClendon Springs property' etc."

The decision of the question involved on this appeal is what effect should be given to the language just quoted. Obviously it appears from what has been said that if Miss Busch had devised the property itself and nothing more had been said, there would have been an ademption when she sold the property. But as appears from the opinion in the case of *Busch* v. *Gecks, supra,* there was an outstanding contract at the time of the execution of the will under which Miss Busch had leased the property under a contract which gave an option to purchase within a possible period of five years or more. That contract was dated January, 1942, and the will was executed June 11, 1945.

It is certain that the will was executed in contemplation of the fact that the lessee might exercise his option to buy and was given five years in which to do so. This contract was rescinded June 18, 1946, and the land was sold to other parties for the consideration of $21,190

evidenced by the notes which form the subject matter of this litigation, the payment of which was secured by a mortgage on the property sold. The result of this transaction is that while Miss Busch ceased to be the owner of the property, she retained and had a very substantial interest in it, and that interest is defined in the purchase money notes. This is the very situation which Miss Busch must have contemplated after she had executed a contract involving the possible sale of the property. When the will was executed Miss Busch did not have merely "equity or interest" in the property, but she had the title thereto. Contemplating the sale which she was then under contract to make, and which was later made, she devised the property or the equity or interest she might own at the time of her death to the beneficiaries named. She did not define that equity or interest, but she devised it, whatever it might be.

If it be said the deed from Miss Busch vested the "equity," that of redemption, in her mortgagor it may be answered that she devised not only her equity but her "interest" as well.

It is unnecessary to consider these distinctions. In the case of *Ormsby* v. *Ottman,* 85 Fed. Rep. 492, Judge Sanborn said: "On the other hand, the word 'interest' is the broadest term applicable to claims in or upon real estate. In its ordinary signification among men of all classes it is broad enough to include any right, title, or estate in, or lien upon, real estate. One who holds a mortgage upon a piece of land for half its value is commonly and truthfully said to be interested, to have an interest, in it, and it would not be true, in the common understanding of men, to say that he had no interest in it." However designated Miss Busch had a very substantial interest in this property at the time of her death, and that interest was devised to the named beneficiaries, the appellants here.

In the chapter on Ademption, Vol. 2, Page on Wills, § 1336 it is said: "If the terms of the will show that testator contemplates some change in the form of the gift, or even a sale and reinvestment of the proceeds, and

that he intends to pass the proceeds, or the property in which the proceeds are reinvested, to the original beneficiary, full effect will be given to such provision. . . . If testator gives the 'proceeds' of certain property, and it appears, from the terms of the will, that he gives such proceeds even if the property is sold in his life time, the beneficiary may have the proceeds as far as they can be traced."

The interest of Miss Busch in the property at the time of her death is readily traceable in the notes given for the purchase price thereof, and we conclude therefore that there was no ademption as to the unpaid purchase price.

In the case of *Mitchell* v. *Mitchell,* 208 Ark. 478, 187 S. W. 2d 163, the facts were that the E. E. Mitchell Co. was a corporation largely owned by E. E. Mitchell, who by his will devised "all my stock and interest in E. E. Mitchell Co." to a son and grandson. He had other children to whom he devised other property. After the execution of the will the corporation surrendered its charter and the business thereafter was continued as a partnership. In the settlement of the testator's estate it was contended that the devise of the stock had been adeemed, but the court held against that contention, and this action was affirmed on the appeal to this court. We there said: "Generally speaking, a change in the form of a security bequeathed does not of itself work an ademption. It must be shown that the testator intended to give specific securities of the form or nature mentioned in the will."

We there cited the case of *Walton* v. *Walton,* 7 Johns. Ch. 258, 11 Am. Dec. 456, where the facts were that a testator had bequeathed all his rights, interest, and property in the Bank of the United States. With the expiration of the Bank's charter its property was transferred to trustees, to be collected and disposed of for the benefit of shareholders. From time to time funds thus received were distributed as dividends, but some property remained with the trustees when the testator died. It was held in the case cited that there was an ademption as to dividends paid to the testator, but not as to the remain-

ing corpus. So here there was an ademption as to the fifty-acre and the twenty-acre tracts of land, and as to any of the purchase money Miss Busch may have collected, but not as to the purchase money remaining unpaid at the time of her death.

The decree of the court below will, therefore, be reversed and the cause will be remanded for further proceedings not inconsistent with this opinion.

WOOD MERCANTILE COMPANY *v.* COLE.

4-8451 209 S. W. 2d 290

Opinion delivered March 15, 1948.

Barber, Henry & Thurman, Phil Herget and *Kirsch & Cathey,* for appellant.

Reid & Roy, for appellee.

HOLT, J. This case arises under the Arkansas Workmen's Compensation Law (Act 319 of 1939). The material facts appear not to be in dispute.

Audrey H. Cole, the husband of appellee, Sadie Lee Cole, was killed in the course of his employment while working on a welding machine of appellant, Wood Mercantile Company, about twelve weeks after he began work for this company. He was 34 years old at the time, and left surviving his widow and three small children. He was a Veteran of World War II, and had served more than seven years in his last enlistment. He was with an Army Railroad Battalion overseas and did electrical welding and burning in overhauling locomotive boilers, tenders, pressure tanks, etc., and rebuilt defective parts. He began his employment with appellant, Mercantile Company, about six months after his discharge. As a Veteran he had qualified for United States Government Subsistence payments according to the Servicemen's Readjustment Act of 1944, Public Law 346, 38 U. S. C. A. § 693, *et seq.*, which is known as the G. I. Bill of Rights. He was classified in that work as a tractor and automobile mechanic, but he was the only welder that appellant, Mercantile Company, had. During the twelve weeks that he worked for appellant, he and two other veterans were all the employees that appellant had at the shop. Cole's beginning wage was $50 per month and it was contemplated and agreed that at the end of each six month's period of employment, his wages were to be increased until the wage objective of $172.80 per month, the journeyman's wage for this type of work, was reached at the end of a thirty-six month training period. Cole received in addition to the $50 per month from appellant, Mercantile Company, the maximum subsistence payment from the Government which, under this status, was $90 per month, or a total of $140 per month.

Appellants say: "The only question presented by this appeal is: What was the average weekly wage of Audrey H. Cole at the time of his accidental death, June 19, 1946?"

Appellee's claim was first considered by the referee, Lewis M. Robinson, who found that there existed no contract of hire between deceased, Cole, and his employer, and applying the *quantum meruit* rule, found that Cole's

services were reasonably worth $30 per week and made an award of $19.50 per week.

On review before the full commission, there was a finding that a contract of hire existed for an advancing scale of wages beginning at $50 per month and working up to $172.80 over a thirty-six month period. Since Cole, the employee, had only worked twelve weeks, the commission applied the "just and fair" rule contained in § 12 of the Compensation Law, found the weekly wage to be $20 per week and made a compensation award of $13 per week.

The circuit court, on appeal, found as a matter of law that the subsistence allowance of $90 per month paid to Cole by the Government must be considered as part of Cole's wage within the meaning of the Compensation Law and when this sum is added to $50 per month, paid by the employer, appellant, Mercantile Company, Cole's total wage was $140 per month which entitled the claimants, appellees, to compensation at the rate of $20 per week.

Appellants contend that the award of compensation should have been $7.50 per week, based upon a monthly wage of $50.

The question presented appears to be one of first impression.

We have reached the conclusion that the findings of the circuit court were correct and that its judgment should be affirmed.

When we give to the provisions of the act that liberal construction to effectuate its aim and purpose, which we have many times held we must do, *Elm Springs Canning Company* v. *Sullins*, 207 Ark. 257, 180 S. W. 2d 113, we think any other view than that adopted by the circuit court would unduly narrow the application and effect of those provisions.

Section 12 of the act provides: "Except as otherwise specifically provided the basis for compensation under this Act shall be the average weekly wages earned

by the employee at the time of the injury, such wages to be determined from the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury divided by fifty-two. . . . Wherever allowances of any character are made to an employee in lieu of wages, or specified as part of the wage contract, they shall be deemed a part of his earnings."

Section 15 (b) provides: "The compensation payable under this section for the death of an employee shall be limited to 65% of the average weekly wages of such deceased employee, for a period of 450 weeks, but in no case shall such compensation exceed the total sum of $7,000. . . ."

Section 2 (h) of the act provides: " 'Wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable cash value of board, rent, housing, lodging or similar advantage received from the employer and including gratuities received in the course of employment from others than the employer when such gratuities are received with the knowledge of the employer."

Under the plain terms of the latter section, wages means not only the monthly payment of $50 by the employer to Cole for his services, but they include "gratuities received in the course of employment from others than the employer when such gratuities are received with the knowledge of the employer." It is conceded here that the employee, Cole, was receiving subsistence of $90 each month from another (U. S. Government) than the employer and the employer knew it. Cole's wages under the program, if his services were satisfactory, were to be increased $20 at the end of each six months' period, until he had reached a journeyman's wage of $172.80 per month. It appears to be undisputed that without some assistance from the Government, Cole would not have been hired by appellant, Mercantile Company. Such was the effect of the testimony of appellant's (Mercantile

Company) foreman, Max Weir. It is also not denied that Cole could have earned approximately $5 per day, or $30 per week, doing the same character of work that he was performing for appellant, Mercantile Company. We think it obvious, therefore, that appellant, employer, benefitted directly from the Government payment to Cole.

It is of strong significance, that as an inducement and aid to the Veteran, entering into such program, the Serviceman's Readjustment Act, *supra,* provided that the Government would pay to such veteran trainee of Cole's status, subsistence allowance of $90 per month, which amount would be decreased in proportion to, and at the same intervals that the employee's (Cole's) wages were increased by his employer. If no relationship existed between the subsistence pay and that paid by the employer, why the provision for the decrease in the former as the latter is increased.

The Service Bulletin containing the regulations for the On-the-Job training program for veterans provides: (T.80k): "XI. VETERANS' PAY. Beginning wage—It is not the school's responsibility to decide what the veteran will be paid, but the beginning wage for the veteran in training should be the same the employer pays other beginners in that occupation. This training program was not organized to allow employers to hire veterans at a lower rate than other beginning employees. . . . The intention of the law is to benefit the veteran. The program should not be used to hire a veteran at a lower wage than other beginning workers."

While the Workman's Compensation Law of New York (Chapter 816 of the Laws of 1913 as amended) in its definition of "Wages" does not expressly include gratuities, yet, where gratuities are contemplated, as a part of the compensation, the courts of that state have included tips.

"Where a taxicab driver was accustomed to receive a constant amount in tips, and this amount was taken into consideration by this employer in fixing his wages, and the tips were thus an advantage received from the

employer, in determining the average weekly wage of the employee as a basis of award, the tips should be added to regular wages paid by the employer in determining the average weekly wage." *Sloat et al.* v. *Rochester Taxicab Co., et al.,* 177 App. Div. 57, 163 N. Y. S. 904, 116 N. E. 1076, (Headnote 2).

"Pullman porters, restaurant waiters, taxicab drivers, and others receiving tips from the third parties are entitled to have such tips considered in determining the amount of their awards for injuries under the Workmen's Compensation Law (Consol. Laws, c. 67), providing the employers in such cases contemplate and intend that their employees shall receive such gratuities. In such cases the compensation paid by the employers is correspondingly less, and they are therefore benefitted by such gratuities." *Begendorf* v. *Swift & Co.,* 183 N. Y. S. 917, (Headnote 1), 193 App. Div. 404).

Of particular significance also is the last sentence in § 12, *supra,* as follows: "Wherever allowances of any character are made to an employee in lieu of wages or specified as part of the wage contract, they shall be deemed a part of his earnings."

We think the $90 subsistence paid Cole by the Government, in the circumstances here, was a part of the wage contract and therefore became a part of his earnings and wages.

Appellant, Mercantile Company, was thus enabled to hire Cole, and Cole was induced thereby to accept employment, at a cheaper pay, or to accept a wage of $11.54 per week for a week of 57 hours when, as indicated, his services were worth, and he could have earned elsewhere $30 per week or $5 per day.

Webster defines "gratuity" as something given freely or without recompense, a gift; something voluntarily given in return for a favor or service; a bounty, a tip."

As above noted, in New York, even where there are no provisions similar to our own in the compensation law respecting gratuities, the courts there have included tips and similar gratuities as part of the wage. Our

own act by specifically including gratuities has, we think, made it clear that the lawmakers intended that gratuities arising in circumstances like those with which we are here dealing should be a part of the wage when computing compensation.

Appellants argue earnestly that when our Workmen's Compensation Law was enacted in 1939 subsistence payments to veterans was unheard of and not contemplated and therefore that such payments cannot be considered as gratuities within the meaning of the act. We cannot agree. We think under the general rule of statutory construction, and especially when considered under the liberal interpretation that we must give our compensation act in favor of claimants, "gratuities," as used in the act, includes subsequent situations which develop later, as here.

The rule is announced in Amer. J. P., Vol. 50, § 237, p. 224: "On the other hand, the fact that a situation is new, or that a particular thing was not in existence, or was not invented, at the time of the enactment of a law, does not preclude the application of the law thereto. The language of a statute may be so broad, and its object so general, as to reach conditions not coming into existence until a long time after its enactment. Indeed, it is a general rule of statutory construction that, in the absence of a contrary indication, legislative enactments, which are prospective in operation and which are couched in general and comprehensive terms broad enough to include unknown things that might spring into existence in the future, even though they are words of the present tense, apply alike to new situations, cases, conditions, things, subjects, methods, inventions, or persons or entities coming into existence subsequent to their passage, where such situations, cases, conditions, things, subjects, methods, inventions, persons, or entities are of the same class as those specified and can reasonably be said to come within the general purview, scope, purpose, and policy of the statute, the mischief sought to be prevented, and the evident meaning of the terms used."

Finding no error, the judgment is affirmed.

WHITE RIVER PRODUCTION CREDIT ASSOCIATION *v.* FEARS.

FEARS *v.* VOLENTINE.

4-8421, 4-8427 209 S. W. 2d 294

Opinion delivered March 15, 1948.

[redacted]

4-8421

[redacted]

Pickens & Pickens, for appellant.

L. A. McLin, J. Brinkerhoff and *Adrian Coleman,* for appellee.

4-8427

[redacted]

L. A. McLin, J. Brinkerhoff and *Adrian Coleman,* for appellant.

Ras Priest, for appellee.

ED. F. MCFADDIN, Justice. The most important issue on these appeals is the extent and effect of lien waivers, signed by the landlords. Other questions are incidental to this one. In case No. 8421, appellees Fears, Bone and Carter are the landlords, and will be so designated. R. E. Coleman is the tenant. The appellant White River Production Credit Association (hereinafter referred to as "Association") made advances to Coleman on the strength of the waivers signed by the landlords. In case No. 8427, the said landlords are the appellants, and Volentine—a *pendente lite* purchaser from the Association—is the appellee.

In October, 1943, Coleman, as tenant, leased 240 acres from Fears, 120 acres from Bone, and 120 acres from Carter. All of these lands were in Greene county, and were leased by Coleman for rice farming for the 1944 Calendar year. A written rent contract was executed between Coleman and each landlord, and all contracts were identical except as to land descriptions, parties and dates. Coleman agreed to pay as rent "one-fourth of all monies derived from the sale of rice grown and marketed from said lands." He represented to each of the three landlords that he would need cash advances to plant, cultivate, harvest and market the rice crop, so in each contract there was this language:

"Lessor by these presents agrees to sign and execute a waiver of his landlord's lien on said crops for the purpose of assisting lessee in procuring a loan thereon."

On November 8, 1943, each of the three landlords executed a written waiver reading as follows:

"LANDLORD'S WAIVER OF LIEN

"In consideration of the sum of $1.00, the receipt of which is hereby acknowledged, and other valuable considerations, I/we hereby, and by these presents relinquish

and waive unto White River Production Credit Ass'n., its transferees and assignees, all and singular, the priority of any right, claim, interest, equity or lien I/we may have for rent, advances or other indebtedness on, in and to the crops now growing on or to be grown during the year 1944 on lands described in the mortgage executed by R. E. Coleman to White River Production Credit Ass'n. dated the 8th day of November, 1943, to which mortgage this waiver is attached; such waiver to extend to and cover the amount now due under and secured by said mortgage or which may be hereafter secured thereby under the terms thereof, and I/we hereby waive the right to a marshalling,[1] and consent to the collection of said mortgage out of any and all said crops.

"I hereby certify to the said association, its successors or assigns, as an inducement to make the loan, that I have not heretofore executed any assignment or waiver of my said lien in favor of any other person, partnership or corporation.

"Witness my/our hand and seal on this 8th day of November, 1943."

These three waivers were attached to, and became a part of, the mortgage from Coleman to the Association, which mortgage (dated November 8, 1943) recited in part as follows:

"The undersigned R. E. Coleman of the County of Clay, State of Arkansas, (hereinafter referred to as the mortgagor), in consideration of the sum of $21,000 loaned to said mortgagor by White River Production Credit Association (hereinafter referred to as the mortgagee), the receipt of which is hereby acknowledged, and evidenced by note(s) of the undersigned in said amount described as follows:

Date	*Principal Amount*	*Date of Maturity*
November 8, 1943	$21,000.00	December 5, 1944

payable to the order of the mortgagee at its office in Newport, Arkansas, with interest from date until paid

[1] We are not, here, called upon to discuss the effect of an executory contract to waive the marshalling of assets.

at the rate of 4½ percentum per annum, for the purpose of securing the payment of said debt and the note(s) evidencing the same, and all renewals and extensions thereof, and all additional loans and advances which may hereafter be made by the mortgagee, its successors or assigns, to the mortgagor, whether made before or after the maturity of the note(s) described herein and during the life of this mortgage, whether or not evidenced by note or notes, and any and all other present or future liabilities of the mortgagor to the mortgagee, its successors and assigns, does hereby sell, assign, transfer, set over and mortgage unto said mortgagee, its successors or assigns, the following decribed personal property: . . ." (there follows description of the rice crop to be grown on the farms of the three landlords and also a description of the chattels belonging to Coleman.)

Coleman personally owned approximately 800 acres in Clay county, and had borrowed money from the Association on his 1943 crop. He still owed the Association a balance in excess of $1,000, which was secured by a mortgage on his chattel property. In February, 1944, he applied to the Association for a loan to enable him to make a rice crop on the said Clay county lands. This loan was approved in the sum of $15,000, and a mortgage on the Clay county crop was executed by Coleman to secure not only the said $15,000 loan, but the $21,000 loan previously referred to. The language in the February, 1944, mortgage as to "all additional loans and advances" was the same as in the November, 1943, mortgage, as previously copied.

In 1944, Coleman made a crop on his own lands, as well as on the lands of the landlords; and on the security of the two mortgages previously mentioned, the Association made loans and advances to Coleman in excess of $56,000. These facts appear to be conceded as true:

1. Some of the said money was used by Coleman to pay old debts and personal expenses, and items not connected with the rice crops. One such "old debt" was the said balance due by Coleman to the Association on the 1943 mortgage previously mentioned.

2. The weather in the fall of 1944 was so unfavorable to the harvesting of rice that the major portion of the crop on Coleman's Clay county land was never harvested or marketed.

3. All of the proceeds of the crops gathered from the landlords' lands were not delivered by Coleman to the Association pursuant to the terms of the mortgages: Coleman allowed others to have some of the proceeds.

4. The Association received about $40,000 from the 1944 rice crop of all of the lands, and still had a claim against Coleman for about $16,000 secured by the mortgage of November 8, 1943, on the chattels.

5. The landlords received nothing.

Thereupon, on March 10, 1945, the landlords brought suit in the Greene Chancery Court, naming as defendants the Association, Coleman, Volentine, and others. The complaint alleged, *inter alia,* that the lien waivers were signed by the landlords for the sole purpose of enabling Coleman to obtain money with which to make a crop on the lands of the three landlords; that the Association had no right to charge against the crops grown on the lands of the landlords the total indebtedness of Coleman to the Association, including the old debts and the other advances; that Coleman and the Association had fraudulently induced the landlords to execute the said lien waivers as a part of a scheme to defraud the landlords out of their rents; that the Association had collaborated with Coleman in secreting a part of the crops, and had allowed Coleman to take a portion of the crops away from the payment on the mortgage. The prayer of the complaint was for (1) a judgment against Coleman for the rents of each landlord; (2) an accounting against Coleman and the Association for the crops grown; (3) a fair determination of the advances made for the planting, cultivating, harvesting and marketing of the crops on the lands of the three landlords, including the segregation of their crops from the entire Coleman crops; and (4) a judgment against the Association for the amounts of the plaintiffs' crops received by the Association over and above the amount required for the

repayment to the Association of the money advances by the Association to the planting, cultivating, harvesting and marketing of the crops on the lands of the three landlords. Also, the landlords prayed that they be subrogated to the lien of the Association in its mortgage on the chattels of Coleman, in order to enable the landlords to collect their rents against Coleman.

Contemporaneously with the filing of the complaint, the landlords filed notice of *lis pendens* in both Greene and Clay counties, and described all the chattel property as contained in the Association's mortgage. Thereafter Volentine paid the Association its balance of $16,000 on the Coleman indebtedness, and took an assignment of the indebtedness and the mortgage held by the Association on the Coleman chattels. Then Coleman surrendered the chattels to Volentine, and he disposed of them.[2] By reason of the transactions *pendente lite,* the landlords claimed that Volentine had rendered himself personally liable for their judgments, and they therefore prayed judgment against Volentine. This claim against Volentine is the issue in Case No. 8427 in this court.

All phases of the causes proceeded to trial in the chancery court, being heard entirely on depositions and stipulations. The record is voluminous. The decree of the chancery court found and held:

1. That the landlords were entitled to judgment against Coleman for $9,306.02 as the amount of their rentals, together with interest thereon from April 14, 1945, until paid (the decree segregating the rents due each landlord); 2. that the landlords "are not liable on their waivers for old debts of the defendant R. E. Coleman, nor for the $15,000 mortgage given by him on crops to be grown on (his) said defendant's farm in Clay county, Arkansas, nor any of the money not used in the production of crops raised on plaintiffs' (landlords') lands"; 3. that the Association had received and held, as proceeds from the rice crops grown on the landlords' lands, an amount far in excess of the amount al-

[2] One angle of the Coleman-Volentine litigation was before this court in the case of *Coleman* v. *Volentine,* No. 8185, 211 Ark. 592, 201 S. W. 2d 592.

lowed under the waivers (as they had been limited in paragraph 2, just above); 4. that the landlords were entitled to judgment against the Association for the said rents of $9,306.02 and interest (because of the items 2 and 3, above); and 5. that the landlords were not entitled to any judgment against Volentine.

From all of the said decree adverse to it, the Association has appealed in case No. 8421; and from that portion of the decree which refused the landlords any judgment against Volentine, the said landlords have appealed in case No. 8427 in this court. There is no appeal by Coleman.

Case No. 8421

I. *The Waivers.* As previously stated, the first and most important question in this case is the extent and effect of the lien waivers signed by the landlords. We have previously copied the wording of the waivers. The language is about as broad as can be imagined. By its terms, each waiver extends to and covers ". . . the amount now due under and secured by said mortgage or which may be hereinafter secured thereby under the terms thereof . . ." The terms of the mortgage have already been copied. It is security for "all additional loans and advances which may hereafter be made by the mortgagee . . . and any and all other present or future liabilities of the mortgagor to the mortgagee." Thus, according to the plain language of the waivers and the mortgage, the landlords waived their liens to the extent of the entire $56,000 debt due by Coleman to the Association. The waivers in this case are quite different from those we have considered in some of our other reported cases, a few of which cases are: *Bigham* v. *Cross,* 69 Ark. 581, 65 S. W. 101; *Necley* v. *Phillips,* 70 Ark. 90, 66 S. W. 349; *Griggs* v. *Horton,* 84 Ark. 623, 104 S. W. 930[3]; *Wilson* v. *Bank,* 170 Ark. 1194, 282 S. W. 689[3]; *Burke* v. *Int. L. I. Co.,* 179 Ark. 651, 17 S. W. 2d 314; *Silbernagel* v. *Taliaferro,* 186 Ark. 470, 53 S. W. 2d 999; *Meyer* v. *McKenzie,* 189 Ark. 76, 70 S. W. 2d 505; and *Lee Wilson & Co.* v. *Fleming,* 203 Ark. 417, 156 S. W. 2d 893. When we

[3] Only a memorandum is contained in the Arkansas Reports; the full context appears in the Southwestern Reporter.

compare the waivers here with that involved in *Silbernagel* v. *Taliaferro, supra,* the sweeping extent of the present waivers is made glaringly apparent. The landlords, here, could have limited their waivers, if they had so desired; but they did not. By the plain wording of the waivers, they extend to the entire $56,000 that the Association loaned Coleman. This conclusion is inescapable, since there is no provision to the contrary in the waivers.

II. *The Intentions of the Landlords.* The landlords insist that, in signing the waivers, they did not *intend* to sign such broad and unconditional instruments. They claim that all they intended to do was to waive their liens to the extent of any amounts that the Association might loan Coleman to enable him to make his crops on the lands of these landlords. They offered evidence of the surrounding circumstances to aid the court in determining their intentions. But it is only when the language of the contract is ambiguous that courts look at the surrounding circumstances to ascertain the intentions of the parties. In *Stoops* v. *Bank of Brinkley,* 146 Ark. 127, 225 S. W. 593, Mr. Justice Hart, speaking for this Court, said:

"Where the language is clearly susceptible of but one meaning, parol evidence to vary the terms of a written contract is not admissible."

In *Lee Wilson & Co.* v. *Fleming, supra,* in discussing the language in a contract of waiver by a landlord, we said:

"It is . . . well settled that the language of a contract, if not doubtful, is conclusive as to the intention of the parties. *Love* v. *Couch,* 181 Ark. 994, 28 S. W. 2d 1067. . . . This rule applies to rent contracts, such as we have in the present case. *Silbernagel & Company* v. *Taliaferro,* 186 Ark. 470, 53 S. W. 2d 999."

In the case here the language of the waivers is plain and unambiguous; and therefore the evidence as to the intentions of the landlords cannot be used to vary the plain wording of the waivers. Even the rent contracts

prepared by the landlords were almost as broad as the waivers, because—by the contracts—each landlord agreed to sign a waiver "for the purpose of assisting lessee in procuring a loan." It is most probably true that each landlord misunderstood the *legal effect* of the contract and waiver which he signed; but a unilateral misunderstanding of the *legal effect* of an instrument is not a sufficient ground for reformation. *Fullerton* v. *Storthz,* 182 Ark. 751, 33 S. W. 2d 714; *Clark* v. *Trammel,* 208 Ark. 450, 186 S. W. 2d 668; and *Crews* v. *Crews,* 212 Ark. 734, 207 S. W. 2d 606. So we conclude that the clear and unambiguous language of the waivers renders inadmissible the evidence as to what the landlords intended, or thought, the instruments to effectuate.

III. *False Representations by Coleman.* The landlords urge that Coleman represented to them that he did not intend to cultivate his Clay county lands; that, because of this representation, they signed the waivers; that Coleman's representation was false, amounting to fraud, and was factual instead of promissory. Because of this fraud, the landlords insist that they should be allowed to rescind the waivers. The evidence shows that Coleman was guilty of false statements to the landlords, but there is no evidence that the Association knew of such representations, much less participated in them. Coleman personally presented the waivers to the landlords, and then returned the signed waivers to the Association. None of the landlords ever had any conversation with any representative of the Association until the fall of 1944. We recognize the rule to be:

"One who accepts the fruits of fraud, knowing the means by which they were obtained, is liable therefor even though he did not personally participate in the fraud." 37 C. J. S. 349.

But in this case the Association made no representations to the landlords, neither did the Association authorize Coleman to represent anything to them, nor did the Association make advances to Coleman knowing that he had misrepresented anything to the landlords. So the above-quoted rule does not apply. The Association

cannot be held liable, here, on the basis of Coleman's fraud, because the Association was ignorant thereof at the time it accepted the waivers and made the advances, and is now seeking to recover only what it so advanced. See *Hardinge* v. *Kuntze,* 278 Pa. 232, 122 At. 509; *Stewart* v. *Mitchell's Admx.,* 301 Ky. 123, 190 S. W. 2d 660; and *Occidental Life Ins. Co.* v. *Minton,* 181 Okla. 298, 73 Pac. 2d 440.

The landlords recovered judgment against Coleman, and as to that angle of the case there has been no appeal. But the landlords failed to prove that the Association—at the time it made the advances to Coleman on the strength of the waivers—had any notice, or reason to suspect, that Coleman had misrepresented anything to the landlords to induce them to sign the waivers. So the landlords' claim for rescission on account of misrepresentation and fraud must fail as against the Association, even if Coleman's statements to them were factual instead of promissory.

IV. *Conversion of the Proceeds of the Crops.* The evidence showed that Coleman converted several hundred dollars of the proceeds of the 1944 rice crop. Because of this conversion, the landlords claim that the Association is liable to them for such amount. But the evidence fails to show that the Association participated in said conversion, or was conscious of it being done. What we said in topic III, *supra,* applies here—*i. e.,* the Association cannot be charged with Coleman's fraud, unless the Association (1) knew or should have known of such fraud, and (2) thereafter received the benefits of such fraud. Nor did the Association participate in the conversion. Such essentials have not been shown. Therefore, our holding in *Walker* v. *Rose,* 153 Ark. 599, 241 S. W. 19 does not apply here.

Case No. 8427

When the landlords filed their suit, they prayed that they be subrogated to the Association's mortgage on Coleman's chattels, and they filed a *lis pendens* notice describing the chattels. During the pendency of the suit Volentine paid the Association the balance of $16,000 of

the Coleman indebtedness, and took an assignment of the mortgage on the Coleman chattels. Then Volentine took possession of the chattels and sold them. Because of these matters, the landlords appealed from the refusal of the chancery court to award them a personal judgment against Volentine.

As a purchaser *pendente lite,* Volentine stands in the same position in which the Association stood. See § 8959, Pope's Digest; *Whiting* v. *Beebe,* 12 Ark. 421; *Holman* v. *Patterson,* 29 Ark. 357; *Pindall* v. *Trevor,* 30 Ark. 249; *Hobbs* v. *Lenon,* 191 Ark. 509, 87 S. W. 2d 6; *First State Bank* v. *Cook,* 192 Ark. 213, 90 S. W. 2d 510; *Swantz* v. *Pillow,* 50 Ark. 300, 7 S. W. 167, 7 A. S. R. 98. In *Mitchell* v. *Federal Land Bank,* 206 Ark. 253, 174 S. W. 2d 671 we quoted from Corpus Juris:

"'. . . one who acquires from a party to the proceeding an interest in property, which is at that time involved in a litigation in a court having jurisdiction of the subject matter and of the person of the one from whom the interest is acquired, takes subject to the rights of the parties to the litigation as finally determined by the judgment or decree, and is as conclusively bound by the result of the litigation as if he had been a party thereto from the outset.'"

So, here, Volentine's rights are the same as if the Association had done what he did.

We have heretofore said—in case No. 8421—that the waivers signed by the landlords extended to the entire $56,000. The Association received $40,000 as proceeds of the rice crops, and had a claim for $16,000 balance against the chattel property. The Association, as a chattel mortgagee, had the right—since the debt was past due—to take possession[4] of the chattels and sell them in accordance with the power of sale in the mortgage. Volentine, as assignee, had the same right, under the wording of the mortgage here involved, that the Association had. The landlords failed to prove that the chattel property was worth more than $16,000, or that Volen-

[4] For cases recognizing this to be true, see West's Arkansas Digest, Chattel Mortgages, § 162; see, also, Hughes on Arkansas Mortgages, § 320.

tine received more than that amount from the property. In short, they failed to show any corruption or unfair dealings by Volentine in disposing of the mortgaged chattels, so they made no case against him. Therefore, the chancery court was correct in refusing to render judgment against Volentine.

Conclusion

The effect of this opinion in Case No. 8421 is to hold: (1) that the waivers were absolute and unconditional, and extended to the entire $56,000 loaned by the Association to Coleman; (2) that until such amount was repaid, the landlords were entitled to no part of the proceeds of the crops; and (3) that the proof did not show that the Association received more than its debt. So we reverse the decree of the chancery court insofar as it rendered money judgments in favor of the landlords against the Association, and remand the cause to the chancery court with directions to enter a decree in keeping with this opinion.

The effect of this opinion in Case No. 8427 is to affirm the decree of the chancery court in denying the landlords a judgment against Volentine. All costs are assessed against the landlords.

LANDERS *v.* DENTON.

4-8494 209 S. W. 2d 300

Opinion delivered March 15, 1948.

T. A. French and *Arthur Sneed,* for appellant.

E. G. Ward, for appellee.

HOLT, J. Sidney Landers died May 28, 1928, intestate. He owned the 100-acre farm involved here. He left surviving appellant, Annie Landers, his widow, and the other appellants who were his children and grandchildren, one being a minor. Annie Landers on June 10, 1936, married E. T. Denton and they occupied the property. Appellee, Ola Denton, married J. E. Denton, the son of Annie Landers' second husband, E. T. Denton. J. E. Denton died May 30, 1941.

The present suit was filed March 26, 1947, by appellants who alleged ownership of the property as heirs of Sidney Landers subject to the dower and homestead rights of Annie Landers Denton, and prayed that title be confirmed in them.

Appellee, Ola Denton, claimed to be the absolute owner of the property primarily by virtue of a warranty deed from the Central Clay Drainage District of Clay county.

The trial court found the issues in favor of appellee, Ola Denton, that she was "the owner of and entitled

to the possession and the rents and profits from the land involved herein; that defendant (Ola Denton) is entitled to have her said title to said lands quieted and confirmed in her in this cause," and entered a decree accordingly. This appeal followed.

It is admitted that Sidney Landers owned the 100-acre tract at his death in 1928 and that it had forfeited to the Central Clay Drainage District of Clay county for failure to pay the assessments of 1928 and 1929 and that the District, through proper foreclosure procedure, had obtained a valid deed, conveying absolute title to it to this property on May 28, 1932, and that its title became absolute following the expiration of the redemption period of two years thereafter.

It is further undisputed that on October 11, 1937, the Drainage District, for a consideration of $400, sold and conveyed this land to appellee, Ola Denton and her husband, J. E. Denton, by warranty deed; and that prior thereto on September 8, 1937, appellants, Annie Landers Denton, E. T. Denton, her husband, Ethel Landers Abbott, and Lloyd Landers executed a warranty deed purporting to convey this same land to J. E. Denton and Ola Denton, husband and wife, for a consideration of $1.00 and other valuable consideration in payment of taxes on said land," without any reservations or conditions.

It is further undisputed that appellee and her husband, as tenants by the entirety, following the execution and delivery to them of the deed from the Drainage District October 11, 1937, immediately took possession of the land and for a cash consideration rented it to Annie Landers Denton and her husband, E. T. Denton, by written contract for the year 1938, and again under similar written contracts for the years 1939, 1940, and 1941. Each of said contracts contained a clause waiving rents to permit the lessees, tenants, to obtain loans to finance crops.

Following the death of her husband May 30, 1941, appellee, Ola Denton, continued to rent the property to Annie Landers Denton and her husband for the years

1942 and 1943 under written contracts which contained no provision for waiver of rents. Following the expiration of the 1943 rental contract, the parties failed to agree upon a contract for 1944. Appellee served notice on her tenants to vacate and upon their refusal she prosecuted a suit against them for possession of said land and for all rents due her for the year 1944 and on appeal to this court this relief was granted her, but title to the property was not determined by that suit. (See *Denton* v. *Denton*, 209 Ark. 301, 190 S. W. 2d 291.)

While still maintaining possession, Annie Landers Denton and E. T. Denton, joined by the other appellants, filed the present suit and as has been indicated claimed ownership of the property and right to possession.

Appellee based her claim of ownership and right to possession to the land involved primarily on the warranty deed from the Central Clay Drainage District of Clay County, Arkansas, of October 11, 1937, and also pleaded adverse possession and laches. Appellants, on the other hand, earnestly contend that while the Drainage District held title to the property by virtue of the tax foreclosure sale and could convey absolute title to appellee, that in the circumstances here, the Drainage District deed amounted to a redemption on the part of appellee, Ola Denton, for the benefit of the heirs of Sidney Landers; that the Warranty Deed, *supra*, of September 8, 1937, made to appellee and her husband by Annie Landers Denton and others should be declared, in effect, an equitable mortgage, and that in any event there was an oral agreement between appellants and appellee that the lands contained in said deed of September 8, 1937, were to be occupied by the appellants, E. T. Denton and his wife, Annie Landers Denton, as long as they should live, rent free.

(1)

We first consider the effect of the deed from the Drainage District. At the time this deed was executed by the Drainage District to appellee, Ola Denton, and her husband third parties as tenants by the entirety, the District held absolute title with the right to convey. Ola

Denton was a stranger to the land here involved and acquired no interest through the death of Sidney Landers. The Drainage District had the right to convey absolute title to appellee, all rights of minors and of all other interested parties were cut off absolutely by virtue of the tax foreclosure decree, after the redemption period had expired. The sale by the District to appellee was not a redemption, in the circumstances here.

The controlling rule is announced in the recent case of *Cole* v. *Sparks,* 205 Ark. 937, 172 S. W. 2d 20, as follows: "Where land, subject to drainage taxes, was sold to the drainage district in a suit for delinquent taxes, the proceedings being in all respects valid, the district acquired title to the property under conveyance from the commissioner after the period for redemption had expired. The district had the right to sell to any third party and its deeds to Sparks and Norton were not redemption deeds. The effort of the drainage district to extend the preferential right of purchase to the previous owners of delinquent land within the district could not extend the time allowed for redemption, which, as to drainage districts, has no saving clause in favor of minors. This court in *Deaner* v. *Gwaltney,* 194 Ark. 332, 108 S. W. 2d 600, said: 'This right of redemption was given to all owners and was not limited to minors, nor were minors given any right of redemption peculiar to themselves. Minors and all others had the same period of redemption.' "

(2)

Appellants' second contention that the deed executed by the widow, Annie Landers Denton, and others to appellee September 8, 1937, was an equitable mortgage is untenable. In the first place, the deed appears regular on its face, is a warranty deed without any reservations or conditions whatever and attempted to convey whatever interest, if any, the grantors claimed. In order to establish it as an equitable mortgage, the rule is well settled that the burden was on appellants to show that it was a mortgage, and the evidence that such was the intention of the parties, must be clear, cogent and convincing. The evidence here, which we think is unnecessary to set out in

detail, falls far short of that character of testimony required to establish an equitable mortgage.

The applicable rule is announced in *Bailey* v. *Frank*, 170 Ark. 610, 280 S. W. 663, where this court said: "The law applicable to such cases is stated in *Edwards* v. *Bond*, 105 Ark. 314, where we said: 'The deed being absolute in form, the burden was upon the appellant to show that it was a mortgage, the law presuming that an instrument is what it appears on its face to be, an absolute conveyance, and, in the absence of fraud or imposition, the proof to overcome this presumption and establish its character as a mortgage must be clear, unequivocal and convincing.' "

In the second place, at the time this deed was executed, title and absolute ownership to this land was, and had been for some years after the period of redemption had expired, in the Drainage District and appellants had no interests in it whatever to convey.

(3)

Appellants' final contention that there was an oral agreement that Annie Landers Denton and E. T. Denton should occupy the land as long as they should live, rent free, we think is not established by the preponderance of the testimony. In fact, the evidence was directly against such contention since it was undisputed that these two appellants, immediately after appellee and her husband took possession of the land under their 1937 deed from the Drainage District, entered into written contracts with appellee to occupy and farm the property and to pay crop rents for each of the years beginning with 1938 on through 1943, and that they did pay rents for the years following the death of Ola Denton's husband. Why pay rent if there were an agreement that they should occupy the property rent free?

Finding no error, the decree is affirmed.

NALL *v.* PHILLIPS.

4-8333 210 S. W. 2d 806

Opinion delivered December 8, 1947.

Rehearing granted May 10, 1948.

Arthur D. Chavis, for appellant.

A. F. Triplett, for appellee.

ED. F. MCFADDIN, Justice. This is a suit between the original title owner (appellee) and the tax title purchaser (appellant).

E. W. Phillips owned a tract of 616.29 acres which forfeited for the 1931 taxes under a void description, in

that the land was described as "part of section 23." The 160-acre tract here involved was a part of the said 616.29 acres. On December 20, 1935, appellant Nall received a donation certificate from the State of Arkansas for the 160-acre tract, described as "west half of the west half of section 23," etc. This donation certificate was issued under the provisions of § 8636, *et seq.*, Pope's Digest. Nall moved to the 160 acres in January, 1936, built a house, made other improvements, and placed about 25 acres in cultivation. He complied with all the legal requirements made on a donation certificate holder, so that, on May 5, 1938, he received a donation deed from the State for the 160-acre tract, legally described as above mentioned. He has at all times continued to live on the land, and to cultivate a portion of it.

On June 14, 1940, E. W. Phillips—owner before the tax forfeiture—filed this suit in the Jefferson Chancery Court to cancel the 1931 tax forfeiture as void, and to cancel Nall's donation deed as a cloud on the title, and to remove Nall from that portion of the land of which he was in possession. Nall by proper pleadings claimed the benefit of § 8925, Pope's Digest—*i. e.,* the two-year Statute of Limitations—since he alleged that he was and had been in possession of the 160 acres since 1935. In 1940, W. W. Phillips, son of E. W. Phillips, intervened, claiming under a "No-Fence District" deed. For some unexplained reason, the case was not tried until October 30, 1946. The evidence disclosed that Nall all the time had been in actual possession of a substantial portion of the 160-acre tract.

The chancery court, relying on a surveyor's report, entered a decree on February 5, 1947, awarding Nall the 70 acres conceded to be in his actual possession, and awarding E. W. Phillips the remaining 90 acres of the 160-acre tract. The chancery decree took no notice of W. W. Phillips' deed from the No-Fence District, evidently treating the deed as a redemption by the son of the father. W. W. Phillips has not appealed; so the validity of that deed, and the efficacy of Nall's tender within the redemption period of the No-Fence District

foreclosure, are matters which pass out of this case on appeal.

From the decree awarding E. W. Phillips 90 acres of the land, Nall has appealed. After the decree of the lower court, and pending appeal, E. W. Phillips departed this life, and the action has been duly and properly revived by his heirs, and also by his personal representative; but we use here the original styling.

I. *The Rights of the Parties are to be Determined as of the Filing of the Suit.* As heretofore stated, E. W. Phillips filed this suit on June 14, 1940. Nall answered on July 3, 1940. Other pleadings were filed by the parties at intervals, until April 5, 1941. Thereafter no other amendatory pleadings were filed. The case lay dormant until July 22, 1946, when Nall sought a dismissal for failure of prosecution; and this step resulted in the trial in October, 1946. At that trial a considerable portion of the evidence offered by Phillips bore on the improving, fencing, etc., done between June 14, 1940, and the trial in October, 1946; and it appears to us that this evidence was largely responsible for the decree rendered. What transpired after June 14, 1940, can have no effect on the rights of the parties here, because, in the absence of amendatory pleadings, the rights must be adjudicated as they existed at the time the suit was filed. In *Hornor* v. *Hanks,* 22 Ark. 572 we said: "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."

This was approved in *Winn* v. *Collins,* 207 Ark. 946, 183 S. W. 2d 593, and reiterated and quoted in *Elston* v. *Wilborn,* 208 Ark. 377, 186 S. W. 2d 662, 158 A. L. R. 179. See, also, 1 C. J. 1149 and 1 C. J. S. 1389. Therefore we determine the rights of these parties based on the possession and the conditions as they existed on June 14, 1940.

II. *The Donation Certificate.* Nall received his donation certificate on December 20, 1935. At that time the statute (then § 6947, Crawford & Moses' Digest) did not allow the holder of a donation certificate to invoke

the said two-year statute. It was Act 7 of the Acts of 1937 that extended the benefit of the two-year statute to the holder of a donation certificate. Section 6947, Crawford & Moses' Digest, as amended by Act No. 7 of 1937, is now found in § 8925, Pope's Digest. We do not need to consider in this case the wording and effect of the 1937 amendment, because Nall was in possession on the date he actually received his donation deed, and such unbroken possession continued under the deed for more than two years before this suit was filed—that is, Nall received his donation deed on May 5, 1938, and Phillips did not institute this suit until June 14, 1940.

III. *Phillips' Claim of Possession of Part of the 160 Acres.* Phillips claims that he was all the time in possession of a part of the 160 acres; and determination must be made of this factual question before we can dispose of the legal questions.

The 160-acre tract extends one mile north and south, and one-quarter mile east and west; and lies on the entire west side of section 23. On the west side of the 160-acre tract, there was the boundary line fence of the No-Fence District; but there were no fences on the north and east sides of the 160-acre tract; and the fence on the south side seems to have been constructed after this suit was filed. During all the time that Nall had his donation deed, he was in actual possession of some 40 or 50 acres located in the south part of the 160-acre tract. All of the remaining part of the 160-acre tract was woodland. Phillips owned or controlled several hundred acres adjacent to, and north and east of, this 160 acres; and his cattle roamed from his land on the north and east into the woodland on this 160 acres. In fact, until long after this suit was filed, Phillips' cattle roamed at will over the entire 160 acres, except that portion on which were located Nall's house, garden, etc. Phillips never had any of the 160 acres in cultivation, and during the entire period from Nall's receipt of his donation deed until after the filing of this suit, Phillips' only act of possession was the roaming of his cattle on this land.

The foregoing constitute the facts on which Phillips based his claim of possession; but those acts of Phillips were not so visible, notorious and continuous as to constitute possession. *Carter* v. *Stewart,* 149 Ark. 189, 231 S. W. 887, 232 S. W. 936, held that pasturing land by cattle, plus the cutting of timber for firewood, when coupled with the sale and removal of merchantable timber from the land, would—altogether—constitute adverse possession. But, here, we have only the pasturing of the woodland by the cattle, without any of the other essentials, so what is said in 2 C. J. 67 applies to this case:

"While grazing livestock over land is of course to be considered with other acts of dominion to show a possession, the mere occupancy of land by grazing livestock upon it, without substantial inclosures or other permanent improvements, is not sufficient to support a plea of limitations, and this is especially true where the claimant used no means to restrain the livestock to any particular land, or where the livestock of others was not excluded from the land. Such a use, it has been said, is to be deemed merely permissive, whether the lands are public or private, and may be terminated at any time."

We, therefore, hold that Phillips was not in actual possession of any part of the 160 acres at any time from Nall's receipt of his donation deed until after this suit was filed.

IV. *The Effect of Nall's Possession.* It is conceded that Nall had continuous actual possession of more than 40 acres of the land for more than two years next before Phillips filed this suit; and it is also conceded that Nall was holding such possession under his donation deed from the State. We have held in topic III, *supra,* that Phillips was not in actual possession of any of the 160 acres during any of the time that Nall was in possession under his tax deed. Under this state of the record, Nall invokes that line of cases which holds that actual possession of a part of a tract of land under a deed which definitely describes the entire tract is, in law, possession to the full limits of the described tract. We have scores of cases which state and apply this rule. Some of them

are: *Crill* v. *Hudson,* 71 Ark. 390, 74 S. W. 390; *Sparks* v. *Farris,* 71 Ark. 117, 71 S. W. 945; *Connerly* v. *Dickinson,* 81 Ark. 258, 99 S. W. 82. For other cases so holding, see West's Arkansas Digest, "Adverse Possession," § 100.

The appellee, on the other hand, contends that this rule of "holding to the extent of the deed boundaries" is at most a rule of constructive possession, and that it does not apply in favor of a tax title claimant as against the original owner of the legal title. Appellee says that constructive possession follows the legal title, and that Phillips' legal title is good until Nall's actual adverse possession ousts Phillips' constructive possession, and that the rule of "holding to the extent of the deed boundaries" cannot be used as the equivalent of actual adverse possession. To sustain his statements, appellee cites and quotes from *Woolfolk* v. *Buckner,* 67 Ark. 411, 55 S. W. 168. Among other expressions, this appears in the opinion:

"If the original owner of the legal title was in constructive possession because he had the legal title, how could the claimant under the void tax title have the constructive possession at the same time? To so hold would be to give to possession under a void tax title more legal effect than to possession under a valid legal title—to give to the mere shadow more force than to the legal title. This cannot be."

The above-quoted language might easily lend itself to the construction that the appellee places thereon, because the opinion does not expressly state that the original title holder remained all the time in actual possession of a portion of the land involved in the litigation, yet such vital fact is true, as will be shown from several contemporaneous opinions interpreting *Woolfolk* v. *Buckner.* They point out the continued actual possession of the legal title holder as the distinguishing point in the case.

In *Crill* v. *Hudson,* 71 Ark. 390, 74 S. W. 299 Mr. Justice Wood—who was a member of the court when *Woolfolk* v. *Buckner* was decided—used this language:

"Possession of a part, under color of title, for the requisite period of time gives title by limitation. *Pillow* v. *Roberts,* 12 Ark. 822; *Wilson* v. *Spring,* 38 Ark. 181; *Elliott* v. *Pearce,* 20 Ark. 508; *Ib.* 542; *McConnell* v. *Swepston,* 66 Ark. 141, 49 S. W. 566; *Finley* v. *Hogan,* 60 Ark. 499, 30 S. W. 1048. *The cases of Woolfolk* v. *Buckner, 60 Ark. 163, 29 S. W. 372, and Id., 67 Ark. 411, 55 S. W. 168, do not apply to this cause. In those cases the owner was in actual possession of a part of the land.* In this case the owner had no actual possession of any part of the land, and, when appellants took possession of a part, that possession extended to the limit of their grant. *Logan* v. *Jelks,* 34 Ark. 547; *Wilson* v. *Spring,* 38 Ark. 181; *Worthen* v. *Fletcher,* 71 Ark. 386, 42 S. W. 900." (italics our own).

Again, in *Jones* v. *Pond,* 79 Ark. 194, 96 S. W. 756 Mr. Justice Wood, in discussing part possession of a tract of land as possession to the extent of the boundaries, pointed out the distinguishing features evident in *Woolfolk* v. *Buckner* in this language:

"Under the decisions of this court in *Carpenter* v. *Smith,* 76 Ark. 447, 88 S. W. 976; *Sparks* v. *Farris,* 71 Ark. 117, 71 S. W. 255, 945; and *Crill* v. *Hudson,* 71 Ark. 390, 74 S. W. 299, when appellant's ancestors took possession of part of the land described in his tax deed, that possession extended to the limit of his grant. *There was no one in the actual occupancy of the residue of the land not occupied by B. F. Jones, thus distinguishing the case in that particular from Woolfolk* v. *Buckner, 67 Ark. 411, 55 S. W. 768.*" (italics our own).

In *Sparks* v. *Farris,* 71 Ark. 117, 71 S. W. 945 Chief Justice Bunn—who was also Chief Justice when *Woolfolk* v. *Buckner* was decided—reconciled the two rules of "constructive possession follows the legal title" and "holding to the extent of the deed boundaries" in this language:

"There is no claim that the appellants had actual possession of any of the land during the running of the two years.

"It has, in one or more cases, been held by this court that in such cases, where the owner and tax purchaser both held actual possession of lands sold for taxes, the latter having actual possession of part, and the former of the remainder, and where the tax deed was void, then in such case the holder of the tax deed held the possession only so far as his actual possession extended, because, the owner having possession also of the remainder, his constructive possession of the whole under the description in his deed was superior to the constructive possession of the purchaser holding under a defective deed. But this rule does not pertain where the actual possession is not divided between the two, for the void deed in such case indicates the possessory claim of the holder thereof, and all the world must take notice thereof, and such is the essence of adverse possession."

Applying the principles of the foregoing cases to the case at bar, the result is this: if Phillips had been in actual possession of any part of the 160 acres during any of the two-year period as fixed by the statute, then Nall could only succeed in retaining in this litigation the land that Nall had actually occupied continuously for the two-year period; but since Phillips was not in actual possession of any of the 160 acres at any time in the two-year period as fixed by the statute, then the rule of "holding to the extent of the deed boundaries" applies, and Nall is entitled to prevail as to the entire 160 acres.

V. *The Void Tax Forfeiture.* The fact that the 616.29 acres forfeited under a void description in 1931 is conceded. But the State Land Commissioner, in executing his donation certificate in 1935, and in executing his deed in 1938, used a valid and legal description for the 160 acres here involved (*i. e.,* West half of the West half of section 23), so Nall, by holding possession under his deed for more than two years, brought himself within the purview of *Wilson* v. *Triplett,* 204 Ark. 902, 165 S. W. 2d 943, wherein we reaffirmed our previous holdings that, although land may be forfeited under a void description, still, if the Land Commissioner deeds a part of the tract under a proper description, and the tax title

holder remains in possession for two years, he becomes entitled to the protection of § 8925, Pope's Digest.

Conclusion: The decree of the chancery court is reversed and the cause remanded with directions to enter a decree in favor of Nall for all of the 160-acre tract involved in this suit.

ROBINS, J., on rehearing. There is no dispute as to the principles of law governing this case. The only question is one of fact, and that is confined within narrow limits and apparently should be of easy solution. The fact situation is one about which there ought to be no room for argument, for the means of making it certain at the trial below were available to both sides.

A correct map of the lands involved in this suit and other adjacent lands of appellee, showing houses, fences and other artificial monuments would have furnished the answer to the question of fact about which the uncertainty has arisen. A map was introduced in evidence, but it did not show these structures, and the testimony of witnesses who indicated location of objects on this map as "here" was, no doubt, helpful to the lower court, but *we* have only the map and the record of what these witnesses said; and we have had difficulty in ascertaining where the pointed out locations were.

There seems to be no dispute that appellee originally owned the entire 160 acre tract, which was a part of a larger tract, known as the Taylor plantation, owned by appellee. It is also conceded that the tax sale through which appellant Nall obtained his title was void; and the sole reliance of appellant to sustain his claim is possession for two years under his void deed from the State, which, he asserts, vests title in him under the provisions of § 8925, Pope's Digest. Appellee concedes, and the lower court found, that appellant had shown such possession as to 70 acres.

The sole issue in this case then is: Had the appellant such possession of the remaining 90 acres as to give him title thereto under the two-year statute, *supra*?

Appellant does not claim that he has had actual possession of said 90 acres or that it has ever been enclosed with the 70 acre tract. But on his behalf it is insisted that, since he has had actual possession of part of the 160 acre tract conveyed to him, he has during the same time had constructive possession of the remainder of the land described in his deed.

The lower court found that appellant had not had such constructive possession, but, on the contrary, appellee had all the while had actual possession of the 90 acres.

From a careful review of the record we cannot say that this finding is against the preponderance of the testimony. The testimony of appellee tended to show that the entire 160 acre tract, along with other lands, was enclosed by fence owned by appellee and fence of a fencing district to which he had joined, and that all this land, except the 70 acre tract, was used regularly as a pasture by appellee.

Appellant admitted that appellee's cattle were pastured in the 90 acre tract, and appellee's theory of the matter is somewhat strengthened by the fact that, after this suit was begun, appellee, at appellant's request, built fences along the boundary of the 70 acre tract awarded to appellant for the purpose of protecting appellant's crops from the ravages of appellee's cattle. Now it is difficult to understand why, if appellant had been in possession of the entire 160 acre tract, appellant would have asked for a fence to protect part of his land from depredations of appellee's cattle roaming on another part of appellant's land.

Appellee claims and the lower court found that appellee had been in possession of the 90 acres; but assuming that neither of the parties had actual possession, appellee, having the superior title, must be deemed to have been in possession. 2 C. J. S. 800.

Since the decree of the lower court is not shown to be contrary to the weight of the testimony, the rehearing must be granted and the decree of the lower court affirmed.

ED. F. MCFADDIN, Justice (Dissenting). The majority is granting a rehearing in this case, setting aside the former opinion and changing the result. From this, I respectfully dissent.

This case was originally submitted on November 10, 1947. The *entire transcript* was read; and an opinion was delivered on December 8, 1947, which reversed and remanded the cause with directions. No dissents appeared as noted to that opinion. On January 12, 1948, the case was submitted on rehearing; and now—four months after the rehearing was submitted—the majority has granted the rehearing, and affirmed the trial court, because the majority says that it is unable to determine wherein the trial court was in error. The opinion of December 8, 1947, (which was then the majority opinion) pointed out the error of the trial court. This former majority opinion has now become the minority opinion.

I still adhere to the views stated in the opinion of December 8, 1947; and I am authorized to state that Mr. Justice FRANK G. SMITH joins me in this dissent.

MAXEY *v.* HUGHES.

4-8492 209 S. W. 2d 303

Opinion delivered March 15, 1948.

Harvey L. Joyce and Glen Wing, for appellant.

Lee Seamster, for appellee.

McHaney, Justice. Appellants and appellees own separate and adjacent tracts of land in the city of Fayetteville, each of which tracts is described by metes and bounds. This suit involves the title to a strip of land 110 feet long running north and south, about seven and one-half feet wide at the south end and about three and nine-tenths feet wide at the north end.

Appellees and their predecessors in title have owned a rectangular lot or tract 100 by 110 feet for many years. Appellees bought same from Hosea Fincher and wife July 19, 1946, and the title thereto is deraigned from E. S. Clark who purchased same August 13, 1923, from J. T. Joiner and wife. It has been in the actual possession of Clark and those claiming under him since August, 1923. Clark built a house thereon and moved into it in January, 1924, and continued to reside there until he sold it November, 1945.

Appellants own the tract or lot immediately to the east of appellees, which they acquired from the heir of W. E. Stafford in 1945. Stafford had owned said tract since 1918, and he and Clark were neighbors. Appellants, in an *ex parte* proceeding, secured a decree confirming their title to the disputed strip in October, 1945. They also constructed a fence on all or a portion of the west side of the disputed strip.

Appellees brought this action to set aside the confirmation decree above mentioned, to require appellants to remove the fence they had built and to confirm and quiet the title to said strip in them. Appellants answered claiming the strip in dispute. They set up the fact of an old fence row along a portion of the line, and asserted that this fence row was an agreed boundary line between the properties. Trial resulted in a decree for appellees, granting the relief prayed by them, including the setting aside of the former confirmation decree. This appeal followed.

We think the only question of any consequence in this case is one of fact. Clark and Stafford were long time owners of their respective tracts and resided thereon. They were neighbors, living close together. Stafford is

now dead and has been for some years. Clark is still living and testified in this case. He said there was an old fence that ran part way between him and Stafford when he moved on his property; that he asked Stafford where the correct line was between their properties and Stafford did not know; that he asked Stafford if they should have the line surveyed and Stafford replied that he didn't think so,—that there was enough land there for both of them; that they had no agreement that the old fence was on the line; and that there never was an agreed boundary line between him and Stafford or between him and the Stafford heir after her father's death, even though he attached a fence on his side to the old fence and that Stafford cut the weeds and grass on his side up to the old fence. The effect of his testimony was that there was no boundary established by agreement and that each claimed to own to the true line regardless of the old fence. Two surveyors testified that the old fence was not on the correct line and that the true line was where the decree of the court put it and which required appellants to move the fence they had constructed eight feet and eight inches east from its present location to the southeast corner of appellees' property, and, at the north end of their property, appellants were required to move the fence three feet and eight inches east to the northeast corner of appellees' property, and on a straight line between said points.

While there is some dispute in the testimony and some contradiction of Mr. Clark's testimony by other witnesses, it appears to be practically certain that the surveyors located the true line between these properties. At least we cannot say the decree is against the preponderance of the evidence, and it is, accordingly affirmed.

McMahon *v.* O'Keefe.

4-8498 209 S. W. 2d 449

Opinion delivered March 22, 1948.

Pryor, Pryor & Dobbs, for appellant.

Franklin Wilder, for appellee.

McHaney, Justice. On July 8, 1947, appellee sued appellant on a promissory note for $614.13, dated April 25, 1942, and payable on demand with interest at 4% per annum. He alleged that said note had not been paid although demand therefor had been made; and that on or about February 22, 1945, and July 1, 1945, appellant wrote letters to him which acknowledged said debt and promised to pay said note, but had failed to do so. He prayed judgment for the amount due. He attached the letter of February 22, 1945, to the complaint as a part thereof. On motion of appellant, appellee was required to attach a copy of the letter of July 1,

1945, to his complaint. Appellant then demurred to the complaint on the ground that the complaint and the exhibits show that the alleged debt is barred by the statute of limitations. The court overruled the demurrer, and, appellant refusing to plead further, judgment was entered against him for $741. This appeal followed.

A note payable on demand is due immediately, and the statute of limitations, § 8933, Pope's Digest, begins to run from the date of the note. *Sturdivant* v. *McCarley,* 83 Ark. 278, 103 S. W. 732, 11 L. R. A., N. S. 825; *McCollum* v. *Neimeyer,* 142 Ark. 471, 219 S. W. 746. This action, having been brought more than five years after the date of the note, was barred by said statute unless same was tolled by either or both of the letters above referred to, both written before the statute bar had attached. In his letter of February 22, 1945, written from Bryant, Arkansas, appellant acknowledges receipt of a letter from appellee of February 17. While this latter letter is not in the record, it must have been a demand on appellant to pay his indebtedness owing to appellee, because appellant's letter goes into great detail stating the reasons why he cannot pay it right away. Among other things he said: "I have a little money due me that I have been trying to collect for the last four months and the last time I talked to the party they thought that about the middle of March to the first of April they would be able to pay me off. I'll contact them right away and see if there isn't some way that they can expedite their paying me what I have coming. The amount isn't enough to clear me up with you but every little bit will help and I do my best to try and borrow some some place to make up the difference." Also he said: "I am telling you just how things are without any frills attached but I also want you to know that I will get in behind this thing and will do everything to see you through."

The letter of July 1, 1945, reads as follows: "Dear Charlie: Have been gone for about two weeks, just returned yesterday and found your letter of June 12th.

"Things are beginning to pick up in so far as I am concerned and it probably won't be so long until I will be able to help out.

"We expect to have a new contract signed up within the next few weeks and also I have another deal on the outside that looks like it may go over. It requires quite a bit of financing but I have some wealthy men who told me they would handle that part of it and so expect them to get on the dotted line within the next ten days.

"Their attorney has been instructed to draw the papers and check the title. It is a deal on coal.

"Don't think it will be too long and all I can say is that as quick as I get any part of it I will send it along to you."

We think these letters clearly constitute an express acknowledgment of the validity of debt due on the demand note and, by inference at least, a promise to pay same. They, therefore, had the effect of tolling the statute, constituting a new promise to pay from their respective dates, and the action having been brought within five years from either date was not barred and the court correctly so held.

Some courts hold there is a distinction between a new promise made before the statute has run and one made after the bar has attached, and that it requires less evidence to create a promise to extend or toll the statute than when the debt is barred. 34 Am. Jur. § 293. Our court seems to follow the general rule that no such distinction is to be made. We held in the recent case of *Root* v. *Thomas,* 203 Ark. 1078, 160 S. W. 2d 46, to quote headnote 2, that: "In order for an acknowledgment of a debt to be sufficient to extend the time for filing an action upon the indebtedness, there must be an unconditional promise to pay or the circumstances must be such that such a promise can be inferred from the writing itself, and the unconditional promise to pay must be made by the parties from whom the debt is due to the parties to whom the debt is due, or to his or her authorized agent." See, also, cases there cited. In *Street*

Imp. Dist. No. 113 of Hot Springs v. *Mooney,* 203 Ark. 745, 158 S. W. 2d 661, we held that, "if by fair construction, the writing constitutes an admission that the claim is a subsisting debt, and if the acknowledgment is unaccompanied by any circumstances repelling a presumption that the party intended to pay," the acknowledgment is sufficient to toll the statute.

Appellant did not deny his debt to appellee in either of said letters and there is nothing therein to repel a presumption that he intended to pay.

The judgment is correct and is affirmed.

HOLT, J., not participating.

HICKS *v.* STATE.

4490 209 S. W. 2d 451

Opinion delivered March 22, 1948.

Rehearing denied April 12, 1948.

K. T. Sutton, for appellant.

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

HOLT, J. Two separate charges were preferred against appellant, a Negro woman. In one she was charged with operating a house of prostitution and in the other of being guilty of prostitution herself, in violation of §§ 1 and 2 of Act 240 of the Legislature of 1943. The causes were, by agreement, consolidated for trial and

she was found guilty by a jury on each charge. On the first, her punishment was fixed by the jury at 90 days in jail and a fine of $150, and on the second, at 30 days in jail and a fine of $100. From the judgment directing that appellant be "confined in the county jail for a period of three months and thirty days and pay a fine of $250" is this appeal.

For reversal, appellant questions the sufficiency of the evidence and also contends that the verdicts were excessive and unreasonable.

There was no complaint as to any of the instructions.

The evidence offered by the State was to the following effect: L. D. Weaver, a deputy sheriff, in company with three other officers, went to appellant's home, and, quoting from his testimony: "Q. You had complaints about the place? A. Yes, sir. Q. What did you find, the four of you? A. We went to the house in which Jennie lives and Mr. Pounds and myself went to the front door and Mr. Webber and the other man went to the back door and when we went in the front door Jennie and a white man were in bed. Q. Were they undressed? A. Yes, sir, they were in their night clothes, the man had his shorts on. Q. Did she come to the door? A. Mr. Pounds went in first and I went in immediately behind him and when we went in she was in bed and there was another man in the back room in bed. Q. Did Mr. Pounds and the other Mr. Weaver come in? A. Yes, sir. . . . Q. She was arrested at that time. A. Yes, sir. Q. During the time you have been on the police force and have been on the sheriff's force, have you observed the place where she lived? A. Yes, sir. Q. What have you observed with reference to white or colored people frequenting the place? A. Every time I have been over there there were white men there, but I never saw a colored man there. Q. Were there other Negro women there? A. Yes, sir. Q. How big a house does she have? A. A four-room house, I think. . . . Q. Have you ever made other arrests there? A. Yes, sir, I have had occasion to get calls that something happened, they were in fights or something like that and I would find them there.

Q. On approximately how many occasions have you seen Negro women and white men frequenting the place there? A. In the last year, seven or eight times. . . . Q. After she was arrested on this charge and made bond, did you have occasion to go back over there? A. Yes, sir, I went over there with her attorney. Q. What did you find on that occasion? A. There was a white man in bed and she was sitting by the bed. Q. Did they have anything to drink then? A. There was a partial bottle of beer gone and while Mr. Sutton and I were there Amanda came in with a sack of beer. . . . Q. On other occasions that you have been to her house did you observe whiskey and beer being consumed? A. Yes, sir. Q. In large or small quantities? A. I would say large quantities, there were several large bottles there."

The officers who accompanied Weaver corroborated his testimony.

E. P. Hickey testified: "Q. You say you have seen white men and white women there in bed? A. Yes, sir. . . . Q. That was last year? A. Yes, sir. Q. How many times did you catch white men and women there? A. I never did go there to make a specific investigation as to her operating a house of prostitution, I would go over there looking for somebody involved in other crimes. Q. The other officers said they never had seen colored women there, you say you saw some there? A. Yes, sir. Q. When was that? A. It might have been last year or the year before, this investigation was brought about by complaints from white men."

Appellant denied her guilt. However, the jury's verdicts finding her guilty reflect that they accepted as true the testimony offered by the prosecution, and this testimony, if believed, abundantly sustained these verdicts. The above testimony speaks for itself and needs no comment.

Appellant's further contention that the punishment was excessive and unreasonable and in violation of the constitutional provision which prohibits "excessive fines" or "cruel or unusual punishment," (Art. 2, § 9, Constitution of Arkansas) is untenable. The punish-

ment fixed by section one of the statute, *supra,* under which appellant was convicted, fixes the punishment at not less than three months nor more than six months in the county jail and a fine of not less than $100 nor more than $250, and the punishment on the second charge under section two was fixed at not less than thirty days nor more than three months in jail and a fine of not less than $50 nor more than $100. The punishment inflicted on each charge was therefore not in excess of the statutory provisions, in fact, it was less. It was obviously the Legislature's intent to afford the jury some discretion in fixing punishment in cases of this nature.

In the case of *Daugherty* v. *State,* 130 Ark. 333, 197 S. W. 576, wherein it was argued that punishment of 10 years in the penitentiary for the larceny of a horse and buggy was "cruel and excessive," this court said: "The statute authorizes the punishment thus adjudged, and the verdict did not exceed the maximum penalty prescribed by the statute for the larceny of a horse. Therefore, no unusual, cruel or excessive punishment was imposed. See *In re Wm. W. Taylor,* 7 S. Dak. 382, 64 N. W. 253, 45 L. R. A. 136, and note, 58 Am. St. Rep. 843."

In *Ex parte Brady,* 70 Ark. 376, 68 S. W. 34, this court held: (Headnote 4). "Constitutional Law—Cruel and Unusual Punishment.—The fact that a defendant was fined sums aggregating $3,200, with costs aggregating $800, in 20 prosecutions for unlawfully selling liquors, and that, if compelled to serve out his fines under contractors and in jail, it will be about 12 years before he can be released, does not establish that the punishment is cruel and unusual, within the prohibition of Constitution 1874, art. 2, § 9."

Finding no error, the judgment is affirmed.

4489 209 S. W. 2d 453

Opinion delivered March 22, 1948.

[redacted]

A. M. Coates, for appellant.

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

SMITH, J. Appellant was tried upon an information charging him with having shot and killed one Calvin Broadnax. He was found guilty of the crime of voluntary manslaughter, and given a sentence of two years in the penitentiary, and has appealed.

Appellant says in his brief that: "This appeal involves only one question and that is whether the State proved the *corpus delicti.* In other words it is the contention of the appellant that there is no proof in the record to establish the fact that the deceased died as a result of the shot fired by him."

Appellant and deceased were next door neighbors. Their wives had a quarrel which eventuated in appellant shooting deceased. The shooting occurred on the night of February 14, 1947. Broadnax was carried to the City Hospital, where he remained for about four months, when he was taken home, where he died June 6th following. While in the hospital Broadnax was attended

by Dr. George R. Storm, who testified that he was a regular practicing physician; that Broadnax had a gun shot wound in his left shoulder; that the bullet lodged in Broadnax' spinal column; that it went in across his chest, and was buried between the third and fourth dorsal vertebra. He thought the wound was fatal when he first examined Broadnax, as Broadnax had no pulse and very little heart beat; that paralysis set in the next morning and that the wound was sufficient to cause death; that the last time he saw Broadnax was the day he left the hospital, and there had been no improvement in his condition. Asked on his cross-examination, "You are not able to testify as to the cause of death?", the doctor answered, "Except as a rule with a gun shot wound like that some paralysis will set up and it is fatal."

There was no other testimony attempting to establish the cause of death, but the testimony recited is sufficient to show that the gun shot wound was the cause of death. No other cause is suggested and the testimony of the doctor is that such a wound as Broadnax received not only was sufficient to cause death, but usually had that result.

When a cause sufficient to produce death is shown, and no other cause is shown, the jury is warranted in finding that the death resulted from the cause shown. In the very recent case of *Glover* v. *State,* 211 Ark. 1002, 204 S. W. 2d 373, we quoted from the case of *Outler* v. *State,* 154 Ark. 598, 243 S. W. 851 as follows: "Chief Justice McCulloch, in that (Outler) 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." To the same effect see, also, *Pride* v. *State,* 208 Ark. 803, 197 S. W. 2d 906.

As the testimony supports the finding that Broadnax died as a result of the gun shot wound, the judgment must be affirmed and it is so ordered.

McKinney *v.* Bugg.

4-8392 209 S. W. 2d 454

Opinion delivered March 22, 1948.

[redacted]

Alfred Featherston, for appellant.

O. A. Featherston and *Boyd Tackett,* for appellee.

Holt, J. Appellees, Ivan and G. A. Bugg, sued "J. B. McKinney, doing business as McKinney Mill," for $1,059.31 for timber which they alleged the company had purchased from them and refused to pay the purchase price. Allegations for an attachment accompanied the complaint, bond was executed, and an order of general attachment issued, was served on March 3, 1947, and the logs and lumber on appellant's yards at Antoine, Arkansas, were attached, the mill, machinery and equipment were not attached. The attachment remained in effect for two days when it was voluntarily released by appellees.

March 25, 1947, appellant, denominating itself "McKinney Lumber Company, Inc.," filed an intervention alleging that it owned the attached timber and that such attachment had been wrongfully obtained to its damage in the amount of $1,129.27, and accordingly prayed for damages.

Upon a trial to a jury, there was a verdict for appellees for the full amount for which they sued, $1,059.31. The jury also found that the intervener, lumber company, was not entitled to any damages growing out of the attachment proceedings and returned a verdict for appellees on this issue. From the judgment the intervener, "McKinney Lumber Company, Inc.," has appealed.

On the threshhold, appellant conceded that there was substantial evidence, on conflicting testimony, to support the jury's verdict in favor of appellees for the timber in the amount of $1,059.31, and there was no appeal from this branch of the case. In this connection, appellant says: "After the verdict of the jury was against the appellant on the main case, the appellant did not make a bond for appeal, but instead paid this judgment and took the logs and sawed them up. Had it not done this, and made a bond, the logs would have been a loss to all parties as the worms would eat them up and they would rot lying in the woods. Of course, the appellant knows from bitter experience that the quality of the logs was far below that which he had authorized his agent, Mr. Stover, to buy. But that is now beside the point. That bridge has been crossed. This court should reverse the case for a new trial only as to the amount of the intervener's damages, and should direct that at this trial the appellant be permitted to open and close the case."

The appellant here is the intervener, McKinney Lumber Company, Inc.

As we read this record, the parties and the trial court treated the intervener, appellant, and the defendant below, denominated as "J. B. McKinney, doing business as McKinney Mill," as one and the same party, and we find no evidence to the contrary. J. B. McKinney testified that he was president (he and his wife owning one-half of the stock) of the McKinney Lumber Company, Inc., and that this company owned the lumber mill at Antoine where the timber involved here was stored, and through the company's agent, Bob Stover, the timber involved had been purchased by this company from appellees, and while stored on the company's yards, as

indicated, was attached and at the end of two days the attachment was voluntarily released by appellees. Appellant, as above noted, says in his brief that the appellant here, the intervener, lumber company, paid off the judgment obtained by appellees against J. B. McKinney, doing business as McKinney Mill. We attach much significance to this in reaching the conclusion that appellant and defendant below were one and the same.

It was conceded, and the court, under proper instructions, told the jury, that the attachment had been issued wrongfully and that they should assess damages against appellees in favor of the "McKinney Lumber Company, Inc., if any, in such sum as you find are actually and naturally the direct consequence of such wrongful attachment."

The jury found from the testimony that appellant had suffered no damages by reason of the attachment and found against it on this issue.

As above noted, the attachment did not run against the mill, machinery and equipment, but only against the timber and logs stacked on the yards.

After reviewing all the testimony, we cannot say that the jury's finding that no damages resulted during the two day's attachment period was not supported by substantial testimony.

Appellant's principal complaint appears to be based on the trial court's refusal to allow him to open and close the case on the theory that it was a third party, intervener, with the burden of proof on it. We think there was no error in the court's action. There would be merit in this contention of appellant if the proof did not conclusively show, as above noted, that appellant and the defendant below were one and the same party.

The rule announced in *Dozier* v. *Union Bank & Trust Co.*, 146 Ark. 386, 225 S. W. 611, applies here. There, this court said: "Lastly, appellant contends that the court erred in placing the burden of proof upon him, for the reason that appellee, Presley, was an intervener in the case and filed an interplea, contending that the burden

rested upon an interpleader to establish his case. Appellant cites the case of *Webber* v. *Rodgers,* 128 Ark. 25, 193 S. W. 87, in support of this position. That was an attachment suit in which a third party intervened and claimed the attached property. In that character of case, the interplea presents an issue independent of the attachment, and the burden of proof rests upon the interpleader, who, for that reason, is entitled to the opening and closing argument. *Excelsior Manufacturing Co.* v. *Owens,* 58 Ark. 556, 25 S. W. 868. In the case at bar, the so-called 'interpleader' was strictly a defendant, being the party of the second part in the contract and the only interested party in the litigation, except the plaintiff. Appellant being the plaintiff and appellee the only interested defendant, the court did not err in instructing that the burden in the whole case was upon appellant.''

Here, the so-called intervener, ''McKinney Lumber Company, Inc.,'' was strictly a defendant with the same interests, and was the same party, as the named defendant.

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

MARR *v.* MARR.

4-8500 209 S. W. 2d 456

Opinion delivered March 22, 1948.

[redacted]

Willis & Walker, for appellant.

Len Jones, for appellee.

ROBINS, J. Appellant asks us to reverse decree of the chancery court by which that court denied her complaint, asking for custody of the five-year-old son of appellant and appellee.

Custody of this child had been previously granted to appellee on October 8, 1946, in a suit in the same court, at which time appellee was granted a divorce from appellant.

In the divorce proceeding appellant signed a waiver of service and entry of appearance, in which it was recited that appellee was to have custody of the child. Appellant, in the instant proceeding, claimed that by reason of illness she did not understand the nature and effect of the waiver when she signed it. Appellee and his lawyer's secretary both testified that appellant discussed the waiver, at first refusing to sign it. The preponderance of the testimony shows that she knowingly signed the waiver; and therefore there was no lack of process as to the first decree.

Even though she signed the agreement for appellee to have the child, this was not binding on appellant or controlling on the court. *Burnett* v. *Clark,* 208 Ark. 241, 185 S. W. 2d 703. Despite any such agreement it was the duty of the court, before rendering the original decree, to make the necessary investigation and determine where the best interests of the child required its custody to be vested. We assume that this was done, and that the decree was based on such investigation.

So the instant proceeding must be treated as one to change the custody of a child after such custody had been judicially determined. In such a case it devolves on the party seeking such change to show altered conditions affecting the child's welfare, or that material facts as to the situation were unknown to the court in the original

proceeding. "A decree fixing the custody of a child is final on the conditions then existing and should not be changed afterwards unless on altered conditions since the decree was rendered or on material facts existing at the time of the decree, but unknown to the court, and then only for the welfare of the child." (Headnote 1) *Phelps* v. *Phelps,* 209 Ark. 44, 189 S. W. 2d 617.

We do not find that the testimony showed such a change in conditions as would authorize a revision of the first order; nor was there any showing that material facts as to the matter were unknown to the court when that order was made.

In neither of the decrees was any provision made for appellant to visit her child or to have it with her. This was error.

The decree appealed from will therefore be modified so as to direct the lower court, on application of appellant, to provide that appellant may visit said child and have it visit her at such suitable times as the lower court may deem proper. Appellee to pay the costs of both courts.

WHITE *v.* JENKINS.

4-8488 209 S. W. 2d 457

Opinion delivered March 22, 1948.

L. B. Smead, for appellant.

Gaughan, McClellan & Gaughan, for appellee.

ROBINS, J. Appellants, citizens and school patrons of Troy Special School District No. 12, of Ouachita county, brought this suit in the chancery court against appellees, directors of that district. In their complaint they asked that appellees be enjoined from using the bus of the district to transport the district's grade school children to the Stephens Special District; that they be enjoined from continuing to keep the Troy District white school closed; and that they be enjoined from sending to the Stephens School any pupils of the Troy District except those in high school grades.

The lower court dismissed appellants' complaint and they have appealed.

The case was tried below on a stipulation which reflected the situation in this district. There were enumerated 35 white children and a "considerably larger" number of negro children. On September 10, 1947, the directors voted not to operate the white school during the year 1947-1948 and to transport the white children to the Stephens School. A contract was entered into with the Stephens District by which the latter district agreed to teach the high school students of the Troy District for $1,200. No charge was made by the Stephens District for the tuition of the grade school children. The County Board of Education authorized the arrangement between the two districts.

The budget statement attached to the stipulation showed the amount available, from all sources, for expenditure by the Troy School District for the school year 1947-1948 to be $7,095. This was to be expended as follows: Salaries of five negro teachers, $2,820; bus driver, tires, repairs, gas, oil, etc., $2,000; operating

expense, $250; repairs on buildings, etc., $140; insurance on buildings, $140; debt service $545; tuition, under agreement with Stephens District, $1,200.

Appellants concede that appellees had the power, under the provisions of § 11727, Pope's Digest, to make an agreement with the Stephens District for the schooling of the Troy District's high school students; and it is not urged that the contract made was an unreasonable or improper one. It is admitted that, with the $1,200 being spent in this way, there would not be sufficient funds left to pay for operating the district's white grade school.

Appellants do not ask that the expenditure of the $1,200 for tuition for high school students be enjoined. Therefore, if the court should order appellees to re-open the white grade school, such an order would require them to spend funds in excess of the district's annual receipts. This school directors are forbidden to do under the provisions of § 11535, Pope's Digest.

While the wisdom of appellees' decision, under which they solved the district's problem by closing the white school, keeping three negro schools open and paying out a total of $3,200 for transportation and tuition of the white children, might well be questioned, we do not find that appellees went beyond their statutory powers or violated any statutory duty in doing this.

It is well settled that courts may not intervene to control matters in the discretion of administrative bodies such as school boards, in the absence of a showing of an abuse of such discretion. Necessarily, some latitude in the exercise of this discretion must be given to these boards. They represent the people of the locality affected and naturally are closer to the problems to be solved than any court or other agency could be. 28 Am. Jur. 352, *Connelly* v. *Earl Frazier Special School District,* 167 Ark. 49, 266 S. W. 929; *Pugsley* v. *Sellmeyer,* 158 Ark. 247, 250 S. W. 538, 30 A. L. R. 1212; *State* v. *Montgomery County Special School District No. 16,* 154 Ark. 176, 242 S. W. 545.

It follows that the decree of the lower court was correct and is affirmed.

ZACH *v.* SCHULMAN.

4-8484 210 S. W. 2d 124

Opinion delivered March 22, 1948.

Rehearing denied April 26, 1948.

Wootton, Land & Matthews, for appellant.

Scott Wood, Leland F. Leatherman and *James W. Chesnutt,* for appellee.

McHaney, Justice. Appellee I. Schulman and Clara Zach, on November 17, 1926, entered into a partnership agreement for the purpose of acquiring certain real and personal property then known as the Algoma Hotel in Hot Springs, Arkansas, and thereafter to operate said hotel as the Balfour Hotel. On the same date, they purchased said property from the then owner, one Lola H. Phelps, who executed a deed to them in their individual names. The purchase price was $34,000, of which $4,000 was paid in cash, each partner contributing $2,000, and for the remainder notes secured by mortgages were executed by them, all of which has been paid from partnership funds realized from the operation of said hotel.

On April 26, 1946, Clara Zach, one of the partners, died intestate and without issue never having been married, and appellants, who are her brother and sister, were appointed administrators of her estate by the Garland Probate Court. There were other collateral heirs of Clara Zach in Poland, but whether living or dead has not yet been determined.

After appellants were appointed administrators of said estate they entered into an agreement with appellee for continuation of the partnership business and secured orders from time to time from the Probate Court authorizing them to continue the operation of said partnership business with appellee. Under said agreement appellants were employed to work in the hotel along with appellee, each of the three to receive a salary of $60 per week, and all checks on the partnership bank account had to be signed by appellant, Samuel Zach, and appellee, and the profits of the business were to be divided equally between appellants and appellee, just as formerly between appellee and Clara Zach.

The partnership business was continued in this way until April 21, 1947, when apellee brought this action against appellants and certain other named heirs of Clara

Zach and her unknown heirs, in which he alleged some of the facts aforesaid and that the debts of the partnership had been paid, and that the accounts between him and his deceased partner had been settled and paid; that he desired to continue the business under the same name and for that purpose to possess the partnership property, and offered to secure appellants as representatives of his deceased partner by bond to be approved by the court, or to see that they were paid the value of such partner's interest, so that he might continue said business as provided by law. He prayed an order of court fixing and determining the value of deceased's interest in the partnership property, and that he, as surviving partner, be authorized to continue the partnership business upon payment of the value of her interest to her legal representatives, appellants, and, upon such payment, the title to all the property described in the complaint be vested in him in fee simple.

The answer of appellants admitted the entry into partnership as alleged, on the date alleged, for the purpose alleged "and that as such partners they purchased the real estate described in the complaint," the operation of the Balfour Hotel on the real estate so described, "and that all of the property described in the complaint, together with all personal property, furniture fixtures and furnishings located therein and apurtenant thereto, were owned by and belonged to said partnership." They admitted the death of Clara Zach and that they are the administrators of her estate, and denied other allegations.

By way of cross-complaint they alleged that they had an oral agreement with appellee to continue the partnership business temporarily, under the orders of the probate court, until the heirs of Clara Zach could be determined and it could be determined whether such business could be carried on or disposed of without liquidation, and that the heirs of Clara Zach had not been determined; that appellee had breached said oral agreement for continuation of such business by filing his complaint and had failed and refused to state an account between them and to liquidate said business and to pay

over to them their intestate's one-half interest in the proceeds of the liquidated partnership; that appellee should be required to give an accounting of capital contributed and of profits and losses of the partnership to the time of its liquidation; and that it should be liquidated and sold at public sale by orders of court, and the interest of their intestate in the proceeds be turned over to them.

Appellants further alleged that they as individuals in their own right were tenants in common with appellee and the other heirs of Clara Zach in the ownership of the real estate, that an equitable division thereof could not be agreed upon, that said real estate was not susceptible of division in kind, and that it should be sold and the proceeds divided among the parties as their respective interests may appear.

Trial resulted in a decree for appellee in accordance with the prayer of his complaint, in that the court held, "that the continuation of said business by agreement of the surviving partner and the representatives of the deceased partner by operation of law constituted a sale and assignment of the partnership assets to the surviving partner; that the representatives of the deceased partner are entitled to receive as ordinary creditors in payment of the interest of the deceased partner in said dissolved partnership an amount equal to the value of the said deceased partner's interest at the time of her death; and the court finds the value of said interest as follows:".

There is here a direct appeal and a cross appeal. In view of the disposition we make of the case on direct appeal, it becomes unnecessary to consider or determine the cross appeal.

The main or principal question for determination is the correctness of the trial court's holding, above quoted, that, by operation of law, the continuation of the partnership business by the surviving partner by agreement with the legal representatives of the deceased partner, "constituted a sale and assignment of the partnership assets to the surviving partner." This holding is based on the court's construction of §§ 41 and 42 of the Uniform Partnership Act, enacted in this State as Act No. 263 of

1941, p. 642, hereinafter referred to as U. P. A., or as said Act.

Another question is whether the U. P. A. applies to partnerships which were entered into prior to the passage of said Act, and had acquired real estate prior to its adoption. We dispose of this question first.

An examination of the reported cases reveals no case that holds that said Act does not apply, and counsel have cited no case that so holds. We have found no case where the question was raised. A number of cases concerned partnerships existing before said Act was adopted in the states of such decisions, and the U. P. A. was held applicable without question. Some such cases are *Crossman* v. *Gibney,* 164 Wis. 395, 160 N. W. 395; *Froess* v. *Froess,* 284 Pa. 369, 131 Alt. 276; and same case, 137 Atl. (Pa.) 124. Our own case of *Terrall* v. *Terrall, admx.,* 212 Ark. 221, 205 S. W. 2d 198, is cited to support the contention that the U. P. A. does not apply to partnership real estate. This case does not so hold, but only that it does not apply to the real estate conveyances there in question, because they were made and rights therein vested long before the U. P. A. was enacted in this State. Moreover, under the plain provisions of said Act a partner ceases to be a tenant in common in partnership property, if he ever was under prior law, and becomes a "tenant in partnership," under § 25 of said Act. This section defines the "Nature of a Partner's Right in Specific Property. (1) A partner is a co-owner with his partners of specific partnership property holding as a tenant in partnership," and the incidents of this tenancy are set out in subsection (2)(a), to (e) inclusive. Section 26 provides: "A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property." So, it appears to us, that real estate owned by a partnership and used for partnership purposes is converted into personal property, so far as the partners are concerned.

We do agree with appellants, however, that the learned trial court erred in the holding set out above as the main or principal question presented for our de-

termination. We do not so construe the relevant sections of said Act.

Section 41 of said Act prescribes the liability of persons continuing the business of the partnership in certain cases, and relates exclusively to the rights of creditors of the partnership and is divided into 10 subsections. Subsection (3) of said § 41 is the only one with any possible relevancy here and it provides: "When any partner retires or dies and the business of dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made." It will be seen that this provision has nothing to do with the question under consideration, but has to do only with the "rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business." As to such creditors, consent of appellants here would subject the interest of their intestate to liability the same as if they had assigned such interest. In other words, an assignment would take place by operation of law for the benefit of existing creditors at the date of dissolution and subsequent creditors. There are no creditors here. The partnership debts existing at the death of intestate, if any, have been paid and there are no subsequent creditors, so § 41 can have no application here.

Section 42 of said Act, in our opinion, does not give the court authority to make the order above quoted. It defines the rights of a retiring partner or the estate of a deceased partner when the partnership business is continued under the conditions set out in § 41 (3) above quoted, that is, in this case, with the consent of appellants as representatives of the estate of Clara Zach. It provides: "When any partner retires or dies, and the business is continued under any of the conditions set forth in § 41 (1, 2, 3, 5, 6), or § 38(2b) without any settlement of accounts as between him or his estate and the

person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by section 41 (8) of this act." We do not think this section gives the surviving partner any additional rights. It relates wholly to the rights of a retired partner or the representatives of a deceased partner, and is permissive as to such rights and not mandatory. They "may have the value of his interest at the date of dissolution ascertained," and, if he so determines, he "shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest," or, at his or their option, shall receive "in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership."

As said by the Pennsylvania Court in *Froess* v. *Froess,* 284 Pa. 369, 131 Atl. 276, construing said § 42, "The plain duty of the surviving partner is to collect the assets of the partnership, receive and receipt for payment, pay and settle partnership debts, settle and wind up the partnership business and distribute the net surplus among the parties entitled to it. The amount found due has preference to any individual creditor of the survivor and it is to be distributed in the manner designated by the Partnership Act, § 40.

"The legal rule is fixed on this subject. If the survivors of a partnership carry on the concern, and enter into new transactions with the partnership funds, they do so at their peril, and the representative of the deceased partner may elect to call on them for the capital with a share of the profits or with interest. If no profits

are made, or even if a loss is incurred, they must be charged with interest on the funds they use and the whole loss will be theirs. . . ." In that case there was no agreement between the surviving partner and the representative of the deceased partner to continue the business after the death of one of the partners.

We have been cited to no case that holds that continuing the business of the partnership by consent or agreement after death of a partner gives the surviving partner under § 42 the right claimed here. It would serve no useful purpose to review the cases cited and would greatly extend this opinion.

The decree will be reversed and the cause remanded with directions to require appellee to liquidate the assets of the dissolved partnership by order of court at public sale, or private sale, if the parties so agree, or to appoint a commissioner for this purpose, notice of such sale to be given as provided by law. Costs will be paid by appellee.

On Rehearing.

McHaney, Justice. Appellee insists we were in error in stating in the original opinion that: "In view of the disposition we make of the case on direct appeal, it becomes unnecessary to consider or determine the cross-appeal." He is correct as to points 1 and 2 of the cross-appeal, that is, the decision made on the main question in the case did not settle these two points of the cross-appeal.

1. In the decree the court rendered judgment for appellants and against appellee for $2,535.52 "which was the balance due the deceased partner, Clara Zach, upon her drawing account in said partnership," and this is item 1 of the cross-appeal. After the death of Clara Zach, Irving Zach, son of one of the appellants, and a public accountant in Brooklyn, New York, examined the partnership books of account at his disposal to arrive at the drawings of each of the partners. He found that appellee

had drawn $13,039.48 more than Clara Zach. This amount was paid by appellee to appellants by a check drawn on the Balfour Hotel or partnership account. Later Irving Zach examined the books further and found additional drawings by appellee over and above those of Clara Zach in the sum of $2,535.52. He testified how that sum was overlooked, and his explanation thereof appeared to the trial court to be reasonable, as it does to us. Appellee did not deny the correctness of the witness's testimony, but admitted that if the books showed he owed it, he was willing to have it entered as a charge against his account. Appellee relies on the plea of an account stated, but that plea is not available against either fraud, mistake or duress. *Coffman* v. *Kirby,* 200 Ark. 998, 142 S. W. 2d 224.

2. Appellee also contends that the court erred in refusing to allow him more than $60 per week as salary and fee for "liquidating the dissolved partnership." Up to the time of this lawsuit appellee was not liquidating the partnership, but was continuing it. His agreement with appellants was that each of the three should receive $60 as salary. This was all he was entitled to.

The petition for rehearing is denied.

KEYLON *v.* ARNOLD.

4-8461 209 S. W. 2d 459

Opinion delivered March 22, 1948.

P. C. Goodwin, for appellant.

Billingsley & Wiley, for appellee.

Ed. F. McFaddin, Justice. This appeal involves certain lands in Izard county. On October 24, 1893, S. C. Keylon contracted to buy from Joseph H. Russell the said land (consisting of 173.80 acres) for a total consideration of $360. Keylon paid $100 cash, received a contract, took possession of the lands, and improved and cultivated a portion thereof, although he continued to live on an adjoining 40 acres which he was in the process of homesteading from the U. S. Government. The lands here involved were never the homestead of S. C. Keylon. He died January 5, 1900, survived by his wife, Jemima E. Keylon, and two children: a boy, A. L. Keylon, then nine years of age—the present appellant—and a daughter, Gertie Keylon, whose age is unstated, and who later married the appellee, John Arnold.

After the death of S. C. Keylon it developed that Joseph H. Russell, who had contracted to sell the lands to S. C. Keylon, owned only a life estate in the lands, and

that the fee title was owned by the estate of Robert F. Russell. He was the son of Joseph H. Russell, and had died a single and unmarried man in 1890. Joseph Russell had died in 1899. The estate of Robert F. Russell was in course of administration in the Izard Probate Court; and Mrs. Jemima E. Keylon filed a petition in that estate. She alleged that her husband, S. C. Keylon, had contracted to buy the 173.80 acres from Joseph H. Russell, thinking him to be the fee owner; that the balance of principal and interest due on that contract was $288; and that Mrs. Jemima E. Keylon desired to pay that balance "out of her own funds" to the estate of Robert F. Russell, and have a deed executed to her and her heirs and assigns. She prayed that the administrator of the estate of Robert F. Russell be directed to execute such a deed to her. The Probate Court, on December 17, 1900, granted the said petition, and the administrator of the estate of Robert F. Russell executed a deed conveying the lands to "Jemima E. Keylon and her heirs and assigns" in consideration of the payment by her of the sum of $288. We are not here concerned with the validity of the said Probate Court order or proceedings.

Mrs. Jemima E. Keylon held the lands under her said deed until November 13, 1941, when she conveyed them by general warranty deed to John W. Arnold and Gertie Keylon Arnold, his wife, for the recited consideration of $1,000; and the deed was duly recorded on November 17, 1941. The real consideration was the agreement by the grantees to care for and support the grantor for the remainder of her life; and the grantees faithfully fulfilled their contract. Mrs. Jemima E. Keylon departed this life July 14, 1945, survived by her son, A. L. Keylon (appellant), and her daughter, Mrs. Gertie Keylon Arnold. Mrs. Arnold died on October 28, 1945, survived by two children, Orson Arnold and Genevieve Arnold Smith, who are appellees here, along with their father, John W. Arnold.

On January 16, 1946, A. L. Keylon filed this suit in the Izard Chancery Court. He alleged that the land (*i. e.*, the said 173.80 acres) was owned by the heirs of S. C. Keylon, deceased, and could not be partitioned in kind,

and should be sold and the proceeds divided: one-half to A. L. Keylon, and one-half to the husband and heirs of Gertie Keylon Arnold. To this complaint John Arnold (husband of Gertie Keylon Arnold) filed answer. After denying all allegations of the complaint, he alleged that Mrs. Jemima E. Keylon, rather than S. C. Keylon, had been the owner of the lands; that Mrs. Jemima E. Keylon had conveyed the lands to John Arnold and Mrs. Gertie Arnold by entirety; and that John Arnold, as the surviving spouse, is the owner of the lands. The cause was heard by the chancery court, and resulted in a decree dismissing the complaint for want of equity; and this appeal challenges that decree.

It is at once apparent that A. L. Keylon is proceeding on the theory that S. C. Keylon had originally contracted to purchase the land; that Mrs. Jemima E. Keylon, in acquiring the deed in 1900, did so as a trustee for the minor children (himself and his sister); and that limitations did not begin to run until the death of Mrs. Jemima E. Keylon. Cases cited by the appellant on his theory are *Higgs* v. *Smith,* 100 Ark. 543, 140 S. W. 990; *Green* v. *Maddox,* 97 Ark. 397, 134 S. W. 931; *Stubbs* v. *Pitts,* 84 Ark. 160, 104 S. W. 1110; *Hawkins* v. *Reeves,* 112 Ark. 389, 166 S. W. 562; and *McLaughlin* v. *Morris,* 150 Ark. 347, 234 S. W. 259. On the other hand, appellee claims that Mrs. Jemima E. Keylon acquired the fee title from the estate of Robert F. Russell, and not from Joseph H. Russell, from whom her husband had contracted to purchase; that Mrs. Jemima E. Keylon paid her own money for the land and owned it in her own right; that when she conveyed in 1941, her grantees received a full fee title; and that at all events, A. L. Keylon is barred by limitations.

The chancery court correctly held that the lands here involved were not the homestead of S. C. Keylon, and therefore did not pass to his widow and heirs as homestead. In view of that holding, it is unnecessary for us to discuss the respective contentions of the parties as hereinbefore set forth, because we find that the decree of the chancery court should be affirmed on the principle of equitable estoppel. While equitable estoppel was not

pleaded, nevertheless, the evidence supporting such defense was received without objection; and in that eventuality equitable estoppel may be made the basis of the decision on the merits of the controversy. See *Brotherhood of Trainmen* v. *Long,* 186 Ark. 320, 53 S. W. 2d 433; *Anglin* v. *Marr Canning Co.,* 152 Ark. 1, 237 S. W. 440; and see, also, 19 Am. Juris. 850 and annotation in 120 A. L. R. 87. Without objection, the appellee testified:

"Q. How did you get possession of this land? A. It was deeded to me and my wife by my mother-in-law. Q. For value received? A. Yes. Q. What was that value? A. We counted it about twelve hundred dollars ($1,200). Q. How did you count that? A. Well, we thought that was about the valuation of it, but my mother-in-law offered this land as payment for her care during her declining years; and this offer was made to us after it was made to her son and they couldn't agree; and then she came to me. Q. You did keep her? A. That's right."

In 1941, Mrs. Jemima E. Keylon went to the appellant (her son), and offered to deed the land to him if he would agree to take care of her in her declining years; and he would not agree. He knew at that time that she was claiming the land as her own. The deed of record (and under which he seeks to claim as a *cestui que trust*) showed that she paid $288 of her own money in order to obtain the deed in 1900. If A. L. Keylon intended to claim that his mother was a mere trustee, he should have spoken while she was still alive and able to testify as to the transactions that occurred from 1893 to 1941. There is some evidence in the record indicating that S. C. Keylon might have surrendered the land in 1894 or 1895. Furthermore, there is some evidence that Mrs. Jemima Keylon at one time had the original "Russell papers," and that they were burned after a lapse of years. All such evidence would undoubtedly have thrown considerable light on the question of whether Mrs. Jemima Keylon was a trustee or a fee purchaser in her own right. Appellant's delay works a species of laches that is closely related to equitable estoppel (19 Am. Juris. 637).

Instead of "speaking up" and asserting his claim in 1941 when his mother offered to deed the land to him, appellant remained silent, when to speak would have saved John Arnold this suit. Not only did the appellant refuse to agree to take care of his mother in her last years, but he sat by and knowingly allowed her to convey the land to John Arnold, and knowingly allowed Arnold to provide maintenance and support for her from 1941 to 1945. Finally, after his mother had passed away, and death had extinguished her testimony, then appellant asserted his claimed interest. It is well settled that equitable estoppel may arise by silence or inaction. In 19 Am. Juris. 661 this appears:

"An estoppel may arise under certain circumstances from silence or inaction as well as from words or actions. Estoppel by silence or inaction is often referred to as estoppel by 'standing by', and that phrase in this connection has almost lost its primary significance of actual presence or participation in the transaction and generally covers any silence where there are a knowledge and a duty to make a disclosure. The principle underlying such estoppels is embodied in the maxim 'one who is silent when he ought to speak will not be heard to speak when he ought to be silent'."

Trapnall v. *Burton*, 24 Ark. 371, is an opinion prepared by Albert Pike.[1] In that opinion there is this classic language:

"If a person who has the claim to, or is the owner of property real or personal, stands by and permits it to be sold, without giving notice of or asserting his right, he is estopped from setting up his claim or title, against the purchaser. *Shall* v. *Biscoe*, 18 Ark. 142; *Corbett* v. *Norcross*, 35 N. H. 99; *Storrs* v. *Barker*, 6 C. J. R. 344.

" 'There is no principle,' said Chancellor KENT, in *Wendell* v. *Van Renssalaer*, 1 J. C. R. 354, 'better established in this court, nor one founded on more solid considerations of equity and public utility, than that which

[1] Immediately following the syllabus of this case, and on page viii of 24 Arkansas Report there is the explanation as to how the opinion was prepared by Albert Pike.

declares, that if one man, knowingly, though he does it passively, by looking on, suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice; and his conscience is bound by this equitable estoppel'."[2]

Our subsequent cases have recognized and applied the principle of equitable estoppel stated in *Trapnall* v. *Burton, supra.* See *Gill* v. *Hardin,* 48 Ark. 409, 3 S. W. 519; *Graff* v. *Lena Lumber Co.,* 96 Ark. 350, 131 S. W. 697; *M. & P. Bank* v. *Citizens Bank,* 175 Ark. 417, 299 S. W. 753, and cases there cited. Authorities generally recognize the applicability of equitable estoppel to a case like the one at bar. See Pomeroy on Equity Jurisprudence, 5th Ed., § 807, and 31 C. J. S. 306, *et seq.*

We hold that the appellant is equitably estopped from questioning the title of John Arnold. Therefore, the decree of the chancery court is affirmed.

LINDSEY *v.* STATE.

4486 209 S. W. 2d 462

Opinion delivered March 22, 1948.

[2] This same quotation from Chancellor Kent was used by Mr. Justice HARLAN of the U. S. Supreme Court in *Kirk* v. *Hamilton,* 12 Otto (102 U. S.) 68, 26 Law Ed. 79.

Reinberger & Eilbott, for appellant.

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

GRIFFIN SMITH, Chief Justice. The defendant was charged with having raped Margaret Euseppi, sixteen-year-old high school student and part-time waitress in a Pine Bluff cafe. Appeal is from a judgment based on the jury's verdict that the crime was assault with intent to rape. Sentence imposed was seven years in prison.

Of the fourteen errors alleged in the motion for a new trial, two are argued: (a) Because the State's evidence went only to the charge of rape, the jury ought not to have been instructed that assault with intent is embraced within the information alleging rape. (b) Mrs. Carl Euseppi, sister-in-law to the prosecuting witness, was permitted to testify that after Margaret had given an account of Lindsey's conduct, she (the witness) did not report it because Margaret thought the transaction should not be made public.

Margaret's uncorroborated testimony regarding the crime and circumstances attending it was sufficient to convict.

Appellant is mistaken in thinking that *attempt* is not included in a charge of rape. He relies upon *Whittaker* v. *State,* 171 Ark. 762, 286 S. W. 937, where Mr. Justice WOOD said the trial court correctly instructed that, under the testimony there, the appellant, if not guilty of rape, was entitled to an acquittal. He did not say, however, that it would have been error to instruct that attempted rape was included in the greater charge. On the contrary, (and in the same paragraph quoted by appellant) Judge WOOD emphasized the fact that Whittaker did not request an instruction on the lesser offense—"which offense is embraced in an indictment for rape", hence the appellant was not in a position to complain of the Court's action in giving Instruction No. 1, to the effect that *under the evidence* Whittaker's act was

rape, or no crime at all. See *Bradshaw* v. *State,* 211 Ark. 189, 199 S. W. 2d 747. The Bradshaw case also holds that the State is not required to corroborate testimony given by the victim, since she is not an accomplice.

The testimony of Mrs. Carl Euseppi in explanation of Margaret's reluctance to publicize the wrong that had been done her was admissible. Wharton's Criminal Law, v. 1, p. 984, § 727, says it is generally held that in a prosecution for rape, and after the prosecutrix has testified to the main facts of the offense, evidence in corroboration may be received. It is competent to show that after the outrage the prosecutrix made complaint to the person or persons to whom a statement of such an occurrence would naturally be made, together with the circumstances under which it was made, where such complaint came within a reasonable time. In *Skaggs* v. *State,* 88 Ark. 62, 113 S. W. 346, consonant with Wharton, Chief Justice HILL's opinion declares the law to be that testimony may be received to show that the prosecutrix made complaint, but details of the complaint are not admissible unless they are a part of the *res gestae,* or in corroboration of testimony given by the prosecuting witness when it is attacked.

The rule of admissibility of testimony such as appellant complains of was discussed by Mr. Justice RIDDICK in passing upon the defendant's contention that a witness was permitted to give "the particular facts which Julia Lagrone, the prosecuting witness, related . . . when making complaint of the assault". *Williams* v. *State,* 66 Ark. 264, 50 S. W. 517. In holding the State had a right to show that the injured woman complained of treatment she had received, Judge RIDDICK said that particular facts stated by her were not competent on direct examination. The case was cited in *Hammer* v. *State,* 104 Ark. 606, 150 S. W. 142. But see *Bridger* v. *State,* 122 Ark. 391, 193 S. W. 962, where it was held that statements made to schoolmates by one who claimed to have been raped, were not admissible for the purpose of corroborating the prosecutrix.

A more liberal rule of admissibility was applied in *Bader* v. *State,* 57 Tex. Cr. R. 293, 122 S. W. 555. It was

there said that evidence of the details of the statement made by prosecutrix to her mother, to the effect that the accused had done her very wrong, and the circumstances and reasons for the disclosure (which had been for some time withheld) was admissible.

An Iowa case—*State* v. *Symens,* 138 Ia. 113, 115 N. W. 878—holds that the State, on disclosing recent complaints of the prosecutrix, cannot show the particulars, but only their nature, "though [this] involves to some extent the particulars".

The true rule would seem to be that while evidence may be admitted to show that the prosecutrix, within a reasonable time, reported the crime to an appropriate person and told *what* occurred, and the person receiving the information may testify that an accusation was made, yet it is not competent for such witness to support testimony of the prosecutrix by repeating in detail what was said by the prosecutrix. In the circumstances referred to statements must be confined to the essential fact that the attack was reported. Details must be restricted to those reasonably necessary to an understanding of the nature of the offense alleged.

It is difficult in criminal cases for a trial court to at all times limit testimony to the narrow channel a defendant would circumscribe. Usually it is not practicable for a Judge to anticipate the precise range a response may take. In the case at bar the Court meticulously rejected all but permissible statements, only allowing Mrs. Euseppi to explain why she did not tell others what Margaret had said. Disclosure made by the answer was that Margaret "begged me not to [tell]". Appellant thinks the reply was prejudicial in that it had a bearing on whether Margaret consented to an act of intercourse. But there was no evidence of intercourse by consent. The defendant denied flatly that he acted improperly from a sexual standpoint; hence consent is not involved.

Affirmed.

COOK, COMMISSIONER OF REVENUES *v.* SOUTHWEST HOTELS, INC.

4-8490 209 S. W. 2d 469

Opinion delivered March 22, 1948.

O. T. Ward, for appellant.

House, Moses & Holmes, for appellee.

GRIFFIN SMITH, Chief Justice. The State alleged that Southwest Hotels, Inc., should pay gross receipts tax on the stipulated value of meals furnished certain of its employees.[1] From a decree restraining the Commissioner of Revenues from enforcing such demands there is this appeal.

Attitude taken by the Commissioner is that in operating their dining service each of appellee's hotels prepares and serves large quantities of foods, some of which is permissively consumed by cooks, waiters, and others

[1] Southwest Hotels, Inc., owns and operates the Marion, Lafayette, Albert Pike, and McGehee in Little Rock, and the Majestic at Hot Springs. The amount claimed is $2,961.81.

who are directly connected with the commodity thus dispensed. No charge is made against these employees for the meals they are incidentally permitted to consume; nor is there in the contract of employment any express agreement that meals will be supplied.

Appellee contends that the practice has continued so long that it is controlled by custom, and that the expense is absorbed in an indirect manner incapable of accurate computation. It is conceded, however, that if the meals should be appraised on a commercial basis they would average 25c each.

The Commissioner points to Act 386 of 1941, § 2(d), and to § 3. The first defines 'gross proceeds' or 'gross receipts'. They include the value of any goods, wares, merchandise, or property "withdrawn or used from the established business or from the stock in trade of the established reserves for consumption or use in such business or by any other person". Section 3 levies the two percent tax "upon the gross proceeds or gross receipts derived from all sales to any person", including (subdivision "a") tangible personal property.

The Commissioner's argument is that because "hundreds of establishments are operated by members of a family who in many instances are owners and live on the premises, and who do work in the preparation and serving of foods", it would be placing a strained construction upon the tax law to say that the General Assembly by express language had taxed the value of merchandise withdrawn for consumption or use in the business, or withdrawn for the use of any other person, but that it did not intend to tax hotels for the value of foods consumed by employees directly charged with the duty of preparing and serving meals. It must be conceded that there is some logical support for the contention, and a construction could be given upholding the theory.

On the other hand the Chancellor's injunction finds footing in the settled rule that an intent to tax must appear from the Act relied upon. *Wiseman* v. *Arkansas Utilities Co.*, 191 Ark. 854, 88 S. W. 2d 81. A clear state-

ment of the policy is found in *United States* v. *Merriam*, 263 U. S. 179, 44 S. Ct. 69, 68 L. Ed. 240, 29 A. L. R. 1547, where Mr. Justice SUTHERLAND said that in dealing with statutes levying taxes the literal meaning of the word employed is most important, "for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer".

The tax relied on is levied upon receipts *derived* from sales. Appellee's contention is that before the tax can be collected it must have been a derivative of an authorized sale; that the fair value of all commodities entering into the production of meals was taken into consideration when the price to customers was fixed, and that in fact the tax was collected when the overall cost of meals in gross was computed and then divided by the taxed personal service.

Although the word "derived" as used in Act 386 has a general meaning, we do not agree with appellee that the Commissioner would be compelled to withhold his demand for payment until a tax had actually been collected by the retailer. It is sufficient if the taxpayer *should* have done so. This, however, is not controlling here if the statute is not sufficiently specific in its application to cover the transactions, and we do not think it was.

Reduced to its practical parts, the question before us is whether the General Assembly, in levying the tax on gross receipts derived from a sale, intended to embrace a transaction such as we are dealing with, and further, if the intent existed, was it expressed in language so direct that a reasonable person would not be left in doubt in respect of his obligation? Tested by this rule the Commissioner must fail, even though he is discharging a duty in requiring a judicial construction regarding enforcement.

It cannot be doubted that under § 1(d) of Act 386, one who withdraws merchandise or commodities from his commercial establishment or stockpile, or who reserves it for personal use, is chargeable with the two

percent tax. We think, however, that there is a substantial difference between withholding for use—a transaction tantamount to a sale to one's self—and in permitting employees who prepare and serve food to make incidental and irregular application of that which in a sense may be surplus; and unless it is shown as a matter of fact that, because of such use materially larger quantities are prepared than would be under a different custom, it is difficult to see how a specific sale has been made. There is no showing that without this privilege the employees in question would have drawn better wages, although from a practical standpoint it must be supposed that they would.

Some of the States where a like tax is laid operate under regulations published by the collecting agent, and require payment by hotels and restaurants where the food is supplied in lieu of some part of the employee's salary — notably Colorado, Iowa, Michigan, Missouri, South Dakota, Utah, and Wyoming. In some instances the tax was on value of meals served at restaurants maintained by large industrial concerns, available only to the manufacturer's personnel. Against a defense that the particular statute applied only to public places there are judicial determinations that meals thus served constituted sales within the meaning of the taxing laws.

An analysis and comparison with the Arkansas Act would not be helpful for the reason that under all of our holdings it has been said that tax liabilities do not spring from inexact language, nor do they attach by construction. While Mr. Justice BUTLER's statement in the Wiseman-Utilities case to which reference has been made may be a little broad in its holding that a tax cannot be imposed except by express words indicating that purpose, certainly the express purpose must be so clear that no reasonable mind should conclude the intent was otherwise.

Affirmed.

GARNER *v.* RICHTER.

4-8481 209 S. W. 2d 442

Opinion delivered March 22, 1948.

[redacted]

Carmack Sullivan, for appellant.

Sidney Kelley, for appellee.

GRIFFIN SMITH, Chief Justice. An original indebtedness of $1,500 was alleged. Five notes, each for $300, were executed by Edward and Rozelle Richter when they purchased land from A. F. Garner. By a separate transaction—not involving novation — Will Crooms bought from the Richters and orally assumed payment of the mortgage-secured debt. Default in payment of any note authorized Garner to declare all of them due. This he did when note No. 1 was not paid at maturity January 10, 1947.[1]

When Garner sought judgment for the principal debt and interest, with a decree of foreclosure, Crooms entered a general denial. The Richters admitted execution of three duplicate notes and prayed that they be discharged from liability on the originals.

From a trial Court finding that Crooms had paid the first note Garner has appealed. The Richters have appealed from the Court's refusal to relieve them from liability on the originals of notes Nos. 4 and 5.

[1] Notes 1, 4, and 5 were lost, but duplicates were given.

The Court based its judgment for Crooms on his testimony and upon evidence given by Bill Wells and Sam Wright, balanced against contentions of Garner and the Richters.

Garner testified that about January 15th he went to Crooms' place of business, and while talking generally Crooms asked if the first note was due. When informed that it was, Crooms directed Garner to bring it to him, adding that he would "take care of all [of the $1,500 indebtedness] within a week or two". Garner returned on the 17th. When he told Crooms he had the note the latter replied, "Come in and I will pay you". Crooms was informed that the amount, with interest on the full debt, was $390; whereupon Crooms started to make out a check, while Garner wrote on the back of the note an indorsement to the effect that it had been paid by check on the Hardy Exchange Bank for "Three Hundred Ninety Dollars, ($390), Three Hundred Dollars ($300) Principal, Ninety Dollars ($90) Interest on Principal".

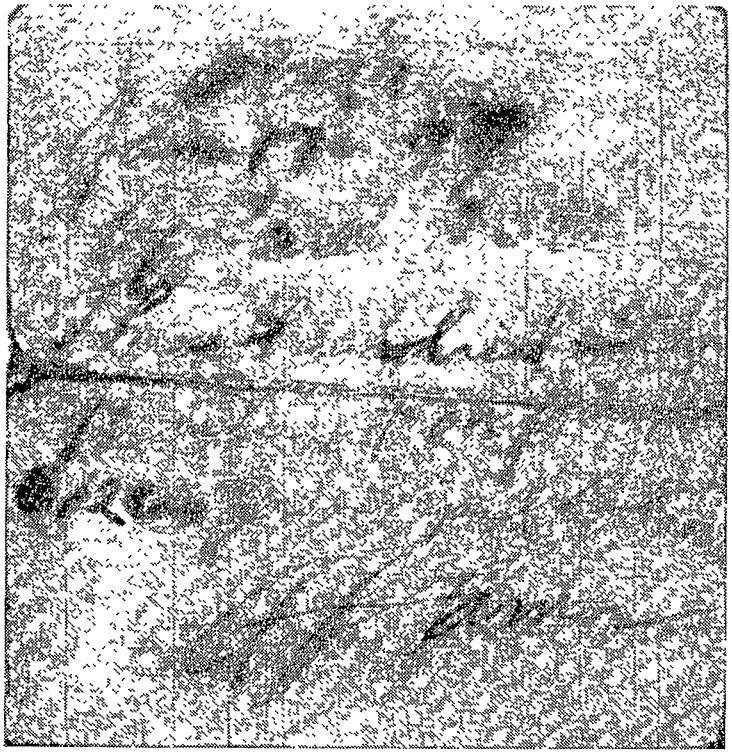
According to Garner's testimony he handed the note to Crooms, expecting to receive the check; but at that time Wells entered and Crooms turned to him and said, "Ain't that the way to do them: get the note, tear up the check, and let them go to hell?"

Garner insisted he spent half an hour endeavoring to get another check, but without avail. After leaving and remaining away two or three hours, he returned and again sought payment, but with no better luck.

Edward Richter testified that Crooms went to his home about the first of January and told Mrs. Richter he had paid the first note. However, at a later period this witness talked personally with Crooms, who claimed to have the note, but did not say he had paid it. Richter also testified that on another occasion he and Mrs. Richter paid Crooms $500 in discharge of a note Mrs. Richter had given as part of the purchase price of the Brewington farm; that Crooms pledged the note to a bank after it had been paid, and that the maker was obliged to employ an attorney in order to recover the note.

Crooms testified that Garner brought the $300 note to him, then added, "I paid him in cash and have the note in my pocket, and I have witnesses that know that fact". He introduced the note. Spoliation is obvious. Garner thinks the physical facts are sufficient to justify this Court in reversing the finding that payment was made in the manner claimed by Crooms.

The indorsement is shown in the reproduction below.



The abbreviation "Pd. Jan. 17, 1946, by" is written with lavender ink with a fountain pen. "Cash $390. Three hundred ninety" is in green ink and appears to have been written with a stub pen. The remainder is in lavender ink, in the same chirography as "Pd. Jan. 17, 1947", although there is a smear of green ink over the figures "$1200". Writing surface of the paper upon which "Cash $390. Three hundred ninety" was written

shows considerable fiber disturbance, such as would be caused by mechanical abrasion. Similar surface mutilations appear elsewhere. "Nib" marks, so called, protrude predominately in areas indicating that writing was done with a stub pen after the paper had been abraised. These physical facts are conclusive of the contention that alterations, authorized or unauthorized, were made.

Explanations by Crooms are far from satisfactory. They include the assertion that two weeks before trial he and certain companions were on Spring River. Their boat sank, ". . . and it made every paper in my pocket wet, [so] the writing or the ink 'ran' as you see them". When asked if all of the writing was in ink having the same color, Crooms replied, "I don't know: it looks like it has faded". And again, "All I know is that I paid [Garner] the cash. He wrote on the back [of the note] and gave it to me. . . . Nothing has been changed if the water didn't change it".

Later the witness, in response to further questioning about the ink, testified he wasn't certain the writing was in one color, then added: "I believe I noticed when he started that he wrote part of it with one pen, and then changed. . . . I remember that I said, 'Garner, you marked [the date] 46'. Then I handed him my pen and he changed it to 47".

There was other testimony by this witness relating to the same transaction, but it amounts to a denial of any knowledge of changes other than substitution of pens, and in that explanation there are discrepancies.

Crooms insisted that he paid Garner "In $100 bills and some twenties, . . . [and] all entries and writing on the note were made by Garner in my office. It is common for me to have a lot of cash".

Wells testified that he lived at Hardy, and when the transaction in question occurred was a school bus driver. He was in Crooms' garage in January, but "didn't see very much", because engaged with Sam Wright in repairing a carburetor. Garner was overheard to tell

Crooms he had "brought those papers down". Following a short conversation, substance of which the witness did not understand, Garner asked Crooms if he was "ready", and the latter gave an affirmative response,—"And then Garner shelled out the papers and [Crooms] paid the money. I saw some hundred dollar bills. [Crooms] gave the money to Garner and [received] the papers. Garner thanked him and said, 'Willey, I am one of the busiest men in town'. He remained about twenty minutes, and left. I don't know how much money [Crooms] paid Garner".

Wright testified substantially as did Wells. He was certain money passed, but didn't know how much. The only thing he heard was when Garner went to leave. At that time "he took the money out of his pocket and rolled it all up and put it [back] in his pocket, and said, 'I am the busiest business-man in Hardy' ".

Garner, upon being recalled, testified there was not a word of truth in what Crooms, Wells, or Wright said about payment having been made with money. There was the further assertion that neither Wells nor Wright was in the office, but were some distance away working on a carburetor. He then added: "I did not write the word "cash" on the back of the note. I wrote "check" in there, and I wrote the whole thing in purple ink.[2]

This case presents an impressive example of difficulties confronting a judge in determining where a preponderance of the evidence rests. *Smith* v. *Magnet Cove Barium Corporation,* 212 Ark. 491, 206 S. W. 2d 442, The Chancellor subjected Crooms to a judicial questioning. He appears to have entertained doubt that Crooms made frank disclosures; anl yet, after considering all of the seeming contradictions or evasions, and taking into account the statements made by presumptively disinterested witnesses, the trial Court resolved doubts in favor of Crooms.

The members of this Court are not satisfied that an injustice is not being done Garner. On the other hand

[2] Garner describes the ink color as "purple". It has been referred to in this opinion as lavender.

the Chancellor, in questioning the witnesses, had the advantage of observing conduct, demeanor, and expressions. In these circumstances we reluctantly affirm.

The court did not err in refusing to hold the Richters harmless absolutely on the original notes that are claimed to have been lost. The record discloses discussions amounting to admissions that copies were executed as a result of A. F. Garner's representations to the Richters that Notes 1, 4, and 5 had been lost, hence, as between the parties to this litigation, an estoppel by record would arise. However, the lost instruments would be valid in the hands of an innocent purchaser who bought for value before maturity without notice.

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

4-8496 209 S. W. 2d 690

Opinion delivered March 22, 1948.

Rehearing denied April 19, 1948.

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

Jabez M. Smith, Roy E. Danuser and *Jim C. Cole,* for appellee.

MINOR W. MILLWEE, Justice. Appellee recovered judgment against appellant for personal injuries which he allegedly sustained while employed as a member of an extra section gang of the railway company on July 30, 1946.

According to the allegations of the complaint and the evidence on behalf of appellee, he and other members of the extra gang were engaged in carrying steel rails on the date of the alleged injury. The rails were being taken from stacks along the right-of-way of appellant's main line track to a spur track connecting with the main line at Donaldson, Arkansas. The men were working under a foreman and in the usual and customary manner of operation one of the crew, designated as a "caller," would direct every step of the work to keep the crew working in unison. The rails were 39 feet long and weighed 1,703 pounds each, and were being carried to, and distributed along, the spur track for the purpose of replacing older and lighter rails then in use.

Appellee testified that on the day of his injury 16 men were being used to carry the rails without a "caller." The rails were carried by the use of tongs, with two men to each pair of tongs, and eight men on each end of the rail. At the time of his injury the 16 men picked up a

rail from a shallow ditch, or drain, at the foot of the railway embankment. It was customary for all the men to come out of the ditch and up the embankment together with the rail level, but on the occasion in question the eight men on the opposite end of the rail from appellee walked up the embankment ahead of those on the "downhill" end of the rail. While the rail was in this position, appellee and another employee were on the extreme end of the rail and started walking backward out of the ditch, when some of the workmen behind them suddenly and without warning "let down," throwing a disproportionate weight of the rail on appellee, causing a severe strain and resulting in a hernia.

Appellee made immediate complaint of the injury to fellow employees and showed them the knot in his left groin at camp that night. He reported the incident to the foreman next morning and was directed to appellant's physician at Malvern. Upon the advice of the physician, appellee entered the hospital maintained for employees of the company at Little Rock, on July 31, and remained there for observation and treatment until August 4th. On his return to Malvern he consulted Dr. Louis Woods.

He also testified that he was unable to do any kind of work for two weeks following the injury and then engaged in cutting pulpwood for about a week. He has been unable to do work requiring heavy lifting since his injury, but has been able to cut billets about half the time. In this work he is paid by the cord and can regulate the speed of the work so that he can rest when he gets tired or is in pain. He is 46 years of age and has worked for appellant since 1924. He had never before assisted in moving rails that heavy with only 16 men.

Dr. Louis Woods testified that he examined appellee on August 10, 1946, and found him suffering from an indirect inguinal hernia which would tend to disable appellee from work requiring heavy lifting. He also testified that appellee was permanently injured unless the hernia was repaired by major surgery. The operation would cause appellee to be out of work for a period of approximately eight weeks.

Three members of the crew who were assisting in carrying the rail testified on behalf of appellant. They stated that appellee complained of being hurt immediately after carrying the rail and told them that he made an awkward step. One of these witnesses said he was doing the "calling" at the time and that it was improper for the men on one end of the rail to come out of the ditch and up the embankment ahead of those on the opposite end. He and the other two witnesses did not see this happen at the time appellee claims to have been injured. They also testified that 24 men with 12 pairs of tongs were used in carrying the rail in question and denied there was a sudden letting down of the weight by other crew members.

The foreman of the extra gang testified that there were at least 30 men in the crew, but all of them were not carrying rails. They always carried 12 pairs of tongs and 24 men were used in carrying rails of this weight. He also stated that 16 men could not do the work with safety because the excessive weight of the rail would be likely to strain them. He did not recall whether he was present at the time appellee claims to have been injured and denied that appellee reported the injury to him.

A physician who examined appellee at the Missouri Pacific Hospital testified that appellee had "inflammation of the splematic cord in the inguinal region," but the witness found no evidence of a hernia. He dismissed appellee from the hospital on August 4th, and told him to resume work when he felt like it and to come back, if further trouble developed.

The first and principal contention of appellant for reversal of the judgment is that the evidence is insufficient to show any neglgience on the part of appellant or the employees working with appellee at the time of his alleged injury. Among the cases cited in support of this contention are the following: *Missouri Pacific R. R. Co.* v. *Medlock,* 183 Ark. 955, 37 S. W. 2d 518; *St. Louis-S. F. Ry. Co.* v. *Burns,* 186 Ark. 921, 56 S. W. 2d 1027; *St. Louis-S. F. Ry. Co.* v. *Byran,* 195 Ark. 350, 112 S. W. 2d 641; *Missouri Pacific R. R. Co.* v. *Vinson,* 196 Ark. 500, 118 S. W. 2d 672;

Kansas City Southern Railway Co. v. *Holder,* 198 Ark. 127, 127 S. W. 2d 807; *Missouri Pacific R. R. Co.* v. *Hudson,* 200 Ark. 404, 139 S. W. 2d 29.

In answer to this contention appellee relies on *C. W. Lewis Lbr. Co.* v. *Rogers,* 199 Ark. 678, 135 S. W. 2d 674, and earlier decisions cited in that case. The facts in that case are very similar to those in the case at bar. The evidence on the part of the plaintiff tended to show that he sustained a hernia when a fellow employee suddenly and without warning released his hold on a heavy timber that was being placed on a truck. The appellant in that case relied on cases cited by appellant in the instant case, but these decisions were distinguished and it was held that the following cases were controlling on the question of negligence: *St. Louis Southwestern Railway Co.* v. *Smith,* 102 Ark. 562, 145 S. W. 218; *Great Western Land Co.* v. *Barker,* 164 Ark. 587, 262 S. W. 650; *Texas Pipe Line Co.* v. *Johnson,* 169 Ark. 235, 275 S. W. 329; *Newark Gravel Co.* v. *Barber,* 179 Ark. 799, 18 S. W. 2d 331; *Louisiana & Ark. Ry. Co.* v. *Muldrow,* 181 Ark. 674, 27 S. W. 2d 516.

In the case of *Standard Oil Co. of Louisiana* v. *Chandler,* 204 Ark. 895, 165 S. W. 2d 595, the testimony of plaintiff showed that he and King, a fellow employee, were engaged in lifting a heavy pump into place when King suddenly released his hold without warning, permitting the pump to fall and injure the plaintiff. There was a positive denial by King of plaintiff's testimony. It was held that a case was made for the jury on the question of the negligence of the fellow employee and the cases relied on by appellant were again distinguished. It was said in that case: "We think this testimony unexplained made a case for the jury upon the question whether King was negligent in prematurely releasing his hold upon the pump, and that the holding in the case of *Public Utilities Corporation* v. *Carden,* 182 Ark. 858, 32 S. W. 2d 1058, is applicable here. It was there held that a case had been made for the jury where it was shown, without explanation, that one of two servants engaged in lifting a heavy rock had released his hold without warning." The case of *C. W. Lewis Lbr. Co.* v. *Rogers,*

supra, and similar cases were cited in support of the conclusion reached by the court.

It is observed that the question whether appellant was negligent in failing to furnish a "caller," and whether appellee's fellow servants were negligent in bringing one end of the rail up the embankment ahead of those on the other end of the rail, and whether other workmen suddenly released their part of the load, were all sharply in dispute.

The evidence is also in conflict as to whether 16 or 24 men were used to carry the rails at the time of appellee's injury, and appellant's foreman admitted that the rail was too heavy for 16 men to carry with safety. Under a similar state of facts in *Griffin* v. *St. Louis, I. M. & S. Ry. Co.,* 121 Ark. 433, 181 S. W. 278, this court held that the testimony was sufficient to warrant the submission to the jury of the question of negligence of the foreman in permitting an insufficient number of men to perform the work.

We are of the opinion that there was substantial evidence adduced at the trial from which the jury were warranted in finding that the injury received by appellee was caused by the negligence of appellant and the fellow servants of appellee. This evidence was sufficient to support the verdict and there was no error in the refusal of the trial court to direct a verdict for appellant.

It is next insisted that the court erred in permitting appellee to testify that appellant's physician at Malvern told him to go to the Missouri Pacific Hospital and that he (appellee) had a rupture. It appears that this physician died before the trial. When counsel for appellant objected to this testimony his objection was sustained and the court admonished the jury not to consider the statement of the doctor that appellee had a rupture. It is undisputed that appellee went to the hospital where he was treated and the fact that he was advised to go there by appellant's doctor was not, under the circumstances, prejudicial.

It is next contended that the court erred in giving four instructions requested by appellee. The instruc-

tions objected to have been approved by this court in many similar cases. Appellant cites no authority in support of his contention that the instructions are erroneous, and we find no error in any of them.

Error is also assigned in the refusal to give defendants' requested instruction No. 7A as follows: "You are instructed that before you can return a verdict herein against the defendants that the plaintiff must prove and you must find that the defendants or their servants, agents and employees were guilty of negligence and that this negligence produced the injuries complained of in the complaint and unless the plaintiff has so proven, then your verdict will be for the defendants *and in this connection, you are told that it is not sufficient merely because other employees let hold of said rail, which they and the plaintiff were carrying, but the burden is upon the plaintiff to show that said employees let down of said rail negligently and carelessly.*"

The court gave the above instruction as modified by omitting the language shown in italics. The modification of this instruction did not in our opinion result in error so prejudicial to appellant as to call for a reversal of the case. That part of the instruction which was omitted merely re-emphasized what the court had already told the jury in the part given, as well as in other instructions, *i. e.*, that the fellow servants must have acted negligently before appellant could be held liable for the injury to appellee. The court defined "negligence" in other instructions given and the jury were bound to have understood that a finding of negligence was essential before a verdict could be returned on any of the charges alleged in the complaint.

At the conclusion of all the evidence appellant requested a directed verdict in its favor on the ground that the evidence showed that appellee was engaged in interstate commerce at the time of his injury and circuit court was, therefore, without jurisdiction. It is now argued that the action should have been brought under the Federal Employers' Liability Act (45 U. S. C. A., § 51 *et seq.*) since the proof clearly showed that appellee was engaged

in interstate commerce. We agree that the case should have been tried under the Federal Act and think the allegations of the complaint, as amended by the proof, were sufficient to authorize a recovery under that act. It is not essential that the federal statute be pleaded, or in any manner referred to, in a plaintiff's pleadings to authorize a recovery under the act. 35 Am. Jur., Master and Servant, § 482. Appellant did not demur to the complaint because a cause of action was not stated nor did he file a motion to require appellee to elect.

However, assuming that the motion for a directed verdict was timely made—was appellant in any manner prejudiced by trial of the issues under the common law doctrine of negligence? In the case of *Chicago & Northwestern Ry. Co.* v. *Gray,* 237 U. S. 399, 35 S. Ct. 620, 59 L. Ed. 1018, the U. S. Supreme Court held that it would not reverse a judgment of a state court in an action for damages for personal injuries, although the action was begun under a state statute when it should have been brought under the federal act, where the error was not prejudicial. See, also, *Duncan* v. *Thompson,* 146 S. W. 2d 112, 62 S. Ct. 58, 314 U. S. 589, 86 L. Ed. 475.

Appellant was favored rather than prejudiced by the failure to proceed under the Federal Employers' Liability Act in the instant case. The question of assumed risk was submitted to the jury. This defense has been completely abolished by the 1939 Amendment to the Federal Employers' Liability Act (45 U. S. C. A., § 54). *Tiller* v. *Atlantic Coast Line R. Co.,* 323 U. S. 574, 65 S. Ct. 421, 87 L Ed 446, 143 A. L. R. 967. It follows that no prejudice resulted to appellant by the failure to try the issues herein under the federal act, and it is in no position to claim error on that ground.

It is also contended that error was committed in refusal of the court to declare a mistrial because of prejudicial argument to the jury by counsel for appellee. We have carefully considered the several objections made to the argument and find that any error that may have arisen therefrom was cured by proper admonition of the trial court.

It is finally insisted that the verdict for $3,000 is grossly excessive. Appellee is 46 years old and the evidence discloses that his earning capacity of $155 per month has been reduced 50 per cent on account of his injury. The injury is permanent unless repaired by major surgery. It was held in *James B. Berry's Sons Co.* v. *Presnall,* 183 Ark. 125, 35 S. W. 2d 83, that an injured employee was not required to submit to an operation for hernia in order to minimize damages sustained through the employer's negligence. There was also evidence that appellee has suffered considerable pain on account of the injury. Under these circumstances we cannot say the verdict is excessive.

We find no prejudicial error, and the judgment is affirmed.

CITY OF MAGNOLIA *v.* BURTON.

4-8457 209 S. W. 2nd 684

Opinion delivered March 22, 1948.

Rehearing denied April 19, 1948.

Henry B. Whitley, for appellant.

Keith & Clegg, for appellee.

SMITH, J. Appellee, plaintiff below, filed this suit in which he alleged ownership of a strip of land de-

scribed as follows: Commencing at the SE corner of the SE¼ of the SW¼ section 12, Twp. 17 S., Rge. 21 W. and running north 40 feet, thence west 245 feet along the south line of lots 1 and 2 of the Northeastern Addition to the Town of Magnolia, thence south 40 feet to the south line of said section 12, thence east 245 feet along said south line of said section 12 to the point of beginning.

Appellee alleged that without authority, and without instituting condemnation proceedings, the City of Magnolia had entered upon the land for the purpose of constructing or continuing a street through it. He prayed that the City be enjoined from disturbing his possession or in the alternative, that he have judgment for the value of the land taken. He recovered a judgment for $800, from which is this appeal.

The title to lots 1 and 2 is not involved. The land involved is a strip in the shape of a parallelogram south of these lots, extending 40 feet north and south, and 245 feet east and west. Lots 1 and 2, according to a plat of the City herein later referred to, front Union Street, which runs east and west in that City, and the disputed strip extends into Union Street.

The plaintiff undertook to deraign a record title to the land, but failed to do so. The court held however, that while plaintiff had not shown ownership of the record title, he had proved ownership by adverse possession. There was offered in evidence a plat of the City of Magnolia, the authenticity and verity of which is questioned, but it was shown that for a period of many years the lots in the City have been described in deeds conveying them with reference to this plat. In attempting to deraign his title, appellee employed descriptions conforming to this map.

No dedication of the streets within the platted area was shown, and the plat was not placed of record until 1923, but conveyances of the blocks and lots comprising the now prosperous City of Magnolia, since the City was a hamlet, were made with reference to it. We therefore hold, upon the authority of the case of *Porter* v. *City of*

Stuttgart, 135 Ark. 48, 204 S. W. 607, that there had been a dedication of the streets as shown on the plat.

This disputed area was therefore over a part of one of the streets in the City. By Act 24 of the extra session of 1897, now appearing as amended, as § 9646, Pope's Digest, it is provided that title to streets may not be acquired by the adverse possession thereof, but prior to the passage of this act title had been acquired by adverse possession, and appellee was the possessor of the title thus acquired. However, it is conceded that he lost this title through a proceeding against him in bankruptcy in 1933, and the title he now claims is based upon his adverse possession since that date. The court found that he had thus acquired title to the strip of land in dispute, and awarded him damages for its value when the city opened the street through it.

There was testimony which supports this finding of fact, but we think the preponderance of testimony is to the contrary. Appellee had a desultory possession for a period of more than seven years, during which time he permitted a neighbor to use the lot as a pasture for a cow, and others to plant it as a garden, and he did so himself for one or more years. But we think the preponderance of the testimony by disinterested witnesses most familiar with the property is to the effect that this possession was not of such continuous character as to ripen into title.

The enclosure of this property and the claim of adverse possession thereof depends largely upon the erection and the date thereof of a fence between it and an adjoining lot referred to as the Ray Paschal lot. Paschal testified that he bought the S½ of lots 1 and 2 in 1940, built a house thereon, and has since resided there. He testified as follows:

"Q. State what evidence of possession on the part of Mr. Burton of these lots, if any, you know of, at the time you bought the property? A. I didn't know anything about it. Q. Did you know he was claiming any land in that neighborhood? A. No, not at the time I bought it. Q. When did you discover he was claiming

any property in that neighborhood? A. After I bought it. I didn't know for sure where the lines were. While I was building we couldn't come to an exact agreement where the land, the line was, and he come along and told me he owned this other over here, and they told me it was a street, and at that time we never could get it worked out satisfactorily, and we put a fence up there. My deed didn't call for a street and I lacked 10 feet of having my frontage. Q. That is the first you knew of it, after you built a house there? A. Yes, sir. When I bought it, they told me where the line was, so I wasn't for sure and I had it surveyed."

There was no cross-examination of this witness.

The testimony to which we give the greatest weight is that of Joe Pearce who had bought all the property described in appellee's bankruptcy proceeding; and it is the Pearce title which appellee claims to have acquired by adverse possession, and Pearce testified that "there had been no fence in there at all between this piece of property and the Ray Paschal property until Pearce moved there," which was in 1940.

Some other testimony tends to sustain appellee's claim of title by adverse possession, while still other testimony contradicts it, in consideration of which we have concluded that appellee has not shown title by adverse possession, and the judgment must therefore be reversed and the cause will be remanded with directions to dismiss the complaint for want of equity.

WYATT *v.* YINGLING.

4-8454 210 S. W. 2nd 122

Opinion delivered March 29, 1948.

Rehearing denied May 3, 1948.

Gordon Armitage, for appellant.

Yingling & Yingling, for appellee.

SMITH, J. Appellants seek by this suit to enforce the specific performance of a contract to sell them a farm. Appellee has welshed on his contract, as the undisputed evidence shows the moral obligation to convey, but mere moral obligation to perform a contract does not suffice to grant the relief prayed. The Statute of Frauds provides that "No action shall be brought . . . to charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them . . . unless some memorandum or note thereof, shall be made in writing, and signed by the party to be charged therewith, or signed by some other person by him thereunto properly authorized."

Justin W. Wyatt, appellant, the proposed purchaser, who was in military service, obtained a leave of absence to buy this farm, but before completing the purchase his leave of absence expired, and he returned to the service, but before returning, he executed a power of attorney to his wife, granting her full power and authority to conduct her husband's business during his absence.

Pursuant to this power, Wyatt's wife signed the following instrument:

"Agreement for Strawberry Crop.

"Whereas, the undersigned, Austin E. Yingling, party of the first part has on this day sold his farm to Justin W. Wyatt, party of the second part, and there is now a patch of strawberries growing on said land. It is hereby agreed by both parties that the said Austin E. Yingling shall have the right to harvest all strawberries produced by all berry plants now growing on the said lands during the spring and summer of 1946, and that Justin W. Wyatt shall have complete and full possession of said strawberry plants after the crop is harvested in spring of 1946.

"It is understood by both parties hereto that the title to said strawberry plants shall remain in Austin E. Yingling until the crop produced in 1946 shall have been harvested, and that full and complete title to said strawberry plants shall belong to said Justin W. Wyatt after the harvest of the 1946 crop is completed.

"Witness our hands this ..... day of September, 1945.

(Signed)

"Austin E. Yingling,

"Justin W. Wyatt."

It is not questioned that the power of attorney conferred upon Mrs. Wyatt the authority to execute this writing. But there was no other writing signed by either Wyatt or his wife relating to the purchase of the farm which could be said to comply with the requirements of the Statute of Frauds, and we think this writing insufficient for that purpose. If it be said that the writing sufficiently identifies the land to be sold, which we do not decide, it may be answered that it makes no reference to the terms of the sale. There is nothing to show the price for which the farm was to be sold, nor how and when the purchase price was to be paid.

In the chapter on Statute of Frauds, 49 Am. Jur., § 354, it is said: "It is not sufficient that the note or

memorandum express the terms of a contract; it is essential that it completely evidence the contract which the parties made by giving all of the essential terms. The writing must be such that all of the contract can be collected thereform; resort cannot be had to the terms of the oral contract to supply deficiencies in the memorandum. . . . A contract in writing which leaves some essential term therof to be shown by parol is only a parol contract, and is, therefore, not enforceable under the statute of frauds."*

This statement of the law accords with our recent case of *Perrin* v. *Price,* 210 Ark. 535, 196 S. W. 2d 766, and other opinions of this court on the subject there cited. In one of these, that of *Tate* v. *Clark,* 203 Ark. 231, 156 S. W. 2d 218, the headnote reads: "A contract for the sale of land which fails to show the terms and conditions of the sale, the price to be paid and the time for payment is not sufficient to satisfy the requirements of the statute of frauds."

It does not appear to be seriously contended that the writing above copied meets the requirements of the Statute of Frauds, but it is insisted that a deed was executed and delivered which does meet the requirements of that statute. The delivery or nondelivery of this deed appears to be the controlling question in the case. It is conceded that the deed in question does meet the requirements of the Statute of Frauds, but the court found on conflicting testimony that it had never been delivered.

Appellants argue that the delivery of the deed was admitted by a demurrer filed in the case, but we do not so interpret the demurrer. After a demurrer had been sustained to the original complaint, an amended complaint was filed which contained the allegation that the deed had been delivered. There was a demurrer to all of the complaint except to the allegation of delivery of the deed. This allegation was not subject to demurrer and it was not demurred to. But the failure to demur to that allegation cannot be treated as an admission of its truth. Had a demurrer been filed to this allegation, it would of

* Pope's Digest, § 6059.

course have been overruled for the reason that the deed would not only have complied with the Statute of Frauds, but if delivered, would have been an end to the lawsuit, as the title to the land would have passed on the delivery of the deed, if delivered for that purpose. The answer denied that the deed had been delivered, and there was thus raised the question of fact which controlled the decision of the court below and is controlling here.

Appellant Wyatt made application for a loan on the land in question for the purpose of raising the money to pay for the land. This application was made to the National Farm Loan Association, referred to as N. F. L. A., through one Ivan Gilliland, a local agent for that organization. An abstract of title was forwarded to the St. Louis office of the N. F. L. A. and after examination the title was approved, but a discrepancy in the description of the land appeared, and the loan agency called for a copy of the deed which appellee was to execute to appellants. A deed in proper form, was submitted to Gilliland for examination, which met his approval, and Gilliland requested that a copy be given him to be sent for examination in St. Louis. Later the original deed was delivered to Gilliland, but when delivered the portions of the deed containing the signatures of the grantors had been torn off, a fact which Gilliland admitted. However this emasculated instrument was returned to appellee on request. It was during the progress of the negotiations referred to that the contract set out above was executed by Mrs. Wyatt.

The testimony sustains the finding that there had been no delivery of the deed but a delivery only of a copy thereof, and this for the sole purpose of examination and not for the purpose of passing the title. Moreover appellee testified that the copy which he delivered to Gilliland for examination had not been signed or acknowledged and Gilliland would not state positively that it had been.

When all the details had been agreed upon and there remained nothing to do to consummate the sale except to deliver a deed to the property, appellee advised appel-

lants that he had decided not to sell the land, and refused to deliver the deed.

There having been no delivery of the deed it is unimportant that, if delivered, it would have fully complied with the Statute of Frauds. We said in the recent case of *Harris* v. *Dacus*, 209 Ark. 1031, 193 S. W. 2d 1006, that "Even when a paper is drawn up as the final obligation, it cannot, if retained by the party signing it and never delivered as his agreement, be made use of, even as a memorandum" complying with the Statute of Frauds.

There having been no delivery of any writing signed by appellee which would meet the requirements of the Statute of Frauds, the court properly denied specific performance, and the decree is therefore affirmed.

SMITH, C. J. and HOLT, J., dissent.

BRADLEY LUMBER COMPANY OF ARKANSAS
v. BURBRIDGE.

4-8309 - 4-8310 210 S. W. 2d 284

Opinion delivered March 29, 1948.

Rehearing denied April 26, 1948.

4-8309

Williamson & Williamson, for appellant.

U. A. Gentry, DuVal L. Purkins and *Shields M. Goodwin,* for appellee.

4-8310

Williamson & Williamson, for appellant.

U. A. Gentry, DuVal L. Purkins and *Shields M. Goodwin,* for appellee.

ROBINS, J. These two appeals were lodged here separately.

In case No. 8309 the appeal comes from a decree of the chancery court, rendered on December 23, 1946, in three different suits (consolidated for trial in the lower court) filed in that court by appellee, L. J. Burbridge, to recover damage for cutting of timber on 320 acres. In one of these cases the lower court denied recovery to appellee, another was dismissed on stipulation, and in the other case the court found that appellee was entitled to damages, but allowed him only one-half of the value of the timber removed because, as the court held, he owned only a half interest in the land.

In No. 8310 appeal is from a judgment of the circuit court, rendered on May 19, 1947, in an ejectment suit instituted by appellee to establish his title and to recover possession of the same tract as that involved in the chancery cases. The circuit court, treating the previous decree in the chancery cases as *res judicata,* held that appellee should recover only a one-half interest in the land.

Inasmuch as the basic question in all these cases is the same—the ownership of the land—we have consolidated the two appeals for determination by single opinion.

Solution of these questions is necessary to a determination of all the issues involved:

I. Question of ownership of the land under the deed executed by J. H. D. Scobey and wife.

II. Question of efficacy of appellant's plea of limitation against appellee's claim of ownership.

III. Question of effect of the quitclaim deed executed by Nettie Burbridge Wells to appellee.

IV. Question of jurisdiction of the circuit court in the ejectment suit.

V. Question of appellee's right to recover for timber cut from the land.

I.

Both parties to this litigation claim through a common source of title.

It is stipulated that appellee's maternal grandfather, J. H. D. Scobey, owned this land on June 4, 1869, and that on that day Scobey and his wife executed a deed, conveying same, and other lands, to his daughter, Isabella J. Burbridge "and the issue of her body, by J. R. S. Burbridge begotten, forever and in fee." The meaning and effect of the quoted language is one of the disputed issues herein. At the time this deed was executed J. R. S. Burbridge and his wife, Isabella, had one child, the appellee, who was 18 days old. They had five children in all, but three of them died without issue, and only two

of them, appellee and his sister, Nettie Burbridge Wells, survived their mother.

J. R. S. Burbridge died in 1885, and his widow, Isabella, never remarried. She died on May 7, 1932, at the age of 93. Isabella J. Burbridge, on September 16, 1891, conveyed the lands in dispute to J. F. Ritchie, through whom appellant deraigns its title. Her deed to Ritchie contained no limitation, but purported to convey the entire estate.

It is urged by appellant that the effect of the deed executed by Scobey in 1869 was to vest in Isabella J. Burbridge and appellee an estate of tenancy in common, with the estate opening up on the birth of each succeeding child to Isabella J. Burbridge so as to permit each such child to take an equal estate as tenant in common. And, argues appellant, since appellee was a tenant in common, instead of a remainderman, the running of the statute of limitations had therefore been started against him much more than seven years before the beginning of any of these suits by appellee.

While the exact language used in the conveyance by J. H. D. Scobey and his wife has not been construed by this court, we have, in many cases, had to determine the meaning of substantially the same wording in deeds.

In the case of *Horsley, et al.*, v. *Hilburn, et al.*, 44 Ark. 458, decided in 1884, this court held that under the common law in force in this state, as modified by the Act of 1837 (Pope's Digest, § 1799), a deed executed by Jesse Shelton to his daughter, Marietta Hilburn, and "the heirs of her body that now are or may hereafter be born" vested a life estate in Mrs. Hilburn and upon her death the remainder in fee in her children that survived her and the issue of such as had died during her life *per stirpes*.

The decision in *Horsley* v. *Hilburn, supra,* has never been overruled, but has been followed by us in many cases. See *Watson* v. *Wolff-Goldman Realty Company,* 95 Ark. 18, 128 S. W. 581, Ann. Cas. 1912A, 540; *Dempsey* v. *Davis,* 98 Ark. 570, 136 S. W. 975; *Maynard* v. *Hender-*

son, 117 Ark. 24, 173 S. W. 831, Ann. Cas. 1917A, 1157; *Pletner* v. *Southern Lumber Company,* 173 Ark. 277, 292 S. W. 370.

In the recent case of *Wilkins* v. *Wilkins,* 212 Ark. 242, 206 S. W. 2d 26, we had to deal with a contention somewhat similar to that urged by appellant here. In that case it appeared that Wilkins and wife executed a deed conveying certain land to their son "and unto his children and assigns forever." It was urged that under this deed the son and his children were vested with title as tenants in common. We rejected this contention and held that the deed created a life estate in the son with remainder in fee simple in the children.

We conclude that the chancery court correctly held that the deed executed by J. H. D. Scobey and wife in 1869 vested in Isabella J. Burbridge a life estate, with remainder in fee simple being vested in such issue of her body begotten by J. R. S. Burbridge as should survive her.

II.

The lands involved herein are wild and unenclosed, and have never been in the actual possession of any of the parties. It is stipulated that each year since the conveyance of same in 1891 by Isabella J. Burbridge to J. F. Ritchie, through whom appellant deraigns its title, appellant and its predecessors in title have paid the taxes accruing against this property until after the institution of all the litigation herein.

Appellant argues that under § 8920, Pope's Digest, this wild and unenclosed land has been in the constructive possession of appellant and those through whom it claims title for more than seven years before the institution of any of the actions brought by appellee, and that therefore these actions were barred by the statute of limitations.

It was the duty of appellant and its grantors, who had, through the deed of Isabella J. Burbridge to J. F. Ritchie, become the owner of an estate in these lands for the life of Isabella J. Burbridge, to pay the taxes accruing against the lands during Mrs. Burbridge's lifetime. A

failure on their part so to do would have resulted in a forfeiture of this life estate to the ones next entitled to take. Section 13813, Pope's Digest.

But, assuming that under the provisions of § 8920, Pope's Digest, the possession of this land has been in appellant and its grantors, such possession was not adverse to appellee and the other remaindermen. No principle of law is better established than that the possession of one claiming under a life tenant is not adverse to the remainderman until the death of the life tenant. *Moore* v. *Childress,* 58 Ark. 510, 25 S. W. 833; *Hayden* v. *Hill,* 128 Ark. 342, 194 S. W. 19; *Ousler* v. *Robinson,* 72 Ark. 339, 80 S. W. 227; *Gallagher* v. *Johnson,* 65 Ark. 90, 44 S. W. 1041; *Morrow* v. *James,* 69 Ark. 539, 64 S. W. 269; *Ogden* v. *Ogden,* 60 Ark. 70, 28 S. W. 796, 46 Am. St. Rep. 151; *Strickland* v. *Moore,* 98 Ark. 30, 135 S. W. 360; *LeSieur* v. *Spikes,* 117 Ark. 366, 175 S. W. 413; *Smith* v. *Maberry,* 148 Ark. 216, 229 S. W. 718; *Hamilton* v. *Farmer,* 173 Ark. 341, 292 S. W. 683.

Nor did the attempted conveyance by Isabella J. Burbridge of the entire estate to J. F. Ritchie work a forfeiture of the life estate or start the statute of limitations to running against appellee. *Smith* v. *Maberry, supra.*

Since appellee's ejectment suit was instituted less than seven years after the death of his mother, it was not barred by limitations.

III.

The chancery court sustained appellant's contention that the deed executed by Nettie Burbridge Wells, the only child (other than appellee) of Isabella J. Burbridge, who did not die before the death of Isabella J. Burbridge, to her brother, appellee, was ineffective to convey any title whatever. This deed, which was executed on May 21, 1913, was a quitclaim deed, but it recited a consideration of $500 paid by appellee to Mrs. Wells, and by its express language it purported to convey to appellee all interests, "present and prospective" of the grantor in these lands. So far as the record discloses, Mrs. Wells

has never attempted to invalidate this deed, nor has she asserted that all her share in the land was not conveyed to her brother by this deed.

The chancery court based its ruling as to this deed on the fact that, since the deed was a quitclaim one, it did not under our decisions, operate to carry after acquired title, and that, since Nettie Burbridge Wells, when she executed the deed, had no present interest in the land, but only an interest contingent on her surviving her mother, she had no alienable title to the lands.

The statute (§ 1798, Pope's Digest) providing that the grantee in any deed, executed by a grantor not then owning the land, purporting to convey the same in fee simple absolute would obtain the benefit of a title afterwards acquired by the grantor, makes no exception against the grantee in a quitclaim deed. But we have held, in the case of *Wells* v. *Chase,* 76 Ark. 417, 88 S. W. 1030 and other decisions rendered thereafter, that a quitclaim deed was not within the purview of this statute.

An examination of the opinion in the case of *Wells* v. *Chase* discloses that the court rested its opinion on the previous declaration by this court in the case of *Blanks* v. *Craig,* 72 Ark. 80, 78 S. W. 764, to the effect that "the statute only affects interests in land which the grantor has conveyed or which his deed purports to convey. It does not affect interests afterwards acquired by the grantor *which he has not previously conveyed or attempted to convey.*" (Italics supplied). The plain inference to be drawn from this language is that, where the grantor in a quitclaim deed conveys or attempts to convey an interest which he does not then own, but afterwards acquires, the grantee becomes the owner of such interest.

Now the deed from Mrs. Wells, though a quitclaim deed, purported, for a substantial consideration, to convey to appellee all her interest in the lands "present and prospective." As a contingent remainderman she had a "prospective" interest in the lands when she executed this deed, and she, by the plain language of her deed, conveyed this "prospective" interest. Therefore, when this "prospective" interest became, upon the death of

Mrs. Isabella J. Burbridge, a vested one it passed to appellee under this deed, which, though a quitclaim deed was fully effective to transfer title. *Bagley* v. *Fletcher,* 44 Ark. 153.

To give this deed the construction insisted on by appellant, we must ignore and treat as meaningless the word "prospective" where used therein. We may not do this. A fundamental rule is that in construing a deed every part thereof must be given effect if it can be done consistently with the rules of law. *Bunch* v. *Nicks,* 50 Ark. 367, 7 S. W. 563.

Even if the deed executed by Mrs. Wells to appellee should be held ineffective as a *conveyance* of title, it could well be sustained as an assignment by her to appellee of any and all interest in the land, present or future, owned by her. It has frequently been held that an assignment of a future interest, or expectancy, though unenforceable at law, is valid in equity and may be enforced in the latter forum when such expectancy ripens into a present and enjoyable estate. "In equity, by the great weight of authority, there can be a valid assignment of . . . property to be subsequently acquired, and of contingent and expectant interests, . . . A court of equity, for example, will uphold an assignment of an interest under a will, such as of a contingent bequest and legacy, to take effect on the happening of some future event, as the coming of age of the beneficiaries or the death of some person." 6 C. J. S., 1056. "Courts of equity have generally upheld assignments of expectancies by prospective heirs . . ." 4 Am. Jur. 269.

Appellant cites in support of the chancery court's holding on this phase of the matter our decision in the case of *Deener* v. *Watkins,* 191 Ark. 776, 87 S. W. 2d 994, where we held that a conveyance by a contingent remainderman, who did not survive the life tenant, made before the death of the life tenant, was ineffective. The difference between the situation in that case and the one at bar is apparent. There the remainderman died before the death of the life tenant, and his expectancy was therefore completely extinguished. Here, Mrs. Wells

survived her mother and the expectancy which Mrs. Wells owned when she conveyed all her interest "present and prospective" to appellee thereupon matured into a present and vested title.

The situation in the case at bar is somewhat analogous to that presented in the case of *Jernigan, Bank Commissioner* v. *Daughtry,* 194 Ark. 623, 109 S. W. 2d. 126, where we held that a mortgage executed by a contingent remainderman, before the death of the life tenant, became effective to carry the title of the remainderman when it became vested upon life tenant predeceasing the remainderman.

We conclude that under the deed of Nettie Burbridge Wells to appellee, upon the death of Mrs. Isabella J. Burbridge, survived by Mrs. Wells, Mrs. Wells' one-half interest in the lands vested in appellee, making him the owner of the entire estate.

IV.

Appellant argues that the lower court had no jurisdiction of the ejectment suit because appellant was not in possession of the lands when the suit was commenced.

It was alleged in appellee's complaint that appellant was in wrongful possession of the lands. This allegation, appellant concedes, was sufficient to make the complaint, on this phase of the case, good on demurrer.

Appellant in its answer specifically pleaded the provisions of §§ 8918, 8920 and 8921, Pope's Digest, as a complete bar to appellee's right of action, and "as an additional investiture of the complete title in fee simple" in appellant. It was further alleged in the answer that more than 25 years before the filing of the suit one of appellant's predecessors in title, under claim of ownership, cut all the commercial timber then growing on the lands, and that "this act of actual adverse possession, and overt claim of unconditional ownership of the entire title was brought to the actual knowledge of the plaintiff more than 25 years before the present action was filed. During all of this period of more than 25 years the de-

fendant, and its predecessors in title, have openly and continuously claimed the absolute title in fee simple to all of the land here involved and the timber thereon growing, as against the plaintiff and all other persons, and have manifested and evidenced this claim of ownership by all of the usual and customary acts of ownership of which this type of land is subject and to which it is liable and susceptive, all of which was well known to the plaintiff during all of these many years. The defendant hereby expressly pleads the general statutes of limitation as a complete bar to plaintiff's action here pending."

This was in effect a plea of adverse possession by appellant and appellant having asserted such a defense in its answer, appellee was not required to prove the actual ouster and adverse holding by appellant. "Where a defendant in his plea or answer sets up the defense of adverse possession, his plea or answer to it will be treated as a confession of the ouster and render the proof thereof unnecessary on the trial." Newell on Ejectment, p. 133.

Dealing with a somewhat similar question in the case of *Brasher* v. *Taylor,* 109 Ark. 281, 159 S. W. 1120, and construing § 8920, Pope's Digest, which declares unimproved and unenclosed lands to be in the possession of one having color of title and paying taxes thereon, we said: "There is no longer any reason for holding that actual or pedal possession by the defendant is an indispensable prerequisite to the right of the plaintiff to bring an ejectment suit against him."

The circuit court properly held that failure of appellee to show actual possession of the lands by appellant did not defeat its jurisdiction in the ejectment suit.

V.

Appellee filed three suits in the chancery court, in one case to enjoin cutting of timber on the lands involved herein and to recover damages for timber cut, and in the other two cases to recover damages for timber cut.

One of these (Case No. 2291 in the lower court), involved the oak and other hardwood timber; and this case, having been dismissed under stipulation of the parties, is not before us.

Case No. 2023 in the lower court was instituted on September 7, 1931, by appellee against appellant and others alleging waste and damage by the cutting and removing of certain piling from the lands. The chancery court found that the value of this piling at the time it was cut was $330.26, and, finding that appellee was entitled to only an undivided half interest in the lands, awarded him judgment for one-half of such value, $165.13, and interest. The lower court's findings as to the removal of this piling and the value thereof being supported by a preponderance of the evidence must be affirmed, but, since, as we have pointed out above, appellee was the owner of the entire interest in the lands, the decree in his favor should have been for the entire value of the piling plus six percent. interest thereon from date of removal.

In case No. 2211, filed by appellee on December 30, 1933, he sought to recover damages against S. H. Fullerton for the value of 3,200,000 feet of pine timber alleged to have been cut and removed by Fullerton from this land during the years 1901 to 1907, inclusive. S. H. Fullerton died in 1939 and the suit was thereafter revived against R. W. Fullerton, S. B. Fullerton, Mrs. Warren G. Horton, and Mrs. S. H. Davis, who were alleged to be the sole heirs and devisees of S. H. Fullerton, deceased.

The lower court held that, since appellee, being all the while *sui juris,* waited 29 or 30 years after the alleged damage was inflicted before seeking redress in a court of equity, his claim was barred by laches and staleness. This holding was correct. *Wilson* v. *Anthony,* 19 Ark. 16; *Brewer* v. *Keeler,* 42 Ark. 289; *Stuckey* v. *Lockard,* 87 Ark. 232, 112 S. W. 747; *Reese* v. *Bruce,* 136 Ark. 378, 206 S. W. 658.

Appellee seeks to avoid the consequence of his long delay in filing this suit by a showing that he did not

live near this land and did not discover that the pine timber had been cut until a short time before he instituted the action. But ignorance of one's rights does not prevent the application of the doctrine of laches in a suit brought after unreasonable delay, unless such ignorance was due to fraudulent concealment or misrepresentation by the party invoking the doctrine of laches. *Landman* v. *Fincher,* 196 Ark. 609, 119 S. W. 521.

Since we conclude that the decree of the chancery court in the suit by appellee against S. H. Fullerton and his heirs and devisees should be affirmed on the merits, it becomes unnecessary to deal with the contentions of each side as to the correctness of the revivor proceeding or to dispose of the motion of these heirs and devisees of S. H. Fullerton to dismiss the appeal as to them.

It follows from what has been said that the decree of the chancery court in case No. 2211 is affirmed and the decree in case No. 2023 reversed and the cause remanded with directions to the lower court to award to appellee the entire interest in the lands described in the pleadings and to enter decree in favor of appellee against appellant for $330.26, with interest thereon from September 7, 1931, at the rate of six percent. per annum and his costs; and in the ejectment suit the judgment of the lower court is reversed and the cause remanded to the lower court with directions to enter a judgment awarding to appellee possession of, and entire title to, the lands involved, and his costs; the costs in this court of the consolidated proceedings to be paid one-fourth by appellee and three-fourths by appellant.

COBB, CITY CLERK *v.* BURRESS.

4-8523 209 S. W. 2d 694

Opinion delivered March 29, 1948.

Roy Penix and *Foster Clarke,* for appellant.

Barrett, Wheatley & Smith, for appellee.

ED. F. MCFADDIN, Justice. This appeal challenges the correctness of a circuit court judgment which awarded a writ of mandamus against the appellant, and thereby allowed a referendum on an ordinance of the City of Jonesboro.

On July 28, 1947, the city council of Jonesboro enacted its ordinance No. 757 levying a tax on certain occupations in that city. The ordinance was published on August 2, 1947, and for three successive weeks thereafter. On September 20, 1947, appellee and others filed with appellant, as city clerk of Jonesboro, a petition for a referendum on said ordinance No. 757—*i. e.,* they sought to have the ordinance submitted to a vote at the municipal election on April 6, 1948. The petition was in 21 parts or divisions (but all together constituting one petition), and contained a total of 406 signatures. Appellant, acting on the advice of the city attorney, refused to certify the referendum petition to the election commissioners.

Thereupon, appellee, as a citizen and taxpayer, instituted this mandamus proceeding on November 14, 1947. The complaint alleged, *inter alia,* that the 406 signatures were "more than 15% of the legal voters . . . casting their vote for the office of mayor at the last preceding general election, . . .", and that the suggested ballot title was sufficient. The complaint prayed that the court "issue a writ of mandamus to the said James Carr Cobb, city clerk, compelling him to certify said petition for ballot title to the election commissioners." Appellant, by response, claimed that the petition for referendum: (a) was filed too late; (b) did not contain 15% of all of the qualified electors; (c) contained signatures that were forgeries; and (d) was circulated by canvassers who were guilty of such fraud as to forfeit certain signatures and leave an insufficient number of valid signatures.

The cause proceeded to a hearing in the circuit court on evidence hereinafter to be detailed in the appropriate topics; and on December 18, 1947, the circuit court granted the mandamus as prayed by the appellee. This appeal[1] challenges the circuit court order, and presents the issues now to be discussed.

I. *Appellant Insists that Section 13309, Pope's Digest, Defeats the Attempted Referendum.* As previously stated, ordinance No. 757 was enacted on July 28, 1947, was published the first time on August 2nd, and the referendum petition was filed with the city clerk on September 20, 1947. This filing was 54 days after the ordinance was enacted, and 48 days after publication; and appellant says that this was too late. Amendment No. 7 (as now numbered) to the Arkansas Constitution was adopted by the people on November 2, 1920, and declared adopted by the Special Supreme Court in the case of *Brickhouse* v. *Hill,* 167 Ark. 513, 268 S. W. 865. Section V[2] of said Amendment No. 7 reads in part:

"Municipalities may provide for the exercise of the initiative and referendum as to their local legislation.

"General laws shall be enacted providing for the exercise of the initiative and referendum as to counties. . . . In municipalities and counties the time for filing an initiative petition shall not be fixed at less than sixty days nor more than ninety days before the election at which it is to be voted upon; for a referendum petition at not less than thirty days nor more than ninety days after the passage of such measure by a municipal council; . . ."

It will be observed that the said Constitutional Amendment gives to municipalities the right to provide for the exercise of referendum as to local legislation, and

[1] The appeal was filed in this court on January 22, 1948. On February 20th appellant moved that the cause be advanced because of public interest: and we ordered the advancement as prayed.

[2] In the dissenting opinion in *Dixon* v. *Hall,* 210 Ark. 891, 198 S. W. 2d 1002 the various paragraphs of the amendment were numbered as sections, and that identification method is followed here for convenient reference—a method concurred in by other members of the court—, but without affording any other support to the said dissenting opinion.

that the time for filing petitions for referendum may be fixed by each municipality at "not less than thirty days nor more than ninety days after the passage of such measure by a municipal council." It is here stipulated that, prior to the inception of this proceeding, the city council of Jonesboro had enacted no ordinance regulating the time for filing a referendum petition. Because of this stipulated fact, appellant relies on § 13309, Pope's Digest, which section is from Act 197 of 1935. That act is captioned "An Act Limiting the Time for Filing Referendum Petitions on Municipal Measures to Thirty Days after the Passage of Such Measures." Section 1 of the said act reads:

"The time for filing petitions for referendum on municipal measures as defined in the Initiative and Referendum Amendment to the Constitution, which amendment was voted on at the general election, November 2, 1920, as amendment Number 13[3], shall be and hereby is limited to thirty days after the passage of any such measure."[4]

It is unmistakably clear that by Act 197 the 1935 General Assembly attempted to limit to thirty days the time within which a petition might be filed for a referendum on a municipal ordinance. But § 22 of said Constitutional Amendment No. 7 provides that the amendment "shall be self-executing, . . . but laws may be enacted to facilitate its operation." This language appears: *"No legislation shall be enacted to restrict, hamper or impair the exercise of the rights herein reserved to the people."* A reference to the dictionary (Webster's Unabridged, New International, Second Ed., published in 1944) shows the primary meaning of "restrict" to be "to limit"; and the Act 197 of 1935 shows that it was a

[3] Our present Amendment No. 7 was formerly numbered as Amendment No. 13, but was correctly renumbered as Amendment No. 7 in Pope's Digest. For full explanation as to the numbering of the Amendment to our present Constitution, see the Parallel Reference Table to Amendments, pp. 197-8 of Vol. 1 of the Arkansas Statutes Annotated of 1947 now in process of publication by Bobbs-Merrill Company; Amendment No. 7 may be found on p. 204 of Vol. I of said publication.

[4] This Section 13309 Pope's Digest is also Section 2-402 of the Arkansas Statutes Annotated of 1947.

legislative attempt to *limit* the time for filing referendum petitions on municipal measures. The Constitutional Amendment No. 7 left to each municipality the right to fix the time for filing referendum petitions on municipal legislation; and it is beyond the power of the Legislature to limit the said constitutional right given to municipalities. So we hold that this Act 197 of 1935 is void insofar as it limits the time for filing referendum petitions on municipal legislation.

In *Southern Cities Dist. Co.* v. *Carter,* 184 Ark. 4, 41 S. W. 2d 1085, we considered a case where the city council had enacted no ordinance fixing the time for filing referendum petitions on municipal legislation. In *Railey* v. *Magnolia,* 197 Ark. 1047, 126 S. W. 2d 273, we considered a case where the city council had fixed the time for filing a referendum petition on municipal legislation. Both of these cases recognized that it was for each municipality to fix the time for filing such referendum petitions. Until the City of Jonesboro fixes some time by municipal ordinance, then the constitutional language of "not less than thirty days nor more than ninety days" is the applicable period. The Legislature cannot limit the right of the municipalities in this regard. *Kitchens* v. *Paragould,* 191 Ark. 940, 88 S. W. 2d 843, while not in point on the question here involved, nevertheless, shows a judicial recognition that the Legislature cannot impede municipalities in their exercise of constitutionally granted powers. Text writers generally recognize this principle as applicable to constitutional grants of referendum on municipal legislation. In 28 Am. Juris. 155, in discussing initiative and referendum, this statement appears:

"On the other hand, an enabling act of the Legislature, intended to carry into effect a self-executing constitutional provision conferring the right of initiative and referendum, which imposes restrictions on proposed legislation not found in the Constitution, is invalid."

It follows that the appellant cannot prevail in his reliance on § 13309, Pope's Digest, since that section is void to the extent herein stated.

II. *Appellant Insists that Section 9733, Pope's Digest, Defeats the Attempted Referendum.* Sections 9728-33, inclusive, Pope's Digest,[5] are from Act 294 of 1937, which act was an amendment of Act 94 of 1919.[6] The only substantial difference between the 1937 and the 1919 acts was that the 1937 act extended to all municipalities the right to levy occupational taxes—a power which the 1919 act gave only to cities of the first and second classes. Section 6 of the 1937 act is a copy of § 6 of the 1919 act, and is now § 9733, Pope's Digest, and reads:

"Upon a petition signed by fifteen percent. of the qualified electors of said city or town, *as shown by the latest payment of poll tax,* being filed with the clerk or recorder of said city or town, *within thirty days* from the date of first publication of the ordinance, an election shall be called by said city council, board of commissioners or board of aldermen within ninety days from the date of the filing of said petition, and said ordinance shall be referred to the qualified electors of said city or town, and if a majority of the votes cast at such election is against said ordinance, it shall stand repealed. The repealing of any ordinance at an election as provided by this Act, does not prohibit the passage of a new ordinance under the provisions of this Act." (Italics our own.)

The second italicized phrase of this section—*i. e.,* "within thirty days"—limits the referendum time to thirty days; and what we have said in Topic I, *supra,* applies here. The thirty-day limitation is void insofar as this case is concerned.

The first italicized phrase in the above section refers to the number of electors who must sign the referendum petition, and requires 15% of the qualified electors "as shown by the latest payment of poll taxes." But this legislative limitation, on the right for a referendum, must be considered in comparison with Constitutional Amendment No. 7; and the legislative requirement must

[5] These sections may be found in §§ 19-4601, *et seq.,* Ark. Stat. Ann. (1947).

[6] The 1919 act is an amendment of Act 179 of 1917.

yield to the Constitutional guarantee. Section 5 of said Constitutional Amendment No. 7 says:

"... Fifteen percent. of the legal voters of any municipality ... may order the referendum, ... upon any local measures. In municipalities the number of signatures required upon any petition shall be computed *upon the total vote cast for the office of mayor at the last preceding general election;* ..." (Italics our own.)

It is readily apparent that the constitutional amendment allows referendum on a municipal ordinance when the petition contains signatures totaling 15% *of the total vote cast for the office of mayor in the last preceding general election,* whereas the statute (§ 9733, Pope's Digest) requires that there be 15% *of the qualified electors "as shown by the latest payment of poll tax."* Insofar as the statute requires a greater number of voters than the constitutional amendment, to that effect, this statute must fail. In the case at bar it is stipulated that there were 2,956 qualified electors as shown by the latest payment of poll tax; but that there were only 1,884 votes cast for mayor in the last preceding general election. We hold that the language of the constitutional amendment is the governing criterion; and that the referendum petition in this case need contain only the signatures of 283 qualified electors, as that number is 15% of the figure of 1,884—the number of votes cast for mayor in the last preceding general election. The petitions for referendum of ordinance No. 757 contained more than 283 valid signatures, as will appear from the discussion in Topic III, *infra.*

Appellant, in insisting that § 9733 is valid, says:

"The validity of this provision for referendum applying to occupation tax ordinances alone was upheld by the Supreme Court of this State in the case of *Davies* v. *Hot Springs,* 141 Ark. 521, 217 S. W. 769, which held that this section (Act of February 19, 1919, page 82, § 6) is not void as the Legislature *may confer or withhold the referendum and may prescribe the terms on which it may be exercised."*

The case of *Davies* v. *Hot Springs* (cited by appellant in the quotation above) was decided on January 19, 1920, and was based on our former I. & R. Amendment, and not on Constitutional Amendment No. 7 now in force. The first I. & R. Amendment adopted in Arkansas was in 1910, and it was then called "Amendment No. 10."[7] It was so referred to in *Tomlinson Bros.* v. *Hodges,* 110 Ark. 528, 162 S. W. 64, and in *Davies* v. *Hot Springs, supra.* In a re-numbering of constitutional amendments, this 1910 I. &. R. Amendment became "Amendment No. 7," and as so numbered may be found on p. 131 of C. & M. Digest of 1921. The I. & R. Amendment of 1910 did not itself provide for referendum on municipal ordinances, but gave the power to the Legislature to so provide; and the Legislature enacted a referendum for municipal ordinances by Act. No. 2 of the Special Session of 1911 (as found on p. 582 of the printed Acts of 1911). Since, under the 1910 I. & R. Amendment, the Legislature had the power to grant or refuse referendum on municipal ordinances, it follows that the language found in *Davies* v. *Hot Springs* was correct when that opinion was announced. But at the general election on November 2, 1920, the people adopted a new I. & R. Amendment (our present Amendment No. 7), which superseded the 1910 I. & R. Amendment; and in the present Amendment No. 7 the right of referendum on municipal ordinances is directly granted to electors in municipalities, independent of legislative enactment. We have previously discussed this fact. Therefore, *Davies* v. *Hot Springs* is outmoded insofar as the point here at issue is concerned, since it was decided under a constitutional amendment that has been superseded since the decision.

Finally, under this topic, appellant urges that the Legislature, by §§ 9728-33, Pope's Digest, allowed cities to enact an occupation tax subject to a referendum, as stated in those sections, and that the referendum on an occupation tax is entirely different from the referendum on any other ordinance. On this argument appellant insists that § 9733 is valid as a legislative grant of power

[7] See Parallel Reference Table to Amendments, pp. 197-8 of The Ark. Stat. Ann. (1947), as previously mentioned.

to a municipality on an expressed condition for a specific kind of referendum. Appellant says that a city had no right to pass an occupation tax until that power was granted by the Legislature; and that the Legislature, in granting to a municipality the right to enact an occupation tax ordinance, had the right to limit or prescribe the manner in which the ordinance would come into effect or be referred. As supporting this argument, appellant cites *Smith* v. *Plant,* 179 Ark. 1024, 19 S. W. 2d 1022 and *Johnston* v. *Bramlett,* 193 Ark. 71, 97 S. W. 2d 631. These cases are cited but as presenting analogous situations. We find no analogy. *Smith* v. *Plant* was a stock law case, and the question was whether White county could initiate a county-wide stock law or take advantage of a legislative enactment. We held that the initiated Act was not contrary to any general statute in effect in White county. *Johnson* v. *Bramlett* was an attack on the local option liquor law, the claim being there made that the local option law required 35% of the voters, whereas the referendum amendment required a smaller percentage. That case has no bearing here, and is limited to its own situation. The decisive point in the case at bar is, that the Constitutional Amendment No. 7 (in § 5 thereof) reserves to the legal voters of each municipality the right of referendum on all of its municipal legislation; and this referendum power extends to any "bill, law, resolution, ordinance, charter, constitutional amendment or legislative proposal or enactment of any character."[8] The constitutional right of referendum possessed by the citizens of a municipality transcends any attempted legislative restriction; and for that reason appellant cannot prevail in his reliance on § 9733, Pope's Digest.

III. *Appellant Insists that the Referendum Petition Contained Signatures that were not Genuine; and also that the Canvassers were Guilty of Such Frand as to Prevent the Referendum.* To be specific, the proof showed:

(a) that Mr Ballew signed his wife's name on part 6 of the referendum petition; that this part 6 contained

[8] See § 6 of Constitutional Amendment No. 7.

a total of 12 signatures; and that the canvasser who made the affidavit on this part was J. T. Scarry;

(b) that Mr. Bowden signed the names of his wife and two sons on part 9 of the referendum petition; that this part 9 contained a total of 16 signatures; and that the canvasser who made the affidavit on this part was John Thomas;

(c) That James Thomas signed his wife's name on part 14 of the referendum petition; that this part 14 contained a total of 25 signatures; and that the canvasser who made the affidavit on this part was J. T. Scarry; and

(d) that Mr. Reed signed his wife's name on part 17 of the referendum petition; that this part 17 contained a total of 31 signatures; and that the canvasser who made the affidavit on this part was Billy Price.

To summarize: six signatures were shown to be non-genuine; these were on four parts of the referendum petition, which four parts contained a total of 84 signatures. In each of the six cases of the non-genuine signatures it was shown that the signature had been subsequently ratified; but these signatures were non-genuine, and must be stricken under the authority of *Hargis* v. *Hall,* 196 Ark. 878, 120 S. W. 2d 335. Still, when we strike these six non-genuine signatures, there remain 400 genuine signatures, and that number is more than sufficient.

Appellant, however, claims that (a) when a non-genuine signature is shown on a list, and (b) when the canvasser has verified that the signature was made in person, then (c) the entire affidavit of the canvasser is false and all the signatures on the part covered by the affidavit of such canvasser must be stricken. Appellant claims that the case of *Sturdy* v. *Hall,* 201 Ark. 38, 143 S. W. 2d 552, supports his contentions. On the other hand, appellee introduced evidence tending to show that the canvassers had acted in good faith, and that the affidavits concerning the six non-genuine signatures were made without willful intent; and by this line of evidence, appellee seeks to bring the case at bar within the

rule announced in *Sturdy* v. *Hall,* 204 Ark. 785, 164 S. W. 2d 884, in which case we struck only the non-genuine signatures. The facts here make unnecessary any further discussion as to the legal questions. As previously stated in this Topic III, the six non-genuine signatures appeared in parts 6, 9, 14 and 17. Assuming—but not deciding—that we struck all of the signatures contained in these four parts, we would remove a total of 84 signatures; and deducting the 84 signatures from the 406 signatures would leave 322, which number is greater than the required 283.

To overcome this last-stated result, appellant claims that these same canvassers who made the affidavits on parts 6, 9, 14 and 17 of the referendum petition—*i. e.,* the canvassers, Scarry, Thomas and Price—also circulated other parts of the referendum petition and made affidavits on the other parts; and appellant claims that all of the parts (in addition to parts 6, 9, 14 and 17) containing an affidavit of either Scarry, Thomas or Price should be stricken, even though there is no proof that such other parts contained non-genuine signatures. We refuse to follow the appellant's argument to such an extreme position. The proof here shows that there was an honest effort by citizens to obtain a referendum election, and it would defeat the very purpose of the constitutional amendment to allow vague presumptions of fraud to overcome tangible evidence of good faith. In short, appellant cannot prevail on his charges of "forgery and fraud."

Conclusion

We have considered all the assignments urged by appellant, and find the circuit court order to be correct, and it is affirmed. Furthermore, it is made to appear to this court that there is good cause for an immediate mandate in this case (see § 2777, Pope's Digest), and so an immediate mandate is ordered issued.

LEHNHOFF *v.* MAY.

4-8456 209 S. W. 2d 700

Opinion delivered March 29, 1948.

Henry B. Whitley, for appellant.

A. A. Thomason, for appellee.

McHANEY, Justice. Appellant and appellee, Cleo May, own adjoining 40-acre tracts of land, the May tract lying immediately east of appellant's tract. This lawsuit grows out of a dispute as to the correct boundary line running north and south between their respective 40-acre tracts.

Appellant acquired title to her 40 acres from the estate of her father, R. W. McMahen who died in 1942. Appellee May acquired her 40 acres from her father, L. E. Green, the other appellee, in 1934, by deed, and L. E. Green acquired title from the estate of his father, W. D. Green who died in 1926.

A strip of land about 36 feet wide and running north and south the full length of said 40-acre tracts is in dispute. Each party claims that said strip is on her land. On December 19, 1946, appellant sold the timber on said strip to one Sam Bass, Jr., who shortly thereafter cut same. After said timber was cut, but before it was removed, appellee, L. E. Green, acting as agent for his daughter, Cleo May, ordered said Bass not to remove the logs so cut from said strip until a survey of the correct line between the two 40-acre tracts could be made. The complaint of appellant, plaintiff below, alleged the above facts and that said Green caused a survey to be made

which established a line about 36 feet west of the old line between said tracts which had been established by the county surveyor some 25 years ago which old line had been recognized and acquiesced in by the predecessors in title of both parties for more than 25 years and that she had no knowledge or notice of any dispute until said Green interfered as above stated. She plead estoppel. She alleged also the cutting of said logs; that they would be damaged if allowed to remain where cut; that their value was $120 which she tenders into court; and asked an injunction to prevent appellees from interfering with their removal. The prayer was for an injunction to prevent appellees from interfering with her use and enjoyment of said strip of land and that her title be quieted in her.

The answer of appellees admitted the ownership of the two tracts by the parties as alleged. They claimed the ownership of the disputed strip by May and that it had been in her possession and that of her predecessors in title for more than 50 years, such possession being open, notorious and actual, and that neither appellant nor anyone else has ever claimed said strip adversely to her until said timber was sold by appellant. By cross complaint they claimed damages for the wrongful cutting of said timber which was alleged to be worth $200. They asked that Sam Bass, Jr., be made a party and caused to answer. They prayed for a dismissal of the complaint, for the recovery of damages and the quieting of May's title to said strip.

Bass answered admitting the cutting of said timber, that he paid $120 for it and that it cost him $40 to have it cut. He prayed judgment for $160 against Green if appellant should win, and the same amount against appellant if Green should win.

Trial resulted in a decree dismissing appellant's complaint for want of equity, and that Sam Bass recover from her $120, appellees and Bass to recover their costs. It appears from the record that appellant has paid and satisfied the record of the judgment against her.

It appears that Mr. McMahen, from whom appellant deraigns the title to her 40 acres, built a fence on the east side of said tract on or near what he thought was the true line between the two tracts. Appellant contends for a reversal that the true line was established by Louis Pope, county surveyor, in 1920, and that appellees have acquiesced therein all this time, so that the line so established becomes the agreed line. This survey was not certified to by Pope. He filed no plat or other instrument showing such survey. It was testified to that a stob driven in the ground marked the southern extremity of said line. Reliance is placed on the testimony of one Dennis who carried the flag for Pope's survey. This witness testified that the purpose of the Pope survey was to establish the line between the May 40 and the 40-acre tract adjoining her 40 on the south, and not to establish a line between appellant and appellee May.

It also appears that after the present dispute arose appellee Green had W. M. Jack, the present county surveyor, establish the line between the disputants and that it was west of the McMahen fence built several years ago.

We think the question was one of fact. The evidence was in dispute as to whether the true line was east or west of the McMahen fence. Appellants contend that it was east and appellees that it was west of said fence. The Jack survey located it west. While the court did not establish a line, it did find that appellant was not the owner of the timber on the strip east of the fence and gave Bass a judgment against her for $120 which she has paid.

After carefully considering all of the evidence we are unable to say that the decree is against the preponderance of the evidence, so it must be and is affirmed.

CYPRESS RIDGE SCHOOL DISTRICT NO. 3
v. MORRIS.

4-8422 209 S. W. 2d 689

Opinion delivered March 29, 1948.

K. T. Sutton, for appellant.

W. M. Lee, for appellee.

GRIFFIN SMITH, Chief Justice. Appeal is from action of Circuit Court in dismissing proceedings whereunder Russell Morris and other taxpaying electors of Cypress Ridge School District successfully contested an election.

A proposal to consolidate with Brinkley School District B resulted, *prima facie,* in a majority of four votes against the plan. Upon review by the County Board of Education it was ascertained that six of the opposition ballots were illegal, hence the issue had carried.

Cypress Ridge, through Waggoner and others, within 30 days filed notice of appeal, but did not tender or propose to execute the bond required by Act 183 of 1925. One of the provisions of this Act is that as a condition of appeal where neither money nor property is involved, penalty shall be "a sum sufficient to protect the appellee and the County Board of Education from payment of cost, which amount shall be indorsed by the Secretary of the Board of Education, on the affidavit of the appellant in such sum to be fixed by [the Board]".

In *McLeod, County Judge* v. *Richardson,* 204 Ark. 558, 163 S. W. 2d 166, Act 183 of 1925 is pointed to as the applicable statute affecting appeals such as we are dealing with. Appellant, however, thinks a change was made

by Act 111 of 1943. It amends § 11475 of Pope's Digest. But Act 111, by § 1, amends § 11473 of the Digest, and is applicable to districts with fewer than ten pupils where terms for the two preceding years were not less than 120 days, hence it does not solve appellants' problem.

Final argument is that § 8476 of Pope's Digest affords relief. It is a part of Chapter 96 of the Digest and applies to appeals from Justice of the Peace Courts. The express provision requiring appeal bonds in school election contests (except as limited by the Act of 1943) is controlling, and is jurisdictional. It follows that the Court did not err in dismissing the appeal.

Affirmed.

JUTSON AND WINTERS *v.* STATE.

4484 209 S. W. 2d 681

Opinion delivered March 29, 1948.

Hugh M. Bland, for appellants.

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

MINOR W. MILLWEE, Justice. Appellants, Eddie Jutson and Oma Winters, were charged by information in the circuit court with the crime of assault with intent to kill, alleged to have been committed upon Halton Rust. On the trial of the case before a jury appellants were convicted of an aggravated assault and their punishment fixed at a fine of $1,000 and imprisonment in the county jail for one year.

Appellant, Oma Winters, is the wife of Charlie Winters, who operates a tire shop in the city of Fort Smith, Arkansas. The parties had been separated for some time prior to the transactions involved herein. Halton Rust had been employed at the tire shop for 14 years and resided with his family at North 5th Street in Fort Smith.

Mr. and Mrs. Rust testified that they were sleeping in the rear of their home on the night of August 19, 1947, when they were awakened by appellant, Eddie Jutson, who informed Mr. Rust that Charlie Winters was outside and wanted to see him. Rust dressed and walked with Jutson to a car parked in front of the Rust home. Appellant, Oma Winters, was in the front seat of the car and the back door was open. Jutson told Rust to get in the car and when he refused, Jutson drew a .45 caliber automatic pistol from his pocket and fired four shots at Rust while the latter was "dodging and ducking" and before he grabbed the gun. In the scuffle that ensued, Rust got hold of the gun and fired the remaining three shots in the air and the pistol then dropped to the ground. While Jutson and Rust were wrestling on the ground, appellant, Oma Winters, picked up the gun and struck

Rust with it about the head and face. Appellants then got in the car and drove away.

Two witnesses who lived nearby testified about hearing the shooting and of bullets entering their homes. A physician who attended Rust described the wounds on his head and face and a powder burn on his finger.

The mother of Charlie Winters, husband of appellant, Oma Winters, testified that her son was living with her at the time of the difficulty; that shortly before 10 p. m. on the night in question appellant, Eddie Jutson, came to her home and inquired as to the whereabouts of Charlie Winters; that Jutson had a pistol in his hand and she informed him that her son was out of town; and that she saw appellant, Oma Winters, waiting in her car for Jutson when he left the house.

Oma Winters testified that all the household goods were taken from her home on Towson Avenue on the night of August 17, and that she had concluded that her husband and Halton Rust were the guilty parties. The tire shop and the home of her mother-in-law had been searched on warrants sworn out by her, but the property had not been found. She stated that the purpose of the visit to the home of Halton Rust was to ask him about the property.

Both appellants testified that, when Jutson and Rust came to Oma Winter's car, Jutson opened the front door and Rust grabbed the pistol which was lying on the front seat. In the struggle that followed between Jutson and Rust for possession of the gun, several shots were fired and Oma Winters finally wrenched the gun from the hand of Rust. They also testified that the first shots were fired by Rust and that neither of them shot at Rust nor struck him with the gun. Jutson admitted that, in response to an inquiry by Rust, he gave a fictitious name and falsely represented to Rust that his employer, Charlie Winters, was in the car and wanted to talk to him. In this connection he testified, "I knew that it wouldn't do, if I told him Mrs. Winters was out there."

Appellants do not urge the insufficiency of the evidence to support the conviction for aggravated assault.

However, it is contended that the trial court erred in the admission of incompetent and prejudicial testimony entitling appellants to either a new trial or a material reduction of the punishment, which they insist is excessive.

Over the objections of appellants, the State was permitted to cross-examine appellant, Jutson, concerning his association with Oma Winters prior to the commission of the alleged offense. Jutson testified that he had known the co-defendant about two years and that they had made extended trips to California, Texas and Oklahoma in her automobile prior to August, 1947. It is argued that this evidence was incompetent and resulted in the conviction of appellants for their indiscretions rather than the offense with which they were actually charged.

We think this evidence was competent. This court has repeatedly held that it is proper to interrogate a defendant, or other witness, on cross-examination, touching his recent residence, occupation and associations, as affecting his credibility as a witness. *Hollingsworth* v. *State,* 53 Ark. 387, 14 S. W. 41; *Hughes* v. *State,* 70 Ark. 420, 68 S. W. 676; *McAlister* v. *State,* 99 Ark. 604, 139 S. W. 684; *Sweency* v. *State,* 161 Ark. 278, 256 S. W. 73.

Cases cited by appellants in support of their contention that the evidence is prejudicial do not involve the admissibility of evidence produced on cross-examination of a witness, but deal with a situation where independent testimony of defendant's associations with third parties is offered by the State to impeach the character of the accused. Typical of such cases is *Mays* v. *State,* 163 Ark. 232, 259 S. W. 398, where it was held (Headnote 2): "While accused, on his cross-examination, could be asked as to his recent residence, occupation and associations, as affecting his credibility, his answers as to these collateral matters, whether true or false, concluded inquiry, and independent testimony on the subject of accused's associates was inadmissible, where there was no attempt to prove a conspiracy between himself and such persons."

This distinction between independent testimony offered by the State in its testimony in chief and the

cross-examination of defendant was also recognized in the case of *Ware* v. *State,* 91 Ark. 555, 121 S. W. 927, upon which appellants also rely. Speaking of the testimony of the defendant in that case, the court said: "As a witness in the cause, he could have been cross-examined; and upon his cross-examination, like any other witness, he could have been asked as to specific acts for the purpose of discrediting his testimony as a witness." In *Hollingsworth* v. *State, supra,* the court said: "The right to impair the evidence of a witness by cross-examination must not be confounded with the right to impeach a witness by evidence introduced by the opposite party. The former may be exercised within a more extended range than the latter." The State did not attempt to impeach the character of appellants by independent testimony and the trial court instructed the jury that they should only consider testimony of their prior association, which was adduced upon cross-examination, as affecting credibility. The testimony was relevant and competent for this purpose.

It is also insisted that the testimony of Mrs. Charlie Winters, mother-in-law of Oma Winters, concerning the visit of appellants to her home shortly before the alleged assault upon Rust was immaterial and prejudicial to appellants. Evidence of the relations existing between the accused and an accomplice, or co-defendant, prior to the crime is generally held to be admissible by the courts. 22 C. J. S. Criminal Law, § 608. Appellants were charged jointly and it is the theory of the State that they were acting in concert in the assault upon Rust. Evidence of their joint actions and association immediately prior to the alleged assault upon Rust was admissible for this purpose.

On cross-examination of appellant, Oma Winters, the prosecuting attorney asked the witness if it were not a fact that she and Jutson were jointly indicted for a felony known as adultery in the State of Oklahoma. The objection of appellants to this question was promptly sustained by the trial court and the jury were admonished not to consider the question in passing on the guilt or innocence of appellants. The question was im-

proper, and if the witness had been permitted to answer, reversible error might have resulted. *Johnson* v. *State,* 161 Ark. 111, 255 S. W. 571; *Wray* v. *State,* 167 Ark. 54, 266 S. W. 939. We think the action of the trial court removed any prejudice resulting from the unanswered question.

Appellants also say the punishment is excessive. It was the peculiar province of the jury to weigh the testimony of the witnesses. If the jury believed the testimony of witnesses for the State, appellants were guilty of a violent, unprovoked and inexcusable attack upon the prosecuting witness with a deadly weapon. While the punishment inflicted is severe, it is authorized by the statute (Pope's Digest, § 2960) and this court will not, under the circumstances, reduce the punishment assessed by the jury. *Hall* v. *State,* 113 Ark. 454, 168 S. W. 1122; *Daugherty* v. *State,* 130 Ark. 333, 197 S. W. 576; *Wagner v. State,* 183 Ark. 1153, 37 S. W. 2d 86.

The judgment is affirmed.

BOOKOUT *v.* REYNOLDS MINING COMPANY.

4-8443 209 S. W. 2d 881

Opinion delivered April 5, 1948.

Bob Ragsdale and *Jno. S. Gatewood,* for appellant.

Buzbee, Harrison & Wright, for appellee.

GRIFFIN SMITH, Chief Justice. Omar S. Bookout was injured June 9, 1943, while employed by Reynolds Mining Corporation. Appeal is from Circuit Court's action in affirming refusal of Workmen's Compensation Commission to reopen an award, and to compensate upon the basis of total permanent disability. Section 13(a), Act 319 of 1939.

The impairment occurred when Bookout was struck by a falling boulder, causing fractures of the left ankle and right thigh bones. The right knee joint was also involved. Treatment and examinations continued for 12 months. During that time medical, surgical, and hospital expenses were paid by the employer.

November 8, 1943, Bookout was assigned new duties by Reynolds, receiving the same hourly wages as when mining. This employment continued until April 20, 1944. During the so-called healing period—in this case twenty-one weeks and four days—the employer's insurance carried paid at the maximum compensation rate of $20 per week. After November 8 such payments were continued, but were charged against a tentative presumption of permanent partial disability, finality to await findings by physicians and surgeons. This occurred June 23, 1944, when Dr. Joe F. Shuffield[1] concluded there would probably be no further appreciable improvement. His belief was that the ankle injury accounted for disability equal to 33 1/3 or 40%. Permanent malfunctioning of the right knee was thought to be 25 to 33 1/3%, affecting use of the right leg to that extent.

This information was given Bookout, who a week after discharge reported to Dr. D. T. Cheairs, medical examiner for the Commission. It was Dr. Cheairs' opinion that injury to the left ankle was equal to a sixty per-

[1] Dr. Shuffield is accepted in medical circles as one of the South's leading authorities as a diagnostician and bone surgeon.

cent impairment of the foot, and that the right knee injury caused a fifty percent disability to the right leg.

October 23, 1944, in consequence of personal appearances before the Commission, Bookout procured approval for settlement of his claim in a "lump sum", as provided for by § 19(j) of the Compensation Act. October 31, 1944, Liberty Mutual Insurance Company paid $2,157.19. The receipt shows that total payments of $3,588.62 were made.

Acting under § 26 of the Compensation Law, which permits review of awards within six months from termination of the compensation period, Bookout alleged the jurisdictional ground that there had been a change in his condition, and petitioned for reconsideration and classification as one permanently and totally disabled. His theory was that the two injuries, when considered together, affected bodily activity, locomotion, and utility to an extent justifying the Commission to act in disregard of that part of the compensation statute which expressly fixes benefits for loss of the use of members of the body.

During September 1944 Bookout was admitted to Army and Navy Hospital at Hot Springs and there examined. A letter from the adjudication officer shows that the patient was rated as totally disabled, beginning September 6, 1944.[2] Dr. Walter Carruthers of Little Rock made an examination. He thought Bookout was totally disabled "as far as his ability to be a miner is concerned". Testimony was given by another physician, and by neighbors who had observed the claimant's condition.

Against these views were opinions by Dr. Shuffield, who reëxamined, and by Dr. Ralph A. Law, a roentgenologist. Dr. Shuffield did not think there had been material changes in Bookout's condition subsequent to the report of June 23, 1944.

[2] The pension granted Bookout is authorized by Congress and may be payable in an amount varying from $60 to $72 per month for permanent total disability "not the result of his own willful misconduct or vicious habits and which is not shown to have been incurred in any period of military or naval service".

Appellant testified that his impairment came from the two injuries previously dealt with. He felt, however, that they were growing worse because the pain was greater, and he was not able to engage in protracted physical work.

It is affirmatively shown by the record that, although Bookout was not initially represented by an attorney, the Commission gave to the case the same unbiased consideration it would have extended if the claim had been presented by a lawyer. The issue is one of fact — fact determined against the petitioner on competent testimony given by highly skilled men who could have no purpose in minimizing degrees of disability. There is the contention that appellant relied upon Dr. Shuffield's prognosis, and that it was erroneous. The Commission believed Dr. Shuffield and Dr. Law. This they had a right to do, for the evidence was substantial. "Findings of the Commission on factual questions are as binding on the courts as are the verdicts of juries." *Andrews* v. *Gross & Janes Tie Co.*, 211 Ark. 999, 204 S. W. 2d 783.

Affirmed.

PORTIS *v.* BOARD OF PUBLIC UTILITIES, LEPANTO.
LEPANTO *v.* GOLDSBY.

4-8438 209 S. W. 2d 864

Opinion delivered April 5, 1948.

[redacted]

John S. Mosby, for appellee.

Willis Townsend, amicus curiae.

HOLT, J. Lepanto, Arkansas, is an incorporated town, owning its water and sewer systems (originally constructed by improvement districts), which are now free of all debts.

Proceeding under Act 95 of the Acts of the Legislature of 1939, a Board of Public Utilities was created and at all times since its creation, has had the sole and exclusive control of the maintenance, enlargement and operation of the water and sewer systems of Lepanto. Finding it necessary to enlarge and extend the two systems, proceedings were begun by the Board of Public Utilities (hereinafter called the Board) to use $2,532.45 of revenues in its hands, and by resolution, said Board sought to issue revenue bonds in the amount of $80,000 to make these improvements.

At the same time proceedings were instituted, before the Town Council of Lepanto (hereinafter called the Town), and an ordinance was enacted to accomplish the same purpose as that undertaken by the Board.

For the purpose of determining whether the authority to issue the proposed bonds was vested in the Board or in the Town, T. B. Goldsby, a property owner, filed suit against the Town and its officers, and D. F. Portis, another property owner, filed a separate suit against the Board. In each of said suits it was sought to enjoin the issuance of the bonds.

Goldsby, in his complaint, alleged, in effect, that the power to issue the bonds rested with the Board of Utilities and not with the Town. The Town's answer was, in effect, a denial that it did not have the authority to issue the bonds. A demurrer to this answer was sustained. The Town elected to stand on its answer, whereupon the court entered its decree granting the injunctive relief prayed and the Town has appealed.

Portis' action was against the Board of Public Utilities of Lepanto, Arkansas, and he alleged, in substance, that the power to issue the revenue bonds in question rested with the Town of Lepanto and not with the Board. The Board answered and in effect denied that it did not have the authority to issue the bonds. A demurrer to this answer was filed and overruled, whereupon the plaintiff, Portis, elected to stand upon his demurrer, refused to plead further, the court dismissed his complaint for want of equity and he has appealed.

The causes were consolidated by the trial court.

On this appeal, the question presented is whether the Board of Public Utilities of the incorporated town of Lepanto, Arkansas, or the Town Council of Lepanto had the right to issue revenue bonds, secured by a pledge of future revenues to pay for certain improvements and extensions to the water and sewer systems of said incorporated town, both of which are now operated by the Board of Public Utilities, and free of debt.

We have reached the conclusion, for the reasons presently to be pointed out, that the sole authority to issue the revenue bonds, here in question, rested with the incorporated town of Lepanto and not with the Board of Utilities.

It is undisputed that until the enactment of Act 95 of 1939, the power to issue these revenue bonds was in the Town under Acts 131 and 132 of 1933, and unless this authority has been taken away from the Town and given to the Board, by Act 95, then the power to issue the bonds must, and does, remain in the Town.

Among the provisions of Act 95 are the following: Section 1 provides that the Board of Public Utilities "... have the sole and exclusive control of the maintenance, enlargement and operations of such plants, subject to the following provisions and conditions; provided this Act shall not apply to such Districts that have outstanding bonds unpaid."

"Section 4. Said Board of Public Utilities may, in their discretion, from time to time, make such enlargement or enlargements of said plants and systems and such extensions of the lines thereof as may be necessary to serve the residents of said city or town with electric lights, electric power, water or sewerage, whether the area to be so serviced shall be included in any such improvement district or not; provided, that no additional tax shall be levied upon the property within such improvement district or districts, but the funds for such purpose may be contributed in whole or in part by outside agencies, or by the persons to be benefited, or in the discretion of the Board, may be taken from the net revenue coming into its hands."

"Section 25. Said Board of Public Utilities shall have the right to fix the rates to be charged for the service to be rendered by any and all plants or sewerage systems under its jurisdiction and may do and perform all things necessary to enforce the collection of the same and shall do any and all things necessary to the successful operation and maintenance of said electric light plants, water plants or sewerage systems."

"Section 28. Any profits derived by any of the Boards of Public Utilities created under this Act, after there has been set aside from the earnings a sum sufficient to pay all outstanding indebtedness of the plants or sewerage systems under the control of said Board and

a sum sufficient to provide for expenses, extensions and enlargements found necessary, or which may be reasonably anticipated, shall be used by said Board to retire any outstanding Bonds or interest thereon issued by any of the Boards of Improvement of the Districts constructing the plants under its control. And in case there are no such outstanding bonds or interest or when all of such outstanding Bonds and interest thereon shall have been paid such profits shall be paid to the Treasurer of the City or Town wherein such Board is created to be by the Board of Aldermen of said City or Town used to defray any expense or pay any debt of said City or Town."

We have found no provision whatever in Act 95, which by express words, by implication, or otherwise, gives to the Board the authority which it claims, to issue these bonds. Had the Legislature desired, or intended, that the Board should have such power, it would have been an easy matter to have expressly so provided in the Act, and this it did not do.

The general rule is well established that municipal corporations, or their officers, departments or subdivisions are creatures of the statute and possess and can exercise only such powers as are granted in express words by such statute, or those necessarily or fairly implied, or incident to the powers expressly conferred, or those powers which are essential or indispensable to the accomplishment of the declared purposes of the corporation.

In *Bain* v. *Fort Smith Light & Traction Company,* 116 Ark. 125, 172 S. W. 843, L. R. A. 1915D, 1021, this court said: "A municipal corporation has no powers except those expressly conferred and those fairly implied for the attainment of declared purposes," and in *Cumnock* v. *City of Little Rock,* 154 Ark. 471, 243 S. W. 57, this court said: "In *Ottawa* v. *Carey,* 108 U. S. 110, 2 S. Ct. 366, 27 L. Ed. 669, the Supreme Court of the United States, speaking through Chief Justice WAITE said: 'Municipal corporations are created to aid the State Government in the regulation and administration of local affairs. They have only such powers of government as are

expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established. 1 Dill. on Mun. Corp., 3 Ed., par. 89, and cases there cited. To the extent of their authority they can bind the people and the property subject to their regulation and governmental control by what they do, but beyond their corporate powers their acts are of no effect.

"On the same point in Dillon on Municipal Corporations, 5th Ed. vol. 1, par. 237 (89), it is said: 'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.'

"The principle laid down above is one of universal application throughout the United States and has been recognized and applied by this court in several cases according to the particular facts of each case." See, also, *Bennett* v. *City of Hope,* 204 Ark. 147, 161 S. W. 2d 186.

In *Detroit Citizens' St. Ry. Co.* v. *Detroit Ry.,* 171 U. S. 48, 18 S. Ct. 732, at p. 734, 43 L. Ed. 67, the Supreme Court of the United States announced the rule in this language: "The power, therefore, must be granted in express words or necessarily to be implied. . . . Municipal corporations possess and can exercise only such powers as are 'granted in express words, or those necessarily or fairly implied, in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.' . . . This would make 'necessarily implied' mean inevitably implied. The Court of Appeals of the Sixth Circuit, by Circuit Judge Lurton,

adopts Lord Hardwicke's explanation, quoted by Lord Eldon in *Wilkinson* v. *Adam,* 1 Ves. & B. 422, 466, that 'a necessary implication means not natural necessity, but so strong a probability of intention, that an intention contrary to that, which is imputed to the testator, cannot be supposed.' ''

In the circumstances here, it cannot be logically or successfully contended that the power of the Board to issue the bonds was a necessary or indispensable one for the reason that the Town had ample power to issue the bonds under Acts 131 and 132 of 1933, *supra,* and as indicated, this power was not taken away from the Town by Act 95.

Of strong significance is the fact that the Legislature refused to grant to the Board the right to use the profits of these plants for the security of future bond issues, but specifically directed (§ 28, *supra,*) that such profits should be paid to the Treasurer of the City or Town, wherein such Board is created, to be ''used to defray any expense or pay any debt of said City or Town.''

Clearly we think it was the intention of the Legislature under Act 95 that Cities or Towns should still have the sole right to issue bonds under Acts 131 and 132 of 1933, *supra,* and realizing that municipalities would need the revenues from these plants to secure any bonds that might be issued by the municipalities, themselves, and for other purposes, the Legislature intended that the sole power to issue such revenue bonds should rest with the municipality.

Of much significance also is the following provision in § 29, *supra,* which specifically denies to the Board the right to mortgage or create a lien upon the plants under its control. ''No Board of Public Utilities created under the terms of this Act shall ever have the right to sell, mortgage, or create any lien whatsoever upon any of the plants under its jurisdiction, etc.''

It must also be noted that no additional tax could be levied upon the property within the improvement district to pay for any enlargements or extensions. Section 4, *supra,* so provides. Thus clearly it appears from

the provisions of § 4 that three methods were provided for funds by which the Board might pay for any enlargements or extensions of the two systems under its control. First, such "funds . . . may be contributed in whole or in part by outside agencies," such as federal grants, gifts, or aid from the municipality from funds on hand or from a revenue bond issue. Second, by contributions from "persons to be benefited." By this the clear intention seems to be, while no tax could be levied to make the improvements, yet if the property owners, desiring them, desired to pay the costs themselves, the Board was empowered to accept such contributions for the purpose of making the improvements, and third, the Board in its discretion, may take funds "from the net revenue coming into its hands" to make the improvements.

In short, we hold that Act 95, *supra,* did not confer upon the Board of Utilities here the power to issue revenue bonds; that, being a creature of the statute, the Board had only such powers as were expressly, or impliedly given to it by the Legislature, and that it was the clear intent of the lawmakers that only one municipal authority, the municipality itself, should have the power to issue these revenue bonds.

Since, however, § 1 of Act 95 specifically provides that the Board was "to have the sole and exclusive control of the maintenance, enlargement and operations of such plants," the water and sewer systems, it would be appropriate for the Board, when it has determined that it would be to the interest of the Town to enlarge or extend these systems, which improvements it is unable to make out of the revenues in its hands, to make this fact known to the Council of the Town of Lepanto with its (Board's) recommendation and request that the Town take the necessary steps to issue and sell revenue bonds to secure the funds for the Board to enable it to make the proposed improvements.

Accordingly, the decree is reversed with directions to proceed in a manner not inconsistent with this opinion.

See 212 Ark. 822, 208 S. W. 2d 772.

4-8516 209 S. W. 2d 868

Opinion delivered April 5, 1948.

Harold Sharpe, for petitioner.

MINOR W. MILLWEE, Justice. This is an original proceeding in this court by petitioner, Emanual Adams, for a writ of mandamus to require the Judge of the First

Judicial Circuit to act upon a motion for new trial filed by petitioner in the Circuit Court of St. Francis County.

It appears from the record that petitioner entered pleas of guilty to three separate charges of burglary and grand larceny in circuit court on September 17, 1947. On September 26, 1947, respondent sentenced petitioner to a term of four years for burglary and two years for grand larceny on each of the three joint charges, the sentences in the three cases to run concurrently. On October 3, 1947, a penitentiary commitment was issued. On December 17, 1947, petitioner, through his attorney, filed a motion in the circuit court to set aside the order of September 26, 1947, sentencing him to six years in the penitentiary, and the commitment issued thereon.

It was alleged in the motion that petitioner was 19 years of age and had never been previously convicted of a crime; that he was not financially able to employ an attorney and the court did not appoint an attorney to represent him; that the trial court did not question him concerning his age and educational background and was not in position to exercise proper discretion in determining whether petitioner should be committed to the State Penitentiary or the Boys' Industrial School; that Thomas Miller, a co-defendant in the cases, who was 18 years of age, was permitted to re-open his case before commitment to the penitentiary and was given a suspended sentence after he made restitution to the injured parties and it was shown that he did not have a prior criminal record.

It was further alleged in the motion that petitioner had been deprived of his liberty without due process of law in that he was not represented by counsel and had not been given an opportunity to present facts which would entitle him to clemency; and that the court acted erroneously in sentencing him to the penitentiary.

Petitioner offered no proof in support of the motion to set aside the order and commitment and same was denied by the trial court on December 17, 1947, and exceptions duly saved. On the same date petitioner filed a motion for a new trial which the trial court refused

to act upon because same was not filed "in appointed time."

While the record fails to show that petitioner excepted to the refusal of respondent to act on the motion for new trial, and is deficient in other respects, we treat the court's action as tantamount to overruling the motion for new trial and this proceeding as an appeal from the action of the court in denying petitioner's motion to vacate and set aside the order sentencing him to the penitentiary and the commitment issued thereon. In determining whether the trial court erred in denying the motion to vacate we may only look to the allegations set out therein.

We have a statute (§ 3902, Pope's Digest) which provides that the court may permit a plea of guilty to be withdrawn, and a plea of not guilty substituted, at any time before judgment. While we have no statute relating to withdrawal of guilty pleas after rendition of judgment, the trial court has power to set aside its judgment at any time before expiration of the term. This court has often held that permission to withdraw a plea of guilty previously entered is a matter that rests in the sound discretion of the trial court, and its action will not be reviewed unless it clearly appears that such court has abused its discretion. We have also said that every presumption must be indulged in favor of the trial court's proper exercise of its discretion. *Joiner* v. *State,* 94 Ark. 198, 126 S. W. 723; *Duncan* v. *State,* 125 Ark. 4, 187 S. W. 906; *McClain* v. *State,* 165 Ark. 48, 262 S. W. 987; *Barnes* v. *State,* 190 Ark. 1061, 83 S. W. 2d 58.

It will be observed that petitioner has never contended that he is innocent of the several charges to which he pleaded guilty, nor has he ever requested that he be permitted to withdraw the guilty pleas. The motion alleges that he was not represented by counsel, but it is not alleged that he requested counsel, nor that he was not advised of his right to counsel under the statute (§ 3877, Pope's Digest). There is neither allegation nor proof that petitioner was improperly induced to enter

a plea of guilty and the record shows that he was advised by the court of the nature of the charges and the legal consequences of such plea. The essence of petitioner's contention in the motion is that the trial court should have re-opened the case and either sentenced petitioner to the Boys' Industrial School or given him a suspended sentence, since this form of clemency was extended to the younger co-defendant.

Under § 12919 of Pope's Digest, it is optional with a trial judge, in the exercise of his sound discretion, whether persons under the age of 18 years convicted of a felony shall be sent to a reform school or the State Penitentiary. *Bohannon* v. *State,* 160 Ark. 431, 254 S. W. 683. Inasmuch as petitioner was over 18 years of age at the time he entered his plea of guilty it was not within the court's discretion to sentence him to the Boys' Industrial School instead of the penitentiary.

In the case of *Cox* v. *State,* 114 Ark. 234, 169 S. W. 789, the defendant entered a plea of guilty to a felony at one term of court and the cause was continued until the corresponding term of the following year. At that term defendant filed a petition to set aside and withdraw his plea of guilty alleging that he was forced to trial without counsel which he was unable to employ and entered the plea when he was not in fact guilty. After hearing testimony, the trial court denied the petition and sentenced defendant to the penitentiary. On appeal the judgment was affirmed and Justice Wood, speaking for the court, said: "The statute provides for the appointment of counsel upon the request of one who has been indicted for a felony where he is unable to employ any. Kirby's Digest, § 2273. Appellant made no request for the court to appoint counsel to defend him. On his motion to set aside the plea of guilty, he did not offer to introduce any testimony that tended to prove that he was not guilty of the crime charged, and his testimony was not sufficient to show that he was induced to enter a plea of guilty under a misapprehension of the facts. His plea of guilty was entered voluntarily, and there is nothing in the record to show that the plea was improperly entered. It was within the discretion of the court,

under the evidence adduced, to allow appellant to withdraw his plea of guilty entered at a former term, or to refuse to allow him to do so. There was no abuse of the court's discretion. *Joiner* v. *State,* 94 Ark. 198, 126 S. W. 723."

Petitioner argues that a "paradoxial" situation exists in this case in that he was charged as an accessory after the fact and sentenced to the penitentiary, while the co-defendant was charged as principal and has been given a suspended sentence. The record does show that petitioner was charged as an accessory after the fact and found guilty as a principal, but this is permissible under the statute (§ 25, Initiated Act No. 3 of 1936, Acts of Ark. 1937, p. 1384). The authority to grant or refuse suspended sentences is in all cases within the sound discretion of the trial court under Act 262 of 1945. The co-defendant was nearly two years younger than petitioner and there may have been many other factors which warranted the trial court in granting a suspended sentence to one defendant and refusing it as to the other.

Since we have concluded that the trial court did not abuse its discretion in denying petitioner's motion to vacate the judgment imposing the sentence and the commitment issued thereon, the petition for writ of mandamus will be denied. It is so ordered.

BRUNDIDGE *v.* O'NEAL.

4-8474 210 S. W. 2d 305

Opinion delivered April 5, 1948.

Rehearing denied May 10, 1948.

John P. Vesey and *Graves & Graves,* for appellant.

Weisenberger & Pilkinton, for appellee.

ROBINS, J. This appeal presents a controversy as to a strip of land 25 feet long and 9.7 feet wide in Block 37, in the business district of Hope, Arkansas. Appellants, J. P. Brundidge, Lois B. Shull, Minnie Brundidge, Walter B. Jones and Mrs. Walter B. Jones, his wife, and Eleanor Jones Gibson, owners of adjacent property, asserting that they and the public had a prescriptive right to use this tract as an alley, brought suit in the chancery court against appellee, N. P. O'Neal, holder of title to the tract by conveyance, and others, to enjoin the appellees from closing same. The City of Hope and other parties interested intervened and joined in the prayer of said appellants. On motion of appellee, N. P. O'Neal and his wife, the widow and heirs of John D. Barlow, deceased, were made parties, it being alleged that the said John D. Barlow had conveyed the entire parcel to Norris O'Neal, through whom said appellees deraign their title, by warranty deed; and said appellees asked for judgment against the widow and heirs of said John D. Barlow for the value of the disputed area in event it should be held that said appellees did not own same.

The lower court found that the tract in dispute did not constitute an alley, denied appellants' prayer for an

injunction and quieted title in appellees, N. P. O'Neal and wife. The court also found that the heirs of John D. Barlow were the owners of the brick wall situated on the north side of their building immediately south of the tract in dispute and confirmed their title thereto. The pleadings presented no dispute as to ownership of this wall, but this issue apparently arose after introduction of some testimony to the effect that a measurement of 115 feet back from the north line of the O'Neal property would place the south line thereof some inches over in the Barlow wall. By appeal and cross-appeal both findings of the court below have been brought here for review.

It is admitted that appellees, N. P. O'Neal and wife hold record title to a parcel of land in the northeast corner of Block 37 fronting twenty-five feet on Second Street and running south along Main Street 115 feet. The original building, a bank building erected in 1892, extended back from Second Street 90 feet. An extension carrying this building about ten feet further south was built in 1907; and this left a vacant space, approximately 9.7 feet wide, between the south wall of the bank building and the north wall of the "Barlow" building which fronted on Main Street south of the bank property. This space is the east end of what appellants contend is an alley or thoroughfare extending east and west entirely through the block.

On the official plat of the city no alley is shown at this location, the only alley in this block shown on the plat being one 20 feet wide and running north and south through the block, from Second Street to Third Street. (The streets and lot lines in Hope do not run exactly east and west or north and south, the city having been laid off with reference to the railroad, which runs through Hope from northeast to southwest; but, for brevity, we refer to lines and directions as north and south and east and west.)

None of the buildings in this block fronting on Second Street extend back the full length of the lots conveyed to the owners, but the vacant ground left at the

rear has varied from time to time as buildings were built or extended; and this space was not of uniform width at the time this suit was filed. The alley shown on the plat and other public alleys in the business district are paved, but the strip in dispute here has never been paved or otherwise improved.

It was not alleged that the area claimed as an alley had ever been formally dedicated as such, either by plat or deed; but the contention of appellants was that they and the public generally, by long continued use of this tract as a way, had acquired a prescriptive right to such use thereof.

There was much proof to show that this alleged alley had for more than thirty years been used as a means of access to the adjoining property. Appellees did not deny this use by the public and the adjoining property owners, but they contended that the use was permissive and not adverse.

On August 18, 1908, at the instance of the then owner of the parcel of land owned now by appellees O'Neal and wife, the City Council of Hope adopted the following resolution:

"Be It Resolved by the City Council of the City of Hope, Arkansas, as follows: Whereas the alley at the south end of the Hempstead County Bank building running east and west parallel with East Second Street and intersecting Main Street just south of the Hempstead County Bank building and the brick building now occupied by the Star of Hope, in Block 37 of the original plat of Hope, Arkansas, has never been dedicated by the rightful owners thereof and is not shown as an alley on the town plat; and, whereas, the said alley is now being used by the general public and by private individuals as a public alley and right-of-way; and, whereas, Hempstead County Bank who is now the rightful owner of the property and premises upon which said alley as above set forth is located and over which it runs, desires to hold said alley and right-of-way as its private property and desires to avoid losing said property on account

of the Statute of Limitations running against it; and, whereas, it is the sense of the Council that the facts and statements herein set forth are true and correct, now, therefore, be it resolved by the City Council of the City of Hope, Arkansas, that said alley and right-of-way be recognized and treated as the private property of Hempstead County Bank, that its further use as a public alley and right-of-way by the public or individuals will be by and through the permission of said owner; that this resolution be made a part of the minutes and council proceedings." A certified copy of this resolution was filed and recorded in the office of the Recorder of Hempstead County on January 25, 1913.

In the case of *Bridwell* v. *Arkansas Power & Light Company,* 191 Ark. 227, 85 S. W. 2d 712, we said: "The rule is well established in this state that the long continued use by the public of a way over unoccupied, uninclosed and unimproved real estate is not presumptively adverse, but on the contrary is presumed to be permissive." Other cases in which this rule has been applied are: *Boullioun* v. *Constantine,* 186 Ark. 625, 54 S. W. 2d 986; and *LeCroy* v. *Sigman,* 209 Ark. 469, 191 S. W. 2d 461.

So here the burden was upon appellants to show that the use of the way involved herein was adverse to the rights of the owner and that such use was not exercised under permission of the owner.

The resolution adopted by the City Council is not conclusive of the matter, but it is of importance as reflecting that as early as 1908 the owner of this tract was asserting openly the right to deny use thereof to the public, and that the governing body of the city conceded existence of this right. This formal concession by the city was certainly a bar to the intervention of the city, although it did not affect the city's power of eminent domain in the premises—a power the city has not seen fit to exercise.

Whether use by the public of an easement over another's land is adverse or permissive is a fact question; and former decisions are rarely controlling, because, in the very nature of things, the fact situation is never

exactly the same in different cases. After a careful review of the evidence we are unable to say that the finding of the lower court that the use was permissive is against the weight of the testimony. Therefore, under our long established rule, we may not overturn this finding.

Likewise, we conclude that the finding of the lower court that appellees, O'Neal and wife, have no title in the north wall of the Barlow property is not contrary to preponderating proof.

The decree of the lower court is affirmed both on direct appeal and cross-appeal.

Mr. Justice McFaddin disqualified and not participating.

Washington *v.* State.

4482 210 S. W. 2d 307

Opinion delivered April 5, 1948.

Rehearing denied May 3, 1948.

W. Harold Flowers, for appellant.

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

ED. F. MCFADDIN, Justice. Appellant was tried on an information charging him with the crime of manslaughter (§ 2980, *et seq.*, Pope's Digest). He was convicted of involuntary manslaughter [1] (§ 2982, Pope's Di-

[1] Involuntary manslaughter, being a lesser degree of manslaughter, was necessarily included in the offense charged in the Information (§ 4047, Pope's Digest).

gest as amended by Act 169 of 1947), and sentenced to three years in the penitentiary. By timely exceptions, and by proper assignments in his motion for new trial, he makes the contentions hereinafter discussed.

I. *Motion to Quash the Information.* This is assignment No. 4 in the motion for new trial. Appellant was tried on an information filed by the prosecuting attorney, rather than on an indictment returned by a grand jury; and appellant claims that prosecuting him by information is violative of his rights under both the State and Federal Constitutions. Amendment 21 of the State Constitution reads:

"That all offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment by a grand jury or information filed by the prosecuting attorney."

This amendment has been upheld by this court against such attack as is here made, in numerous cases, some of which are: *Penton* v. *State,* 194 Ark. 503, 109 S. W. 2d 131 and *Smith et al.* v. *State,* 194 Ark. 1041, 110 S. W. 2d 24. The United States Supreme Court has repeatedly held that a State can—if it so desires—provide for a prosecution by information instead of by indictment. Some of these cases are: *Hurtado* v. *California,* 110 U. S. 516, 28 L. Ed. 232, 4 S. Ct. 111; *Bolln* v. *Nebraska,* 176 U. S. 83, 44 L. Ed. 382, 20 S. Ct. 287; and *Gaines* v. *Washington,* 277 U. S. 81, 72 L. Ed. 793, 48 S. Ct. 468. Appellant quotes from, and relies on, the dissenting opinion of Mr. Justice Black in *Adamson* v. *California* (decided June 23, 1947), 332 U. S. 46, 91 L. Ed. 1903, 67 S. Ct. 1672. But we must follow the majority in that case, rather than the minority. We therefore conclude that the trial court was correct in refusing to quash the information.

II. *Motion to Quash the Panel of Petit Jurors.* This topic embraces assignments Nos. 5 and 6 in the motion for new trial. Appellant filed a motion of eight numbered paragraphs seeking to quash the entire panel of petit jurors. The prayer of that motion was:

"Wherefore, the petitioner further states that while white electors are regularly selected to serve as regular members of the Petit Jury Panel at each term of the Jefferson Circuit Court, no Negroes have been selected and that said Negro electors have been systematically excluded from serving as regular members of the Petit Jury Panel in said Jefferson County Circuit Court for a half century solely because they are Negroes. The defendant charges that this constitutes a discrimination against him, a Negro, and such discrimination is a denial to him of equal protection of the laws of the United States of America as guaranteed by Section One of the Fourteenth Amendment to the Constitution of the United States of America. Petitioner further alleges that due process of law is being denied him by the State of Arkansas, through its Administrative Officers, and prays that present Petit Jury Panel be quashed."

We group and discuss appellant's arguments under this assignment:

A. *Systematic Exclusion.* In support of his motion, appellant introduced United States census figures of 1940,[2] which showed the population of Jefferson county in that year to have been a total of 65,101, classified by the Census Bureau as follows:

Native-born white	28,696
Foreign-born white	383
Negroes	35,980
Other races	42
Total	65,101

It was testified that there were 11,400 qualified electors in Jefferson county in 1947, of which approximately 3,000 were Negroes; and it was shown that there had been no Negroes on trial juries in Jefferson county for a period of 30 years prior to the March, 1947, adjourned term.

Under this evidence appellant urges that there was a systematic exclusion of Negroes from jury service at

[2] These were the census figures in 1940. No effort was made to show the population in 1947.

the time of the trial of this case (which was on October 10, 1947, a regular day of the regular October, 1947, term). The evidence offered by appellant was obviously in anticipation of the holding of the U. S. Supreme Court in the case of *Patton* v. *Mississippi,* decided December 8, 1947, 332 U. S. 463, 92 L. Ed.,* 68 S. Ct. 184. In that case the U. S. L. Ed. headnote summarizes the opinion in this language:

"Where, in a county the adult population of which is more than 35% Negro, no Negro has served on a grand or petit criminal court jury for 30 years, the inference of systematic exclusion is not sufficiently repelled by showing that a relatively small number of Negroes meets a requirement that a juror must be a qualified elector."

In the Patton case it was shown that Negroes were not called for jury service at the time of Patton's trial; but in the case at bar the record reflects that Negroes were selected for jury service at a special term of the Jefferson Circuit Court in March, 1947, and again at the regular term of the court in October, 1947, from which last-mentioned term comes this appeal. Thus, at the two most recent terms, including the one in which appellant's trial occurred, Negroes were selected for jury service. So, any alleged systematic exclusion of previous years certainly had been abandoned at the time of the trial of this case—and this abandonment was no doubt in keeping with the holding of the U. S. Supreme Court in *Hill* v. *Texas,* 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159. That case referred to grand juries, but—*a fortiori*—is also germane to petit juries. So, we hold that the evidence here sufficiently repels any inference of present systematic exclusion, since Negroes are now called for jury service.

B. *Studied Evasion.* Appellant insists that only three Negroes were selected on the panel of petit jurors at the October, 1947, term; and insists that this was a studied evasion. He says:

"Appellant believes that the mere placing of three Negroes on the panel as alternates is proof enough of a

* Page not accessible at time of going to press.

method or common understanding of administrative officers (and) constitutes a would-be legalized manner in which to continue the systematic exclusion of Negroes from jury service."

But the proof in this record shows that the three Negroes were members of the regular panel of petit jurors called in the present case. They were V. T. Price, R. D. Doggett and Prince Swaizer. They were members of the regular panel, and numbered 7, 10 and 12 in the examination of jurors for trial in this case. There is no evidence even tending to show that the jury commissioners selected these three Negroes or any other members of the jury panel for any purpose other than to truly comply with the law of the land.

The fact that the jury commissioners selected Negroes for the panel satisfies the burden placed on the State under the holding in *Patton* v. *Mississippi, supra:* and the burden then devolved on the appellant to show that the jury commissioners practiced "evasion." There is no such proof in the record. The jury commissioners were not called to testify, yet it was shown that they had selected other lists from which some of the additional jurors were called after the regular panel had been exhausted.

Appellant says in his brief:

"Appellant prays the earnest consideration of this court for an announcement of policy as to what constitutes compliance with the constitutional provision that a person has a right to trial by an impartial jury. Does the mere presence of three Negroes on the panel constitute due process where they have been designated by the jury commissioners as alternates?"

The language of the U. S. Supreme Court in the case of *Akins* v. *Texas,* 325 U. S. 398, 89 L. Ed. 1692. 65 S. Ct. 1276, is an answer to appellant's question. This is the language:

"Petitioner's sole objection to the grand jury is that 'the commissioners deliberately, intentionally and pur-

posely limited the number of the Negro race that should be selected on said grand jury panel to one member.' Fairness in selection has never been held to require proportional representation of races upon a jury. *Virginia* v. *Rives,* 100 U. S. 313, 25 L. Ed. 667; *Thomas* v. *Texas,* 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 393. Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligibile individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination 'in the selection of jurors on racial grounds.' *Hill* v. *Texas, supra,* (316 U. S. 404, 86 L. Ed. 1562, 62 S. Ct. 1159). Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and not on the theory that racial groups must be recognized. *Norris* v. *Alabama,* 294 U. S. 587, 79 L. Ed. 1074, 55 S. Ct. 579; *Hill* v. *Texas,* 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159, and *Smith* v. *Texas,* 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164, 211 *supra.* The mere fact of inequality in the number selected does not in itself show discrimination."

The record here contains the *voir dire* of each member of the panel from which the jury was selected to try this case. The *voir dire* examination is set out on pages 38 to 82 of the transcript. In all, 26 prospective jurors were interrogated on the *voir dire.* Two were excused for cause; seven were excused by appellant; five were excused by the State; and the remaining 12 were selected as jurors. Under § 3997, Pope's Digest, appellant had eight peremptory challenges, and the State had six. Thus, neither the State nor the appellant exhausted the peremptory challenges allowed by law. Appellant is in no

position to complain of the selection of any juror, because appellant was not required to take any juror he did not desire. He announced his contentment with the jury without exhausting all of his peremptory challenges. See, also, *State* v. *Koritz,* 227 N. C. 552, 43 S. E. 2d 77, wherein *certiorari* was denied by the U. S. Supreme Court on October 13, 1947, 332 U. S. 768, 92 L. Ed.,* 68 S. Ct. 80. Every juror accepted on the trial jury in this case was accepted by appellant. He did not exhaust his challenges, and has made no showing that the jury commissioners selected other than fair jurors. In the absence of any such showing, we hold that the trial court was correct in refusing appellant's motion to quash the panel of petit jurors.

III. *Sufficiency of the Evidence.* Assignments numbered 1 to 3, inclusive, in the motion for new trial present this issue, wherein appellant challenges the sufficiency of the evidence to sustain the conviction. Appellant was tried for the homicide of Mrs. Margaret Hill. The evidence showed that on the night of August 23, 1947, Mr. and Mrs. Hill (the deceased) with their baby, and accompanied by Mr. and Mrs. Orville Estes and their children, were in the Hill car en route to See Mr. Hill's sister, who lived in Jefferson county. Mr. Hill stopped his car well over on the side of the highway, and started towards a farmhouse to inquire directions. At that moment appellant, driving a car down the highway at a rate of speed estimated to be between 70 and 75 miles per hour, and "zigzagging across the road," approached the Hill car. Mr. Hill and Mr. and Mrs. Estes all testified that they thought that appellant was about to collide with the Hill car. The deceased evidently was of the same opinion; for—holding her baby in her arms —she jumped from the car and started across the road to what she apparently thought would be a place of safety. But just at that instant appellant swerved his car toward her, struck Mrs. Hill and the baby, and dragged them about 75 or 100 yards before they were thrown clear of the car. Mrs. Hill's skull was crushed, and she lived only a few minutes.

* Page not available at time of going to press.

Appellant did not stop; he drove into and out of a wooded ditch and down the road nearly two miles, where he abandoned his car in the middle of the highway, and then proceeded to his father's home in Lonoke county. There, he was arrested the following day. Appellant admitted to the officers (and they so testified) that he was driving the car that struck and killed Mrs. Hill. This evidence offered by the State (and the appellant offered none) was sufficient to sustain the verdict of involuntary manslaughter, under Act 169 of the Acts of 1947, which amended § 2982, Pope's Digest, and also provided the punishment for involuntary manslaughter. For cases where a homicide occasioned by the driving of an automobile has been held to be involuntary manslaughter, see *Bowen* v. *State,* 100 Ark. 232, 140 S. W. 28; *Madding* v. *State,* 118 Ark. 506, 177 S. W. 410; *White* v. *State,* 164 Ark. 517, 262 S. W. 338; *Craig* v. *State,* 196 Ark. 761, 120 S. W. 2d 23; *Phillips* v. *State,* 204 Ark. 205, 161 S. W. 2d 747; *Fitzhugh* v. *State,* 207 Ark. 117, 179 S. W. 2d 173; and *Benson* v. *State,* 212 Ark. 905, 208 S. W. 2d 767. We therefore hold that the evidence was amply sufficient to sustain the verdict.

IV. *Other Assignments.* As previously stated, the motion for new trial contained 17 assignments of error. Those heretofore discussed are the only ones urged by appellant in his brief in this court; but we have studied all 17 assignments and find no error. Those hereinbefore considered are assignments numbered 1 to 6, inclusive; those not heretofore discussed, but now disposed of, are:

Assignment No. 7 related to a ruling by the court concerning a juror. The court held the juror to be competent, and appellant excused him. Since appellant did not exhaust his peremptory challenges—as heretofore mentioned—he cannot urge this assignment. See *Mabry* v. *State,* 50 Ark. 492, 8 S. W. 823; *York* v. *State,* 91 Ark. 582, 121 S. W. 1070, 18 Ann. Cas. 344; and *Shoop* v. *State,* 209 Ark. 498, 190 S. W. 2d 988.

Assignment No. 8 related to the court's ruling in allowing the State to introduce in evidence pieces of ap-

pellant's car found at the scene of the impact and in the ditch where appellant drove the car before returning to the highway. The pieces of the car were properly identified, so there was no error in admitting this evidence. See *Barber* v. *State,* 182 Ark. 738, 32 S. W. 2d 619 and cases collected in West's Arkansas Digest "Criminal Law," § 404(3).

Assignments Nos. 9 to 17, inclusive, related to instructions given by the court. A careful review of these instructions discloses no error.

The judgment of the circuit court is in all things affirmed.

WARREN *v.* KLAPPENBACH.

4-8495 209 S. W. 2d 468

Opinion delivered March 22, 1948.

Carlos B. Hill, for appellant.

Price Dickson and *Peter G. Estes,* for appellee.

ED. F. MCFADDIN, Justice. The only question on this appeal is whether the chancery court erred in refusing to tax, against both plaintiff and defendant, the fee allowed the plaintiff's attorney in this partition suit. The answer to this question necessitates a determination as to whether the facts in the present case are similar to the facts in *Lewis* v. *Crawford,* 175 Ark. 1012, 1 S. W. 2d 26—where such fee was refused—; or to those in *Ramey* v. *Bass,* 210 Ark. 1097, 198 S. W. 2d 835—where such fee was allowed. There is no conflict between the two cited cases: the first involved an adversary proceeding, and the second an amicable proceeding. Which type is the present case? That is the decisive question, and must necessarily be answered by the facts.

In the case at bar, Julia E. Warren (appellant) and Mary Klappenbach (appellee) were tenants in common, each owning a one-half interest in certain property in Fayetteville. Julia E. Warren filed this suit for partition in June, 1947, alleging the ownership, and that:

" . . . she and the defendant cannot agree upon an equitable division of said city lot, or parcel of land, and that in fact the said parcel of land is not susceptible of a division in kind without a material injury to the rights of the parties, and that the said city lot should be sold, and the proceeds of such sale divided according to the interests of the parties hereto."

Mary Klappenbach, being a nonresident, was summoned by publication; and in July, 1947, she filed answer. She admitted the co-tenancy, but denied that the sale of the property was advisable or necessary. Her answer stated in part:

"This defendant further states that she and the plaintiff herein have been negotiating for a settlement of the subject matter of this cause and that in the opinion of this defendant the lands herein can be divided in kind, and if not divided in kind that this defendant desires to retain the property and make an adjustment with the plaintiff herein for her undivided interest without the necessity of exposing said lands to public sale.

"That the defendant herein has been compelled to contribute amounts in payment of taxes and other expenses for which she has not been reimbursed by the plaintiff, which expenditures have inured to the benefit of plaintiff herein in the protection of the interest of plaintiff in the lands described in the complaint, and that an accounting should be had between plaintiff and defendant and whatever amount found to be due by the plaintiff to the defendant should be charged against plaintiff's interest in the lands described in the complaint.

"Wherefore this defendant prays that complaint of the plaintiff be dismissed for want of equity, and that an accounting be had between plaintiff and defendant and

that such amounts be charged against plaintiff's interest in the lands described in plaintiff's complaint and for all other and further relief to which she may be entitled."

The cause proceeded to trial before the chancery court on the issues joined, with each party represented by an attorney of her own choosing. A decree was entered ordering sale of the property, as sought by the plaintiff. After the sale, Julia E. Warren's attorney filed a motion praying that the court fix his fee and tax the same as costs against the entire proceeds of the sale, that is, *that the fee of the plaintiff's attorney be paid equally by plaintiff and defendant.* Section 10531, Pope's Digest, was cited as authority for such motion. The court fixed the fee for Julia E. Warren's attorney, but refused to require any part of the fee to be paid from Mary Klappenbach's (appellee's) interest or her proceeds of the sale. From such refusal there is this appeal.

It is clear from the pleadings hereinbefore detailed that this partition suit between Julia E. Warren and Mary Klappenbach has been an adversary proceeding from its very inception. The case at bar is therefore similar in its facts to *Lewis* v. *Crawford, supra,* and is ruled by the holding in that case. The chancery court was correct in refusing to tax against Mary Klappenbach's interest any portion of the fee of Julia E. Warren's attorney. Affirmed.

ROGERS *v.* MORGAN.

4-8471 210 S. W. 2d 129

Opinion delivered April 5, 1948.

O. W. (Pete) Wiggins, for appellant.

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

McHaney, Justice. Appellant and appellee are Negroes and are half brother and sister. Both were born out of wedlock with different mothers, but the same father, John Morgan. It is stipulated that appellant is the legitimate daughter of John Morgan because he married her mother after her birth and recognized her as his child. It is conceded that John Morgan married appellee's mother after appellee's birth, but it is denied that he ever recognized appellee as his son. The sole question presented by this appeal is, was appellee Herschell Morgan legitimized by the subsequent marriage of his mother and father and did the father thereafter recognize appellee as his child? The question arises over the right of inheritance of property.

Our statute, § 4341 of Pope's Digest, provides: "If a man have by a woman a child or children, and afterward shall intermarry with her, and shall recognize such children to be his, they shall be deemed and considered as legitimate."

Since it is admitted that John Morgan is appellee's father and that he married appellee's mother after she had given birth to appellee, the proof was directed to the only issue remaining, that is, whether John Morgan recognized appellee as his child. This issue is one of fact. The undisputed facts are that John Morgan was lawfully married to Mary Sisk, appellee's mother, on September 29, 1904, in Pulaski county. At that time appellee was an infant between four and seven months old. It appears that John was fearful of prosecution and married her to avoid it. He abandoned her and the child a short time after marriage and refused to live with her, went to Oklahoma and took with him Bertha Lawrence, with whom he lived in adultery, and as a result appellant, Isabelle Morgan, now Rogers, was born. On

May 12, 1908, Mary Sisk Morgan divorced John in Pulaski county, and in June following John married Bertha, thus legitimatizing appellant. In the divorce complaint of Mary against John appears this allegation: "That, at the time that defendant deserted plaintiff, he left her almost in a suffering condition with neither fuel, sufficient clothing, shelter, or anything else; and also with infant, of whom defendant is the father." This complaint was never denied and it does not appear that John ever denied that appellee was his child. On the other hand, two witnesses testified that, on several occasions, John told them that the child was his, and one of them said he contributed to the child's support. Another witness, an employee of a life insurance company, testified that John took out a policy of insurance on his life in 1943, in which appellee was named as beneficiary. There was testimony on behalf of appellant that tended to dispute that of appellee, but we think the evidence amply sufficient to support the court's finding that John Morgan was the father of appellee and that he so recognized appellee as his son.

This case is unlike *Williams* v. *Ketchum,* 178 Ark. 1141, 13 S. W. 2d 605, where the court found that Henry Williams was not the father of Joe Williams who claimed to be his son. In *Moorehead* v. *Dial,* 134 Ark. 548, 204 S. W. 424, it was held that the evidence was sufficient to establish that Morehead was the child of one Crawley. Here, fatherhood is conceded, and we think the evidence justified a finding that the father recognized appellee as his son.

The decree is correct and is affirmed.

WHALEY *v.* WHALEY, ADMINISTRATRIX.

4-8469 209 S. W. 2d 871

Opinion delivered April 5, 1948.

Carl Langston and *Quinn Glover,* for petitioner.

Dwight L. Savage, Henry Donham and *William H. Donham, Jr.,* for respondent.

MINOR W. MILLWEE, Justice. Beatrice Whaley has filed a petition for writ of *certiorari* in this court seeking to quash a decree of divorce which Dr. E. S. Whaley, who is now deceased, obtained from her in the Lonoke County Chancery Court in July, 1946.

The following facts appear from the record as reflected by the petition and response filed in the case: Petitioner and Dr. E. S. Whaley were married at Hope, Arkansas, in 1907 and lived together until May, 1932, when they separated while residing at Prescott, Arkansas. Immediately after the separation, Dr. Whaley moved to Carlisle in Lonoke county, Arkansas, where

he engaged in the practice of medicine until his death in June, 1947.

On June 21, 1946, Dr. Whaley conveyed to petitioner certain real estate in the city of prescott, Arkansas, which respondent contends, and petitioner denies, the latter accepted in settlement of her property rights and in contemplation of the divorce action filed against her by Dr. Whaley. On June 29, 1946, petitioner signed and acknowledged a "Stipulation, Waiver, and Entry of Appearance" to a divorce complaint by Dr. Whaley in the Lonoke Chancery Court, as follows: "Comes now the defendant in the above styled cause of action, Mrs. Beatrice Whaley, and enters here her appearance in the above styled cause of action, waives service of summons, waives notice to take depositions and waives the time and consents that this cause may be heard before the Chancellor of the First Chancery District of Arkansas, or the Lonoke Chancery Court, either in vacation or term time and Decree entered herein as the Term Time."

A decree dated July 15, 1946, signed by Henry E. Spitzberg as Special Chancellor, was entered in the Lonoke Chancery Court granting Dr. Whaley a divorce from petitioner on the grounds of indignities and separation without cohabitation for more than 10 years, under Sub-sections 5 and 7 of § 4381, Pope's Digest. This decree recites that the cause was submitted to and heard by the court upon the petition of Dr. Whaley, the stipulation, waiver, and entry of appearance of petitioner, and the depositions of certain witnesses. An endorsement "In vacation July 15, 1946" was placed on the face of the decree by the clerk at the time of recording. The clerk's endorsement on the complaint reads: "Filed as of July 12, 1946, on July 16, 1946."

On October 29, 1946, Dr. E. S. Whaley was married to respondent, Naomi Simmons Whaley, and they lived together at Carlisle, Arkansas, until his death, intestate, on June 13, 1947.

Three daughters were born to the marriage of Dr. Whaley and petitioner and are now grown and married. Two of these daughters reside in Arkansas and joined

in a petition with the respondent requesting the Lonoke Probate Court to appoint the latter as administratrix of their father's estate. Letters of administration were granted on the petition and respondent is now the duly qualified and acting administratrix of said estate.

On August 23, 1947, petitioner filed in the Lonoke Chancery Court a motion to strike and expunge the divorce decree from the record of the court. This motion alleged that the special chancellor had no authority to act or serve as such, and had no jurisdiction to grant the divorce decree of July 15, 1946; that petitioner was not served with process and had no notice of the divorce proceedings; that the grounds of divorce were not proved; and that petitioner was the lawful widow of Dr. E. S. Whaley, deceased, and entitled to a widow's benefits in the estate of said deceased. Respondent filed a motion to dismiss and intervention in these proceedings, which are still pending in the chancery court.

In her petition for *certiorari* in this court, Beatrice Whaley alleges that on July 12, 1946, an attorney for Dr. Whaley prepared the divorce complaint, depositions and precedent for decree at his office in Lonoke county and forwarded them to Mr. Spitzberg at Little Rock, Arkansas, for signature before the complaint and other instruments had been filed with the clerk of the Lonoke Chancery Court; that said special chancellor signed the precedent for decree and returned the file to the attorney who filed same with the chancery clerk on July 16, 1946, with instructions to file the instruments as of July 12, 1946. There is attached to the petition certain correspondence, which is not a part of the record now sought to be reviewed, to establish these allegations.

It is further alleged by petitioner that on July 8, 1946, the Governor attempted to appoint Mr. Spitzberg as special chancellor to serve for a period not to exceed 30 days in the absence of the regular chancellor; that he was also elected special chancellor by the Lonoke County Bar on July 12, 1946, for the same purpose; that at the time Mr. Spitzberg signed the purported divorce decree he was not a special chancellor and was without

authority and jurisdiction to grant the divorce; that the decree shows on its face to be void and of no effect; and that the divorce suit is still pending in the Lonoke Chancery Court and should be abated because of the death of Dr. Whaley.

The response of Naomi Whaley specifically denies the allegations of the petition and states that in contracting the marriage with Dr. Whaley she relied upon the validity of the divorce decree and property settlement which she alleges Dr. Whaley made with petitioner; that petitioner had full knowledge of the divorce proceeding while represented by able counsel; that the action of petitioner in entering her appearance in the divorce proceeding and consenting to entry of a decree in term time or vacation, and her failure to make a defense to the complaint or take any action to question the validity of the decree until after the remarriage and death of Dr. Whaley, constituted an estoppel of petitioner from being granted the relief sought in the petition; that petitioner is guilty of laches, and that her delay in attacking the validity of the decree will, by reason of the intervening rights of respondent, result in incalculable hardship and damage to respondent if the petition is granted. The response further alleged that the petition should be denied for the reason that it does not allege that petitioner has any defense to the divorce action, and that it fails to show sufficient cause for this court to exercise its discretion and grant the writ.

It is the contention of petitioner that the divorce decree granted Dr. Whaley on July 15, 1946, is void and a nullity because a special chancellor acting either by appointment under Act 417 of 1941, or election by members of the bar, is without authority to render a decree in vacation; that said Act 417 of 1941 is unconstitutional and the jurisdiction of the Lonoke Chancery Court had not been invoked when the alleged decree was signed in Pulaski county. Counsel on both sides have presented excellent briefs on these points but we find it unnecessary to a decision of this case to consider these questions.

It has been the consistent policy of this court to refuse to grant writs of *certiorari* except where such ac-

tion is necessary to do substantial justice, or prevent a wrong. The writ is not regarded as one of right, but rather as one which rests in the sound discretion of the court and should not be granted where it would operate inequitably and unjustly. In *Arkadelphia Milling Co.* v. *Bd. of Equalization,* 136 Ark. 180, 206 S. W. 70, the court said: "*Certiorari* is a writ of discretion, and not a writ of right, and is not a proceeding to be employed when its employment does an injustice and deprives one of a legal right which would have been established by the proceeding sought to be reviewed, had that proceeding been conducted in compliance with the strict forms of law."

This court has also adopted the practice and policy in *certiorari* proceedings of refusing to quash a judgment, even though void, unless it appears that the petitioner has a defense to the action. In *Gates* v. *Hayes,* 69 Ark. 518, 64 S. W. 271, this court reversed the action of the circuit court in quashing a personal judgment, void because rendered on constructive service, where petitioner did not allege or show a defense to the suit upon which the judgment was rendered. The court said: Moreover, the aid of the writ should never be granted except to do substantial justice. *Burgett* v. *Apperson,* 52 Ark. 213, 12 S. W. 559. Although not strictly applicable to proceedings by *certiorari,* § 4200, Sand. H. Dig., shows the policy of the law to be not to vacate judgments unless there is some defense to the action in which the judgment was rendered. This is the principle applicable here, independent of the statute." This holding was followed in the cases of *Hollis* v. *Hogan,* 126 Ark. 207, 190 S. W. 117, and *Nelson* v. *Freeman,* 136 Ark. 396, 206 S. W. 667.

The three cases last cited were reviewed in the later case of *Overton* v. *Alston,* 199 Ark. 96, 132 S. W. 2d 834, where this court said: "*Certiorari* is not a writ of right, but issues only on special cause shown to the court to which application is made, and the court is vested with judicial discretion to grant or refuse the writ as justice may seem to require. Inasmuch as the writ is a discretionary one, it is often denied where the power to issue is unquestionable. The writ will be granted only where

necessary to prevent substantial wrong. 11 C. J. 128." It was further said in that case: "A judgment will not be quashed on *certiorari,* even though erroneous or void, unless it appears from the petition that the petitioner has a defense to the action. This court has many times held that where there was a defective service and a judgment had, in order to get that judgment set aside, the party must show a meritorious defense. This extraordinary writ being a writ of discretion, the reason is very much stronger for refusing to quash the judgment, if there is no meritorious defense alleged in the petition."

The principle held applicable in the above cited cases, independent of statute, has often been recognized in proceedings to vacate divorce decrees. In *Allsup* v. *Allsup,* 199 Ark. 130, 132 S. W. 2d 813, appellant delayed filing a motion to vacate the decree for 17 months after knowledge of its rendition. It was held that the delay would not, under the circumstances, be excused, the court saying: "All her contentions fail for the following reasons: First, no fraud was proven or established in procuring the decree. Second, she had no defense, or alleged none that would entitle her to prevail in this motion. Third, she delayed unduly after notice and permitted changed circumstances and conditions and new rights of another party to arise during her extended delays, the appellee having married again." See, also, *Corney* v. *Corney,* 97 Ark. 117, 133 S. W. 813; *Bauer, Executor* v. *Brown,* 129 Ark. 125, 194 S. W. 1025; *Page* v. *Woodson,* 211 Ark. 289, 200 S. W. 2d 768; and L. R. A. 1917B, 425.

This court is also committed to the rule that the writ of *certiorari* will be refused when the party seeking it fails to show that he has proceeded with due expedition after discovering that it was necessary to resort to it. *Black* v. *Town of Brinkley,* 54 Ark. 372, 15 S. W. 1030; *Lyons* v. *Green,* 68 Ark. 205, 56 S. W. 1075; *Hill* v. *Taylor,* 199 Ark. 695, 135 S. W. 2d 825.

It is clear from the record in this case, that petitioner and the deceased had been separated for 14 years in 1946 when he conveyed valuable real estate to her; and

that a few days thereafter she executed an entry of appearance in the divorce proceeding in which she expressly consented that a decree might be entered either in term time or vacation. Although she had full knowledge of the proceeding, she took no action to set it aside until more than a year after its rendition, and after the remarriage and death of Dr. Whaley. Her delay and inaction has permitted changed circumstances and conditions to arise which render it inequitable and unjust to an innocent third party for a court to grant the petition. The petition does not allege fraud, or other inequitable conduct, on the part of Dr. Whaley in obtaining the decree, nor that petitioner has any defense to the divorce action.

We conclude that petitioner has not shown sufficient cause for this court to exercise its discretion to grant the extraordinary writ of *certiorari,* and that it would amount to an abuse of discretion on our part to award the writ under the circumstances presented here. The petition is, therefore, denied.

PONDER *v.* RICHARDSON.

4-8506 210 S. W. 2d 316

Opinion delivered April 12, 1948.

Rehearing denied May 10, 1948.

W. P. Smith, for appellant.

W. E. Beloate and *Cunningham & Cunningham,* for appellee.

ED. F. MCFADDIN, Justice. This appeal is a controversy between the tax title purchaser (appellant) and the original landowners (appellees). The fractional northwest quarter of section 8, township 15, range 1 in Lawrence county contains 149.46 acres according to government survey; so the west one-third of the fractional northwest quarter of section 8 contains a total of 49.82 acres. Under that last-mentioned description—*i. e.,* "W 1/3 Frl. NW ¼ section 8, 49.82 acres," etc.—the land forefeited to the State for the nonpayment of taxes for the year 1941. In due time the State received a deed, and then the State proceeded to sell the land—under the same description—to the appellant on May 25, 1945, at the total appraised price of $249.10.[1] Thereafter the State instituted confirmation proceedings under Act 119 of 1935 for the benefit of the State and its vendee (appellant, insofar as the land here involved is concerned). Appellees intervened[2] in the confirmation proceedings

[1] The total which appellant paid the State was $254.98, which—in addition to the appraised value—included $4.98 for "confirmation fee" and $1.00 for deed.

[2] Although appellees have a dispute between themselves as to the division of ownership, still they are attacking appellant's tax title; and that is the main point at issue in this appeal.

and by numerous assignments assailed the validity of the 1941 tax sale on which appellant's title is based.

The chancery court found the 1941 tax sale to be void, and canceled the appellant's deed from the State as a cloud on appellees' title. From that portion of the decree the appellant has appealed. The chancery court also required appellees to pay into the court the 1941 taxes and the taxes for subsequent years on that portion of the lands owned by appellees; and against that portion of the decree the appellees have cross appealed. The chancery court held the 1941 tax sale to be void, because: (a) one acre in the northwest corner of the "W 1/3 Frl. NW ¼ section 8" was a cemetery; and (b) this cemetery was exempt from taxation; yet (c) in listing the "W 1/3 Frl. NW ¼ section 8" on the tax book, and in selling it for 1941 taxes, the State included the exempt cemetery along with the non-exempt land; and (d) such inclusion made the tax sale void on direct attack—such as is this proceeding. We agree with the decree of the learned Chancery Court.

I. *The Existence of the Cemetery.* The proof showed that in 1889 James Rogers and wife (being the owners of the "W 1/3 Frl. NW ¼ section 8") executed a deed to one acre in the northwest corner of said land for use as a cemetery or public burying ground; and that said acre was used for a Negro cemetery for many years and has many graves and tombstones thereon, and is partially separated by a fence from the remaining portion of the said land. That said acre is a cemetery is conceded by all parties. The fact that no bodies have been buried in the cemetery in recent years does not militate against its existence as a public burying ground. In 61 C. J. 491, in discussing the exemption of a cemetery from taxation, the holding of the cases is summarized as follows:

"Property used for interment of the dead of past years and preserved as a cemetery is exempt, despite cessation of use for burial of persons dying thereafter, and despite failure to maintain it in good condition."

To the same effect, see annotation "Scope and Application of Exemption of Cemeteries from Taxation" in 168 A. L. R. 283. We conclude that the cemetery here involved retained its existence as a cemetery.

II. *The Exemption of the Cemetery from Taxation.* Art XVI, § 5 of the Arkansas Constitution of 1874 provides:

". . . the following property shall be exempt from taxation: . . . cemeteries used exclusively as such; . . ."

Section 13603, Pope's Digest, exempts from taxation:

". . . All lands used exclusively as graveyards, or grounds for burying the dead, except such as are held . . . with a view to profit."

This cemetery was a public burying ground and was held with no view to profit. So, it was exempt from taxation, and any purported tax deed of the said cemetery was void. See *Winn* v. *Little Rock,* 165 Ark. 11, 262 S. W. 988. See, also, 51 Am. Juris. 894, "Taxation," § 1023. It was the duty of the assessing officer to show the cemetery as exempt from taxation. If this duty had been performed, then the property remaining for taxation could have been assessed for taxation as: "W 1/3 Frl. NW ¼ section 8 less cemetery of one acre in northwest corner." The property was described on the assessment roll, and sold as "W 1/3 Frl. NW ¼ section 8 containing 49.82 acres," and this last-mentioned description necessarily included the cemetery since it was not excepted from the description as it should have been.

III. *Effect of Including the Cemetery in the Assessment and Sale of the Tract Sold.* We have here a situation wherein appellees' property was assessed and taxed along with exempt property, with the result that appellees were assessed and taxed for more property than was subject to taxation. In *Kaplan* v. *Scherer,* 205 Ark. 554, 169 S. W. 2d 660 a similar situation was presented, and we copy from that case:

"It is undisputed that appellee's property, in question here, was carried on the tax books, and assessed, as 'the east 60 feet of lot 11, block 30, town of Texarkana, Arkansas', when in fact appellee only owned the east 51.1 feet of lot 11 black 30, town of Texarkana, Arkansas. She was assessed, therefore, on more property than was subject to taxation, the title of nine feet of the assessed property being in the city of Texarkana since 1931, and not subject to taxation. In other words, she was assessed and taxed on the basis of ownership of 60 feet when she owned only 51.1 feet of lot 11. This, we think, is clearly an illegal and void assessment, and the taxing officers were unauthorized to sell, and lacked the power to sell, property for taxes which were not chargeable against it."

So, in the case at bar, the inclusion of the cemetery made the assessment void. Mr. Cooley, in his work on Taxation, 4th Ed., § 1430, says:

". . . a whole tract cannot be sold where the tax is assessed or due on only a part of it."

See, also, *Jones* v. *Gibson,* 4 N. C. 480, 7 Am. Dec. 690. In 51 Am. Juris. 504 the rule is stated in this language:

"The general rule appears to be that a tax levied upon partly exempt real property as a whole is not valid as to the nonexempt part, if the assessment is inseparable, but is wholly void. A tax on exempt property is absolutely void because for an unauthorized purpose, and when the void assessment is so interwoven with an assessment on other property as to be inseparable therefrom, the whole becomes void."

In 118 A. L. R. 861, there is an annotation on the effect of assessing non-exempt property *in solido* with exempt property; and the cases cited in that annotation sustain the general rule to the effect that the inclusion of exempt property voids the entire assessment, if the assessment is inseparable. Here, the assessment was on the entire tract, and was inseparable. See, also, *Bonner* v. *Board of Directors,* 77 Ark. 519, 92 S. W. 1124. It follows therefore that the 1941 tax sale was void, and the chancery court was correct in so holding.

The majority of this court finds a distinction between the holding in the case at bar and that in *Burbridge* v. *Smyrna Baptist Church,* 212 Ark. 924, 209 S. W. 2d 685: such distinction being, that here we are sustaining a direct attack on a tax sale, while in the Burbridge case the payment of taxes for more than 15 years was held to be color of title irrespective of the validity of the tax sale.

IV. *The Cross Appeal.* The chancery court required the appellees to pay into court—for the benefit of appellant—the taxes and penalties for 1941 and subsequent years on the land that the appellees owned and claimed in this suit—which is all the land except the one acre that is the cemetery. The appellees have cross appealed from that portion of the decree which required them to make such payments. The chancery court was correct in making the requirement. Our holding in the recent case of *Buschow Lumber Co.* v. *Witt,* 212 Ark. 995, 209 S. W. 2d 464, is ruling on this cross appeal. The Buschow case states what is required of a suitor in a court of equity, and indicates how some of the money so paid into court may go to the tax title purchaser, and also his procedure for obtaining relief for any remaining deficiency.

Affirmed on both direct appeal and cross appeal.

HUGHES *v.* JACKSON, COUNTY JUDGE.

4-8579 210 S. W. 2d 312

Opinion delivered April 12, 1948

Rehearing denied May 10, 1948.

Hebert & Dobbs, for appellant.

James Pilkinton, G. W. Lookadoo, J. H. Lookadoo and *McMillan & McMillan,* for appellee.

GRIFFIN SMITH, Chief Justice. By amendment No. 25 to the Constitution "County Hospital" was added to the purposes for which bonds might be issued under Amendment 17.

Certain taxpayers have appealed from equity's decree dissolving a temporary injunction and dismissing the complaint. Effect is to permit issuance of $200,000 in bonds for construction of a Clark County hospital, with a levy of two and a half mills to pay principal and interest.

The vote *for* construction was, *prima facie,* 1,434, with 1,100 *against. For* the building tax returns as certified showed 1,431; *against,* 1,103.

Amendment 17 provides that when the question is submitted for consideration of the voters, (in the instant case by special call) procedure governing general elections shall apply. Act 294 of 1929 facilitates the purposes intended to be served by Amendments 17 and 25. Although this statute was enacted before Amendment 17 was amended, our decisions are to the effect that when substance of Amendment 25 was brought into Amendment 17, the latter (prospectively) would be treated as having been enlarged, hence Act 294 is germane where its terms do not conflict with the basic law.

By Act 294 appeals from County Court orders may be taken within thirty days "as to the result of the election". Pope's Digest, § 2470; A. S. v. 2, § 13-1216.[1]

[1] The reference "A. S. v. 2, § 13-1216" is to the new Digest printed by Bobbs-Merrill, only the first two volumes being available.

The County Court adjudication that necessity for a hospital existed was recorded Sept. 12, 1947. An election was called for October 21. October 27 (pursuant to certification by the Board of Election Commissioners that a majority of those voting favored the project and had approved the tax) the County Court made its official finding; and on November 17 Quorum Court levied the authorized tax.

November 26 other taxpayers joined with A. R. Hughes in filing in Chancery what they denominated a "Petition of Appeal from, and Review of, Order and Finding of Clark County Court, and for Injunction". It was alleged that in finding that necessity required construction of a hospital the Judge acted upon his own initiative, hence the act was not that of the County Court; and, being non-judicial it was void, and the election pursuant to this arbitrary determination was without legal foundation. It was also contended that election irregularities were so widespread as to create a presumption of fraud, and the people were deprived of a fair expression.

We do not consider the charges of irregularities. Under the Constitution appeals from judgments of the County Court are to Circuit Court, under such restrictions as may be prescribed by law. Art. 7, § 33. The time within which an appeal may be taken has been limited to six months. Pope's Digest, § 2913.

Appellants think that because Act 294 of 1929 (Pope's Digest, § 2470) does not mention the court to which electors may appeal, the jurisdiction of Chancery is available in the circumstances here, injunctive relief having been asked. While it is true that Act 294 does not name the court of redress, the Constitution does. We are cited to *Cisco* v. *Caudle, County Judge,* 210 Ark. 1006, 198 S. W. 2d 992, a case involving Amendment 17 and construction of a hospital for Washington County. The Chancery decree was reversed and the cause remanded with directions to overrule the demurrer, and for further proceedings. A controlling difference between that litigation and the appeal with which we are dealing is that

Cisco was not contesting an election, and matters of which complaints were made appeared on the face of the record.

Appellants had a right to apply to Chancery Court for the remedy they sought through injunction, but this did not invest that Court with power to review proceedings of the County Court under the doctrine that equity, having acquired jurisdiction for one purpose, will administer complete relief. Unless the vices urged in avoidance were a part of the record and without other proof were sufficient to sustain the Court in restraining an illegal exaction, appellants cannot properly complain of the dismissal order.

Affirmed.

MILLER *v.* BLANTON.

4-8470 210 S. W. 2d 293

Opinion delivered April 12, 1948.

Hill, Fitzhugh & Brizzolara, for appellant.

J. F. Quillin and *Hal L. Norwood,* for appellee.

ROBINS, J. As a result of a collision between an automobile owned and driven by appellee, M. W. Blanton, and an automobile being operated by appellant, Lloyd Miller, on a mission for his employer, the appellant, Columbia Pictures Corporation, said appellee and his wife, the appellee, Dorothy Blanton, sustained bodily injuries; and it was stipulated that the automobile of the first named appellee was damaged in the sum of $500.

In separate actions (consolidated for trial) brought by appellees against appellants, verdicts were returned in favor of appellees as follows: Appellee, Dorothy Blanton, compensatory damages, $1,000, punitive damages, $500; appellee, M. W. Blanton, compensatory damages, $500, punitive damages, $500. From judgment conforming to verdicts this appeal is prosecuted.

Only these two contentions are argued by appellants:

I. That there is no legal basis for the assessment of punitive damages herein.

II. That the amount of the compensatory damages awarded to appellee, Dorothy Blanton, is excessive.

I.

The collision occurred on Highway 88, a graveled state highway, about three miles east of Mena. At this

point there is what is described by witnesses as a "blind hill," on which drivers of vehicles approaching the crest from opposite sides cannot see the approaching vehicle until just before they meet.

Appellant, Miller, was driving toward the east and appellees were traveling west, as they neared each other on the hill.

The car of appellee Blanton was well on his right hand side of the road, and as he saw the automobile of appellant Miller coming toward him over the hill, traveling on Blanton's half—Miller's left-hand side of the highway—said appellee made an unsuccessful effort to avoid the collision by driving his automobile farther to the right.

When persons living near by reached the scene the abnormal condition of appellant Miller was apparent. One of these testified that Miller's breath smelled of liquor, and that his tongue seemed to be thick. Another witness noticed the liquor on his breath and said that he staggered when he tried to walk. This witness expressed the opinion that Miller was drunk. Uncertainty about his condition was removed by the testimony of Miller himself. He testified that during a few hours before he left Mena he had consumed "four or five highballs" and that he was "half drunk." He admitted that he was on the wrong side of the road when his car struck appellee's automobile, and could give no reason whatever for driving over this hill on his left-hand side of the highway.

In the absence of proof of malice or willfulness, before punitive damages may be awarded, it must be shown that there was on the part of the tortfeasor a "wanton disregard of the rights and safety of others." *Texarkana Gas & Electric Light Company* v. *Orr,* 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30.

Was there in the instant case substantial testimony to justify the finding of the jury that appellant, Miller, was guilty of this "wanton disregard of the rights and safety of others"?

The evidence showed that Miller, after drinking intoxicating liquor to the extent that his talk and his walk were noticeably affected, and to the extent that, according to his own statement, he was "half drunk," entered his car and sought to drive it over an improved state highway. In doing this he violated the criminal laws of this state (§ 6707, Pope's Digest).

When Miller imbibed alcoholic liquor he knew that he was taking into his stomach a substance that would stupefy his senses, retard his muscular and nervous reaction, and impair, if not destroy, the perfect coordination of eye, brain and muscles that is essential to safe driving. After Miller voluntarily rendered himself unfit to operate a car properly he undertook to drive his automobile, a potentially lethal machine, down a well traveled highway. His conduct in doing this was distinctly anti-social, and the jury was amply authorized in saying by their verdict that he was exhibiting a "wanton disregard of the rights and safety of others."

Appellants strongly rely on the opinion in the case of *Strauss* v. *Buckley,* 20 Cal. App. 2d 7, 65 Pac. 2d 1352, in which the California District Court of Appeals reversed, as excessive, a judgment for injuries growing out of an automobile collision. The court stated that the large amount of the verdict might be accounted for only on the theory that frequent reference to the drunken condition of the defendant had aroused the passion and prejudice of the jury. It does not appear that punitive damages were sought in that case, but the court did express the view that such damages were not recoverable because of the drunken condition of the driver, basing this declaration on the theory that the drunkenness was "an offense in itself for which punishment may be imposed in the ordinary course of law." The fallacy of this reasoning is apparent. Under this theory punitive damages might not be recovered for a felonious assault, no matter how cruel or malicious or wanton, because a punishment for the act was provided by the criminal statutes.

The majority rule in this country is at variance with the reasoning upon which the California court, in the *Strauss* case, based its opinion. The general rule is that the fact that the act complained of is a violation of the criminal laws will not bar recovery of punitive damages by the injured party. 25 C. J. S. 719. "According to the weight of authority, however, recovery of exemplary or punitive damages will not be denied merely because the wrongful act upon which the action is based may be or has been punished criminally." 15 Am. Jur. 711.

The Supreme Court of California, in the case of *Bundy* v. *Maginess,* 76 Cal. 532, 18 Pac. 668, held (Headnote 2): "In an action for assault and battery, the fact that defendant had previously been punished, criminally, for the assault is not a bar to the recovery of exemplary damages for the same offense."

We think this language of the Supreme Court of Arizona, in sustaining (in the case of *Ross* v. *Clark,* 35 Ariz. 60, 274 Pac 639) recovery of punitive damages against a drunken driver, whose car had collided with that of the injured parties, appropriate here: "As to the punitive damages, we do not think them too large, nor do we think them unjustified by the facts. . . . The evidence as to the defendant's condition at the time is in dispute. . . . The jury must have believed that he was intoxicated. The evidence tends to show he was driving at a reckless speed, with little control of his car. The traffic at the place and time was heavy, and for safety of himself and others demanded careful driving. It is made a criminal offense for a person to drive an automobile on the public highways of this state while in an intoxicated condition. The jury fixed the defendant's penalty pretty high, but we think the example and warning to drunken or intoxicated operators of automobiles just and wholesome and that it should not be disturbed by us."

Appellant Miller testified that a charge of "reckless driving" was filed against him as a result of this collision and that he pleaded guilty to this charge. The offense of "reckless driving" is thus defined by § 6708,

Pope's Digest: "Any person who drives any vehicle in such a manner as to indicate either a willful or a wanton disregard for the safety of persons or property is guilty of reckless driving." This testimony as to appellant's plea of guilty was competent as showing a deliberate declaration against interest by said appellant. 20 Am. Jur. 545. It therefore appears that the said appellant formally admitted that on the occasion of appellees' injury he was guilty of the very conduct that, under the rule laid down in all the decisions, authorizes the imposition of punitive damages.

It is argued by appellant, Columbia Pictures Corporation, that punitive damages against it were not recoverable because there was no proof that it participated in, authorized, or ratified, Miller's wrongful conduct.

There are jurisdictions in which it is held that exemplary damages may not be recovered against the employer for a tort of the employee in the absence of proof that the employer participated in, authorized, or ratified, the wrongful act.

But in most jurisdictions, "exemplary or punitive damages may be recovered from an employer for acts or omissions of his employee done or omitted to be done in the scope and course of his employment whenever the employee's acts are of such character as to form the basis for an allowance of exemplary damages, even though these acts were done without the employee's [employer's] knowledge or authorization and were not subsequently ratified by him, regardless of whether he did or did not know the servant to be incompetent or disqualified for the service in which he was engaged." 15 Am. Jur. 732. Arkansas is shown in annotation to this text as being one of the states in which this rule is in force, our decisions in the case of *St. L. I. M. & S. R. Co.* v. *Wilson,* 70 Ark. 136, 66 S. W. 661, 91 Am. St. Rep. 74, and in the case of *Texarkana Gas & E. L. Co.* v. *Orr,* 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30, being cited. In the last cited case this question was not specifically discussed but the court upheld a verdict against a corporation for punitive damages in favor of

the estate of one who had been killed by a "live" electric power wire which had been permitted by the employees of the power company to remain lying across a street for several hours. In the other case the court said: "The jury may have found that appellant [railroad company] was liable for compensatory damages . . . but it did not follow that because they so found they should find punitive damages on said ground, unless they should further find that the tort or wrong of the servant in the particular alleged was in the line of his employment, and was willful, wanton, or malicious."

In the case of *Little Rock Ry. & Electric Co.* v. *Dobbins,* 78 Ark. 553, 95 S. W. 788, a street railway company sued by a passenger for damages arising from a forcible expulsion from a street car by the conductor asked the following instructions: "A street railway company is not liable in exemplary damages for the wrongful act of its employees in ejecting a passenger from its car, in the absence of proof of want of care in the selection of such employees and of authority given [by] it for the commission of the act, or ratification thereof after its commission." This court held that the refusal of the lower court to give this instruction was not error, the court's opinion being epitomized in headnote 1 thus: "A corporation, as distinguished from an individual, is liable in punitive damages for the malicious acts of its agents, done within the scope of their employment, although such acts were not ratified by it." While the language of the opinion referred only to corporations engaged as public carriers, the opinion was rested largely on this declaration of law by the Supreme Court of Mississippi in the case of *Pullman Palace Car Co.* v. *Lawrence,* 74 Miss. 782, 22 So. 53: "It is argued that vindictive damages are in their nature penal, and that no one should be liable to punishment unless the act complained of is his own act, made so by his authorization or ratification of it when committed by the servant, and that it is illogical for the courts to do anything punitive in character unless the master is directly and personally responsible for the very act complained of. The sufficient answer to this contention is that the judge-made law of punitive damages

is not the result of logic, but of public necessity, as text writers and courts have repeatedly shown. If corporations—artificial beings who can act only through agents and servants in their varied and multitudinous and constantly recurring business dealings with the public—can never be held liable in punitive damages for the acts of their servants unless expressly ratified by them, no matter how gross and outrageous the wrongful act of the servant, we feel perfectly safe in declaring that no recovery for more than mere compensatory damages will ever again be awarded against corporations. Corporations never expressly authorize their servants to beat or insult or outrage those having business relations with them, and they rarely ratify such conduct. Having by the constitution of their being to act solely by agents or servants, they must, as matter of sound public policy, be held liable for all the acts of their agents and servants who commit wrongs while performing the master's business and in the scope of their employment, and this to the extent of liability for punitive damages in proper cases." In the case of *Little Rock Ry. & Electric Co.* v. *Dobbins, supra,* we said, as to this statement of the law by the Mississippi court: "This doctrine, although apparently in conflict with the decision of the Supreme Court of the United States, is supported by the majority of the States that have announced a rule upon the subject, and is in accord with our own views, as announced in several cases . . ."

In the case of *Pine Bluff & Arkansas River Railway Company* v. *Washington,* 116 Ark. 179, 172 S. W. 872, Judge HART, speaking for the court, said: "This court has adopted what is usually called the rule of general liability, which has been defined as follows: 'A corporation may be held liable to exemplary or punitive damages for such acts done by its agents or servants acting within the scope of their employment as would if done by an individual acting for himself, render him liable for such damages. See case note to 48 L. R. A., N. S. p. 38.' "

The lower court did not err in submitting to the jury the question of the liability for punitive damages of the corporate defendant.

II.

The testimony showed that appellee, Dorothy Blanton, was about five months advanced in pregnancy when she was injured; that she was rendered unconscious and had to be carried to a hospital; that the collision caused her to suffer with pains in her back, leg and hips, and from shortness of breath. We cannot say, as a matter of law, that the jury's allowance of $1,000 for her physical injury and pain and suffering was excessive.

The judgment is affirmed.

SMITH, J., dissenting. The testimony shows that appellant Miller was driving across the center line of the road when the collision occurred. This was in violation of the traffic laws, and sustains the finding of negligence and this is true whether Miller was drunk or sober. According to the undisputed testimony, Miller had been drinking, and he entered a plea of guilty to the charge of driving recklessly. But nothing more was shown. Miller was negligent, grossly so, when he drove his car while in an intoxicated condition. But the testimony shows nothing more. There is an entire absence of testimony showing willfulness or wantonness on his part.

The hill where the collision occurred is referred to as a blind hill. Neither of the cars, coming in opposite directions, could see the other until the crest of the hill had been reached, and the cars were within forty feet of each other before the driver of either car could see the other. Both cars were driving at a speed of about thirty-five miles per hour. The testimony as to the tracks of the respective cars shows that each, after discovering the presence of the other, attempted to avoid the collision. No one saw the collision except the occupants of the two cars, as there was no other traffic on the road at the time, coming from either direction. Because Miller was intoxicated the jury assessed punitive damages against

him in favor of each of the plaintiffs, in the sum of $500. There was no other reason for doing so.

Cases on the subject as to when and under what circumstances punitive damages may be assessed are almost without number, and there are many of our own cases on the subject. I shall not review these cases, but will refer only to those which may be regarded as the leading cases which have been cited most often.

The first of these is the case of *Kelly* v. *McDonald*, 39 Ark. 387, in which case Chief Justice ENGLISH said: "Exemplary damages ought not to be given, unless in case of intentional violation of another's right, or when a proper act is done with an excess of force or violence, or with malicious intent to injury another in his person or property."

On the authority of this McDonald case, Justice SANDELS said in the case of *St. Louis, I. M. & S. Railway Co.* v. *Hall*, 53 Ark. 7, 13 S. W. 138: "The element of willfulness or conscious indifference to consequences, from which malice may be inferred, is lacking. The engineer of defendant appears to have occasioned the injury while in the performance of his duty. He is not shown to have acted otherwise than with a careless unconsciousness of plaintiff's possible danger." The judgment for punitive damages in that case was reversed for the reason just stated. Both of these cases have been frequently cited and followed, and in none of them has the law as declared in those opinions been questioned.

Another leading case on the subject is *St. Louis, I. M. & S. Ry. Co.* v. *Dysart*, 89 Ark. 261, 116 S. W. 224. There a collision occurred between an Iron Mountain train and a train of the Frisco Railroad Co. at a surface crossing of the railroads in the town of Nettleton. Negligence more gross could hardly exist in any case. The opinion recites that the Iron Mountain train in violation of the operating rules of that company, ran upon the crossing without stopping, striking the Frisco train. Damages both compensatory and punitive were awarded. The judgment for compensatory damages was affirmed; the

judgment for punitive damages was reversed and dismissed. It was there said: "There is much contrariety of opinion among the authorities as to what is essential in order to justify an infliction of punitive or exemplary damages. But this court is firmly committed to the doctrine that negligence alone, however, gross, is not sufficient, and that there must be an added element of intentional wrong, or, what is its equivalent, conscious indifference in the face of discovered peril, from which malice may be inferred." (Citing cases) it was there further said: "The terms 'wilfulness, or conscious indifference to consequences from which malice may be inferred,' as used in the decisions of this court, means such conduct in the face of discovered peril. In other words, in order to superadd this element of damages by way of punishment, it must appear that the negligent party knew, or had reason to believe, that his act of negligence was about to inflict injury, and that he continued in his course with a conscious indifference to the consequences, from which malice will be inferred." Here the undisputed evidence is that as soon as Miller became aware that his negligence had imperiled the safety of another, he did everything in his power to avert the consequences.

A judgment for punitive damages was affirmed in the case of *St. Louis, I. M. & S. Ry. Co.* v. *Stamps,* 84 Ark. 241, 104 S. W. 1114. Justice Riddick wrote a dissenting opinion which is referred to in the opinion on rehearing as the opinion of the late Mr. Justice Riddick. This dissenting opinion is probably the last opinion written by Judge Riddick. In his dissenting opinion Justice Riddick said: "Negligence, I admit, is shown, but to my mind the circumstances all rebut the idea that the injury was wilfully inflicted, or that there was anything wanton or wilful in the conduct of the engineer. For that reason I am convinced that exemplary damages ought not to be allowed. In the opinion on rehearing, a difference of opinion existed as to the established facts, and the opinion states "If the majority could see the facts that way, there would be no escaping the conclusion stated in the opinion of Mr. Justice Riddick." So that the entire court

approved the statement of law in Justice RIDDICK's dissenting opinion above quoted.

We do not find in any of our own cases any holding contrary to Justice RIDDICK's statement of the law, on the contrary, in the Chapter on Damages, West's Digest of the Arkansas Reports, Sec. 91, numerous cases are cited in support of the statement there appearing that "negligence, however gross, will not justify a verdict for exemplary damages unless the negligent party is guilty of willfulness, wantonness or conscious indifference to consequences from which malice may be inferred." No case to the contrary is cited.

The case of *Texarkana Gas & Electric Co.* v. *Orr*, 59 Ark. 215, 27 S. W. 66, is cited in support of the judgment here appealed from. In that case a judgment for punitive damages was sustained. A headnote reads: "Evidence that an electric light company knew in the night time that its wires were badly grounded, that its superintendent gave orders that the power should nevertheless be kept up, that after daylight, about 6 a. m., when many people were on the street, a live wire still lay on a street crossing by coming in contact with which a passerby was killed, is such evidence of wanton disregard of the rights and safety of others as will justify an assessment of punitive as well as actual damages."

In that case there was knowledge of possible peril to pedestrians on the street, and a conscious indifference to this peril. In our consultation the case of *Ross* v. *Clark*, 35 Ariz. 60, 274 Pac. 639 was before us. The Supreme Court of Arizona there affirmed a judgment for punitive damages against the drunken driver of a taxicab. But the opinion recites the following facts. "The evidence tends to show he was driving at a reckless speed, with little control of his car. The traffic at the place and time was heavy, and for safety to himself and others demanded careful driving." It thus appears that there existed in that case a conscious indifference to the injury and damage the drunken driver would probably inflict. These facts are absent here. Miller was not driving

recklessly, and there was no traffic except that of the two cars which collided.

In our recent case of *Benson* v. *State,* 212 Ark. 905, 208 S. W. 2d 767, we affirmed a penitentiary sentence of eighteen months against the defendant who killed a person while recklessly and illegally operating a truck under the influence of intoxicating liquors, under Act 169 of the Acts of 1947. It was there pointed out that under § 6707, Pope's Digest, as amended by Act 194 of the Acts of 1943, it is made unlawful for any person to drive a vehicle while under the influence of intoxicating liquors. The majority opinion supplements this Act of 1943 by imposing punitive damages for which the statute does not provide. In other words, the punishment imposed by law is insufficient, and the majority have added to it a civil liability. The General Assembly did not impose this liability, but the majority have done so of their own accord, and this has been done contrary to an unbroken line of our decisions on the subject of liability for punitive damages.

For the violation of Act 194 of the Acts of 1943, amending § 6707, Pope's Digest, Miller became liable, under that Act, to imprisonment for not less than ten days, nor more than one year in jail, or to a fine of not less than $25 or more than $1,000, or both such fine and imprisonment. The presumption is conclusive that Miller, under his plea of guilty, was given what was thought to be an appropriate punishment for his violation of the statute, which the opinion in the case of *Benson* v. *State, supra,* says was passed to prevent accidents and for "the preservation of persons from injury on the highways." Miller testified that he entered a plea of guilty because the sheriff told him that the tracks of his car showed that he had driven to the left of the center line of the highway.

By § 6708, Pope's Digest, it is provided that "Any person who drives any vehicle in such a manner as to indicate a wilful or wanton disregard for the safety of persons or property is guilty of reckless driving" and is subject to the penalty there provided. This Act applies

to the person who either willfully or wantonly disregards the safety of others. These terms "willfully and wantonly" are defined in the opinion in the Dysart case, *supra,* to mean, "such conduct in face of discovered peril. . . . and that it must appear that the negligent party knew, or had reason to believe, that his act of negligence was about to inflict injury, and that he continued in his course with a conscious indifference to the consequences, from which malice will be inferred."

No prudent man would drive a car while drunk, but the lack or absence of prudence is mere negligence and negligence, however gross, does not justify the imposition of punitive damages.

The person driving a vehicle in violation of the law is subject to the punishment prescribed by law, whether he injures anyone or not. To constitute a violation of the law the statute does not require or provide that he shall have injured another person. It is a penal statute, highly so, but does not provide for the imposition of punitive damages for its violation. The majority have supplied this omission.

Of course one who injures another willfully or wantonly is not exempt from liability for punitive damages because in inflicting the damage he committed a crime. One might become liable for punitive damages without committing a crime. The test for imposing punitive damages is not merely whether one has violated the law, but is rather whether he acted willfully or wantonly in his wrong-doing, as these terms have been defined by this court. If while acting willfully or wantonly one injures another, he is liable for punitive damages, but the liability for punitive damages arises not from the fact alone that the law was violated, but from the added fact that he had acted willfully or wantonly.

Here there is an entire absence of any showing that Miller acted willfully or wantonly, or with conscious disregard of the safety of any other person. He was perceptibly under the influence of liquor, and was properly held liable for the consequence of his negligent driving

in that condition, but unless the mere fact of being drunk supplies the absence of willfulness or wantonness, and renders such proof unnecessary, punitive damages should not be awarded.

There appears, therefore, no reason for the imposition of punitive damages in this case, except the fact alone that Miller was under the influence of intoxicating liquors. Certainly this is a proper circumstance to consider in determining whether he is liable for the injury inflicted, but compensatory damages only may be awarded where there is absent, as in this case, any element of willfulness or wantonness, or a conscious indifference to the consequences of one's conduct.

The Court of Appeals of California in the case of *Strauss* v. *Buckley,* 20 Cal. App. 2d 7, 65 Pac. Rep. 2d 1352, announced what I think is the law conforming to our own decisions. There a judgment for punitive damages was awarded against the drunken driver of an automobile. In reversing that judgment it was said: "The damages recoverable in a case of this kind are to be compensatory only; punitive damages are not recoverable because of the drunkenness of the defendant. That is an offense in itself for which punishment may be imposed in the ordinary course of law. Evidence of the drunkenness may be offered, of course, to show the negligence of the driver, but it may not be used to enhance the award of damages beyond that which will fairly compensate the plaintiff for the injuries suffered."

The majority have departed from the requirements heretofore existing for the imposition of punitive damages, and the new rule must eventuate in one or two things: First, insurance carriers in future policies must expressly exempt themselves from liability for punitive damages, or, Second, they must charge increased rates for insurance to compensate their increased and added liability.

In my opinion the judgment for compensatory damages should be affirmed and the judgment for punitive damages should be reversed and dismissed. I am au-

thorized to say that Justice McHaney and Justice McFaddin concur in the views here expressed.

Bailey *v.* Bank of Dover.

4-8476 209 S. W. 2d 864

Opinion delivered April 12, 1948.

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

Reece Caudle and *Robt. J. White,* for appellee.

Per Curiam. Appellee has moved for affirmance of the judgment appealed from on the ground that appellant has failed to comply with Rule 9 of this court. This rule requires that in each case the appellant make an abstract of material portions of the "pleadings, proceedings, facts and documents upon which appellant relies, . . ."

In the case at bar no abstract was made of the complaint, it being thus referred to in appellant's brief: "Complaint was filed in this case, wherein the usual allegations were made on February 20, 1946." Only this reference to the answer is made: "Answer was filed by the Bank of Dover on November 7, 1946." The lower court made findings of fact and of law. These findings are not abstracted. No abstract of contents of motion for new trial is made. Manifestly such an abstract does not comply with our rule. See *Droke* v. *Rogers,* 210 Ark. 938, 198 S. W. 2d 180; *Golden* v. *Wallace,* 212 Ark. 732, 207 S. W. 2d 605, and cases therein cited.

The judgment appealed from is affirmed.

The Chief Justice dissents.

LEWIS *v.* LEWIS.

4-8502 209 S. W. 2d 874

Opinion delivered April 12, 1948.

[redacted]

Harper, Harper & Young, for appellant.

Hardin, Barton & Shaw, for appellee.

SMITH, J. This is the second appearance of the parties to this litigation in this court. In a former opinion reported as *Lewis* v. *Lewis,* 202 Ark. 740, 151 S. W. 2d 998, a decree was affirmed awarding appellee a divorce and alimony in the sum of $60 per month. Only the allowance of alimony was contested on that appeal. The opinion there delivered reflects that appellant, the husband, was solely at fault and that he was living in adulterous relations with the corespondent whom he has since married. This woman was at the time of her marriage to appellant the mother of three children, and the children are now living with appellant in a home which he acquired subsequent to the divorce. It appears that he made application to the court for a reduction in the amount of alimony the original decree required him to pay, but the relief was denied. Subsequent to that proceeding he filed a similar motion in which he alleged a change in his condition and ability to pay since his first motion for a reduction of alimony was denied.

Appellee filed a response to this motion in which she alleged a change in her own condition had occurred, and she prayed that the alimony allowance be increased. The testimony shows without dispute that appellee is an invalid and requires constant medical attention, and that she has no income and only slight earning capacity. Her allowance barely affords subsistence.

The only reason assigned for a reduction of alimony is appellant's decreased ability to pay. The question involved and decided on the former appeal was that of his ability to pay the alimony allowed. The former opinion discussed his earnings, the principal source of which came from the operation of a passenger bus.

Appellant testified at the hearing from which this appeal comes that he suffers from arthritis, and that this affliction required him to sell his bus, and his franchise to operate it, for which he received $6,000 cash. After selling the bus, appellant was employed to operate it, but he was injured in a collision which caused the loss of one eye, and the impairment of the vision of the other, and he now has pending a suit for damages on this account. Testimony shows that appellant acquired a truck which he personally operates. The former opinion recites that appellant had a contract to carry mail and newspapers, but he testified that he is no longer able to perform that contract.

He received $6,000 for his bus, but he testified that this is being consumed and he now has only $1,100 in cash and that he barely subsists on his reduced earnings.

Appellant remarried after the divorce, and now has the responsibility of the support of his present wife and her three children, but the court refused, and we think properly so, to take this fact into account. He had a prior obligation fixed by the divorce decree, before he contracted this new obligation. He deserted his invalid wife and abandoned his obligation to her, for the woman responsible for the divorce, as appears from the former opinion.

Appellant testified that he and his present wife bought $700 in bonds during the war, and that with these

and help which he gave her, she has built a lunch stand on the school grounds in Mansfield, where they now live. He testified that the earnings from this business are slight and uncertain. There is no testimony that appellant's present wife ever had any money, or had ever earned any.

The decree from which is this appeal was rendered by the chancellor who granted the original divorce, and fixed the alimony to be paid, and after seeing the witnesses and hearing the testimony offered by them, he reduced the alimony to the extent of only $10 per month. Certainly this is not beyond the necessities of appellee, and we are unable to say that it is beyond the ability of appellant to pay, apart from the support of his present wife and her children whose claim upon him as found by the court below is subordinate to that of appellee.

Appellant does not account very satisfactorily for the expenditure of the $6,000 which he received from the sale of his bus, except to say that he acquired his home, and he admits that he has $1,100 of it on hand.

Appellant has some earning capacity with the use of his truck. He has had two hearings on the question of the reduction of this alimony and if he does not recover damages in his law suit and sustains further diminution of earning capacity, he may again apply for a reduction.

The question presented is one of fact, and we are unable to say that the decree is unsupported by the testimony and it is accordingly affirmed.

DEAN *v.* FREEZE.

4-8489 209 S. W. 2d 876

Opinion delivered April 12, 1948.

Ben B. Williamson, for appellant.

Chas. F. Cole, for appellee.

SMITH, J. Alvia Webb owned a 10-acre tract of land in section 14, T. 15 N., R. 10 W., Stone county, Arkansas, known as Camp Sylamore. On March 5, 1947, he leased the premises to Bill Brown and Thurlow Freeze for a period of three years, at a monthly rental of $50 per month, payable monthly in advance, which rental covered the premises and the building located thereon, and the equipment in the building used in the operation of a night club and place of entertainment and amusement.

On May 2, 1947, Brown and Freeze assigned the lease to William H. Phillips, which lease and the assignment thereof were duly recorded and on May 16, 1947, Phillips assigned and transferred the lease to Freeze individually. Subsequent to the execution of the original lease Webb sold the property to Daisy Dean, retaining

title to the personal property used in connection with the amusement resort.

After purchasing the property Mrs. Dean served notice on Freeze to vacate it within three days, and when the notice was not complied with she entered the building and removed its contents. The building was used only at nights, and it was entered in the daytime. Freeze obtained a temporary restraining order, which on final hearing was made permanent, enjoining Mrs. Dean from interfering with Freeze's possession, and from that decree is this appeal.

In response to the petition for the restraining order, Mrs. Dean denied that Freeze had a valid lease, and she prayed that he be enjoined from interfering with her possession.

These pleadings dispose of appellant's first contention that the court was without jurisdiction to grant the relief prayed, inasmuch as each party prayed that the other be restrained from interfering with the other's business.

The answer prayed that the cause be dismissed for the want of equity, but there was no motion to transfer the cause to the law docket. Appellant insists that the cause should be transferred to the law docket, inasmuch as she had both possession and the title to the property. Her title is not disputed, but her right of possession is. After giving the notice required to maintain an action of unlawful detainer, appellant abandoned that proceeding, and entered the building and removed its contents. This notice itself was a recognition of appellee's possession. That he was in possession is an undisputed fact. Personal property which appellee either owned or had leased was found in the building and was removed by appellant.

Appellant insists that she acquired title to the building and to the right to its possession as an innocent purchaser. It is admitted that the lease of the building and its contents for a period of three years was recorded, but it is insisted that as recorded the property was

described as being in Range 11, and the lease was not shown on the abstract of title which Mrs. Dean had prepared before she purchased the property, and that she was not chargeable with notice of the recorded lease because as recorded it did not describe the land in question.

The testimony is conflicting as to whether Mrs. Dean had actual knowledge of the existing lease when she purchased. The decree indicates the finding that she had this knowledge. However, she had knowledge of the fact that an occupant was in possession and it was her duty to inquire of the occupant by what right he was in possession and she is charged with the knowledge of the facts which the inquiry would have developed. *Hughes Bros.* v. *Redus,* 90 Ark. 149, 118 S. W. 414; *Cupp* v. *Cady,* 190 Ark. 700, 81 S. W. 2d 417. It was expressly held in the Hughes Bros. case, *supra,* to quote a headnote that "One's actual possession of land is notice to the world of the title under which he claims." Here Mrs. Dean bought the tract of land of which Freeze had actual possession, and she was not therefore an innocent purchaser.

Mrs. Dean denied knowing anything about the lease when she purchased, but she admitted that she knew someone was in possession. She so advised Webb, but she testified that Webb told her that the lease had been broken, and that she could get possession without trouble. Webb testified that he told Mrs. Dean that the property was under an outstanding lease, and that the only way he could sell the property was for her to deal with his leasee "about getting him out of it."

The lease provided that the rent should be paid monthly in advance, and should be in force only so long as the rent was paid, and it is insisted that default was made in its payments. On this issue Freeze testified that he tendered the rent, but that Mrs. Dean declined to accept it, and his testimony was corroborated by one Lloyd Gladden, whose testimony was not contradicted.

Freeze testified that he did not pay the rent on the first day of the month as that day was Sunday, but that

the tender was made the next day. We think this was a sufficient tender.

We conclude that the court correctly held that Mrs. Dean had bought subject to an unexpired lease and that she was not an innocent purchaser, and that there was no failure to tender the rent when due. The decree enjoining Mrs. Dean from interfering with the possession of Freeze is therefore affirmed.

LYNN SCHOOL DISTRICT NO. 76 *v.* SMITHVILLE SCHOOL DISTRICT NO. 31.

4-8514 211 S. W. 2d 641

Opinion delivered April 12, 1948.

Rehearing denied June 21, 1948.

D. Leonard Lingo and *W. A. Cunningham,* for appellant.

E. H. Tharp and *W. E. Beloate,* for appellee.

MINOR W. MILLWEE, Justice. Lynn School District No. 76 of Lawrence county has appealed from the judgment of the circuit court setting aside orders of the County Board of Education dissolving Oak Hill District No. 3 and Smithville District No. 31 and annexing the territory of said districts to the appellant.

In October, 1946, electors residing in said districts 3 and 31 filed separate petitions before the County Board of Education, under § 11488, Pope's Digest, to dissolve said districts and annex the territory thereof to appellant, District No. 76. The written consent of the board of directors of appellant to the annexation proposal also was filed with the county board. Other electors in District No. 31 filed a petition asking dissolution and annexation to Imboden District No. 45. Notice of the filing of the petitions and that a hearing thereon would be had on November 2, 1946, was published by the County

Supervisor, as secretary of the County Board of Education. After a hearing on said date the board of education entered an order finding that due notice of the hearing had been given as provided by law; that a majority of the qualified electors residing in districts 3 and 31 had signed petitions for dissolution of said districts and annexation to appellant; that the petition for annexation of district 31 to Imboden District No. 45 did not contain a majority of the electors and should be denied; that it was to the best interest of the inhabitants of the area affected that districts 3 and 31 should be dissolved and the territory annexed to appellant, which was accordingly ordered.

On April 25, 1947, persons claiming to be directors and qualified electors of districts 3 and 31 filed with the Board of Education separate affidavits for appeal from the order of November 2, 1946. These affidavits state that the petitions upon which the orders of dissolution and annexation were made did not contain a majority of the electors; that sufficient notice of the hearing was not given as provided by law; and that the orders were void because of fraud practiced by the appellant district. A transcript of the proceedings before the board was then filed in the circuit court.

On August 25, 1947, appellant filed in the circuit court its motion to dismiss the separate appeals because: (1) The affidavit for appeal was not filed within the time required by law; (2) Appellees had not filed the bond for costs required by Act 183 of 1925.

On September 11, 1947, appellees, Districts 3 and 31, filed separate pleadings in the circuit court designated "Substituted Complaint Asking for a Writ of *Certiorari*" alleging they had previously filed an original complaint, which had disappeared from the records, and now appeared as an appeal from the order of November 2, 1946. It was also alleged that the Board of Education was without jurisdiction of the original petitions because notice of the hearing published by the County Supervisor had not been authorized by the Board of Education, and proof of publication thereof filed.

prior to rendition of the order; and that there was no petition filed by a majority of the electors of District No. 76.

The pleading further states that, prior to the filing of the original petitions, the board of directors of appellant executed separate written agreements to maintain schools in the two districts for the first eight grades so long as a majority of the patrons of the district desired; and that said agreement further provided that should proposed Initiated Act No. 1 of 1946, known as the School Reorganization Act, fail to pass in the 1946 general election, the district boundary lines would be restored and the old districts re-established upon a petition of the majority of the electors of the original districts; that when it was ascertained that said Act had failed to pass, a majority of the electors of the old districts filed their respective petitions with the County Board of Education to re-establish said districts and set aside the orders of November 2, 1946; that appellant's repudiation of said agreement constituted a fraud upon the Board of Education and the electors of districts 3 and 31 who signed the original petitions. It was prayed that the order of November 2, 1946, be declared void and vacated and all rights of appellee be restored by proper orders of the court.

Appellant, without abandoning its motion to dismiss, filed its answer to the complaint admitting certain allegations and denying others. The answer also alleges that, after expiration of the time for appeal from the orders of November 2, 1946, appellant borrowed money and purchased a school bus, hired additional teachers and contracted for the erection of additional school buildings to accommodate the pupils residing in the territory which formerly comprised districts 3 and 31; that said districts did not hold a school election nor levy a school tax in March, 1947, and were barred by laches and estoppel from seeking relief by *certiorari*.

At a hearing in circuit court on September 11, 1947, the County Supervisor testified that a majority of the electors of former districts 3 and 31 filed petitions on

February 3, 1947, before the County Board of Education to re-establish said districts, and that a hearing was held before the board on March 28, 1947, and the petitions denied. At this point the trial court held that the consolidation orders of November 2, 1946, were conditioned on the passage of proposed Initiated Act No. 1 of 1946. The court concluded that the filing of the second petitions on February 3, 1947, was a continuation of the former proceedings and since the affidavits for appeal were filed within 30 days of the order of March 28, 1947, said appeal was perfected within the time required by law. The motion of appellant to dismiss was accordingly overruled. Appellant excepted to the ruling of the court and this is the principal assignment of error brought forward in the motion for new trial.

There was other testimony showing that electors who signed the original petitions were induced to do so in reliance upon the agreement of some of the directors of appellant to re-establish the districts, if proposed Act No. 1 failed of passage in the general election. These electors were of the opinion that the proposed Act would pass, in which event they preferred that the district be annexed to appellant instead of being forced to consolidate with some other district under the provisions of the proposed Act.

There was other evidence showing that appellant purchased a bus for transportation of high school pupils and incurred other expenses totaling $3,500 to take care of the additional enrollment resulting from consolidation. This was done more than 30 days after the order of annexation of November 2, 1946, and before the filing of the petition for restoration of the two districts on February 3, 1947. Appellant also hired additional teachers and incurred other expenses to maintain the schools up to the eighth grade in the old districts. The old districts did not hold a school election in March, 1947, and part of the electors residing therein voted in the election held in District 76.

In June, 1947, a special election was held in the appellant district in which it was voted to set aside millage

to retire a loan of $13,000 from the Revolving Loan Fund, the proceeds thereof to be used in the construction of additional buildings made necessary by the consolidation. Some of the electors of the old districts also participated in this election.

The trial court found that the Board of Education was without authority to act on the original petitions because they were signed with the understanding that the old districts would be restored in the event proposed Initiated Act No. 1 of 1946 failed of passage; that the entire proceedings amounted to a fraud practiced on the Board of Education and the electors of districts 3 and 31. The orders of November 2. 1946, were accordingly set aside and Districts No. 3 and 31 ordered re-established as they existed prior to the date of the filing of the original petitions.

We conclude that the able trial judge erred in overruling appellant's motion to dismiss the appeal of appellees from the orders of the County Board of Education. The orders of dissolution and annexation entered by the County Board of Education on November 2, 1946, were unconditional and contained no reference to the agreement executed by some of the directors of appellant whereby they agreed that districts 3 and 31 might be re-established if proposed Act No. 1 failed to pass. However, the trial court treated the filing of the petitions for restoration of the old districts on February 3, 1947, as a continuation of the original annexation proceedings, and the filing of the affidavits of appeal more than five months after the order of November 2, 1946, as being timely, since said affidavits were filed within 30 days of the order of March 28, 1947, which denied the petitions to re-establish the old districts.

Assuming, without deciding, that the court was authorized to so determine the effect of the proceedings, and that the affidavits for appeal were filed in due time, still appellees must fail since they neither tendered nor filed the bond required by Act 183 of 1925. This Act provides that parties aggrieved by the final order of the Board of Education may appeal therefrom within

30 days by making and filing a proper affidavit and bond as provided in the Act. In the recent case of *The Cypress Ridge School District No. 3* v. *Morris, ante,* p. 192, 209 S. W. 2d 689, the provision requiring the filing of an appeal bond was held to be jurisdictional and the trial court's action in dismissing the appeal for failure to tender or file such bond was affirmed.

It is observed that the general election of 1946 was held within a few days following the orders of November 2, 1946. Appellees took no action until three months later when they filed petitions to restore the districts. The petition for *certiorari* was not filed until September 11, 1947. While appellees alleged that a similar complaint had been previously filed, which disappeared from the record, this was strenuously denied by appellant and there is nothing in the record to support the charge made by appellees. It was alleged in the complaint, and appellees now contend, that the orders of annexation were void because the petitions were not signed by a majority of the electors in appellant district. Section 11488 of Pope's Digest requires a petition by a majority of the qualified electors of the district to be dissolved and the consent of the board of directors of the district to which the dissolved district is to be annexed. This statute was amended by Act 235 of 1947 to make the same provision applicable where procedure is by election instead of petition. The board of directors of appellant joined in the petition and consented to the annexation proposal in the instant case and a petition of electors of appellant district was not required under the statute. *School District No. 3* v. *School District No. 47,* 199 Ark. 921, 136 S. W. 2d 476.

The orders of the County Board of Education of November 2, 1946, are valid on their face and the law expressly provides for an appeal. This court has often held that the writ of *certiorari* will not be made a substitute for appeal and cannot be used in any case where there is or has been a right of appeal, unless the opportunity for appeal has been lost without fault of the petitioner. *Bird* v. *McCrory Special School District,* 175 Ark. 724, 300 S. W. 370. The written agreements

upon which the electors of districts 3 and 31 are alleged to have relied in signing the original petitions were not executed at a meeting of the board of directors of appellant nor were the directors who signed the agreement authorized to do so by the board. Three of the five directors of appellant signed one of the instruments and the president and secretary of the board signed the other. The powers of the directors of a school district are derived only from legislative authority and persons dealing with them are presumed to know the limitations of such powers. *Rural Special School District No. 50* v. *First National Bank,* 173 Ark. 604, 292 S. W. 1012. The Board of directors of appellant was without power to execute the agreements and appellees were chargeable with notice thereof. *School District No. 18 of Jackson County* v. *Grubbs Special School District,* 184 Ark. 863, 43 S. W. 2d 765.

We are also of the opinion that appellees are precluded from obtaining relief by *certiorari* under the decisions of this court in *Rural Special School Dists. Nos. 17 and 95* v. *Ola Special School District No. 10,* 182 Ark. 197, 31 S. W. 2d 129. In that case appellants sought a writ of *certiorari* to quash an order of the Board of Education on the ground that said order was void because made without the notice required by law. This court affirmed the action of the trial court in refusing to grant the writ and it was there said: "An effort to quash an order or judgment in a matter involving the public interest or of a public nature, such as the consolidation and creation of school districts, is not entertained as of right, but is a matter resting in the sound discretion of the court, which should not grant relief unless the remedy is sought within apt time or without an unreasonable delay in applying therefor. Here appellants appeared and remonstrated against the making of the order without objecting that notice had not been given of the application therefor, made no effort to appeal from it, and sought no relief by this proceeding until more than five months after the order was made, the entire status changed, and the unusual expenses incurred necessary to the carrying out of the

order and conducting the schools in the territory as consolidated. No elections were held or school tax voted in the old districts because of the consolidation, and some of the electors residing therein participated in the school election in the new district."

In the case at bar appellees joined in the petitions upon which the orders of November 2, 1946, were based and took no action to set such orders aside until three months after the orders were made and the general election of 1946 was held. They sought no relief by *certiorari* until more than 10 months after the orders were made. In the meantime appellant incurred additional expenses in the purchase of a school bus, the employment of additional teachers and the construction of additional buildings to accommodate the increased number of pupils resulting from annexation of the two districts. No elections were held or school tax voted in the dissolved districts at the regular school election in March, 1947, and some of the electors residing in said districts voted in the election in the appellant district. Some of these electors also voted in the special election held by the new district for the purpose of setting aside millage to retire a loan of $13,000 to be used to construct new buildings. The delay of appellees was unreasonable under the circumstances and the extraordinary writ of *certiorari* should not issue as a substitute for the right of appeal, which they failed to pursue in the manner provided by statute.

The judgment is reversed and the cause will be remanded to the circuit court with directions to grant the motion of appellant to dismiss the appeal of appellees from the orders of the County Board of Education, and to reinstate the orders of said board of November 2, 1946.

MILLMAN LUMBER COMPANY *v.* BRYANT.

4-8493 209 S. W. 2d 878

Opinion delivered April 12, 1948.

Owens, Ehrman & McHaney, for appellant.

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

HOLT, J. This action was begun January 6, 1947, and involved title to the timber on 631 acres of land in Baxter county, Arkansas.

November 22, 1945, J. J. English, the owner, conveyed by deed the timber on this land to appellant, R. H. Millman, for a cash consideration of $2,000, giving a period of three years within which to cut and remove the timber. This timber deed was not filed for record until August 30, 1946, and in the meantime, on July 23, 1946, English conveyed this tract without reference to reservation of the timber, by warranty deed, to appellee, Clyde

Bryant, and this latter deed was filed for record on the same day that it was executed.

Late in 1946, appellant, Millman, entered upon the land and cut a small amount of the timber, whereupon appellees, by appropriate proceedings, sought injunctive relief and damages against appellant on the ground that Bryant was an innocent purchaser and had no notice when he purchased the tract of land from English of the prior sale of the timber by English to appellant, Millman.

Upon a hearing, the trial court enjoined appellant from cutting and removing any of the timber except approximately 20 acres (described in the decree), and denied appellee damages for the timber so cut and removed. This appeal followed.

Appellees have cross-appealed from that part of the decree denying damages for the portion of the timber cut by appellant. Appellant says that the question presented here is "whether the appellee, Clyde Bryant, is a *bona fide* innocent purchaser for value of the lands involved in this action and the timber growing thereon without notice of the title of the appellant, R. H. Millman, in and to said timber."

Appellee states the question: "Was the conduct of appellee that of a prudent man under the circumstances existing? . . . If appellee's conduct was that of an ordinarily prudent person and if he pursued his inquiry with ordinary diligence under the circumstances obtaining, he is an innocent purchaser. If he failed to do so, he is charged with the full knowledge of all facts which reasonable inquiry would have disclosed."

It is undisputed that J. J. English, the owner of the 631 acres of timber land involved, conveyed by deed the timber on this tract to R. H. Millman for a consideration of $2,000, cash, on November 22, 1945, and that this deed was not recorded until August 30, 1946. It is further undisputed that English, by warranty deed, without exception or reservation of the timber growing on the tract, conveyed it to appellee, Clyde Bryant, on July 23, 1946. While negotiations were being carried on between

English and Bryant for the sale of the land, according to the stipulated testimony of English, he (English) told Bryant that "in the beginning of negotiations with plaintiff (Bryant) for the sale of the lands herein involved he fully informed plaintiff of all the facts in connection with the sale of the timber on the lands herein involved and that plaintiff had knowledge of such facts at the time they finally agreed upon the terms of the sale; that English told the plaintiff he had sold all the timber and had executed a timber deed therefor and that plaintiff had knowledge of all these facts when he agreed with English upon the purchase price of said lands and finally consummated the sale."

Bryant denied that English told him that there was an outstanding timber deed to the entire tract, but admitted that English, during the negotiations for the purchase of the land, told him that the timber on about 25 or 30 acres of the tract had been sold, but did not remember to whom the sale was made. He further testified that he caused a search of the records to be made and found no timber deed on record, that he had Mr. Curlee make this record search for him "that morning before the deed was made" and that he relied upon this information.

Mr. Curlee, who brought English and Bryant together, testified: "Q. (By Mr. Owens) Mr. Bryant says that he asked you to go over to the courthouse and see if you could find a timber deed on record? A. That's right. Q. And you were unable to locate one? A. There was not any there that I could find at that time. Q. Then the deal was closed, as a matter of fact, on the strength of the record? A. I would say that and on the strength of what Mr. English had told him. . . . Q. I will ask you to state whether or not Mr. Curlee, that in that conference, Mr. English stated in the presence of Bryant and Ernie Wright, that he had told him prior to that deal being closed, that he had sold the timber? A. That's correct, but I am not saying he said he sold all the timber, but the timber we were talking about. . . . Q. (By Mr. Shouse) . . . There wasn't anything said in your presence about all the timber, was there? A. No, sir.

Q. You understood and in fact, you knew all the while that Mr. English had informed Mr. Bryant of the sale of a part of the timber? A. That's correct. . . . A. To tell you the truth, I wasn't interested in the sale because I just simply brought them together. I never was with him on the place, in fact I took Clyde down there and introduced them and went back when they closed the deal and took this fellow's acknowledgment." We do not detail all the testimony.

The cause comes to us for trial *de novo*.

We recognize the well established rule that, on a disputed question of fact in an equity cause, the findings of the Chancellor should not be disturbed unless they are found to be against the preponderance of the testimony, but in the present case, we have reached the conclusion, after a careful consideration of all the testimony, that it preponderates against the Chancellor's findings.

The principles of law announced in *Cooksey* v, *Hartzell,* 120 Ark. 313, 179 S. W. 506, are controlling here. In that case, the facts, in effect, were quite similar to the present case. There, the owner of the land involved testified positively that the day before he sold the land to the appellee (Hartzell) he told Hartzell the timber on the land had been previously sold. Hartzell denied that the vendor had made any such statement, but admitted that the vendor had told him that the timber on 3 acres of the land had been sold. There, as here, the timber deed was not recorded until after the vendor of the timber had executed a warranty deed conveying the entire tract, without reservation of the timber. There, the appellee admitted that he knew there was an outstanding timber deed to 3 acres out of a quarter section involved, and in the present case, appellee admitted that he knew there was an outstanding timber deed to 25 or 30 acres of the 631-acre tract involved. It was there said: "In other words, he was put upon notice of appellant's ownership, and even though the deed was unrecorded, his grantor's prior conveyance to appellants must prevail over his subsequent purchase. The timber deed, even though unrecorded, was good between the parties and against subsequent purchasers with notice."

In the very recent case of *Thackston* v. *Farm Bureau Lumber Corporation,* 212 Ark. 47, 204 S. W. 2d 897, we reaffirmed our holding in *Broderick* v. *McRae Box Company,* 138 Ark. 215, 210 S. W. 935, and said: "Prior to the execution of the deed to the land from Hall to Broderick, Hall, by a written contract, sold and conveyed the timber to a third person. According to the testimony introduced for the defendants, McRae Box Company and Hale, Broderick was informed by his vendor before the execution of the deed by the latter to the former that the timber had been sold. This was actual notice to Broderick and put him on inquiry as to the rights of the parties who had purchased the timber. *Kendall* v. *J. I. Porter Lumber Company,* 69 Ark. 442, 64 S. W. 220; *Collins* v. *Bluff City Lumber Co.,* 86 Ark. 202, 110 S. W. 806; and *Weaver-Dowdy Co.* v. *Martin,* 94 Ark. 503, 127 S. W. 705. It is true that Broderick denied that Hall told him that he had sold the timber at the time he made the contract with him for the sale of the land; but the testimony as to notice need only be established by a preponderance of the evidence."

In *Kendall* v. *J. I. Porter Lumber Company, supra,* we find this language: "Appellant was also informed by his vendor that the J. I. Porter Lumber Company had purchased the timber. This did actually put him on inquiry, and he searched the records for a deed from William Godfrey to the Lumber Company. Failing to find such a deed, he purchased the timber. He did not, however, prosecute the inquiry with due diligence. There was one other source of information open to him, and that was an application to the appellee. He failed to make it, and is therefore chargeable with notice of the contents of Godfrey's deed to the Lumber Company. The undisputed facts show that he had actual notice."

The general rule is announced in *Devlin on Real Estate,* "Deeds," Third Edition, Vol. 2, page 1342, § 725, as follows: "It is a well-settled rule, both in England and in this country, that subsequent purchasers who have notice of a prior unrecorded deed, acquire their rights in subordination to it. They are affected by their knowl-

edge of its existence in the same mode, and to the same extent, as if the deed had, prior to their purchase, been properly recorded. Whatever is notice enough to excite attention and put a party on guard and call for inquiry is notice of everything to which such inquiry might lead. When a person has sufficient information to lead him to a fact he shall be deemed conversant of it."

So here, we think it clear that appellee on the undisputed facts had actual notice of an outstanding timber deed, and in the circumstances, cannot be heard to say that he was without such notice.

Accordingly, on the direct appeal, the decree is reversed and the cause remanded with directions to enter a decree consistent with this opinion. On the cross-appeal, the decree is affirmed.

PUGH *v.* CAMP.

4-8499 210 S. W. 2d 120

Opinion delivered April 12, 1948.

M. P. Watkins, for appellant.

Judson N. Hout, for appellee.

McHANEY, Justice. This action of appellant against appellee was one in replevin for the recovery of the pos-

session of one 1942 Model Ford Coach and damages for the alleged wrongful detention of same, which car appellant alleged belonged to him. Order of delivery and summons were served on appellee who executed a cross bond and retained possesion of the car. Trial resulted in an instructed verdict for appellee on which judgment was entered, and this appeal followed.

The only question we think it necessary to determine is the assignment that the court erred in giving to the jury a peremptory instruction for appellee. This was given at the conclusion of the evidence for appellant.

It is well settled that a verdict should be directed against a party only when there is no evidence tending to establish an issue in his favor, when viewed in the most favorable light to him. *Barrentine* v. *Henry Wrape Co.*, 120 Ark. 206, 179 S. W. 328. Or, stating it another way, "If there is any evidence tending to establish an issue in favor of a party, it is error to direct a verdict against him." Headnote 1, *Scott* v. *Wis. & Ark. Lbr. Co.*, 148 Ark. 66, 229 S. W. 720.

Appellant testified that he was the owner of said coach and on January 15, 1947, conditionally traded same to one Haynes for a 1942 model Chevrolet Sedan; that said Haynes was out of St. Louis and was operating a used car lot in Marked Tree, selling and trading cars on the market; that he was to pay Haynes $25 difference in the cars, but refused to do so until Haynes furnished him ownership papers to the Chevrolet which he promised to do; that Haynes told him he did not have the ownership papers to the Chevrolet with him, but that his wife had them in St. Louis, and that he would get them in a short time and give them to appellant—that he had to go to St. Louis in a day or two to get more cars; that he told Haynes he would not trade without the papers, so Haynes replied: "You just drive this Chevrolet, and I will make the trip back to St. Louis in the Ford and bring the ownership papers back to you"; and that appellant consented to that arrangement with the statement to Haynes that he would not trade cars "until you deliver those owner-

ship papers to me." He further testified he told Haynes the Ford would be his until he received said papers.

We think this evidence given by appellant, if credited by the jury, sufficient to support a finding that he never did part with the title to the Ford car—no completed swap—no final meeting of the minds, and that a question for the jury was made. If appellant did reserve the title to the Ford car, its sale by Haynes passed no title, since he had none to pass, and title can be reserved by parole. *Home Fire Ins. Co.* v. *Wray,* 177 Ark. 455, 6 S. W. 2d 546, cited in *Sykes* v. *Carmack,* 211 Ark. 828, 202 S. W. 2d 761. It is conceded that the Chevrolet car was stolen in St. Louis and that it was turned over by appellant to the State Police in Jonesboro. It is also conceded that Haynes, instead of going to St. Louis in the Ford to get the title papers to the Chevrolet, took the Ford to Newport, Arkansas, and sold it, and that it was sold two or more times before appellee acquired it, and that all these parties bought without notice of any fraud practiced on appellant by Haynes, or of any defect in the title to the Ford.

This case is somewhat similar to our recent case of *Sykes* v. *Carmack, supra,* where a licensed automobile dealer in Clarksville sold the car there in question to one Young, a stranger, for a cash consideration and accepted a check in payment for the car drawn on a bank in Russellville. He testified he told Young they would fix up the papers the next day when the check cleared, and that he would go to the bank the first thing the next morning and get the money, but Young said he needed the car to take his men to his mill, so he let Young take the car. He testified positively the title to the car was not to pass until the check cleared, and that he did retain the title to the car. The next morning the check was presented to the bank and payment was refused. Young took the car to Mena, sold it to a dealer there, and the appellee in that case bought it. Sykes brought replevin for the car, and on a trial to a jury verdict was rendered against Sykes, and on appeal we affirmed. We there said: "The interest of appellant and his son (a witness) 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." We also said in the Sykes case: "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."

So, here, while appellant's testimony, as above set out, was not disputed by any witness, his interest in the litigation is such that his testimony may not be regarded as undisputed, and a question of fact was made for the jury.

Appellee cites *Sadler* v. *Lewers,* 42 Ark. 148, where it was held that one who voluntarily parts with his property in exchange for stolen property cannot, upon surrendering the stolen property to the true owner, recover his own from one who has acquired it for value and without notice of the fraud. But there the owner parted with the title to his mare in exchange for a stolen mule and paid $10 to boot. There was no reservation of title in the mare. See, also, *Andrews* v. *Cox,* 42 Ark. 473, 48 Am. Rep. 68, which distinguished the latter from the former, both written by Judge EAKIN at the same term of court.

Here, appellant admits that he surrendered possession of the Ford temporarily, but did not surrender title. This, we think, made a question of fact for the jury, and that the court erred in directing a verdict for appellee.

The judgment is reversed and the cause remanded for a new trial.

DRENNAN *v.* MCCARTHY, GUARDIAN.

4-8507 210 S. W. 2d 791

Opinion delivered April 19, 1948.

S. L. White, for appellant.

Moore, Burrow, Chowning & Mitchell, for appellee.

ED. F. MCFADDIN, J. By appeal and cross-appeal there is presented this multi-sided litigation which involves, in the main, questions as to (1) the minors' right to collect rent from the homestead, and (2) the widow's dower in personalty. A chronological statement will present the picture.

C. L. McCarthy was a resident of Pulaski county, and a valuable and trusted official (secretary-treasurer) of the Little Rock Furniture & Manufacturing Company. He drew a salary of $75 per week, plus 5% of the net annual profits of the corporation. This 5% was called a "bonus." The fiscal accounting period of the Little Rock Furniture & Manufacturing Company (hereinafter called the corporation) ended on May 31st each year; and as of that date the bonus was determined and paid. In the latter part of November, 1945, Mr. McCarthy became ill with a heart condition. At its own expense, the corporation sent him to various specialists, but to no avail. He died April 2, 1946, survived by his wife (appellant) and his two minor children, Charles, aged 10, and John, aged 5. These were Mr. McCarthy's children by a former marriage; he and appellant were married in September, 1944. Mr. McCarthy had requested that his brother, Will McCarthy, be appointed guardian of the two minors; this was done, and we will hereinafter refer to Will McCarthy as guardian. On the widow's petition the Commercial National Bank was appointed administrator of the estate of C. L. McCarthy (hereinafter referred to as the deceased).

The corporation paid McCarthy his salary of $75 per week during his entire illness; and continued to pay the salary, post-mortem, to May 31, 1946, and also paid the bonus for the full fiscal year. The calculation of the post-mortem salary and the bonus, less deductions, was as follows:

Post-mortem salary—Gross		$ 765.00	
Less old-age benefits	6.75		
Less U. S. withholding tax	33.30		
Less personal account	308.92		
Total deductions		348.97	
Net after deductions			326.03
Bonus—Gross		$8,821.49	
Less old-age benefits	13.50		
Less U. S. withholding tax	$1,499.65		
Total deductions		1,513.15	
Net after deductions			7,308.34
Total net			$7,634.37

This calculation is the basis of the contention as to the widow's dower. The deceased owned other personal property, but as to the widow's dower in such other personal property, there appears to be no dispute in this litigation. The only real estate owned by the deceased was his home in Little Rock, then occupied as a homestead by the widow and the two minors.

About two weeks after his appointment, the guardian moved the two minor children from their homestead to the home of the guardian. Some time about October, 1946, the widow remarried, and is now Mrs. Sammie L. Drennan. Controversies arose as to the corporation's calculation (hereinbefore set out), and also as to the minors' homestead claims. Thereupon the widow [1] (appellant) instituted this suit in the chancery court against the corporation, the guardian, and the administrator. She alleged, *inter alia,* that she had not received all of her dower in the money paid by the corporation. The wording of the allegation was:

"That the defendant's (corporation's) agents in computing the widow's dower and the interest of said minors, erroneously charged and deducted from the gross amounts due, certain sums and items for Old Age Benefits and Federal Withholding Taxes. That under the law, plaintiff is entitled to her dower therein without deduction. That she is entitled to an accounting

[1] Although Mrs. McCarthy has remarried, and is now Mrs. Drennan, we will continue to refer to her as the widow, since her claims arise because of such status.

between the Little Rock Furniture & Mfg. Co., Will McCarthy, Guardian, the administrator and herself to the end that the court may accurately determine and award her judgment, against the proper party, for the balance due her as dower therein."

The administrator demurred to the complaint, saying: "This court has no jurisdiction over the person of the defendant or the subject matter of the action." The corporation filed a general denial. The guardian, in addition to a general denial, filed a cross complaint in which he claimed that the widow should be required to pay the minors one-half of the fair rental value of the homestead from the time the minors ceased to occupy the homestead. The hearing in the chancery court resulted in a decree:

1. sustaining the demurrer of the administrator;

2. declaring that the widow was entitled to statutory dower in one-third of the net $7,634.37—and not in the gross $9,496.49—shown in the corporation's calculation;

3. finding that the widow was liable to the minors for one-half of the fair rental value of the homestead from June 1, 1946; and

4. fixing the said one-half at $37.50 per month.

From that decree the widow has perfected a direct appeal, and the guardian a cross-appeal. Appellant says:

"The court erred in the following respects:

"I. in dismissing as to the administrator;

"II. in refusing to appoint a master to state an account between the parties;

"III. in charging appellant with one-half of the rental value of the homestead;

"IV. in refusing to award appellant judgment for dower in the gross earnings (5 percent.) due her husband by the employer without deduction for taxes, old age benefits or other charges."

In discussing and disposing of these four assignments, we will also dispose of the guardian's cross-appeal.

I. *The Demurrer of the Administrator.* The chancery court was correct in refusing to allow the widow to sue the administrator in equity in a matter involving how much dower she was entitled to receive in the personalty of the estate. The administration of the estate was pending in the probate court, and, there, the widow had already received, as dower, some amounts from the bank account and also some corporation stock certificates. She did not allege, in this equity suit, that she had made any demand on the administrator that it institute proceedings against the corporation and the guardian; neither did she allege any fraud, accident, mistake, or impending irremedial mischief. When the probate court has undertaken to act, equity will not take jurisdiction while adequate right of redress in probate is still available, and the estate is in process of administration. In *Reinhardt* v. *Gartrell,* 33 Ark. 727, Mr. Justice EAKIN discussed Art. VII, § 34 of our present Constitution, and made these sage observations as to the extent and limitations on the power of chancery to take jurisdiction in estates pending in the probate court:

"The courts of Chancery have no power to take such cases out of the Probate Courts, for the purpose of proceeding with the administration. But their power and functions to relieve against fraud, accident, mistake or impending irremediable mischief, is universal; extending over suitors in all courts, and over the decrees in those courts, obtained by fraud, or rendered under circumstances which render it inequitable that they should be enforced. Hence, any frauds in the settlements of administrators or executors may be corrected. When that is done, if there be still a necessity for continued proceedings in the course of administration, such proceeding should go on in the Probate Court, upon the basis of the reformed settlement. The object of Chancery intervention having been accomplished, the jurisdiction in equity should cease with the necessity."

Another phase of probate-chancery jurisdiction will be discussed in Topic IV, *infra.*

II. *Necessity of a Master.* There was no abuse of discretion by the chancery court in refusing to appoint a master. What we said in *Norden* v. *McCallister,* 207 Ark. 1101, 184 S. W. 2d 459, is apropos here:

"We find nothing in the record to indicate any necessity for the appointment of a master. The chancery court is clothed with considerable discretion as regards the appointment of a master. *Bryan* v. *Morgan,* 35 Ark. 113; *Parker* v. *Wells,* 84 Ark. 172, 105 S. W. 75; 19 Am. Juris. 254; 30 C. J. S. Equity, § 522, 919. In this case the chancery court determined directly from the testimony the amounts . . . The accounts were not complicated. . . . Certainly there was no abuse of discretion by the chancery court in refusing to appoint a master under the facts in this case."

III. *Charging the Widow with One-Half of the Rental Value of the Homestead.* As previously stated, the guardian took the two minors from their homestead to his own residence prior to June 1, 1946; and the chancery court held that the widow must pay the guardian one-half of the rental value of the homestead from that date. The proof showed that the widow desired that the children remain with her; that the homestead was open to them if the guardian would permit them to return; that if the homestead were rented, it would rent at a monthly yield of from $60 to $100; but that the property was occupied by the widow, her present husband, her sister and the family of the latter. The widow testified that her sister (Mrs. Hogue) paid the utility bills and looked after the yard and gave the widow her meals in return for Mrs. Hogue and her family living in the homestead. It is admitted that the widow had not abandoned the homestead. The Constitution of this State, Art. IX, § 6, says:

"If the owner of a homestead die, leaving a widow, but no children, and said widow has no separate homestead in her own right, the same shall be exempt, and

the rents and profits thereof shall vest in her during her natural life, provided that if the owner leaves children, one or more, said child or children shall share with said widow and be entitled to half the rents and profits till each of them arrives at twenty-one years of age—each child's right to cease at twenty-one years of age—and the shares to go to the younger children, and then all to go to the widow, and provided that said widow or children may reside on the homestead or not; and in case of the death of the widow all of said homestead shall be vested in the minor children of the testator or intestate."

Two cases involving this Constitutional provision are *Winters* v. *Davis,* 51 Ark. 335, 11 S. W. 420 and *Sparkman* v. *Roberts,* 61 Ark. 26, 31 S. W. 742. The opinions in both of these cases were written by Mr. Justice BATTLE, and are typical specimens of his logical thinking and clear expression. In *Winters* v. *Davis,* Justice BATTLE recited that the widow: " . . . denied to the minor children the right to hold possession and share the rents and profits thereof with her. For a part of the time she rented it (homestead) and collected the rents. Three of the minor children bring this action against her and her present husband for their share of the rents and profits." The lower court allowed recovery to the minors; and the decree was affirmed by this court.

In *Sparkman* v. *Roberts, supra,* the widow's second husband occupied the rural homestead for seven years, and collected the rents and also used the land himself. Three of the minor children, entitled to homestead, brought action against the stepfather for their share of the rents. From an historical review, Justice BATTLE reached the conclusion that the framers of our present Constitutional provision (Art. IX, § 6) intended that the widow and minor children should each: " . . . be accountable to the others for any rents, profits and benefits he or she may receive from the homestead in excess of his or her share, the widow being entitled to one-half and the children to the remainder."

Justice BATTLE continued: A careful consideration of the Constitution will show that such is its intention. In giving to the minor children the right to share the homestead equally with the widow, the Constitution at the same time vested them with the right to one-half of the rents and profits. As to the use, occupancy, rents and profits, they are placed upon an equality with the widow. The conferring upon them these rights to the exclusion of the adult children, and exempting them from the duty to remain upon the homestead, is a recognition of their probable need of the assistance which can be derived therefrom for their support or education, and of their inability, without it, to make adequate provision for themselves; and is an evidence of the intention of the Constitution to supply this want by the homestead, so far as it will extend. They were doubtless exempted from the duty to occupy the homestead for the purpose of maintaining their right to the same, because it was manifest, from their age, inexperience, incapacity, and lack of property, they might not make it profitable or desirable to do so. In both events, provisions are made for them. In the latter it was intended that they should have one-half of the rents or profits derived therefrom, if occupied by another. In every event they are to have the benefit of the homestead during their minority. To permit the widow, or any one in her right, to use and occupy it without liability to them for one-half of the benefits thereby enjoyed would defeat the object, in part, of the Constitution in making this provision for them. A construction that will give her the right to do so is contrary to the spirit and intention of the Constitution. Hence we conclude that the widow, if she occupy and use it, is liable to the minor children for one-half of its rental value, that being the benefit derived."

It will be observed that Mr. Justice BATTLE said that the minors were entitled to "one-half of the rents or profits derived therefrom, if occupied by another." In the case at bar the widow did not deny the minors access to the homestead—as in the Winters case; furthermore, in the case at bar, the guardian has voluntarily removed

the minors and should not be allowed to force the widow to pay *market value rent* on her own homestead. There are some differentiating facts between the two adjudicated cases and the case at bar; nevertheless, the two adjudicated cases are authority for our holding—which we now make—that the widow here is liable to the minors for one-half of the value of such rents and profits *as the widow actually received* from the homestead. She is entitled to occupy the homestead, but, in allowing Mrs. Hogue to occupy the house, the widow has been receiving her part of the utilities and her meals, linens, etc. These items, over and above her own occupancy, constitute the "rents and profits" that she is receiving, and she should pay to the minors one-half of the value of such rents and profits. There is no suggestion of subterfuge by the widow in allowing Mrs. Hogue to occupy the house. If such subterfuge existed, then the widow would be liable for half of the rental market value of the homestead.

We hold that the chancery court used an erroneous formula—*i. e.*, rental market value—for charging the widow with the rents and profits of the homestead instead of requiring the widow to pay one-half of the rents and profits *actually received* by her. For this reason, so much of the decree as adjudicated the amount of the rents must be reversed, and the cause remanded for a further hearing on this phase of the case in order to determine the correct amount in the light of this opinion. The homestead was the only real estate of the deceased, so settling the homestead issue in this chancery case is not an invasion of the jurisdiction of the probate court.

IV. *The Widow's Dower in the Corporation Bonus and Post-Mortem Salary.* We have previously copied the calculation of the corporation as to these items. The gross total of such salary and bonus before any deductions was $9,496.49. The total of the deductions was $1,862.12, leaving a net balance of $7,634.37. The effect of the chancery decree was to award the widow $2,544.77,

which is one-third of the net. From such decree the widow has appealed. She claims that she is entitled to $3,165.49, which is one-third of the gross, and that the deductions are to be charged against that part of the estate other than her dower. The guardian has cross-appealed; he claims (a) that the widow is not entitled to any of the post-mortem salary, since the husband was never "seized and possessed of it;" and (b) that the widow is entitled to dower in only that portion of the bonus which had accrued on November 22, 1945—the date Mr. McCarthy ceased to be active in the business. The guardian claims this bonus—on such date—to be $4,214.60.

After the death of Mr. McCarthy the corporation took the position that any payments it made thereafter (either post-mortem salary or bonus) were mere donations, and that the corporation could pay such amounts to either the administrator or the guardian, as the corporation elected. Accordingly, the corporation paid the administrator only $3,762.84, and paid the guardian, direct, the sum of $3,871.52. The testimony shows that it was the policy of the corporation to pay its officials (such as Mr. McCarthy) a stipulated salary, and also a part of the net profits; that when other officials had died the salary and bonus had always been calculated to the end of the fiscal year. With this established policy having been shown, it follows that what the corporation did was to pursue its course of business rather than to "make a donation." This case is therefore different in facts from that of *West* v. *Todd,* 207 Ark. 341, 180 S. W. 2d 522.

From a careful review of the evidence, we reach the conclusion that the corporation should have paid to the administrator whatever was the entire amount that the corporation was to pay, and should have left to the probate court the fixing of dower from said total. Having reached this conclusion, we therefore hold that the guardian is in error in claiming that the widow has been overpaid; she is entitled to a statutory dower of one-third in the total of whatever amount the corpora-

tion should have paid. The administrator should have paid her one-third of the $7,634.37, and then proceeded against the guardian and the corporation to recover any amounts due the estate. This figure is independent of the widow's contention concerning the deductions.

We come then to the widow's contention that her dower should have been one-third of the gross, instead of one-third of the net. She particularly objects to the withholding tax of $1,499.65 on the bonus, and claims that the U. S. Statutes do not require such a withholding tax on a bonus accrued and paid after the taxpayer's death. But in making this claim, she is seeking to have the chancery court supersede the probate court in the alloting of her dower in the personal property. Prior to the filing of this suit she had petitioned the probate court for an assignment of dower in some of the personal property. She had received dower in the bank account of the deceased, and also had received dower in the corporation stock owned by the deceased. Having asked the probate court to assume jurisdiction to assign the dower to her in the personal property, and having received a portion of such dower, she cannot now invoke chancery jurisdiction as a substitute for the already active probate jurisdiction. We have previously mentioned that she made no allegations concerning fraud, accident, mistake or impending irremedial mischief.

In *Shields* v. *Shields,* 183 Ark. 44, 34 S. W. 2d 1068, after the probate court had undertaken to assign dower to a widow in the personal property, she filed an independent action in the chancery court. We dismissed the chancery action, saying:

"The jurisdiction of the probate and the chancery courts in the assignment of dower in both real estate and personalty is therefore concurrent, and the case before us is one where the jurisdiction of the chancery court was invoked to assign dower in the real estate, but not in the personal estate, whereas the administrator had made a partial assignment of dower, which action he had reported to the probate court. The money

given and paid the widow by the administrator constituted a partial assignment of dower, and the probate court approved the report thereof. This was an assumption of jurisdiction by the probate court to assign dower in the personalty, and after jurisdiction had been assumed by the probate court for this purpose, the chancery court should not have interfered, as the jurisdiction of the two courts was concurrent, and the jurisdiction of the probate court had first been invoked in regard to the personalty. *Phillips* v. *Phillips,* 143 Ark. 240, 220 S. W. 52; *State* v. *Devers,* 34 Ark. 188."

That case is ruling here. The widow could have petitioned the probate court to require the administrator to discover additional assets,[2] and to require the administrator to file suit against the corporation [2] to determine whether the corporation had correctly or erroneously withheld and paid the U. S. Government the withholding tax on the bonus. But the widow, under the facts in this case, is not free to bring an independent suit in equity for her dower, since she has already invoked the probate jurisdiction, and has made no allegations concerning fraud, accident, mistake, or impending irremedial mischief. The demurrer of the administrator presented the issue as to the right of the widow to maintain this suit, and that demurrer necessarily went to the jurisdiction of the chancery court to determine dower in the proceedings between the widow and the corporation. The sustaining of that demurrer was correct (as we pointed out in Topic I, *supra*), and the effect of such ruling was to leave the chancery court without jurisdiction to consider the widow's claim for further dower as against the corporation.

Conclusion: It follows that the chancery court was correct: (a) in sustaining the demurrer of the administrator, (b) in refusing to appoint a master, and (c) in holding that the widow was liable to the guardian for one-half of the rents and profits received by her from the homestead. But the chancery court was in error:

[2] See *Fancher* v. *Kenner,* 110 Ark. 117, 161 S. W. 166, and *Shane* v. *Dickson,* 111 Ark. 353, 163 S. W. 1140.

(a) in adjudging the amount of such rents and profits as it did, and (b) in entertaining jurisdiction of the widow's complaint against the corporation involving the question of dower. The cause is therefore affirmed in part and reversed in part, and remanded for further proceedings not inconsistent with this opinion.

HOWELL *v.* HOWELL and STEVENS *v.* STEVENS.*

4-8389—4-8371 208 S. W. 2d 22

Opinion delivered January 12, 1948.

Rehearing denied February 9, 1948.

* See *Pope* v. *Pope, infra*, p. 321.

John L. Sullivan, for appellants.

Ruth May Wassell and *Chas. Jacobson,* for appellees.

GRIFFIN SMITH, Chief Justice. On the appellant's allegation that the decree from which he appeals is void, we treat the cause as having been brought up by *certiorari.*

Ruth Howell, plaintiff below, procured from the Second Division of Pulaski Chancery Court a decree of divorce from George Howell, the latter having declined to defend until enforcement of the decree was undertaken. He then asserted invalidity of Act No. 42 of 1947 under which the General Assembly attempted to relieve from obvious overwork the regular Chancellor—a Chancellor whose excellent record in many complicated cases has often been reviewed by this Court.

Appellee's first contention is that the Court's status, not having been raised at trial, cannot be considered here. It is argued that *quo warranto* is the exclusive method for questioning acts of an official; and, it is urged, the present proceeding, being a collateral attack upon an order regular on its face, the decree must be treated with that respect due judgments of all courts of record, hence the only matters subject to review are errors assigned as grounds for reversal.

The right of a supervising court to deal with a particular proceeding in a manner consistent with justice and to thereby expeditiously dispose of issues is unquestioned where recourse to the procedure is not prejudicial to one who is not immediately before the appellate court and where there is no statutory or constitutional impediment. If the result arrived at is the only one that in any event could be reached, the party indirectly affected is not injured. To this end appeal may be treated as *certiorari.* The writ may not be used as a substitute for appeal. It is insufficient because only the face of the record and matters of which the appellate court takes judicial notice may be considered. But it does not follow that an appeal

cannot be treated as *certiorari*; and this discretion to convert and to apply practical processes arises in those cases where through inadvertence or a lack of procedural understanding the wrong course has been pursued where the judgment or decree, however just and free from error, cannot stand because it does not in fact have judicial support.

Such was the case in *Axley* v. *Hammock, Chancellor,* 185 Ark. 939, 50 S. W. 2d 608.[1] Compensation for damaged reputation was sought in Circuit Court from Southern Lumber Company on the ground that the corporation's president had uttered slanderous words injurious to the plaintiff Axley, a company employe. The defendant moved for a transfer to equity, alleging the plaintiff, as supervisor in charge of records, had acted fraudulently; that complicated accounts were involved, and that a master would be required to clarify. The prayer was granted, and in Chancery the plaintiff's motion to remand was overruled. From a decree finding there was no liability on either side and taxing costs equally, Axley prayed an appeal, but subsequently petitioned this Court for a writ of *certiorari* to quash the decree. The principal contention was that on the slander issue the plaintiff below had a constitutional right of trial by jury, hence Chancery, where the legal issue was tried by the Court, did not acquire jurisdiction. In the opinion, written by Mr. Justice Mehaffy, there is reference to the rule announced in *Adams* v. *Sub-Drainage District No. 3,* 171 Ark. 802, 286 S. W. 962, where it was said that *certiorari* may not be used as a substitute for appeal, being a writ of discretion. After stating that in the case presented by Axley the writ could not be demanded as a matter of right, it was said that by parity of reasoning the respondent could not insist that it be not issued. When called upon to grant a writ of *certiorari,* or in response to the urge that it be denied, "Discretion," said Judge Mehaffy, "requires the judge or court to act according to the dictates . . . of their own judgment and con-

[1] In the Axley case the original petition to this Court was that a writ of *certiorari* issue, while in the instant proceeding we are treating the appeal as *certiorari.*

science, and it involves a fair consideration of all the peculiar features of the particular question involved."

In *McCain, Labor Commissioner,* v. *Collins,* 204 Ark. 521, 164 S. W. 2d 448, *certiorari* was approved as the appropriate method of bringing to the attention of Circuit Court an order issued by the Merit System Council sustaining actions of the State Labor Commissioner in dealing with personnel. From a Circuit Court judgment reversing the Council the Commissioner appealed. The opinion sustaining the Council cites *Hall* v. *Bledsoe,* 126 Ark. 125, 189 S. W. 1041, and other cases, with emphasis on *Merchants & Planters Bank* v. *Fitzgerald,* 61 Ark. 605, 33 S. W. 1064.

We held in *Griffin* v. *Boswell,* 124 Ark. 234, 187 S. W. 165, that *certiorari* was the appropriate remedy to review a County Court's judgment where lack of jurisdiction was urged. To the same effect is *City of Fayetteville* v. *Baker,* 176 Ark. 1030, 5 S. W. 2d 302, where it was alleged that the trial court acted in excess of its jurisdiction.

However, a different rule applies where the subject matter "is colorably within a court's general jurisdiction." *St. Louis, I. M. & S. Ry. Co.* v. *State,* 65 Ark. 200, 17 S. W. 806. In the latter case Mr. Justice HEMINGWAY said that the restricted office of the writ " . . . precludes a review of such matters as, coming within the court's jurisdiction, were incorrectly determined." Continuing, the opinion contains the following: "The petitioner had the right of appeal, which it does not appear to have lost by an unavoidable casualty. Such being true, *certiorari* can be invoked only to set aside a judgment rendered without jurisdiction. . . . Jurisdiction is defined to be 'the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials. First, the court must have cognizance of the class of cases to which the one to be adjudged belongs. Second, the proper parties must be present. And third, the point decided must be, in substance and effect, within the issue.' . . . Where the court has a general cognizance over the class of cases to which that to be adjudged belongs, it has jurisdiction of the partic-

ular case upon a colorable presentation of the facts necessary to constitute it a member of the class."

Reed v. *Bradford,* 141 Ark. 201, 217 S. W. 11, presented a controversy, brought here on appeal, where in Circuit Court it had been sought by *certiorari* to quash a judgment rendered by Special County Judge J. W. Butt. The litigation involved a public road. It had been argued that the regular Judge, S. F. Dillard, was disqualified. The Governor, supposing Dillard's disqualification was unquestioned, issued a commission to Butt. Dillard, as the constitutional judge, and Butt, without insisting the commission was valid, rendered conflicting judgments. Those adhering to the decision rendered by Butt insisted that the Governor's commission, *prima facie,* constituted him a judge *de jure,* and his title to the office for the special purpose could be questioned only by the State in a *quo warranto* proceeding.

Disposing of this argument, Chief Justice McCulloch said: " . . . It is urged that this is a collateral attack on the judgment pronounced by the special judge, and that [the attack] cannot be sustained. The judgment is void on its face for the reason [that the regular judge was present, and acted as such in the identical matter on the day Butt attempted to serve, and this was reflected by the record], and *certiorari* in the Circuit Court which has supervisory jurisiction over inferior courts is the proper remedy, even though a remedy by appeal is also available."

Having reached the conclusion that *certiorari* is appropriate in the case at bar, and that matters included in the appeal record are all that pertain to the proceeding, and that nothing additional could be added if the writ were actually served, our inquiry goes to the question whether, with Act 42 before us, the decree relied upon by the appellee-respondent reflects a valid exercise of the judicial power.

In the volume on Judgments, Restatement of the Law, p. 45, the American Law Institute says that "if a person or body assumes to act as a court without any

semblance of legal authority so to act and gives a purported judgment, the judgment is, of course, wholly void. Such a judgment is open to collateral attack wherever in a judicial proceeding it is relied upon as a cause of action or defense. The judgments of a *de facto* court, however, are not void. Thus, judgments given by courts in the Confederate States during the Civil War were not open to collateral attack, even though after the termination of the war it was held that those courts were not legally constituted. So also, where a court is established by statute and operates thereunder as a *de facto* court, its judgments are not void although the statute is unconstitutional."

Section 1 of Act 42 declares that "hereafter there shall be an additional Chancellor for the First Chancery Circuit," whose jurisdiction, except on exchange, shall be confined to Pulaski County. Section 2 divides the circuit into two divisions "to be known as the First Division and the Second Division of the First Chancery Circuit of Arkansas." Section 3 retains the Chancellor then serving as the Chancellor of the First Division.

Section 4 provides: "The Chancellor of the 2nd Division . . . as herein created, shall be the present Master in Chancery of the Chancery Court of Pulaski County, who shall hold said office until January 1, 1949. At the General Election in November 1948, there shall be elected a Chancellor for said Second Division of the Chancery Court, who shall take office January 1, 1949, and whose term of office shall be six years. . . . Said Chancellor of the Second Division . . . shall hold court in the County of Pulaski, and in no other County of said Circuit. The compensation . . . shall be $4,800 per year until the General Election in November 1948, and thereafter it shall be $6,000 per year."

Other provisions relate to the oath of office, records to be kept by the Clerk, (whose salary is fixed at $4,000 per annum) the appointment of a deputy to wait upon the court, appointment of a court reporter, continuing sittings of court, ordinary methods of appeal to the Supreme Court, a mandate to the County Judge to provide

appropriate quarters for the new court, authority to refer matters to a master—and finally (Sec. 12) a provision that "The invalidity of any section or sections of this Act shall not affect the validity of the balance of said enactment.

In examining the Act, of which we have judicial knowledge, it appears (1) that the General Assembly functioned in two respects: It exercised the inherent right to legislate, and then assumed the executive function of appointment—a power it did not possess. This being true, the so-called decree signed "Ruth F. Hale, Chancellor" imports no judicial authority and must be treated as a nullity.

Government as we know it—or at least as it *affects* us—is characterized by that fundamental division of power so often spoken of as the three coördinate departments—Legislative, Executive, Judicial. Each division functions in a separate, but restricted political area or sphere. Neither may be infringed upon by the other.

It would be much easier, from this Court's standpoint, to say that but little difference in the general scheme would be observed if we closed our eyes until November and permitted the legislative usurpation to take its course. A Chancery Court, efficiently presided over, dealing with a heavy daily docket, would be allowed to function in circumstances where it is said that relief is an emergency. Sec. 13, Act 42. But, unfortunately, the entire fabric of constitutional government is involved, and confession here that a meritorious case justifies sabotage of fundamentals can only have the effect of making government more difficult and justifying the public's all-too-often expressed fear that principles are lost by attrition more often than they are bartered for profit.

Oates v. *Rogers,* 201 Ark. 335, 144 S. W. 2d 457, illustrates the point. There the General Assembly enacted what could have been a valid measure to separate the offices of sheriff and collector in Pulaski County. But after performing the legislative requirements the Assembly delegated to the County Judge, the Chancellor, and the three Circuit Judges, authority to select a collector to

serve for a period of five years. The Supreme Court's holding was that because appointment is non-judicial, circuit and chancery judges are without power, under the constitution, to exercise that function—a duty expressly conferred upon the Governor. The limitation discussed by Judge RIDDICK in *Cox* v. *State,* 72 Ark. 94, 78 S. W. 756, 105 Am. St. Rep. 17, was mentioned in the Oates-Rogers opinion. That exception has no application here for the reason that Chancellors are State officers under the constitution; and by the same authority the Governor has the right to fill vacancies pending election. See, also, *Matthews* v. *Bailey, Governor,* 198 Ark. 830, 131 S. W. 2d 425.

The assertion that Mrs. Hale is a Chancellor *de jure* advances for consideration the argument that our Constitution invests the Governor with power to fill vacancies; for say proponents, since the Act that undertook to create the Chancery Division named an incumbent, no vacancy existed and the Executive has not been deprived of any right. The plausibility of this argument must yield to the practical mechanics of legislation which afforded the General Assembly every procedural convenience to establish the Division and at the same time produce a vacancy. Had that been done each governmental department—legislative and executive—would have acted in its accredited field, neither impinging upon the other.

The most difficult problem is whether, in spite of the severability provision of Sec. 12, the Division would have been created had the General Assembly realized the appointment was a nullity.

Argument that the creative sections—1, 2 and 3—would not have been enacted had it been known the vacancy could be filled only by executive appointment or election, finds support in the fact that the three sections lead logically into Section 4. It is our view that the Act was intended as a whole. It was a new departure. Legislators must have been cognizant of the unusual power they were attempting to exercise and unquestionably there was doubt regarding constitutionality of the method adopted; and yet, in spite of this, no alternative was ex-

pressed—only the provision for an election to be held more than twenty months in the future.

Amendment No. 29 to the Constitution directs the Governor to fill vacancies " . . . . in the office of United States Senator, and in all elective state, district, circuit, county, and township offices except those of Lieutenant Governor, Member of the General Assembly, and Representative in Congress of the United States," and (Sec. 2) " . . . No person appointed under Section 1 shall be eligible to appointment or election to succeed himself."

Under this discriminating provision appointment to a vacancy in the *circuit* for the term running between creation of the Division and election would have rendered such appointee ineligible as a candidate in succession; hence we must conclude that with the Amendment as a guide, and with a desire to promote to the Chancellorship the officer then serving as Master in Chancery, it was felt that the technical distinction between appointment to an office not previously existing, and appointment to fill an admitted vacancy, was a tenable assuasive, hence no vacancy as contemplated by Amendment No. 29 had been filled. This line of argument might easily lead one into infinite fields of inductive reasoning, but it could hardly eliminate from the Constitution the expressed intent that one invested with an office in any of the "circuits" whose right rests upon any security less than an election must stand aside as an ineligible when an election is legally held.

In considering arguments advanced by the respondent-appellee that the General Assembly did not intend to create an office and leave it vacant (for, they say—quoting from *Hutchenson* v. *Pitts,* 170 Ark. 248, 278 S. W. 639—" . . . it is an elementary principle that the law abhors vacancies in public office")—in this connection it is difficult to say that where so much attention was given to a proscribed method of appointment in an effort to prevent the office from being vacant until it could be filled by the Governor, February 7, 1947, the purpose was other than to adroitly blend the principal transaction

with incidental provisions, and thus retard or obscure recognition of the harmful element.

The right of a State Legislature to make appointments in circumstances where under the constitution that power was placed elsewhere was discussed by the Supreme Court of Indiana in three pertinent cases, one of which dealt with the judiciary. In *State of Indiana ex rel. Alvin P. Hovey* v. *William T. Noble et al.*, 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. Rep. 143, consideration was given to the General Assembly's asserted right to create and name Commissioners of the Supreme Court. They were charged with the duty of aiding and assisting the Court under such rules and regulations as might be promulgated by that body, "and to aid and assist the Court in the performance of its duties."

The Supreme Court first held that the duties with which it was charged were created by the constitution, and that only judges whose offices were so created could collectively function as a court. In *State of Indiana ex rel. Henry Jameson et al.* v. *Caleb S. Denny et al.*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79, attention was called to Sec, 1, art. 3, of the Indiana Constitution, providing that "The powers of the government are divided into three separate departments: the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided." Our Constitution (art. IV, Secs. 1 and 2) is: "The power of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confined to a separate body of magistry, to-wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another. No person, or collection of persons, being one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

In the Jameson-Denny case the Indiana Court held that power vested in the legislature "to provide by law

the manner or mode of making an appointment to office, does not include the power to make the appointment."

In the Hovey-Noble case it was said concerning the commissioners: "If the duties assumed to be assigned [to them] are judicial, then they must constitute a court, since only courts can exercise judicial power. But, as no such court is recognized by the Constitution, it can have no legal existence. If, however, it be conceded that the tribunal which the Act assumes to establish is a court, then the instant the Act took effect the offices of the judges of that court were vacant." And, in respect of judicial power: " . . . It is the Constitution, and not the Legislature, which makes the investiture, and it is the courts and judges who are invested with [this] power." See *City of Evansville et al.* v. *State of Indiana, ex rel. Fred Blend,* 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93.

So, in the case at bar, the Constitution invests judicial power in courts, and it places appointive power with the Executive—certainly as to the enumerated offices. There is no color of right, no semblance of authority, no repository of power even inferentially hinted at in the Constitution, no fine shade of reason from which substance might spring, and no theory upon which those charged with promulgating the State's public policies and enacting its laws, can assign to themselves a duty expressly placed elsewhere by the very Constitution which created a legislative department.

Appellee-respondent argues that facts in *Keith* v. *State,* 49 Ark. 439, 5 S. W. 880, support the proposition that with creation of the Chancery Division in the instant case and the attempted appointment of a Chancellor, the person so designated became a *de facto* judge if not in fact *de jure.*

In the Keith case Judge R. H. Powell had been regularly elected to preside over the Third Judicial Circuit. The Fourteenth Circuit was subsequently created, involving a reassignment of counties. The legislative directive was that "The Circuit Judge elected at the last general election for the Third Circuit, whose residence

falls within the Fourteenth, as created by this Act, shall continue to exercise the functions of Circuit Judge for the Fourteenth Circuit until his successor is elected and qualified as now provided by law."

By a plea to the Court's jurisdiction, and by subsequent plea in abatement when found guilty on a criminal charge, Keith undertook to question the Court's jurisdiction when his appeal was lodged in the Supreme Court. Chief Justice COCKRILL held that appeal was not the right remedy. It was also held that the record disclosed that Powell, if not a judge *de jure,* was a judge *de facto,* hence the conviction could not be attacked collaterally.

The difference between Keith's position and the situation here presented is that Powell, having been elected to the judgeship, was assigned to a different district, but nevertheless he had been elected. His judicial status was created by machinery set in motion by the Constitution. He was a regular judge who had been duly commissioned and had taken the oath of office; hence his acts in a particular case were subject to review at the instance of the State only.

In the absence of election to office (however defectively the election may have been held) one may claim to be a *de facto* officer by virtue of appointment only in the event the appointing power had authority or apparent authority to make the designation. If the agency lacked the actual or ostensible authority to appoint in any circumstance, its appointee cannot be considered a *de facto* officer. This is true because the attempt would not be the proper exercise of an existing power, but an effort to exercise a non-existent power.

Conditions under which a judgment is absolutely void were discussed by Chief Justice BUNN in *Caldwell* v. *Barrett,* 71 Ark. 310, 74 S. W. 748. The following language is found in the opinion:

"In order to be a *de facto* judge there must be a regularly constituted office and a vacancy therein before one appointed or elected to fill such office can be denominated a *de facto* officer. . . . When there is an office, and no *de jure* officer to exercise its functions, then one ap-

pointed under the form of law would be a *de facto* officer at least, and his acts are not to be called in question collaterally. The question is quite different where there is no *de jure* office, . . . for the foundation of the proceeding must be . . . a lawfully created court, or there is a total want of jurisdiction in the court itself to hear and determine the case, and this jurisdictional infirmity will annul any proceedings therein on mere suggestion to the proper court. It would be beyond all precedent to term the judge presiding in a court which is not a court at all a *de facto* judge."

And, for the same reason, one appointed to an office that does exist, *but not appointed under form of law,* would not be a *de facto* officer.

Result of our holding is (a) that in spite of words of severability used in Act 42, the General Assembly did not intend that the office it attempted to create should be filled by executive appointment, hence there was no distinct or independent purpose to divide the circuit or district and leave the office vacant for almost two years, and (b) not having the power of appointment, the Legislature could not lend color to acts of the person named; hence, judgments, orders, and decrees are without legal force. It follows that the decree must be vacated, but inasmuch as the cause was filed in Pulaski Chancery Court, which is unaffected by the legislation, it is remanded for consideration.

Cause No. 8371 (*Helen D. Stevens* v. *Arthur G. Stevens*) is another appeal from the Second Division, submitted December 8, 1947. The decree there, also, must be set aside and the cause remanded to Pulaski Chancery Court.

Mr. Justice McFaddin and Mr. Justice Millwee dissent. Mr. Justice McHaney was absent and did not participate in the consideration or determination of the case

Ed. F. McFaddin, Justice (dissenting). The majority—as I read the opinion—is holding (a) that all of Act 42 of 1947 (hereinafter referred to as "Act 42") is void because of Section 4 of the Act, and (b) that the Second

Division of the First Chancery District is not even a *de facto* court, and that Judge Ruth F. Hale, Chancellor of the court, is not even a *de facto* judge. The effect of this holding is to render void *ab initio* all of the judgments and decrees that Judge Hale has rendered. The majority opinion is sweeping and far reaching; I dissent from each and both of the conclusions reached by the majority.

The Legislature certainly had the right to create the Second Division Court of the First Chancery Circuit. Act 42, with the exception of § 4, is patterned after and is entirely similar to Act 372 of 1923 (hereinafter referred to as "Act 372"), which created the Second Division Court of the Seventh Chancery Circuit. The validity of the said Act 372 was upheld by this court in the case of *Gordon* v. *Reeves,* 166 Ark. 601, 267 S. W. 133. A comparison of the two Acts leads to the inevitable conclusion that the purpose of Act 42 was to relieve the congestion existing in the Pulaski Chancery Court, just as Act 372 was to relieve the congestion existing in the chancery courts of Union and Ouachita Counties, which were only two of the several counties in the Seventh Chancery Circuit. If the purpose of Act 372 was to relieve the congestion in the chancery court, how can the majority say in the case at bar that the primary purpose of Act 42 was to elevate Judge Ruth F. Hale to the position of Chancellor? And, yet, that is what the majority opinion means. Otherwise, the majority would have given some effect and significance to § 12 of Act 42, which section reads:

"The invalidity of any section or sections of this Act shall not affect the validity of the balance of said enactment."

I think § 4 of Act 42 is unconstitutional, in that the Legislature attempted to fill a vacancy. But I think that with § 4 stricken from the Act, there still remains a valid, legal and workable Act. It is the duty of this court, in construing a legislative enactment, to give effect to the valid portions of the Act. See *State* v. *Marsh,* 37 Ark. 356; *State* v. *Byles,* 93 Ark. 612, 126 S. W. 94, 37 L. R. A.,

N. S. 774; *Cotham* v. *Coffman,* 111 Ark. 108, 163 S. W. 1183; *Mississippi Co.* v. *Green,* 200 Ark. 204, 138 S. W. 2d 377; *Stanley* v. *Gates,* 179 Ark. 886, 19 S. W. 2d 1000. Other cases on this point are collected in West's Arkansas Digest, Statutes, § 64. In *Mississippi Co.* v. *Green, supra,* this court found that § 10 of Act 452 of 1917 (concerning the qualifications of judges of the county, probate and common pleas courts in Mississippi county) was unconstitutional. Yet, with that section stricken, this court held that the remainder of the Act was valid, legal and workable. I think the same rule should be applied in the case at bar. Other cases—involving courts and judicial officers, and in which this court has stricken the illegal provisions and enforced the remainder of the Act—are collected in West's Arkansas Digest, Statutes, § 64(3).

Here is the way that Act 42 is valid, legal and workable, with § 4 stricken, to-wit: the remaining sections of the Act create the Second Division of the First Chancery Circuit; provided that there shall be an additional chancellor; prescribe the duties of the chancellor and the oath of office to be taken; etc., etc. In the case of *State ex rel. Wood* v. *Cothan,* 116 Ark. 36, 172 S. W. 260, there was created a new judicial circuit. The question was as to the vacancy, and the method of filling it, and this court said:

"It is conceded by learned counsel on both sides that the creation of the new judicial circuit caused a vacancy to exist, within the meaning of the Constitution, in the office of judge of that circuit. This court has so decided. *State ex rel. Smith* v. *Askew,* 48 Ark. 82, 2 S. W. 349.

"It will be noted that the Legislature authorized only a temporary filling of that vacancy by executive appointment, and left the succession to be supplied in conformity to existing laws without attempting to define or to reiterate them. The lawmakers could not have done otherwise, for the tenure of office and the method of filling a vacancy is unalterably fixed by the Constitution. *Cobb* v. *Hammock,* 82 Ark. 584, 102 S. W. 362; *State*

ex rel. Attorney General v. *Stevenson,* 89 Ark. 31, 116 S. W. 202."

So, here, it was unnecessary for the Legislature to say anything as to how the vacancy in the office should be filled. The vacancy existed immediately when the Act became a law; and the Constitution directed how the vacancy should be filled, *i. e.,* by appointment of the governor. In the light of the last-cited case, Act 42 is certainly a valid, legal and workable Act, with all of § 4 stricken. So, there should be a valid *de jure* court. Yet, the majority strikes down the entire Act because of § 4.

My next point is, that with a valid legal, *de jure* court created, then Judge Ruth F. Hale, in presiding over that court, under commission, was certainly a *de facto* judge. In 46 C. J. 1057, in stating who is a *de facto* officer, this is given as the rule:

"One who holds an office under an appointment or election giving color of title may be a *de facto* officer, although the appointment or election is irregular, or invalid, or although he has been appointed by an authority not competent under the law to make the appointment, and even though his title is derived from an unconstitutional statute."

The records in the office of the Secretary of State (and we take judicial notice of these records) show that on February 8, 1947, a commission issued to Ruth F. Hale as chancellor of the Second Division of the First Chancery Circuit; and that she took the oath in legal form as "chancellor of the Second Division of the First Chancery Circuit of Pulaski county for the term ending January 1, 1949." The oath of office was filed the same day in the office of the Secretary of State, and the record there shows that she "qualified" on February 8, 1947. She certainly then became a *de facto* judge, and her situation is not one whit different from the situation of Judge Powell in the case of *Keith* v. *State,* 49 Ark. 439, 5 S. W. 880. The majority differentiates the above case from the case at bar on grounds that do not appear to me to find support in the Keith case.

Here is the way I understand *Keith* v. *State*: Judge R. H. Powell, at the regular election in 1886, was elected judge of the Third Judicial Circuit. The Legislature, by Act of May 3, 1887, created the Fourteenth Judicial Circuit from some of the counties formerly in the Third and Fourth Judicial Circuits. The 1887 Act prescribed:

"Section 9. That the Circuit Judge elected at the last general election for the Third Circuit, whose residence falls within the Fourteenth, as created by this Act, shall continue to exercise the functions of Circuit Judge for the said Fourteenth Circuit until his successor is elected and qualified as now provided by law."

In other words, the 1887 Act created the Fourteenth Circuit, and designated the judge of that circuit by reference to his residence. (That is what Act 42 does, *i. e.*, it creates the Second Division of the First Chancery Circuit, and designates the chancellor by reference to her former position.) In July, 1887, Judge Powell held court for the Fourteenth Circuit in Boone county (a county formerly in the Fourth Circuit, so Judge Powell could preside over that court only because of the 1887 Act). Keith was convicted of second degree murder; and he raised in the trial court the question that Judge Powell was not legally the judge of the Fourteenth Circuit, and therefore could not pronounce sentence on him.

Chief Justice Cockrill, speaking for this court in the Keith case, said that Judge Powell was at least "the judge *de facto* of the circuit in which the appellant was convicted." Chief Justice Cockrill further said:

"The principle that the acts of an officer *de facto* are binding upon the public as though done by one in office *de jure,* and that his right to the office cannot be questioned except in a direct proceeding to which he is a party, is well settled and is not new in this court. *Moore, as Adm'r.* v. *Turner,* 43 Ark. 243; *Pearce* v. *Edington,* 38 Ark. 150; *Kaufman* v. *Stone,* 25 Ark. 336; *Caldwell* v. *Bell & Graham,* 3 Ark. 419; S. C., 6 *id.,* 227; *Hildreth's Heirs* v. *McIntire's Devisees,* 1 J. J. Marsh, 206, 19 Am. Dec., 61, and note."

Cases from Pennsylvania, Massachusetts, New York and other jurisdictions were reviewed, all supporting the holding that a person presiding over a court legally established was in fact a *de facto* judge. The holding in the case of *Keith* v. *State* was not based on the premise that Judge Powell had been elected to some office (as the majority seems to differentiate it here); because he had been elected to an office entirely distinct from the one which he was seeking to hold. The rule announced in *Keith* v. *State* is the rule generally. In 15 C. J. 874, this is given as the general rule:

"Where a court has been established by an Act of the legislature apparently valid, and has gone into operation under such Act, it is to be regarded as a court *de facto,* and where the organization of a court is authorized by law, a court organized thereunder is at least a *de facto* court, although it is defectively organized. . . . The legality of the existence of a *de facto* court and its right to exercise its functions cannot be inquired into collaterally, but only in a direct proceeding at the instance of the State. Neither can the question of the legal existence of a trial court be raised by appeal."

Without lengthening this dissent, it is my settled view that, with § 4 of Act 42 stricken, the remaining sections leave a valid, legal and workable Act; and that Judge Ruth F. Hale is certainly a *de facto* judge, and, as such, her acts cannot be questioned in the type of case here presented.

For the reasons herein stated, I respectfully dissent from the holding of the majority, and I am authorized to state that Mr. Justice MILLWEE joins me in this dissent.

McHANEY, Justice, dissenting. On account of illness I "was absent and did not participate in the consideration or determination of the case," as noted in the majority opinion. I have participated in the consideration of this consolidated case on rehearing and I now desire to dissent from the holdings as expressed in the majority opinion.

I agree with everything that was said in the minority opinion and disagree on every point with the majority, except the holding that § 4 of Act 42 is invalid. The holding of the majority that the appeals in the two cases, which were consolidated here for consideration, could be treated as petitions for *certiorari* and quashed as void judgments, is without authority to support it. The cases cited are not in point. Here, the title to the office is raised and determined, when the incumbent is not made a party and given a chance to defend her title. This cannot be done except in the case of an intruder or usurper without any color of right to the office. In *Levy, Admr.* v. *Lychinski,* 8 Ark. 113, this court said: "A writ of *certiorari* is not a proceeding against the tribunal or individual composing it; it acts upon the cause or proceedings in the inferior court, and removes it into a superior tribunal for reinvestigation. The jurisdiction so acquired is appellate and not original."

In 14 C. J. S., *Certiorari,* § 28, it is said: "It appears to be the general rule that *certiorari* will not lie to try title to office, or where the determination of the right to office is the obvious and only object of the writ, and this is so even though the parties to the writ consent. In such cases *quo warranto* is the proper remedy."

So, it is my opinion that this court should not have considered and decided the title to the office in a divorce case which came here on appeal and in which the right of the incumbent to the office was not raised on the trial, but here for the first time, and the judge not being a party to the action in any way. The title to the office could only be determined by *quo warranto* in a proceeding by the State at the instance of the Attorney General.

The majority also holds that the legislature would not have passed Act 42, without § 4, the appointing section. It is said that §§ 1, 2 and 3, the sections that created the Second Division of the Pulaski Chancery Court, "lead logically into § 4. It is our view that the Act was intended as whole." What right the majority had to say, as it did in effect, that the legislature

would not have enacted Act 42 without § 4 in it, I am unable to determine. The legislature itself said it would. It said so in § 12 by saying: "The invalidity of any section or sections of this Act shall not affect the validity of the balance of said Act." How can the majority say the legislature did not mean what it said? The appointment of Ruth Hale in § 4 was incidental to the Act as a whole and the reason for the Act was stated in § 13 to be: "The docket of the present Chancery Court of Pulaski county is so crowded that it is impossible for one chancellor to hear all the cases without undue delay in some of them, in view of the fact that said chancellor has to devote much of his time to the holding of the Chancery Courts in the other three counties of said circuit; therefore, this Act is necessary for the immediate preservation of the public peace and safety and said Act shall take effect and be in force from and after its passage, and all laws and parts of laws in conflict herewith are hereby repealed."

Was the appointee a *de facto* judge? This question was discussed in the dissenting opinion. Of course, it was necessary for the majority to hold the whole of Act 42 to be void in order to arrive at the conclusion that the appointee was not a *de facto* judge, for once it is admitted that the Act did create the Second Division of said court, a power the legislature concededly had, it necessarily follows that the appointee, no matter how defective the appointment, is a *de facto* judge. In Vol. 43, Am. Jur. p. 224, § 470, it is said: "The *de facto* doctrine was ingrafted upon the law as a matter of policy and necessity, to protect the interests of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law. It was seen that it would be unreasonable to require the public to inquire on all occasions into the title of an officer, or compel him to show title, especially since the public has neither the time nor opportunity to investigate the title of the incumbent. The doctrine rests on the principle of protection to the interests of the public and third parties, not to protect or vindicate the acts or rights of the particular *de facto*

officer or the claims or rights of rival claimants to the particular office. The law validates acts of *de facto* officers as to the public and third persons on the ground that, although not officers *de jure,* they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid.

"Judicial as well as ministerial officers may be officers *de facto,* within the rule, hereafter considered, that the acts of a *de facto* officer are valid as to the public and third persons."

The majority have nullified hundreds of divorce decrees, decrees concerning property rights, alimony, support and custody of children. It has invalidated all subsequent marriages of divorced spouses and may have rendered them bigamous. Titles to real property have been clouded, and conveyances of homesteads subsequently by the husbands *of such divorcees* have been nullified where the wives did not join in such conveyances. It is impossible to predict all the disastrous results that will attend this holding. Yet all the parties to such litigation were perfectly innocent. These are the considerations that gave rise to the *de facto* doctrine. "The principle is founded," said the New York Court in *Curtin* v. *Barton,* 135 N. Y. 505, 34 N. E. 1093, "on considerations of public policy, and its maintenance is essential to the preservation of order, the security of private rights, and the due enforcement of the law. . . . The incumbent of the office is not a party to this action. His title to the office is not in question directly, as in the cases where an action in the nature of a *quo warranto* is brought by the attorney general, or where he brings the suit himself to recover the salary. When a court with competent jurisdiction is duly established, a suitor who resorts to it for the administration of justice and the protection of private rights should not be defeated or embarrassed by questions relating to the title of the judge, who presides in the court, to his office. If the court exists under the constitution and laws, and it had jurisdiction of the case, any defect in the election or mode of appointing the judge is not available to litigants."

Our own decisions, as well as those of all other courts, are to the same effect. In *Keith* v. *State,* 49 Ark. 439, 5 S. W. 880, Chief Justice COCKRILL for the court quoted with approval from *Clark* v. *Commonwealth,* 29 Penn., St., 129, the following: "A very important question upon the constitutional power of the Legislature so as to alter judicial districts as to transfer a Judge to the courts of certain counties who was never voted for in those counties, was intended to be raised by this plea; but, unfortunately for the prisoner, it cannot be raised in this form. His plea admits that Judge Jordan (before whom the trial was had) 'is a Judge *de facto*'; and if he did not admit this we would take judicial notice of the legislation which placed him in the courts of Montour county, so far as to hold him to be a judge *de facto.* That legislation is at least a colorable title to his office. Can the right and power of a judge *de facto,* with color of title, be questioned in any other form than by *quo warranto,* at the suit of the Commonwealth? Assuredly not." See, also, the additional quotations from the Keith case and other cases cited in the dissenting opinion by Mr. Justice MCFADDIN.

So, here, the legislation, Act 42, constituted at least colorable title to the office held by the appointee and she was at least a *de facto* judge, and the right and power of a judge *de facto,* with color of title, cannot be questioned by a litigant in that court and can only be questioned by *quo warranto.* The appointee in *quo warranto* is made a defendant and is given the right to defend his title, a fundamental right that has not heretofore been denied a *de facto* officer. See *Scott* v. *McCoy,* 212 Ark. 574, 206 S. W. 2d 440.

Persons going into a regularly constituted court to settle private rights ought not to be required to inquire into the right of the presiding judge to hold the office at their peril. They have the right to assume that a judge of a court of competent jurisdiction is entitled to the office either *de jure* or *de facto,* and that its judgments and decrees are valid. Private litigation would never be determined if every litigant could question the right of the judge to be a judge.

The majority opinion as originally written does not refer to the case of *State* v. *Green and Rock,* 206 Ark. 361, 175 S. W. 2d 575, but it was mentioned in consultation on rehearing as being an authority to support the opinion. I do not think so. That is the case where the Governor, pursuant to Act 290 of 1943, appointed Walter N. Killough as temporary Circuit Judge, while his brother, Neill Killough, the regular Circuit Judge, was serving in the armed forces of the U. S. The court held §§ 1 and 2 of said Act 290 unconstitutional and that the appointee was not a *de jure* judge. The concluding sentence of the opinion by the late Judge Knox reads: "We conclude that the judge granting the writ (Walter N. Killough) was not a judge *de jure* by virtue of his appointment under the authority of the Act, and this is the only question we are asked to decide." Mr. Justice FRANK G. SMITH and I dissented in that case, and the question of whether Walter N. Killough was a *de facto* judge was not raised or decided. That was a *habeas corpus* case where the judge granted the writ over the State's objections and the State appealed. This court treated the appeal as being in the nature of *quo warranto,* to try the title to the office. It was the State's action and not that of a private litigant so it cannot be any auhority to sustain the present holding, where private litigants are permitted to question the title of office.

Realizing as I do, the serious and perhaps unsolvable predicament into which literally hundreds, if not thousands, of innocent litigants find themselves as a result of this decision, and believing that it is unsound and not at all necessary or proper to so hold, I most respectfully dissent. A rehearing should be granted. Justices MCFADDIN and MILLWEE expressed their views in the dissent to the original opinion and they also concur in the views here expressed.

POPE *v.* POPE.*

4-8602 210 S. W. 2d 319

Opinion delivered April 19, 1948.

[redacted]

George W. Shepherd, for appellant.

Sam Robinson, for appellee.

SMITH, J. My vote was required, and was cast, to make the opinion in the cases of *Howell* v. *Howell,* and *Stevens* v. *Stevens, ante,* p. 298, 208 S. W. 2d 22, and I assume my full share of responsibility for the opinion in those cases, but having reached the conclusion that it is unsound, I am now voting to overrule it.

On the authority of the case of *Caldwell* v. *Barrett,* 71 Ark. 310, 74 S. W. 748, it was held that there could not be a *de facto* judge unless there was a *de jure* office, and I do not recede from that view. But was there a *de jure* office? This I think is the controlling question in the case. This question has given me the greatest concern, and I

* See *Howell* v. *Howell, ante,* p. 298.

have endeavored very diligently to answer and refute the arguments contained in the dissenting opinions of Justices McHaney and McFaddin that there was a *de jure* office, but I have been unable to find a satisfying answer to the arguments of those judges, and I am now agreeing with them that there was a *de jure* office. Whether there was a *de jure* office of Chancellor of the Second Division of the Chancery Court, depends on the answer to the question, whether the provisions of Act 42 of the Acts of 1947 are separable. If they are not, as the original opinion held, the Act must fall, as there is no difference of opinion about § 4 of the act, which named Judge Hale as Chancellor, being unconstitutional. The original opinion held that it was beyond the power of the General Assembly to create a constitutional office and name a person to fill it, and I have not receded from that view, which indeed is the opinion of all the members of the court. Judge Hale was not therefore Chancellor *de jure,* but was she a Chancellor *de facto*? The arguments of the dissenting judges and the authorities cited by them in support thereof, which I shall not repeat or review here, convince me that Judge Hale was a Chancellor *de facto,* if the provisions of Act 42 are separable.

The court was created by the first three sections of Act 42, which were patterned after Act 372 of Acts of 1923. This last named Act, in its first three sections, added an additional Chancellor to the Seventh Chancery District, and gave that official jurisdiction in only two of the counties comprising that district. The validity of this Act 372 was upheld in the case of *Gordon* v. *Reeves,* 166 Ark. 601, 267 S. W. 133. If that case is to be followed, the first three sections of Act 42 created the second division of the Pulaski Chancery Court, which court is now in existence, if the provisions of Act 42 are separable.

By § 12 of Act 42, the provisions thereof are made separable by enacting that the invalidity of any section or sections of the Act shall not affect the validity of the balance of said Act. In view of this definite statement of the legislative intent, I have concluded that we have

no power to say that the Legislature did not mean what it said. Numerous acts have been passed containing provisions similar to § 12 of Act 42, and these acts have been upheld, after eliminating any unconstitutional part of the act, provided the part which remained after striking down the unconstitutional portions thereof left a workable act. See cases cited in the dissenting opinion of Justice McFaddin. Here we have an act which creates a court, if the case of *Gordon* v. *Reeves, supra,* is followed, and when the unconstitutional provisions of the act are stricken, we have an office without a Judge, which may be filled in the manner provided by the Constitution, that is, by appointment of the Governor.

An attempt was made in this case to validate a decree of divorce rendered appellee by Judge Hale. In my opinion it was beyond the power of the Chancellor to do this. He could, of course, hear the testimony on which the original decree was rendered, or hear other testimony showing grounds for divorce, and grant one, but he could not by *nunc pro tunc* order validate the divorce decree, if it was invalid when rendered.

Now the effect of the change of my vote is to hold that these decrees rendered by a *de facto* Chancellor were valid, and do not require a *nunc pro tunc* order to sustain their validity. The decree from which is this appeal sustaining appellee's divorce is therefore affirmed, not on the ground that a void decree could be cured by *nunc pro tunc* order, but is affirmed upon the ground that the decree was not void, and does not require validation.

Decree affirmed. Chief Justice Griffin Smith and Justice Robins dissent.

Griffin Smith, Chief Justice, dissenting. The decisions in *Howell* v. *Howell* and *Stevens* v. *Stevens,* were made January 12. They were concurred in by four judges after the most painstaking consideration and diligent research, and with full comprehension of what the results would be. All of the arguments now adopted to overrule what was said to be sound reason for the determination then made were before the Court, and were rejected be-

cause, as it was said, a fundamental principle could not be the subject of judicial expedition. The following paragraph summarized our feelings regarding the law:

"It would be much easier, from this Court's standpoint, to say that but little difference in the general scheme would be observed if we closed our eyes until November and permitted the legislative usurpation to take its course. . . . But, unfortunately, the entire fabric of constitutional government is involved, and confession here that a meritorious case justifies sabotage of fundamentals can only have the effect of making government more difficult and justifying the public's all-too-often expressed fear that principals are lost by attrition more often than they are bartered for profit."

A substantial contingent of the vocal public has long felt that in matters affecting influential social or political groups, *pressure* from without can be brought to bear upon courts. The result of today's recantation, and the swing from right to left, will inevitably have the effect of accentuating this presumptively untenable belief. From the hour the two opinions were handed down, interested persons and their voluble sympathizers have maintained a continuous and persistent barrage of propaganda against the law as interpreted by the court's majority. Few avenues of so-called "approach" have been left untried. Now, since the purpose these interests had in view has been achieved by methods other than the judicial process, rightly or wrongly the result will be attributed to the Unofficial Court of Private Clamor.

The majority's opinion of January 12th, now becomes a part of the dissenting opinion of the Chief Justice. The Court then said:

On the appellant's allegation [in *Howell* v. *Howell*] that the decree was void, we treat the cause as having been brought up by *certiorari*.

Ruth Howell, plaintiff below, procured from the Second Division of Pulaski Chancery Court a decree of divorce from George Howell, the latter having declined

to defend until enforcement of the decree was undertaken. He then asserted invalidity of Act No. 42 of 1947. . . .

Appellee's first contention is that the Court's status, not having been raised at trial, cannot be considered here. It is argued that *quo warranto* is the exclusive method for questioning acts of an official; and, it is urged, the present proceeding, being a collateral attack upon an order regular on its face, the decree must be treated with that respect due judgments of all courts of record, hence the only matters subject to review are errors assigned as grounds for reversal.

The right of a supervising court to deal with a particular proceeding in a manner consistent with justice and to thereby expeditiously dispose of issues is unquestioned where recourse to the procedure is not prejudicial to one who is not immediately before the appellate court and where there is no statutory or constitutional impediment. If the result arrived at is the only one that in any event could be reached, the party indirectly affected is not injured. To this end appeal may be treated as *certiorari.* The writ may not be used as a substitute for appeal. It is insufficient because only the face of the record and matters of which the appellate court takes judicial notice may be considered. But it does not follow that an appeal cannot be treated as *certiorari;* and this discretion to convert and to apply practical processes arises in those cases where through inadvertence or a lack of procedural understanding the wrong course has been pursued where the judgment or decree, however just and free from error, cannot stand because it does not in fact have judicial support.

Such was the case in *Axley* v. *Hammock, Chancellor,* 185 Ark. 939, 50 S. W. 2d 608.[1] Compensation for damaged reputation was sought in Circuit Court from Southern Lumber Company on the ground that the corporation's president had uttered slanderous words injurious to the plaintiff Axley, a company employe. The defendant moved for a transfer to equity, alleging the plaintiff,

[1] In the Axley case the original petition to this Court was that a writ of *certiorari* issue, while in the instant proceeding we are treating the appeal as *certiorari.*

as supervisor in charge of records, had acted fraudulently; that complicated accounts were involved, and that a master would be required to clarify. The prayer was granted, and in Chancery the plaintiff's motion to remand was overruled. From a decree finding there was no laibility on either side and taxing costs equally, Axley prayed an appeal, but subsequently petitioned this Court for a writ of *certiorari* to quash the decree. The principal contention was that on the slander issue the plaintiff below had a constitutional right of trial by jury, hence Chancery, where the legal issue was tried by the Court, did not acquire jurisdiction. In the opinion, written by Mr. Justice MEHAFFY, there is reference to the rule announced in *Adams* v. *Sub-Drainage District No. 3,* 171 Ark. 802, 286 S. W. 962, where it was said that *certiorari* may not be used as a substitute for appeal, being a writ of discretion. After stating that in the case presented by Axley the writ could not be demanded as a matter of right, it was said that by parity of reasoning the respondent could not insist that it be not issued. When called upon to grant a writ of *certiorari,* or in response to the urge that it be denied, "Discretion," said Judge Mehaffy, "requires the judge or court to act according to the dictates . . . of their own judgment and conscience, and it involves a fair consideration of all the peculiar features of the particular question involved."

In *McCain, Labor Commissioner,* v. *Collins,* 204 Ark. 521, 164 S. W. 2d 448, *certiorari* was approved as the appropriate method of bringing to the attention of Circuit Court an order issued by the Merit System Council sustaining actions of the State Labor Commissioner in dealing with personnel. From a Circuit Court judgment reversing the Council the Commissioner appealed. The opinion sustaining the Council cites *Hall* v. *Bledsoe,* 126 Ark. 125, 189 S. W. 1041, and other cases, with emphasis on *Merchants & Planters Bank* v. *Fitzgerald,* 61 Ark. 605, 33 S. W. 1064.

We held in *Griffin* v. *Boswell,* 124 Ark. 234, 187 S. W. 165, that *certiorari* was the appropriate remedy to review a County Court's judgment where lack of jurisdiction was urged. To the same effect in *City of Fayetteville* v.

Baker, 176 Ark. 1030, 5 S. W. 2d 302, where it was alleged that the trial court acted in excess of its jurisdiction.

However, a different rule applies where the subject matter "is colorably within a court's general jurisdiction." *St. Louis, I. M. & S. Ry. Co.* v. *State,* 55 Ark. 200, 17 S. W. 806. In the latter case Mr. Justice HEMINGWAY said that the restricted office of the writ ". . . precludes a review of such matters as, coming within the court's jurisdiction, were incorrectly determined." Continuing, the opinion contains the following. "The petitioner had the right of appeal, which it does not appear to have lost by an unavoidable casualty. Such being true, *certiorari* can be invoked only to set aside a judgment rendered without jurisdiction. . . . Jurisdiction is defined to be 'the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials. First, the court must have cognizance of the class of cases to which the one to be adjudged belongs. Second, the proper parties must be present. And third, the point decided must be, in substance and effect, within the issue.' . . . Where the court has a general cognizance over the class of cases to which that to be adjudged belongs, it has jurisdiction of the particular case upon a colorable presentation of the facts necessary to constitute it a member of the class."

Reed v. *Bradford,* 141 Ark. 201, 217 S. W. 11, presented a controversy, brought here on appeal, where in Circuit Court it had been sought by *certiorari* to quash a judgment rendered by Special County Judge J. W. Butt. The litigation involved a public road. It had been argued that the regular Judge, S. F. Dillard, was disqualified. The Governor, supposing Dillard's disqualification was unquestioned, issued a commission to Butt. Dillard, as the constitutional judge, and Butt, without insisting the commission was valid, rendered conflicting judgments. Those adhering to the decision rendered by Butt insisted that the governor's commission, *prima facie,* constituted him a judge *de jure,* and his title to the office for the special purpose could be questioned only by the State in a *quo warranto* proceeding.

Disposing of this argument, Chief Justice McCulloch said: " . . . It is urged that this is a collateral attack on the judgment pronounced by the special judge, and that [the attack] cannot be sustained. The judgment is void on its face for the reason [that the regular judge was present, and acted as such in the identical matter on the day Butt attempted to serve, and this was reflected by the record], and *certiorari* in the Circuit Court which has supervisory jurisdiction over inferior courts is the proper remedy, even though a remedy by appeal is also available."

Having reached the conclusion that *certiorari* is appropriate in the case at bar, and that matters included in the appeal record are all that pertain to the proceeding, and that nothing additional could be added if the writ were actually served, our inquiry goes to the question whether, with Act 42 before us, the decree relied upon by the appellee-respondent reflects a valid exercise of the judicial power.

In the volume on Judgments, Restatement of the Law, p. 45, the American Law Institute says that "if a person or body assumes to act as a court without any semblance of legal authority so to act and gives a purported judgment, the judgment is, of course, wholly void. Such a judgment is open to collateral attack wherever in a judicial proceeding it is relied upon as a cause of action or defense. The judgments of a *de facto* court, however, are not void. Thus, judgments given by courts in the Confederate States during the Civil War were not open to collateral attack, even though after the termination of the war it was held that those courts were not legally constituted. So, also, where a court is established by statute and operates thereunder as a *de facto* court, its judgments are not void although the statute is unconstitutional."

Section 1 of Act 42 declares that "hereafter there shall be an additional Chancellor for the First Chancery Circuit," whose jurisdiction, except on exchange, shall be confined to Pulaski County. Section 2 divides the circuit into two divisions "to be known as the First Divi-

sion and the Second Division of the First Chancery Circuit of Arkansas." Section 3 retains the Chancellor then serving as the Chancellor of the First Division.

Section 4 provides: "The Chancellor of the 2nd Division . . . as herein created, shall be the present Master in Chancery of the Chancery Court of Pulaski County, who shall hold said office until January 1, 1949. At the General Election in November 1948, there shall be elected a Chancellor for said Second Division of the Chancery Court, who shall take office January 1, 1949, and whose term of office shall be six years. . . . Said Chancellor of the Second Division . . . shall hold court in the County of Pulaski, and in no other County of said Circuit. The compensation . . . shall be $4,800 per year until the General Election in November 1948, and thereafter it shall be $6,000 per year."

Other provisions relate to the oath of office, records to be kept by the Clerk, (whose salary is fixed at $4,000 per annum) the appointment of a deputy to wait upon the court, appointment of a court reporter, continuing sittings of court, ordinary methods of appeal to the Supreme Court, a mandate to the County Judge to provide appropriate quarters for the new court, authority to refer matters to a master—and finally (Sec. 12) a provision that "The invalidity of any section or sections of this Act shall not affect the validity of the balance of said enactment.

In examining the Act, of which we have judicial knowledge, it appears (1) that the General Assembly functioned in two respects: It exercised the inherent right to legislate, and then assumed the executive function of appointment—a power it did not possess. This being true, the so-called decree signed "Ruth F. Hale, Chancellor" imports no judicial authority and must be treated as a nullity.

Government as we know it—or at least as it *affects* us—is characterized by that fundamental division of power so often spoken of as the three coördinate departments—Legislative, Executive, Judicial. Each division

functions in a separate, but restricted political area or sphere. Neither may be infringed upon by the other.

It would be much easier, from this Court's standpoint, to say that but little difference in the general scheme would be observed if we closed our eyes until November and permitted the legislative usurpation to take its course. A Chancery Court, . . . dealing with a heavy daily docket, would be allowed to function in circumstances where it is said that relief is an emergency. Sec. 13, Act 42. But, unfortunately, the entire fabric of constitutional government is involved, and confession here that a meritorious case justifies sabotage of fundamentals can only have the effect of making government more difficult and justifying the public's all-too-often expressed fear that principles are lost by attrition more often than they are bartered for profit.

Oates v. *Rogers,* 201 Ark. 335, 144 S. W. 2d 457, illustrates the point. There the General Assembly enacted what could have been a valid measure to separate the offices of sheriff and collector in Pulaski County. But after performing the legislative requirements the Assembly delegated to the County Judge, the Chancellor, and the three Circuit Judges, authority to select a collector to serve for a period of five years. The Supreme Court's holding was that because appointment is non-judicial, circuit and chancery judges are without power, under the constitution, to exercise that function—a duty expressly conferred upon the Governor. The limitation discussed by Judge Riddick in *Cox* v. *State,* 72 Ark. 94, 78 S. W. 756, 105 Am. St. Rep. 17, was mentioned in the Oates-Rogers opinion. That exception has no application here for the reason that Chancellors are State officers under the constitution; and by the same authority the Governor has the right to fill vacancies pending election. See, also, *Matthews* v. *Bailey, Governor,* 198 Ark. 830, 131 S. W. 2d 425.

The assertion that Mrs. Hale is a Chancellor *de jure* advances for consideration the argument that our Constitution invests the Governor with power to fill vacancies; for, say proponents, since the Act that undertook to cre-

ate the Chancery Division named an incumbent, no vacancy existed and the Executive has not been deprived of any right. The plausibility of this argument must yield to the practical mechanics of legislation which afforded the General Assembly every procedural convenience to establish the Division and at the same time produce a vacancy. Had that been done each governmental department—legislative and executive—would have acted in its accredited field, neither impinging upon the other.

The most difficult problem is whether, in spite of the severability provision of Sec. 12, the Division would have been created had the General Assembly realized the appointment was a nullity.

Argument that the creative sections—1, 2 and 3—would not have been enacted had it been known the vacancy could be filled only by executive appointment or election, finds support in the fact that the three sections lead logically into Section 4. It is our view that the Act was intended as a whole. It was a new departure. Legislators must have been cognizant of the unusual power they were attempting to exercise and unquestionably there was doubt regarding constitutionality of the method adopted; and yet, in spite of this, no alternative was expressed—only the provision for an election to be held more than twenty months in the future.

Amendment No. 29 to the Constitution directs the Governor to fill vacancies " . . . in the office of United States Senator, and in all elective state, district, circuit, county, and township offices except those of Lieutenant Governor, Members of the General Assembly, and Representative in Congress of the United States," and (Sec. 2) " . . . No person appointed under Section 1 shall be eligible to appointment or election to succeed himself."

Under this discriminating provision appointment to a vacancy in the *circuit* for the term running between creation of the Division and election would have rendered such appointee ineligible as a candidate in succession; hence we must conclude that with the Amendment as a guide, and with a desire to promote to the Chancellorship

the officer then serving as Master in Chancery, it was felt that the technical distinction between appointment to an office not previously existing, and appointment to fill an admitted vacancy, was a tenable assuasive, hence no vacancy as contemplated by Amendment No. 29 had been filled. This line of argument might easily lead one into infinite fields of inductive reasoning, but it could hardly eliminate from the Constitution the expressed intent that one invested with an office in any of the "circuits" whose right rests upon any security less than an election must stand aside as an ineligible when an election is legally held.

In considering arguments advanced by the respondent-appellee that the General Assembly did not intend to create an office and leave it vacant (for, they say—quoting from *Hutchenson* v. *Pitts,* 170 Ark. 248, 278 S. W. 639—" . . . it is an elementary principle that the law abhors vacancies in public office")—in this connection it is difficult to say that where so much attention was given to a proscribed method of appointment in an effort to prevent the office from being vacant until it could be filled by the Governor, February 7, 1947, the purpose was other than to adroitly blend the principal transaction with incidental provisions, and thus retard or obscure recognition of the harmful element.

The right of a State Legislature to make appointments in circumstances where under the constitution that power was placed elsewhere was discussed by the Supreme Court of Indiana in three pertinent cases, one of which dealt with the judiciary. In *State of Indiana ex rel. Alvin P. Hovey* v. *William T. Noble et al.,* 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101, 10 Am. St. Rep. 143, consideration was given to the General Assembly's asserted right to create and name Commissioners of the Supreme Court. They were charged with the duty of aiding and assisting the Court under such rules and regulations as might be promulgated by that body, "and to aid and assist the Court in the performance of its duties."

The Supreme Court first held that the duties with which it was charged were created by the constitution,

and that only judges whose offices were so created could collectively function as a court. In *State of Indiana ex rel. Henry Jameson et al.* v. *Caleb S. Denny et al.*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79, attention was called to Sec. 1, art. 3, of the Indiana Constitution, providing that "The powers of the government are divided into three separate departments: the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided." Our Constitution (art. IV, Secs. 1 and 2) is: "The power of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confined to a separate body of magistry, to-wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another. No person, or collection of persons, being one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

In the Jameson-Denny case the Indiana Court held that power vested in the legislature "to provide by law the manner or mode of making an appointment to office, does not include the power to make the appointment."

In the Hovey-Noble case it was said concerning the commissioners: "If the duties assumed to be assigned [to them] are judicial, then they must constitute a court, since only courts can exercise judicial power. But, as no such court is recognized by the Constitution, it can have no legal existence. If, however, it be conceded that the tribunal which the Act assumes to establish is a court, then the instant the Act took effect the offices of the judges of that court were vacant." And, in respect of judicial power: " . . . It is the Constitution, and not the Legislature, which makes the investiture, and it is the courts and judges who are invested with [this] power." See *City of Evansville et al.* v. *State of Indiana, ex rel. Fred Blend,* 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93.

So, in the case at bar, the Constitution invests judicial power in courts, and it places appointive power with

the Executive—certainly as to the enumerated offices. There is no color of right, no semblance of authority, no repository of power even inferentially hinted at in the Constitution, no fine shade of reason from which substance might spring, and no theory upon which those charged with promulgating the State's public policies and enacting its laws, can assign to themselves a duty expressly placed elsewhere by the very Constitution which created a legislative department.

Appellee-respondent argues that facts in *Keith* v. *State,* 49 Ark. 439, 5 S. W. 880, support the proposition that with creation of the Chancery Division in the instant case and the attempted appointment of a Chancellor, the person so designated became a *de facto* judge if not in fact *de jure.*

In the Keith case Judge R. H. Powell had been regularly elected to preside over the Third Judicial Circuit. The Fourteenth Circuit was subsequently created, involving a reassignment of counties. The legislative directive was that "The Circuit Judge elected at the last general election for the Third Circuit, whose residence falls within the Fourteenth, as created by this Act, shall continue to exercise the functions of Circuit Judge for the Fourteenth Circuit until his successor is elected and qualified as now provided by law."

By a plea to the Court's jurisdiction, and by subsequent plea in abatement when found guilty on a criminal charge, Keith undertook to question the Court's jurisdiction when his appeal was lodged in the Supreme Court. Chief Justice Cockrill held that appeal was not the right remedy. It was also held that the record disclosed that Powell, if not a judge *de jure,* was a judge *de facto,* hence the conviction could not be attacked collaterally.

The difference between Keith's position and the situation here presented is that Powell, having been elected to the judgeship, was assigned to a different district, but nevertheless he had been elected. His judicial status was created by machinery set in motion by the Constitution. He was a regular judge who had been duly commissioned and had taken the oath of office; hence his acts in a par-

ticular case were subject to review at the instance of the State only.

In the absence of election to office (however defectively the election may have been held) one may claim to be a *de facto* officer by virtue of appointment only in the event the appointing power had authority or apparent authority to make the designation. If the agency lacked the actual or ostensible authority to appoint in any circumstance, its appointee cannot be considered a *de facto* officer. This is true because the attempt would not be the improper exercise of an existing power, but an effort to exercise a non-existent power.

Conditions under which a judgment is absolutely void were discussed by Chief Justice BUNN in *Caldwell* v. *Barrett,* 71 Ark. 310, 74 S. W. 748. The following language is found in the opinion:

"In order to be a *de facto* judge there must be a regularly constituted office and a vacancy therein before one appointed or elected to fill such office can be denominated a *de facto* officer. . . . When there is an office, and no *de jure* officer to exercise its functions, then one appointed under the form of law would be a *de facto* officer at least, and his acts are not to be called in question collaterally. The question is quite different where there is no *de jure* office, . . . for the foundation of the proceeding must be . . . a lawfully created court, or there is a total want of jurisdiction in the court itself to hear and determine the case, and this jurisdictional infirmity will annul any proceedings therein on mere suggestion to the proper court. It would be beyond all precedent to term the judge presiding in a court which is not a court at all a *de facto* judge."

And, for the same reason, one appointed to an office that does exist, *but not appointed under form of law,* would not be a *de facto* officer.

Result of our holding is (a) that in spite of words of severability used in Act 42, the General Assembly did not intend that the office it attempted to create should be filled by executive appointment, hence there was no dis-

tinct or independent purpose to divide the circuit or district and leave the office vacant for almost two years, and (b) not having the power of appointment, the Legislature could not lend color to acts of the person named; hence, judgments, orders, and decrees are without legal force. It follows that the decree must be vacated, but inasmuch as the cause was filed in Pulaski Chancery Court, which is unaffected by the legislation, it is remanded for consideration.

Cause No. 8371 (*Helen D. Stevens* v. *Arthur G. Stevens*) is another appeal from the Second Division, submitted December 8, 1947. The decree there, also, must be set aside and the cause remanded to Pulaski Chancery Court.

SCRINOPSKIE *v.* MEIDERT.

4-8504 210 S. W. 2d 281

Opinion delivered April 19, 1948.

Byron Bogard, for appellant.

Paul E. Talley and *Wayne W. Owen,* for appellee.

HOLT, J. Prior to November, 1946, appellant, Izzy Scrinopskie, and appellee, Johnny Meidert, were partners, operating three liquor stores in the city of North Little Rock, known as "Mint Liquor Store," "101 Liquor Store," and "Pike Liquor Store." This partnership was mutually dissolved and a dissolution agreement entered into November 26, 1946. Under the terms of this agreement, appellant acquired two of the liquor stores and appellee, Meidert, was paid $10,000 in cash and $8,000 in merchandise, and in addition, the agreement provided for the execution of a written lease from appellant to Meidert on the property occupied by the Mint Liquor Store for a twelve-month term with options for annual renewals up to November 1, 1950. Appellant held a lease on this property which expired on the latter date.

The agreement further provided that the lease should contain the following provisions: "It being understood that said lease shall provide that in the event party of the second part (Meidert) shall discontinue the retail liquor business, then same shall operate as a cancellation of said lease between the parties hereto."

This lease was formally executed December 1, 1946, containing the above mentioned provisions and the further covenant under which appellant agreed "not directly or indirectly or through agents or employees to operate a liquor store within one-half mile of the above described property during the period of this lease or any

extensions or renewals thereof." The lease also contained the following additional provisions:

(a) "It is mutually agreed by and between the parties hereto that in the event party of the second part (Meidert) ceases to operate a liquor store in the premises heretofore granted for any reason, either willingly, at his own option or by virtue of a revocation of his permit, this lease may at his sole option be immediately terminated."

(b) "It is the intention of this lease agreement to grant unto the party of the second part (Meidert) the same rights and privileges with reference to the space now occupied by the Mint Liquor Store as hereto enjoyed by the parties hereto in the operation of said Mint Liquor Store, with the above mentioned eight-foot extension. And it is agreed that the assigns, transferees and heirs-at-law of the party of the second part (Meidert) and the assigns, transferees and heirs of any person or persons succeeding to the rights of the party of the second part (Meidert) herein shall enjoy all the rights and privileges which will be conveyed unto the party of the second part by the terms of this agreement."

Under the terms of this lease, Meidert agreed to pay a rental of $50 a month for the Mint Liquor Store for a period of one year, with renewal options up to November 1, 1950.

This lease was duly recorded December 6, 1946.

During March, 1947, appellant received a monthly rental check from Bennie Johnson, one of the appellees, which appellant declined, and returned. Upon investigation, appellant learned that appellee, Meidert, in February, 1947, had sold the Mint Liquor Store to Bennie Johnson and had assigned his lease from appellant to her, and that Meidert no longer operated the business upon the premises. In July, 1947, and prior to trial of the present suit, appellee, Bennie Johnson, vacated the premises of the Mint Liquor Store and moved to a new location across the street.

Subsequent tenders of the monthly rentals were made to appellant by Bennie Johnson, which appellant refused and at the trial of the present case, tender was made to appellant.

This suit was brought by appellant on June 7, 1947, to cancel the lease and evict appellee, Bennie Johnson, from the premises. Appellees denied that appellant had the right to cancel the lease. On a hearing, the Chancellor found that appellant was entitled to cancellation of the lease, but that he should be enjoined from operating a liquor store on the premises where the Mint Liquor Store was located.

Appellant has appealed from that part of the decree which enjoined him from operating a liquor store on the premises, and appellees, Johnny Meidert and Bennie Johnson, have cross-appealed from that part of the decree which cancelled the lease.

The facts appear not to be in dispute. The primary and decisive questions presented are: (1) Did appellee, Meidert, under the terms of the lease, in question, have the right to sell and assign the lease on the Mint Liquor Store to appellee, Bennie Johnson? (2) Did the trial court err, in the circumstances here, in enjoining appellant from operating a liquor store on the premises in controversy?

After a careful review of the record, we have reached the conclusion that the court erred in holding that the lease in question was of such a personal nature as to preclude its assignment in any and all circumstances. In our interpretation of the provisions of the lease contract before us, there are certain well defined rules to guide us. Every effort should be made to interpret contracts favorably to their enforcement and to prevent forfeitures.

In *Singer Sewing Machine Co.* v. *Brewer,* 78 Ark. 202, 93 S. W. 755, this court said: "Forfeitures are not favored in the law, and in order to be enforced they must be plainly and unambiguously provided in the contract.

It is the duty of courts, when contracts are fairly susceptible of more than one construction, to adopt such as will not work a forfeiture of the acquired rights of either party."

In *Williams* v. *Shaver,* 100 Ark. 565, 140 S. W. 740, it is said: "But where forfeitures are provided for by the express terms of a contract, it has been well settled that they are not favored in equity. It is well recognized that the right of forfeiture is a harsh remedy and liable to produce great hardships. For this reason it has been uniformly held that before a forfeiture will be declared the law will require that a strict compliance with every important prerequisite must be shown, even in such contracts where the forfeiture is provided for by express terms."

This court again in the case of *Hastings Industrial Co.* v. *Copeland,* 114 Ark. 415, 169 S. W. 1185, with reference to construing contracts said: "In construing a contract, the object is to arrive at the intention of the parties as shown by the circumstances surrounding the making of the contract, the situation and relation of the parties, and the sense in which, taking these things into consideration, the words used would naturally be understood. . . . As between two constructions, each reasonable, one of which will make the contract enforceable, and the other of which will make it unenforceable, that construction which makes the contract enforceable will be preferred. Thus, if a contract is open to two constructions, one of which will accomplish the intention of the parties, and the other of which will defeat such intention, or will make the contract meaningless, the former construction is to be preferred. Page on Contracts, Vol. 2, paragraph 1120."

In *Mississippi Home Ins. Co.* v. *Adams & Boyle,* 84 Ark. 431, 106 S. W. 209, we find this language: "It is our duty, in arriving at the intention of the parties, to give force and effect to all the provisions, and every word, if possible. The language, as a whole, should, if possible, be so construed as to make the apparently con-

flicting provisions reasonable and consistent, and so as not to give one of the parties an unfair and unreasonable advantage over the other."

Appellees argue that that portion of the lease indicated as (b), *supra,* makes it assignable, and we agree. The language used "that the assigns, transferees and heirs-at-law of the party of the second part (Meidert) and the assigns, transferees and heirs of any person or persons succeeding to the rights of the party of the second part (Meidert) herein shall enjoy all the rights and privileges, which will be conveyed unto the party of the second part (Meidert) by the terms of this agreement," clearly empowered Meidert to assign his lease and his assignee would succeed to his rights under the lease.

We see no conflict between this provision and provision (a), *supra.*

It must be borne in mind that a material part of the consideration which passed to Meidert under the partnership dissolution agreement, *supra,* was the lease to him of the Mint Liquor Store, which, with the option privileges, he was to have until November 1, 1950. We think not only that, in the circumstances, an assignment of the lease was contemplated by the parties but, as indicated, specifically provided.

We said in *The Leader Company* v. *Little Rock Railway & Electric Company,* 120 Ark. 221, 179 S. W. 358: "In *Fort Smith Light & Traction Co.* v. *Kelley,* 94 Ark. 461, we quoted with approval from Thornton on Oil and Gas, § 477, and certain other authorities, wherein the rule was laid down that 'a grant to the company or its assigns is sufficient to authorize an assignment without further consent' of the other party to the contract."

As to that part of the decree in which appellant was enjoined from operating a liquor store in the premises of the Mint Liquor Store following vacation of these premises by Bennie Johnson, we are unable to determine from the record whether Bennie Johnson was evicted from the premises or voluntarily surrendered possession

and opened up a liquor store across the street. If she were forced to move then, if she so desires, she should have the premises returned to her. Otherwise, the injunction against appellant's occupancy should be dissolved.

Accordingly, the decree is reversed and the cause remanded with directions to proceed in accordance with this opinion.

ARKANSAS MOTOR COACHES, LTD., INC. *v.* WHITE BUS COMPANY, INC.

4-8515 210 S. W. 2d 314

Opinion delivered April 19, 1948.

E. J. Butler, Bailey & Warren and *Walls Trimble,* for appellant.

Mann & McCulloch, for appellee.

ROBINS, J. Appellants are common carriers of passengers by motor bus, and as such have obtained from the Public Service Commission of Arkansas "certificate of convenience and necessity" authorizing them to operate over Highway 70 between Little Rock and Memphis. By their bill filed in the chancery court appellants sought an injunction to prevent appellee, which had obtained no authorization from the Public Service Commission, from operating its passenger motor buses over a portion of the above route on Highway 70.

From a decree of the lower court denying injunctive relief prayed they prosecute this appeal.

The facts are stipulated. It is agreed that appellants have obtained the "certificate of convenience and necessity" as alleged by them; and that appellee, without having obtained from the Public Service Commission any such certificate, is operating passenger buses on regular schedules over Highway 70 from Forrest City to Madison, and over Highway 50 from Madison to Widener, and return; and from Forrest City to Palestine and return, over Highway 70.

It is the contention of appellee, sustained by the lower court, that it is not required to obtain authority from the Public Service Commission because its operations fall within the exception created by sub-division 5 of § 5 (B) of Arkansas Motor Carrier Act (Act 367 of 1941), which exempts from control by the Commission buses operated wholly within a municipality, or between contiguous municipalities, or "within a zone adjacent to and commercially a part of any such municipality."

The decision of this case turns on the meaning of the phrase "within a zone adjacent to and commercially a part of any such municipality," as used in said Act. Appellee insists that the stipulation shows that Palestine, Madison and Widener and the territory between

said points and Forrest City are "within a zone adjacent to and commercially a part of" Forrest City.

The relevant portion of this stipulation is as follows: "The towns of Madison, Widener, Caldwell and Bonair, and the City of Forrest City, are all within St. Francis county. Forrest City is the largest city of this county. Forrest City is the county seat of St. Francis county. All of these towns are so small that most of their inhabitants do part of their trading in Forrest City. A great many of the inhabitants do a large part of their trading in Forrest City. The same is true of those persons living along the road between each of these towns and Forrest City. These towns are so small that their stores do not carry as complete lines of merchandise, or as many varieties, as those in Forrest City; therefore, the inhabitants of these towns must, of necessity, buy these items somewhere else. Most of these purchases are made in Forrest City. None of these outlying towns has a lawyer, and virtually all legal business is done in Forrest City. None of these outlying towns has a hospital or clinic, while the hospitals and clinics in Forrest City handle most of the patients from these areas. Many persons from these towns, and the areas between them and Forrest City, come to Forrest City for entertainment and recreation. Most of the agricultural products of the areas surrounding these towns are cleared through offices and businesses in Forrest City. Many persons owning land in and around these towns have their residences in Forrest City and travel back and forth between them. Numbers of inhabitants from each of these towns, and their surrounding areas, come to Forrest City at least once per week, particularly on Saturday, for one or more of the reasons stated above."

There is no statement in the stipulation as to whether inhabitants of Palestine, or of the territory between Palestine and Forrest City use the latter city as a trading point.

Widener and Palestine are incorporated towns. Forrest City is a city of the first class. Widener is 6½ miles from Forrest City and Palestine is 7 miles from Forrest City.

We have not heretofore had occasion to construe the phrase "within a zone adjacent to and commercially a part of any such municipality"; and we are not referred to the decision of any court of last resort where such phrase has been defined.

We conclude that the Legislature did not intend to include a non-contiguous municipality in a "zone adjacent to and commercially a part of" another municipality. The fact that the state has incorporated territory into a city or town is a formal recognition by the state that such community is a separate and independent entity, regardless of how small its population may be. The word "zone," in its original significance, means "belt"; and it would appear that when the Legislature referred to a "zone adjacent to and commercially a part" of a city it meant that area lying immediately adjoining on all sides the corporate limits of such city and inhabited by people who trade and, in most cases, work in such city, rather than an area that would include other separate municipalities.

Palestine and Widener, being incorporated towns, therefore, would not fall within a "zone adjacent to and commercially a part of" Forrest City.

Hence the operations of appellee were not exempt from control of the Public Service Commission; and, since appellee has not obtained from the Commission the "certificate of convenience and necessity" to authorize its passenger carrier service, it follows that the lower court should have granted the injunction asked by appellants. *Morgan* v. *Fielder,* 194 Ark. 719, 109 S. W. 2d 922.

The decree appealed from is reversed and the cause is remanded to the lower court for further proceedings not inconsistent with this opinion.

4-8511 210 S. W. 2d 290

Opinion delivered April 19, 1948.

[redacted]

George E. Pike and Botts & Botts, for appellant.

Peyton D. Moncrief, Virgil R. Moncrief and *John W. Moncrief,* for appellee.

McHaney, Justice. Appellee brought this action against appellant, individually and as trustee, and the DeWitt Cooperative Buyers Association, hereinafter referred to as the Association, of which appellant is the General Manager, to have declared and enforced by specific performance an alleged oral agreement between her and appellant whereby the latter was to bid in and

buy for their joint account certain real estate to be sold by a commissioner at a partition sale on July 22, 1946. Appellee is one of the four heirs of the late J. E. Stephens, who died intestate owning the real property in the City of DeWitt here involved, and a large amount of other real and personal property. The land involved is all of block 4, except the railway, Improvement Company's Addition, and the south part of block A, same addition, being a plot of ground 50 feet wide by 392 feet long, adjacent to said block 4. The Association had been the tenant of Mr. Stephens prior to his death, and of the estate up to the time of the sale and its confirmation, above mentioned, of a warehouse located on a portion of said block 4 and desired to purchase same together with certain vacant property adjacent to said warehouse in said block in the form of a V between the railroad tracks. Appellee desired to purchase the remainder of said block 4 on which two or more residential rental houses were located and which were renting at the time for about $100 per month. She alleged in her complaint that prior to the sale she had an agreement with appellant to the effect that he would bid in the whole of said block 4 for their joint benefit, she to have all the property in said block 4, except the warehouse and the vacant property within the V which was for the Association. The specific allegation is: "After negotiations and discussion between C. L. McNutt, representing the DeWitt Cooperative Buyers Association, and this plaintiff, it was ultimately agreed between defendant C. L. McNutt and plaintiff that said McNutt would at said sale bid on all of said property for and as trustee for the DeWitt Cooperative Buyers Association and this plaintiff and he did so bid and being the highest bidder said property was struck off and sold by the Commissioner to C. L. McNutt, trustee, for sum of $14,000."

She further alleged that she has at all times been ready, able and willing to pay her share of the purchase money and take her part of the property, or, in the alternative, to pay all the $14,000 and take all the property so bid in. She did not allege what her share of the pur-

chase price was to be, but did testify that the basis agreed on was $5,000 for the property the Association wanted and $9,000 for what she wanted.

She further alleged that appellant was acting as trustee for her and the Association and bought the whole of said block 4 and said south part of block A in his name as trustee, but since said sale he has fraudulently repudiated his trust and caused the deed to be executed by the Commissioner to the Association; and that, relying upon said agreement, she refrained from bidding at said sale which she would have done but for said agreement. She tendered "full performance on her part" and prayed that said property be impressed with a trust and that the agreement be enforced.

Appellant and the Association answered with a general denial and particularly that neither appellant nor it had any agreement whatever with appellee as to the purchase of said property in a way that she might have an interest therein. They further stated that after the purchase the sale was approved by order of the court, and, in apt time, the court ordered Commissioner's deed to be executed to the Association which was done, and the purchase price of $14,000 was paid to the Commissioner. They plead the statute of frauds in bar of the action.

Trial resulted in a holding that appellee should not have specific performance of the alleged contract which the court held was established by a preponderance of the evidence, but was entitled to a judgment against appellant in the sum of $1,500. The complaint as to the Association and said property was dismissed as being without equity and judgment was entered against appellant for $1,500, the costs to be paid one-half each by appellant and appellee. Both parties have appealed, appellee having appealed from that part of the decree which dismisses the Association from the action and cross-appealed as against appellant on the ground that the judgment against him for $1,500 is inadequate.

Whether we consider this as an action for specific performance of the alleged oral contract, or one for the establishment and enforcement of a constructive trust in the property, we think the appellee must fail because the alleged agreement has not been established by clear, satisfactory and convincing evidence. The trial court treated it as an action for specific performance and refused to decree therefor because a part of the property claimed by appellee had been sold. Whether that reason is correct or not we do not decide. But, we have many times held that a court of equity may grant specific performance of a parol contract to convey land only where the evidence of the agreement is clear, satisfactory and convincing. *McKie* v. *McClanahan,* 190 Ark. 41, 76 S. W. 2d 971; *Kranz* v. *Kranz,* 203 Ark. 1147, 158 S. W. 2d 926. The same rule of evidence holds true as to the establishment and enforcement of a constructive trust. In *Eason* v. *Wheeler,* 167 Ark. 320, 268 S. W. 29, we held, to quote headnote 1, that: "A mere parol agreement by a purchaser of land at execution sale to reconvey the land to the execution defendants upon their reimbursing him for expenses incurred is void within the statute of frauds unless there is established an element of positive fraud whereby the title was wrongfully acquired." Assuming, without so holding in this case, that there was here an element of positive fraud whereby the Association acquired the title wrongfully, so as to take it out of the statute of frauds, § 6059, Pope's Digest, still the evidence is insufficient to establish a constructive trust, or, more particularly, a trust *ex maleficio.* In *Eason* v. *Wheeler, supra,* Judge Wood, for the court, quoted with approval from *Tiller* v. *Henry,* 75 Ark. 446, 88 S. W. 573: "Constructive trust may be proved by parol, but parol evidence is received with great caution, and the courts uniformly require the evidence to establish such trusts to be clear and satisfactory. Sometimes it is expressed that the 'evidence offered for this purpose must be of so positive a character as to leave no doubt of the fact,' and sometimes it is expressed as requiring the evidence to be 'full, clear and convincing' and sometimes expressed

as requiring it to be clearly established.' . . . Titles to real estate cannot be overturned by a bare preponderance of oral testimony seeking to establish a trust in opposition to written instruments. The conservatism of the courts has prevented the tenure of realty being based on such shifting sands.''

Here, the appellee testified positively that she had the agreement with appellant set out above. He testified just as postively that he had no such agreement with appellee. There is some corroborative evidence as to each of them, but we are unable to say that the evidence for appellee satisfies the clear and convincing rule as above stated. In fact we are in doubt where the mere preponderance of the evidence lies. This being true appellee must fail, not only as against the Association, but as against appellant as well. It is undisputed that appellant McNutt did not buy for himself, but for his employer, the Association. He received no personal benefit and it is practically undisputed that the land was sold for its fair market value and that its sale resulted in no damage to her, even though she may have been deceived by appellant.

The judgment against appellant McNutt will be reversed and the cause dismissed, and on the appeal of appellee against the Association, the decree will be affirmed.

GULLEY, SHERIFF, *v.* APPLE.

4-8509 210 S. W. 2d 514

Opinion delivered April 19, 1948.

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

Sam Robinson, for appellee.

MINOR W. MILLWEE, Justice. This appeal involves the constitutionality of Act 172 of 1937 (§§ 5400-5402, Pope's Digest), known as the Uniform Act for Out-of-State Parolee Supervision.

Appellee was sentenced to four years imprisonment in the Missouri State Penitentiary by the circuit court of

Carter county, Missouri, on April 23, 1945. On March 11, 1947, the Missouri Board of Probation and Parole granted appellee's application for parole and permission to return to his mother's home in North Little Rock, Arkansas. The parole agreement and order of the board issued thereon provided that said parole might be revoked by the board without notice, and that if appellee should be arrested in another state during the parole period, he would waive extradition and not resist being returned to the State of Missouri. On August 20, 1947, the Missouri board revoked the parole and directed the arrest and return of appellee to the Missouri Penitentiary.

Appellee was then arrested by an Arkansas parole officer and lodged in the Pulaski county jail. On August 30, 1947, he filed a petition for a writ of *habeas corpus* before the judge of the First Division of the Pulaski Circuit Court and was granted bail pending a hearing before the Governor of Arkansas on extradition proceedings instituted by the State of Missouri. A governor's warrant for appellee's removal to Missouri issued as a result of this proceeding and appellee was again lodged in the Pulaski county jail.

On September 20, 1947, a second petition for a writ of *habeas corpus* was filed before the same judge in which appellee attacked the validity of the extradition proceedings and the governor's warrant issued thereon. On October 15, 1947, appellant, Tom Gulley, Sheriff of Pulaski county, filed his response to the petition alleging that he was holding appellee under authority of Act 172 of 1937 and the compact entered into between the states of Arkansas and Missouri pursuant to the provisions of said act. The response did not deny the invalidity of the extradition proceedings before the Governor as alleged in the petition. By permission of the court appellee later filed a reply to the response of appellant in which the constitutionality of said Act 172 was challenged on the grounds hereinafter discussed.

At a hearing held on October 15, 1947, appellant admitted, and the trial court held, that the extradition pro-

ceedings before the Governor had been abandoned and that appellant's authority for the detention of appellee rested solely on the interstate compact under Act 172, *supra*. Appellant introduced testimony showing the conviction of appellee, the agreement under which appellee was paroled and the revocation of said parole by the Missouri board. Evidence was also introduced establishing the identity of appellee and the authority of the Missouri parole officer designated by the board as the agent for the return of appellee to Missouri. At the conclusion of the hearing on October 15, 1947, further action was postponed until October 29, 1947, when the trial court rendered its decision holding Act 172 of 1937 unconstitutional and void. The writ of *habeas corpus* was accordingly granted and appellee ordered discharged. The sheriff of Pulaski county has appealed.

In holding the act unconstitutional the trial court based its decision primarily on the ground that Act 172 violates Art. I, § 9 of the Constitution of the United States which provides that the privilege of the writ of *habeas corpus* shall not be suspended except in cases of rebellion or invasion. The court specifically found: "The Act of Congress (18 U. S. C. A., § 420) authorized the compact, but did not authorize state legislation flowing therefrom which would deny the petitioner due process of law. The Act provides in effect that officers of the sending state may retake a parolee without any process of law and that its right to such seizure of the person shall not be reviewable by our courts. This is a denial of the right to have the writ issued at all, and a hearing on the legality of the detention is thereby avoided. It does not even provide that the courts may determine the authority of the officer or identity of the person. It provides no forum for the determination of these two requirements which are the only obstacles left in the Act to delay the apprehension and removal of the person to the demanding State." The court also found that the only source of authority for the interstate compact is Art. IV, § 2 of the U. S. Constitution and the congressional enabling acts thereto; and that this constitutional

provision contained no limitation or modification of the privilege of the writ of *habeas corpus*.

Article I, § 10 of the Constitution of the United States prohibits a state from entering into any agreement or compact with another state without the consent of Congress. In recognition of this constitutional provision, Congress, in 1934, enacted a statute (48 Stats. 909, 18 U. S. C. A., § 420) giving its consent to the several states to enter into compacts "for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts."

Pursuant to this statute the uniform act in question has been enacted in most of the states, including Arkansas and Missouri. The act authorizes and directs the Governor to enter into a compact on behalf of the state with any of the other states legally joining therein, permitting parolees to reside out of the state in which they have been convicted and sentenced. It further obligates the receiving state to assume the duties of visitation and supervision of such parolees by the same standards that prevail for its own. On September 15, 1937, the Governor of Arkansas entered into the compact with other states adopting the uniform act. Missouri became a party to the compact with Arkansas on April 3, 1947.

The particular provision of Act 172 of 1937 held to be unconstitutional by the trial court is found in § I (3) of the act, which reads: "That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole

shall be conclusive upon and not reviewable within the receiving state: Provided, however, that if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense."

Appellee argues that this section conflicts with Art. IV, § 2, clause 2 of the Constitution of the United States and 18 U. S. C. A., § 662. It is insisted that this constitutional provision and congressional act provide the only method by which appellee might be returned to the State of Missouri. The section of the Constitution referred to provides: "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." This provision is not self-executing. *Com. of Kentucky* v. *Dennison,* 24 How. 66, 16 L. Ed. 717. Congress subsequently enacted R. S., § 5278, 18 U. S. C. A., § 662, which prescribes the procedure to be followed in making the constitutional provision effective.

Our attention has been called to only one case in which the question of the constitutionality of the uniform act has been decided. *Ex parte Tenner,* 20 Cal. 2d 670, 128 Pac. 2d 338. In that case Tenner was convicted of a felony in the State of Washington and sentenced to a term of five years in the state penitentiary. Thereafter he was paroled and permitted to go to the State of California. The parole was later revoked by Washington parole authorities, who ordered Tenner's return to the penitentiary. Tenner was arrested in California and on application for a writ of *habeas corpus* the California Supreme Court, one judge dissenting, denied the writ and held the uniform act in question constitutional. The petitioner in that case assailed the act on the same grounds now urged by appellee in support of the trial

court's adjudication of unconstitutionality in the case at bar. After tracing the history of the constitutional provisions and legislative enactments relating to the subject of extradition, the California court concluded that the act in question did not violate any constitutional provision. In reaching this conclusion the court said:

"The administration of parole is an integral part of criminal justice, having as its object the rehabilitation of those convicted of crime and the protection of the community. Unquestionably such rehabilitation of a parolee may often be facilitated by transferring him to another state, with new surroundings and better opportunities for employment. It is apparent, however, that the success of such out-of-state transfers requires adequate control and intelligent supervision of parolees during the period of their readjustment to civil life. And from the standpoint of the protection of society, there is sound reason for an agreement between states that the authority over parolees should follow them across state lines. The knowledge on the part of the out-of-state parolee that he may summarily be returned to prison for any violation of the rules which he has agreed to obey undoubtedly is an effective check upon any inclination to violate parole.

"The compact represents the social policy of both California and Washington in this regard. It is an agreement for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of the criminal laws of each state within the contemplation of the federal legislation and therefore does not violate the prohibition of the Constitution concerning compacts between states.

"Nor does the act of the respondent deprive the petitioner of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution. He had his day in court when he was tried and convicted of a felony and sentenced to a maximum term of five years in the Washington State Penitentiary. The parole which he accepted was granted

upon the express condition that the Board of Prison Terms and Paroles 'may at any time within its discretion and without notice cause the parolee to be returned to the said institution to serve the full maximum sentence or any part thereof.' One convicted of crime has the right to reject an offer of parole, but once having elected to accept parole, the parolee is bound by the express terms of his conditional release. *In re Peterson,* 14 Cal. 2d 82, 92 P. 2d 890. . . .

"Except for § 2 of Art. IV of the Constitution, there would be no question concerning the right of states to provide, by their joint agreement, for the return of a certain class of fugitives, subject, of course, to the constitutional provision regarding interstate compacts. The right created by Art. IV, it has been held, is a guarantee of which a state may avail itself to secure the return of an offender against its law. *State* v. *Parrish,* 242 Ala. 7, 5 So. 2d 828, 832; *Ex parte Roberts,* 186 Wash. 13, 56 P. 2d 703. And since the extradition provision is not for the benefit of the fugitive, an asylum state may require the Governor to surrender a fugitive on terms less exacting than those imposed by the act of Congress. *State ex rel. Treseder* v. *Remann,* 165 Wash. 92, 4 P. 2d 866, 78 A. L. R. 412. As authority to require the return of fugitives originally existed in the states and remains there except as expressly limited by the Constitution, even in the field of federal extradition, the act of Congress is not exclusive of state action which does not come within its express terms. On the contrary, said the Supreme Court of the United States, it must have been intended to leave subjects within the constitutional power and not provided for by that statute subject to the state authority which then controlled them. *Innes* v. *Tobin,* 240 U. S. 127, 36 S. Ct. 290, 60 L. Ed. 562. Neither the terms of the constitutional provision nor the act of Congress making it effective indicate that the extradition procedure was intended to be exclusive. . . .

"The existence of an independent method of securing the return of out-of-state parolees does not conflict with nor render ineffectual the federal laws with relation to

extradition. The federal method of extradition is always present and may be invoked when necessary to secure the right to return of the fugitive to the demanding state. Also states not party to the interstate compact are free to invoke that procedure to secure the return of fugitive parolees. And if a state has elected to follow the federal procedure and claim the constitutional guarantee, the fugitive of course has the right to insist, on *habeas corpus,* that the procedure conform to the federal law. Similarly the parolee detained under the interstate compact has the right to complain, by means of *habeas corpus,* if that law is not complied with by the authorities. But no right exists on the part of the parolee, whose parole has been revoked, to claim that he may only be removed by the method of his choosing. And since the statute applies uniformly to all parolees from states party to the compact, the petitioner may not complain that the statute deprives him of the equal protection of the laws." (Citing cases.)

We concur in the views thus expressed by the California court and conclude that the states, by adoption of the act in question, have established a valid method of procuring the return of a particular class of fugitives which is independent, but not exclusive, of the regular extradition procedure. We are also of the opinion that the trial court misconstrued the act as meaning that a parolee is denied the right to resort to the writ of *habeas corpus* to determine whether the act has been complied with by the authorities in establishing the authority of the officer and the identity of the person to be retaken. As pointed out by the California court, a parolee detained under the compact still retains this right under the act. It is the decision of the sending state to retake the parolee that is made conclusive and not subject to review within the receiving state.

Appellee contends that even if we follow the holding in the Tenner case, *supra,* he should nevertheless be discharged for the reason that appellant, by first resorting to the regular method of federal extradition in the pro-

ceedings before the Governor, became bound by this election and is precluded from relying on the provisions of the interstate compact. In support of this contention, appellee relies on the following statement of the court in the Tenner case, *supra*: "Of course, when a state elects to use the method of federal extradition, and in so doing has made the demand as required by the Constitution and act of Congress, the federal law applies and governs the procedure of return." It is true that the federal procedure and the Uniform Extradition Act (Act 126 of 1935) were applicable, exclusively, so long as appellant pursued this method of procedure. But appellant completely abandoned the federal procedure at the hearing held on October 15, 1947, and relied solely on the compact under Act 172 of 1937 as his authority for the detention of appellee. Appellee made no objection to the action of the trial court in permitting this to be done. Under these circumstances, appellee is precluded from raising this objection for the first time here. Moreover, this court is committed to the rule that the testing of the sufficiency, or legality, of extradition proceedings does not render a subsequent application for extradition *res judicata. Letwick* v. *State,* 211 Ark. 1, 198 S. W. 2d 830.

The judgment of the circuit court is reversed, and the cause remanded with directions to dismiss the petition of appellee and remand him to the custody of the sheriff of Pulaski county who will deliver appellee to the authorized agent of the State of Missouri for return to that state.

WILLIAMS *v.* MAIER.

4-8473 210 S. W. 2d 499

Opinion delivered April 19, 1948.

Rehearing denied May 17, 1948.

M. F. Elms, for appellant.

A. G. Meehan and *G. B. Segraves, Jr.,* for appellee.

SMITH, J. Appellant owned and operated a lead mine near Point Cedar, Arkansas. Her mine shaft filled with water, and her pump in use was not adequate to draw it off. She went to Stuttgart to rent a pump, but was unable to do so. She was told by Mr. Ragland, the owner and operator of a machine shop in that city, that appellee had a second hand pump for sale. She contacted appellee, who offered to sell his pump for $400, but when he learned that appellant required another thirteen foot joint of pipe, he increased the price to $500. He proposed to deliver the pump for the additional sum of $25, making the purchase price $525. Appellee told appellant that the pump was six miles from town, and a mile from the highway, and could not be examined because of the muddy road, which would have to be traveled to get to it. However, appellee represented that the pump was in A-1 condition, and upon this representation she bought it. That this representation was made is conclusively evidenced by the bill of sale appellee gave appellant which reads as follows:

"November 14, 1945

"Mr. W. M. Maier promises to deliver to Mrs. Lena D. Price-Williams one 10″ Layne Pump, and 110′ of column complete, and it is guaranteed to be in A-1 workable condition, for the sum of $525, cash in hand paid, the receipt of which is hereby acknowledged. Said pump is to be delivered to the property of Price-Williams Lead

and Zinc Mines at Point Cedar, Arkansas, on or before November 16, 1945.

"W. M. Maier."

The pump was delivered and installed and after trial was found not to be in A-1 workable condition. This is shown not only by the overwhelming preponderance of the evidence, but we think without substantial contradiction. The only evidence that it was in A-1 workable condition when sold was the testimony of appellee that he had used the pump successfully for a period of six years, without trouble except the usual and incidental repairs required in its operation, which had been in use for an indefinite time before appellee bought it. But no testimony was offered that it operated successfully when placed in appellant's mine shaft, or could have been. The undisputed testimony to the effect that the pump would not work successfully and could not be made to do so, is to the following effect. The persons who installed the pump and attempted to operate it were shown to be experienced in the operation and installation of pumps gave testimony as to the bad condition of the pump. Appellant employed a man whose business it was to install pumps, as she was not certain that her own employees could successfully install it. Typical of the testimony as to the condition of the pump was that of F. C. Liveoak, who was appellant's mine superintendent. He testified that he had worked twelve or fifteen years in the oil fields and had worked ten or twelve years mining. He testified that he examined this pump after its delivery, and that he advised appellant to make no attempt to install it, as it was just a pile of junk. It was caked with rust, its bearings were worn, the stuffing boxes were worn out, water would come in and drown out the oil, and they had to pour oil in all the time they were operating it. The pump was cleaned, several days being spent in doing so, in an approved manner, and after being properly placed in the mine shaft it was started Thursday evening, and was operated that night and Friday, and went out around 2:30 Sunday morning, and could not be further operated. It constantly gave trouble,

they had to stand over it constantly to keep it running cool, and kept pouring oil in it, and the water would come up and drive the oil out as fast as it was poured in. They had plenty of oil, and but for its constant use the pump would have gone out in thirty minutes, because if you cannot get oil through the pump properly, water will come in and heat it greatly. Operations were discontinued after a few hours' use and a part of the pipe was sent to a machine shop to be threaded, some bearings were made and other work was done, but the pump thereafter functioned no better. This witness testified that the pump was put in the mine over his protest, and that he started to quit when his protest was ignored, but that he was persuaded to remain, and that the day after the pump was installed he quit appellant's employment and has not been employed by her since. He and a number of other witnesses familiar with the construction of pumps, explained their operation, using terms difficult to understand by one without mechanical training. These numerous witnesses, all more or less experienced in the operation of pumps, testified that the bearings and bushings were worn out and no one testified that the pump could have been successfully operated.

One Childers, the assistant of Tuthill, who had been employed to install the pump, superintended its installation, and testified that the pump was not in good working condition as the bearings were worn out and so badly worn you could stick a twelve-inch file down between the pump bowl and the bearings and you could see where it was worn. No one testified that the pump was not properly installed. No one testified that it worked successfully or could have been made to do so by proper operation. An honest effort was made by competent pump people to operate the pump, without success, at considerable expense. Indeed it was shown that additional damage to the pump was done in the attempt to operate it. One Fox, employed by appellant as a mechanic in charge of her mine, testified that the damage would not have been done if the pump had been in reasonably good working order, and that the pump stopped,

or burned out from general wear in the tubing and bushing.

Ragland, who referred appellant to appellee, testified that after the pump had been drawn by appellant, he offered $350 for it, but his offer was refused. It was not shown what use Ragland could or would have made of the pump had he bought it, but it was his business to repair pumps.

Appellant testified that after the pump failed to operate it was pulled out of the shaft, and she had the pump examined by Mr. Whalen, reputed to be the best pump man in Hot Springs, who after he examined the pump refused to do any work on it for the reason that it was worn out and was beyond repair.

The pump was delivered at appellant's mine November 16, 1945, and several days were spent in cleaning it as it was full of mud. Appellant came to Stuttgart a few days after removing the pump from the mine and demanded the return of her money, which was refused. She filed her complaint demanding the return of her money December 27, 1945, in which she alleged her offer to return the pump and "that she makes no claim to same, but that it is on the ground subject to the orders of the defendant." The answer contained a general denial of the allegations of the complaint, but did not specifically deny that the return of the pump had been tendered as alleged.

There was testimony to the effect that appellant's employees continued to use the pump after knowing that it was heating and would burn out if its use was continued, but that it was thought it could be used long enough to lower the water level to that of the smaller pipe in the shaft. But nevertheless the testimony is undisputed that the pump was not in A-1 condition at any time as it was warranted to be. We find therefore that there was a breach of the warranty under which the pump was sold.

Section 69 of Act 428 of the Acts of 1941 declares the remedies available for the breach of a warranty in

a contract for the sale of goods. This Act is entitled: "An Act to Make Uniform the Law of Sales of Goods," and is commonly referred to as the Uniform Sales Law.

Section 69 of this Act provides the remedies the buyer has for a breach of warranty. Sub-section D of this section provided that "The buyer may, at his election . . . rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid."

Sub-paragraph three of this section provides: "Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale."

Here it is insisted that if appellant's testimony is true, she knew of the breach of warranty before she attempted to use the pump, and that when the offer to return the pump was made it was not in "substantially as good condition" as it was when the pump was delivered.

The testimony shows that appellant's use of the pump was made in the attempt to operate it, but it shows in addition that after discovering its condition she continued to use it in the evident attempt to pump off the water before the pump burned up. Appellant's mechanic employed at her mine testified that he knew what was going to happen if they continued to operate the pump in its worn condition, and that with knowledge that the

pump was burning up they tried to finish the job of pumping off the water before it did burn up.

By paragraph 7 of § 69 of Act 428 it is provided: "In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

Of course appellant could not recover the value the pump would have had if she had not burned it up in the attempt to finish the job before it did burn up, and appellee must be credited with the amount or extent of the damage which she did to the pump in its improper use after knowing its defective condition. She would therefore be entitled to recover the price she paid for the pump less the diminished value due to its improper use. In addition she would be entitled to the cost of installation of the pump, and the cost of the repairs, and the parts which she bought.

The annotation to the Uniform Sales Act, page 338, cites cases which hold that such expenses are recoverable. Among others the case of *Moss* v. *Yount,* 296 Ky. 415, 177 S. W. 2d 372, 151 A. L. R. 441, in which case it was held that where a tractor sold was worthless except as junk, buyer's reasonable efforts to restore tractor to condition where it would serve purpose for which it was bought, and expenses while making such efforts were proximate result of seller's breach of warranty. Other cases cited to the same effect are *Stevens* v. *Howe Co.,* 275 Mass. 398, 176 N. E. 208, and *Plumbers Supply Co.,* v. *Lanter,* 280 Ky. 523, 133 S. W. 2d 739.

We conclude, therefore, that the judgment below must be reversed and the cause will be remanded with directions to submit for the jury's determination the amount of appellant's damage, against which appellee will be credited with the amount of the damage to the pump resulting from its use after it was known that it could not be operated successfully.

MARSH *v.* MARSH.

4-8525 210 S. W. 2d 811

Opinion delivered April 26, 1948.

Rehearing denied May 24, 1948.

[redacted]

Dinning & Dinning, for appellant.

Peter A. Deisch, for appellee.

MCHANEY, Justice. This action was brought by appellee against appellants for specific performance of an alleged oral contract made in 1936 to convey 20 acres of land, described as the N½ of N.E. N.E. section 21, 1.S. 1.E., in Phillips county, Arkansas, to him. He alleged that he entered into possession of said 20 acres and cleared a part of it in 1936 and 1937 and that he has been in the actual possession of said tract since 1936 and had paid the full purchase price agreed upon, including general and improvement district taxes; that in 1943 appellant Vagious Marsh advised him that he was still indebted to said appellant in the sum of $43.50, which

sum he paid by check which bore a notation to the effect that it was in settlement of the purchase price of said 20-acre tract, so described as above; that the final payment was made by check on February 24, 1947, in the sum of $44.25 which bore a similar notation; and that said appellant refused to convey, but offered to convey, in lieu of the 20-acre tract above described and which it was agreed should be conveyed, another 20-acre tract of inferior quality to that bought.

The answer denied any agreement as to the 20-acre tract claimed by appellee. He alleged that "owing to the fact that the plaintiff and defendant are brothers, and that he has a natural affection for the plaintiff, he agreed with the plaintiff to convey to him the following described 20 acres of land, to-wit: "E½ E½ E½ NE 21-1S-1E."

Trial resulted in decree which found the facts in favor of appellee, that is, that appellee and appellant did have an oral contract for the purchase and sale of the 20-acre tract first above described herein, that appellee occupied said land and made valuable improvements thereon, paid the agreed purchase price, and has complied with all the terms of said contract, and, therefore, ordered specific performance.

As above stated, this is a suit between brothers. Both are Negroes and appear to have some attachment for each other. We think the evidence supports the findings and decree of the court. It is undisputed that they had an agreement for the purchase by appellee of a 20-acre tract from appellant in said section 21. The dispute is as to which 20 acres. Appellant says it was the E½ of the E½ of NE¼ of said section, while appellee says it was the N½ of the N.E. N.E. of said section 21. Appellee is corroborated as to the correct description by his two checks, one dated March 1, 1943, for $43.50, bearing the notation: "For 20 acres of land N½ of NE¼ of NE¼ S21, 1S, 1E," and the other dated February 24, 1947, for $44.25, bearing the notation: "In full payment on 20 acres of land." This latter notation evidently has

reference to the description noted on the former check. These checks were endorsed and cashed by appellant without any question of or objection to the description, and we think they are sufficient to take the alleged oral sale out of the statute of frauds, § 6059, Sub-section 4, Pope's Digest, even though possession had not been established, and that the evidence is thus made clear and convincing as to what tract was to be conveyed.

After the oral agreement was entered into, but before suit was brought, appellant Vagious conveyed the tract here involved and other land in the same section to his wife. When this fact appeared, she was made a party defendant with her husband. The evidence tends to show the wife knew all about the transaction between her husband and appellee. It is also true that appellee was in possession of said tract, a fact of which she was bound to take notice. *Clinton School Dist.* v. *Henley,* 212 Ark. 643, 207 S. W. 2d 713.

The decree is correct and is, accordingly, affirmed.

HILL *v.* WHITNEY.

4-8512 210 S. W. 2d 800

Opinion delivered April 26, 1948.

Rehearing denied May 24, 1948.

S. Hubert Mayes and Buzbee, Harrison & Wright, for appellant.

Virgil D. Willis and *W. S. Walker,* for appellee.

SMITH, J. Appellants, who are general road construction contractors, entered jointly into a contract with the State Highway Commission to repair and rebuild about seven miles of highway No. 7, south of Harrison, Arkansas. Crooked Creek crosses this segment of the highway near its center. The highway had been slightly relocated at the point where it crossed the creek, and the construction work of grading and graveling had been almost completed on December 7, 1946. A new bridge was to be built adjacent to and east of the old bridge. Appellants had built the road up to the edge of the creek, and on both sides of it. The road came to the edge of the bank of the creek on the south side, but not quite so near on the north side of the creek. The elevation of the rebuilt road at the creek was about five feet higher than the floor of the old bridge. The old bridge remained in service, and as one approached it from the north the traveled way of the highway swung in a well defined turn to the right onto the old bridge. Once across the bridge some twenty or thirty feet, there was a sharp turn to the left, up a short steep grade back to the rebuilt highway.

On the night of December 7, 1946, appellee traveled highway No. 7 south from Harrison, to escort a young lady from a party to her home beyond or south of Crooked

Creek. He testified that as he came into Highway 7, south of Harrison, there were no signs of a closed highway, which was a much traveled road. The slight swing of the road turning south to the bridge was clearly visible and the bridge was crossed and the young lady was taken home without mishap. Soon thereafter he started to return to Harrison, traveling from south to north. There were no slow or other warning signs as he approached the creek from the south. This statement of facts is taken from appellee's testimony, and does not appear to be disputed. The road was apparently straight to the bank of the creek, where there was a perpendicular drop of about twenty feet. Appellee had never traveled that portion of the road before in that direction, but had traveled it from the opposite direction in escorting the young lady home. The view of the creek and the bridge traveling north over it was entirely different from that presented when approaching it from the opposite direction. Just at the edge of the twenty-foot precipice, and not more than six feet from it, the Highway Department had erected a barricade, which, if observed, would have indicated that a sharp turn to the left was required to remain in the road and cross the bridge. Had appellee observed this barricade and made this turn he would have recrossed the bridge as safely as he did in going over it.

The Highway Department had placed a single striped board eight to ten inches wide, and about eight or ten feet long in the center and across the road, not more than six feet from the creek bank. On the board there were alternating, diagonal stripes of red and white making what was called a "scotch light barricade," which could be seen several hundred feet. But this barricade was not placed at the point of turning onto the bridge, but was some twenty or thirty feet north or nearer the precipice. In other words, one would pass the turning off point before reaching the barricade. There were no lights burning and appellee testified that the road beyond the point of turning off to the bridge, and leading into the bank of the creek appeared just like the rest of the road, and

that the only sign of any kind was the single board at the edge of the creek bank.

We think this testimony made a question for the jury as to negligence. Appellants say that they were not negligent as there was no failure to perform any duty on their part, as it was the duty of the Highway Department to safeguard the place of crossing the bridge.

It is true the barricade was erected by the Highway Department and was restored by the Department after it had been knocked down, nevertheless we think it was the duty of appellants both as a matter of contract, and of common law obligation, to warn the traveling public of a hazard which they had created, and to use ordinary care to protect the public from the danger incident to this hazard.

Now it is true that appellants were under no contract to relocate the bridge, but they had built the dump or roadway to the point where the new bridge was to be located, and their contract covered the work on both the north and south side of the bridge. Paragraph No. 7.9 under which appellants were operating reads as follows:

"The Contractor shall provide, erect and maintain all necessary barricades, suitable and sufficient red lights, danger signals and signs and take all necessary precautions for the protection of the work and safety of the public. Highways closed to traffic shall be protected by effective barricades on which shall be placed acceptable warning signs. The Contractor shall provide and maintain acceptable warning and detour signs at all closures and intersections, directing the traffic around the closed portion or portions of the highway, so that the temporary detour route or routes shall be clearly indicated. All barricades and obstructions shall be illuminated at night and all lights shall be kept burning from sunset until sunrise."

The only attempt to comply with this contractual and common law duty was to erect the barricade referred to, but even this was not properly placed, at least the jury might have so found.

The cause was submitted under an instruction reading as follows:

"Gentlemen of the Jury, you are instructed that those in charge of constructing, grading, asphalting or repairing a public highway are bound to see that the public has a reasonable warning of any dangers created by them. So, in this case, if you find that the defendants, acting jointly or either one acting independently, were in charge of constructing, grading, asphalting or repairing the highway and that they left open a dangerous gap or recession therein and that they negligently failed and neglected to place the proper notice or notices, warning or warnings, and that such negligent failure to do so, if you so find, was the proximate cause of the plaintiff's injury and damage to his automobile, if you find that there was injury and damage, or either, you will find for the plaintiff and assess his damages in whatever sum will fairly compensate him, unless you find that his injury and damage, if any, were caused by his own contributory negligence."

It is not questioned that if either appellant is liable both are, and we think the instruction correctly declared the law and that the testimony warranted the court in giving it.

A serious question in the case is whether appellee was guilty of contributory negligence, but we are unable to say as a matter of law that he was. He had never traveled the road before, except while traveling in the opposite direction and the situation at the opposite ends of the bridge was entirely different. He had crossed the bridge in safety and no doubt thought he could safely recross it. There were no lights on the barricade and no signs or markers indicating its presence as one approached it, and appellee testified that he did not see it until he had passed the point in the road where he should have turned to the left to cross the bridge. He testified that he observed the road as he drove along and that he continued in what appeared to be the traveled portion thereof, and that as soon as he saw the barricade he ap-

plied his brakes, but was unable to stop his car until he had run into the barricade which was placed at the edge of the precipice. The jury might well have found that appellee was guilty of contributory negligence, but we are unable to say as a matter of law that it could not find otherwise. *Coca-Cola Bottling Co.* v. *Shipp,* 174 Ark. 130, 297 S. W. 856.

In the case just cited, a car was driven at night, at a speed so great that the driver thereof could not see a parked truck at a distance far enough away to avoid striking it. In reversing the judgment rendered in that case it was held that in the exercise of ordinary care the driver should not have driven his car at a speed so great that he could not stop his car within the range of his vision after discovering an object or obstruction on the highway. In other words, the range of his vision from the use of his lights should have regulated and controlled his speed, so that he could stop his car after discovering the obstruction. The opinion was reversed on rehearing and it was held that inasmuch as there was no light on the truck, reasonable minds might differ as to whether the driver of the car was negligent. So here, in the absence of lights on the barricade, reasonable minds might differ as to the question of appellee's contributory negligence in view of the circumstances herein stated.

Two instructions were asked as to the character of lights with which appellee's car should have been equipped. Both appear to be correct declarations of law as they were based upon and in fact copied from applicable statutes, but neither was given. The court declined to give either upon the ground that both were abstract as there was no testimony that appellee's lights did not comply with the requirements of the law, and the only testimony on that question was to the effect that appellee's lights were in good condition. The court did not err in this respect as there is no duty to give abstract instructions, however clearly and correctly they may declare the law upon an abstract question.

Finally it is insisted that the verdict for $5,000 is so grossly excessive that it may not be permitted to stand. It is certainly generous and abundantly adequate, but it is not so excessive that it may not be permitted to stand. Much testimony was offered as to the damage to the car. According to appellee the car was worth $1,100 before it was precipitated into the creek, and it was so badly torn up that its salvage value was only $150. As to the personal injury, appellee testified that he was pinned under his car and did not know when nor how he was rescued and that he did not regain consciousness until the following day. He had many bruises and lacerations. Two teeth were broken off in his gums, he lost another, and two others were so loosened that he was advised he would lose them. The inside of his cheek was badly cut and required eight stitches. A figure eight was cut in his forehead, the scar of which remains, and the pain in his knee was so great that he could work only for short periods of time. There was opposing testimony to the effect that appellee received medical treatment on only two occasions and that he was confined in his room only a day or two and that except for the damage to his mouth and teeth he was not severely injured. These were all questions for the jury and we are unable to say that the testimony in appellee's favor is not sufficient to support the verdict.

As no error appears the judgment must be affirmed and it is so ordered.

PUGH *v.* STATE.

4494 210 S. W. 2d 789

Opinion delivered April 26, 1948.

Rehearing denied May 24, 1948.

Hibbler & Hibbler, for appellant.

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

ROBINS, J. Appellant, a negro, asks us to reverse judgment of the lower court, entered in accordance with verdict of trial jury, by which the death sentence was imposed upon him for the crime of rape.

The victim was a little negro girl two and a half years old; and the beastly assault was made upon her in the vicinity of the church of which her father was pastor and while her mother and father were attending a meeting in this church. The child had been in the building with her parents, but was permitted to leave to play, as her parents supposed, with her little brother in the vestibule. The child's assailant found her alone on the steps outside and took her a short distance from the church, where the assault was committed. She was found later, her pants having been taken off her, her remaining clothing dirty and wet, and she was bleeding profusely from extensive lacerations. Her physical condition was such that an operation extending over a period of two hours, during which she was kept under ether, was required.

Appellant was taken into custody a few hours after the crime was committed. When arrested he was armed

with a "sawed-off" pistol, loaned to him, as he said, by a friend, "for protection" at a dance which appellant was planning to attend. Appellant had been, according to his statement, drinking beer and whiskey on the night of the crime. After he was arrested it was discovered by the officers that appellant had in his hip pocket the child's pants, which her mother identified as having been worn by the little girl on the night the crime was committed.

For reversal these contentions are made by appellant:

I. That the evidence was insufficient to show that the crime of rape was committed.

II. That the confession of appellant was improperly admitted in evidence, because it was an involuntary one, and for the further reason that it was obtained while appellant was being illegally detained without a warrant, and without having been carried before a magistrate as required by provisions of § 3729, Pope's Digest.

I.

As soon as the victim of the assault was found by her parents she was taken to a hospital. The physician who examined her there testified in detail as to the torn and lacerated condition of her genitals, and stated that he found male spermatozoa therein. He expressed the opinion that penetration and emission had occurred. This testimony, in connection with the fact that the child, on account of non-age, was incapable of consent, was enough to establish that rape had been committed upon her.

The confession introduced in evidence was a typewritten transcript of stenographic notes of an interview between appellant and the prosecuting attorney, in the latter's office, on the day following the commission of the offense. Present at this interview were the prosecuting attorney, the assistant prosecuting attorney, the prosecuting attorney's secretary, who made the stenographic notes of the interview and the transcription

thereof, the chief of detectives of the city of Little Rock, and appellant.

The transcript shows that the prosecuting attorney told appellant that he would not be mistreated or abused in any way. All of those present at this interview, except appellant, testified that there was, at the time this confession was made, no force used or threats or promises made by the officers to obtain this confession; and appellant's attorney agreed in open court that the defendant was in no way coerced while in the prosecuting attorney's office; but appellant testified that on the night before he had been severely beaten by the city officers in an effort to extort a confession from him, and that he was in great fear that, in spite of the prosecuting attorney's assurances, he would be beaten again if he did not confess to the crime. There was evidence that he had been struck about the head the night before, but officers testified that it was necessary to strike him, as he was being arrested, in order to prevent him from using the pistol, which they said he was attempting to draw.

After hearing evidence as to the circumstances under which the confession was made the court determined that it might be read to the jury.

The court instructed the jury, as to the confession, in part as follows: "The reason the state has the burden of proving the voluntariness of a confession, as distinguished from one that is wrested from a man by the use of force, duress, violence, threats of violence or promises of reward, is because a man ought not be compelled to testify against himself . . . So, the application of threats or violence or promises of reward is looked on with disfavor from the courts. If a confession is gotten from a man by those means, you should repudiate it and not give it any consideration if you believe that it was in this case. But, if you believe this was a voluntary confession and not made under threats or violence or promises of reward, then you give that confession what weight you think it is entitled. You can believe that portion you believe or believe it all or not believe it. You

are the sole judges of the credibility of the witnesses and that includes testimony of the confession. Now for a confession to be admissible you must find beyond a reasonable doubt, first, that a confession was made; second, that it was true when it was made; third, that the one produced in evidence was the one that was made; and, fourth, that it was voluntarily made and not made under duress or promises of reward. . . . A confession made by a defendant while in the custody of officers is presumed to be involuntary, and it is the duty of the state to overcome that legal presumption before you consider it at all. . . ."

The record shows that the lower court, in dealing with this confession, adhered to the rule laid down by us in many cases, and which was thus stated in the case of *Burton* v. *State,* 204 Ark. 548, 163 S. W. 2d 160: "We have frequently defined the practice where it is contended that a confession offered in evidence was not freely made. This practice is for the court to hear, as a preliminary matter, in the absence of the jury, testimony as to the circumstances under which the confession was made, and to exclude it from the jury if it were not freely made. If, however, there is an issue of fact as to whether the confession were freely made, that question should be submitted to the jury after having heard the testimony as to the circumstances under which it was made, and the jury should be told to disregard the confession if it were found not to have been voluntarily made."

We conclude, therefore, that there was no error in permitting the confession to be read to the jury and giving to the jury the cautionary instruction as to the requisites of a valid confession.

Appellant also argues that the confession was inadmissible because it was obtained at a time when he was being held in custody without a warrant and without having been taken before a magistrate. No objection, on this ground, to the admission of the confession in evidence was made during the trial, nor was any such objection

set up in the motion for new trial. The record before us is devoid of any proof as to whether any warrant for appellant's arrest had been issued, or as to whether he had been taken before a magistrate, before the confession was obtained. It is unnecessary, therefore, for us to discuss this contention.

No objection to any of the court's instructions was made by appellant nor did he ask any instructions in addition to those given by the court.

We have carefully reviewed the entire record in this case and find no error prejudicial to appellant shown there. The evidence—even if the confession be ignored—abundantly justified the jury's verdict.

The judgment is affirmed.

PITTS *v.* PITTS.

4-8533 210 S. W. 2d 502

Opinion delivered April 26, 1948.

Byron Bogard, for appellant.

Tom F. Digby, for appellee.

MINOR W. MILLWEE, Justice. R. C. Pitts and Homer Pitts, brothers, purchased adjoining residential lots in Poe's Addition to the City of North Little Rock, Arkansas, in 1938 for the purpose of erecting homes thereon. The lots are 45 by 140 feet in size and are located in Block 18 of the addition. R. C. Pitts purchased lot 10 which lies south of lot 11, purchased by his brother. The two brothers began improving their property immediately following their purchase.

Homer Pitts, with the assistance of his brother, constructed a three-room house on lot 11 and moved into the house with his wife and four minor children in March, 1938. About a month later R. C. Pitts constructed a division fence on a line running lengthwise across lot 10 from the northeast corner thereof to the west, or street, line at a point 13.5 feet south of the northwest corner of the lot. This litigation involves the title to the triangular strip off the north side of lot 10 enclosed by this fence.

The two brothers were employed by the Rock Island Railroad Co., at Tie Plant, near North Little Rock, where Homer Pitts was killed in July, 1946. Appellee, Martha Pitts, as the widow and administratrix of his estate collected a substantial sum from the railway company for the death of her husband. In April, 1947, R. C. Pitts had a survey made of the lots and, after demanding pos-

session of the disputed strip, began removing the fence he had erected in 1938. Appellee then instituted this suit against appellants, R. C. Pitts and wife, alleging ownership of the disputed strip by adverse possession and praying that appellant be restrained from encroaching upon or interfering with her possession of the property.

In their answer, appellants denied the claim of adverse possession asserted by appellee and alleged that her use and possession of the strip of land in controversy was with the permission of appellants. The trial court found for appellee and decreed that her title to the disputed strip be quieted and appellants permanently enjoined from interfering with her possession of the property.

The testimony on behalf of appellee is to the effect that she and her deceased husband planted trees and shrubbery along the fence soon after it was erected by R. C. Pitts in 1938; that they kept the grass mowed on the strip and used a portion of it as a driveway continuously since the fence was constructed; that they have exercised all the rights of ownership and claimed title thereto since they moved on the property in 1938 without objection on the part of appellants who resided on the adjacent lot. About four years before institution of the instant suit Homer Pitts also constructed a wash shed on the strip without objection from appellants.

Appellee testified that R. C. Pitts sought a loan from her following her settlement with the railway company in the spring of 1947. On the advice of her attorney she refused to make the loan. Shortly thereafter she was notified by her brother-in-law for the first time that he claimed the strip of land in controversy and intended to place a fence on the true line as shown by the survey which he had recently caused to be made.

Neighbors of the parties testified that appellee and her husband had exercised complete control and dominion over the enclosed property for approximately nine years and that they had never heard R. C. Pitts make any

claim of ownership thereof prior to 1947. Shortly before the filing of the suit, appellee's brother, without authority from appellee, offered to settle the controversy by purchasing the disputed strip from R. C. Pitts, but this proposal was refused.

Appellant, R. C. Pitts, testified that he did not know "exactly" where the line was when he constructed the fence in 1938; that the fence was erected so as to enable his brother to have a driveway on the south side of his house and to prevent hogs which appellant kept on his lot from being so close to his brother's house; that the fence was left there to keep appellee's children out of his garden; that he had an agreement with his brother that the property was to be returned to witness, if he ever needed it; and that he did not need the property until the spring of 1947 when he decided to build a home for his daughter on the front part of his lot. He admitted that he sought a loan from appellee shortly before the controversy arose over the line and stated that he thought he offered her good security, but he denied that her refusal to grant the loan had anything to do with the boundary dispute.

A sister of the Pitts brothers testified that, shortly before the trial, appellee told her she would buy the strip of land in controversy, if R. C. Pitts would sell it to her. She also stated that she once heard Homer Pitts say he wished his brother would sell him half of his lot.

A fellow workman of the brothers testified that several years before the trial he heard R. C. Pitts tell his brother that he "lacked a few feet having his amount of footage across the lot."

J. A. Douglass testified that he had a discussion with Homer Pitts in April, 1946, when he was planning to add a room to the front, or west side, of his house. Douglass asked him why he did not build on the south side of the house and Pitts stated that he couldn't "because it would be on his brother's land." The addition was to be 14 feet wide and Pitts did not say how far the proposed

room would encroach on his brother's land. Witness estimated the distance from the south side of the house to the fence to be 12 to 14 feet.

The chancellor sustained appellee's objection to the competency of certain statements made by deceased Homer Pitts during his lifetime, but same were admitted for the purpose of the record. For reversal of the decree, appellants contend that the trial court erred in excluding this testimony; also, that the court's finding that appellee acquired title to the disputed strip by adverse possession for the statutory period is against the preponderance of the evidence.

We agree that any statements made by the deceased Homer Pitts during his lifetime and while he held possession, which might tend to show that his holding was permissive, and not adverse, were admissible and should not have been excluded. In *Russell* v. *Webb,* 96 Ark. 190, 131 S. W. 456, the court said: "It is well settled that declarations and admissions of one in possession of land, relating to the title thereof and adverse to his interest, are admissible against him; and declarations and admissions of a person, made while in possession, adverse to his title are admissible against his successors in interest and all who claim under him." This rule has been followed in later cases which are cited in *Norden* v. *Martin,* 202 Ark. 180, 149 S. W. 2d 550.

The only statement attributed to the deceased, Homer Pitts, which might tend to show the manner of his holding is that detailed by the witness J. A. Douglass to the effect that Homer Pitts stated in 1946 that he could not build the fourteen-foot addition on the south side of his house because he would encroach on his brother's property. On cross-examination, the witness stated that deceased did not say how far the proposed room would extend on appellant's lot and admitted that a slight encroachment over the line established by the fence would result from the addition. So, unless we can say that the finding of the chancellor on the issue of adverse possession is against the preponderance of the evidence, after

consideration is given to the statements attributed to the deceased, the decree must still be affirmed.

The rule to be applied in determining whether the possession of the disputed strip by appellee and her deceased husband was adverse or permissive is stated in the headnote of the case of *Wilson* v. *Hunter,* 59 Ark. 626, 28 S. W. 419, 43 Am. St. Rep. 43, as follows: "Where one of two coterminous proprietors by mistake builds upon or encloses land of the other, intending to claim adversely merely to the real boundary line, his possession is not adverse to the other; but if his possession was acquired and held under the claim that the land was his own, his possession is adverse to the other, even though the claim of title was the result of a mistake as to the boundary." Numerous cases have subsequently reaffirmed the rule. Some of these are: *Shirey* v. *Whitlow,* 80 Ark. 444, 97 S. W. 444; *Goodwin* v. *Garabaldi,* 83 Ark. 74, 102 S. W. 706; *Etcherson* v. *Hamil,* 131 Ark. 87, 198 S. W. 520; *Miller* v. *Fitzgerald,* 169 Ark. 376, 275 S. W. 698; *Terral* v. *Brooks,* 194 Ark. 311, 108 S. W. 2d 489; *Waters* v. *Madden,* 197 Ark. 380, 122 S. W. 2d 554.

If the line established in the erection of the fence by R. C. Pitts in 1938 was by mistake and the possession of appellee and her deceased husband was held with the intent to claim the property to the fence line as their own, without recognition of any right in the appellants, then their title by adverse possession was established. If, on the contrary, the intent of appellee was to claim only to the true boundary, the possession was permissive. It is undisputed that appellee and her deceased husband, for approximately nine years, held open, notorious, exclusive and continuous possession of the disputed strip and exclusively exercised all rights of ownership of the property. They planted trees and shrubbery along the fence immediately after its erection by appellant, R. C. Pitts, and have since used the strip as a driveway and erected a permanent building on the property without objection from appellants. However, appellants say all this was done with their permission and point to their

testimony in which they stated that Homer Pitts agreed to return the property when they needed it. There is little in the evidence to corroborate appellants' testimony that such agreement ever existed. Appellee testified that she knew nothing of such agreement and had never heard it discussed; and that she and husband at all times claimed the property as their own. None of the neighbors who testified had ever heard such agreement mentioned. The admission of R. C. Pitts that he did not know the exact location of the line when he built the fence is inconsistent with his testimony that the agreement was made. It is also significant that he did not inform appellee that he had such agreement with his brother when he decided to remove the fence in 1947. Whether appellee's refusal to lend him money precipitated a controversy that might have never arisen otherwise is a matter that the trial court was in much better position to determine than is this court on appeal.

The offer of appellee to purchase the property in controversy from R. C. Pitts after the statutory period of seven years had elapsed, if made, may be considered in determining the character of the possession during the statutory period, but will not have the effect of divesting a title that had already vested by adverse possession. The offer to purchase may have been made in order to buy peace and avoid litigation, and not in recognition of appellants' title. *Blackburn* v. *Coffee,* 142 Ark. 426, 218 S. W. 836; *Shirey* v. *Whitlow, supra*; *Baughman* v. *Forsee,* 211 Ark. 149, 199 S. W. 2d 596. The fraternal relationship of R. C. Pitts and his deceased brother is also a factor for consideration in determining whether the possession of one is hostile to the other, but such relationship is not controlling. 2 C. J. S., Adverse Possession, p. 662.

The question whether the possession of appellee and her deceased husband was adverse or permissive was one of fact. When all the evidence adduced on that issue is considered, we are unable to say that the trial court's finding, that appellee's claim of adverse possession was

duly established, is against the preponderance of the evidence.

Affirmed.

CLARK *v.* COLLINS.

4-8527 210 S. W. 2d 505

Opinion delivered April 26, 1948.

Bryan McCallen and *Schoonover & Steimel,* for appellant.

E. L. Mizell and *E. L. Hollaway,* for appellee.

MINOR W. MILLWEE, Justice. Appellee, Dick Collins, was plaintiff in circuit court in an action for damages for breach of a lease contract executed on May 11, 1946, whereby appellant, O. C. Clark, leased the Midway Cafe in Corning, Arkansas, to appellee for one year beginning October 11, 1946, at a rental of $40 per month. A. R. Bloom and Martha Bloom were also made party defendants.

In the complaint filed on November 9, 1946, appellee alleged that he tendered the first monthly rental payment due under the lease and demanded possession of the premises, but that the Blooms were in possession as tenants of appellant and refused to deliver possession or to account to appellee for rents; that the premises were of the reasonable rental value of $75 per month and appellee was, therefore, damaged in the sum of $420 by reason of the breach of the lease agreement. Appellee also alleged that he had suffered further damages by reason of having purchased furniture and equipment in the sum of $1,000 to be used in operation of the cafe, which he was unable to use by reason of the breach of the lease agreement. Judgment was prayed for damages in the total sum of $1,420 against all the defendants.

Appellant, O. C. Clark, made default at the March, 1947, term of court and the case was passed to the October, 1947, term for the purpose of fixing the amount of damages. On October 28, 1947, appellant filed a motion for leave to file an answer to which appellee filed a response on the same date. After hearing the testimony presented by both parties, the trial court denied the motion. Appellant then filed a motion which reads as follows:

"Comes O. C. Clark and for his motion herein, states:

"That this defendant was denied permission by the court to file answer herein and default was rendered

against him, and jury empanelled for the purpose of assessing the damages to plaintiff.

"That the defendant is entitled to cross-examine plaintiff's witnesses on the question of damages and to introduce proof herein before the jury for the purpose of minimizing the damages of the plaintiff.

"Wherefore, defendant prays that he be permitted and granted opportunity to cross-examine the witnesses of the plaintiff and to introduce proof to minimize the damages of said plaintiff before the jury herein."

This motion was overruled by the trial court and appellant duly saved his exceptions. After hearing the testimony offered by appellee on the question of the amount of the damages, the jury returned a verdict in favor of appellee and against the appellant, O. C. Clark, in the sum of $720, and judgment was rendered accordingly.

For reversal of the judgment, appellant contends that the trial court erred in overruling his motion for permission to cross-examine appellee's witnesses and introduce proof before the jury in mitigation of damages. There is no bill of exceptions and the final judgment makes no reference to the filing of the motion, or the action of the court thereon. On this state of the record appellee insists that the alleged error is not subject to review on appeal. However, this court has repeatedly held that a bill of exceptions is unnecessary where the error sought to be reviewed appears in the record proper. *Jones* v. *Jackson,* 86 Ark. 191, 110 S. W. 215; *Sizer* v. *Midland Valley R. R. Co.,* 141 Ark. 369, 217 S. W. 6; *Buchanan* v. *Halpin,* 176 Ark. 822, 4 S. W. 2d 510. The pleadings and record entries are a part of the record proper and need not be set forth in the bill of exceptions. *London* v. *Hutchens,* 80 Ark. 410, 97 S. W. 443; *Hanson* v. *Anderson,* 91 Ark. 443, 121 S. W. 736; *Morrison* v. *St. Louis & San Francisco Railroad Co.,* 87 Ark. 424, 112 S. W. 975; Stevenson's Supreme Court Procedure, p. 5. The motion filed by appellant and the formal order entered by the

court overruling same constitute a part of the record proper. Since the alleged error complained of appears therein, it is subject to review on appeal in the absence of a bill of exceptions.

In the early cases of *Thompson* v. *Haislip,* 14 Ark. 220, and *Mizzell, et al.* v. *McDonald, et al.,* 25 Ark. 38, this court laid down the rule that in a hearing to determine the amount of damages after default, a defendant has a right to cross-examine the plaintiff's witnesses and to introduce evidence in mitigation of damages. In the last case cited Chief Justice WALKER, speaking for the court, said: "As regards the first question, the defendants, by failing to plead in bar, confessed the plaintiffs' right to recover damages, but not the amount of damages claimed in the declaration; because, if such is the effect of a judgment by default, then there would be no necessity for calling a jury to inquire of damages, and judgment would, without the intervention of a jury, be rendered for the amount of damages set forth in the plaintiff's declaration. It must therefore follow, that although the assumpsit to pay for the goods, averred to have been sold and delivered is admitted by the default, and no longer an open question for contest, such is not the case as regards the amount of damages to be recovered. In the case of *Thompson* v. *Haislip,* 14 Ark. 220, this court recognized this rule, and held that, upon a writ of inquiry of damages, the defendant had a right to cross-examine a witness introduced by the plaintiff, and that it was error to refuse such permission. And we think that, upon principle, the decision in that case is alike applicable to this. The open question before the jury was as to the amount of the damages to be assessed, and if the defendant be permitted (as we have held he should be) to cross-examine a witness introduced by the plaintiff, for the purpose of reducing the amount of damages, we think, for the same reason and upon principle, he should be permitted to introduce evidence for the purpose."

These decisions have never been overruled and the principles announced have been followed in other juris-

dictions. In 31 Am. Jur., Judgments, § 521, it is said: "The general rule is that in an inquiry of damages upon a default, all of the plaintiff's material allegations are to be taken as true, and the determination of the amount of the damages to be awarded is all that remains to be done. In the trial of the question of damages, the defaulting defendant has the right to be heard and participate. He may cross-examine witnesses, and may offer proof in mitigation of damages, or as to an adjustment or payment of the amount claimed." See, also, Black on Judgments (Second Edition), Vol. 1, § 91; 49 C. J. S., Judgments, § 201, p. 358.

We conclude that the trial court erred in denying appellant the right to cross-examine the witnesses for appellee and to introduce evidence for the purpose of minimizing the damages. The default fixed appellant's liability on the cause of action and admits that something is due appellee by reason of the breach of the lease contract. Appellee is entitled to nominal damages whether he introduces any evidence or not, and the amount of the damages is all that he is required to prove, or that appellant is permitted to controvert.

For the error indicated, the judgment is reversed and the cause remanded for a new hearing on the question of the amount of appellee's damages.

FORD & SON SANITARY COMPANY *v.* RANSOM.

4-8519 210 S. W. 2d 508

Opinion delivered April 26, 1948.

Richard W. Hobbs, for appellant.

David B. Whittington and *McMath & Schoenfeld,* for appellee.

Ed. F. McFaddin, Justice. Ford & Son Sanitary Company (a partnership composed of Reuben and George Ford) was engaged in hauling garbage in Hot Springs, and in that business operated several large trucks. The truck concerned in this case had a metal body several feet high, and was seven feet, two inches in width. At the rear of the vehicle there were swinging doors or tail gates two feet high. About 3:30 p. m. on May 26, 1947, the appellee, Mrs. Ransom, was standing in the street near the curb on Park Avenue in Hot Springs, and was struck by the swinging door or tail gate of the said gar-

bage truck owned by the appellants. The truck was being driven on Park Avenue by Henry Johnson, one of the regular drivers, and he was accompanied by a fellow-employee named Ivy Rainier. Mrs. Ransom recovered judgment against Ford & Son Sanitary Company, and the partners, who by this appeal challenge the said judgment.

The motion for new trial contains only one assignment, which reads: "The verdict and judgment is contrary to the law and the evidence, for the reason that there was no evidence introduced to show that the defendant Henry Johnson was acting within the scope of his employment and that there was substantial and uncontradicted evidence introduced to show that the defendant Henry Johnson was engaged outside the scope of his employment and purely on business of his own and for that of one other than his employers at the time the plaintiff, Mayoma Ransom, sustained the injuries complained of in the complaint filed in this cause."

Appellant thus states the issue on this appeal: "The sole question involved in this appeal is whether or not there was sufficient evidence introduced during the course of the trial for the jury to find that the alleged negligent act of Henry Johnson was done while acting within the scope of his employment and for the benefit of the appellants."

In the case at bar the appellant company's truck was being driven by one of its regular employees during regular business hours. In the case of *Mullins* v. *Ritchie Grocer Company,* 183 Ark. 218, 35 S. W. 2d 1010, Chief Justice HART, speaking for this court, said:

"In a case-note to 42 A. L. R. at page 919, it is stated that proof that the automobile causing the damage belonged to the defendant, and was being operated at the time of the injury by an employee of the defendant, creates a reasonable presumption that the driver was acting within the scope of his employment or in the course of his master's business. This presumption, however, is one of fact, and may be defeated or overcome by testi-

mony tending to contradict it. Our own court adopted this rule in the case of *Terry Dairy Co.* v. *Parker,* 144 Ark. 401, 223 S. W. 6. In this connection, it may be stated that the phrase 'in the course or scope of his employment or authority,' when used relative to the duties of the servant or employee, in cases of this sort, means while engaged in the service of his master or while about his master's business.

"The doctrine is settled in this State that, if the automobile causing the accident belongs to the defendant and is being operated at the time of the accident by one of the regular employees of the defendant, there is a reasonable inference that at such time he was acting within the scope of his employment and in the furtherance of his master's business. The inference or presumption of fact, however may be rebutted or overcome by evidence adduced by the defendant during the trial. Where the evidence on this point is contradictory, the question is one for the jury. Where the facts are undisputed and uncontradicted, it becomes a question for the court. *Healey* v. *Cockrill,* 133 Ark. 327, 202 S. W. 229, L. R. A. 1918D, 115; *Bizzell* v. *Hamiter,* 168 Ark. 476, 270 S. W. 602; and *Hunter* v. *First State Bank of Morrilton,* 181 Ark. 907, 28 S. W. 2d 712."[1]

Applying the rule announced in the foregoing case to the case at bar, this is the picture: when the plaintiff showed that the truck which inflicted the injury was owned by the defendant company, and was at that time being driven by the said defendant company's regular employee, then such proof raised a temporary presumption that the employee was in the scope of his employ-

[1] The case of *Mullins* v. *Ritchie Grocer Co.,* 183 Ark. 475, 36 S. W. 2d 406, is a landmark in our jurisprudence and has been cited with approval many times. Some of the subsequent cases are: *Casteel* v. *Yantis-Harper Co.,* 183 Ark. 475, 36 S. W. 2d 406; *Rex Oil Corp.* v. *Crank,* 183 Ark. 819, 38 S. W. 2d 1093; *Marshall Ice Co.* v. *Fitzhugh,* 195 Ark. 395, 112 S. W. 2d 420; *Ball* v. *Hail,* 196 Ark. 491, 118 S. W. 2d 668; *Brooks* v. *Bale Chevrolet Co.,* 198 Ark. 17, 127 S. W. 2d 1935; *Lion Oil Co.* v. *Smith,* 199 Ark. 397, 133 S. W. 2d 895; *Fooks* v. *Williams,* 205 Ark. 119, 168 S. W. 2d 193. The general rule as stated in 5 Am. Juris. 842, 871, is in accord with the rule stated by this court in the Mullins case. See, also, annotations in 74 A. L. R. 951, 965; 95 A. L. R. 878; 107 A. L. R. 419, 435.

ment. The defendant company, to avoid liability, was then obliged to introduce substantial proof directed to the negation of scope of employment. When the defendant company introduced such proof, the presumption (arising from ownership and driving of the vehicle) had served its purpose, and disappeared: so that if—independent of such presumption—there was no evidence to dispute the defendant's proof, and if such proof contained no substantial contradictions in itself, then there would have been no evidence to take the case to the jury on the "scope of employment" theory.[2] But if—independent of the presumption—the defendants' proof was substantially contradicted by the plaintiff's proof or by inconsistencies in the defendants' own proof, then the issue of scope of employment would be for the jury.[3]

With the foregoing understanding, we proceed to review the defendants' (appellants') proof on the negation of scope of employment, and then to discuss the contradictions:

1. Henry Johnson, the driver of the defendants' truck, testified that he had stopped on Court Street and picked up some garbage in the scope of his employment, and thereafter his helper—Ivy Ranier—told him that he, Ranier, had permission for Johnson to drive to the Parkway Court to get some chairs for Ranier personally. Johnson said that he was on this mission for Ranier when Mrs. Ransom was struck.

2. Ivy Ranier testified that he was with Henry Johnson, and that they had just returned from the dump and had not stopped to pick up any garbage, when he asked Johnson to drive him to the Parkway Courts to get some chairs; that Johnson did not ask him if he had permission to make such a trip; that he did not have

[2] See *Brooks* v. *Bale Chevrolet Co.*, 198 Ark. 17, 127 S. W. 2d 135, in which an instructed verdict for the defendant was affirmed; and see *Fooks* v. *Williams*, 205 Ark. 119, 168 S. W. 2d 193, in which a judgment for plaintiff was reversed and the cause dismissed.

[3] There is an annotation in 95 A. L. R. 876 on "Presumptions of Evidence"; and *Mullins* v. *Ritchie Grocer Co.*, *supra*, is discussed therein.

such permission; and that the trip to the Parkway Courts was off of the regular route.

3. George Ford (one of the appellants) testified that his company had another truck that picked up garbage at the Parkway Court; that Henry Johnson was on a private mission when he went there; that no permission had been given to Johnson or Ranier to go to the Parkway Court; and that Johnson was three blocks off of his route at the place where Mrs. Ransom was injured.

4. Reuben Ford (another appellant) testified substantially to the same effect as did George Ford.

From the above review, it is readily apparent that there are some contradictions in the testimony of Henry Johnson and Ivy Ranier. But—independent of all other matters—there is a significant contradiction between the testimony of George and Reuben Ford on the one hand, and the testimony of P. G. Ransom for the appellee. This we now discuss: before either George or Reuben Ford testified, P. G. Ransom (husband of the injured woman and, himself, a party to this litigation) had testified that George Ford had come to see P. G. Ransom shortly after Mrs. Ransom was hurt. Here is the testimony of P. G. Ransom:

"Q. Do you know who owns Ford & Son Sanitary Company? A. Yes. George Ford and Reuben, I believe it is. Q. Did either of them come to see you after this accident? A. Yes, they did. Q. Which one? A. That fellow sitting right there (Indicating). Q. What did he have to say about the accident? A. He came up and apologized for it, which I thought was very nice of him, and talked to me about it and told me how sorry he was, and said his driver was a little reckless, and says, 'Papa' —I believe he said Papa—'and myself want to do the right thing about it.' And I said, 'I am glad you do, and when my wife gets better and makes a change for the better or worse, I will come around and give you a chance.' "

Neither of the appellants denied this testimony of P. G. Ransom. They did not refer to it or try to explain it. So, it seems, that immediately after Mrs. Ransom was injured, George Ford "wanted to do the right thing;" at that time he said the driver of the truck was "his driver;" and no claim was then made by George Ford that the driver was outside the scope of his employment. This testimony by P. G. Ransom, unexplained as it was by appellants, made a fact question for the jury as to whether the appellants had rebutted the presumption arising from ownership and driving of the vehicle. Even if such legal presumption be considered as a mere rule to disappear when substantial proof be offered by the defendants, still, at the time that the defendants offered their proof, the testimony of P. G. Ransom had made a question for the jury as to scope of employment.

We therefore conclude that there was substantial evidence to have the question of scope of employment submitted to the jury, just as was done. Since this is the only assignment on the appeal, it follows that the judgment must be affirmed.

COOK, COMMISSIONER OF REVENUES *v.* ARKANSAS STATE RICE MILLING COMPANY.

4-8522 210 S. W. 2d 511

Opinion delivered April 26, 1948.

Bruce T. Bullion, for appellant.

Rose, Dobyns, Meek & House, for appellee.

HOLT, J. Appellee, Arkansas State Rice Milling Company, an Arkansas corporation, is engaged in the rice milling business in Carlisle. This action arose from a dispute as to the effective date of Act 135 of the 1947 Legislature and more particularly as to when it affects the income of appellee.

Appellee, in its complaint, alleged: "(2) The plaintiff has for many years filed its federal and state income tax returns on the basis of a fiscal year beginning on July 1 of each year, and ending on June 30 of the succeeding year. In accordance with said practice plaintiff filed in the office of the defendant, on or about November 15, 1946, its Arkansas income tax return for its fiscal year beginning on July 1, 1945, and ending on June 30, 1946. Upon said return the plaintiff computed its income tax liability in accordance with the applicable laws of the State of Arkansas, and at the time of filing said return it paid its Arkansas income tax in the amount of $5,568.10. In computing its net taxable income under the Arkansas income tax laws, plaintiff deducted from its gross income the sum of $118,120, which it had paid

to the United States of America in federal income taxes during the above fiscal year.

"3. The defendant (appellant) has served on the plaintiff (appellee) a 30-day notice of a proposed deficiency assessment in its state income tax liability for the fiscal year ending June 30, 1946, in the amount of $602.63. This proposed deficiency is asserted on the theory that under the provisions of Act 135 of 1947 Acts of Arkansas, the plaintiff was entitled to deduct the full amount of federal income taxes paid during the first six months only of its fiscal year, or, that it could deduct 100% of its federal income taxes paid for this fiscal year prior to January 1, 1946, but that for the remaining six months of said fiscal year, or from January 1, 1946, to July 1, 1946, the plaintiff was entitled to deduct only one-half of the amount of its federal income taxes paid.

"4. In computing this proposed deficiency tax, defendant allowed plaintiff a deduction of $94,014.95 in federal income taxes paid prior to January 1, 1946, which was the entire federal income tax liability of plaintiff for the period from July 1, 1945, to December 31, 1945, inclusive, but disallowed plaintiff the sum of $12,052.52, as a deduction for the period from January 1, 1946, to June 30, 1946, which amount represented one-half of plaintiff's federal income tax liability for this period. The plaintiff's income being within the 5% bracket under the Arkansas income tax laws, the defendant proposed a deficiency in the amount of $602.63, being 5% of said sum of $12,052.52. In accordance with the provisions of § 14055 of Pope's Digest of the Statutes of the State of Arkansas the plaintiff applied to the defendant for a revision of the proposed deficiency assessment. On August 5, 1947, the defendant notified the plaintiff of his determination that no revision in the proposed deficiency assessment would be allowed. Plaintiff offers to tender into the registry of this court the sum of $602.63 if the defendant demands that such payment into the registry of the court be made.

"5. Plaintiff states that it is entitled to deduct all federal income taxes paid by it during its fiscal year ending June 30, 1946, and that the assertion of such proposed deficiency against the plaintiff constitutes an illegal exaction under Article XVI, § 13, of the Arkansas Constitution."

It prayed that appellant be permanently enjoined from collecting the amount of the tax claimed.

The Commissioner of Revenues, appellant, demurred as follows: "The defendant admits all of the facts as set out by plaintiff in this cause, but specifically asserts that paragraph 5 of plaintiff's complaint is an erroneous conclusion of law and not an admitted fact; that the admitted facts of plaintiff's complaint do not constitute a cause of action and for this reason defendant demurs thereto."

The trial court overruled this demurrer, appellant refused to plead further, elected to stand on its demurrer, and from the decree granting the injunctive relief prayed is this appeal.

Excellent and exhaustive briefs have been presented by counsel.

The question presented is one of law and is clearly stated by appellant as follows: "May a taxpayer, whose 1945-1946 fiscal year ended on June 30, 1946, deduct one hundred (100%) percent. of his federal income taxes paid during that portion of their fiscal year beginning January 1, 1946, and ending June 30, 1946? Or, stated differently, was it the intention of the 1947 Legislature, in passing Act 135, to make the provisions of the Act apply to all persons alike as of one certain date, or did they intend that it should have different effective dates, depending upon the system of accounting utilized by the taxpayer?"

The answer turns on the construction of an amendment to Act 118 of the Legislature of 1929 by Act 135 of 1947.

Our income tax Act, No. 118 of 1929, was amended by Act 135 of 1947, § 2, (Effective date March 3, 1947) to provide that a deduction of only 50% of federal income taxes "paid or accrued within any income year" might be deducted by the taxpayer in computing his taxable income to the State of Arkansas, and to provide further that "the provisions of this Act shall be applicable to incomes for the year 1946, calendar and fiscal, and for each income year thereafter (tax year 1947 and for each tax year thereafter, as the term 'tax year' is defined in Sub-section 11 of § 14025 of Pope's Digest of the Statutes of Arkansas)."

Sub-section 11 of § 14025 of Pope's Digest provides: "The word 'Tax Year' means the calendar year in which the tax is payable," and "the word 'fiscal year' means an income year, ending on the last day of any month other than December."

As indicated, appellee reported its income on a fiscal year basis beginning on July 1st and ending on June 30th of the succeeding year, and in the present case its income from July 1, 1945, to June 30, 1946, is involved. Appellee made this return on November 15, 1946, and paid in full the tax due the State at that time. When appellant recomputed appellee's tax he allowed appellee 100% credit, or deduction, for federal tax paid from July 1, 1945, to January 1, 1946, but only a 50% deduction of his federal tax paid from January 1, 1946, to July 1, 1946. When this tax was paid, the law as it then stood (Act 118, *supra*,) permitted appellee 100% deduction of its federal tax. The Legislature, however, on March 3, 1947, approved Act 135, *supra,* which contained a retroactive provision and which appellant argues permits the State to reopen appellee's return filed November 15, 1946, and assess an additional tax for the first six months of 1946.

The power of the Legislature to enact retroactive legislation is well established by our own decisions, and generally. However, the rule is also clear that when the lawmakers attempt to enact a retroactive income tax

law, as here, they must expressly so declare in the Act, or use such clear and unambiguous language that it must be held such was intended or implied.

A cardinal rule of statutory construction is as announced by this court in *Miller* v. *Wicher,* 160 Ark. 479, 254 S. W. 1063: "One of the well-known canons of construction is to construe a law so as to give some meaning to all its parts, if possible, provided the construction placed upon the law is not inconsistent with the language used therein. No part of the Act should be eliminated as conflicting with any other part therein if all the parts can be harmonized so as to reflect the true intent of the lawmaking body."

Just what did the lawmakers mean by "the provisions of this Act shall be applicable to incomes for the year 1946, calendar and fiscal"? From the definition of "fiscal year" above noted, there can be no fiscal year wholly within the year 1947. A fiscal year under our income tax law must begin in one year and end in the next succeeding year. It can never coincide with a calendar year. There can be no doubt as to the meaning of the phrase "calendar year 1946" for that is clearly defined by § 2 (11 and 12) of Act 118 of 1929 as that period, January 1, 1946, and ending December 31, 1946.

The parties in the present case appear to be in agreement that the provisions of Act 135, *supra,* apply to the income of calendar year taxpayers as of January 1. 1946, and to taxpayers operating on a fiscal year basis when their 1945-46 fiscal year begins after August 15, 1945.

Did the Legislature intend to refer to the calendar year and give no meaning to the "fiscal year," or did it mean a fiscal year beginning or ending in 1946? At most, the language used before the explanatory words in parenthesis, *supra,* is not free from uncertainty or doubt. The meaning of the words within the parenthesis is clear. This, however, refers to tax year of 1947,—which is the first year in which the tax must be paid on an income

earned in 1946, and also for each tax year thereafter,—and means that Act 135 of 1947 is to apply to income taxes payable in 1947 and each succeeding year.

In November, 1946, appellee, as indicated, paid the full tax due for the last six months of 1945 and the first six months of 1946. Here, we are primarily concerned with the applicable date of the deduction which appellee claims, rather than the extent of the deduction, and we hold that the operation and effect of Act 135, *supra,* in the present case, was not retroactive and therefore did not apply to appellee's fiscal year which ended June 30, 1946.

Had the lawmakers intended that Act 135 should be retroactive as to appellee's tax for the first six months of 1946, it could have plainly said so in language similar to that used in Act 118, as follows: "Section 4. Such tax shall first be assessed, . . . and paid in the year 1929, and with respect to the net income received during the calendar year 1928; provided, when the taxpayer's income year ends on any date other than December 31, 1928, only that portion of such annual income shall be taxable under this Act as is applicable to the calendar year 1928."

This language is clear and unambiguous.

In *Rhodes* v. *Cannon,* 112 Ark. 6, 164 S. W. 752, we find this language: "In the case of *City R. Co.* v. *Citizens St. R. R. Co.,* 166 U. S. 557, 17 S. Ct. 653, 41 L. Ed. 1114, it was said: 'A statute should not be construed to act retrospectively or to affect contracts entered into prior to its passage unless its language be so clear as to admit of no other construction.' In the case of *Beavers* v. *Myar,* 68 Ark. 333, 58 S. W. 40, it was said: 'An act of the Legislature will not be construed to have a retrospective effect if susceptible of any other construction.' "

In the recent case of *Hardin, Commissioner of Revenues* v. *Fort Smith Couch & Bedding Co.,* 202 Ark. 814, 152 S. W. 2d 1015, this court had for consideration an amendment to our income tax law which was uncertain

as to its effective date. The principles of law announced there apply with equal force here. It appeared that the Legislature in a 1941 Act had stated that the new Act should apply to the "income tax year of 1941," which could have meant either the income year, 1941, or the tax year, 1941. In resolving the doubt in favor of the taxpayer, we said: "There are two well settled rules for statutory construction in this state. One is that, 'It is presumed that all legislation is intended to act only prospectively, and all statutes are to be construed as having only a prospective operation unless the purpose and intention of the Legislature to give them a retroactive effect is expressly declared or necessarily implied from the language used.' (Citing cases.) In *Rhodes* v. *Canon,* 112 Ark. 6, 164 S. W. 752, the rule is thus stated: 'No statute will be given retroactive effect if it is susceptible of any other construction.' Now, to give this statute the construction contended for by appellant would be in the very teeth of this rule. There are no express words giving it a retroactive effect and we find no language in the emergency clause or elsewhere that necessarily so implies. At least we cannot say that the statute is not susceptible of any other construction. If the Legislature intended to make the Act retroactive so as to tax, with the new rates, 1940 income, it certainly did not choose definite language to express such intention. The second rule is well stated in *Wiseman* v. *Ark. Utilities Co.,* 191 Ark. 854, 88 S. W. 2d 81, by the late Judge BUTLER as follows: 'It is the general rule that a tax cannot be imposed except by express words indicating that purpose. The intention of the Legislature is to be gathered from a consideration of the entire Act, and where there is ambiguity or doubt it must be resolved in favor of the taxpayer, and against the taxing power.' "

We conclude, therefore, that the trial court correctly enjoined appellant from collecting the tax here involved, and the decree is accordingly affirmed.

4-8538 210 S. W. 2d 804

Opinion delivered May 3, 1948.

[redacted]

E. R. Parham, for appellant.

J. G. Moore, for appellee.

McHANEY, Justice. This appeal stems from litigation which began on April 4, 1942, in which appellants, who are husband and wife, sought to enjoin appellees, who are also husband and wife, from closing a roadway across the land of appellees, which road afforded appellants the only ingress and egress to and from their land. A temporary order was entered granting the relief prayed on the filing of the complaint. Trial resulted in a decree modifying the temporary order to the extent of permitting the gate or gates on appellees' line to be locked on furnishing appellants with a key. This decree

was made on July 30, 1942, but was not entered of record until May 5, 1945, when it was entered *nunc pro tunc.*

On July 7, 1945, appellees filed a motion to vacate the decree of July 30, 1942, on the ground that conditions had changed since July 30, 1942, so that it was now inequitable to allow said injunction to remain in force, in that a better road had been constructed by the county, over other lands, which would be more advantageous to appellants, if they would permit the county to extend same; that appellants and their tenants had continuously failed and refused to keep the gates locked which permitted appellees' stock to escape from their farm; and that the former injunction should be vacated. An amendment to the motion was filed on April 11, 1946, which reiterated the misconduct of appellants and their violations of the injunctive order by leaving the gates open for stock to escape, driving over their lands and crops instead of staying on the road, and that their conduct was malicious, willful and wrongful to their damage.

Appellants, on May 5, 1947, moved to strike the motion to vacate and the amendment thereto for the reason that the term of court at which the injunction was granted had expired and that the court was without power to vacate same. This motion to strike was overruled, and appellants say they "have prosecuted this appeal from such final order under paragraph 3, § 2735 of Pope's Digest."

Whether this is a "final order" from which an appeal may be taken under the section of the Digest mentioned, we do not now determine.

Appellants contend that the injunctive order or decree of July 30, 1942, confirmed appellants' easement across the lands of appellees, and that, if an easement so existed, it cannot be lost except by release or abandonment, and that, the term of court at which said decree was entered having expired, the court is now without power to vacate, or modify same, except as provided by statute, § 8246, Pope's Digest. The rule is well established by many decisions of this court that the trial court, after the

lapse of the term, may not set aside, vacate, modify or amend its judgments or decrees, except on one or more of the grounds mentioned in said § 8246. *Robinson* v. *Citizens Bank,* 135 Ark. 308, 204 S. W. 615; *Robertson* v. *Cunningham,* 207 Ark. 76, 178 S. W. 2d 1014; *Patillo* v. *Toler,* 210 Ark. 231, 196 S. W. 2d 224. But this rule has no application to the power of a chancery court to vacate, set aside or dissolve an injunction previously granted, after the lapse of the term, and counsel for appellants concede this power, provided no vested rights of the parties are abrogated thereby. We think the terms of the injunctive decree do not confer any vested rights upon appellants. The original decree provided that, "the defendants and each of them are hereby enjoined and restrained from interfering with plaintiffs' use of the road" (describing it). That was the preliminary order which was made permanent on July 30, 1942, and no vested rights were given appellants. Nothing is said about an easement over the land of appellees. Let it be remembered that the trial court has not vacated the original injunction. It has been asked to do so, and has overruled appellants' motion to strike the request, which we take as a holding of power to grant the relief. We think the court had that power. In the early case of *Sanders* v. *Plunkett,* 40 Ark. 507, Judge Eakin, for the court, said: "Without discussing the general subject of the powers inherent in Chancellors to undo what they have done, after being better advised, we think the statutes themselves confer this power in cases of vacation, or chamber orders for injunction. The power to make them is conferred in plain express language. (Gantts's Digest, §§ 3450 to 3458.) They are always discretionary, and no limit of time is fixed within which the determination may be made. It would be unreasonable to hold him to his original view of the case on first blush, and if he might recall his order in an hour, why not next day, or a week afterwards. It is not like the judgment of a Court which cannot be altered after the term. And the person in whose favor it was granted cannot be in worse condition by the dissolution than he would have been by original refusal,

for the defendant urging the dissolution can have no damages on the bond. There is no inconvenience then from the exercise of this power of dissolution, but a very great inconvenience might arise from want of power to correct an improvident injunction.

"It would seem that the power to make an order of this provisional and discretionary nature, implies the power to recall it, in all cases where the person on whose motion it was made is, at worst, only placed in *statu quo,* and deprived of an advantage improvidently granted, and which was in the discretion of the Chancellor."

The general rule is stated in 28 Am. Jur. § 323, p. 493, to the same effect as that above quoted, and it is further stated: "The court has inherent power in this respect and may exercise it after the term in which the decree is rendered. . . . Since an injunction order or decree does not create a right, its modification cannot be considered an unconstitutional deprivation of property without due process." Citing *Ladner* v. *Siegel,* 298 Pa. 487, 148 Atl. 699, 68 A. L. R. 1172.

The action of the court in overruling the motion to strike is correct, and is, accordingly, affirmed.

BOWMAN *v.* STATE.

4499 210 S. W. 2d 798

Opinion delivered May 3, 1948.

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

HOLT, J. Appellants, Roy and Vernon Bowman, brothers, on June 10, 1947, were charged in an information with the crime of first degree murder by shooting and killing, with pistols, Clay D. Sampson June 9, 1947. A jury found each of them guilty of murder in the second degree and assessed the punishment of each at 12 years in the State Penitentiary. From the judgment is this appeal.

Only the State's brief is before us. Appellants have filed none and are not represented here by counsel.

Fifty-two assignments of alleged errors have been presented. We consider them in their order.

1, 2, 3, 6, 7, 8 and 9

Assignments 1, 2, 3, 6, 7, 8 and 9 question the sufficiency of the evidence.

The testimony in effect shows that appellants, along with seven or eight relatives, were living in a three-room tenant house on a farm near Goshen. This farm was rented and occupied by Clay Sampson, his wife, Nonie, and his daughter. The tenant house was about 100 yards from a much larger dwelling in which the Sampsons lived. Quarrels and bad feeling arose between the Sampsons and appellants, primarily from appellants' refusal to keep closed a yard gate of the Sampsons, after getting water from a well, through which gate stock would enter and damage Sampson's property. Sampson nailed up the gate and as a result, appellants cursed and abused Nonie Sampson and her daughter, and threatened "to kill every damn thing out there." Mrs. Sampson and her daughter conveyed these threats to Clay Sampson and the bad feeling between appellants and the Sampsons continued to mount until on June 9, 1947, appellants parked their truck in a road near a field where Clay Sampson was plowing corn. They got out of the truck and walked across the field to him, each armed with a loaded pistol. Mrs. Sampson observed their actions and thinking her husband in danger, procured an automatic shotgun and attempted to carry it to him. Just as she was trying to place it in his hands, each of the appellants began shooting. They fired seven or eight shots. Clay Sampson fell mortally wounded with a bullet through his brain, death resulting shortly thereafter. Mrs. Sampson fell, seriously but not fatally injured, with a bullet in her face. She was confined to a hospital for approximately two weeks. Appellants also threatened to kill an eyewitness, George Edward Toney, who had come upon the scene from a hay field a short distance away. Toney testified, in effect, that they cursed him and threatened his life because they told him he had seen and knew too much.

We think it unnecessary to detail more of the testimony. It speaks for itself and was more than ample to

warrant the jury's verdict convicting appellants of second degree murder.

4

The fourth assignment questions the information on the ground that it contravenes the rights of appellants under the Constitution of Arkansas and the Constitution of the United States, and "particularly Amendments V and XIV of the Constitution of the United States." This very question was decided adversely to appellants' contention in the case of *Penton* v. *State,* 194 Ark. 503, 109 S. W. 2d 131.

5

It is next argued (Assignment 5) that the court erred in refusing a continuance on account of an absent witness, Howard Bragg of Goshen. The record discloses that a subpoena was not issued for this witness and placed in the hands of the sheriff until the date of the trial, October 14, 1947, which was more than four months after the filing of the information and the arrest of appellants. In these circumstances, the court did not err. Proper diligence was not shown to have been exercised by appellants. "The granting or refusing of continuance is within the sound legal discretion of the court, and this court will not interfere where there has been no abuse of that discretion." *Bailey* v. *State,* 204 Ark. 376, 163 S. W. 2d 141.

In *Bullard* v. *State,* 159 Ark. 435, 252 S. W. 584, where a situation similar, in effect, presented itself and a motion for continuance had been overruled, this court said: "The court overruled the motion, and did not err in so doing, because the appellant fails to show that he had exercised proper diligence to obtain the absent witnesses. Neither the appellant nor his attorney asked that subpoenas be issued for the witnesses before the day of the trial. This he could and should have done. *Sheptine* v. *State,* 135 Ark. 230-239, 202 S. W. 225; *Jackson* v. *State,* 94 Ark. 169, 126 S. W. 843."

10

Assignment 10 questions the trial court's action in refusing to reprimand the Prosecuting Attorney for stating in the presence of the jury that the testimony of George Toney showed viciousness. The court did not err. As above noted, Toney, in effect, testified that appellants threatened to kill him because he knew too much and he was forced to beg for his life. The conclusion of State's counsel that Toney's testimony showed the vicious state of mind of appellants at the time of the killing was not improper.

11

Appellants' 11th assignment questions the competency of certain testimony of George Toney. We have carefully reviewed this testimony and conclude that its admission was not error.

28-36 and 37-51

Assignments 28 to 36 inclusive alleged that the court erred in refusing to sustain appellants' general objection to each of the instructions given by the court. Assignments 37 to 51 inclusive alleged that the court erred in refusing each of the instructions requested by appellants. In this connection it suffices to say that we have carefully examined all of the instructions given by the court and we find that they fairly and correctly declared the law applicable to the facts presented and were similar, in effect, to those many times approved by this court. While some of the instructions requested by appellants might have been proper, the court was not required to repeat the effect of an instruction already given which clearly covered the issue involved, and therefore appellants could not have been prejudiced thereby. "It was not error to refuse to give instructions which were sufficiently covered by others which were given." (*Hogue* v. *State,* 194 Ark. 1089, headnote 2, 110 S. W. 2d 11.)

The remaining assignments bearing upon the refusal to admit, and the admission of parts of the testimony of certain witnesses, have been carefully reviewed by us

and we hold that the ruling of the trial court in all instances was without error.

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

KREBS *v.* COON.

4-8537 210 S. W. 2d 812

Opinion delivered May 3, 1948.

D. H. Crawford and *H. H. McKenzie,* for appellant.

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

SMITH, J. This is a suit to recover the balance alleged to be due on a contract to stack lumber and from a judgment in appellee's favor is this appeal.

The issues involved are stated in the instructions of the court, which are copied as a statement of the case. Instruction No. 1 reads as follows:

"The plaintiff has brought this suit against the defendant for a sum of money which he claims is due him for certain work he performed and had performed at defendant's lumber yard at Boughton. Mr. Coon, the plaintiff, claims that in connection with his job of stacking lumber at Mr. Krebs' lumber yard he had an understanding with the defendant, or his agents in charge of the yard, for Mr. Coon to have himself and his men, Coon's men, unload trucks of lumber and sort or separate that lumber and that for that, according to Mr. Coon's contention, Coon was to receive from the defendant, however much that cost; that is, Mr. Coon was not to lose anything. He claims he had a contract or working agreement with the defendant to stack lumber at this lumber yard and also to unload trucks and separate the various kinds of lumber there and stacking it.

"Now, Mr. Krebs contends that Mr. Coon's job was to stack and that the lumber stacking job included all the things that he is claiming pay for here today and that he has been paid for it. Mr. Coon claims that his job was stacking lumber and in addition thereto, that he had a separate agreement to unload the trucks and to sort or separate the various dimensions of the lumber and the kinds of lumber in the stacks as well as stacking it, and that he, according to that agreement and understanding, is entitled to receive whatever it was worth—whatever it actually cost him from Krebs for what he claims was additional work for unloading the trucks and sorting the lumber and building a few stack bottoms. Mr. Krebs claims his contract was to stack lumber, but that contract included all these things and that the price he was paying for stacking the lumber included pay for whatever he did about unloading the trucks, if anything, and for sorting and separating the lumber.

"Now, there is another item that is independent of this. There is an item for checking lumber at $3 per day which is separate still from all these matters. Plaintiff claims that he is entitled to $45 for 15 days' work for checking lumber for which he hasn't been paid and defendant denies he owes that. But, that is a little different

from the main thing. The main thing is the plaintiff's claim for more payment for unloading the trucks, and sorting and separating the timber without having been paid for that and that they agreed to pay him extra for it. The defendant denies it and says it was his duty to do all the things for the price he was paying him for stacking lumber and he claims that he has paid plaintiff for all of it.

"It is simply a question of fact. The burden is on the plaintiff to prove his case by a preponderance of the evidence. In other words, he is required to prove to you that there was such an agreement; that he was to receive extra compensation for unloading the trucks and for sorting the lumber and building the extra stack bottoms. If he proves that to you by a fair preponderance of the evidence, then he should also prove by a preponderance of the evidence how much it was worth. Unless plaintiff has proven those things to you, you will find for the defendant. If you find from the evidence in this case that plaintiff's theory is right as to the contract and that he is entitled to a certain sum of money, you will find for him in that amount. On the other hand, if you find that Krebs' statement is correct and it was all included in the price he was paying, and that it has been paid, then you should find for the defendant, or, if the proof is evenly balanced and you cannot tell which way to go, then you will find for the defendant. The matter of the $45 is a separate item that is independent of this contract with reference to the stacking and sorting of the lumber. If you find by a preponderance of the evidence that he did agree to pay him for that—checking the lumber—which, according to the undisputed evidence was $3 per day, if you find that he did 15 days' work for which he has not been paid, if you find that by a preponderance of the evidence, he should have judgment for the $45. If he didn't work that 15 days, he shouldn't recover anything, and your verdict on that item should be for the defendant."

It appears from this statement of the case that the questions involved are ones of fact, and involve no ques-

tion of law. That this is true is shown by the objection made to the instruction which reads as follows:

"The defendant objects generally to the instruction given by the court and specifically for the reason that there is no testimony in the record as to what the work of unloading trucks and sorting the lumber is worth and in submitting that issue to the jury, the court is submitting an issue not supported by any competent testimony. The defendant further objects because the instruction permits the jury to find what the actual cost to the plaintiff was to stack and unload and sort the lumber and there is no competent testimony, but only the statement of the plaintiff, Coon, that it was worth a certain amount of money for that work."

No other instruction was asked, and the jury was left to determine the questions of fact raised by the testimony, which is in hopeless conflict and cannot be reconciled.

Appellant is engaged in the business of manufacturing and selling lumber and lumber products. Appellee was employed as a lumber stacker and began working under a contract reading as follows:

"I, Conway Coons of Gurdon, Ark., R. 2, agree to serve as foreman and build stack bottoms and supervise and help in the stacking of lumber for the Krebs Lumber Co. Located Boughton, Ark., and managed by Walter W. Jolly, Gurdon, Ark.

"I, Walter Jolly, agree to pay the above Conway Coons for the above service described $2.50 per thousand until we have sufficient stack bottoms built, decided upon by myself. After stack bottoms are built and when they are to be refilled they are to be refilled at the price of $1.50 per thousand.

"All lumber is to be removed from stack bottoms, and loaded on wagons or trucks for the plainers or shipping at the price of ($0.75) seventy-five cents per thousand.

s/ Conway Coon
Walter W. Jolly."

The contract was entered into June 12, 1946, and the undisputed testimony is that Jolly, who signed as a party thereto, was in fact acting for appellant in the capacity of manager or superintendent. The testimony is to the effect that when delivery of the lumber at appellant's yard began it was found to be of mixed dimensions and required sorting. Appellee complained that this was a work which his contract did not require him to perform.

It became necessary to build a number of foundations on which to stack the lumber, called stack bottoms. The contract set out above required appellee to build the stack bottoms, but it did not specify at whose expense the work should be done. It did specify that until a sufficient number of stack bottoms had been built, appellee should be paid at the rate of $2.50 per thousand feet for the lumber stacked. A controversy arose as to the work appellee was required to do, and the price to be paid for doing it, but the testimony fully sustains the finding that an additional contract was made. However, the terms of the additional contract and the amount and value of the work to be done under it is in dispute, and out of this dispute arose the issues of fact submitted to the jury under the instructions above copied.

On these issues the great preponderance of the testimony supports appellant's contention, but the testimony is in dispute and we can only determine whether the testimony offered in appellee's behalf is legally sufficient to support the verdict of the jury, and in determining that question we must give the testimony offered by appellee its highest probative value.

When thus viewed the testimony is to the following effect: Appellee employed and paid his own crew of men in stacking and sorting the lumber and in building the stack bottoms, and in so doing he was an independent contractor. Jolly was superseded as manager by one McDermott on July 10th, on which day, according to appellee's testimony, a supplemental contract was made with appellant himself to pay for additional work and at an increased price.

Appellee sued for the sum of $801.50 covering work done by himself and by men employed by him from July 10th to August 23rd, on which day, according to appellee's testimony, he was discharged by McDermott. The verdict in his favor was for the sum of $670.50, for which amount judgment was rendered. Appellant insists that this sum is grossly excessive, even though there was a contract to pay appellee for work not covered by the original contract, and further that appellee was paid in full for all work which he did or hired done.

It would serve no useful purpose to recite the conflicting testimony, as to the amount of work appellee did or hired done, and it must suffice to say that while appellee's testimony on this question is not clear as to the exact amount of work done, his testmiony shows work of a value equal to the verdict returned.

Appellee was paid at the end of each week, and a number of receipts were offered in evidence showing payment at the end of each week, which contained such notations as "paid in full" or "paid to date." Appellee testified that he did not observe these notations when he signed the receipts, and that they were intended to cover only the work of stacking under the original contract. As will be observed, the instructions given made no specific reference to this question of fact, and however improbable appellee's explanation of the receipts may appear to be, we cannot say as a matter of law that the jury had no right to accept appellee's explanation as to the purpose of the receipts, and the items which they were intended to cover.

Appellee's testimony is legally sufficient to support the verdict, and the judgment thereon must therefore be affirmed.

CASCIO *v.* STATE.

4487 210 S. W. 2d 897

Opinion delivered May 3, 1948.

Rehearing denied May 31, 1948.

Will Shepherd, Kenneth C. Coffelt and *Ed F. McDonald,* for appellant.

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

ROBINS, J. Appellant was charged in an information filed by the Prosecuting Attorney with violating the statute (§ 3063, Pope's Digest) which forbids possessing or having in one's custody tools designed for burglary. A trial jury found him guilty and fixed his punishment at imprisonment in the penitentiary for three years. From judgment on the verdict this appeal is prosecuted.

These assignments of error are argued here:

I. That the motion to quash the information should have been sustained.

II. That the court should, on account of insufficiency of evidence against appellant, have directed a verdict of "not guilty."

III. That the lower court erred in refusing to permit appellant to challenge peremptorily two jurors previously accepted.

IV. That a coat owned by a man named Strong was improperly admitted in evidence.

V. That error was committed by the lower court in giving and refusing certain instructions.

VI. That the lower court erred in allowing the Prosecuting Attorney to make certain statements in his argument to the jury.

I.

In the information it was charged that appellant and Strong "did unlawfully and feloniously have in their possession and custody certain tools, punches, pliers, chisels, flashlights, jimmies, implements and mechanical devices adapted, designed and commonly used for breaking into vaults, safes, railroad cars, boats, vessels, warehouses, stores, shops, offices, dwelling houses, door shutters and windows of buildings, . . . "

This information was in substantially the language of the statute and was sufficient. *Satterfield* v. *State,* 174 Ark. 733, 296 S. W. 63. The fact that some or all of the enumerated articles were such as might be kept for a lawful purpose did not render the information invalid. "Generally speaking it is not necessary that the tools or implements were originally made or intended for an unlawful use. If they are suitable for the purpose of breaking and entering burglariously, it is wholly immaterial that they were also designed and adapted for honest and lawful uses." 9 Am. Jur. 282.

Appellant urges that constitutional amendment No. 21, authorizing prosecution of crimes by information, is contrary to the constitution of the United States. We considered this question in the case of *Penton* v. *State,* 194 Ark. 503, 109 S. W. 2d 131, and there upheld the validity of this amendment. Other cases in which the same ruling was made are: *Deatherage* v. *State,* 194 Ark. 513, 108 S. W. 2d 904; *Smith and Parker* v. *State,* 194 Ark. 1041, 110 S. W. 2d 24; and *Brockelhurst* v. *State,* 195 Ark. 67, 111 S. W. 2d 527. We find no reason to overrule our previous decisions.

II.

The gist of appellant's contention as to the insufficiency of the evidence is that the articles named in the information and found in his possession were such as any citizen might lawfully have.

The evidence disclosed that about 3:30 in the morning a policeman discovered two men standing in front of a store on Main Street in Little Rock. Hearing a noise, the policeman started toward the store and then discovered three men running away from there. The policeman ordered them to halt and fired his pistol in the air, but they continued running. A few minutes later he found one of the men, Strong, hiding under the steps in the rear of a nearby building. Other police were summoned and it was found that the front door of the store had been "jimmied" open. Two "jimmy bars" and a pair of woolen gloves were found in the vicinity.

About daylight appellant was found by officers. His shirt was wet with perspiration and when approached by officers he gave an unsatisfactory explanation of his presence in Little Rock. When arrested he had on his person title papers to a 1946 Mercury automobile. This car was found parked at Thirteenth and Louisiana Streets, a distance of about two blocks from the store where the burglary was committed.

It is argued by appellant that there was no proof as to the distance intervening between Thirteenth and Louisiana Streets and the burglarized store at Twelfth and Main Streets. But this was a matter of which the lower court might properly take judicial knowledge, and which was probably well known to every member of the jury. "Courts sitting in a city judicially notice the streets, squares, and public grounds thereof, their location, and relation to one another, ..." 20 Am. Jur. 78.

The police discovered appellant's coat and Strong's coat in the Mercury car. Appellant admitted to one of the officers that he owned the automobile and asked that he be permitted to have his glasses which had been taken therefrom. In the cardboard box where appellant's glasses were located some of the alleged burglar's tools were found. When one of the officers showed appellant these tools and told him he would be charged with pos-

sessing burglary tools appellant replied: "That is not a complete set of burglary tools."

Officers experienced in police work testified that the tools found in appellant's car were useful as tools for burglary. One of these witnesses testified that the collection of tools taken from appellant's car was "the customary assortment . . . that most burglars have to carry out their work."

The testimony was sufficient to authorize the jury's finding that the tools in question were such as those described in the statute, the possession of which was made unlawful. *Prather* v. *State,* 191 Ark. 903, 88 S. W. 2d 851.

III.

After certain jurors had been examined and accepted by both sides, and after the state had exhausted its peremptory challenges, appellant sought to challenge peremptorily two of the jurors theretofore accepted by each side. No reason for challenging these jurors was assigned by appellant. Under the circumstances, there was no abuse of discretion on the part of the lower court in denying appellant's request. *Allen* v. *State,* 70 Ark. 337, 68 S. W. 28; *Jones* v. *State,* 166 Ark. 290, 265 S. W. 974; *Brust* v. *State,* 153 Ark. 348, 240 S. W. 1079.

IV.

Both appellant and Strong were charged with the offense in the same information; but appellant was granted a severance by the court on its own motion. Appellant urges that, since Strong was not on trial, it was error to permit the state to introduce Strong's coat in evidence and to prove that it was found in appellant's car. We cannot agree. The jury was called upon to determine whether the collection of tools found in appellant's car was a set of burglar's tools or were tools lawfully kept. In arriving at a determination of this question it was proper to submit to the jury any evidence showing the use that was being made of appellant's car, where the tools were found, on the occasion of the burglary. Strong

was shown to be one of the men who ran away from the door of the store after it had been broken open; and the fact that his coat was in appellant's car near by the scene of the crime was a proper circumstance to be considered by the jury in ascertaining whether the tools, found in the same car, were in fact tools for burglary.

V.

Appellant argues that error was committed by the lower court in the giving and refusing of certain instructions. We deem it unnecessary to set these instructions out at length. We have carefully examined the record and find that the instructions given by the court properly presented to the jury the law applicable.

VI.

The argument of the Prosecuting Attorney, complained of by appellant as improper, was this:

(1). The Prosecuting Attorney, referring to Strong's coat which the officers found in appellant's car, said: "What explanation have they made of that?" Appellant contends that this argument was a comment on appellant's failure to testify. We conclude that this remark is not fairly susceptible of the meaning attributed to it by appellant.

(2). The Prosecuting Attorney said: "Where is the other man? Nick Cascio knows where he is and who he is, and if we knew we would have him here in short order." While this argument might have been somewhat irrelevant, yet, in view of the state's evidence, indicating that appellant, Strong and a third man were jointly engaged in a criminal enterprise, the argument was not prejudicial to appellant.

(3). In referring to appellant, the Prosecuting Attorney said: "He is a professional thug and came here to commit the crime of burglary." If the testimony of witnesses for the state is credible then the statement of the Prosecuting Attorney was true. *Ingle* v. *State,* 198

S. W. 2d 996. However, when objection to this argument was made the court told the jury not to consider it.

(4). Finally, the Prosecuting Attorney said: "If you want to invite and encourage out of the city thugs to come into this place . . ." Objection to this argument was also sustained by the court.

Necessarily, a broad discretion in controlling argument of attorneys is given to trial judges. *Wilson* v. *State,* 126 Ark. 354, 190 S. W. 441; *Walker* v. *State,* 138 Ark. 517, 212 S. W. 319; *Rosslot* v. *State,* 162 Ark. 340, 258 S. W. 348; *Kelley* v. *State,* 175 Ark. 1170, 1 S. W. 2d 46; *Hicks* v. *State,* 193 Ark. 46, 97 S. W. 2d 900; *Holcomb* v. *State,* 203 Ark. 640, 158 S. W. 2d 471. We find no abuse of such discretion in this case.

The judgment is affirmed.

LOLLAR v. APPLEBY.

4-8541 210 S. W. 2d 900

Opinion delivered May 3, 1948.

Rehearing denied May 31, 1948.

Charles D. Atkinson, Charles W. Atkinson and *Malcolm E. Rosser,* for appellant.

Rex W. Perkins and *G. T. Sullins,* for appellee.

MINOR W. MILLWEE, Justice. Appellants, Chester O. Lollar and wife, instituted this suit on April 9, 1947, as an *ex parte* proceeding under §§ 10958-10969, Pope's Digest, to quiet their title to a tract of land located in Block 18, Masonic Addition to the City of Fayetteville, Arkansas.

On May 16, 1947, appellees, George Appleby and Herbert A. Lewis, filed separate interventions alleging they were owners and in possession of separate lots lying immediately south of, and adjacent to, the tract owned by the Lollars; that appellants were claiming ownership of a strip of land 2½ feet wide along the line forming the north boundary of appellees' lots and the south boundary of appellants' lot; that appellees had been in adverse possession of the 2½-foot strip for more than seven years under color of title and payment of taxes, and appellants had never been in possession of the strip; that many years ago a line was established between appellants and appellees land by the then adjacent owners and a fence erected thereon, which still stands and has been since recognized by all adjacent owners as the true boundary line. Appellees prayed that the line marked by the fence be fixed as the boundary line between their lots and the property of appellants; that appellees' title to the disputed strip be quieted and appellants enjoined from trespassing thereon.

Appellants filed separate answers denying the material allegations of the interventions. On July 16, 1947, appellant, Phillips Motor Co., Inc., intervened and alleged that it purchased the tract owned by the Lollars on May 24, 1947. The motor company adopted all pleadings filed by the Lollars and prayed that its title to the entire tract be confirmed. It was stipulated that Susie E. Vaulx, appellants' predecessor in title, and each of the appellees, had paid taxes on the respective tracts owned by them for more than seven years next before the filing of the suit under a description listed on the tax records as "Pt. Block 18, Masonic Addition to Fayetteville."

After hearing the evidence and viewing the lands involved, the trial court entered a decree quieting the title of Phillips Motor Co. in all the tract claimed by it lying north of the line established by the fence now standing on a portion of said tract. The title of appellees was quieted to the disputed 2½-foot strip lying south of

said fence line and north of the lands as described in the respective conveyances to appellees. Appellants have appealed from that part of the decree which finds that appellees acquired title to the disputed strip by adverse possession.

The lot of appellants faces west on College Avenue in an old residential section of the City of Fayetteville and is described as being 263.6 feet long and 102.25 feet wide. Dr. W. B. Welch acquired the lot in 1882 as part of a tract described as being 450 feet long and 102.5 feet wide. This lot ran clear through block 18 of Masonic Addition from College Avenue on the west to Washington Avenue on the east. Some time after his purchase of the tract, Dr. Welch erected a fence along the south line which extended the full length of the block and fenced out the 2½-foot strip in controversy. In 1908, he conveyed a portion of the east side of the tract to H. M. Stringfellow and wife.

Dr. Welch resided on the lot now owned by Phillips Motor Co., until his death in 1917. He devised the property to his widow, Julia G. Welch, who continued to reside on the property until her death in 1931. Susie E. Vaulx became the owner of the lot under the terms of the will of her aunt, Julia G. Welch. Miss Vaulx lives in Muskogee, Oklahoma, and has never resided on the property. She has made periodic visits to Fayetteville for many years and rented the premises to tenants through local agents until March 29, 1947, when she conveyed to appellants, C. O. Lollar and wife. Prior to the sale to the Lollars, her agent had a survey made of the lot without notice to appellees.

Julia G. Welch was residing on the lot owned by appellants in January, 1920, when appellee, George Appleby, purchased his lot which lies immediately south of appellants' tract and is described as being 245 feet long and 125 feet wide. The lot was vacant at the time of Appleby's purchase and he immediately proceeded to build his home thereon. Appleby testified that he and Mrs. Welch had a discussion about the fence while his

house was under construction and, without being questioned on the subject, she told him the fence was on the line between the two lots. She also suggested that the fence be removed from between the front part of their houses and this was done for a distance of 75 to 90 feet east from College Avenue. Since 1920, Appleby has continued to reside on, use and occupy the land up to that part of the fence still standing and the line marked by removal of the west end of the fence. He has mowed the grass and maintained a flower bed up to the fence line and exercised complete dominion over the property for more than 27 years. Julia G. Welch recognized the fence line as the boundary between their properties until her death in 1931 and Appleby's right to possession and use of the disputed strip has never been disputed.

Appellee, Herbert A. Lewis, purchased his lot in 1935. The lot is described as being 205 feet long and 75 feet wide and faces east on Washington Avenue. In the deed conveying the property to Lewis the lot is described as being in section 6 instead of section 15, where all the lands involved herein appear to be situated. Appellants say that Lewis is bound by this deed and that the description employed conclusively demonstrates that his lot could not be contiguous to the lot of appellants. Appellants made no objection to the introduction of the deed in the proceedings in the chancery court. Moreover, prior conveyances to the grantor of Lewis correctly describe the property as being in section 15. The error in the deed to Lewis was clearly a clerical misprision which the trial court had a right to correct in the rendition of the decree.

The house on the Lewis lot was constructed about 1890. The fence between his lot and the lot of appellants and Mrs. Read, east of appellants, is a part of the fence constructed by Dr. Welch. There are some old iron stobs on the line of the old fence which appear to have been placed there many years ago. During the 12½ years Lewis has resided on the property he has claimed and occupied to the fence and the adjacent owners have never disputed his possession of the strip in controversy. Former owners of the Lewis lot and adjacent owners appear

to have recognized the fence erected by Dr. Welch as a division line.

Chester O. Lollar and James T. Phillips, manager of Phillips Motor Co., testified that they did not know appellees were claiming title to the 2½ foot strip off the south side of the lot described in their deeds. However, both knew of the location of the fence and stated that they paid little attention to it and made no inquiry about the line at the time of their purchase.

The agent of Susie E. Vaulx who negotiated the sale to the Lollars stated that he saw the fence, but attached no importance to it. Similar testimony was given by the agent who looked after the property for Susie E. Vaulx for several years prior to the sale to the Lollars.

Appellants are correct in their contention that they held record title to the strip of land in controversy, according to the survey, and that the burden of proof, therefore, rested on appellees, who were without color of title, to establish their claim by showing that their possession was actual, open, hostile and exclusive for the statutory period of seven years. In *Culver* v. *Gillian,* 160 Ark. 397, 254 S. W. 681, the court said: "In cases of adverse possession under color of title the actual possession, by presumption of law, is constructively extended to the limits defined in the paper conveyance which gives color of title. In the case, however, of adverse possession without color of title, the adverse possession is limited to the land actually adversely occupied. . . .

"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." Later cases have reaffirmed the principles announced in this case. See *Terral* v. *Brooks,* 194

Ark. 311, 108 S. W. 2d 489; *Stricker* v. *Britt,* 203 Ark. 197, 157 S. W. 2d 18; *Davis* v. *Strong,* 208 Ark. 254, 186 S. W. 2d 776.

In 2 C. J. S., Adverse Possession, § 70, p. 587, it is said: "When the proof shows that the possession is held by one and title by another, the law, not favoring wrong, will presume that the possession is held in subordination to the legal title, and to constitute an adverse holding against the true owner it must be shown either that the true owner had knowledge of the adverse holding or that the latter was so open and notorious as to raise a presumption of notice to him, equivalent to actual notice."

We think the evidence on behalf of appellees meets the requirement which the law thus places upon them, and that the trial court's finding that appellees acquired title to the disputed strip by adverse possession is supported by the great preponderance of the evidence. The openness and notoriety of the possession of appellees for a term much longer than the statutory period of seven years is undisputed and was sufficient to raise a presumption of notice to appellants, and their predecessors in title, of the adverse nature of appellees' holding. The fact that appellees were ignorant or mistaken as to the location of the true line does not prevent them from asserting title by adverse possession if they held possession with the intention of claiming to the fence line regardless of the location of the true boundary. *Goodwin* v. *Garibaldi,* 83 Ark. 74, 102 S. W. 706; *Wells* v. *Bentley,* 87 Ark. 625, 113 S. W. 639; *Miller* v. *Fitzgerald,* 169 Ark. 376, 275 S. W. 698. Appellees bought their lots on the assumption that the fence then standing across the entire block was on the line and have continued to occupy the disputed strip up to the fence line as their own without recognition of the right or title of adjacent owners.

Since we conclude that the chancellor properly held that appellees acquired title to the disputed strip by adverse possession, it is unnecessary to determine whether an agreement to establish the fence line as a boundary may also be inferred from long continued acquiescence and occupation to such line by the parties and their pred-

ecessors in title, as has been held in such cases as *Deidrich* v. *Simmons,* 75 Ark. 400, 87 S. W. 649, and *Gregory* v. *Jones,* 212 Ark. 443, 206 S. W. 2d 18.

Affirmed.

SCHWAM *v.* REECE.

4-8510 210 S. W. 2d 903

Opinion delivered May 10, 1948.

Atlee Harris, Hale & Fogleman and *Wils Davis,* for appellant.

J. H. Spears, Rieves & Smith and *James W. Wrape,* for appellee.

MINOR W. MILLWEE, Justice. Appellant, F. A. Schwam, has appealed from three separate judgments rendered against him in circuit court growing out of a collision between an automobile driven by him and

a bus being driven by appellee, W. F. Reece, for appellee, W. Harry Johnson, doing business as Great Southern Coaches. The collision occurred on U. S. Highway 70, a four-lane paved highway, at a point near the eastern limits of the City of West Memphis, Arkansas, on November 18, 1946.

On January 2, 1947, appellee, W. F. Reece, filed suit against appellant. The complaint alleged that Reece was driving a bus east on one of his regular trips between West Memphis, Arkansas, and Memphis, Tennessee, for appellee, Johnson, about 4:10 p. m., when appellant, who was driving west in his automobile, negligently and recklessly left his right-hand side of the road and drove across the center line of the highway into the bus driven by Reece; that the impact of the collision rendered the bus uncontrollable and resulted in serious personal injuries to Reece for which he prayed damages in the sum of $25,000.

On March 28, 1947, appellee, People's Mercantile & Implement Company, filed a separate action in circuit court against appellant, Schwam, and appellee, Johnson, alleging that the collision of the automobile and bus was caused by the joint and several negligence of the drivers of both vehicles; that as a result of the collision, the bus ran off the highway and upon the property of the implement company adjacent to the south side of the highway and ran into and damaged two of the company's tractors in the sum of $2,553.95.

On April 7, 1947, appellant filed an answer and cross complaint in the action brought by Reece. Johnson was joined as a cross-defendant in the cross complaint in which appellant alleged that he suffered personal injuries and damages to his automobile in the sum of $18,250 as a result of the negligent operation of the bus by Reece while acting within the scope of his employment as a driver for Johnson.

On April 22, 1947, Reece answered the cross complaint of appellant. On the same date Johnson also answered and filed a cross complaint against appellant

praying for damages to the bus. Johnson and appellant filed separate answers to the complaint filed against them in the separate suit of People's Mercantile & Implement Company in which each denied the allegations of the complaint and alleged that the collision and resulting damages were caused solely by the negligence of the other. On May 7, 1947, appellant answered the cross complaint of Johnson in the action brought by Reece.

The cases were consolidated for trial before a jury resulting in separate verdicts and judgments against appellant, in favor of Reece for $2,500; in favor of Johnson for $2,000; and in favor of People's Mercantile & Implement Company for $2,553.95.

The first contention of appellant for reversal of the judgments is that the evidence is legally insufficient to support the verdicts. The evidence on behalf of appellee is to the effect that he was driving the bus east out of West Memphis and made a stop a short distance west of the point of collision and then proceeded eastward driving in the south lane of the highway at about 25 to 30 miles per hour, when he approached a slight hump in the highway. Reece testified: "As I said, I slowed down a little bit to cross the hump in the highway. I had it in high gear then and was beginning to pick up a little speed. I guess I had went around ten or fifteen feet when I happened to notice a car coming down meeting me, sixty or seventy feet away, on the north side of the highway coming west. When he got about fifty feet in front of me he just darted in front of me, and when I seen he was going to hit me I pulled the bus to the right to try to keep him from hitting me, and he hit my left front fender a glancing blow, and the side of his car come on down and hit the side of it. When it did it knocked out my brakes, opened up the accelerator, and also jammed the steering system so that I couldn't get it straightened up in the road. And after it got started, naturally me being confused and all that I couldn't think to turn the key off, and the next thing I knew I was hitting the two tractors and the telephone pole."

Reece also testified that the bus picked up speed after the collision until it struck the two tractors parked in front of the implement company 25 feet from the south side of the highway and then struck the pole where it came to a stop. The distance from the point of the collision to the tractors was estimated at 168 to 180 feet, and from the tractors to the electric power pole at 79 to 90 feet. Two witnesses who were passengers on the bus corroborated the testimony of Reece and stated that appellant, without giving a signal, crossed the center line of the road as though he intended to turn into a roadside restaurant located south of the highway.

J. R. Hayes, a resident of Little Rock, Arkansas, testified that he was driving east about a block behind the bus at the time of the collision and observed appellant suddenly turn his automobile across the center line of the highway into the bus on the south side of the road.

Witnesses for appellees and appellant testified that dirt, broken glass, and other debris were found on the south side of the highway after the collision, indicating the point of impact to be in the first lane south of the center line. The speed of the bus was estimated by various witnesses at 25 to 60 miles per hour and the speed of the automobile at 25 to 50 miles per hour.

Appellant is a grocery merchant at West Memphis and testified that he was returning from a trip to Memphis, Tennessee, with a load of groceries in his automobile at the time of the accident. He stated that he was driving in the south or center lane on the north side of the highway when he saw the "flash of a vehicle" come across the center line and strike his automobile. He did not see the bus until it was about four or five feet from him and was rendered unconscious and injured by the collision. He had not eaten lunch on the day of the accident, and stopped about two or three miles east of the point of collision and took a "couple of swallows" of wine from a pint bottle purchased in Memphis. About 2/3 of a bottle of peach or apricot "whis-

key'' was found in appellant's car after the collision. The bottle was between a pint and quart in size.

Appellant criticizes the testimony of certain witnesses as being unworthy of belief. He also states that the testimony of Reece that the bus was being operated in the extreme south lane of the highway is at variance with the physical fact that glass and debris were found in the first lane south of the center line of the road. It is also argued that, if the witness, Hayes, was driving 100 yards behind the bus, it would have been impossible for him to have seen the automobile of appellant cross the road in front of the bus, as he testified. It is true that the evidence is conflicting, but the jury, being the sole judges of the credibility of the witnesses, had a right to believe or disbelieve all, or any part, of the testimony of the various witnesses and to resolve any conflicts or inconsistencies in the evidence. The fact that glass and other debris were found in the first lane south of the center line of the highway would support the theory of appellees that appellant left his side of the highway and drove his car across the center line into the bus, whether Reece was driving in the first or second lane south of the center line. The jury chose to believe appellees' theory of the case which is supported by evidence that is substantial and sufficient to support the verdicts.

It is next contended that the court erred in denying appellant permission to make a closing argument against the cross-complainant and cross-defendant, Johnston. Appellant insists that he had this right under the 6th subdivision of 3 Ark. Stats. § 27-1727, which provides that the party having the burden of proof shall have the opening and concluding argument. The trial court fixed the order of argument by counsel of the respective parties as follows: Mr. Spears for Reece; Messrs. Hale and Davis for Schwam; Mr. Wrape for Johnson; Mr. Smith for People's Mercantile & Implement Co.; and Mr. Spears for Reece. It will be observed that appellant was not the original plaintiff in either of the suits. In the case filed by Reece, appellant made Johnson a cross-defendant and

Johnson cross-complained against appellant so that three parties had the burden of proof to make out their cases, namely: *Reece* v. *Schwam; Johnson* v. *Schwam;* and *Schwam* v. *Reece and Johnson.* There was also the suit of *People's Mercantile & Implement Co.* v. *Schwam and Johnson* in which the company had the burden of proof. It is obvious that it would have been impossible for the trial court to have permitted each party with the burden of proof to open and close the argument and that the statute relied upon by appellant is not adapted to the complex situation presented in the instant case where there are multiple parties plaintiff and defendant with separate interests.

Cases cited by appellant do not involve a situation where there are multiple parties plaintiff and defendant as a result of the application of the consolidation statutes (3 Ark. Stats., §§ 27-1304 and 27-1305). In 64 C. J., Trials, § 263, p. 246, it is said: "Where there are two plaintiffs, each having the right to open and close, or where several defendants plead over against each other, the order of their argument, as among themselves, rests within the sound discretion of the court." In support of this statement the textwriter cites the case of *Metropolitan Life Ins. Co.* v. *Shane,* 98 Ark. 132, 135 S. W. 836, where this court said: "It is urged by counsel for the intervener that the court erred in not permitting him to open and close the argument. This contention is made upon the ground that the burden of proof was on him to show that Louisiana Shane was insane and not legally responsible for her act at the time she killed the insured. But the court did permit the counsel for intervener to close the argument to the jury, and only allowed the plaintiff's counsel to make the opening statement in the case. In this case both the plaintiff and the intervener were seeking a recovery against the Insurance Company. Under the answer made by the Insurance Company the plaintiff was not entitled to recover without the introduction of testimony. As against the Insurance Company, the plaintiff and the intervener were equally plaintiffs, and each was a defendant against the other as to their rival claims for recovery against the Insurance Company.

As each would be entitled to begin and close the argument equally with the other in their actions against the Insurance Company, it was within the sound discretion of the trial court to determine the order of the argument."

In *Dickinson, Receiver,* v. *McBride,* 127 Ark. 555, 193 S. W. 89, the court, in construing the statute relied upon by appellant, said: "Of necessity, trial courts must be conceded a discretion in the conduct of proceedings before them, else, disorder will follow. If the statute in question is not mandatory, it certainly grants the power to trial courts to control the course of argument so as to conform to orderly procedure. Unless there is a clear abuse of discretion, this court will not interfere . . ." We conclude that it was within the sound discretion of the trial court to designate the order of the several arguments in the instant case and that no abuse of that discretion has been shown.

Appellant next complains of the trial court's refusal to admit in evidence an alleged written statement of the witness, James Maynard. Maynard testified as a witness for Reece on direct examination that the latter was driving 25 or 30 miles per hour at the time of the collision. On cross-examination he was asked about a previous statement he allegedly made to Mr. Harris in which he said the bus was going 40 to 42 miles per hour. The alleged written statement was not signed by the witness nor was it otherwise properly identified for introduction as his statement. Moreover, the witness admitted that he made the previous statement to Harris concerning the speed of the bus and explained the circumstances under which it was made. In the case of *Humpolak* v. *State,* 175 Ark. 786, 300 S. W. 426, it was held that when a witness admits upon cross-examination that he made the contradictory statements about which he is questioned, there is no necessity for proving them and same are, therefore, not admissible in evidence. In that case the court approved the rule stated in 28 R. C. L. 224 as follows: "But the great weight of authority is to the effect that a witness may be impeached by proof of prior contradictory statements, where he merely testified that he

does not remember, or has no recollection of making the statements referred to. Of course, if the witness admitted that he made the contradictory statements there is no necessity for proving them, and they are therefore not admissible in evidence." The court did not err in excluding the alleged written statement.

Appellant also offered, and the trial court refused to admit, the testimony of P. B. Powers to show the speed and manner in which Reece was driving the bus on another trip about 30 minutes prior to the accident and two or three miles from the scene of the collision. Appellant offered to show by the witness that Reece was driving about 50 miles per hour at that time and place. The general rule is that it is not competent for a witness to testify as to the rate of speed at which a party to an automobile accident operated his automobile on occasions or at places other than the one in question. Berry on Automobiles (7th Ed.), Vol. 5, p. 453; Blashfield's Cyclopedia of Automobile Law and Practice (Perm. Ed.), Vol. 9, § 6210. The case of *Pugsley* v. *Tyler,* 130 Ark. 491, 197 S. W. 1177, involved an action for injuries sustained when plaintiff's team, frightened by defendant's method of driving his automobile, overturned the wagon. This court held that it was error to require defendant to state whether, on another occasion, he had driven his automobile without lights past another person's team, frightening it. It was there said: "This court has adopted the rule, where the sole issue is one of negligence or non-negligence on the part of a person on a particular occasion, that previous acts of negligence are not admissible." That case, like the one at bar, is to be distinguished from those cases involving the admissibility of evidence where it is shown that the speed at which the driver was traveling was one continuing act of negligence and not a separate and different act from the one involved in the collision. See *Missouri Pac. Transp. Co.* v. *Mitchell,* 199 Ark. 1045, 137 S. W. 2d 242; *Jelks* v. *Rogers,* 204 Ark. 877, 165 S. W. 2d 258. The offered testimony was too remote in point of time and place to be admissible. Appellant argues that the testimony was competent as bearing on the credibility of Reece, but no suggestion was made at

the trial that the jury's consideration of the offered testimony should be thus restricted.

Error is also assigned in the exclusion of the testimony of appellees' witness, Henley, relative to the distance from the place where the tractors were struck to the pole where the bus came to a stop. The witness stated that he made measurements several months after the accident from tire marks on the pavement, but did not know whether these marks indicated the same place the tractors were standing at the time of the collision. Since the witness was unable to accurately identify the correct place of measurement, the court properly excluded the testimony. Besides, appellant could not have been prejudiced by the exclusion of the testimony. The witness offered to state that the distance was 79 feet. The witness, C. D. Shaw, gave the same testimony as to the distance based upon measurements which were not questioned. Two other witnesses estimated the distance to be 85 to 90 feet, which was more favorable to appellant than the excluded testimony.

L. O. Winston, a passenger on the bus, was permitted to testify that immediately after Reece swerved the bus to the right to avoid the collision, and witness observed that the bus would strike the tractors, he called to Reece: "Throw on your brakes"; and the driver replied: "I have no brakes." The statements were spontaneous declarations uttered at the time of the occurrence of the collision and were clearly admissible as a part of the *res gestae*. *St. Louis & S. F. Ry. Co.* v. *Murray,* 55 Ark. 248, 18 S. W. 50, 16 L. R. A. 787, 29 Am. St. Rep. 32; *Beal-Doyle Dry Goods Co.* v. *Carr,* 85 Ark. 479, 108 S. W. 1053, 14 Ann. Cas. 48; *Arkansas Power & Light Co.* v. *Heyligers,* 188 Ark. 815, 67 S. W. 2d 1021; Anno. 91 A. L. R. 1129.

In a preliminary instruction outlining the respective theories of the several parties the trial court stated the contention of appellant as follows: "Schwam denies that the collision resulted from any negligent act of his. He contends that the collision was the result of the negligent conduct of Reece in that he was operating the bus at an

excessive and dangerous rate of speed; that he was moving from one lane of the highway to another in disregard for the traffic thereon, and that he failed to keep his bus under proper control. He seeks to recover from Johnson and Reece compensation for his alleged personal injuries and property damage." Appellant now insists that this part of the instruction was prejudicial because it failed to state the full details of appellant's contentions in that it did not properly apprise the jury of his contention that Reece drove the bus across the center line of the highway to the north side and into the car of appellant. A comparison of that part of the instruction to which complaint is made, with the allegations of the cross-complaint of appellant against Reece and Johnson shows that the court's charge substantially followed the identical language of the cross-complaint. The instruction given conformed to appellant's theory of the case as reflected by his cross-complaint and was not, therefore, prejudicial. *Dardanelle Pontoon Bridge & Turnpike Co.* v. *Croom,* 95 Ark. 284, 192 S. W. 280, 30 L. R. A., N. S. 360.

It is also argued that error was committed in permitting counsel for Johnson to cross-examine Reece's witness, James Maynard. Appellant says the interests of Reece and Johnson were identical and that their respective counsel improperly collaborated throughout the trial. In his brief, appellant does not set out the testimony or other proceedings in which the alleged error occurred, nor is there any reference to the transcript in connection with this alleged error. We find the contention to be without merit.

It is finally insisted that the forms of verdict submitted by the court were confusing to the jury. It is not suggested wherein the forms submitted were confusing, or that they are defective or erroneous. The forms clearly provide for findings for or against each party to the proceedings on every issue involved in the several cases, and we find no error in them.

No other errors are urged for reversal of the judgments, and they are affirmed.

Opinion delivered May 10, 1948.

[redacted]

Shaver, Stewart & Jones and *Bert B. Larey,* for appellant.

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

SMITH, J. Appellant was put to trial under an information charging him with the crime of murder in the first degree, alleged to have been committed by shooting and killing one Andrew A. Ellis. A verdict was returned finding him guilty of murder in the second degree, and fixing his punishment at twenty-one years in the peniten-

tiary, and from the judgment pronounced on that verdict is this appeal.

Many exceptions were saved during the progress of the trial, but the only one seriously insisted upon for the reversal of the judgment is that the testimony is insufficient to sustain the verdict or to warrant a conviction of any higher degree of homicide than voluntary manslaughter, and we are asked to reduce the punishment accordingly. Our authority to grant this relief in a proper case was recognized in the case of *Blake* v. *State,* 186 Ark. 77, 52 S. W. 2d 644, and in numerous cases there cited to the same effect. The testimony is sharply conflicting in many essential respects as several, at least, of the witnesses were partisans of the State or of the appellant, but we must of course give the testimony tending to support the verdict its highest probative value.

There was operated near the City of Texarkana, a beer and dance hall, where appellant had been employed for five months before the killing. He was armed with both a pistol, which he carried in a holster, and a blackjack, which he carried in his pocket. No authority for wearing these weapons was shown, or claimed, and their ostensible purpose was to preserve order in the dance hall.

Deceased escorted a young woman to the dance hall on the night of the killing and they, as well as appellant, appeared to be drinking beer rather freely before the altercation arose which terminated in the killing. About midnight, when the beer had begun to have its effect, two young women began to dance what several witnesses referred to as a vulgar dance. Another young woman who took up the tickets, went to the dancing couple and ordered them to desist. The order was not obeyed and an argument arose, hearing which the deceased made himself a party to the controversy, and as the argument became more acrimonious, appellant appeared and ordered deceased to sit down. Appellant was knocked down and the testimony is in dispute as to whether deceased knocked him down with a beer bottle or with his fist, but it is not questioned that he did knock appellant down.

The proprietor appeared and a scuffle ensued in which proprietor, appellant and deceased were all piled up on the floor. According to appellant he was knocked down a second time and his blackjack taken out of his pocket, and he was beaten in the face with it. The proprietor testified that he too was knocked down by the deceased, who was shown to be a large and very powerful young man, and while he was in the pile on the floor, deceased beat the proprietor with a blackjack. Witnesses for the State testified that they saw no use made of the blackjack.

The combatants were finally separated and when appellant arose he drew his pistol and began firing it. The first shot does not appear to have been directed at anyone. When deceased saw appellant's pistol he began to retreat, according to the State's testimony, and as appellant advanced, deceased raised his hands and said several times "Don't shoot," during all of which time he was backing towards the wall of the building.

The insistence for the modification of the judgment is that the recited testimony shows a killing in the heat of a sudden passion induced by provocation apparently irresistible and without cooling time. The parties were strangers to each other prior to the time of the killing.

Instructions were given to which no exceptions were saved, and no objections are urged. In one of these instructions the offense of voluntary manslaughter was clearly defined, to which instruction the court added the following modification:

"The instruction which I have just given you, however, is subject to this exception: If you find from the evidence beyond a reasonable doubt that the defendant maliciously and without any reason or justification himself provoked and was the aggressor in the difficulty which he had with the deceased Ellis, then the fact that the deceased may have inflicted a blow or blows on the defendant which aroused in him an apparently irresistible passion and that as a result of such passion the defendant killed the deceased, the grade of the offense would not be reduced from murder to manslaughter."

The testimony shows without dispute that appellant was knocked down and according to his testimony this was done with a beer bottle, although witnesses for the State testified that they saw no bottle, and thereafter one event followed another in such rapid succession that there did not exist what in law is called cooling time, that is, time for reflection and for recovering from a passion suddenly aroused caused by provocation which apparently made the passion and the impulse to kill irresistible.

The statute (§ 2981, Pope's Digest) provides that, "Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible," and but for this passion which evidently existed, appellant would have been guilty of the highest degree of homicide, as the testimony shows that when appellant was extricated from the pile of men on the floor, he drew his gun and began firing. The first shot was apparently not fired at anyone, but two others were, and with a deadly accurate aim, during which time appellant was advancing on deceased who was retreating towards the wall of the room, with his hands uplifted saying, "Don't shoot, don't shoot." Nevertheless, the regard of the law for human frailty is such that the degree of the homicide would be reduced from murder to manslaughter, although at the instant of firing the fatal shots appellant was in no danger and was then the aggressor, because of the sudden heat of passion caused by the provocation apparently sufficient to be irresistible and the jury was so advised, provided, as stated in the modification or addition to the instruction above copied, appellant had not been the aggressor, thereby provoking the provocation which aroused the irresistible passion. In other words, one cannot by his own aggression provoke an assault upon himself, and then be heard to say that cooling time was not afforded. In the case of *Noble* v. *State*, 75 Ark. 246, 87 S. W. 120, Justice McCulloch said:

"A person cannot take advantage of a provocation invited and brought about by his own unlawful aggres-

sion, in order to reduce the grade of his crime from murder to manslaughter, when he has not in good faith attempted to retire from the encounter. If appellant was the aggressor in the first difficulty, and was assaulted and cut by deceased while so engaged, and killed deceased upon a sudden heat of passion aroused by the assault made by deceased, the grade of his offense was not thereby reduced to manslaughter. This is because malice, which is an essential element of murder, is implied from the fact that he sought the difficulty in which provocation for passion was given, and became the aggressor therein."

The testimony is conflicting as to who was the aggressor at the inception of the trouble. There was an argument, no doubt somewhat heated, before appellant became a participant, but there had been no violence until appellant appeared on the scene. There is testimony on the part of the State to the effect that appellant precipitated the fight by striking deceased, and if so he was the aggressor in the general fight in which he was knocked down, and became so infuriated that the passion was irresistible.

The testimony shows that appellant was drinking beer, as were many others in the dance hall, and while it was not shown that he was drunk, the jury may have believed that he was in a condition to join in the quarrel, without invitation or necessity, and that by striking the deceased he ignited the argument into a fight in which he was knocked down and thrown into a sudden heat of passion which he was unable to control, lacking cooling time. If so, the grade of the homicide was not reduced by his towering rage, and the judgment must be affirmed.

KERR, ADMINISTRATOR *v.* GREENSTEIN.

4-8531 212 S. W. 2d 1

Opinion delivered May 3, 1948.

Rehearing denied June 28, 1948.

John R. Thompson, for appellant.

Moore, Burrow, Chowning & Mitchell, for appellee.

ED. F. MCFADDIN, Justice. The sufficiency of the service of process on the appellee is the issue for decision. The question is: does service pursuant to our non-resident motorist service statute apply to a defendant such as appellee?

Appellant, as administrator of the estate of Elmedia E. Kerr, filed action against the appellee in Pulaski Circuit Court, claiming damages for the death of the deceased. The complaint alleged that the deceased was driving her automobile on a public highway when the appellee negligently drove another car into and against her car, inflicting injuries which resulted fatally, and for which damages were prayed. The appellee was and is a non-resident of Arkansas, and service of process was obtained pursuant to the provisions of Act 39 of 1933 as amended by Act 40 of 1941. The text of these Acts may be found in 3 Ark. Stats., §§ 27-341 and 27-342.[1] We will refer to this statute as the "non-resident motorist service statute." The appellee filed motion to quash service; and the motion to quash was submitted to the circuit court on a stipulation reading entirely as follows:

"Comes the plaintiff, W. D. Kerr, as Administrator of the estate of Elmedia E. Kerr, deceased, by his attorney of record, John R. Thompson, and comes the defendant, Emanuel Greenstein, specially and not generally by his attorneys of record, Moore, Burrow, Chowning & Hall, and agree and stipulate upon the following facts for the sole purpose of the Court's consideration in passing upon the defendant's motion to quash summons issued and served upon him in this cause, by serving him under the provisions of Act 39 of the Acts of the General Assembly of the State of Arkansas for 1933, as amended by Act 40 of the Acts of 1941 of the General Assembly of the State of Arkansas:

"Mr. A. Sanders, a resident of Little Rock, Arkansas, died on April 21, 1946, and a number of relatives by

[1] This reference is to the Arkansas Statutes Annotated of 1947, published by Bobbs-Merrill Company, now in process of completion. This section is in Volume 3. Act 39 of 1933 may be found in §§ 1375-1376, Pope's Digest of 1937.

blood and marriage came to Little Rock for his funeral, among them being the defendant, Emanuel Greenstein, who is a resident of Chicago, Illinois, and a Mrs. Jennie Freeman, who is a resident of Dallas, Texas.

"Both Mr. Greenstein and Mrs. Freeman were guests in the A. Sanders home, which after the death of Mr. A. Sanders was occupied by his family. The wife of Mr. A. Sanders died some two years prior to the death of A. Sanders and he had not remarried.

"After the funeral of A. Sanders, Mrs. Freeman desired to return to her home in Dallas, Texas, and a few minutes before her train was due to leave the Missouri Pacific station, one of the daughters of Mr. A. Sanders requested Mr. Greenstein to drive Mrs. Freeman to the railroad station, and it was while he was in the act of driving her to the station in the A. Sanders car that the collision occurred which is the ground of this suit.

"The automobile which the defendant, Emanuel Greenstein, was driving at the time of the collision with the Kerr automobile was owned by A. Sanders personally and bore an Arkansas 1946 state license issued him by the State of Arkansas, and bore no license of any other state. The car was used by Mr. A. Sanders for his own personal use and his daughters who lived with him had the privilege of using the car.

"The defendant, Emanuel Greenstein, at the time that said automobile collision occurred, was a resident and a citizen of the City of Chicago, and State of Illinois, and had his legal domicile in said City and State, and he has not changed his residence or domicile since said collision. He came to Little Rock for the Sanders funeral by railroad and returned in the same way following the automobile collision, and he did not have with him in the State of Arkansas while here an automobile owned or controlled by him, and the only automobile which he drove while in the City of Little Rock and State of Arkansas was the A. Sanders car aforesaid.

"The service that has been had on the defendant in this cause was service of a summons under the pro-

visions of the above act, and it is the contention of the plaintiff that such service is sufficient service, while it is the contention of the defendant that valid service cannot be secured upon him under the provisions of said Acts under the facts hereinabove stipulated."

The circuit court held the service to be insufficient, and sustained appellee's motion to quash. Thereupon the plaintiff elected not to ask for alias service, but prayed an appeal to the Supreme Court. Authority for treating the court's order as final and appealable may be found in the cases of *Berryman* v. *Cudahy Packing Co.*, 189 Ark. 1151, 76 S. W. 2d 956 and *Yocum* v. *Oklahoma Tire & Supply Co.*, 191 Ark. 1126, 89 S. W. 2d 919. There is thus presented the question of the sufficiency of the service of process, to be determined on the stipulated facts heretofore quoted. Appellant relies on *Oviatt* v. *Garretson*, 205 Ark. 792, 171 S. W. 2d 287, wherein we discussed our non-resident motorist service statute. Appellee claims that our statute provides for service only on "non-resident owners," and not on "non-resident operators" of vehicles owned and operated in Arkansas.

I. *Statute to be Strictly Construed.* At the outset, we state that our statute is to be strictly construed, because it is in derogation of common law. In *Brown* v. *Cleveland Tractor Co.*, 265 Mich. 475, 251 N. W. 557, and, again, in *Flynn* v. *Kramer*, 271 Mich. 500, 261 N. W. 77 the Supreme Court of Michigan, in discussing the Michigan non-resident motorist service statute, said:

"The statute is in derogation of common right, must be strictly construed, and cannot be extended by implication to include persons not coming within its terms."

In *Jermaine* v. *Graf*, 225 Ia. 1063, 283 N. W. 428, the Supreme Court of Iowa, in discussing the Iowa non-resident motorist service statute, said.

"In several jurisdictions it has been held that statutes, of the nature of these we are discussing, are in derogation of the common law and must be construed strictly, and may not be extended by implication to non-

residents not coming within their terms. *Brown* v. *Cleveland Tractor Co.,* 265 Mich. 475, 251 N. W. 557; *Morrow* v. *Asher,* D. C., 55 Fed. 2d 365; *Day* v. *Bush,* 18 La. App. 682, 139 So. 42."

In 5 Am. Juris. 830, "Automobiles," § 591, the general rule is stated:

"Statutes which provide for constructive or substituted service of process on non-resident motorists are in derogation of common rights and should be strictly construed, and strict compliance therewith must be observed, although provisions should not be read into such a statute which are not expressly stated or necessarily implied."

Other cases sustaining the above statements are: *Commonwealth* v. *Maryland Casualty Co.,* 112 Fed. 2d 352; *Webb Packing Co.* v. *Harmon,* 38 Del. 476, 193 At. 596; *Rose* v. *Gisi,* 139 Neb. 593, 298 N. W. 333.

II. *Historical Study of Our Statute.* Having therefore decided that our non-resident motorist service statute should be construed strictly, we come next to an historical study of the statute. In *Hess* v. *Pawloski,* 274 U. S. 352, 71 Law Ed. 1091, 47 S. Ct. 632, the United States Supreme Court, in 1927, sustained a Massachusetts statute providing for service of process on non-resident motorists. Subsequently in *Wuchter* v. *Pizzutti,* 276 U. S. 13, 72 L. Ed. 446, 48 S. Ct. 259, the United States Supreme Court in 1928 considered a New Jersey statute designed along the same lines as the Massachusetts statute, but held the New Jersey statute defective on a point not here at issue. These two cases probably served as the impetus for various states to adopt statutes similar to the Massachusetts statute, and without the fatal defect of the New Jersey statute. In 1929, the State of Oregon by Chapter 359 enacted a non-resident motorist service statute.[2] Many states have somewhat similar statutes.[3]

[2] The 1929 Oregon law together with a 1939 amendment were considered by the Oregon Supreme Court in *State* v. *Latourette,* 168 Ore. 584, 125 Pac. 2d 750.

[3] In the annotations following our statute in 3 Ark. Stats., § 27-341 comparative legislation is shown from some, but not all, of the

Our original statute (Act 39 of 1933) seems to be a composite of the Massachusetts, New Jersey and Oregon statutes. Act 40 of 1941 amended the 1933 Act, to permit service in an action against the estate of the deceased non-resident.

III. *Analysis of Our Statute.* Our completed statute (Act 40 of 1941) is found in 3 Ark. Stats., §§ 27-341 and 27-342. Insofar as the point here at issue is concerned, the statute provides:

"... the acceptance by a non-resident owner, chauffeur, operator, driver of any motor vehicle, ... of the rights and privileges conferred by the laws of the State of Arkansas to drive or operate ... a motor vehicle upon the public highways of said State as evidenced by his or its operating or causing or permitting a motor vehicle to be operated ... on such highway in the State of Arkansas shall be deemed equivalent to the appointment by such non-resident owner, ... of the Secretary of the State of Arkansas ... to be the true and lawful attorney and agent of such non-resident owner upon whom may be served all lawful process in any action or proceedings against him ... growing out of any accident or collision in which said non-resident owner or any agent, servant or employee of any such non-resident owner may be involved while operating a motor vehicle on such highway, ... Service of such process shall be made by serving a copy of the process on the said Secretary of State and such service shall be sufficient service upon the said non-resident owner, ..."

It will be noted that in the first part of the first sentence (and also in the caption) the words "chauffeur, operator, driver" appear. But in the portion of the Act which speaks of which non-resident has made the appointment, the words are:

other States. In Blashfield on Automobile Law and Practice, Permanent Edition, § 5913, there is a discussion of non-resident motorist service statutes and the cases construing them. In 32 Mich. Law Review, p. 325, there is an article "Process in Actions Against Non-resident Motorists." See, also, annotations in 155 A. L. R. 333, 138 A. L. R. 1464, 125 A. L. R. 457, 96 A. L. R. 594, 82 A. L. R. 768, 57 A. L. R. 1239, and 35 A. L. R. 951.

". . . shall be deemed equivalent to appointment by *such non-resident owner.*" (Italics our own.)

Furthermore, in speaking of the sufficiency of the service, the language is:

". . . such service shall be sufficient service upon the *said non-resident owner.*" (Italics our own.)

In short, there is no sentence in the Act which says that service on the Secretary of State shall be sufficient service on a *non-resident operator* of an automobile owned by or registered in the name of a citizen of this State.

We have previously mentioned the Oregon statute (Chapter 359 of 1929), which is captioned:

"To Grant to Non-resident Owners of Motor Vehicles the Privilege of Using the Highways of the State of Oregon, and Providing for the Appointment by Such Non-resident Users of the Highways of the State of Oregon of the Secretary of State as Attorney in Fact for such Non-resident Owners of Vehicles. . . ."

In *State* v. *Latourette,* 168 Ore. 584, 125 Pac. 2d 750, the Supreme Court of Oregon had before it a case in which the defendant was merely the non-resident operator, and not the non-resident owner, of the automobile which was being driven at the time of the collision. There was thus presented the question as to whether the Oregon statute of 1929 included a *non-resident operator* as distinct from a *non-resident owner,* and the Oregon Supreme court pointed out that only a non-resident owner could be brought into court by service of process on the secretary of state under the 1929 Oregon statute. Said the court:

"If it had desired, the legislature could have included within Chapter 359, Oregon Laws 1929, all non-resident operators of motor vehicles on the highways of this State. It limited the application of that Act, however, by the title thereof, to non-resident owners of motor vehicles. We are not permitted to enlarge the scope of the enactment."

Further, the Oregon court said:

"... the 1929 enactment limited the Act to non-resident owners of motor vehicles using the highways of this State, and ... such title was not broad enough to include all non-residents. ... It is our conclusion that Chapter 359, Oregon Laws 1929, does not include or apply to non-resident drivers or motor vehicles on the highways of the State of Oregon, unless they are the owners of such vehicles, for the reason that the title of the Act is limited to non-resident owners of motor vehicles."

The Oregon case is highly persuasive. Under the facts stipulated in the present case, the appellee was not a *non-resident owner,* but was merely a *non-resident operator.* We cannot find in our statute any statement which says that service on the Secretary of State is service on anyone except a *non-resident owner.* Since appellee does not come within that designation, and since the statute should be strictly construed, we reach the conclusion that the circuit court was correct in sustaining the motion to quash. Under the holding of the U. S. Supreme Court in *Hess* v. *Pawloski, supra,* it may be within the power of our legislature to broaden our statute; but what we here decide is, that our present non-resident motorist service statute does not make service on the Secretary of State sufficient service on anyone except a "non-resident owner."

IV. *Disposing of Appellant's Other Arguments.* To sustain the service on the appellee, several suggestions have been made. These we now discuss:

1. It is pointed out that in the first part of the first sentence of our statute, the words are "non-resident owner, chauffeur, operator, driver ...", whereas in subsequent instances the words are merely "*such* non-resident owner" or "*said* non-resident owner." It has been suggested that the use of the words "such" and "said" has the effect of making "non-resident owner" in each instance include also "chauffeur, operator, driver," since these last-quoted words follow immediate-

ly after "owner" both in the caption of the 1933 Act and in the first sentence of the Act. But the words "such" and "said" are reflexive and restrictive. They call attention to the one previously mentioned; they are not substitutes for *et cetera.*" If the framers of our Act had intended that "chauffeur, operator, driver" were to be understood as going along with "owner" in each instance, the definite words so stating should have been placed in the Act. In giving the Act a strict construction, we are not free to enlarge its words.

2. It has been suggested that a *non-resident operator,* while he is operating the vehicle in this State, occupies the position of "owner," since he is in charge of the vehicle; and based on that suggestion, we are asked to say that an operator is always an owner. To support that argument, attention has been called to the case of *C. R. I. & P. Ry. Co.* v. *State,* 84 Ark. 409, 106 S. W. 199, wherein we held that a corporation operating a railroad was liable under a statute imposing duties on an owner. But that case quoted as in point a Missouri case which said:

"If the defendant was at the time in the possession of and running and operating the railroad in question, it was presumptively the owner; and, in the absence of a contrary showing the court would be authorized in holding defendant to be the owner."

In the case at bar there can be no "presumption," because there is a "contrary showing," in that the stipulated facts negative any presumption of appellant's ownership. Furthermore, our motor registration statute (§ 6667, Pope's Digest) defines "owner"; and our non-resident motorist service statute, here involved, contains no other definition of that word.

3. It is suggested that the word "owner" is surplusage in our non-resident motorist service statute: that is, that the statute would be complete to merely say "non-resident," and would thus apply to all non-residents, whether owners or operators. But to strike out the word

"owner" would be to enlarge the statute and give it a liberal construction, whereas, as previously pointed out, the statute should be strictly construed. We are not privileged to strike out a word when the effect would be to liberalize the statute that is to be strictly construed.

4. Finally, it is insisted that in *Oviatt* v. *Garretson,* 205 Ark. 792, 171 S. W. 2d 287, we said that the Act provided for service on "non-resident owners, drivers, etc.," and—because of such language—it is urged that we should now apply the statute to non-resident operators. The answer to this argument is that, a non-resident owner was also the driver in the Oviatt case; and the language in that opinion referred to such a situation. Furthermore, past its applicability to the case then decided, the language was dicta, and the dicta in one case cannot serve as the *ratio decedendi* in a succeeding case.[4]

Conclusion: Since appellee was merely a non-resident *operator,* and not a non-resident *owner,* it follows that the circuit court was correct in sustaining the motion to quash. Therefore the judgment is affirmed.

The Chief Justice and Mr. Justice Robins dissent.

Griffin Smith, Chief Justice, dissenting. The majority opinion, as an academic treatise on the science of interpretation and explanation, (sometimes spoken of as hermeneutics) would not provoke disputation; but when applied to the controversy presented by the appeal of Kerr as Administrator the reasoning seems fallacious. It rests upon the proposition that merely because a tortfeasor is a nonresident he has a common *right* to avoid trial in the state where his alleged negligence caused injury, followed by death.

The decision would be correct if it can be said that the General Assembly was more concerned with actual ownership of a motor vehicle than it was with the result so clearly expressed in the statute.

[4] The foregoing statement appears in *McLeod* v. *Dilworth,* 205 Ark. 780, 171 S. W. 2d 62.

Act 40 of 1941 amends Act 39 of 1933. In each the emergency asserts that if injury or damage occurs within the State ". . . on account of the acceptance of the rights and privileges to so use such highways, . . . and whereas, when such damage is so done by such non-resident owners or their agents, servants, or employees by the operation of motor vehicles, which are dangerous machines, and the use of which [is] attended by serious damages to persons and property, and whereas in cases of such injury and damage by such non-resident owners those suffering damages thereby have no convenient method by which they may sue to enforce their rights, . . . this Act [is] necessary", etc.

Clearly the legislative intent was to create a service agent for convenience of one injured by a non-resident who had accepted the State's conditional grant of highway use, and the word "owner" is of the same dignity as "*chauffeur, operator, driver,*" mentioned in Sec. 1 of the Act. This construction finds support in subsequent designations, where the reference is to "*such*" non-resident owner, or "*said*" non-resident owner. Failure of the lawmakers to repeat "chauffeur", "operator" or "driver" is held by the majority to disclose a design not to include them, notwithstanding the fact that rights were being created for citizens who were injured in property or person.

While the precise question in the instant appeal was not before the Court in *Oviatt, Administrator,* v. *Garretson,* 205 Ark. 792, 171 S. W. 2d 287, (*ownership* of the car driven by Mrs. Tarnutzer having gone unchallenged) it is of interest that attorneys who represented the executor in that case (who are now attorneys for the appellee here) treated the Act as applicable to any non-resident motorist who made use of Arkansas highways. At page 21 of that appellant's brief it is said, "If this is true the statute that provides that *one who uses the highways* . . ." etc. Page 27: "Manifestly under our statute there is no interest coupled with the agency power of the Secretary of State to accept service of summons such as to survive the death of

the non-resident user of our highways. . . ." Page 28: ". . . Nor is [the Secretary of State] given any interest in any cause of action or suit arising out of *the use of the highway by the non-resident motorist*". At page 31 the reference is to "the Buick car driven by Mrs. Tarnutzer".

Mr. Justice McFaddin, in writing the Court's unanimous opinion in the Oviatt case, said: "There was no provision in [Act 39 of 1933] whereby service of process could be obtained upon the estate of a deceased non-resident owner or driver. To remedy this situation, the General Assembly of 1941 passed Act No. 40, which amended Act 39 of 1933, *and provided that in a suit against any non-resident owner or driver,* in case of death, . . . , the action could be filed or continued against the administrator or executor". Again it was said: "It is true that Act 40 of 1941 stated that by using our highways a non-resident *owner or driver* constituted the Secretary of State as his agent for service of process". And finally, "A non-resident who utilizes the State's highways . . . was bound by such statutes."

There was no recorded expression at variance with these definite statements of what the two Acts then stood for. Since the statutes are the same today that they were when the construction concurred in by counsel for the appellant was reached in 1943, I can see no overpowering necessity for judicial emasculation of Act 40 in the interest of a so-called "common right"—that is, the right not to be sued in the State where the injury occurred.

In *Tallman* v. *Tallman,* 23 N. Y. S. 734, 3 Misc. 465, the word "interpretation" was said to have been defined as the process by which the intention of a writer is determined, either from his words, "or from other conjectures, or both". Rutherford, 2 Inst. 414, divides interpretation into three sorts—literal, which is where we collect the intention from the words used, and from no other source; rational, where the words do not express the writer's intention perfectly, but either exist

or fall short of it, so that we are going to collect it from probable or rational conjectures only; and mixed, where the words, though they do express the writer's intention when they are rightly understood, but are in themselves of doubtful meaning, and we are forced to have recourse to conjectures to find out in what sense they are used".

Effect of the majority opinion is to say that, although the lawmakers, by express words, said their intention was to provide a method for serving non-resident *owners, chauffeurs, operators, drivers,* of motor vehicles, yet when in subsequent provisions these non-residents were spoken of as "said" owners, or "such" owners, then there was nothing in the Act by which to determine in what sense "such" and "said" were used, hence chauffeurs, drivers, and operators could not have been in the legislative purview; and though non-residents use of our highways, a construction in derogation their "common rights" must not be applied.

It was said in *Roberts* v. *Portland Water District,* 126 A. 162, 124 Me. 63, that "interpretation" is ascertainment of true sense of any form of words, and "construction" is drawing of warrantable conclusions not always included in direct expression.

I am unable to understand how any warrantable conclusion other than that the service was good can be drawn from Act 40, and I still agree with what was said about it in the Oviatt case.

The rule that a particular statute must be strictly construed does not mean that by narrow or forced interpretation matters obviously within the legislative purpose must be excluded merely because, after an intent has been expressed, it was not followed by precise words when the apparent object was subsequently alluded to. No practice is better established than this. Reports are full of cases in which it is said that intention of the lawmakers is to be derived "from a view of the whole and of every part of the statute, taken and compared together. . . . When words are not explicit, the intention is to be collected from the context and the occa-

sion and necessity of the law, and from the mischief felt and the remedy in view; and the intention is to be taken or presumed according to what is consonant to reason and good discretion". The quotation is credited to Chancellor Kent. See Walker's opinion, In re *Merrill,* 102 Atl. 400.

The case presented by Kerr results in a determination by this Court that the "mischief felt and the remedy in view" had no relation to the act of a non-resident who came into the state and as driver of a borrowed car negligently used the highways. The majority says there are no words in the Act "consonant with reason and good discretion" from which an intent to hold any but an owner can be presumed. "Owners, agents, servants, or employes," found in the emergency clause, and "owner, chauffeur, operator, driver", appearing in Sec. 1, are declared to be strangely ambiguous and obscure, hence without meaning.

Mr. Justice Robins joins in this dissent.

CLEMENTS *v.* STATE.

4493 210 S. W. 2d 912

Opinion delivered May 10, 1948.

Joe Clay Young and *Dewver Dudley,* for appellant.

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

McHaney, Justice. Appellant was charged by information with the crime of murder in the first degree, for shooting and killing his wife, Mrs. Nell Clements, on December 25, 1946. He was convicted of murder in the first degree and sentenced to life imprisonment in the State Penitentiary. From the judgment and sentence he has appealed.

Only one question is argued for a reversal of the judgment, and that is the admissibility of the testimony of Dr. Kozberg, a psychiatrist of State Hospital and one of the physicians who examined appellant for sanity, and who testified that appellant was sane at the time of the shooting and at the time of trial. The testimony of this witness was given in rebuttal to testimony given by witnesses for appellant tending to show that, shortly before the killing, he appeared to be nervous, highly nervous, couldn't be still, "cried a good deal," and was disturbed as a result of his marital troubles,—an apparent attempt to establish a plea of temporary insanity or irresponsibility.

Trial occurred on November 24, 1947. Prior thereto, on August 1, 1947, the court made an order directing the sheriff to deliver appellant to the superintendent of the State Hospital for observation and examination, as provided by Initiated Act No. 3 of 1936 (Acts 1937, p. 1384). At that time appellant had not entered a plea of insanity, but the order recites that the prosecuting attorney appeared and "indicated to the court that the insanity of the defendant, Bill Clements, may be an issue in the trial of this cause, whereupon, the court, acting upon such information (and) of its own motion finds and directs as follows:"; then follows the order for the examination of appellant and a written report of his mental condition at the time of the offense.

The record does not show that appellant objected to being sent to the State Hospital for examination, or to

the examination there made. He did object and except to the testimony of Dr. Kozberg on the ground that he was compelled to give evidence against himself in violation of his constitutional rights under Art. 2, § 8, Ark. Constitution 1874, and Amendment 5, Constitution of the United States. We cannot agree with appellant in this contention.

Section 11 of Initiated Act No. 3, Acts 1937, p. 1384, provides that the circuit judge, in a criminal prosecution, "shall postpone all other proceedings in the cause and shall forthwith commit the defendant" to the State Hospital for observation, under these conditions: 1, where defense of insanity has been raised on behalf of the defendant and becomes an issue in the cause; or 2, 'the circuit judge has reason to believe that the defense of insanity will be raised on behalf of the defendant and will become an issue in the cause"; or 3, the judge believes there are reasonable grounds to believe that the defendant was insane at the time the crime was committed, or 4, has since become insane. No. 2 above fits this case, that is, the judge has reason to believe that the insanity defense would be raised, and his belief was justified as the trial so showed. The Act provides that the judge shall pursue the course here taken and he literally complied with the statute. This section provides further that such action shall not preclude the State or defendant from calling expert witnesses to testify at the trial who shall have free access to the defendant for observation and examination during the period of his commitment to the State Hospital for examination. We have had several cases in this court since the adoption of this Act arising under §§ 11 and 12, now §§ 3913 and 3914 of Pope's Digest, some of them being *Brockelhurst* v. *State,* 195 Ark. 67, 111 S. W. 2d 527; *Hall* v. *State,* 209 Ark. 180, 189 S. W. 2d 917; *West* v. *State,* 209 Ark. 691, 192 S. W. 2d 135, but the exact question now raised has not heretofore been presented so far as our investigation discloses. Appellant has cited *Bethel and Wallace* v. *State,* 178 Ark. 277, 10 S. W. 2d 370, where we held the admission of the testimony of a physician who examined appellants at the request of the sheriff's office, that they had a certain vene-

real disease, in a prosecution for rape, was prejudicial error under the above constitutional provisions. But this case arose long before the adoption of Initiated Act No. 3, and is not controlling here, and there is no showing of prejudice to appellant arising because he was sent prior to a special plea of not guilty because of insanity. The record does show that he refused to discuss his case with the physicians at the State Hospital and was uncoöperative because of the advice of counsel.

Appellant concedes that the State made a strong case against him and we think the one argument made cannot be sustained so the judgment must be and is affirmed.

SMITH *v.* STATE.

4492 210 S. W. 2d 913

Opinion delivered May 10, 1948.

Sam Robinson, for appellant.

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

ROBINS, J. Appellant, charged by indictment with the crime of rape, was by trial jury found guilty of assault with intent to rape and his punishment fixed at imprisonment in the penitentiary for twenty-one years. From judgment in accordance with the verdict this appeal is prosecuted.

Only two assignments of error are urged here.

It is first argued by appellant that the lower court erred in refusing to exclude from the jury an answer made by a witness for the State to a question asked by counsel for appellant on cross-examination. This witness was a physician who examined the victim of appellant's attack a few hours after it occurred, and on his direct examination he was asked, and testified as to the girl's physical condition at the time he made the examination, and at the time of an examination previously made. On cross-examination he was asked a question, apparently designed to elicit from him an opinion that the physical condition of the girl, as found by him after the attack, indicated intercourse by mutual consent rather than carnal connection accomplished by force. The physician's answer was unfavorable to appellant and his counsel asked that it be excluded because the witness was "delving more into the field of a psychologist." The court refused the request.

In the first place, the general rule is that it is not error to refuse to exclude testimony elicited on cross-examination if the answer is responsive to the question. *Hopkins* v. *State,* 174 Ark. 391, 295 S. W. 361. Furthermore, appellant had in reality made this physician his own witness on this feature of the case, and, after doing so, was in no position to complain when his witness made what appellant thought an inappropriate answer.

It is next urged that the lower court erred in refusing instruction No. 8, asked by appellant, as to the quality of fear, on the part of the female, where she claims that she yielded through fear, that must be shown by the evidence in a case of this kind; and that the court erred in giving an instruction, on its own motion, which made reference to fear on the part of the assaulted female.

The girl assaulted did not testify that she yielded to appellant through fear. She testified that he beat her and kicked her and that she fought him for some time and until she was exhausted and could no longer protect herself. There was no testimony whatever indicating that the offense was accomplished by reason of fear on the part of the victim. The requested instruction was therefore abstract, and refusal to give it was not error. *Sims* v. *State,* 171 Ark. 799, 286 S. W. 981; *Withem* v. *State,* 175 Ark. 453, 299 S. W. 739; *Smith* v. *State,* 192 Ark. 967, 96 S. W. 2d 1. But, having asked an instruction on this subject, appellant cannot complain of the court's action in mentioning fear on the part of the female in another instruction.

The testimony in this case would have sustained a conviction of the crime of rape. Appellant, of course, cannot complain of the jury's leniency.

Affirmed.

CITY OF LITTLE ROCK *v.* GRIFFIN.

4-8463 210 S. W. 2d 915

Opinion delivered May 10, 1948.

T. J. Gentry, Frank H. Cox and *Rose, Dobyns, Meek & House,* for appellant.

Osborne W. Garvin, for appellee.

ED. F. MCFADDIN, Justice. This appeal is designed to present issues about the Little Rock zoning ordinance (No. 5420), and also as to whether the said ordinance conflicts with ordinance No. 5454. Neither ordinance is in evidence. We do not take judicial notice of municipal ordinances. *Strickland* v. *Little Rock,* 68 Ark. 483, 60 S. W. 26; *Gardner* v. *State,* 80 Ark. 264, 97 S. W. 48; *Drifoos* v. *Jonesboro,* 107 Ark. 99, 154 S. W. 196; *Skiles* v. *State,* 150 Ark. 300, 234 S. W. 721; *Lowe* v. *Ivy,* 204 Ark. 623, 164 S. W. 2d 429; *Little Rock* v. *Joyner,* 212 Ark. 508, 206 S. W. 2d 446. So, we must necessarily decide the appeal on general issues, rather than on the actual wording of the particular ordinances.

Paul Y. Griffin and J. Harry Leggett have been for many years partners doing business under the trade names of Griffin-Leggett Funeral Home and Griffin-Leggett Burial Association. We refer to these individuals as "Griffin-Leggett." Block 260 of the original City of Little Rock is bounded on the south by West Capitol Avenue; on the east by Chester Street; on the north by West Fourth Street; and on the west by Ringo Street. Lots 7, 8, 9, 10, 11 and 12 in said block 260 each has a frontage of 50 feet on Chester Street and a depth of 150 feet. Lot 7 is at the south end of the block and lot 12 is at the north end. In 1936, Griffin-Leggett acquired the east half of said lots 7, 8 and 9, and located their funeral home thereon (which is on the northwest corner of Capitol Avenue and Chester Street). Later, Griffin-Leggett acquired the west half of these lots 7, 8 and 9, and enlarged their business to include all of the three lots. A funeral chapel is a part of the business.

In 1946, Griffin-Leggett acquired lots 10, 11 and 12 in block 260, and removed therefrom two residences and a garage, in order to use the lots as a parking space for the vehicles of themselves, their employees, patrons and other persons attending services in the funeral chapel. On August 12, 1946, Griffin-Leggett petitioned the city

council as follows: The undersigned, owners of property at the southwest corner of West 4th and Chester Streets, described as lots 11 and 12, block 260, original City of Little Rock, hereby petition the council for permission to erect a five-foot stone fence around the above lots; the fence will be of stone and brick construction, will be attractive in appearance, and its main purpose will be to serve as a screen for cars that are parked for funeral services; attractive entrances will be provided."

The petition, as it appears in the transcript, does not include lot 10, but this lot seems to have been included in the permit issued by the city, and is treated in this case as so included. Likewise, on August 12, 1946, the city council granted the petition; the council minutes read: "There was then presented a petition from Griffin-Leggett Funeral Home for permission to erect a five-foot stone and brick fence around their property at the southwest corner of West Fourth and Chester Streets, which petition was filed in compliance with the terms of Ordinance No. 5454. Upon motion of Alderman Sims, seconded by Alderman Coffman, said petition was granted."

Immediately after receiving the above authority, Griffin-Leggett constructed around lots 10, 11 and 12 a stone and brick fence about five feet high, agreeing in architectural design with their buildings on lots 7, 8 and 9; and Griffin-Leggett graveled lots 10, 11 and 12, and have used them as a parking space for the vehicles of themselves, their employees, patrons and other persons attending services held in the funeral chapel. This litigation concerns such use of said lots 10, 11 and 12. Griffin-Leggett also attempted to persuade the City of Little Rock to rezone lots 10, 11 and 12 from "D (apartment) property" to "H (business) property" under some provision of the zoning ordinance (lots 7, 8 and 9 had already been so rezoned). Such rezoning of lots 10, 11 and 12 was not achieved; and these lots are hereinafter referred to as the "said lots."

On June 6, 1947, the city engineer of Little Rock ordered Griffin-Leggett to discontinue the use of said lots as a parking space; the engineer claiming that such use

was in violation of the zoning ordinance. Thereupon Griffin-Leggett filed this suit in the Pulaski Chancery Court against the city of Little Rock and the city engineer, alleging the facts substantially as above detailed, claiming their present use of the lots as a parking space to be legal under the city council's permission; and also claiming estoppel against any interference with such present use of the lots as a parking space. The prayer of the complaint was: "Wherefore, plaintiffs pray that the said use of said lots ten, eleven, and twelve be not interrupted, disturbed, or discontinued, that defendants be temporarily enjoined and restrained from interfering in any way or manner with the use of said lots, and upon final hearing pray that said injunctive order be made permanent, and for all proper and equitable relief."

Later, Griffin-Leggett filed an amendment to the complaint naming as additional defendants the members of the Board of Adjustment (which board was alleged to have been created under the Little Rock zoning ordinance). The prayer of that amendment was: ". . . plaintiffs pray as in the original complaint and alternatively pray that a mandatory injunction be issued directing the Board of Adjustment to permit the use of said lots, as described in the original complaint herein, for the reasons herein cited and as a duty imposed by law, and for all other proper and equitable relief."

All of the defendants in one answer denied all allegations in the complaint and amendment. Specifically, they claimed that, since the plaintiffs had been unsuccessful in all of their efforts to have said lots rezoned from "D (apartment) property" to "H (business) property," the plaintiffs should not obtain by court action the relief which the administrative agencies had denied them. This paragraph appears in the answer: "Defendants further state that said lots 10, 11, and 12 of block 260 of the original City of Little Rock even though the owners thereof have been denied the use of such property for commercial purposes that such owners are at this time using such property for commercial purposes, and have constructed driveways, and entrances upon said prop-

erty to facilitate the business of operating a funeral parlor. That such use is in violation of said Ordinance 5420."

Two property owners intervened; and made common cause with the defendants. The cause was heard by the chancery court on testimony of numerous witnesses taken *ore tenus*. The chancery court found all of the issues of law and fact in favor of the plaintiffs and entered a decree:

1. Permanently enjoining the defendants from interfering with the plaintiffs in the use of lots 10, 11 and 12 as a parking space;

2. Holding the Little Rock zoning ordinance to be void insofar as it pertained to the said lots; and

3. Reclassifying said lots from "D (apartment) property" into "H (business) property" under the zoning ordinance.

From that decree the defendants and interveners have appealed.

To review in this opinion all of the evidence would serve no useful purpose. Neither is it necessary to go into a lengthy discussion on the power of the courts to declare void a zoning ordinance insofar as particular lots are concerned. Some of our cases on zoning ordinances are: *Herring* v. *Stannus,* 169 Ark. 244, 275 S. W. 321; *Little Rock* v. *Pfeifer,* 169 Ark. 1027, 277 S. W. 883; *Little Rock* v. *Sun Bldg. & Dev. Co.,* 199 Ark. 333, 134 S. W. 2d 582; *McKinney* v. *Little Rock,* 201 Ark. 618, 146 S. W. 2d 167; *Little Rock* v. *Bentley,* 204 Ark. 727, 165 S. W. 2d 890; *Little Rock* v. *Joyner,* 212 Ark. 508, 206 S. W. 2d 446.

In the present case the plaintiffs (appellees here) proved that the city council had granted them a permit to use said lots for a parking space, and that the property had been so used for some time before the city engineer attempted to prohibit such continued use. As previously stated, we do not have in the record before us the ordinance No. 5454 under which the city council

granted the plaintiffs such authority; but the city by appropriate proceedings had the power to grant to the plaintiffs such use, and did execute such grant. We have previously copied the request and the action of the council thereon. That action could have superseded any necessity of the plaintiffs pursuing further the zoning matter. *Prima facie* it had that effect, insofar as the plaintiff's use of the lots as a parking space is concerned: and the evidence shows that such is the only use that the plaintiffs are making of the said lots. So we affirm all that part of the decree of the chancery court which enjoined the defendants from interfering with the plaintiffs' use of said lots as a parking space for the vehicles of themselves, their employees, patrons and all others using the facilities of the funeral home.

But the chancery court went further, and held the zoning ordinance void as to the said lots, and rezoned the lots into "H (business) property." The zoning ordinance is omitted from the evidence. A strong case was made here for rezoning and there is some evidence that relief might have been granted to the plaintiffs by the city authorities. Such remedies in this case should have been exhausted before recourse was had to the courts. We therefore reverse that portion of the decree of the chancery court which (1) held the zoning ordinance void as to lots 10, 11 and 12, and (2) rezoned the said lots into "H (business) property." But this is without prejudice to Griffin-Leggett's right to initiate further proceedings for a rezoning of the said lots if they desire to change the use from the present parking use to some other use. The costs of all courts are adjudged against appellants.

EVERETT *v.* STATE.

4496 210 S. W. 2d 918

Opinion delivered May 10, 1948.

Fred M. Pickens, Fred M. Pickens, Jr., and *Chas. F. Cole,* for appellant.

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

HOLT, J. Appellant was convicted of murder in the second degree and his punishment assessed at ten years in the State Penitentiary. The information charged that appellant murdered "Ralph Hedden by beating and kicking the said Ralph Hedden with his fists and feet," etc. From the judgment is this appeal.

The motion for a new trial contains twelve assignments of alleged errors. We consider them in the order presented.

1, 2, 3, 5, 6, 10 & 12

Assignments 1, 2, 3, 5, 6, 10 and 12, in effect, challenge the sufficiency of the evidence.

At about one p. m. on Sunday, September 7, 1947, appellant, Shelby Everett, and seven or eight others, including Ralph Hedden, the victim of his assault, engaged in a game of dice or "shooting craps," as it is commonly called, in Sherrill's pasture near Mountain Gap, Independence county. During the progress of the game, a dispute arose between appellant and Hedden over a dollar wager and a fight resulted between them. Both parties had been drinking liquor and neither was armed.

An eyewitness, Henry Rowens, gave the following version of the encounter: "When Hedden came up they quit poker playing and split up there and one bunch went one way and the other bunch they had a little crap game there and Shelby Everett was shooting and Hedden had him faded; and the dispute, it seems like, was over a borrowed dollar; . . . and then Shelby made his point and he told him he owed him a dollar and Hedden said he didn't have a dollar called or something like that; and Shelby just hit him and he just laid over and he kind of stamped him a little. . . . Mr. Hedden fell back and so he kicked at him a few times; and Hedden said he didn't want any trouble; and I said to Widney Everett: 'Don't let him stamp him up,' or something like that. I asked him to pull Shelby off and not let him stamp the man there; that he wasn't trying to fight . . . He had just fallen over on the cushion there and so he pulled him back and this fellow Hedden got up and ran a ways, and they both ran and Shelby caught him out there. . . . A. All he (Hedden) did was to throw his hand up over his head as he was lying there."

Dee Smart, who was present, testified: "A. Shelby just got up and crossed the table and hit him; and they got him off of him. Q. Did he knock him down? A. Yes, he just fell back there. Q. You say they got him off of him, did he do anything besides hit him? A. Well, he kicked him once. . . . Q. Who pulled him off of him? A. William Young and Fayette Everett, I believe it was.

Q. After they pulled him off, what happened? A. Well, the fellow (Hedden) got up and he ran. . . . A. Well, Shelby (appellant) caught him out there in the field and I wouldn't be sure whether he hit him or not, but he just fell, that is all I know of it. . . . Q. When he kicked at him, in what position was Mr. Hedden? A. He was lying forward. Q. On the ground? A. Yes, sir. Q. Who pulled him away that second time? A. I think it was Wid and William Young."

Hayden Sanders testified that as he was passing by on his horse he saw appellant running after Mr. Hedden, and quoting from his testimony: "I rode up to the opening and I saw Shelby running after Mr. Hedden and I heard Mr. Hedden say: 'Catch him, boys, don't let him hit me.' And then he said: 'Stop, stop.' So Shelby ran on and hit him and ran on by him four or five steps and he kicked at him as he ran by him; and then he turned back on him and stamped him. Q. And did you see Shelby Everett hit Mr. Hedden? A. I certainly did. Q. Did he knock him down? A. Yes, sir."

Dr. John Adametz testified that he was a resident physician at the Baptist Hospital in Little Rock and had occasion to examine Mr. Ralph Hedden who was brought to the hospital following appellant's assault on Hedden: "Q. What did you find, sir? A. I found that he had a skull fracture in the base of his skull. Q. Where was that? A. On the left-hand side in the back of his head. Q. Did you diagnose any further complications? A. Yes, we diagnosed by means of a spinal tap, we knew that he had blood in the spinal fluid and had some hemorrhage inside of the skull. Q. You mean you took some fluid from the spinal cord? A. Yes, from the spinal canal. Q. Was it cloudy? A. It was cloudy, sir, and pinkish red, indicating that there was relatively fresh blood in it. . . . A. He talked irrationally. Was not able to answer any of my questions coherently. He was neither orientated as to time nor as to place. . . . A. Yes, he (Hedden) died while at the hospital. Q. What was the cause of his death, if you know? A. The man died from cerebral hemorrhage or bleeding within the brain, to the

best of my knowledge. Q. In your opinion, Doctor, what would cause such a hemorrhage of that type? . . . A. In my opinion, in this particular case, we had X-rays of that skull of this patient and he definitely had a linear fracture on the left back part of his head; and it is my opinion that the hemorrhage was a result of this fracture. Q. You speak of this bleeding or cerebral hemorrhage, was it at one place in his head or two places? A. Prior to the autopsy I would not be able to answer that question, but at the time of the autopsy there was bleeding from more than one place, but I prefer that the pathology department discuss that one part of the case. Q. Then, in your opinion Ralph Hedden died as a result of a cerebral hemorrhage secondary to his head injury? A. That is correct."

Dr. W. R. Lee testified: "Q. I will ask you whether or not you did an autopsy with Dr. Adametz on the body of Ralph Hedden? A. That is right. Q. Doctor, judging from your findings there in making that autopsy, in your opinion, what caused the death of Ralph Hedden? A. It was our opinion that he died as a result of a skull fracture which in turn caused a hemorrhage into the brain. Q. Will you state, Doctor, just what you found relating to that brain injury or injuries? A. Yes. In the right area, frontal area of the brain, in this area all in here we found a mass of hemorrhage. There was a mass of hemorrhage —now this area of hemorrhage in the front part of the brain here was under the covering of the brain which we call dura-frontal. We also found in the back part of the brain, we found another area of hemorrhage which was above the dura. There was also a skull fracture in this region back here (indicating the left back part of the head). Q. Both these bleedings were causing a pressure on the brain? A. That is right. Q. As a result of that pressure, it caused him to die what kind of death? A. It was pulmonary; it was respiratory type of death. He had a pressure on the brain and the cord itself was blocked both ways from the brain to the lungs causing the lungs not to function. Q. In your opinion, could this injury up here have occurred from a blow back here? (indicating on back of the head). A. It was our opinion

that it did occur from the blow in the rear or back of the head. . . . Q. And it was as a result of this injury that he had to his head and to his brain that he died, in your opinion? A. Yes, sir."

Dr. Anderson Nettleship gave corroborative testimony and in addition testified: "A. Well, any force which would hit the brain, or hit the skull with a force sufficient to produce a jar or bouncing of the brain inside of the skull would produce the damage. We concluded the damage in this instance was recent. . . . Q. Doctor, is it possible to have a concussion of the brain without a skull fracture? A. Yes, very definitely so. . . . A. The immediate cause of death was edema of the brain, or pressure on the brain from the injuries to the back part of the head, caused this man to get in a pulmonary phase of shock from which it was impossible for him to recover. Q. What would an injury of that type be secondary to? A. It would be secondary to some force hitting the skull, or some blow upon the head; you can call it anything you want to, but it is some force hitting the skull."

Appellant, Everett, testified in his own behalf. He admitted he struck the deceased, Hedden, two licks, but denied that he kicked him or hit him in the back of the head.

We do not attempt to detail all of the evidence. It suffices to say that after considering it all, and when we give to it, as we must, its strongest probative force in favor of the State, the testimony was ample to warrant the jury's verdict of murder in the second degree. The evidence shows that as a direct result of the beating, kicking and stamping by appellant, of his victim, Hedden died four days later. Appellant was the aggressor from the beginning.

Appellant argues that "there is nothing in the proof offered by the State to indicate any intent to take life, a necessary element of murder in any degree." The rule is well settled in this State that "actual intent to take life is not a necessary element in the crime of murder in the second degree," *Brassfield* v. *State*, 55 Ark. 556, 18 S. W. 1040 (headnote 4).

In *Ballentine* v. *State,* 198 Ark. 1037, 132 S. W. 2d 384, we said: "We have many times held that actual intent to take life is not a necessary element of the crime of murder in the second degree. *Brassfield* v. *State,* 55 Ark. 556, 18 S. W. 1040; *Byrd* v. *State,* 76 Ark. 286, 88 S. W. 974. Malice, however, is a necessary element of murder, either in the first or second degree, and it must be either express or implied. Section 2967 provides: 'Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing manifest an abandoned and wicked disposition.' "

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In his fourth assignment, appellant says that "the Court erred in permitting the witness, Dr. John H. Adametz, over the objections and exceptions of the defendant at the time to testify in answer to the question as to what caused the hemorrhage of the type he had testified to as being found after the autopsy of the deceased, as follows: 'In my opinion, in this particular case we had X-rays of the skull of the patient and he definitely had a linear fracture on the left back part of his head—and it is my opinion that the hemorrhage was a result of this fracture.' "

There was no error in admitting this testimony. In one of our earlier cases, *Ebos* v. *The State,* 34 Ark. 520, Dr. Barry, a qualified physician and surgeon, testified that he made a post-mortem examination on the body of Mary Ebos; "that he found upon the right side of her head, just above the temple bone, a severe contused wound, about six inches in length, and from about one and a half to two and a half inches in width, to the skull. That the skull was not fractured, and he discovered no injury to it. . . . The attorney for the State then asked the witness his opinion as to the cause of the death of the deceased. . . . Witness then testified, in answer to the question, that such a wound as that upon the head of deceased might produce death, and frequently did, and that in his opinion, said wound did cause the death of the deceased by concussion of the brain."

This testimony was held to be properly admitted. See, also, *Brown* v. *State*, 55 Ark. 593, 18 S. W. 1051.

7, 8, 9

Appellant in his seventh assignment alleges that "the Court erred in refusing to permit the jury to consider the testimony of Widney Everett, a witness for and a brother to the defendant, wherein he stated that he went to the deceased where he was lying and says 'Ralph, do you want me to take you home?' And he says, 'No, I am just a little sick or drunk and I will be all right in a few minutes and that is when I left'," it being contended by appellant that this testimony was a part of the *res gestae*. The court properly directed the jury not to consider this testimony, as part of the *res gestae*, since it was undisputed that these words were spoken by Ralph Hedden after (fifteen minutes or more) the termination of the fight.

The court in *Johnson* v. *State*, 179 Ark. 274, 15 S. W. 2d 405, announced the rule on the admissibility of such testimony as follows: "Any act or declaration which is done or said after the fight was over is not a part of the *res gestae* and not admissible as a part of the transaction. *State* v. *Ramsey*, 48 La. Ann. 1407, 20 Sou. 904; *Spivey and Lynch* v. *State*, 114 Ark. 367, 160 S. W. 949."

Further objections of appellant to certain comments of the trial court before the jury on the testimony of Widney Everett were made. In this connection, it suffices to say that we have carefully examined these objections and find them to be without merit.

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Finally, appellant argues that error was committed by the court's refusal to give his offered instruction No. "A." The first sentence of this instruction contains this statement: "You are instructed that the evidence against the defendant is largely if not entirely circumstantial." The court properly refused to give this instruction for the reason that the prosecution here was based on direct, and not on circumstantial, testimony. The instruction

was abstract in effect, inherently wrong and was properly refused.

Appellant made no objections to any of the instructions given by the court, which fairly and fully declared the law applicable to the facts in a case of this nature.

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

DEWITT *v.* STATE.

4491 210 S. W. 2d 922

Opinion delivered May 10, 1948.

Robert E. Johnson and *Geo. W. Johnson,* for appellant.

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

GRIFFIN SMITH, Chief Justice. In May 1947 three hounds were stolen from Scott County citizens—two from Ben Harris and one from Jim Hawthorne. Four months later they were found in the possession of H. B. Sitz at Castle, Oklahoma. Ernest DeWitt, the accused, resides at Bartlesville, Okla., but was arrested at Henryetta, where he had formerly lived.

By information appellant was charged (a) with having stolen one of the Harris hounds, and (b) with feloniously receiving the dog knowing that it was stolen. He was convicted on the second count and sentenced to a year in prison.

Sitz, as a witness, admitted procuring the Harris hound from DeWitt. The seller said he bought it from

a man named Glover, who lived in Texas. In acquiring the dog Sitz traded DeWitt a hound that cost him $49.

Ted Houston, testifying for the State, quoted DeWitt as having said he bought three dogs from a stranger, and that in part the transactions occurred in front of Williams' stock barn at Ft. Smith. DeWitt told him he thought the man from whom he made the purchases lived in Scott County, near Waldron.

Thomas Powell, operator of a service station at Y-City, near Boles, in Scott County, testifying November 3, 1947, said he had seen the defendant at the station "two or three times" during the past five or six months. He qualified this with the assertion that the "two or three times" were not more than a month apart—"all three times were within a month."

The defendant testified that to a limited extent he bought and sold dogs, and would sometimes have more than half a dozen in his kennel. In connection with the dogs stolen from Harris and Hawthorne, he had made a purchase in front of the Williams barn. On cross-examination appellant testified that he frequently went to his father's home at Charleston. En route home on one occasion he saw "this man" at Williams' barn, leading a dog. The man told him his name, but it had been forgotten. Appellant paid $22.50 for a dog, put it in his car, and drove to Henryetta. During the conversation near the sales barn, the stranger told appellant he had another hound, a much faster hunter, and appellant became interested. About a week or two later the stranger brought the second dog to appellant's home. It was guaranteed to "outrun anything you put him up against." The dog appellant claims was brought to him by the stranger whose name had been forgotten was the one stolen from Harris, who identified it as having unusual "dew claws."

Appellant denied having been in Scott County. In this he was contradicted by Powell. Appellant admitted that in January, 1947, he was convicted for stealing a dog. The trial occurred at McAlester, Okla. Before being arrested on the charge of stealing the Harris hound, appel-

lant and his wife went to California, remaining there three days.

Counsel for appellant offered an instruction on circumstantial evidence. Since there is no direct proof that DeWitt received the dog in Scott County knowing it had been stolen, or in circumstances from which a reasonable person would have been put on notice, we feel that the instruction should have been given. Other errors are alleged, but inasmuch as the judgment must be reversed for failure to instruct in the respect mentioned, it becomes unnecessary to discuss them.

Reversed, with directions that the cause be retried.

HARRIS *v.* WHITWORTH, ADMINISTRATOR.

4-8528 211 S. W. 2d 101

Opinion delivered May 17, 1948.

W. Leon Smith, for appellant.

Marcus Evrard, for appellee.

SMITH, J. The present appeal is a continuation of the case of *Harris* v. *Whitworth, Adm.,* reported in 210 Ark. 198, 194 S. W. 2d 1017, the style of that case and this one being the same.

As appears from the former opinion, and from the record in the instant case, one C. H. Harris had attained the advanced age of eighty-eight years at the time of his death on March 19, 1945. He owned at the time of his death two farms, some city property, and valuable personal property, including two separate bank accounts, one of $12,000 and the other of $20,000, and United States bonds having a maturity value of $5,000. He was survived by two sons and two daughters. Frank Whitworth was appointed administrator of the estate.

Ancel Harris, one of the sons, who is the appellant here and was the appellant in the former cases, filed suit against the administrator in which he alleged that he and his father had entered into a partnership agreement in 1921 to operate as partners the farm property then owned

by his father, and certain city property, also owned by his father, and were to share in the profits and losses of the partnership, which relation continued until the death of his father, but that at the instance of his brother Gordon, and his sisters, Mrs. Burks and Mrs. Nation, an administrator had been appointed, who had wrongfully taken possession of all money and all of the personal property. He alleged that as surviving partner he was entitled to the possession of these assets for the purpose of winding up the partnership affairs, and that his demand for possession of this property had been refused. He prayed that the administrator be enjoined from listing this property as assets of the estate, and that the administrator be required to surrender the partnership assets to him.

Thereafter on May 11, 1945, appellant filed another suit against his brother and sisters, in which he sought specific performance of an alleged oral contract with his father, made in 1921, by which, as a part of the partnership contract, his father agreed to convey to him the smaller of the two farms, comprising 120 acres. Certain other facts are recited in the former opinion, which were developed in the instant case, and will be repeated here. Both cases were dismissed for the reason that the allegations of the complaints were not sufficiently established by the testimony, and the separate decrees in those cases were affirmed on the appeal to this court on the former appeal, for the reason that we were unable to say that the findings of fact by the court were against the preponderance of the evidence.

The decrees mentioned were rendered Feb. 1, 1946, but before they had been decided by this court, appellant filed on April 1, 1946, the claim which is the basis of this suit. In this claim it was alleged that the intestate, claimant's father, was indebted to him in the sum of $40,000 for services rendered by him to his father. Many witnesses testified and a large record was made on the hearing of this claim. Practically the same witnesses testified at that hearing as had testified at the original trial and in the final decree from which is this appeal, the court approved the action of the administrator in disal-

lowing the claim. The court made only the general finding that the testimony was insufficient to support the claim.

No formal plea of *res judicata* was interposed, but it is insisted that the original decree which this court affirmed on June 30, 1946 (*Harris* v. *Whitworth, Adm., supra*), is conclusive of this litigation, for the reason that substantially the same testimony was heard at the first trial which was offered at the second trial.

The holding and the effect of the former opinion was that appellant had not established the existence of a partnership with his father, nor had he proved a contract with his father to convey to him the smaller farm. There was no finding as to what services appellant had rendered his father, or the value thereof, as the pleadings did not raise that issue. It is true that practically the same testimony was offered in both cases to obtain the relief prayed in each case, but it is true also that the relief now prayed was not asked in the former case. It is true also that the parties were not the same. In appellant's first suit the administrator only was a party, and in his suit for specific performance, the administrator was not a party.

At the time of the filing of the suits first mentioned and at the time of the rendition of the decree by the Chancellor, in those cases, no claims had been filed with the administrator as provided and required by §§ 101 and 105, Pope's Digest, for the allowance of a claim against an estate. These statutes provide the procedure where one seeks to enforce a claim against an estate and their provisions had not been invoked until the present suit was filed.

At § 1256, p. 847, 34 C. J., it is said: "Causes of action which are distinct and independent, although growing out of the same contract, transaction, or state of facts, such as a claim for a sum due for work performed under a contract and a claim for damages for its breach, may be sued upon separately, and the recovery or judgment for one of such causes of action will not bar subsequent actions upon the others." Among the numerous cases cited in the note to this text are our cases of *Davis* v. *Dickerson,*

137 Ark. 14, 207 S. W. 436, and *Warmack* v. *Askew,* 97 Ark. 19, 132 S. W. 1013. In the case last cited a suit was brought upon two promissory notes. The defense interposed was that the notes were given for the purchase price of a patented article, which were void, for the reason that they did not show that fact upon their face. After the expiration of three years from the date of same, the plaintiff amended his complaint to sue on the account. It was held that the amended complaint stated an entirely new and distinct cause of action, and was barred by the Statute of Limitations, notwithstanding the fact that the original suit was filed within three years after the cause of action accrued. In the opinion last cited it was said:

"In the case of *Roth* v. *Merchants' & Planters' Bank,* 70 Ark. 200, 66 S. W. 918, 91 Am. St. Rep. 80, the court held that the failure to comply with the statute in regard to the execution of a note given for a patented machine, implement, substance or instrument does not affect the validity of the sale, but only renders the note absolutely void; and that an adverse judgment in a suit on the note is no bar to an action upon the contract of sale. See, also, *Tillman* v. *Thatcher,* 56 Ark. 334, 19 S. W. 968."

In the Roth case, *supra,* Judge Battle quoted from the case of *Russell* v. *Place,* 94 U. S. 608, 24 L. Ed. 214, as follows: "To render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be cancelled was necessarily tried or determined,—that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter."

Following that statement Judge Battle then said: "In *Shaver* v. *Sharp County,* 62 Ark. 78, 34 S. W. 261, it is said: 'That which has not been tried cannot have been adjudicated. . . . That which is not within the scope of the issues presented cannot be concluded by the judgment.' See, also, *Dawson* v. *Parham,* 55 Ark. 286, 18 S. W. 48; *McCombs* v. *Wall,* 66 Ark. 336, 50 S. W. 876;

Cromwell v. *County of Sac,* 94 U. S. 351, 24 L. Ed. 195; *Davis* v. *Brown,* 94 U. S. 423, 24 L. Ed. 204.

"The same rule obtains as to cross-claims, set-offs and recoupments. The defendant in an action against him is not bound to set up such claims, if he has them, but it is generally optional with him to do so or not. *McWhorter* v. *Andrews,* 53 Ark. 307, 13 S. W. 1099; 21 Am. & Eng. Enc. Law (1st Ed.) 224, and cases cited."

The cases of *Davis* v. *Dickerson, supra,* and *Gray* v. *Bank of Hartford,* 137 Ark. 232, 208 S. W. 302, are to the same effect. A headnote to the case of *Whitmore* v. *Scoggin,* 147 Ark. 236, 227 S. W. 610, reads as follows: "The dismissal of a suit in equity to compel specific performance of a contract will not bar an action at law to recover damages for breach of such contract; the issues in the two actions being different."

At § 1227, p. 806, 34 C. J., Chapter on Judgments, it is said: "Where a plaintiff is defeated in an action based upon a certain theory of his legal rights or as to the legal effects of a given transaction or state of facts through failure to substantiate his view of the case, this will not as a rule preclude him from renewing the litigation, without any change in the facts, but basing his claim on a new and more correct theory. This rule applies where plaintiff bases his claim in the second suit upon a different right or title from that set up in the first action, provided the two titles are so inconsistent that they could not both have been brought forward in the same action; where he alleges a different ground of liability on the part of defendant, where he fails to establish defendant's liability under a written instrument, and afterward seeks recovery as on a resulting trust or on the ground of fraud or mistake; where, having failed to establish a specific lien on property, he sues again on the ground of the personal liability of defendant; where, having sued for the price of property and failed to prove a sale, he brings a new action for its use or detention, where an unsuccessful attempt to enforce a liability under a statute is followed by an action to hold the same defendant liable on the same facts as at common law or *vice versa,* where two

actions are brought under different statutes, or where, after an adverse decision in an action brought under a state law, plaintiff sues in the state court under a federal law. And a similar rule obtains in equity; where the equities of a second bill are materially different from the first, although the origin of both is the same, the adjudication of the first is no bar to the second."

A number of our cases on the subject are cited and reviewed in the case of *Hicks* v. *Norsworthy,* 176 Ark. 786, 4 S. W. 2d 897, where it was held that the unsuccessful attempt of a husband to show that he was the absolute owner of a tract of land did not thereby preclude him from later asserting that he had an estate by curtesy in the land. After stating that under the provisions of the code a defendant in an action at law must interpose all defenses legal and equitable that he has, the court proceeded to say: "That is true, and if the plea of *res judicata* was made against the person who was defendant in the former suit, he would have had to interpose all the defenses he had in the former suit. But certainly plaintiff was under no obligation to bring a suit alleging that he was entitled by curtesy because his wife owned the property, when his suit was based on the claim that he himself was the owner of the property." See, also, *Hatch* v. *Scott,* 210 Ark. 665, 197 S. W. 2d 559, and *Dumas* v. *Smith,* 210 Ark. 1057, 147 S. W. 2d 1013.

The present suit is based upon a claim for services performed and while it was shown in the former cases that services were performed, the only questions in issue on the former appeal were whether or not there was a contract to convey an interest in land and also whether a partnership contract existed.

We conclude, therefore, that the appellant having failed to establish an express contract and having mistaken the proper action he should have brought, he yet has the right to prosecute the claim in which he seeks to recover against the estate on a *quantum meruit* basis.

The record in the instant case is a very voluminous one as twenty-one witnesses, including appellant, testified in his behalf, and the testimony of thirteen witnesses

was heard in opposition. There are many conflicts in this testimony which cannot be reconciled, but there are certain facts which are established by the undisputed testimony, or by the great preponderance thereof. One fact which is not disputed is that for a number of years appellant performed services for his father, of great value, and the testimony shows that these services were rendered upon the expectation that he would be compensated. Indeed the expectation arising out of an implied, if not an express promise to pay, is not denied. The contention is not that they were not to be paid for, but rather that payment had been made as the services were performed.

In the case of *Wilson* v. *Dodson,* 203 Ark. 644, 158 S. W. 2d 46, it was said that where a suit is brought by a child for services rendered the parent, the burden is upon the child to prove that they were of such extraordinary character that the parent would not expect the child under such circumstances to render such services without compensation. They must be of the nature that they could not be attributed to any filial duty or obligation. This family doctrine rule invoked by appellee which if applicable would deny appellant compensation has no application here for the following reasons among others.

Appellant was not a child, but was a man over fifty years old, and had a family of his own who, however, did not reside with him at all times. While appellant resided on his father's farm, the home was his. The testimony shows that as appellant's father advanced in years, after the death of his wife in 1920, he depended more and more upon appellant until finally appellant apparently had sole control of the farms and livestock which the decedent owned. So complete was appellant's control of the farm and livestock that a neighbor testified that he supposed appellant was the owner. He sold the cattle in market, made settlements with tenants and with day laborers. The testimony shows that he gave close and efficient attention to his father's affairs. He arose early and worked until late in the day and frequently into the night. He did the blacksmith work and performed many other labors which mere filial duty or obligation would not have required. He was paid no fixed wages or salary, but was

given such money as his personal and household expenses required.

There was testimony that decedent said he had paid appellant as he did other laborers, but this testimony if competent is not to be credited. Appellant's mother was afflicted with tuberculosis and it became necessary for her to reside in a higher altitude, which involved such expenses that decedent placed a mortgage on one of his farms in 1921, and it was eleven years before any part of the principal was paid. After appellant apparently had taken over the management of his father's business, the financial condition of decedent substantially improved until at the time of his death the mortgage had been discharged, and a valuable personal estate had been accumulated. According to appellant this had all been done under a contract with his father which made him an equal partner in his father's operations. The opinion in the former appeal is conclusive of the fact that no such contract existed, but it is not conclusive of the fact that the services were rendered without expectation of payment, or that payment had been made. A Mrs. Meharg testified that she always paid her rent to appellant and further, "I thought I was devoted to my parents, but nothing like he (appellant) was to Uncle Charlie (as decedent was commonly called). Ancel (appellant) had the duty of looking after him (decedent) as well as looking after the business." Appellant gave testimony as to his contract and relationship with his father, and as to the services rendered pursuant thereto and their value. The competency of this testimony is one of the principal questions discussed in the briefs of opposing counsel. Appellant says the decree from which is this appeal could not have been rendered unless this testimony is entirely disregarded and he apparently makes the concession that his case is dependent upon this testimony.

Upon the authority of the case of *Campbell* v. *Hammond,* 203 Ark. 130, 156 S. W. 2d 75, we hold that the testimony of appellant was in fact incompetent, but we do not concur in the view that appellant's case was dependent upon his own testimony. The incompetency of appellant's own testimony is conceded, but it is contended

that the incompetency was waived by the introduction of testimony on the part of appellee as to the transactions between appellant and his father. Section 5154, Pope's Digest, reads as follows:

"In civil action, no witness shall be excluded because he is a party to the suit or interested in the issue to be tried. Provided, in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party."

The provisions of the statute may be waived, and it was held in the case of *Lisko* v. *Hicks,* 195 Ark. 705, 114 S. W. 2d 9, that they were waived when testimony in contravention of the statute was offered and admitted without exception thereto when offered. Here the testimony was objected to when offered, but it is insisted that appellee made the provisions of the statute inapplicable by offering testimony contravening the statute, but we do not so understand the record. Appellant offered the testimony of witnesses, not parties to the suit, who were fully competent to testify, tending to show a contract between himself and his father, and it was therefore competent for appellee to offer testimony of other witnesses, not parties to the suit, and therefore competent, to testify to refute this testimony without waiving the inhibition of the statute.

However, it was held in the Campbell case, *supra,* that: "It is true that the probate court is still a court of law as was held in *Young* v. *Young,* 201 Ark. 984, 147 S. W. 2d 736, where we said: 'Although probate courts are presided over by the chancellor, they continue to be courts of law.' But this fact does not preclude us from trying such cases *de novo* under said amendment," No. 24, which amendment conferred probate jurisdiction upon the chancery courts.

Appellant's concession, if indeed he intended to concede, that his case was dependent upon his own testimony, does not prevent us from trying the case *de novo.*

That duty remained, the concession to the contrary notwithstanding, and in our opinion the testimony apart from that of appellant himself, abundantly supports the finding which we make, that appellant's services were performed under the expectation of payment and pursuant to the promise of compensation. *Williams* v. *Walden,* 82 Ark. 136, 100 S. W. 898. The testimony of a number of witnesses, not parties to the suit, is to the effect that decedent recognized his obligation to appellant and contemplated compensating him in addition to what he had been paid.

The preponderance of the testimony is that appellant's services were reasonably worth as much as $150 a month, in addition to his necessary living expenses which had been paid, and we think he should have judgment for that sum, totaling $1,800 per year, but this recovery should be for only three years, § 8928, Pope's Digest, a grand total of $5,400.

The judgment of the court below will, therefore, be reversed and the cause remanded with directions to render judgment in appellant's favor for $5,400 and all cost of the suit.

HORN *v.* SCHOOL DISTRICT NO. 23 OF SEARCY COUNTY.

4-8539 211 S. W. 2d 107

Opinion delivered May 17, 1948.

N. J. Henley and *J. F. Koone,* for appellant.

Opie Rogers, for appellee.

ROBINS, J. Appellants, electors of School District No. 1 of Searcy county, seek to reverse judgment of the circuit court by which the action of the County Board of Education in consolidating that district with School District No. 23 was affirmed.

The only question posed is whether, after petition for consolidation (as authorized by § 11481, Pope's Digest) is filed with the Board of Education, and notice thereof given, but before the same is acted on by the county board, supplemental petitions, asking for the consolidation, signed by electors not on the original petition, may be filed and taken into account by the board in determining whether the consolidation is favored by a majority of the district's electors.

In the case at bar it appeared that there were 40 electors in the district; so that 21 qualified signers on the petition were required. The petition involved herein was signed by 27 persons, of whom it was shown six were not electors, leaving thereon 21 valid signatures. Of these, four signers, shown to be electors, filed written requests, under the provisions of the statute (§ 11481, Pope's Digest), before the board acted on the petition, to have their names taken therefrom. Thus, there was left a total of only 17 proper signatures on the petition. Thereafter, and before any action by the board, seven persons, claiming to be electors of the district, filed petitions asking that the consolidation, as prayed for in the original petition, be made. The circuit court held that these persons should be counted as signers of the original petition, thus arriving at the conclusion that the petition was signed by a majority of the voters of the district.

We have not heretofore had occasion to pass on this question. However, in holding, in the case of *Dansby School District No. 34* v. *Haynes School District No. "H,"* 210 Ark. 500, 197 S. W. 2d 30, that electors who

had, before the Board of Education acted, made written request that their names be taken from a consolidation petition, might have their names reinstated on the petition, we said: "It is essential, of course, that the petition when filed contain the requisite majority, but the question whether it did contain that majority is to be determined as of the time the petition is presented to the board for final action. Prior to that time names appearing upon the petition may be stricken upon the written demand of the elector who had signed, but even so it may be restored provided the elector makes written demand that this be done, and the instrument referred to as the third petition was such a demand. *This demand does not add a new name to the original petition,* it merely restores a name to the petition which appeared thereon when it was filed." (Italics supplied.)

The Legislature, which has plenary power to regulate the organization and affairs of school districts, expressly provided that any person who had signed a petition for consolidation might, before the petition was acted on by the county board, have his name stricken from the petition.

But the Legislature did not authorize the addition of new signatures to the petition after it was filed nor did it authorize the filing of additional petitions, after the original petition was filed and the required notice thereof given. Since the lawmakers authorized the withdrawal of names from such petition, they must have realized that the exercise of this right might, in some cases, reduce the number of signers on a petition to less than the required majority.

The fact that, with knowledge of this possibility, the Legislature did not see fit to extend to the promoters of the consolidation the right, after filing of the petition, to obtain other signatures or file additional petitions is highly significant, and we think it must be taken as indicative of a legislative intent to withhold such a right. *Watkins* v. *Wassell,* 20 Ark. 410; *Little Rock & Fort Smith Railroad Company* v. *Clifton,* 38 Ark. 205; *Cook, Commissioner of Revenues,* v. *Arkansas-Missouri Power Corporation,* 209 Ark. 750, 192 S. W. 2d 210.

We conclude, therefore, that the lower court erred in holding that the additional petitions and requests for consolidations filed after the notice of filing of the petition was given, were in reality a part of the original petition; and for that error the judgment is reversed and the cause remanded with directions to grant a new trial and for further proceedings not inconsistent with this opinion.

MORGAN *v.* STATE.

4501 211 S. W. 2d 108

Opinion delivered May 17, 1948.

Cecil E. Johnson, Jr., and *Abe Collins,* for appellant.

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

MINOR W. MILLWEE, Justice. Appellant was indicted by the grand jury of Little River county for feloniously embezzling certain beans, the property of I. S. Cates. A petit jury found him guilty of grand larceny and fixed his punishment at one year in the state penitentiary.

I. S. Cates was harvesting a crop of soy beans on his farm near Foreman, Arkansas, in October, 1947, when he employed appellant as a truck driver in hauling the beans from the farm to the oil mill at Ashdown, Arkansas. As each load of beans was delivered to the oil mill, appellant was furnished a delivery ticket, which he returned to his employer, showing the weight of each load. Over appellant's objection that the weight tickets would be the best evidence of what they showed, Cates was permitted to testify that said tickets disclosed a discrepancy in weights involving a shortage of from 500 to 800 pounds on each load, after the first few loads hauled by appellant.

The witness further testified, over appellant's objection, that he took eight of the tickets showing the largest loads and eight showing the smallest loads and made a calculation based on the two groups of tickets, which disclosed a variation, or total shortage, of approximately 8,000 pounds of beans hauled by appellant. It was also shown by the witness that the weight tickets were at his home and could be produced within an hour. Appellant objected to all the testimony concerning what the weight tickets showed, and the calculations made by the witness from them, because it was based on records in possession of the witness which were the best evidence and should have been produced. The trial court overruled the objections to which exceptions were duly saved. Assignments 4, 5, and 6 in appellant's motion for new trial challenge the correctness of the trial court's ruling in the admission of this testimony.

In 20 Am. Jur., Evidence, § 403, it is said: "It is an elementary principle of the law of evidence that the best evidence of which the case in its nature is susceptible and which is within the power of the party to produce, or is capable of being produced, must always be adduced in

proof of every disputed fact. Secondary evidence is never admissible unless it is made manifest that the primary evidence is unavailable, as where it is shown that it has been lost or destroyed, is beyond the jurisdiction of the court, or is in the hands of the opposite party who, on due notice, fails to produce it." It is further stated at § 407 that this principle is not restricted to public documents and writings, but applies with equal force to a private writing; and where the contents of such writing are in issue, the instrument itself is the best evidence thereof, and must be produced or its absence legally accounted for and excused.

At § 433 of the same work it is said: "Secondary evidence of the contents of writings is admitted upon the theory that the original cannot be produced by the party by whom the evidence is offered within a reasonable time by the exercise of reasonable diligence. Until, however, the nonproduction of the primary evidence has been sufficiently accounted for, secondary evidence is not ordinarily admissible. This rule applies to criminal, as well as civil, suits." See, also, 32 C. J. S., Evidence, § 828; *Finn* v. *State,* 127 Ark. 204, 191 S. W. 899.

We conclude that the court erred in admitting oral evidence of the contents of the weight tickets and the calculations of the witness, Cates, based thereon. This evidence was relevant to the issue of appellant's guilt. The tickets were in possession of the witness and could have been produced within a reasonable time. Under these circumstances, admission of secondary evidence of the contents of the tickets constituted prejudicial error calling for reversal of the judgment.

Appellant also filed a motion in arrest of judgment in which he challenged the sufficiency of the verdict on the ground that he was found guilty of grand larceny when he was indicted and tried for embezzlement. Appellant was indicted and tried under § 3151 of Pope's Digest, which provides that any agent, or employee, who shall embezzle property of his employer "shall be deemed guilty of larceny, and on conviction shall be punished as in case of larceny." Section 3153 of Pope's Digest, as

amended by Act 323 of 1947, dealing with embezzlement by a bailee contains a similar provision. The trial court followed the language of the statute in his instructions to the jury and appellant made no objection to these instructions. The verdict of the jury finding appellant guilty of grand larceny was in accordance with the terms of the statute. It is not contended that the statute is invalid or unconstitutional and the court did not err in overruling the motion in arrest of judgment on this ground.

This brings us to the second ground urged by appellant in his motion in arrest of judgment, *i. e.*, that the facts stated in the indictment do not constitute a public offense amounting to a felony since the indictment does not allege the value of the property embezzled. While the value of the property alleged to have been embezzled is not set out in the indictment, it is alleged that appellant feloniously embezzled and converted the beans to his own use. Under our statute (§ 2922, Pope's Digest) a felony is defined as an offense punishable by death or imprisonment in the penitentiary. Since the cause must be retried on account of the error in the admission of testimony, and in view of the provisions of §§ 3851-3853 of Pope's Digest, as construed by this court in *Underwood* v. *State,* 205 Ark. 864, 171 S. W. 2d 304, we find it unnecessary to decide whether the indictment is defective in failing to allege the value of the property alleged to have been embezzled. On remand of the cause for a new trial, the state may determine to either file a new charge or amend the present indictment.

For the error in admitting oral testimony of the contents of the weight receipts, the judgment must be reversed and the cause remanded for a new trial.

WALTERS *v.* WALTERS.

4-8444 211 S. W. 2d 110

Opinion delivered May 17, 1948.

Curtis L. Ridgway and *Richard M. Ryan,* for appellant.

Hebert & Dobbs, for appellee.

HOLT, J. Appellant, Margaret F. Walters, and appellee, Howard Walters, were married in Omaha, Nebraska, in August, 1929. No children were born to this union. They separated in January, 1944. In March, 1945, appellee sued his wife for divorce in Douglass county, Nebraska, and shortly thereafter this suit was dismissed at his insistance. October 18, 1946, appellee filed another suit in Nebraska against his wife for divorce and this suit he dismissed January 15, 1947. While this latter action was still pending in the Nebraska court, appellee moved to Hot Springs, Arkansas, on November 7, 1946, and on January 16, 1947, one day after the dismissal of the Nebraska suit, filed the present action for divorce, in Arkansas, alleging as grounds that he and appellant had lived separate and apart, and had not cohabitated as husband and wife for more than three years before the institution of the cause, and further alleged indignities such as to render his condition

intolerable (§ 4381, Pope's Digest, Sub-sections 7 and 5 respectively).

Appellant answered with a general denial,—except admitting the marriage and that no children had been born,—and specially pleaded that appellee had failed to establish the jurisdictional ground of residence in Arkansas as required under the "First" Sub-division of § 4386 of Pope's Digest, which provides: "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." She also filed a cross complaint in which she alleged, in effect, that appellee had been guilty of such indignities and intolerable treatment toward her as to render her condition intolerable, again challenged the jurisdiction of the trial court, and her prayer was that she be granted a decree of divorce, alimony and for certain money alleged to have been loaned her husband, costs, etc. Upon a trial of the cause, the court found (quoting from the decree): "That the plaintiff (appellee) is a *bona fide* resident of the County of Garland, State of Arkansas; that the court has full and complete jurisdiction of the parties hereto and of the subject matter of this action; that the parties hereto have lived separate and apart for more than three consecutive years, without cohabitation, next before the commencement of this suit and that the plaintiff is entitled to a decree of absolute divorce," and entered a decree accordingly. This appeal followed.

At the outset, we are met with the earnest contention of appellant that the trial court lacked jurisdiction for the reason that appellee, at the time the present suit was filed January 16, 1947, was not a *bona fide* resident of the State of Arkansas within the meaning of the section of the statute, *supra* (§ 4386).

After a careful review of the record, we have reached the conclusion that this contention must be sustained.

The testimony discloses that the parties here were residents of Omaha, Nebraska, from the date of their marriage, 1929, until their separation in January, 1944.

As above indicated, appellee filed two separate suits in Nebraska against appellant for divorce, the first he dismissed shortly after it was filed, and the second, which he filed October 18, 1946, he dismissed January 15, 1947, just one day before he filed the present suit in Garland County, Arkansas. Appellee, in his second Nebraska suit of October 18, 1946, alleged "that the parties are residents of Omaha, Douglass county, Nebraska, and have been for several years last past."

He testified: "Q. That suit was filed on the 18th day of October, 1946, was it not? A. About that time as I recall. Q. And at that time you were a citizen and resident of Omaha, Nebraska? A. If I hadn't been my attorney would not have filed the suit, I presume. Q. Were you a citizen and resident of Omaha, Nebraska? A. I was a citizen of the State of Nebraska. . . . Q. And notwithstanding all that, on the 15th day of January, 1947, which was the day before you filed your suit here in the Garland Chancery Court, you dismissed that cause of action? A. That is right. . . . Q. You would have accepted a divorce in Nebraska if you could have gotten it? A. If it had been granted before I had to come. Q. When did you decide to make your residence in Hot Springs? A. In the early fall prior to January when I came down here after my conversation with Mr. Roberts about the merits of this proposition here. Q. Why didn't you dismiss your suit then when you came away from Nebraska? A. Because I didn't know—I hadn't definitely made up my mind—why didn't I dismiss it before I left? Q. Why didn't you dismiss your suit, if you knew you were coming to Hot Springs to live, the day you left Nebraska? A. I figured there was ample time to do that after I moved here. Q. You still had that suit pending when you moved here? A. Yes."

He further testified that he came to Hot Springs November 7, 1946, to work for the Sleepy Valley Mineral Water Company and had resided in Hot Springs since; that his intentions were to remain and make his home in Hot Springs; that he lived at 621 Park Avenue.

The principles of law announced in the recent case of *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585, and *Swanson* v. *Swanson,* 212 Ark. 439, 206 S. W. 2d 169, are controlling here.

In the Swanson case, referring to our holding in the Cassen case, we said: "In that case we held that a plaintiff must be a *bona fide* resident of Arkansas, and have the *animus manendi* (the intention of remaining)—that is, he must be domiciled here—before he can invoke the jurisdiction of the courts of this State to obtain a divorce." In the Cassen case, we held: (Headnote 4) "The essential as to *bona fide* residence must exist not only at the time the decree is rendered, but must also have existed at the time the suit was filed."

Whether appellee was a *bona fide* resident of Arkansas with the intention of remaining here and making this his home, at the time the suit was filed and the decree rendered, was purely a question of fact, and we hold, on the testimony presented, largely on that of appellee himself, that the great preponderance of the evidence showed that he was not such *bona fide* resident. Of much significance, and bearing upon appellee's intention as to establishing residence in Arkansas, was his admission that until the day before the present suit was filed in Hot Springs, there remained on file in a court in Douglass county, Nebraska, his suit, *supra,* for divorce, in which he alleged and claimed that he was a resident and citizen of Nebraska. Also of significance was his admission, in effect, that he was ready and willing at all times to accept the fruits and benefits of that suit until the very date of its dismissal, which was one day before the present suit was filed, and his testimony when asked why he did not dismiss the Nebraska suit the day he left for Arkansas, answered: "I hadn't definitely made up my mind. . . . I figured there was ample time to do that after I moved here."

For the error indicated, the decree is reversed and the cause dismissed.

HAYES *v.* TIGGINS.

4-8505 211 S. W. 2d 112

Opinion delivered May 17, 1948.

C. M. Martin, for appellant.

J. Bruce Streett and *Rowell, Rowell & Dickey,* for appellee.

GRIFFIN SMITH, Chief Justice. The appeal is to reverse a decree directing that the oral contract appellee asserted be specifically performed by conveyance of real property. The parties were formerly husband and wife. During the marital relationship they acquired by the entirety a house and lot in the City of Camden, having paid $300 for the property in 1936.

Cubie Hayes moved to Nebraska. Following a divorce in 1942 Cubie, according to his testimony, paid taxes on the property at Camden for 1944, but thereafter neglected to do so. Appellee testified that Cubie returned to Camden, and in October 1946 talked with her by telephone at Pine Bluff. At that time there was an offer by the former husband to sell his interest in the realty for $125, and an acceptance. The day following this conversation Christine procured two postal money orders payable to Cubie, one for $25 and the other for $100.

Christine testified that after talking with Cubie she consulted a lawyer, who prepared two deeds. In one of these she conveyed to her uncle, Albert Gordon, it being

contemplated by her that Cubie would execute the same document. The other deed would have been a transfer of title from Gordon to appellee. In transmitting the papers to her uncle, Christine wrote: "I am sending you the amount of $125 to hold until Cubie signs this quitclaim deed. . . . He is crazy anyway, and I rather not come in contact with him any more. . . . Let me know what you or he did about it by return mail. . . . I notified Cubie that I was sending the money to you. Please contact him . . . at your earliest convenience."

On cross-examination Christine admitted that Cubie did not tell her to send the money and deed, "But I thought that was the proper way. . . . He did not tell me he would sign the deed."

Albert Gordon testified that he received the deeds and money orders from Christine, but had not formerly communicated with her regarding the transaction. The first information came to him with the letter and papers. He tried on several occasions to find Cubie, but failed.

Cubie Hayes testified that he had been working in Omaha, sometimes earning as much as $75 per week; and after leaving Arkansas he sent money to his wife. The purpose in returning to Camden was to see about his furniture, and rentals. His understanding was that the property had been let for $9 a week. Explaining the conversations with Christine, Cubie testified that he called her regarding the furniture, some of which she had moved.—"I told her I was entitled to part of it. I mentioned some of the things: the living room suite, gas stove, couch, and a few other items I had paid for, including an ice box. . . . She wouldn't talk about the rents; said she would see her lawyer. Then I told her I would take $125 for my part of the rents and furniture. Nothing was said about selling the house. . . . She didn't mention Gordon to me. I didn't see him, or know he had anything to do with it."

There was testimony by persons who claimed to have heard Cubie talking with Christine, and by others who said they heard Christine talking with Cubie. Each wit-

ness, in the main, supported what the principal had said. Cubie testified he had saved $450 at the time the property was bought, and from this the $300 payment was made. Christine just as positively testified that her money was used, and that she asked the seller (H. M. Pace) to put Cubie's name in the deed. She then said that she "gave" her husband money with which to pay for the property.

The Chancellor, in decreeing specific performance, said that in his opinion Christine's money was paid to Pace. It is our view, however, that when the testimony is considered as a whole it is not sufficiently convincing to justify the decree.[1] Christine, while answering that she did not know what the property was worth, would not say the value was less than $2,000. In response to the question, "What would you say the place was worth in October, 1946," she replied, "I imagine a thousand dollars or more." Another witness thought $1,200 was a fair price.

There are strong circumstances sustaining appellant's contention that the offer to sell for $125 had reference to the interest he claimed in furniture and rentals. We do not think the burden of proving a valid contract was met, and the decree must be reversed, each litigant to pay half of the costs. It is so ordered.

COOLEY *v.* STATE.

4495 211 S. W. 2d 114

Opinion delivered May 17, 1948.

Rehearing denied May 31, 1948.

[1] The complaint did not say whether the contract relied upon by the plaintiff was written or oral; hence the statute of frauds was not pleaded.

Talley & Owen, for appellant.

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

Ed. F. McFaddin, Justice. Appellant, Robert Cooley, was tried on an information charging him with the crime of murder in the second degree, for the homicide of John L. Williams, alias William K. Tatum. From a conviction of voluntary manslaughter and a sentence of two years in the penitentiary, there is this appeal. The motion for new trial contains 16 assignments, which we group and discuss in topic headings.

I. *The Sufficiency of the Evidence.* This embraces assignments numbered 1, 2, 3, 5, 10 and 11 in the motion

for new trial. It was admitted that appellant killed the deceased: self-defense was the plea. The evidence viewed most strongly for the State (as we do on appeals in criminal cases like this[1]) discloses that appellant shot and killed the deceased near a tavern or road house in Pulaski county. The deceased first had a difficulty with a witness named Emmet Williams. When appellant's wife intervened, the deceased turned on her; and then appellant entered the affray. He hit the deceased, and then—after retreating into the darkness—shot the deceased while he was not then approaching or pursuing the appellant. There was sufficient evidence to take the case to the jury, and to support the verdict rendered.

II. *Amending the Information.* This embraces assignments numbered 6, 7, 8, 9 and 12 in the motion for new trial. The information as originally filed gave the name of the deceased as John L. Williams. Preliminary to presenting the case to the jury, the court—after hearing witnesses—allowed the State to amend the information to show that the deceased also went under the name of William K. Tatum. There was no error committed by the court in this regard. The identity of the deceased was known to the appellant; and the adding of the various aliases could not possibly have affected his plea of self-defense. See § 24 of Init. Act 3 of 1936, as found on p. 1384 of the Acts of 1937, which is now § 3853, Pope's Digest; *Bennett* v. *State,* 201 Ark. 237, 144 S. W. 2d 476, 131 A. L. R. 908; *Tate* v. *State,* 204 Ark. 470, 163 S. W. 2d 150; and *Underwood* v. *State,* 205 Ark. 864, 171 S. W. 2d 304.

III. *Use of Written Statements of Witnesses.* This embraces assignments numbered 13 and 16 in the motion for new trial. In the investigation of the homicide the prosecuting attorney had taken written statements from some of the witnesses. When they proved forgetful, or reluctant to testify, the court allowed the prosecuting attorney to refresh their memories from such statements. There was no error committed in this respect; see *Combs*

[1] See *Coffer* v. *State,* 211 Ark. 1010, 204 S. W. 2d 376; and, also, cases collected in West's Arkansas Digest, "Criminal Law," § 1144 (13).

v. *State,* 163 Ark. 550, 260 S. W. 736; and *Crafford* v. *State,* 169 Ark. 225, 273 S. W. 13.

IV. *Rebuttal Testimony.* This embraces assignments numbered 14 and 15. When the appellant was testifying he said he did not shoot at Louis Gray, and also that he did not "shoot up" Mose Edwards' tavern just a few days before the homicide here involved. On rebuttal, the State was allowed to prove:

(a) by Louis Gray, that the appellant did shoot at him; and

(b) by Mose Edwards, that the appellant shot a pistol six times at Mose Edwards' place of business just a few days before the homicide.

The appellant claims that this rebuttal was improper and prejudicial, and cites *Carlley* v. *State,* 191 Ark. 363, 86 S. W. 2d 36. But the cited case affords appellant no support. In it, certain testimony about the defendant's conduct was introduced in the State's case in chief; and we held that it was prejudicial because it cast an additional burden on the defendant prior to his defense testimony. Here, the defendant took the witness stand, and made some sort of denial about having or using a pistol. Certainly, the trial court did not abuse its discretion in admitting the challenged testimony by way of rebuttal. *Bobo* v. *State,* 179 Ark. 207, 14 S. W. 2d 1115.

V. *Alleged Refusal to Give an Instruction.* The court instructed the jury as to second degree murder, voluntary manslaughter, reasonable doubt, self-defense, circumstantial evidence, burden of proof, and other relevant issues, as is usual in a criminal case of this kind. There is no assignment of error concerning the giving or refusing of any instruction except appellant's assignment No. 4, which reads: "The court erred in failing and refusing to instruct the jury as to the law regarding involuntary manslaughter, as requested by the defendant, to which action of the court the defendant at the time objected and saved his exceptions."

Our search of the transcript fails to disclose that the appellant ever presented any requested instruction to the trial court on involuntary manslaughter. The situa-

tion in the case at bar is similar to that in *Pate* v. *State,* 206 Ark. 693, 177 S. W. 2d 933. What was said in that case applies here—*i. e.,* if appellant desired an instruction, he should have submitted one to the court "setting forth a proper statement of the law in that particular, and, not having done this, he cannot complain of the court's failure to give such instruction."

The judgment of the circuit court is in all things affirmed.

MARTIN *v.* STATE.

4504 211 S. W. 2d 116

Opinion delivered May 17, 1948.

William W. Shepherd, for appellant.

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

GRIFFIN SMITH, Chief Justice. This is an appeal on behalf of James Lee Martin from a judgment of Circuit

Court affirming a finding by Juvenile Division of County Court that the respondent was a delinquent minor within the meaning of Act 215 of 1911, as amended. Pope's Digest, Secs. 7459 to 7500.

It is contended the proceedings were void for want of judgment recitals heretofore held to be jurisdictional.

The record discloses that on September 2d, 1947, R. Jackson Greene, later referred to as Probation Officer, filed in Juvenile Court Division of Pulaski County Court an allegation that J. L. Martin was a delinquent as defined by Sec. 7463 of Pope's Digest. Specifically, it was stated that Martin was incorrigible, and that he had stolen a radio and rifle. It was then said (a) "That the guardian of said child is James and L. B. Martin"; (b) "That no guardian of said child is known to this petitioner." The petition was duly verified. The Sheriff was commanded to summon "L. B. Martin and James Martin to appear with J. L. Martin in Pulaski Juvenile Court on the 5th day of September, 1947, at 11 a. m., to answer a petition filed against the delinquency of J. L. Martin in the Pulaski Juvenile Court by R. Jackson Greene." The return shows the process was served September 2d by delivering a true copy to L. B. Martin and James Martin.

The judgment, not dated, shows that the case was styled R. Jackson Greene vs. James L. Martin, James Martin, and L. B. Martin; and then, "On this, the same being the day heretofore set by the Court for hearing of this cause, . . . comes the petitioner, . . . and come the defendants, James Martin and L. B. Martin, with James Martin. . . . "

The Court found that the respondent was delinquent and committed him to the Negro Boys Industrial School.

In an affidavit for appeal James Lee stated that his mother, L. B. Martin, was his natural guardian. She affirmed this status.

On hearing *de novo* in Circuit Court there was abundant testimony to sustain the Juvenile Court's finding that James Lee was delinquent, to which the inference is

compelling that his mother was unable to control him. It is not necessary to recite the testimony.

In Circuit Court, prior to a hearing, there was a motion to quash the Juvenile Court judgment. It was insisted that James Lee, as an incorrigible, was in fact charged with having stolen personal property mentioned in the citation, hence he was guilty of burglary and larceny—crimes not cognizable by the inferior tribunal. It was further insisted that the word "incorrigible" is not to be found in any definition of a criminal act; therefore one might be incorrigible, but not guilty of violating a penal statute. In support of this argument we are cited to *Underwood* v. *Farrell,* 175 Ark. 217, 299 S. W. 5.

Another objection was that if the judgment should stand, the "defendant" would be denied the right of trial by jury, "guaranteed to him by § 10 of Art. 2 of the Constitution of Arkansas, . . . and also [denied] the rights, privileges, and immunities guaranteed by § 21 of Art. 2, and Amendments 5, 6, 8, 14, and 15 to the Constitution of the United States." An argument in appellant's brief is that a state statute which denies a citizen of Arkansas and of the United States the right of trial by jury, is violative of Amendments 6 and 14 to the U. S. Constitution.

Assertion that there is federal compulsion of trial by jury is unsound. The answer was tersely stated by Mr. Justice Cardozo in *Palko* v. *Connecticut,* 302 U. S. 319, 58 S. Ct. 149, 82 L. Ed. 288. The Sixth Amendment, says the opinion, calls for a jury trial in criminal cases, and the Seventh for a jury trial in civil cases at common law were the value in controversy shall exceed twenty dollars "[But], this Court ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether."

The opinion by Mr. Justice Reed in *Adamson* v. *California,* 91 Law Ed. 1903, 332 U. S. 46, 67 S. Ct. 1672, 171 A. L. R. 1223, contains the expression that "The Bill of Rights, when adopted, was for the protection of the individual against the federal government and its pro-

visions were inapplicable to similar actions done by the states."

The Fourteenth Amendment prohibits a state from making or enforcing any law abridging privileges or immunities of citizens of the United States; "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

There is the additional statement in the Adamson case that "Nothing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution."

The opinion of Chief Justice WHITE in *Minneapolis & St. Louis Railroad Company* v. *Bombolis, Administrator of Nanos,* 241 U. S. 211, 36 S. Ct. 595, 60 L. Ed. 961, Ann. Cas. 1916E, 505, L. R. A. 1917A, 86, is summarized as follows: The Seventh Amendment exacts a trial by jury according to the course of the common law, that is, by unanimous verdict. The first ten Amendments are not concerned with State action and deal only with Federal action. The Seventh Amendment applies only to proceedings in courts of the United States; it does not in any manner govern or regulate trials by jury in State courts, nor does it apply to an action brought in the State court under the Federal Employers' Liability Act. A verdict in a State court in an action under the Employers' Liability Act, 45 U. S. C. A. § 51 *et seq.,* which is not unanimous, but which is legal under the law of the State, is not illegal in violation of the Seventh Amendment. While a State court may enforce a right created by a Federal statute, such court does not, while performing that duty, derive its authority as a court from the United States but from the State, and the Seventh Amendment does not apply to it.

The fundamental misconception pursued by appellant is that his detention is punishment for crimes mentioned in the petition. The Underwood-Farrell decision does not sustain him. It is true that there, as here, the

minor (Archie Underwood) was proceeded against in Juvenile Court, but the action was commenced when James Kaiser, whose barn Underwood had feloniously burned, procured prosecution for the crime. However, when the examining trial was set for hearing by a justice of the peace, Kaiser asked Juvenile Court to adjudge the sixteen-year-old boy a delinquent. The order was that as a delinquent Underwood be confined to the Boys' Industrial School at Pine Bluff, "there to remain in the care, custody and control of the [school] authorities for a term of three years."

Circuit Court, by *certiorari,* directed that the record be brought up. At the same time release was sought through *habeas corpus,* and denied. This Court quashed the judgment because the record disclosed that prior to the crime involving destruction of Kaiser's barn, the accused had not been delinquent, hence punishment was for a specific crime, and not in the nature of a corrective measure meant for the individual's well-being. It was then said that the Legislative intent was expressed in *Ex Parte King,* 141 Ark. 213, 217 S. W. 465. The King opinion deals largely with constitutionality of Act 315 of 1911, the principal holding being that judicial and administrative functions conferred upon the County Court do not interfere with the constitutional jurisdiction of Probate Courts over the estates of infants. A judgment of Circuit Court, awarding the *custody* of Pearl King to the Girls' Industrial School, was affirmed.

Jackson v. *Roach,* 176 Ark. 688, 3 S. W. 2d 976, reversed Independence Circuit Court, and held that it did not acquire jurisdiction because the Juvenile Court judgment did not affirmatively show that the minor's mother, as natural guardian, was a party to the proceedings "and duly served with summons."

In *Ex Parte Kelley,* 191 Ark. 848, 88 S. W. 2d 65, Jefferson Circuit Court's action in affirming an order of commitment was reversed because the order did not show that a petition had been filed. This was said to be jurisdictional.

In the case at bar the judgment-order mentions Greene as the petitioner; and appellant has brought up a record showing the petition was filed September 2d and that service was had the same day. There is also an express showing that the minor's mother was present, and that father *and* mother were summoned.

We quite agree with counsel for appellant that if the Juvenile Court Act were a substitute for prosecution, and that punishment as for a crime attended the exercise of jurisdiction, there would be an invasion of the defendant's right to trial by jury, guaranteed by Sec. 7 of Art. 2 of the Constitution of 1874 (modified in civil cases by Amendment No. 16. See *Western Union Telegraph Co.* v. *Philbrick,* 189 Ark. 1082, 76 S. W. 2d 97).[1]

[1] Act 110 of 1927, p. 308, amended Sec. 7 of Act 215 of 1911, by substituting 21 years for each sex, the original Act having fixed 17 years for males and 18 years for females as the period of minority. In each Act the Court is given authority, (if it finds parent, guardian, or custodian of a delinquent minor an unfit person) " . . . to enter an order committing such child to some suitable State Institution, organized for the care of delinquent or neglected children; . . . provided, that the Court shall not commit any [such child] to an institution or home used for the care, imprisonment, or reformation of delinquent children or adult criminals."

Act 67 of 1917, as expressed in Sec. 1, had for its purpose procurement of a better location, and improved conditions, for the State Reform School, " . . . and for the better discipline, education, and employment of juvenile offenders, moral delinquents and dependent children." It established two Industrial Schools—one for girls and one for boys. Section 4 directed the management to immediately erect at least two cottages and equip them " . . . for the care of such delinquent and dependent girls as may be committed to said school by the Juvenile Courts of this State, in the same manner as provided for in Sections 4 and 5 for the erection of the Boys' Industrial School." Section 4 required construction " . . . of such buildings, work rooms and apartments" as might be needed, to be constructed in such manner " . . . as to segregate the older from the younger children, and the more [hardened] from the less hardened ones."

Act 59 of 1923 changed the name of the Girls' Industrial School to "Arkansas Training School for Girls." Act 186 of 1945 created the Negro Girls' Training School.

Section 11 of Act 67 of 1917 provides that "All Juvenile Courts of the State . . . shall have full authority to commit delinquent and dependent boys to the Boys' Industrial School of the State; . . . it being understood, however, that only such dependent children may be committed to such institution as in the opinion of the Court cannot be placed in a good home." [It will be observed that the Act in conferring authority to commit first mentions delinquent *and* dependent boys, while in the second case only a *dependent* who cannot be placed in a good home may be committed.]

Act 280 of 1939, Sec. 38, transferred supervision of ministerial work of the Juvenile Court Department, taking it from the Attorney General's office and placing it with the State Department of Public Welfare. It amends Sec. 2 of Act 187 of 1925.

The State's purpose to deal with immature delinquents in a manner differing from criminal procedure was undertaken when Act 199 was approved April 25th, 1905. The measure established a reform school "For the discipline, education, employment, and reformation of convicts in the Penitentiary under the age of 18 years." From this beginning the more modern institutions have emerged, with a gradual recognition by the General Assembly that society gains more through reformation of juveniles than it does from punishing them. The entire purpose is one for moral recovery. A criminal charge is treated as evidence of delinquency when established. Felonious conduct and misdemeanors are not dealt with as such, but are considered only in determining what is best for the minor when all of the circumstances of birth, environment, opportunity, habit, and demonstrated tendencies are measured.

While the basic findings relating to appellant as a delinquent could have been stated in a more explicit manner, absence of details is in keeping with a general policy of Juvenile Courts to refrain from publicly stigmatizing by record recitals those who in later years might be embarrassed by a *quasi*-judicial finding that specific crimes had been committed. Sufficiency of evidence to establish delinquency may always be reviewed—a right which, subject to those human frailties that pertain to appellate as well as trial courts, affords protection against arbitrary or erroneous action.

Affirmed.

CITY OF NEWPORT *v.* OWENS.

4-8543 211 S. W. 2d 438

Opinion delivered May 17, 1948.

Rehearing denied June 14, 1948.

Kaneaster Hodges, for appellant.

Pickens & Pickens, for appellee.

Ed. F. McFaddin, Justice. This appeal is an effort by the City of Newport to annex certain territory. At the annual municipal election in 1947, the electors of the city voted in favor of annexing approximately 2,000 acres lying to the east and northeast of the city. A petition praying for such annexation was duly filed in the county court. Forty-five property owners residing in the territory proposed to be annexed, appeared as remonstrants. The city then amended its petition, and omitted approximately 1,000 acres in the extreme north of the territory originally described; so that the territory finally sought to be annexed amounted to approximately 960 acres. The county court granted the city's amended petition. Thereupon Ed Owens and 14 other property holders, in the remaining territory sought to be annexed, appealed to the circuit court, where the cause was tried *de novo,* as is the rule in such cases. The circuit court denied the city's petition for annexation of the territory; and this appeal challenges the circuit court judgment.

The city's procedure for annexation was in accordance with § 9501, Pope's Digest,[1] which is § 84 of Act 1 of 1875. This section has many times been before this court, some of the cases being: *Dodson* v. *Fort Smith,* 33 Ark. 508; *Foreman* v. *Marianna,* 43 Ark. 324; *Vestal* v. *Little Rock,* 54 Ark. 321, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778; *Vogel* v. *Little Rock,* 54 Ark. 335, 15 S. W. 836; *Vogel* v. *Little Rock,* 55 Ark. 609, 19 S. W. 13; *Woodruff* v. *Eureka Springs,* 55 Ark. 618, 19 S. W. 15; *Gunter* v. *Fayetteville,* 56 Ark. 202, 19 S. W. 577; *Barnwell* v. *Gravette,* 87 Ark. 430, 112 S. W. 973; *Batesville* v. *Ball,* 100 Ark. 496, 140 S. W. 712, Ann. Cas. 1913C, 1317; *Fowler* v. *Ratterree,* 110 Ark. 8, 160 S. W. 893; *Brown* v. *Peach Orchard,* 162 Ark. 175, 257 S. W. 732; *Pine Bluff* v. *Mead,* 177 Ark. 809, 7 S. W. 2d 988; *Pike* v. *Stuttgart,* 200 Ark. 1010, 142 S. W. 2d 233; *Chastain* v. *Little Rock,* 208 Ark. 142, 185 S. W. 2d 95. With admirable frankness the appellant concedes—and correctly—that under the rule of our cases we must affirm the circuit court judgment if there be any substantial evidence to support the judgment. Some of the cases so holding are *Brown* v. *Peach Orchard, supra,* and *Pine Bluff* v. *Mead, supra.* Furthermore, appellant also concedes—and correctly—that if substantial evidence shows that any material portion of the proposed territory should not be annexed, then the circuit court judgment must be affirmed. *Vestal* v. *Little Rock, supra,* and *Pine Bluff* v. *Mead, supra,* so hold.

In *Vestal* v. *Little Rock, supra,* Mr. Justice HEMINGWAY, speaking for the court, gave what has come to be the standard test as to when contiguous territory should be annexed:

"That city limits may reasonably and properly be extended so as to take in contiguous lands, (1) when they are platted and held for sale or use as town lots, (2) whether platted or not, if they are held to be brought on the market and sold as town property when they reach a value corresponding with the views of the owner, (3) when they furnish the abode for a densely-settled

[1] This section is found in 2 Ark. Stats. § 19-307.

community, or represent the actual growth of the town beyond its legal boundary, (4) when they are needed for any proper town purpose, as for the extension of its streets, or sewer, gas or water system, or to supply places for the abode of business of its residents, or for the extension of needed police regulation, and (5) when they are valuable by reason of their adaptability for prospective town uses; but the mere fact that their value is enhanced by reason of their nearness to the corporation, would not give ground for their annexation, if it did not appear that such value was enhanced on account of their adaptability to town use.

"We conclude further that city limits should not be so extended as to take in contiguous lands, (1) when they are used only for purposes of agriculture or horticulture, and are valuable on account of such use, (2) when they are vacant and do not derive special value from their adaptability for city uses."[2]

The question here is not what we would decide if we were trying the case on the preponderance of the evidence. Rather, the issue here is, whether there was any substantial evidence that any material part of the proposed territory should not be annexed. The answer to that question necessitates only a partial review of the evidence.

A considerable portion of the evidence was directed to that portion of the territory referred to as Lakeview Addition; and the evidence preponderates in favor of its annexation. But a tract of approximately ninety acres, lying in the northern part of the territory proposed to be annexed, was shown to be agricultural. One of appellant's witnesses spoke of these lands as "farm lands here in the south part of Section 1." Another witness for appellant said: "That is good agricultural land." Still a third witness said: "That is cultivated land at this time . . . some cotton out there and some soy beans, maybe. Part of it is pretty good land. Down at this end of it is white land, land that doesn't produce a whole lot." There was testimony seeking to bring this

[2] This quotation is given as the general rule in 37 Am. Juris. 644.

agricultural land within the rule announced in *Vogel* v. *Little Rock,* 55 Ark. 609, 19 S. W. 13; and, if the circuit court had included this land, there would have been substantial evidence to support such holding. There was substantial evidence, however, that this agricultural land, of approximately 90 acres, does not fulfill the test for annexation as stated by Justice HEMINGWAY, to-wit:

"We conclude further that city limits should not be so extended as to take in contiguous lands, (1) when they are used only for purposes of agriculture or horticulture, and are valuable on account of such use, (2) when they are vacant and do not derive special value from their adaptability for city uses."

It follows therefore that there is substantial evidence in the record going to show that a material portion of the land sought to be annexed—*i. e.,* the 90 acres—should not be annexed; and because of that evidence and the cases heretofore cited, we must affirm the circuit court judgment.

SHIPPEN *v.* SHIPPEN.

4-8453 211 S. W. 2d 433

Opinion delivered May 17, 1948.

Rehearing denied June 14, 1948.

James E. Hyatt, Jr., and *A. F. Barham,* for appellant.

Bruce Ivy and *W. W. Prewitt,* for appellee.

ROBINS, J. Appellants instituted proceedings in the probate court to contest the will of their father, E. S. Shippen, who died January 29, 1944. The will was executed on May 23, 1936, and by its terms all the testator's children (except one child for whom a $100 bequest was made) received $5 each. The remainder of testator's property, valued at more than $100,000, was devised and bequeathed to testator's second wife, contestee Mattie Shippen.

Appellants asserted (and appellees denied) that the testator was mentally incapable of executing the will and further that when he signed it he was under the undue influence of said contestee.

The lower court found the issues in favor of appellees and from judgment upholding the will this appeal is prosecuted.

In 1916, E. S. Shippen, then a resident of Louisville, Kentucky, deserted his first wife (now deceased) who had borne him nine children, and came to Arkansas, where, in 1918, he secured a divorce from his wife, ap-

parently without her knowledge. In a short time he married appellee, Mattie Shippen, with whom he was said to have been infatuated for six years. Thereafter he lived with said appellee, in Mississippi county, Arkansas, until his death.

The testimony of appellants was to the effect that until Mr. Shippen met contestee, Mattie Shippen, he was a kind and loving husband to their mother and was affectionate toward his children. They described his unfortunate infatuation for said appellee and stated that because thereof he became rude and unkind to their mother before he finally left her. They insisted, however, that throughout his life he evinced a strong affection for them and showed such a feeling toward them as would cause them naturally not to expect disinheritance at his hands. Most of them testified to a belief that he was not mentally capable of executing a will. None of these appellants ever lived with the testator or was closely associated with him after he came to Arkansas in 1916. Some incidents, from which a conclusion might be drawn that he was subject to undue influence of appellee, Mattie Shippen, were related.

Appellants introduced the testimony of ten persons who had been associated, to a varying extent, with the testator. Some of these witnesses stated that he was a reckless driver. Others testified to occasional and unrelated peculiar actions of testator, which caused them to conclude that he was mentally unbalanced.

A summary of contestants' testimony was submitted to a psychiatrist, in the form of a hypothetical question, and in answer thereto he expressed the opinion that at the time the will was executed by him Mr. Shippen was of unsound mind and therefore incapable to make a will.

Twenty-two acquaintances and associates of the testator testified on behalf of contestees. The net effect of their testimony was that Mr. Shippen was an unusually successful business man, of strong determination and not susceptible of being controlled in his decisions by others. He was shown to be well informed and a leader in civic affairs. Their testimony showed that he

suffered financial reverses during and prior to 1934, when, by appellee Mattie Shippen pawning her jewelry, he borrowed enough money to enter the business from which, in ten years he acquired a considerable fortune.

The persons who witnessed the will testified that Mr. Shippen, unaccompanied by appellee, Mattie Shippen, or anyone else, brought the typewritten will, already prepared, to them to be witnessed.

Mr. Shippen, during the latter years of his life, suffered from a genito-urinary disorder, culminating in a malignant growth which caused his death. Two of the physicians who attended him at different times testified that up until a short time before his death he was of sound mind.

Appellees submitted to another psychiatrist the same hypothetical question as that propounded to the psychiatrist who testified for contestants, and elicited an answer from the witness that in his opinion the testator was of sound mind when he executed the will.

We have often defined mental capacity such as must be possessed by a testator in order for him to make a valid will. The rule has been generally expressed that sound mind and disposing memory, constituting testamentary capacity, is (a) the ability on the part of the testator to retain in memory without prompting the extent and condition of property to be disposed of; (b) to comprehend to whom he is giving it; and (c) to realize the deserts and relations to him of those whom he excludes from his will. *Taylor* v. *McClintock*, 87 Ark. 243, 112 S. W. 405; *Boone* v. *Boone*, 114 Ark. 69, 169 S. W. 779; *Mason* v. *Bowen*, 122 Ark. 407, 183 S. W. 973, Ann. Cas. 1917D, 713; *Griffin* v. *Union Trust Company*, 166 Ark. 347, 266 S. W. 289; *Puryear* v. *Puryear*, 192 Ark. 692, 94 S. W. 2d 695; *Petree* v. *Petree*, 211 Ark. 654, 201 S. W. 2d 1009. And the burden of proof, in cases of this kind, is on the contestant, who asserts the mental incapacity of the testator. *McWilliams* v. *Neill*, 202 Ark. 1087, 155 S. W. 2d 344; *Parette* v. *Ivey*, 209 Ark. 364, 190 S. W. 2d 441.

When these rules are applied to the testimony adduced in this case it must be held that appellants did not discharge successfully the burden imposed upon them. There was no testimony from which it may be concluded that Mr. Shippen did not, at the time of executing the will, remember the extent and condition of his property or that he did not know to whom it was being given by him. While it might seem that, in virtually disinheriting the children of his first wife, he was doing a cruel injustice to his own flesh and blood, it cannot be said that a preponderance of the evidence showed that he did not realize the deserts and relationship of these children. A man's mental capacity must be gauged by something more than his idiosyncrasies and peculiarities. His ability to meet and successfully contend with problems of life is a most important index to his mental calibre. The undisputed testimony shows that from 1934 to his death —and the will was executed during this period—Mr. Shippen amassed a comfortable fortune and became a leader in civic affairs in his community. Such results are not ordinarily achieved by persons of unsound mind.

Considering the question of undue influence such as invalidates a will, we said in the case of *McCulloch* v. *Campbell,* 49 Ark. 367, 5 S. W. 590: "The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property."

The testimony shows that Mr. Shippen had a deep and abiding love for appellee, Mattie Shippen, even though it may have been illicit in its inception. When he executed the will he had been living with her in wedlock for 18 years, and she had borne him a son who received the same legacy as did each of Shippen's children by his first wife. The proof showed that appellee had made him a dutiful and loving wife. His closest associates testified that Mr. Shippen was a man of independent thought and action. There was no proof whatever that appellees ever brought any influence to bear upon him to make any sort of disposition of his property. Apparently

his will was prepared in the office of one of the leading lawyers of the state. It is undisputed that Mr. Shippen selected the witnesses and had them attest his execution of the will, all in the absence of appellees. In view of this testimony it cannot be held that the will was executed through fear, coercion or any other malign influence which would stamp it as not the testator's own act.

The judgment of the probate court was correct and is affirmed.

CITY OF LITTLE ROCK *v.* EVANS.

4-8517 212 S. W. 2d 28

Opinion delivered May 24, 1948.

Rehearing denied July 5, 1948.

T. J. Gentry and *Frank H. Cox,* for appellant.

Cooper Jacoway and *Edward E. Stocker,* for appellee.

SMITH, J. This case involves the use that may be made of a certain lot under the zoning ordinance of the City of Little Rock.

Blocks 9 and 10, S. J. Johnson's Addition to the City of Little Rock, Arkansas, are bounded on the west by Washington Street and on the east by Peyton Street. They are separated by Fifteenth Street.

Appellee, G. C. Evans, Sr., owns the north half of block 10, which is on the south side of Fifteenth Street. The east 150 feet of this frontage is zoned "I" Light Industrial under the City's zoning ordinance for a depth of 47 feet. The remaining and west 73 feet of the Fifteenth Street frontage is zoned as "K" Heavy Industrial to a depth of 140 feet. Appellee also owns the 73-foot frontage on the north side of Fifteenth Street directly across the street from the "K" Heavy Industrial area. This north 73 feet is described as lots 6 and 7, block 9, S. J. Johnson's Addition; is zoned as being in the "B" One Family District; and is the subject matter of this action.

Appellee is in the business of manufacturing automatic heating equipment, a business he began in 1935 in a small building behind his home on the north half of block 10, and he still resides at that address. At his instance a portion of lot 10 was rezoned to permit the erection and operation of his plant in that block. His business prospered and grew until he now employs forty or more persons. He bought two lots in block 9 directly across Fifteenth Street, opposite his plant, and applied for and obtained a permit to erect, on this block 9, a small building to be used for storage purposes. That property had, pursuant to the zoning ordinance, been placed in zone "B" or the One Family District. He did not remove the building at the expiration of the 90-day permit and received orders from the City Engineer to do so. Instead of removing the building he filed suit in the chancery court to enjoin the City from interfering with his use of the building, and he offered much testimony that the property on which he had erected his storage building had ceased to be residential property. His contention was sustained and the City was enjoined from interfering with his occupancy of the building for storage purposes.

We do not pass upon the correctness of this ruling as a matter of fact, for the reason that appellee has bypassed the zoning ordinance without any attempt to comply with its provisions. Appellee knew that block 9 had been zoned as "B" one family residence property, and had applied for and had obtained permission to violate the ordinance for a period of 90 days, at the expiration of which time instead of removing his building, the erection of which was in violation of the zoning ordinance, he sought to enjoin the City from enforcing compliance with the ordinance.

Upon the authority of the case of *City of Little Rock* v. *Joymer,* 212 Ark. 508, 206 S. W. 2d 446, and the even more recent case of *City of Little Rock* v. *Griffin, ante,* p. 465, 210 S. W. 2d 915, the decree granting appellee the relief prayed by rezoning block 9 must be reversed, and the cause will be dismissed as having been prematurely brought, but without prejudice to any future action he may take as required by the zoning ordinance.

In the case first cited the property owner who sought to have his property rezoned by order of the chancery court, applied to the City Engineer for a permit to erect a commercial building on property in a residential district zone, and when the permit was refused he applied to the chancery court, praying that his property be reclassified as being in a commercial district zone. He was granted the relief prayed and from that decree the City appealed. It was there argued that the property owner had not exhausted his administrative remedy by applying to the Board of Adjustment, as required by § 18 of the zoning ordinance before instituting his suit. This question was disposed of on the ground that the zoning ordinance had not been offered in evidence and that in its absence from the record, we could not take judicial cognizance of its provisions. It was there said: "It is the general rule that one seeking to restrain the regulation of a board or commission should first exhaust his remedy at law where that remedy is adequate. 28 Am. Jurs., Injunctions, § 266." It was said, however, "An attempt to obtain a building permit and exhaust the remedies provided by a

zoning ordinance is not a prerequisite to a suit to enjoin enforcement of the ordinance on the ground that it is invalid in its entirety." It was not insisted in that case, nor in this, that the ordinance is void in its entirety.

In the instant case we do have in the record the zoning ordinance and it is not contended that any attempt was made to comply with § 18 thereof, and in the Griffin case, *supra,* it was said that, "Such remedies (that is, those provided by the ordinance) should have been exhausted before recourse was had in the courts."

This subject is annotated in the notes to the case of *People of the State of New York* v. *Calvar Corp.,* 286 N. Y. 419, 36 N. E. 2d 644, 136 A. L. R. 1376. There the Court of Appeals of New York reviewed the right of a property owner for a reclassification of his property and it was there said:

"Refusal to grant such a permit in proper case, if not reviewable by the courts, might result in unlawful deprivation of the defendant's property. There has been no such deprivation until there has been application for a permit and unreasonable refusal and a statute does not violate the Constitution where it does not deprive an owner unreasonably of his property if the statute is properly administered in accordance with its terms. *Dowsey* v. *Village of Kensington,* 257 N. Y. 221, 177 N. E. 427, 86 A. L. R. 642.

"Perhaps there has already been application and denial in this case, but that does not appear from the record and the appellants are not asking here a review of any determination by the Board of Appeals denying such an application. Only in proceedings brought to review such a determination, if made, could the court review the action of the Board, or determine whether the ordinance has been administered in manner so unreasonable that enforcement would constitute an unlawful taking of the defendants' property."

For the reason that the property owner has not exhausted his administrative remedies and is not asking a

review of any order of the Adjustment Board, the cause must be dismissed and it is so ordered, but without prejudice to any future action appellee may be authorized to take under the ordinance.

MILLWEE, J., not participating.

DILL, TRUSTEE, *v.* SNODGRESS.

4-8521 211 S. W. 2d 440

Opinion delivered May 24, 1948.

Tilghman E. Dixon and *Wm. J. Kirby,* for appellant.

A. F. House, for appellee.

GRIFFIN SMITH, Chief Justice. The controversy involves title to approximately seven and a half acres of unimproved land within the corporate limits of Little Rock.

In October 1923 the then owner, Ella Lurtey, contracted a sale to W. M. McNutt. Approximately nine years later McNutt assigned his contract to Fred A. Snodgress for a cash consideration of $300. At the time this assignment was made—June 9, 1924—McNutt and his wife, by deed, conveyed their equity to Snodgress, and

the deed was recorded. The Lurtey contract obligated the owner to execute a warranty deed to McNutt when $2,200 had been paid.

July 26, 1924, Snodgress deeded the property to Mark and Viola Owens, husband and wife, and this deed was recorded. Finding that they would be unable to discharge their obligations to Snodgress, the grantees reconveyed to him by deed of July 9, 1925. This instrument was not recorded. Thereafter Snodgress paid on the Lurtey obligation until total credits aggregated $1,759.36. Altogether, taxes included, he had paid $2,500.

Snodgress testified that Ella Lurtey left Little Rock without giving him a forwarding address, and that he did not know where she was. He owed three or four hundred dollars, but the debt was barred by limitation.

S. L. Dill is engaged in the real estate business, and testified that for a year or more he had been interested in the property and had tried to get in touch with the owner. Through his attorney, Tilghman Dixon, he succeeded in locating Viola Owens in California at Pasadena, (her husband having died). Mrs. Owens' California attorney—Morton H. Eddy—finally wrote that his client would execute a quitclaim deed for $100.

Dill says that in purchasing the property he was representing family interests, including his father, mother, a brother, and himself; hence it was sought to put the title in him as trustee. Dill admitted that before attempting to find Mrs. Owens he went to Snodgress' office and asked where Mrs. Owens could be found. Snodgress, according to Dill, told him that he (Snodgress) was the owner, Dill adding, "But according to the record I couldn't find where it was indicated. I also told [Snodgress] that if he could offer any evidence of ownership, I would make an attempt to trade with him; and that is as far as I would go." Dill's attorney asked, "Did you tell [Snodgress] that if he had a deed of any kind to produce it?" Answer: "I told him if he could show he was the owner I would be glad to try and work out a trade with him." Question: "And he did not, at any time, show you

a deed or any instrument of any kind?'' Answer: ''No, sir; I have never seen a deed from Mr. Snodgress yet myself.'' Later Dill testified he was told Snodgress had a deed from Owens.

Snodgress testified that he had practiced law in Little Rock for thirty-five years and was owner of the property in question. He identified the various documents to which reference has been made, and verified signatures. Dill called at his office at least three times to discuss buying the property, and mentioned the matter once or twice on the street. The witness said he told Dill there was a balance due Mrs. Lurtey; that she was dead, or her address was unknown. Dill's plan was to plat the property. He was shown a file disclosing delinquent tax obligations. In this file there were three deeds, including the one from Mark and Viola Owens that had not been recorded; and, said Snodgress, ''I showed [Dill] the deed and told him about the trouble I was having with Mrs. Lurtey.''

After Dill's conversation with Snodgress he met a son of Viola Owens, who was temporarily in North Little Rock. At this time the California address had not been ascertained, or, if it had been, Mrs. Owens was not willing to sell. This is shown by an Eddy-to-Dixon letter, in which Eddy said he had talked with a daughter of Mrs. Owens, '' . . . who told me her mother desired to do nothing. I, frankly, do not understand her attitude, but that is her present conclusion. I told the daughter she might as well sign the quitclaim deed and let you handle the rest.'' This letter was dated June 6, 1947, and refers to a communication from Dixon dated May 13th.

Appellee's counsel argues that something said to Mrs. Owens' son by Dill or those representing him must have been persuasive, and that the son communicated with his mother, for on June 24th Eddy telegraphed Dixon that Mrs. Owens had just informed him she would sell for $100. The deed, seemingly, had been prepared in Little Rock and forwarded to Pasadena. Dill caused it to be recorded July 1, 1947.

It will thus be seen that Dill as trustee claims under a quitclaim deed executed by one of two persons, and that ownership of the land, *prima facie,* was in Mark and Viola Owens, to whom Snodgress had conveyed by deed duly recorded; while upon the other hand Snodgress held a deed from Mark and Viola Owens, executed prior to Viola's quitclaim to Dill; but this deed had not been recorded.

Since occupancy by Snodgress was at one time actual, (a dilapidated house having been destroyed) the question is one of fact: Did evidence submitted by Snodgress preponderate in favor of his contention that Dill had actual notice of his interest? In *The Henry Wrape Co.* v. *Cox,* 122 Ark. 445, 183 S. W. 955, it was said that "if the plaintiff took the quitclaim deed from its immediate grantor without notice of an outstanding conveyance or obligation respecting the property, or notice of facts which, if followed up, would have led to knowledge of such outstanding conveyance or equity, it was entitled to protection as a *bona fide* purchaser upon showing that the consideration stipulated had been paid, and that such consideration was a fair price for the claim or interest designated."

While an unrecorded mortgage is not a lien on the property as against a stranger—*Sims* v. *Petree,* 206 Ark. 1023, 178 S. W. 2d 1016 (cited in *Primm* v. *Farrell-Cooper Lumber Co.,* 210 Ark. 699, 197 S. W. 2d 557)—and this is true although there may have been actual knowledge of the existence of the mortgage, the same rule does not protect one who, with notice that the record owner of property has conveyed it, procures from such owner a quitclaim deed; and this governs in the case at bar, where the price paid was only a twentieth of actual value. See *Skelly Oil Co.* v. *Johnson,* 209 Ark. 1107, at pages 1122-23; 194 S. W. 2d 425, at pages 432-33. We think the Chancellor did not misjudge the weight of evidence in holding that Dill had knowledge of the Snodgress deed. Certainly Dill had information from which knowledge could have been acquired, for the very person from whom he procured the quitclaim deed was one of the two who had formerly conveyed.

When Dill filed his complaint against Snodgress, Manie Schuman was named as a defendant tax title purchaser, he having in 1940 procured the Land Commissioner's deed for 1936 forfeiture. There is a stipulation that sale to the State was void because there was included in the sum demanded the so-called pension tax. *Adamson* v. *City of Little Rock,* 199 Ark. 435, 134 S. W. 2d 558. Schuman moved to dismiss on the ground that neither Dill nor his predecessors in title was owner of the land in 1936, and therefore each was without legal authority to question the sale. Schuman made the further claim that following his purchase in 1940 he paid taxes for seven consecutive years, and that his right to the property had accrued through adverse possession, under Pope's Digest, § 8920. In his brief Schuman says: "The decree [finding for Snodgress and against Dill and Schuman] should be reversed, and [the cause] remanded with directions to dismiss the suit as a whole, as we [have all] failed to show a present right to title."

Section 8920 of Pope's Digest deems unimproved and uninclosed land to be in the possession of one who under color of title has paid taxes, but the benefits created are available only to a person who himself or those under whom he claims "shall have paid such taxes for at least seven years in succession." The Act does not apply to lands fenced or in cultivation. In *Schmeltzer* v. *Scheid,* 203 Ark. 274, 157 S. W. 2d 193, it was held that § 8920 " . . . applies to urban as well as rural unoccupied, wild, or uninclosed land." Actual language of the statute is "unimproved *and* uninclosed land," not "unoccupied, wild, *or* uninclosed land." Whether the urban property contended for by Dill and Snodgress falls properly within the statutory intent, irrespective of the exact language used in construing it, is unimportant in view of Schuman's concession that he should not prevail. Although Schuman alleged the land was unimproved and uninclosed, Snodgress testified that it was fenced when he bought; that the two-room house had been destroyed, and that vandals took the fence. There is no proof that the fence was destroyed more than seven years prior to

the time suit was filed, hence nothing definite upon which to invoke § 8920.

Counsel for Schuman, in reviewing transactions showing the Lurtey-to-McNutt contract, the McNutt assignment to Snodgress, the McNutt warranty deed to Snodgress, the Snodgress deed to Mark and Viola Owens and their reconveyance to Snodgress, Viola Owens' quitclaim deed to Dill, trustee, and a quitclaim deed from the McNutts to Dill, trustee (July 14, 1947), argues that neither Dill nor Snodgress can question validity of the Land Commissioner's deed without showing that the owner or those through whom he claims had title to the property when it forfeited.

There is the further argument that Snodgress, "by his apparent abandonment, lost whatever right he formerly may have had," evidence of this status being failure to pay the admitted balance, and long delay in asserting title. In support our attention is called to *Hopper* v. *Chandler,* 183 Ark. 469, 36 S. W. 2d 398. We agree with counsel for appellee that language quoted in the Hopper case upon which Schuman relies is applicable only where the attack is upon a deed executed by the County Clerk. See *St. Louis Refrigerator & Wooden Gutter Co.* v. *Thornton,* 74 Ark. 383, 86 S. W. 852; *Stanton* v. *Moore,* 210 Ark. 416, 196 S. W. 2d 573; Pope's Digest, § 13874. Judge Riddick, in *Rhea* v. *McWilliams,* 73 Ark. 557, 84 S. W. 726, said that the statute was enacted for protection of parties holding under tax titles, and was intended to cure defects in such titles as against those having no interest in the land at the time of sale; nor does it apply in cases of conflicting tax titles. Schuman's deed, it should be remembered, was from the Land Commissioner.

It is our view that Snodgress had an interest in the property that entitled him to contest Schuman's tax title. Snodgress assumed obligations of the McNutt contract with Mrs. Lurtey, including the duty to pay taxes. One who by contract is required to pay taxes is by law entitled to redeem. There is no substantial denial of the statement by Snodgress that diligent effort was exerted to

locate the record owner, although appellee admits that during the "lean years" the contract was retained only through courtesy of Willis Holmes and E. G. Shoffner, who represented Mrs. Lurtey.* While Snodgress spoke of the balance due on the contract and said it was barred by time, he could not compel Mrs. Lurtey (if alive, or her heirs, if she be dead) to execute a deed in evidence of the title while at the same time pleading limitation; nor does Snodgress' statement that the debt was barred necessarily mean that he would plead limitation. On the contrary he expressed a willingness to discharge the obligation.

The Chancellor correctly determined all issues. Affirmed.

HENDERSON *v.* RICHARDSON.

4-8544 211 S. W. 2d 436

Opinion delivered May 24, 1948.

* The briefs refer to Mrs. Lurtey as "Elta" and as "Ella."

Cunningham & Cunningham, for appellant.

W. E. Beloate, Sr., for appellee.

MINOR W. MILLWEE, Justice. In a confirmation suit instituted by the State of Arkansas under Act 119 of 1935 it developed that the state had sold the west one-third of the northwest quarter of section 8, township 15 north, range 1 west, in Lawrence county, Arkansas, to W. M. Ponder.

Appellee, Jennie Richardson, intervened in the confirmation suit attacking the sale to Ponder and claiming title to the south two-thirds of the above described tract under the terms of the will of her father, James Rogers, deceased.

Appellants are the children and heirs at law of Lucinda Harris, sister of appellee. They filed a separate intervention in the confirmation suit seeking to set aside the tax deed to Ponder. The intervention also contained a cross-complaint against appellee in which it was alleged that the purported will of James Rogers was fraudulent and not entitled to be placed of record; that said James Rogers died intestate; and that appellants were the owners of an undivided one-half interest in the whole tract in controversy.

That part of the suit involving the validity of Ponder's tax title, which was contested by all the parties to this suit, was docketed and adjudicated separately. The trial court held Ponder's deed to be void and we affirmed in the case of *Ponder* v. *Richardson, ante,* p. 238, 210 S. W. 2d 316. The instant suit involves the division of ownership of the tract as between the appellee and appellants.

James Rogers occupied the lands in controversy from the date of his purchase in 1883 until his death in 1910. Under the terms of a will executed in 1902 he devised the tract in controversy to his wife, Mary Rogers, for life and at her death the south two-thirds was given to appellee and the north one-third to Lucinda Harris and Cora Jones, also daughters, equally. It was further provided that since Cora had no children, she should have the use of the north one-third during her life and, at her death, her interest should go to Lucinda, or her heirs. The will of James Rogers was filed and duly probated in April, 1910. The original will was still on file in the clerk's office at the time of the trial in this case, but was never recorded by the clerk as required in § 14554 of Pope's Digest.

The trial court entered a decree finding the will of James Rogers, deceased, to be valid and vesting title in the south two-thirds of the tract in controversy to appellee and the north one-third to appellants as heirs of Lucinda Harris, as directed in the will. Appellants have appealed and appellee has cross-appealed as to that part of the decree which denies her an interest in the north one-third of the tract as an heir at law of Cora Jones, deceased.

Mary Rogers continued to reside on the lands after the death of James Rogers until about 1920 when she moved to Muskogee, Oklahoma, with appellee and her sister, Cora Jones. Cora Jones died without issue about 1930 and Mary Rogers died in 1941. Lucinda Harris, mother of appellants, died in 1943. Appellee looked after the renting of the farm and payment of taxes for her mother for several years prior to the latter's death. She has also redeemed the lands from tax sales at various times and has expended approximately $400 in clearing up the title to lands. She paid one-half the rents collected on the farm to Lucinda Harris for at least one year following the death of their mother and sent appellant, Jessie Henderson, one-half the rents after the death of Lucinda. Lucinda Harris and appellants also paid half of the taxes on the lands for several years.

In 1914, a decree was entered in a foreclosure suit brought by T. C. Neece against Julia Nash, *et al.*, to foreclose a real estate mortgage. Mary Rogers and her children were eventually made parties to the suit and a decree was rendered in which the will of James Rogers was ignored and homestead and dower interests in the land were found to be vested in Mary Rogers.

For reversal of the decree in the instant case, appellants do not now urge the invalidity of the will of James Rogers, deceased. However, it is insisted that the evidence shows that all parties abandoned their respective claims of title under the will and elected to take under the statute of descent and distribution. It is argued that the decree of *Neece* v. *Nash, et al.*, was entered for the purpose of carrying out the agreement to abandon the claims under the will and that the conduct of appellee in paying over to her sister one-half the rents and accepting one-half the taxes supports this contention. We agree with the finding of the trial court that the decree in the case of *Neece* v. *Nash, et al.*, did not adjudicate the title as between the heirs of James Rogers, deceased, and did not, therefore, have the effect of divesting the title acquired by them as devisees under the will.

Nor do we think that payment by appellee of one-half the rents to appellants and their mother for several years, and appellee's acceptance of one-half the taxes from appellants, sufficient to establish an agreement of the parties to abandon their respective claims of title under the will. Appellee denied that such agreement existed. Jessie Henderson who testified for appellants knew nothing of such agreement and further testified that she and her brothers only claimed the "north end" of the tract. The parties are unlettered colored people and the fact that they may have been ignorant of the exact portions of land given them under the will does not estop appellee from now claiming thereunder. In the case of *Thomas* v. *Spires*, 180 Ark. 671, 22 S. W. 2d 553, upon which appellants rely, it is said: "The principle invoked is that a party who, by his acts, declarations or admissions, either deliberately or with willful disregard of the

interests of another, induces him to conduct or dealings which he would not have otherwise entered upon is estopped to assert his rights afterwards to the injury of the party so misled." The evidence here falls short of establishing such fraudulent conduct on the part of appellee as to work an estoppel on her part to claim under the will.

On her cross-appeal appellee contends that she is entitled under the will to an interest in the north one-third of the tract as an heir of her sister, Cora Jones. It is argued that the devise of a life estate to Cora Jones after a similar devise to Mary Rogers is not permissible and that Cora Jones, therefore, took the fee which descended to her heirs. Appellee relies on the cases of *Pletner* v. *Southern Lumber Co.,* 173 Ark. 277, 292 S. W. 370, and *Bowlin* v. *Vinsant,* 186 Ark. 740, 55 S. W. 2d 927, where it was held that a fee simple estate in the remainderman is created in a devise by a testator to his wife for life with remainder to another and her bodily heirs. In the case of *Bowlin* v. *Vinsant, supra,* the testator devised land to his wife, Mrs. Bowlin, for life and at her death to his daughter, Gertrude Vinsant, and the heirs of her body. The court said: "If it had been the intention of the testator to devise only a life estate to Gertrude Vinsant, to take effect immediately upon the death of Mrs. Bowlin, he doubtless would have used similar language as he did concerning his wife, 'during her life', or some similar expression showing a clear intention to convey a life estate." In the case at bar the testator, James Rogers, did devise only a life estate in the north one-third of the tract to his daughter, Cora Jones, after first giving a similar estate to his wife, Mary Rogers, in the whole tract. A testator may create successive life estates in the same property. Thompson on Wills (3rd Ed.), § 352, p. 525; 69 C. J., Wills, § 1627. The will further provided that since Cora Jones had no children, her interest, at her death, should go to her sister, Lucinda Harris, or her heirs. Cora Jones died without issue prior to the death of Mary Rogers, the first life tenant, and her interest passed under the will to Lucinda Harris. Upon the death

of Lucinda Harris in 1943, title to the north one-third vested in appellants as her sole heirs at law.

The decree of the chancery court is correct and is accordingly affirmed on both direct and cross-appeals.

BRATTON *v.* STATE.

4502 211 S. W. 2d 428

Opinion delivered May 24, 1948.

Abe Collins and *Cecil E. Johnson, Jr.*, for appellant.

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

MINOR W. MILLWEE, Justice. Defendant was indicted and convicted for embezzlement of funds of the Temple Cotton Oil Company while employed as manager of the company's oil mill at Ashdown, Arkansas, and his punishment fixed by the jury at one year in the State Penitentiary.

G. A. Reed, representing a firm of accountants, made an audit of the oil company's records covering the period from April 1, 1942, to February 28, 1947. It was stipulated that the records of the oil company correctly reflected the figures shown by this audit. Reed testified that the petty cash record kept by defendant showed many items listed in the cash book as receipts from customers of the oil mill in the form of cash and checks as having been deposited in the bank when the bank statements failed to reflect such deposits. Copies of deposit slips kept as company records were altered so as to include the undeposited receipts to correspond with the false entries of deposits made in the cash book. These transactions were detailed by the witness and the shortages thus reflected by the audit amounted to $1,000 for the year 1945 and $3,400 for the period from January, 1945, to February, 1947. The total shortages from April, 1942, to February, 1947, amounted to $7,000.

The audit also reflected alterations in the "sales," "cash disbursements," "expense and supply" and "bank reconcilement" accounts to conceal the accumulated shortages from month to month. The entries in these records were shown to be in defendant's handwriting and were carried forward in monthly reports which he made to the Texarkana office of the company. Defendant was under bond to the oil company in the sum of $5,000, which has been paid on the basis of the audit made by Reed.

The State offered the testimony of the grand jury reporter concerning admissions made by the defendant as a witness before the grand jury investigating the charges against him. Defendant objected to this testimony on the ground that he had been subpoenaed as a witness before the grand jury. At this point the trial

court sustained the objection unless it could be shown that defendant freely and voluntarily made the statements. It was then shown that a few days prior to the convening of the grand jury, counsel for defendant requested of the prosecuting attorney that defendant and his witnesses be permitted to appear before the investigating body. This was agreed to, and counsel for defendant furnished the prosecuting attorney with a list of witnesses, including the name of defendant, who were subpoenaed to appear before the grand jury.

When the defendant appeared before the grand jury, he was told by the prosecuting attorney that he was not required to give any testimony; that it was probable that the grand jury would indict him; and any statements he desired to make would be of his own free will. After being so advised, defendant said he wanted to make a statement and proceeded to make a detailed statement to the jury. Upon this showing the trial court permitted the grand jury reporter to testify that defendant admitted to the grand jury that he made all the monthly reports of the company and had taken more than $1,000 from company funds, and that in each monthly report he concealed, or covered up, the accumulated shortages.

The principal assignment of error relied on by defendant is that the trial court erred in the admission of the testimony of the grand jury reporter. It is argued that the admissions of defendants before the grand jury were inadmissible under § 3956 of Pope's Digest, and amounted to self-incrimination in violation of Art. II, § 8 of the Constitution of Arkansas. Section 3956 of Pope's Digest reads: "*Joint offender as witness.* In all cases where two or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor; but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offense." Section 8 of Art. II of the state Constitution provides that no person shall be compelled in a criminal case to be a witness against himself.

Defendant relies on the cases of *Bates* v. *State,* 164 Ark. 240, 261 S. W. 315, and *Baker* v. *State,* 177 Ark. 13, 5 S. W. 2d 337. These cases involve situations where a defendant either refused or was compelled to answer incriminating questions in an involuntary appearance before a grand jury in cases where accused was jointly charged or concerned with others in the commission of an offense. In the Bates case the court said the effect of the constitutional prohibition "is to prevent anyone from being compelled to give testimony in a criminal case which could be used to convict him of a crime." The element of compulsion is wholly lacking in the case at bar. It is true that defendant was served with a subpoena to appear before the grand jury, but this was done at the request of his counsel. It is undisputed that defendant not only voluntarily appeared before the jury, but solicited the opportunity to do so. It is also undisputed that the statement to the grand jury was freely and voluntarily made by defendant.

The facts here relative to the admission or confession of defendant before the grand jury are somewhat similar to those involved in *Dunham* v. *State,* 207 Ark. 472, 181 S. W. 2d 242. It was there held that a voluntary written confession of accused made before a coroner's inquest was admissible in evidence on the trial of accused for homicide even though her appearance at the inquest was involuntary. The appellant in that case also relied on § 3956, Pope's Digest, *supra.* In declaring the statute inapplicable, the court said: "This statute has no application, as appellant is not jointly charged with any other person and she was not called as a witness against any other person." So here, defendant was not jointly charged, or concerned, with another nor was he called as a witness against any other person.

In Wharton's Criminal Evidence (11th Ed.), Vol. 2, § 586, it is said: "The rule is well established that confessions and declarations voluntarily made by a witness before a grand jury may be introduced in evidence in a subsequent criminal prosecution in which the witness is the defendant." See, also, § 630 of the same work and

volume; 22 C. J. S., Criminal Law, § 830, p. 1453; Anno. 9 L. R. A., N. S. 533; 27 A. L. R. 151. In *Harshaw* v. *State*, 94 Ark. 343, 127 S. W. 745, it was held that a written confession freely and voluntarily made and sworn to before a justice of the peace was admissible in evidence against the defendant at his trial on a charge of forgery. The statement of defendant to the grand jurors in the instant case meets all the requirements of the above rule and it was admissible in evidence against him.

It is next insisted that the court erred in refusing to give defendant's requested instruction No. 8, which reads as follows: "If after a careful consideration of all the evidence you believe and find it has been customary for the employees in the office of Temple Cotton Oil Company at its plant in Ashdown, Arkansas, to borrow money from the cash drawer at said plant and place slips therein in lieu of said cash so borrowed and that said custom was known to or acquiesced in by the management of said company and that the withdrawals of cash by the defendant complained of herein, if any, were made by him pursuant to this custom and without any fraudulent or felonious intent at the time on his part to embezzle said funds or convert them to his own use; or if you have a reasonable doubt as to whether or not this is true you must acquit the defendant."

Defendant introduced several witnesses who testified that cash advances were made to all employees of the mill applying therefor by having the employee sign a voucher for the amount advanced, which was placed in the cash box kept in the safe. These advances were repaid each pay-day either by deducting them from the employee's pay check or the employee giving his own check for the amount advanced. This custom was followed by other companies where the witnesses had been employed. Two employees who worked in the office with appellant followed this practice. One of these was secretary and treasurer of the company, and also engaged in the trucking business with another officer of the company at Texarkana. The partnership hauled products for the mill and also for the public generally. The oil company fre-

quently made advances by check to the local partner in the operation of the partnership business and an account was regularly maintained for this purpose. This account was kept current and there were no shortages reflected in the account by the audit. The two office employees were positive in their testimony that all advances made to them were regularly and duly repaid; that they knew nothing about the shortages in the accounts maintained by defendant, and had nothing to do with the alteration of the records disclosed by the audit.

The defendant did not testify at the trial. The evidence does not disclose to what extent, if any, he engaged in the practice of obtaining cash advances from the cash box, or whether he ever "borrowed" money from the company. The evidence did not, therefore, warrant the giving of the requested instruction. The instruction was also misleading in that the jury's consideration was thereby limited to withdrawals of cash from the cash box when the audit discloses that a substantial portion of the shortages resulted from the failure to deposit customers' checks. Moreover, the jury were told in other instructions that it was incumbent on the state to show beyond a reasonable doubt that defendant fraudulently embezzled and converted the funds of the oil company to his own use without the consent or acquiescence of the company. The requested instruction was also improper in that it authorized an acquittal because of a reasonable doubt as to a particular part of the evidence when such doubt should arise from a consideration of all the evidence. *Foster* v. *State,* 179 Ark. 1084, 20 S. W. 2d 118. There was no error in the court's refusal to give the requested instruction.

Outstanding citizens of Little River county testified to the good reputation of the defendant. A jury composed of other outstanding citizens of the county found him guilty under evidence that is substantial and sufficient to support the verdict. The court fully and fairly instructed the jury. The points of law embraced in other instruc-

tions requested by the defendant and refused by the court were sufficiently covered in those given.

We find no prejudicial error, and the judgment is affirmed.

LAWRENCE *v.* CALVERT FIRE INSURANCE COMPANY.

4-8448 211 S. W. 2d 119

Opinion delivered May 24, 1948.

J. C. Brookfield, for appellant.

W. N. Killough, for appellee.

GRIFFIN SMITH, Chief Justice. Litigation dealt with by the appeal began in 1941 when A. D. Lawrence wrecked a 1937 Ford "pickup" truck by driving it into a ditch near Wynne. Lawrence purchased the vehicle from Kinsey Motor Co., at Forrest City, title notes having been sold to Commercial Credit Corporation. Certain risks were covered by Calvert Fire Insurance Company.

There is testimony from which an inference arises that Lawrence, after the wreck, did not endeavor to salvage the damaged truck; whereupon Fire Adjustment Bureau of West Memphis sent A. J. Boots to look after the Calvert Company's interests. H. K. Barwick, operating the Ford Garage at Wynne, was engaged to tow the truck to his place of business. This service was sublet at a cost to Barwick of $20. At the instance of the Insurance Company an appraisement of damages was made and the estimate of $162.51 accepted. Settlement upon this basis was made, a check for this amount, less $50

"deductible," having been delivered to Finance Corporation, whose debt exceeded the remittance.

J. C. Brookfield, an attorney of Wynne, was employed by Lawrence. Brookfield is now dead. His estate is represented by Ada V. Burns, Administratrix.

In September 1941 Brookfield signed the proof of loss, in which it was shown that Commercial Credit Corporation held a title lien, and that actual value when the wreck occurred, or immediately prior thereto, was $275. There was also an affirmative statement by the Insurance Company that payment would be made to Credit Corporation.

On behalf of Barwick there is testimony that Brookfield, representing Lawrence, did not desire that expenses incident to repairing the truck be incurred. Brookfield contended that Barwick undertook to hold the property for towage charges and for repairs it was alleged were to be made. Barwick denied this, saying he offered to waive even the $20 and turn the truck over to Brookfield. Finally Brookfield refused to accept the truck unless the Insurance Company procured an acquittance from Finance Corporation. Since the parties were unable to agree, Brookfield, who by intervention alleged a joint interest with Lawrence in the subject-matter, filed suit in replevin, effect of which was to charge that the truck had been converted by Barwick and the Insurance Company.

October 17, 1941, a "writ of replevin and summons" issued from the court of W. Z. Campbell, Justice of the Peace, commanding the Sheriff to take the truck from Barwick and the Insurance Company, "and hold the same subject to the order and decision of the Court." No value was stated, nor was a money judgment asked. Contention of the appellees is that, by consent, the cause was continued indefinitely in order that the parties might reach a settlement, Barwick insisting that he did not claim the truck and had at all times been willing to deliver it to the rightful owner. The summons issued by Campbell called for a hearing October 30. November 18th Brookfield wrote Barwick, declining a settlement that had been pro-

posed, but making another offer. The J. P. docket shows that the cause was continued from October 30 to November 10, and on November 10th it was continued to the 21st, when judgment was entered against Barwick and the Insurance Company for $288.05.

The Insurance Company says it was not served with summons, did not enter its appearance, and did not have notice of the proceedings at that time. Barwick thought his name had been included in the summons as a legal formality and did not know a claim was urged against him, and time for appeal expired before either defendant knew that judgment by default had been rendered. They successfully applied to Chancery for a temporary injunction to prevent the Sheriff from levying execution.

An interlocutory order denying a motion to dissolve reached this Court on appeal and the Chancellor was affirmed in an opinion by Mr. Justice KNOX May 3, 1943. *Brookfield* v. *Calvert Fire Insurance Co.*, 205 Ark. 767, 170 S. W. 2d 682. In the opinion it was said that the power of Chancery to enjoin enforcement of a judgment rendered without service was unquestioned, where without negligence the defendant has lost his remedy at law. Primarily, however, the lower court was affirmed because essential testimony had not been preserved and brought up by bill of exceptions.

It was subsequently alleged in the case at bar that the Chancellor was arbitrarily continuing the temporary order upon the ground that necessary witnesses were serving in armed forces of the United States and their attendance could not be compelled. A petition by Lawrence "For Mandamus and Prohibition" was denied by this Court in October 1943.

Thereafter the cause was set for hearing, resulting in a decree of May 26, 1947, making the injunction permanent. The Chancellor found that the judgment of November 21, 1941, was by default, and taken without notice that the cause would be heard at that time. There was an agreement, he said, that continuance would be for an indeterminate period, with an understanding that, before

further action, Brookfield would inform the defendants in time for trial, and that there had been failure to abide the agreement.

A review of the record is not convincing that the Chancellor's findings are contrary to a preponderance of the testimony; hence the decree is affirmed.

MECHANICS & TRADERS INSURANCE COMPANY *v.* GRAMLING.

4-8545 211 S. W. 2d 645

Opinion delivered May 24, 1948.

Rehearing denied June 21, 1948.

McMillen & Teague, for appellant.

Barrett, Wheatley & Smith, Phil Herget and *Kirsch & Cathey,* for appellee.

ROBINS, J. Appellants ask us to reverse judgment of the lower court against them in favor of appellees for amount alleged to be due on fire insurance policies issued by appellants.

Appellees, on November 13, 1946, sold to Coleman, Keller & Ackerman certain personal property, taking twelve promissory notes of the vendees, each in the sum of $585, for the purchase money. In order to secure these notes the vendees executed and delivered to appellees a chattel mortgage on this personal property, and the mortgage was duly filed with the recorder on November 13, 1946. The vendees also delivered to appellees certain fire insurance policies covering the mortgaged property. Each policy bore a "loss payable" clause in favor of appellees. Among these policies were three policies, each for $500, and issued, respectively, by the three appellants. The property insured was destroyed by fire on February 3, 1947.

The sole defense of appellants was that two of the policies sued on had, on November 15, 1946, and the other on November 19, 1946, long before the fire, been canceled, and were not in force when the property burned.

Whether these policies were effectually canceled, insofar as the rights of appellees are concerned, is the sole question in this case.

The testimony, in which there is little dispute, showed that the policies sued on were issued by the Freeze Insurance Agency, which was the local agent (with power to issue policies) of each of the appellants. On November 15, 1946, this agency received instructions from appellants, Mechanics & Traders Insurance Company and Louisville Fire & Marine Insurance Company, to cancel the said policies issued by said appellants, respectively; and like instructions were received on November 19, 1946, from appellant, The Yorkshire Insurance Company, Ltd. In obedience to these instructions a representative of the Freeze Insurance Agency attempted to take up these policies from the persons named therein as the assured, but was told that the policies had been lost or mislaid. This agent thereupon took from one of the parties insured written statements by which cancellation of the policies was agreed to and surrender of the policies when found was promised. No notice of this cancellation was ever

given to appellees, though the policies were in their possession.

The "loss payable" clause in each of the policies was as follows: "It is agreed that any loss ascertained and proved to be due the insured under this policy shall be held payable to J. C. Gramling, W. D. Stark and Jess Gramling as interest may appear; subject, however, to all the provisions and stipulations of this policy."

The provisions for cancellation in each of the policies were as follows:

"Cancellation of Policy. This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company, by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the *pro rata* premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

"Mortgagee Interests and Obligations. If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation."

The manager of the Freeze Insurance Agency testified that he knew of the mortgage held by appellees.

Appellants argue that the "loss payable clause" on the policies involved was not the comprehensive "standard mortgage clause" generally used to protect mortgagees, and that under the clause used appellants were not required to notify appellees. The contention of appellants is that they were required to notify only the persons named in the policies as the assured, in order to effect cancellation.

But appellants' local agent admitted that he knew of the existence of the mortgage to appellees. This knowledge of the agent was knowledge of the insurers. *Mutual Aid Union* v. *Blacknall,* 129 Ark. 450, 196 S. W. 792; *Mechanics' Insurance Company* v. *Inter-Southern Life Insurance Company,* 184 Ark. 625, 43 S. W. 2d 81.

Each of these policies was payable to appellees as their interest might appear and the policies contained provisions to the effect that where a policy was made payable to a mortgagee cancellation might be effected by "giving to such mortgagee a ten days' written notice." Since appellees were mortgagees—a fact of which appellants had actual, as well as record, notice—appellees were, under the letter of the contracts, entitled to notice of intention of insurers to cancel the policies.

It is conceded that no notice of cancellation was ever given to any of the appellees. It follows that there was no valid cancellation of these policies, so as to affect the rights of appellees, and that, as to them, the policies were in effect at the time the property was destroyed by fire. *National Union Indemnity Company v. Standard Accident Company of Detroit,* 179 Ark. 1097, 20 S. W. 2d 125; *Dent* v. *Froug's, Incorporated,* 189 Ark. 461, 74 S. W. 2d 237.

It is not disputed that more than the amount of the insurance was due to appellees on their promissory notes. Hence, they were entitled to the judgments sought by them.

We find it unnecessary to consider other questions argued in the briefs, since, under the documents and facts, about which there is no dispute, appellants had no valid defense.

The judgment of the lower court is affirmed.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, THOMPSON, TRUSTEE *v.* PERRYMAN.

4-8400 211 S. W. 2d 647

Opinion delivered May 24, 1948.

Rehearing denied June 21, 1948.

[redacted]

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

Partain, Agee & Partain, for appellee.

Ed. F. McFaddin, Justice. This appeal stems from a grade crossing collision between a railroad engine and an automobile, the latter occupied by six boys.

On Sunday morning, June 23, 1946, the six boys drove in a 1936 two-door Ford sedan to a swimming hole on Frog Bayou in Crawford county. The car was owned by a member of the family of Roosevelt Foster, one of the boys, and he had invited the other five to go with him. On their return trip, and while Roosevelt Foster was driving, there occurred the grade crossing collision which resulted in the death of one of the boys (Tommy Perryman, aged 14), and the injuring of Roosevelt Foster, aged 16, and Voile Ray Aldridge, aged 13. These three boys were in the front seat of the car. Insofar as the record here shows, the three boys in the back seat were not injured. They were Lawrence Perryman, aged 16; William Thacker, aged 16; and Bennie Jean Perryman, whose age is not stated.

Three actions [1] filed against the St. Louis-San Francisco Railway Company (Frank A. Thompson, Trustee) were—by consent—consolidated for trial, and resulted in verdicts as follows:

[1] In one action the plaintiff was James T. Perryman as administrator; and also individually. In the second action the plaintiffs were Voile Ray Aldridge, by his father, and J. J. Aldridge individually. In the third action the plaintiffs were Roosevelt Foster, by his mother, and Mrs. Nancy Foster individually. In this third action George Foster and the Federal Union Insurance Company intervened.

1. James T. Perryman, administrator of the estate of Tommy Perryman, $25;

2. James T. Perryman, father of Tommy Perryman, for loss of services of the minor, $5,000;

3. Voile Ray Aldridge, for his pain, suffering and injuries, $10,000;

4. J. J. Aldridge, father of Voile Ray Aldridge, for loss of services of the minor, $1,000;

5. Roosevelt Foster, for his pain, suffering and injuries, $100;

6. Mrs. Nancy Foster, mother of Roosevelt Foster, for the loss of services of the minor, $400; and

7. The defendant railroad company, as against the interveners, George Foster and the Federal Union Insurance Company for damages to the car.

From an unavailing motion for new trial against the judgments on the first six verdicts, appellant brings this appeal. The briefs of both sides contain 465 printed pages, and the transcript contains 506 typewritten pages. We list and discuss appellant's argued assignments.

I. *Appellant Says, "No Actionable Negligence Was Proved, and Plaintiffs Were Not Entitled to Recover."* The only allegations of defendant's (appellant's) negligence relied on by the plaintiffs (appellee) were: (1) the failure to sound the bell or whistle, and (2) excessive speed of the train. Several witnesses testified that neither the whistle nor the bell was sounded for the crossing, as required by law. (§ 11135, Pope's Digest.) For instance, the disinterested witness, H. B. Simmon, testified:

"Q. Did you or not hear the train whistle at that time? A. No, sir, there was no train whistle at this crossing. Q. Were you near enough to hear one if it had whistled? A. Yes, sir. Q. And you state that it didn't whistle as it approached the crossing? A. No, sir. Q. Did you or not hear the bell ring? A. No, sir.

Q. You didn't hear a bell ring or a whistle blow? A. No, sir, I heard the engine puff."

Jim Kinner, another disinterested witness, testified:

"Q. How far away would you say he whistled? From this crossing? A. Close to a half-mile. Q. Did the train ever whistle any more? A. No, sir. Q. Did a bell ever ring from that time on? A. No, sir. Q. If it had done so, would you have heard it or not? A. Yes, sir. Q. Did you see the train? A. Yes, sir. Q. I wish that you would tell the jury how fast that train was going. A. In my judgment it was running 50 miles an hour."

Even if we disregard the evidence about the speed of the train, nevertheless, we must conclude that there was substantial evidence that the statutory signals were not given. But, says the appellant, failure to give the statutory signals was not the cause of the collision, because the boys could have seen and heard the train if they had looked or listened, and such knowledge would have made the signals unnecessary. On this point appellant cites and relies on such cases as: *Mo. Pac. R. Co.* v. *Hood,* 199 Ark. 520, 135 S. W. 2d 329; *Mo. Pac. R. Co.* v. *Dennis,* 205 Ark. 28, 166 S. W. 2d 886; *Mo. Pac. R. Co.* v. *Doyle,* 203 Ark. 1111, 160 S. W. 2d 856; *Mo. Pac. R. Co.* v. *Moore,* 199 Ark. 1035, 138 S. W. 2d 384; *Crossett Lumber Co.* v. *Cater,* 201 Ark. 432, 144 S. W. 2d 1074; and other earlier cases cited in those above listed.

Appellant's contention makes necessary a description of the highway and railroad track. For the purpose of this opinion, we treat the railroad track as running from south to north. The gravel highway from the south ran parallel and east of the railroad track to the crossing here involved, and then after a sweeping curve the gravel highway ran north, parallel to and west of the railroad track. The train was going from south to north, and the automobile was traveling from north to south. Thus, the car was approaching the crossing from the west, and struck the engine slightly back of the cowcatcher. Taking the route traveled by

the car from the swimming hole to the crossing, there was a long curve going south and east to the crossing. When the automobile was about 80 feet from the crossing, the highway ran practically due east to the crossing. Some evidence tended to show that from 50 to 65 feet west of the crossing there was nothing to obstruct the view, or to keep the boys from seeing the train as it approached from the south.

Did the boys in the car see and hear the train, or know of its approach so as to make the statutory signals unnecessary? It is claimed that Roosevelt Foster, driver of the car, on the day after the collision, gave a written statement to the railroad claim agent, which read in part:

"The road is of gravel and when around 400 feet west of the crossing, we were traveling east to the track and coming around the curve, and we were all talking and laughing about a ball game, proceeding about 15 miles per hour. I was looking to my left or the north as (I) came to the track and did not see or hear the train. I can see and hear good. The first I looked to my right or south, was when my car was about 15 feet from the track and had slowed the car down to 10 or 12 miles per hour. I then looked to my right and saw the train on the track and it was about 2 or 3 box car lengths south of the crossing. I went for my brakes, but they did not hold good and I then got the car in low gear, don't know whether I put it in reverse or not, but was doing this to get the car stopped."

But at the trial Roosevelt Foster repudiated this statement, and testified: "Q. As you approach that crossing state whether or not there was any interference with your view of the track: was there anything to keep you from seeing the track? A. Yes, sir. Q. What was it? A. A big sweet gum tree. Q. Was that on your right or left? A. It was on my right. Q. At that time it was to the south of you? A. Yes, sir. Q. Did you or not look down that way or attempt to look down that way? A. I looked. Q. Did you see any train or not? A. I didn't, I couldn't. Q. Was there anything except

the sweet gum to cut off your view? A. There were some sprouts. Q. Which direction were they from the tree? A. They were farther south. Q. Tell the jury whether or not you heard or saw any train coming? Did you or not look and listen for a train? A. Yes, sir."

And, again:

"Q. Did you hear any train whistle as you approached the crossing? A. No, sir. Q. Did a train whistle as you approached the crossing? A. No, sir. Q. Did you hear a bell ring? A. No, sir."

Furthermore, it is claimed that Voile Ray Aldridge gave a signed statement to the railroad claim agent some time after the collision, in which statement the following appears:

"As we approached the track, I don't know how fast we were moving, but we were all talking as going to have a ball game that afternoon. As we came to the track we heard, or I did, the train whistling, but I thought it was coming from the north, and I looked that way as coming to the track. The first I knew it was coming from the other direction was as our car got to the edge of the woods on west side of track and to our right—don't know how many feet back that is, but seemed pretty close to the track. I don't know just how far the train was to my right, but seemed awfully close to crossing. I don't recall whether anyone called to Rosie to stop or not, and don't remember whether I did or not. I don't recall hitting the train, and don't know where we hit it. I don't recall anything after that, as the next thing I knew I was in hospital at Fort Smith. I don't recall whether the bell was ringing or not, but did hear it whistling as we approached crossing, and thought it was coming from our left, or from the north."

But at the trial Voile Ray Aldridge testified: "Q. As you came to the crossing of the road with the railroad, did you or not hear a train whistle or a bell ring? A. No, sir. Q. Were you looking or listening, Voile Ray, or not? A. Yes, sir. Q. As you approached the crossing, did you or not have a clear view of the track, or

was there something to obstruct your view? A. There was a big sweet gum tree. Q. Were there leaves on the tree at that time? A. Yes, sir."

Under this assignment appellant also argues that the cause of the collision was not the railroad's failure to give the statutory signals, but, rather, the absence of brakes on the car. The appellant introduced the alleged signed statement of Roosevelt Foster, in which this appears: "I went for my brakes, but they did not hold good and I then got the car in low gear, don't know whether I put it in reverse or not, but was doing this to get the car stopped. I don't know where the train hit the car or where we hit the train. The brakes would hold part of the time, but would take some time to stop it."

But, as before mentioned, at the trial Roosevelt Foster repudiated the signed statement, and testified that the brakes were working. This appears: "Q. Don't you know that you put it in reverse because the brakes were not working? A. No, sir, they were working. Q. If anybody else says that they were not working, then they are just mistaken about it? A. Yes, sir."

Furthermore, Voile Ray Aldridge was interrogated on cross-examination about the brakes, and gave answers as follows: "Q. The brakes on that car were not very good? A. They were pretty good brakes. Q. Don't you know that you were having trouble with the brakes and the car wouldn't stop because it didn't have good brakes, don't you recall that? A. No, sir."

It is thus clear that the testimony of the witnesses at the trial was a repudiation of their previous statements; and the testimony at the trial, if believed by the jury, was sufficient not only to repudiate the statements, but to establish that the boys did not know of the approach of the train until shortly before striking the engine; and also that a question of fact was presented as to the brakes on the car. See *St. L. S. F. Ry.* v. *McCarn,* 212 Ark. 287, 205 S. W. 2d 704. It is not for the judges of this court to determine whether the signed statements are more trust-

worthy than the testimony from the witness stand. That is a matter for the jury, which is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Mo. Pac. Transp. Co.* v. *Sharp,* 194 Ark. 405, 108 S. W. 2d 579; *Washington County* v. *Day,* 196 Ark. 147, 116 S. W. 2d 1051; and *Mo. Pac. Transp. Co.* v. *George,* 198 Ark. 1110, 133 S. W. 2d 37. In the early case of *Hynson* v. *Terry,* 1 Ark. 83, this court in the first year of our statehood said: "It is the province of the jury to weigh and compare the testimony and to apply the facts to the principles given them in charge by the court."

So, it is clear that the question, whether the failure to give the statutory signals was actionable negligence in this case, was a matter for the jury under the testimony as presented. It would serve no useful purpose to try to point out how the facts in this case differ from or agree with the facts in previous cases involving grade crossing collisions, because each case has its own peculiar set of facts. The pole star for this court on appeal is, whether there was substantial evidence to take the case to the jury on the question of actionable negligence. We have sketched here only a portion of the evidence, but a portion sufficient to show that a jury question was made on the issue of actionable negligence, *i. e.,* failure of the railroad to give the statutory signals as being the cause of the collision.

II. *Appellant Says, "The Driver and Occupants of the Car Were Guilty of Contributory Negligence, and Plaintiffs Cannot Recover."* This issue of contributory negligence of the boys is closely akin to the issue of the defendant's actionable negligence, heretofore discussed. The relationship of the two issues is this: contributory negligence, just as the actionable negligence of the defendant, is a question for the jury, if substantial evidence be introduced on such issue. Furthermore, in railroad crossing cases contributory negligence is not an absolute defense, but only a "measuring and reducing" defense. (Section 11153, Pope's Digest, as amended by Act 140 of 1945, and see cases cited in West's Arkansas Digest, "Railroads," § 350(13).)

In the present case the court submitted to the jury, in defendant's instructions 31 and 32, the question of whether the boys in the car were engaged in a joint enterprise, and the jury verdicts constitute a negative answer to that question. In this state of the record, there was no joint enterprise; and the negligence of the driver of the car is not imputed to the other occupants. *Mo. Pac. R. Co.* v. *Johnson,* 204 Ark. 604, 164 S. W. 2d 425; *Mo. Pac. R. Co.* v. *Henderson,* 194 Ark. 884, 110 S. W. 2d 516; *Hot Springs St. Ry. Co.* v. *Hildreth,* 72 Ark. 572, 82 S. W. 245; and other cases collected in West's Arkansas Digest, "Negligence," § 93. The only duty of the occupants of the car—other than the driver—was to comply with the ordinary "stop, look and listen" rule, as announced by our cases.[2] In *St. L. S. F. Ry. Co.* v. *Steele,* 185 Ark. 196, 46 S. W. 2d 628, we said, of a guest in an automobile approaching a railroad crossing: "The testimony showed that appellee was riding in the car with the Negro as a guest by his own invitation, it is true, but any negligence of the owner or driver of the car cannot be imputed to him, although he was bound to the exercise of ordinary care for his own safety under the circumstances, . . ." See, also, 5 Am. Juris. 776, and cases there cited.

As previously mentioned, our comparative negligence statute (§ 11153, Pope's Digest, amended by Act 140 of 1945) provides that contributory negligence is not an absolute defense, but is only for proportional diminishing of recovery. So, even if the driver and occupants were guilty of contributory negligence, still, if the railroad company was guilty of actionable negligence greater than the contributory negligence, then it was for the jury to diminish the recovery in porportion to such contributory negligence. Whether the driver and occupants were guilty of contributory negligence, is a disputed question of fact under the evidence in this case, and was properly submitted to the jury. The language of Mr. Justice FRAUENTHAL in *Ark. Central Ry.* v. *Williams,* 99 Ark. 167, 137 S. W. 829, is apropos:

[2] See West's Arkansas Digest, "Railroads," § 327.

"But where the evidence is conflicting, the question as to whether or not the traveler at the public crossing did look and listen for an approaching train before reaching the crossing, and whether or not he did continue with vigilance and care until the point of danger was past, is ordinarily one of fact for the jury to determine. Unless the evidence is either uncontradicted or is indisputable, to the effect that he did not look and listen, the verdict of a jury finding that the traveler did so look and listen should not be set aside as a matter of law."

III. *Appellant Says, "The Verdicts Are Inconsistent and the Judgments Should Be Reversed."* Originally, Mrs. Nancy Foster, mother of Roosevelt Foster, claimed that she was the owner of the automobile that Roosevelt Foster was driving, and she asked damages in the sum of $400 for the car and $2,000 as damages for her loss of the services of the minor, Roosevelt Foster. Later, however, it developed that the automobile that Roosevelt Foster was driving was owned by his brother, George Foster, who had collision insurance on the car. Accordingly, George Foster and his insurance carrier (Federal Union Insurance Company) intervened in the case, and sought to recover from the railroad company the amount of the damages to the car. The jury returned a verdict in favor of the railroad company and against the said interveners. Because of this verdict, appellant argues that, since the owner of the car did not recover, there is therefore a conflict between the verdicts, and all the judgments should be reversed. To support such argument, appellant cites such cases as: *Mo. Pac. Ry. Co.* v. *Boyce,* 168 Ark. 440, 270 S. W. 519; *Muha* v. *De Luccia* (N. J.), 136 Atl. 332, 5 N. J. Misc. 274; and *Lanning* v. *Trenton Co.* (N. J.), 130 Atl. 44, 3 N. J. Misc. 1006.

But we think one reason that the jury returned the verdict against George Foster and the insurance company was because of the peculiar and misleading instruction given the jury at the request of said interveners. The instruction read in part as follows: "As to the automobile the intervener insurance company alleges, and the plaintiff George Foster concedes, that under the policy

written by it covering said vehicle, the said plaintiff has been reimbursed by said intervener in the sum of $260.50; so if you find for George Foster as to said property damage and further find that said damage, if any, amounted to as much as $260.50, then your verdict should be for the intervener for that amount. And if you find the damage to said property was more than the amount claimed by said intervener, then you may find for George Foster for such excess, if any, not to exceed the sum of $50."

It was conceded in the evidence that George Foster was the owner of the car, but the amount of the damages was disputed, and under this instruction the jury was—in effect—told that, if the damages amounted to as much as $260.50, then the verdict would be for the intervener; and if the damages exceeded $260.50, then the excess, not to exceed $50, would go to George Foster. The jury might well have found from the evidence that the total damage to the car did not exceed $260.50; and in that event, could have returned a verdict against the interveners—under the wording of this instruction—without necessarily finding that the driver of the car was guilty of contributory negligence. Viewed in this light, the verdict against the interveners does not necessarily establish that the jury found that the driver of the car was guilty of contributory negligence; and this disposes of the argument about inconsistency in the verdicts as regards the point here argued.

IV. *Appellant Says, "The Verdict in Favor of the Plaintiff, James T. Perryman, Is Inconsistent, and the Judgment for Him Is Inherently Wrong."* One of the actions was by Perryman, as administrator of the estate of his son; and in this action there was a verdict for Perryman, as administrator, for $25. In the same action James T. Perryman, as father of the deceased minor, also sought damages for the loss of the services of the minor by reason of his death; and in that phase of the action there was a verdict for the father for $5,000.

The gist of the appellant's argument in this assignment is, that, since there was a verdict for Perryman as

administrator, it was therefore error to have a verdict for Perryman as father; because the administrator is the sole person who can maintain an action. Appellant cites and strongly relies on *Sinclair Rfg. Co.* v. *Henderson,* 197 Ark. 319, 122 S. W. 2d 580. In answer to the appellant's argument, appellee cites and relies on *Southwestern G. & E. Co.* v. *Godfrey,* 178 Ark. 103, 10 S. W. 2d 894. We think the case of *Sauve* v. *Ingram,* 200 Ark. 1181, 143 S. W. 2d 541, settles this issue in favor of the appellee. In the Sauve case Mr. Justice MEHAFFY pointed out that the presence of the father's name in the pleadings did not change any "claim or defense, and appellant could not possibly have been prejudiced thereby." So, here, appellant—in consenting to the consolidation of all of the cases—acknowledged that the designation of the father as such really meant that the administrator was acting for the benefit of the father, since the father was also the administrator. Therefore, the two verdicts really mean that the jury awarded $25 to the administrator for the estate, and $5,000 to the administrator for the benefit of the father for loss of the services of the minor. We will further discuss the amount of this verdict under Topic VI herein, but we overrule appellant's argument concerning inconsistencies in the verdicts.

V. *Appellant Says, "The Court Erred in Giving Plaintiffs' Requested Instructions."* The court gave 15 instructions for the plaintiffs and 24 instructions for the defendant; and the defendant made only general objections to plaintiffs' instructions. It would unduly prolong this opinion to set out all the instructions challenged, and to give in detail the reasons for our holding on each such instruction. We conclude that the instructions for the plaintiffs were not inherently erroneous, and were good as against general objections, which alone were offered.

VI. *Appellant Says, "The Damages Are Excessive."* We discuss the judgments.

A. There was a verdict for James T. Perryman for $5,000 for loss of the services of his minor son, Tommy Perryman, who was killed in the collision. The law does

not attempt to compensate parents for the grief and pain they sustain in the loss of a child. No amount of money could do that. What the law does—in the absence of a showing of reasonable expectancy of earnings after minority—is merely to compensate a parent for his monetary loss in being deprived of the earnings and services of the child during what would have been the remaining period of a child's minority. See *Interurban Ry. Co.* v. *Trainer,* 150 Ark. 19, 233 S. W. 816, and see, also, *St. L. S. F. Ry. Co.* v. *McCarn,* 212 Ark. 287, 205 S. W. 2d 704. With this point understood, we examine the testimony in this case.

The evidence shows that Tommy Perryman was 14 years and 8 months of age at the time of his death. The father, James T. Perryman, testified that the family lived on a 10-acre tract, and that Tommy, with the other children—when not in school—helped around the house and in growing and selling watermelons and other produce; that Tommy's earnings were "used to buy clothes and stuff like other boys"; that part of the boy's earnings were retained by the parent; and that the total return from the 1946 watermelon crop of all the children was $162. On this meager evidence of the earnings and services and contributions of the minor, we cannot sustain a judgment in excess of $2,500. Under the facts shown here, any amount greater than $2,500 for the father for loss of services of the minor is grossly excessive. So, if a remittitur is entered within 15 judicial days reducing this judgment of James T. Perryman to $2,500, then the judgment will be affirmed for the remaining $2,500; otherwise, the judgment will be reversed and the cause remanded.

B. There was a verdict for Voile Ray Aldridge for $10,000 for his personal injuries. The collision occurred on June 23rd; the boy was taken immediately to a hospital and kept under an oxygen tent for several days; he did not regain consciousness until July 1st; he remained in the hospital until July 4th, and then remained in bed in his home for three weeks thereafter. He suffered a frac-

tured skull, two broken ribs, a broken left arm, a collapsed lung and a severe wound near the rectum. He has permanent scars on his forehead and nose, and a permanent thickening of the bony growth in the skull. He still suffers pain. Based on the above-mentioned injuries, we are unable to say that the verdict is grossly excessive.

C. There was a verdict for J. J. Aldridge, father of Voile Ray Aldridge, for $1,000 for expenses and for loss of services of the minor. The evidence shows that Mr. Aldridge paid hospital and medical expenses amounting to $299.35; and that the minor is unable to work as before. We cannot say that this verdict is grossly excessive.

D. There are three other verdicts, and we cannot say that any of them is grossly excessive. They were: for Roosevelt Foster, $100; Mrs. Nancy Foster, $400; and Perryman, administrator, $25.

Conclusion

If a remittitur be entered within 15 judicial days reducing the judgment for James T. Perryman to $2,500, then that judgment will be affirmed for the remaining $2,500. Otherwise, that judgment will be reversed and that cause remanded. All the other judgments are affirmed. The costs of this appeal are to be paid by the appellee, Perryman, since the action was consolidated by consent, and since there is a substantial reduction in the total amount of the judgments involved in this appeal.

The Chief Justice dissents on the ground that appellees' proof does not substantially negative the overwhelming evidence given on behalf of the Railroad that the reckless indifference of youthful motorists was the proximate cause of injury. Mr. Justice McHaney (now ill and absent) voted to reverse and dismiss when the appeal was considered on April 6th. He asked that his dissent be noted.

HURLEY *v.* HORTON.

4-8526 211 S. W. 2d 655

Opinion delivered May 24, 1948.

[redacted]

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

W. F. Reeves and *N. J. Henley,* for appellee.

SMITH, J. On March 12, 1942, appellant Hurley sold to appellee Mays the white oak timber, ten inches and above, suitable for stave bolts, growing on approximately 300 acres, for the sum of $400, which was paid by check. In acknowledging receipt of the check appellant wrote: "You are to have a reasonable time to remove."

No timber was cut until January 12, 1947, at which time a crew of men began cutting and removing the timber. Appellant protested that the time for cutting the timber had expired, and directed appellee to cut no more. When appellee continued cutting, appellant filed suit to

enjoin him, and a temporary restraining order was granted, which was served the same day, and appellee ceased cutting on that date. Pending trial it was agreed that appellee might remove the bolts already cut, and pursuant to that agreement he removed eight and one-third cords of bolts, worth $30 per cord.

The answer filed alleged that a reasonable time for cutting the timber had not expired at the time cutting was commenced, and also that appellant was estopped from claiming the benefit of the alleged breach, if any, by the acquiescence in appellee's delay in cutting the timber. Upon the issues thus joined, trial was had on July 28, 1947, and a decree was rendered dismissing appellant's complaint as being without equity, and from that decree is this appeal.

The essence of appellee's first defense is that through governmental restrictions on the distillation of whiskey, the demand for staves of the character which he proposed to manufacture had been so greatly reduced that such staves could not be manufactured at a profit. No other reason existed or was shown for appellee's failure to cut and remove the timber within a reasonable time, and the evidence on this issue was conflicting. There was testimony that other similar timber in that vicinity was being cut between the date the timber was sold and the date the cutting commenced.

It was held in the case of *Liston* v. *Chapman & Dewey Land Co.*, 77 Ark. 116, 91 S. W. 27, that what is a reasonable time for cutting timber, when no definite time is granted, is usually a question of law and fact, which facts are to be ascertained by inquiring into the conditions of the land and timber, obstacles opposing and facilities favoring and conditions surrounding the parties at the time the contract was made, and that while no fixed rule could be established for ascertaining what is a reasonable time the facts and circumstances of each particular case are determinative of the issue. No reason for not cutting was shown except that the market conditions were such that it was not profitable to do so. It was held in the case of

Polzin v. *Beene,* 126 Ark. 46, 189 S. W. 654, that mere cost of compliance with a contract cannot excuse a party from the performance of an undertaking to do that which is lawful and possible, and in the case of *Young* v. *Cowan,* 134 Ark. 539, 204 S. W. 304, it was expressly held that a decline in the market price of timber to be manufactured, constituted no excuse for a failure to remove the timber within a reasonable time. We conclude, therefore, that appellee failed in his first defense. In this connection it is pointed out that no milling operation is required in manufacturing stave bolts.

The contracting parties were long-time friends and knew each other well. Appellee testified that at a time when he might have cut the timber he wrote appellant about an extension of time, but that he received no answer. Appellant testified that he did not receive the letter.

Appellee testified as to a conversation between himself and appellant which later occurred to the following effect. He called on appellant at his office and told him that he was ready to cut the timber and appellant said, "All right, but I think it is a bad time to cut it now. Jim Bullock and Ray Watkins are up there and I think it is a bad time to cut it. And I told Hurley that if he thought I ought to delay cutting, I would, and he said there was no hurry, no rush. I relied upon this statement and told my foreman to refrain from cutting as we had a lot of other timber to cut." Appellant did not specifically deny this testimony, but did say that he did not remember the conversation.

If when appellee was ready to cut the timber, and at a time when he had the right to do so, he was told by appellant that there was no hurry, and not to rush, he was misled to his detriment and equitable estoppel arose against claiming a subsequent forfeiture unless and until appellant was told that more than a reasonable time to remove the timber would not thereafter be granted.

In the case of *Thomas* v. *Spires,* 180 Ark. 671, 22 S. W. 2d 553, it was held, to quote a headnote: "A party

who, by his acts, declarations, or admission, either deliberately or with willful disregard of the interests of another, induces him to conduct or dealings which he would not otherwise have entered upon is estopped to assert his rights afterwards to the injury of the party so misled."

Under this testimony we think an estoppel arose, and the decree is affirmed.

LAMBERT *v.* STATE.

4508 211 S. W. 2d 431

Opinion delivered May 31, 1948.

F. B. Clement and *Byron Goodson,* for appellant.

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

GRIFFIN SMITH, Chief Justice. Appellant was charged by information with having feloniously brought into Sevier County an automobile, knowing it had been recently stolen. The jury found him guilty and fixed punishment at five years in prison. From judgment on the verdict appellant alleges numerous errors.

It is necessary to deal with but one assignment: the Court should have granted the defendant's motion that he be committed to State Hospital for observation, notice having been given that a plea of not guilty by reason of insanity would be made. The motion was filed February 16—a day before trial—and argued.

Initiated Act No. 3, §§ 11, 12, and 13, Pope's Digest, §§ 3913, 3914, and 3915, came to the Court's attention in *Whittington* v. *State,* 197 Ark. 571, 124 S. W. 2d 8; *Bray* v. *State,* 197 Ark. 913, 125 S. W. 2d 478; *Korsak* v. *State,* 202 Ark. 921, 154 S. W. 2d 348; *Gaines* v. *State,* 208 Ark. 293, 186 S. W. 2d 154. There are discussions in other cases. See "Preliminary Determination of Sanity," 142 ALR 956, annotation at p. 961.

The inquiry here goes only to the question whether the trial court had discretion to hear testimony and thereafter overrule the motion for commitment to the Hospital. Three members of this Court think effect of our cases is that applicable sections of the Initiated Act are mandatory, and that if the motion is made before or at the time of arraignment, the order of commitment must be made, and the case continued. Their views are that the Act is not susceptible of a construction which would allow the Court any discretion. Another Judge thinks that, although the trial Court had some discretion, yet where (as here) preliminary proof develops testimony that the defendant is a psychopathic personality, and that this seemingly induced the Court to submit an instruction on insanity, denial of the motion to commit was erroneous.

Result is that the judgment must be reversed. The cause is remanded for a new trial.

The Chief Justice and Mr. Justice Frank G. Smith think effect of the majority opinion is to permit the defendant in any criminal case to procure a continuance by the simple device of waiting until the time of arraignment and then pleading insanity. It is their view that a broader construction should be given, requiring (except in extraordinary cases where delay was unavoidable) reasonable notice of an intent to make the plea.

FORESEE *v.* BOARD OF DIRECTORS BERGMAN SPECIAL SCHOOL DISTRICT NO. 8.

4-8559 211 S. W. 2d 432

Opinion delivered May 31, 1948.

Woody Murray, for appellant.

W. J. Cotton, for appellee.

ROBINS, J. Appellant brought suit in the lower court seeking to quiet his title to lots 1 to 12, inclusive, in block 25, of the town of Bergman. Appellees were made defendants, since they claimed the lots under a deed executed on September 18, 1918, by Helen Elizabeth Nelson to Special School District No. 35 of Bergman, which was afterwards consolidated with Bergman Special School District No. 8, of which appellees are directors. Appellant based his claim to title on two deeds from the State to which the lots were forfeited and sold for delinquent taxes.

The lower court sustained the contention of appellees that the tax sales were void because the lots, at the time of assessment and sale, were owned by the school district and used by it for school purposes.

The sole question below and for determination here is: Were the lots, when assessed and sold for taxes, being held and used by the district "exclusively for school purposes" so as to be exempt from taxation under the provisions of Art. XVI, § 5, of the Constitution of Arkansas?

There is little dispute in the testimony. Shortly after School District No. 35 bought the lots in 1918 it erected a school building thereon, which was used by the district up until 1931, when, after the consolidation, the building, except the foundation, was torn down by the district. A new school building was erected for the consolidated district some distance from the lots herein involved.

Since the removal of the old building, the lots, except for the foundation, have been vacant. The officers of the district testified that they had not rented the property, but that they had been planning to make use of the property by erecting on the old foundation a gymnasium for use in connection with the school activities of the district.

In the case of *McCullough* v. *Swifton Consolidated School District,* 202 Ark. 1074, 155 S. W. 2d 353, the question to be determined was whether property conveyed to School District No. 23 "for school purposes" had been abandoned for such purposes so as to bring into operation a reverter clause in the conveyance. The evidence showed that School District No. 23 had been consolidated with appellee district, which began to tear down the school building of the first named district. But the testimony further showed that the appellee district purposed to build on the same site a waiting station for children to use in meeting the school bus. On this testimony we held that the use of the property "for school purposes" continued, and that the land did not revert to the grantor. Other cases of somewhat similar import are *Rose* v. *Marshall Special School District No. 17,* 210 Ark. 211, 195 S. W. 2d 49, and *Conner* v. *Heaton,* 205 Ark. 269, 168 S. W. 2d 399.

In the case of *Hudgins* v. *Hot Springs,* 168 Ark. 467, 270 S. W. 594, it appeared that in December, 1912, the city of Hot Springs purchased certain land for use as a dumping ground for refuse. It was so used for three or four months, when such use was discontinued on account of the impassable condition of the road leading to it. Thereafter it was never used as a dumping ground or for

any other purpose. The land was assessed for taxes in 1914 and in 1915 was sold to Hudgins for nonpayment of taxes. After expiration of period of redemption Hudgins obtained a deed from the clerk. The city brought suit to cancel the tax title. In affirming decree of the lower court in favor of the city this court said: "Here the property was used for a public purpose, and there had been no change in the use of it. The city had simply quit using it for a time as its dumping ground because of the condition of the roads. It had not been used for any private purpose, and it could not even be said that, at the time the property was sold for taxes, the city had abandoned its use as a dumping ground. It was not bought for future use, but was actually used as a dumping ground for several months after its purchase."

In the case at bar the testimony on behalf of appellees convinced the lower court that the school district had been keeping the property in dispute with the *bona fide* intention to use it as a location for a gymnasium and that it actually purposed to erect such a building thereon.

We are unable to say that the finding of the lower court is against the preponderance of the evidence. Accordingly, the decree appealed from must be affirmed.

CAPITAL TRANSPORTATION COMPANY *v.* STRAIT, JUDGE.

4-8577 211 S. W. 2d 889

Opinion delivered May 31, 1948.

House, Moses & Holmes, for petitioner.

Geo. W. Shepherd, for respondent.

ROBINS, J. Petitioner asks us to grant writ of prohibition against Honorable Audrey Strait, Judge of the circuit court of Yell county, directing him to proceed no further with trial of a certain cause pending in said court wherein Thurman L. Ramey, Linda Lee Ramey, Ella Rea Ramey, Inis Ramey, A. C. McCarty and Freddie Joan McCarty are plaintiffs and the petitioner, Capital Transportation Company, and Emerson Williams are defendants. Said suit was brought in the lower court to recover damages alleged to have been sustained by the plaintiffs resulting from a collision which occurred in North Little Rock between an automobile owned and driven by plaintiff, Thurman L. Ramey, and a bus owned by petitioner, Capital Transportation Company, and operated by Emerson Williams as driver. It was averred in the complaint that all of the plaintiffs were residents of Yell county; and the jurisdiction of the Yell circuit court was invoked on that ground under authority of Act 314 of the General Assembly of Arkansas of 1939.

The petition filed in this court shows that the petitioner filed in the lower court a motion to dismiss the complaint, alleging that the injuries occurred in Pulaski county and that all of the plaintiffs were residents of Pulaski county at the time the injuries occurred; and that on January 14, 1948, a hearing was held on this motion, at which eight witnesses testified on behalf of the defendants and seventeen witnesses testified on behalf of the plaintiffs. After hearing this testimony the lower court overruled the motion to dismiss.

A transcript of the evidence introduced on the hearing of this motion is attached to the petition filed in this

court; and from this evidence petitioner argues that it was shown that the plaintiffs were residents of Pulaski county at the time of the collision.

A recital of the testimony at the hearing below is unnecessary. It suffices to say that the record shows clearly that there was an issue of fact presented to the lower court by this testimony. We have frequently held, in cases of this kind, that where there is a contradiction in the testimony presented to the lower court on a motion challenging jurisdiction the writ of prohibition will not be awarded by us; and the party seeking such relief will be remitted to his remedy by way of appeal, should final judgment go against him in the lower court.

In the recent case of *Twin City Lines, Inc.*, v. *Cummings, Judge,* 212 Ark. 569, 206 S. W. 2d 438, we were asked to grant a writ of prohibition against the Judge of Benton circuit court to prevent further proceedings in a suit brought in that court by the father and administrator of the estate of Helen Pearce to recover for injury and death of Helen Pearce which occurred in Sebastian county. In that case, as here, there was a motion to dismiss on the ground that Helen Pearce was, at the time of her injury and death, a resident of Sebastian county. In denying the writ sought in that case we said:

"It will be observed that the question as to whether the trial court had jurisdiction of the person of petitioner turns on the fact of Helen Pearce's residence at the time of her death. The fact of deceased's residence at the time of her death is, therefore, a controverted and contested question which the trial court was called upon to determine from the testimony adduced on that issue. This court has repeatedly held that where the jurisdiction of a trial court depends upon a question of fact, a writ of prohibition will not lie. *Crowe* v. *Futrell,* 186 Ark. 926, 56 S. W. 2d 1030; *Terry* v. *Harris,* 188 Ark. 60, 64 S. W. 2d 80; *LaFargue* v. *Waggoner,* 189 Ark. 757, 75 S. W. 2d 235; *Chapman & Dewey Lumber Company* v. *Means,* 191 Ark. 1066, 88 S. W. 2d 829. In *Sparkman*

Hardwood Lumber Company v. *Bush,* 189 Ark. 391, 72 S. W. 2d 527, this court said: 'The office of the writ of prohibition is to restrain an inferior tribunal from proceeding in a matter not within its jurisdiction; but it is never granted unless the inferior tribunal has clearly exceeded its authority and the party applying for it has no other protection against the wrong that shall be done by such usurpation. When the court has jurisdiction over the subject-matter and the question of its jurisdiction of the person turns upon some fact to be determined by the court, its decision that it has jurisdiction, if wrong, is an error, and prohibition is not the proper remedy. *Order of Ry. Conductors of America* v. *Bandy,* 177 Ark. 694, 8 S. W. 2d 448; *Merchants' & Planters' Bank* v. *Hammock,* 178 Ark. 746, 12 S. W. 2d 421; *Lynch* v. *Stephens,* 179 Ark. 118, 14 S. W. 2d 257; *Roach* v. *Henry,* 186 Ark. 884, 56 S. W. 2d 577; *Crowe* v. *Futrell,* 186 Ark. 926, 56 S. W. 2d 1030.' Petitioner argues that the circuit court placed the wrong construction on the testimony which was introduced at the hearing on its motion to quash and dismiss, and says that the facts are undisputed that deceased was a resident of Sebastian county, Arkansas, at the time of her death. We do not regard the testimony as to deceased's residence as being wholly undisputed and certainly the legal effect of such facts is a matter that is highly controversial. In *Robinson* v. *Means, Judge,* 192 Ark. 816, 95 S. W. 2d 98, Justice BAKER, speaking for the court, said: 'Probably in most instances the facts upon which jurisdiction may rest or be determined are controverted. In most other instances they might be controverted, that is to say, there is the possibility of the facts being disputed. In either event the matter is one that must be determined by the trial court, and in the proper exercise of the trial court's functions we do not interfere by prohibition. We might differ most seriously from the view taken by the trial court, but if we think the trial court erred, we can correct that only upon appeal.' "

The rule laid down above is controlling here.

The writ of prohibition will be denied.

Opinion delivered May 31, 1948.

Rehearing denied June 28, 1948.

Wils Davis, Eugene Sloan and *Arthur L. Adams,* for appellant.

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

HOLT, J. Appellant, Walter Montague, was charged with murder in the first degree by shooting a Negro, Ralph Donaldson, with a thirty-eight calibre pistol and killing him. He was convicted of murder in the second

degree and his punishment assessed at twenty-one years in the State Penitentiary. From the judgment is this appeal.

For reversal, appellant has set out in his motion for a new trial thirteen assignments of alleged errors, which he has grouped in the following propositions:

"1. The trial court committed reversible error in excluding evidence, offered by the defendant, tending to show the violent, turbulent character of deceased, known to defendant and impelling him to act in his own self-defense.

"2. The trial court committed reversible error in admitting in evidence, over the objection and exception of defendant, (the State's cross-examination) regarding separate and distinct offenses of defendant, disconnected in time, place and occasion from the offense charged.

"3. The trial court committed reversible error in permitting counsel for the State to engage in unrestricted, inflammatory argument, not supported by any competent evidence, reflecting upon the family of defendant, and of his counsel, and calculated to prejudice the jury. All of this was done without admonition or caution to the jury by the trial court."

Before considering these "propositions," which we shall presently do in their inverse order, we examine assignments 1, 2, 3, and 11, which, in effect, challenge the sufficiency of the evidence. Appellant admitted that he killed the deceased, but claimed that he did so in his necessary self-defense.

Appellant's victim, Ralph Donaldson, at the time he was killed, was 28 years of age, had been married about 7 years, and had one child about four weeks old. He was of slender build and weighed about 140 pounds. His wife testified that on September 21, 1947, at about 7:15 p. m., Gladys and Byrnis Montague, sister and brother of appellant, drove to the home of the deceased and asked for him. Ralph had worked until 12 o'clock the preceding night, had gone to bed at 2:30 that afternoon and was still

in bed. He got up, put on a khaki shirt and trousers, and after Gladys told him appellant wanted to see him at his office, Ralph went off in the car with them. His wife never saw him again until she viewed his body at Gregg's Mortuary. The deceased had worked for appellant since his marriage, or for about 7 years, but had quit working for him approximately two days before he was killed.

W. E. Robbins, a police officer, testified that he, in company with Officer Cole, went to appellant's office a few minutes after the shooting: "Q. When you got there, who was present? A. Mr. Walter Montague, Mr. Byrnis Montague and Miss Gladys Montague. . . . Q. Where was Walter Montague when you went in? A. He was about four feet from the head of the man that was shot, sitting in a chair. . . . Q. Behind the desk in a chair in the front part of the office? A. Yes, sir. . . . A. Well, he (Ralph) was hardly dead yet. He was gasping for breath, and his eyes were fluttering. He was dying. . . . A. I asked who shot the Negro. Mr. Walter Montague said he had—Mr. Walter Montague said 'I did.' And I said 'It looks like you have killed you a man, Mr. Montague' and he replied, 'I hope I did.' . . . Q. When you walked into the office there did you see anything on the floor about the body? A. No, sir; not any gun or knife on the floor. . . . Q. Tell this court and jury what Walter Montague had to say about this Negro having a knife. A. He didn't say a word to me about him having a knife. No mention was made about him having a knife at all. Q. Tell this jury what Walter Montague, Byrnis Montague, or Gladys Montague had to say about this Negro attacking Walter, or any other Montague. A. They didn't say anything to infer he had made any movement to attack anyone."

Officer Cole corroborated Robbins' testimony.

Gladys Montague testified (appellant's brief): "Byrnis and Gladys took Ralph Donaldson to office. Witness went in first, sat down back of desk. Ralph went in second and sat on stool, Byrnis came in and sat down on edge of desk. Walter went over and sat down in chair.

Did not force Ralph to go. Ralph went voluntarily. Was no design to take his life," and "A. Walter said 'Ralph, didn't you tell me that Gladys had been going with Elbert Goodman?' Ralph kind of dropped his head, and said 'Now, Mr. Walter——,' as if he wanted to evade the question. And Walter said 'Now, Ralph, didn't you unsolicited tell me Gladys had been going with Elbert Goodman?' He said 'Yes, Mr. Walter, I did.' I said 'Ralph, did you ever see me anywhere with Elbert Goodman?' He said 'No, Miss Gladys, I never did.' I said 'Did you ever see anything in this office or anywhere else that would cause you to make a remark like that?' He said 'No, Miss Gladys, I never did.' I said 'Why did you tell a thing like that?' He said 'I don't know.' Then Walter said 'Ralph, you told a damn lie about that, I want the truth about this: What did you do with my money you stole Friday night?' Q. What happened when Walter said that? A. Ralph run his right hand in his right pocket and come out and raised it, and lunged toward Walter. . . . A. He had an object in his hand. . . . Q. When he lunged at Walter, as you say, what happened? A. Walter fired the shot."

While appellant did not, in oral arguments or in his brief, seriously argue that the evidence was not sufficient to support the verdict, we have carefully examined it all and find it amply warranted the jury's action. It would serve no purpose to detail more of the testimony.

No complaint is made by appellant as to any of the instructions.

We come now to consider the three grouped propositions, *supra.*

(3)

The record reflects that Mr. Spencer, Deputy Prosecuting Attorney, in opening the argument for the State used this language, over the objections and exceptions of appellant: "We have two slaughter houses here where dumb animals are slaughtered and prepared for food, but we have one place of business we're not proud of, and it should be called Walter's Slaughter House, Inc. It

doesn't deal in the commodity of hogs, sheep or cattle, but in human lives. He already has two notches on his gun and a scratch besides; for God's sake don't let him put on a third one. Give this killer that's loose at Christmastime the works."

Mr. Hale, Prosecuting Attorney, who closed the argument for the State, used the following language: "The fact and the whole unshirted truth is this statement of his, gentlemen of the jury: 'There are two extremes; one of them is the electric chair, and one is to turn him loose.' He told you himself you would have to go to the extreme to turn this ex-convict, this two-time killer and another time shooter—that you would have to go to an extreme to turn him loose. . . .

"Mr. Sloan says that society will continue if this jury lets him loose. Society continued before when a jury popped him on the wrist and said 'We will give you two years for knifing the life out of a man at the Jonesboro Transfer Company. We will call it manslaughter. We will let you off because you come from a prominent family here in Jonesboro,' and that's the reason they get off. . . .

"Now, with reference to family. Yes; some of his people married some good people; some of his people are good people. He has a sister there that sat at that counsel table that is a good woman. No doubt about it. I think that is so. Don't you know she was ashamed, humiliated and embarrassed, not only to sit here with a killer for effect, but to know her brother, the black sheep of that family, had killed not once—not twice—not three times—three times! And who has brought about disgrace to the family——."

At this point, the record discloses: "Mr. Davis: I object to that, if the court please. We object to that line of argument. Mr. Hale: That is in the record, if the court please. Mr. Davis: Just a moment——. The Court: Just a minute, Mr. Hale, I don't know of any evidence saying he has taken life three times. Mr. Dudley: Counsel did not say that. The Court: So far as what he did,

he did what this court convicted him of, and nothing more. Mr. Hale (continuing): He has admitted on this witness stand that he has done plenty. This jury knows what the record is. They know that surely when you start stomping on any toes they'll find something objectionable. And you know every time you heap some hot coals under their shirt-tail they're going to jump——. Mr. Davis: That is still objected to, that character of argument, if the court please."

We are unable to say that the above language used by State's counsel was not warranted on the facts or that it was prejudicial to appellant's rights. Some of the statements were but expressions of counsel's opinion and others were supported by the facts. It is undisputed in this case that appellant had killed two men (including Ralph Donaldson) and shot a third. In fact, appellant himself so testified.

In these circumstances, we think the trial jury, possessing all the qualifications required under our statutes (§§ 8312 and 8314, Pope's Digest), that is "electors of good character, of approved integrity, sound judgment and reasonable information," could not have been misled, to the prejudice of appellant by referring to him as "ex-convict," a "two-time killer" and "another time shooter," and his place of business as "Walter's Slaughter House, Inc.," after the court's ruling, *supra.*

In *Crosby* v. *State,* 169 Ark. 1058, 277 S. W. 523, we said: "Numerous objections were made to the argument of special counsel assisting the prosecuting attorney in closing the case for the State. But we have concluded that, while the argument was perfervid, the statements in it were either in response to statements made by an attorney for the appellant, or were mere expressions of special counsel's opinion," and in *Johnson* v. *State,* 129 Ark. 313, 195 S. W. 1065, this court said: "In the final analysis, the reversal rests upon an undue advantage having been secured by argument which has worked a prejudice to the losing party not warranted by the law and facts of the case. *Kansas City Southern Ry. Co.* v. *Murphy,* 74 Ark. 256, 85 S. W. 428."

Appellant complains about other parts of Mr. Hale's closing argument, but the record reflects that no objections or exceptions were noted. Especially does he complain about the following language, to which no objection was made: "Ivie Spencer didn't make it half rough enough—he didn't make it half rough enough! In describing to you as he did this horrible killing he painted you a picture that you yourselves didn't take part in, and wouldn't have taken part in for anything under God's heaven."

Appellant insists that the trial court abused its discretion in failing on its own motion to interrupt the prosecuting attorney and instruct the jury not to consider such remarks. We cannot agree. It suffices to say that we have carefully examined the remarks complained of and hold that the action of the court in the circumstances was not reversible error.

(2)

The record discloses the following on the cross-examination of appellant: "Q. Now, you are an ex-convict, aren't you A. Yes, sir. Q. What were you convicted for? A. Manslaughter. Q. That was the time you killed a man by the name of Nash with a knife right in the same office where you killed this Negro boy?" (Objected to.) "The Court: What is the objection? Mr. Davis: The objection is this. He cannot go into the details of the killing, but then if he does, I want the privilege of summoning some witnesses to testify about it. The Court: He just asked about the killing. Mr. Davis: He says he admitted it. That is as far as he can go. . . . Mr. Davis: I object to any further questions about it. The Court: The objection is overruled. Mr. Davis: Our exception. Q. With reference to your sentence for manslaughter, you killed a man by the name of Nash with a knife in this office there, didn't you? A. It was on the street. Q. But didn't it start in the office? A. No—no. There wasn't any argument in the office. Mr. Davis: We object to all that detail, your Honor. The Court: He may ask where he killed him. Mr. Davis: He has an-

swered that. Q. I will ask you this question: Didn't you run him out of the office there and cut him down while he was on the outside? Mr. Sloan: If the court please, that goes to the question of whether he was rightfully or wrongfully convicted at that time. The Court: He may ask him about convictions. We are not going into detail. Q. You some ten or eleven years ago shot a young man by the name of Jimmie Young here on the streets of Jonesboro, didn't you? Mr. Davis: Wait a minute. I object to that, if the court please, unless he was convicted. And Mr. Hale knows it is an improper question. The Court: He may ask him whether or not he shot him. Mr. Davis: Note an exception. A. I did. Q. All right. You shot a young man over on the street who worked for the Tribune, some ten or eleven years ago, didn't you? A. Yes, sir. Mr. Davis: That is objected to, if the court please. The Court: Objection overruled. Mr. Davis: Exception. Q. While we are talking about what you have done, Walter, I will ask you if you didn't dispose of a bunch of government typewriters here a few years ago? A. No, sir. Q. The WPA typewriters? A. No, sir. Q. You didn't? A. No, sir. Mr. Davis: That is objected to, if the court please, unless he was convicted of the crime. The Court: The testimony is admissible—that sort of testimony is admissible only as going to the credibility of the witness, and the State is bound by his answer."

This testimony, brought out on cross-examination of appellant, was proper as bearing upon his credibility, and the court properly so instructed the jury.

In *Pope* v. *State,* 172 Ark. 61, 287 S. W. 747, this court said: "On the cross-examination of appellant he was asked if he had not cut other men, and particularly if he had not stabbed a man named Crow, and the witness answered that he had. Exceptions were saved to these questions and answers. There was no error in this ruling. Such testimony was held competent in the recent case of *Whittaker* v. *State,* 171 Ark. 762, 286 S. W. 937, it being held that it is within the discretion of the trial court to permit, within reasonable limits, an inquiry, on cross-examination, into the character and antecedents of

the defendant for the purpose of testing his credibility as a witness, when the examination is limited to such antecedents as throw light on the credibility of the witness," and in the recent case of *Jutson and Winters* v. *State, ante,* p. 193, 209 S. W. 2d 681, we said (quoting from *Ware* v. *State,* 91 Ark. 555, 121 S. W. 927): "As a witness in the cause, he could have been cross-examined; and upon his cross-examination, like any other witness, he could have been asked as to specific acts for the purpose of discrediting his testimony as a witness. In *Hollingsworth* v. *State,* 53 Ark. 387, 14 S. W. 41, the court said: 'The right to impair the evidence of a witness by cross-examination must not be confounded with the right to impeach a witness by evidence introduced by the opposite party. The former may be exercised within a more extended range than the latter.' "

We think the trial court held the cross-examination within reasonable bounds.

(1)

Finally, as to appellant's contention that error was committed in excluding evidence offered by the defense "tending to show the violent, turbulent character of the deceased, known to defendant," appellant says: "Exception was duly saved to refusal of the court to permit defendant's witness, Jimmie Jones, to testify about the details of an arrest of the deceased, Ralph Donaldson, (in 1942) in the presence of defendant when Ralph Donaldson was attempting to load a shotgun for the purpose of attacking and shooting witness, Jimmie Jones, and witness, Hoyt Cloyd. . . . Section V of the motion for new trial preserves the same exception to exclusion of the testimony of Hoyt Cloyd." Cloyd's testimony was similar, in effect, to that of Jones.

"Due exception was also taken to the exclusion of the testimony of Ike Brown, regarding an assault upon him by deceased, resulting in a plea of guilty to aggravated assault. . . . At the same time there was offered and refused record of convictions (of deceased) in the Municipal Court of the City of Jonesboro."

The offered record showed the deceased to have paid fines for gaming on July 9, 1945, July 30, 1945, June 24, 1946, for assault and battery March 5, 1944, and on July 27, 1943, paid a fine of $54.45 for resisting an officer, and also that he was indicted for assault with intent to kill a Negro, Ike Brown, and the charge reduced to aggravated assault, for which he paid a fine.

The action of the trial court in excluding this offered testimony of Jimmie Jones, Hoyt Cloyd, and Ike Brown, and the record of convictions of deceased in the Municipal Court of the City of Jonesboro was correct. Appellant insists that this evidence was proper to show the state of mind of the deceased at the time of the killing.

The rule is well settled that appellant had the right to produce testimony bearing upon the general reputation of the deceased, Donaldson, and this the court permitted him to do. However, as was said by this court in *Pope v. State, supra*: "It was not proper therefore to inquire into the details of the life of deceased having no relation to the encounter which caused his death, and the inquiry was therefore properly confined to the general reputation of the deceased.

"At § 222 of the chapter on 'Homicide,' in 13 R. C. L., p. 919, it is said: 'Where character evidence is offered in support of the contention that the deceased was the aggressor or to characterize and explain his acts, the defense is restricted to proof of general reputation in the community where the deceased lived, and may not show particular acts or conduct at specified times. It may not be shown that the deceased had engaged in frequent fights in which he used deadly weapons, and therewith made deadly assaults on his antagonists. But, on the issue whether or not the accused had reasonable ground to believe himself in imminent danger, he may show his knowledge of specific instances of violence on the part of the deceased. But in no case may a witness state his opinion of the character of the deceased or how the latter would have acted under any particular set of circumstances.' "

Here, appellant sought to show, by other witnesses, specific criminal acts of the deceased, which, under the above rule, he could not do. Witnesses Jones, Cloyd and Brown could properly testify as to their knowledge of the reputation of the deceased as being violent and turbulent, but they could not testify as to "particular acts or conduct at specified times."

Finding no error, the judgment is affirmed.

ROBINS and MCFADDIN, JJ., dissent.

ADKINS *v.* L. L. COLE & SON.

4-8540 211 S. W. 2d 885

Opinion delivered May 31, 1948.

Rehearing denied June 28, 1948.

J. H. Moody and *W. J. Dungan,* for appellant.

John D. Eldridge, Jr., for appellee.

ED. F. MCFADDIN, Justice. The sole question on this appeal is: was there sufficient evidence to take the case to the jury on the issue, whether the driver of appellant's vehicle was within the scope of employment at the time of the collision?

Appellant lives in Bald Knob, and owns farms between that city and Augusta, another city 12 miles to the east. One farm is the Rio Vista Farm, and is six miles from Bald Knob; and another is the Green Tom Lake Farm, nine miles from Bald Knob. In March, 1947, appellant instructed his employee, T. B. Cathey, to take some seed and feed in appellant's truck to the Rio Vista Farm. After reaching that farm and delivering the load, Cathey went on to Augusta instead of returning to Bald Knob. A few hours later, in returning from Augusta, and while driving appellant's truck on the highway, and in front of the Green Tom Lake Farm, Cathey had a collision with appellee's truck.

When appellee sued for damages, appellant's defense—insofar as this appeal is concerned—was, that Cathey was outside the scope of employment at the time and place of the collision. The trial court submitted this issue to the jury. Appellant insists that he was entitled to an instructed verdict. He presents here only his assignment No. 4 in the motion for new trial, which assignment reads:

" . . . the court committed error in not instructing a verdict for the defendant upon the defendant's requested instruction No. 1 as follows:

" 'The defendant moves the court to direct a verdict for him because the driver of defendant's truck was not acting within the scope of his employment at the time of the collision between the truck of plaintiff and the truck of defendant, as shown by the undisputed evidence' . . . "

In the recent case of *Ford & Son Sanitary Co.* v. *Ransom, ante,* p. 390, 210 S. W. 2d 508, we had an appeal in which—as here—the sole issue was, whether there was sufficient evidence to take the case to the jury on the question of scope of employment. In that opinion we said:

" . . . when the plaintiff showed that the truck which inflicted the injury was owned by the defendant company, and was at that time being driven by the said

defendant company's regular employee, then such proof raised a temporary presumption that the employee was in the scope of his employment. The defendant company, to avoid liability, was then obliged to introduce substantial proof directed to the negation of scope of employment. When the defendant company introduced such proof, the presumption (arising from ownership and driving of the vehicle) had served its purpose, and disappeared; so that if—independent of such presumption—there was no evidence to dispute the defendant's proof, and if such proof contained no substantial contradictions in itself, then there would have been no evidence to take the case to the jury on the 'scope of employment' theory. But if—independent of the presumption—the defendants' proof was substantially contradicted by the plaintiff's proof or by inconsistencies in the defendant's own proof, then the issue of scope of employment would be for the jury."

In the case at bar the appellant introduced evidence tending to show that Cathey had entirely departed from the scope of employment. On the other hand, appellee introduced evidence tending to show that the defense of "scope of employment" was inconsistent with his previous declarations. The state policeman who investigated the collision talked with both of the parties at the scene of the accident; and testified:

"Q. You say Mr. Adkins told you Mr. Cathey was his driver, do you mean that he told you he was driving for him then or was in his employ? A. I went there; and there were several cars there and I came down between the corn trucks of Mr. Cole's and Mr. Adkins'; and Mr. Adkins said one was his, and Mr. Cole said one was his. Q. Mr. Adkins didn't tell you that Mr. Cathey was on business for him? A. He said he was working for him."

Furthermore, appellee Cole testified as to his conversations with Adkins at the scene of the collision, where each had been called. This is Cole's testimony:

"Q. State to the jury the substance of your conversation with Mr. Adkins and Mr. Cathey while Mr. Adkins

was present. A. Of course, we all were interested in how it happened. I heard my driver's story and his driver's story and that was about all. It was obvious where my boys had been. Q. Did Adkins admit the ownership of the truck? A. Yes, sir. Q. What did he say about Cathey? A. He said that he was working for him. I picked up the fact that Cathey had come to the farm to bring some feed.

. . . . .

"Q. Are you familiar, approximately, with the location of Mr. Adkins' farm? A. Yes, sir. Q. Where did the accident happen? A. Right along beside his farm; I didn't know it was his property then, but I have learned later.

. . . . .

"Q. Adkins told you Cathey was working for him? A. Yes, sir. Q. Working for him that day? A. Yes, sir."

When appellant testified, he did not deny the testimony of the state policeman and Cole as heretofore copied. In fact, appellant admitted that Cathey had no instructions as to returning to Bald Knob, and testified as follows:

"A. I sent Mr. Cathey to the farm, I believe with some seed and feed and maybe some tools. Q. He said hay? A. Well, hay is feed; I had some hay in Bald Knob in a big barn, a big warehouse. Q. Where did you send it? A. To Rio Vista. Q. In your truck? A. Yes, sir. Q. Did he go to your farm at Rio Vista? A. I suppose he did. Q. What was he supposed to do after he delivered that; did you tell him to do anything else? A. No, I didn't tell him to do anything. Q. Was he supposed to go down there and take that and come back to Bald Knob? A. As far as I know, I didn't tell him to do anything different."

From the immediately foregoing testimony, the jury could have inferred that Cathey, in addition to carrying feed to the farm at Rio Vista, also had tools for the farm in front of which the collision occurred—the Green Tom

Lake Farm. From the testimony of the state policeman and the appellee, the inference could reasonably have been drawn that Adkins admitted at the scene of the collision that Cathey was in the scope of his employment at that time and place. Such admission is certainly inconsistent with the defense now made that Cathey was then outside the scope of his employment; and such inconsistency made a jury question.

The matter may be summarized: the fact that Cathey was driving appellant's truck raised a temporary presumption that Cathey was in the scope of his employment, and—to avoid liability—appellant was obliged to introduce substantial proof directed to the negation of scope of employment; but the testimony introduced by the appellee, as heretofore detailed, contains statements of the appellant inconsistent with the defense of scope of employment. In view of such inconsistency, a question was made for the jury under the rule stated in *Ford* v. *Ransom, supra.*

The judgment of the circuit court is affirmed.

The Chief Justice dissents.

ADAMS *v.* HALE.

4-8649 212 S. W. 2d 330

Opinion delivered June 7, 1948.

Arnold Adams, for appellant.

U. A. Gentry, Donald S. Martz and *Catlett & Henderson,* for appellee.

GRIFFIN SMITH, Chief Justice. In *Howell* v. *Howell* and *Stevens* v. *Stevens, ante,* p. 298, 208 S. W. 2d 22, (January 12, 1948) it was held that essential provisions of Act 42 of 1947 were violative of Constitutional authority because the General Assembly had usurped an executive function in designating the person who should serve as Chancellor of a Second Division of the Pulaski Chancery Court it was sought to establish. For reasons stated in the opinion it was then thought by the Court's majority, three justices dissenting, that if denied the right of filling the vacancy necessarily existing when the office was created, the Legislature would have declined to act favorably on the Bill, hence no Division had been established—or, as the Court said, ". . . there was no distinct or independent purpose to divide the Circuit or District and leave the office vacant for almost two years."

That part of the opinion holding a Court had not been made was overruled April 19, the Chief Justice and Mr. Justice ROBINS dissenting. *Pope* v. *Pope, ante,* p. 321, 210 S. W. 2d 319.

Act 42, by § 4, directs that a Chancellor for the Second Division be chosen at the general election in November, 1948, to take office January 1 and hold for a term of six years. Compensation is fixed at $6,000 per annum.

The First Chancery Circuit embraces Pulaski, Prairie, Lonoke, and White Counties. Section 1 of Act 42 is expressed in this language:

"Hereafter, there shall be an additional Chancellor for the First Chancery Circuit, whose jurisdiction in the trial and final determination of all Chancery cases shall include and be limited to the County of Pulaski, except on exchange of Circuits with some other Chancellor as such exchanges are now provided by law."

Section 6 of Act 42 vests in the Chancellor of the First Division authority to appoint a Court Reporter for the Second Division at a salary of $3,000. The Chancery Clerk (appointed by the Judge presiding over the First Division (§ 7) receives an increase in salary, and the Clerk appoints a deputy (§ 6) who is paid $2,400 per year.

The question presented by this appeal is, Do electors of the *four* counties participate in selection of a Chancellor for the Second Division, or may voters of Pulaski County alone make the determination?

Guy E. Williams and Mrs. Ruth Hale announced as candidates for the democratic nomination for Chancellor of the Second Division. Mrs. Hale qualified in Pulaski County only, contending that since the office pertained to a Division, limited to a single County, its personnel was not a matter of concern to the electorate of Prairie, Lonoke, and White Counties. Williams qualified in all the Counties; whereupon Mrs. Hale brought an action against Arthur L. Adams as Chairman, and Harvey G. Combs as Secretary of the State Democratic Committee to enjoin them from certifying to the County Committees of Prairie, Lonoke, and White, the name of Guy E. Williams as a candidate. The trial Court found for the petitioner, and this appeal followed, with oral argument during the morning of May 31.

It was said in the *Pope case* that Act 42 was patterned after Act 372 of 1923, which authorized an additional Chancellor for the Seventh District and gave to the Division jurisdiction in but two of the six counties —Ouachita and Union. Lafayette, Columbia, Dallas, and Calhoun, with Ouachita and Union, constitute the Circuit. Act 15 of 1931 amended Act 372 by providing that the Second Division "in the Seventh Chancery District"

should convene court at designated times. Act 5 of 1939 extended the Second Division to include Columbia County. Much of the language of Act 372 is copied *verbatim* in Act 42. This furnishes proof absolute that those who drafted Act 42 had Act 372 as a guide.

In 1937, by Act 171, six-year terms were established for Chancellors. Section 1 of the Act provides that "The Chancellors of the respective Chancery Circuits *shall be elected by the qualified electors of the several Chancery Circuits.*".

Act 3 of 1939, consolidating the jurisdiction of Probate Courts with Chancery, mentions "the Chancellor of any Circuit," and "any County in his Circuit." Act 5 of 1939 refers to "the Second Division of the Chancery Court of the Seventh Chancery Circuit." The decrees signed by Mrs. Hale in *Howell* v. *Howell* and in *Stevens* v. *Stevens* were necessarily executed in her capacity as Chancellor of the Second Division of Pulaski Chancery Court, First Circuit; and certainly, in view of the decision in *Pope* v. *Pope, the First and Second Divisions of the First Chancery Circuit of Arkansas* were recognized, for that is what Act 42 says.

It is argued by appellee that because § 2797 of Pope's Digest creates separate Courts of Chancery "in every County," the Second Division established by Act 42 is segregated, notwithstanding the provisions of Act 171 of 1937, Pope's Digest, § 2795. The statute directs action by qualified electors "*of the several Circuits.*" The language relating to Circuits, it is said, "must be interpreted in the light of the general plan and purpose for which the several Chancery Circuits were created in the first instance, namely, to provide for a Chancellor to serve the entire Circuit in which he is elected."

We take judicial notice that Chancellors for the Second Division of the Seventh Circuit have been regularly chosen by voters of all of the counties. Election returns are on file with the Secretary of State, that official being directed by law to receive them. It is inconceivable that those who drafted Act 42 were not familiar with

construction given the Seventh Circuit Act. True, there has not been a judicial determination of the question now presented; but in no election since 1923 have the rights of voters of all Counties in the Seventh Circuit been questioned; nor do the citizens of Ouachita, Union—and later Columbia—Counties appear to have felt they were discriminated against, or that rights guaranteed by Art. II, § 2, of the Constitution of Arkansas have been violated.

Evidence of the General Assembly's belief that it had created a District office, or, rather, that Pulaski County remained a part of the First Circuit as such, is found in Act 276, approved March 19, 1947. It became a law more than a month after Act 42 was approved by the Governor, and is "An Act to make appropriation for an additional Chancellor for the First Chancery Circuit of Arkansas." The expression "First Chancery Circuit" appears four times in the measure.

We think the Special Chancellor, in granting injunctive relief to the petitioner, erred for these reasons:

(1) Act 171 of 1937 expressly directs that Chancellors be elected by voters "of the several Chancery Circuits."

(2) Strictly speaking, one County cannot be a "Circuit," although by appropriate language the General Assembly may divide a Circuit, and that division is not unlawful merely because a single County forms the judicial unit.

(3) The appropriation for salary—Act 276 of 1947—is for an officer of a Circuit, and payment is from the State's general fund.

(4) In *Howell* v. *Howell, Pope* v. *Pope,* and in the two dissenting opinions written January 12th, the "Second Division" is spoken of as a part of the First Circuit.

(5) A Chancellor elected by the four Counties of the First Circuit is vested with power (in the absence of supervisory mandate, Art. VII, § 4, Constitution of

1874) to neutralize the Second Division by assigning to the First Division any case that may be filed in Second Division. The First Division Chancellor, acting for all of the people of all of the Counties, appoints the Second Division stenographer and Clerk, and indirectly controls appointment of the Clerk's deputy.

(6) Official conduct long pursued will be given great weight in determining intent; hence election participation by all Counties of the Seventh Circuit in selection of a Chancellor for the Second Division creates a presumption that the lawmakers, in literally copying from Act 372, knew of the construction given that measure, and acquiesced in it.

(7) If, with knowledge that voters of the Seventh Circuit had not been denied the right to select their Chancellors, the General Assembly used Act 372 as a model, and declined to restrict the right of franchise, then it is not the duty of a Court to assume that the lawmakers, through oversight alone, failed to affirmatively express an intent contrary to what can be gathered from wording of the Act.

(8) There is nothing ambiguous about that part of § 1 of Act 42 that says, "Hereafter there shall be *an additional* Chancellor *for the First Chancery Circuit.*"

It follows that the decree must be reversed. This is done, with direction that the injunction be dissolved.

In briefing the case neither side raised the question of equity's jurisdiction. Since affirmative relief is not granted the petitioner, determination of the power of equity in a case like this is reserved.

THOMPSON *v.* THOMPSON.

4-8450 212 S. W. 2d 8

Opinion delivered June 7, 1948.

Rehearing denied July 5, 1948.

John R. Thompson, for appellant.

George Shepherd and *Wood & Smith,* for appellee.

ROBINS, J. Appellant sued appellee for divorce, and appellee, on his cross complaint, was granted divorce; and custody of their child, Yvonne, then five years old, was awarded to appellee's mother. On appeal from that part of the decree fixing custody of the child we reversed the order of the lower court, and directed that custody of the child be given to appellant, the mother, with appellee being accorded the right to visit the child at appropriate times. *Thompson* v. *Thompson,* 209 Ark.

734, 192 S. W. 2d 223. On filing of our mandate, the lower court made an order in compliance therewith.

On March 1, 1947, appellant filed a petition in the lower court asking that she be granted permission to take her daughter with her to a new home to be established by appellant in Florida with Claude K. Barco, whom she was about to marry. Appellee thereupon filed reply to said petition, asking that the previous order, made in obedience to our mandate, be changed so as to take the custody of this little girl from appellant, her mother, and give it to appellee. From an order made by the lower court on September 26, 1947, changing the custody of the child and giving it to appellee, this appeal is prosecuted by appellant.

While any order as to custody of a child is subject to future modification by the court making it, the rule, uniformly adhered to by us, is that before such modification may be made it must be shown that, after the making of the original order, there has been such a change in the situation as to require, in the interest of the minor, the change to be made, or it must be shown that material facts affecting the welfare of the child were unknown to the court when the first order was made. *Myers* v. *Myers,* 207 Ark 169, 179 S. W. 2d 865; *West* v. *Griffin,* 207 Ark. 367, 180 S. W. 2d 839; *Miller* v. *Miller,* 208 Ark. 1058, 189 S. W. 2d 371; *Phelps* v. *Phelps,* 209 Ark. 44, 189 S. W. 2d 617; *Graves* v. *French,* 209 Ark. 564, 191 S. W. 2d 590.

It is not insisted that any material facts affecting the welfare of the child were unknown to the court when the previous order awarding custody to appellant was made. Therefore, the only inquiry here is: Has there been such a material change in the situation as would require a modification of the former order so as to deny to the mother custody of her little daughter?

While there was an effort on the part of appellee to show that the new husband of appellant—she married Barco while the litigation was pending—was of such character as to render him unfit to be the step-father

of the child, there was no definite proof to sustain such a contention. On the contrary, it was shown that he was a man of some means, that he had given appellant property of the approximate value of $35,000 and that he owned and maintained a comfortable home. He had formerly been engaged in the meat packing business, but at the time of trial was a law student in the University of Florida, expecting to graduate in the fall of 1948. He is a member of the Presbyterian church and of several fraternities. He had two sons, both of whom were in college.

The chief basis for the contention that the Barco home was not a proper one for the child was that Barco had but recently obtained a decree of divorce (in Florida) against a former wife and that this former wife had taken an appeal to the Supreme Court of Florida. It was urged—and the lower court adopted the view—that, since there was an uncertainty about the validity of appellant's marriage to Barco, the child ought not to be permitted to go to the Barco home pending a settlement of this uncertainty.

The chancellor made this statement at the conclusion of the testimony: "Now, weighing all the evidence and the testimony before the court, and discerning these parties before the court, it is the opinion of the court that there is now just one controlling issue in the case and that issue is this—'should the court let this child go down to Florida now where the Barco marital status is so uncertain and Mr. Barco's case is now on appeal—should the court permit this little child to be taken out of school and away from these people, not ever having been in the home in Florida, until the marital status at least is cleared up?' In other words, the mother of this child, Marcelyn Thompson Barco, may be right back here in Little Rock in thirty days. It seems to the court that it would be unfair to pick the child up now and take her out of school and send her to Florida in a new home with a new father dominating her. She would have to adjust herself to the new environment and to the new way of living. Now, if that were a stable home and we knew that the mother was there to stay, we would

view it from a different angle and ask that a thorough investigation be made by social agencies. I believe it would be a tragedy and very harmful to the child to make her undergo that change, not knowing it was a permanent arrangement for the child. In other words, Mrs. Barco, if the Florida court reverses the lower court, you and Mr. Barco would not be married. I read the deposition of the clerk of the Supreme Court of Florida thoroughly and he said the case is on appeal and they cannot approximate the date an opinion will be delivered. I think it will be agreed that now is a very inopportune time to change the little child's environment and schooling and subject her to adjusting herself when she may be right back in Little Rock."

We cannot agree that uncertainty as to Barco's marital status was sufficient ground to justify an order taking this little girl away from her mother. The lower court should have indulged the presumption in favor of appellant that if her marriage to Barco proved invalid by reason of adverse action of the appellate court, appellant would have no longer remained in his home. Certainly appellant's marriage to Barco was *prima facie* legal—and appellant ought not to be deprived of her daughter's custody because appellant saw fit to enter into a marriage with a respectable man, who had been declared eligible to marry by a court of competent jurisdiction. It may be noted, however, that the Supreme Court of Florida, on April 20, 1948, after the trial of the case at bar, affirmed the lower court's decree granting divorce to Barco. *Barco* v. *Barco,* 34 So. 2d 879.

We conclude that the testimony does not show that there has been such a change in the situation as will adversely affect the welfare of the child, and justify an order taking this little girl away from her mother, who, as this court has already found, was capable of rearing her properly.

Nor do we think there was sufficient reason shown to deny appellant the right to take her daughter with her to her new home.

Discussing a somewhat similar question, this court said, in the case of *Weatherton* v. *Taylor,* 124 Ark. 579, 187 S. W. 450: "If the established facts justify the conclusion that the mother of the child is capable of giving proper care to the child, and that she will comply with the orders of the court, it would not be beyond the power of the court to permit her to take the child to her home in another state."

Appellee should be afforded the opportunity to have his daughter visit him at reasonable and proper times, and at least twice each year—once for a week during Christmas holidays and once for three weeks during the summer. Appellant should be required to defray the expense of those trips. To insure compliance on the part of appellant with the terms of the order to be made, she should be required to file a bond in the sum of $3,500, with good and sufficient surety, to guarantee her faithful observance of the terms of such order.

The decree of the lower court is accordingly reversed and this cause is remanded with directions to the lower court to enter an order in accordance with this opinion; appellee to pay the costs of this court and appellant to pay costs in the court below.

The Chief Justice, although not legally disqualified, did not participate in discussions incident to the case, or take part in its determination; nor did he attend the Court's conference during the time the appeal was being considered.

Order Per Curiam July 5, 1948.

No. 8450—*Marcelyn Thompson* v. *Henry V. Thompson,* from Pulaski chancery; rehearing denied, but the opinion of June 7 is amended, permitting the father to have custody of Yvonne eight weeks during each summer, the current period to begin June 7, 1948.

CENTRAL SURETY FIRE CORPORATION *v.* WILLIAMS.

4-8550 211 S. W. 2d 891

Opinion delivered June 7, 1948.

Buzbee, Harrison & Wright, for appellant.

Huie & Huie, for appellee.

ED. F. MCFADDIN, Justice. The extent of coverage of the insurance policy is the question presented.

On November 7, 1946, appellant issued a policy which protected appellee Williams to the extent of $1,750 against the loss of his Chrysler automobile by "theft, larceny, robbery or pilferage"; and the policy was in force at all times hereinafter mentioned. On December 26, 1946, a man calling himself George F. Martin approached Williams, seeking to buy the Chrysler automobile. The conversations began about 1:30 p. m. About 3:30 p. m. (which was after banking hours), Martin agreed to pay Williams $2,875 for the car, and offered a check drawn by Martin on the Kansas City Trust Company of Kansas City, Missouri. Martin suggested that

Williams call a party in Pine Bluff for references. When the Pine Bluff party recommended Martin for credit, Williams took Martin's said check, and delivered the car to Martin along with a bill of sale. The recommendation by the Pine Bluff person proved to have been an honest mistake, but—in reliance on such recommendation—Williams took the check, and parted with his car and the title thereto. The check was returned by the Kansas City bank, with the notation that Martin had no account. The Federal Bureau of Investigation was looking for Martin, and Williams joined in the search. Martin was apprehended, minus the automobile, in Las Vegas, Nevada. Williams appeared before a grand jury in Kansas City, Missouri, in its investigation of Martin, who was an ex-convict.

As soon as the check was returned, worthless, Williams notified the appellant insurance company, and made claim for $1,750, on the theory that he had lost his car by "theft, larceny, robbery or pilferage." Appellant resisted the claim, and this suit resulted. The chancery court, in decreeing recovery for Williams, found:

" . . . That the automobile of Ralph Williams . . . was taken from him by a swindler operating through a preconceived plan to defraud the plaintiff Ralph Williams; which the court finds to be larceny under the statutes of Arkansas and within the meaning of the policy; . . . "

This appeal challenges the chancery decree.

We conclude that the chancery court decree is correct; and here is the reasoning which impels such conclusion.

I. *The Crime by Which Martin Obtained the Car.* Appellant argues (a) that Martin was not guilty of larceny, but was guilty of false pretense (§ 3073, Pope's Digest); and (b) that the insurance policy does not protect Williams against false pretenses, but only against "larceny, theft, robbery and pilferage." Appellant contends that, when an owner voluntarily parts with both

possession and title, the person thus obtaining the property is guilty of false pretenses and not larceny, and appellant cites these cases: *Parker* v. *State*, 98 Ark. 575, 137 S. W. 253; *Lawson* v. *State*, 120 Ark. 337, 179 S. W. 818; *Higgins* v. *State*, 141 Ark. 633, 217 S. W. 809; *Fisher* v. *State*, 161 Ark. 586, 256 S. W. 858; *Arkansas National Bank* v. *Johnson*, 122 Ark. 1, 182 S. W. 523; and *Morgan* v. *State*, 169 Ark. 579, 275 S. W. 918.

We are convinced that Martin's entire dealings with Williams were part of a preconceived plan and were fraudulent in their inception. In short, Martin started out to swindle Williams of his car, and used the check on the Kansas City bank as a part of the scheme. Even if Martin was guilty only of false pretense, still—under our statute—such false pretense is deemed to be larceny. Our statute (§ 3073, Pope's Digest) reads:

"Every person who, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain a signature of any person to any written instrument, or obtain from any person any money, personal property, right of action, or other valuable thing or effects whatever, upon conviction thereof shall be deemed [1] guilty of larceny and punished accordingly."

One guilty of the statutory crime of false pretense is deemed—or adjudged—"guilty of larceny and punished accordingly." By the plain wording of our false pretense statute, the person guilty of its violation is adjudged guilty of *larceny*. The wording of our statute brings the act of Martin within the policy coverage of the insurance company, *i. e.*, larceny.

II. *Cases from Other Jurisdictions.* We have no case in our reports with facts directly in point with those in this case; so counsel on both sides in their zeal have furnished us excellent briefs listing and discussing cases

[1] "Deemed" means "adjudged." See 18 C. J. 450.

from other jurisdictions as persuasive to a decision here.[2] We briefly review the cited cases and authorities.

A. *Cases and Authorities Cited by Appellee.* We mention only four cases and two texts.

1. In *Nugent* v. *Union Automobile Insurance Co.,* 140 Ore. 61, 13 Pac. 2d 343, Nugent held a policy of insurance which protected him against "theft, robbery or pilferage" of his automobile. Possession of and title to the car were delivered to a professional swindler on a check which was bad. Nugent sued the insurance company for theft of his car, and liability was denied. The question was, whether such a state of facts as previously mentioned constituted "theft, robbery or pilferage." The Supreme Court of Oregon answered the question in the affirmative; and we observe that a much stronger case for recovery exists in the case at bar, for here the coverage is against "theft, *larceny,* robbery or pilferage."

2. In *Champion* v. *Chicago Fire & Marine Ins. Co.,* 140 N. J. L. 554, 141 Atl. 794, the plaintiff's automobile was insured against "theft, robbery or pilferage." An alleged purchaser obtained possession of the car by delivering a check for $500, which check later proved worthless. The plaintiff filed claim against the insurance company under the above policy; liability was denied. The Court of Errors and Appeals of New Jersey awarded recovery against the insurance company, saying:

"In *Gardner* v. *State,* 55 N. J. Law 27, 26 A. 30, cited and approved here in *Downs* v. *N. J. Fidelity & Plate Glass Co.,* 91 N. J. Law 523, 103 A. 205, L. R. A. 1918D, 513, Mr. Justice Depue, speaking for the Supreme Court, defined the common-law crime of larceny as the equivalent of the generic offense of stealing, and, quite manifestly, the ingenious device resorted to in this instance must comport with that definition, which in effect com-

[2] There are annotations in American Law Reports on the general subject here involved. These annotations may be found in 14 A. L. R. 215, 19 A. L. R. 171, 24 A. L. R. 740, 30 A. L. R. 662, 38 A. L. R. 1123, 46 A. L. R. 534, 89 A. L. R. 465, 109 A. L. R. 1080, 133 A. L. R. 920, and 152 A. L. R. 1100.

prehends the popular conception of theft. 2 Bouv. Law Dict. 1115."

3. In *Gaudy* v. *North Carolina Home Ins. Co.,* 145 Wash. 375, 260 Pac. 257, the plaintiff's automobile was claimed to have been insured against "theft, robbery or pilferage." Possession of and title to the car were obtained by a swindler on a check which proved worthless, and a claim was filed against the insurance company. The case turned on the effective date of the insurance policy, but in commenting on liability—if the policy had been in force—the Supreme Court of Washington quoted § 2601 of Remington's Compiled Statutes of that state, reading in part:

" 'Every person who, with intent to deprive or defraud the owner thereof . . . (2) Shall obtain from the owner or another the possession of or title to any property, real or personal , . . . by color or aid of any fraudulent or false representation, personation or pretense or by any false token or writing or by any trick, device, bunco game or fortune telling, . . . steals such property and shall be guilty of larceny.' "

The court then said: "It seems to us the transaction comes directly within the provisions of this statute."

It will be observed that the Washington statute, as above quoted, makes a person convicted of false pretense, guilty of larceny. As previously noted, that is the way the Arkansas statute reads, and the Washington case is persuasive to our holding here.

4. In *Hill-Howard Motor Co.* v. *North River Ins. Co.,* 111 Kan. 225, 207 Pac. 205, 24 A. L. R. 736, the plaintiff held a policy of insurance which protected his automobile against "theft, robbery or pilferage." He delivered the possession of and title to his automobile to a swindler who operated by means of a preconceived plan. The plaintiff filed claim against the insurance company for loss of his car. The Supreme Court of Kansas, in sustaining a recovery, said:

"The prevailing rule is that any scheme, whether involving false pretenses or other fraudulent trick or de-

vice, whereby an owner of property is swindled out of it with the preconceived intent of the swindler not to pay for it, is classed as larceny, and is punished accordingly. Here the swindler planned to fraudulently get possession of the plaintiff's property with intent to deprive him of it without his consent.

. . . . .

"Under these circumstances, the plaintiff was deprived of his property by a species of 'theft,' and such an offense is generally so defined."

We again observe that a much stronger case for recovery exists in the case at bar where the coverage includes *larceny* in addition to theft, robbery or pilferage.

5. In addition to the cases there are certain texts that state the general rule in a case such as this one. We quote from these. In Appleman on Insurance Law and Practice, § 3212, in discussing loss of vehicles through conversion by a purchaser, the text reads:

"Where the car is lost to a swindler, operating through a preconceived plan, this amounts to a theft under the terms and provisions of the policy. Thus where one fraudulently represents himself to be a prospective purchaser, this result would follow, such as where a worthless check is given for the acquisition cost."

And, in Blashfield's Cyclopedia of Automobile Law and Practice, Permanent Edition, § 3712 reads: "So the act of a swindler, who by means of a preconceived plan which involves impersonation, misrepresentation, and fraud, deprives the insured of the possession of an automobile, the insurer retaining title to it, is larceny by trick, and theft within the meaning of the policy."

B. *Cases Cited by the Appellant.* We list and discuss all six of the cases cited by the appellant.

1. In *Royal Ins. Co.* v. *Jack,* 113 Ohio St. 153, 148 N. E. 923, 46 A. L. R. 529, an automobile was delivered to a swindler on the false pretense that a check was certified, when—in truth—the check was bad. The policy of

insurance was a coverage against "theft, robbery, or pilferage." The Supreme Court of Ohio, in denying recovery to the plaintiff, held that the automobile was not obtained from the owner by either theft or larceny, but was obtained by false pretense only. But the Ohio false pretense statute does not read as does our statute. The Ohio statute (§ 13104, Ohio Penal Code) reads: "Whoever, by false pretense and with intent to defraud, obtains anything of value . . . if the value of the property . . . so procured . . . is $35 or more, shall be imprisoned in the penitentiary . . . or if less than that sum shall be fined . . ."

In other words, the Ohio statute on false pretense prescribes its own penalty and does not conclude, as does our statute, with the expression "shall be deemed guilty of larceny"; and this difference in the wording clearly distinguishes the Ohio case from the case at bar.

2. In *Illinois Automobile Ins. Exchange* v. *Southern Motors Sales Co.,* 207 Ala. 265, 92 So. 429, 24 A. L. R. 734, the owner parted with possession and title to his car because of false pretense, and sought to recover from the insurance company under a policy which contained a coverage against "theft, robbery or pilferage." The Supreme Court of Alabama, in denying recovery, held that there was no theft or larceny, but only a false pretense. But the Alabama court used this language: " . . . the doctrine is well established that, where the owner intends to transfer not the possession merely, but also the title to the property, although induced thereto by the fraud or fraudulent pretenses of the taker, the taking and carrying away do not constitute theft or larceny."

The above-quoted language indicates that Alabama does not have a false pretense statute similar to our statute; so the Alabama case affords the appellant no support.

3. In *Cedar Rapids National Bank* v. *Am. Surety Co.,* 197 Iowa 878, 195 N. W. 253, an automobile was not involved. Rather, a check was cashed by a bank under circumstances that amounted to false pretense. The bank

sought to hold the insurance company liable under a policy that protected the bank against "theft." The Supreme Court of Iowa, in denying recovery, held there was no theft, but only false pretense. But the Iowa statute on false pretense (§ 5041, Iowa Code of 1897) is similar to the Ohio statute previously quoted, and is entirely dissimilar from our false pretense statute.

4. In *Van Vechten* v. *Am. Eagle Fire Ins. Co.,* 239 N. Y. 303, 146 N. E. 432, 38 A. L. R. 1115, a garageman appropriated a car left in his care, and the owner sought to recover from the insurance company on a policy that covered "theft, robbery or pilferage." The New York Court of Appeals, in denying recovery, held there was no theft, saying: "Theft under this contract is theft as common thought and common speech would now imagine and describe it."

But this cited case from New York is considerably weakened by the subsequent opinion of the same court in *Block* v. *Standard Ins. Co.,* 292 N. Y. 270, 54 N. E. 2d 821, 152 A. L. R. 1097, in which the coverage was against "theft (broad form), loss of or damage to the automobile caused by larceny, robbery or pilferage." In sustaining recovery against the insurance company in the Block case, the New York court said:

"The policy in the Van Vechten case was apparently not the present form of 'comprehensive' policy. Here the insurance company has insured against theft in its 'Broad Form' and has defined it, not as theft, robbery or pilferage but as 'Larceny, Robbery or Pilferage.' The defendant wrote the policy and chose the words used. We must give effect to the word 'comprehensive' and the definition of theft. To do so is to fasten liability upon the defendant. The average automobile owner knows that the taking of an automobile in manner such as was done here constituted the crime of larceny. His legislative representative voted for that enactment. The newspaper he reads contains reports of unauthorized temporary appropriations of automobiles and both he and the newspapers now use the word joy-ride as a definition of such an act. Such act is larceny and is so considered by

the average man whether or not he is the owner of an automobile. Such is the ordinary meaning which 'the average policyholder of ordinary intelligence, as well as the insurer, would attach to it.' *Abrams* v. *Great American Ins. Co.,* 269 N. Y. 90, 199 N. E. 15."

5. In *Aetna Casualty & Surety Co.* v. *Salyers,* 294 Ky. 826, 172 S. W. 2d 635, a car was entrusted or rented to a person who absconded. It was claimed that he was a thief, and recovery was sought from the insurance company. But the Kentucky Court of Appeals, in denying recovery, pointed out that there was excepted from the coverage "loss or damage due to: wrongful conversion, embezzlement . . . while rented under contract or lease.". The court held the absconder was an embezzler, and not a thief. In the case at bar the entire policy is not before us. There is only the stipulation that the coverage was against "theft, larceny, robbery or pilferage." It is not claimed that there is any exception from such coverage; so the Kentucky case is not in point.

6. In *Laird* v. *Employers' Liability Corp.,* 2 Terry (Del.) 216, 18 Atl. 2d 861, no automobile was involved. The facts showed that certain stock certificates were obtained by plaintiffs by false pretenses. The plaintiffs sued the defendant on an insurance policy which protected them against loss arising from the securities being "stolen." The Superior Court of Delaware said of the method employed in obtaining the securities: "It is a fraud, of course, but it is not stealing. . . . In the contract or indemnity in question the word 'stolen' is not qualified by the context, and it must be given its usual and ordinary meaning. The loss did not result from larceny or theft, but through a distinct species of fraud; . . ."

There was no showing that Delaware had a statute on false pretense reading as does our false pretense statute; so the Delaware case affords the appellant no support.

Conclusion: After reviewing the authorities from the other states, we conclude that our own statute (§ 3073,

Pope's Digest) is conclusive of the question here at issue, because the swindler obtained Williams' car by false pretense, and one guilty of false pretense "shall be deemed guilty of larceny." We therefore affirm the decree of the chancery court.

The Chief Justice dissents.

McCollum *v.* Price.

4-8564 211 S. W. 2d 895

Opinion delivered June 7, 1948.

Quinn & Williams, for appellant.

T. B. Vance, for appellee.

MINOR W. MILLWEE, Justice. Pearl G. Price died testate in Miller county, Arkansas, on August 31, 1945, survived by appellee, W. R. Price, her husband, and appellants, Marion Dale McCollum and Sam Gardner McCollum, her sons by a former marriage.

On May 28, 1947, appellee instituted this suit in chancery court against appellants, as heirs at law of Pearl G. Price, and against appellant, Sam Gardner McCollum, as administrator of the estate of Pearl G. Price, deceased, alleging that Mrs. Price owned cash on deposit in two Texarkana banks in the amount of $2,400.62 undisposed of by will at the time of her death; that notwithstanding the fact that appellants were both nonresidents of the state appellant, Sam G. McCollum, had procured his appointment and assumed to act as administrator of the estate of Pearl G. Price and assumed dominion over the bank deposits; and that appellee was entitled to a curtesy right of one-third of the deposits for which judgment was prayed.

The answer of appellants denied that appellee was entitled to such curtesy right and alleged that Pearl G. Price had by her last will, which had been duly probated, bequeathed all her personal property to appellants. Appellant, Sam G. McCollum, denied that he was

a non-resident and admitted that he had taken over all property of the estate of his mother as the duly qualified administrator with will annexed of said estate. Appellant, Sam Gardner McCollum, later filed a cross complaint in which he alleged that appellee was liable for payment of funeral expenses which had been paid by the administrator in the sum of $452. Also that certain personal property belonging to the estate of Pearl G. Price was in the possession of appellee and should be delivered over to the administrator.

In his answer to this cross complaint, appellee alleged that the administrator had caused the will of Pearl G. Price to be probated in Miller Probate Court and that under the terms of said will the administrator was charged with the payment of said funeral expenses; and that said administrator, being one of the chief beneficiaries under the will, and having accepted his interest charged with the payment of said expenses, should be estopped to claim reimbursement from appellee. Appellee also alleged that he was the owner of the personal property claimed by the administrator, with the exception of certain enumerated household items, which he had at all times been ready to deliver to appellants.

Appellee also filed an amendment to his complaint alleging that he and Pearl G. Price, as husband and wife, entered into a written contract with J. M. Bates to purchase their home place for a consideration for $250 cash and $1,400 payable in 72 equal monthly installments; that, to secure the payment of the purchase price, appellee and his wife as owners by the entirety executed and delivered their joint note and deed of trust to Bates; that appellee paid the balance of said purchase money out of his separate funds in the amount of $1,566; that appellee and Mrs. Price went into possession of the property at the time of their purchase and occupied it as a homestead until her death, and that, since his wife's death, appellee has continued to occupy the premises claiming to be the owner thereof in fee by right of survivorship. It was prayed that title to the property be quieted in appellee as against the claims of appellants

either as heirs at law of Pearl G. Price or as devisees under her last will.

In their answer to the amendment to the complaint, appellants denied all material allegations therein and alleged that Pearl G. Price was the owner of the home place at the time of her death by virtue of a warranty deed from J. M. Bates and wife; that appellee had full knowledge of the deed and agreed to the taking of the deed in his wife's name and that the property should be her separate estate; that appellee had represented that the property belonged to his wife and should be estopped from now asserting any interest in the property; and that by the terms of the last will of Pearl G. Price, appellee was devised a conditional life estate in the home place, which is the only interest he has in the property.

At the time of the marriage of appellee and Pearl G. McCollum in 1931, she owned several parcels of real estate in Texarkana which came to her through her first husband. Mr. and Mrs. Price were divorced in 1934, but remarried about two months later. In January, 1939, they decided to purchase a home and entered into a written contract of purchase of a six-acre tract in the Alhambra Place Addition to the City of Texarkana through a local agent of the owner, J. M. Bates. The contract provided for a cash consideration of $250 and the balance of $1,250 payable in 72 monthly installments with interest. It was signed by both appellee and his wife and provided that the owner should convey the tract to them jointly. Mr. and Mrs. Price executed their joint note for the deferred payments and also a joint deed of trust to secure the payment of said note.

Appellee has been employed by a railway company for 22 years earning approximately $300 per month. He testified that a few days after he and his wife executed the contract of sale they went to the real estate agent's office to receive the deed, but it was not ready and that his wife returned to the office the next day and procured the deed to her as sole grantee in his absence and without his knowledge or consent. This deed was

acknowledged on January 26, 1939, and the joint deed of trust was signed and acknowledged on February 1, 1939. Appellee learned of the deed to his wife upon her return from the real estate office, but took no action to correct it. The down payment of $250 was made by Mrs. Price, but the 72 monthly payments were made out of appellee's earnings and all receipts evidencing the monthly payments were issued to them jointly. These payments were completed shortly prior to her death in August, 1945. Appellee further testified that he and his wife entered the contract of purchase as man and wife and with the understanding that "whichever died first the property would belong to the other." A real estate agent who lived near Mr. and Mrs. Price testified that in 1941 or 1942 a party was interested in buying the Price place; that he approached Mrs. Price about the matter and she told him that the place belonged to appellee, or that he was paying it out, and that the agent would have to see him.

In June, 1941, Pearl G. Price executed her will in which she devised several tracts of land to her two sons. In item 2 of the will she stated that all property bequeathed and devised in the will came from her first husband except the home place and one other tract which she purchased in her own right. Item 6 of the will devises the home place to appellee for life provided he occupy it as a home and continue the monthly payments on the unpaid balance due thereon, if any, at her death. It was further provided that if appellee failed to carry out either of these provisions the property should immediately vest in her sons, but if same were complied with the property should go to the two sons, at appellee's death. Mrs. Price advised her two sons of the existence of the will shortly after it was executed, but appellee did not know his wife had made a will until after her death in 1945. Appellee and his wife resided in the home place from 1939 until her death. Appellee has since continued to occupy the property claiming title in fee. The younger son of Mrs. Price lived with his mother and appellee for several years and was shown to be a resident of Arkansas at the time

he qualified as administrator with will annexed of his mother's estate. Appellee assisted the administrator in making an inventory of the personal property of the estate.

The chancellor decreed that at the time of the death of Pearl G. Price the bank deposits were her separate property and passed under her will to appellants, and that appellee took no curtesy right therein; that the deed of the home place to Pearl G. Price as sole grantee was taken in the absence of appellee and without his knowledge and consent; that the purchase of said home by appellee and his wife under the joint contract of purchase, note, deed of trust, the agreement between the parties and payment of the purchase money created an equitable estate by the entirety in appellee and his wife; that upon the death of Pearl G. Price, appellee became the owner of the home place by right of survivorship; and that the will of Pearl G. Price was ineffective to restrict such right. Title to the home place was quieted and confirmed in appellee. The cross complaint of the administrator seeking reimbursement of the payment for funeral expenses and recovery of certain items of personal property from appellee was dismissed for want of equity.

Appellants have appealed from that part of the decree finding appellee to be the owner of the home place under an estate by the entirety. Appellee has cross-appealed from that part of the decree holding that he took no curtesy right in the bank deposits of $2,400.62.

On the direct appeal appellants insist that the chancellor erred in holding that an estate by the entirety was created in appellee and his wife as to the home place under the rule followed in such cases as *Harbour* v. *Harbour,* 103 Ark. 273, 146 S. W. 867; *Fine* v. *Fine,* 209 Ark. 754, 192 S. W. 2d 212; and *Green* v. *Green,* 210 Ark. 675, 197 S. W. 2d 294. In *Harbour* v. *Harbour, supra,* the rule is stated as follows: "It has been frequently held that where the husband purchased and paid for lands, taking the deeds therefor in the name of his wife, the presumption is that his money, thus used, was intended as a gift

to her, and the law does not imply a promise or obligation on her part to refund the money or to divide the property purchased or to hold the same in trust for him. His conduct is referable to his affection for her and his duty to protect her against want, and it will be presumed to be a gift and, so far as he is concerned, becomes absolutely her property. *Wood* v. *Wood,* 100 Ark. 370, 140 S. W. 275; *Womack* v. *Womack,* 73 Ark. 281, 83 S. W. 937; *O'Hair* v. *O'Hair,* 76 Ark. 389, 88 S. W. 945."

In *Fine* v. *Fine, supra,* we reaffirmed the following rule announced in *Parks* v. *Parks,* 207 Ark. 720, 182 S. W. 2d 470: "The proof necessary to overcome the presumption of gift to the wife where the husband purchased land and caused the deed to be executed to her must be clear and convincing." In *Green* v. *Green, supra,* we said: "But this presumption about the gift is not a conclusive presumption, and may be rebutted by evidence of facts antecedent to and contemporaneous with the conveyance, showing that the conveyance was not a gift."

The instant case does not involve a situation where the husband purchased lands and caused the title to be placed in his wife's name. The evidence here supports the finding of the chancellor that the deed to Pearl G. Price by the vendor under the contract of purchase was procured by Mrs. Price in the absence of appellee and without his knowledge and consent. Under the terms of the contract of purchase, the vendor agreed to convey the property to appellee and his wife jointly. Appellee also testified that he and his wife entered the contract of purchase as man and wife with the understanding that in the case of the death of either the property would belong to the other.

In the case of *Roach* v. *Richardson,* 84 Ark. 37, 104 S. W. 538, it was held that where a husband and wife purchased land and the seller executes a bond for title or contract of sale to them jointly, they become seized of an equitable estate by the entirety and the survivor, upon payment of the purchase money, is entitled to the fee. In that case John Whitson and wife purchased the

tract of land and gave their joint notes for the purchase money. The sale was evidenced by bond for title or written contract of sale executed by the vendor to Whitson and wife, and Whitson died in possession of the land owing a balance of the purchase money, which was paid by his widow. Upon the payment of said balance the seller executed a deed to the widow. Justice Wood, speaking for the court, said:

"Did the bond for title or contract of sale convey to John Whitson and his wife an estate in entirety? In *Strauss* v. *White,* 66 Ark. 167, 104 S. W. 538, this court said: It has been uniformly held by this court that when the owner sells land, takes the notes of the vendee for the purchase money, and executes to him a bond for title, the effect of the contract is to create a mortgage in favor of the vendor upon the land to secure the purchase money, subject to all the essential incidents of a mortgage, as effectually as if the vendor had conveyed the land by an absolute deed to the vendee and taken a mortgage back to secure the purchase money. . . . It follows, then, . . . that the vendee, in analogy to the mortgagor, is the owner of an equity of redemption, and that his is the real and beneficial estate which is descendible by inheritance, devisable by will, and alienable by deed precisely as if it were an absolute estate of inheritance at law, subject, of course, to the rights of the vendor.' . . .

"One who holds bond for title from the holder of the legal title has an equitable estate in the land so conveyed to him. In equity he is the real owner, but subject to have his interest defeated or taken away if he fails to comply with the conditions of the bond. *Norman* v. *Pugh,* 75 Ark. 52, 86 S. W. 833. Here it is not pretended that the conditions of the bond were not fulfilled by Whitson and his wife. The deed to her after the death of her husband evidenced the conveyance of the entire estate which was hers by right of survivorship at his death. 'If an estate in land be given to the husband and wife, or a joint purchase be made by them, during coverture, they are not properly joint tenants, nor tenants in common, for they are but one person in law, and can not take by moieties. They are both seized of the entirety,

and neither can sell without the consent of the other, and the survivor takes the whole. This species of tenancy arises from the unity of husband and wife, and it applies to an estate in fee, for life or for years.' 2 Kent's Com. 132. See *Branch* v. *Polk,* 61 Ark. 388, 33 S. W. 434, 30 L. R. A. 324, 54 Am. St. Rep. 266; *Shaw* v. *Hearsey,* 5 Mass. 521."

In the case of *Heinrich v. Heinrich,* 177 Ark. 250, 6 S. W. 2d 21, a husband and wife purchased a lot under a joint contract of purchase and the husband made a down payment of $150 and the wife paid the balance of the purchase money. It was held that an equitable estate by the entirety resulted and the court said: "As the purchase money had been paid, this created an equitable estate in entirety by appellant and appellee. *Roach* v. *Richardson,* 84 Ark. 47, 104 S. W. 538. An estate by entirety, either legal or equitable, cannot be divested out of the husband and invested in the wife, or *vice versa,* by the courts." See, also, *Hawkins* v. *Lamb,* 210 Ark. 1, 194 S. W. 2d 5.

We think the rule announced in *Roach* v. *Richardson, supra,* is applicable here and that the written contract of sale, when considered with all the surrounding circumstances, created an equitable estate by the entirety in appellee and his wife. It is true that the deed to Whitson's widow was made after his death in that case, while the deed to Pearl G. Price in the case at bar was executed soon after the contract of sale. Appellants argue that this deed definitely concluded the transaction and that appellee, by failing to take any action to correct or set aside the deed, should now be estopped to assert any claim of title in the property. However, it appears that the court treated the bond for title, or contract of sale, and the due performance of its conditions by Whitson and his wife as controlling in the Richardson case. The joint contract of purchase was held to have established the nature of the estate created as an equitable one by the entirety. While appellee took no action to correct or set aside the deed to his wife in the instant case, his subsequent acts were in recognition of the joint contract of purchase. The deferred monthly pay-

ments were made for six years out of his wages and receipts were issued to them jointly in accordance with the terms of their joint note, deed of trust and contract of purchase. The making of the will by Mrs. Price in which she stated that she owned the home place in her own right was kept as a carefully guarded secret from appellee, and is inconsistent with her actions in obtaining monthly receipts issued to the parties jointly in compliance with the terms of the contract of purchase. Appellants do not occupy the position of innocent purchasers of the property for value, nor has their position changed for the worse by acts or omissions of appellee under all the circumstances in evidence.

We conclude that the trial court did not err in holding that an equitable estate by the entirety was created in appellee and his wife, and that he became the absolute owner of the home place by right of survivorship at her death.

The cross-appeal involves the correctness of the trial court's finding that appellee took no curtesy right in the bank deposits in the form of savings accounts left by Pearl G. Price in two Texarkana banks. Appellee first contends that the trial court erred in admitting in evidence the order of the referee admitting the will of Pearl G. Price to probate. It is argued that Act 448 of 1941, which authorizes the referee in probate to admit wills to probate, is unconstitutional. When the original will was offered in evidence, appellee objected to its introduction because it was a part of the material papers of the probate file. A copy being substituted, the will was introduced without further objection. Appellants then offered to introduce the order of the referee admitting the will to probate, when appellee objected on the ground above stated. We think appellee is estopped to urge the inadmissibility of the order admitting the will to probate. In none of the pleadings filed by him did he in any manner question the validity of the will. On the contrary, when the administrator filed the cross complaint against appellee seeking to charge him with the payment of the funeral expenses of his wife, appellee filed a response thereto stating that the administrator

had "caused said will to be probated" and specifically pleaded the terms of the will, which charged the administrator with the payment of said funeral expenses. The trial court held in favor of appellee on the administrator's cross complaint and dismissed it for want of equity. Having thus relied upon the provisions of the will as a defense to the cross complaint, and having received the benefit of the court's action based on such defense, appellee will not be heard to question the authority of the referee to admit the will to probate in this collateral proceeding.

It is next insisted by appellee that the terms of the will were insufficient to pass title to the bank savings accounts to appellants. The will of Pearl G. Price is complete and appears to be an attempt on her part to dispose of all of her property. After devises of several tracts of land, or an interest therein, to appellants, the will contains the following provision: "Item 8: I give and bequeath to my sons, Marion Dale McCollum and Sam Gardner McCollum, all of my household and all other personal possessions, of whatsoever kind and wherever located." It is contended that this bequest is not broad enough to cover the savings accounts in the bank under the doctrine of *ejusdem generis*. Appellee relies on the recent case of *McLane* v. *Chancy,* 211 Ark. 280, 200 S. W. 2d 782. In that case the testatrix devised and bequeathed her home "together with all the personal property therein" to the named beneficiary. We held that the term "personal property therein" was not broad enough to include the proceeds from postal savings certificates and an insurance policy found in the home, and that the bequest of personal property carried only the usual and ordinary household effects. The bequest in the case at bar is not limited to the contents of a house or a certain place, but includes all personal possessions, household or otherwise, owned by testatrix wherever located.

"Under the doctrine of *ejusdem generis*, where there is a testamentary gift of property, or of the property of a general description, contained in a particular place,

and a specific enumeration is coupled with a general description of the property given, it is presumed the testator intended that only things of the same kind as those enumerated should pass. Thus where the bequest of certain property and its 'contents' is coupled with an enumeration of things, it will be presumed that the testator intended that only things *ejusdem generis* should pass." Thompson on Wills (2d Ed.), § 242. The doctrine does not express a rule of property and is only of value as an aid to the discovery of the testator's intent, which must be gathered from the will in its entirety. If that intent is shown to be contrary to that which the doctrine would suggest, then the testamentary intent will prevail and the rule will not be applied. Anno. 137 A. L. R. 214.

In *Nolan* v. *Perry,* 202 Ark. 449, 150 S. W. 2d 751, it was said: "As has many times been said, it is the duty of the court to ascertain, from a consideration of all the language used in the will, the intention of the testator and to give effect to that intention, unless contrary to some rule of law or public policy. *Sheltering Arms Hospital* v. *Shineberger,* 201 Ark. 780, 146 S. W. 2d 921. Another rule, equally well settled, is that wills should be so construed as to avoid partial intestacy, unless the language used compels a different construction. *Union Trust Co.* v. *Madigan,* 183 Ark. 158, 35 S. W. 2d 349; *Pletner* v. *Southern Lbr. Co.,* 173 Ark. 277, 292 S. W. 370."

There is no residuary clause in the will under consideration and this is an additional circumstance which precludes any logical inference other than the intent on the part of testatrix to make a full disposition of her property. *Union Trust Company* v. *Madigan, supra.* When the whole will is construed we think it was the clear intention of Mrs. Price to bequeath all of her personal property to appellants, including the bank deposits. Limitation of the wording of item 8 to household goods or other property of that character would render meaningless the term "other personal possessions, of whatsoever kind and wherever located" and would be contrary to the testamentary intent as gathered from the entire will.

The decree is correct and is accordingly affirmed both on direct and cross-appeal.

ASSOCIATES INVESTMENT COMPANY *v.* PIPPIN.

4-8529 211 S. W. 2d 887

Opinion delivered June 7, 1948.

Fletcher Long, for appellant.

O. H. Hargraves, for appellee.

SMITH, J. While in the armed service of the government near Waco, Texas, William H. Pippin bought a second-hand Buick automobile. The sale was evidenced by a written contract which recited a cash payment of $250 and a balance of $511.80. This balance was payable in monthly installments of $42.65, and the contract recited that upon failure to make any payment when due, the balance then due should be immediately payable, and that the vendor should have the right to take possession of the car, as the title thereto had been reserved until all payments were made. The contract provided that it might be assigned and that the assignee should have all the rights reserved by the seller. The contract was duly assigned to appellant Associates Investment Company, who brought this suit to recover possession of the car after Pippin had made default in three consecutive payments.

Through its office in Memphis, Tennessee, a car was located by appellant in Forrest City, which appellant

alleged was the car to which it had a title retaining contract, and J. T. Howard, its representative from Memphis, was sent to Forrest City to make collection, or to secure possession of the car. A sales contract had been sent to Howard, and he located the car which Pippin had left in the garage of appellee Kinzer for extensive repairs, which were made. Demand for possession of the car was refused unless the repair bill amounting to $366.32 was paid, and this suit was brought to recover possession of the car.

There was a trial before a jury and a verdict was returned in favor of appellee, and from the judgment pronounced upon that verdict is this appeal.

It is conceded that the case was submitted to the jury under correct instructions. Indeed, the only question in the case is the one of fact, the identity of the car.

Howard, appellant's agent, had no means of identifying the car except by comparison with the sales contract which described the car as a used, 1937 Buick, whose motor number was 43314561. Testimony was offered that each car had a motor number and that no two cars of the same make had the same number, and that a plate was placed on each motor containing its number and that this was done for purposes of identification.

It is undisputed that the car in question did not have that motor number, but had a different one, and it is insisted that this discrepancy made a question of fact as to whether the car here in question was the car to which appellant had the title retaining contract.

This would ordinarily be true, but we think the undisputed testimony established the identity of the car in suit as the car which Pippin had bought in Texas. In his deposition Pippin testified that he did not know whether the car in suit was the car which he had bought or not, but he exhibited a "Certificate of Title" to a motor vehicle which had been issued to him by the State Highway Department of Texas, dated December 31, 1946. This certificate contained the following recitals:

"The said motor vehicle is subject to the following liens. First in favor of A. I. C. Date, Dec. 11, 1946. Address, 601 Franklin Street, City, Waco, State, Texas. Amount, $511.80. License No. E. L. 1176, Reg. weight 3600."

The sales contract was dated December 11, 1946, and it recited the balance due was $511.80. There was no testimony as to the number of the license plate on the car.

Appellee testified that he had seen Pippin driving the car before it was brought to his garage for repairs, and that new parts were required and extensive repairs were made at Pippin's direction.

Pippin testified: "I don't definitely know that the car the plaintiff is claiming is the one I bought, because I went back to the army after I left it to be fixed. I could not swear that it was the same car that was delivered to me," but he further testified that the car in which he drove from Texas to Forrest City is the car for which he contracted liability under the sales contract, and that he had not kept up his payments, and that he had bought no other car.

Reversal of the judgment in favor of appellee is asked upon the ground that the verdict is contrary to the undisputed testimony, and we think it is. The question presented is not one of the preponderance of the testimony, but is rather whether there is any substantial testimony to support the verdict. Except only for the discrepancy in the motor number, there is no testimony which leaves any doubt about the identity of the car Pippin bought in Texas and he took the one he bought to appellee's shop for repairs.

The judgment must therefore be reversed and the cause will be remanded for further proceedings in accordance with this opinion inasmuch as appellee executed a bond for the retention of the car.

ANDERSON HOTELS OF LOUISIANA, INC., *v.* SEIBERT.

4-8535 211 S. W. 2d 876

Opinion delivered June 7, 1948.

[redacted]

Vera P. Street and *John R. Thompson,* for appellant.

O. D. Longstreth, Jr., Dave E. Witt and *Philip McNemer,* for appellee.

HOLT, J. This is an action for damages alleged to have been sustained by appellee through the negligence of appellant in the maintenance of its bathroom and plumbing equipment, pipes and water facilities in one of its rooms immediately over appellee's place of business.

Appellee alleged in his complaint that appellant is the lessee and operator of the Lincoln Hotel, 1209 W. Markham Street, Little Rock, Arkansas, and that he, appellee, operates a news agency business immediately under one of appellant's hotel rooms.

"That on or about May 24, 1946, one of defendant's bathrooms overflowed and said overflow ran down into plaintiff's place of business and flooded same, thereby damaging numerous articles of merchandise and damaged the interior of plaintiff's place of business. The said overflow and resulting damage was caused by defective plumbing equipment in the bathrooms of defendant's hotel; that defendant was notified of such defective plumbing and resulting damages caused by such defect and defendant, its agents, servants and employees negligently failed and refused to repair or remedy same, damaging the plaintiff, on this occasion, in the sum of $34 in merchandise, labor and repairs."

That a similar overflow from appellant's bathroom and defective water pipes occurred November 13, 1946, causing damage to appellee's merchandise in the amount of $46.32; that about February 3, 1947, a similar overflow from one of appellant's bathrooms occurred, flooding appellee's place of business and damaging his merchandise in the amount of $434.69.

"That about February 21, 1947, the plaintiff's place of business was again damaged by the flooding caused by the overflow of one of defendant's bathrooms as a result of defective plumbing equipment and damaging the plaintiff in the sum of $125 for labor, merchandise and repairs; that on or about February 25, 1947, the plaintiff's place of business was again damaged by the flooding caused by the overflow of one of defendant's bathrooms as a result of defective plumbing equipment and damaging the plaintiff in the sum of $38.67 for labor, merchandise and repairs; that prior to May 24, 1946, plaintiff notified defendant of damages to his merchandise and place of business caused by defective plumbing in one of defendant's bathrooms and defendant promised to repair same. And again after each of the above mentioned dates defendant promised to repair same, but that defendant has failed and refused to repair or remedy such defect; that said bathroom plumbing is in bad repairs; that defendant has knowledge of such condition

and its negligence in failure to repair same has damaged the plaintiff in the sum of $668.68."

Damages were sought in the total amount of $668.68.

To this complaint appellant interposed a general denial. A jury awarded appellee damages in the amount of $500, and from the judgment is this appeal.

It is undisputed that appellant took over and began operating the Lincoln Hotel about May 19, 1946, as lessee.

(1)

For reversal, appellant first contends that the evidence was not sufficient to support the verdict. We cannot agree. Appellee gave testimony to support the amount of the damages to his merchandise occasioned on the dates and in the manner as set out in his complaint, *supra,* and also damages to the interior of his place of business. He testified that the first time that he claimed damages was on account of the commode being stopped up and the second occasion was the overflow of a bathtub, that on February 3, 1947, a defective trip in the commode that would not stop the water caused damage, that the metal ceiling rusted away under the bathroom and that he reported these damages to appellant's manager. He further testified that since October (1946) water had come into his place of business thirty or thirty-five times. A second time in February, 1947, that much damage was caused by this same defective commode, that it was a continuous situation, that his total damage to books and magazines alone amounted to $565.04.

Albert Milner testified that holes four feet square in the wooden ceiling, under the tin in the room occupied by appellee, had rotted out, that all side walls were water and dirt streaked and it would take six months to a year for this situation to be created.

Mr. Frazier, manager of appellant's hotel from October, 1946, until April 4, 1947, gave testimony tending to corroborate the above witnesses and admitted that

appellee notified him of each overflow that occurred subsequent to October, 1946.

The general rule as to liability, in circumstances such as we have here, is stated in 2 C. J. S., under the title, "Adjoining Land Owners," § 42, in this language: "A landowner is liable for damages to his neighbor caused by his negligent failure to keep his premises in repair. To be chargeable with negligence, however, he must have express or implied notice of the defective condition and a reasonable time thereafter to remedy it." Section 44: " . . . A landowner who is guilty of negligence in allowing matter, offensive or inoffensive of itself, such as water, dirt, sand, debris, and the like, to pass from his land into that of the adjoining proprietor, is liable for the damage caused thereby, irrespective of motive or intent, but he is liable only for his negligence. The injured owner is not precluded from recovery because he has failed to erect barriers to protect himself from his neighbor's negligence. Failure of plaintiff to make a reasonable effort to minimize damages goes to the extent of a recovery and not to the right of recovery," and in *Rosen et al.* v. *Kroger Grocery & Baking Company* (Mo. App.), 5 S. W. 2d 649, cited in support of the above text, it was there held (headnote 4): "General rule is that one who uses his premises so negligently as to cause injury to person on adjoining premises is liable for injuries so sustained." (Headnote 5): "Where tenant maintained ice box and pipe and other arrangements for draining water therefrom in such condition that instead of water being drained out of building it was caused to seep and soak into division wall, damaging wall and merchandise on other side, evidence of overflow upon floor being such as to put tenant on inquiry and proof of resulting damage to landlord having been established, held, that case was made for jury."

In footnote 82 of the text, *supra,* the text writer summarizes from the Rosen-Kroger case, *supra,* as follows: "One who collects and keeps water on his premises, which is likely to do mischief if not properly controlled, is liable for his negligence, either in the original con-

struction of his reservoir or receptacle, in subsequently allowing it to become defective, or in failing properly to guard against all such contingent damages as might reasonably be anticipated."

These general rules apply here, and we hold that the evidence was ample to support the jury's verdict.

(2)

Appellant next contends that the court erred in giving appellee's instruction No. 1 over its objection, which is as follows: "You are instructed that where two or more floors of a building are owned or leased by different persons that the owner or lessee of the upper floor owes a duty to the owner or lessee of the lower floor to keep the bathroom facilities in proper condition and repair, so as not to injure the owner or lessee of the lower floor in his use of said lower floor.

"You are instructed that if you find from a preponderance of the evidence in this case that the defendant, or its agents, servants, and employees, while acting within the scope of their employment, permitted or suffered defendant's plumbing to become defective so as to flood defendant's bathrooms with water and said water flowed down into plaintiff's place of business in such quantities that said water damaged plaintiff's merchandise and place of business, and if you further find from a preponderance of the evidence that such acts on the part of defendant's agents, servants, and employees was negligence, then you will find for the plaintiff for such damages as you find from the evidence in this case that plaintiff has suffered."

We think this instruction was a correct declaration of the law, was in accordance with the rules of law, *supra,* on the facts presented and that the court therefore committed no error in giving it.

(3)

Next, appellant argues that the court erred in refusing to give its requested instruction No. 5, as follows:

"You are instructed that if you find that the damage, if any, was caused by an act of a guest of the hotel, you must find for the defendant, unless you further find that the defendant knew of, or by the exercise of ordinary care could have known, that the hotel guest was likely to do the act which caused the damage, and failed to take immediate steps to remove the danger of damage."

There was no error in refusing to give this instruction for the reason that we find no evidence in this record that any of the damages alleged were caused by guests of the hotel. The instruction was abstract and properly refused.

(4)

Appellant next contends that "the court was in error when he permitted the jury to take into consideration damage to the real estate, and that he erred when he ruled as he did in the permitting of testimony to go to the jury."

It will be noted that appellee in his complaint alleged damages to his merchandise and the interior of his place of business. He testified: "We have to take care of anything we do to the inside—it has to be taken care of by us. That is specified in our lease. The renter is responsible for the upkeep of the inside, the owner is responsible for the outside upkeep."

There was testimony, as expressed by the trial court, "that the damage has been a continuous sort of thing." These damages were not only continuous at different times to the merchandise but also to the walls and inside of appellee's place of business. We think, therefore, that there was no error in admitting testimony as to damages to the walls and inside of appellee's place of business.

(5)

Finally, appellant argues that "the court erred in not permitting the defendant to exhibit to the jury merchandise which the plaintiff had collected damages for."

There was no error in the court's action in this connection for the reason that appellant sought to exhibit to

the jury certain merchandise damaged at other times for which no recovery was sought in the present suit, and for which damages appellant had already fully compensated appellee. Such evidence could have no bearing upon the present suit and was properly refused.

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

GRIFFIN *v.* BRIDGER.

4-8569 212 S. W. 2d 24

Opinion delivered June 14, 1948.

Rehearing denied July 5, 1948.

E. D. McGowan, for appellant.

Eugene Sloan, for appellee.

MINOR W. MILLWEE, Justice. This suit was begun by appellant, Jesse G. Griffin, as plaintiff in the chancery

court against appellee, Floyd R. Bridger, for an accounting.

Plaintiff alleged that on June 8, 1943, he executed and delivered to defendant a note and chattel mortgage to secure an indebtedness which he owed defendant in the sum of $3,292; that on November 13, 1943, plaintiff also executed and delivered to defendant a bill of sale to secure defendant for money which the latter advanced to pay a loan owed by plaintiff to the Jonesboro Production Credit Association; that defendant refused, after demand, to give an accounting of monies or property which he had received pursuant to said conveyances; and that the value of the property delivered as security was $4,000 greater than the amount of plaintiff's indebtedness to defendant and the credit association. Plaintiff prayed for an accounting and judgment for such sums in excess of the indebtedness as might be found due him.

The answer of defendant admitted the execution of the mortgage and bill of sale by plaintiff, but denied that the bill of sale was in fact a mortgage, or that it was executed to secure defendant for money advanced by him to pay plaintiff's debt to the credit association. It was further alleged that the bill of sale was executed for the purpose of vesting absolute title to the property described therein in defendant and that said instrument was an absolute bill of sale; that defendant on January 4, 1944, paid the balance due by plaintiff to the credit association in the sum of $1,286.35; that plaintiff sold a part of the property covered by the mortgages to the credit association and defendant, without applying all the proceeds of the sale to the payment of either of said mortgages; and that the amount of the loans and advances to plaintiff, and on his behalf, exceeded the actual value of the property covered by the bill of sale and plaintiff was without further interest in said property.

The chancellor found all issues in favor of defendant and specifically that the instrument executed by plaintiff in favor of defendant on November 13, 1943, is in fact a bill of sale and not a chattel mortgage; and that the cause of action should be dismissed at plaintiff's cost.

The defendant has been engaged in the farming, ginning and mercantile business near Jonesboro in Craighead county for a number of years. Plaintiff married defendant's daughter and had engaged in farming with his father-in-law for several years prior to 1943. Defendant extended financial assistance to plaintiff from time to time to carry on his farming operations and a running account of these transactions was kept on the books of defendant. On February 3, 1943, plaintiff borrowed $2,500 from the Jonesboro Production Credit Association and executed a chattel mortgage on his livestock, farming implements and 1943 crops to secure said loan. On June 8, 1943, plaintiff owed defendant $3,292 on the open account and executed his promissory note to defendant due November 15, 1943, for this amount. The note was secured by a chattel mortgage on the same chattels described in the prior mortgage to the credit association and it was understood between the parties that defendant's mortgage was subject to the mortgage held by the association. The mortgage to defendant also secured all other indebtedness which might be due defendant at the time of a foreclosure thereof.

On November 13, 1943, plaintiff executed, acknowledged and delivered an instrument designated as a bill of sale transferring title to defendant to all the property covered by the above-mentioned mortgages. This instrument contains the usual provisions of a bill of sale and stipulates that in consideration of the sum of $1.00 to him paid by defendant, the plaintiff does bargain, sell, set over, transfer and deliver to defendant the personal property therein described. It also provides the usual warranty of title to the property and that it is free of all encumbrances except the chattel mortgage held by defendant.

The instrument contains two additional paragraphs which read as follows: "This bill of sale covers any other personal property that I may own and may not be listed above, except personal effects. . . .

"The purpose of this instrument is to authorize and empower the said F. R. Bridger to use, sell and dispose

of any or of all said property in his discretion and to vest absolute title to any vendee, it being understood that the proceeds from any sales shall first be applied on any indebtedness that the undersigned may owe the said F. R. Bridger and any balance remaining after the payment of said indebtedness to him shall be used by the said F. R. Bridger as he may see fit."

Plaintiff and his wife had been separated for several months prior to November 13, 1943. Defendant had counseled with both about their marital troubles and the friendly business relations between plaintiff and defendant continued. Prior to the date of the execution of the bill of sale plaintiff had made plans to accept employment at a war plant in Wichita, Kansas. According to the testimony of defendant, plaintiff at that time advised him that he was leaving the country; that he wanted to pay defendant, but did not have the money and was unable to sell the mortgaged property for enough to pay his debts; and that he wanted defendant to take over his personal property, pay the indebtedness to the credit association and defendant and, if any balance remained, to use it as defendant saw fit.

Plaintiff left for Kansas on the day following the execution of the bill of sale. A witness who accompanied him on the trip, and was employed at the same plant, testified that plaintiff picked up a woman at Walnut Ridge, Arkansas, who accompanied them to Kansas and stayed at the place where plaintiff and witness roomed; that plaintiff said he did not expect to live in Jonesboro again and introduced the woman to people in Wichita as his wife.

Plaintiff had been deferred for military duty on account of his farming activities prior to January 7, 1944, when his draft classification was changed. The following day he enlisted in the Naval Reserve and was discharged March 25, 1944. He testified that the bill of sale was given to defendant with the understanding that the latter should handle his business while he was away and that he made several demands on defendant for a settlement soon after his discharge from the Navy. This was denied

by defendant who stated that the provisions of the bill of sale were in strict compliance with their agreement and that plaintiff made no demand for a settlement or indicated that he claimed any further interest in the property until this suit was instituted in September, 1945. Plaintiff and his wife were divorced in February, 1945, and she was awarded custody of their daughter. Defendant paid the balance of $1,286.35 due by plaintiff to the Jonesboro Production Credit Association on January 4, 1944. In December, 1944, he sold a herd of cattle covered by the mortgage at public auction for $2,323. He continued to keep a detailed account showing the indebtedness and various credits thereon and stated that this was done for the purpose of ascertaining whether a surplus would remain after debts and expenses were paid and with the intent to turn over any surplus to his daughter for the use and benefit of his granddaughter, the child of plaintiff.

The evidence further shows that the bill of sale as originally prepared provided that any balance remaining after payment of plaintiff's indebtedness should be "paid over to Helen Griffin, my wife." It is undisputed that plaintiff objected to this provision before he signed the instrument. Defendant testified that this provision was scratched out and the words "used by the said F. R. Bridger as he may see fit" interlined in longhand in ink at the request of plaintiff after he kept the instrument overnight. Plaintiff stated that before signing the instrument he changed the foregoing provision by striking the name of his wife and writing in the name of his daughter. We have carefully examined the original bill of sale which is in the record and are unable to agree with plaintiff's present contention that ink eradicator has been used to alter the instrument. The testimony of defendant as to the interlineation is corroborated by that of the notary public who took plaintiff's acknowledgment and by the surrounding circumstances.

For reversal of the decree plaintiff contends that the trial court erred in holding the instrument executed on November 13, 1943, to be in fact a bill of sale instead

of a chattel mortgage. Plaintiff relies on decisions of this court holding that a bill of sale, absolute in its terms, becomes a chattel mortgage upon proof by clear and decisive evidence that it was given as security for a debt. *Trieber* v. *Andrews,* 31 Ark. 163. Plaintiff earnestly insists that he has met the burden of proof and is entitled to an accounting from defendant who occupies the position of a mortgagee in possession.

In determining the right of plaintiff to maintain the instant suit, we reach the conclusion that it is unnecessary to decide whether the instrument here involved is a bill of sale, chattel mortgage or an assignment for the payment of debts. The instrument contains many of the essential elements of an assignment. The distinction between a chattel mortgage and an assignment is stated in 10 Am. Jur., Chattel Mortgages, § 17, as follows: "The difference between them is that a chattel mortgage is merely a pledge, lien, or security for a sum of money due, while an assignment passes the complete title with the possession to the assignee, without the defeasance clause, and is a wiping out or full settlement of the debt, while a chattel mortgage does not extinguish the debt." If at the time of the execution of the instrument it was the intention of the parties to divest the debtor of the title, and so make an appropriation of the property affected to the raising of a fund to pay debts, then the instrument is an assignment and not a mortgage. *Smead* v. *Chandler,* 71 Ark. 505, 76 S. W. 1066, 65 L. R. A. 353.

If it be conceded that the instrument was given as security for, and recognized the continued existence of, the indebtedness, it further provided that any surplus remaining after payment of the indebtedness should be applied as defendant saw fit, and the preponderance of the evidence supports the conclusion that this was the real intention of the parties. If, however, the instrument, as actually executed, provided that any remaining surplus should be paid to the daughter of plaintiff, as plaintiff contends, this would give plaintiff no right to maintain a suit for the recovery of such surplus in his own right, as he is attempting to do here. Plaintiff has not

sued for the benefit of his daughter whose permanent custody now rests in the child's mother and defendant has continued the keeping of books of the transactions with the intention of applying any surplus for the use and benefit of said child.

Under the terms of the instrument under consideration title and right to possession of the chattels passed to defendant with the right of appropriation and sale of the property for the raising of a fund to pay the debts of plaintiff. The instrument contains no defeasance clause and provides that any surplus remaining after payment of plaintiff's indebtedness shall be used by defendant as he may see fit. This provision was placed in the instrument at the suggestion of plaintiff because he did not want his estranged wife to participate in any balance remaining after the payment of his debts. Plaintiff has neither alleged nor proven fraud on the part of defendant in the execution of the instrument and is precluded from maintaining the instant suit in which he seeks to recover for himself a possible surplus that, under his own testimony, was to be paid over to his daughter. It follows that the trial court correctly dismissed the suit of plaintiff and the decree is, therefore, affirmed.

SMITH *v.* SMITH.

4-8419 212 S. W. 2d 10

Opinion delivered June 14, 1948.

Ross Robley, for appellant.

Byron Bogard, for appellee.

HOLT, J. Appellant, Marvin J. Smith, and appellee, Pauline Nell Smith, were married February 14, 1942. Two children were born to this union, a girl now five and a boy three. These parties separated July 4, 1946, and on the 25th of July thereafter, appellee obtained a decree of divorce from appellant, the two childern were by the court placed in the care and custody of the maternal grandmother, Mrs. Dan Beavers, and appellant was directed to pay $60 per month for their maintenance. Each of the parties has remarried since the above decree.

Appellant filed the present suit June 16, 1947, asking for the care and custody of these children on the grounds of alleged changed conditions such as would warrant change of custody to him. The trial court denied his petition, and from the decree is this appeal. The findings of the trial court were amply supported by the testimony.

The evidence shows that Mr. and Mrs. Dan Beavers have had the care and custody of these children practically all of their lives. Mrs. Beavers is 47 years old and her husband 53. They are shown to be good people and have given these children the only home they have ever known. They gave them excellent care and are devoted to them.

On the other hand, appellant has shown very little interest or affection for his children since their birth. In fact, he has virtually abandoned them. He has failed to comply with the order of the court as to maintenance and by his own admissions for a year or more prior to the present suit, has contributed nothing towards their support. He proposes to take them to Port Allen, La., where he lives with his second wife in the home of his mother-in-law and to allow his mother-in-law, 57 years of age, to care for the children while he and his wife continue their present employment in Baton Rouge, La.

The evidence further shows that following the court's order for the maintenance payments, appellant left the State of Arkansas and ignored the court's order. Following the above order, appellant returned to Little Rock only once, and that was on his "honeymoon" with his second wife. (Quoting from his testimony): "Q. And you came to Little Rock on your honeymoon A. I did. Q. And you didn't bring them any money? A. No, I didn't. Q. So for the past year, as far as you are concerned, these children could have been wards on charity of the Pulaski County Juvenile Court, couldn't they, while you were honeymooning with your present wife and going in debt to do it, that's true isn't it? A. That's true. Q. Did you visit with the children when you were here, Mr. Smith? A. No, because I knew it would be trouble for me and my wife and we wouldn't be able to do anything about that. Q. Did you call the home of Mrs. Beavers to ask how they were and if they were in good health? A. No, I found my children were in good health through various people. Q. All the time you have been away from the children, have you written them letters asking Mrs. Beavers to read them to them? A. No, I haven't. . . . Q. What prompted you to come to

Little Rock on this particular occasion, Mr. Smith? A. I received a letter from the Prosecuting Attorney. . . . Q. This letter from the Prosecuting Attorney's office in Little Rock was with respect to the support of your minor children here, wasn't it? A. Yes. Q. It was in response to that letter that you made the trip to Little Rock and it was after you got to Little Rock that you employed an attorney and filed this petition to get the children, wasn't it? A. Yes, it was."

Appellant admitted borrowing $250 for his honeymoon trip but none of this money went to the maintenance of his children.

Until the present suit was filed, appellant made no complaint as to the care and treatment these children were receiving at the hands of their grandparents.

The grandmother, Mrs. Beavers, testified: (Appellant's brief) "I am 47. No one lives in the house but we and the children. My husband is Dan Beavers who works for Leird Lumber Company, aged 53, and earns $40 a week. Had these children since birth, save three months. They are four and three respectively."

According to our long established rule in cases of this nature: "In determining the custody of a minor child, the welfare of the child is the supreme and controlling consideration. In the comparatively recent case of *Kirby* v. *Kirby,* 189 Ark. 937, 75 S. W. 2d 817, we said: 'It is the well-settled doctrine in this state that the chancellor, in awarding the custody of an infant child or in modifying such award thereafter, must keep in view primarily the welfare of the child, and should confide its custody to the parent most suitable therefor, the right of each parent to its custody being of equal dignity. Act 257 of 1921 (now §§ 6203-6207, Pope's Digest). . . . A decree fixing the custody of a child is, however, final on the conditions then existing, and should not be changed afterwards unless on altered conditions since the decree, or on material facts existing at the time of the decree but unknown to the court, and then only for the welfare of the child.' See, also, *Phelps* v. *Phelps,* 209 Ark. 44, 189 S. W. 2d 617. The party seeking a modification of a di-

vorce decree awarding custody of a minor child assumes the burden of showing such a change in conditions as to justify such modification. *Kirby* v. *Kirby, supra,* and *Seigfried* v. *Seigfried* (Mo. App.), 187 S. W. 2d 768;" *Blake* v. *Smith,* 209 Ark. 304, 190 S. W. 2d 455.

We also said in *Graves* v. *French,* 209 Ark. 564, 191 S. W. 2d 590, (quoting from *Verser* v. *Ford, et al.,* 37 Ark. 27): "This is a contest for the custody and nurture of an infant girl of tender age, whose mother died at her birth, and who, from the first two or three days of her existence, has been cared for and kept by the grandparents. The father now demands the child again, having since married, and being in circumstances to provide and care for it. . . . The father has shown himself to be a moral man, with the means of discharging his parental obligation. Certainly, under the circumstances, if he had been in possession of the child, no chancellor could have found warrant in equity for taking her away to be placed under the grandmother's care. But it cannot be ignored that the case does not present that attitude. The child was placed where she is by the father's assent, and has so remained. By his assent ties have been woven between the grandmother and granddaughter, which he is under strong obligation to respect, and which he ought not wantonly and suddenly to tear asunder."

What was there said, applies with equal force here.

Finding no error, the decree is affirmed.

East Texas Motor Freight Lines, Inc. *v.* Buck.

4-8548 212 S. W. 2d 13

Opinion delivered June 14, 1948.

[redacted]

Huie & Huie and *Louis Tarlowski,* for appellant.

G. W. Lookadoo, for appellee.

Ed. F. McFaddin, Justice. This appeal results from a traffic mishap. Appellant's truck and appellees' car were both proceeding north on U. S. Highway 67 in Clark county on August 18, 1947. The appellees' car was in front, and turned left to leave the highway. At that same instant appellant's truck took the left lane in an effort to overtake and pass appellees' car. A collision resulted. The Buck car was owned and driven by Mr. Buck, and occupied by him and Mrs. Buck, the other appellee. Judgments were recovered by the Bucks against appellant; and this appeal challenges those judgments. Appellant states the issues on this appeal:

"1. whether the judgments are supported by substantial testimony; and

"2. whether the judgments are excessive."

We discuss and decide these issues.

I. *Sufficiency of the Evidence.* There was substantial evidence presented from which the jury could—and did—find: (1) that Mr. Buck gave the required arm signal before turning to the left; (2) that appellant's truck driver failed to see or heed such signal; and (3) thereby negligently ran into the Bucks' car. So we find no merit in appellant's first contention.

II. *Excessiveness of the Verdicts.* This assignment requires more elaboration. The verdict for Mr. Buck was for $350 for damages to his car, and $10,000 for personal

injuries. The verdict for Mrs. Buck was for $10,000 for personal injuries. The amount of each of the personal injury verdicts is challenged. The evidence as to the injuries is in irreconciliable conflict. Here are two examples of such conflict: (a) One expert took X-ray pictures of Mrs. Buck, and found only one fractured rib; a second expert took X-ray pictures of Mrs. Buck, and found four fractured ribs. A third expert took X-ray pictures of her, and found no fractured ribs. (b) A physician who examined Mr. and Mrs. Buck shortly after the accident found their injuries to be so minor as to fail to justify hospitalization. Their family physician examined them later, and found them to be suffering from "permanent injuries." How can the average layman on the trial jury decide a case satisfactorily to all the litigants if the medical experts cannot agree among themselves as to (a) what injuries are shown by X-ray pictures; and (b) whether the injuries are minor or major?

It is not the province of the appellate court—in considering whether a verdict is excessive—to determine as between the credibility of the various sets of medical experts. On appeal we are required to give the evidence supporting the verdict its highest probative value. *Mo. Pac. R. Co.* v. *Newton,* 205 Ark. 353, 168 S. W. 2d 812; and *Mo. Pac. R. Co.* v. *Byrd,* 206 Ark. 369, 175 S. W. 2d 564. So, here, we must take the substantial evidence showing the greatest amount of injuries, and then—based on such injuries—determine whether the verdict is excessive. In *Mo. Pac. R. Co.* v. *Newton,* 205 Ark. 353, 168 S. W. 2d 812, we reviewed some of the earlier cases on the duty of this court when there is a claim that the verdict is excessive. Some other cases to the same effect are: *St. L. S. W. Ry. Co.* v. *Kendall,* 114 Ark. 224, 169 S. W. 822, L. R. A. 1915F, 9; *Mo. Pac. Transp. Co.* v. *Simon,* 199 Ark. 289, 135 S. W. 2d 336; *St. L. S. W. Ry. Co.* v. *Brummett,* 201 Ark. 53, 143 S. W. 2d 555; and *Daniels* v. *Allen,* 206 Ark. 1155, 178 S. W. 2d 853.

With the foregoing principles well in mind, a careful review of the evidence has convinced the majority of this court (in which the writer does not agree (that: (1) any

verdict for Mrs. Buck in excess of $5,000 is grossly excessive; and (2) that any verdict for Mr. Buck (for his personal injuries) in excess of $7,500 would be grossly excessive.

Conclusion: If, within 15 judicial days, a remittitur of $5,000 be entered on the judgment for Mrs. Buck, and also a remittitur of $2,500 will be entered on the judgment for Mr. Buck, then the judgments will be affirmed in all other respects. If such remittiturs be not entered, then both judgments will be reversed and the causes remanded. Costs of this appeal are to be paid by appellees.

GOLENTERNEK *v.* KURTH.

4-8530 212 S. W. 2d 14

Opinion delivered June 14, 1948.

Rehearing denied July 5, 1948.

Buzbee, Harrison & Wright, for appellant.

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

Ed. F. McFaddin, Justice. Appellant, Mrs. Sarah Golenternek, is engaged in the buying of hides in Shreveport, Louisiana. From that city, appellant's agents drive trucks to various cities, and buy hides, and transport them in said trucks to Shreveport. One of appellant's trucks (a two-ton truck) containing a load of hides, and en route from Hot Springs, Arkansas, to Shreveport, was wrecked at Gurdon, Arkansas, on Friday, January 31, 1947. Thereupon, R. C. Frazier, a regular employee of appellant, proceeded in one of her one-ton trucks from Shreveport to Gurdon, and transported about half of the load of hides from the wrecked truck to Shreveport. Then on Sunday, February 2, 1947, Frazier—accompanied by his wife and children—returned in the one-ton truck from Shreveport to Gurdon. Instead of stopping in Gurdon and getting the remaining hides and returning to Shreveport, Frazier drove on to Arkadelphia; and there—while driving appellant's truck—had a collision with a car driven by appellee, Mrs. Dorothy Kurth; who sued appellant for personal injuries and property damages occasioned by the collision. From a verdict and judgment for appellee, there is this appeal presenting the issues now to be discussed.

I. *Admission of Evidence.* Appellant admitted that Frazier was her employee, and that he was driving her truck at the time and place of the collision, and that Frazier was paid a regular salary by her; but she insisted that Frazier was outside the scope of his employment at the time and the place of the collision. She urged that Frazier's duties required him to load the hides at Gurdon and return to Shreveport; that instead of so do-

ing, he proceeded about 18 miles past Gurdon to Arkadelphia, and was thus on a mission of his own and outside the scope of his employment at the time and place of the collision. Frazier so testified. Appellee insisted that when the collision occurred in Arkadelphia, Frazier was actually en route from Gurdon to Hot Springs in the course of business for the appellant. As bearing on this trip to Hot Springs, appellee testified to a declaration made to her by Frazier at the scene of, and immediately after, the collision. We copy from the transcript:

"Q. Did he (Frazier) tell you then where he was going? By Mr. Harrison: Now, we object to any statements made by Mr. Frazier relating to his agency or authority or the mission he was on, and on the question of liability for the accident on the part of the defendant company inasmuch as any declaration on his part would not be admissible. By the Court: She can state where he said that he was going, but the matter of agency is admitted, I believe. By Mr. Lookadoo: I am not introducing it on the matter of agency, as that is admitted. By Mr. Harrison: Yes, agency is admitted, but it is specifically denied in that admission that he was acting within the scope of his employment, and we object to any statement he may have made there. By the Court: Overruled. By Mr. Harrison: Save our exceptions. By Mr. Lookadoo: Q. What did he tell you? A. He called me over to one side immediately after that and told me that he was on his way to Hot Springs to get some furs and was going back to Gurdon to pick up some more. Q. Did he tell you that he was making the trip for the defendant. A. Yes sir. By Mr. Harrison: Now, at the conclusion of these questions and answers relating to his declared mission—Mr. Frazier's declared mission to Mrs. Kurth—the defendant moves that those questions and answers be stricken from the record for the same reasons that those declarations are inadmissible against the defendant. By the Court: Overruled. By Mr. Harrison: Save our exceptions."

Was the said statement by Frazier to the appellee admissible on the issue of scope of employment? That

is the question presented. Appellant has cited us to many cases from other jurisdictions holding a declaration such as this one to be inadmissible. Some of these cases are: *Otero* v. *Soto,* 34 Ariz. 87, 267 Pac. 947; *Deater* v. *Pa. Machine Co.,* 311 Pa. 291, 166 Atl. 846; *Lewis* v. *Word Transfer Co.* (Tex.), 119 S. W. 2d 106; *Webb-North Motor Co.* v. *Ross* (Tex.), 42 S. W. 2d 1086; *Wenell* v. *Shapiro,* 194 Minn. 368, 260 N. W. 503; *Moore* v. *Rosenmond,* 238 N. Y. 356, 144 N. E. 639. But, regardless of the holding in other jurisdictions, we are firmly committed to the holding that such a declaration as was here made by an admitted agent is admissible on the issue of scope of employment. In *Mullins* v. *Ritchie Grocer Co.,** 183 Ark. 218, 35 S. W. 2d 1010, a declaration of an admitted agent was offered, and we said:

"It will be remembered that appellant offered to show by witness that he helped John Lewis to repair his automobile between five and six o'clock in the afternoon near Gregory City, and that, while doing so, Lewis told him he was trying to collect some accounts or bills for the Ritchie Grocer Company. It is true that it is well settled that the fact of agency cannot be established by the declarations of the agent, but this was not the purpose of the testimony. The fact of agency had already been established by evidence which was not attempted to be contradicted. The offered evidence was for the purpose of showing that Lewis was acting in the furtherance of his master's business or in the course of his employment as traveling salesman in a place where his duty called him, and the evidence was competent for that purpose."

In the concluding paragraph the court further said: "His statement tended to show that he was acting in the course of his employment, and was admissible to show that he was acting within the real and apparent scope of his authority; and not for the purpose of establishing his agency, which had already been established by undisputed evidence."

* A recent case construing this cited case (although not on the point here discussed) is that of *Ford & Son Sanitary Co.* v. *Ranson, ante,* p. 390, 210 S. W. 2d 508 (opinion delivered April 26, 1948).

Some of the other cases to like effect, and reaffirming the rule stated in *Mullins* v. *Ritchie Grocer Co., supra,* are: *Casteel* v. *Yantis-Harper Tire Co.,* 183 Ark. 475, 36 S. W. 2d 406; S. C. 183 Ark. 912, 39 S. W. 2d 306; *Rex Oil Corp.* v. *Crank,* 183 Ark. 819, 38 S. W. 2d 1093; and *Marshall Ice & Electric Co.* v. *Fitzhugh,* 195 Ark. 395, 122 S. W. 2d 420. So we hold that Frazier's statement, here challenged, was admissible under the facts in this case. With this challenged declaration in the record, an issue was made for the jury on the question of scope of employment; and the case was submitted under a proper instruction covering that issue.

II. *Ownership of, and Damages to, the Car Driven by Appellee.* Appellee testified that the car she was driving had formerly been owned by her divorced husband, but had been allotted to her in a property settlement at the time of her recent divorce. Evidence to the contrary was the certificate of registration of the car in the husband's name. But, even so, appellee's testimony made a jury question as to her ownership. She was in possession of the automobile; and possession of personal property is *prima facie* evidence of title and ownership. *Black* v. *Roberson,* 87 Ark. 641, 112 S. W. 402; *Forrest* v. *Benson,* 150 Ark. 89, 233 S. W. 916; see, also, 50 C. J. 786.

The jury awarded Mrs. Kurth $700 for damages to the car. The measure of damages—in a case such as this one—is the difference between the market value of the car immediately *prior* to the injury and the market value immediately *after* the injury. See *Kane* v. *Carper-Dover Merc. Co.,* 206 Ark. 674, 177 S. W. 2d 41, and cases there cited. The plaintiff testified that she had been offered $1,500 for the car prior to the collision, and that $800 was the best offer she received after the collision. But this evidence of isolated offers cannot in itself—and it stands alone in this case—be used *by the plaintiff* to establish market value. *Jonesboro, Etc. R. Co.* v. *Ashabranner,* 117 Ark. 317, 174 S. W. 548. In 20 Am. Juris. 341 it is stated: "As a general rule, proof of mere offers to buy or sell . . . is not competent to show the value of such property."

In the absence of other competent proof of market value, we have held that the difference in market value before and after the collision may be established by a showing of the amount paid in good faith for the repairs necessitated by the collision. *Payne* v. *Mosley*, 204 Ark. 510, 162 S. W. 2d 889, and *Kane* v. *Carper-Dover Merc. Co., supra.* Under these cases appellee is entitled to recover only the sum of $475 for damages to the car, as that is the greatest total amount shown to have been paid for repairs. So, the item of $700 must be reduced to $475.

III. *Excessive Verdict for Personal Injuries.* The jury awarded appellee $10,000 for her personal injuries and pain and suffering. She sustained some physical injuries, and a mental expert testified that she suffered from traumatic neurosis, which gave her "a floating fear —that is, she is afraid of something and does not know what it is." In *St. L. S. W. Ry. Co.* v. *Kendall,* 114 Ark. 224, 169 S. W. 822, L. R. A. 1915F, 9, Mr. Justice KIRBY referred to the earlier case of *St. L. I. M. & S. Ry.* v. *Brown,* 100 Ark. 107, 140 S. W. 279; and said:

" 'There is no market where pain and suffering are bought and sold or any standard by which compensation for it can be definitely ascertained and the amount actually endured determined,' and compensation therefor must be considered on a reasonable basis, and the jury cannot give any amount they please, although the amount of damages must be left largely to the reasonable discretion of the jury. The court is of the opinion that the amount awarded for pain and suffering is excessive also."

After we have considered all of her injuries, earning capacity, and all other factors, we have reached the conclusion that any verdict, for personal injuries and pain and suffering, for more than $5,000 would be grossly excessive.

Conclusion: If, within 15 judicial days, a remittitur of $225 be entered on Mrs. Kurth's judgment for damages to the automobile, and also a remittitur of $5,000 be entered on the judgment for Mrs. Kurth's personal

injuries, then the judgments will be affirmed in all other respects. If such remittiturs be not entered, then the judgments will be reversed and the cause remanded. Costs of this appeal are to be paid by the appellee.

SHARP *v.* SONENBLICK & SKLAN.

4-8546 212 S. W. 2d 18

Opinion delivered June 14, 1948.

Harvey L. Joyce and *Glen Wing,* for appellant.

ROBINS, J. Appellant, a produce dealer of Springdale, sued appellees, engaged in the same business at Chicago, for $685.15, balance alleged due on a truck load of poultry. Service of process was obtained by garnishment proceedings against funds of appellees in a bank in Springdale.

Appellees denied any indebtedness to appellant, asserting that a certain check for $2,710, sent to appellant by appellees and cashed by appellant, was in full settlement of the asserted claim of appellant.

The cause was tried to a jury. At the conclusion of all the testimony the court, concluding that tender of said check by appellees, and cashing thereof by appellant, constituted an accord and satisfaction, peremptorily instructed the jury to return a verdict in favor of appellees.

From judgment in accordance with the verdict this appeal is prosecuted.

This fact situation was shown by the testimony:

On January 18, 1947, a contract, by long-distance telephone conversation, was entered into, under which appellant sold and agreed to deliver to appellees at Chicago a truck load of "broilers." The price on one grade of poultry was to be 32 cents a pound and on the other grade it was to be 30 cents a pound. The chickens were transported in appellant's truck, driven by his employee, Virgil Parker. The truck left Springdale on January 19th, arrived at Chicago about midnight on January 21st, and was unloaded at the dock of appellees the following morning.

The poultry was, before being unloaded, examined by an inspector for the "Chicago Poultry Board," who issued a certificate stating that the "health condition," as well as the "feed condition," of the birds was "O.K."

About an hour and a half was consumed in unloading and weighing at appellees' warehouse. During this time one of the appellees was present and examined the chickens. Appellant's driver checked the weights with appellees. Only the live birds were weighed. There were about six dead birds in the shipment. It appeared that approximately that number usually die on a trip of this distance.

After the chickens were received and weighed appellees' bookkeeper made out a check for $3,395.15, payable to appellant, and drawn on a Chicago bank. Appellant's driver protested that the price at which the amount due for the poultry was calculated was one cent per pound less than the price agreed on, but finally accepted the check and brought it back to appellant. Appellant endorsed the check and deposited it for collection.

About a week later appellant was notified that payment on the check had been stopped. Up to that time, according to appellant's testimony, no complaint had been made by appellees as to the condition of the poultry.

According to the testimony of Sklan, one of the appellees, the day after the chickens were delivered it was found that two-thirds of the chickens had died from exposure to cold weather on the trip, and he called appellant over the telephone and made complaint about the poultry, and appellees stopped payment of the check. Sklan also testified that about a week later Sharp called up over the telephone and in the conversation it was agreed that appellant would accept $2,710 in settlement of the matter and that, in pursuance of the agreement, check for that amount was sent appellant, who cashed it.

Appellant denied that he had had such conversation with appellees. Gobble, appellant's manager, stated that he had a conversation with Sonenblick about the check for $2,710. He testified that they did not tell him and he did not know that the check was in full payment of the account and that he did not say that he was so accepting it. On the contrary, according to his testimony, he told Sonenblick he would "get the rest of it some way."

The check for $2,710 contained no notation to the effect that it was in full settlement of the claim, and no letter of transmittal was sent with it by appellees.

In testing the correctness of a court's action in peremptorily instructing a jury, the evidence adduced must be given its strongest probative force in favor of the party against whom such instruction is given. *Barrentine* v. *Henry Wrape Co.,* 120 Ark. 206, 179 S. W. 328.

When all the testimony is considered in the light most favorable to appellant, we conclude that there was made a jury question as to whether the $2,710 was tendered and accepted in full settlement of the amount due for the poultry.

In the case of *O'Leary* v. *Keith,* 134 Ark. 36, 203 S. W. 38, it was shown that appellant, who had purchased eight cars of apples, in remitting therefor, made a deduction of fifty cents a barrel (on six cars) from the purchase price, on account of alleged inferior quality. Appellee cashed the checks sent him by appellant and sued for the balance. Appellant sought, in that case, to show

that acceptance of the checks amounted to an accord and satisfaction, and that he was entitled to a peremptory instruction. But we said in that case: "The court was not warranted in instructing the jury as a matter of law that the undisputed evidence, in the instant case, constituted a complete accord and satisfaction. It was an issue for the jury under the evidence as to whether the payment made by the appellant and accepted by appellee constituted an accord and satisfaction." Like holdings were made in these cases: *Collier Com. Co.* v. *Wright,* 165 Ark. 338, 264 S. W. 942; *Cromer* v. *Henry,* 203 Ark. 497, 157 S. W. 2d 507; *Yarbrough* v. *Alston,* 208 Ark. 1106, 188 S. W. 2d 621.

Other rulings of the lower court were complained of in appellant's motion for new trial; but the only error urged in appellant's brief, and, hence, the only assignment considered here is the action of the lower court in instructing the jury to return a verdict in favor of appellees.

For the error of the lower court in giving the peremptory instruction in favor of appellees the judgment is reversed and the cause remanded to the lower court with directions to grant appellant a new trial.

CLACK *v.* STATE.

4506 212 S. W. 2d 20

Opinion delivered June 14, 1948.

C. R. Huie and *John H. Wright,* for appellant.

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

SMITH, J. Two informations were filed against appellant, each charging him with the commission of the crime of carnal abuse, and by consent they were tried together. In one information, it was charged that appellant carnally knew one Linnie Sue Dixon, a female under the age of sixteen years, and in the other it was charged that he carnally knew one Clara Jean Clack, a female under that age. These girls are the daughters of Bertha Perry and appellant admitted that Clara Jean was his illegitimate daughter, but he was not the father of Linnie Sue.

All the parties lived in Arkadelphia, and Bertha went from there to the State of Washington. She left both of her children in appellant's home and it was during her absence in Washington that the crimes were committed according to the testimony of the girls. Appellant was found guilty under both informations and given the minimum sentence in each case.

The State's case depended upon the testimony of the two girls, and there was no corroboration of their testimony, except that each girl corroborated the other. However, as they were not accomplices, no corroboration of their testimony was required to sustain the convictions. *Bond* v. *State,* 63 Ark. 504, 39 S. W. 554, 58 Am. St. Rep. 129; *Waterman* v. *State,* 202 Ark. 934, 154 S. W. 2d 813. Doctors testified that neither girl was a virgin.

The sufficiency of the testimony is not questioned, except that it is argued that their testimony is improb-

able and unreasonable, but the truth thereof was of course a question for the jury. The cause was submitted under instructions of which no complaint is made.

After the submission of the case to the jury the record recites:

"Thereupon, the jury, after hearing the instructions of the court, and the argument of counsel for both the State and the defendant, retired to consider of its verdicts, and subsequently reported to the court that the jury was deadlocked, and the court upon questioning the jury as to how they stood numerically, asked if there was anything in the evidence or the instructions of the court about which they disagreed, and informed the jury that the evidence could be read to them or the instructions read, which inquiry elicited the following question from a member of the jury: 'Q. The jury would like to know how the sheriff found out about these cases?'

(At this juncture of the case, the court conferred with counsel for the State and counsel for the defendant, and after consulting with them, made the following remarks to the jury—the reporter's record does not reflect the statements in the conference, but at request of the attorney for the defendant, Mr. Wright, the remarks of the court to the jury were taken—Steno's note.)

By the Court: "Gentlemen, we will tell you how it happened. The attorneys have agreed that here is the way it got to the sheriff. The girl reported it to the pastor of the church. Now, that is in evidence. This is in addition—in the way of an additional report. The pastor wrote a letter to the girl's mother in Washington. The girl's mother went to the Welfare Department in the State of Washington. The Welfare Department in Washington wrote to the Welfare Department here, and the Welfare Department here reported it to the sheriff.

By Mr. Wright: "Save our exceptions.

"The jury, thereupon retired to consider of its verdict, and subsequently returned into court the verdicts as shown by the transcript of the clerk of the Clark Circuit Court, to which this record is attached."

As appears from the language just quoted, the record does not reflect just what occurred during the conference between court and counsel, but only the result thereof. The statement of the court to the jury reflected the result of the conference, and it is not questioned that the court accurately stated that result, nor does it appear that counsel for appellant objected to the statement being made, or that he asked the court to withdraw it, although it does appear that after it had been made an exception was saved.

The instruction was not proper, and should not have been given as it offends against § 23 of Art. VII of the constitution, which provides that, "Judges shall not charge juries with regard to matters of fact, but shall declare the law." The reversal of the judgment would therefore be required except for the fact that it appears that the instruction was given with the consent of both the prosecuting attorney and counsel for appellant, and no request was made that it be withdrawn.

The instruction was given to answer the inquiry of the jury and its truth is not questioned, nor was objection made when it was given, nor was it asked that it be withdrawn. One cannot consent that the court, during the progress of the trial, take some action, and then complain of that action in the absence of any showing that consent had been given under some misapprehension or without attempting to withdraw the consent. *Rose* v. *State,* 122 Ark. 509, 184 S. W. 60; *King* v. *State,* 165 Ark. 613, 262 S. W. 336; *Ellis* v. *State,* 172 Ark. 613, 290 S. W. 59. Appellant is, therefore, in no position to complain of an error into which he led the court, or permitted the court to make without objection. There was no objection but only an exception.

The case of *Hinson* v. *State,* 133 Ark. 149, 201 S. W. 811, is cited and relied upon for the reversal of the judgment, but there are material differences which distinguish the two cases. In the Hinson case the trial judge, without the knowledge of defendant's counsel, entered the jury room after the jury had failed to agree, and told the jury what his recollection of the testimony was

as to the age of the girl alleged to have been carnally known, although he told the jurors that they should not be influenced by his recollection. Here, everything complained of occurred in the presence of appellant's counsel, and the court told the jury only what counsel had agreed the testimony was upon the point about which the jury had made inquiry. In view of the consent given and the failure to object or to ask the withdrawal of the instruction, appellant may not be heard to complain of this error.

As no error appears, the judgments must be affirmed and it is so ordered.

RICE *v.* BEAVERS.

4-8520 212 S. W. 2d 30

Opinion delivered June 21, 1948.

Rehearing denied July 5, 1948.

[redacted]

Boyd Tackett and *Shaver, Stewart & Jones,* for appellant.

Jerry Witt and *Rose, Dobyns, Meek & House,* for appellee.

SMITH, J. L. L. Beavers is the president of the Montgomery County Bank, and was the owner of a majority of its capital stock. Royal A. and J. A. Rice, who are brothers, are natives of that county. They removed to New York, where they were engaged successfully in various business enterprises and accumulated a considerable amount of surplus cash which they sought to invest. In all the transactions hereinafter referred to Royal A. Rice acted for himself and for his brother and mother, and he will be referred to as Rice. He and his brother became nostalgic and decided to return to their old home and they made considerable investments in timber lands in that county. Rice ascertained that the bank was a prosperous institution, and he proposed to Beavers to buy a controlling interest in the bank. It is undisputed that in all the negotiations Rice very explicitly stated that he did not want to buy any of the bank's stock unless he could buy a controlling interest, and he proposed to purchase that interest from Beavers who individually owned a majority of the stock. Beavers testified that he was not anxious to sell, and would not have sold except that Rice represented that he wanted the bank stock for investment purposes only. Rice told him that he was not a banker, and knew nothing about operating a bank, and would not buy the stock unless Beavers would agree to remain in charge of it. The testimony is conflicting as to whether Rice negotiated with any of the stockholders except Beavers, but the court below found the fact to be that Rice made the same representations to certain other stockholders who have intervened in the case. In any event, we think the testimony sustains the finding made by the court below that the sale was induced by Rice's representation that he wanted the stock for investment

purposes only, and that he had no intention of taking control of the bank and would not buy unless Beavers agreed to continue as president.

The negotiations for the purchase of the stock began in April or May, 1945, and were consummated by the sale thereof some weeks later. Beavers consulted three of the larger stockholders, who were directors, and it was agreed that these four stockholders would together sell a majority interest, which was apportioned as follows:

Beavers and family	300 shares
Whittington	90 shares
Standridge	100 shares
Hickey	11 shares

making a total of 501 shares, which was a majority of the stock, as there are only 1,000 shares. The stock thus sold was not all of the stock owned by any one of the persons above named. The par value of the stock was $25 per share, and its book value was $33 per share, and Rice paid $50 per share for the stock.

After the purchase and the transfer of the stock, Beavers published in a local paper a notice of the sale, in which it was stated that Rice had bought the stock for investment purposes only, and that there would be no change in the management of the bank.

The by-laws of the bank provided for an annual meeting of the stockholders on the second Tuesday in January, and this meeting was held in 1946 without incident, as all officers of the bank were reëlected, but friction soon arose which the Bank Commissioner, who had been appealed to by both Beavers and Rice, was unable to adjust. Rice complained that unsafe loans had been made to certain of the directors, and he demanded that a loan committee consisting of three members be constituted, of which he should be one, and that any member of the committee should have the right to veto any loan. There were other points of disagreement and Rice announced his intention to change the management, although he disclaimed any intention of having himself elected president, or his brother elected cashier. This report became

current and general dissatisfaction arose among both stockholders and depositors and a number of accounts were closed and there were withdrawals of deposits from October 7, 1946, to June 26, 1947, amounting to $236,-074.84.

Rice had incurred many animosities in the vicinity and a number of witnesses testified that if he took charge of the bank, deposits would be withdrawn in numbers and amounts which would require the bank to close its doors.

Notice of the 1947 stockholders' meeting was given, which did not contain the notice required by the by-laws, upon which Rice insisted, that certain changes in the by-laws would be proposed. This meeting was not held. On the morning of the day on which it was to be held a large crowd, which Rice referred to as a mob, assembled near the bank and a committee of citizens was appointed to wait on Rice to protest any change in the bank management. Rice did not attend the meeting and it was not held, because he owned or controlled a majority of the stock.

Rice demanded that notice be given of a meeting to be held at a later date, and when this demand was not complied with he filed suit to compel Beavers to call a stockholders' meeting. Beavers filed an answer in which he alleged that the sale of the stock had been induced and procured through the false and fraudulent representation made by Rice that he wished to buy the stock for investment purposes and without the intention of assuming control of the bank. He prayed that the sale be rescinded. The three directors above named who had joined Beavers in the sale of a portion of their stock, filed interventions containing the same allegations as the answer of Beavers, to the effect that they had been induced to sell their stock by the false representation above mentioned and they too prayed the rescission of the sale.

The court made the finding that the representations of Rice in regard to his intentions in buying the stock were false when made and the relief prayed was granted,

and the sale was ordered rescinded upon the tender and payment to Rice of the money he had paid for the stock, with interest thereon, and this appeal is from that decree.

The majority do not concur in the view that the sale of the stock was procured through fraud. The fact is undisputed that Rice imposed the condition before buying any of the stock, that a controlling interest should be sold him and although the finding is not questioned that Rice represented that he was buying the stock for investment purposes only, the fact remains that he was insistent that a majority of the stock be sold him, and this was done. The sellers of the stock had no right to assume that Rice had agreed that he would never at any time, or under any circumstances, assert the rights which the ownership of the majority of the stock gave him. This is not a case where a portion of the stock, less than a majority thereof, was sold, but is a case where the majority of the stock was sold and it was sold upon a condition that a controlling interest be sold. The correspondence offered in evidence makes clear the fact that Rice was demanding the right of control, whether he exercised the right or not. There was offered in evidence a letter from Rice to the cashier of the bank, who conducted and consummated the sale, stating that he would not buy less than a controlling interest, as he did not want to be left out on a limb, as he expressed it, meaning, of course, without control.

Nor does it appear that Rice acted capriciously in making the demands which he did make in regard to the management of the bank. There was a transaction which had been reported to the Bank Commissioner which apparently required an explanation, which was not made because of an objection to the explanation by counsel of the appellees which the court sustained. This related to a loan made to one Carpenter about which Rice had complained to the Bank Commissioner. A loan of $1,400 was made to Carpenter on March 30, 1944, and another loan of $400 was made on April 25, 1944. The bank records apparently showed that Carpenter had paid interest amounting to $22.16 on one loan and interest amounting

to $4.75 on the other, and that Carpenter paid $2,000 by check on the bank in satisfaction of the total loan of $1,800, which excess payment was not reflected by the records of the bank. There may have been an explanation, but none was made.

It may be true, as the court found, that hostility to Rice and objections to his taking charge of the bank are such that withdrawals would be made in such amount and in such rapidity as to embarrass and possibly close the bank, but even so Rice has the right to demand that a stockholders' meeting be held for the transaction of any business that may be properly considered at such a meeting as provided by § 2188, Pope's Digest. It is true that this meeting cannot be held at the time provided by the by-laws, but that is no reason why it should be pretermitted. It may yet be called and should be. Fletcher Cyclopedia Corporations, Vol. 5, Private Corporations, p. 22.

The court ordered the sale of stock rescinded upon condition that Rice be repaid the purchase price of the stock with interest thereon. The proper tender of this money was made, which Rice declined to accept, whereupon the court ordered that he be enjoined from selling or otherwise disposing of the stock.

The decree will be reversed and the cause will be remanded with directions to set aside the order rescinding the sale of the stock, and to call a stockholders' meeting, and the order restraining Rice from selling his stock will be revoked. All costs will be assessed against appellees.

WILSON *v.* CURB & GUTTER IMPROVEMENT DISTRICT No. 406.

4-8570 212 S. W. 2d 351

Opinion delivered June 21, 1948.

[redacted]

M. A. Matlock, for appellant.

Sherrill, Cockrill & Wills and *H. M. Trieber,* for appellee.

ROBINS, J. Appellant is the owner of certain vacant lots situated in Curb and Gutter Improvement District No. 406 and Street Improvement District No. 407, of Little Rock.

In appropriate proceedings in the court below the districts obtained decrees of foreclosure on August 14, 1942, against these and other lots on which assessments for the districts had not been paid. Pursuant to these decrees sales were had on August 26, 1942, and the districts purchased the same for delinquent assessments, penalties and costs, the total of which, against appellant's property and the other delinquent property, was $10,445.25.

On August 15, 1947, appellant filed his interventions in the foreclosure proceedings, alleging that the districts had sold and assigned to appellee Sanders, for $5,325,

an amount substantially less than the total delinquent assessments, the certificates of purchase issued to the districts, covering the property involved and all other lots foreclosed by the districts. Appellant alleged that this sale, made during the period in which he had a right to redeem from the sale, was an attempt to cut off appellant's right of redemption. Appellant offered to pay into court a sum equal to that paid by said appellee for the certificates of purchase; and he prayed that the assignment of the certificates of purchase be canceled and that the districts be required to accept from appellant the amount tendered in full satisfaction of the delinquent assessments, and to assign the certificates of purchase to appellant.

A demurrer to this intervention was sustained by the lower court and appellant within the time given him to plead further filed an amendment to his intervention.

In this amendment he set up that, in addition to the vacant property described in the original intervention, he owned in said districts another parcel of real estate upon which all the assessments due to the districts had been paid, and that by reason thereof he had an equitable interest in the proceeds of sales made by the district, since all indebtedness due by the district had been paid; that he had been negotiating with the attorney for the district for the purchase, at a discount, of the certificates of purchase covering the property owned by appellant, and that, while no agreement as to the price of the certificates had been reached, he "had requested and been promised a priority and an option to purchase said lots and parcels of land at the minimum price the said improvement district was willing to sell." He further alleged that "as the owner of an equitable interest in the proceeds of any sales . . . he was and is entitled to a priority and an option to purchase at whatever minimum discount price the said improvement district . . . was willing to sell."

Appellant prayed for an order directing said appellee to transfer to appellant the certificates of purchase covering appellant's property upon payment by appel-

lant of the correct proportionate part (applicable to appellant's lots) of the purchase price paid by the said appellee to the districts; or, in the alternative, that the districts be required to accept from appellant the sum of $5,325 and that all of the certificates of purchase be assigned to appellant.

A demurrer to this pleading was sustained, and appellant electing not to plead further his intervention was dismissed for want of equity. He has appealed.

While appellant asserted his right to redeem in his original intervention, he did not offer to exercise this right; nor does he urge that right here.

In his intervention he alleged that he had been given an option (by whom or upon what consideration was not set up) to purchase the property at the lowest price the districts were willing to accept. But in his argument here appellant abandons all contention as to such agreement.

As stated by appellant in his brief, the issue here is: "Whether improvement districts that have foreclosed their liens and received Certificates of Purchase at sales on account of delinquent benefits assessed may, in their discretion, sell and assign their Certificates of Purchase at a substantial discount to a stranger to the title at a private sale before the period of redemption has expired, without notice to the known owner who was at the same time negotiating with and offering to purchase the said certificates at a discount, and who was willing, and is still willing, to pay the said improvement districts, or the purchaser from the said improvement districts, the same amount the stranger to the title paid, and has tendered the same with full recompensation to the purchaser or the districts together with interest thereon at the lawful rate from the date of the sale and assignment to the stranger."

Appellant concedes that the districts have the power to sell real estate acquired by them in foreclosure proceedings and also that they may sell and assign their

certificates of purchase before the expiration of the period of redemption, but he argues that the districts should be required to sell same to the original property owner at the best price it can obtain from a stranger. No court decision or statute is cited in support of this contention, but it is urged "that as a matter of right and equity . . . a stranger to the title should not have a preference in a private sale over the original owner of lots sold."

In the case at bar there is no allegation of fraud or collusion on the part of officials of the districts and said appellee; nor is it alleged that the price paid by said appellee for the certificates of purchase is an unfair one so far as the districts are concerned. Appellant's position is simply: that, as the original owner and as the owner of other property in the districts, appellant is entitled to have the bargain said appellee has made with the districts.

In the absence of any statutory directive to the contrary, the districts had the right, absent fraud or collusion, to sell the certificates of sale to anyone offering a fair price; and there is nothing in the complaint to indicate that the price was unfair or that the sale was tainted with fraud or collusion. The statute does not give the property owner the priority asserted by appellant; and there is no rule of law that accords him any such a right.

The decree of the lower court was correct and is affirmed.

HOWELL *v.* BASKINS.

4-8573 212 S. W. 2d 353

Opinion delivered June 21, 1948.

G. B. Colvin, for appellant.

J. E. Brazil and *Clay Brazil,* for appellee.

MINOR W. MILLWEE, Justice. Appellants are the sole heirs at law of Thomas J. Howell, deceased, and were

plaintiffs in the circuit court in an action in ejectment against the defendant (appellee), James C. Baskins.

Plaintiffs alleged they were the owners and entitled to possession of a tract of land in Perry county described as follows: "All that part of the W½ of SE¼, Sec. 34, Tp. 5N, Rge. 18W, which lies between the east fork of Howell Creek and west fork of Howell Creek and more minutely described as follows: Starting at the northwest corner of said W½ of SE¼ and run south on the west line thereof 1,146 feet to the west bank of the east fork of Howell Creek which is the place of beginning, running thence south 998 feet to the east bank of the west fork of Howell Creek, running thence in a slightly southeasterly direction meandering with said east fork of Howell Creek to the east line of said W½ of SE¼, running thence north on said east line a distance of approximately 100 feet to the west or south bank of the east fork of Howell Creek running thence in a northwesternly direction meandering with the west or south bank of the east fork of Howell Creek to the place of beginning and containing 16 acres more or less." It was further alleged that defendant was wrongfully in possession of the property under claim of ownership and refused to deliver possession to plaintiffs.

In his answer defendant denied the allegations of the complaint and stated that he obtained title to the lands in controversy under a warranty deed from W. A. Hemingway on April 30, 1945. It was further alleged that defendant and his predecessors in title had been in actual, open, continuous, peaceful and adverse possession of said lands for more than 25 years; that during this period all the land between the east and west fork of Howell Creek as described in the complaint had been under fence; and that the west bank of the east fork and the east bank of the west fork of said creek had been considered the line between the plaintiffs' and defendants' land during said period.

It was stipulated at the trial that record title to the land was in the plaintiffs, thus casting the burden on defendant to establish his claim of title by adverse pos-

session. Trial to a jury resulted in a verdict and judgment for defendant and this appeal follows.

The first three and eleventh assignments of error challenge the sufficiency of the evidence to support the verdict. Howell Creek divides on or near the east line of the SW¼ of the SE¼ of section 34, township 5 N, range 18 west in Perry county. The east fork of the creek runs in a northwesterly direction while the west fork runs generally west and the land in controversy is located between the two branches of the creek.

The father of W. A. Hemingway occupied and cultivated the lands under claim of ownership prior to his death in 1917 or 1918. G. C. Smith testified that he had charge of the renting of the lands for W. A. Hemingway from 1925 to 1930 and that the lands were enclosed in a stone and wire fence that ran along the west bank of the east and west forks of Howell Creek. At that time a cross fence running north and south between the two forks of the creek cut off two or three acres which lay west of the east line of the 40-acre tract and was used as a lane by adjacent owners.

Jesse McCabe testified that he rented the land from W. A. Hemingway from 1934 or 1935 to 1937, inclusive, and cultivated all the land between the two prongs of Howell Creek and that said land was under fence. He also said Charlie Smith followed him in possession of the tract.

Charlie Smith stated that he rented the lands from W. A. Hemingway from 1938 until the land was purchased by defendant in 1945; that he cultivated and pastured the land under the rental contract from year to year until Hemingway wrote him that he was selling the land; and that he surrendered possession to defendant in 1945 when the latter showed him the deed from Hemingway. He also testified that Howell maintained a fence on the east side of Howell Creek while Hemingway and his tenants maintained a fence on the west side which extended all the way around the west bank of the two forks of the creek. All of the tenants paid Hemingway an annual rental of $20 for the land.

The defendant testified that he took possession of the land from Charlie Smith after he received the deed from Hemingway in April, 1945, and had since been in possession under claim of ownership. The land is a part of other lands which he purchased from Hemingway and a fence which runs alongside the west bank of the east and west forks of Howell Creek has been maintained for more than 20 years by those who cultivated the lands under rental contracts from Hemingway. Defendant stated that about 15 years ago there was a lane on the east side of the tract near the point where the creek separated, but that he and Hemingway's tenants had, for the past 15 years, occupied the land up to the bank of the creek. He denied that he had surrendered possession of a small part of the east side of the tract to Mr. Lackey who had been in possession of the Howell lands on the east since 1946 under a contract of purchase with plaintiffs. Defendant stated that he permitted Lackey to pasture his cattle on part of the lands in controversy, but denied that the latter had occupied, or made any claim of ownership to, that part of the land formerly used as a lane.

Lackey testified he had used part of the lands in controversy to pasture his cattle since he moved on the Howell land in February, 1946. He contracted to purchase 68 acres from plaintiffs and thought he was buying the land in controversy, but had made no claim of ownership of any part of it to the defendant. He stated there was evidence of an old fence which ran north and south between the two branches of the creek west of the point where the creek separates, and that he used the land east of this fence line as a pasture. Armour Smith gave conflicting testimony as to whether Hemingway claimed title to and held possession of all the lands between the two branches of the creek.

The proof offered by defendant thus tended to show that the lands were fenced and continuously occupied and cultivated by him and the tenants of W. A. Hemingway for at least fifteen years prior to the institution of this action. W. A. Hemingway is a resident of California.

Since he did not testify, plaintiffs insist there is no evidence that he ever claimed title to the lands in controversy. It is undisputed that he rented the lands to tenants for 20 years and that his father occupied the lands for several years prior to 1918. The possession of a tenant is generally held to be that of his landlord. *Gee* v. *Hatley,* 114 Ark. 376, 170 S. W. 72. The evidence offered by defendant was substantial and sufficient to support the finding of the jury that defendant and those under whom he claims had been in adverse possession of the lands for more than seven years and the trial court did not err in submitting this issue to the jury.

Plaintiffs also contend that since defendant was without color of title to the lands in controversy, his possession could not be tacked to that of W. A. Hemingway. This question was decided contrary to plaintiffs' contention in the case of *St. Louis S. W. Ry. Co.* v. *Mulkey,* 100 Ark. 71, 139 S. W. 643, Ann. Cas. 1913C, 1339, where the court said: "It is next contended that appellee can not claim the benefit of the adverse possession of her grantors because their deeds to her do not include the land. While it is true that the land described in the deed to her does not include the strip in controversy, still her grantors, whose adverse possession had probably already ripened into title, intended it should, and thought it did, and at the time of the conveyance transferred to her the possession of it in fact, intending that she should have all the land within the inclosure. This was sufficient, even if it be conceded that there was no conveyance of it in writing, and constituted such privity as entitled her to avail herself of his or their adverse possession and to tack her possession to theirs if necessary to complete her title and claim of ownership. *Memphis & L. R. Rd. Co.* v. *Organ,* 67 Ark. 84; Wood on Limitations, § 271, pp. 695-6 and cases cited; 1 Cyc. 1006." This rule is followed generally in other states which, like Arkansas, have no statute making color of title a necessary requirement to the establishment of title to improved lands by adverse possession. 2 C. J. S., Adverse Possession, § 132, p. 698. The deed from Hemingway to defendant was defective in describing the lands, but it was the intention of the

grantor to convey the lands which he had rented to tenants for 20 years and possession of these lands was transferred to defendant at the time of the conveyance. It was, therefore, permissible for defendant to tack his possession to that of Hemingway in order to complete his title by adverse possession.

It is next insisted that the trial court erroneously admitted in evidence a map of the lands in controversy. This map, or sketch, was drawn by counsel for defendant and only purported to portray approximate distances and location of the land lines and the two branches of the creek which partly enclose the property. A witness who was thoroughly familiar with the lands testified that the map constituted a fair representation of the property. It is argued that only a map which is based on a survey made by a competent surveyor, showing the exact location and boundaries of the lands, is admissible and that the person making such map is alone qualified to identify and explain it. The map was not introduced as independent evidence, but only for the purpose of enabling the witnesses to explain the approximate locations and surrounding conditions of the property.

In 20 Am. Jur., Evidence, § 739, it is said: "It is a well-established rule, applied in everyday practice in courts, that maps, drawings, and diagrams illustrating the scenes of a transaction and the relative location of objects, if shown to be reasonably accurate and correct, are admissible in evidence, in order to enable the court or jury to understand and apply the established facts to the particular case." See, also, 32 C. J. S., Evidence, § 730. This rule has been generally followed by this court. *Ault* v. *McGaughey,* 173 Ark. 322, 292 S. W. 359; *Day* v. *State,* 185 Ark. 710, 49 S. W. 2d 380; *Pinson* v. *State,* 210 Ark. 56, 194 S. W. 2d 190. In the last case cited we said: "No prejudice resulted from the use made, or from introduction of the rough sketch or plat for the purpose of illustrating a point. Exactness was not claimed, nor was there any contention that distances indicated were sufficiently at variance with actuality to create a prejudice." There was no claim of exactness

in the case at bar and the map was used by counsel on both sides in examining the witnesses, who were thereby enabled to give clearer representations of objects and places than could have been given otherwise. Introduction of the map did not result in prejudicial error.

It is also argued that the court erred in admitting in evidence the deed from W. A. Hemingway to defendant which purported to convey the lands in controversy under a part description. At the time of the introduction of the deed the court stated that the description was defective and that the deed did not constitute color of title. In instruction No. 1 given by the court the jury were again told that the conveyance was too vague and indefinite to transfer a legal title and, therefore, did not constitute color of title to the lands in controversy; and that the burden shifted to defendant to prove title by adverse possession. Under this careful admonition by the trial judge, no prejudice resulted to plaintiffs in the admission of the defective deed.

It is also insisted that payment of taxes for the period of limitation is a condition precedent to a claim of title by adverse possession when made by a party without color of title. The county tax records showed that defendant and those under whom he claimed paid taxes on 10.08 acres under a part description for the years 1938 to 1945, inclusive, while plaintiffs paid taxes on 38 acres under a part description in the same 40-acre tract during the same period. Under our decisions neither payment of taxes nor color of title is essential to establish a claim of title to improved and enclosed lands by adverse possession where the claimant and his predecessors are in actual possession. *Hargis* v. *Lawrence,* 135 Ark. 321, 204 S. W. 755; *Culver* v. *Gillian,* 160 Ark. 397, 254 S. W. 681.

The trial judge fully and correctly instructed the jury on all issues. We find no prejudicial error and the judgment is affirmed.

YANCEY *v.* CITY OF SEARCY.

4-8631 212 S. W. 2d 546

Opinion delivered June 21, 1948.

Rehearing denied July 5, 1948.

Harry Neelly, for appellant.

Yingling & Yingling, for appellee.

Ed. F. McFaddin, Justice. Searcy is a city of the second class; and this is a suit brought by a citizen and taxpayer against the city and its officials to test the legality of certain purchases and plans contemplated by the city. The appellant, as plaintiff below, claimed that the city proposed to act *ultra vires*; the appellees (defendants below) in their answer detailed exactly how and why the city was about to proceed. The appellant's demurrer to the answer was overruled. Thereupon the appellant refused to plead further; and the chancery court dismissed the complaint for want of equity. On this appeal the issue is, whether the allegations of the complaint, as amplified and explained by the answer, show that the city is about to engage in an *ultra vires* undertaking.

The complaint alleged, *inter alia*: "The inhabitants of said city (Searcy) are supplied with water by the White County Water Company, a Delaware corporation, duly licensed to do business in the State of Arkansas, which owns and operates a pumping and filtering plant and reservoir on Little Red River. After pumping the water into the settling basins and treating it, the company distributes the water through a large single main which supplies not only the City of Searcy, Arkansas, but also the municipalities of Judsonia and Bald Knob, the service main running through Judsonia to reach Bald Knob. The company also owns and operates the waterworks system at Beebe, but this has an independent source of supply, derived from wells in the vicinity, and there is no physical connection between the Beebe waterworks system and the rest of the White County Water Company's properties.

"The City of Searcy is proposing to buy the entire plant of the White County Water Company, which will include all of its pumping station, reservoirs, settling tanks, and filtering and treating plant on the Little Red River, the supply main from there not only to the City of Searcy but on through Searcy to Judsonia and Bald

Knob, the distribution systems in the three cities, and their franchises and licenses, as well as the entire waterworks system serving the incorporated town of Beebe; . . . that this action will have the City of Searcy, Arkansas, engaged in business as a public utility, since it will be selling water to three other communities; that this is *ultra vires* and will involve the city in the hazards of a commercial enterprise, subjecting it to the losses and expenses incident to the operation and maintenance of public utility systems."

The answer alleged, *inter alia*: "Defendants admit that they have negotiated a contract with the White County Water Company for the purchase of all of its properties, which will include the source of supply and distribution of water, the other physical assets of said company, and the franchises for supplying water to the residents of Searcy, Beebe, Judsonia and Bald Knob, for the reason that the City of Searcy is in urgent need of additional facilities both for supply and for a distribution system to serve sections of the City that have been recently improved, creating a greatly increased demand for water, and is in need of additional water pressure for the protection of the life and health of its citizens and has been notified by the Arkansas Inspection and Rating Bureau that if these improvements are not made, the classification of Searcy will be reduced from the 7th class to the 8th class, with the result that its insurance rates will be substantially increased . . . ; that the company refuses to sell the Searcy plant as a separate unit from its entire system for the reason that the Searcy distribution system is the profitable part of the company's entire operation and if it were to be taken by the City under right of eminent domain it would so damage and impair the value of the rest of the property that the severance damages added to actual value would make the cost substantially greater than the actual value of the Searcy water properties, and that therefore it is cheaper for the City to acquire the entire property of the company than to acquire only that part thereof which serves the City of Searcy; that the City would either have to acquire and pay for the company's present pumping sta-

tion, settling basins, filter tanks and water mains, or it would have to build new ones to serve its own needs; that present day costs would make this an extravagant undertaking; that if the City did not do this it would be a consumer of the White County Water Company and would not be able to secure the additional water supply and to make the extensions and improvements which it urgently needs.

. . . . .

"... the estimated cost of the needed improvements is $225,000, which the city can secure from the sale of the three municipal properties which it does not need, and if necessary it can issue some ad valorem bonds under the authority of Amendment No. 13. . . .

"The city can buy the entire property of the White County Water Company for $358,390, from which the company will pay all of its debts so that the city will have clear title to the properties; the city has a firm offer for a series of revenue bonds to be issued under the provisions of Act No. 131 of 1933 and the amendments thereto, in an amount sufficient to pay for the entire properties, and it can use the money to be received from the sale of the Beebe, Judsonia and Bald Knob properties for extensions and improvements to the Searcy system. The bonds will be revenue bonds and cannot possibly be a charge upon the property of the plaintiff and will not increase his taxes, since the cost of the project will be paid entirely by the users of water. . . .

"The system is now the only available source of supply of water to Judsonia and Bald Knob, and for that reason, if the defendant city acquires the entire property, it will be necessary for it to continue to supply water to Judsonia and Bald Knob until such time as it can sell these two systems, but it is not the intention of the city to engage in the business of a public utility; and it has found buyers for the distribution system at Bald Knob, the distribution system at Judsonia, and the entire system at Beebe, and these transfers can be made shortly after the defendant acquires the property, so that it will

then own only the necessary source of supply, treatment and filter plants, and the transmission lines. The cities of Judsonia and Bald Knob are not financially able to pay for the water main which extends from the corporate limits of Searcy and runs through Judsonia on to Bald Knob, but they have sufficient water revenues respectively to enable each to sell a series of water revenue bonds to pay for its distribution system, and the City of Searcy can, over a reasonable period of years, amortize the cost of the supply main from Searcy to these cities through the water rates to be charged to them.

"The money which the city will receive from the sale of the Beebe, Judsonia and Bald Knob properties will be used by the city to carry out the entire program for improvement of supply and distribution and extension of the mains of the service in Searcy, in order to afford better protection for the property and the lives of the inhabitants of Searcy and to meet the requirements of the Arkansas Inspection and Rating Bureau."

We have copied rather extensively from the pleadings so that the full picture will be visible in its correct proportions. As we see it, Searcy proposes to buy the White County Water Company for $358,390 and issue revenue bonds therefor. But the White County Water Company is a public utility serving not only the individual water users in Searcy, but also the individual water users in Bald Knob, Judsonia and Beebe, each of which is a separate municipality, and each located several miles distant from, and not contiguous to, the City of Searcy. Searcy would continue serving these individual users until Searcy sells the distribution systems in the three other cities; and then Searcy would continue to sell water to the distributors of water in Bald Knob and Judsonia. Searcy intends to sell the distributing systems in Bald Knob, Judsonia and Beebe, but until these sales are accomplished, Searcy would continue to serve the individual consumers in those other cities. It is inescapably true that Searcy would be a public utility, distributing water to inhabitants of Bald Knob, Judsonia and Beebe instantly this proposed purchase was accomplished.

Does the law permit a municipality to do this? That is the question.

We have adopted and reiterated the statement by Dillon on the power of a municipal corporation: "It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers and no others*: First, those granted in *express words*; second, those *necessarily or fairly implied in* or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."[1]

All parties herein agree that there are four Arkansas cases that bear on the question at issue; and each side cites each of these cases as authority for its position. We will briefly review these cases, and indicate which side they support.

1. In *McGehee* v. *Williams,* 191 Ark. 643, 87 S. W. 2d 46, we held that the City of Fort Smith could sell surplus water to the City of Alma. That case affords no support to Searcy, for two reasons: (a) The case holds that the water may be sold to a city; but Searcy is proposing—for the time being, at least—to sell to individual water users in other cities, each several miles removed from Searcy. (b) There is now no surplus water in Searcy. In fact, the entire reason, for what Searcy is undertaking, is to obtain more water for Searcy. So all the cases and rules about "surplus water" are entirely beside the point as regards Searcy's position in the case at bar.

2. In *North Little Rock Water Co.* v. *Waterworks Commission of Little Rock,* 199 Ark. 773, 136 S. W. 2d 194, the City of Little Rock purchased the properties of

[1] See Dillon on Municipal Corporations, 5th Ed., Vol. I, § 237(89). We quoted the foregoing in *Cumnock* v. *City of Little Rock,* 154 Ark. 471, 243 S. W. 57, 25 A. L. R. 608, and in *Ark. Util. Co.* v. *City of Paragould,* 200 Ark. 1051, 143 S. W. 2d 11.

the Arkansas Water Company within the City of Little Rock. The plant was within the city limits of Little Rock, and supplied the individual water users in North Little Rock (a separate municipality). As a part of the purchase agreement with the Arkansas Water Company, Little Rock agreed to furnish water to the company, so that the company would continue to serve the individual water users in North Little Rock. We held: (a) that Little Rock was obligated to furnish such water to the company, saying: " . . . when a public service corporation sells and transfers its property serving a certain community, the transferee succeeds to the obligations of the transferor serving the community; and this rule applies when a municipality, with power to do so, purchases a distribution system serving a certain community, the purchasing municipality would be compelled to continue the service"; and (b) that the proposed sale of water was not *ultra vires*, since Little Rock was selling the water to the company at the city boundaries of Little Rock, and since the proposed plan had been approved by the Department of Public Utilities.

There are several reasons why this cited case does not support Searcy; we list only one: in the case at bar Searcy does not propose to limit its activities to the sale of water at its city boundaries; rather, it proposes—indeed, it would be obligated—to go into the other cities and sell to individual consumers. Such procedure can find no support in the case of *North Little Rock Water Co.* v. *Waterworks Commission of Little Rock, supra.*

3. In *Arkansas Utilities Co.* v. *City of Paragould,* 200 Ark. 1051, 143 S. W. 2d 11, the City of Paragould proposed to serve a nearby community with electric power; but Paragould did not obtain a permit from the Department of Public Utilities as was (and is) required by § 2108, Pope's Digest, (being § 45 of Act 324 of 1935). In holding that such permission from the Department of Public Utilities was mandatory, we said: "We know of no other statute, and the diligence of counsel has disclosed no other, giving municipalities the express power to extend their electric facilities to rural communities,

outside the city limits, and we can see no reason to imply such power as an incident to operations within, especially where such rural communities are already being served. We can see many reasons *contra.* For instance, if it should be held that such extension rendered the municipal plant a public utility as to its operations outside, it would of necessity assume all the burdens and liabilities of a public utility, such as taxation, continuity of service, liability for tort actions, and the like.

"It is argued that the city has a surplus of electrical energy over its needs and that it ought to have the right to dispose of such surplus. It may do so in either the method provided by statute, or by delivering it to a purchaser at the corporate limits without regard to said statute. But when it seeks to engage in the utility business outside its corporate limits, it must get the consent of the Department as provided by statute."

The above quotation is apropos here; and Searcy's possible liability in tort actions, by individual water users in Bald Knob, Judsonia and Beebe, can well explain why the appellant has full justification for this litigation. Certainly, the cited case affords Searcy no support. In fact, the cited case clearly supports the appellant.

4. In *Mathers* v. *Moss,* 202 Ark. 554, 151 S. W. 2d 660, the City of Dumas (owning its waterworks system) proposed to issue $9,000 of revenue bonds in order to extend its water facilities one and two-tenths miles beyond the city limits to a National Youth Administration Residency. It was insisted that this extension would be a profitable venture. In holding that Dumas could not legally do what it contemplated, we said:

" . . . to so hold would be to go a step further than we have yet gone, and if it were so held there would appear to be no restraint upon municipalities engaging generally in utility services not restricted to their own inhabitants.

"Here, it is to be remembered that it is proposed to extend water mains one and two-tenths miles beyond the city limits, not to obtain a water supply for the inhab-

itants of the city, but to sell water to the residency; nor is this a case where the city is proposing to sell a surplus above its own needs; nor is it a case of the city going beyond its own borders to obtain an outlet for sewage disposal. It is the case of a city going beyond its own limits to furnish water and sewage facilities to another community—the residency—because it was found and declared in the ordinance that the city would profit by doing so. . . .

"We are constrained, therefore, to hold that the city proposes to confer and supervise powers not authorized by law, and the decree will, therefore, be reversed, and the cause remanded with directions to sustain the demurrer to the answer."

This cited and quoted case is decidedly adverse to the position of Searcy, and affords much support to the appellant.

So much for the Arkansas cases cited by the parties. We find it unnecessary to discuss cases from other jurisdictions. The only Arkansas statute cited by Searcy as permitting a municipal corporation to do what is here contemplated is § 10001, Pope's Digest, which may also be found in II Ark. Stats. (1947), § 19-4202. This statute is § 1 of Act 135 of 1939, and is a substantial reënactment of § 1 of Act 96 of 1935. The germane portion reads: "A municipality constructing such waterworks system or integral part thereof may sell the water to private consumers located inside and outside of said municipality. It may sell a part of said water to an improvement district, or it may sell said water or a part thereof to a private corporation engaged in the business of selling water to private consumers in said municipality."

This statute was in effect and was cited by section number in *Mathers* v. *Moss, supra*;[2] and the holding in that case necessarily limits the sale of water outside the municipality to (a) surplus water; or (b) water sold after compliance with § 2108, Pope's Digest. Neither

[2] A study of the transcript in that case discloses that ordinance 120 of the City of Dumas was enacted January 15, 1941.

situation exists in the case at bar; so we hold that § 10001, Pope's Digest, affords Searcy no support.

In short, if Searcy were to do what its answer contemplates, then Searcy would be going into the business of buying, operating and selling waterworks systems in three other municipalities; and Searcy would be using (a) its tax-exemption status, (b) its revenue bond issuing power, and (c) its ad valorem tax power, to finance and carry on the operations in the other three municipalities. This State has given a municipal corporation no such power. What the City of Searcy proposes to undertake is *ultra vires,* and the chancery court erred in failing to so hold.

Before concluding, we mention two other matters:

1. Searcy uses the plea of expediency as its defense —that is, Searcy says it will lose a classification rating made by the Arkansas Inspection and Rating Bureau if Searcy fails to get better water protection. We point out that the Department of Public Utilities has the power to act on Searcy's complaint in such a case under § 2082, Pope's Digest.

2. An apparent defect in Searcy's case is the absence of allegations (a) that the Department of Public Utilities has agreed that the White County Water Company can sell its plant, as required by § 2117, Pope's Digest; and (b) that Searcy has the consent of the Department of Public Utilities to serve consumers outside its city limits (as is required by § 2108, Pope's Digest). But, since we have already arrived at a result adverse to Searcy, and since these points are not discussed in the briefs, we forego further comment about them, except to say that we consider them germane.

Conclusion: The decree of the chancery court is reversed, and the cause remanded with directions to grant the appellant the permanent injunction as prayed.

4-8579 212 S. W. 2d 357

Opinion delivered June 21, 1948.

L. A. Hardin, for appellant.

Sherrill, Cockrill & Wills, for appellee.

ROBINS, J. In appellant's suit against appellee for personal injury, alleged to have been sustained by him by reason of the explosion of a bottle of Coca-Cola, the lower court, at the conclusion of all the testimony, instructed the jury to return a verdict in favor of appellee. Appellant asks us to reverse the judgment entered on the directed verdict.

Appellant was superintendent of the Hall Building in Little Rock. Appellee owned and maintained in this building an automatic vending machine to dispense its

bottled drinks. This machine contained a storage compartment where the bottles were cooled and it was appellant's custom every morning to take the bottles from this compartment and place them in the dispensing compartment, from which they were automatically delivered to purchasers who dropped a five cent coin in the slot.

Early in the morning of August 2, 1946, appellant was engaged in taking the bottles containing Coca-Cola out of the storage chamber and placing them in the dispensing compartment, when, according to appellant's testimony, a bottle exploded in his right hand, inflicting a serious injury to appellant's hand. It seems not to be disputed that appellant sustained a substantial and probably permanent injury.

In his amended complaint appellant alleged that the machine for some time had been out of order in that it was overcooling the drinks and that appellee, though notified of this defective condition, had failed to remedy same. He further alleged that a frozen or partially frozen bottle of Coca-Cola is liable, on account of the gas pressure therein, to explode; and that appellee's negligence in permitting the overfreezing of the Coca-Cola bottle was the cause of the explosion and appellant's consequent injury.

Appellee's answer was a denial of the allegations of the complaint and a plea of contributory negligence.

Horace Blount testified that he was superintendent in charge of all properties of the Boyle Realty Company, including the Hall Building; that prior to appellant's injury witness had complained to appellee about the cooling machine and had told appellee that the machine was freezing the Coca-Colas and bursting the bottles; that the machine belonged to appellee who had charge of keeping it in repair.

Forest D. Parker testified that he was present when appellant suffered the injury to his hand; that he had occasionally filled the machine and that just prior to appellant's injury the machine was overfreezing; that they would have a bursted bottle or so every morning;

that appellee set the machine up and tested it; that he reported the overfreezing to appellee.

H. L. Bogan, a professional chemist and chemical engineer, testified that freezing of the liquid in a Coca-Cola increased the gas pressure in the bottle, this on account of the gas which the fluid is charged with is, by the freezing process, expelled from the liquid. "A coke frozen solid would have the opportunity to expel all of its gas. . . That volume of gas would have to be forced into approximately one ounce space—space occupied by one fluid ounce. That would tremendously increase the pressure if all the carbon dioxide came out—by just calculation and knowledge it would be approximately 12 times." Between freezing and freezing to a solid "there would be a proportional difference."

Appellant testified that for about a week prior to his injury the cooling machine had been freezing the bottles; that this trouble had been reported to appellee, but without results; that the machine belonged to appellee and none of the men at the Hall Building were allowed to tamper with the mechanism; that on the occasion of his injury he was taking out bottles, and had pulled one loose from the ice when it exploded in his hand; that the bottle cut him in the palm of the hand; that he bled profusely and was taken to the hospital; that after about two months he underwent an operation to correct the severed tendons and nerves; but there had been no improvement; that this particular Coca-Cola was frozen and when it burst it made a gushing sound.

Baxter F. Cheatham, in the service department of appellee, testified that he may or may not have had a call about the machine at the Hall Building prior to appellant's injury; that at that time they kept no record of such calls.

Bob Titus testified that he was production manager at appellee's plant at Little Rock; that the equipment is modern and up-to-date in every respect and the temperature and pressure of drinks is checked regularly; that the bottles are made according to specifications and will

stand up to 1,200 pounds per square inch, whereas the average pressure is from 400 to 570 pounds; that it is his experience that the crown will start leaking at 100 pounds pressure. He detailed the method of manufacture and stated that gas is fed into the mixture while it is being prepared.

In appraising the testimony, for the purpose of determining the propriety of the lower court's action in giving a peremptory instruction for appellee, we must accord to the testimony the greatest probative force it will reasonably bear in favor of appellant. *Barrentine* v. *The Henry Wrape Co.,* 120 Ark. 206, 179 S. W. 328. We conclude that, when the evidence is thus viewed, there was testimony from which a jury might have found that the injury of appellant was caused by the negligence of appellee in failing to maintain its vending machine in a reasonably safe condition, and in permitting the Coca-Cola bottles to freeze to the point that an excessive gas pressure was caused. Witnesses testified as to the abnormal performance of the machine and that the excessively low temperature had been causing bottles to burst; that appellee, though apprised of the defective condition of the machine, failed to make the necessary repairs or adjustments; and that excessively low temperatures of the bottles greatly increased the gas pressure therein. The jury might have found that the excessive gas pressure thus created brought about the cracking or explosion of the bottle in appellant's hand. To say the least of it, the proof in this case was such that fair-minded men might honestly differ as to the conclusion to be drawn from the facts shown; and our rule is that, in such a case, the question should be submitted to the jury. *St. Louis, Iron Mountain & Southern Railway Company* v. *Fuqua,* 114 Ark. 112, 169 S. W. 786.

Since the evidence presented a fact question as to whether negligence of appellee was the proximate cause of appellant's injury, the lower court erred in not submitting the matter to the jury.

The judgment of the lower court is reversed and the cause remanded with direction to grant appellant a new trial.

VETERAN'S TAXICAB COMPANY *v.* CITY OF FORT SMITH.

4-8556 212 S. W. 2d 341

Opinion delivered June 21, 1948.

Grant & Rose and *Rose, Dobyns, Meek & House,* for appellant.

Harrell Harper, Hugh M. Bland and *Paul E. Gutensohn,* for appellee.

Ed. F. McFaddin, Justice. Fort Smith, Arkansas, is a city of the first class operating under the commission form of government. This appeal challenges the action of the city commission in revoking the permit it had previously granted to the Veteran's Taxicab Company to operate taxicabs in that city.

On August 31, 1946, appellant—after a showing of public convenience and necessity—obtained from the city commission [1] a permit to operate taxicabs in that city. One hundred ($100) dollars was paid by appellant as the license fee for five taxicabs to be operated for the period ending December 31, 1946; but no operation of taxicabs by appellant was attempted until August 28, 1947. The

[1] Act 213 of 1939 was then the governing act on the authority of cities in such matters. See *North Little Rock Transportation Co.* v. *City of North Little Rock,* 207 Ark. 976, 184 S. W. 2d 52.

nature of the operations on this last-mentioned date will be discussed in topic III(b), *infra*. On August 19, 1947, the city commission of Fort Smith served on the appellant an order (returnable before the commission on August 30, 1947) to show cause why the permit of August 31, 1946, should not be revoked. Pursuant to the show-cause order there was a hearing before the city commission attended by all interested parties, and the entire record of proceedings was duly transcribed.

At the hearing it was claimed by the city commission that the appellant had failed to comply with ordinance 1969 of Fort Smith, in that the appellant (1) had not operated under the ordinance, and (2) had disposed of its permit without permission of the city.[2] Here is the language of the presiding officer of the commission at the time of the hearing:

"Now, the city commission doesn't think the Veteran's Taxicab Company has complied with this section of the ordinance which requires the operation by January 1, 1947. Then, too, we were furnished information that the Veteran's Taxicab Company had changed ownership. . . . Now, what the city commission wants to know is why they have not operated. That is first. Then, why—if it has changed hands—the commission was not notified . . ."

At the conclusion of the hearing the city commission, by order dated September 6, 1947, revoked the permit of the appellant. Thereupon the Sebastian Circuit Court—on petition of appellant—had the transcript of proceedings before the commission brought to the circuit court by certiorari; and after due consideration the circuit court, by order of September 30, 1947, denied appellant any relief and affirmed the action of the city commission. From the circuit court judgment there is this appeal presenting—*inter alia*—the issues now to be discussed. Appellees are the City of Fort Smith and its commissioners; rival cab companies intervened in the

[2]The holding now made on the first contention makes it unnecessary to discuss the second contention.

hearing before the commission, and were parties in the circuit court, and join with appellees in this court.

I. *The Proceeding by Certiorari.* Appellees contend that the action of the city commission in revoking the permit is not subject to review by certiorari in the circuit court; but the appellees are in error in this contention. Section 2865, Pope's Digest, provides for certiorari in the circuit court in a case such as this one. *Williams* v. *Dent,* 207 Ark. 440, 181 S. W. 2d 29, fully discusses the point.

But the circuit court on certiorari does not try the cause *de novo;* neither does it substitute its judgment for that of the city commission. In *Merchants & P. Bank* v. *Fitzgerald,* 61 Ark. 605, 33 S. W. 1064, Mr. Justice BATTLE said that certiorari can be used by the circuit court:

". . . in the following classes of cases: (1) where the tribunal to which it is issued has exceeded its jurisdiction; (2) where the party applying for it had the right of appeal, but lost it through no fault of his own; and (3) in cases where it has superintending control over a tribunal which has proceeded illegally, and no other mode has been provided for directly reviewing its proceedings. But it cannot be used as a substitute for an appeal or writ of error, for the mere correction of errors or irregularities in the proceedings of inferior courts . . ."

Chief Justice MCCULLOCH, in *Hall* v. *Bledsoe,* 126 Ark. 125, 189 S. W. 1041, (involving certiorari to a state board), quoted the above, and added:

"But it does not follow that the court, on hearing the writ, proceeds *de novo* and tries the case as if it had never been heard in the inferior court. This is true, because as we have already seen, the office of the writ, which has not been enlarged by statute, is merely to review for errors of law, one of which may be the legal insufficiency of the evidence, and for the purpose of testing out that question the circuit court is, by the statute, empowered to hear evidence *de hors* the record in order to ascertain what evidence was heard by the

inferior tribunal, and to determine whether or not the evidence was legally sufficient to sustain the judgment of that tribunal. That question is one of law, which is subject to review like all other errors of law. *Catlett* v. *Railway Co.*, 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254."

In the case at bar there was filed in the circuit court a transcript of all the proceedings before the city commission, so there was no occasion or right to have evidence *de hors* that record. The circuit court held that the city commission had acted legally and within its jurisdiction, and with no arbitrary abuse of power. On appeal we examine the record to ascertain if the circuit court was correct. Such is the extent of the review.

II. *Failure of the Appellant to Comply with City Ordinance 1969.* The city commission of Fort Smith, by its order of September 6, 1947, revoked the permit of the Veteran's Taxicab Company "for the failure to comply with the terms of said ordinance and for failure to operate taxicabs under the provisions of said permit." What does the record show in this regard?

The language of the city commission in granting the permit to the appellant on August 31, 1946, was:

". . . that the Veteran's Taxicab Company be issued a permit to operate taxicabs in the City of Fort Smith, Arkansas, after passage and approval of an ordinance amending the taxicab ordinance, which the city attorney is instructed to draw and present to the city commission for approval within thirty days of this date—said ordinance to provide appropriate penalties for violation of pertinent taxicab regulations, and said ordinance to provide that existing taxicab companies be given a period for adjustment, not to extend further than January 1, 1947, to comply with the regulations therein included."

The above reflects that, at the time of the granting of the permit, the city commission was contemplating the passage of a new ordinance regulating taxicabs, and appellant's permit was conditioned upon compliance

therewith. The contemplated ordinance was duly passed prior to January 1, 1947, and is ordinance No. 1969. So it will be observed that the granting of the permit by the city commission of Fort Smith was on condition that the appellant would operate taxicabs "after the passage and approval" of ordinance 1969.

The city ordinance 1969 is captioned: "An Ordinance Providing Regulations, Licenses for the Ownership and Operation of Taxicabs within the City of Fort Smith, Arkansas, Providing Penalties for its Violation, and for Other Related Purposes and Repealing Prior Ordinances where Same Conflict Therewith." The ordinance consists of 14 sections, and is extremely comprehensive. Section 1 reads:

"From and after January 1, 1947, no person, as herein defined, shall be granted a permit to own and operate any taxicab, as herein defined, within this city, and from and after this date the permit, license or certificate heretofore granted any person to own and operate any taxicab within this city, shall be deemed hereby revoked and the ownership and operation thereof shall be unlawful, unless all such persons shall first comply with the provisions of this ordinance and of all existing ordinances not hereby amended or repealed, and all state laws regulating the ownership and operation of taxicabs."

Section 7 reads in part: "The Board of Commissioners shall revoke any permit granted when any person holding same shall violate or fail to comply with the provisions of this and all other valid ordinances or State laws regulating taxicabs, and when any such permit be revoked any further operation thereunder shall be unlawful and a violation of this ordinance. . . .

"No permit shall be granted any person who fails to furnish satisfactory evidence of compliance with this and all other ordinances and State laws regulating taxicabs; *and from and after January 1, 1947, any permit, license or certificate to own and operate, or operate, such taxicab, or taxicabs, within this city, granted or issued prior*

to the adoption of this ordinance, shall forthwith be revoked unless the person or persons to whom the same have been issued or granted shall by that date be in full compliance with this and all other ordinances and State laws regulating taxicabs;[3] . . . ''

We particularly call attention to the italicized language in section 7, which clearly states that any permit issued before January 1, 1947, ''to own and operate'' taxicabs shall be revoked unless the holder shall on January 1, 1947, be in full compliance with the ordinance. It is admitted by appellant that it had not complied with ordinance 1969 at any time up to August 19, 1947 (date of the show-cause order). Appellant paid no fees after January 1, 1947, nor began the operation of any cabs under its permit until after the show-cause order had been served. These omissions made a *prima facie* case to justify revocation of appellant's permit for noncompliance with ordinance 1969, and for nonuser. In 43 Am. Juris. 585, ''Public Utilities and Services,'' § 21, in speaking of the forfeiture of a permit, this appears: ''As is true of franchises generally, a franchise granted to a public service corporation may be forfeited for misuser or nonuser.'' See, also, Pond on Public Utilities, 4th Ed., § 464, where this appears: ''Where, however, the municipal public utility fails or refuses for an unreasonable time to install its plant and provide service, the courts will not hesitate to declare its special franchise privileges to be forfeited on account of their nonuser.''

III. *Appellant's Reasons for Noncompliance with Ordinance 1969.* To answer the position of the city, appellant makes two contentions, which we now discuss:

(a) Appellant claims that it was not required to be in operation on January 1, 1947, or on any other specified time. We hold that the language of the permit and the portion of the ordinance, as previously set forth and italicized, clearly disclose that the appellant was required to have its taxicabs in operation and be in compliance with the ordinance not later than January 1, 1947.

[3] Italics our own.

(b) Appellant also contends that its noncompliance with ordinance 1969 is to be excused because of a pending appeal. Appellant points out that when its permit was granted on August 31, 1946, rival taxicab companies obtained *certiorari* in the circuit court of Sebastian county to review the proceedings of the city commission in granting appellant its permit. The Sebastian circuit court on December 31, 1946, dismissed the said certiorari proceedings; and thereupon the four rival taxicab companies appealed to this court. The case here (our number 8232) was filed May 5, 1947; and dismissed by the four cab companies on September 15, 1947, before any submission to, or decision by, this court. The pendency of this appeal from the circuit court to this court is claimed by appellant to be full justification for its failure to put its cabs in operation prior to the service of the show-cause order on August 19, 1947.

But there was no *supersedeas* of any kind obtained by the four rival taxicab companies from the said court order of December 31, 1946. Section 2764, Pope's Digest, on the effect of an appeal from the circuit court, says: "An appeal or writ of error shall not stay proceedings on the judgment or order, unless a *supersedeas* is issued." So, the circuit court order affirming the action of the city commission in granting a certificate of public convenience and necessity was the full authority for the appellant to begin its operations; and the appellant cannot hide behind the pendency of an appeal as an excuse for failure to act under its permit.

When a regulatory body issues a permit based on a finding of public convenience and necessity, the grantee must begin operations under the permit within due time, unless such operations are excused by the regulatory body or enjoined by a court. The granting of a certificate of public convenience and necessity is based on the premise that the public will be served by the grantee of the permit; and the grantee cannot hold the permit and—at the same time—refuse to serve the public because of the possibility of unfavorable appellate court action. Such a refusal would deprive the public of the services

which the permit was supposed to ensure. In 43 Am. Juris. 584, "Public Utilities and Services," § 20, this appears: "In every grant of a public utility franchise, there is implied an agreement on the part of the grantee that it will be exercised . . . "

A case not altogether in point, but yet recognizing that a permit may be revoked for nonuser, is that of *Santee* v. *Ark. Corp. Commission,* 205 Ark. 1, 166 S. W. 2d 672. That the appellant, here, could have commenced operations under its permit, if it had so desired, is shown by the fact that, after the show-cause order was served, appellant (on August 28, 1947) operated four taxicabs which it had obtained from the North Little Rock Transportation Co.—shown to be a company under the management of Mr. Fred Andres, who also is the manager of the appellant company.

The excuse of the appellant for noncompliance was not sufficient to justify the circuit court, or this court on appeal, in holding that the city commission of Fort Smith acted illegally, arbitrarily or without jurisdiction in revoking the permit of the Veteran's Taxicab Company for its failure to comply with ordinance 1969, and for its failure to operate taxicabs under its permit.

It follows therefore that the judgment of the circuit court is in all things affirmed.

WUNDERLICH ET AL. *v.* CATES ET AL.

4-8487 212 S. W. 2d 556

Opinion delivered June 21, 1948.

Wils Davis and *D. Fred Taylor, Jr.,* for appellant.

Holland & Taylor, for appellee.

GRIFFIN SMITH, Chief Justice. Ownership of an island in the Mississippi River is involved. The appeal presents (a) factual questions, (b) mixed questions of law and fact; and, (c) application of well established principles when it is ascertained which of the litigants presents a record showing a preponderance of competent and relevant testimony. Difficulty arises in determining what witnesses,—or, as here, which *group* of witnesses—had familiarity with physical condition, historical data, (including surveys, flood stages, uncontrolled action of waters, shore contours, elevations, and other factors, such as growth of vegetation and navigation)—all of which, it is urged, sheds light upon land

formations created by shifting sands and rich alluvium in the area between Arkansas and Tennessee.

Appellants first insist that Harshman's Island is in Tennessee. This, if established, would deprive the Mississippi Chancery Court of jurisdiction, and the order restraining Alvin Wunderlich, Harry Stanford, Luther Gifford, and T. L. Brown from "going on or interfering with Harshman's Island or any accretions thereto" is void.

Responsive to a petition filed in February 1940 by W. C. Cates, the State Land Commissioner, under authority of Act 282 of 1917, caused a survey of Harshman's Island to be made. It disclosed a land area of 109.04 acres within Mississippi County, Arkansas. Field notes and other data incident to the survey were filed with the Commissioner and have been brought into the record as exhibits. The State's deed to Cates is dated April 1, 1940.

The complaint, filed in April 1942, asserted Cates' ownership of the island and his subsequent conveyance of a fourth interest to Andy Harshman, sale of an equal interest to Eddie Reginold, and a lease for 1940 to Jack Buchanan. When Buchanan's term expired January 1, 1941, he refused to quit. Suit in unlawful detainer was brought, with judgment for the plaintiff in June 1941. It was further alleged that on the day following judgment, Wunderlich, through collusion with Buchanan, "placed a Negro in possession of the island." Later the Sheriff established Cates and his co-plaintiffs in possession, removing the Negro. Cates began farming operations, but Wunderlich ". . . sent various and sundry persons to the island with teams and plows to cultivate. . . . These parties were arrested and fined in Municipal Court, . . ." etc. Another allegation was that Wunderlich caused one of plaintiff Cates' tenant houses to be broken into, the purpose being to hold possession through T. L. Brown's occupancy. Brown was arrested, put in jail, and released on bond. He returned to the island and again undertook to occupy the tenant property.

These and similar acts were relied upon by Cates to sustain the asserted jurisdiction of equity to abate conduct amounting to a nuisance and continuing trespasses. Want of an adequate remedy at law was urged.

As part of a comprehensive denial, Wunderlich, for himself and others, alleged invalidity of the State's deed to Cates. It was, he said, procured by false representations of the applicant, who induced the surveyor to act fraudulently. Affirmatively, Wunderlich alleged that the area in suit was part of Island 25, "being an island in the Mississippi River which formed more than 100 years ago some distance above its present position, and in the middle of the river."

It was then asserted that the main steamboat channel was on the Arkansas side of the river; that by gradual and imperceptible water processes the upstream end of Island 25 eroded, "and the foot built, until the said island assumed its present position in front of it, or on the river side of sections 12, 13, and 14, township 14 north, range 12 east, and section 18, township 14 north, range 13 east, as the sections were originally surveyed by the U. S. government as a part of Arkansas, about 1845. Subsequently the channel "caved away the Arkansas shore line as thus surveyed, but a few years later the channel left the Arkansas side of the river; and Island 25 gradually built downstream toward the Arkansas shore, until now a part of the island lies within the original boundaries of the Arkansas survey, but a greater portion lies eastwardly from said original river bank, and the present river channel is east and southeast of all of Island 25, including the island in controversy, the Mississippi River being the eastern and southeastern boundary of said island."

These allegations were followed by the assertion that for more than fifty years Island 25 had been generally regarded as part of Tennessee; that the true boundary between Arkansas and Tennessee at the point in question had not been established "by the proper forum, for the reason that Wunderlich, through mesne conveyances [shown by exhibits] acquired both the titles to all the

lands included within the Tennessee survey, and the said area, now being on the Tennessee side of the river; and all adverse claims of title being concluded and consolidated in Wunderlich, [he] has, for convenience, assessed said lands as a part of Arkansas, and has paid taxes thereon in Mississippi County for the past 25 years, and said tax payments have covered the area in question, as well as other parts of Island 25."

Damages in the sum of $5,000 for wrongful issuance of the restraining order were prayed.

First.—Was the land in Arkansas? Appellant's admission that he assessed the property in Mississippi County "for purposes of convenience" is highly persuasive that Wunderlich thought it was in Arkansas. Leon W. Smith, special master appointed by the Chancellor, says it was undisputed that in 1892 Island 25 was generally considered a part of Arkansas. Children from the island went to Arkansas schools, electors of the island served on Arkansas juries and as school directors, and crimes committed on the island were tried in this State. Some of those residing on the island paid taxes in Tennessee in 1902, 1903, and 1904, but all refused after that time to recognize Tennessee sovereignty.

In 1904 Tennessee health officers went to the island to vaccinate against smallpox, but the citizens refused to concede their right to enforce the Tennessee law, and "ordered the officers back." Irrespective of conflict in the evidence, it is our view that appellant did not overcome presumptions arising from the conduct of those immediately concerned, and the acquiescence by Tennessee over a long period of time in a seemingly undisputed status. This conduct justified the Land Commissioner's representative in believing that his survey was accurate, and that the conclusions to be drawn from all of the facts and circumstances supported one of two alternatives: (a) the land, geographically, was in Arkansas; or, (b) if substantial doubt existed, Tennessee had ostensibly yielded to the Arkansas view, and this was tantamount to disclaimer. *Maryland* v. *West Virginia,* 217 U. S. 1, 30 S. Ct. 268, 54 L. Ed. 645.

While we are not, in the case at bar, dealing with a controversy between two states, in respect of which the Constitution places original jurisdiction in the Supreme Court of the United States, certain principles mentioned by Mr. Justice DAY, who wrote the Court's opinion in the Maryland-West Virginia dispute, are applicable; for, said he, long acquiescence in the possession of territory, with the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority. Citing *Indiana* v. *Kentucky,* 136 U. S. 479, 10 S. Ct. 1051, 34 L. Ed. 329. Again it was said, "No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected." *Rhode Island* v. *Massachusetts,* 4 How. 591, 11 L. Ed. 1116.

The record with which we are dealing is void of any evidence showing that Tennessee in its sovereign capacity regards Harshman's Island as within its territorial area; hence, as between the litigants here, the Court was justified in assuming jurisdiction, and its decree will be binding upon the parties until in a contest between the two states there is a finding by the U. S. Supreme Court that the territory in question belongs to Tennessee. In that event the Arkansas decree might not be *res judicata.*

Second.—It is strenuously contended that, even if the island were judicially found to be in Arkansas, Chancery did not have jurisdiction of the subject matter; that appellants had the right to trial by jury, hence the decree is void. There are cases, such as *Smith* v. *Hamm,* 207 Ark. 507, 181 S. W. 2d 475, and *Howard* v. *Western Maryland Ry. Co.,* 138 Md. 46, 113 Atl. 574, holding (a) that although Chancery may enjoin criminal acts violative of personal and property rights, jurisdiction will not be assumed where the resulting decree is inferential only, and not determinative in respect of the plaintiff's property rights; and, (b) that injunction should not be

granted for the permanent enforcement of an alleged right if that right is involved in reasonable doubt.

In the Smith-Hamm case Mr. Justice KNOX quoted with approval from *Crighton* v. *Dahmer,* 70 Miss. 602, 13 So. 237, 21 L. R. A. 84, 35 Am. St. Rep. 670, where it was said that ordinarily equity will not interfere to prevent the commission of criminal acts if the injury resulting to property is consequential only; but if the acts (although criminal in the sense that penalties have been imposed for their commission) are primarily and essentially an injury to property, preventive relief may be granted within the same limits and under the same conditions as though the element of criminality were absent: that is, an injunction will not issue unless the threatened damage is irreparable and the evidence is clear and convincing.

Injunctive relief was upheld in *Ritholtz* v. *Arkansas State Board of Optometry,* 206 Ark. 671, 177 S. W. 2d 410, a statement in the opinion being that action of the Board in attempting to restrain the defendant from engaging in a practice denounced by Act 94 of 1941 was not a proceeding to restrain the commission of a crime, *as such.* Rather, the object was to stop the illegal practice of optometry, prevention of which could not be adequately dealt with by invidiual prosecution.

The same principle applies to Cates' right to make use of his property without molestation. The State's deed was, *prima facie,* evidence of ownership. Until appellants had shown a superior title they were trespassers whose conduct was repeatedly found to be of a criminal nature. When persisted in, in willful disregard of legal authority, the acts assumed a propensity disclosing malignant willfullness. In these circumstances property rights were impaired.

It is true there was no allegation of insolvency—a declaration ordinarily essential to a proceeding of this nature. There were certain elements, however, that were difficult of ascertainment in monetary measurement. The mere fact that a defendant is solvent does not of itself place his acts of aggravation beyond injunctive reach.

If appellants had acquiesced in judicial findings that they were without legal right to harass Cates, there would have been no final determination of property rights in this Chancery action.

While strenuously insisting that as record owner "and in actual and constructive possession" he was entitled to trial by jury, Wunderlich prayed for affirmative relief—including damages for $5,000; also that the State's deed be cancelled as a cloud upon his title. Had the proceeding by Cates been one in ejectment, not associated with a distinct equitable right, appellant's objection would be tenable.

Cates claims to have been in actual possession. His deed from the State was color of title, for its execution was in pursuance of a discretion vested by Act 282 of 1917 to determine essential facts. Since by express terms the Act is not applicable to lands formed by accretion, it necessarily follows that the Commissioner, in making the sale, must have found that Harshman's Island was not an accretion; hence, until fraud had been shown, the deed, *prima facie,* was good. *Reed* v. *Wilson,* 163 Ark. 520, 260 S. W. 438; nor could the State's right to have the island surveyed for the purpose of determining its status under Act 282 be lost by adverse possession. *Jones* v. *Euper,* 182 Ark. 969, 33 S. W. 2d 378. See *Lewis* v. *Owen,* 146 Ark. 469, 225 S. W. 648, where it was held that in the absence of fraud or collusion the Commissioner's decision that land the petitioner sought to buy was not an island could not be controlled by mandamus, even if erroneous. Judge John E. Martineau (U. S. District Judge) said that the Arkansas decisions were authority for the proposition that a determination by the Land Commissioner that lands deeded under Act 282 were island formations concluded the state from contending otherwise, in the absence of fraud or collusion. *State of Arkansas ex rel. Norwood, Attorney General,* v. *Rust Land & Lumber Co.,* 51 Fed. 2d 555.

Third.—If Wunderlich is to prevail his title must rest upon one of two contentions: (a) The so-called island was, in fact, an accretion to lands as to which he

has shown ownership, or (b) an area formerly owned by Wunderlich submerged, and from the bed of this once-destroyed land a new formation arose, constituting what is now called Harshman's Island.

A comprehensive discussion of riparian rights is to be found in the Court's majority opinion by Judge BATTLE in *Wallace* v. *Driver,* 61 Ark. 429, 33 S. W. 641, 31 L. R. A. 317, cited and to some extent explained in *Yutterman* v. *Grier,* 112 Ark. 366, 166 S. W. 749. Quoting from *St. Louis, Iron Mountain & Southern Railway Co.* v. *Ramsey,* 53 Ark. 314, 13 S. W. 931, 8 L. R. A. 559, 22 Am. St. Rep. 195, (an opinion written by Judge HUGHES) it was said that a riparian owner upon navigable stream whose title derives from the United States takes only to high water mark and not to the middle of the stream, the bed of the stream being in the State. "This high water mark," says the Ramsey opinion, "is to be found by ascertaining where the presence and action of water are so usual and long continued in ordinary years as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation and the nature of the soil." In the Wallace-Driver opinion Judge BATTLE added: "According to the cases . . . the high water mark, as thus defined, being the boundary line of the riparian owner in this State, is the point at which the formation of all lands acquired [by such owner] by accretion must begin. A formation of alluvion beginning at any other point would belong to the State or other party. In that case the gradual and imperceptible addition, which is necessary to constitute an accretion, would be lacking."

In the Yutterman-Grier case Chief Justice MCCULLOCH said that the Court, in *Wallace* v. *Driver,* was speaking in general terms, for "it is not literally correct to say that the rule of accretion does not apply if any part of the process [of formation] is perceptible."

Act 127, approved April 26, 1901, affected "all lands which [have] formed or may hereafter form, in the navigable waters of this State and within the original boundaries of a former owner of land upon such

stream." Title was vested in the former owner, "his heirs or assigns, or in whoever may have lawfully succeeded to the right of such former owner therein." A preamble recites that "Under existing laws if such land reforms as an island in a navigable stream, though within the original boundary of the former owner, it belongs *not* to him, but to the State."

Under this Act appellant must prevail if Harshman's Island formed within original boundaries of Wunderlich's land, and this is true irrespective of the claim that it was an accretion to Island 25. In substantiation of this contention it is argued that testimony given by Ed Tillman, O. W. Gauss, and Wunderlich, partially superimposed upon Mississippi River Commission charts showing the river's progress between 1883 and 1906, and deed from St. Francis Levee District to Wunderlich, brings the transaction within the rule announced in *Lightfoot* v. *Williamson et al.,* 282 Fed. 592, where Act 19 of 1893, as amended by Act 75 of the same year, was construed.

In that case Lightfoot sought to quiet title to Bullinton Island in the Mississippi River as against Williamson and others who had held possession, with cultivation of the 425 acres, for 40 or 50 years. Lightfoot claimed under a deed from the State, pursuant to Act 282 of 1917. Williamson and others associated with him in the suit claimed under two quitclaim deeds from St. Francis Levee District, and the District, in turn, claimed under Acts 19 and 75 of 1893. Lightfoot, who was favored by the Land Commissioner, contended in Federal Court that the Commissioner's determination of ownership—whether in the District or State at the time Lightfoot's deed was executed September 19, 1918—was conclusive. The Circuit Court of Appeals, in affirming Judge Trieber, found it was not necessary to decide whether the Commissioner's deed could be questioned, "for," says Judge CARLAND's opinion, "If the Levee District had title to the land at the date of [its] quitclaim deeds, that title passed to [Williamson and others], and the Commissioner of State Lands had no jurisdiction to adjudicate the title. Whether the Levee District had

title . . . depends upon . . . whether the land was within its boundaries."

So, says appellant, if at the time St. Francis Levee District conveyed to Wunderlich's grantors the land was within the District, then the Commissioner's deed to Cates was ineffective.

The Lightfoot-Williamson case deals with *re-formed lands,* as distinguished from accretions.

Fourth—The Evidence.—J. A. Pigg, an abstracter called by appellants as a witness, testified that he had certain records. From a photostatic copy of a map of Island 25 prepared by the Mississippi River Commission, the lines of Secs. 17 and 20 were shown. The work was done in 1923 or 1924. The records in Mississippi County, Arkansas, disclosed that part of the land of Island 25 was claimed by Lauderdale County, Tennessee, and an inspection of records at Ripley, Tenn., showed the same claims. The lines of Secs. 17 and 18 were projected from a designated corner of Sec. 18.

Copies of deeds numbered from three to twenty-three were introduced. Exhibit No. 18 was a deed from W. P. Hall and S. A. Forsythe, conveying to Alden Land & Timber Co. lands not pertinent to this controversy, and all of Secs. 17, 18, and 19, township fourteen north, range thirteen east, and accretions thereto, ". . . located on Island 25 in the Mississippi River." The deed was dated June 21, 1920. A deed of February 23, 1917, from St. Francis Levee Board to W. P. Hall purported to coyvey "All that body of land lying east and south of the original government meander line and west of the Mississippi River." It appears that Forsythe, who joined in Hall's deed to the Alden Company, derived title through a Tennessee grant.

Appellant's abstract contains the statement that in a partition suit concluded in 1907, involving the lands of W. W. Ward, certain lands were set aside to the Ward heirs, claimed by them under the Tennessee grant, ". . . as well as under the riparian title to the Arkansas lands." The witness then said: "I know that all of the lands in Secs. 17, 18, and 20, which we have been

discussing, are on Island 25, a considerable portion having been in cultivation since 1924."

Conceding, on cross-examination, that "his books" only covered lands in the Osceola District of Mississippi County, Pigg added, "If there is an island east of Island 25 known as Harshman's Island, I could not testify about it. . . . According to this map, all of Sec. 17 is on Island 25. . . . There could not be any island east of Island 25 in Secs. 17 and 20, according to the map." As summarized by appellants, the Pigg exhibits disclosed title ". . . to all riparian lands bordering on the Mississippi River along the reaches involved, and to all the accretions thereto, as well as the deed from St. Francis Levee District."

Wunderlich testified that the "area involved" is a part of Island 25, purchased by him in 1915 or 1916. The conveyances, he said, cover all of Sec. 17 and the north half of the north half of Sec. 20, "and the lands claimed by [Cates] are within the boundary lines of my deeds."

Appellant had heard there was an island called Harshman's "somewhere in there," but he was certain the land in Sec. 17 is all connected with the Arkansas shore. Twenty years ago he walked entirely across Secs. 17 and 18 without finding any water. It was "made" land, but would be covered by high water. Until Wunderlich heard that Cates had procured a deed from the State he did not know there was a place called Harshman's Island. The name "Harshman" was first used when the Land Commissioner's representative made the survey in 1940. "Wrenn Island," said the witness, [elsewhere in the testimony referred to for purposes of identifying other points] "is down in Sec. 19, township fourteen, range thirteen—possibly some in Sec. 20."

O. W. Gauss, civil engineer who was in the government service for fourteen years, testified that he had known Island 25 since 1910. He mentioned matters in substantiation of his belief that some of Island 25 was the Forsythe (Ward estate) lands included in the Tennessee grant. Since this phase of the litigation has been

decided against appellant, the contentions will not be reviewed.

Referring to a map introduced as an exhibit to Pigg's testimony, Gauss said that the lines of Secs. 17 and 20 were correctly drawn, and that these sections were a part of Island 25, and that Wunderlich had been in possession for twenty-five years. The particular area in controversy, identified by Cates as Harshman's Island, ". . . lies mostly in Sec. 17 [within the boundaries of deeds held by Wunderlich], and recorded." Referring to a map, surveys, and reports to be found in the Congressional Library at Washington, (copies of which were used) Gauss read from the 1824 edition of Cramer & Spears' "Navigator." Island 25 was spoken of as being "two miles below the bar, in the middle of the river, with a good channel on either side, and about a mile long."

Andy Harshman testified that the island bearing his name formed about 1918, and that vegetation appeared two years later. A sand bar connects it with the mainland, but water still separates the land in suit from Wunderlich's holdings. When asked how long after the bar appeared river traffic continued on each side of the island during low water stages, Harshman replied:

"I don't think any big boats [ran] during low water after 1927 or '28. Six or seven years after the growth [of vegetation] appeared the big boats quit running. [The channel] shut off at the upper end. I imagine it would take a big boat around 25 feet at Memphis to go through there." [Presumptively the witness intended to say that if the stage at Memphis were 25 feet, a big boat could negotiate the channel]. Again referring to the sand bar, Harshman said that it connected the land in litigation with the Wunderlich lands on Island 25. Later he testified that "There has always been, and still is, water between Mr. Wunderlich's land and Harshman Island."

There is a great deal of testimony to the same effect, and many statements that the property contended for by

Cates and his associates was never part of the Wunderlich holdings.

M. A. Meroney took a number of pictures in February 1942. For the purpose of photographing the essential points the witness placed his camera in location just south of the line between Secs. 17 and 20 "from Island 25 looking across to Harshman's Island." The photographs showed water between the mainland and Harshman, "between 500 and 800 feet wide." The witness then said: "After taking the pictures I walked around enough to see the channel went into the river. Lex Shamlin and I estimated, with a pole, that the bank was fifteen feet high."

C. S. Baggett took pictures in 1941, using Island 25 as a base. He said: "The day [the pictures were taken] we went down where the chute empties into the river. It looked like it was four or five hundred feet wide."

J. C. Bright was familiar with Harshman's Island:— "It appeared out in the middle of the river. Early in 1920 I worked for Luxora Cooperage Company, rafting logs, going on both sides of the island with rafts. There was a well defined channel between [Harshman's] and the Arkansas shore. The formation first occurred as a sand bar. . . . The first place it attached was at the upper end, some time in 1918. I lived right at the head of the chute in 1912 and 1913. I moved away permanently in 1932, [but had lived in the same neighborhood all those years"].

Henry Freeman said that the island began to "show up" in 1918. At that time there was a channel between the formation and Island 25, but it has filled since. Now there is only a sand bar between the two islands, but "water is running through there."

Corbia Dingler occupied Harshman's Island in 1941 as a tenant. We went to and from it in a boat. A sand bar was spoken of as being "considerably north of the land, connecting with Island 25 during the latter part of the year, [but] there is water at all times [separating] Mr. Wunderlich's line across [to Harshman's"]. On

cross-examination Dingler insisted that "water went through there until the fall of 1928. It was 25 or 30 yards wide, and 100 yards in the middle."

Ross Stevens, postmaster at Blytheville, had frequently hunted over the area in question. He had known Harshman's Island since 1925. It was separated from the mainland by a chute, but there were sandbar crossings.

Russell Farr identified a plat made by W. H. Lawhorn and O. W. Gauss in 1935 showing lands the witness owned. He said: "After the blueprint was made Mr. Wunderlich and I agreed on a boundary line 900 feet south of the line of Secs. 18 and 19, and we exchanged deeds. The picture [you have shown me] was taken with the camera near the dividing line [to which I have referred]. We took another picture down the chute two or three hundred feet, and we went down the chute to the river. . . . There is a well-defined chute between Wrenn's Island and Harshman's Island. . . . Several years ago I was on what is known as Harshman's Island when it was just a small body of sand and land out in the river. I walked from the lower end of Wrenn's Island on a sand bar without crossing any water at all."

On recall, Andy Harshman testified that water would run through the chute between Harshman's Island and the Arkansas shore when a stage of 21 feet at Memphis is reached. It would require a stage of 38 feet to put water over the island. . . . The water in the chute extends north [of Bench Mark A-1-32]. Before the 1937 [flood] it extended to the river. Now it is partly dry in low water periods, there being deep and shallow places in it. It goes dry in extremely low water."

J. W. Meyer, an engineer, identified Bench Mark A-1-32 on the enlargement of a map filed as an exhibit to Pigg's testimony. The contour showed a gradual lowering of the land "each way." It sloped off on all sides from the highest elevation of 250 feet, to the lowest point where the elevation was 225 feet.

C. M. Buck, Blytheville attorney of fine attainments, and one who has had many years of experience with liti-

gation resulting from accretion, avulsion, and island formations, made a personal inspection of the area involved, and said, "In my opinion Harshman's Island is an *island* if you mean to distinguish it from an accretion."

L. McMakin, 71 years of age—a steamboat pilot since 1900, had been familiar with the Mississippi River in the vicinity of Island 25 since 1916. He distinctly remembered that in 1932 or 1933 he made a trip upstream, ". . . going to the left of a towhead called Island 25 Towhead. The boat drew five or five and a half feet of water. Willows were sticking out on this towhead. I think it formed in 1916. . . . When I went between what I call Towhead of Island 25 and Island 25 the river was bank-full."

Rebuttal testimony offered by appellants was in direct contradiction to that offered on behalf of appellees.

Testifying for appellant Wunderlich, Ed Tillman (who claimed to have observed river trends for many years) said the Harshman Island area began forming as a gravel bar just below a point known as Tomato, then built south; "for," said he, "a bar forms at the shore and builds out." On cross-examination the witness testified there was a growth of willows on the bar, and that the growth extended to the shore, [presumptively Island 25] "and from there out to the river there is scattered vegetation. . . . You will find [cottonwood and willows] all over the bar. . . . During high water [it is probable that gas boats negotiate the area between Harshman's Island and Island 25], but no steamboat traffic has ever run there, to my knowledge. . . . Going to the house [on Harshman's Island] there would be no way to get there except by crossing water, or crossing a bare sand bar." [The testimony was given by deposition at Osceola September 7, 1943].

Fifth.—Master's Report.—After discussing mixed questions of law and fact, the Master concluded his review of appellants' claim that the land was in Tennessee with this statement: "If Island 25 were in Arkansas in 1916, then there could be no question of Harshman's

Island being in Arkansas, because the undisputed proof shows that the towhead [referred to by numerous witnesses] started west of the channel and east of the Island 25." A head note to Mr. Justice HUGHES' opinion in *Railway* v. *Ramsey,* 53 Ark. 314, 13 S. W. 931, 8 L. R. A. 559, 22 Am. St. Rep. 195, was used as a definition:—"A gravel bar in the bed of navigable river, over which steamboats in ordinary high water pass, which is distinguishable from the banks by the absence of soil and vegetation, is not alluvion added to the land of the riparian owner, *but belongs to the State,*" the Italicized words having been omitted from the quotation.

It was the Master's understanding of Wunderlich's contentions that Harshman's Island was consummated from a beginning described by Herschel Mitcheson, who as a witness identified a point on the west bank of the river, where formation of a sand bar gradually extended downstream southeasterly. The point of beginning was approximately 2,600 yards north of the north line of Wunderlich's property—Island 25. Following extension of the bar into deeper water, and reappearance of the bar, alluvion accumulated, forming land—sometimes called an "outcropping." But the Master said that at low water a sand bar extended entirely around the property in question, barren of soil or vegetation. He believed this to be undisputed. While we do not think that this statement was uncontradicted, it is not difficult to agree that a preponderance of the evidence supports it.

The testimony and exhibits, according to the Master's views, disclosed that the land claimed by Cates had for some time been of substantial formation, and susceptible of cultivation. There was a further finding that the so-called sand bar was not attached to Wunderlich's property at any point. At extreme low water the *bar,* if not entirely barren, is from ten to twenty-five feet lower than well-defined banks of Island 25. "Certainly," said the Master, "[Harshman's Island] cannot be considered as accretion, as it did not form from defendants' land outward or away from it, but by filling in behind this bar toward [Wunderlich's] land. These

observations are made upon the assumption . . . that [Wunderlich's] theory [is] that the land in question is an outcropping on this bar extending out into the river. Land which begins forming at a bar or island in the river and [builds] toward the mainland is not accretion to the mainland."

Many maps, drawings, surveys, plats, river bulletins, charts, photographs, copies of ancient publications, and other material documentation were introduced, including a table of conventional signs used in a reconnaissance of the Mississippi and Ohio Rivers by Capts. H. Young and W. T. Pouissin, topographical engineers, in 1821, and surveys by the Mississippi River Commission. These were intended to verify the appellants' belief that Harshman's Island was in Tennessee. They are of little help in determining how the island was formed.

In mentioning testimony given for appellants by St. George Richardson, a civil engineer of Memphis, the Master, discussing a statement by the witness that Harshman's Island was part of a sand bar "attached to the mainland," said that from an examination of maps and charts to which Richardson referred, it was fairly inferable that the witness had in mind a sand bar connected with the mainland a mile and a half north of the Wunderlich property. The Master then said:

"It is my opinion that a sand bar now between Wunderlich's land [on Island 25, and Harshman's Island], filled in from the towhead toward the west chute of the river, and, as a matter of fact, has gradually filled in below the sand bar attached to the mainland north of Wunderlich's property, [and this process continued] until, of course, the chute between the mainland and the island has been narrowed perceptibly on both ends; but in ordinary high water there is still a well defined channel between the mainland and the island."

Questions of fact have been decided against appellants by two Chancellors and a Master. A decree was rendered November 30, 1945, by Edward L. Westbrooke, Jr., Special Chancellor, whose right to act was challenged. The controversy on that point was decided in

Wunderlich's favor November 18, 1946. *Cates* v. *Wunderlich,* 210 Ark. 724, 197 S. W. 2d 482. On remand the entire case was retried on the record formerly made, supplemented by a motion to dismiss, the appointment of a Master, and the Master's report, upon which final adjudication was predicated. All have been carefully checked and compared.

A transparent map superimposed over a 1937 chart (referred to as Sheet 40) would place Harshman's Island partly within Secs. 17 and 20; but there is nothing persuasive to show, in respect of testimony given by Richardson, (other than deductions, speculation, and conclusions) that the island accreted to property owned by Wunderlich, that it formed within the original boundaries of lands owned by Wunderlich bordering on the river, or that it did not come into being as a towhead, separated completely from Island 25 by a channel or chute. True, testimony is in sharp disagreement regarding the nature of the channel; but the fact that Harshman's Island is somewhat connical—that is, it slopes gradually north, east, south, and west, from center—affords physical support to the suggestion that it gradually built as appellees claim. At least a preponderance of the evidence sustains this conclusion; hence the decree must be affirmed. It is so ordered.

PARAMOUNT PICTURES, INC., *v.* SNOW.

MONTICELLO COTTON MILLS COMPANY *v.* LARKIN.

4-8571, 4-8572 212 S. W. 2d 346

Opinion delivered June 21, 1948.

4-8571

Bridges, Bridges, Young & Gregory, for appellant.

Wootton, Land & Matthews and *James L. Byrd,* for appellee.

4-8572

Bridges, Bridges, Young & Gregory, for appellant.

C. T. Sims, for appellee.

GRIFFIN SMITH, Chief Justice. As insurance carrier under separate contracts, Hartford Accident & Indemnity Company has joined with Paramount Pictures, Inc., and Monticello Cotton Mills Co., in presenting identical questions of law arising under Workmen's Compensation Act of 1939, as amended.

Paramount's employe was Guy Snow, who was the Corporation's manager at Newport when injured September 2, 1942. For five weeks and six days he was compensated at the maximum rate of $20 per week. He returned to work, but was transferred to Hot Springs. Between October 14, 1942, when work was resumed, and September 30, 1945, Snow's earnings were in excess of those at the time of injury. During the employment period compensation under Act 319 of 1939 was suspended. *Sallee Bros.* v. *Thompson,* 208 Ark. 727, 187 S. W. 2d 956.

When the interim employment was terminated October 1, 1945, Snow petitioned for a resumption of payments, and the Commission, after a hearing, directed that this be done, beginning April 11, 1945. The Commission found—and this appears to be undisputed—that while appellee was employed after the layoff of five weeks and six days, he did not regain the state of health formerly

enjoyed, and " . . . in fact, suffered a physical impairment to his body generally, the extent of which was not finally determined until . . . April 11, 1947." The award was on the basis of a 25% disability to the body as a whole, covered by § 13 (c-23) of the Compensation Law. Direction was that payment be made during such disability, " . . . but not to exceed in any event 444 1/7 weeks from October 1, 1945."

Larkin's award was for $10.40 per week for a disability resulting from injuries received June 18, 1942, while working for Monticello Cotton Mills Co. Compensation began June 23, 1942, and continued until July 27 of the same year. Larkin then resumed work, continuing the employment until March 6, 1943, when the same disabling cause compelled relinquishment of the position. September 15, 1943, the Commission directed a resumption of payment, and under this order the obligation for 110 5/7 weeks was discharged—that is, to March 16, 1945. Larkin then obtained employment at the Camden Naval Ordnance Plant, being so engaged until November 16, 1946, at which time unemployment occurred, and a claim for resumption of payments was asserted. On the ninth of April, 1947, the Commission found that appellee still suffered permanent partial disability entitling him to compensation of $7 per week during continuance of the impairment, subject to controlling provisions of Act 319, but " . . . not to exceed 339 2/7 weeks from November 16, 1946."

In each case appellants contend that the Commission has misconstrued the law, and that the Circuit Court of Jackson County, in Case No. 8571, and the Drew Circuit Court, in Case No. 8572, erred in not holding that in those cases where the maximum number of weeks during which compensation must be paid is 450, time begins to run from the first week, and that any interruption of payments, as in *Sallee* v. *Thompson*, must be deducted from the compensable period. For example, if a claimant is first entitled to a stipulated sum for 450 weeks and is paid for 100 weeks, then presumptively he is entitled to 350 weeks additional. But if, at the end of 100 weeks,

employment is accepted in circumstances where there has been no reduction in the worker's earning capacity by reason of the injury, and this continues for, say, 50 weeks and terminates while the original impairment persists, lapsed time has been 150 weeks; and the question is, Does Act 319 contemplate that (irrespective of interruption of what would have been compulsory payments except for private engagement) rights under the law terminate by limitation 450 weeks from first payment under the award? Is "time out" during voluntary employment subsequent to injury to be counted as though compensation had been continued by the employer or his insurance carrier?

Emphasizing the rule so well understood that its value gains nothing when repeated, appellants believe the legislative intent must be gathered from pertinent language used in the Act, with particular reference to § 13(a) and (b), and § 13 (c-23).

Section 13 (c-23), preceded by a list of specific allowances, deals with "all other cases [of permanent partial disability"], and directs payment to the injured employee upon the bases of 65% of the difference between average weekly wage and earning capacity after the impairment "in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the Commission on its own motion or upon application of any party in interest, *and in no case exceeding a longer period than 450 weeks, or a maximum of $7,000.*"[1]

Section 13(a)—permanent total disability—contains the limitation, " . . . but not exceeding a total of 450 weeks, and in no case shall the total compensation exceed the sum of $7,000." The restriction in § 13(b)—temporary total disability—is, " . . . but not exceeding a total of 450 weeks, and in no case shall the total compensation exceed the sum of $7,000."

In the quoted subdivisions of section thirteen the language varies,—in (a) and (b) but slightly. Pre-

[1] Italics supplied.

ceding the limitation formula in § 13(c-23) compensation is " . . . payable during the continuance of such partial disability, . . . in no case exceeding a longer period than 450 weeks." So, say appellants, "In one breath the Legislature specified *the maximum period of time* during which compensation would be payable, and in the next, *the maximum amount* which could be received, [$7,000,] was expressed."

But is it logical, from the changed phraseology alone, to assume that the General Assembly intended to differentiate between (a) permanent total disability, (b) temporary total disability, and (c) permanent partial disability, and to conclude, further, that this results from the slight alteration in word arrangement? Surely a policy so important would have received express treatment by the lawmakers. It is hard to believe that the advantage to employer or insurance carrier resulting from appellants' construction of the intent behind the three sections was conferred in an off-hand way. This view, however, is not reached without according to appellants' counsel full credit for an exceedingly adroit and ingenious argument, strongly presented.

Our Compensation Law is in many respects similar to Oklahoma's. The point at issue was discussed by the Supreme Court of that State in *Magnolia Petroleum Company* v. *Allred,* 160 Okla. 126, 16 Pac. 2d 78. The worker received an award "for a period not to exceed 300 weeks from the fourteenth day of October 1931." After receiving the compensable injury he worked "in the same employment or otherwise" for a period of four years. In holding that this time of employment was part of the 300 weeks, the Court appears to have reasoned as appellants do in the case at bar, and in this they are sustained more or less by *Industrial Truck Construction Co.* v. *Colthrop,* 162 Okla. 274, 19 Pac. 2d 1084; *Boardman & Co.* v. *Clark,* 166 Okla. 194, 26 Pac. 2d 906; *Johnson* v. *Iverson,* 175 Minn. 319, 221 N. W. 65, 222 N. W. 508; *General Chemical Co.* v. *Vail,* 34 Del. 322, 152 Atl. 425; *Mott* v. *Carnegie Coal Co.,* 114 Pa. Super. Ct. 239, 173 Atl. 670; *Barlock* v. *Orient Coal & Coke Co.,* 114 Pa.

Super. Ct. 228, 173 Atl. 666; *Raven Red Ash Coal Corp.* v. *Absher,* 153 Va. 332, 149 S. E. 541.

In the Johnson-Iverson case (Minn.) it was said that the 300 weeks' period for which compensation was allowed commenced one week after injury and it could not be extended by temporary interruptions during which no compensation was owing or awarded.

The opinion by Mr. Justice RICE in the Vail case (Del.) says that where the accident occurred April 10, 1920, the compensable period of 285 weeks terminated [headnote] "about September 26, 1925, and Industrial Accident Board could not make award for partial disability thereafter, though compensation was not paid for all of 285 weeks."

In the Mott case (Penn.) it was held that the employee's period for partial disability ran concurrently with the period during which he was paid for total disability, and with the period thereafter during which the claimant worked. The same rule was applied in the Barlock appeal, also decided by the Pennsylvania Superior Court.

The Absher case (Va.) said the Compensation Act [headnote] permitted recovery "only for period of 300 weeks from date of injury, regardless of intervening period, when employee appeared to have recovered, and during which no payment was made."

Arkansas was the forty-seventh state to provide planned compensation for injured workmen, and Mississippi the forty-eighth. Although uniform in general purpose, the various legislative Acts—sometimes repeatedly amended—employ expressions peculiarly pertinent to the subject-matter, and court constructions in each of the states are with reference to the exact language used. An examination of many cases discloses such a contrariety of judicial thought that little good could result from a review. After all, we must determine what the General Assembly of this State purposed to do, and declare the intent if it can be gathered from language.

It seems reasonably certain that by § 13(c-23) the plan was to provide a method by which a compensable claimant would receive (1) 65% of the difference between his average weekly wages and his wage-earning capacity after the injury "in the same employment or otherwise"; (2) the maximum weekly payment, by § 10, is not more than $20 nor less than $7. (3) Total compensation shall not be more than $7,000. (4) Duration of the payment period is 450 weeks; but, since there are no express words of limitation other than those pertaining to the amount of payment—that is, $20, $7, and $7,000—credit in point of time cannot be taken by the employer or carrier because of the claimant's voluntary conduct in accepting employment, and working in spite of physical impairment. Take, for example, the case of a claimant whose injury entitles him to permanent partial disability, and who, being in a high wage bracket, is awarded $20 per week for 450 weeks. The total would be $9,000; yet because of the limitation of $7,000 he will realize $2,000 less than 450 multiplied by 20.

To hold that the weekly period must be reduced to correspond with "time out" during voluntary employment would be to say, in effect, that the injury is not to be *fully* compensated and that essence of the Act is time. We do not think this was the legislative intent, hence the judgments must be affirmed.

WESTERN UNION TELEGRAPH COMPANY *v.* ESTES.

4-8532 212 S. W. 2d 333

Opinion delivered June 21, 1948.

John H. Waters, D. H. Crawford and *Rose, Dobyns, Meek & House,* for appellant.

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

GRIFFIN SMITH, Chief Justice. Judgment for $1,172.-50 was rendered on a jury's verdict that Western Union willfully failed to deliver a telegram in a reasonably expeditious manner.

Horace Estes is a rural mail carrier in Clark County, with Gurdon as his home. Incidentally he gambles on horse races and sometimes receives tips at the post office, sent from Washington Park Race Track, Ill., which is near Chicago. August 27, 1945, a Western Union message was filed with the Washington Park office of the Telegraph Company at 10:30 a. m., directed to Estes at Gurdon. It read: "Meet Ankylos today. Any news from Hot Springs? Write." The sender signed "Steve."

Estes alleged that his relations with "Steve" were such that "tipping" information would have been relied upon. It was customary for the tout to write, giving preliminary data, and if the chances to win were as promising on race day as they were when the letter was written, a telegram would be sent. Appellee testified that prior to August 27th he had received such a letter, and if the wire message had been delivered he would have placed $250 with an East St. Louis bookmaker—$100 to win, $75 to place, and $75 to show. He ascertained later that Ankylos had won, and that his profits on the intended bet would have been $1,172.50. "Steve" communicated with Estes, asking for his "split" on the tip. It was conceded that the telegram was not delivered until the race had been run; hence, says Estes, his loss was his failure to win.

Of the several defenses interposed and urged on appeal, we consider but one: the transaction was illegal; and this is true whether the laws of Arkansas or Illinois be considered. A bookmaker operating as in the case at bar is met by § 3355 of Pope's Digest, and gains nothing from §§ 12435-12457. See, particularly, § 12448. Applicable also is Ch. 38, § 336, Illinois Revised Statutes, 1945,

State Bar Association Edition; § 37j. Consider *Albright* v. *Karston,* 206 Ark. 307, 176 S. W. 2d 421; *Albright* v. *Muncrief,* 206 Ark. 319, 176 S. W. 2d 426; *Southwestern Bell Telephone Co.* v. *Bagley,* 178 Ark. 876, 12 S. W. 2d 782, 62 A. L. R. 177; *Eager* v. *Jonesboro, Lake City & Eastern Express Company,* 103 Ark. 288, 147 S. W. 60; *Lindsey* v. *Rottaken,* 32 Ark. 619; *Martin* v. *Hodge,* 47 Ark. 387, 1 S. W. 694, 58 Am. Rep. 763; *Brelsford* v. *Stoll,* 304 Ill. App. 222, 26 N. E. 2d 159; *Capps et al. v. Postal Telegraph-Cable Company,* 197 Miss. 118, 19 So. 2d 491.

Wiggins v. *Postal Telegraph & Cable Company,* 130 S. C. 292, 195 S. E. 568, is annotated in 44 A. L. R. At page 783 the annotation reads: "The majority of the cases support the rule applied [by the South Carolina Court in *Wiggins* v. *Telegraph Company*] that a telegraph company is not liable for negligence in connection with the transmission of telegrams which relate to gambling transactions."

Judgment reversed and cause dismissed.

CITY OF HARRISON *v.* MOSS.

4-8597 212 S. W. 2d 334

Opinion delivered June 21, 1948.

Roy L. Baker, Jr., for appellant.

Shouse & Shouse, for appellee.

MINOR W. MILLWEE, Justice. Appellant, City of Harrison, brought this action in circuit court to condemn 21.13 acres of land belonging to appellees, Ralph Moss and wife, Pearl Moss, for use in the expansion of a municipal airport located about three miles northwest of the city.

Appellant proceeded in the exercise of its right of eminent domain under §§ 10037 and 10038 of Pope's Digest, as amended by Acts 18 and 39 of 1945. A jury empaneled to assess the damages returned a verdict in appellees' favor of $8,000. The only question argued for reversal of the judgment rendered on the jury's verdict is the sufficiency of the evidence to support the verdict, which appellant contends is grossly excessive.

Appellees own 124 acres which is fenced and used as a pasture for livestock. Eighty acres of the 124-acre tract comprise two 40-acre tracts running north and south and lying west of and adjacent to the present airport. The tract condemned by appellant divides this 80-acre tract near the middle leaving 28 acres north of the condemned strip isolated from the remaining 31 acres south of the strip. An additional 44 acres joins the 31-acre tract on the southwest corner. The 21.13 acres condemned is level land while the remainder is rolling and hilly and not as adaptable to the growth of grass for pasture as the condemned land. The 124-acre tract is at its nearest point a quarter of a mile from U. S. Highways 65 and 62.

Section 10038 of Pope's Digest, as amended by Act 39 of 1945, provides that the procedure for the exercise of the right of eminent domain by municipalities in condemnation of lands for airports shall be that prescribed by law for the exercise of such power by railroads. In *Malvern & Ouachita River Railroad Co.* v. *Smith,* 181 Ark. 626, 26 S. W. 2d 1107, appellee's farm was divided into two parts by condemnation proceedings for a railroad right-of-way. Appellee testified that he had been damaged to the extent of $5,000 and other witnesses in his behalf fixed the sum at $3,000, the amount of the jury's verdict. In reducing the verdict to $2,000

the court said: "The measure of damages in such cases is, of course, the difference in value of the land before and after the construction of the railroad, excluding any enhancement of value by the building of the railroad, and in the very nature of the case this is largely a matter of opinion, and whether a witness has such knowledge of the facts as to make his opinion of any value is a question largely within the discretion of the trial judge, and the value of such testimony may be tested by a cross-examination of the witness as to the facts upon which the opinion is based. *St. Louis, A. & T. R. R. Co. v. Anderson,* 39 Ark. 167; *Texas & St. L. Ry.* v. *Kirby,* 44 Ark. 103, 106. . . .

"In testing the sufficiency of the evidence to support the verdict we must view it in the light most favorable to appellee. In the case of *Railway* v. *Combs,* 51 Ark. 324, 11 S. W. 418, Chief Justice COCKRILL said: 'The same principles obtained in these statutory proceedings as in common law suits in regard to new trials. When the verdict is sustained by competent evidence, we do not interfere.' But we have concluded that the competent testimony does not sustain the verdict. It is true that one or more witnesses for appellee placed the damage at a sum equaling the verdict returned by the jury, but the cross-examination of these witnesses fails to show any fair or reasonable basis for the opinion."

We have repeatedly recognized the rule, "that where there is any evidence of a substantial nature, which, by positive statements or reasonable inference, when given its strongest probative value, tends to support the finding of the jury, that finding will be sustained, although, from the record presented to this court, it might seem to be against the preponderance of the credible evidence." *Mo. Pac. R. R. Co.* v. *Henderson,* 194 Ark. 884, 110 S. W. 516.

In the instant case appellee, Ralph Moss, is the only witness who placed his damages at a sum as high as the verdict returned by the jury. On direct examination he testified: "Q. What in your candid opinion is this 22 acres of land the city is taking worth per acre?

A. Around $350 an acre. Q. What in your opinion would be the reasonable, or fair market value of your entire tract of land as it stands before the city has taken this strip out of it? A. I would say around $15,000. Q. What, in your opinion, would be the market value, that is, what would you be able to sell the remaining land for after this 22 acres is taken out, taking into consideration the shape it is left in, and the remnants that are left there? A. I would say $6,500 or $7,000. Q. You don't think you could sell it for more than $7,000? A. No, sir. . . . Q. Let's see, then you think your total damage by reason of the taking of your 22-acre strip would be at least $8,000? A. Something like that, yes sir."

On cross-examination appellee stated that his opinion of the market value of his land was based on its value as pasture land and "what it would be worth to me." He also stated that he had recently bought a seven-acre tract similar to and near the lands here involved but situated on U. S. Highway 65 and for which he paid "around $300 an acre." This land was bought for building purposes and appellee admitted on cross-examination that lands suitable for a building site on the highway are considerably higher in price than pasture land located off the highway. On further cross-examination he testified: "Q. Is there other land in that vicinity that to your knowledge has sold that high? A. Yes. Q. Where? A. Just south of the airport 26 acres brought $3,500. Q. Does it have a house on it? A. Yes. Q. Does yours? A. No. Q. Does the house make a difference? A. No."

Two witnesses for appellees who were engaged in farming and livestock raising and were familiar with market values in the vicinity, by positive statements, fixed the damages sustained by appellees at $6,000, while a third placed the damage at $6,500. Another witness for appellees estimated the value of the entire 124-acre tract at "between $12,000 and $15,000" and stated that the value of the lands remaining after taking of the condemned strip would be "possibly one-half, or a little more." Witnesses for appellant estimated appellees' damages to be $3,000 to $3,500.

It will be observed that the estimate made by appellee, Ralph Moss, as to the amount of his damages is considerably higher than that of the four witnesses presented by him in support of his claim. When his testimony is tested by his cross-examination as to the facts forming the basis of his opinion, we conclude there is no reasonable basis to support a verdict in excess of $6,500. If, therefore, appellees will, within fifteen days, enter a remittitur for $1,500, the judgment will be affirmed for $6,500; otherwise, it will be reversed and the cause remanded for a new trial.

LITTLE *v.* MILES.

4-8501 212 S. W. 2d 935

Opinion delivered April 26, 1948.

Marcus Evrard and *W. P. Beard,* for appellant.

John D. Thweatt, Cooper Thweatt, J. F. Holtzendorff and *Frances Drake Holtzendorff,* for appellee.

GRIFFIN SMITH, Chief Justice. The jury found that drivers of three motor cars traveling in the same direction were negligent in the matter of speed, sudden stopping without warning, and, inferentially, the two cars following the first did not give due regard to the distance

separating them from the one immediately ahead. Consequently, there were rear-end collisions or "side-swipings" when the first car suddenly stopped. The plaintiff, appellant here, in meeting the three cars at the time of difficulty, was forced from the highway into a ditch. His truck was damaged $479.93, and spoilage to cargo amounted to $75. Judgment for $554.93 was asked.

The question is whether, in the absence of an instruction authorizing apportionment of damages, the jury had a right to find that A, B, and C, as responsible parties operating offending cars, were liable in different sums. There were three verdicts—two for $200 each, and one for $154.93. The motion for judgment *non obstante veredicto* was overruled. Appeal was taken on the theory that each defendant was answerable for the full amount.

We agree with appellant that a trial court should render judgment conformable to law, and the obvious mistake of a jury touching other than factual matters does not impair this right. *Crary* v. *Carradine & Newman,* 4 Ark. (Pike) 216; *Woodruff* v. *Webb,* 32 Ark. 612; *Coleman* v. *Utley,* 153 Ark. 233, 240 S. W. 10.

Act 315 of 1941—Contribution Among Tortfeasors—was discussed in *Schultz* v. *Young,* 205 Ark. 533, 169 S. W. 2d 648, and it was involved in *Ward* v. *Walker,* 206 Ark. 988, 178 S. W. 2d 62.

The Act provides that "When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their *pro rata* share."

The Shultze-Young case shows that the Act was prepared by National Conference of Commissioners on Uniform State Laws. Notes by the Commissioners were mentioned in the opinion.

Appellant, who seems to apprehend that two of the judgments are not collectible, may have been apportioned *out* of most of the recovery to which he is entitled. How-

ever, we have not the right to place a construction on the Act at material variance from its purpose. The intent was to permit finders of facts to decide relative responsibility of each tortfeasor and to hold him responsible in that proportion only. The law does not presume that full recovery can be defeated because one or more of the defendants may be execution proof. Sufficient evidence was before the jury to permit it to appraise the conduct of each defendant and to undertake, as fairly as practicable, to fix the responsibility of each. This having been done, the Court's action in denying appellant's motion for a judgment notwithstanding must be sustained.

Affirmed.

Opinion redelivered July 5, 1948.

[PER CURIAM. An opinion in this case was delivered April 26, 1948, affirming the judgments. It was withdrawn May 10 by an order of the Court, entered on its own motion. Further consideration of the issues compels the conclusion that the appeal is ruled by the Shultze-Young case, to which reference was made. There is an additional reason why, in the case at bar, judgment cannot be rendered for an amount greater than $154.93 under authority of the common law. See *Wear U. Well Shoe Co.* v. *Armstrong,* 176 Ark. 592, 3 S. W. 2d 698, and similar cases. The opinion withdrawn May 10th will be reinstated. It is so ordered.]

ORSBURN *v.* GRAVES.

4-8534 210 S. W. 2d 496

Opinion delivered June 14, 1948.

Buzbee, Harrison & Wright, for appellant.

G. W. Lookadoo, for appellee.

GRIFFIN SMITH, Chief Justice. If appellee is the widow of William Graves, then admittedly she is entitled to an award denied by Workmen's Compensation Commission; and Associated Indemnity Corporation, as carrier of the risk, must pay. The Commission, in its consideration of facts, found that the relationship of husband and wife did not exist, and then held, as a matter of law, that Act 319 of 1939 did not apply, the term "widow" having been limited" . . . to the decedent's wife living with or dependent for support upon [the employe] at the time of his death." Circuit Court reversed and ordered payment.

The injury causing death occurred October 31, 1945. Liability was admitted, but when Mary Graves claimed benefits accruing to a widow it was shown to the Commission's satisfaction that the marriage upon which she relied must have been bigamous, hence void.

Claimant, as a witness, testified that her marriage to William Graves occurred on a farm in Texas—a place called Blossom Prairie. The ceremony was performed by a white man, but the witness didn't know whether he was a preacher or a Justice of the Peace. Only three were present when the transaction occurred, Mary, William, and the person who officiated; and the date was May 15, 1923.

But Mary admitted that during the preceding year she had married Charles Debrow in Miller County, Arkansas. She had never taken any steps to annul the

marriage or procure a divorce, and so far as she knew Debrow had not. No papers of any description had been served on her, nor had she signed anything relating to a divorce. According to Mary's life-story, she and Debrow lived together but a short time. However, after the separation Debrow continued to live at Lost Prairie, near Texarkana. He was killed by a stroke of lightning while plowing in 1930. In the meantime, however—according to Mary's claims—Debrow had married another, or at least that was the understanding. Before Mary and Debrow married in 1922 they had two children—George, born in 1916, and Willie, born a year later; and, said the witness, "I had another child, Lena Mae Wells, but I just don't know when she was born. She is now eighteen." [Since the deposition was taken in October 1946, Lena Mae was born in 1928 if her age was correctly given].

Testifying further, Mary said that Lena Mae's father was Isom Wells, but "Lena Mae was born after Debrow and I separated."

Catherine Smith testified that she "courted" Charles Debrow four years, then "married" him in November 1927. He was living at Lost Prairie in Miller County from the time she first knew him until 1930, when he was killed. Her family moved to Lost Prairie in 1922, and she had known Charles since that time.

Question: "Did Charles say anything to you about having [procured] a divorce: did he tell you he was married to anyone?" A. "I am going to tell the truth, I don't want to make a mistake. I don't know." Later the witness said that Debrow told her he "had a divorce."

Cecil Orsburn, by whom William Graves was employed at Okolona when the accident resulting in Graves' death occurred, testified that Mary and William lived together, "and I think since 1923." He thought they were married.

The overwhelming weight of evidence is that Debrow, before and after marrying Mary, lived in Miller County, and that he was not divorced there.

It is urged, however, that testimony by Catherine Smith Debrow that she was married to Charles, and his statement respecting a divorce—insistence is that this and other evidence of conduct and community understanding were sufficient to raise a presumption that Debrow would not have married Catherine without divorcing Mary, hence Circuit Court was justified in finding, (a) that proof was insufficient to show that Debrow had not divorced Mary, this, in part, upon the showing that Charles was quoted by Catherine as having said he was divorced, and the Court thought Debrow might have procured a divorce in some county other than Miller; (b) because the record was "silent as to transactions subsequent to the death of Debrow in respect to Mary's relations with Graves, there is a legal presumption that they married after 1930."

It will be observed that in both instances, (a) and (b), the Court passed upon the weight of evidence, then applied legal conclusions. But the Commission, whose duty it is to weigh the evidence, had appraised the same factual matters, and from substantial evidence concluded (a) that there was not sufficient proof to show that Debrow had divorced Mary, and (b) the record was affirmative on transactions affecting Mary and Graves after 1930.

By the plaintiff's own testimony "William and Mary [I think] had been living together ever since they [came to Okolona in 1923"]. This was said by Cecil Orsburn, for whom Graves was working at the time he was killed. If Graves and Mary had been in Arkansas since 1923, the relationship had its inception shortly before or soon after the alleged marriage between Mary and Graves in Texas. This so-called common law marriage at Blossom Prairie was of no effect. Catherine Smith does not claim to have married Debrow until 1927—four years after Mary (who admittedly was Debrow's wife in 1922) made contact with Graves. There is not a scintilla of evidence that Debrow divorced Mary *between* 1922 and May 15, 1923.

If, as the plaintiff proved, she and Graves lived at Okolona from 1923, she was a resident of Clark County

during the entire period in question, excepting, perhaps, the fraction of a year in Texas. The evidence is overwhelming—that Debrow remained in Miller County; and, while proof of a subsequent marriage creates a presumption of divorce, there is no inference or presumption that an illegal divorce was procured. Since Debrow was at all times a resident of Miller County, he could not legally invoke the aid of a different jurisdiction. Pope's Digest, "Venue," Sec. 4383.

In *Edelstein* v. *Brown et al.*, 35 Tex. Civ. App. 625, 80 S. W. 1027. Texas Court of Civil Appeals, it was held that where cohabitation was begun at a time when the woman was the wife of another, and there was no evidence of any subsequent change in their intentions as to the relationship existing between them, the fact that after the woman secured a divorce the cohabiting couple held themselves out as husband and wife was not sufficient to establish a common law marriage. Mr. Justice FLY, who wrote the Texas court's opinion, referred to Edelstein as the woman's "paramour," rather than her common law husband.[1]

While Arkansas recognizes a valid common law marriage—that is, one consummated in a state authorizing that procedure—the recognition is accorded because, to do otherwise, there would inevitably be involved a denial of full faith and credit.[2]

Keezer, in his work on Marriage and Divorce, Third Edition, by Moreland, says that growing unpopularity of common law marriage is shown by the fact that in the last decade it has ceased to exist in Delaware, Minnesota, Nebraska, Nevada, and New Jersey by express prohibitory legislation, and it has been disapproved by the Supreme Court of Wyoming, while other courts have

[1] On the question of presumptions, see *Lathan* v. *Lathan*, 175 Ark. 1037, 1 S. W. 2d 67; *Goset* v. *Goset*, 112 Ark. 47, 164 S. W. 759, L. R. A. 1916C, 707; *Gray* v. *Gray*, 199 Ark. 152, 133 S. W. 2d 874; *Martin* v. *Martin*, 212 Ark. 204, 205 S. W. 2d 189; *Brotherhood of Railroad Trainmen* v. *Fountaine*, 155 Ark. 578, 245 S. W. 17.

[2] Common law marriages are authorized in eighteen states: Alabama, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Michigan, Mississippi, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, and Texas.

depricated its existence. It was abolished in England in 1753—more than a decade prior to publication of the first two volumes of Blackstone in which that great law commentator characterized marriage, as viewed by English law, "in no other light than a civil contract." It is not authorized generally among other peoples, and was abolished by the Catholic Church at the Council of Trent in 1563. In conclusion it is said: "The pioneer conditions which fostered common-law marriage in the United States have disappeared, except perhaps in Alaska, which does not authorize such marriage. The clerk's office is available to all, and none are beyond the sound of church bells. If reason be the life of the law it would appear wise to abolish common-law marriage everywhere in the United States by individual action in the several states in which it still enjoys a tenuous hold, for its continuance seems to promise more abuse than use."

We have consistently held that in determining questions of fact discretion of the Compensation Commission will not be disturbed in making or denying an award if action is based upon substantial evidence. In the case at bar we think there was proof abundant that an invalid "marriage" did not entitle appellee to the consideration she contends for; hence the judgment must be reversed and the Commission's order reinstated.

SCHULZE *v.* PRICE.

4-8557 213 S. W. 2d 365

Opinion delivered June 21, 1948.

Rehearing denied October 4, 1948.

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

Robert J. White and *Reece Caudle,* for appellee.

SMITH, J. This appeal presents only the question, whether the testimony sustains the verdict upon which the judgment was rendered, from which is this appeal.

The Russellville Livestock Sales Company operates a barn where auction sales of livestock are conducted from time to time. Horses and other livestock are brought there for sale. One Kelley took several horses there for sale. When sold at auction, the animal sold is said to go through the ring, that is, it is sold at public auction. One of Kelley's horses did not go through the ring, and was not sold at auction, but was sold at a private sale to appellant, Schulze, who had told his neighbor, Frank Vaughan, that he desired to buy a horse for light work. Vaughan, who was employed by the Sales Company, told Schulze that there was a horse for sale in the barn which he thought would answer his purposes, and the horse was shown to Schulze by Vaughan.

Schulze detailed the conversation relating to the sale as follows: "Q. You bought the horse on the representation of Mr. Kelley and Mr. Vaughan? A. Yes, sir. Q. And you relied solely on the representation that Mr. Kelley, the owner of the horse, made to Mr. Vaughan and which Mr. Vaughan represented to you? A. I relied on the statement that was made to me by Mr. Vaughan, also

the statement coming from Kelley who was supposed to own the horse. Q. You knew that Mr. Kelley was the owner, or you assumed that he was? A. I assumed that he was the owner from what was told me."

When the horse was shown Schulze it was discovered that it had a knot on its throat which he was told had been caused by a kick or a bruise. The horse was priced to Schulze at $55, but Kelley agreed to reduce the price to $50 on account of the knot. As to this reduction Schulze testified as follows:

"The $55 would have been perfectly all right if the horse had been sound as represented. I agreed to pay $50. My understanding was that the $5.00 was being knocked off due to the fact that this horse had this 'knot' caused by a kick or a bruise, otherwise it was sound and had no disease. Q. That was Kelley's representation to Vaughan? A. Yes, sir. Q. That wasn't the representation of Mr. Criner or Mr. Price? A. I don't think that entered into it."

Price testified that he and Criner operated the Sales Company as partners, and that they did not sell the horse to Schulze, but the sale was made by Kelley. Asked why the check was not made to Kelley, Price said he did not know, that possibly Kelley would not accept the check, but that they cashed it in order to collect a charge of $1.05 for the use of their facilities.

Schulze took the horse home and found it suffering from distemper. He demanded a refund of his money, which the Livestock Sales Company refused to make, and he stopped payment of his check.

The Sales Company sold four other horses for Kelley, which did go through the ring, and the statement given Kelley included the $50 paid for the horse here in litigation. Schulze testified that he sold the horse for $75, but that he had incurred expenses amounting to $65.78, which included feed, medicine, pasturage and the expense of certain plowing, "that I intended to use the horse for," the amount of the separate items not being shown.

When Schulze stopped payment of the check, Price and Criner, doing business as the Russellville Livestock Sales Company, sued Schulze for the amount of the check. The judgment in their favor rendered by the Justice of the Peace was appealed and on the trial of the appeal judgment was again rendered in favor of the plaintiffs, and the garnishment of funds of Schulze on deposit in a bank was sustained.

The cause was heard by the court, by consent, sitting as a jury, and no request was made for declarations of law, or findings of fact, and we may therefore consider only the sufficiency of the evidence to support the judgment.

We think it was sufficient. The court may have found that the Sales Company did not make the sale and collected only for the use of its facilities for the exhibition of the horse for sale. The finding may also have been made that no agent of the Sales Company made any representations as to the condition of the horse, but even so Schulze admits that he knew who the owner was, and for whom Vaughan was acting in exhibiting the horse.

In the recent case of *Ferguson* v. *Huddleston,* 208 Ark. 353, 186 S. W. 2d 152, it was said: "The general rule is stated in *Drake* v. *Pope,* 78 Ark. 327, 95 S. W. 774: 'It is well-established that a broker cannot be held personally liable to the third party upon a contract for a disclosed principal; and if the third party knew, or had sufficient knowledge to create an inference, that the broker was acting for another, then the broker is not liable. But if he does not disclose his principal nor the fact that he is acting as a broker, but deals personally, then he is liable, although in fact he acted as broker, and his principal may be held after disclosure, but this does not prevent his personal liability if the third party elects to hold him instead of his after-disclosed principal. (Citing authorities.)' "

Here even though Vaughan participated in making the sale, it is not disputed that he was acting for Kelley, a known principal, for whose representations the Sales

Company was not responsible, as the sale was made by Kelley and not by the Sales Company. The sale was not made by the Sales Company in the usual and ordinary course of its business, or at all, and as it paid full value for Schulze's check, it is entitled to recover the amount paid in cashing it. The judgment of the court below to that effect must be affirmed and it is so ordered.

DANIELS *v.* NEWSOM.

4-8513 213 S. W. 2d 367

Opinion delivered June 21, 1948.

Rehearing denied October 4, 1948.

Crumpler & O'Connor, for appellant.

T. O. Abbott, for appellee.

GRIFFIN SMITH, Chief Justice. Ownership of a city lot in El Dorado is involved. Wilson G. Newsom claims

(a) through quitclaim deed of Ethel James, Receiver for Sewer District No. 4, executed January 21, 1943, and (b) by virtue of a deed from the Commissioner of State Lands, dated February 10, 1943. The State deed sought to convey the "Frl. C. Pt. 90 x 110 ft., Lot 6, Block 8, Kinard Subdivision." We agree with appellant that "Frl. C. Pt." as a description is too indefinite in a tax sale to vest title in particular property, and it conveyed nothing. If appellee prevails his ownership must stem from the Receiver's deed.

The cause was heard upon Daniels' substituted complaint, in which it was alleged that title to the property described in the margin [1] was acquired in 1920 when appellant purchased from W. J. Newsom, appellee's father. A contention is that the Receiver's deed failed in its purpose for want of authority by that official to effectuate a conveyance (a) because the statutory penalty of ten percent was exceeded, and (b) because all lands described in the Commissioner's report of sale were offered *en masse,* and for a sum in excess of the total charged against all the tracts. Numerous other irregularities were asserted.

Although there is a great deal of proof, some relating to the original sale under authority of the District's Commissioners, the trial Court held—and properly, we think,—that the proceeding in the instant suit was a collateral attack on the decree through which the District acquired title to the property; hence, extrinsic evidence could not be heard to impeach the decree. The record showed that a commissioner was appointed to conduct the sale, and that his report was duly made to the Court, and approved. Apparently no deed was executed, but a certificate of purchase was mentioned in the decree.

[1] [Being in Section 32, Township Seventeen South, Range Fifteen West, Union County], commencing at the northeast corner of the northeast quarter of the northeast quarter of said Section Thirty-two and running south 190 yards, thence west 40 feet, more or less, to the west side of the concrete sidewalk, thence west 304 feet to the point of beginning for this lot, thence running south 90 feet, thence west 110 feet, thence north 90 feet, and thence east 110 feet to the point of beginning for this lot; this lot being a part of Lot Six in Block Eight of the Kinard Subdivision to the Town of El Dorado, [according to plat on file, etc.].

Since the District was purchaser, and did not object to the Commissioner's failure to have a deed approved and delivered, its title was referable to the decree, and was as effective as though the formalities ordinarily attending a judicial sale had been meticulously complied with. If the Receiver was vested with power to sell the District's property—or as the only material issue here is whether the record sustains the Court's finding that the lot sold by the Receiver can be identified; and, if so, did it belong to the District when the Receiver acted.

As the complaint discloses, Lot Six of Block Eight lies within Section Thirty-two, Township Seventeen South, Range Fifteen West, Union County. South West Avenue (extending north and south) is immediately east of Section 32. The first transaction affecting the area involved is a deed from F. P. Stevenson to W. J. Newsom. The description begins at a point 190 yards (570 feet) due south of the northeast corner of the section line. It shows the so-called "floating" property within the quartersection, with a beginning 570 feet south of the northeast corner. This deed, however, conveyed a lot 90 feet north-south by 200 feet east-west. The same deed, however, conveyed a second lot, beginning where the east-west line mentioned in the first deed ended, and extending 430 feet west, thence south 90 feet, east 430 feet, north 90 feet, to the point of beginning. The two descriptions created the strip 630 by 90 feet heretofore referred to.

In 1920 W. J. Newsom conveyed to W. G. Newsom a lot 176 feet deep off the west end of the 630-ft. strip, but in describing the property the beginning was 570 feet south of the northeast corner of Section 32, "thence west 40 feet more or less to the west side of the concrete sidewalk, thence west 414 feet to the point of beginning for this lot, thence south 90 feet, thence west 176 feet," etc. Here, for the first time, in projecting the line west from a point 570 feet south of the northeast corner of Section 32, mention is made of 40 feet, and a sidewalk; but by adding 40, 414, and 176 feet the full east-west length of Lot 6 is found to be 630 feet, so the guiding point is still

east of the forty feet, and the 40-ft. strip is east of the west side of the sidewalk.

On the same day W. J. Newsom conveyed to W. G. Newsom, as just shown (January 21, 1920), W. J. Newsom conveyed to E. M. Daniels a lot 90 x 110 feet carved from Lot Six, and lying immediately east of the 176-ft. strip sold by W. J. to W. G. Newsom. The deed, as in the other conveyances, had its point of beginning 570 feet south of the section corner, "thence west 40 feet, more or less, to the west side of the concrete sidewalk, thence west 304 feet to point of beginning for this lot, thence running south 90 feet, thence west 110 feet, thence north 90 feet, and thence east 110 feet to the point of beginning for this lot." By adding 304 and 40 feet "as the point of beginning for this lot," as the deed says, the sum of 344 taken from the 630-ft. east-west measurement of Lot Six leaves a remainder of 286 feet, or an amount equal to the two lots lying to the west, one being 110-ft. in length, and the other 176.

Concurrently with the foregoing—January 21, 1920—W. J. Newsom conveyed to Grover Sontag a lot 90 x 66 feet lying immediately east of the Daniels lot. In the deed to Sontag, the elder Newsom again picked up the point 570 feet south of the section corner, went west 40 feet more or less to the west side of the concrete walk, then west 238 feet "to the point of beginning for this lot," then south 90 feet, west 66 feet, north 90 feet, and east 66 feet to the point of beginning "for this lot." By adding the east-west measurements mentioned—238, 40, and 66-ft.—there is a total of 344 feet; hence the western boundary of the Sontag lot is the east boundary of the Daniels lot, and the full area of 630 feet is accounted for.

After executing the conveyances just described, W. J. Newsom still owned the property east of the three lots taken from the west end of the 630-ft. strip, or 278 feet. It was acquired by W. G. Newsom from Mrs. S. L. Carroll. In describing this lot the point of beginning was 570 feet south of the section corner, thence south 90 feet, west 278 feet, north 90 feet, and east 278 feet to the point

of beginning. It will be observed that in this deed, executed in 1938, no mention is made of the sidewalk, nor is there a reference to the 40 feet referred to in some of the other deeds.

The next transaction involves sale of the Daniels lot under the receivership. It is identified as "Center part of Lot Six, 90 x 117-ft., described as: Beginning NE corner of W. J. Newsom's lot, run W. 304-ft. for beginning, S. 90-ft., W. 117-ft., N. 90-ft., E. 117-ft. to beginning, Block Eight, Kinard Addition."

Can this lot be located?

The northeast corner of W. J. Newsom's lot would be a point 570 feet south of the northeast corner of Section 32. Proceeding west 304 feet a point east of the Daniels lot is reached. Because the property deeded by Mrs. S. L. Carroll to W. G. Newsom in 1938 definitely begins 90-ft. south of a point 570 feet south of the northeast corner of Section 32, it necessarily follows that this point is 660-ft. south of the section corner. From the point of beginning "for this lot," the direction is 278 feet west. This corresponds with the items of 238 and 40-ft. mentioned in the deed from W. J. Newsom to Grover Sontag, but it must be remembered that three lots had been taken from the west end of the 630-ft.—one 187-ft., one 110-ft., and the Sontag lot of 66-ft. This left 278-ft., 238-ft. of which was west of the 40-ft. strip; but, as has been shown, distance from the Daniels east line to "the northeast corner of the Newsom lot" is 344-ft. instead of 304. Nor does the Daniels lot occupy the "center part of Lot Six." Being 110-ft. in depth, a lot 176-ft. lies west of it, and 344-ft. are east. If in the center of Lot Six, there would be 260 feet of the parent lot on either side, irrespective of ownership.

Appellee testified that during the noon hour of the day of trial, while Court was in recess, he took a steel tape and measured *from the street* on South West Avenue to the east line of the property in litigation—the Daniels lot. The distance was 304 feet. The street had been established for many years: in fact, was there when

the witness was born. Effect of this testimony, if it could be received, is that the 40-ft. street, when added to 304 feet, would project the east-west line of the Newsom lot 344 west of the section line, and the Receiver's description would be nearer correct, although a strip seven feet wide is not accounted for by any record entries.

Newsom seeks to exclude certain evidence appellant thinks would show invalidity of the original sale for want of power. He correctly takes the position that in a collateral attack the record alone may be considered, yet in effect he would reform the Receiver's deed by testifying that a correct description may be had by measuring from a point he thinks was *intended,* then going 304 feet west. But appellee cannot have the benefit he seeks by excluding everything but the record, then amplifying the record with his personal testimony.

We must assume that the notice of sale was in harmony with descriptions subsequently used, for the decree in the District's favor recites regularity. If this be true, and if we accept the description, "Beginning [at the northeast] corner of W. J. Newsom's lot" as the same point referred to in all of the deeds—that is, the northeast corner of section 32—then 304 feet west includes 26 feet of the Sontag lot. Since that lot, east and west, is 66 feet, the point of beginning in the Receiver's deed would be 40 feet east of the northwest corner of Sontag's line, thence south 90 feet, and west 117 feet. This would leave untouched 33 feet of the west side of the Daniels lot as described in the Receiver's deed; but, inasmuch as Daniels originally acquired 110 feet instead of 117, there is a discrepancy of seven feet. Add this, speculatively, to the undescribed 33 feet just mentioned, and the same total of 40 feet protrudes itself—indicating that the Commissioners and the Receiver had in mind that the W. J. Newsom lot began at a point 40 feet west of the northeast corner of section 32, but south of it.

There is no legal basis for holding that the west 33 feet of the Daniels lot was included in the sale. It was not described in any of the proceedings, and the power to sell was lacking. Intendment and the good office of equity

cannot be substituted for due process, however meritorious the result might be.

To hold that the sale was good as to the east 77 feet, but bad as to the west 33 feet, would measurably harmonize with descriptions, but would not comport with intent.

It follows that the decree must be reversed, with directions to quiet title in Daniels when necessary adjustments have been made. The Chancellor did not adjudicate other claims interposed; hence the cause is remanded with directions to dispose of the controversy in a manner not inconsistent with this opinion.

Ross *v.* Ross.

4-8565 213 S. W. 2d 360

Opinion delivered June 21, 1948.

Rehearing denied October 4, 1948.

Edward J. Rubens and *Hale & Fogleman,* for appellant.

Dodd & Colvin, for appellee.

HOLT, J. The parties here were married July 10, 1937, in Madison, Wisconsin. Appellee, Mayford C. Ross, filed the present suit for divorce in Arkansas February 21, 1947, alleging as a ground therefor separation without cohabitation for three consecutive years (subdivision 7, § 4381, Pope's Digest). On November 2, 1947, a decree was entered granting to appellee a divorce from appellant, in accordance with the prayer of his complaint.

This appeal is from that decree.

Appellant, for reversal, argues that the decree is against the preponderance of the evidence, and after a careful review of all the testimony, we have reached the conclusion that this contention must be sustained.

The record reflects that the present suit is the fifth attempt by appellee to secure a divorce from appellant. Appellee testified: "A. I originally instituted suit for divorce in Detroit, Michigan, but the decree was denied. This was in 1943. Since that time I have instituted three actions, exclusive of this one, in Crittenden county, Arkansas."

The cause comes to us for trial *de novo*.

The burden was on appellee to show by a preponderance of the evidence separation without cohabitation for three consecutive years. We held in *McClure* v. *McClure*, 205 Ark. 1032, 172 S. W. 2d 243, that the word "cohabitation" in the above section was used by the Legislature in its popular sense, and meant "sexual intercourse."

We said in *Bell* v. *Bell*, 179 Ark. 171, 14 S. W. 2d 551, (quoting with approval from *Pryor* v. *Pryor*, 151 Ark. 150, 235 S. W. 410): " 'Divorces are not granted upon the uncorroborated testimony of the parties and their admission of the truth of the matters alleged as grounds therefor.' It was also said in the above case: 'In conflicts between the two depositions (husband and wife) hers must be deemed of greater weight, because he seeks to obtain a divorce by his own testimony, and she attempts to defeat it by hers. He must establish alleged causes of divorce by corroborating evidence. In getting

at the truth in relation to private scenes, quarrels and injuries between husband and wife, unwitnessed by others, it may be well to admit the testimony of the parties in divorce cases, but, because of the rule, founded on public policy, that a divorce will not be granted upon the unsupported testimony of the party seeking it, it necessarily follows that the greater weight must be given to the party opposing it, where their depositions conflict."

The evidence was presented by depositions.

Appellant testified: "Q. Were you in the company of your husband, Mayford Charles Ross, in the fall of 1946? A. Yes, several times. Q. Did he call on you at your apartment? A. Yes. Q. Did you accompany him to dinner and to various places of amusement? A. Yes, several times. Q. While in your apartment, did you have sexual relations with your husband? A. Yes. Q. Did he ask you to grant him a divorce, and then state that you could live together as common law husband and wife? A. Yes."

Irene Galison testified on behalf of appellant: "Q. Were you in the company of the plaintiff and the defendant in the fall of 1946? A. Yes. Q. Did you see the plaintiff kiss, and otherwise display affection toward her? A. Yes. Did they come into your presence together? A. Yes."

Appellee contradicted the above testimony of appellant and Miss Galison, stoutly denying that he had intercourse with his wife at any time since 1942.

He further testified: "Q. How long did you live in Detroit during the year 1946? A. Approximately nine months. . . Q. During that week (meaning the week of June 9, 1946) above mentioned, did you phone Mrs. Ross three or four times? A. I do not recall the week of June 9th specifically, but I know that I never called her as much as three or four times during any one week. I did call her, however, on several occasions to try to persuade her to let the divorce go through without further contest. Q. Between June and November of 1946, did you not take Mrs. Ross out on several occasions and

accompany her to her home? A. I was in her company on three occasions during the nine months I was in Detroit, but I do not think that all three of the times were between June and November. I met her on one occasion at her suggestion, and on two occasions at my suggestion. The first time I met her at seven o'clock in the evening at the Bouche Cocktail Lounge which is near her apartment." During this meeting a friend of appellee was in the cocktail lounge at appellee's request without appellant's knowledge. Appellee testified that he did not take appellant to her apartment following this meeting.

A few weeks later, at appellee's suggestion, he again met his wife at another cocktail lounge near her apartment. This meeting, at 2:30 in the afternoon, lasted for about two hours. Appellee's friend was again present in the cocktail lounge without appellant's knowledge. Both parties had several cocktails and following the meeting, appellee secured a car and took appellant home to her apartment. He testified that he did not go in but left her at the door. His witness friend followed in another car.

Still on another occasion, he admitted meeting appellant at the apartment of one of appellant's friends, a man whose name he could not recall. There was also present on this occasion appellant's friend, Irene Galison. This meeting, he testified, was for the purpose of attempting to reconcile their differences and no unpleasantness occurred while there. "The girls had prepared some sandwiches in the kitchen and called to us to come on out to the kitchen, which we did, and ate the sandwiches." He then left the apartment. He testified that this was the last time he had seen appellant.

He further testified: "Q. Did you not, in the presence of the said Irene Galison, say that your wife was a good person and just as clean inside as out? A. I do not think I made any such statement, although I attempted never to belittle or ridicule her in the presence of her friends, and it is possible that I made this statement. Q. On one of your visits with your wife, did you not ask her to permit you to take a divorce and then suggest that after the divorce was granted, you would live with her as

common law husband and wife? A. I have never suggested anything remotely resembling that. She may conceivably have reference to the fact that I once told her that under no circumstances would I consider having any relations of any nature with her until after the divorce was granted because I certainly was not going to jeopardize the grounds upon which I was relying, which is three years continuous separation, by living with her or committing anything that would put any question of doubt that the separation had been broken."

We think the effect of this testimony of appellee demonstrates that he not only was willing to secure a collusive divorce, but also would not be averse to having sexual relations with appellant after the divorce was granted, and the force to be given to his testimony thereby materially weakened.

After a careful review of all the testimony and weighing it in the light of the rules above announced, we have reached the conclusion that appellee has failed to discharge the burden which rested upon him to show by corroborative evidence and a preponderance thereof, separation for three years without cohabitation.

For the error indicated, the decree is reversed, and the cause dismissed.

MAGNOLIA PETROLEUM CO. *v.* LANGFORD.

4-8552 212 S. W. 2d 22

Opinion delivered June 28, 1948.

Substituted for one delivered May 31, 1948.

Armistead, Rector & Armistead, for appellant.

George O. Patterson and *Jack Langford,* for appellee.

SMITH, J. This is a suit to restrain appellant from using as a roadway a strip of land thirty feet wide, and four hundred sixteen feet long extending from McKennon Street south to Griffin Street in the City of Clarksville, Arkansas, which runs through block 46 of that city. This block fronts the right-of-way of the Missouri Pacific Railroad Company and according to a plat thereof, which was offered in evidence by appellee, has been subdivided into five lots. W. H. Langford, who owned the property in his lifetime, and who died in 1937, sold lots in this block in 1919, 1920, 1921 and 1926, this sale last mentioned having been made to appellant, Magnolia Petroleum Company. The other sales were made to the Standard Oil Company, the Sinclair Oil Company and the Continental Oil Company. The oil companies bought these lots to afford access to the railroad, their western boundary being the right-of-way of the railroad company.

All of these oil companies improved their respective lots by building storage tanks thereon. In 1922 or 1923, Langford laid off the strip of land here in question, extending through block 46, from McKennon Street to Griffin Street. A fence which had been in place along

the west line of the block was removed and rebuilt to form the eastern line of the strip of land in question, leaving a space of thirty feet between the fence as rebuilt and the east line of the Magnolia property. This suit was filed in 1946 to enjoin the use of the strip of land as a road, and from a decree granting that relief is this appeal.

It is conceded that no formal dedication of this strip of land as a street was ever made, but it was alleged, and we think the testimony shows, that the public acquired a right by prescription to use it as such.

The deed to the appellant refers to the property as a part of block 46 and presumptively the deeds to the other oil companies employed similar descriptions. At any rate, all the oil companies have for many years made the same use of their property and the enjoyment of this use involved the right to use the strip of land which is designated as a gravel street on the plat. The use of this strip of land which many witnesses referred to as a street is essential to ingress and egress from the front end of the Magnolia lot, although a side entry may be effected from that lot to the street south of it, and is indispensable to the owners of the inside or interior lots, and if the use of the street is enjoined, the owners of these lots cannot use them for the purposes for which they were purchased. Indeed it was conceded that the strip of land here in question was a way of necessity for the Sinclair property and also for the Continental property, and for that reason a non-suit was taken in the separate suits which had been filed against those companies.

Mr. Langford, the grantor in these deeds to the oil companies, above referred to, and from whom appellee inherited his title, died in 1937, and the son, as heir at law, brought this suit. A son-in-law of Mr. Langford, called as a witness for appellee, testified as follows:

He was asked: "Q. Do you recall any instances with reference to the opening of that roadway? A. I helped Mr. Langford—my father-in-law, the old man, you know

—measure that off. I don't know what year it was. If I remember right, it was about 1923—either 1922 or 1923; some time in there. In other words, it was after he sold the second lot. We went down there and I held the rod for him and he measured that thirty-foot roadway there. Q. All right. Now, when you say 'thirty-foot roadway', you mean thirty feet toward the east from the oil company properties running east and west? A. Yes, sir. Q. And did he also measure it from the north, from where McKennon Street now is to where Griffin Street now is? North and south along that tract . . . A. Yes. Q. . . . thirty feet wide across there. And you helped him measure it, is that correct? A. Yes, sir. Q. Do you know what his . . . what he was doing when he did that? A. Do you mean . . . Q. What? A. . . . for what purpose? Q. Yes. What his purpose was. What he was doing by doing that. A. I will state his purpose was to give these fellows that he sold lots to room to get in there. He said that he was going to . . . ''

The court interrupted to say: ''You needn't state what he said. If you know that's what the purpose was, you can answer it that way.''

The witness had already answered.

The decree of the court is defended upon the ground that the use of the road or street was permissive and that it ran over land which was vacant and unoccupied and the insistence is that the owner had the right to withdraw this permission at his pleasure, and numerous cases including that of *Bridwell* v. *Ark. P. & L. Co.,* 191 Ark. 227, 85 S. W. 2d 712, which cites a number of other cases, is cited in support of that contention. There are points of distinction between this and the Bridwell case, *supra,* which renders that case inapplicable here. For instance, in the Bridwell case the fact is recited that the way used in that case was not upon a well established or defined route.

The contrary is true here. The road was well defined and had been used not only by the owners of the lots, but by the public generally for a period of more than

twenty years. It was shown that on certain occasions the road had been worked by both the city and the county, and its boundaries were always well defined. The city had filled holes in the street with rock and shale, and owners of the lots had also filled holes in the road as they developed. A number of witnesses, long-time residents of the city, testified that the public generally used the road for many purposes, not only in going to and from the property of the oil companies, but in crossing the railroad property at Griffin Street.

A witness was asked: Q. "Can you say how many automobiles or vehicles of one kind or another travel that roadway daily?" He answered: "Well, there is lots of traffic on it. I will say that. Q. Would you say there is as many as a hundred cars a day, or what? A. Now I don't know—I don't believe there is that many; sometimes there might be and sometimes there is not. It's just owing to the amount of traffic on the streets over here. Some use it delivering in their trucks; and then there was lots of traffic there when they had the scales over there, and the gin, and all. There was lots of cars and trucks used that. I couldn't tell you just how many; I wouldn't say. But there was lots of them used it." In other words, the traffic was formerly even heavier than it is now.

A ditch had been dug along the street and the manager of the light and water company in the city testified that he built a power line along the street in 1923, without asking or obtaining permission from appellee or his predecessor in title, and upon the assumption that the street was a public highway. That it was so used appears to be established not only by a preponderance of the testimony, but by the undisputed testimony. The court evidently so found for at the conclusion of the testimony the court said: "I believe the only question involved is whether it's been in adverse or permissive use during these years. As the court sees it, permissive use —don't put down what I am saying." The remainder of the court's conclusions were not reported.

It was held in the case of *Holthoff* v. *Joyce,* 174 Ark. 248, 294 S. W. 1006, to quote a headnote: "Where the owner of land divided it into lots and blocks, and sold lots by reference to a plat, he irrevocably dedicated the streets and alleys to public use."

While no plat of this land was ever filed of record, and no formal dedication of the land for public use was ever made, the deed to the Magnolia Company warranted the assumption that the strip of land had been dedicated to the public use. Indeed, the plaintiff's own testimony shows that the old fence was removed and rebuilt to apparently enclose the street, and that this was done to enable the purchasers of the lots to use the lots for their intended purposes.

Appellant bought its lots after the fence had been removed and rebuilt for the apparent purpose of providing egress and ingress to the lots, and if there was any intention not to dedicate the land to a public use, that intention was never disclosed and the public used the road without express permission to do so, and we think this use was hostile and adverse to any claim of right on the part of appellee or his predecessor in title.

If there were no formal dedication, and none was shown, yet we think appellant has by prescription the continuing right to use the road in going to and returning from the lot which it had bought from appellee's ancestor, and the decree will be reversed and the cause will be remanded with directions to dissolve the injunction and dismiss the suit as being without equity.

OZAN LUMBER COMPANY *v.* TIDWELL.

4-8576 212 S. W. 2d 349

Opinion delivered June 28, 1948.

S. Hubert Mayes, for appellant.

William F. Denman, for appellee.

HOLT, J. August 27, 1945, appellee, Clarence Tidwell, a resident of Nevada county, was involved in a collision in that county with a truck belonging to appellant, Ozan Lumber Company, and driven by its employee, C. M. Kirby.

Thereafter, on September 5, 1945, Tidwell brought suit against the appellant, Lumber Company, in the Nevada Circuit Court. In his complaint he alleged, among other things, that as the driver of appellant's truck attempted to pass him, appellant's driver "carelessly and negligently pulled his truck onto and against the plaintiff's (appellee's) truck, which was standing only one (1) foot in the said Cale road, in clear, open view of the driver of the said truck and trailer then and there operated by the defendant, Ozan Lumber Company, by their agent, servant and employee, one Kirby, completely demolishing plaintiff's truck and at the same time seriously, painfully and permanently wounding and injuring the plaintiff, Clarence Tidwell, as hereinafter set out and charged."

He prayed for damages for personal injuries in the amount of $25,000. There was no prayer for property damage.

Upon a trial, January 14, 1946, a jury awarded damages in the amount of $15,000. Upon appeal to this court, a remittitur was ordered and the judgment affirmed for $4,500, conditioned on appellee's acceptance of the remittitur.

Thereafter, appellee accepted the judgment as modified and appellant duly satisfied the judgment.

The present suit was instituted February 12, 1947, by Clarence Tidwell against the Ozan Lumber Company, in which he sought to recover $750 alleged damages to his truck which grew out of the collision on August 27, 1945, *supra.* The allegations with reference to damages to appellee's truck were identical with those alleged in the former suit, and the parties are the same.

Appellant interposed a general denial and specifically pleaded *res judicata,* and said: "This defendant states that all elements of damage flowing from the accident on August 27, 1945, have been completely adjudicated by virtue of the filing of the original suit referred to herein, the securing of a judgment, and the satisfaction of the judgment as affirmed by the Supreme Court of the State of Arkansas. WHEREFORE, this defendant pleads *res judicata* as a complete bar to a recovery in this suit, etc."

The trial court, sitting as a jury, after denying appellant's plea of *res judicata,* rendered a judgment in appellee's favor for $750 as prayed. This appeal is from that judgment.

For reversal, appellant contends: "I. The court erred in overruling the plea of *res judicata.* II. The verdict is excessive."

We have reached the conclusion, after a review of the record, that the court erred in refusing to sustain appellant's first contention. It, therefore, becomes unnecessary to consider the second.

The facts are undisputed. The parties were residents of Nevada county, the collision occurred there, and both suits were instituted and tried in the Circuit Court

of Nevada county. The parties were the same in each action.

Appellee, Tidwell, alleged in his first complaint, filed in 1945, not only a cause of action for personal injuries, but also a cause of action for the destruction of, or damages to his truck, but he did not pray for any property damage, a right that was open to him and which in view of the allegations in his complaint he should have litigated in his first suit. We hold, therefore, that the former judgment was conclusive not only of all damages for personal injuries but for any damages to his truck.

In *Robinson* v. *Missouri Pacific Transportation Company,* 192 Ark. 593, 93 S. W. 2d 311, in an opinion by Mr. Justice MEHAFFY, this court said: "We have many times held that all questions within the issue, whether formally litigated or not, are settled by the decision of the court. 'It is well-settled doctrine in this jurisdiction that a judgment of a court of competent jurisdiction is conclusive of all questions within the issue, whether formally litigated or not. It extends not only to questions of fact and law which were decided in the former suit, but also to the grounds of recovery or defense which might have been, but were not, presented.' (Citing many cases)." See, also, *Bass* v. *Minich,* 194 Ark. 589, 109 S. W. 2d 139.

In *McDaniel* v. *Richards,* 141 Ark. 453, 217 S. W. 478, Mr. Justice WOOD, speaking for the court, said: "When a complaint on its face shows that a cause of action stated therein was between the same parties and involving the same subject-matter as that determined or which could have been determined in a former suit between them, the complaint fails to state a cause of action which the plaintiff can maintain against the defendant and is demurrable. The demurrer in such case will be treated as a plea of *res judicata,* and the case disposed of the same as if such formal plea had been filed."

As indicated, appellant's plea of *res judicata* should have been sustained. For this error, the judgment is reversed and the cause dismissed.

The Chief Justice and Justice McFaddin concur. Millwee, J., dissents.

Hensley *v.* Hensley.

4-8581 212 S. W. 2d 551

Opinion delivered June 28, 1948.

W. F. Reeves, for appellant.

N. J. Henley, for appellee.

Smith, J. Appellant filed suit against appellee, her husband, in which she prayed a divorce be granted her, that she be awarded custody of their infant daughter, four years old, that an allowance for the support of the child be made and for alimony.

The only relief granted was to award appellant the custody of the child, with the right of visitation on the part of its father, who was directed to pay appellant $15 per month for the child's support and from that decree is this appeal.

The only relief prayed by appellant on this appeal is that she be granted a divorce. The ground alleged therefor was that appellee had so mistreated her as to render her condition as his wife intolerable.

The testimony indicates that the parties were out of one quarrel only to engage in another, and that neither was blameless. They had a number of fights in which appellant said that she put in as many licks as she could. A divorce had previously been granted on her petition, and they remarried. Later a second divorce was granted

on appellee's petition, and they later were married for the third time. Appellant now seeks a third divorce.

Appellant left her home without telling appellee that she was going to do so. She had previously taken the child to her mother's home. She explained this action by saying that she was afraid to tell her husband that she was going to leave, as she was afraid he would whip her if she did so; that he had frequently whipped her with a cane or with his belt. Three neighbors testified that appellant exhibited welts on her thigh and on her legs which appellant testified had been caused by appellee whipping her with his belt. No one saw him do this except appellant and there was no corroboration of her testimony that appellee had whipped her, but the welts corroborated appellant's testimony that someone had struck her and more than once. Appellee testified that he had never struck her, but there was no evidence that anyone else had.

There are conflicts in the testimony which cannot be reconciled. Appellee testified that he loved his wife, and did not want her to have a divorce, and that he would be glad to have her return to his home. Appellant testified that appellee told her that he no longer loved her, but that he did love their child, and that he only wanted her in his home to have the child there.

Appellant testified that the chief cause of the quarrels between herself and appellee was his jealousy of her. This appellee denied. He testified that he was not jealous of his wife, and did not question her character, except that she was not satisfied with any home he had provided for her, as she wished to live in town, and he was unable to live there, but that he provided well for her in the home in which they lived. Several witnesses corroborated appellee's testimony that he provided well for appellant, but it appears appellee borrowed from his mother and members of his family much of the money spent in his wife's support. She testified that most of the money given her for her support had been won gambling or was the proceeds of the illegal sale of liquor. Appellee admitted that he gambled, but

testified that he had abandoned that practice, and he denied being engaged in the illegal sale of liquor, although he admitted that officers searched his truck and found two gallons of whiskey in it, and that he had paid a fine on that account.

A sister-in-law of appellee testified that she had heard appellee curse and abuse appellant on many occasions, that they quarreled frequently and that appellee was the aggressor. Appellee denied this and stated that his sister-in-law became angry with him because he refused to loan his truck to her son. This appellant denied.

Appellee's mother filed an intervention in the case in which she prayed that the custody of the child be awarded her. She alleged and testified that neither appellant nor appellee is a fit person to have the custody of the child, that their tempers were so irascible that there was constant quarreling and that the child should not be reared in that environment.

Appellant testified that she had remarried appellee twice upon his promise that he would no longer mistreat her, but that his promises proved false, and that she did not intend to live with him any longer. Appellant's testimony is that this last separation was final and while we find that she was not without fault, we also find that appellee was the chief offender and we think a divorce should be granted appellant. *Lemaster* v. *Lemaster*, 158 Ark. 206, 249 S. W. 589.

The decree of the court below will therefore be reversed and the cause will be remanded with directions to grant appellant a divorce.

BOND, COUNTY JUDGE *v.* KENNEDY.

4-8635 212 S. W. 2d 336

Opinion delivered June 28, 1948.

J. H. Spears, for appellant.

Cecil B. Nance, for appellee.

MINOR W. MILLWEE, Justice. The questions to be determined by this appeal are: First, the right of Crittenden county, Arkansas, to build a county hospital

outside the corporate limits of Marion, Arkansas, the seat of justice or county seat of said county; second, whether a proposed deed will convey good title to the county.

An election was held in Crittenden county on October 28, 1947, under the provisions of Amendment No. 17, as amended by Amendment No. 25, to the State Constitution. A majority of the electors voting at said election authorized the construction of a county hospital and the levying of a special building tax for that purpose. The estimated cost of the hospital to the taxpayers of Crittenden county is $800,000, to which sum the federal government proposed to add $400,000, or one-third the total cost of construction and equipment of the hospital.

Appellee, a citizen and taxpayer, appealed to the circuit court from a judgment of the county court adopting the report and recommendations of a commissioner of public buildings and ordering payment of $5,000 appropriated by the quorum court for the purchase of a building site selected by said commissioner. At the trial in circuit court, a jury was waived and the cause submitted to the trial court upon the order of the county court together with certain exhibits thereto, and the following stipulation:

"1. That Lamar L. Rogers is the duly appointed Commissioner of Public Buildings of Crittenden county, Arkansas, and as such Commissioner was requested by the county court in its official capacity to locate a suitable site for a proposed county hospital; that he located a site and has offered a deed of Eugene Woods and wife dated March 23, 1948, said deed having been approved by said Commissioner and by the appropriate authorities of the State of Arkansas and by the appropriate authorities of the United States of America from whom a grant to aid in the construction of the county hospital is being awarded; that the said site obtained is the most advantageous site in Crittenden county, Arkansas, and that his report was confirmed and approved on the 5th day of April, 1948, by C. H. Bond, County

Judge of Crittenden county, Arkansas, and that the said C. H. Bond, acting in his official capacity as county judge of Crittenden county, Arkansas, directed the Clerk of the County Court of Crittenden county, Arkansas, to issue a warrant drawn on the general treasury of Crittenden county, Arkansas, for the sum of five thousand and no/100 ($5,000) dollars, payable to Eugene Woods.

"2. It is further stipulated and agreed that the site of the proposed hospital is located in block nine (9) of the Eugene Woods Subdivision to the City of West Memphis, Arkansas, same lying and being situate in the northeast quarter (NE¼) of section thirteen (13), township six (6) north, range eight (8) east and is six miles south of Marion, which is the seat of justice and the county site of Crittenden county, Arkansas, and that there is no suitable ground belonging to the county for the site of said hospital, at the seat of justice which is Marion, and that Marion has no modern or adequate sewer system that will be needed to service a hospital of the size needed to serve Crittenden county.

"3. It is further stipulated and agreed that the deed conveying said property to the County of Crittenden contained the following clause:

" 'TO HAVE AND TO HOLD the said premises unto the said grantee, in fee simple forever, together with all appurtenances thereunto belonging or in anywise appertaining. SUBJECT, however, to the following conditions to the faithful observance of which the grantee by the acceptance of this deed firmly binds and obligates itself, its successors and assigns, to-wit: Said grantee shall within thirty-six months from the date hereof commence the construction upon said property of a hospital building and shall have same ready for occupancy as a hospital within ninety-six months from this date, and in the event either of such said conditions is not complied with, the grantor, his heirs, devisees, or assigns shall have the exclusive option to buy said property for the sum of five thousand & no/100 ($5,000) dollars for a period of ninety days from the first breach of the foregoing conditions, which privilege shall be

binding upon the grantee, its successors or assigns, it being agreed and understood that the cash consideration paid hereunder to the grantor is substantially less than the present market value of said property and that the moving consideration for the conveyance of same by the grantor to the grantee is to aid in the construction of a hospital thereon.'

"4. It is further stipulated and agreed that an election was regularly called and held in Crittenden county, Arkansas, under the provisions of Amendment No. 17 of the Statutes of Arkansas on the 28th day of October, 1947, at which election a majority of the qualified electors of Crittenden county, Arkansas, voting at said election, authorized the construction of a county hospital for Crittenden county, Arkansas, and the levying of a tax for said purpose.

"5. It is further stipulated and agreed that on the 17th day of November, 1947, the Quorum Court of Crittenden county, Arkansas, levied a tax of four mills for the purpose of the retirement of the principal and interest of bonds in the sum of eight hundred thousand and no/100 ($800,000) dollars which are to be issued for the construction of said county hospital; that on the 5th day of January, 1948, the Quorum Court of Crittenden county, Arkansas, appropriated the sum of five thousand and no/100 ($5,000) dollars for the purchase of a site for said county hospital."

The order of the county court further found that the deed offered to the county conveyed title in fee simple. It also approved an agreement by the county to the condition imposed by the federal government as a prerequisite to its grant of aid in the construction of the hospital under the provisions of the Federal Hospital Survey and Construction Act (Public Law No. 725, 79th Congress). This agreement provided that in the event the county should sell the hospital to any person or agency which is not qualified for such federal aid, or is not approved as a transferee by the state agency, or if said hospital has ceased to be a nonprofit hospital, within 20 years after completion of construction of said

hospital, then the federal government shall be entitled to recover one-third of the value of such hospital from either the transferer or tranferee.

The circuit court found the county court to be without authority to purchase a site for a county hospital away from Marion, the county seat of justice. The order of the county court authorizing the purchase of the site was set aside and the county has appealed.

The judgment of the trial court is based upon §§ 2455 and 2456, Pope's Digest, which provide:

"Section 2455. The court shall designate the place whereon to erect any county building on any land belonging to the county at the established seat of justice thereof.

"Section 2456. If there be no suitable ground for that purpose belonging to the county, the commissioner of public buildings shall select a proper piece of ground at the seat of justice, and may purchase or receive by donation a lot or lots of ground for that purpose, and shall take a good and sufficient deed in fee simple for the same to the county, and shall make report of his proceedings to the court at its next term."

These sections of the digest originally appeared as §§ 8 and 9, Chapter 36, of the Revised Statutes adopted by the Legislature of 1837. This chapter of the Revised Statutes contained 19 sections dealing with the subject of county buildings, which, with the exception of §§ 3 to 5, inclusive, now appear as §§ 2451 to 2466, Pope's Digest. The first two sections of said Chapter 36 (now §§ 2451 and 2452, Pope's Digest) provide for the erection in each county of a county courthouse and jail at the county seat, and also a fireproof vault for the keeping of county records either in a separate building near the courthouse, or inside the courthouse. No other buildings are mentioned in the statute as originally adopted although there are references in other sections of the statute to "any of the buildings aforesaid," "any public buildings" and "any county building," as in § 2455, Pope's Digest, *supra*. This chapter of the Revised Stat-

utes later appeared as the first 19 sections of Chapter 42 of Gould's Digest.

By an act of January 10, 1851, page 99, the Legislature provided for the building and establishment of county poorhouses without restriction as to location within the county. This act later appeared as §§ 20 to 26 of Chapter 42 of Gould's Digest and is now found in Chapter 127 of Pope's Digest.

Act 56 of 1871 authorized counties to issue bonds, not to exceed $50,000, for the construction of courthouses and jails and prescribed the procedure to be followed in the issuance of such bonds. The Legislature of 1873 treated said Act 56 of 1871 as having repealed Chapter 42 of Gould's Digest in its entirety, and by Act 51 of 1873 the 1871 act was repealed and Chapter 42 of Gould's Digest re-adopted.

If §§ 2455 and 2456 of Pope's Digest, *supra,* are lifted from their context as a part of the early statute and literally construed, then it is apparent that the construction given by the able trial court is proper. It, therefore, becomes necessary to determine the intent of the Legislature of 1873 when it re-adopted the Revised Statutes of 1837 with reference to the erection and location of county buildings. Did the Legislature intend to restrict the location of all county buildings to the seat of justice of the county, or did such restriction merely apply to such buildings as were referred to in the enactment, which were the only public buildings the county was authorized to construct at the time? In determining this question there are certain principles of statutory construction established by our decisions which should be noticed.

In the case of *Perry County* v. *House,* 196 Ark. 317, 117 S. W. 2d 342, the court stated: "The primary rule in the construction of a statute is to ascertain and give effect to the intention of the lawmakers, and this intention is to be ascertained from a consideration of the entire act. In arriving at the intention of the lawmaking power it is proper to consider the object to be se-

cured, the circumstances attending the adoption of the measure, and its relation to other laws. *Koser* v. *Oliver,* 186 Ark. 567, 54 S. W. 2d 411; 25 R. C. L. 960, 965; 59 C. J. 948; *Berry* v. *Cousart Bayou Drainage Dist.,* 181 Ark. 974, 28 S. W. 2d 1060."

And in *Prewitt* v. *Warfield, County Judge,* 203 Ark. 137, 156 S. W. 2d 238, the court said: "The primary rule in the construction of statutes is to ascertain and give effect to the intention of the Legislature. In order to arrive at the intention of the Legislature the court should examine the statute in the light of the history of its enactment, the contemporary history of the conditions and situation of the people, the economic and sociological policy of the state, its constitution and laws, and all other matters of common knowledge within the limits of their jurisdiction. Prior legislation on the subject, the entire legislation at the time, and the reasonableness or otherwise of one construction or the other are matters competent for consideration. 25 R. C. L. 1029."

In 50 Am. Jur., Statutes, § 236, it is stated: "Because it is easy to be wise after one sees the results of experience, there is always a tendency, it has been said, to construe the language of a statute in the light in which it appears when the construction is given. Such an approach to the question is erroneous. Since, in determining the meaning of the terms of a statute, the aim is to discover the connotation which the Legislature attached to the words, phrases, and clauses employed, the words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted, and the statute must be construed as it was intended to be understood when it was passed."

The rule which gives consideration to surrounding circumstances and the history of the time in determining legislative intent has been recognized in interpreting the intent of the framers of the State Constitution. In *Conner* v. *Blackwood, State Highway Commissioner,* 176 Ark. 139, 2 S. W. 2d 44, the appellant contended that an act which authorized the State Highway Commission

to construct and operate toll bridges on the state highway system was unconstitutional in that it deprived the county courts of their exclusive original jurisdiction over roads and bridges in violation of Art. 7, § 28 of the State Constitution. In holding the act valid, this court, speaking through the late Justice McHaney, said: "We do not think the framers of the Constitution had in mind any such stupendous advancement in methods of locomotion and means of transportation as exists today. They did not get a vision of the future of their State, with its citizens traveling entirely across the State over a great State Highway, a distance of three or four hundred miles, in ten or twelve hours. Then, with the means at hand, 50 miles was a hard day's journey. Even so, they did not, in framing the Constitution, deny the right, power and authority of the State to lay out, construct, repair and maintain State highways, and necessarily bridges or ferries thereon." The same rule of construction has been applied by this court to the wording of deeds. *Beasley* v. *Shinn,* 201 Ark. 31, 144 S. W. 2d 710, 131 A. L. R. 1234; *Missouri Pac. Rd. Co., Thompson, Trustee* v. *Strohacker,* 202 Ark. 645, 152 S. W. 2d 557; *Carson* v. *Missouri Pacific Railroad Co., Thompson, Trustee,* 212 Ark. 963, 209 S. W. 2d 97.

When §§ 2455 and 2456, Pope's Digest, *supra,* are construed in the light of these well established rules of construction, we think it is clear that the Legislature of 1873, in reviving the 1837 statute, only intended to require the location of courthouses, jails and record vaults at the seat of justice of the county. These were the only buildings mentioned in the statute and the reasons for restricting location to the seat of justice are obvious. The courts of justice and county offices and records were maintained and kept in the courthouse. It was also proper and convenient for county jails to be at the seat of justice for the incarceration of persons awaiting trial or convicted of crimes in the courts. On the other hand, the reasons that demanded the location of these buildings at the seat of justice do not prevail in the case of such county buildings as a hospital, or poorhouse. In many cases, as here, the seat of justice may

not have the facilities or provide a suitable location for furnishing proper hospital service to inhabitants of the county.

Nor is it likely that the Legislature of 75 years ago foresaw the economic changes which have given rise to the present day need for county hospitals. Arkansas was predominantly an agricultural state in 1873 with few thickly populated areas or industrial centers. Each farm family managed to take care of its own sick and indigent, and the Legislature did not foresee the shifting of the farm population to urban industrial centers thus creating a need for county hospitals. This need was not recognized by the electorate until 1938 when Amendment 25 to the Constitution was adopted enabling the electors of a county to authorize the construction of a county hospital. Our conclusion that the lawmakers of 1873 did not intend to include county hospitals in the requirement that county buildings be located at the seat of justice is strengthened by the fact that a subsequent Legislature authorized the building of county poorhouses without such restriction as to location.

It will be noted that the owner of the land offers to convey it to the county at the price of $5,000 upon the condition that the county shall within 36 months from the date of the deed begin construction of the hospital upon the lands conveyed, and shall have it ready for occupancy as a hospital within 96 months from said date. Upon a breach of either condition, the grantor, or his successors, is granted the exclusive option to buy said property for $5,000, the option to run for a period of 90 days from the first breach of the foregoing conditions.

It is argued that this provision of the deed constitutes a reversionary clause and that fee simple title will not, therefore, be conveyed to the county. The case of *Corpier* v. *Thompson*, 155 Ark. 509, 244 S. W. 738, involved the construction of a deed containing a similar provision. It was there said: "We do not think the court erred in quieting the title in J. B. Thomason to the four acres of land constituting the site of the Mason

schoolhouse. The record reflects that J. B. Thomason purchased the said tract of land from Rural School District No. 20 before Act No. 598, Acts 1921, went into effect. The contention of appellant, W. J. Corpier, is that said tract of land reverted to him when Rural Special School District No. 20 abandoned the site for school purposes. The record reflects that W. J. Corpier conveyed the property to Common School District No. 62, which district was subsequently absorbed by Rural Special School District No. 20. The deed was lost, but the proof showed that it contained the following provisions: 'But when ceased to be used for school purposes, that I (W. J. Corpier) or any one else owning the land at that time, is to have the land at the specific price of $60.' The above is not a reverting clause. It is an optionary clause on the part of the grantor in the deed, to repurchase the land, upon a contingency therein expressed, for the sum of $60. The deed passed a fee title absolute to Common School District No. 62, and its successor, Rural Special School District No. 20, sold the land to appellee, J. B. Thomason, before appellant, W. J. Corpier, attempted to exercise the option."

So here, the grantor merely has an option to repurchase the hospital site upon certain contingencies which end with the completion of the building. The condition stipulated is not a reverting clause and the deed passes title to the county in fee simple.

There is nothing in the agreement with the United States that restricts the county's title to the building site. As a condition for granting federal aid the government is entitled, under the agreement, to recover one-third of the value of the hospital if it is sold to certain classes of persons within 20 years or ceases to be operated as a nonprofit hospital within that period. The title never reverts to the United States in any event, and the condition expires at the end of twenty years.

It follows that the trial court erred in holding that the county court is without authority to purchase the site for a county hospital outside of Marion, the seat of justice of the county. The judgment is, therefore, reversed

and the cause remanded with directions to reinstate the order and judgment of the county court.

McFaddin, J., dissents.

Connor *v.* Ricks, Mayor.

4-8661 212 S. W. 2d 552

Opinion delivered June 28, 1948.

Curtis L. Ridgway and *Ernest Maner,* for appellant.

Leland F. Leatherman, for appellee.

Griffin Smith, Chief Justice. This is an appeal from Chancery Court's refusal to enjoin Hot Springs officials from paying public funds to George Callahan as

Chief of Police, and to restrain Callahan from receiving such payments. The legal question is whether Callahan's appointment was valid.

The petition alleges that Leland Leatherman, G. C. Smith, and Herbert Brenner, as a Board of Civil Service Commissioners, proceeded in an illegal manner April 26, 1948, when Callahan was selected, in that they disregarded mandatory provisions of Civil Service Rules, and Act 28, approved February 13, 1933.

Act 28, applicable to Cities of the First Class having a police department, and to all Cities having organized fire departments, directs that at the first regular meeting of the Council or governing body after the Act became effective a Civil Service Commission be established in the manner outlined. Section 3, in language ordinarily construed to be mandatory, is a commission to the Board to "prescribe, amend, and enforce rules and regulations governing the . . . departments"; and it invests the rules with force of law.

Certain "must" provisions are included in the Act, subdivision 4 of § 3, and § 6, being applicable to the controversy before us.

Not until March 14, 1947—nearly fourteen years after Act 28 received approval—did the City of Hot Springs give attention to the measure. Then, by Ordinance No. 2141, the Board was created, with a recital in the Ordinance that it was the duty of the Council to elect Commissioners. There were subsequent changes in personnel.

On May 2, 1947, the Council approved rules and regulations submitted by the Board.

Earl Ricks is Mayor of Hot Springs. Acting, as he thought, upon legal authority, he appointed George Callahan Chief of Police. The Mayor's right to appoint was challenged in a Chancery proceeding. On appeal it was held, on authority of *Stout* v. *Stinnett,* 210 Ark. 684, 197 S. W. 2d 564, that power of appointment had been transferred from the Mayor to the Civil Service Commission. *Connor* v. *Ricks, Mayor,* 212 Ark. 833, 208 S. W. 2d 10.

With this Court's holding (February 2, 1948) that the Mayor was without authority to appoint, Callahan was named Commissioner of Public Safety for Hot Springs. This action was successfully challenged in Chancery Court, without appeal.

April 26, 1948, the Board appointed Callahan Chief of Police, and he immediately entered into the discharge of his duties. Shortly thereafter Bert Connor and James Shannon, as taxpaying citizens and electors, asked Chancery Court for an injunction, the granting of which would have been predicated upon a finding that the Board was without power to select Callahan because of his ineligibility.

Testimony of Leland Leatherman as Secretary of the Board is that at a regular meeting of the Board February 23, 1948, the Secretary was directed to cause publication of notice through local newspapers, and by posting at the City Hall, that examinations would be held April 5th for establishment of eligible lists from which original appointments and promotions would be made for Fire and Police departments. Such notices were published, as directed.

The Board, in promulgating rules and regulations, had adopted with but slight changes what were known to be standard or uniform rules, etc., under which Little Rock and many other Cities had supervised personnel of the two departments. Members of the Hot Springs Board, in order to become better informed regarding procedural matters found to be advantageous elsewhere, applied extensively for information, and in particular wrote the World Book Company, the United States Civil Service Commission, and International Association of Police Chiefs, for material and suggestions. Professor J. B. Johns, who had formerly served as director of Hot Springs Business College, was asked to conduct written phases of the examinations.

It is argued in appellee's brief that inasmuch as Hot Springs has an annual floating population of more than a quarter of a million persons, many of whom are expert

criminals, such as Frank Nash, Verne Miller, Louis Buchalter, and associates, (see *State* v. *Richetti,* 342 Mo. 1015, 119 S. W. 2d 330; *People* v. *Buchalter,* 289 N. Y. 181, 45 N. E. 2d 225) the police chief should possess unusual ability, hence the applicability of that part of § 6 of Act 28 authorizing the Commission to suspend competition if the vacancy to be filled requires "peculiar or exceptional qualifications of a scientific, professional or expert character." This power reposes in the Commission when there is satisfactory evidence that competition is *impracticable,* and that the position *can* best be filled through selection of one not in the line of promotion provided for by Act 28.

Callahan took an examination held December 1, 1947, but the position to be filled was that of patrolman, and it is not contended this test satisfied the letter of the law, although Callahan was subjected to other tests. Appellants' entire case rests upon the belief that Callahan was promoted without being on an eligible list.

Section 10 of the Hot Springs Civil Service Rules is a substantial compliance with § 6 of Act 28, some parts of the statute having been copied; but to the language of § 6 there was added: "In filling [vacancies requiring peculiar or exceptional qualifications of a scientific, professional or expert character] the person so selected will not be required to meet the qualifications set out elsewhere in these rules and regulations as to residence, citizenship, age, weight, and height, but he shall undergo a medical examination and satisfy the Commission as to his mental and physical fitness for the position the same as is required of other applicants elsewhere in these rules [,] and the Commission need only satisfy itself, in any way it deems best, that the person so selected is the best one available under the circumstances to fill the position for which he is selected."

Subdivision 4 of § 3, Act 28, deals with creation of eligible lists for each rank of employment for the fire and police departments. It renders ineligible "for examination for advancement" any who have not served at least a year in the lower rank, " . . . except in case of

emergency, *which emergency shall be decided by the Board of Commissioners.*"

Effect of what the Commission did was to hold (a) that there was no eligible list from which selection of a Chief of Police could appropriately be made, and (b) that the long delay in putting Act 28 into use created an unusual condition, perhaps without precedent, justifying recourse to discretionary powers conferred by subdivision 4 of § 3, and § 6.

In the very thorough and comprehensive brief submitted by appellants' counsel it is argued, in purpose, that the exceptions mentioned in § 6 of Act 28 must be construed in the true sense of words used—"scientific," "professional," or "expert," and that Callahan does not qualify in respect of either term. This belief, however, rests upon the assumption that it was the Commission's duty to present evidence in support of its discretion—this under the general rule that if rights are claimed through a statutory exception it must affirmatively appear that one who relies on the exception has the burden of showing that he comes within it.

There is language in subdivision 4 of § 3 placing a very broad discretion in the Commission, for the Act says that the emergency there contemplated "shall be decided by the Board." But even so, it is not to be presumed that the lawmakers intended to invest the Commission with arbitrary powers. A discretion is exactly what the word implies: the exercise of a privilege, right, or power consonant with reason and good judgment. It was defined by Coke in *Rooke's case,* 40 Eliz., as a science of understanding, to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretenses, "and not to do according to their wills and private affections."

The Kansas Supreme Court, in *State* v. *Tindall,* 210 Pac. 619, 112 Kan. 256, said of discretion as applied to public functionaries, that it is a power or right, conferred by law, to act officially in certain circumstances according to the dictates of their own judgment and conscience, un-

controlled by the judgment or conscience of others, and "It perverts and destroys the meaning of the word to hold that exercise of discretion may be reviewed or controlled by some other person or tribunal than the person on whom it is conferred."

So, in the case at bar, the Legislature must have contemplated that extraordinary circumstances might arise in the administration of police and fire departments calling for abandonment of the hard and fast rule as expressed by letter of the law, and the substitution of that fine sense of discretion which in legal contemplation a board or commission will exercise when power to act in a particular circumstance is reposed in individuals constituting the agency thus created. Discretion is never controlled by a so-called higher authority. It is the *abuse* of power that calls for supervision; and when abuse occurs discretion ends.

Coupled with the contention that the Board has not produced evidence that an emergency existed there is the argument that in any event a permanent appointment of the kind in question could not be made, and when the emergency ends Callahan's tenure terminates. If it be conceded that the appointment cannot last beyond the emergency, we must assume this to be the Commission's intention. A situation somewhat similar occurred when the judiciary was called upon to construe § 9 of art. 19 of the Constitution. It prohibits the General Assembly from creating any permanent State offices "not expressly provided by the Constitution." The decision in *Greer* v. *Merchants & Mechanics Bank,* 114 Ark. 212, 169 S. W. 802, was that in the absence of a legislative declaration that an office it created *was* permanent, Courts would indulge the presumption that permanency was not intended, and this would be true whether duration of the office was fixed in the Act, or if nothing whatever was said in respect of time. There are other similar cases.

By the same reasoning we must assume that the Commission does not intend Callahan's occupancy of the position to continue beyond the emergency.

In providing Civil Service machinery for police and fire departments, as expressed in Act 28, the General Assembly's policy was to promote efficiency, hence better public service, by eliminating the so-called "spoils system" and substituting mandatory examinations to determine relative qualifications, and to require that promotions be made from a lower to a higher bracket—this upon the supposition that it was difficult to efficiently substitute for experience gained through application to a particular task.

If, when Act 28 was approved, Hot Springs—without unreasonable delay—had established a Civil Service Commission, then at least in contemplation of law the Police Department would have been a functioning organization, made so through examinations, tests, orderly compliance with the law's intent, and merited promotions. In consequence of the Council's conduct in treating the State's mandate as a dead letter, it cannot now be said that Mayor Ricks—who took office last year—and the Council he serves with, were not confronted with an emergency. It may not have been the exact complication contemplated by the lawmaking body when it undertook to provide flexibility to an otherwise rigid set of rules; but certainly the situation is unusual, and it is one that probably will not again occur.

From the Commission's actions it appears conclusive that difficulties occasioned by protracted municipal indifferences to legislative mandate created a difficult status, and one from which the newly-created Board could salvage the overall purpose in no more effective manner than through use of the personnel on hand, supplemented by the emergency appointment of a Chief, in the manner shown.

The Chancellor found that discretion was not abused, and we are unable to say he erred. It follows that the decree must be affirmed.

McSwain *v.* Criswell.

4-8589 213 S. W. 2d 383

Opinion delivered June 28, 1948.

Rehearing denied October 4, 1948.

Botts & Botts, for appellant.

Geo. E. Pike, for appellee.

Robins, J. The chancery court upheld the contention of appellees, Callie Criswell and other heirs at law of M. O. McSwain, deceased, that a deed purporting to have been executed by M. O. McSwain in his lifetime, conveying to W. C. McSwain, appellant, 240 acres in Arkansas county, and a bill of sale said to have been executed at the same time, by which title to certain personal property was transferred from said M. O. McSwain, deceased, to appellant, were both void. This appeal ensued.

M. O. McSwain, a bachelor, died on September 19, 1944. During most of his life he had made his home with appellant, his elder brother. In his latter years M. O. McSwain became afflicted with a cancer which finally caused his death.

The questioned deed and bill of sale showed execution on August 3, 1944, but there was some testimony indicating that this date was erroneous and that the papers were really executed on August 8, 1944. The deed was filed for record on October 3, 1944.

In the complaint it was charged "that M. O. McSwain did not sign such purported deed, that the deed was not properly acknowledged by a notary public as required by statute, and that such deed was never delivered by M. O. McSwain." As to the bill of sale it was alleged in the complaint that it was not signed or delivered by M. O. McSwain in his lifetime.

While it is argued in appellees' brief that "the actions of W. C. McSwain and members of his family and the officers connected with the transaction, taken as a whole, constitute a fraud upon the rights of the appellees . . . there is no allegation in the complaint as to the acts constituting such fraud; nor was there any testimony tending to show that either the deed or bill of sale was obtained by fraud.

An unacknowledged deed is good between the parties. *Jackson* v. *Allen,* 30 Ark. 110. Hence, the allegation and testimony as to the irregularity of the acknowledgment are not of importance except as they may shed light on the real issue in the case, which is: Did M. O. McSwain, being of sound mind, execute the deed and the bill of sale?

Appellee, Mrs. Callie Criswell, testified that M. O. McSwain and W. C. McSwain were her brothers; that a few days after the death of M. O. McSwain she inquired of appellant about the "papers" of their deceased brother and appellant told her he had not found them yet; that some days later he showed her the deed and bill of sale and she told appellant that the signature to these papers was not that of M. O. McSwain; that she would say she didn't believe it is his handwriting; "I didn't see him write it; but it don't look like his handwriting to me"; that M. O. McSwain had told her he would leave her as much as anybody; that M. O. Mc-

Swain and appellant lived together a long time; that he had stayed with her a part of the time and she had never charged him board until after he had made her pay some interest; that deceased called appellant's home his home and that they worked together, though M. O. McSwain was not able to do more than look after stock; that she thought the two owned their personal property together; that appellant waited on his brother after he got down; that she had never assisted W. C. McSwain in taking care of her brother; that the papers were prepared by Charlie Morgan in DeWitt; that appellant told her it was his brother's wish not to tell her about the papers.

Rev. Frank Fox testified that he assisted W. C. McSwain in taking M. O. McSwain in an ambulance to Savannah, Missouri; that they left Arkansas county on August 1, 1944, and arrived back at the home of appellant on August 3rd; that during this time M. O. McSwain was rational and in his right mind. (This testimony tended to show that M. O. McSwain did not execute any papers on August 3, 1944).

John Stephens, a son-in-law of Mrs. Callie Criswell, testified that he heard appellant tell Mrs. Criswell that he didn't know anything about his brother's papers, and was present later when appellant showed them to her; that M. O. McSwain was in poor health for eight or ten years before his death; that Wert McSwain was son of Jim McSwain, deceased.

Mack Criswell, a son of Callie Criswell, testified that he went with his mother to the clerk's office and found the deed recorded; that he talked with Mr. Bruce Kendall and Charlie Morgan and found out they wrote the deed; that Mr. Morgan stated that he wrote the deed, but it had been acknowledged before Mr. Kendall as notary public; that Mr. Kendall said M. O. McSwain was rational and on this occasion he (Kendall) went to the room of M. O. McSwain and talked with him with no one else present; that M. O. McSwain was not rational the night before he died, but that he was rational when he came back from the hospital; that M. O. lived with W. C.

many years before his death; that M. O. was not able to farm.

Wert McSwain testified that he was a son of a brother (now deceased) of W. C. and M. O. McSwain; that he was with Mrs. Criswell when W. C. McSwain showed her the papers, and she looked at them and said they didn't look like the handwriting of M. O. McSwain; that he was not with them when they talked with Kendall and Morgan; that M. O. McSwain lived with W. C. McSwain many years before his death; that M. O. McSwain had been incapacitated for eight to twelve years before his death.

Bruce Kendall testified that he had been a notary public for 27 years; that he had known the McSwains for many years; that in August, 1944, at the request of W. C. McSwain he went to his home to notarize some papers; that he went into a room with M. O. McSwain, who had already prepared a deed and a bill of sale, and they went over them; that he took M. O. McSwain's acknowledgment to the papers after they made certain corrections and interlineations; that witness made these at the suggestion of M. O. McSwain, who said there were lands mentioned that he did not own and he owned other lands not mentioned; that M. O. McSwain had checked his old deeds and discovered the mistake; an interlineation was also made in the bill of sale at M. O. McSwain's request; that he was in his right mind; that witness did not prepare the papers; that they indicated they were prepared on December 21, 1942; that the certificate shows the acknowledgment to have been taken on August 3rd, but this was error, as he went out there on election day, August 8th; that he was paid $5 for going out there in his truck; that he kept no record; that M. O. McSwain wanted W. C. McSwain to have this property.

The net effect of the testimony of six other witnesses for appellant, nearly all of them members of the family, was that W. C. McSwain virtually reared M. O. McSwain; that M. O. McSwain made his home all his life with W. C. McSwain; that their property was handled as a unit, and that it was accumulated as a result of their

joint efforts and by the work of W. C. McSwain's sons; that for many years M. O. McSwain was disabled and could do no work, during which time he was cared for by W. C. McSwain and his family; that M. O. McSwain often expressed the intention of conveying all his property to W. C. McSwain, and because of a falling out with his sister he did not want her to share in his property; that the signatures to the deed and bill of sale were genuine.

Appellant, in his testimony, detailed the long continued and close relationship between him and M. O. McSwain and described their method of handling all their property together; he testified that M. O. McSwain often said he would deed all his property to appellant and finally, after a dispute with Mrs. Criswell in 1942, when she asked him to pay her board for a short time he had stayed with her, M. O. McSwain had the deed and bill of sale prepared; that it was prepared on December 12, 1942; that he was not at home when Kendall came to take the acknowledgments, but came in before he left; that M. O. McSwain told him about the mistakes in the deed which were corrected by interlineation; that after the papers were signed M. O. McSwain handed the papers to him, telling him they were his; that the signatures were those of M. O. McSwain, and to exemplify same he introduced in evidence a number of bank checks signed by M. O. McSwain; that he did not know why M. O. McSwain did not sign the deed after Morgan prepared it, but he took it home and put it in his trunk; that it was at his brother's request that he did not tell Mrs. Criswell about the papers; that he showed them to her later, and that since then she had them in her possession.

Appellees had the burden to show, by a preponderance of the testimony, that the deed and bill of sale were forgeries. *Blackburn* v. *Cherry,* 87 Ark. 641, 113 S. W. 25; *Staggers* v. *White,* 121 Ark. 328, 181 S. W. 139; *Thompson* v. *Kinard,* 168 Ark. 1057, 272 S. W. 668; *Hildebrand* v. *Graves,* 169 Ark. 210, 275 S. W. 524; *Ledbetter* v. *Smith,* 202 Ark. 144, 149 S. W. 2d 564.

A careful review of the evidence impels the conclusion that appellees have not met this burden. The evi-

dence showed a strong motive for the execution of the papers by M. O. McSwain; and we think that a preponderance of the testimony showed that M. O. McSwain, being of sound mind, did in fact execute the deed and bill of sale. There is no proof on which a finding that he was induced to do so by fraud or undue influence could be based.

It follows that the decree of the lower court must be, and is, reversed and the cause remanded with directions to the lower court to dismiss the complaint for want of equity.

ROWLAND *v.* STATE.

4483 213 S. W. 2d 370

Opinion delivered June 28, 1948.

Rehearing denied October 4, 1948.

Henry Donham and *C. Floyd Huff, Jr.*, for appellant.

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

ED. F. MCFADDIN, Justice. This appeal is from a conviction on an indictment for bribery, wherein it was alleged that the defendant (appellant here), Jay M. Rowland, as city attorney of Hot Springs, received money as bribes, to-wit, $50 each month during the years 1945 and 1946 from Otis McCraw, operator of the Southern Club, a gambling establishment; and that said bribes were paid to Rowland with intent to influence his actions and decisions as city attorney pertaining to the ordinance which prohibits gambling. The defendant was indicted under § 3249, Pope's Digest. Some of our cases involving the offense of bribery are: *Watson* v. *State,* 29 Ark. 299; *Chapline* v. *State,* 77 Ark. 444, 95 S. W. 477; *Butt* v. *State,* 81 Ark. 173, 98 S. W. 723, 118 A. S. R. 42; *Value* v. *State,* 84 Ark. 285, 105 S. W. 361, 13 Ann. Cas. 308; *State* v. *Dulaney,* 87 Ark. 17, 112 S. W. 158, 15 Ann. Cas. 192; *State* v. *Bunch,* 119 Ark. 219, 177 S. W. 932; *Sims* v. *State,* 131 Ark. 185, 198 S. W. 883; *Payne* v. *State,* 165 Ark. 229, 263 S. W. 780; and *Barrentine* v. *State,* 194 Ark. 501, 108 S. W. 2d 784. The record here is voluminous;[1] but in the excellent brief for the appellant all the assignments are grouped into six topic headings; and in the oral argument it was agreed that these six topic headings embrace all the assignments. We proceed therefore to list and discuss the six topic headings as contained in the appellant's brief.

I. *Appellant says, "The Grand Jury was Illegally Empaneled and the Indictment is Void."* The City of Hot Springs is in Garland county, which is in the 18th Judicial Circuit. Judge Earl Witt was the Judge of this circuit until December 31, 1946, and was succeeded by Judge C. H. Brown on January 1, 1947. The regular terms of the Garland Circuit Court begin on the fourth Monday in March and September of each year.[2] At the opening of the September, 1946, term, Judge Witt empaneled a grand jury which had been selected by the jury commissioners. This grand jury served only a short time,

[1] The transcript contains 694 pages, and another transcript used as an exhibit contains 236 pages. The printed abstract and briefs contain 521 pages. In the motion for new trial there are 92 assignments, and in the motion in arrest of judgment there are 14 assignments.

[2] Section 2832, Pope's Digest.

and in October, 1946, a court order was entered, reading: "The said grand jury, having no further business under consideration, adjourned subject to the call of the foreman of the grand jury or the call of the Judge of this court."

That grand jury was never reassembled. On February 21, 1947, (Judge C. H. Brown having taken office on January 1, 1947, as aforesaid) a court order was entered, dismissing that grand jury; and on March 1, 1947, a court order was entered, directing the sheriff to summon a special grand jury to convene on March 4, 1947. The special grand jury did so convene, and, on March 19, 1947, returned the indictment against the defendant (appellant), on which he was tried in this case.[3]

Appellant claims that the special grand jury was not empaneled in accordance with law, and that the indictment should have been quashed. His motion to that effect was overruled by the court (Judge Cummings presiding) on April 14, 1947. Appellant cites, *inter alia,* Art. II, § 8 of our Constitution, Amendment XXI thereto, and §§ 3798-99, 3829, 3882-4, 3887, 8306-8, 8312, 8326-27, and 8333, Pope's Digest. In addition to textbooks and cases from other jurisdictions, appellant cites the following decisions from this court: *State* v. *Cantrell,* 21 Ark. 127; *Wilburn* v. *State,* 21 Ark. 198; *Harding* v. *State,* 22 Ark. 210; *State* v. *Swim,* 60 Ark. 587, 31 S. W. 456; *Bowie* v. *State,* 185 Ark. 834, 49 S. W. 2d 1049; *Mo. Pac. Transportation Co.* v. *Parker,* 200 Ark. 620, 140 S. W. 2d 997.

We hold that the circuit court had full power to empanel a special grand jury as was done in this case. Section 3004, Crawford & Moses' Digest (being §§ 71-72 of Chap. 45 of the Revised Statutes of 1837), says: "If any offense be committed or discovered during the sitting of any court after the grand jury attending such court shall have been discharged, such court may, in its discretion, by an order to be entered in the minutes, direct the sher-

[3] Judge C. H. Brown presided until an exchange-of-circuits agreement with Judge Maupin Cummings, effective April 14, 1947; and Judge Cummings presided (except as shown in Topic VI, *infra*) until the culmination of this case in the circuit court. This will be discussed further in topic VI, *infra.*

iff to summon a special grand jury. The sheriff shall, in pursuance of such order, forthwith summon such grand jury from the inhabitants of the county qualified to serve as grand jurors, who shall be returned and sworn, and shall proceed in the same manner in all respects as provided by law in respect to other grand jurors."

Under the foregoing statute we held that the summoning of a special grand jury was within the discretion of the court. (See *Davis* v. *State,* 118 Ark. 31, 175 S. W. 1168, and cases there cited; and see, also, *Breysacher* v. *State,* 123 Ark. 101, 184 S. W. 433.) Under the foregoing statute the special grand jury could have been summoned only when an offense had been committed or discovered "*during the sitting of any court after the grand jury attending such court shall have been discharged.*" This restriction, as stated in the italicized quotation last above, was eliminated by § 33 of Initiated Act 3 of 1936 [4] wherein § 3004, Crawford & Moses' Digest, was amended to read: "At any time a grand jury is not in session, the court, in its discretion, by order entered of record, may empanel a special grand jury. Such special grand jury when empaneled shall have all the powers and proceed in all respects as provided by law for the conduct of regular grand juries."

The foregoing § 33 of Initiated Act 3 of 1936 is full authority for the calling of the special grand jury in the case at bar. The regular grand jury was "not in session": with the approval of the court, in October, 1946, it had adjourned subject to call; also it had been discharged by action of the court on February 21, 1947. So, a special grand jury could have been empaneled.

Appellant says that the special grand jury should have been selected by the jury commissioners, rather than by the sheriff. But we have repeatedly held, as stated by Mr. Justice HART in *Brewer* v. *State,* 137 Ark. 243, 208 S. W. 290: "Moreover, under our system, there are two modes by which a grand jury may be lawfully

[4] The Initiated Act 3 was captioned, "An Act to Amend, Modify and Improve Judicial Procedure and the Criminal Law, and for other purposes." The act was adopted by the People at the General Election in 1936, and may be found on pages 1384, *et seq.*, of the Acts of 1937.

selected. One is where they are selected pursuant to the provisions of the statute; and the other is where the circuit court causes them to be selected in the exercise of its inherent constitutional right. *Wilburn* v. *State,* 21 Ark. 198, and *Straughan* v. *State,* 16 Ark. 37."

To the same effect is *Edmonds* v. *State,* 34 Ark. 720. The omission, in § 33 of Initiated Act 3 of 1936, of the provision found in § 3004, Crawford & Moses' Digest, to the effect that the court might direct the sheriff to summon the special grand jury, is immaterial, since we had said, in the quotation from Mr. Justice HART above, that the court, in having a grand jury summoned by the sheriff, was acting under its "inherent constitutional right." The existence or absence of a statute—authorizing the court to have the sheriff summon the jury—could make no difference when the circuit court was acting under its inherent constitutional right. So we hold that the circuit court had the power to empanel a special grand jury just as it did in this case.

II. *Appellant says, "There was an Illegal Discrimination Against Defendant in the Selection of the Special Grand Jury."* Appellant offered evidence tending to show: (a) that for many years prior to 1946 Hot Springs and Garland county had been under the political domination of the Leo McLaughlin faction of the Democratic party; (b) that appellant was a member of the McLaughlin faction; (c) that in the 1946 state and county Democratic primary there was a contest between the so-called "G.I. Ticket" and the "McLaughlin Ticket"; and (d) that the G.I. Ticket was headed by Judge C. H. Brown, Sheriff I. G. Brown and others (the Browns were not shown to be related). The evidence showed that the feeling ran high between these factions, both in the Democratic primary in August, 1946, and in the general election in November, 1946.

The point here is: the appellant claims that Judge Brown and Sheriff Brown and the prosecuting attorney and other officials—all elected on the G.I. Ticket—willfully and deliberately selected, for the special grand

jury, men known to be hostile to the McLaughlin Ticket, and known to be loyal and devoted adherents of the G.I. Ticket; and appellant claims that there was a violation of his rights, as guaranteed by Art. II, § 8 of the State Constitution, and Amendment XIV of the United States Constitution, in the alleged exclusion from the special grand jury of all persons except G.I. adherents. In support of his contentions, appellant cites these cases from the U. S. Supreme Court: *Hill* v. *Texas* [5] (on exclusion of Negroes), *Hale* v. *Kentucky* [6] (on exclusion of Negroes), *Thiel* v. *Southern Pacific Co.* [7] (on exclusion of day laborers), and *Ballard* v. *United States* [8] (on exclusion of women); and appellant also cites these cases from other courts: *Carruthers* v. *Reid* [9] (on exclusion of Negroes), *Walter* v. *Indiana* [10] (on exclusion of women), and *Kentucky* v. *Powers* [11] (on exclusion of Republicans). This last-cited case was reversed by the U. S. Supreme Court on the question of jurisdiction.[12]

The opinion by Judge Cochran in *Kentucky* v. *Powers, supra,* is the only case to which our attention has been called, wherein has been discussed political affiliation as constituting a distinct classification in the matter of selecting jurors for either grand or petit jury service. This matter of "groups and classifications" could easily be carried to an extreme. To illustrate: if religion be recognized as a basis for classification of our people, as regards selection for, or exclusion from, jury service, then a defendant of the Catholic faith might claim that he had been discriminated against if no Catholics were on the panel of the challenged jury. Likewise, a Protestant might make the same claim if none of his faith was on the challenged jury. Then the major religious groupings might be subdivided. If the defendant were a Meth-

[5] *Hill* v. *Texas,* 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159.

[6] *Hale* v. *Kentucky,* 303 U. S. 613, 82 L. Ed. 1050, 58 S. Ct. 753.

[7] *Thiel* v. *So. Pac. Co.,* 328 U. S. 217, 90 L. Ed. 1181, 66 S. Ct. 984.

[8] *Ballard* v. *U. S.,* 329 U. S. 187, 91 L. Ed. 181, 67 S. Ct. 261.

[9] *Carruthers* v. *Reid,* C. C. A., 8th Circuit, 102 Fed. 933.

[10] *Walter* v. *Indiana,* S. Ct. of Ind., 195 N. E. 268, 98 A. L. R. 607.

[11] *Kentucky* v. *Powers,* U. S. District Ct., 139 Fed. 452.

[12] *Kentucky* v. *Powers,* 201 U. S. 1, 50 L. Ed. 633, 26 S. Ct. 387, 5 Ann. Cas. 692.

odist or a Presbyterian, he might make the claim that he had been discriminated against if the challenged panel contained none of his religious faith.

Furthermore, if political affiliation be recognized as a basis for classification of our people as regards selection for, or exclusion from, jury service, then a defendant who is a Democrat might claim he had been discriminated against if no Democrats were on the panel of the challenged jury. Likewise, a Republican might make the same claims if no Republican were on the challenged jury. Then, the Democratic party might be subdivided, into Conservatives v. New Dealers. Furthermore, Democrats in Arkansas might be subdivided on the basis of whom they had supported for Governor in the last primary election; and finally we could get to the situation, as here, where the Democrats of one county—Garland—could subdivide into "G.I. Faction v. McLaughlin Faction." The inevitable contention would be that, in the selection of the jury there had been a discrimination against the class of which the appellant was a member. That is the contention here.[13] We have given the foregoing illustrations to demonstrate how far this "G.I. Faction v. McLaughlin Faction" question carries us in the supposed application of the 14th Amendment. If such were ever held, then the United States would become a nation of pressure groups and distinct interests, rather than a nation of free and united people. Our divisions would be emphasized at every turn, rather than our similarities.

But, as interesting as is this contemplation and speculation, we find it unnecessary to pass on the legal question posed—*i. e.*, illegal discrimination—because we hold that the appellant failed to prove that he was discriminated against in any way in the selection of the special grand jury. Each of the 16 persons composing the special grand jury was called as a witness by the appellant on the hearing of the motion to quash. The testimony is contained in 62 pages of the transcript. A careful reading of the record discloses that the special grand jury

[13] There is an annotation on Unfair Practices in Jury Selection in 82 L. Ed. (U. S.) 1053.

was fairly selected, and representative of the business and social and political life of the community. As regards residence: 12 of the jurors lived in Hot Springs and four [14] lived outside the city. Of those living in the city, two [15] had their places of business outside the city. As regards politics: eight jurors [16] had supported a part of the McLaughlin Ticket and part of the G.I. Ticket. Two of the jurors [17] had been election officials approved at the time by the dominant political faction, *i. e.,* the McLaughlin faction. All who were questioned on the point stated that the indictment as returned was based on the evidence presented before the special grand jury, and that their report was true and correct. Sheriff I. G. Brown testified as to how he selected the men for the special grand jury: "I made my selection on a number of things . . . intelligence, reputable businessmen, and their integrity."

The evidence given by the sixteen special grand jurors supports that statement.

Furthermore, the appellant Rowland was not a candidate in the state or county elections in 1946 when the "G.I. Ticket v. McLaughlin Ticket" issue was involved; Rowland was city attorney of Hot Springs, and the date of the city election does not coincide with the state and county elections. No member of the special grand jury was asked whether he knew or had ever heard of Rowland, or what faction Rowland supported, or what faction supported Rowland. Certainly, in the record before us, Rowland has made no showing of any illegal discrimination. This finding—based on the facts presented—makes it unnecessary for us to decide (1) the posed legal question as to whether political factionalism in a county race could be seized upon by a city official to quash an indictment on the basis of illegal discrimination; and (2) the interesting legal question as to whether the right of the prosecuting attorney to proceed by information, under

[14] These four were: Brenner, Pennington, Biles and Connelly.

[15] These two were: Craig and Duncan.

[16] These eight were: Hogaboom, Pennington, Lewis, Craigo, Duncan, Givens, Biles and Clark.

[17] These two were: Givens and Burgess.

Amendment XXI of the Arkansas Constitution, has made obsolete and outmoded the entire question of illegal discrimination in the selection of a grand jury. We affirm the action of the trial court in refusing to quash the indictment.

III. *Appellant says, "The Demurrer to the Indictment Should Have Been Sustained."* The indictment reads: "The grand jury of Garland county, in the name and by the authority of the State of Arkansas, accuse Jay M. Rowland of the crime of accepting and receiving bribes committed as follows, to-wit: The said Jay M. Rowland in the county and state aforesaid, being then City Attorney of the City of Hot Springs, a place of profit and trust under the laws of the State of Arkansas, unlawfully, feloniously, and corruptly accepted and received:

"Money and bribes, to-wit: $50 per month each month in the years 1945 and 1946 from Otis McCraw, Sr., and J. O. McCraw, operators of the 'Southern Club Book,' Hot Springs, Garland county, Arkansas, a bookmaking and gambling establishment. The money and bribes were paid to Jay M. Rowland for himself and Leo P. McLaughlin with intent to influence Rowland's actions and decisions as city attorney, pertaining to state laws and ordinances of the City of Hot Springs, Arkansas, which prohibit gambling and the operation of gambling houses insofar as they applied or might apply to Otis McCraw, Sr., J. O. McCraw, or the 'Southern Club Book.' Such money and bribes, totaling $1,200 during the years 1945 and 1946, were paid to Jay M. Rowland for himself and Leo P. McLaughlin, against the peace and dignity of the State of Arkansas."

Appellant says the indictment fails to state an offense, and in his brief, uses this language: "The defect in the indictment is its failure to allege that the defendant received money with the intent that his actions and decisions as city attorney be thereby influenced. The indictment does allege that money was paid with such intent. In other words, it alleges that McCraw intended to influence Rowland's actions by paying the money, but

it wholly fails to allege that Rowland accepted the money with the requisite criminal intent."

In support of his contention, appellant cites, *inter alia*: *Sims* v. *State,* 131 Ark. 185, 198 S. W. 883; *Myers* v. *State,* 168 Ark. 498, 270 S. W. 959; *Williams* v. *State,* 93 Ark. 81, 123 S. W. 780; *Davis* v. *State,* 80 Ark. 310, 97 S. W. 54; *U. S.* v. *Hess,* 124 U. S. 486, 8 S. Ct. 571, 31 L. Ed. 516; *Pettibone* v. *U. S.,* 148 U. S. 197, 13 S. Ct. 542, 37 L. Ed. 419.

The appellant was indicted under § 3249, Pope's Digest, which may be epitomized, insofar as the question now presented is concerned, as follows: "If any person shall, . . . give . . . any money . . . or any other valuable thing whatever, to any . . . person holding any place of profit or trust, under any law of the state, . . . with intent to influence his . . . decision on any question, matter, cause or proceeding which may . . . be brought before him in his official capacity, . . . and shall be convicted thereof, such person so . . . giving . . . any such money . . . or other valuable thing . . . and the . . . officer or person who shall in any wise accept or receive the same or any part thereof, shall be liable to indictment . . ."

A careful study of the section discloses that there is no language in the statute concerning the *intent* of the bribe receiver. This is evidently true, because the word "bribe" carries with it the necessary meaning that it is to influence the conduct of the recipient. Webster's New International Dictionary, 2d Ed., 1944, defines bribe as: "A price, reward, gift or favor bestowed or promised with a view to pervert the judgment or corrupt the conduct of a person in a position of trust, as an official or voter."

Bouvier's Law Dictionary defines bribe: "The gift or promise, which is accepted, of some advantage as the inducement for some illegal act or omission . . ."

In *Watson* v. *State,* 29 Ark. 299, in discussing bribery, we said: " 'Bribery . . . is where a judge or

other person concerned in the administration of justice takes any undue reward to influence his behavior in office.' 4 Black Com., 139. And Russell says: 'Bribery is the receiving or offering any undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and incline him to act contrary to the known rules of honesty and integrity.' 1 Russ. on Crimes, 154; 1 Hawk. P. C., 414."

Since the indictment charged the defendant with accepting a *bribe,* that word, in itself, carried the necessary and obvious implication that the bribe influenced his conduct. Of course, at the trial it was necessary for the State to *prove* that the defendant received the money with the intent to influence his actions and decisions as city attorney in regard to the ordinance of the City of Hot Springs prohibiting gambling and the operating of gambling houses. The court so instructed the jury in instruction No. 10.[18] But in the indictment it was not necessary to do more than to follow the statute. See *Lemon* v. *State,* 19 Ark. 171; and *State* v. *Hooker,* 72 Ark. 382, 81 S. W. 231, and cases there cited. A comparison of the indictment with the statute shows most conclusively that the indictment was framed in accordance with the statute.[19] Therefore the trial court correctly overruled the demurrer to the indictment.

IV. *Appellant says, "The Evidence is Insufficient to Support the Verdict."* We briefly review some of the evidence. The defendant became city attorney of Hot Springs in April, 1944, and continued as such official until after 1946; during each month of 1945 and 1946 he received $50 from Otis McCraw. This was paid openly. For many years prior to December 28, 1946, McCraw had owned and operated gambling businesses; and one such place was the Southern Club. McCraw admitted that he operated gambling establishments, and that he knew these were illegal; he testified: "Q. You stated that you paid him these checks openly. You ran your—did you

[18] The germane portion of this instruction is copied in Topic V, *infra.*

[19] See, also, § 22 of Initiated Act No. 3 of 1936.

run your gambling business openly? A. Yes, sir. Q. You knew gambling was illegal, didn't you? A. Yes, sir."

Beginning in 1942 the Southern Club was subject to raids by the state police, who—on such occasions—destroyed the equipment, and undertook to confiscate any money found at the gambling establishment. Then it was that McCraw employed the appellant to represent him at the fee of $50 per month for the Southern Club. Rowland was not city attorney at that time, but became such in 1944; and his employment by McCraw continued through 1945 and 1946. As to why he employed Rowland, McCraw said: "Q. But you did expect him to represent you down here in the courthouse? A. Well, I wanted him to just look after these things down there. Q. You wanted him to look after those things in the event your employees were arrested? A. Yes. Q. Or in the event you were arrested? A. Yes. Q. Now, did that same agreement carry over when you hired him at the Southern Club? To pay him $50 monthly? A. The same thing. Q. Same understanding? A. Same understanding. Q. And in the event of raids, he was to represent you and the rest of your employees who were representing you? A. Yes—same as he had been doing right along. Q. The same as he did for you at the Ohio?[20] A. Yes, sir."

The ordinance of the City of Hot Springs of March 4, 1886, prohibited gambling. Section 1 reads, in part: " . . . That every person in the corporate limits of the City of Hot Springs who shall set up, keep or exhibit any gaming table or gambling device . . . shall be deemed guilty of a misdemeanor . . . "

Section 2 reads, in part: "That every person, who shall either directly or indirectly be interested or concerned in any gaming prohibited by the first section of this ordinance, . . . shall be guilty of a misdemeanor . . . "

Section 5 reads, in part: "That every person who shall, within the corporate limits of the City of Hot

[20] The Ohio Club was another gambling house operated by McCraw; but this present indictment concerns payments involving only the Southern Club.

Springs, exhibit any game, . . . instrument or thing, wherein or whereby money may be won or obtained, shall be deemed guilty of a misdemeanor."

Section 7 says of gambling houses: " . . . it shall be lawful for the mayor or chief of police, or any of the policemen of said city, to enter or cause the same to be entered by force, by breaking doors or otherwise, and to arrest, with or without warrant, all persons found therein."

McCraw testified that neither he nor any of the employees at his gambling houses were ever arrested by the municipal authorities for violation of the gambling ordinance.

That the position of city attorney is a place of profit or trust under the law of Arkansas is shown by the fact that the office of city attorney was created by the Legislature (§ 9819, Pope's Digest, and see *State* v. *Bunch,* 119 Ark. 219, 177 S. W. 932.) Adverting then to the epitomizing of § 3249, Pope's Digest, as shown in the previous topic, we have a situation wherein a person (McCraw) gave money to a person (Rowland) holding a place of trust (city attorney) under the law of the State; and the result was that neither McCraw nor any employee of his gambling house was ever arrested for violating the city ordinance against gambling. These questions remain: (1) whether McCraw paid Rowland the $50 per month "with intent to influence his decision" as city attorney in enforcing the gambling ordinance; (2) whether the $50 per month influenced Rowland's conduct; and (3) whether Rowland was under any duty to enforce the gambling ordinance. As to (1) and (2), the record is voluminous. Evidence of numerous facts and circumstances was presented as bearing on each of these. Without lengthening this opinion, we conclude that a jury question was presented as regards the intentions of McCraw and the conduct of Rowland.

We come then to the question as to whether Rowland was under any duty to enforce the previously mentioned ordinance of the City of Hot Springs against gambling.

Appellant argues that he, as city attorney, was under no duty to prosecute McCraw, and therefore his failure to prosecute was not a violation of any duty; and from this —appellant argues—the alleged bribe did not influence him in any official duties. Appellant cites § 9819, Pope's Digest, (an act of 1893) on the duties of a city attorney. This act says that the city attorney: " . . . shall give the bond, perform the duties and receive such salary as is now or may hereafter be prescribed by ordinance in each of said cities . . . "

This act leaves it entirely to the city council in each city to prescribe the duties of city attorney. The State introduced three ordinances of the City of Hot Springs purporting to detail the duties of the city attorney. These were the ordinances of April 21, 1886; February 5, 1896; and March 6, 1896. The ordinance of February 5, 1896, provided, in part: "That it shall be the duty of the city attorney, or an attorney representing him, to be in attendance in police court at each and every meeting of said court . . . "

The ordinance of March 6, 1896, provided, in part, as to the duties of the city attorney: " . . . It shall also be his duty to draft all ordinances, bonds, contracts, leases, conveyances, and such other instruments of writing as may be required by the business of the city, and to furnish written opinions upon subjects of a legal nature submitted to him by the council, and to conduct all law business in which the city may be interested, whenever called upon by the police judge in cases of special importance, and represent the city in its police court. . . . "

Appellant insists that these ordinances disclose no affirmative duty on the part of the city attorney to file prosecutions against persons engaged in gambling. In other words, appellant contends that, under these ordinances, there was no duty on the part of the city attorney of Hot Springs to enforce the gambling ordinance in the police court, unless particularly requested by the police judge.

But, regardless of this contention as to the municipal ordinances, Act 115 of 1929 (now found in § 9585, Pope's Digest) materially broadens the duties of a city attorney, and is the statute that imposed the duty upon the city attorney regarding the enforcement of city ordinances. This statute reads, in part: "If the mayor . . . *or any other elective officer of any city* . . . shall willfully and knowingly fail, refuse, or neglect to execute or cause to be executed any of the laws or ordinances within their jurisdiction, they shall be deemed guilty of nonfeasance in office . . . " (Italics our own.)

It is interesting to note that by Act 54 of 1895 (as found in § 7525, Crawford & Moses' Digest) the penalty for failure to execute the laws, as contained in the above section, rested only upon the mayor or police judge. But by Act 115 of 1929 the Legislature broadened this section so as to make the penalty for failure to enforce the laws rest on "any other elective official." In other words, the language italicized above was added to the statute by the 1929 act; and the effect of this 1929 legislation was to make the city attorney liable for nonfeasance if he "willfully and knowingly failed, refused or neglected to execute or cause to be executed any of the laws or ordinances" of the city.[21] The Legislature created the office of city attorney (§ 9819, Pope's Digest), and had the right to impose duties upon that official, in addition to the duties that the municipal corporation might impose.

The effect of the said act of 1929 was to place on the city attorney the duty to be active in the enforcement of the ordinances of the city; and it was provided that, if he should "willfully or knowingly fail, refuse or neglect to execute or cause to be executed any of the laws or ordinances" of said city, he should be deemed guilty of nonfeasance in office. Thus, a duty rested upon the appellant as city attorney of Hot Springs, because the ordinance

[21] One instance, where additional duties were placed on the city attorney by legislative enactment, may be found in § 9945, Pope's Digest, wherein it was made the duty of the city attorney also to be attorney for the civil service commission. Another instance is in §§ 7338 and 9757, Pope's Digest, wherein it was made the duty of the city attorney to be the attorney for all municipal improvement districts in cities of the second class and incorporated towns.

(of March 4, 1886) of that city prohibited gambling and gambling houses. The jury could have concluded from the evidence that the effect of the bribe given by McCraw to Rowland resulted in Rowland's willfully and knowingly failing, refusing and neglecting to execute or cause to be executed the ordinance of Hot Springs against gambling. Therefore, we conclude that there was sufficient evidence to sustain the verdict.

V. *Appellant says, "The Court Erred in Admitting Testimony Concerning the Hot Springs Waterworks Purchase."* In the course of the trial the State introduced evidence of other transactions in which the appellant had been engaged. One of such transactions related to Rowland's activities in the purchase of the Hot Springs Waterworks by the City of Hot Springs from a public utility which previously owned and operated the waterworks. Mr. Cherry was an investment banker in Little Rock; and he desired to purchase the bonds that the City of Hot Springs would issue if it purchased the waterworks. Accordingly, in 1942, Mr. Cherry employed Rowland to assist in consummating the purchase of the waterworks by the city. Cherry agreed to pay Rowland an attorney's fee of $35,000, and also a "finder's fee" of $15,000 if the city purchased the waterworks. Both amounts were in fact paid to him after the city made the purchase. The "finder's fee" was paid to Rowland on December 12, 1943; and he paid Mr. Moody and Mr. Smith each $5,000 of this "finder's fee"; and it was shown that Moody and Smith were aldermen of the City of Hot Springs, and members of the water committee of the city council.

Furthermore, it was shown that on August 23, 1943, Rowland, styling himself "acting city attorney," filed an intervention for the City of Hot Springs in a proceeding before the Arkansas Department of Public Utilities,[22] wherein was involved the attempt of the utility company to issue bonds on the Hot Springs Waterworks properties. The City of Hot Springs opposed the bond issue by the utility company, and then the city purchased the

[22] The Department of Public Utilities is now known as the Arkansas Public Service Commission. See Act 40 of 1945.

waterworks property, and issued its own bonds, which were purchased by Mr. Cherry's investment house. Rowland was authorized by the city council of Hot Springs (of which Smith and Moody were members) to represent the city before the Department of Public Utilities. In short, Rowland "gave" to two city aldermen $5,000 each as "finder's fee" in the waterworks matter; and while Rowland was receiving $35,000 as attorney's fee from Cherry, he was also styling himself "acting city attorney" of Hot Springs in appearing before the Department of Public Utilities.

The purpose of this testimony concerning Rowland's activities and fees in the waterworks matter is fairly obvious—*i. e.,* to show how Rowland had acted in other instances, in order to shed light on his intention in accepting the money each month from McCraw. The trial court limited the effect and scope of such evidence. Instruction No. 10 reads in part as follows: " . . . Testimony of other transactions between the defendant, Rowland, and other persons was offered by the State and admitted by the court, but you are instructed that you cannot consider any testimony as to other transactions between the defendant, Rowland, and persons other than Otis McCraw, Sr., and J. O. McCraw except for the sole and only purpose of assisting you in determining the intent of the defendant, Rowland, and his good faith or honesty of purpose in any transactions he had with Otis McCraw, Sr., and J. O. McCraw. In considering such testimony, you must consider it for that purpose alone, and although you may believe that the defendant, Rowland, may have behaved dishonestly with other persons, you cannot convict him in this case unless you do find and believe beyond a reasonable doubt that he accepted money as alleged in the indictment from Otis McCraw, Sr., and J. O. McCraw with the intent to influence his actions and decisions as city attorney in enforcing ordinances of the City of Hot Springs prohibiting gambling and operating of gambling houses insofar as they might apply to said Otis McCraw, Sr., and J. O. McCraw."

With the limitations as contained in the instruction, we hold that the evidence as to the Hot Springs waterworks was admissible. In *State* v. *DuLaney,* 87 Ark. 17, 112 S. W. 158, Chief Justice HILL said:

"The principle of evidence, that offenses or acts similar to the one charged may be competent for the purpose of showing knowledge, intent or design, is as thoroughly established as the general proposition that other crimes or offenses cannot be shown in evidence against a defendant charged with a particular crime. While the principle is usually spoken of as being an exception to the general rule, yet, as a matter of fact, it is not an exception; for it is not proof of other crimes as crimes, but merely evidence of other acts, which are from their nature competent as showing knowledge, intent or design, although they may be crimes, which is admitted. . . .

"Mr. Wigmore, in speaking of the admissibility of such evidence in charges of bribery, says: 'On a charge of bribery, any of the three general principles—knowledge, intent and design—may come into play. To show knowledge of the nature of the transaction, a former transaction of the sort may serve as indicating an understanding of the particular transactions. To show intent, another transaction of the sort may serve to negative good faith. To show a general design, a former attempt towards the same general end may be significant.' I Wigmore on Evidence, § 343."

In keeping with the foregoing, it is clear that the trial court was correct in admitting—under the limitations stated in the copied instruction—the testimony concerning the Hot Springs waterworks purchase.

VI. *The Appellant says, "The Trial Court Erred in Overruling Defendant's Motion Suggesting the Disqualification of the Judge."* Judge C. H. Brown was the regular circuit judge of the 18th Circuit of which Garland county is a part. The defendant filed his motion suggesting the disqualification of Judge C. H. Brown to preside in the case; and later defendant filed a motion asking

that a special judge be elected as provided by Art. VII, § 21 of the Arkansas Constitution. Judge Brown summarily overruled both of these motions; and then exchanged circuits with Judge Maupin Cummings (regular judge of the 4th Circuit); and Judge Cummings thereafter presided through the entire trial, ruling on the motion to quash (mentioned in Topic I, *supra*) and the demurrer (mentioned in Topic II, *supra*), and all matters thereafter.

There is no suggestion that Judge Cummings was in any manner disqualified; but there is here challenged Judge Brown's right to make the exchange of circuits (under Art. VII, § 22 of the Constitution, and § 2852, Pope's Digest). The appellant says: "A judge disqualified on the grounds of disqualification alleged in this case should not be permitted to select a presiding judge in the case. This should be left to election by members of the local bar, just as the Constitution provides."

The case of *Evans* v. *State,* 58 Ark. 47, 22 S. W. 1026, is enlightening, and is authority against the appellant's contention. Evans was indicted for murder in Union county, and obtained a change of venue to Ouachita county. The regular judge (of the 13th Circuit of which Union and Ouachita counties were parts) was Judge C. W. Smith. He was disqualified in the case because he was related within the fourth degree to the victim of the murder. Judge C. W. Smith effected an exchange of circuits with Judge A. M. Duffie (judge of the Seventh Circuit), who presided through the entire Evans trial. The defendant protested against Judge Duffie presiding, because he had in effect been selected by Judge Smith under the exchange of circuits (under Art. VII, § 22 of the Constitution, and § 1374, Mansfield's Digest). In holding the defendant's objection to be without merit, Mr. Justice Battle, speaking for this court, said: "Appellant insisted that Judge Duffie had no right or was disqualified, to preside in his trial because of Judge Smith's relationship to the deceased. How this could disqualify Judge Duffie we are unable to understand. The

Constitution authorized them to temporarily exchange circuits or hold courts for each other for such length of time as seemed to them practicable and to the best interest of their respective circuits and courts. The disqualification of one to preside in causes pending in his court or the impropriety of his so doing might well have been a good cause or reason for the exchange. In exchanging circuits they had the right to fix the time according to what in that respect seemed to them practicable and to the best interest of their respective circuits and courts. When the exchange was made, the law did not limit the right of either to preside in trials to those wherein the regular judge was not disqualified. The disqualification of one did not attach to the other or affect his qualification."

In the case at bar it is not claimed that Judge Maupin Cummings—who presided throughout all the trial on the merits—was in any way disqualified. So the alleged disqualification of Judge C. H. Brown could not attach to Judge Maupin Cummings. If Judge C. H. Brown had been a litigant, then he could not have selected a judge by exchange of circuits. But Judge C. H. Brown's alleged disqualification was not by reason of being a litigant, so he could effect an exchange of circuits just as he did following the precedent of *Evans* v. *State, supra,* in this case. We therefore hold appellant's contentions under this assignment to be without merit.

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

GUNNELS *v.* MACHEN.

4-8604 212 S. W. 2d 702

Opinion delivered July 5, 1948.

Jack Machen, for appellant.

Gaughan, McClellan & Gaughan, for appellee.

MINOR W. MILLWEE, Justice. Appellee, L. F. Machen, has resided at Camden, Arkansas, for the past five years where he is employed at a paper mill. He formerly lived near Village in Columbia county, Arkansas, where he still owns a 120-acre farm. In 1944, he was also the owner of a two-sevenths interest in a 65-acre tract near Village, having inherited a one-seventh interest from his father and acquired a one-seventh interest from another heir. Appellant has been engaged in the mercantile business at Village for a number of years and the parties have had considerable business dealings.

On March 20, 1944, appellees executed a warranty deed, absolute in form, conveying their undivided interest in the 65-acre tract to appellant for a recited consideration of $10. Machen had the deed prepared at Magnolia and took the instrument to the First National Bank there. W. C. Blewster, president of the bank, gave Machen a check for $400 drawn on appellant's account. Machen cashed the check and left the deed with Blewster. A few days later Blewster gave the deed to appellant who placed it in his safety deposit box at the bank without recording it.

In May, 1945, appellant had another deed prepared conveying the same two-sevenths interest in the land and sent it to Camden by his son for execution by appellees. This deed recited a consideration of $100, and was executed by appellees on May 12, 1945, and filed for record by appellant on May 21, 1945. It recites: "This deed given to replace a former deed which has been lost."

Machen was in Village on December 14, 1944, when he paid appellant $18 and took a receipt prepared and signed by appellant which recites: "Paid on land $18.00." After recording the second deed, appellant sold timber off the land and executed an oil and gas lease covering it.

Appellees instituted this suit to have the deeds given to appellant declared to be a mortgage and to be permitted to redeem the two-sevenths interest in the land from it. They alleged in their complaint that the deed first executed, though absolute in form, was in fact given as security for a loan of $400 from appellant to L. F. Machen and with the understanding that said deed would be held as security for payment of the loan; that when Machen later offered to pay the loan he learned that appellant had recorded the second deed contrary to the agreement of the parties; that appellant refused to accept payment of the indebtedness and claimed the land as his own by virtue of the deed.

Appellant answered and denied the allegations of the complaint as to the deed being intended as a mortgage and asserted that he purchased appellees' interest in the lands for a consideration of $400 and that the deeds were executed as an absolute conveyance pursuant to such sale and purchase. The chancellor found the issues in favor of appellees declaring the deeds were given to secure a debt and intended as a mortgage and allowing redemption therefrom. This appeal challenges the sufficiency of the evidence to support the finding of the chancellor.

There is a decided conflict in the testimony as to the agreement between the parties when the first deed was executed and as to certain happenings thereafter.

L. F. Machen testified: He built a house on his 120-acre farm and lacked $400 having sufficient funds to complete payment of construction costs. In March, 1944, he approached appellant at his store in Village and asked him if he wanted to buy the two-sevenths interest in the 65-acre tract and appellant told him he was not interested in buying it because he did not want to become involved with that many heirs in the land. Machen then told appellant that he did not want to sell the interest, but would like to borrow enough to finish payments for the house on the other tract. Appellant agreed to make the loan, but declined to take a second mortgage which Machen offered to give on the 120-acre tract. Appellant then proposed that appellees execute a deed to the two-sevenths interest in the 65-acre tract and place it in the bank as security for the loan. Machen agreed to this arrangement and explained that he might not be able to repay the loan before fall. Appellant stated that this would be satisfactory and directed Machen to have the deed prepared. The next day Machen had the deed prepared and took it to the First National Bank in Magnolia where he expected to meet appellant. Mr. Blewster at the bank telephoned appellant who directed Blewster to sign appellant's name to a check for $400 to Machen and accept the deed. Machen cashed the check and delivered the deed to Blewster.

Machen further testified that he came to Village on December 14, 1944, and told appellant that sickness in his family had rendered him unable to make monthly payments on the debt, but offered to get the money if appellant wanted it. Appellant told him that he did not need the money and to go ahead and pay when he could. Machen had $18 with him which he paid appellant and took appellant's receipt which recited, "Paid on land $18.00." Machen also had an account at the store and assumed that the receipt was so worded to show that payment was on the land debt rather than on his store account. He did not see appellant again until the first of January, 1946. He usually went to Village in the fall to collect rent from his brother who was farming the 120-acre tract, but did not go in the fall of 1945 be-

cause his brother had not sold his cotton and Machen did not expect to get any rent until the first of the year. When he went to appellant's store in January, 1946, to pay off the $400 debt, appellant was not there and his son told Machen that his father had put the deed on record, and that appellee would have to see him. After finding the deed had been placed on record, he made four trips from Camden to see appellant and found him at the store on the fifth trip.

Machen gave the following account of their conversation at that time: "I says this is the 5th trip I have made here to see you, and I says I can't understand, what you mean by putting that deed on record, and I says what did you do it for, you had no right to do that; he says you told me to, I says I never done anything of the kind, why he says you certainly did, I says when, he says I don't remember the date but some time when you was in here, and then I took out this receipt and I asked him did you sign this, and he says yes, and I says then why did you put the deed on record after I made a payment on it; he says you think I would donate it to you; he says I don't know why you did it; I says that is as big a lie as ever fell from human lips, and I says I have the money ready for you, if you want it you can have it, if not I can't help it; and I turned around and walked out. I says I couldn't do anything about that without getting a lawyer, and I got one, and that is the end of the story."

Machen also testified that he had borrowed small sums from appellant several times prior to 1944 without giving a note or any kind of security; that on one occasion he borrowed a substantial sum to buy an oil lease and when he sold the lease he repaid appellant and gave him one-half of the profit on the sale. He also stated that he borrowed $250 from appellant in April, 1937, and executed a deed covering the same two-sevenths interest in the land here involved to secure the loan. On that occasion the deed was made to the son of appellant at appellant's request. When Machen repaid the loan to appellant three months later, the son reconveyed to Machen. Both deeds were recorded and introduced in evidence by

appellees. Appellant disclaimed any knowledge of the transaction.

Appellant gave the following version of the transactions between the parties: Machen approached him in March, 1944, about selling the two-sevenths interest and he told Machen that he was not interested in buying an undivided interest in the estate; that Machen then proposed that if appellant would buy the interest and was unsuccessful in acquiring the interest of the other heirs or if Machen was unsuccessful in acquiring the other interests for appellant, then Machen would repurchase the two-sevenths interest; that he agreed to this arrangement and directed Machen to have the deed prepared and nothing was said about the time within which Machen might repurchase the land.

Appellant gave the following testimony concerning his conversation with Machen at the time he gave Machen the receipt for the $18 payment: "Q. This receipt that has been introduced by the plaintiff, that is the receipt you gave him, is it? A. Yes. At that time he hadn't paid any of the other and I was still hoping he would buy it back, and I had told him I wouldn't take it under any circumstances; so, I never heard any more from him in 30 days, and he came back and told me, he says Baxter, go ahead and take the place, he says my wife has been sick and I have had lots of doctor bills and it don't look like I will ever get the money, and I says is that what you want to do and he says yes . . ."

Appellant also stated that he had forgotten where he left the first deed and had the second deed executed to replace it. He bought the interest of two other heirs after the second deed was recorded and stated that he did not see Machen after January, 1945, until some time in January, 1947. Huie Eads testified on behalf of appellant that he had a conversation with Machen in 1945 in which he offered to buy the land in controversy and Machen told him he had sold it to appellant. In rebuttal, Machen stoutly denied the statement although he admitted having a conversation with the witness. He detailed the circumstances surrounding the conversation and defi-

nitely fixed the time of its occurrence as the year 1943, which was prior to the date of the execution of the first deed to appellant.

It was shown that the lands in controversy had little, if any, market value for oil until a few months prior to July, 1945, when a wildcat well was brought in about a mile east of the land.

The rule is well established by many decisions of this court that in order to change, by parol testimony, the purport of a deed, absolute in form, by showing that it was executed as a mortgage, the proof must be clear, unequivocal and convincing. *Hayes* v. *Emerson,* 75 Ark. 551, 87 S. W. 1027; *Rushton* v. *McIllvene,* 88 Ark. 299, 114 S. W. 709; *Wimberly* v. *Scoggin, Receiver,* 128 Ark. 67, 193 S. W. 264; *Holman* v. *Kirby,* 198 Ark. 326, 128 S. W. 2d 357; *Watson* v. *Clayton,* 203 Ark. 1097, 160 S. W. 2d 849. While it requires clear and decisive testimony to prove that a deed absolute in form was intended as a mortgage, it is not required that it shall be undisputed or absolutely conclusive. *Scott* v. *Henry,* 13 Ark. 112; *Hoyer* v. *Edwards,* 182 Ark. 624, 32 S. W. 2d 812; *Sturgis* v. *Hughes,* 206 Ark. 946, 178 S. W. 2d 236.

In the recent case of *McBride* v. *McBride,* 208 Ark. 739, 187 S. W. 2d 341, we said: "Appellee argues that the decree should be affirmed for the reason that this court has many times held that a deed, in form, will not be decreed to be a mortgage in fact, except upon testimony that is clear, unequivocal and convincing, and so we have. And it is insisted also that the testimony is sharply conflicting, and so it is. But while we have held that the relief of declaring an instrument in form a deed to be a mortgage in fact will not be granted except upon testimony that is clear and convincing, we have also held that it is not required that the testimony be undisputed; but that this relief will be granted if, notwithstanding conflicts in the testimony, that testimony which is credited and believed to be true, meets the requirements imposed by law. *James, et al.* v. *Furr, et al.,* 126 Ark. 251, 190 S. W. 444; *Berard* v. *Fitzpatrick,* 134 Ark. 190, 203 S. W. 1039." In the case last cited, it is

said: "Indeed, in suits of this character the testimony is quite frequently in sharp conflict, but the relief prayed for is not refused on that account if, from the testimony as a whole, it clearly and certainly appears that the writing in question was not to have the effect which its terms ordinarily import."

Although no mention was made of a contract to repurchase the land in the pleadings, appellant testified that such an agreement was made with Machen. The cases of *Matthews* v. *Stevens,* 163 Ark. 157, 259 S. W. 736; *Beloate* v. *Taylor,* 202 Ark. 229, 150 S. W. 2d 730; *Sturgis* v. *Hughes,* 206 Ark. 946, 178 S. W. 2d 236; and *Newport* v. *Chandler,* 206 Ark. 974, 178 S. W. 2d 240, are cited in support of appellant's contention that a contract to repurchase rather than a debt is involved in the instant case. It would unduly extend this opinion to point out the difference between the facts of those cases and those involved in the instant case.

In *Matthews* v. *Stevens, supra,* Justice HART, speaking for the court, said: "It is well settled in this State that whenever, at the time of a sale, a vendor is indebted to the purchaser, and continues to be indebted after the sale, with the right to call for a reconveyance upon payment of the debt, a deed absolute on its face will be considered by a court of equity as a mortgage. *Harman* v. *May,* 40 Ark. 146, and *Brewer* v. *Yancey,* 159 Ark. 257, 251 S. W. 677.

"The effect of our decisions is that, whether any particular transaction does thus amount to a mortgage or to a sale with a contract of repurchase must, to a large extent, depend upon its own circumstances. The question ultimately turns, in all cases, upon the real intention of the parties, as shown upon the face of the writings or as disclosed by extrinsic evidence. The rule is undisputed that, to show that a deed is not in fact an absolute conveyance, but was intended as a mortgage to secure a debt, the evidence must be clear, satisfactory and convincing. *Hays* v. *Emerson,* 75 Ark. 551 87 S. W. 1027; *Snell* v. *White,* 132 Ark. 349, 200 S. W. 1023; *Henry* v. *Henry,* 143 Ark. 607, 221 S. W. 481; and *Jefferson* v.

Souter, 150 Ark. 55, 233 S. W. 804." See, also, *DeLoney* v. *Dillard,* 183 Ark. 1053, 40 S. W. 2d 772; and *Holman* v. *Kirby, supra.*

There are several circumstances in the case at bar that give strong support to the proposition that a debt was created at the time of the execution of the deed to appellant and that the instrument was intended by the parties to secure the debt. It is certain that appellant did not want to buy the property. It is also significant that appellant left the first deed in the bank without recording it and that he secured the second deed and placed it of record about the time leases were being obtained for the drilling of an oil well near the land. The payment of the $18 by Machen on December 14, 1944, and the issuance of the receipt therefor by appellant is a significant circumstance showing a recognition by both parties that an indebtedness existed. The fact that a note was not given to evidence the loan would be a strong circumstance in favor of appellant, but for the further showing that Machen had previously obtained loans from appellant by delivery of a deed as security and without executing a note.

The Chancellor made exhaustive findings in which he applied the well established rule that the testimony in appellees' favor must be clear, unequivocal and convincing. The evidence is, in our opinion, sufficient to support his conclusion that appellees have fully discharged the burden resting upon them under the rule.

Affirmed.

ZACKERY *v.* WARMACK.

4-8594 212 S. W. 2d 706

Opinion delivered July 5, 1948.

L. L. Mitchell and *H. H. McKenzie,* for appellant.

McRae & Tompkins, for appellee.

MINOR W. MILLWEE, Justice. At the time of her death intestate about the year 1919, Fannie Mixon was the owner of a 40-acre tract of land in Nevada county, Arkansas. She left surviving her the appellant, John Zackery, and five other children as her sole heirs at law.

On May 20, 1920, Rufus Zackery, one of the children, conveyed his interest in the land to John Zackery, Dock Zackery, Alfred Zackery, Annette Sterling and Mary Ellen Leake, his five brothers and sisters. The general taxes for the year 1929 were not paid and appellant, John Zackery, purchased the land at the 1930 tax sale. He received a clerk's tax deed on March 31, 1937, and has since paid taxes each year until, and including, the year 1945.

Alfred Zackery died intestate without issue in 1943. Rufus Zackery died intestate in 1944 leaving 10 children as his sole heirs, and Annette Sterling died intestate in 1945 survived by eight children.

Appellee, J. B. Warmack, filed this suit on July 8, 1947, against all the heirs of Fannie Mixon, deceased,

except Dock Zackery. He alleged that he was the owner of an eighteen-fortieths interest in the land by virtue of warranty deeds from Pat Robinson and wife and Dock Zackery and wife, executed in March, 1947; that the tax sale and deed to appellant based thereon were void and the procurement of said deed by appellant was merely a redemption for the benefit of his relatives and tenants in common; that appellant was wrongfully claiming full title to the lands and cutting and removing the timber therefrom. Appellee prayed that the interests of the respective owners be fixed and the land sold for the purpose of partition; that judgment also be rendered for the value of the timber cut by appellant and that the amount of such judgment be charged against his interest in the land.

No defense was interposed by any of the defendants except appellant, John Zackery, who filed an answer and cross complaint alleging that he acquired full title to the land under his tax deed and the payment of taxes for the years 1930 to 1945, inclusive, under claim of ownership against the other heirs of Fannie Mixon, deceased, and all parties claiming through them. Appellant prayed that the deeds from Pat Robinson and Dock Zackery to appellee be cancelled and that his title to all the land be quieted.

Trial resulted in a decree in favor of appellee ordering sale of the lands for the purpose of partition according to the respective interests of the parties fixed in the decree. The court found that the tax sale and clerk's deed to appellant were void, but that said deed was color of title and constituted a redemption from the tax forfeiture for the benefit of appellant's relatives and tenants in common; that appellant had at all times recognized the interests of the other heirs of Fannie Mixon, and their assigns, and that his possession had never been adverse to them. The decree further found that appellant should be permitted to retain the proceeds of the sale of timber of the value of approximately $83 to reimburse him for taxes paid on the land. The cross complaint of appellant was dismissed and he has appealed.

At the time of Fannie Mixon's death in 1919, a part of the 40-acre tract was in cultivation and appellant rented the lands to a tenant for one year following the death of his mother. The land has since remained wild, unenclosed and unimproved. Appellant is the eldest of the six children of Fannie Mixon and has at all times resided near the property. All the other heirs, except Dock Zackery who lives at Prescott, Arkansas, moved to other counties shortly after their mother's death.

The taxes on the land were apparently paid by appellant in the name of Fannie Mixon from 1919 to 1929. After his purchase at the 1930 tax sale, appellant paid the taxes in his own name until 1945. In March, 1925, he executed a right-of-way deed to the 40-acre tract to the Arkansas Power & Light Company and collected the consideration of $1.00 per pole. In August, 1935, he executed a mineral deed and an oil and gas lease to Earl Morgan and a consideration of $40 is recited in each instrument. In 1937, he sold some timber from the land.

The testimony of appellant is replete with faulty recollection of dates and events and contains conflicting statements on material factual issues. This is no doubt due to his advanced age. On direct examination, he stated that he told all of his brothers and sisters except Dock Zackery that he had purchased the land at the tax sale and was claiming it. On cross-examination, he testified:

"Q. When you bought the land in for that tax forfeiture, you were going to freeze out your brothers and sisters and take it all yourself? A. They did not say anything about it and I did not either. I just bought it in and supposed it was mine. Q. You say they did not say anything about it and you did not either? A. No, it just sold for taxes and I bought it in. I kept it like it was mine for it sold for taxes and I bought it in. Q. Didn't you think you ought to tell them something about it if you were going to claim all the land your mother owned? A. I thought they ought to say something about it. . . . Q. You never told them you were claiming all the land, that they did not have any more claim in the land? A. I did not think I had to tell them that. They knowed it

was forfeited. They knowed somebody bought it in and whoever bought it, it belonged to them. Q. If they knew you had bought it, if they knew their brother had bought it? A. Just like anybody else had bought it. . . . Q. The heirs that were scattered and gone did not know every time you made any transaction down there about that land? A. I don't know whether or not they did. I haven't told them nothing about it."

Appellant did not remember having an understanding with the other heirs that he would pay the taxes with the money received for the right-of-way deed in 1925. Although his brothers and sisters have not lived near the land since he purchased it at the tax sale, he had seen them occasionally when they returned on visits. He produced several witnesses who testified that the tract had been known as the John Zackery land for 15 or 20 years.

Appellee placed in evidence a warranty deed dated April 11, 1939, from Dock Zackery, Annette Sterling, Mary Ellen Leake and Alfred Zackery to Pat Robinson conveying a six-twentieths interest in the land. This deed was recorded May 18, 1939.

Robinson testified that sometime prior to execution of this deed Alfred Zackery, who lived near Lewisville in Lafayette county, employed witness to defend him in a criminal case; that Alfred and his two sisters first executed a mortgage of their interest in the land to secure payment of the attorney's fee and later, along with Dock Zackery, executed the deed. After obtaining the deed Robinson was checking the title and learned that appellant had sold or was attempting to sell timber from the land. He stated that he wrote a letter for his client, Alfred Zackery, to appellant warning him against further cutting of the timber and that Alfred received a reply from appellant about thirty days later in which the latter stated that none of the other heirs had contributed to payment of taxes and that proceeds from the sale of timber were being used for that purpose only. This explanation was satisfactory to all concerned and Robinson withheld the filing of a suit against appellant and a lumber company which had purchased the timber.

Robinson was uncertain whether he got the information about timber cutting from the heirs or from checking the county records. He also stated on cross-examination that it was his recollection that the cutting and sale of timber by appellant occurred before he (Robinson) acquired an interest in the lands.

Dock Zackery testified that after his mother died appellant agreed to keep the taxes paid and to notify the other heirs if he was unable to make such payments; that no such notice was ever received by the other heirs and that appellant was to use the proceeds from the right-of-way deed to the power company in making tax payments. Although he first testified that he learned appellant was claiming the land about 8 or 9 years ago, he later gave the following testimony:

"Q. Did your Brother John ever tell you, at any time, that he owned all that, that he had taken your part of the land? A. He did not tell me that way. He said that he had paid the back taxes. Q. When did he tell you that? A. Three (3) or four (4) years ago. Q. Do you know why he told you that? Did he ever ask you to give him any money or keep the taxes paid? A. No, sir. Q. Three (3) or four (4) years ago he told you he had paid the taxes up? A. He taken the land up. He paid the back taxes. I said, 'How come?' He said that he took it up to keep anybody else from getting it. He said, 'You all are not out of it'."

Dock Zackery conveyed all his interest in the land to appellee by warranty deed dated March 8, 1947, and Pat Robinson executed a similar deed to appellee on March 15, 1947. On March 17, 1947, appellee executed a royalty deed back to Robinson conveying one-fourth of the minerals in the land.

For reversal of the decree it is earnestly insisted by appellant that his payment of taxes on the lands for at least 16 years, together with the several conveyances which he executed, constituted an ouster of his cotenants, thereby vesting the whole title to the land in him by adverse possession; and that the trial court's holding to the contrary is against the preponderance of the evi-

dence. In support of this contention appellant cites several cases holding that payment of taxes for seven consecutive years on wild and unimproved land under color of title constitutes a possession equal to seven years actual adverse possession under the provisions of § 8920, Pope's Digest. In most of the cases cited the question of the cotenancy relationship was not involved.

The principle to be applied in determining whether appellant has acquired the interests of the tenants in common is stated in *Singer* v. *Naron,* 99 Ark. 446, 138 S. W. 958, as follows: "The reason that the possession of one tenant in common is *prima facie* the possession of all, and that the sole enjoyment of the rents and profits by him does not necessarily amount to a disseizin, is because his acts are susceptible of explanation consistently with the true title. In order, therefore, for the possession of one tenant in common to be adverse to that of his cotenants, knowledge of his adverse claim must be brought home to them directly or by such notorious acts of an unequivocal character that notice may be presumed." See, also, *Hill* v. *Cherokee Construction Co.,* 99 Ark. 84, 137 S. W. 553; *Davis* v. *Harrell,* 101 Ark. 230, 142 S. W. 156; *Gibbs* v. *Pace,* 207 Ark. 199, 179 S. W. 2d 690.

It is also well settled that one tenant in common cannot add to, or strengthen, his title by purchasing title to the entire property at a tax sale, and that such purchase merely amounts to a redemption which inures to the benefit of all the tenants and confers no right upon the tenant so purchasing except to demand contribution from his cotenants. *Spikes* v. *Beloate,* 206 Ark. 344, 175 S. W. 2d 579.

In the case of *Jones* v. *Morgan,* 196 Ark. 1153, 121 S. W. 2d 96, cited by appellant, it was held that the chancellor was justified in finding that one tenant in common held land adversely to his cotenants where he lived on the land for 37 years during which time he paid all the taxes, retained the crops, sold timber and made valuable improvements with no complaint from the other cotenants. In the case at bar appellant was not in actual pos-

session of the land. He has made no improvements and there is evidence of certain admissions on his part tending to show that he continued to recognize the rights and interests of his brothers and sisters.

Appellant relies strongly on the case of *Avera* v. *Banks,* 168 Ark. 718, 271 S. W. 970. The facts in that case were that Louis J. Banks died childless and intestate in 1907 owning title to certain lands. His widow had three children by a former marriage, one of whom was the appellant, Avera, and one-half of the land descended to the widow. She died in 1911, and her interest descended to Avera and his two sisters. The sisters conveyed to Avera who acquired a tax deed to the land in 1916 and paid the taxes from 1907 until 1923. At the time of his death Banks owed $275 which was more than the land was worth at the time, and Avera and his mother paid this debt. The appellees in that case were the heirs of Banks and tenants in common with Avera. While it was held that Avera had not acquired the interest of the other cotenants by adverse possession, it was further found that appellees were estopped by laches from maintaining a partition suit. The court stated that the other heirs were not misled by any action on the part of Avera and that there was no excuse whatever shown for their delay in asserting title to the land which had suddenly become valuable on account of the discovery of oil in the neighborhood.

It was further said in the Avera case: "In this connection it may be stated that M. J. Avera did not take possession of the land by permission of appellees. He occupied no relation of trust or confidence to them, except that he and they owned the land as tenants in common. He acquired his interest by inheritance from his mother, and appellees inherited directly from Louis J. Banks. These facts render appellees guilty of laches in not sooner asserting their rights and making it inequitable to divest numerous purchasers of the rights which they had acquired under their oil and gas leases."

In the case at bar there has been no substantial increase in the value of the land since the death of Fannie

Mixon and there is evidence that appellant assumed the responsibility of making tax payments for the benefit of all the heirs from the sale of timber and other interests in the land. The equities of third parties have not intervened, and such delay as has occurred on the part of other cotenants has worked no serious disadvantage to appellant. While the amount of tax payments is not shown, it is not unreasonable to assume that his receipts from the sale of timber and other interests were considerably in excess of disbursements for taxes. "Laches, in legal significance is not mere delay, but delay that works a disadvantage to another." *Osceola Land Co.* v. *Henderson,* 81 Ark. 432, 100 S. W. 896.

The testimony of Dock Zackery and Pat Robinson indicates that appellant recognized the interests of the other cotenants and that he was not holding adversely to them. Appellant argues that this testimony is unreasonable and fallacious. The chancellor apparently did not so regard it. He saw and heard all the witnesses and was in a more favorable position to properly appraise and weigh the testimony than is this court on appeal. *Murphy* v. *Osborne,* 211 Ark. 319, 200 S. W. 2d 517. We cannot say that his finding—that the acts and conduct of appellant in connection with the lands in controversy did not amount to an ouster of his cotenants—is against the preponderance of the evidence. The decree is, therefore, affirmed.

THOMAS *v.* SITTON.

4-8586 212 S. W. 2d 710

Opinion delivered July 5, 1948.

J. F. Koone, for appellant.

Opie Rogers, for appellee.

HOLT, J. Appellee, Haskell Sitton, January 16, 1948, filed "Petition for Writ of Mandamus" in the Van Buren Circuit Court, in which he alleged that he was the duly appointed and acting City Marshal of Clinton. "That he was employed by the City Council and has served in the capacity of Marshal since 1st day of May, 1946, and that he was serving as such Marshal in December, 1947; that his fixed salary was and is $250 per month payable semi-monthly on the 1st and the 15th of each month; that the said city paid him until December, 1947, and that the respondent, (appellant) J. A. Thomas, who is the City Treasurer and whose duty is to pay all officers and to pay this petitioner herein, refused to pay him for his month's work performed in December, 1947; that on January 12, 1948, the City Council passed a resolution to pay his salary for the month of December, 1947; that the respondent failed and refused to pay same, notwithstanding this resolution; and that there is sufficient money in

the treasury with which to pay the salary of the petitioner herein. . . . ''

Copy of the resolution, *supra,* was made a part of the petition.

Appellee prayed for Writ of Mandamus, directing and compelling appellant ''as Treasurer of the City of Clinton to issue and deliver to the petitioner herein, (appellee) check for $250 in payment of his December salary, etc.''

Appellant, Thomas, answered with a general denial and specifically pleaded: ''That the . . . council of the City of Clinton, . . . Clinton being a city of the second class, . . . has never, at any time, had the power or authority to hire, elect or appoint a city marshal for the City of Clinton, or to constitute any person an employee to perform the duties of city marshal; . . . that the plaintiff, Haskell Sitton, is not now, nor was he at any time during his alleged employment, or on January 12, 1948, a resident of the City of Clinton; . . . that plaintiff has heretofore been paid more by the City of Clinton than he was entitled to either under his alleged employment or under the law which prescribed the compensation for marshals of cities of the second class.''

Upon a hearing, the trial court granted appellee the relief prayed and directed appellant, Thomas, as treasurer of the City of Clinton, to issue and deliver to appellee check for $250 in payment of his December salary.

This appeal followed.

For reversal, appellant argues: ''1. That said city does not owe Haskell Sitton any sum whatever, . . . because he has never at any time before January, 1948, resided within the limits of the City of Clinton, and was, therefore, but a *de facto* city marshal and not legally entitled to compensation for his services as city marshal. 2. Because, while the law provided for the election of a city marshal, he was appointed or employed by a . . . city council which had no authority to appoint or employ a city marshal or to fill a vacancy in the office of city marshal. 3. Because the city, through its council, has

already paid the said Haskell Sitton at least the sum of $500 in excess of the salary fixed at the beginning of his term by way of increases of salary contrary to a statute prohibiting increases. 4. Because, the Legislature having fixed the compensation of marshals of cities of the second class, there was, in the absence of other provision therefor, no authority for the council to fix his salary, Clinton being a city of the second class."

The material facts appear not to be in dispute. Clinton is a city of the second class. Appellee, Sitton, admitted that he had never resided in the City of Clinton and was not a qualified elector therein.

At the outset, it becomes necessary to determine whether, in the circumstances here, the position held by appellee, Sitton, was that of an officer or an employee. In other words, whether the position of marshal of the second class city of Clinton was a public office. We hold that the position was that of an officer and not that of an employee and constituted a public office.

Section 9810 of Pope's Digest provides that "the qualified voters of each city of the second class shall, . . . elect a city marshal, . . . Each of said officers shall continue in office until his successor is elected and qualified, and shall have such powers and perform such duties as are prescribed in this act, or as may be prescribed by any ordinance of such city, not inconsistent with the provisions of this act."

Section 9801 provides that: "The qualified voters of cities of the second class shall, on the first Tuesday in April, in the year eighteen hundred and eighty-eight, and on the same day every two years thereafter, elect . . . one city marshal, etc."

Section 9577 requires all officers (which includes marshals) elected or appointed in any municipal corporation to take the oath prescribed by the Constitution of this State for officers, and all such officers may be required to make bond for the faithful discharge of their duties.

Section 9812 prescribes the powers and duties of marshal of cities of the second class, and provides that "he shall, in the discharge of his proper duties, have like powers, be subject to like responsibilities, and shall receive the like fees as sheriffs and constables in similar cases."

Section 9811 classifies a marshal as an officer in this language: "Whenever a vacancy shall occur in the office of recorder or marshal in any city of the second class from any cause, the city council shall, . . . proceed to elect . . . a marshal to serve for the unexpired term."

Under the above sections of the statute, it is made plain that the position of marshal has all the elements of an office and meets the necessary tests set out in *Rhoden* v. *Johnston,* 121 Ark. 317, 181 S. W. 128. There, this court said: "An apt definition is given by the Supreme Court of the United States in the case of *United States* v. *Hartwell,* 6 Wall. 385, 18 L. Ed. 830, as follows: 'An office is a public station or employment, conferred by the appointment of government, and embraces the ideas of tenure, duration, emolument, and duties.'

"The same court, in *Hall* v. *Wisconsin,* 103 U. S. 5, 26 L. Ed. 302, said: 'Where an office is created, the law usually fixes the compensation, prescribes its duties, and requires that the appointee shall give a bond with sureties for the faithful performance of the service required'."

We held in the recent case of *Moncus* v. *Raines,* 210 Ark. 30, 194 S. W. 2d 1, that a town marshal, of an incorporated town, under § 9799, was a public officer.

It is obvious that the powers, duties and responsibilities of a marshal of a city of the second class, under § 9812, are as broad and numerous as those of a town marshal under § 9799, *supra.* The provisions of both sections are practically identical. In wording, they are, in effect, the same.

It must necessarily follow, therefore, that a marshal of a city of the second class and a town marshal of incorporated towns are officers under the meaning of Art. 19,

§ 3 of our Constitution. That section provides: "No person shall be elected to or appointed to fill a vacancy in any office who does not possess the qualifications of an elector."

Appellee, Sitton, having never resided in the City of Clinton was not eligible to hold the office of city marshal.

It is undisputed that he was employed by the City Council of Clinton May 1, 1946, to serve as marshal at $175 per month, and thereafter in September, his salary was raised to $200 per month. He continued to act and receive this salary up to January 1, 1947, but thereafter for each month of 1947 he was paid $250, except for the month of December when payment to him was stopped by order of the mayor. As above indicated, the City Council of the City of Clinton was without authority to employ appellee, Sitton, as its marshal, since, as pointed out, the Legislature has provided that such marshal shall be elected by the qualified voters of the city (§ 9801, Pope's Digest), or in case of a vacancy in the office of marshal by a majority vote of the City Council (§ 9811). At most, he was but a *de facto* officer, under color of his appointment by the City Council. We held in *Hill* v. *Rector,* 161 Ark. 574, 256 S. W. 848, that: (Headnote 2) "A *de facto* officer has no right to the emoluments of an office the duties of which he performs under color of an appointment but without legal title." The City of Clinton, therefore, does not owe appellee anything.

Even if appellee were eligible to hold the office of marshal and had been appointed by the Council to fill a vacancy under § 9811, *supra,* his position would not be improved here for the reason that the term of his office would not have expired until April, 1948, and his salary increases (far in excess of the amount here involved) received by him since his initial appointment, May 1, 1946, have been in violation of the provisions of § 9581, which prohibits any increase during the term of his appointment as indicated. *Barnes* v. *Williams,* 53 Ark. 205, 13 S. W. 845, and *Weeks* v. *Texarkana,* 50 Ark. 81. 6 S. W. 504.

For the error indicated, the judgment is reversed and the cause dismissed.

THACKER *v.* HICKS.

4-8601 212 S. W. 2d 713

Opinion delivered July 5, 1948.

W. Leon Smith, for appellant.

Cecil Grooms, for appellee.

HOLT, J. Appellant, L. F. Thacker, began this suit September 9, 1946. He alleged in his complaint that he was "the owner of a leasehold interest" in a tract of land in Greene county, here involved, and entitled to its possession. He further alleged that appellees, Steve Hicks and his wife, had wrongfully, forcibly and by threats, moved on said land, had taken possession and control and refused to vacate. He prayed for possession and for alleged damages.

February 8, 1947, appellant, Kitchen, intervened, alleging "that the (lease) term of said Thacker has expired and he has surrendered said land to intervener; that intervener is the owner of a leasehold interest in said land by virtue of a lease dated October 15, 1943, executed by Lester Kent, the owner of said lands, for a term commencing on the 1st day of January, 1947, and ending on the 31st day of December, 1949, and by virtue thereof

the intervener has succeeded to the rights of the said Thacker."

October 6, 1947, Kitchen filed an "Intervention and Amendment to Complaint" in two counts. In the first, he made, in effect, the same allegations, as in his first intervention, *supra,* and that appellees held possession wrongfully, forcibly and without right. In his second count, he alleged, in effect, that after appellees had wrongfully and forcibly taken possession of said land, appellant, Thacker, "entered into an agreement with the defendants (appellees) whereby the said L. F. Thacker then being in possession of said property agreed with the defendants that they might occupy the small house in question and farm ten acres of the land adjacent thereto for the year 1946, the defendants to farm ten acres of land on a sharecrop basis; . . . that . . . defendants failed and refused to comply with said contract and failed and refused to farm said lands according to the terms of said agreement, and that they, therefore, forfeited their right to longer occupy said premises and that said contract expired on December 31, 1946, and had expired at the time the intervener herein gave written notice to the defendants to vacate said premises, and surrender the possession thereof; that the intervener is entitled to the possession of said property and as the successor in interest in the leasehold of said land, is entitled to maintain this action against the defendant; and that the defendants have paid no rents on said lands, but continued to forcibly and unlawfully retain possession thereof."

Appellees answered with a general denial and asserted ownership of the land and the right to its possession. They also denied that they had entered into any lease contract with appellants, or any one else, and in effect, by way of cross complaint prayed for actual damages in the amount of $500 on account of the wrongful acts of appellant and punitive damages in the amount of $2,000.

A jury trial resulted in a verdict for appellees for restitution of the property claimed by them and damages in the amount of $250. From the judgment is this appeal.

For reversal, appellants contend (1) that the trial court erred in permitting improper cross-examination of appellant, Thacker; (2) in giving an alleged improper instruction; (3) in refusing to give a certain instruction requested by appellants, and (4) that the evidence was insufficient to support the verdict.

We have concluded that appellants' first contention, that the court permitted improper testimony to go to the jury, must be sustained.

There was testimony to the effect that appellees moved on the land in question in 1931, claimed ownership, made substantial improvements and occupied it adversely until about December 3, 1941. This land lies along the St. Francis River and is commonly known as "swamp land." The evidence further shows that in July, 1940, B. C. Hudson attempted to convey this land to Lester Kent. Just what interest Hudson had in the land, the record does not show. December 3, 1941, appropriate proceedings were had, resulting in both appellees being declared insane, and they were duly committed to the State Hospital for a period of about four months, when they were released. While appellees were in the hospital, Kent leased the land to appellant, Kitchen. Kitchen subleased to Sprague and Company, and the company leased it to Thacker. After the expiration of Thacker's alleged lease, Kitchen took possession under a purported lease from Kent. In late 1945 or the early part of 1946, appellees, finding the property vacant, moved back on the land and into the same house they left when they were removed to the State Hospital, and remained on the property until evicted by a court order February, 1947. Appellant says that appellant, "W. T. Kitchen . . . is now the real party in interest in this case." Kitchen, as above noted, claims to have leased the land in question from Lester Kent.

The record reflects that appellants, in support of their allegations in count two of their amended complaint

and intervention, *supra,* in which they alleged that appellees occupied the land under a contract with Thacker, introduced Thacker as a witness to support this contention. Appellees positively denied that they ever entered into such contract. In this connection, appellant says: "At any rate, the witness, Thacker, was the only person introduced by the appellant to establish the existence of that contract. Therefore, it became a question as to whom the jury believed with reference to the making of that contract, the witness Thacker or the appellee, Tommie Hicks."

During the cross-examination of witness, Thacker, the record reflects the following: "Q. You never were tried for a violation of the election laws of Craighead County? A. Oh! Q. Sure 'Oh!' You were in on that? A. Yes. *Mr. Smith*: That question is objected to. *Mr. Grooms*: He has already answered it. *Mr. Smith*: I move that it be stricken from the record. *The Court*: Mr. Combs, read the question and answer. (Question and answer read by reporter.) *The Court*: Objection overruled. *Mr. Smith*: Exceptions."

The admission of this testimony was prejudicial to appellants and was error.

We have many times held that it is improper, on cross-examination, to ask a witness if he had been indicted or accused of a crime. It would be proper to inquire if he had been declared guilty or convicted of a crime. This court in *Kennedy* v. *Quinn,* 166 Ark. 509, 266 S. W. 462, said: "We have frequently and recently decided that a witness cannot be interrogated on his cross-examination for purpose of impeachment concerning indictments or mere accusations of crime. He may be asked if he was guilty or was convicted, but he cannot be asked if he was indicted or accused."

In the early case of *Bates* v. *State,* 60 Ark. 450, 30 S. W. 890, the trial court, over objections, permitted a witness on cross-examination to be asked if he had not been indicted three times for stealing hogs. The witness answered: "Yes, but I was acquitted each time, and one time the judge ordered the case *nol prossed.*" This

court, in reversing that case, said: "The fact that the appellant answered that he had been acquitted each time he had been indicted before did not, in our judgment, necessarily have the effect to remove all prejudice that may have been caused by the question and answer. The question was improper, and whether it may have prejudiced the jury we have no certain means of determining. It was calculated to do so, especially as the court instructed them to consider it."

And, in *Kincaid* v. *Price*, 82 Ark. 20, 100 S. W. 76, this court said: "It is true that on cross-examination a witness may be examined touching his past and present mode of life having any bearing on his character and the weight to be attached to his testimony, but the mere fact that a man has been indicted for a crime is not of itself sufficient ground to reject his testimony."

We do not discuss the other alleged errors, but in view of a new trial, we point out that on the record presented, we think there was substantial evidence warranting the jury's verdict and there was no error in any instructions given or refused by the court. But for the error indicated, the case would be affirmed. Accordingly, the judgment is reversed and the cause remanded for a new trial.

JACKSON *v.* ELLIS.

4-8558 212 S. W. 2d 715

Opinion delivered July 5, 1948.

H. G. Leathers and *Willis & Walker,* for appellant.

Claude A. Fuller, for appellee.

GRIFFIN SMITH, Chief Justice. Lillian Dudenbostel, 63 years of age, purchased a Packard automobile March 18, 1947, and without procuring a driver's license began operating it. She had not had previous experience as a driver. While Mrs. Dudenbostel was returning from Berryville to Eureka Springs the morning of April 11, 1947, accompanied by Mabel Ellis, the car collided with a truck owned by A. M. Jackson, driven by his son, Homer Jackson.

In June 1946 Northwestern Fire & Marine Insurance Company issued to Magnus Kettner a certain policy covering damages that might result to the owner of a designated Packard automobile. The car was sold to Mrs. Dudenbostel, who received an assignment of the insurance coverage. Following the collision on April 11th the Insurance Company (having settled with the assignee) sued A. M. Jackson for $700. Mrs. Ellis sued Jackson for $10,000. Jackson cross-complained, alleging that the Packard automobile was being jointly operated by Dudenbostel and Ellis, and that his truck had been damaged to the extent of $500. Mrs. Dudenbostel, alleging the negligence of Homer Jackson, and consequential personal injuries, sued A. M. Jackson for $5,000. Jackson cross-complained as to this action, asking compensation for damage to his truck, $500. The various causes were consolidated for trial, with judgments against A. M. Jackson and in favor of the Insurance Company for $700; against Jackson and in favor of Mrs. Ellis for $5,000, and against Jackson and in favor of Mrs. Dudenbostel for $2,500.

The Dudenbostel-Ellis car was being driven on Highway 62 when the collision occurred near Eureka Springs

at a point not far from the intersection of Highway 23. Occupants of the Packard testified very positively that the Jackson truck was seen at a substantial distance with its left front wheel on the "wrong" side of the blacktop center. The Packard was proceeding slowly, traveling not in excess of 15 or 20 miles per hour. As the truck continued and space between the two vehicles narrowed, each lady realized the danger. Mrs. Dudenbostel "hugged" her right side of the highway and had slowed almost to a standstill when the impact occurred. Each said there was nothing either could have done to avoid the mishap.

Homer Jackson testified that he was driving alone. In approaching the [intersection?] the Dudenbostel car appeared to be making a left turn "across the right hand side of the pavement, which was *my* side of the road. I thought they were going to go ahead and turn off the road, [so] I started by them on the left hand side. After I got closer it appeared they cut back to me. I tried to go around them on the wrong side and get out of the way, but didn't make it."

With these and other facts in evidence, a case was made for the jury on the question of negligence.

First.—The motion for a new trial contains fifteen assignments. Our conclusion is that prejudice did not result from any of the Court's rulings to which exceptions were saved unless it be said that the verdicts were excessive and that evidence concerning indemnity insurance carried by Jackson should have been excluded.

While testifying Mrs. Dudenbostel was asked: "After this accident occurred, and [after Homer Jackson] had gotten down from where his [truck] was, . . . did he make any statement to you about it?" Answer: "Well, he came up the hill . . . toward me. . . . I was quite hysterical and crying. He said, 'don't worry—it's all my fault'; and I said to him, 'Why didn't you go back to the right hand side of the road?' He said, 'Well, lady, I don't know. I had the crazy idea of cutting around you on the left. I'm just a nitwit'. And then he said, again, 'Don't worry: we

are fully covered by insurance and I'm taking all the blame' ".

The Court was asked to instruct the jury that the reference to insurance was improper. The motion was overruled on the ground, seemingly, that the explanation given by Jackson was a part of the *res gestae,* and that the unnecessary comment regarding insurance was so closely related to and interwoven with the impulsive explanation as to render it inseparable.

Norman Faulkner, a witness for the plaintiffs, testified that after the collision he was standing near the car and asked Jackson what was wrong. The latter replied, "Well, we had an accident. It's all my fault, and I take the blame." An attorney for one of the plaintiffs who sued for personal injuries interpolated, "Is that all he said?" The witness replied, "He said something about being covered by insurance."

It is urged by appellant that the attorney knew what the answer would be, that it could not possibly be a part of the *res gestae,* and that there was an unnecessary design to induce the witness to give inadmissible and prejudicial testimony. The writer of this opinion thinks this testimony should have been excluded. The majority, however, view the situation as summarized at page 1448, 56 A. L. R., where it is said that evidence showing an admission of liability by the defendant may properly be admitted, "although it is developed that in making the admission the defendant stated that he carried liability insurance." California, Massachusetts, Michigan, and Missouri are cited by A. L. R.

In *Sims* v. *Martin,* 33 Ga. App. 486, 126 S. E. 872, it was held that where an automobile owner's declarations (that a collision was his fault, that he was going too fast, that he had insurance and would make settlement) were made immediately following the transaction, and while the injured party was still lying on the street, and before the owner (who was the driver) had gotten out of his car, they were admissible as part of the *res gestae*; and, although the part referring to insurance was expressly

withdrawn, there was no error in refusing to declare a mistrial.

The opinion in *Ward* v. *Haralson,* 196 Ark. 785, 120 S. W. 2d 322, written by the late Mr. Justice McHaney, declares the law to be that where counsel for the appellees injected into the case [testimony] that appellant had insurance coverage, the action was "wholly inexcusable, uncalled-for by anything that had previously occurred in the case, and was highly prejudicial." The opinion then continues: "We think the remarks of the Court were not sufficient to remove the prejudice, and that a mistrial should have been declared. The obvious and only purpose in making the statement was to advise the jury that an insurance company would have to pay any judgment rendered. This was error."

It is contended in the instant case, and the majority accepts the explanation, that there was no planned and independent purpose by counsel for the plaintiff to emphasize insurance, or to draw from the witnesses any statements made with conscious reflection influenced by considerations other than the impulse to translate action into words. The rule governing admission of testimony as a part of the *res gestae* is too well known to acquire value by repetition.

Second.—The difficult question is whether the jury was influenced by passion and prejudice in awarding $2,500, and $5,000, respectively, to Mrs. Dudenbostel and Mrs. Ellis.

Mrs. Ellis testified that she was partially "knocked out" by the collision and had "fading" periods. Was taken to Basin Park Hotel (Eureka Springs) in an ambulance, and the following day was sent to Fayetteville hospital, where she remained ten days. A long gash was cut in one leg. It was "standing open" and bleeding. Ankle was hurt "in some way" and pains sometimes recur. Legs and ankle swell. Was also cut through the lip "here." The witness said there was a scar, but she didn't suppose the jury could see it. Also thought eyesight was damaged—"I attributed it to injuries; it 'seems' I don't

see as well as before. Think injury is to both eyes, rather than one. Pain under my hips was excruciating after the accident. Am nervous, especially at night when cars pass by and brakes 'screetch'."

Dr. J. F. Johns, who attended Mrs. Ellis at Basin Park Hotel, and later sent her to Fayetteville, substantially confirmed what the patient said regarding cuts and bruises. He added that her greatest complaint was of pains in the region of the right hip, but the Doctor "couldn't detect that there was anything amiss, any injury to it." He then explained that pain could not be seen, and that he accepted Mrs. Ellis' statements that she suffered; "but," said he, "she was evidently under great shock and mental stress and strain *somewhere*. . . . I couldn't say whether her spine was hurt—don't think any doctor around here could." [The Fayetteville physician was not called, nor did he testify by deposition.]

Mrs. Dudenbostel testified to the following list of injuries: She was thrown against steering wheel; has some fractured ribs and ribs that were badly bruised; chest was bruised, "and, holding on to the wheel the way I did, my wrist was 'strained' and I jammed my knees up against something and bruised them; couldn't use my right hand for a while and couldn't go up and down stairs. My right knee was not functioning the way it should. Was in a very bad nervous and mental condition, from which I still haven't recovered. Was hit somewhere above my eyes and I am suffering severe pains." The patient had made a trip to Chicago, thinking the change would do her good. Had been "out" about $50 for doctors, and nurses, and drugs. She added, "I think that I could now go back to work."

Dr. Ross Van Pelt testified that he saw Mrs. Dudenbostel April 11th at the Basin Park Hotel, "and later in my office where I made an examination." The patient had contusions of chest wall at junction of fifth, sixth, and seventh ribs, and "gasped some" when taking a deep breath. There were contusions on the left knee, and on the nose. The right wrist was sprained. The chest was

strapped to give comfort, with changes April 16th, 20th, and 25th. Mrs. Dudenbostel was "better" April 28th. The Doctor called on her or saw her May 5th and May 30th. The trial appears to have been conducted September 11, 1947, and Dr. Van Pelt saw the patient Sept. 10th. She had returned from Chicago and complained of some pain, "but this, I believe, was not related to the injury." The Doctor was positive Mrs. Dudenbostel's sixth rib was fractured, and perhaps the seventh. In summation, "She had this bruise on her chest wall and her left knee, a contusion of the nose, and the right wrist was sprained."

It is our view that any judgment for Mrs. Ellis in excess of $2,500 would be excessive, and that proof in support of injuries to Mrs. Dudenbostel does not sustain a judgment for more than $1,500. If, within fifteen juridical days remittitures are entered for $2,500 in the one case and $1,000 in the other, judgments will be affirmed. Otherwise the causes will be remanded for new trials; affirmed as to $700.00 judgment in favor of Northwestern Fire & Marine Insurance Co.

ICE SERVICE COMPANY *v.* GOSS, COMMISSIONER OF LABOR.

4-8578 212 S. W. 2d 933

Opinion delivered July 5, 1948.

House, Moses & Holmes, for appellant.

Luke Arnett, for appellee.

GRIFFIN SMITH, Chief Justice. The question is whether persons operating ice delivery routes in Pine Bluff, who use horse-drawn vehicles owned by the Company and pay five cents per hundred pounds for the equipment, are employees or independent contractors within the meaning of Act 391 of 1941.

M. E. Goss is Commissioner of Labor, charged with specific administrative duties, including collection of the so-called unemployment compensation tax. From the Commissioner's determination that the tax was payable by Ice Service Company an appeal was taken to the Board of Review,[1] and the finding was sustained. Appeal to Circuit Court terminated in like manner.

The Act accords an independent status to one performing duties under a contract if the individual has been and will continue to be free from control or direction "over the performance of [the services rendered or contemplated] both under his contract of service and in fact."

Tested by this definition, were the delivery men employes, or were they independently engaged, within the rule discussed in *Moore and Chicago Mill & Lumber Co.* v. *Phillips,* 197 Ark. 131, 120 S. W. 2d 722, and *Crossett Lumber Co.* v. *McCain, Commissioner of Labor,* 205 Ark. 631, 170 S. W. 2d 64?

Ice Service Company is not a manufacturer. It purchases the output of local producers and distributes at

[1] Duties imposed upon the Industrial Board created by Act 391 of 1941 were transferred to the Commissioner of Labor by Act 126 of 1943. Appeals such as we are dealing with were, by § 2 of Act 126, "transferred to the Board of Review."

wholesale and retail. Prior to 1940 customers were served from trucks or wagons operated by the Company at a wage scale of approximately $2.50 per day, sometimes supplemented by commissions. Failure of the Company to meet wage demands resulted in a strike, in consequence of which there were agreements by Service Company to sell ice to the men at 25c per hundred pounds if the men supplied their own transportation, or 30c per hundred if the Company allowed use of horse and wagon. Quite a number of those who could not furnish delivery facilities have been using Company units. The Labor Commissioner does not contest an independent status for drivers using their own transportation; but in respect of those who pay the additional charge it is contended they are employes. Appellant challenges the Court's finding to this effect.

E. W. Abbott, Company cashier, testified that "these peddlers" can use their own equipment if they want to, or they can pay five cents per hundred pounds for horse and wagon. If Company facilities are utilized, the five-cent differential is transferred to a work sheet for bookkeeping purposes and is finally entered as expenses. Work sheets show the tonnage each man receives. When asked whether the Company kept a record "of what [the delivery men] pay in to you," Abbott replied: "No, sir. We only keep a record of the individual tonnage—we keep a record on the revenues. . . . The only thing we have is what we sell the ice for. We know how much money we take in in a day. We have no payroll sheets, nothing to show whether the distributors have assistants, or how much is paid them."

Continuing his testimony, Abbott explained that the Company used two types of coupon books, one for wholesale and one for retail trade. These were sold on the basis of 35c and 40c per hundred pounds of ice and handled as money. They may be had by anyone, and in the matter of selling them, "The drivers make the deals," or perhaps half of the books are sold that way. If a driver misses a customer there is usually a complaint. This information is transmitted to the driver, who is then supposed to deliver. The wagons are serially numbered and

have printed on them, "Ice Service Company." Customers may purchase ice by calling at the Company's platform, where the retail price is 40c—the same as that charged by delivery men. All of the route men sold for the same price, although, said Abbott, "We have reason to believe that the distributor had the right to sell for anything he wanted to."

Henry Jones, one of the drivers who used Company equipment, testified he had been employed about thirty years, occasionally serving in the loading cage, "but if the driver was off I would run his route, because I was acquainted with all of them." When asked why he joined the strikers in 1940, Jones replied, "I didn't strike for anything—the white folks struck. I didn't know anything about it. They say we all walk out, and so I goes home. . . . After that the [Company] man said if we could get a truck or use their wagons we could sell ice. . . . I guess they told me where to work, [but] I couldn't sell ice anywhere." The Company supplied cards showing prices. These were procurable at the platform, and were used "so the people who bought ice wouldn't think they were getting 'gipped'." They were marked, "Ceiling price forty cents."

Fred Morgan, another driver using Company equipment, testified that he sold ice at 41c per hundred, adding a penny to cover sales tax. The witness said he "sometimes" paid the tax, and "sometimes" didn't—"I had been paying the tax to Mr. Abbott, but I haven't paid any in quite a while." Morgan was not with the Company when the strike occurred, but had previously worked for it. After the strike he "made a trade" with Sam Cook, manager. Cook assigned a route to Morgan—one he was familiar with—and deliveries were begun. Later the territory so assigned became "too heavy" for Morgan, who informed Cook of that fact. Cook replied, "I will put another [wagon] out there." Cook told Morgan "to find someone and send him in." This occurred in April.[2] A nineteen-year-old boy was procured, and the route was divided. Louie Galloway, route foreman (not now with

[2] Hearing by the Board of Review was had November 21, 1945. The opinion is dated January 11, 1946.

the Company) divided the route, assigning respective territories. When Galloway quit his place was not filled.[3]

Other testimony given in substantiation of the Company's contention that the men were independent contractors was virtually the same as that quoted.

The City of Pine Bluff levies an occupation tax of $100 a year "for the privilege of peddling ice." This is paid by the Company. In addition there is a charge of $5 for use of wagons, referred to in the testimony as a license-tag fee. It was conceded that the Company paid this assessment on each of its wagons and that the charge was not extended against the individual drivers.

Although the delivery men are required to call at the Company's storage plant and receive ice according to their requirements, the Company maintains a replacement service and delivers to wagons *en route* when the retail supply is exhausted. No charge is made for these sub-deliveries.

Fred Washington, another driver, testified that in some instances he accepted coupons for cash; that coupons entitled customers to receive ice at 35c per pound, and he did not question the transactions, since customers procured coupon books from the Company.

All wagons and horses supplied by the Company were maintained and serviced by it. Drivers merely return the equipment to Company custody when daily work on the routes has been completed.

Appellant insists that affirmance of the judgment here will necessarily impair or overrule the *Crossett Lumber Company-McCain* case, and the decision in *Moore, etc.,* v. *Phillips,* heretofore referred, and holdings of like import. The suggestion is not sound. Logging,

[3] Morgan's testimony shows that Galloway, as route foreman, exercised certain supervisory acts, but the record does not clearly disclose when he quit. However, it was "sometime last year—he left for the Army." The inference is that Galloway served the Company long after the 1940 strike; and, as explained by Morgan, his duties were "hiring of the crowd; and [he] was in charge of the wagons." Question: "Did he go out on the route with you?" A. "Yes, Sir. Every day you would see Mr. Louie. He would talk with us about deliveries."

per se, is an independent profession. Reported cases disclose that scores of substantial individuals and organizations having no interest directly or indirectly with mills that use forest products, are engaged in timber-moving activities. In those cases we have held that an independent relationship may be created, subject to strict examination as to motives where there is evidence that subterfuge might be profitable to one of the parties.[4] But it has never been held that an imperative part of a principal transaction—a part intimately related to final objective, as in the instant case,—can be arbitrarily lifted from its normal position as a necessary link between purpose and result, and then treated as a wholly disconnected transaction in respect of which the principal is not concerned with means or method, and exercises no control.

Ice Service Company v. *Forbess,* 180 Ark. 253, 21 S. W. 2d 411, is in point, the primary distinction being that in the case at bar we are dealing with taxation as distinguished from an action to compensate personal injuries occasioned through negligence. It was held in circumstances similar to appellant's present contention that the relationship of master and servant existed, and judgment for $4,000 was sustained.

Affirmed.

BREITHAUPT *v.* PARKER, REFEREE.

4-8603 213 S. W. 2d 382

Opinion delivered July 5, 1948.

Rehearing denied October 4, 1948.

[4] There is no suggestion in this case that the plan of delivery was adopted as a means of evasion.

Bob Bailey and *D. D. Panich,* for appellant.

John W. Bailey, Edwin E. Dunaway, Guy E. Williams, Attorney General, and *Ted R. Christy,* for appellee.

ROBINS, J. Appellants were entrusted by the Referee of Pulaski County Juvenile Court with the custody and care of Joseph Edward Hoffman, then about 2½ years old. The child's mother was dead, and its father not in a position to look after it. Appellants, who were childless and without possibility of offspring, cared for the child eight months, became very much attached to it, and wished to adopt it as their own, in accordance with an agreement they alleged they had with the Referee. But the child was taken from appellants by the Referee. They thereupon filed petition in the probate court, asking for adoption of the child. The Referee filed motion to dismiss which was sustained.

Another petition for adoption was filed on February 14, 1947, but no hearing was had thereon.

On January 7, 1948, appellants filed an amended and substituted petition, asking the same relief. This petition was dismissed by the probate court and this appeal followed.

The order appealed from contains the following:

"Findings of Fact

"That the petition for adoption filed January 17, 1946, by petitioners herein to adopt Joseph Edward Hoffman, a minor, was presented to the court on June 11, 1946, upon a Motion to Dismiss filed by the respondent, Flossie S. Parker, Referee; that no testimony was taken to the merits of said petition, but that said Motion to Dismiss was sustained as a matter of law, but that the order of dismissal was never placed of record; that petitioners filed a second petition on February 14, 1947, which was not passed on by the court; that an Amended and Substituted Petition was filed to adopt said minor child on January 7, 1948, and that said second petition

and amended and substituted petition were submitted to the court upon the respondent's Motion to Dismiss on March 1, 1948; that prior to the said hearing before this court on the 1st day of March, 1948, said minor child had been removed from the jurisdiction of this court; that respondent, Bernice G. Ratcliffe, was appointed Guardian for said minor child on May 22, 1947, and was discharged as such Guardian on June 3, 1947; that said minor child has not been under her care, custody or control since June 3, 1947, the date of her discharge, and said minor child is not now under her care, custody or control; that Respondent, Flossie S. Parker, has had no jurisdiction, custody or control over said minor child since May 22, 1947, and now has no jurisdiction, custody or control over said minor child.

"Conclusions of Law

"That the petition to adopt filed herein February 14, 1947, and the Amended and Substituted Petition filed on January 7, 1948, was not presented to this court until March 1, 1948, the date of this hearing; that said minor child, Joseph Edward Hoffman, had heretofore been removed from the jurisdiction of this court; that said minor child, Joseph Edward Hoffman, is not in the custody or control of the respondents, and that said respondents cannot deliver said child to the custody of this court for the reason they are each without authority to do so; that said child is not now within the jurisdiction of this court; that petitioners took no appeal from the order of this court made on June 11, 1946, but which was never entered.

"It is therefore by the court, considered, ordered, adjudged and decreed, that the Motion to Dismiss of the respondents should be, and the same is hereby granted, and the petition of the petitioners filed February 14, 1947, together with the Amended and Substituted Petition filed on January 7, 1948, be and the same are hereby dismissed; the petitioners object and except to the Findings of Fact and Conclusions of Law, and the order of the court and ask that their objections and exceptions be noted of record which is accordingly done and an appeal

is hereby granted to the Supreme Court of the State of Arkansas.

"This order having been made by the court on March 1, 1948, the same is ordered entered now for then.

"Dated this 16th day of March, 1948."

This order was approved by the attorneys for all parties.

Whether proof was heard by the lower court before the findings of fact and conclusions of law were made does not appear; but no such proof is brought into the record by bill of exceptions or otherwise.

Taking the recitals of the order as correct—and we must do this since there is no proper challenge of their correctness—it appears that the child is not in the jurisdiction of the court; and the court was therefore without power to make any order of adoption.

For that reason the order appealed from must be affirmed.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, THOMPSON, TRUSTEE *v.* THURMAN.

4-8590 213 S. W. 2d 362

Opinion delivered July 5, 1948.

Rehearing denied October 4, 1948.

[redacted]

E. G. Nahler, E. L. Westbrooke, Jr., and *E. L. Westbrooke,* for appellant.

C. M. Buck and *J. G. Sudbury,* for appellee.

Ed. F. McFaddin, Justice. Vennie Thurman, a woman 34 years of age, was struck by a train of the appellant, and subsequently died. This action was prosecuted by appellee, as her administrator, to recover damages for the benefit of the estate, the husband, and the next of kin. From a verdict and judgment allowing such recovery, there is this appeal presenting, *inter alia,* the issues hereinafter discussed.

The evidence showed that the appellant operated a train known as "the Moose,"[1] running from Jonesboro to Blytheville on the Jonesboro, Lake City & Eastern railroad track. The "Moose" entered Blytheville from the west, and proceeded east until reaching a switch known and posted as "West Bly." Then the train proceeded southerly on a curved track, and away from the said J. L. C. & E. track, which continued due east. There was a footpath along the south side of the J. L. C. & E. track as it entered Blytheville, and the footpath continued on the southeast side of the curved track after the latter left the straight track at West Bly. This footpath was frequently and commonly used by the public. The deceased lived in the west part of Blytheville, and on the morning of December 24, 1946, she started along the footpath to the business district of the city; and was struck and run over by the train at a point on the curved track several hundred feet from the said West Bly switch. She was found in an unconscious condition in the footpath on the southeast side of the said curve, and her severed leg was alongside the track.

[1] "The Moose" consisted of a motor-operated passenger car with an ordinary combination mail-express car attached to the rear.

The allegations on which the plaintiff sought to recover were that the employees [2] of the railroad company: (1) failed to keep a lookout as required by law; (2) operated the train at an excessive rate of speed; (3) failed to give the statutory signals; and (4) failed to use ordinary care to prevent injuring the deceased after discovering her peril, or after her peril should have been discovered with the exercise of ordinary care. We now consider the evidence relating to each of these four allegations of negligence.

I. *Failure to Keep a Lookout.* The statute (§ 11144, Pope's Digest) requires the railroad company to keep a lookout; and says: "The burden of proof shall devolve upon such railroad to establish the fact that this duty to keep such lookout has been performed."

To fulfill the duty imposed by this statute, the railroad company offered testimony of the engineer Hamby that he did keep the lookout. There was no substantial evidence to the contrary. So we hold, under the authority of *St. L.-S. F. Ry. Co.* v. *Williams,* 180 Ark. 413, 21 S. W. 2d 611, that the railroad offered testimony—not affirmatively contradicted—to the effect that the lookout was kept.

II. *Excessive Speed of the Train.* Appellant introduced ordinance No. 27 of the City of Blytheville, making it unlawful for any train to run in the city at a speed greater than six miles per hour. We need not discuss the ordinance, or whether its violation would be negligence, because the evidence here fails to show that the speed of the train had any causal connection with the injury. In *Garner* v. *Mo. Pac. R. Co.,* 210 Ark. 214, 195 S. W. 2d 39, we discussed a situation where, as here, there was no showing that the speed of the train had any causal connection with the injury. What was said in that case is apropos here.

III. *Failure to Give the Statutory Signals.* Section 11135, Pope's Digest, is the applicable statute. Appel-

[2] The engineer of the train was Harry Hamby. He was a defendant, and judgment was rendered against him also. In view of the result here reached, it is unnecessary to consider the separate assignments presented by him.

lee's own witness—Handy Smith—testified that the bell was ringing continuously, and that the whistle sounded for each crossing. In fact, all the evidence shows that the statutory signals were given; so the plaintiff made no case on this allegation of negligence.

IV. *Discovered Peril.* This is the allegation to the effect that the railroad company failed to exercise ordinary care to prevent injuring the deceased after discovering her peril, or after her peril should have been discovered with the exercise of ordinary care. We find no substantial evidence for the plaintiff in support of this allegation. Only two witnesses testified on this point. One was the engineer, Harry Hamby, who testified that his position as motorman was at the front of the train; that he had a good view; that he saw appellant walking in the path alongside the track when the train was over 400 feet away from the deceased; that the train gave the signals, and deceased looked back; that she walked along in the path; that when the train was so close to her that it could not be stopped, she walked in front of the train; that he did all he could to stop the train; and that the next thing he knew, the train struck deceased. Certainly, the testimony of Harry Hamby shows no negligence on the part of the railroad company or any of its employees.

The only other witness who saw the deceased on the railroad right-of-way prior to her injury was the plaintiff's witness, Handy Smith. He testified that he was at his brother's house located north of the railroad track, and "about two blocks" west of the curve; that his brother's garden was south of (and across) the railroad tracks, and the witness was anxious to keep a stray horse out of the garden; that witness made two trips from the house to the garden; that on his first trip he saw the deceased walking toward Blytheville, and she was in the path on the south side of the track; that this was a few minutes before the train arrived; that on his second trip to the garden, witness saw the train pass his brother's house, and witness saw the deceased walking in the path on the southeast side of the curve, which curve the train had not then reached. Witness said the train "blocked

his view" of the deceased, and then he realized the train was stopping; that he went to where the deceased was lying; that she was in the path on the southeast side of the curve and her severed leg was "inside the south hand rail of the line the train was on"; that the rear of the train was stopped less than 100 feet from the woman's body. The witness assisted in moving the deceased to the ambulance; she died in a hospital several hours later without making any statement—so far as the record here shows—as to how she came to be injured.

The testimony of the witness, Handy Smith, fails to show that the railroad was guilty of any actionable negligence in this matter of discovered peril. The deceased was in the pathway when the witness last saw her before she was injured; and at that time and place she was not in a perilous position. How or when she left the pathway and was injured by the train is not shown by this witness. His testimony, therefore, leaves only conjecture as to (a) whether the deceased became confused and started across the track; or (b) whether her clothing caught on the train and pulled her under it; or (c) just what did happen. Verdicts cannot be founded on conjecture; negligence must be proved. See *Glidewell* v. *Arkhola Sand & Gravel Co.*, 212 Ark. 838, 208 S. W. 2d 4, and cases there cited.

We find no substantial evidence showing that the railroad company or its employees were guilty of any negligence; and in the absence of such proof, the judgment of the lower court must be reversed, and the cause dismissed. It is so ordered.

4-8598 213 S. W. 2d 353

Opinion delivered July 5, 1948.

Rehearing denied October 4, 1948.

Claude Duty, for appellant.

John W. Nance, for appellee.

SMITH, J. The parties to this litigation own the two units of a two-story building covering two lots each 25 feet wide, in the City of Rogers. This building was erected as a single building, with a party wall from the west to the east end thereof. Appellants own the north half of the unit and appellee is the owner of the south half. The building is on a corner lot fronting First Street, and was without access from that street to the

second story of the building. There was a back stairway, leading from the side street to the second story. First Street is east of the building and Poplar Street is the side street on the south side of the building. There was a back stairway leading from Poplar Street to the upper floor, but no stairway from First Street. The back stairway was on the west end of the south half of the building, leading from Poplar, the side street, and it was the only means of access to the upper floor. There were no toilet facilities in the building.

On Nov. 4, 1912, the then owners of the building entered into an agreement which was duly signed and acknowledged, but never recorded, reading as follows:

"This agreement, made this 4th day of November, 1912, between Ben Hatler, party of the first part, and Mrs. S. S. Bailey, party of the second part; Witnesseth: That whereas, the said first party of the first part is the owner in fee of the north half of lot 12, block 11, in the City of Rogers, Arkansas, and the said second party is the owner in fee of south half of the said described lot, each owning the building on their respective lots. And whereas, it has been agreed by and between the said parties; that the said first party will erect and build a stairway not less than three feet and four inches in width, leading from the first floor, in the southeast corner of building owned by him to a landing on the second floor of said building, with an opening on First Street; that he will build a room and toilet and wash basin in the southwest corner of the second floor of said building and connect same with sewer and drain pipes at alley on west of said lot; that he will make an opening in partition wall at landing, at top of stairs into a hall, in building belonging to said second party, in which opening will be placed a door, subject to approval of insurance companies now writing insurance of said building; also a door of the same kind and material to be built in wall opening from hall to the aforesaid toilet room.

"And it is further agreed that the said second party will pay one-half of the cost of building and making the aforesaid improvements, the same to be paid as soon as

same are completed, and she agrees to pay the further sum of $150 on or before April 1, 1915, providing said improvements are completed by that time, and if not completed by that time to be paid when completed.

"And whereas, in consideration of the above work and payments to be made and performed by the said parties hereto, it is mutually agreed that the parties hereto, each, their heirs and assigns are to have the free use of the stairway, toilet room and hall now on the second floor of the building of the said second party running along the north wall of said building and connecting the landing to head of stairs with the aforesaid toilet room, and the further right to connect both of the lower floors of the building with sewer pipes.

"It is mutually understood that this agreement shall run with the building so long as both buildings shall stand, or may be terminated by mutual agreement of the parties hereto, their heirs and assigns; but that this agreement shall not have the effect, or operation of conveying to the other, his or her heirs or assigns, the fee simple of any part of the ground or land on which the stairway hall, toilet room or drain and sewer pipes shall or now stand, but only to the right to the use and benefit of said described improvements; that the cost of maintenance of the aforesaid improvements shall be shared equally by the parties to this contract.

Ben Hatler.
Sarah S. Bailey."

Prior to the completion of the proposed improvements Mrs. Bailey sold and conveyed the south half of the property which she owned, to W. E. Kefauver, who assumed the obligation of the contract above recited and was to enjoy its benefits. Hatler made the improvements contemplated and Kefauver made the payments required by the contract, and when the improvements were completed there was a stairway along the south wall of the north half of the building, leading from First Street to a landing where an opening four feet wide in the wall was made. A fireproof door to this opening was built, and through this door access could be had to the south half

of the building. A toilet was installed in the southwest corner of the north half of the building and access to it was provided through a hall by another opening in the partition wall where another fireproof door was installed. Two means of ingress and egress were thus afforded to the second floor of both buildings, and all parties used both facilities.

This continued until October 2, 1916, when Mrs. Hawkins, who had acquired title to the north half, placed a lock on the door to the toilet, whereupon Kefauver filed suit to enjoin her from closing the toilet. The complaint in that case recited the facts above stated and pleaded the easement Kefauver had acquired under the contract above copied. Testimony was taken; that on the part of Mrs. Hawkins being to the effect that she was not a party to the easement contract and that she had acquired title to the north half of the building without knowledge of the easement. Kefauver testified that he had advised Mrs. Hawkins of the existence and terms of the easement contract, but this she denied. A final decree was rendered in that case on January 15, 1918, reading in part as follows:

"It is therefore, by the Court, considered, ordered and decreed that the temporary restraining order heretofore made in this cause by the Hon. W. E. Hill, County Judge of Benton County, Arkansas, be and is hereby made permanent and perpetual and that the defendant, her agents, servants and employees be and are hereby forever enjoined and restrained from interfering with, or in any manner depriving the plaintiff of the use and benefit of the toilet room now situated and installed in the southwest corner of the second floor of the two-story brick building owned and controlled by the defendant, Mrs. Lizzie Hawkins, and being situated on:

"The north ½ of lot (12) twelve in block (11) of the Original Town (now city) of Rogers, Benton county, Arkansas, and it is further ordered and adjudged that the plaintiff do have and recover of and from the defendant the sum of $100 as his damages for the wrongful interference with and deprivation of the plaintiff's use

and benefit of said toilet room and one-half of the costs of this suit be and are hereby adjudged against each of the parties plaintiff and defendant herein, for which let execution issue.

"In the argument of this case the defendant objected to the jurisdiction of the Court to determine plaintiff's right to the easement involved in this suit, which objection was overruled and to all rulings and findings of the Court the defendant objected and excepted and prayed an appeal to the Supreme Court which appeal is granted." No appeal was taken from that decree and it long since became final.

More than three years after the rendition of this decree, Kefauver for a valuable consideration, relinquished his right to use the toilet room. This was done by a written contract reading as follows:

"This certifies that the undersigned has and by these presents does sell, assign and transfer all his right, title and interest in and to a certain toilet room and equipment located on the second floor over the room or building now owned by Mrs. Lizzie Hawkins, same being situated on the north half of lot twelve, in block eleven, in the original town, now city, of Rogers, Arkansas, unto Mrs. Lizzie Hawkins, it being the certain toilet room, etc., now located in the southwest corner of the room on the second floor of the building located on the above described lands which certain toilet room is mentioned in an order of the Chancery Court of Benton county, Arkansas, recorded in Chancery Record No. 1308 at page T-361, Jan. 15, 1918, and this sale is made for a valuable consideration."

It will be observed that neither the decree referred to in the agreement just copied, nor that agreement itself made any reference to the use by Kefauver of the stairway leading up from First Street or the landing at the doorway.

The upper floor of the Kefauver part of the building was subdivided into office rooms and was occupied by tenants, until Kefauver converted the upper floor into a

storeroom for furniture and other merchandise and used the front stairway for moving merchandise to and from the upper floor of his part of the landing. Kefauver finally rented Mrs. Hawkins' half of the building and occupied it as a tenant for a number of years. The stairway leading from First Street was continuously used after it was built in 1913.

Mrs. Hawkins died and her title was inherited by her son and daughter whose tenant Kefauver continued to be for some years, and some time after the termination of this tenancy these heirs of Mrs. Hawkins undertook to close the opening in the partition wall through which access to the south half of the building was obtained, and this would have deprived Beaulieu, who had acquired Kefauver's title to and interest in the building, of the use of the stairway, and this suit was brought to prevent this being done.

This suit was filed by Beaulieu, who had acquired Kefauver's title and interest, against the heirs of Mrs. Hawkins. The complaint recites the facts herein stated, and makes the decree, the pleadings and depositions on which it was rendered, exhibits thereto. This complaint alleged that Beaulieu had an easement in the use of the door landing from the stairway, furnishing ingress and egress to the south half of the building.

The trial court was of the opinion that the decree above copied dated January 15, 1918, was conclusive of the litigation, and upon that theory made permanent a temporary restraining order preventing the Hawkins' heirs from closing the door in the partition wall and this appeal is from that decree.

Mrs. Hawkins' heirs, appellants here, asked permission at the trial from which is this appeal, to introduce testimony to the effect that in rendering the decree of January 15, 1918, the court did not consider, or take into account, the Bailey-Hatler contract above copied. But the court held that the decree was conclusive of the finding that an easement ran with the land and declined to hear this testimony. The correctness of this ruling is the controlling question in the case.

We think the ruling was correct. The pleadings, depositions and decree in that case were all before the Chancellor when he made permanent the temporary restraining order against closing this toilet. To reach that conclusion the court must necessarily have found that an easement running with the land existed. There could have been no other basis for that decree. Appellants' ancestor was a party to that suit, and they took by inheritance only such title and interest in the property as their ancestor owned, which was the fee title to the north half, subject to the existing easement.

While the testimony is conflicting as to whether Mrs. Hawkins had actual notice of the easement, the court was justified in finding in the 1918 decree that she had such constructive notice thereof as to put her upon inquiry when she purchased. The stairs, doors and opening in the wall all must have been observed and they were in use and, as has been said, there was no basis for the 1918 decree except that an easement existed based on the easement contract made an exhibit in that case.

After the 1918 suit, Mrs. Hawkins settled the toilet question by the agreement herein copied, which made no reference to the stairway and opening in the partition wall, which her heirs now seek to close, and she permitted the continued use of the stairway and door leading into the south half.

We conclude that if Mrs. Hawkins did not have actual notice of the easement contract, she did have actual notice, when she purchased, of such facts as must necessarily have apprized her that the stairway and door into the south half were being used under claim of right, any investigation of which would have revealed the easement contract, and the court must have so found in the 1918 decree.

It follows that the decree must be affirmed and it is so ordered.

4-8583 213 S. W. 2d 356

Opinion delivered July 5, 1948.

Rehearing denied October 4, 1948.

[redacted]

John R. Thompson, Bailey & Warren and *Walls Trimble,* for appellant.

U. A. Gentry, for appellee.

ED. F. MCFADDIN, Justice. The decisive question is the validity of the alleged family settlement.

In 1946, Samuel Ernest Pfaff died intestate, survived only by (a) Terrence Pfaff, a son; (b) Justine Pfaff Petre, a daughter; and (c) two grandchildren, Carel Heizman Clements and Carl E. Heizman II, who were the only children of Ernestine Pfaff Heizman, a daughter of Samuel Ernest Pfaff, who had predeceased her father. Terrence Pfaff was appointed administrator of the estate of Samuel Ernest Pfaff, but before completion of the administration, Terrence Pfaff died intestate and childless. He was survived by (a) his wife,

Anna Mae Pfaff; (b) his sister, Justine Petre; (c) his niece, Carel Heizman Clements; and (d) his nephew, Carl E. Heizman II, as his sole and only heirs at law. The nephew was a minor; the sister and niece were adults. The estate of Samuel Ernest Pfaff consisted of both realty and personalty; and the estate of Terrence Pfaff consisted in part of the inheritance from the estate of Samuel Ernest Pfaff.

Mrs. Petre, Mrs. Clements and Carl E. Heizman II voluntarily signed and delivered to Anna Mae Pfaff (the widow of Terrence Pfaff) an instrument reading:

"We, the undersigned heirs to the estate of the late Samuel Ernest Pfaff, request that Mrs. Anna Mae Pfaff, widow of Terrence O. Pfaff, deceased, be granted one-third (1/3) of the estate of the late Samuel Ernest Pfaff, and which the late Terrence O. Pfaff would have received."

It is not claimed that there was any fraud, imposition or over-reaching by Mrs. Anna Mae Pfaff in obtaining the instrument. Mrs. Petre testified: "A. Well, Anna Mae called and asked me if I would sign a paper giving her my brother's share of the estate, and we were all grief stricken and felt sorry for her, and told her we would sign it; so she came over to my house, and I was in bed at the time, and we made out this—written long hand—to the effect of what we wanted to write, giving her the share, and she typed it herself and brought it back to me after that to sign it, and I signed and had Pat[1] sign, and then we carried it out to Carel and she signed it."

And, again, Mrs. Petre testified: "A. Anna Mae called me over the phone and wanted to know if we would sign that paper. That was before it was ever drawn up, and she said she had to guarantee the funeral expenses out at the undertaker's and wanted to know if we would sign this paper and we told her we would. Q. And you knew when you signed it, Anna Mae was going to guarantee those funeral expenses, didn't you? A. Anyone

[1] "Pat" appears to be the nickname of Carl E. Heizman, II.

would; it was her responsibility. Q. And she told you she would guarantee it if you would sign that? A. She said she wanted to submit the paper to the undertaker. Q. You signed it so she would have the paper to submit to the undertaker? A. I signed it because I felt sorry for her. Q. Why did you tell Carel that you wanted her to sign it so she could present it to the undertaker? A. Because that is what Anna Mae told me."

Later, each of the signers—that is, the sister, niece and nephew of Terrence Pfaff—decided to repudiate the said instrument. This litigation was instituted by them in the chancery court to have such repudiation judicially declared. Since Carl E. Heizman II is a minor, his legal right of repudiation is admitted; but appellant (defendant below) denied the right of the sister and niece—that is, Mrs. Petre and Mrs. Clements—to repudiate the instrument, which defendant claimed was a valid "family settlement." From a decree of the chancery court allowing such repudiation, there is this appeal.

The appellees (plaintiffs below) thus state the issue here: "The sole question to be determined is the legal effect of the instrument signed by the appellees, and whether or not the same might be revoked by the signatory parties."

Appellees further state their position, regarding the alleged family settlement, in this language: "Appellant takes the position that the instrument constituted a family settlement, but this position is obviously untenable. There was no settlement of the respective rights of the parties, nor was the instrument executed for the purpose of adjusting, in any manner, the rights of the persons interested in the estate. There was no mutuality of contract and no consideration passing from Anna Mae Pfaff to the signers. The signers merely gave up all interest in the estate which they owned to one not entitled thereto, without any consideration."

We are thus presented with the question of whether the instrument signed by the appellees was a valid and sufficient family settlement. There is a vast number of cases in Arkansas which have discussed family settle-

ments. Some of them are: *Pate* v. *Johnson,* 15 Ark. 275; *Turner* v. *Davis,* 41 Ark. 270; *Mooney* v. *Rowland,* 64 Ark. 19, 40 S. W. 259; *LaCotts* v. *Quertermous,* 84 Ark. 610, 107 S. W. 167; *Martin* v. *Martin,* 98 Ark. 93, 135 S. W. 348; *Giers* v. *Hudson,* 102 Ark. 232, 143 S. W. 916; *Felton* v. *Brown,* 102 Ark. 658, 145 S. W. 552; *Ellison* v. *Smith,* 107 Ark. 614, 156 S. W. 417; *Dudgeon* v. *Dudgeon,* 119 Ark. 128, 177 S. W. 402; *Sursa* v. *Wynn,* 137 Ark. 117, 207 S. W. 209; *Caldcleugh* v. *Caldcleugh,* 158 Ark. 224, 250 S. W. 324; *Davis* v. *Davis,* 171 Ark. 168, 283 S. W. 360; *Tandy* v. *Smith,* 173 Ark. 828, 293 S. W. 735; *Hollowoa* v. *Buck,* 174 Ark. 497, 296 S. W. 74; *Outlaw* v. *Finney,* 175 Ark. 502, 1 S. W. 2d 38; *Skaggs* v. *Prince,* 176 Ark. 1170, 5 S. W. 2d 927; *Purinton* v. *Purinton,* 190 Ark. 523, 80 S. W. 2d 651; *Edwards* v. *Swilley,* 196 Ark. 633, 118 S. W. 2d 584; *Barnett* v. *Barnett,* 199 Ark. 754, 135 S. W. 2d 828; *Stark* v. *Stark,* 201 Ark. 133, 143 S. W. 2d 875; *Shell* v. *Sheets,* 202 Ark. 708, 152 S. W. 2d 301; *Randall* v. *Kimball,* 205 Ark. 970, 172 S. W. 2d 22; *Mills* v. *Alexander,* 206 Ark. 754, 177 S. W. 2d 406; and *Johnson* v. *Williams,* 207 Ark. 94, 179 S. W. 2d 654. In these cases there is the common refrain that family settlements are favored, and should be encouraged where no fraud or imposition was practiced.

Similar general statements regarding family settlements may be found in the standard textbooks. There are annotations on family settlements in 6 A. L. R. 555; 38 A. L. R. 759; and 54 A. L. R. 976. See, also, 12 C. J. 322, 362; 15 C. J. S. Compromise and Settlement, §§ 3, 9, pp. 715, 727; 58 C. J. 992; 5 R. C. L. 880; and 11 Am. Juris. 258.

A study of our cases, and also those from other jurisdictions, fails to disclose any definition, or any statement listing all of the essential ingredients of a family settlement. Notwithstanding such absence, there are, however, some matters that are clear; and these are sufficient for a decision in the case at bar:

1. It is not necessary that there be a previous dispute or controversy between the members of the family before a valid family settlement may be made. Thus,

in *Martin* v. *Martin, supra,* there was no dispute at the time of the conveyance or will in question, yet the agreement was called a "family settlement"; and Mr. Justice FRAUENTHAL, speaking for the court, used this language:

"This was in effect a family settlement of the interests of these members of the family in these two remaining tracts of land which came from these two estates of the family. Courts of equity have uniformly upheld and sustained family arrangements in reference to property where no fraud or imposition was practiced. The motive in such cases is to preserve the peace and harmony of families. The consideration of the transaction and the strict legal rights of the parties are not closely scrutinized in such settlements, but equity is anxious to encourage and enforce them. As is said in the case of *Pate* v. *Johnson,* 15 Ark. 275: 'Amicable and family settlements are to be encouraged, and when fairly made . . . strong reasons must exist to warrant interference on the part of a court of equity.' *Turner* v. *Davis,* 41 Ark. 270; *Mooney* v. *Rowland,* 64 Ark. 19, 40 S. W. 259; *LaCotts* v. *Quertermous,* 84 Ark. 610, 107 S. W. 167; *Smith* v. *Smith,* 36 Ga. 184, 91 Am. Dec. 761; *Smith* v. *Tanner,* 32 S. C. 259, 10 S. E. 1058; *Good Fellows* v. *Campbell,* 17 R. I. 402, 22 Atl. 307, 13 L. R. A. 601."

The case last cited in the above quotation is that of *Good Fellows* v. *Campbell,* 17 R. I. 403, 13 L. R. A. 601, wherein there had been no previous dispute, yet a family settlement was upheld; and the opinion contains this pertinent language:

"But there is a class of cases of family arrangements, relating to the settlement of property, in which there is no question of doubtful or disputed rights, and in regard to which a peculiar equity has been administered, in that they have been supported upon grounds which would hardly have been regarded as sufficient if the transaction had occurred between strangers. In these cases the motive of the arrangements was to preserve the honor or peace of families or the family property. When such a motive has appeared, the courts have not closely scrutinized the consideration. *Trigg* v. *Read,* 5

Humph. 529, 546, 42 Am. Dec. 447; Burkholder's App., 105 Pa. 31; Wilen's App., *Id.* 121; *Walworth* v. *Abel,* 52 Pa. 370; *Farnsworth* v. *Dinsmore,* 2 Swan. 38; *Williams* v. *Williams,* L. R. 2 Ch. App. 294, 304; *Houghton* v. *Houghton,* 15 Beav. 278; *Wycherley* v. *Wycherley,* 2 Eden 175; *Frank* v. *Frank,* 1. Ch. Cas. 84; *Stapilton* v. *Stapilton,* 1 Atk. 2; *Pullen* v. *Ready,* 2 Atk. 587; *Cory* v. *Cory,* 1 Ves. Sr. 19; *Head* v. *Goodlee,* Johns. V. C. 536, 569.

"In the case at bar the motive for the agreement was, as we have seen, to provide, among other things, for the amicable distribution among the respondents of the surplus of his estate, including the moneys payable on the benefit certificates, after the payment of debts, etc. This motive constituted a sufficient consideration within the law relating to family arrangements, and the agreement is therefore sustainable as a family arrangement."

Furthermore, in Bouvier's Law Dictionary (Rawles 3rd Ed., Vol. II, p. 1188) under the title of "Family Arrangement," this appears: "Such an arrangement may be upheld, although there were no rights in dispute at the time of making it, and the court will not be disposed to scan with much nicety the *quantum* of the consideration; . . . "

So we hold that there need be no pre-existing dispute in order to have a valid family settlement.

(2) Likewise, it is not essential that the strict mutuality of obligation or the strict legal sufficiency of consideration—as required in ordinary contracts—be present in family settlements. It is sufficient that the members of the family want to settle the estate: one person may receive more or less than the law allows; one person may surrender property and receive no *quid pro quo.*[2] Thus, in *Turner* v. *Davis,* 41 Ark. 270, there was claimed that one—Watkins—had no interest in the property sufficient to support a family settlement; but in disposing of that contention, Mr. Justice EAKIN said: "We cannot go behind the agreement to ascertain the interest of Wat-

[2] See 251 C. J. 124 and Bouvier's Law Dictionary (Rawles 3rd ed., vol. II, p. 2785) for discussion of *quid pro quo.*

kins. It is a matter of no consequence whether he had courtesy or had nothing. . . . The agreement stands on the ground of family settlements, . . . They are supposed to be the result of mutual good will, and imply a disposition to concession for the purpose, regardless of strict legal rights; always excepting cases of fraud, of which nothing, in this case, appears."

Again, in *Sursa* v. *Wynn,* 137 Ark. 117, 207 S. W. 209, the widow agreed with her two sons that a certain item—inheritance tax—would be paid equally by the three of them. Later the widow contended that she was not legally liable for any of the tax, and desired to repudiate the alleged agreement. In disposing of that contention, Mr. Justice HART said: ". . . they agreed that in the settlement of the estate they would share equally in paying the inheritance tax. . . . This they had a right to do and the agreement made by them was a valid and binding agreement."

In 11 Am. Juris. 258, in speaking of family settlements, this is stated: ". . . it being a general principle that a voluntary conveyance, made with a view to a family settlement, is such a conveyance as the law will effectuate."

It is true that in some of our cases (a recent such case is *Mills* v. *Alexander,* 206 Ark. 754, 177 S. W. 2d 406), we have mentioned the "consideration" or benefit received by the person who later sought to question the family settlement; but in each such case the consideration was discussed to demonstrate that there had been no fraud, imposition or overreaching practiced against the complaining party. In the case at bar there is no claim that there has been any such fraud, imposition or overreaching, so the matter of consideration becomes of no consequence in the family settlement here involved. But even if there should be some idea of consideration in a family settlement, then it is found, in the evidence here, in the fact that Mrs. Anna Mae Pfaff agreed to guarantee all of the funeral expenses of Terrence Pfaff, in return for which appellees signed the instrument here attacked. Appellees say that they gained nothing by this

guarantee by Mrs. Pfaff. That may be true; but the parties traded on the basis of such a promise; and what was said in the Rhode Island case of *Good Fellows* v. *Campbell, supra,* applies here: "This motive constituted a sufficient consideration within the law relating to family arrangements, and the agreement is therefore sustainable as a family arrangement."

Likewise, in Bouvier's Law Dictionary (Rawles 3rd Ed., Vol. II, p. 1188) this appears: "In these cases, frequently, the mere relation of the parties will give effect to bargains otherwise without adequate consideration. 1 Chitty Pr. 67; 1 Turn. & R. 13; *Boyd* v. *Robinson,* 93 Tenn. 1, 23 S. W. 72; *De Hatre* v. *De Hatre,* 50 Mo. App. 1."

Without extending this opinion by further discussion of family settlements, it is sufficient to announce our conclusion: that Mrs. Petre and Mrs. Clements are bound by the family settlement with Mrs. Pfaff, and the chancery court erred in failing to so hold. The decree of the lower court is therefore reversed, and the cause remanded with directions to enter a decree in accordance with this opinion.

ROBINS, J., disqualified and not participating.

BLY *v.* STATE.

4514 214 S. W. 2d 77

Opinion delivered October 4, 1948.

Rehearing denied November 8, 1948.

Linus A. Williams and *J. H. Brock,* for appellant.

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

Ed. F. McFaddin, Justice. From a conviction of second degree murder and a prison sentence of five years, there is this appeal. The motion for new trial contains 21 assignments, which we group and discuss in convenient topic headings.

I. *Sufficiency of the Evidence to Sustain Second Degree Murder or Any Other Conviction.* Assignments 1, 2, 3, 4, and 5 present various phases of this topic. Viewed in the light most favorable to the State, as we do in appeals by the defendants,[1] the facts reflect that the defendant, Jack Bly, aged 86, and Richard A. McAnally, aged about 47, were engaged in drinking intoxicants in Bly's cabin. The drinking commenced on Friday afternoon; and McAnally slept in the cabin with Bly that night. Saturday morning, McAnally, after obtaining more whiskey, returned to Bly's cabin. About noon Saturday, McAnally, while eating at the table, cursed Bly, who became so enraged that he attacked McAnally with a knife and killed him by severing his jugular vein. The

[1] *Coffer* v. *State,* 211 Ark. 1010, 204 S. W. 2d 376; *Powell* v. *State, ante,* p. 442, 210 S. W. 2d 909. Other cases on this point are collected in West's Arkansas Digest, "Criminal Law," Key No. 1144 (13).

defendant admitted that he inflicted the wound which caused McAnally's death, but claimed: (1) that he acted in necessary self-defense, and (2) that in all events the crime was only manslaughter since—as he urged—there was absent the ingredient of *malice,* which is essential to second degree murder.

The plea of self-defense presented a factual issue on which the testimony was in sharp dispute. There is ample evidence to sustain the conviction against the plea of self-defense. We come, then, to the contention that there was no malice. It is true that the distinction between murder in the second degree and manslaughter is the presence of malice, express or implied. In the case of *Townsend* v. *State,*[2] 174 Ark. 1180, 298 S. W. 3, Chief Justice HART, speaking for the Court, used this language:

"Whether an offense is murder in the second degree or manslaughter depends upon the presence or absence of malice which may be expressed or implied. The law implies malice where there is a killing with a deadly weapon and no circumstances of mitigation, justification, or excuse appear at the time of the killing. Inasmuch as no one can look into the mind of another, much latitude is allowed in the introduction of testimony on the question of motive, and the only way to decide upon the mental condition (intention) of the accused at the time of the killing is to judge it from the attendant circumstances."

If the jury disbelieved—as it evidently did—the defendant's plea of self-defense, then the killing was without sufficient justification. It was done with a deadly weapon, a knife; and the law will imply malice when the killing is without provocation and is done with a deadly weapon. *Webb* v. *State,* 150 Ark. 75, 233 S. W. 806; *McAdams* v. *State,* 25 Ark. 405; *Vance* v. *State,* 70 Ark. 272, 68 S. W. 37. The last cited case also holds that mere words used by the deceased, however abusive and violent, are not sufficient to reduce the grade of the homicide from murder to manslaughter. We conclude that the

[2] Only the memorandum appears in the Arkansas Reports. Full opinion in Southwestern Reporter.

evidence is sufficient to sustain the conviction of second-degree murder.

II. *Admission of Certain Evidence.* Assignments 16 to 21, inclusive, question various rulings made by the trial court in permitting witnesses for the State to testify.

(a) The mortician who prepared the body of the deceased for burial was permitted to testify that he found no weapon of any kind in the clothes of the deceased. It was shown that the body had not been disturbed from the time of the killing until taken in charge by the mortician; so the questioned evidence was admissible as against the general objection offered.

(b) Law enforcement officers were permitted to testify on direct examination as to statements made by the defendant after he was arrested. Then, on rebuttal, the officers were permitted to testify that the defendant did not tell the witnesses that the killing was done in self-defense. There was no error in admitting any of this testimony because the evidence shows that the defendant was freely and voluntarily talking to the officers; and we have repeatedly held that such statements, freely and voluntarily made, are admissible. *Bates* v. *State,* 210 Ark. 1014, 198 S. W. 2d 850; *Thomas* v. *State,* 210 Ark. 398, 196 S. W. 2d 486.

III. *Instructions Given and Refused.* Assignments 7 to 15, inclusive, question various instructions given by the court, and assignment 6 relates to the court's refusal to give the defendant's instruction "A." The court gave 46 instructions which covered all phases of the law under the evidence presented. We find these instructions to be correct as against the general objections offered to each such instruction. Furthermore, the defendant's instruction "A," insofar as it was a correct declaration of the law, was fully covered in the other instructions given so that there was no error in refusing it.

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

4512 213 S. W. 2d 974

Opinion delivered October 4, 1948.

Rehearing denied November 1, 1948.

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

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

SMITH, J. Appellant was convicted and given a life sentence in the penitentiary upon the charge that he had murdered Nancy Chansley, who was his mother-in-law, and from that judgment is this appeal.

He filed a motion to quash the jury panel, which motion was overruled, and while that action is assigned as error, the assignment is not argued in the brief. This motion may be disposed of, however, as was a similar motion in the recent case of *Washington* v. *State, ante,* p. 218, 210 S. W. 2d 307. It may be said here as was said there: "Appellant is in no position to complain of the selection of any juror, because appellant was not required to take any juror he did not desire. Every juror accepted on the trial jury in the case was accepted by appellant" as he did not exhaust his challenges.

Appellant has been married three times, and all of his marriages proved infelicitous. His last marriage was to the daughter of the woman he was charged with having murdered. He lived in that home with his wife and her mother, who had married one Sherman Barker, and with Mrs. Barker's (*nee* Chansley's) two sons. It appears that a large part of appellant's earnings were devoted to the support of the family thus constituted.

An illicit relation arose and existed between appellant's wife and Clyde Adams, of which all the family were aware. Appellant was employed as a railroad section hand and had taken out a group insurance policy for $1,000, payable to his wife. He conceived the idea that a conspiracy existed to kill him in order that the insurance might be collected, and for Adams to marry his widow. Upon this question appellant asked an instruction reading as follows:

"You are instructed if you find from the testimony that the deceased, Nancy Chansley, Clyde Adams and Columbus Chansley, together with Ruby Jones conspired to bring about the separation of the defendant and Ruby Jones and the marriage of Ruby Jones and Clyde Adams and the death of the defendant, Robert Jones, if necessary in order to collect his insurance and that in doing

this Clyde Adams, Columbus Chansley and Nancy Chansley were killed then you should find the defendant not guilty."

This instruction was properly refused for two reasons. First, no such conspiracy was shown, and second, it would have been no defense if true.

Appellant not only killed his mother-in-law, but he also killed Columbus Chansley, his brother-in-law, and Clyde Adams, his wife's paramour. All three were shot with a thirty-eight caliber Colt pistol, which appellant testified he had bought from Sherman Barker, his wife's stepfather. Barker identified the pistol which appellant admittedly had employed and testified that he had "missed it" from his home.

After appellant had been arrested he signed a written confession which contained among others the following recital, "I made up my mind this morning when I got out of bed about four a. m., that I was going to get shed of them, that is Clyde Adams, Columbus Chansley, Nancy Chansley, and my wife, Ruby."

Before admitting this confession in evidence, the court properly had a preliminary hearing in chambers as to whether the confession had been freely and voluntarily made. The testimony which is incorporated in the record was amply sufficient to warrant the admission of the confession in evidence, but the instructions directed the jury to determine whether the confession had been voluntarily made, and to disregard it unless it was found to have been voluntary.

There were five cartridges in the pistol which appellant used. With these he shot Clyde Adams twice, and Columbus Chansley twice. He shot Mrs. Chansley with the remaining cartridge after which he beat her over the head with the pistol. His counsel summarizes his testimony in the following language which we copy literally:

"The sum and substance of his statements were: He went to the home of Nancy Chansley, his estranged wife's mother, about ten o'clock, October 31, 1947. He

went there at the urgent request of his wife, Ruby Jones, who had agreed to go to the show with him. But to his surprise Ruby was mad and spoke abusive words to him; that she and her mother had a secret conference; that he started to catch a way back to his work, but that he went down into a pasture where he was attacked by Clyde Adams and Columbus Chansley. He shot them from the front and started home. Nancy Chansley attacked him with a large knife. He shot her, but due to the slight wound she was not stopped and he had to hit her with the revolver, then she dropped the knife and they made friends, so to speak. She was not seriously hurt and walked with him out of the pasture and about halfway to the main road. They sat down and talked their troubles over. He says that they agreed that the wounded woman should tell that a car hit her and that when she should come to his home they would marry or live together."

The court of its own motion ordered appellant sent to the State Hospital for Nervous Diseases for examination as to his sanity, and the superintendent of that institution, with another physician also employed there, testified that appellant was sane, although his mentality was that of an eleven-year-old child. A young lady who is an instructor in psychology in one of the state schools testified that she examined appellant and that the tests she gave him showed the mentality of a child only six and a half years old, and certain other testimony was to the effect that appellant's mentality was that of a child not over ten years old. Upon this, and other testimony, two defenses were interposed, first that appellant was not guilty because of lack of mentality, and second, that he killed Mrs. Chansley in his necessary self-defense.

Before the trial, a motion was filed that the State be required to furnish appellant's counsel a copy of appellant's confession which was offered in evidence, but the request was denied. We see no reason why this request was not granted, in fact we think it should have been, but we cannot say that this was such prejudicial error as calls for the reversal of the judgment. Copying the con-

fession would have furnished no evidence that it was not freely and voluntarily made.

Photographs of the dead bodies of Clyde Adams and Columbus Chansley were taken a few hours after they were killed, and these photographs were offered in evidence over appellant's objection, it being insisted that their gruesomeness tended to prejudice the jury against appellant, and proved no fact which was denied. There had been no mutilation of the bodies, and the testimony on the part of the state was to the effect that the bodies had not been moved and that both men were lying where they had fallen. In overruling the objection to the admission of the photographs, the court said:

"In view of the defense interposed here, that of self-defense, and for the further fact that Mr. Hickman (the sheriff) says he was present when the pictures were taken and that the bodies were in the same position as they were when he first saw them and shown to him by the defendant, Jones, the Court holds them admissible. The Court doesn't feel that there is anything present in the pictures themselves which would have a tendency to inflame or create any bias in the minds of the jury."

After appellant had been placed under arrest he conducted the sheriff to the scene of the killing, and in regard to this evidence, the court instructed the jury as follows:

"You are instructed that with reference to this evidence, it is to be considered by you only as tending to shed light, if it does shed light, on the intent or motive with which the alleged assault was made on Mrs. Nancy Chansley, and for no other purpose. The defendant, Robert Jones, is being tried at this time only for the alleged killing of Mrs. Nancy Chansley and not for the alleged killing of Columbus Chansley or Clyde Adams, and the testimony introduced should be considered only by the jury in determining the guilt or innocence of the defendant on the charge for which he is now being tried and for no other purpose."

After killing Mrs. Chansley, her son Columbus, and Adams, appellant returned to the Barker home, where

he told Barker that he had killed the boys and that he had shot Mrs. Chansley. He said the boys "ganged" him and had him down on the ground when he shot them.

Appellant testified that he could neither read nor write, although he got up to the third grade in school, and his testimony shows him to be a man of little intelligence, although he answered rationally the many questions asked him on his direct and cross-examination, and he undertook to tell a story which if believed, would have supported a plea of self-defense. He began working as a section hand at a wage of $3 per day which was later raised to $4 per day. He told a story of his wife's infidelity, and of his relations with her family calculated to embitter him, but he denied having any intention of killing his wife or anyone else. When he came to the immediate circumstances of the killing, his story was that he met the boys and proposed to pay one of them some money he owed, and the boys said they did not want his money, but did want his hide, and that he retreated as they advanced until he fell in a ditch. The men continued to advance with drawn knives, and that he first shot Columbus, who was nearest him, and he then shot Clyde who continued to advance with his knife in hand. The pictures tend to refute this story as the bodies were found on opposite sides of the road about twenty or thirty feet apart.

Appellant further testified that after shooting the boys, Mrs. Chansley appeared on the scene and said: "If the boys can't kill you I will," and she advanced on him with a long dirk knife; that she struck at him with the knife and cut the sleeve of his shirt and that he could not run away as she was too close to him, and as she kept coming on him he shot her.

The photographs were admissible in evidence for either of two reasons: First, they tended to refute appellant's statement that the boys "ganged" him, as the bodies of the boys were found on opposite sides of the road; and second, they tended to show that appellant was carrying out the plan, which according to his confession, he had formed at four o'clock that morning, that is, to

kill the three persons he did kill, and the fourth person he did not kill.

In the case of *Johnson* v. *State,* 156 Ark. 459, 246 S. W. 516, the defendant was on trial for killing one R. B. Wood. At the same time he had killed another man, named Elston Wood. The State was permitted, over defendant's objection, to show the location and range of the wound inflicted upon Elston Wood. In holding that this was not error, Justice HART there said: "While the defendant was being tried for the killing of R. B. Wood, yet Elston Wood was first killed by him. Both killings occurred at the same time and place and were necessarily parts of the same transaction. The two shots were fired in quick succession, and the testimony was competent as tending to show motive on the part of the defendant." So here. The photographs tend to refute appellant's testimony as to his position when he fired the fatal shots and tend to show his motive and design in killing the men.

Appellant asked an instruction which was properly refused reading as follows: "You are instructed if you find from the testimony that the defendant has the mind of a child under twelve years of age you should find the defendant not guilty."

In the case of *Chriswell* v. *State,* 171 Ark. 255, 283 S. W. 981, a headnote reads as follows: "Proof that an adult defendant had the intelligence of a child from seven to nine years old is insufficient to show that he was insane and therefore incapable of committing a crime."

The defense of insanity was not interposed, it being insisted only that appellant was mentally undeveloped. Upon this question Justice BUTLER said in the case of *Daniels* v. *State,* 186 Ark. 255, 53 S. W. 2d 231: "All courts agree that mere mental weakness does not exempt from responsibility, nor can one with a mind below normal be exempted from punishment, any more than a person with normal mind." See, also, *Bell* v. *State,* 120 Ark. 530, 180 S. W. 186; *Mitchell* v. *State,* 206 Ark. 149, 174 S. W. 2d 241.

Appellant insists that the alleged confession was improperly admitted for the reason that it was made

while he was under arrest without a warrant and without being carried before a committing officer, but we have held that these are only circumstances to be taken into account in determining whether the confession had been voluntarily made. See *Thomas* v. *State,* 210 Ark. 398, 196 S. W. 2d 486.

The testimony shows that Mrs. Chansley's skull was fractured and that she died the day after she was shot and assaulted, and as a result thereof, and the testimony supports the finding that she was shot and beaten as a part of the plan which the confession detailed.

Certain other errors have been assigned and argued, but we do not regard them as of sufficient importance to require discussion and decision.

As no error appears the judgment must be affirmed and it is so ordered.

ROBINS, J., dissenting. I respectfully dissent from the majority opinion.

In this case appellant was tried and convicted on information charging him with the murder of Nancy Chansley. He admitted the homicide, and his defense was that he did the killing in self-defense, and also that he was not of sufficient mental capacity to be amenable to the law for his act.

On the same day on which Mrs. Chansley was killed, but at a different time and place, appellant had killed Columbus Chansley and Clyde Adams. The lower court permitted the state to introduce in evidence photographs of the dead bodies of Columbus Chansley and Cldye Adams as they lay upon the ground in the field where they were killed. Appellant admitted killing these two men and no issue was made upon that question.

I can conceive no theory upon which the photographs of the dead bodies of appellant's two other victims were admissible. They could certainly shed no light upon the issues to be decided by the jury, which were, whether appellant killed Nancy Chansley in self-defense and whether he was sane when he did so. No evidence ought

to be received in any case, civil or criminal, unless such evidence is material and relevant to the issues in such case. If the fact of the killing by appellant of the two men done at a place almost a quarter of a mile from where Mrs. Chansley was slain, and at a different time, was material in the case at bar, this was abundantly shown by appellant's confession, in which he admitted killing the two men. The introduction of the photographs was not necessary or informative for that purpose. The inevitable effect of these photographs was to inflame and prejudice the minds of the jury against appellant, and, since they were not relevant to the issues joined, I think that the learned circuit judge erred in permitting them to be introduced. "Photographs that are calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions." 20 Am. Jur. 609.

I am authorized to state that Mr. Justice HOLT and Mr Justice MCFADDIN join in this dissent.

ANDERSON *v.* STATE.

4503 213 S. W. 2d 615

Opinion delivered October 4, 1948.

Orion E. Gates, for appellant.

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

GRIFFIN SMITH, Chief Justice. Act 146, approved March 4, 1943, authorizes the Game and Fish Commission to issue commercial fishing license to any person who has resided in the State for a continuous period of six months. It permits use of a sein, trammel, or gill net. A further incident to the applicant's status is that in addition to residing in Arkansas for six months, he must have no other home. Sec. 13 (E).

H. H. Anderson and five other citizens of Louisiana procured nonresident fishing license under subdivision (B) of § 11, Act 146, paying the annual fee of $5.

Roy M. Adams, a resident citizen of Monticello, owned and operated a domestic fish market. He also owned a 400-yard sein, and for 1947 had paid the license imposed by § 13 (C).

Anderson and his associates were arrested by Game Warden Roy W. Hennigan, who took them before a justice of the peace to answer charges of engaging in commercial fishing without the requisite authority. When the arrests were made all but H. H. Anderson were using Adams' sein in Big Johnson Lake, Calhoun County. They had taken approximately 400 pounds of spoon-billed catfish and buffalo. Before the officer took his prisoners to the magistrate, Anderson appeared. His participation in the enterprise is established by affidavit filed in Circuit Court in the form of motion for a bill of particulars.

The arrests were made in September 1947. Following a favorable action on their motion for a continuance, the defendants were given until October 27th to prepare. At that time they were fined $50 each, and appealed.

In Circuit Court January 12, 1948, the defendants (who were not personally present) moved through their attorney to dismiss the appeals on the ground that the justice of the peace was without jurisdiction because no warrant of arrest had been issued. It was argued there, as here, that a game warden is not an officer within the meaning of our Code of Criminal Procedure authorizing arrests to be made by a peace officer in obedience to warrant, or without a warrant [in certain circumstances], or by a private person who has reasonable grounds to believe that a felony has been committed. Pope's Digest, §§ 3720-21; A. S. 43-403-4.

Appellants seemingly rely upon § 2 of Act 276 of 1919, where it was provided that wardens should investigate violations of the fish and game laws and report to an officer, " . . . but no such warden shall have power to make arrest or serve warrants unless deputized by the sheriff in the county in which the violation occurs." This provision, however, was superseded by Act 160 of 1927, Pope's Digest, §§ 5851-52. See the new Digest, A. S. 47-119 and 47-120, and Compiler's note at p. 579, v. 4. But, irrespective of the cited Acts, Amendment No. 35 to the Constitution, effective July 1, 1945, is conclusive. Section seven of the Amendment directs the Commission to elect certain personnel, including wardens. Section eight authorizes "all employed personnel" to make arrests for violation of the game and fish laws.

An information filed by the Prosecuting Attorney in Circuit Court is alleged to have been faulty in respect of offense dates. It is our view, however, that the defendants were properly in Court by virtue of their appeal from fines assessed by Magistrate G. W. Earnest, hence sufficiency of the information will not be considered.

Judge Gus W. Jones, who by consent sat without a jury, made express findings that cover five typewritten pages. The substance is that Adams, as owner of the net, was not operating it, but that he had permitted the six defendants to use it. Some of the fish were bought by Adams, the remainder having been sold elsewhere, some in Louisiana. It resulted, therefore, that the men,

being nonresidents who had not been in the State six months, did not come within the terms of § 13 (E) of Act 146, and the statutes do not contain other provisions conferring the right to engage in commercial fishing. The fact that each had procured the annual nonresident license mentioned in § 11 (B) was no protection.

Appellants' counsel lays stress upon two contentions: First, any law depriving nonresidents of rights given citizens of this State is discriminatory, hence it would violate the privileges and immunities guarantee expressed in the Fourteenth Amendment to the Federal Constitution, and Art. 2, § 8 of the State Constitution—due process. If, as we hold, the arrests and trials were authorized by law, due process was observed, and the objection must fail.

Appellants think the evidence shows they were employed by Adams on a wage basis, and they contend that the owner of a net who has complied with the legal prerequisites for commercial fishing may engage others to assist him, and it is immaterial whether such servants be residents or nonresidents if they have paid the fee required by § 11 (B). The trial court did not find with the defendants on a question of fact that might clearly distinguish the activities. Conversely, the Court's summation of the evidence was that, in respect of the net, it established the relationship of owner and borrowers, the latter, inferentially, owing some obligation to the owner in the way of remuneration. We agree that the testimony is susceptible of this construction. Warden Hennigan testified that the defendants told him—presumptively at the time of arrest—that *they* sold part of the catch in Monticello, and the balance in Louisiana. There is no evidence of an accounting to Adams, and he did not testify.

In passing sentence the Judge said that there might be some question regarding the Legislature's power to prohibit nonresidents from fishing in Arkansas, "and this is a matter that gives me more concern than anything in this lawsuit."

The exact question has often been before the United States Supreme Court, and decisions are that (a) subject to the paramount right of navigation, each State owns the bed of all waters within its jurisdiction and may appropriate them, to be used by its citizens as a common for taking and cultivating fish; (b) the right which the citizens of the State thus acquire is a property right, and not a mere privilege or immunity of citizenship; (c) a State law, by which only such persons as are *not* citizens are prohibited from engaging in fishing activities in waters under State jurisdiction, is neither a regulation of commerce nor a violation of any privilege or immunity of interstate citizenship. *McCready* v. *Virginia,* 94 U. S. 391, 24 L. Ed. 248.

Interesting opinions touching State ownership of game and fish were written by Mr. Justice HEMINGWAY in *Oregon* v. *State,* 56 Ark. 267, 19 S. W. 840. See, also, Judge MCCULLOCH's opinion in *State* v. *Mallory,* 73 Ark. 236, 83 S. W. 955, 67 L. R. A. 773, 3 Ann. Cas. 852. Reference is there made to comprehensive opinion by Mr. Justice WHITE of the United States Supreme Court, (*Greer* v. *Connecticut,* 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793) where the Oregon case is cited. A different situation arises where the State, as proprietor in trust, discriminates between its own citizens in respect of privileges pertaining to wildlife. *Lewis* v. *State,* 110 Ark. 204, 161 S. W. 154. There are annotations in 61 A. L. R., beginning at p. 337, and in volume 112 of the same work, p. 63; also in 39 L. R. A., 581-91. In the *Greer* v. *Connecticut* case Mr. Justice WHITE quoted with approval from *Ex Parte Maier,* 103 Calif. 476, 37 Pac. 402, 42 Am. St. Rep. 129, where Judge VAN FLEET said for the Court: "The wild game within a State belongs to the people in their collective sovereign capacity. It is not the subject of private ownership except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the preservation of the public good."

Affirmed.

4511 213 S. W. 2d 617

Opinion delivered October 4, 1948.

Robert J. Brown, for appellant.

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

HOLT, J. Appellant, Jim Holliman, by information was charged with two offenses, burglary and grand larceny. A jury convicted him on both charges and fixed his punishment for grand larceny at one year in the State Penitentiary and two years on the charge of burglary. From the judgment in which the trial court directed the terms to run concurrently, is this appeal.

For reversal, appellant argues that the evidence was not sufficient to support the verdicts and that there was error in admission of certain testimony as to an alleged confession.

At the outset, we are met with the State's contention that there was no motion for a new trial and no proper bill of exceptions presented for our consideration. After a careful review of the record, we have reached the conclusion that both of the State's contentions must be sustained.

There is no motion for a new trial in this record, and as was said by this Court in *State* v. *Moore,* 166 Ark. 499, 266 S. W. 460, "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. The same rule applies in regard to the bill of exceptions. *Crow* v. *Cox,* 158 Ark. 641, 251 S. W. 676."

We find no error on the face of the record. See, also, *City of Monticello* v. *Kimbro,* 206 Ark. 503, 176 S. W. 2d 152.

As indicated, there is still another reason why this case must be affirmed and that is that there is no proper bill of exceptions presented by the record for our consideration. What purports to be a bill of exceptions was not signed by the trial judge and in the absence of a bill of exceptions our review is limited to any errors appearing on the face of the record. As above indicated, no error appears on the face of the record here.

In *Hobbs* v. *Bolz Cooperage Company,* 145 Ark. 435, 224 S. W. 968, we said: "There is no bill of exceptions in the record—that which purports to be a bill of exceptions not being signed by the trial judge—therefore, we cannot review the proceedings for assigned errors occurring during the trial. We must assume, in the absence of a bill of exceptions, that there was sufficient evidence to support the verdict and that the proceedings were free from error," and in *Ward* v. *State,* 135 Ark. 259, 204 S. W. 971, (headnote) this Court held: "It is necessary that the bill of exceptions, in a case where defendant has been convicted of a felony, shall be signed by the trial court." See, also, *York* v. *State,* 186 Ark. 260, 53 S. W. 2d 226.

Appellant's assignment of errors in the instant case was such as must have been brought into the record by proper bill of exceptions (*Ward* v. *State, supra*).

Finding no error, the judgment is affirmed.

4509 213 S. W. 2d 619

Opinion delivered October 4, 1948.

[redacted]

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

ROBINS, J. Appellant has prosecuted this appeal from the judgment of the lower court based upon a jury verdict, by which he was found guilty of the offense of uttering a forged instrument and his punishment fixed at imprisonment in the State Penitentiary for two years. No brief has been filed on his behalf.

The motion for new trial reflects that the correctness of the verdict was challenged on the ground that appellant's motion for a continuance was not granted and on the further ground that the verdict was contrary to the evidence. An examination of the transcript discloses that no bill of exceptions has ever been filed in this case.

The granting or refusal of a motion for continuance is a matter within the sound discretion of the trial court, and from the record before us we are unable to say that there was any abuse of discretion on the part of the lower court in this regard.

Since there is no bill of exceptions in this case, we must presume that the evidence was sufficient to warrant the verdict. *Earl* v. *State,* 155 Ark. 286, 244 S. W. 333;

State v. *Moore,* 166 Ark. 499, 266 S. W. 460; *French* v. *State,* 205 Ark. 386, 168 S. W. 2d 829.

The judgment appealed from is therefore affirmed.

McCuistion *v.* State.

4516 213 S. W. 2d 619

Opinion delivered October 4, 1948.

Ras Priest, for appellant.

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

Minor W. Millwee, Justice. Appellants, Lloyd E. and L. C. McCuistion, are brothers. They were charged by information with murder in the first degree in the killing of Johnny Denton on the night of September 28, 1947. Appellants were charged and tried jointly and each found guilty of murder in the second degree. The jury fixed the punishment of Lloyd E. McCuistion at 15 years, and L. C. McCuistion at five years, in the penitentiary.

The motion for new trial contains five assignments of error. The first four relate to the sufficiency of the evidence to support the verdicts and the fifth alleges the verdicts were excessive. Present counsel for appellants, who was not connected with the trial in circuit court, candidly admits that the motion of appellants for an

instructed verdict of not guilty at the conclusion of the testimony, based on the alleged insufficiency of the evidence, was without merit.

The evidence on behalf of the State discloses that appellant, Lloyd E. McCuistion, Johnny Denton, deceased, and several others engaged in a poker game at a cabin on Horseshoe Lake on the night in question. During the game, Lloyd E. McCuistion and another player engaged in a drunken altercation in which McCuistion was the aggressor. The fight was later renewed outside the cabin and deceased, Johnny Denton, became involved in the affray for a short time. McCuistion was severely beaten about the face. Denton and four other players then left the scene in his automobile and drove to Shoffner and other places.

After leaving the cabin, appellant, Lloyd E. McCuistion, borrowed a shotgun from a neighbor and enlisted the assistance of his younger brother, L. C. McCuistion, who also obtained his shotgun. They then entered an automobile driven by another brother in search of Johnny Denton. After making inquiry at several places, they overtook and stopped in front of the Denton car, which also stopped. Appellants then walked to the driver's side of the Denton car where appellant, L. C. McCuistion, opened the door and pulled Denton from under the steering wheel and each of the appellants shot Denton as he lay with his left foot under the clutch pedal of the automobile and his head and arms on the ground. There were no weapons in the car or on the body of deceased and either shot would have proved fatal. Appellants offered no testimony to dispute that offered by the State, which was sufficient to sustain a verdict for murder in the first degree.

For reversal of the judgment, counsel for appellants insists that the court committed reversible error in failing to instruct the jury on voluntary manslaughter. This contention cannot be sustained. It is true there was no instruction given on voluntary manslaughter, but none such was requested by appellants. On the contrary, counsel for appellants specifically requested the trial court to

limit the instructions to the charge of first degree murder only, which request was overruled. Since appellants did not request an instruction submitting the issue of manslaughter to the jury, they cannot now complain of omission of the court to do so. *Graves* v. *State,* 155 Ark. 30, 243 S. W. 855; *Guerin* v. *State,* 155 Ark. 50, 243 S. W. 968; *Martin* v. *State,* 189 Ark. 408, 72 S. W. 2d 539. Other cases which have approved the rule that it is not the duty of the court to give an instruction on any point which an appellant desires to present to the jury unless he asks a correct instruction thereon are *Allison* v. *State,* 74 Ark. 444, 86 S. W. 409; *Jackson* v. *State,* 92 Ark. 71, 122 S. W. 101; *Lucius* v. *State,* 116 Ark. 260, 170 S. W. 1016; *Atkinson* v. *State,* 133 Ark. 341, 202 S. W. 709; *Lowmack* v. *State,* 178 Ark. 928, 12 S. W. 2d 909; *Pate* v. *State,* 206 Ark. 693, 177 S. W. 2d 933; *Cooley* v. *State, ante,* p. 503, 211 S. W. 2d 114.

The fifth assignment of error, that the verdicts were excessive, is likewise without merit. Since we conclude that the evidence was sufficient to sustain verdicts for a higher degree of homicide than that found by the jury, the punishment assessed, being within the limitations fixed by statute (§ 2979, Pope's Digest), cannot be said to be excessive. *Rogers* v. *State,* 136 Ark. 161, 206 S. W. 152; *Jutson and Winters* v. *State, ante,* p. 193, 209 S. W. 2d 681, and cases there cited.

The record is free from reversible error, and the judgment is affirmed.

HIGDON *v.* STATE.

4517 213 S. W. 2d 621

Opinion delivered October 4, 1948.

O. H. Hargraves, for appellant.

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

WINE, J. Appellant was put to trial under an information charging him with the crime of murder in the first degree, alleged to have been committed by shooting and killing one Evaristo Duran. A verdict was returned by the jury finding him guilty of murder in the second

degree and assessing his punishment at seven years in the State Penitentiary, and from the judgment pronounced on that verdict comes this appeal.

The deceased, Duran, was a man of Mexican origin and a tenant on the farm of the appellant located near Heath. On the night of the fatal shooting, the appellant and the deceased left Heath together in a "jeep" driven by the appellant, ostensibly for the purpose of returning to the Higdon farm. According to the testimony, there is a bridge approximately ninety feet long over a drainage ditch between Heath and the home of the appellant. It was on this bridge that the fatal shooting occurred, and there were no eyewitnesses to the shooting, at least none was introduced by the appellant or the State in the trial court.

One Herbert Flowers was called by the State and testified as follows: "When I got there (the bridge), the Mexican was about at the center of the bridge. I drove up there, and I saw lights shining on him, and I searched him, and some men and boys were there, and I told them not to let anyone touch him until the sheriff got there, and I called the sheriff." Question: "What was his condition with reference to being alive or dead?" Answer: "He was dead. He was still warm."

Ray Campbell, a deputy sheriff of St. Francis county, was called by the State, and testified as follows: "We (accompanied by three State policemen) made an investigation, and found out that the Mexican left Heath with Mr. Higdon about 11 o'clock in a 'jeep.' We didn't know Mr. Higdon. We found out where he lived, and went out and got him and brought him back up there." Question: "Where did Mr. Higdon live from where you found the body?" Answer: "About a mile and a quarter to a mile and a half south."

This deputy sheriff further testified that they (the deputy sheriff and three State policemen) proceeded to the home of the appellant, and took him in custody. Under further questioning, Deputy Sheriff Campbell testified as follows:

Question: "What did he (appellant) say about it?" Answer: "He said that he never had any trouble with him (Duran) and that he was one of the best hands he ever had." Question: "Did he make any statement about the killing?" Answer: "He said that he knew nothing about it."

Yet, the appellant took the stand and testified in his own behalf as follows: Question: "On the night of September 27 or the early morning of September 28, I don't remember which, you are accused of killing one Evaristo Duran. Did you kill that Mexican?" Answer: "Yes, sir." Question: "Will you please state why you killed him?" Answer: "He was attacking me with a knife. He first attacked me with a rock and he hit me with it, and then he attacked me with a knife."

In addition to the foregoing admission by the appellant, it is noted that in ruling on the appellant's request and motion for the trial court "to instruct a verdict for the defendant on the ground that there was not sufficient testimony to sustain a charge of murder, and that there was no testimony that the defendant killed the deceased," the trial judge overruled said motion which was made at the conclusion of the direct testimony offered by the State, with these words:

"The Court holds there is sufficient evidence to go to the jury, and, in addition thereto, in the opening statement to the jury, the counsel for the defendant made the *admission* that the deceased had been killed by the defendant. The motion is denied."

In this, the trial court was correct, and this disposes of appellant's assignment of error number 5.

The appellant's assignments of error 1, 2, and 3 go to the sufficiency of the evidence, and it is insisted that the evidence is insufficient to warrant the verdict of the jury. The effect of said assignments of error 1, 2, and 3 is that the verdict of a jury which rests solely upon speculation and conjecture should not be permitted to stand. This, of course, is elementary law, but where, as here, the verdict does not rest solely upon speculation

and conjecture, and there is evidence of a substantial nature which supports it, this Court has held in many cases, two as recently as May 10, 1948, that it will give the testimony tending to support the verdict its highest probative value. In *Powell* v. *State, ante,* p. 442, 210 S. W. 2d 909, and in the case of *Everett* v. *State, ante,* p. 470, 210 S. W. 2d 918, this Court held:

"We do not attempt to detail all of the evidence, but suffice it to say that after considering it all, and when we give to it, *as we must,* its strongest probative force in favor of the State, the testimony was ample to warrant the jury's verdict of murder in the second degree."

The appellant, as assignment of error No. 4, urges that his constitutional rights were invaded, and that he was deprived thereof by the trial court's refusal to abate and quash the information filed herein by the prosecuting attorney. This Court has very recently, in an opinion delivered April 5, 1948, in the case of *Washington* v. *State, ante,* p. 218, 210 S. W. 2d 307, held adversely to such contention, with extensive citations.

Having hereinabove disposed of appellant's assignment of error No. 5, we pass to assignment of error No. 6, which is that the trial court fell into error in admitting photographs of the nude body of the deceased, showing the five bullet wounds therein, which appellant contends was highly prejudicial, and that said photographs do not reveal any facts that could not be introduced by oral testimony. There was no contention that such photographs were not those of the deceased, accurately taken, nor that the wounds were not the five bullet wounds which resulted in the deceased's death. These photographs, having been shown to be accurately taken and correct representations of the subject matter were admissible to show the area of injury. The admission and relevancy and materiality of photographs is left to the discretion of the trial judge, and any prejudicial abuse will justify reversal on appeal, but there was no such abuse in this case. Am. Jur., Vol. 20, 609, § 729. See, also, the same volume, § 728, p. 608.

"Photographs are admissible in evidence in criminal cases upon the same principles and rules governing their admission in civil cases."

For further citations on the admissibility of photographs, see *Simmons* v. *State,* 184 Ark. 373, 42 S. W. 2d 549; *Sellers* v. *State,* 91 Ark. 175, 120 S. W. 840; *Washington* v. *State,* 181 Ark. 1011, 28 S. W. 2d 1055; *Nicholas* v. *State,* 182 Ark. 309, 31 S. W. 2d 527.

Appellant's assignment of error No. 7 goes to the trial court's overruling appellant's motion to strike the testimony of Lt. Allen R. Templeton with reference to the markings on the bullets removed from the deceased's body for the reason that no photographs were taken for the benefit of the jury. This contention is wholly without merit, and will not be further discussed.

Assignment of error No. 9 is to the effect that there was error in allowing the prosecuting attorney to propound to the defendant upon cross-examination the following question: "Did you ever kill a man before this? How many men have you killed?"

To this question counsel for the appellant objected. The trial court overruled counsel's objection. Appellant then answered, "Yes, sir, I killed another man."

A similar question was discussed by the late Justice Wood in the case of *McAlister* v. *State,* 99 Ark. 604, 139 S. W. 684.

"It is well settled that for the purpose of impairing the credit of a witness by evidence introduced by the opposite party, such evidence must go to his general character; that proof of specific acts of immorality is not competent. Yet it is held that for the purpose of discrediting his testimony, the witness may be asked upon cross-examination as to specific acts."

And quoting further from the same case: "The right to impair the evidence of the witness by cross-examination must not be confounded with the right to impeach a witness by evidence introduced by the opposite party. The former may be exercised within a more extended range than the latter."

It is noted that appellant had ample opportunity under further questioning to show or explain mitigating circumstances, if any, surrounding the killing of another man, which he did not do.

Appellant, for his tenth and last assignment of error, urges that the trial court erred in refusing to give defendant's requested instruction No. 9. This requested instruction No. 9 was largely repetitious and the substance thereof fully covered in other instructions given by the court.

Although counsel for the appellant, in his Motion for a New Trial, sets out ten assignments of error, in his brief, under Argument, he groups them into three "propositions"; namely, (1) sufficiency of the evidence, (2) admission of photographs, and (3) cross-examination of defendant. But this being a felony case, we have reviewed all of the assignments of error set out in appellant's Motion for a New Trial, and we now deal with appellant's three "propositions."

Proposition No. 1 deals with the sufficiency of the evidence, which question in that respect has hereinabove been discussed and disposed of and further, "that there is no evidence to show that the killing was done with malice aforethought, but on the contrary, there is evidence to show that the killing was done in self-defense. The uncontradicted testimony was that the appellant was assaulted by the deceased, first by a rock which he threw at the appellant, and later by a knife."

The only such "uncontradicted testimony" is that of the appellant, himself, and there was no testimony or explanation of how the deceased came into possession of a rock while riding in a "jeep" with the appellant on the bridge where the body of the deceased was found, nor was there any testimony to explain why the deceased, under such circumstances, seated in a "jeep" with the appellant, first threw a rock before assaulting the appellant with a knife, if deceased had intent to inflict bodily harm. Suffice it to say, the jury rejected the plea of self-defense and, as stated by Chief Justice HART in the case of *Townsend* v. *State,* 174 Ark. 1180, 298 S. W. 3: "It is

earnestly insisted that there is no testimony in the record tending to overcome the evidence of the defendant to the effect that he shot and killed the deceased in his own self-defense. It was the peculiar province of the jury to weigh the evidence and to believe the testimony that they believe to be true and to reject that which they believed to be false. The reason is that the jury trying a case hear and observe the conduct of the defendant and the witnesses in the case and are, therefore, better able to estimate the value of the testimony than this court which is necessarily confined to the words of the witnesses as written down."

We now pass to the question of malice aforethought, and quote further from the same citation, *Townsend* v. *State,* 174 Ark. 1180, 298 S. W. 3: "The law implies malice where there is a killing with a deadly weapon and no circumstances of mitigation, justification, or excuse appear at the time of the killing. Inasmuch as no one can look into the mind of another, much latitude is allowed in the introduction of testimony on the question of motive, and the only way to decide upon the mental condition of the accused at the time of the killing is to judge it from the attendant circumstances." See further *Dame* v. *State,* 164 Ark. 430, 262 S. W. 313.

Where, as here, the appellant with deadly aim and accuracy pumped five bullets into the body of the deceased (four in the chest and one in the left arm just above the elbow), it would appear that the appellant's heart was in his work.

Proposition No. 2 deals with the introduction of photographs of the deceased which has been hereinabove discussed and disposed of.

Appellant's proposition No. 3 is addressed to the cross-examination of the appellant by the prosecuting attorney in propounding the question: "Did you ever kill a man before this? How many men have you killed?", and the trial court's overruling the objection of the counsel for the appellant to such question and permitting the appellant to answer, "Yes, sir, I killed another man."

The substance and effect of this proposition has been hereinabove discussed and disposed of.

Finding no reversible error, the judgment must be affirmed.

DRAINAGE DISTRICT NO. 16, MISSISSIPPI COUNTY, *v.* HOLLY AND ROACH.

4-8560, 4-8561 (consolidated) 214 S. W. 2d 224

Opinion delivered October 11, 1948.

Rehearing denied November 15, 1948.

Shane & Fendler, for appellant.

C. M. Buck and *J. G. Sudbury,* for appellee.

Ed. F. McFaddin, Justice. These two cases were separately appealed and briefed; but the evidence is identical and the questions may be settled in one opinion. They are: (1) What are the boundaries of the present right-of-way of the District? and (2) Has the District abandoned its old right-of-way?

Drainage District No. 16 of Mississippi County (here referred to as District) was established by order of the County Court in 1915 under the Alternative Drainage District Law of Arkansas (§ 4455 *et seq.*, Pope's Digest[1]). For the purpose of draining and protecting against overflows approximately 60,000 acres in Mississippi county, the District constructed a levee, twenty miles long, west of Big Lake and Little River, extending from the Missouri State Line to the south boundary of the District. The County Court made an order in 1915 locating the levee; but, as actually constructed on the lands here concerned, the levee was not on the site specified in the County Court order. The right-of-way for the 1915

[1] In § 40 of Sloan's two-volume treatise on "Improvement Districts in Arkansas," there may be found, compiled, to the date of the publication of that treatise, the various Acts on the Alternative Drainage System Law.

levee seems to have been acquired by *prescription* rather than by *condemnation* or *grant from the landowners.*

In 1938, the Federal Government agreed to construct a new set-back levee if the District would furnish the right-of-way. Accordingly, the District obtained from J. W. Cowan an instrument entitled "flowage easement" which described the lands affected by said instrument as follows: "A right-of-way 250 feet in width over and across the Frl. S½ of the NE¼, section 21, township 16 north, range 9 east, to be used for the construction and maintenance of said floodway levee and said land side ditch."

The District also obtained from R. E. Santy a similar flowage easement which described the lands affected as follows: "A right-of-way 300 feet in width over and across the north half of the southeast quarter, west of old levee, section 21, township 16 north, range 9 east, to be used for the construction and maintenance of said floodway levee and said land side ditch."

The lands described in the instrument from Cowan to the District are now owned by Holly, who is the appellee in case No. 8560; and the lands described in the instrument from Santy to the District are now owned by Roach, appellee in case No. 8561.

By authority of the foregoing instruments, the District, in 1938-1939, constructed a new levee on and over the lands described in the instruments, and then constructed a ditch on the land side of the levee; that is, the ditch is west of the levee and within the protected lands. The dirt for the new levee was obtained by using all of the old levee, and also by using the dirt from the said land side ditch. In 1939 or 1940, after the completion of the new levee, houses and fishing camps were constructed on appellees' lands outside the new levee—*i. e.,* between it and the lake, and on or near the location of the old levee. These buildings were used as a congregating place for fishermen and others who crossed the new levee to reach them.

Thereupon, in 1946, the District filed these suits against the appellees, Holly and Roach, who respectively

claimed by grant from Cowan and Santy, and who are occupying the land in front of the new levee. The District prayed that its title be quieted to the right-of-way of the new levee and the land side ditch; that the defendants be required to vacate and remove their buildings and camps, as heretofore mentioned; and that all the defendants be permanently restrained from interfering in any way with the District in safeguarding and maintaining the new levee and land side ditch. The defendants, by answer, claimed that their buildings were located on lands entirely east of, and outside of, the right-of-way of the new levee; and that the right-of-way of the old levee had been abandoned by the District and was owned by the defendants.

After an extensive hearing, in which maps and aerial photographs were introduced and many witnesses heard, the Chancery Court entered a decree in favor of the defendants and against the District. In each case the Court found: "And the Court finds that plaintiff District never acquired any rights-of-way across the lands in suit at the location where it constructed its levee in 1915, except by prescription, and that such rights-of-way and easements as were acquired by prescription were abandoned and lost as the result of tearing away and removing, in 1938-1939, the levee so constructed in 1915, and by acquiring new rights-of-way across said lands and constructing a new levee in 1938-1939."

In the Holly case (No. 8560 here) the Chancery Court also found: " . . . that the right-of-way acquired by plaintiff district . . . by deed [2] from J. Wiley Cowan . . . is a single strip of land 250 feet in width over and across the fractional south half and the northeast quarter of said section 21, township 16 north, range nine east, Mississippi county, Arkansas, beginning, for its western boundary, at a point five feet west of the west bank of the land side or seep ditch, constructed by the U. S. Government in 1938 or 1939, and extending east 250 feet."

In the Roach case (No. 8561 here) the Chancery Court also found: " . . . that the right-of-way ac-

quired by plaintiff District . . . by deed[2] from R. E. Santy . . . is a single strip of land 300 feet in width over and across the north half of the southeast quarter of section 21, township 16 north, range 9 east, Mississippi county, Arkansas, beginning, for its western boundary, at a point five feet west of the west bank of the land side or seep ditch, constructed by the U. S. Government in 1938-1939, and extending east 300 feet."

In each case the District's complaint was dismissed for want of equity; and these appeals challenge the correctness of the Chancery decrees.

I. *The District says: "The Right-of-way of the New Levee Extends from a Point Five Feet West of the West Toe of the New Levee Eastwardly to the West Line of the Old Levee."* In this contention, the District asks us to reverse the Chancery Court and hold: (1) that the right-of-way of the new levee was necessarily immediately adjacent to and west of the old levee; and (2) that the land side ditch—constructed 100 feet west of the new levee—is entirely outside of the rights-of-way granted by Cowan and Santy to the District; because, if the land side ditch is a part of the rights-of-way granted by Cowan and Santy, then the grant would not extend from the land side ditch to the rights-of-way of the old levee. The Commissioners of the District and also persons owning land adjacent to the Cowan (now Holly) and Santy (now Roach) lands testified that they "understood" that the District had always claimed its right-of-way to be as stated in this topic heading. But we hold that the wording of the instruments and the actual location of the new levee and the land side ditch afford full support to the decree of the Chancery Court.

In neither the Cowan nor the Santy instruments was the right-of-way described by metes and bounds. In the Cowan instrument this was the description: "right-of-way 250 feet in width . . . to be used for construction and maintenance of said floodway levee and said land side ditch." The instrument nowhere states that the right-of-way was to be adjacent to the old levee; and

[2] The "deed" is the "flowage easement" previously mentioned.

if we should so hold—which we do not—then we would be (1) reading something into the written instrument which is not there, and (2) doing violence to what the instrument stated to be the intended use for the right-of-way—*i. e.,* a new levee and a land side ditch. Both were located within the 250-foot right-of-way. In the Santy instrument, the description was "a right-of-way 300 feet in width . . . west of the old levee . . . to be used for the construction and maintenance of the said floodway levee and said land side ditch." The District contends that the language "west of the old levee" necessarily means that the right-of-way was to be west of *and immediately adjacent* to the old levee, but the words "west of old levee" cannot be enlarged to mean "and adjacent to." Rather, the fact that the District constructed the land side ditch and the new levee within the 300-foot right-of-way clearly indicates that a description was intended which would include the location of both the land side ditch and the new levee.

In *Fulcher* v. *Dierks Lumber & Coal Company,* 164 Ark. 261, 261 S. W. 645, Mr. Justice Wood, speaking for this Court, said: "As is held by the Court of Appeals of New York, 'when the right-of-way is not bounded in the grant or reservation, the law bounds it by the lines of reasonable enjoyment.' Where such right-of-way is reserved, or expressly granted and not defined, the owner of the servient estate, in the first instance, has the right to delimit it, and, in the event of his failure to do so, it may be selected by the grantee of the easement; but, in either case, the location must be a reasonable one, taking into consideration the interest and convenience of both the dominant and servient estates. 9 R. C. L. 791, § 48, and cases there cited; *Grafton* v. *Mauer,* 103 N. Y. 465, 29 N. E. 974, 27 Am. St. Rep. 533, and cases there cited; see, also, *U. S.* v. *Van Horn,* 197 Fed. 611-616; 14 Cyc. 1161-1203; *Alabama Corn Mills Co.* v. *Mobile Docks Co.,* 200 Ala. 126, 75 So. 574; *McKenney* v. *McKenney,* 216 Mass. 248, 103 N. E. 631."

The District, as the owner of the dominant estate, selected and fixed the right-of-way by locating the levee and the land side ditch. In *St. L., I. M. & S. Ry. Co.* v.

Stevenson, 125 Ark. 357, 188 S. W. 832, we held that once the owner of the dominant estate had selected it, then the right-of-way could not thereafter be extended without a new grant from the landowner. To the same general effect, see *Board of Directors of St. Francis Levee District* v. *Bowen,* 80 Ark. 80, 95 S. W. 993. The rationale of the general holdings on this point is stated in 17 American Jurisprudence, p. 998: "The general rule is that the location of an easement once selected cannot be changed by either the landowner or the easement owner without the other's consent. The reason for this rule is that treating the location as variable would incite litigation and depreciate the value and discourage the improvement of the land upon which the easement is charged. Accordingly, a definite location of an easement determines and limits the right of the grantee so that he cannot again exercise a choice." See, also, annotation in 110 A. L. R. 182 and Thompson on Real Property (Per. Ed.) § 565.

Since the flowage instruments of 1938-1939 (as herein involved) provided for both a levee and land side ditch, and since the District located both the levee and the ditch over the lands here involved, we reach the conclusion that the Chancery Court correctly decreed that the District's right-of-way included both the levee and the land side ditch; and we affirm the decree of the Chancery Court fixing such locations.

In the Roach case it was shown that in 1941 Roach leased from the District the levee right-of-way for pasturage purposes, and also that Roach has farmed the strip between the land side ditch and the levee. Based upon this evidence, it is claimed by the District that Roach thereby acquiesced in the District's present contention which is that the land side ditch is no part of the right-of-way. We affirm the action of the Chancery Court in holding against the District on this contention. The District by its easement had a right to use the property for a land side ditch and a levee, and also for any other purposes necessary or incidental thereto. Aside from these express and implied uses, the lands belonged to the landowners. In pasturing the levee with the consent of

the District and in farming the strip between the levee and the ditch, Roach was not claiming any rights in the easement different from those which he had as landowner, nor was he recognizing any rights in the District different from those granted. The strip of land (about 100 feet in width) between the land side ditch and the west toe of the new levee could be cultivated by the landowners with the consent of the District so long as such use did not interfere with the superior rights of the District to its right-of-way. In *Patterson Orchard Co.* v. *Southwest Arkansas Utilities Corp.*, 179 Ark. 1029, 18 S. W. 2d 1028, 65 A. L. R. 1446, (in which the appellant was the landowner, and the appellee had a right-of-way easement) we said: ". . . the appellee has the exclusive possession of the strip of land taken for all purposes necessary to carry into effect and maintain the transmission line, and to no other extent. Therefore the appellant still has and does have the right to enter upon the same at all reasonable times and for all reasonable purposes not inconsistent, or in interference, with the rights of the appellee. Appellant may continue to grow his peach trees, cultivate them, and gather the fruit, so long as it does not interfere with the property of the appellee or its employees in the performance of their legitimate duties."

And in 17 American Jurisprudence, p. 994, the rule is stated: "On the other hand, nothing passes as an incident to the grant of an easement except what is requisite to its fair enjoyment; and notwithstanding such a grant, there remains with the grantor the right of full dominion and use of the land, except in so far as a limitation thereof is essential to the reasonable enjoyment of the easement. It is not necessary that the grantor expressly reserve any right which he may exercise consistent with a fair enjoyment of the grant; such rights remain with him." So the use by Roach of the land between the levee and the land side ditch did not change the right-of-way selected by the District for the levee and the land side ditch.

II. *The District says: "The Right-of-way of the Old Levee Extends from the West Line of the Slope of the*

Levee 200 Feet Eastward.'' Having fixed the location of the right-of-way under the Cowan and Santy grants of 1938, in Topic I, *supra,* there actually exists a strip of land approximately 75 feet wide lying east of the present right-of-way and the location of the old levee. Then there is another strip approximately 50 feet wide between the location of the old levee and the Borrow Ditch in front of the old levee from which ditch the dirt was evidently obtained to construct the old levee. It is on these two strips and the intervening strip (where the old levee was located) that are now situated most of the buildings used by defendants. In other words, these buildings are outside [3] the right-of-way of the present levee, as fixed in Topic I, *supra.* Most of these buildings are on the right-of-way of the old levee; and if the District has not lost this right-of-way by abandonment, then the District is entitled to have the buildings removed if they interfere with its rights.

We come then to the question: Has the District lost its right-of-way to the old levee location by reason of abandonment? The issue here is abandonment, and not that of mere nonuser. It is well recognized that an easement (whether created by grant or prescription) may be lost by abandonment. *Gurdon & Ft. Smith Rd. Co.* v. *Vaught,* 97 Ark. 234, 133 S. W. 1019; *Fulcher* v. *Dierks Lumber & Coal Co.,* 164 Ark. 261, 261 S. W. 645; Thompson on Real Property (Per. Ed.) § 691; 17 American Jurisprudence 1026; 19 C. J. 940; 28 C. J. S. 722. In *Gurdon & Ft. Smith Rd. Co.* v. *Vaught, supra,* Mr. Justice FRAUENTHAL said: ''Whether or not an abandonment exists in any given case depends upon the particular circumstances of such case. A right-of-way is but an easement, which will be held to be abandoned when the intention to abandon and the acts by which such intention is carried into effect clearly indicate such abandonment. While nonuser does not alone constitute an abandonment, yet it is some evidence thereof, and when, in addition to such nonuser, facts are proved and circumstances shown

[3] That is, between the levee right-of-way and the stream against the waters of which the levee was designed to afford protection.

in testimony evincing that intention, then the abandonment is established."

The evidence showing abandonment of right-of-way of the old levee embraces, *inter alia,* these facts: (a) The 1915 right-of-way was for a levee only, and in 1938 the District acquired by grant a right-of-way for a new levee, which was erected on the new location. (b) The District entirely destroyed the old levee by removing the earthen embankment to the location of the new levee.[4] (c) The District exercised no control over the right-of-way of the old levee from 1939 until shortly before the filing of this suit. (d) The District suffered the appellees to erect buildings of a permanent nature on the old right-of-way. In 17 American Jurisprudence, p. 1028, in the discussion of abandonment of an easement, this appears: "Abandonment of an easement will be presumed where the owner of the right does or permits to be done any act inconsistent with its future enjoyment." See, also, Thompson on Real Property (Per. Ed.) § 694.

There was other evidence of abandonment, and the Chancery Court found that the District had abandoned its old right-of-way. We cannot say that the decree of the Chancery Court on this issue is against the preponderance of the evidence; so, we affirm the finding as to abandonment.

III. *The District says: "All the Appellees Have Been Interfering with the District's Commissioners in Many Particulars, and If Left Unrestrained Will Continue to Interfere to a Greater Extent."* We forego any extended discussion of this topic. If the District desires to proceed by eminent domain to acquire the defendants' holdings, then this present suit is no bar, assuming—but not deciding in this opinion—that the District has such power of eminent domain. Furthermore, if the defendants, by trespass or otherwise, have damaged the levee or should do so in the future, then this case is no bar to a proper proceeding by the District for redress and relief. The present litigation was primarily a proceeding to

[4] The aerial photographs in the record show that the location of the old levee is level with the surrounding terrain.

have determined judicially (1) the right-of-way of the District under the Cowan and Santy instruments, and (2) the rights of the District to the right-of-way of the old levee. We have determined only those questions.

The decree of the Chancery Court is affirmed in each case.

[redacted]

FIELDS *v.* STATE.

4519 214 S. W. 2d 230

Opinion delivered October 11, 1948.

Rehearing denied November 8, 1948.

[redacted]

U. C. May and *R. S. Dunn,* for appellant.

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

SMITH, J. Appellant was tried upon the charge of murder in the first degree, alleged to have been commit-

ted by killing one Earl Hornsby. He was convicted as an accessory after the fact to the commission of that crime and given a sentence of six years in the penitentiary, and from that judgment is this appeal.

A reversal of this judgment is asked upon the ground that the testimony is insufficient to support the finding that appellant committed this crime. The testimony shows that a party consisting of three women and three men spent an afternoon in revelry at the home of appellant, referred to as his shack, in making music, singing and drinking whiskey.

The witnesses who testified were secretive and as uncommunicative as possible. Appellant himself did not testify. He was armed with a pistol, which he fired about 11:00 p. m., but it is not disclosed for what purpose he fired it. No one was shot. Hornsby was killed soon after the pistol had been fired. He was stabbed with a pocket knife. His throat was cut and a doctor who examined the wound testified that Hornsby had lived probably fifteen minutes. He was stabbed while in the shack, but the body was found the following morning outside the shack, but near the door. How Hornsby got outside the door is not clear, but the implication is that the body was carried from the room outside the shack. Stella Upshaw, a member of the party, testified that she saw Roy Capes strike Hornsby, who had not assaulted Capes, and that Hornsby slumped down in the doorway.

May Morris, who had been a member of the party, testified that she left and on her return she asked Capes and appellant what had happened during her absence. She was told to shut up. She asked if she was going to be mixed up in the affair and they told her not if she did not know anything, and appellant then said that they had a dead man on their hands. A knife, evidently the one with which Hornsby was killed, was found in a box in the shack. The party dispersed and this witness testified that when she left, only appellant remained.

When Hornsby's body was found on the morning following his death, the shack was locked and appellant was not at home. He made no report of the killing until

after his arrest when he told the officers that Capes was the man they were looking for. Appellant made no attempt to conceal Hornsby's body, further possibly than to take it out of the room, but he did attempt to prevent any disclosure as to the manner of the killing when he told May Morris that she would not be "mixed up in this" provided she knew nothing, which could mean only, or at least the jury might have found, meant that she was to give no information about the killing, and he had given none.

Appellant may have been something more than an accessory after the fact. When he was arrested blood was found on his clothes and shoes and under his finger nails. His explanation to the officers when they called these facts to his attention was that he had killed a chicken.

It is clearly established that the killing occurred in appellant's presence and in his room, and the knife with which the fatal blow was inflicted was found in a box in his room, and he not only made no report of a crime which he had witnessed, if he had not actually participated in its commission, but he attempted to thwart an investigation by telling May Morris she would not be mixed up in the matter provided she knew nothing.

Section 2936, Pope's Digest, reads as follows: "An accessory after the fact is a person who, after a full knowledge that a crime has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime."

In the case of *Terry* v. *State,* 149 Ark. 462, 233 S. W. 673, it was said: "In the case of *Stevens* v. *State,* 111 Ark. 299, 163 S. W. 778, we considered what affirmative action would be required to constitute one an accessory after the fact. We there quoted from the case of *Davis* v. *State,* 96 Ark. 7, 130 S. W. 547, the following statement of the law: 'The mere passive failure to disclose the commission of the crime would not make one an accessory under our statute. There must be some affirmative act tending toward the concealment of its commission, or a refusal to give knowledge of the commission of the crime,

when same is sought for by the officials of the person having such knowledge. It has been held by this court that the fact that the person knowing of a crime conceals his knowledge of its commission, for his own safety, does not raise a presumption that he is an accomplice.' ''

We think the testimony sustains the finding that there was something more than the mere passive failure to inform the officers of the crime, but that there was rather an affirmative attempt to prevent the disclosure of its details.

Capes was indicted for killing Hornsby, and was found guilty of murder in the first degree, and was given a life sentence in the penitentiary, which he is now serving. Appellant was found guilty and given a sentence of six years in the penitentiary, as an accessory to the crime of murder in the second degree. There was no error in this.

Initiated Act No. 3, adopted at the 1936 general election, appears at p. 1384 *et seq.* of the Acts of 1937 and is entitled, ''An Act to Amend, Modify, and Improve Judicial Procedure and the Criminal Law and for Other Purposes.'' Section 25 of the Act, which appears as § 3276, Pope's Digest, reads as follows: ''The distinction between principals and accessories before the fact is hereby abolished, and all accessories before the fact shall be deemed principals, and punished as such. In any case of felony, when the evidence justifies, one indicted as principal may be convicted as an accessory after the fact; if indicted as accessory after the fact, he may be convicted as principal.''

But this section of the initiated act makes no change in the punishment of accessories after the fact. It is a procedural act, relating to the indictment and prosecution of accessories and abolishes the distinction so far as the indictment is concerned, but it does not affect the punishment of accessories as provided in § 2939 of Pope's Digest which reads as follows: ''Accessories before the fact to all other felonies shall receive the same punishment as principals, and all accessories after the fact shall receive the same punishment as their principals, except

in cases of murder in the first degree, who shall be punished as principals in murder in the second degree. Provided, that persons standing to the accused in the relation of parent, child, brother, sister, husband or wife shall not be deemed accessories after the fact, unless they resist the lawful arrest of such offenders."

Prior to the initiated act it was required that an accessory be indicted as such. *Burns* v. *State,* 197 Ark. 918, 125 S. W. 2d 463. But since the initiated act an accessory after the fact may be indicted as a principal as was done in the instant case, but if convicted he is punished, not as principal in murder in the first degree, but as a principal in murder in the second degree. The reason for the distinction no doubt was that to constitute murder in the first degree deliberation and premeditation are required, whereas the guilt of an accessory after the fact arises from conduct after the killing has been committed. There was therefore no error in the distinction between the verdict in appellant's case from that in Capes' case. Appellant may have been an accessory before the fact, but the jury did not so find, and if there was any error in this respect, it is one of which appellant cannot complain.

No error appears and the judgment will be affirmed, and it is so ordered.

LINDQUIST *v.* STATE.

4515 213 S. W. 2d 895

Opinion delivered October 11, 1948.

Joe H. Schneider, Henry Donham and *William H. Donham, Jr.*, for appellant.

Guy E. Williams, Attorney General, and *Eugene R. Warren,* for appellee.

GRIFFIN SMITH, Chief Justice. Karl Lindquist and the other appellants constitute the State Board of Chiropractic Examiners. Acting under what they thought to be the applicable statute, Pope's Digest, § 10778, they licensed Thelma Anderson in September 1947 without requiring her to procure a certificate from the Board of Examiners in the Basic Sciences. Each was fined one dollar, it being the trial Court's views, in which we concur, that the action was erroneous but not willfully or wantonly done.

Appellants contend they were authorized by Pope's § 10778 (§ 3, Act 485 of 1921) to grant reciprocity "with states having equally as high literary professional requirements as provided in this State."[1] Section 1 of the Act, § 10776 of Pope's Digest, prohibits an applicant from taking an examination before the Chiropractic Board without supplying evidence that he or she possesses a four-year high school education or the equivalent. The license-seeker must also have graduated from a reputable college of Chiropractic teaching a resident course of not less than three years in anatomy, chemistry, physiology, hygiene, symptomatology, chiropractic principles, and diagnosis. One in possession of these prerequisites may take the examination.

Appellants' argument is that under § 3 the Chiropractic Board is *expressly* empowered to recognize a reciprocating state's license because there has been a determination that the applicant was qualified in basic science subjects and that such state exacted literary [and] professional requirements equal in dignity to those established in Arkansas. [Reference to the conjunction "and" is made in the first footnote.]

[1] Appellants, in copying § 3 of the Act, have unintentionally added "and" between "literary" and "professional." Neither the Digest nor the printed Acts of 1921 contains "and," nor does the original or enrolled Bill, now on file in the office of the Secretary of State.

Subsequent to the legislation heretofore referred to the General Assembly, as a matter of public policy, established a Board of Examiners in the Basic Sciences. Act 147 of 1929, Pope's Digest, § 10795-14. Some of its provisions were construed in *Stroud* v. *Crow,* 199 Ark. 814, 136 S. W. 2d 1025. In the opinion it was said that the 1929 enactment did not repeal, amend, or modify any preëxisting law "relative to examination of applicants to practice the healing art, but is an additional requirement." It was something to be complied with before taking the examination.

These statements, it is now urged, are judicial determination that discretion was left in the Chiropractic Board to waive examinations.

Section 19 of the Basic Science Act directs that none of its provisions be construed as repealing any statute in force at the time of its passage "with reference to the requirements governing the issuance of a license to practice the healing art or any branch thereof."

We think (as Mr. Justice McHaney expressed it in the *Stroud* case) that Act 147 "superimposed its requirements" upon preëxisting laws. Since it directs how the licensing authority should proceed and is complete in this respect, construction is not difficult. Section 1 bars from examination any person who has not presented *to the licensing board* . . . a certificate of ability in the basic science subjects issued by the State Board of Examiners [in the basic sciences]; but *that* Board (§ 8) may waive the examination required by § 7 and issue a certificate upon which the licensing board may act. In either event the Basic Science Board must certify. Sections 1 and 7 of Act 147 are not inconsistent or contradictory.

In extenuation, appellants call attention to official opinions given by the Attorneys General, as early as June 1929 and as recently as 1947, expressing the belief that the law permitted the exercise of reciprocity as practiced by appellants; hence they should be excused. Courts

have no such power; but they may, as we here do, recognize an absence of wrongful intent.

Affirmed.

Mr. Justice McFaddin not participating.

Kansas City Southern Railway Company *v.* State.

4518 214 S. W. 2d 79

Opinion delivered October 11, 1948.

Rehearing denied November 8, 1948.

Hardin, Barton & Shaw, for appellant.

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

Wine, J. Appellant brings this appeal from a judgment of conviction in the Sebastian County Circuit Court, imposing a fine of $50 for a violation of the "Full Switching Crew Law" of Arkansas, Act No. 67 of the Acts of 1913, which Act now appears as §§ 11161, 11162, 11163 and 11164 of Pope's Digest of the Statutes of Arkansas.

Counsel for appellant, and the Prosecuting Attorney who issued the information, entered into a stipulation of facts reading as follows:

"STIPULATION

"It is stipulated and agreed by the parties hereto that:

"I. The defendant, The Kansas City Southern Railway Company, is a Missouri corporation engaged in the business of a common carrier in the State of Arkansas and other states;

"II. It is a railroad company, or corporation, operating a railroad not less than one hundred miles in length;

"III. In the operation of its railroad the defendant conducts a branch operation between Poteau, Oklahoma, and Fort Smith, Arkansas, a distance of 28.9 miles, over tracks belonging to the Frisco Railway Company under a trackage agreement with the Frisco. This operation is exclusively car-lot operation, involving no less-car-lot shipments, no passenger trains, no mail, no passengers and no main line regular or extra freight trains on the leased track. The defendant operates between these points, on the leased track, one freight train each way daily except Sunday. Trains consisting of less than 25 cars are operated over the entire route from Poteau to Fort Smith by a crew of the defendant's employees consisting of an engineer, a fireman, a conductor and two brakemen. Such trains are operated between Poteau and Heavener, Oklahoma, with a crew of the defendant's employees consisting of an engineer, a fireman, a conductor and two brakemen, and between Heavener, Oklahoma, and Fort Smith, Arkansas, with a crew of the defendant's employees consisting of an engineer, a fireman, a conductor and two brakemen. Said crews operate such trains into Fort Smith, and there engage in spotting cars. "Spotting" involves switching, pushing or transferring of cars across public crossings within the city limits of the said city of Fort Smith. When the basic work day expires a second (or relief) crew, consisting of the same number of employees, completes any spotting (switching, as aforesaid) and operates a newly made up train back to Poteau, Oklahoma, with the same engine and caboose as was used by the crew on the operation

into Fort Smith. A basic (or nominal) work day for the defendant's employees herein referred to in this type of service is eight hours. The spotting (switching, as aforesaid) operations in Fort Smith occur on tracks and property belonging to both the defendant and the above referred to Frisco; shown on Exhibit B.

"IV. The City of Fort Smith, Arkansas, is a city of the first class;

"V. It is agreed that on October 28, 1947, the crew of the defendant; that is, one engineer, a fireman, a conductor and two brakemen, did engage in spotting cars as defined in Paragraph III above in the City of Fort Smith, Arkansas.

"VI. Exhibit B, attached to this stipulation and made a part hereof, shows the correct location of the defendant's Kansas City Southern Company, main line railroad, and the branch line operation over tracks leased from the Frisco between Poteau, Oklahoma, and Fort Smith, Arkansas.

"VII. It is agreed by the parties that Exhibit A shall be attached to this stipulation and become a part of this stipulation, said exhibit having been copied from records kept by the company, as to the revenues received and expenditures connected with this branch operation. Said revenues and expenditures of this branch operating being kept separate and apart from the revenues and expenditures of the other operations.

"VIII. The Kansas City Southern Railway Company agrees to immediately comply with the Full Crew law if the courts adjudge the operation of this branch to be a violation of same.

"Executed at Fort Smith, Arkansas, this 19 day of January, 1948."

The case was submitted to the trial court sitting as a jury upon the agreed stipulation and exhibits thereto without oral testimony.

Arkansas has three so-called "Full Crew Laws," being Act No. 116 of 1907 (§§ 11155, 11156 and 11157,

Pope's Digest); Act No. 298 of 1909 (§§ 11158, 11159 and 11160, Pope's Digest), and Act No. 67 of 1913 (§§ 11161, 11162, 11163 and 11164, Pope's Digest), the last named Act being the "Full Switching Crew Law," not to be confused with the two former Acts herein mentioned, and being the only Act applicable in this case.

The *only* question for determination here is whether the Fort Smith branch of the appellant's railway system is a railroad less than 100 miles in length such as would exclude it from the provisions of Act No. 67 of 1913 (§ 11163, Pope's Digest). In approaching this question, we first point to paragraph II of the stipulation which, of course, refers to appellant's entire system.

Appellant seeks refuge in the case of *Chicago, R. I. & P. Ry. Co.* v. *The State,* 86 Ark. 412, 111 S. W. 456, but it must be noted that case was primarily an attack upon constitutionality of Act No. 116 of 1907, it being asserted that the provisions of that Act requiring railroad companies to equip certain freight trains with at least three brakemen, imposed an undue burden on interstate commerce, and hence was in conflict with Acts of Congress on that subject. While this Court upheld the Act, as did the Supreme Court of the United States in affirming the judgment of this Court, 219 U. S. 453, 31 S. Ct. 275, 55 L. Ed. 290, neither of the two above mentioned questions decided in that case is presented here, and reference to the factors and considerations to be used in determining whether a railroad is a short independent line or a part of the over-all system of a trunk line. We agree that ownership alone is not the true or only test, but rather the issue is whether "the railroad companies operate (the line) as a part of their systems."

We do not think it important or controlling to a determination of this case that the employees (train crews) and equipment (engine and caboose) used on the Fort Smith branch of appellant's railroad were restricted to branch line service, as contended in appellant's brief, (though not included in the stipulation) for it is not even suggested in appellant's brief that such employees do not have service and seniority rights over the entire sys-

tem, or that they are not paid on the same basis and with the same type vouchers drawn on the general treasury of the company, as are all other employees of appellant. Likewise, it is not shown that either the employees or equipment used is peculiar to that particular branch, or that such equipment carries different markings, and could not or would not be freely used on any other part of appellant's system, where adaptable; nor do we think it important that "revenues and expenditures of said branch line operations are kept in books and records separate and apart from the main line operation." This does not appear to be unusual in railroad accounting. It is not suggested by appellant that the revenues from this branch are withheld from the general treasury of the company, or that they are not expended as are other available revenues.

This leaves only the question of appellant "operating between Poteau, Oklahoma, and Fort Smith, Arkansas, a distance of 28.9 miles, over tracks belonging to the Frisco Railway Company under a trackage agreement with the Frisco." Can it be seriously urged that this arrangement or practice is unusual in the annals of railroad operation? We think not.

Appellant's position in this case is little, if any, more tenable than were its contentions in the case of *Kansas City Southern Railway Company* v. *The State,* 116 Ark. 455, 174 S. W. 223, wherein it urged that "its line in said county (Benton), starting at Sulphur Springs enters the State of Oklahoma at a distance of 28.8 miles, the exact mileage between the Missouri line and the Oklahoma line being 28.83 miles and denying that the train was operated unlawfully or in violation of the 'Three Brakemen Act,' Act No. 116, 1907, alleging that the same was not applicable to such train or the operation of its road in that county." This Court upheld the Benton Circuit Court in its judgment of conviction.

Finally, it is noted that this appellant was tried and convicted on a similar charge of a like offense in the same court of the same county, November 20, 1935, and we affirmed in an opinion written by the late Justice

BUTLER, *The Kansas City Southern Railway Company* v. *The State,* 194 Ark. 80, 106 S. W. 2d 163. The legislative Act with which we are here concerned (Act 67 of 1913) was upheld by this court in an opinion written by Chief Justice McCULLOCH, *St. Louis I. M. & S. Railway Company* v. *The State,* 114 Ark. 486, 170 S. W. 580, later affirmed by the Supreme Court of the United States, 240 U. S. 518, 36 S. Ct. 443, 60 L. Ed. 776.

There being no error in the record, the judgment is affirmed. It is so ordered.

HOLT, J., dissenting. I respectfully dissent from the majority opinion. The facts are undisputed. A fair and concise summation by appellant is: "The Kansas City Southern Railway Company (Defendant-Appellant) is a common carrier for hire. It operates a main line railroad through the states of Missouri, Kansas, Arkansas, Oklahoma, Louisiana and Texas, from Kansas City, Missouri, to Port Arthur, Texas. Said main line railroad does not serve Fort Smith. It runs through Oklahoma several miles west of Fort Smith. Appellant operates a branch line railroad from Poteau, Oklahoma, to Fort Smith, over 28.74 miles of track owned by the St. Louis & San Francisco Railway Company (Frisco).

"Inside the city limits of Fort Smith, appellant owns two miles of track, and it has trackage rights over 1.02 miles of Frisco tracks. For several years appellant has utilized said leased trackage from Poteau to Fort Smith for a branch operation. It transports thereover only carload shipments of freight. There is no mail, passenger or express service on said branch line.

"It operates one freight train of less than 25 cars each day. No main line equipment is used in the Fort Smith branch operation. Crews consist of an engineer, a fireman, a conductor and two brakemen. They work exclusively on the Fort Smith branch line operation.

"Carlot shipments are brought into Fort Smith over the branch line by one crew; and cars are spotted within the city limits. A second crew takes a newly made up train at Fort Smith back to appellant's main line at

Poteau, Oklahoma. Spotting and switching cars within the Fort Smith city limits is confined to the 3.02 miles of track owned by appellant and the Frisco railroad, which said tracks are separated from appellant's main line by the 28.74 miles of Frisco tracks.

"The Fort Smith branch is operated by appellant as a separate unit from its main line. Seperate books are kept on said operation, and as stated, cars are switched exclusively on said branch line."

Appellant was convicted under the provisions of §§ 11161-11164, Pope's Digest, (Act 67 of the 1913 Legislature), for failing to provide the full number in its switching crew as allegedly required by this act. This statute is highly penal and must be strictly construed. It admits that only five men constituted the crew here involved, but earnestly argues that the spur or branch line track in question was less than 100 miles in length and was not used as a continuous line with the main line, and therefore the provisions of the act, *supra,* did not apply to it. This, I think, on the facts presented becomes the decisive question in this case. Section 11163 provides: "The provisions of this Act . . . shall not apply to railroad companies or corporations operating railroads less than 100 miles in length."

As I read the facts, this short branch line, or spur, is less than 100 miles in length, in fact is 28.74 miles, and in my opinion, the principles of law announced in *C. R. I. & P. Ry. Co.* v. *State,* 86 Ark. 412, 111 S. W. 456, apply with equal force here, and are controlling.

In the instant case, it appears undisputed that appellant maintains this branch line as a separate operation from its main line operation. It operates exclusively in carlot shipments. No passenger trains are operated on this leased track and no mail or passengers carried. No main line regular, or extra freight trains, are operated on this track. Appellant operates on this leased track one freight train each way daily except Sunday. All trains consist of less than 25 cars and a crew of one engineer, one fireman, one conductor and two brakemen.

All freight thus hauled over this branch line is delivered by the main line in the same manner as any connecting carrier would handle it. Admittedly this branch line, or spur, is owned, for all purposes here, by appellant. Ownership, however, as pointed out in the Rock Island case, *supra,* is not the sole test. It was there said:

"That there is a marked difference in the management, control and operation of long and short line railroads is a matter of common knowledge, known to all observers. Great trunk lines have been constructed through the country that are highways of interstate and international commerce. Both freight and passenger trains pass back and forth upon them every few minutes, and great speed is attained in their movement. On the other hand are found many short lines which supply the needs of small communities, and upon such lines there are but few trains, and those of light weight and of few coaches and cars in comparison with the magnificent passenger and tremendous freight trains moved upon the large trunk lines. Bringing the comparison more nearly home, there are found in this State important through lines, upon which are moved many passenger and freight trains daily; and there are also found many short lines of railroad, some owned and operated by independent companies and some operated as branches and feeders to the larger companies by whom they are owned or controlled. Upon these small roads the necessity of protecting trains from collision from either end is materially less than upon the great lines where the trains are more numerous, heavier and accustomed to greater speed. The movement of a train is necessarily less fraught with danger where there is no other train upon the line, or but few, than upon a line where trains are moving every few minutes, or every few hours. Short lines are usually lightly constructed, and carry light rolling stock in comparison to the great systems. These and other matters of common observation of the difference between long and short lines of railroad can afford reasons why the Legislature should leave untouched the short lines of

railroads with legislation designed to promote safety in operation of long freight trains. . . .

"It may be argued that the Legislature intended to treat these short lines and branches of the larger lines as part of the large systems. If the railroad companies operate them as part of their systems, certainly they are within the act, and the similarity with the short independent lines does not then exist. If the railroad companies operate them separately as independent lines are operated, then there can be no just reason in principle for a distinction between them and the separate lines. Such distinction would then be based solely upon ownership. This legislation can only be supported on account of its supposed promotion of the safety of the public and the employees of a public service corporation, and a distinction based on ownership is wholly untenable.

"The proper construction to place on the act, and that renders it valid, is: If the short line is in fact used as a continuous line with the main line, or in any other way as a part of it, and not as a separate line merely connecting with it, then it is a part of the line. But if it is a mere connecting line, separately operated—operated as an independent short line is operated—although owned by the company owning the larger line, then it would not be within the statute."

I think it is established, in the instant case, that this short branch line was a connecting line and operated separately from the main line operations though owned by the main line and was not within the statute. All switching operations were totally disconnected from appellant's main line by 28.74 miles of Frisco tracks. Appellant's income from said branch line is separately kept from the main line operations and the switching crew paid from the branch line income. The case of *The Kansas City Southern Ry. Co.* v. *State,* 194 Ark. 80, 106 S. W. 2d 163, referred to in the majority opinion is, I think, clearly distinguishable for the reason that the issue presented here was not raised in that case.

The judgment should be reversed and the cause dismissed.

Mr. Justice FRANK G. SMITH concurs in this dissent.

MCCRACKEN *v.* STATE.

4531 214 S. W. 2d 84

Opinion delivered October 11, 1948.

Rehearing denied November 8, 1948.

Franklin Wilder, for appellant.

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

ROBINS, J. The grand jury returned indictment against appellant charging him with the offense of aiding, encouraging, assisting and advising one Harold Dean Frye in committing the offense of carnal abuse.

He was convicted by a trial jury and subsequently sentenced to imprisonment.

Appellant asks reversal of the lower court's judgment on these grounds: (1) That the arrest of certain defense witnesses during the trial was prejudicial error; and, (2) that the verdict was contrary to the evidence.

I.

During the trial two witnesses for the defense testified that they had had sexual intercourse with the prosecuting witness. A few minutes after this testimony was given the court took a recess until the following day, and after the recess the Prosecuting Attorney went from the courtroom out into the hall and had the Deputy Sheriff place these two defense witnesses under arrest for perjury. These witnesses later went back on the stand and recanted their former testimony. A motion for a mistrial on account of the arrest of the two defense witnesses was presented to the court and overruled. On the hearing of this motion the Prosecuting Attorney testified that the arrest did not occur in the courtroom or in the presence of the jury, unless some of the jury were mingling with the crowd in the hallway. The lower court denied the motion for a mistrial.

Appellant attached to his motion for a new trial affidavits of two members of the jury who testified that they heard the Prosecuting Attorney tell the Deputy Sheriff to hold the two witnesses on a perjury charge, that the incident occurred immediately after the court had recessed and the jury had been permitted by the court to separate, and that there were two or three other jurors present at the time.

Our cases, such as *Crosby* v. *State,* 154 Ark. 20, 241 S. W. 380; *Martin* v. *State,* 130 Ark. 442, 197 S. W. 861; and *Lile* v. *State,* 186 Ark. 483, 54 S. W. 2d 293, in which we held that it was reversible error for the judge, in the presence of the jury, to order the arrest of a witness in a criminal case, are not controlling here. In the case at bar the court made no order at all. The jury had, without any objection on the part of appellant, been permit-

ted to separate until the resumption of the trial the following morning, and the request for the arrest made by the Prosecuting Attorney was not made in the courtroom. There is nothing in the record to indicate that the Prosecuting Attorney knew that any juror heard his conversation with the Deputy Sheriff, or that he tried purposely to let the jury know of the incident. We conclude that under the circumstances shown the lower court properly denied the motion for a mistrial, and that no reversible error was committed in connection with the arrest of the two defense witnesses. Furthermore, the only direct proof that any member of the jury witnessed the arrest of the defendant's witnesses was sought to be established by the affidavits of two members of the jury. The trial court should have excluded these affidavits—and probably did—because § 4060, Pope's Digest (4 Ark. Stats., § 43-2204) provides: "A juror cannot be examined to establish a ground for a new trial, except it be to establish, . . . , that the verdict was made by lot." With the jurors' affidavits excluded—as the law requires—there is no showing that the trial court abused its discretion in overruling the motion for a new trial.

II.

The testimony on behalf of the State tended to show that one of appellant's boys was keeping company with the prosecuting witness, a fifteen-year-old girl, that he became intimate with her, and that she had become pregnant; that Harold Dean Frye and appellant drove in a car with the girl out to a secluded place where Frye had intercourse with her.

Appellant did not deny that he was with Frye and the girl on the occasion described by her, but he stated that when he saw that Frye was putting his arm around the girl "I thought then that I had better get out, that they had some talking and necking to do, and I got out and walked down from the car a piece and took a chew of tobacco and stood around there awhile." Appellant also testified that he did not suggest to Frye that he engage in intercourse with the girl. The theory of the State, accepted by the jury, was that appellant was aid-

ing and encouraging the Frye boy to have intercourse with the girl so as to cast a doubt on any claim that appellant's son was the father of the child which she had conceived. It was also shown that appellant told the girl's father about her intercourse with Frye, and told him that he (the appellant) was actually in the car with them at the time it occurred. The evidence was sufficient to justify the jury in its finding.

No error appearing, the judgment is affirmed.

Justices SMITH and HOLT dissent.

STOCKTON *v.* BAKER.

4-8554 213 S. W. 2d 896

Opinion delivered October 11, 1948.

John Baxter and *Hopson & Hopson,* for appellant.

James Merritt, Tom F. Digby and *Gerland P. Patten,* for appellee.

HOLT, J. This litigation grew out of a head-on collision between two automobiles on a paved street within the city limits of Prescott, at about 4:00 p. m., May 13, 1946. The day was clear and the pavement dry. The mishap resulted in personal injuries to Mrs. Lillie Baker, driver of one of the cars, and in injuries and the subse-

quent death of her husband, John E. Baker, who was riding in the car, with her, in the front seat at the time. Both cars were almost completely demolished. Appellant, Jesse Stockton, driver of the other car, a taxicab, also received personal injuries.

August 27, 1946, Mrs. Lillie Baker, in her own right, sought damages for personal injuries from appellant Stockton, and also damages to her car. In the same complaint, she also sought to recover $10,000 for the benefit of her husband's estate.

Stockton answered with a general denial and affirmatively pleaded contributory negligence of both Mrs. Lillie Baker and her husband, and by way of cross complaint sought to recover for personal injuries and for damages to his taxicab.

On the issues joined, a jury returned a verdict for appellee, Lillie Baker, as administratrix of the estate of John E. Baker, deceased, only, in the amount of $6,500, and from the judgment is this appeal.

For reversal, appellant argues (1) that the collision and the damages resulting therefrom were due solely to the negligence of Mrs. Lillie Baker; that Stockton was not shown to be guilty of any negligence, and that there was no substantial evidence to support the verdict returned; and (2) says, in any event, "the judgment must be reversed and the cause remanded for a new trial, for either one of the following reasons: (a) The court erred in not ordering a mistrial when appellee's witness testified that there was an insurance policy involved. (b) . . . in granting appellee's instruction No. 2. (c) . . . in giving instruction No. 10. (d) Appellee and her husband were engaged in a joint enterprise. (e) Because the verdict and judgment are excessive and makes Lillie Baker the beneficiary of her own wrong."

(1)

As in most cases of this nature, the evidence was conflicting with each party attempting to shift the blame. The testimony tended to show, however, when stated in

the light most favorable to appellee, as we must do, that Mrs. Lillie Baker, in company with her husband, was driving her automobile along a paved street in the city of Prescott in front of three or four other cars, and from 20 to 30 feet behind a large truck, which obstructed the view of oncoming cars. She was at the time within the city limits and driving from 20 to 25 miles per hour. The city's speed limit was 25 miles per hour. In attempting to pass the truck, Mrs. Baker pulled to the left over the black center line, dividing the pavement, to ascertain whether the way was clear, and just as she did so, her car was immediately struck head-on by an oncoming taxicab driven by Stockton at a speed of approximately 50 miles per hour. The impact was so great that both cars were practically demolished and as noted above, both Mrs. Baker and Stockton received personal injuries and Mrs. Baker's husband, John E. Baker, who was seated beside her, received injuries from which, after much conscious pain for several days, died.

It would serve no purpose to detail all the testimony. The jury evidently found that both Lillie Baker and Stockton were guilty of negligence such as would preclude a recovery on behalf of Stockton or Lillie Baker in her own right. It does not follow, however, that Lillie Baker as administratrix of the estate of John E. Baker, deceased, should be denied recovery for the benefit of her husband's estate, unless her negligence should be imputed to her husband in the circumstances here.

There was evidence that Mrs. Lillie Baker owned the car which she was driving and had control and management. Her husband was seated by her side, to her right, with his view obstructed by the truck, and after his wife had driven the car a sufficient distance to the left to enable him to see ahead, he observed the oncoming taxicab and shouted, "look out, look out, look out," but almost immediately the collision occurred. Whether, in the circumstances, John E. Baker was guilty of contributory negligence was a question for the jury. The governing rule was recently stated by this Court in *Willbanks* v. *Laster*, 211 Ark. 88, 199 S. W. 2d 602, in this language: "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."

As indicated, whether appellant's husband was guilty of contributory negligence in the circumstances, was for the jury, and we are unable to say, on the testimony presented, that there was no substantial evidence upon which the jury must have found that he was free of negligence.

(2)

(d) Appellant insists, however, that Mrs. Lillie Baker and her husband were engaged in a joint enterprise such as would preclude recovery. On this issue there was testimony, as has been indicated, that the car which Mrs. Baker was driving belonged to her. Mrs. Baker had been on a visit to her sisters in Emmet, Arkansas, and had invited her husband to accompany her. She had been driving automobiles for approximately 17 years and was an experienced driver. Her husband was a retired railroad engineer and did not own or drive an automobile. Whether she and her husband were on a joint mission or enterprise, in the circumstances, was properly submitted to the jury under instruction No. 5, given at appellant's request. "You are instructed that if you find from a preponderance of the evidence that J. E. Baker and his wife were engaged in a joint enterprise, the negligence of Lillie Baker, if any, would be imputed to her husband, J. E. Baker. In order for a joint enterprise to arise two fundamental and primary requisites must concurrently exist, to-wit: A community of

interest in the object and purpose of the undertaking in which the automobile is being driven, and an equal right to direct and govern the movements and conduct of each other in respect thereto. If either or both of these elements is absent, there is no joint enterprise."

This instruction followed the rule announced by this Court in *Lockhart* v. *Ross,* 191 Ark. 743, 87 S. W. 2d 73. There we said: "In Cyc. of Automobile Law and Practice, Blashfield, Vol. 4, Ch. 65, p. 171, § 2372, it is said: 'A person accepting an invitation to ride in the automobile of another does not, merely, by reason of such fact, thereby engage in such common enterprise or joint adventure with the driver as to absolve either from liability to the other for an act of negligence.' An essential, and perhaps the central, element which must be shown in order to establish a joint enterprise is the existence of joint control over the management and operation of the vehicle, and the course and conduct of the trip. There must, as said in another connection, in order that two persons riding in an automobile, one of them driving, may be deemed engaged in a joint enterprise for the purpose of imputing the negligence of the driver to the other, exist concurrently two fundamental and primary requisites, to-wit, a community of interest in the object and purpose of the undertaking in which the automobile is being driven, and an equal right to direct and govern the movements and conduct of each other in respect thereto. 'If either or both of these elements is absent, the absence thereof is fatal to the claim of joint enterprise.' "

(a) It is next contended that the court erred in not granting a mistrial "when appellee's witness testified that there was an insurance policy involved." On cross-examination of witness, Mary Hubbard, by appellant, the following occurred: "Q. Now, Mrs. Hubbard, have you hired an attorney in Prescott for the purpose of bringing a lawsuit in connection, (Interrupted) A. I haven't so far, no. Well, yes, I did but he was bought off by the insurance company and Jesse Stockton."

There was no error in admission of this testimony for either of two reasons. First, it was brought out by

appellant himself on cross-examination and he cannot complain. Second, the record discloses that there was no objection made and no exceptions saved.

(b) Appellant also alleges error in giving appellee's instruction No. 2. This instruction, in effect, says appellant, "states that the jury would find that the plaintiff was not guilty of negligence if, at the time of the collision, she was in the act of ascertaining whether the highway was clear and free of oncoming traffic for a sufficient distance ahead to permit her to overtake and pass the vehicle in front of her and was acting as an ordinary prudent person would have acted under the same or similar circumstances."

This instruction was given in connection with Mrs. Lillie Baker's suit to recover in her own right and since the jury by its verdict must have found that Mrs. Lillie Baker was guilty of such negligence as to preclude recovery in her own right, appellant cannot complain, and his contention becomes immaterial.

(c) Appellant also contends that it was error for the court to give on its own motion, instruction No. 10, as follows: "As between Mrs. Lillie Baker suing in her own right and as widow of the deceased, John E. Baker, and as Administratrix, and the defendant and cross complainant, Jesse Stockton, if you find from the evidence that Mrs. Baker was not guilty of any negligence as defined in these instructions and that Jesse Stockton was guilty of negligence and that his negligence, if any, caused or contributed to the injuries and damage complained of, your verdict will be for the plaintiff, Mrs. Lillie Baker, suing in her own right and as widow of the deceased and as Administratrix. If you believe from the evidence that Jesse Stockton at the time of the collision complained of, was free of any negligence and that the collision was caused solely by the negligence, if any, of Mrs. Lillie Baker, then your verdict would be for Jesse Stockton on his cross complaint as against Mrs. Lillie Baker. If you find from the evidence that Mrs. Lillie Baker at the time complained of was guilty of negligence as defined in these instructions and that Jesse Stockton

was also guilty of negligence as defined in these instructions, Mrs. Lillie Baker, as Administratrix of the Estate of John E. Baker, deceased, would be entitled to recover as Administratrix for benefit of the Estate of John E. Baker, deceased, if you find that they were not engaged in a joint enterprise at the time and that the negligence, if any, of Mrs. Lillie Baker should not be imputed to John E. Baker, as is defined to you in these instructions."

Appellant's specific objection was: "Instruction No. 10 is specifically objected to because it is long and confusing; that that part of the instruction which leaves it for the jury to determine if Mr. and Mrs. Baker were on a joint enterprise is erroneous for the reason that there is no evidence in the record forming the basis upon which that part of the instruction relating to joint enterprise could be based."

In his argument, appellant says that "this instruction was inherently wrong because it did not submit to the jury the question of the contributory negligence, if any, of John E. Baker, deceased."

Appellant's objection is untenable for the reason that he made no specific objection to the instruction on the ground that it failed to submit to the jury the question of contributory negligence of the deceased.

The above instruction No. 10, in its general terms, was clear and correct. We said in *Western Coal & Mining Company* v. *Burns,* 84 Ark. 74, 104 S. W. 535: "A party cannot complain of the failure of the court to instruct on a given point in a case unless he himself asks for a correct instruction. *Allison* v. *State,* 74 Ark. 444. Especially is this true where a correct instruction on the subject in general terms has been given, and the party is asking for a specific one."

(e) On the question of the excessiveness of the verdict in favor of the estate of John E. Baker, deceased, but little need be said. He was injured May 13, 1946, taken to a Prescott hospital and removed to the Missouri Pacific Hospital in Little Rock on the 20th, and died on the 24th. During a large part of this time he was con-

scious and suffered excruciating pain. The evidence disclosed he had broken ribs, broken legs, punctured lungs, internal injuries, bleeding from ears and nose, draining spinal fluid through the ears, unable to swallow, breathing with difficulty, and was heard to cry out "Help me! Help me! Breathe for me!" He was 69 years old and had a life expectancy of 8.97 years. We are unable to say, in the circumstances, that an award of $6,500 was excessive.

Finally, appellant says that the trial court erred in refusing to grant a new trial on newly discovered evidence. The nature of the alleged newly discovered evidence was that the records in the Tax Assessor's office for Desha county showed that on the 19th day of March, 1946, the Chrysler automobile which Mrs. Lillie Baker was driving at the time of the mishap and which she claimed to own, was assessed in the name of J. E. Baker of McGehee, Arkansas, Mrs. Lillie Baker's deceased husband. Obviously this evidence was a matter of public record. It was, in the circumstances, within the sound discretion of the trial court to determine whether appellant had used due diligence to discover this testimony. The rule is announced in *Citrus Products Company, Inc.*, v. *Tankersley,* 185 Ark. 965, 50 S. W. 2d 582, where this Court said: "This Court has repeatedly held that a motion for a new trial on the ground of newly discovered evidence should not only be supported by affidavits, but that a new trial would not be granted on the grounds of newly discovered evidence unless the party applying for the new trial had used proper diligence. Here, after approximately six months' time, plaintiffs went to trial without introducing any competent evidence, either to show that a partnership existed, and, if so, who the members were, . . . "

In the instant case, it appears that appellant had ample time before trial in which to discover this evidence and prepare for trial. We are unable to say that the trial court abused its discretion in denying a new trial.

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

Opinion delivered October 11, 1948.

S. J. Reid, for appellant.

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

MINOR W. MILLWEE, Justice. Appellants were convicted of the offense of grand larceny. They have waived all assignments of error in their motion for new trial except Assignment No. 4, which challenges the validity

of the term of the circuit court at which they were tried and convicted. This point was raised in the trial court by motion of appellants to adjourn and continue the cases against them until the next regular term. The motion was filed and overruled on February 19, 1948. It alleges that court was not then legally convened as required by law and was, therefore, without jurisdiction to proceed in the cases; that said court was not convened on either of the first three days of the February, 1948, term and stood adjourned by operation of law until the next regular term; and that any proceedings had would be void and subject appellants to expensive litigation in violation of their constitutional rights.

For reversal of the judgment, appellants insist that the February, 1948, term of court had lapsed on February 19, 1948, and all proceedings had on that date and on April 27 and 28, 1948, when they were tried and convicted, are void.

Section 2832, Pope's Digest, fixes the time for convening and holding circuit court in Grant county on the third Monday in February and August. The convening order for the February, 1948, term of court reads as follows:

"THURSDAY MORNING, FEBRUARY 19, 1948

"BE IT REMEMBERED, that a Circuit Court was begun and publicly held in and for the county of Grant and State of Arkansas, in the Courthouse of Grant county, Arkansas, on the 19th day of February, 1948, said date being on Thursday after the third Monday in February the time prescribed by law for the holding of said Court, present and presiding the Hon. Thomas E. Toler, Judge of the 7th Judicial Circuit before whom the following proceedings were had, to-wit:"

The term as fixed by the statute thus began on February 16, 1948, said date being the third Monday in February. It is clear from the recitals of the convening order that court was not opened until Thursday following the third Monday, or the fourth day of the term. If court were held at a time unauthorized by law, its proceedings are void. In the early case of *Brumley* v. *State*,

20 Ark. 77, the Court said: "The meeting together of the judge, and officers of Court, at the place, but not at the time fixed by law for holding the Court, was not a Court, under our Constitution and laws; but was a mere collection of officers, whose acts must be regarded as *coram non judice* and void, as heretofore held by this Court in *Dunn* v. *The State,* 2 Ark. 229, 35 Am. Dec. 54." See, also, *Williams* v. *Reutzel,* 60 Ark. 155, 29 S. W. 374, and cases there cited.

At common law, if the judge fails to appear on the date fixed by law for the opening of the term, the term lapses. The inconvenience resulting from the strictness of the common law rule led to a general enactment of statutes preventing a lapse of the term for a limited period. 21 C. J. S., Courts, § 155; 14 Am. Jur., Courts, § 35. The Legislature of 1837 adopted Rev. Stat., Ch. 43, §§ 25-27, which now appear as §§ 2850 and 2851 of Pope's Digest, and provide:

"Sec. 2850. Adjournment to third day. If any court shall not be held on the first day of the term, such court shall stand adjourned from day to day until the evening of the third day.

"Sec. 2851. Continuance of case upon lapse of term. If at that time the court shall not be opened, such court shall stand adjourned until the next regular term, and all cases, civil, penal and criminal, shall stand adjourned over until next term of such court. It shall be the duty of the clerk of such court, in such case, to enter upon his docket a continuance of all suits and prosecutions."

In *Neal* v. *Shinn,* 49 Ark. 227, 4 S. W. 771, this court held that §§ 2850-51, *supra,* were not abrogated by Art. 7, § 21, of the Constitution of 1874, which provides for the election of special judges. In that case the regular judge did not appear on the first two days of the regular term and the attorneys in attendance failed to elect a special judge on the second day of the term under the constitutional provision. However, the regular judge did appear and assume his duties on the third day of the term which was held permissible and prevented the lapse of the term. The court said: "Construing these provi-

sions as *in pari materia* with the Constitution (*Billingsley* v. *State,* 14 Md. 369), the conclusion is, that if the attorneys fail to exercise their privilege of choosing a special judge at 10 o'clock of the second day of the term, and the regular judge does not appear, the court will stand adjourned until the next day, when he may lawfully assume the duties of the bench." In reference to the constitutional provision the Court also said: "The provision recognizes the right of the regular judge to appear at any time during the term and assume his judicial duties, if a special judge has set and kept the machinery of the court in motion."

According to the record before us in the case at bar, the attorneys in attendance failed to exercise their privilege of electing a special judge under the constitutional provision so that the machinery of court might thereby be kept in motion. Nor did the regular judge appear and open court until the fourth day of the term. Under the plain provisions of the statute (§ 2851, Pope's Digest) the term lapsed on the evening of February 18, 1948, the third day of the term.

It is contended by the State that appellants submitted to the jurisdiction of the court by filing a motion to quash the information after the trial court overruled their motion to adjourn and continue the cause. Since the court was not legally in session and was without authority to proceed, appellants could not submit to jurisdiction that was nonexistent. Jurisdiction being lacking in the first instance, it could not be conferred by consent.

Counsel for the State also argue that the record of the ruling of the court on appellants' motion to adjourn and continue the case is improper and insufficient for this court to review. The record reflects a notation following the filing mark of the clerk on the motion, "Motion Overruled—Exceptions Saved." While it is true that the record does not show a formal order overruling the motion and is not to be approved as a precedent, we think it sufficiently reflects the action of the trial court. *Tong* v. *State,* 169 Ark. 708, 276 S. W. 1004. Besides, the

State is hardly in position to urge the point. The record further shows that the prosecuting attorney, on the date of trial, also moved to continue the cases because of the lapse of the term, and this motion was likewise overruled by the trial court.

The State also insists that the trial judge was authorized to open court on the fourth day of the term under the provisions of § 31 of Initiated Act No. 3 of 1936 (Acts of 1937, p. 1397) and Act 202 of 1943. Section 31 of the initiated act is applicable to criminal proceedings only, while § 1 of Act 202 of 1943 applies to all proceedings and reads as follows:

"Section 1. When any Circuit Court is duly convened for a regular term the same shall remain open for all criminal, civil, or special proceedings until its next regular term, and may be in session at any time the judge thereof may deem necessary; but no such session shall interfere with any other court to be held by the same judge. If the time has not been fixed by the Court, or unless in such cases they are required by law to take notice, all interested parties, together with their attorneys, shall receive notice from the Clerk of said Court of any proceeding affecting their rights, and shall be given time to prepare to meet such proceedings."

It is insisted that the above section authorizes the action taken by the trial court when it is construed in connection with the title of the Act, which reads: "An Act Declaring Circuit Courts Open at All Times for Civil and Criminal Proceedings." We cannot agree with this contention. By § 1, the power and authority of the judge to convene court at any time he "may deem necessary" is predicated on the prerequisite that court has been first "duly convened for a regular term." It is true that the enactment of both the initiated act and the 1943 statute effected a more liberal procedure in the time and manner of holding courts. The initiated act specifically repealed many prior statutes on the subject, but left intact §§ 2832, 2850 and 2851 of Pope's Digest.

On the record here, we conclude that the February, 1948, term of the Grant Circuit Court lapsed on the eve-

ning of February 18, 1948, and that the proceedings had thereafter are void and of no effect. It appears from the record that appellants were regularly charged by information filed by the prosecuting attorney at a prior term of court. Since their trial and conviction were void, the State may elect to conduct another trial. The judgment is accordingly reversed, and the cause remanded for trial.

ARKANSAS STORES, INC. *v.* MCCLENDON.

4-8562 214 S. W. 2d 61

Opinion delivered October 18, 1948.

Glenn F. Walther and *House, Moses & Holmes,* for appellant.

Coffelt & McDonald, for appellee.

GRIFFIN SMITH, Chief Justice. By contract of June 14, 1946, Cecil McClendon began business at Benton as an Arkansas Stores Associate Dealer under covenant to make all purchases of merchandise from appellant when the goods were intended for resale. The undertaking, by

express terms of the contract, was terminable on notice of thirty days if given by either party.

Appellant is not a manufacturer, but purchases in large quantities for a number of associate stores, thereby procuring price concessions. For its services appellant received a commission of ten percent.

In February 1947 appellant sued for an alleged balance of $1,233.32, attaching to the complaint an itemized statement. In his answer McClendon copied § 6 of the contract: "Party of the Second Part shall not be required to purchase any merchandise not wanted." This, said McClendon, was his "complete defense." By way of cross-complaint he alleged failure of the plaintiff to supply goods that were ordered and could have been furnished, and a consequential damage of $5,000 because of non-delivery. Upon trial the verdict was, "We, the jury, find for the defendant, Cecil McClendon, in the sum of $2,500." Judgment, and the Court's action in overruling the Corporation's motion for a new trial, resulted in this appeal.

Although McClendon handled a variety of merchandise after contracting with appellant, the bulk of his business appears to have been automobile and truck tires manufactured by the Firestone Company, although other things were sold, including refrigerators, shotguns, bicycles, radio sets, etc. McClendon concedes that during the first two months—that is, June and July of 1946—the flow of goods to his place of business was reasonably satisfactory. In fact, there was an arrangement whereby appellant as procurer directed that salable articles be sent to McClendon even though not ordered. These were returnable at McClendon's discretion. Transactions of this nature resulted in frequent credit entries, and for several months no questions arose.

Appellant contends the indebtedness accumulating between November 20th and December 20th amounted to $1,233.32, and that in spite of repeated statements, personal importunities, and a final withdrawal of credit, the account went unpaid. Appellee's defense is that from time to time his business was glutted with over-shipments

representing commodities "automatically" supplied, and that when attempts were made to procure credit by leaving the goods at "the Firestone Warehouse at 555," arguments occasionally ensued, with an absolute refusal to receive them. Appellant denied it was connected with 555 in a sense authorizing the latter to receive shipments sent to Little Rock for McClendon's credit. However, there was testimony that articles so sent had been accepted, hence a question of fact was presented and the jury could have found that acquiescence by appellant established a custom upon which appellee might rely. Appellant also testified, through its manager, that particular goods for which McClendon asked credit under the return privilege, had been accepted and paid for, hence as to such charges the books had been closed.

There is testimony in support of appellee's cross-complaint that he was damaged to the extent of $5,000 through appellant's willful failure to supply merchandise for which there was ready consumer demand, such as radio sets, electric refrigerators, bicycles, shotguns, and the like. During the first two months when shipments were satisfactory, appellee thought his profits on the goods so supplied were $1,000 per month, based on a thirty percent mark-up. At the time the contract was made McClendon owned a stock of hardware worth $4,000, sale of which was consented to by appellant's representatives who knew that McClendon was not buying exclusively from the Corporation.

First.—Construction of the Contract.—An initial prejudicial error was made by the trial court in overruling the defendant's petition that the cross-complaint be made more definite and certain by stating what merchandise was ordered, when ordered, and what specific profits the cross-complainant would, with reasonable certainty, have realized from sales; but, in view of our construction of the contract and the relationship established under it, the judgment for damages must be reversed and the cause dismissed on the ground that a want of good faith in supplying merchandise was not shown. While testimony given by McClendon and appellant's manager is in conflict respecting availability of certain

items, and this Court does not have judicial knowledge that a particular thing could or could not have been procured at any time during the last half of 1946, the parties did not, in their contract, provide for damages.

Briefly, the agreement was that McClendon would operate a place of business at Benton in a building to be approved by appellant, all advertising matter and media of identification to be "Arkansas Stores, Associate Dealer." All sales agreements, franchises, and contracts with suppliers were to run in the name of and become the exclusive property of the Corporation. Paragraphs 4, 5, and 6 read: (4) "[McClendon] agrees to make all purchases of merchandise for resale from [the Corporation]. No purchases of merchandise for resale are to be made direct from suppliers. (5) [The Corporation] agrees to sell [McClendon] at its net cost, including freight and other charges. (6) [McClendon] shall not be required to purchase any merchandise not wanted."

The question is whether language in paragraph four wherein McClendon agrees "to make all purchases" from the Corporation, and the Corporation's consent in paragraph five "to sell [McClendon] at its net cost" bind the Corporation to do more than it did to supply merchandise. Each was equally interested in maintaining a steady flow. The Corporation made ten percent on all goods accepted by McClendon, and, according to McClendon, he realized approximately thirty percent on consumer sales. There is evidence that McClendon bought hardware and some other merchandise where he could get it—this with appellant's knowledge. McClendon testified he had seen, displayed in other Associate Dealer Stores,—particularly at Conway, Hot Springs, and in North Little Rock—bicycles, washing machines, and other demand goods he could have sold if appellant had not negligently failed to supply them.

Assuming, without deciding, that the contract was intended to be appellant's assurance it would furnish all of McClendon's merchandising wants, there is nothing to indicate that failure *in any and all events* to meet these demands would give rise to a cause of action. The fact

that appellee saw bicycles, washing machines, radios, etc., in other Associate Dealer Stores is not substantial testimony that appellant wrongfully refused to have the same kind of goods sent to appellee, or that they could have been supplied in quantities even measurably approaching the maximum sales upon which the damage claim is predicated. Let it be said that some of the desired items were seen in North Little Rock, Hot Springs, and Conway, and that a *few* could have been sent to appellee; still we are faced with a situation where if the judgment for $2,500 on the cross-complaint should be sustained because appellee was ignored, he must have received $8,330 worth of the named articles if the mark-up were 30%, and all of the goods had been received and sold. There is no proof to support this conclusion, and the verdict was highly speculative and conjectural; nor is the situation one requiring that the right of retrial be accorded. Had the motion to make more definite and certain found affirmative response, appellant could have been prepared to meet the allegations of negligent failure, and competent proof of loss directly traceable to appellant might have been shown. In these circumstances a construction of paragraphs five and six would have been necessary.

Second.—Appellant's Original Demand.—Appellee was not required to pay the full demand of $1,233.32 if unauthorized goods for which he had not settled were shipped him and their return refused. Each party to the controversy testified to opposing facts in two respects: (a) Appellant justified its action on the ground that the goods tendered had been paid for and that other items subject to return were left at an unauthorized place; (b) Appellee contended that returns had formerly been left at 555 and accepted, and that he was not currently chargeable with any of the entries constituting the maximum demand. The jury had a right, on competent evidence, to say whether appellant's action in crediting shipments left at 555 established a custom justifying appellee's conduct.

From the judgment alone we cannot determine what the jury's findings were. It may have thought appellant was entitled to the claimed balance of $1,233.32, but that

appellee had been damaged to the extent of $3,733.32. Had credit been allowed for the first item, net damages under the cross-complaint would be $2,500. This phase of the controversy is remanded, with directions that the issue be retried on the plaintiff's original cause of action.

SMITH *v.* CARTER.

4-8566 214 S. W. 2d 64

Opinion delivered October 18, 1948.

C. C. Hollensworth, Aubert Martin and *J. T. Haley, Jr.,* for appellant.

DuVal L. Purkins, for appellee.

SMITH, J. On September 1, 1942, the parties to this litigation executed what is called a Flexible Farm Lease, and in doing so employed a blank contract prepared by the Federal Government which referred to appellee as landlord, and appellant as tenant. It is quite a lengthy document, and when all the blank spaces had been filled it would have constituted a lease and nothing more, except that there was added at the end thereof, the following recital:

"It is agreed that the tenant may purchase this farm for two thousand dollars ($2,000) *and* time during the life of the lease, payments to be made in ten (10) equal annual payments of two hundred dollars ($200) each. If the tenant purchase the farm, any annual rents that have been paid may be counted as payments on farm if enough additional is paid to make any annual payment equal to two hundred dollars ($200)."

The effect of this addition was to convert the contract from an ordinary lease, to a lease with an option to purchase.

It is recited in paragraph two of the lease that "The term of this lease shall be five years from January 1, 1943, to December 31, 1947, and this lease shall continue in effect from year to year thereafter until written notice of termination is given by either party to the other on or before the 1st day of October, before expiration of this lease or any renewal."

Other provisions of the lease relevant to the questions presented on this appeal are found in sub-paragraph (c) of paragraph seven, and in sub-paragraphs (b) and (c) of paragraph eight. Sub-paragraph (c) of paragraph seven provides that the tenant will not commit waste on or damage to the farm, or permit others to do so. Sub-paragraphs (b) and (c) of paragraph eight read as follows:

"(b) The tenant may use dead and unmarketable timber and other timber designated by the landlord for his own fuel, but the tenant shall cut no growing trees of value for fuel or other use and shall market no timber from the farm without the consent of the landlord."

"(c) Willful neglect, failure, or refusal by either party to carry out any material provision of this lease shall give the other party the power to terminate the lease, in addition to the right to compensation for damages suffered by reason of such breach. Such termination shall become effective thirty (30) days after written notice of termination specifying the delinquency has been served on the delinquent party, unless during such thirty (30) day period the delinquent party has made up the delinquency. The landlord shall have the benefit of any summary proceedings provided by law for evicting the tenant upon termination under this paragraph, or at the end of the term."

On November 5, 1946, Carter, the landlord, served on Smith, the tenant, a written notice reading as follows:

"This notice to you, in accordance with the terms of the lease, dated September 1, 1942, entered into by you with the undersigned for the use and occupation (of the leased land) to terminate said lease for willful neglect, failure and refusal on your part to carry out the terms thereof. Some of the terms of said lease which you have violated are:

"1. You have failed to farm the premises in an efficient and husbandlike manner.

"2. You have cut and removed merchantable timber.

"3. You have failed to keep the premises in good repair.

"4. You have failed to maintain the fences as directed.

"5. You have diverted lumber, materials and fence rails wrongfully.

"In many other particulars you have violated the terms of said lease.

"Therefore, this is the thirty-days written notice to you of the termination of said lease in accordance with its terms and unless you comply with said lease or surrender the possession of the lease premises within thirty days from the date of the service of this notice upon you, the undersigned will take action at law to evict you.

"This notice executed on this 5 day of November, 1946, and served upon you on the 5 day of November, 1946."

The tenant responded to this notice by filing a suit for the specific performance of the contract in which he alleged that he had complied with all the terms and conditions of the lease, and prayed that he be granted the right to make the payments of purchase money required by the lease. An answer was filed containing allegations upon which much testimony was offered, which the Chancellor reviewed in the written opinion, evidencing that the testimony was carefully considered. In this opinion findings of fact were made to the effect that the tenant had breached the contract in the respects mentioned in the notice above copied, and it was found that damages to the extent of $100 had been incurred. The opinion reflects that greater damages had been inflicted, but the testimony was not sufficiently definite as to the items thereof to warrant a finding for a larger amount.

The court found that the notice above copied was not an eviction notice, but a notice to repair and compensate damages pursuant to sub-paragraph (c) of paragraph eight above copied. The court further found that appellant did not avail himself of the provisions of this sub-paragraph, but on the contrary denied any damage or any breach of the contract. The court found against this contention and found to the contrary that appellant had breached the contract in several respects, to-wit: by cutting down a plum orchard, by selling merchantable timber, removing and not rebuilding fences, and by failure to cultivate all the land.

Appellant says that the relief prayed, to-wit: specific performance, should be awarded him notwithstand-

ing these facts, for the reason that he now proposes to pay appellee the full purchase price of the land and that if he does so appellee is not entitled to cancel the lease. In support of this contention the case of *Keogh* v. *Peck,* 38 A. L. R. 1151, 316 Ill. 318, 147 N. E. 266, is cited. There a tenant sought to enforce an option to purchase the leased property, which right was resisted upon the ground that the tenant, in violation of the contract, had demolished a building on the land. This was held no defense where the tenant had exercised his option before the forfeiture was declared.

In the instant case the testimony abundantly supports the specific findings of the Chancellor that appellant had breached his contract in several respects, and that he did not attempt to avail himself of the provisions of sub-paragraph (c) of paragraph eight until after the time allowed by that sub-section to repair and compensate the breach had expired.

This is not a suit to enforce a contract to convey land, in which contracts time is not of the essence, unless made so by the contract. It is rather a suit to enforce an option to buy. The option was entirely with the tenant. He was under no obligation to buy. He could do so or not as he pleased, and in such contracts time is of the essence whether the contract expressly so provides or not.

At § 84 of the chapter on Landlord and Tenant, 51 C. J. S., there is a discussion of the right of a tenant in possession under a contract giving him the option to buy, and under the sub-head of "Time to Exercise Option" it is said: "In the exercise of the option, time is of the essence; the court is without discretion to grant additional time, and the lessee cannot extend the prescribed period merely by holding over and paying rent." See, also, *Carpenter* v. *Thornburn,* 76 Ark. 578, 89 S. W. 1047; *Thomas* v. *Johnson,* 78 Ark. 574, 95 S. W. 468; *Grummer* v. *Price,* 101 Ark. 611, 143 S. W. 95; *Bishop* v. *Melton,* 202 Ark. 732, 152 S. W. 2d 299.

Here the court found, and we think the testimony supports the finding, that appellant did not tender com-

pliance in the time and manner required by the contract. The parties differ as to the meaning and proper interpretation of the typewritten addenda herein quoted, providing the time and manner of making payments. Appellee insists that it was agreed that if appellant decided to exercise the option to buy he should have made a cash down payment of $200 and should pay interest on any delayed payment at the rate of ten percent. per annum. We do not agree with this contention, but even so, appellant did not make tender of payment as the contract required.

Appellant testified as to only two tenders. The first was some time after the annual rent of $150 had been paid, which was payable in any event. His wife offered to make a tender of $50 additional which appellee refused, but attached to the tender was the demand that appellee execute a deed and take a deed of trust to secure the balance of the purchase money. The contract did not authorize this demand. Appellee was not required by the contract to execute a conveyance of any kind until the payments had been completed. He did offer to execute a bond for title, but this was not what appellant demanded.

The second tender was made at the end of the five-year period, but this was only $200, with an offer to pay the balance, which tender was not actually made. But even so, the contract had then been breached without offer to repair as sub-paragraph (c) of paragraph eight required.

Appellant insists that appellee waived his right to insist that the contract had been breached. The basis of this insistence is that duing the fourth year of the lease, but before its end, appellee had agreed that appellant might continue to occupy the land under the contract, but appellee insists that when he did so agree, he was unaware of the nature and extent of the breaches of the contract, and that when this was discovered and ascertained, he gave the notice above referred to, which the court designated as a notice to repair, which, as we have said, was not complied with.

The option to buy was of course dependent upon the lease, and if appellant had forfeited his rights thereunder, he necessarily forfeited his option to buy.

The testimony warrants the finding of the court that no offer to repair and pay damages was made until the right to evict had accrued and the judgment must therefore be affirmed, and it is so ordered.

SANDERS *v.* GREEN.

4-8605 214 S. W. 2d 67

Opinion delivered October 18, 1948.

Price Dickson, for appellant.

Rex W. Perkins and *G. T. Sullins,* for appellee.

WINE, J. The appellants who are the mayor and aldermen of the City of Fayetteville and election commissioners and sheriff of Washington county, Arkansas, bring this appeal from an order of the Chancery Court of that county enjoining the appellants J. C. Parks, J. S. Bates and S. B. Hanna as such election commissioners from "including on the ballot for the general or any special election to be held in the City of Fayetteville" the question of the adoption or rejection of an ordinance numbered 930, hereinafter discussed, or "from delivering any such ballots containing the matter aforesaid." The appellant, Bruce Crider, Sheriff, was also in said order "restrained and enjoined from including in his proclamation of election to be held on April 6, 1948, or special election notice of election as to Ordinance No. 930."

The appellees are members of the "Board of Control" of the City Hospital located in the City of Fayetteville, and alleged in their original complaint in equity that "each of them is a *bona fide* resident citizen, and qualified elector of the City of Fayetteville, Arkansas, and that they (filed and prosecuted) this suit as members of said Board of Control of said City Hospital, and also as citizens and qualified electors of the City of Fayetteville, Washington county, Arkansas."

On the 17th day of June, 1947, prior to the filing of this suit, an election was held in the City of Fayetteville, to determine the will of the legal electors on the question of whether the city should issue its bonds in the sum of $75,000, the proceeds to be used *"for the purpose of constructing additions to, and remodeling City Hospital."* The proposal for this bond issue received a majority of

the votes cast at said election and thereafter bonds in the sum of $75,000 were issued and sold by the City of Fayetteville (for the specific purpose for which they had been voted) and the proceeds derived from the sale of these bonds are now held by the City of Fayetteville in trust *for the purpose for which they were voted and sold.* There is no controversy to this point in the proceeding had and done thus far.

On the second day of February, 1948, following the election and sale of these bonds the City Council of the City of Fayetteville passed and published a certain ordinance being numbered 930, the title of which reads as follows:

"An ordinance submitting to the qualified electors of the City of Fayetteville, the question of the expenditure of seventy-five thousand ($75,000) being the proceeds of the sale of the Fayetteville hospital bonds directing the expenditure of said proceeds for hospital purposes by the City of Fayetteville, either independently or in connection and coöperation with the County of Washington and the University of Arkansas or either of them and either in connection with or independent of the present hospital known as the City Hospital, and for other purposes."

In the body of this Ordinance No. 930, the bonds previously sold are referred to as *ad valorem* bonds and said ordinance further recites:

"Whereas said bond were sold by the City of Fayetteville, Arkansas, and no part of the proceeds of said sale have been expended, and whereas conditions have arisen which were not contemplated or foreseen at the time the question was submitted to the qualified electors of the City of Fayetteville, Arkansas, and

"Whereas the City of Fayetteville has no assurance that a Federal grant supplementing the proceeds of the sale of the hospital bonds will be granted, and

"Whereas the City of Fayetteville entertains serious doubts that by the expenditure of the unsupplemented proceeds of sale, the present City Hospital can be remodeled and added to in a satisfactory manner, and

"Whereas the City of Fayetteville has no assurance that the expenditure of the proceeds of the sale of the hospital bonds in the present location can be justified."

At this juncture appellees filed their complaint in equity praying that the court immediately issue its restraining order to each and every one of the defendants (appellants here) commanding them and each of them to, at once, desist and refrain from doing any matter or thing whatever in furtherance of the provisions of said Ordinance No. 930. Appellants filed a demurrer to this complaint setting forth:

"(1) That said complaint does not state sufficient facts to constitute a cause of action.

"(2) That said complaint does not state sufficient facts to constitute a cause of action within the jurisdiction of this court."

A temporary restraining order was first issued by the court, followed on the 17th day of March, 1948, by a final decree making the temporary order permanent on the basis of the right of equity to prevent a multiplicity of suits. The appellants elected to stand on their demurrer, refusing to plead further,

We think the Chancery Court did have jurisdiction and did not err in issuing a temporary injunction, in overruling appellants' demurrer, nor in making said injunction permanent.

While it is a well settled rule of law that equity will, ordinarily, not restrain a municipal corporation in the exercise of its legislative power, there are, however, notable exceptions to this rule. 43 Corpus Juris Secundum, § 118, p. 649: "There are exceptions, however, to this doctrine of noninterference, as where the mere passage of the ordinance would immediately occasion, or would be followed by, some irreparable loss or injury beyond the power of redress by subsequent judicial proceedings, or where it would cause a multiplicity of suits . . . "

Joyce on Injunctions, Vol. I, p. 802, § 518, treats of this exception: "To prevent a multiplicity of suits is a

favorite ground for granting injunctive relief in courts of equity. The object to be attained by a resort to a court of equity in such cases is to obtain a final determination of the particular right in controversy, as between all the parties concerned, by a single issue, instead of leaving the right open to litigation by separate suits brought by each of the parties in interest . . . "

The foregoing rule was adopted by this Court in two early Arkansas cases, *Floyd* v. *Gilbreath, et al.,* 27 Ark. 675, and *Greedup, et al.,* v. *Franklin County, et al.,* 30 Ark. 101. This rule has been followed not only in this, but in other jurisdictions: *Second National Bank of Titusville, Pennsylvania,* v. *Caldwell, et al.,* 13 Fed. 429, and *Fairley* v. *City of Duluth, et al.,* 150 Minn. 374, 185 N. W. 390, 32 A. L. R. 1268, which quotes with favor the rule laid down by this Court in *Greedup, et al.,* v. *Franklin County, et al., supra.*

There is another more cogent and compelling reason why equity had jurisdiction in this case and why the decree of the Chancery Court is correct; that is, to prevent a diversion of public funds. The City Council of Fayetteville, by the former ordinance of June 17, 1947, submitted to the voters of that city the question of whether the bond issue of $75,000 should be approved *"for the purpose of constructing additions to and remodeling City Hospital."* This was submitted to the voters under the provisions of Amendment 13 to the Constitution of the State of Arkansas, which gives the voters of the cities of the first and second class (Fayetteville is a city of the first class) the right to vote bonds "for the purchase of sites for, construction of, and equipment of . . . hospitals."

This same amendment provides that the ordinance passed by the city council of such cities and submitted to the people for election shall "specifically state the purpose for which the bonds are to be issued, *and if for more than one purpose, provisions shall be made in said ordinance for balloting on each separate purpose* . . . " (italics our own). In the absence of any objection to the contrary, it is by this Court assumed that the former

ordinance voted on June 17, 1947, fulfilled this requirement, and that the bond issue was approved by the voters for the specific purpose stated in the ordinance. The city officials issued and sold the bonds, received and now hold the proceeds. This is a trust fund to be expended for the purpose stated in the former ordinance approved by the voters, June 17, 1947.

Now, by Ordinance No. 930, it is sought to enlarge, modify and materially change the purpose first contemplated and which led to the existence of the fund now held in trust from the proceeds of the bonds. To permit effect to be given Ordinance No. 930 would constitute a diversion of funds such as is forbidden by this same amendment No. 13. It would have been a vain and idle thing to have permitted an election to be held on the latter Ordinance No. 930 when the result of such election and the adoption of Ordinance No. 930 would have led to a diversion of public funds. We, therefore, hold that appellees' complaint in equity did "state sufficient facts to constitute a cause of action," and that the decree of the Chancery Court was correct and should be affirmed.

It is so ordered.

STIMSON VENEER & LUMBER TRUST *v.* LACONIA LEVEE DISTRICT OF DESHA COUNTY.

4-8611 214 S. W. 2d 70

Opinion delivered October 18, 1948.

Daggett & Daggett, for appellant.

DeWitt Poe, for appellee.

HOLT, J. Laconia Levee District of Desha county, appellee, brought this action to foreclose its lien against certain lands, including the lands of appellant here involved, for delinquent taxes for the years 1943, 1944, and 1945. Appellant in its answer and cross-complaint denied the District's right to foreclose on the ground "that all of said lands are located outside or on the river side of the levees of the Laconia Levee District and receive no benefit or protection whatever from the District or its levees, and that to collect tax from said land would be an unauthorized and illegal taking under the laws and Constitution of the United States and the State of Arkansas, and asks that the complaint heretofore filed be dismissed and that all right, title, claim to, or demand of the appellee in and to said lands be cancelled and the title quieted in appellant and that appellee be enjoined from hereafter attempting to collect taxes from the above and described lands."

Appellee, District, replied, admitting that appellant's lands were west of what is known as the White

River Levee and subject to overflow, but denied that said lands are not benefited. From a decree in favor of appellee is this appeal.

The following facts were stipulated as true: "1. That the Stimson Veneer & Lumber Trust is the owner of the following described lands, to-wit: (describing them).

"2. That the boundaries of the Laconia Levee District were fixed by Act 463 of the year 1917, by the Arkansas General Assembly, whereby the western boundary of the District was fixed as Scrub Grass Bayou, the northern line being the county line between Phillips county and Desha county, and the eastern and southern line being the Mississippi River Levee, and comprising some 30,000 acres of land; that by said Act the District was authorized to issue bonds and levy a tax upon the lands in the district, the purpose being to enlarge and construct its levees as reflected by the map attached hereto, which is made a part of this stipulation and which the parties agree is accurate; that bonds were issued and the levee tax pledged, which levy was by § II of Act 463 of 1917 made continuous and obligatory upon the lands within said district until said indebtedness should be fully paid; that there now remains unpaid of said indebtedness the sum of $77,000, evidenced by serial refunding bonds, dated May 1, 1946, bearing interest at the rate of 2½ per cent. per annum.

"3. That the lands of the Stimson Veneer & Lumber Trust are west of the levee of the Laconia Levee District and east of the Scrub Grass Bayou, and are now, and have been at all times, subject to backwater overflow of the Mississippi River and White River, as shown by the map attached hereto.

"4. That many years after the construction of the Laconia Levee District Levee the White River Drainage District constructed a levee along the east bank of the White River and east of the cross-complainant's lands and joined the Laconia Levee on its western edge; that since the construction of said White River Drainage District levee the water level on these lands from the Mis-

sissippi River overflow and backwater up the White River has been materially increased.

"5. That all of the lands of cross-complainant herein involved are wild and unoccupied lands.

"6. It is stipulated and agreed that west of Bayou, NW¼ of section 35, township 7 south, range 1 west, is without the boundaries of the district and should be stricken from the tax rolls."

It was also stipulated that St. George Richardson, a civil engineer of Memphis, Tennessee, whose qualifications are unquestioned, if present, would testify, among other things, that "I am entirely familiar with the area here in dispute. I have been upon the lands upon numerous occasions. I have studied the exhibit which has heretofore been introduced herein, the lands in question being indicated thereon by the area shaded red. It is my opinion, based upon my personal knowledge of these lands and upon my study of the aforesaid exhibit, that the levee constructed by the Laconia Levee District is not now, nor could it ever be, of any benefit to these lands. Therefore, taxation of said lands by the district would be, in my opinion, an arbitrary and manifest abuse of its taxing power."

There was also introduced in evidence, by appellee, "a decree dated the 21st day of April, 1919, in Desha Chancery Court in the case of *White River Lumber Company, et al.,* v. *Laconia Levee District, et al.,* which decree recited that all the lands described in the complaint were assessed by the Laconia Levee District for the years 1915, 1916, 1917, and 1918, and that payment of said taxes was refused by the respective owners upon the claim that said lands were not benefited and were erroneously assessed in said district. Said decree held that certain lands of plaintiffs were benefited and liable to assessment for taxation and rendered judgment" for the delinquences. Said lands were described as follows: (describing them).

"The court held that all other lands described in the complaint, and not included in the above listed, were out-

side the boundaries of the Laconia Levee District and not benefited by the improvement, set aside the former assessments, and exempted said lands from future assessments."

Appellee is relying upon the provisions of Act 463 of the Legislature of 1917 for its authority to impose and collect the taxes on the lands of appellant involved here. That Act is entitled: "AN ACT to authorize the Laconia Levee District in Desha county to borrow money and to prescribe and define the boundaries of, and the property within, said district, upon which imposts may be assessed and collected to provide funds to pay the principal and interest of said borrowed money, and other necessary expenses of the district."

Section 1 of the Act authorized the borrowing of money not in excess of $300,000 for paying debts and making needed improvements in the levee system and to issue negotiable 6% bonds, etc.

Accordingly, money was borrowed and the district has still outstanding refunding bonds in the approximate amount of $77,000.

Section 2 provides: "To secure the payment of said bonds and the interest thereon as they mature, said board of levee inspectors shall have the right to execute an instrument to a trustee for the bondholders, by which it shall pledge and mortgage all its income to secure the payment of said bonds, and shall levy and collect in said district annually on the following described property, to-wit:

"Beginning at the base of the Mississippi River, in the northeast quarter of section 6, township 7 south, range 2 east, on the line between Desha and Phillips counties; thence due west to the east bank of Scrub Grass Bayou, in section 2, township 7, range 1 west; thence southwardly along the east bank of Scrub Grass Bayou to the line between the north and south halves of section 7, township 8 south, range 1 east; thence eastwardly and northwardly along the south and east base of the Mississippi River levee, to the point of beginning (the limits

of said levee district being hereby fixed and determined by said above recited description), and also upon all railways, tramways and rights of way which are located within the above described boundaries, which now are or shall become taxable for state revenue, a levee tax not exceeding ten (10) per cent. of the value assessed there against for the purpose of state and county general taxation; which levy is hereby made continuous and obligatory until all of said bonds and interest thereon shall have been fully paid.''

This section is the Legislature's determination as to the district's boundaries and it is undisputed, as has been indicated, that appellant's lands are within these boundaries.

Whether the lands of appellant involved here, admittedly within the boundaries of the district, were benefited by the improvement and subject to the payment of the assessments imposed depends on whether the Legislature, in creating the Improvement District, manifestly and arbitrarily abused its powers under the Act, *supra.* The guiding rule was announced by this court in *St. Louis, Iron Mountain & Southern Railway Company* v. *Board of Directors of Levee District No. 2 of Jackson County,* 103 Ark. 127, 145 S. W. 892, in this language: ''After the Legislature has determined that a certain area which it has organized into an improvement district will be benefited by the improvement, it is not a question for the courts to determine upon a preponderance of the evidence as to whether or not the legislative judgment has been properly exercised. It is only an arbitrary and manifest abuse of power by the Legislature in creating improvement districts that will be reviewed by the courts.

''Mr. Cooley said: 'The whole subject of taxing districts belongs to the Legislature. It has been repeatedly decided that the legislative act assigning districts for special taxation on the basis of benefits can not be attacked on the ground of error in judgment regarding the special benefits and defeated by satisfying a court that no special or peculiar benefits are received. If the Legislature has fixed the district, and laid the tax for the

reason that in the opinion of the legislative body such district is peculiarly benefited, its action generally must be deemed conclusive.' 2 Cooley on Taxation (3 Ed.), pp. 1207-8.

"As is said in *Moore* v. *Board of Directors of Long Prairie Levee District,* 98 Ark. 113, 135 S. W. 819: 'Only an arbitrary and manifest abuse of power by the Legislature would be reviewed, and not merely mistakes of judgment. To hold otherwise would be to take away from the lawmakers the powers committed to them and to substitute the judgment of the courts, requiring the latter to review every matter alleged to have been erroneously determined by the Legislature.

We think it would serve no purpose to attempt to discuss and analyze the facts presented on the question of whether appellant's lands have been benefited or improved by the levee. It suffices to say that after a careful review of the record we conclude that the testimony is sufficient to show that the determination of the Legislature, in including within the district the lands of appellant, was not an arbitrary and manifest abuse of its powers under the rule announced above.

In reaching this conclusion, we are not influenced by the decree of the Desha Chancery Court of April 21, 1919, *supra,* and attach no importance to it.

We attach great weight to the undisputed fact that appellant, or its predecessors in title, (just when appellant acquired title, the record does not show), since the creation of this district, under Act 463 of 1917, has paid all annual installments extended against these lands, without objection. It therefore for many years had knowledge that its lands were included in the district, and that bonds had been issued and sold, which became a burden not only upon appellant's lands but upon all the lands in the district.

In the circumstances, appellant's objection comes too late. (*Tarleton Drainage District No. 15* v. *American Investment Company,* 186 Ark. 20, 52 S. W. 2d 738.)

Finding no error, the decree is affirmed.

STEVENS, TRUSTEE *v.* OWEN.

4-8584 214 S. W. 2d 503

Opinion delivered October 18, 1948.

Rehearing denied November 29, 1948.

A. A. Thomason and *Wade Kitchens,* for appellant.

Ezra Garner, for appellee.

ROBINS, J. Phases of the litigation involved in this appeal have been before this court on four previous occasions. See *Owen* v. *Dumas,* 200 Ark. 601, 140 S. W. 2d 101; *Dumas* v. *Smith, Chancellor,* 201 Ark. 1057, 147 S. W. 2d 1013; *Dumas* v. *Owen,* 205 Ark. 777, 171 S. W. 2d 294; and *Dumas* v. *Owen,* 210 Ark. 505, 196 S. W. 2d 987.

The lower court, when deciding the case at bar, made written findings in which it was shown that all issues raised in the instant case were completely adjudicated by the decision of this court in the last above cited case. In our opinion in that case the entire history of the litigation was recited and it was pointed out that all the issues sought to be raised there, which we find to be the same as those presented in the case at bar, had been fully settled. Since the matters involved in this litigation have been heretofore exhaustively set forth in different opinions of this court, we deem it unnecessary to make another recital of them here. It suffices to say that we conclude that the lower court's finding that these issues had already been settled in previous litigation is correct.

Accordingly, the decree appealed from is affirmed.

4522 214 S. W. 2d 372

Opinion delivered October 18, 1948.

Rehearing denied November 22, 1948.

[redacted]

Griffin Smith, Jr., for appellant.

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

ED. F. MCFADDIN, Justice. Mizell Palmer has appealed from a conviction of rape and sentence of death.[1] This being a capital case, § 4257, Pope's Digest,[2] prescribes the extent of the review. The motion for new trial contains four assignments; and the transcript discloses other objections made by the defendant. We will group and dispose of all the assignments and objections found in the record.

I. *Sufficiency of the Evidence.* This issue is presented by assignments 1, 2, and 3 in the motion for new trial and also by the defendant's objection to the court's refusal to instruct a verdict of not guilty. On the night of October 19, 1947, the prosecuting witness and her male escort were riding in an automobile, and stopped when a tire sustained a puncture. The woman remained seated while the man got under the car to inspect the tire. At that time the defendant and one Charles Hamm, each armed with a pistol, approached them and robbed them, taking $6 from the man and $20 and a purse from the woman. While Hamm held the man at the point of a gun, Palmer raped the woman. Then Palmer held the gun on the man while Hamm raped the woman. In each instance her resistance was overcome by her fear of the firearm.

Thereafter, the defendant and Hamm departed; and the lady and her escort quickly gave the alarm to the officers. Many suspects were viewed by the lady at various times, but she made no identification until she saw the defendant in the line of men in custody on December 5, 1947—the day the defendant was arrested. At the trial the lady again unequivocably identified the defendant and testified to the facts hereinbefore detailed. There was testimony to show actual penetration, force, and lack of consent. The evidence satisfied the statutory provision of "carnal knowledge of a female, forcibly, and against her will." We have many times held that in a rape case the testimony of the prosecuting witness does not have to be corroborated. *Hodges* v. *State,* 210 Ark.

[1] Pope's Digest, § 3403 *et seq.* and 4 Ark. Stats. §§ 41-3401 *et seq.* define the offense and state the punishment, which is death or life imprisonment as the jury may determine.

[2] 4 Ark. Stats. § 43-2723.

672, 197 S. W. 2d 52, and *Bradshaw* v. *State,* 211 Ark. 189, 199 S. W. 2d 747, are two recent cases on this point. In the case at bar a factual question was presented to the jury independent of the corroboration, and independent of the alleged confession. In short, the evidence is sufficient to support the verdict.

II. *The Admissibility of the Defendant's Alleged Confession.* This issue is presented by assignment No. 4 in the Motion for New Trial, and also by the defendant's repeated objections, as found in the record. Palmer was taken into custody about 11 a. m., December 5, 1947, by two deputy sheriffs, and within a few minutes was taken to the Pulaski county jail. Sometime during the noon hour he was identified by the prosecuting witness from a line of five or six men. About 1 p. m. the two arresting officers told Palmer that the lady had identified him; and within fifteen minutes he confessed to them that he was guilty of the robbery and the rape. Later the defendant confessed to the Deputy Prosecuting Attorney; and still later, he confessed to the Prosecuting Attorney who had Palmer's statements taken down and transcribed. He assured the Prosecuting Attorney that the confession was voluntary and made without any threats against or promises to him.

At the trial the defendant insisted that all the confessions were extorted from him by the beating and threatening of the two arresting officers. Also the defendant's counsel (appointed by the trial court, and filing the brief here) duly objected at every stage of the proceedings to the admission of the confession in evidence. The claim was made below, and is renewed here, that the defendant was (1) arrested without a warrant, (2) not taken before a committing magistrate as required by § 3729, Pope's Digest,[3] (3) held from 11 a. m. until after 1 p. m. of December 5, and (4) then questioned by the officers. Because of these matters, it is urged that the defendant did not enjoy that due process of law guaranteed by the 14th Amendment to the U. S. Constitution; and it is sought to bring this case within the claimed

[3] 4 Ark. Stats. § 43-601.

purview of the holdings of the U. S. Supreme Court in the case of *Ashcraft* v. *Tennessee*,[4] *Malinski* v. *New York*,[5] and *Haley* v. *Ohio*.[6]

In the case of *State* v. *Browning*, 206 Ark. 791, 178 S. W. 2d 77, we held that the failure (1) to have a warrant of arrest and (2) to take the accused before a committing magistrate did not prevent the confession made to the officers from being admissible in evidence if the jury found the confession to have been voluntarily made. We also held that a jury question was presented as to whether the confession was voluntary; and we quoted with approval the statement from Wharton's Criminal Evidence, 11th Ed., Vol. 2, p. 1023, § 610: " 'The mere fact that a confession is made while the maker is in the custody of a police officer, or even while confined under arrest, is not sufficient of itself to affect its admissibility, providing that it is otherwise voluntarily made. This rule pertains equally whether the arrest is legal or illegal.' "

In a concurring opinion in the Browning case, this language appears: "Sooner or later the United States Supreme Court may be asked to extend the holding of the McNabb case to every case where the defendant claims the benefits of the Fourteenth Amendment to the Constitution of the United States. When that question is decided by the United States Supreme Court it will be time enough for the Arkansas Supreme Court to consider changing our holding on this point to conform to the federal holding. If the rule in the McNabb case is so extended by the United States Supreme Court to apply to any cases where the Fourteenth Amendment is invoked, then will be the proper time for us to review our holdings . . . ."

Appellant says that the time has arrived to review not only our former holdings, but also to overrule *State* v. *Browning*;[7] and claims that subsequent rulings of the

[4] 322 U. S. 143, 88 L. Ed. 1192, 64 S. Ct. 921.

[5] 324 U. S. 401, 89 L. Ed. 1029, 65 S. Ct. 781.

[6] 332 U. S. 596, 68 S. Ct. 302.

[7] *State* v. *Browning*, 206 Ark. 791, 178 S. W. 2d 77, has been cited and adhered to in *Hall* v. *State*, 209 Ark. 180, 189 S. W. 2d 917 and in *Thomas* v. *State*, 210 Ark. 398, 196 S. W. 2d 486.

U. S. Supreme Court make this mandatory. Appellant's counsel says of our holding in *State* v. *Browning*: "The Browning case was, in view of federal decisions, to its date, correctly decided. Since the opinion was rendered, however, all law on the subject has been revolutionized by *Ashcraft* v. *Tennessee*."[8] This statement of counsel is bottomed on a thorough familiarity with the earlier cases of *Brown* v. *Mississippi*,[9] *Chambers* v. *Florida*,[10] *McNabb* v. *U. S.*,[11] and *Anderson* v. *U. S.*,[12] and necessitates consideration only of the Ashcraft and subsequent cases, of which there are two, being *Malinski* v. *New York*[13] and *Haley* v. *Ohio*.[14] We therefore proceed to review and compare the facts in these three cases with those in the case at bar, because the rationale of the holdings of the United States Supreme Court, on the question of the voluntary nature of a confession, when the due process clause is claimed by the defendant, seems to indicate that each case turns on its own particular facts:

(A) In *Ashcraft* v. *Tennessee*[15] a purported confession was introduced in evidence in the trial of Ashcraft for murder. The trial judge instructed the jury to disregard the confession unless the jury found it to have been made voluntarily. Ashcraft was convicted, and on appeal to the Supreme Court of Tennessee, the conviction was sustained. The U. S. Supreme Court, entertaining jurisdiction under the due process clause of the Fourteenth Amendment, proceeded to examine the evidence to determine whether the confession was voluntary and said: "Our duty to make that examination could not have been 'foreclosed by the finding of the court, or the verdict of a jury or both.' *Id.* We proceed therefore to consider the evidence relating to the circumstances out of which the alleged confessions came."

[8] 322 U. S. 143, 88 L. Ed. 1192, 64 S. Ct. 921.
[9] 297 U. S. 278, 80 L. Ed. 682, 56 S. Ct. 461.
[10] 309 U. S. 227, 84 L. Ed. 716, 60 S. Ct. 472.
[11] 318 U. S. 332, 87 L. Ed. 819, 63 S. Ct. 608.
[12] 318 U. S. 350, 87 L. Ed. 829, 63 S. Ct. 599.
[13] 324 U. S. 401, 89 L. Ed. 1029, 65 S. Ct. 781.
[14] 332 U. S. 596, 68 S. Ct. 302.
[15] 322 U. S. 143, 88 L. Ed. 1192, 64 S. Ct. 921.

The U. S. Supreme Court then found that Ashcraft had been examined continuously for 36 hours; that for the first 28 hours he maintained his innocence; that finally he weakened under the grueling and continuous examination, and made the alleged confession. Here is one statement from the opinion: "For thirty-six hours after Ashcraft's seizure during which period he was held incommunicado, without sleep or rest, relays of officers, experienced investigators, and highly trained lawyers questioned him without respite."

Repeatedly in the majority opinion, the U. S. Supreme Court refers to the 36 hours of continuous questioning. The length of time of examination seems to have been the controlling factor; and if that be the test, then the case at bar is not within the rule of the Ashcraft case because, here, the accused (1) was arrested at 11 a. m., (2) was viewed and identified between 12 noon and 1 p. m., (3) was questioned by the officers at 1 p. m. for ten or fifteen minutes, and (4) then confessed when truthfully informed that the lady had identified him. There was no lengthy examination. Furthermore, the confession to the Deputy Prosecuting Attorney was almost instantaneous, as also was the one to the Prosecuting Attorney. There is entirely absent from this record —except for the unsupported statements of the accused— any evidence of coercion or grueling and continuous questioning. So we hold that the case at bar is not ruled by *Ashcraft* v. *Tennessee*[16] because facts pointed out in that case, as fatal to the confession being voluntary, are not present here.

(B) In *Malinski* v. *New York*[17] there was also the question of the admissibility of a confession. The U. S. Supreme Court's statement reflects the facts: "Malinski was arrested while on his way to work on the morning of Friday, October 23, 1942. The police did not then arraign him but took him to a room in the Bossert Hotel in Brooklyn where he arrived about 8 a. m. He was immediately stripped and kept naked until about 11 a. m. At that time he was allowed to put on his shoes, socks

[16] 322 U. S. 143, 88 L. Ed. 1192, 64 S. Ct. 921.
[17] 324 U. S. 401, 89 L. Ed. 1029, 65 S. Ct. 781.

and underwear and was given a blanket in which to wrap himself. He remained that way until about 6 p. m. Malinski claims he was beaten by the police during that period. The police denied this. There was no visible sign of any beating, such as bruises or scars; and Malinski made no complaint to the judge on arraignment nor to the jail authorities where he was later held. Sometime during Friday morning Spielfogel was brought to the hotel. He and Malinski were put alone together in a room sometime that afternoon. Shortly after their conference—apparently around 5:30 p. m. or 6:00 p. m.—Malinski confessed to the police."

The opinion also gives an excerpt from the prosecutor's summation to the trial jury. We copy further from the opinion: "If that evidence alone is not sufficient to show that that confession was coerced, the comments of the prosecutor place it beyond doubt. For in his summation to the jury he made certain statements which the Court of Appeals said were 'indefensible' (292 N. Y. 373, 55 N. E. 2d 353) and which we think are sufficient to fill in any gaps on the record before us and to establish that this confession was not made voluntarily. He said that Malinski 'was not hard to break'; that 'He did not care what he did. He knew the cops were going to break him down.' And he added: 'Why this talk about being undressed? Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking.' If we take the prosecutor at his word, the confession of October 23d was the product of fear—one on which we could not permit a person to stand convicted for a crime."

In the Malinski case,[18] following the arrest and before the confession, there was: (1) a three-hour period of nakedness, (2) then a "blanket covering" for several hours, (3) a long delay to "let him think that he was going to get a shellacking," and (4) a "stool pigeon"

[18] 324 U. S. 401, 89 L. Ed. 1029, 65 S. Ct. 781.

brought in to give mock advice. The foregoing facts—evidently regarded as of controlling importance by the U. S. Supreme Court—are all absent in the case at bar. Here, as previously recited, the accused was promptly lodged in jail, and promptly confessed after being identified by the lady; so, in its cardinal facts, the Malinski case is entirely dissimilar from the case at bar.

(C) In *Haley* v. *Ohio* [19] a Negro boy, 15 years of age, was arrested at midnight and questioned. His alleged confession was introduced in evidence against him. Here is the essential statement found in the majority opinion of the U. S. Supreme Court: "Beginning shortly after midnight this 15-year-old lad was questioned by the police for about five hours. Five or six of the police questioned him in relays of one or two each. During this time no friend or counsel of the boy was present. Around 5 a. m. —after being shown alleged confessions of Lowden and Parks—the boy confessed."

The United States Supreme Court reviewed the entire record to determine whether the confession was voluntary. This is the language of the opinion: "But the ruling of the trial court and the finding of the jury on the voluntary character of the confession do not foreclose the independent examination which it is our duty to make here. *Ashcraft* v. *Tennessee,* 322 U. S. 143, 148, 88 L. Ed. 1192, 64 S. Ct. 921. If the undisputed evidence suggests that force or coercion was used to exact the confession, we will not permit the judgment of conviction to stand even though without the confession there might have been sufficient evidence for submission to the jury. *Malinski* v. *New York, supra* (324 U. S. 404, 89 L. Ed. 1032, 65 S. Ct. 781), and cases cited."

On such review the U. S. Supreme Court concluded that the questioning of the 15-year-old boy for four or five hours in the night time rendered the confession involuntary, saying: "Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm

[19] 332 U. S. 596, 68 S. Ct. 302.

a lad in his early teens. This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a. m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him."

Youth, midnight arrest, and continuous questioning by officers for four or five hours are facts which are entirely absent from the case at bar. Here, the accused was a man 23 years of age, who had served in the Armed Forces. He was arrested at 11 a. m. and held two hours without questioning. He then confessed after ten or fifteen minutes of questioning. We are convinced that what caused the confession was not the questioning by the officers, but the knowledge, truthfully imparted to the defendant, that the lady had positively identified him, just as she did before the jury. In all events the holding of the U. S. Supreme Court in the Haley case does not require us to reverse our long established rule as reflected in *State* v. *Browning*.[20]

As we have previously observed, the rationale of the holdings of the U. S. Supreme Court, on the question of the admissibility of a confession, seems to be that the result in each case must turn on its own particular facts which the Supreme Court of the United States determines independently of the conclusion reached by any other fact finding agency or judicial tribunal. We have reviewed in considerable detail the Ashcraft, the Malinski, and Haley cases in order to ascertain whether the facts, regarded as salient by the U. S. Supreme Court in those cases, are similar to those in the case at bar. We conclude that the facts here are so different from those in the three reviewed cases that those cases afford no sufficient justification for overruling our own long line

[20] 206 Ark. 791, 178 S. W. 2d 77.

of opinions. We adhere to the ruling in *State* v. *Browning, supra,* and reject appellant's contention.

III. *Refusal of the Trial Court to Reduce Palmer's Sentence to Life Imprisonment.* Mizell Palmer and Charles Hamm were jointly charged with rape. The record does not show any order of severance; but it is fairly inferable that one or the other of the accused obtained a severance.[21] Only Mizell Palmer was on trial in the case here involved. The trial and jury verdict were on May 13. On May 14, the Motion for New Trial was filed and overruled, and 45 days were given for the Bill of Exceptions. On May 20, the death sentence was pronounced on Palmer in keeping with the jury verdict. Then on June 7, Palmer's attorney filed in the Circuit Court a pleading denominated "Motion to Reduce Sentence," which, omitting caption and superscription, reads:

"Defendant Mizell Palmer moves the Court to reduce his sentence, for grounds stating:

"1. Co-defendant Charles Hamm, jointly charged and separately tried, was found guilty of the identical offense by a jury drawn from a separate panel, and his punishment fixed at life imprisonment; whereas defendant Mizell Palmer was sentenced to death.

"2. The verdict returned in defendant Palmer's case must necessarily have been the result of passion and prejudice by the jury, caused by reading of the alleged confession.

"3. Defendant Mizell Palmer's sentence is excessive, and he has been denied equal protection of the law and privileges and immunities of citizenship guaranteed by the 14th Amendment to the Constitution of the United States.

"Wherefore, defendant Mizell Palmer prays that his sentence be reduced to life imprisonment; and that the record of trial of both defendants be consolidated for purpose of appeal."

[21] Concerning Severance, see § 3976, Pope's Digest, Act No. 209 of 1945; and 4 Ark. Stats. § 43-1802.

This motion was in all things overruled by the Circuit Court on June 9; and the ruling on such motion is assigned as the error presented in this topic heading. When a severance is granted, the trial against each defendant proceeds entirely independently of the other. The record of the trial in the case of *State* v. *Hamm* is not before us; and we have no information as to what particular facts and defenses were presented in that case. Palmer has not tendered us, either by supplemental bill of exceptions or otherwise, the record in the Hamm case: so, we do not know Hamm's mental condition or any other factor that might have appeared in evidence in that case to cause the jury to find him guilty or to fix his sentence at life imprisonment. The Arkansas law [22] allows the trial jury to determine the punishment in rape cases at either death or life imprisonment; and the punishment allotted to Palmer was within the limits allowed by law. So, we cannot say that the punishment was excessive or unjust; and this disposes of the first two items in appellant's Motion to Reduce Sentence.

Finally, appellant says that Palmer was denied equal protection under the 14th Amendment to the U. S. Constitution since Palmer received the death sentence and Hamm received only life imprisonment. We find no merit in this contention. The case of *Howard* v. *Fleming* [23] is decisive, and is against the appellant. In that case, Howard and other defendants were jointly indicted *and tried* in North Carolina on a charge of conspiracy to defraud. All three defendants were convicted; one defendant was sentenced to seven years, and the other two were sentenced, each, to ten years. The two defendants receiving the 10-year sentences claimed that the longer sentences denied them the equal protection of the law under the 14th Amendment—the same argument here made by Palmer. Mr. Justice BREWER delivered the opinion of the U. S. Supreme Court, and thus clearly stated the contention and the Court's holding against it: "Again, it is contended that the defendants were denied the equal protection of the laws, . . . in that two

[22] Pope's Digest, § 3403 *et seq.*; and 4 Ark. Stats. § 41-3401 *et seq.*
[23] 191 U. S. 126, 48 L. Ed. 121; 24 S. Ct. 49.

were given ten years' and the third only seven years' imprisonment, . . . That for other offenses, which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted, does not make this sentence cruel. Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one."

The jury trying Mizell Palmer returned a verdict of guilty and a death sentence which is authorized by the Arkansas statute. The trial judge rendered judgment in accordance with the verdict. We find no reversible error and affirm the judgment.

ROBINS, J., dissents.

ROBINS, J., dissenting. In my opinion a material portion of the evidence in this case—all that part pertaining to the alleged oral confession made by appellant to the officers—was inadmissible.

It is not disputed that appellant was taken into custody and held without any warrant of arrest and was not "forthwith" taken before a magistrate, as required by the provisions of § 3729, Pope's Digest. During the time he was thus illegally detained the alleged confession was obtained.

My views on the inadmissibility of such a confession are set forth fully in my dissenting opinion in the case of *State* v. *Browning,* 206 Ark. 791, 178 S. W. 2d 77; and it is unnecessary to reiterate them here. Some recent decisions of the Supreme Court of the United States which support these views are: *Ashcraft* v. *State of Tennessee,* 322 U. S. 143, 88 L. Ed. 1193, 64 S. Ct. 921, and *Haley* v. *State of Ohio,* 332 U. S. 596, 68 S. Ct. 302.

The confession was obtained through a violation of appellant's rights under the statute above cited and under the "due process" clauses of the state and federal constitutions. Therefore it ought not to have been received in evidence.

Courts should see to it that every accused person receives in full measure the protection that our federal

and state constitutions, as well as our statutes, provide for him; and neither heinousness of the crime with which he is charged nor apparent obviousness of his guilt ought ever to swerve us from this high duty.

SMITH *v.* MOSCHETTI.

4-8587 214 S. W. 2d 73

Opinion delivered October 18, 1948.

J. B. Reed, for appellant.

R. G. Ward and Guy B. Reeves, for appellee.

MINOR W. MILLWEE, Justice. Appellant, E. R. Smith, prosecutes this appeal to reverse a judgment against him for $2,100 in which the trial court also sustained an attachment for a 1939 model Ford truck.

The facts leading up to the institution of the action are as follows: In September, 1946, appellee, A. A. Moschetti, was engaged in the used car business at Oakland, California, where appellant, a member of the naval forces, was receiving treatment at a navy hospital. Appellant was introduced to appellee by Albert Landers, another sailor stationed at the hospital. Appellee and appellant entered into a "deal" whereby appellant, by using his "veteran's priority," would purchase a new Oldsmobile automobile from an Oakland dealer for appellee who was to pay appellant $300 "for his trouble" upon delivery of the car.

On September 11, 1946, appellee advanced to appellant $100 which he deposited with the motor company with an application for purchase and as a down payment on the car. On October 11, 1946, appellee delivered to appellant a cashier's check for $2,000 which represented the balance of the purchase price of the car to be delivered to appellee. On the same date appellant paid the motor company and procured delivery of the car. Instead of delivering the car to appellee, according to the arrangement, appellant left California and drove the car to his home in Lonoke county, Arkansas.

On October 19, 1946, appellant's father received a telegram from Albert Landers inquiring of the whereabouts of appellant. In answer to the telegram, Landers was informed that appellant had gone to Florida. Appel-

lant's father testified that his son did not go to Florida, but had told him he was going and was away from home three or four days about the time the telegram was answered.

Appellant lived with his father in Lonoke county until January, 1947, when they moved to a place near Rector in Clay county. Appellant was unmarried and became 21 years of age in April, 1947. On February 4, 1947, he traded the automobile for a 1939 model Ford truck which he used for trips to and from the town of Rector.

Appellee first filed an action in the Lonoke Circuit Court, but appellant had then moved to Rector and no service was had in the Lonoke county action. On June 6, 1947, appellee filed his complaint, affidavit and bond for attachment of the Oldsmobile car in the Circuit Court of Clay county, Eastern District. On August 2, 1947, the attorney for appellee, by interlineation, amended the affidavit for attachment by substituting a description of the 1939 Ford truck for that of the Oldsmobile automobile. This was done before the clerk who issued a new writ of attachment describing the truck instead of the automobile. On the same date the deputy sheriff of Clay county, in company with appellee's attorney, took possession of the 1939 Ford truck at the home of appellant's father near Rector. The truck was delivered to a garage at Rector for storage and the deputy sheriff made his return on the writ which was filed in the sheriff's office by counsel for appellee sometime in the afternoon of August 2, 1947.

On October 13, 1947, appellant filed a pleading styled, "Demurrer, Motion to Dismiss Cause and Quash Writ." In this pleading appellant demurred to the complaint on the following grounds:

"That, plaintiff's complaint does not state facts sufficient to constitute a cause of action,

"That, this court has no jurisdiction of the person of the defendant,

"That, this court has no jurisdiction of the subject matter of this alleged cause of action,

"That, this plaintiff does not have the legal capacity to maintain this cause of action,

"That, there is another cause of action pending between these parties for the same alleged cause of action,

"That the person named defendant in this alleged cause demurs, objects and excepts to the venue herein."

In the same pleading appellant also attacked the form, regularity and sufficiency of the affidavit and writ of attachment on numerous grounds. It further alleged that no summons or writ of attachment had been served on appellant, and that fraud had been practiced on the court and appellant in several particulars. The prayer of the pleading was that the writ of attachment be quashed and the cause of action dismissed.

After hearing testimony on the demurrer and motion, the trial court overruled same and set the case for trial. On October 22, 1947, the date of trial, appellant answered denying the allegations of the complaint and pleading his minority at the time of the transactions with appellee. At the conclusion of the testimony, each party requested instructed verdicts in his favor, and the trial court rendered judgment for appellee and sustained the attachment.

For reversal of the judgment appellant contends that the trial court erred in overruling his demurrer and motion to dismiss. It is first insisted that the changes by interlineations in the complaint and affidavit for attachment made by counsel for appellee on August 2, 1947, amounted to fraud practiced upon appellant and the court. It appears that the complaint and affidavit were captioned, "In the Lonoke County Circuit Court" when filed on June 6, 1947. It further appears that counsel for appellee changed the caption on the complaint and affidavit to read. "In the E. D. Clay County Circuit Court." The clerk testified that the amendment of the affidavit for attachment was made before him on August 2, 1947, and that he issued a second writ of attachment on that date describing the 1939 Ford truck; that counsel for appellee was in his office before and after noon on

said date and he could not recall the time of day the changes were made. Appellee had the right to amend the complaint and affidavit. *Fortenheim* v. *Claflin, Allen & Co.*, 47 Ark. 49, 14 S. W. 462. We agree with the trial court's finding that, since said amendments appear to have been made prior to the serving of the attachment and long before any answer or other pleading had been filed by appellant, fraud was not practiced on either the appellant or the court in the amendment of the pleadings.

It is next contended that the court did not acquire jurisdiction to issue the writ of attachment because of the failure of appellee to verify his complaint under §§ 586-7 of Pope's Digest. These sections relate to attachment by a creditor against a debtor before his claim is due. Appellee did not proceed under these sections, but proceeded by a separate complaint and affidavit under § 533 of Pope's Digest, and it is not required that both the complaint and the affidavit be verified.

It is next insisted that there was a lack of service of the writ of attachment because the officer took charge of the truck without having the writ in his possession and without serving a copy thereof on any person. Under the second subdivision of § 544 of Pope's Digest, an order of attachment may be executed upon personal property capable of manual delivery, by the officer taking it into custody and holding it subject to the order of the court. According to the testimony of the deputy sheriff, this section of the statute was complied with and delivery of a copy of the order to the person holding the property was not required.

It is next insisted that the demurrer and motion to dismiss should have been sustained because there was no service of summons upon appellant. On conflicting testimony, the trial court found that summons was properly served on September 17, 1947, by the sheriff of Clay county. We find it unnecessary to determine whether this finding was erroneous, since appellant clearly entered his general appearance by filing the demurrer and motion to dismiss. A demurrer on the grounds of lack of jurisdiction of person, when accompanied by a general

demurrer, because the complaint does not state a cause of action, amounts to a general appearance. The demurrer of appellant was not based solely on the ground of lack of jurisdiction of the person, but same was a general demurrer and constituted a general appearance and a waiver of any defect in the jurisdiction arising from want of service of process. *Hawkins* v. *Taylor,* 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82; *Greer* v. *Newbill,* 89 Ark. 509, 117 S. W. 531; *Hogue* v. *Hogue,* 137 Ark. 485, 208 S. W. 579; *St. Louis & San Francisco Ry. Co.* v. *McBride,* 141 U. S. 127, 11 S. Ct. 982, 35 L. Ed. 659; 6 C. J. S., Appearances, § 12, p. 25; 3 Am. Jur., Appearances, § 15.

It is next contended that the trial court erred in overruling appellant's motion to dismiss the case at the conclusion of the testimony because of a variance between the allegations of the complaint and the proof. The complaint alleged that "defendant was to bring this automobile and deliver it to this plaintiff, until this defendant could reimburse this plaintiff . . . ." Appellee testified on direct examination, without objection, that the automobile was to become his property upon delivery by appellant. When this discrepancy was brought out on cross-examination, appellee asked permission to amend the complaint to conform to the proof. The trial court made no ruling at the time of the request, but overruled appellant's motion to dismiss at the conclusion of all the testimony. The denial of this motion was tantamount to a ruling that the complaint would be treated as amended to conform to the proof. Appellant did not offer testimony to dispute that offered by appellee nor did he claim any surprise by its introduction. Under these circumstances, the trial court had a right to treat the complaint as amended to conform to the proof, and we hold that no abuse of the court's broad discretion in such matters has been shown. *Rucker* v. *Martin,* 94 Ark. 365, 126 S. W. 1062; *Thomas* v. *Spires,* 180 Ark. 671, 22 S. W. 2d 553.

Appellant next contends that the pleadings and proof establish a contractual relationship between the parties and that the trial court should have sustained appellant's plea of non-liability on account of his minority in Sep-

tember and October, 1946. Appellant relies on the case of *Crockett Motor Co.* v. *Thompson,* 177 Ark. 495, 6 S. W. 2d 834, where it was held that a minor was not liable on his contract for the purchase of an automobile which he used for pleasure and to ride a few miles to town and back. Appellee's cause of action in the instant case is substantially grounded in tort, and not in contract. According to the undisputed evidence, appellant fraudulently converted the automobile, which he was to deliver to appellee, to his own use. A minor who is of sufficient age to be criminally responsible is liable for his torts. *Moore* v. *Wilson,* 180 Ark. 41, 20 S. W. 2d 310; *Kibler* v. *Kibler*, 180 Ark. 1152, 24 S. W. 2d 867.

In 27 Am. Jur., Infants, § 92, it is said: "The mere fact that a cause of action grows out of or is connected with a contract will not shield an infant from liability for a tort which is not a mere breach of the contract, but is a distinct willful and positive wrong in itself." The author further states: "Although goods converted by an infant are in his possession by virtue of a previous contract, the conversion is in its nature a tort; it is not an act of omission, but of commission, and is within the class of offenses for which infancy affords no protection." See, also, 43 C. J. S., Infants, § 89. The fact that appellee's cause of action grew out of his agreement with appellant will not shield the latter from liability for his fraudulent conversion of the automobile, which is in itself an independent and willful wrong.

Since we reach the conclusion that appellant's plea of minority is no defense to the action, it becomes unnecessary to determine whether the trial court was in error in treating the action as one for money had and received and rendering judgment on that basis.

We find no reversible error, and the judgment is affirmed.

POOL *v.* SHUFFIELD.

4-8613 214 S. W. 2d 223

Opinion delivered October 18, 1948.

Rehearing denied November 15, 1948.

John H. Wright, for appellant.

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

ROBINS, J. Appellant prosecutes this appeal from a judgment against him in a suit brought by appellee, a minor, to recover a truck which appellee had traded to appellant.

An examination of appellant's abstract and brief discloses that the judgment appealed from must be affirmed for noncompliance with rule 9 of this court. In the abstract prepared and filed by appellant the motion for new trial is not shown nor are its contents abstracted. There is, therefore, nothing in the abstract to apprise us of what matters were presented to the lower court in the motion for new trial.

Accordingly, under our rules, the judgment appealed from must be affirmed.

CLARDY *v.* STATE.

4526 214 S. W. 2d 232

Opinion delivered October 25, 1948.

Marcus Fietz, for appellant.

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

SMITH, J. Appellant was indicted for operating a gambling house, and was found guilty and given a sentence of two years in the penitentiary, from which judgment is this appeal. He was arrested April 23, 1948, and put to trial May 8th thereafter.

For the reversal of the judgment he assigns as error the action of the court in overruling his motion for a continuance upon the ground that he had not been afforded the opportunity to prepare for trial. Two weeks intervened between the date of his arrest and his trial, and no showing was made that this was not ample time in which to prepare the defense.

Appellant insists for the reversal of the judgment that the testimony is not sufficient to show his participation in the operation of the gambling house. That a gambling house was operated is not disputed, and it was stipulated that the house in which it was operated belonged to appellant. The building had been a two-story residence, but it had ceased to be used except as a gambling house. The gambling was conducted on the second floor, the lower floor being used in the sale of beer and the operation of slot machines. There was a table adapted to and used in the operation of a dice game.

This was a "banking game," that is the players did not bet against each other, but all bets were made against

the "house." Winning bets of money were paid and losing bets were collected by an operator who stood behind the table where the dice were shot. No witnesses testified that appellant was seen at this table, but all the witnesses testified that he was always present downstairs where the beer was sold. One witness testified that he saw appellant downstairs forty-five or fifty times, and all the other witnesses testified that appellant was always present when they visited the place which was called "Blue's Place," Blue being the name by which appellant was known. Appellant remained downstairs where he made change and sold beer. His wife worked there also, and sold beer. One of the witnesses testified that upon leaving the place appellant invited him to return. We think this testimony sustains the finding that appellant was concerned with and was a party to the operation of the gambling house.

Error was assigned in permitting the state to show that both appellant and his wife sold beer downstairs. When objection was made to the admission of this testimony, the prosecuting attorney said: "The state is not attempting to offer at this time that he (appellant) sold one bottle of beer or a thousand bottles. The state offers this testimony to show that he was present and taking an active interest in the general operation of the place called 'Blue's Place.' " Witnesses testified that they went to the place to drink beer and to shoot dice. The sale of beer tended to attract patronage and was a part of the plan of operation. In other words, the patrons did drink beer downstairs, and shoot dice upstairs. This testimony tended to show that if the place was not Blue's Place, as it was called, he participated in its operation, and that testimony is sufficient to sustain the conviction.

The judgment must therefore be affirmed and it is so ordered.

4513 214 S. W. 2d 234

Opinion delivered October 25, 1948.

[redacted]

Creekmore & Robinson and *Rains & Rains,* for appellant.

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

GRIFFIN SMITH, Chief Justice. Appellants were found guilty of stealing a hog. From prison sentences of one year each they have appealed on the grounds (a) that the proof was insufficient; (b) they were prejudiced by inadmissible evidence; (c) a demurrer to the information should have been sustained, and (d) eleven jurors were permitted to convene on the second day of trial during absence of the twelfth.

The hog appropriated by the defendants was shot in an old field near the home of T. J. Jones, who claimed the animal. Much testimony was directed to identification of the defendants as the persons engaged in the unlawful enterprise, but consideration of this evidence is eliminated with admissions by all that they were participants in the physical acts complained of.

In claiming to own the hog, Earl Armer testified he had ascertained it was ranging near Jones' home, and that he asked Doyle Kerr and Milford and Arthur Key to drive with him to the place in question. The actual shooting was done by Kerr, who acted for Armer. All defended on the ground they believed Armer when he told them the hog was his and that he had a right to its possession.

Armer testified that six or eight months before the cases were tried he had lived in the Uniontown community, but in moving elsewhere he left a hog. It had been purchased from his brother, Clyman, at Short, Oklahoma. When asked when the hog was acquired he replied, "Around a year." Clyman Armer testified that the deal spoken of by his brother occurred "About two years ago." At another point in his testimony Earl Armer said the hog he left at Uniontown was eighteen months old.

Deputy Sheriff Bill Yancy arrested Armer and Milford Key at 5105 Myer St., Fort Smith, where the hog was being butchered in the kitchen. The head and "hide" were found about fifty feet from a highway along which the defendants had traveled. The ears had been removed.

By its verdict the jury found that Armer did not own the hog, and that neither he nor the other defendants acted in good faith. We cannot say the evidence (some of which is not set out) was not sufficient to sustain the convictions.

Arthur Key was asked, on cross-examination, if he had ever stolen a hog. Over objection by counsel the witness was told to answer, with directions to the jury that any response by the witness would be considered only

in determining his credibility. Other similar questions were asked, with like rulings by the Court. The following occurred:

By Counsel: "The defendants now move the Court that all the testimony in regard to other crimes be stricken from the record, and the jury instructed not to consider it". The Court: "Gentlemen of the Jury, you will not give this testimony any consideration".

No objection was made that the ruling was insufficient, hence the error complained of is not properly before us in the sense urged by appellants.

The information charged that the four defendants —naming them—while in Crawford County, committed larceny January 9th, 1948, by willfully and feloniously taking, stealing, and carrying away one hog, the personal property of T. J. Jones. Although value of the hog was not alleged, the act was designated a felony and grand larceny. This was sufficient under Sec. 22 of Initiated Act No. 3, 4 Ark. Stats. 43-1006. The State, upon appropriate motion by the defendant, must file a bill of particulars. In the case at bar deficiencies of the information were not particularized. The transcript shows a statement by the Court March 15th to the effect that "the defendants demurred in short on the record." The demurrer was overruled. This was not error.

Finally it is urged that in permitting the eleven jurors to retire to a room before the twelfth member arrived, the defendants' substantive rights were impaired and a mistrial should have been declared. Record indorsements are:

Judge Kincannon: "When Court convened at nine o'clock eleven jurors were present. After deliberating thirty minutes yesterday they did not reach a verdict. The defendants are now present; and, as we need the courtroom for another case, the jurors may go to the jury room, but not to discuss or deliberate on a verdict until the twelfth juror arrives". It is further shown that the absent juror arrived "within two or three minutes after the jurors had gone to the room, and that he was sent to join his associates".

Counsel contend that a literal construction of the Court's directions did not prevent the jurors from discussing the guilt or innocence of the defendants, the inhibition being that they were "not to discuss or deliberate *on a verdict*". It is highly improbable that the eleven jurors, within the two or three minutes complained of, drew this fine sentence distinction. On the contrary, we think a fair construction of what the Judge said amounted to an admonition not to discuss the case.

Affirmed.

RICE *v.* RICE.

4-8609 214 S. W. 2d 235

Opinion delivered October 25, 1948.

Boyd Tackett and *Shaver, Stewart & Jones,* for appellant.

John Freeman and *Curtis L. Ridgway,* for appellee.

SMITH, J. This is a suit to enforce a judgment entered in the Supreme Court of the State of New York, in and for Westchester County, on February 6, 1947. Appellant and appellee were married in New York prior to 1936, and lived together as husband and wife until prior to the month of October, 1940, when they separated and have since lived separate and apart.

Appellee instituted suit on October 16, 1940, in the Supreme Court of Westchester County, seeking separate maintenance, and a decree was entered which awarded her $10 per week. On August 3, 1943, this decree was modified in a proceeding in which the parties appeared, increasing this award to $15 per week. On various occasions contempt proceedings were instituted against appellant for his failure to pay the installments as they matured. Appellant left the State of New York November 27, 1945, and removed to this state, where he has since resided. He made payments as required by the court order rendered in a suit in which he personally appeared until December 15, 1945, since which time he has made no payments. Those payments were made by checks mailed by appellant to an address which appellee has not since changed.

The records of the New York court duly exemplified and authenticated disclose the following proceedings: A motion was filed without notice for judgment for the amount of the installments in arrears, which upon hearing was ascertained to amount to $840. Appellant did not appear.

It was ordered that appellant appear at a term of the court to be held on January 31, 1947, to show cause why an order should not be made directing the clerk of the court to enter a money judgment in favor of appellee for the amount in arrears. It was ordered "that a copy of this order and the affidavit of Josephine Rice, verified January 16, 1947, be served upon defendant Royal

A. Rice at Mt. Ida, Arkansas, (his place of residence then and now) by mailing the same to said defendant on or before the 22nd day of January, 1947, by registered, air mail, and that such service shall be deemed sufficient service thereof," dated January 17, 1947, and signed by a Justice of the Supreme Court.

It appears from the court records, duly exemplified and authenticated, that the notice referred to was given in the time and manner required. Indeed appellant admitted the receipt of this notice, but he was not otherwise notified. Upon proof of this notice the court ordered a docket judgment to be entered pursuant to § 171, Book II, McKinney's Consolidated Laws of New York, Annotated, p. 301.

The instant case presents a record identical in all essential respects to the case of *Dadmun* v. *Dadmun,* 279 Mass. 217, 181 N. E. 264, except that here there was a notice of the motion for the docketing order given through the mail, whereas in the Dadmun case, *supra,* there was no notice of the application for the docketing order. Headnotes in the Dadmun case read as follows:

"Judgment of sister state for money already due as alimony held entitled to full faith and credit.

"Where husband was served and appeared in suit for separation and separate maintenance in sister state in which alimony was awarded, subsequent judgment of such state entered on wife's application without service thereof on husband for unpaid alimony held enforceable in Massachusetts.

"The judgment for arrears of alimony due and unpaid enforceable in Massachusetts, since the proceedings in which it was entered were manifestly incidental to the original suit for separation and separate maintenance, and there was no showing that under the laws of the state in which judgment was rendered that new service on or notice to the husband was required."

It is insisted that the later case of *Griffin* v. *Griffin,* 327 U. S. 220, 66 S. Ct. 556, 90 L. Ed. 635, impairs the

authority of the Dadmun case, *supra.* In the Griffin case the Supreme Court of New York granted a motion to docket as a judgment arrears of alimony awarded under a prior decree, and this was done without notice to the delinquent husband of any kind, of the application for the docketing order. Suit was filed in the District of Columbia to enforce the judgment of the New York court, and the relief prayed was granted and that judgment was affirmed by the Court of Appeals without opinion. This judgment was reversed upon the appeal to the Supreme Court of the United States in the Griffin case, *supra.*

The opinion in that case pointed out that the husband, if he had had notice of the motion to docket as a judgment the arrearage, would have had the right to defend under the laws of New York, on the ground that the alimony or some part of it, was not due because of the death or re-marriage of the wife; or that the obligation had been discharged by payment or otherwise; or that the circumstances had so changed as to justify a reduction of the alimony already accrued by modification of the alimony decree. For these reasons the court said: "It is plain in any case that a judgment *in personam* directing execution to issue against petitioner, and thus purporting to cut off all available defenses, could not be rendered on any theory of the state's power over him, without some form of notice by personal or substituted service."

The order to docket a judgment was not a proceeding to establish liability. That had been done in a proceeding in which appellant had appeared. It was rather a proceeding to enforce a liability already adjudged, in which appellant was directed to pay $15 each week. Service of summons as in an original suit to establish liability was not required. It was sufficient if there was some form of notice by personal or substituted service of the motion to docket the judgment and in the instant case notice was effectively given as appears from appellant's own admission that he had received the registered letter which the court order directed should be

mailed him. A footnote in the Griffin case reads as follows:

"We do not share in the apprehension that the cost of providing such notice as will satisfy due process requirements each time a proceeding is begun to docket a judgment for an accrued installment of alimony will be incommensurately high. In various statutes New York has been able to provide for notice by mail, which is reasonably adapted to provide actual notice and inexpensive in its operation. New York Civil Practice Act, § 229-b; New York Real Property Law, § 442-g; New York Vehicle and Traffic Law, §§ 52, 52-a; see, also, *Durlacher* v. *Durlacher,* 173 Misc. 329, 17 N. Y. S. 2d 643."

The New York practice is not essentially different from our own. We held in the case of *Jones* v. *Jones,* 204 Ark. 654, 163 S. W. 2d 528, that "Since the parties to a divorce proceeding remain parties for the purposes of enforcing decrees for alimony, no additional service of process in an attempt to collect arrearage in alimony is necessary." It suffices if a delinquent husband is given an opportunity when the court attempts to ascertain the delinquency to show sufficient change in the circumstances of the parties as would effect the amount of the delinquency.

Pursuant to the New York practice the court directed that appellant be given notice by registered mail of the motion to docket the arrearage as a judgment. The New York court could do nothing more to enforce a liability adjudged in a proceeding in which appellant had appeared. The authenticated record of the proceeding in New York shows that appellant had received the registered letter, which the clerk of the court was directed to mail to him, and that the clerk entered upon the appropriate docket the judgment of $840, and it is upon this docket judgment that appellee brought suit in the Montgomery Circuit Court of this state.

Appellant insists that it was error to render judgment upon the record. First, the docket judgment was not a final judgment, for the reason that under the laws of New York he had the right to show cause, why the

judgment should be reduced or be wholly vacated in proper circumstances, and for the reason second, that he had obtained in this state an absolute divorce from appellee on March 22, 1946, and in no event could any support money be due after that date.

It is true that under the laws of the State of New York appellant had the right to show why the judgment should not be enforced for any legal reason, but it is true also that he made no attempt to avail himself of this right, and he alleges no right to have the judgment reduced or satisfied, as he paid nothing in its satisfaction and does not allege his inability to pay. While the alimony judgment is subject to modification when attempt is made to enforce it, it is nevertheless a judgment until modified and as has been said, appellant made no response to the motion to docket the judgment, notice of which had been given him in the manner heretofore stated. He made only the defenses stated that the New York judgment should not be given full faith and credit for the reasons herein stated. He does insist that the docket judgment was not properly authenticated, but we find the fact to be otherwise.

Upon the defense that appellee's right to collect her judgment was destroyed by the rendition of the decree for divorce, without provision for alimony by a decree of the Chancery Court in this state on March 22, 1946, the facts are that appellant obtained a decree for an absolute divorce without provision for alimony, but this decree was rendered upon constructive service. Under the laws of this state, as announced in the case of *Wagster* v. *Wagster,* 193 Ark. 902, 103 S. W. 2d 638, this decree upon constructive service did not destroy appellee's right to the support money under the decree of another jurisdiction. But this is a question which is governed by the decisions of the Supreme Court of the United States, and is concluded by the opinion of that court in the case of *Estin* v. *Estin,* 334 U. S. 541, 68 S. Ct. 1213, rendered June 7, 1948.

There the parties were married in New York and lived together until the wife was awarded a decree of

separation with an allowance of $180 per month as personal alimony. Thereafter the husband removed to the State of Nevada, where he obtained a decree of divorce upon constructive service, of which the wife was aware, but in which case she did not appear. The Nevada decree made no provision for alimony. After the rendition of the Nevada decree, the husband ceased making the payments ordered by the decree of the New York court. Thereupon the wife sued in New York for a supplementary judgment for the amounts of the arrears. The husband defended upon the ground that the alimony provision of the separation decree had been eliminated by reason of the Nevada decree. The Supreme Court of New York overruled this defense and granted the wife judgment for the arrears, which judgment was affirmed by the appellate division and also by the Court of Appeals. 296 N. Y. 308, 73 N. E. 2d 113.

Upon the appeal to the Supreme Court of the United States it was contended that since the Nevada decree of divorce was recognized as valid in New York, the husband was no longer obligated to support his wife. In overruling that contention it was said by Justice DOUGLAS, speaking for the majority of the court:

"The Nevada decree that is said to wipe out respondent's claim for alimony under the New York judgment is nothing less than an attempt by Nevada to restrain respondent from asserting her claim under the judgment. That is an attempt to exercise an *in personam* jurisdiction over a person not before the court. That may not be done. Since Nevada has no right to adjudicate respondent's rights in the New York judgment, New York need not give full faith and credit to that phase of Nevada's judgment. A judgment of a court having no jurisdiction to render it is not entitled to the full faith and credit which the Constitution and statute of the United States demand. *Hansberry* v. *Lee,* 311 U. S. 32, 40, 41, 61 S. Ct. 115, 117, 85 L. Ed. 22, 132 A. L. R. 741; *Williams* v. *North Carolina,* 325 U. S. 226, 229, 65 S. Ct. 1092, 1094, 89 L. Ed. 1577, 157 A. L. R. 1366, and cases cited.

"The result of this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each state to the matters of her dominant concern."

Over appellant's objection the court admitted in evidence a deposition of appellee filed in the Montgomery County Chancery Court in the divorce case, in support of her prayer that the divorce decree granted appellant in this state be vacated upon the ground that it had been obtained by fraudulently concealing from the attorney appointed to represent her as a nonresident defendant, her address, when appellant well knew her address, but did not disclose it to the attorney for the nonresident defendant, so that the divorce was granted without notice to her that the suit was pending, thereby depriving her of the opportunity to appear and defend.

It is insisted that it was error to admit this deposition, but we do not think so as it was taken in another suit between the same parties, and involved the same subject matter. *Gulley* v. *Bache,* 98 Ark. 583, 136 S. W. 667; *McTighe* v. *Herman,* 42 Ark. 285.

But even so, the admission of the deposition in evidence was not prejudicial as the Chancery Court of Montgomery County had never acted upon the motion to vacate the divorce decree, so that the case stands upon a decree for divorce rendered upon constructive service which may or may not be valid depending upon the final adjudication as to whether or not it had been fraudulently obtained. But if the decree is valid, and it has not yet been vacated, the only effect would be to grant appellant a divorce without discharging the decree of the Supreme Court of New York, requiring him to pay the maintenance allowance. This is the point decided in the Estin case, *supra.*

Judgment was rendered against appellant for the $840 arrearage of alimony adjudged by the Supreme

Court of New York, and as we think the court had jurisdiction to hear this matter, and no showing was made that the alimony was not due or should be reduced, the judgment will be affirmed.

BROWN *v.* STATE.

4530 214 S. W. 2d 240

Opinion delivered October 25, 1948.

W. Harold Flowers, for appellant.

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

WINE, J. Appellant was put to trial under an information charging him with the crime of assault with intent to kill alleged to have been committed by so assaulting one Boyd Cunningham, a member of the police force of Camden, Ouachita county, Arkansas. A verdict of guilty was returned by the jury assessing his punishment at five years in the State Penitentiary. From the judgment pronounced on that verdict comes this appeal.

Appellant, in his brief, urges a reversal of the judgment of the trial court for the following reasons:

I. The court erred in overruling appellant's motion to quash the information.

II. The court erred in overruling appellant's motion to quash the regular jury panel.

III. The verdict is contrary to the law and to the evidence.

I. *Motion to Quash Information.* Pursuant to Amendment 21 to the Constitution of the State of Arkansas, appellant was tried under an information filed by the Prosecuting Attorney and appellant insists that prosecuting him by information rather than by indictment returned by a grand jury is violative of his rights under both the state and federal constitution. Section 1 of Amendment 21 to the State Constitution reads as follows:

"That all offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment by a grand jury or information filed by the Prosecuting Attorney."

This amendment has been successively upheld by this court in many cases. Some of the more recent being

Higdon v. *State, ante,* p. 881, 213 S. W. 2d 621; *Washington* v. *State, ante,* p. 218, 210 S. W. 2d 307; *Penton* v. *State,* 194 Ark. 503, 109 S. W. 2d 131; and *Smith, et al.* v. *State,* 194 Ark. 1041, 110 S. W. 2d 24.

The Supreme Court of the United States has many times held that a state may—if it so desires—provide for prosecution by information rather than by indictment: *Hurtado* v. *California,* 110 U. S. 516, 28 L. Ed. 232, 4 S. Ct. 111; *Bolin* v. *Nebraska,* 176 U. S. 83, 44 L. Ed. 382, 20 S. Ct. 287; and *Gaines* v. *Washington,* 277 U. S. 81, 72 L. Ed. 793, 48 S. Ct. 468. For a more recent pronouncement on this point, see the case of *Paterno* v. *Lyons,* 334 U. S. 314, 68 S. Ct. 1044, in which Mr. Justice FRANKFURTER, in his concurring opinion said: ". . . So far as the United States Constitution is concerned, the states may dispense with accusations by grand juries, it is for New York and not for us to decide when the procedural requirements of New York law, not touching those fundamental safeguards which the United States Constitution protects, are satisfied."

Appellant quotes and seeks refuge in the dissenting opinion of Mr. Justice BLACK in the case of *Adamson* v. *People of the State of California,* 332 U. S. 46, 91 L. Ed. 1903, 171 A. L. R. 1223, 67 S. Ct. 1672, but the majority of that court held contrary to the views therein expressed by Mr. Justice BLACK and this court has followed the majority.

II. *Motion to Quash Panel of Petit Jurors.* Appellant, in apt time, filed his Motion to Quash Panel of Petit Jurors, in which appellant (omitting preamble) avers that: "in order to circumvent recent decisions of the United States Supreme Court reversing convictions in cases in which discrimination as is herein shown has been practiced a conspiracy, common understanding or method has been developed by which one or two Negroes are called whenever it appears that the unlawful method will be challenged. The defendant avers that the action of the Jury Commissioners of the present May, 1948, Term of the Ouachita Circuit Court, in naming two Negroes as members of the regular panel, is not

in good faith as no Negroes have ever been summoned for regular jury service for a period of fifty years, more or less; and as a result thereof all Negroes in Ouachita county, Arkansas, have been denied their constitutional right of trial by a jury of their peers.

"That the total population of Ouachita county, Arkansas, as of April 1, 1940, according to sixteenth census, is 31,151, divided as to the races as follows: white, 16,446 and Negro, 14,697, that the Negro population is more than forty per cent of the total population; that the total number of electors eligible for consideration as jurors is 7,719; that defendant avers and believes that of the total number of electors in Ouachita county, 1,496, or approximately 20% of the total number of electors, are members of the Negro race.

"That 32 persons were summoned as jurors for the May, 1948, Term of Ouachita County Circuit Court; and that the said Jury Commissioners named only two qualified electors in the Negro race; that the said Jury Commissioners and their predecessors, for a period of 50 years, more or less, have never selected from qualified Negro electors, who had been, were, and still are, numerous on the list of qualified electors of Ouachita county, Arkansas, regular members of the jury panel; and further, the defendant avers and believes that the Jury Commissioners either of their own volition or upon a directive of the Judge of the said Ouachita County Circuit Court named the two present Negro members of the panel in order to prevent the present panel from being challenged successfully.

"That the two Negro members of the present panel are exempt from Jury service under §§ 8294 and 8295 of Pope's Digest of the Statutes of Arkansas.

"That no Negro has ever been named as jury commissioner in the Ouachita County Circuit Court, despite the fact that the Judge of the said Court is empowered to appoint three Jury Commissioners whose duty according to law is to select grand and petit jurors for the Ouachita Circuit Court.

"That there has been now and for a long time prior to a systematic exclusion of Negroes from jury panels despite the fact that the list of qualified jurors are designated by law according to race.

"The defendant charges that this constitutes a discrimination against him, a Negro, and such discrimination is a denial to him of equal protection of the laws of the United States of America as guaranteed by § 1 of the Fourteenth Amendment to the Constitution of the United States of America. Petitioner further alleges that due process of law is being denied by the State of Arkansas, through its administrative officers, and prays that the present Petit Jury panel be quashed."

Appellant's motion seems highly inconsistent in its various aspects. The substance of the said motion being that he, as a Negro, is being discriminated against and his constitutional rights violated by what he terms a systematic exclusion of members of his own race from juries in Ouachita county, yet at the same time admitting that two members of his own race were members of the regular jury panel, but avers that the jury commissioner's action "in naming two Negroes as members of the regular panel is not in good faith, as no Negroes have been summoned for regular jury service for a period of fifty years, more or less."

It does not seem important to a determination of this case what may or may not have been done or practiced in this respect in the past for a period of fifty years or any other number of years. Assuming that appellant might have produced proof that such practice may have been followed and may have been erroneously followed, if such practice was discontinued as is admitted by appellant in empanelling the jury present for service at the time of appellant's trial, it would seem to be a violent presumption or conclusion on the part of appellant that the action of the jury commissioners in naming two Negroes as members of the regular panel was not in good faith. On the contrary, would it not be more reasonable and plausible to assume that the jury commissioners selected these two Negro members

in perfectly good faith to strictly comply with the law of the land and to obviate any claim of discrimination. As to that portion of appellant's motion which avers that the two Negro members of the present panel were exempt from jury service under §§ 8294 and 8295 of Pope's Digest of the Statutes of Arkansas. Section 8294 provides that no members of certain professions or avocations or persons sixty-five years of age *shall be compelled* (italics supplied) to serve on grand or petit juries and § 8295 provides that any licensed undertaker or embalmer *may be excused* (italics supplied) from service on petit or grand juries. These sections are permissive and not a prohibition against such persons serving as members of petit and grand juries, but only permit such persons to claim exemption and such rights of exemption could not have here worked to the prejudice of appellant. It is not even suggested that such exemption was claimed by either of the two Negro jurors. The record in this case clearly shows that formal arraignment and drawing of the jury was waived by both appellant and the Prosecuting Attorney, and there is no showing that appellant exhausted all of his peremptory challenges or that the two Negro members were challenged by the state or did not in fact serve on the trial jury.

Assuming that appellant's figures are correct, and that there are 1,496, or approximately 20 per cent of the total number of electors of Ouachita county who are members of the Negro race, proportionate representation of races for selection as jurors has never been held to be mandatory: *Virginia* v. *Rives,* 100 U. S. 313, 25 L. Ed. 667; *Thomas* v. *Texas,* 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 393.

Section 8306 of Pope's Digest of the Statutes of this state provides: "Selection by court. Jurors in both civil and criminal cases shall be selected as follows: The circuit courts at their several terms shall select three jury commissioners possessing the qualifications prescribed for petit jurymen, who have no suits in court requiring the intervention of a jury."

There is nothing in this record to indicate or suggest that the discretion of the trial court in its selection of jury commissioners was violated or in any wise irregular or prejudicial to appellant. On the contrary, the converse would appear to be true, by the admitted fact that said jury commissioners selected and included in the regular jury panel two members of appellant's own race. We are not apprised of any case in which this court or the Supreme Court of the United States has held that proportionate representation of race or class is prerequisite in the selection of jury commissioners.

Although not cited in the brief of either the appellant or Attorney General, we have closely scrutinized the case of *Ware* v. *State,* 146 Ark. 321, 225 S. W. 626, and distinguish this case in that it is here admitted that two members of the appellant's own race were included in the regular jury panel, whereas in the Ware case (*supra*) both the grand and petit juries were made up exclusively of members of the white race, the appellant Ware being a Negro. And furthermore, 31 Am. Juris. 621, § 90, states the rule to be as follows: "One objecting to a jury panel on the ground of unlawful discrimination in the selection of persons for jury service must allege such discrimination by asserting facts sufficient to show its existence, and must prove or offer to prove the facts alleged. An affidavit or a verified motion or challenge is not sufficient, of itself, to support a charge of discrimination in the selection of a jury, and the filing of such affidavit or verified motion or challenge does not dispense with the necessity of offering proof of the alleged discrimination."

What proof could appellant have offered to show discrimination or exclusion of members of his race from jury service with two such members admittedly standing by for service. This is particularly true when we consider appellant's assertion that Negroes were, in fact, placed on the jury panel for the express purpose of circumventing successful challenge. We, therefore, cannot say that it was error for the trial court to overrule appellant's motion to quash panel of petit jurors.

III. *Sufficiency of the Evidence.* We now pass to the appellant's contention that the verdict is contrary to the law and the evidence. Section 2961, Pope's Digest, of the statutes of this state reads as follows: "ASSAULT WITH INTENT TO KILL. Whoever shall feloniously, willfully and with malice aforethought, assault any person with intent to murder or kill . . . and their counsellors, aiders and abettors shall, on conviction thereof, be imprisoned in the penitentiary not less than one nor more than twenty-one years."

The evidence may be summarized as follows: Boyd Cunningham, the arresting officer, testified that in the course of his duties as a member of the police force of the City of Camden, on the night of February 25, 1948, he encountered the appellant, together with others on the streets of Camden, engaged in an altercation with a colored taxi driver over the payment or nonpayment of a taxi fare by the appellant. At the outset the officer requested only that the appellant and his associates quiet down and soften their language, that their actions and language already justified an arrest for disturbing the peace, as a considerable number of people had gathered around the appellant and his group. To this, appellant replied that "No white --- -- - ----- is going to arrest . . . ," and started walking away from the officer. The officer followed, and in attempting to take the appellant into custody, slipped and fell. A physical encounter then ensued, and the appellant wrested from the officer (Cunningham) the officer's service revolver, which he (appellant) attempted to use on the officer until two bystanders rushed to the officer's assistance. One of said bystanders held the cylinder of the revolver so that it could not be fired by the appellant.

This testimony was substantially corroborated by the two bystanders who came to the aid of the officer, and by one other witness. After considering all of the evidence, which we do not attempt to detail, and when giving it, as we must, its strongest probative force in favor of the State, the testimony was ample to warrant the jury's verdict of assault with intent to kill.

While not urged in appellant's brief, other assignments of error were set out in the motion for a new trial, all of which we have considered and found to be without merit. After a review of the instructions offered and given the jury and a consideration of the entire case, we find no reversible error.

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

It is so ordered.

ED. F. MCFADDIN, Justice (dissenting). I respectfully dissent, because (1) the trial court erred in refusing to allow the appellant to introduce evidence on his motion to quash the venire; and (2) this error calls for a reversal. This case is ruled by our own cases of *Ware* v. *State,* 146 Ark. 321, 225 S. W. 626, and *Bone* v. *State,* 198 Ark. 519, 129 S. W. 2d 240, as well as by numerous cases decided by the Supreme Court of the United States, many of which are cited and discussed in the annotation in 82 Law Ed. 1053, entitled "Violation of Constitutional Rights of Defendants in Criminal Cases by Unfair Practices in Selection of Grand or Petit Jurors."

In the case at bar the appellant filed his motion to quash the panel of petit jurors. The motion—copied *in extenso* in the majority opinion—alleged, *inter alia,* that the action of the jury commissioners denied the defendants their constitutional right of "trial by a jury of their peers," and that the inclusion of two Negroes on the jury panel was in a studied effort to deprive the defendants of a fair petit jury panel. It was not a question of whether the judge had correctly instructed the jury commissioners, but it was a question of whether the jury commissioners—after receiving the court's instructions—had, by their very method of procedure, circumvented the defendant's claimed constitutional rights. Here is a verbatim copy of the entire proceedings on this motion to quash:

"Court: I have before me your motion to quash the jury panel based on the allegation of discrimination against the Negro race. The Jury Commissioners were

appointed by the Court in the usual and customary manner, and they were duly sworn in accordance with the Statute, and instructed by the Court,—the jury commissioners were under specific instructions, and were admonished that there must be no discrimination shown in the selection of the jury, and that no person should be disqualified because of his race, creed or other such matters. The Jury Commissioners were advised that the Court was requiring them to select people of all races residing in Ouachita County so far as they were able to do so, and in accordance with the Court's instructions the jury commissioners selected the present panel, which includes two members of the Negro race—they are on the jury panel and present today. The motion will be overruled.

"Counsel for Defendant: We save our exceptions to the ruling of the Court. I would like to present the Court with some proof in connection with that motion. I would like to say that it is a sincere effort made to determine this question from a standpoint of proportional representatives on juries. In a recent decision appealed from the Jefferson Circuit Court to the Supreme Court—in that case it appears from the opinion that we should have put in more proof from the jury commissioners with regard to the selection of the jurors. For the purpose of the record, I would like to ask the Court to permit me to examine the present Jury Commissioners, and the prior commissioners who are available, together with the examination of the Clerk of the Court and the Sheriff.

"Court: What do you want to do that for?

"Counsel for Defendant: I want to establish the manner in which the jury is selected; in other words, it is my contention that the placing of one member of the Negro race on the jury does not meet a substantial compliance with the constitutional provisions.

"Court: I think that the record speaks for itself; the Jury Commissioners were instructed just exactly as the Court has stated, they were told to select this jury

without discrimination of race, creed or anything else, those are the facts and the record speaks for itself. If there had not been Negroes on other juries in this county, and you disqualify this jury, it would seem to me that it would make it impossible to try one of these cases at all. The request will be denied.

"Counsel for Defendant: We save our exceptions to the ruling of the Court."

The Court's ruling, as reflected by the above, was tantamount to the trial court refusing to hear evidence, because—as the trial court said—the jury commissioners had been correctly instructed. Even so the appellant was entitled to introduce evidence in his effort to show that the jury commissioners had not complied with the law and the instructions of the court. It is not for us to speculate—as I think the majority has done—as to what the defendant would have been able to show by the proof that he wanted to offer. The point is that he was not allowed to offer any proof. In *Ware* v. *State,* 146 Ark. 321, 225 S. W. 626, decided by this Court on December 6, 1920, the same point was made. There, the defendants filed a motion to quash the panel, and the motion was overruled without allowing the defendants to introduce testimony. This Court held that such proceeding was error. Here is a portion of that opinion:

"Did the court err in refusing to hear testimony on the motions? While no written pleas were required of the State in answer to the motions, yet it does not appear that the State, orally or otherwise, in any manner controverted the facts set forth in the motions. The prosecuting attorney did not ask that witnesses be called to disprove the allegations. But the appellants prayed that the 'jury commissioners who selected the juries be summoned to testify upon this motion,' and that the indictments be quashed, and the present panel of the petit jury be set aside. The record thus shows an offer and attempt upon the part of the appellants to introduce evidence in support of their motions. *Brownfield* v. *S. Car.,* 189 U. S. 427. Under these circumstances the ruling of the court in refusing the prayer of appellants to hear evidence on

the motions was but tantamount to disposing of the same as if on demurrer. *Castleberry* v. *State,* 69 Ark. 346. The ruling of the court was equivalent to saying that the facts, although properly pleaded and true, were in law not sufficient. In *Castleberry* v. *State, supra,* after quoting from *Carter* v. *Texas, supra,* (177 U. S. 442, 20 S. Ct. 687, 44 L. Ed. 839), we held that it was error to overrule a similar motion, and concluded the opinion by saying: 'The Court below erred in overruling the motion to quash without hearing the evidence. The appellant was entitled to introduce testimony to sustain the allegations in his motion.' This doctrine was also recognized in *Franklin* v. *State,* 85 Ark. 534, 109 S. W. 298, 24 S. Ct. 257, but in that case the motion was overruled because the defendant did not offer to introduce evidence in support of it. See, also, *Brownfield* v. *So. Carolina, supra; Rogers* v. *Alabama,* 192 U. S. 226. In the last case it is said: 'It is a necessary and well settled rule that the exercise of jurisdiction by this court cannot be declined where it is plain that the fair result of a decision is to deny the rights.' In that case the State trial court had stricken from the files a motion similar to the ones under review here because of its length.

"In *Whitney* v. *State,* 42 Tex. Crim. R. 283, 59 S. W. 895, the Supreme Court of Texas, after citing *Carter* v. *Texas, supra,* and other decisions of the Supreme Court of the United States, says: 'We understand the court to have held in *Carter* v. *State,* above, that wherever the Federal question is made it is the duty of the court to probe the matter in order to determine whether or not the Fourteenth Amendment had been violated in the formation of the jury.'. We cannot escape the conclusion, therefore, that the court erred in refusing to hear evidence upon appellants' motions and in overruling such motions without hearing the evidence. In addition to the other authorities above cited, see *Yick Wo* v. *Hopkins,* 118 U. S. 356; Brannon on the 14th Amendment, p. 336, *et seq.; Bush* v. *Kentucky,* 107 U. S. 110; *Ex parte Virginia,* 100 U. S. 339; *Rogers* v. *Alabama,* 192 U. S. 226; Collins on the 14th Amendment, p. 73; *Collins* v. *State,*

60 S. W. 42; *Bullock* v. *State,* 47 Atl. 62; see Taylor on Due Process of Law, p. 329, *et seq.*"

The holding was summarized in this language: "A majority of the court is of the opinion that the trial court erred in refusing to hear evidence on the motions to set aside the regular panel of the petit jury and erred in overruling such motions without hearing the evidence. The above errors must cause a reversal in all the cases."

Bone v. *State,* 198 Ark. 519, 129 S. W. 2d 240, was decided by this Court on June 5, 1939. In that case, the defendant had filed a motion to quash the panel because Negroes had been excluded. In an effort to remedy that situation, the trial court excused three white jurors, and summoned in lieu thereof three Negro jurors. Even that proceeding was held to be irregular, and the judgment of conviction was reversed. Mr. Justice Baker, speaking for this Court, said:

"This is not a case of first impression on this subject in this state. A very similar matter was up for consideration and hearing nearly twenty years ago in the case of *Ware* v. *State,* 146 Ark. 321, 225 S. W. 626. In that case a similar question was presented to the trial court, as was before the circuit court of Pulaski County in this case. A motion was filed in that case alleging identical facts, with a similar prayer, that is to say, that Negroes had been excluded from jury service because of, and on account of their race or color, and that this was a denial of equal protection of the law under the provisions of the Fourteenth Amendment to the Constitution of the United States. In addition to the allegation of these facts, the pleader in the Ware case offered by a statement in the motion to make proof of the facts alleged, but in that case, as in this, the court, without hearing any evidence, overruled the motion and put the defendants to trial. It may be said that in neither case does the record disclose what the proof would have been had the court not promptly overruled the motion filed. In the Ware case, *supra,* the court held that the challenge to the petit jury, made when the jury was called for the trial, was in due time.

"One of the errors found in the Ware case was in the fact, as disclosed by the opinion, that it was error to overrule the motion without hearing evidence in support of its allegation. Of course, this implies that had the court heard this evidence, and if it had been sufficient to establish the fact of the systematic exclusion from jury service of members of the Negro race solely on account of race or color, it was the duty of the court, upon such finding, to quash the venire or jury panel so formed under such conditions and circumstances. The court so declared.

"The last statement finds conclusive authority and support in many decisions of the United States Supreme Court, some of which will be cited in our discussion."

It is not a question of whether the defendant in the case at bar had a fair trial, or whether he was guilty. The point is, that he raised a Federal question; and it was the duty of the trial court to allow him to introduce evidence in his effort to develop his proof on the Federal question. Because he was not accorded such right to introduce proof, I think the case should be reversed and the cause remanded for a development of the proof on the Federal question. I therefore respectfully dissent from the affirmance of this case; and I am authorized to state that Mr. Justice HOLT joins me in this dissent.

FAITH *v.* EPPERSON.

4-8625 214 S. W. 2d 223

Opinion delivered October 25, 1948.

Elbert W. Price, for appellant.

Yingling & Yingling, for appellee.

ROBINS, J. The lower court, on demurrer by appellee, held appellants' complaint for specific performance insufficient and entered decree dismissing same. Appellants prosecute appeal from that decree.

The allegations of appellants' complaint were, in substance, that appellants, being the owners of a certain lot in Searcy, Arkansas, agreed to sell same to appellee for $2,000, and were paid thereon $30, for which they gave written receipt to appellee; that in conformity with the agreement appellants executed a deed and had prepared an abstract, which they left with a third party for delivery to appellee; but that appellee had failed and refused to accept the deed and abstract, which were tendered into court.

The prayer of the complaint was that appellee be required to pay into the registry of the court the balance of $1,970 due on the purchase money.

For reversal of the lower court's decree appellants cite cases holding that delivery of possession of real estate under a verbal contract will take such a contract out of the statute of frauds and that delivery of a deed to a third party as agent for the grantee effects a transfer of the title.

But in those cases the question to be determined was whether such delivery of the possession of the land, or delivery of the deed to the escrow agent, was binding on the vendor.

In the complaint in this case it was not alleged that there was any writing signed by the vendee, as required by § 6059, Pope's Digest, or that the vendee had taken possession of the land. We have held that the rule that delivery of a deed in escrow takes the contract out of the statute of frauds applies only in favor of the vendee. *Barr* v. *Johnson,* 102 Ark. 377, 144 S. W. 527; 19 Am. Jur.

428. The complaint of appellants therefore failed to allege a contract binding on appellee.

The decree of the lower court was correct and it is affirmed.

McCULLOCH *v.* McCULLOCH.

4-8618 214 S. W. 2d 209

Opinion delivered October 25, 1948.

Robert L. Rogers, II, and *Wayne W. Owen,* for appellant.

Clark & Clark and *John W. George,* for appellee.

HOLT, J. Appellant, Irene McCulloch, brought this action August 31, 1946. She alleged in her complaint that on May 6, 1914, she married Joe McCulloch, the son of R. B. and Etta A. McCulloch; that prior to this marriage, Joe had prevailed upon his father to purchase a lot in Conway, and erect a house thereon for him and Irene to occupy as a home; that Joe repaid his father the purchase price and thereafter, R. B. McCulloch executed a deed conveying the property to Joe, which deed was delivered but never recorded. She further alleged that she has occupied the house since her marriage to Joe in 1914; that Joe died in 1921; that R. B. McCulloch died testate in 1935, and, under the terms of his will, devised all his real estate to his wife; that Etta A. McCulloch, his wife, died testate in 1946, devising all her real estate (which included the property here) to Ben McCulloch, appellee; that in 1931, Joe's father and mother executed a mortgage on the property to appellee which constitutes a cloud upon appellant's title. Her prayer was that such mortgage be declared subject to the title of appellant; that the deed from R. B. McCulloch be established and that title to the property be declared in appellant by virtue of adverse possession for more than seven years.

Appellee answered with a general denial and affirmatively pleaded that this appellant, Irene McCulloch, has been at all times a tenant at will of R. B. McCulloch and his successors in title; that during all the time of her occupancy of the property R. B. McCulloch and his successor in title "paid taxes on said property, kept the improvements and repairs on said property and paid for the same, and otherwise exercised rights of ownership over said property"; that appellee is the unconditional

owner of the property, terminates the tenancy of appellant and demands possession of the property.

From a decree in favor of appellee is this appeal.

Appellant says: "The action was filed and tried on the lost deed theory, and statute of limitations, and we believe the great preponderance of the evidence established the execution and delivery of such deed. The evidence not only established the deed but also, we think, clearly established a parol gift of the land which was accompanied by adverse possession and the making of valuable improvements."

The rule is well established that the evidence required to prove and establish a lost deed must be clear, satisfactory and convincing, though it need not be undisputed. We said in *Dillard* v. *Harden,* 197 Ark. 586, 124 S. W. 2d 10: "Now, while it is true, as said by the court below, that the testimony must be 'clear, concise and satisfactory,' it is not required that it be undisputed. It is sufficient if the testimony which we credit and accept as true shows clearly, concisely and satisfactorily that the deed sought to be restored had in fact been executed and delivered," and in *Slaughter* v. *Cornie Stave Company,* 172 Ark. 952, 291 S. W. 69, we said: "It is the settled rule in this state that parol evidence to prove the contents of a lost deed should show that the deed was duly executed as required by law, and should show substantially all its contents by clear, convincing and satisfactory evidence. *Hooper* v. *Chism,* 13 Ark. 496; *Nunn* v. *Lynch,* 73 Ark. 20, 83 S. W. 316; *Kennedy* v. *Gilkey,* 81 Ark. 147, 98 S. W. 969; *Queen* v. *Queen,* 116 Ark. 370, 172 S. W. 1018, Ann. Cas. 1917A, 1101; *Wasson* v. *Walker,* 158 Ark. 4, 249 S. W. 29; and *Langston* v. *Hughes,* 170 Ark. 272, 280 S. W. 374.

"An excellent statement of the rule was made by Chief Justice MARSHALL in *Tayloe* v. *Riggs,* 1 Pet. 591, 7 L. Ed. 275. It is as follows: 'When a written contract is to be proved, not by itself but by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satis-

factorily, and, if that cannot be done, the party is in the condition of every other suitor in court who makes a claim which he cannot support.'"

After reviewing the testimony, we hold that appellant upon whom the burden rested, under the above rules, has failed to produce the measure of proof required.

Briefly stated, the material facts were to the following effect: Before the marriage of Joe and Irene McCulloch in May, 1914, Joe's father, R. B. McCulloch, bought a lot on which he erected a house. Immediately following their marriage, he permitted them to occupy this property, free of rent, insurance, taxes and upkeep. In 1917, Joe joined the Naval forces and was away until sometime in 1919, when he returned to his family, which then consisted of his wife and their two small children. He remained a few weeks, went to Florida, joined some rum runners off the coast of that state, and has not been heard from since. From the date that appellant first occupied the property in 1914, R. B. McCulloch controlled it until his death. He permitted Irene and the children to occupy it without any cost and assisted her with her living expenses. As indicated, the property at all times was assessed, and insurance carried, in the name of R. B. McCulloch or his predecessors in title. No deed to this property to either Joe or Irene, or to both, has ever been recorded or found. While Irene testified that Joe had paid his father for this property, owned it, and that she had seen and read a deed to it, she could not describe the deed with any certainty as to date, consideration, description of the property, or name the officer taking the acknowledgment. The great preponderance of the evidence shows that Joe did not pay for the property.

One other witness, Herbert Maddox, testified that he saw a deed from R. B. McCulloch to Joe, but he was unable to give any information as to the date of the deed, the consideration, the name of the officer taking the acknowledgment, or whether it was a warranty or quitclaim deed. On the property described, he testified: "Q. Did you ever see a deed from R. B. McCulloch and wife to Joe McCulloch wherein lot two (2) and the east half (E½) of lot three (3), block fifteen (15), Harkrider's

Addition to the City of Conway, Arkansas, were conveyed? A. The deed I saw was from R. B. McCulloch. I do not remember whether Irene McCulloch's name was in the deed or not."

A number of witnesses gave testimony that strongly tended to contradict appellant's present claim of ownership. Mrs. H. J. Gwatney testified that some time in 1935 in a conversation in the W.P.A. work room, appellant said to her: "I don't have to pay any taxes or rent, because the house belongs to Ben (appellee)."

Harold Gist testified that about the time that R. B. McCulloch died, appellant had chosen some cheap wallpaper to be put in the house and he was trying to induce her to buy a better grade, that she remarked "that she did not know how long they would let her live there, that she did not want to spend any more on the place than she had to."

Mrs. Bess McHenry testified that she had a conversation with appellant about fifteen years ago about putting gas in the house and that appellant "said she was not going to put gas in the old house because it did not belong to her and she was not going to put any improvements on the place when it did not belong to her."

There was other testimony of similar effect, which we do not detail.

It appears undisputed, as alleged in appellant's complaint, that in 1931, R. B. and Etta A. McCulloch executed a mortgage on the property to appellee.

Jacob Becht, now of Sonora, California, testified that he saw R. B. McCulloch give checks in payment for the construction of the house.

Without detailing more of the testimony, it suffices to say that we think the preponderance of the evidence shows that appellant at all times has occupied the property in question as a tenant at will or by sufferance, and not as owner.

On the question of whether appellant has acquired this property by adverse possession, we think the evi-

dence falls far short of establishing title in appellant in this manner. What is necessary to constitute adverse possession was announced by this Court in *Watson* v. *Hardin,* 97 Ark. 33, 132 S. W. 1002, as follows: "It is well settled by the authorities that this possession must be actual, open, continuous, hostile, exclusive and be accompanied by an intent to hold adversely and in derogation of and not in conformity with the right of the true owner. . . . It must be hostile in order to show that it is not held in subordination and subserviency to the title of the owner."

Here, appellant's possession, as above noted, was shown to be by sufferance or permission only.

Nor do we think appellant has established a parol gift of the property to her. We said in *Young* v. *Crawford,* 82 Ark. 33, 100 S. W. 87: " 'A parol gift of land,' says Prof. Pomeroy, 'will not be enforced unless followed by possession and by valuable improvements made by the donee, or unless there are some other special facts which would render the failure to complete the donation peculiarly inequitable and unjust.' " See, also, *Akins* v. *Heiden,* 177 Ark. 392, 7 S. W. 2d 15, and *Hunt* v. *Boyce,* 176 Ark. 303, 3 S. W. 2d 342. In *Akins* v. *Heiden, supra,* we said: "The general rule is that evidence necessary to establish a parol gift of land must be clear and unequivocal."

Here, we find no evidence that appellant made any substantial improvements on the property nor any other special facts to warrant completion of a parol gift.

The decree is correct and is affirmed.

ROBINS, J., disqualified and not participating.

GILLIOZ *v.* KINCANNON, JUDGE.

4-8575 214 S. W. 2d 212

Opinion delivered October 25, 1948.

[redacted]

Harper, Harper & Young and *J. W. Durden,* for petitioner.

Paul X. Williams and *George E. Lusk, Jr.,* for respondent.

HOLT, J. This action is an original proceeding wherein M. E. Gillioz, petitioner, seeks a "Writ of Prohibition" to enjoin Judge J. O. Kincannon, Judge of the Logan Circuit Court, Southern District, from assuming jurisdiction in three separate tort actions instituted by different plaintiffs, one by J. L. Strickland and L. J. Willis, a second by Jess Tillery, and a third by C. A. Gantt, against petitioner, M. E. Gillioz.

Petitioner alleged in his petition that on August 23, 1947, the above plaintiffs sued him along with H. J. Doty, alleging that petitioner and Doty "while engaged in doing business in the State of Arkansas, clearing an area known as the Blue Mountain Dam area in South Logan county, Arkansas, carelessly and negligently set fire to grass and timber adjoining plaintiffs' lands on the ..... day of August, 1946, without giving notice to these plaintiffs; and fire spread to plaintiffs' lands and burned and injured the lands and growing timber, the meadows and the grazing land, and prayed judgment against the defendants for $2,500, costs. . . ."

That constructive service was had on petitioner, Gillioz, who was a nonresident, living in Monette, Missouri, that said service was had in accordance with the provisions of Act 347 of the 1947 acts of the Legislature.

He further alleged "that on September 16, 1947, defendant, M. E. Gillioz, appearing specially for the purpose of presenting his motion and for no other purpose and at all times objecting to the jurisdiction of the court over his person, filed a verified motion to quash service of summons alleging that the attempted service of summons upon him by serving summons on C. G. Hall, Secretary of State of the State of Arkansas, and by notifying said defendant by United States mail by sending copy of summons and copy of complaint to him under the provisions of Act 347 of the Acts of Arkansas for

1947, was void and did not give the court jurisdiction over the person of this defendant for the reason that the provisions of Act 347 of the Acts of Arkansas for 1947 are void as being in contravention of the Constitution of the United States and the Constitution of Arkansas; defendant further stated in his motion that even if Act 347 of 1947 be not unconstitutional for the reason aforesaid, service could not be had upon this defendant under provisions of this Act for the reason that the complaint showed on its face that the cause of action sued upon arose prior to the adoption of said Act and the General Assembly of the State of Arkansas was without power to make the provisions retroactive, since it affects a substantive right of this defendant; defendant further stated that at the time of the filing of this action and at the time of the attempted service upon him, he was not engaged in any business in the State of Arkansas, is not now so engaged and has not been engaged in business in the State of Arkansas since the filing of this action; that on January 16, 1948, said Motion to Quash Service of Summons was presented to the court and after hearing the verified motion and considering the pleadings filed, the same was overruled, to which ruling of the court the petitioner excepted; . . .

"That the Logan Circuit Court, Southern District, is exercising or threatening to exercise jurisdiction over the person of M. E. Gillioz, a resident of the State of Missouri, in a cause of action which arose out of alleged acts of this petitioner, which according to the complaint, occurred during the year of 1946."

Petitioner, Gillioz, concedes that this case comes within the provisions of Act 347 of 1947 and that the procedure therein outlined for a nonresident service was followed. He earnestly contends, however, (1) that this Act is unconstitutional in its entirety and (2) that, in any event, that part of § 4 which provides that its provisions shall be applicable retroactively is void.

(1)

The Act contains the following provisions: "Section 2. Any nonresident person, firm, partnership, general or

limited, or any corporation not qualified under the Constitution and Laws of this state as to doing business herein, who shall do any business or perform any character of work or service in this state shall, by the doing of such business or the performing of such work, or services, be deemed to have appointed the Secretary of State, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident, upon whom process may be served in any action accrued or accruing from the doing of such business or the performing of such work, or service, or as an incident thereto by any such nonresident, or his, its or their agent, servant or employee. Service of such process shall be made by serving a copy of the process on the said Secretary of State, and such service shall be sufficient service upon the said nonresident of the State of Arkansas, provided that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff, or his attorney, to the defendant at his last known address, and the defendant's written return receipt, or the affidavit of the plaintiff, or his attorney of compliance herewith are appended to the writ of process and entered in the office of the clerk of the court wherein said cause is brought. The court in which the action is pending may order such continuance as may be necessary to afford the defendant, or defendants, reasonable opportunity to defend the action.

"Section 3. Service of summons when obtained upon any such nonresident as above provided for the service of process herein shall be deemed sufficient service of summons and process to give to any of the courts of this state jurisdiction over the cause of action and over such nonresident defendant, or defendants, and shall warrant and authorize personal judgment against such nonresident defendant, or defendants, in the event that the plaintiff prevails in the action.

"Section 4. The provisions of this Act shall be applicable both retroactively and prospectively.

"Section 5. Each paragraph, each sentence and each clause of this Act shall be treated and construed as be-

ing separable and the invalidity of any paragraph, sentence or clause shall not affect the validity of the other paragraphs, sentences or clauses."

It is admitted that the tort actions involved here arose in August, 1946, prior to the passage and approval by the Legislature of Act 347 in 1947.

We have reached the conclusion that the Act, insofar as it is prospective, is constitutional and a valid exercise of the legislative authority, but invalid and unconstitutional insofar as it attempts to make its provisions retroactive, in effect, and we therefore hold that the service here on the petitioner is void.

On the question of the constitutionality of Act 347 of 1947, it appears that the same procedure, in effect, for service of process on nonresidents, not qualified to do business in this state and who shall do any character of work or service in Arkansas, was required by Act 94 of 1941, applying to the practice of optometry, but the constitutionality of Act 94 was upheld by this court in *Ritholz* v. *Dodge, Chancellor,* 210 Ark. 404, 196 S. W. 2d 479, 167 A. L. R. 705. The same procedure, in effect, was required by Act 39 of 1933 affecting nonresident motorists and the consttiutionality of that Act was sustained in *Kelso* v. *Bush,* 191 Ark. 1044, 89 S. W. 2d 594. See, also, *Yocum* v. *Oklahoma Tire & Supply Co.,* 191 Ark. 1126, 89 S. W. 2d 919, in which Act 70 of 1935 a companion Act to Act 39 of 1933, *supra,* which permitted substituted service on nonresident owners by service on their agents when engaged in the particular business set out in the act.

In discussing the constitutionality of Act 347 of 1947, here involved, then considered prospectively only, Dr. Leflar in 1 Ark. Law Rev., No. 4, page 201, makes the following comment: "The principal purpose of Act 347 of 1947 was to extend the circumstances in which Arkansas courts may exercise personal jurisdiction to render judgments *in personam* on constructive service against nonresident defendants in suits on causes of action arising out of acts done by such defendants in Arkansas," and on the validity of the Act, said: "The

basic problem is the same as that which arose under the 1935 enactment (Act 74) referred to above. It has long been recognized that the doing of acts within the state is a sufficient basis for personal jurisdiction over foreign corporations, even though the artificial language of implied consent and presumed presence was sometimes used in the cases as a make-weight to sustain jurisdiction. The same reasoning sometimes with some of the same make-weights, sustained jurisdiction against nonresident motorists in actions for damages arising out of highway accidents in which they participated. The United States Supreme Court has sustained state jurisdiction over the nonresident members of a firm or partnership on causes of action arising out of the firm or partnership business done in the state. (Citing *H. L. Doherty & Co.* v. *Goodman,* 294 U. S. 623, 55 S. Ct. 553, 79 L. Ed. 1077.) It is today established that the true basis for jurisdiction by constructive service on a nonresident under such circumstances is the fact of doing acts or causing them to be done, in the state, the acts being of the type so affecting the public interest, in that they are apt to give rise to causes of action in local citizens, that such police regulation as is represented by these statutes is allowable. This theory has been definitely adopted by the Arkansas Supreme Court in upholding the 1935 enactment."

In the Doherty case, *supra,* cited by Dr. Leflar, a nonresident citizen of New York was doing business in Iowa through an agent. In the present case, it is conceded that petitioner, Gillioz, a nonresident, was doing business in Arkansas, either in person or by agent. In upholding the constitutionality of the statute, the court said: "By its terms and under our holdings, the statute is applicable to residents of 'any other county' than that in which the principal resides, whether such county be situated in Iowa or in some other state. In other words the statute does apply to nonresidents of Iowa who come within its terms and provisions, as well as to residents. . . . The statute is applicable to individual nonresidents who come within its express terms and provisions. . . .

"The statute in question does not in any manner abridge the privileges or immunities of citizens of the several states. It treats residents of Iowa exactly as it treats residents of all other states. . . .

"The justice of such a statute is obvious. It places no greater or different burden upon a nonresident than upon the resident of this state. . . . A nonresident who gets all the benefit of the protection of the laws of this state with regard to the office or agency and the business so transacted ought to be amenable to the laws of the state as to transactions growing out of such business upon the same basis and conditions as govern residents of this state."

In the case of *International Shoe Co.* v. *Washington,* 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057, in which constructive service was involved, the following rule was announced: "Historically the jurisdiction of courts to render judgment *in personam* is grounded on their *de facto* power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. Ed. 565. But now that the *capias* and *respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

In the case of *Sugg* v. *Hendrix,* 142 Federal Reporter, 2nd series, p. 740, the Circuit Court of Appeals, 5th Circuit, upheld the constitutionality of a Mississippi statute similar (except that there is no retroactive clause) to Act 347, *supra,* in fact, being in all material provisions almost an exact copy of our Act. In that case, quoting from the court's statement, it was said: "The process on the defendant was under the aforementioned statute, which the defendant, appearing specially, moved to quash, asserting that the statute was

unconstitutional in that a state could not provide for other than personal service of process upon a nonresident individual so as to subject him to a money judgment merely because such individual nonresident was doing business in the state. He insists that the statute denies nonresident individuals: (a) Due process of law; (b) the equal protection of the law; and (c) the same privileges and immunities as are allowed resident citizens. The court below was of the opinion that *Flexner* v. *Farson,* 248 U. S. 289, 39 S. Ct. 97, 63 L. Ed. 250, was decisive and the process was quashed on the strength of the holding in that case," and in reversing the action of the court, the court used this language: "The statute in question takes due precaution to insure the defendant of the receipt of the notice and of a reasonable opportunity to appear and to defend the case. Since the Act does this, and since it makes the nonresident who does business in the state through managers, superintendents, and foremen, or *in absentia,* subject to process only in actions for damages arising out of such business in the same manner as a resident, we are of the view that it does not deny the defendant the equal protection of the law, due process of the law, nor deny to him any privileges and immunities that are afforded to a resident of the state. . . . The thought is not shocking that one who comes into a state for the purpose of conducting his business in that state should be made amenable to the courts and laws of the state and answerable to its citizens for damages sustained by them which were the result of the business transacted in the state."

Our conclusion, therefore, as has been indicated, is that Act 347 is constitutional, in its prospective operation, and applies to all nonresidents "not qualified under the constitution and laws of this state as to doing business herein, who shall do any business or perform any character of work or service in this state," subsequent to the effective date of the said Act, and does not violate any constitutional right of such nonresident since it provides for a form of service, the effect of which is to give the defendant actual notice. It does not violate the

due process clause since it requires a legal basis for jurisdiction, that is the nonresident, defendant, must have done some business, work or service within the state. It does no violence to the privileges and immunities clause because it does not discriminate between nonresidents but places them upon the same basis as residents.

(2)

As above noted, petitioner's contention that the retroactive application of Act 347, in the circumstances here, is unconstitutional and void, must be sustained for the reason that to uphold its retroactive effect would destroy a substantive right which petitioner enjoyed prior to its enactment and at the time the tort actions here arose.

We cannot agree with respondent's contention that the Act is procedural only.

The rule appears to be well settled generally that retrospective laws as the one here, are unconstitutional if they interfere with substantive, or substantial rights, and are valid only when they effect remedies or procedure. C. J. S. 16, p. 861, § 417 *et seq.*

"Rights conferred by statute are determined according to statutes which were in force when the rights accrued and are not affected by subsequent legislation. The Legislature has no power to divest legal or equitable rights previously vested." *Coco* v. *Miller,* 193 Ark. 999, 104 S. W. 2d 209.

In 50 Amer. Jur., p. 493, § 477, the author says: "Because every law that takes away or impairs vested rights under existing laws, is generally reprehensible, unjust, oppressive, and dangerous, such retroactive laws have not been looked upon with favor, but with disfavor, so that courts are loath to give a statute such effect. To the contrary, a prospective interpretation of statutes affecting substantive rights is favored. It is a maxim, which is said to be as ancient as the law itself, that a new law ought to be prospective, not retrospective, in its operation *(nova constitutio futuris formam imponere debet, non praeteritis).*"

In the instant case, petitioner came into Arkansas to transact a lawful business. He remained here either in person or by agent until his work was completed. At the time of his departure, there was no law in effect here providing for an *in personam* judgment against him on constructive service.

The act, *supra,* provided that Gillioz, by performing certain acts in this state shall be deemed to have appointed the Secretary of State as his agent upon whom service might be had. The creation of this agency, which agency did not exist at the time the act was done, was not a mere "procedural matter," but in effect contractural.

We conclude, therefore, that under the above authorities and announced rules, petitioner has been denied substantive rights and accordingly, the writ prayed must be and is granted.

NANCE *v.* EILAND.

4-8620 214 S. W. 2d 217

Opinion delivered October 25, 1948.

John F. Park, for appellant.

Rose, Dobyns, Meek & House, for appellee.

MINOR W. MILLWEE, Justice. Appellants, R. G. Nance and Lonnie Dallas, were engaged as partners in the brokerage and agency business in the City of Little Rock in 1946 under the trade name of "Arkansas Business Brokers." In February, 1946, they hired appellee, G. C. Eiland, as a salesman under an oral contract of employment on a commission basis. Under the employment agreement appellee was to furnish his car, time and efforts in the promotion of the business for which he was to receive 50% of the commission which appellants charged a customer, if appellee obtained the listing of the property for sale from the customer and then sold the property; 40% of said commission, if appellee sold property which had been listed by another agent or member of the firm; and 10% of said commission, if he obtained a listing of property which was sold by another agent.

According to the testimony of appellee, appellants further agreed, as a part of the original contract of employment, that they would not "cancel out" on him; that is, they would not release the customer from his contract with appellants prior to its expiration date.

Appellants, in their testimony, stoutly denied this part of the agreement.

On March 5, 1946, W. A. Kail came to appellants' office and listed his automobile supply business for sale. Appellee obtained the written contract from Kail giving appellants the exclusive right, for a period of sixty days, to sell Kail's business for a commission of 10% of the gross amount for which the property sold. Appellee began work on the contract and interviewed several prospects. He brought some of them to Kail's place of business for inspection of the property and conferences with the seller.

Appellee testified that Kail called him on April 16, 1946, about a modification, or release, of the contract; that at appellee's suggestion Kail came to the office and after a discussion with appellant Dallas and appellee, it was agreed that Kail, who had himself found a buyer, should have the right to make a direct sale and pay a reduced commission of 5%; that Dallas then and there also agreed with appellee that, if the latter would consent to the proposed modification of the contract with Kail, he would be paid one-half of the 5% commission to be paid by Kail; and that appellant Nance, who later learned of the transaction, at first objected but subsequently agreed to the payment of 50% of the commission to appellee.

This testimony was disputed by appellants who testified that the agreement permitting Kail to make a direct sale was made in the absence of appellee and without any agreement to pay him one-half the commission; and that they subsequently agreed to pay appellee the listing fee of 10% of the commission.

Kail sold the property on April 16, 1946, and paid appellants $833.30, the amount of the 5% commission. On May 9, 1946, appellants tendered their check in the amount of $83.30 to appellee by mail in full settlement of his commission. The tender was refused and on May 23, 1946, appellee instituted this action to recover one-half of the 5% commission amounting to $416.65.

In their answer, appellants denied all allegations of the complaint except the tender of $83.30 in full payment of appellee's services, which they admitted. In an amendment to the answer they asserted that the alleged agreement to pay appellee one-half of the commission was without consideration and unenforceable.

The cause was submitted to a jury resulting in a verdict and judgment for appellee for $416.65.

Appellants' first contention for reversal is that the complaint should have been dismissed because it does not state facts sufficient to constitute a cause of action. It is insisted that the complaint failed to allege any promise on the part of appellee as a consideration for the alleged promise of appellants to pay him 50% of the commission. The complaint is defective in this respect, but this deficiency in pleading was cured by proof on the part of appellee, which was admitted without objection from appellants. In *Barnes* v. *Hope Basket Company,* 186 Ark. 942, 56 S. W. 2d 1014, Justice BUTLER, speaking for the court, said: "It is always within the sound discretion of the court to permit a complaint to be amended to conform to the proof; and where the allegations in the complaint are insufficient, it is proper at the conclusion of the evidence to treat the complaint as amended to conform to the proof, where there are no objections to the introduction of the evidence and no claim of surprise is made. *K. C. Sou. Ry. Co.* v. *Rogers,* 146 Ark. 232, 225 S. W. 640; *L. & C. Co.* v. *Sanders,* 173 Ark. 362, 292 S. W. 657; *Thomas* v. *Spires,* 180 Ark. 671, 22 S. W. 2d 553." Appellants did not question the sufficiency of the complaint by demurrer or motion to dismiss. They did not claim surprise when appellee testified that they agreed that he would have the full "listing time" to work on his prospects and that they would not release the customer from his contract during this period. The trial court had the right, therefore, to treat the complaint as amended to conform to this proof.

The second contention of appellants, closely related to the first, is that the trial court erred in refusing to direct a verdict in their favor because no consideration

was shown for the alleged agreement of appellants to pay appellee one-half of the 5% commission. Among the cases cited in support of this contention is *Feldman* v. *Fox,* 112 Ark. 223, 164 S. W. 766, where the court said: "If no benefit is received by the obligee except what he was entitled to under the original contract, and the other party to the contract parts with nothing except what he was already bound for, there is no consideration for the additional contract concerning the subject matter of the original one." Appellants insist that they received no new benefit by making a promise to pay appellee one-half the commission and that appellee suffered no detriment and parted with nothing except what he was already bound for under the original contract.

The jury was warranted in finding that appellants agreed, as a part of their original contract with appellee, that they would not release a customer from the listing contract until its expiration date. At the time Kail sought permission to make a direct sale and pay a reduced commission, his contract with appellants had 18 days yet to run. Appellee testified that he had at least one "live prospect" for sale of the property at that time. If so, he still had 18 days in which to effect a sale of the property at a commission in twice the amount for which he obtained judgment. If appellee agreed that Kail might be released from the original contract on the condition that he be given one-half the reduced commission, as he testified, then he surrendered a valuable right in that he was thereby deprived of an opportunity of making a sale within the 18-day period at a higher commission. Thus, the new promise to appellee that appellants would pay him one-half the commission is based upon the agreement on his part to release them from their original promise not to allow the customer to cancel out prior to the expiration date of the listing contract. We hold that the agreement on appellee's part to release appellants from their prior obligation afforded sufficient consideration for the new promise, and that the court correctly denied appellants' request for a directed verdict.

It is next contended that the court erred in modifying appellants' requested instruction No. 3 which reads as follows:

"You are instructed that under the undisputed evidence in this case, the property involved was not in fact sold by the plaintiff, and therefore under the terms of the original employment contract between the plaintiff and defendants, the plaintiff would only be entitled to 10% of the commission earned by the defendants, which is the sum of $83.30, and which sum has been tendered in open court to the plaintiff by the defendant.

"On the other hand, the plaintiff contends that the original contract between him and the defendants was changed by a new agreement, with reference to this particular sale only, under which new agreement plaintiff was to receive 50% of the commission, even though plaintiff did not himself make the sale.

"You are instructed that before you can return a verdict for the plaintiff in this case in any sum in excess of $83.30, which defendants admit they owe, you must first find, from a preponderance of the evidence that two conditions existed with reference to such alleged new agreement:

"1st. That such alleged new agreement was actually entered into between the plaintiff and the defendants; and

"2nd. That such alleged new agreement, if you find that same was entered into by the parties, was based upon a valuable consideration.

"And in this connection you are instructed that in order to make a contract binding there must be a consideration. To be a consideration there must be a benefit to the party promising or a loss or detriment to the party to whom the promise is made."

The trial court amended said instruction and gave it in a modified form, as follows:

"You are instructed that the plaintiff contends that the original contract between him and the defendants

was changed by a new agreement, with reference to this particular sale only, under which new agreement plaintiff was to receive 50% of the commission, even though plaintiff did not himself make the sale.

"You are instructed that before you can return a verdict for the plaintiff in this case in any sum in excess of $83.30, which defendants admit they owe, you must first find, from a preponderance of the evidence that such alleged new agreement was actually entered into between the plaintiff and the defendants."

We think the trial court properly eliminated the first paragraph of the requested instruction. This part of the instruction would have been misleading to the jury in that it purported to set out the terms of the original contract without reference to the highly disputed question of fact as to whether appellants had agreed in the original contract that they would not release a customer from his listing contract until its expiration date. The court had already told the jury in instruction No. 1 requested by appellee that this disputed question of fact should be found in appellee's favor before he was entitled to recover. The effect of paragraph 1 of appellants' requested instruction No. 3 was to eliminate this term from the original contract.

The modification of the last two paragraphs of the requested instruction presents the most difficult question in the case. A determination of this question is dependent on whether the trial court had a right to determine as a matter of law that the promise of appellants to pay appellee one-half the 5% commission was based on a valuable consideration, provided the jury found that appellants agreed as a part of the original contract of employment that they would not cancel out the contract of a customer prior to its expiration date. We again point out that an affirmative finding of the agreement not to cancel out was made a condition of recovery in appellee's requested instruction No. 1 given by the court. Appellants ignored this feature of the contract in all their requested instructions and the only fact question that was submitted to the jury in the re-

quested instruction was whether appellants agreed to pay appellee one-half the reduced commission. If appellants desired to have the question of their agreement not to cancel out put to the jury in another form, it should have been submitted in the form of a fact question and not one of law for the jury to determine.

Appellants rely on the case of *Nakdimen* v. *First National Bank,* 177 Ark. 303, 6 S. W. 2d 505, where the trial court gave an instruction, No. 6½, which is practically identical with the last paragraph of appellants' requested instruction No. 3. The appellee bank made no objection to the giving of the instruction in that case and this court did not pass upon the propriety of the instruction. In that case the trial court also refused to give instructions requested by appellant Nakdimen containing abstract definitions of the term "valuable consideration." On the contrary, the jury was told in another instruction, which was approved, that the agreement of the appellee bank to pay the debts of another bank was sufficient consideration to support a promise of appellant Nakdimen to pay $5,000, if the jury found such promise was made.

So here, the effect of appellee's requested instruction No. 1 was to tell the jury that appellants' agreement not to cancel out, if made, was sufficient consideration to support their promise to pay appellee one-half the 5% commission. The jury found by their verdict that appellants made the agreement not to cancel out, and it follows as a matter of law that there was a sufficient consideration for the new agreement. We, therefore, find no reversible error in the court's modification of instruction No. 3 requested by appellants.

Appellants finally insist that the trial court erred in giving appellee's requested instruction No. 1, which was specifically objected to on the ground that it was abstract and ignored appellants' defense of lack of consideration for the substituted agreement. This instruction was a binding instruction in that it undertook to tell the jury the conditions under which a verdict should be returned for the plaintiff. Appellants say in their brief:

"All the jury had to find, under this instruction was that 'Dallas asked the plaintiff, Eiland, to consent to that modification; that the plaintiff Eiland consented thereto upon the express condition that the defendant would pay him one-half of the total commission they might receive; that the defendant, Lonnie Dallas, agreed to that condition—.' " Appellants have overlooked that part of the instruction requiring the jury to find "that they agreed they would not allow any seller to cancel out prior to the expiration of the listing contract," before they could find for appellee. Since we hold that the trial court correctly determined that a finding of fact in favor of appellee on this issue supplied a valuable consideration for the agreement of appellants, we find no error in this assignment. The instruction is long and fully covered all the issues before the jury.

Finding no prejudicial error, the judgment is affirmed.

NOWLIN *v.* KREIS.

4-8681 214 S. W. 2d 221

Opinion delivered October 25, 1948.

Ben C. Henley and *W. F. Reeves,* for appellant.

Arthur N. Wood, for appellee.

ED. F. MCFADDIN, Justice. Appellees filed petitions in the County Court of Marion county, on May 10, 1948, praying for a local option election under the provisions of Initiated Act No. 1 of 1942.* The present appellants

* This Act may be found on page 998 of the bound volume of Acts of 1943. The Act has been before this Court in numerous cases, some of which are listed in *Tollett* v. *Knod,* 210 Ark. 781, 197 S. W. 2d 744.

appeared as remonstrants in the County Court, on May 20, 1948, and challenged the sufficiency of the petitions. There was a hearing in the County Court presided over by County Judge Burl King; and the petitions were held sufficient. The remonstrants then appealed to the Circuit Court for trial *de novo* as provided by law.

On June 10, 1948, in the Circuit Court, the said remonstrants filed a pleading in which they alleged that County Judge Burl King had signed one of the petitions for the local option election, and that about twenty of Judge King's relatives (each within the fourth degree of consanguinity or affinity) had likewise signed the petition. The remonstrants claimed that the signing of the petitions by Judge King and his relatives made Judge King disqualified (under Art. 7, § 20 of our Constitution) to preside over the County Court in the hearing on the sufficiency of the local option petitions; and—said the remonstrants—the County Court as so constituted had no jurisdiction to consider the petitions, and therefore the Circuit Court acquired no jurisdiction on appeal. The motion also stated that the movants (*i e.,* remonstrants) did not know until after the County Court hearing that either Judge King or his relatives had signed the petitions for the local option election. The prayer was that the petitions be dismissed. The Circuit Court overruled the motion of the remonstrants; and the correctness of that ruling is the sole question on this appeal.

The disqualification of the Judge may be waived by failure to seasonably object. *Washington Fire Ins. Co.* v. *Hogan,* 139 Ark. 130, 213 S. W. 7, 5 A. L. R. 1585. We hold that the appellants in the case at bar should have presented *in the County Court* their motion to disqualify Judge King, and that such failure constituted a waiver of the claimed disqualification. That Judge King had signed the petition was a patent fact—*i. e.,* apparent on the face of the petition—and not a latent fact that might not have been discovered with the exercise of due diligence. In *Byler* v. *The State,* 210 Ark. 790, 197 S. W. 2d 748, in discussing the disqualification of the Trial Judge by reason of relationship, we said: "There was no lack of diligence on appellant's part in making the discovery.

If appellant had been aware of this fact before his trial, he could not thereafter raise the question, as the law would not allow one to speculate on the outcome of the trial, and thereafter take advantage of a fact known to, but not raised by him until after an adverse verdict had been returned. *Morrow* v. *Watts,* 80 Ark. 57, 95 S. W. 988."

In the case at bar the movants, with the exercise of due diligence, could and should have seen that Judge King's name was on the petition as it was the fourth name on the first petition; and the movants' failure to file *in the County Court* the motion for disqualification constituted a waiver of the alleged disqualification.

Whether Judge King was disqualified because of signing the petition is a question we need not decide. Some cases hold that the signing of a petition for a local option election does not disqualify the Board or official who is later to pass on the petition. See *Galey* v. *Board of Commissioners,* 174 Ind. 181, 91 N. E. 593, Ann. Cas. 1912C, 1099; *Lemon* v. *Peyton,* 64 Miss. 161, 8 So. 235; *Hunter* v. *Senn,* 61 S. C. 44, 39 S. E. 235. See, also, 30 Am. Juris. 778. Other cases hold *contra* to the above. *Rosenberg* v. *Rohrer,* 83 Nebr. 469, 120 N. W. 159, and cases cited in the annotation in Ann. Cases 1912C, 1092. It would, of course, be better practice for the County Judge not to preside in a case where he had signed the petition as his interest might be more than that of an ordinary citizen or taxpayer, which was the interest discussed in *Foreman, et al.* v. *Town of Marianna,* 43 Ark. 324, and *Osborne* v. *Board of Improvement,* 94 Ark. 563, 128 S. W. 357. However, this need not be further discussed since we hold that the alleged disqualification of Judge King was waived. Affirmed.

The Chief Justice concurs.

4-8617 214 S. W. 2d 353

Opinion delivered November 1, 1948.

[redacted]

Robert A. Zebold, for appellant.

T. S. Lovett, Jr., and *G. D. Walker,* for appellee.

ED. F. MCFADDIN, Justice. Appellee filed suit to have Mr. E. P. Ladd declared a constructive trustee; and the chancery court so decreed. This appeal questions the correctness of that holding, and also presents the other questions hereinafter discussed.

I. *Was Mr. Ladd a Constructive Trustee?* Since each case involving a constructive trustee is necessarily to be determined in the light of its own particular facts, we set forth the facts in this case in considerable detail. Caswell Bunton (colored) died intestate in 1924, the owner of the 114 acres of land here concerned. His five

children and heirs were all adults, being Sarah Williams, John Bunton, Mary Bunton Smith, Luzelia Bunton, and Eddie Bunton. All the heirs were nonresidents except Sarah Williams and John Bunton. These two undertook to hold the property for themselves and their co-tenants. In addition to State and County taxes, the lands were subject to Improvement District taxes in (a) Cousart Bayou Drainage District, (b) Southeast Arkansas Levee District, and (c) No Fence District No. 2.

Sarah Williams, a Negress—now over 62 years of age—was the representative of the other heirs. For several years she paid the taxes and assessments on the lands; but in 1928 and subsequent years the lands became delinquent to the various taxing agencies. In 1933, Cousart Bayou Drainage District purchased the lands at its foreclosure sale for the delinquent assessments of 1928, 1929 and 1930 in that district. The Levee District and the No Fence District likewise foreclosed and purchased for their delinquent assessments. The lands also forfeited for the State and County taxes of 1929 and 1930. Although the time for redemption had expired, it was the policy of the Cousart Bayou Drainage District—and apparently also the policy of the other districts—to show the delinquent landowners all possible leniency.

That Sarah Williams was trying all the time to save the lands is shown by ample evidence. On November 9, 1936, Sarah went to see Mr. A. F. Triplett of Pine Bluff, who was the attorney for the Cousart Bayou Drainage District, to discuss with him the delinquencies on this land. Mr. Triplett agreed with her that the Cousart Bayou Drainage District would settle all of its delinquent items—including the foreclosure sale and the purchase title—for the sum of $400. Then Sarah went to see Mr. Walter White to obtain a loan from him in order to save the lands. Mr. White professed inability to make the loan, but agreed to consult Mr. E. P. Ladd to see if he would advance Sarah the necessary money.

Mr. White did see Mr. Ladd; but Mr. White and Sarah Williams have entirely different understandings as to what Mr. White reported to Sarah. Sarah testified

that she understood, from what Mr. White told her, that Mr. Ladd would clear up all the tax delinquencies, and would hold possession of the land until the rents repaid him all of his expenditures for taxes, improvements and interest; and then he would return the land to Sarah for herself and her brothers and sisters. Mr. White testified that Sarah wanted Mr. Ladd to have the land for the delinquent taxes, rather than for some other person to obtain the land. At all events, Sarah remained on the land until Mr. White wrote her a note on January 11, 1937, reading: "Sarah: You can go ahead and move if you want to. Mr. Ladd has paid everything off on the 114 acres of land. So you can rest easy now, and Johnnie will have to pay rent if he stays there." Sarah moved from the land after receiving this note, and Mr. Ladd took charge and remained in possession thereafter.

Mr. Ladd's acquisition of the legal title was accomplished by obtaining a deed * to him from the Cousart Bayou Drainage District on January 9, 1937, and then using that title as a basis for redeeming from the forfeiture to the State, and also for redeeming from the forfeitures to the Levee District and the No Fence District. In short, it was the acquisition of the legal title from the Cousart Bayou Drainage District by deed dated * January 8, 1937, that made it possible for Mr. Ladd to redeem from the other taxing agencies.

As previously stated, Mr. A. F. Triplett was the attorney for the Cousart Bayou Drainage District. Mr. Triplett testified of his conversation with Sarah, prior to Mr. Ladd's deed: "I told Sarah Williams at all times that the Drainage District did not want to see any property owner lose his property for taxes, and that we would do everything within reason to prevent such a result, including the acceptance of partial payment and the granting of any reasonable period to pay the amount due."

In response to the question, "Under what terms of agreement, if any, was this property conveyed to Mr. Ladd by the district?", Mr. Triplett said: "Mr. Ladd

* The deed was dated January 8th, but appears to have been delivered January 9th.

came to my office somewhere around the 1st of January, 1937, and offered to buy the district's title to the Bunton property for $400. He stated that he was making the offer upon behalf of the Buntons and would deed the property back to them if they paid him back his money. The district had a great deal more than $400 in the property; but since I had tried repeatedly to get the Buntons to redeem without any payment whatever being made, and since I had received the information that members of the family other than Sarah Williams, and especially John Bunton, had been advised that he could beat the drainage tax, and since the annual tax on this property was approximately $100, and Mr. Ladd stated that he was buying it on behalf of the owners, and since the property had been sold to the district since March 6, 1933, I concurred with the Board in the view that it would be better to accept the $400 and get the property back on the tax books. I therefore closed the deal with Mr. Ladd on the basis of $400 on January 9, 1937."

Mr. Triplett further said: "There could have been no question in the minds of either Mr. Ladd or myself as to the terms upon which he was buying the property."

Sarah testified that in 1939 she asked Mr. Ladd about the place; and that he said that he still lacked $500 of having all of his money, but that he had the place rented for 1940 and 1941, and that he said, "All I want is my money." In December, 1941, Sarah again went to see Mr. Ladd; and she testified that he then told her, for the first time, that he was claiming the property as his own. In March, 1942, this suit was instituted to have Mr. Ladd declared a constructive trustee. As previously stated, the Chancery Court held that Mr. Ladd was a constructive trustee, and the question now under consideration is whether that holding is correct.

We have a vast number of cases involving attempts to have the holder of a legal title held to be a constructive trustee. In some of the cases, the trust was declared; in others, it was denied. The question here is, on which side of the line this case falls. Each side cites many other cases, but we list the following as typical. Appellant

says the facts here are more similar to cases like *Ammonette* v. *Black,* 73 Ark. 310, 83 S. W. 910; *Spradling* v. *Spradling,* 101 Ark. 451, 142 S. W. 848; and *LaCotts* v. *LaCotts,* 109 Ark. 335, 159 S. W. 1111; in each of which the trust was denied. Appellee says that the facts in the case at bar are more similar to cases like *Strasner* v. *Carroll,* 125 Ark. 34, 187 S. W. 1057, Ann. Cas. 1918E, 306, and *Holman* v. *Kirby,* 198 Ark. 326, 128 S. W. 2d 357, in each of which the trust was declared.

After careful consideration, we reach the conclusion that this case is more similar to the latter cases than the former; and that the Chancery Court was correct in decreeing the trust. Sarah Williams retained possession until assured that Mr. Ladd had the deed, and that she could "rest easy." Until that instant, she retained her possession, and continued her efforts to obtain funds from others with which to redeem the property. She was, by that assurance, lulled into a feeling of security that her property was not lost. Furthermore, the testimony of Mr. Triplett makes certain the fact that the District would not have conveyed the property to Mr. Ladd, except for Mr. Ladd's representation that he was acting for Sarah Williams' benefit. Mr. Ladd's 1941 refusal, and his verified answer of denial (filed as a pleading in this case) show that the statements made to Triplett were a species of constructive fraud sufficient to call into action equity's power to decree a trust. In *Strasner* v. *Carroll,* 125 Ark. 34, 187 S. W. 1057, Mr. Justice HART, quoting from another case, said:

" 'There is another class of cases growing out of the conduct of debtors and purchasers at public sales. This is where the purchaser becomes such under a state of facts as would make it a fraud to permit him to hold on to his bargain. As if a purchaser, by means of a promise to reconvey to his debtor, should induce a relaxation of the efforts on his part to prevent a sacrifice of his property, and thereby obtain it at an under price, or, if the purchaser, taking advantage of that reluctance invariably manifested by those attending public sales to interfere with any arrangement a debtor makes to save his property, should create an impression that he was buy-

ing for the debtor, thereby preventing competition, or by any other improper means obtain the property of a debtor at a sacrifice, such conduct would convert the purchaser into a trustee for the benefit of those who were defrauded by his conduct. Such cases go upon the ground of fraud, and courts will give relief without regard to the circumstance whether the agreement was a written or a verbal one, or whether it was supported by a consideration or not. Such are the cases of *Rose* v. *Bates,* 12 Mo. 30; *Estill* v. *Miller & Estill,* 3 Bibb. 177.' See, also, *Leahey* v. *Witte,* 123 Mo. 207, 27 S. W. 402. The same rule applies where the promisee relaxed his efforts to save the property from being sold at the judicial sale. *Arnold* v. *Cord,* 16 Ind. 177; *Lillard* v. *Casy,* 2 Bibb, (Ky.) 459. As bearing on the subject as sustaining the rule where the facts warrant it, see *Patrick* v. *Kirkland,* 53 Fla. 768, 43 So. 969, 125 Am. St. Rep. 1096, 2 Ann. Cas. 540, and case note to 5 A. & E. Ann. Cas. at p. 173; Perry on Trusts (4th Ed.), Vol. 1, § 215, and *Ryan* v. *Dox,* 34 N. Y. 307, 90 Am. Dec. 696."

From the evidence detailed, and from other facts and circumstances in the record, we hold that the evidence meets the test of "clear, convincing and satisfactory" as is required to support such a trust. See *Davidson* v. *Edwards,* 168 Ark. 306, 270 S. W. 94.

II. *Appellee's Right to Maintain the Suit.* Appellant challenges the appellee's right to bring the original suit. We discuss this contention, although it does not appear to have been presented in the lower court. When Sarah Williams learned in December, 1941, that Mr. Ladd denied the trust status, she and John Bunton executed a deed to appellee Joe Bones—son-in-law of Sarah Williams; and Bones filed the suit against Mr. Ladd, setting up the full history of the title and the heirship. Sarah Williams subsequently intervened in the case. It was shown that Sarah Williams and her brother, John Bunton, were not claiming adverse to their co-tenants; and that the deed to Joe Bones was because of some peculiar idea of the correct way to bring the suit. The deed was without monetary consideration. So, we treat the case here as though the appellee is acting for all the heirs of

Caswell Bunton. Sarah Williams was a party to the record, and she testified that she was acting for all of the heirs. The determination of the rights of the heirs *inter sese* is not before us.

III. *Admissibility of Sarah Williams' Testimony.* Appellant insists that the testimony of Sarah Williams, as to her dealings and conversations with E. P. Ladd, is inadmissible because of § 5154, Pope's Digest, which—under circumstances therein stated—prevents a party from testifying as to transactions with a testator or intestate. This suit was originally filed in March, 1942, by Joe Bones against E. P. Ladd. Sarah Williams intervened, and adopted the allegations of the complaint against Ladd. During the pendency of the litigation, Ladd died testate, and R. A. Zebold was appointed administrator with will annexed of Mr. Ladd's estate. This suit was revived against Zebold, as administrator, and also against the widow and son of E. P. Ladd. Sarah Williams' deposition was taken while the administrator was a party to the suit. Later the administration of E. P. Ladd's estate was closed, and the property vested in the widow and son of E. P. Ladd; and Zebold, as administrator, ceased to be a party to this suit. Such was the status of the parties, and the record, when the cause was heard by the chancery court.

The objection to the admissibility of Sarah Williams' testimony must be determined as of the time of the trial in the chancery court, and not as of the time of the taking of her deposition. See *Park* v. *Lock,* 48 Ark. 133, 2 S. W. 696; *St. L. I. M. & S. Ry. Co.* v. *Harper,* 50 Ark. 157, 6 S. W. 720, 7 Am. St. Rep. 86. See, also, 18 C. J. 744. Under our cases, as just cited, Sarah Williams' testimony was admissible at the time of the trial in the chancery court; because, at that time, only the widow and son were parties defendant, and the inhibition of § 5154 of Pope's Digest does not apply when the widow and heirs are the only opposing defendants. See *Lawrence* v. *LaCade,* 46 Ark. 378.

The decree of the chancery court is affirmed.

[redacted]