SMITH *v.* STATE.

4583 223 S. W. 2d 1011

Opinion delivered October 31, 1949.

Rehearing denied November 21, 1949.

Max Howell, for appellant.

Ike Murry, Attorney General, and *Jeff Duty,* Assistant Attorney General, for appellee.

MINOR W. MILLWEE, Justice. Appellant was charged with murder in the first degree for the killing of Mrs. Sallie Mae Barner. The jury found him guilty and fixed his punishment at death and this appeal is prosecuted to reverse the judgment rendered in accordance with the jury's verdict.

The facts as disclosed by testimony offered by the State are substantially as follows: Sallie Mae Barner was employed as a nurse at the University Hospital in the City of Little Rock. On the morning of May 4, 1949, Mrs. Barner was on her way to work and had reached a point near the hospital between 10th and 11th Streets on McAlmont Street, when she was shot and killed. A man was seen running from the scene of the killing. Police who arrived soon after the shooting found five expended pistol shells around the body of deceased. A .38 caliber automatic pistol with three unexpended shells in a maga-

zine clip was found in a yard at 1011 McAlmont Street. The finding of a man's jacket containing pictures of the deceased, and other papers, in the alley between 9th and 10th Streets led to a search for appellant who was apprehended by a police officer at Jacksonville, Arkansas, on the morning of May 5, 1949.

Appellant was brought to Little Rock where he freely admitted the killing to Chief of Detectives, C. O. Fink, and consented to the making of a full statement to the prosecuting attorney. After being advised that he did not have to make a statement and that if he did so it could be used against him, and after being sworn by the prosecuting attorney, appellant's statement in question and answer form was taken down by the grand jury reporter and introduced at the trial. According to this statement, appellant and deceased were married in Texas in July, 1946. Appellant had been previously married, but was under the impression that a divorce had been procured by his first wife. When deceased learned that appellant had not been divorced from his first wife, she obtained an annulment of her marriage to appellant. The annulment was obtained in March, 1947, and Texas enforcement officers were informed of the bigamous marriage. Appellant was charged with bigamy in Cass county, Texas. He entered his plea of guilty to the charge and was sentenced to three years in the Texas Penitentiary. He was released from the penitentiary in March, 1949, and came to Little Rock on April 29, 1949.

Appellant learned that Mrs. Barner was working at the hospital and after talking with her on the telephone met her at Second and Main Streets in North Little Rock. He asked her for his social security card, some rings, and $500 which he stated he had left with her for safekeeping until his release from the penitentiary. She stated that she did not have the things, but would get them and asked him to come back later. A few days later appellant went to Mrs. Barner's residence in North Little Rock, but learned that she had moved. Being unable to locate her new place of residence, appellant went to 1011

McAlmont Street on the morning of May 4, 1949, and waited for Mrs. Barner to come to work at the hospital.

In his confession, appellant first stated that he had stolen the pistol which he took to the scene of the killing, but later said that a young lady with whom he was keeping company had procured the pistol for him after he had lied to her about needing it for protection. The confession continues: "Q. Now, what did you want with the gun? A. I wanted it to scare her to try to get my money and stuff from her if it was necessary. Q. You got the gun to scare Mrs. Barner to the point of getting your money if it was necessary? A. Yes, sir. Q. When did you decide to kill her? A. Not until I was talking to her. Q. While you were talking to her you decided to kill her? A. Yes, sir. We was standing there talking and arguing and she said she had my social security cards over at the hospital there on the second floor where she was working, and the rings and other little keepsakes and things, well, I don't know where she had them. I told her, I said, 'Sallie Mae, I have got to have some money. I gave it to you to keep so I could get established when I got out of the penitentiary' and she said she didn't have any money and she said, 'I am not going to get any' and naturally we got in an argument and before I knew it it had happened. When she started off she said, 'I am going to call the law on you' so I stopped her. Q. You say you stopped her? A. I called her and she stopped. She stepped off in the edge of the street and I told her, 'Sallie Mae, I want my money and things' and she said, 'I am not going to give them to you. I am going to call the law' and we had already had some hot words and it just happened. Q. When she started off didn't you grab her arm? A. She was on the side of me and when she started around me I put my hand out to stop her and I said, 'Wait a minute. We are not through talking' and she stepped on off in the street and she said, 'I am not going to give you anything' and she said, 'I am going on to the hospital and call the law' and I just went haywire and did it, and shot her. Q. How many times did you shoot her? A. Really, sir, I don't know. Q. When did you pull

the gun out? A. I showed it to her while we were on the sidewalk. Q. You showed it to her while you were talking? A. Yes, sir. Q. Then you had it in your hand? A. No, sir. Q. Where was it? A. In there (indicating). Q. Under your shirt or under your jacket? A. Under my jacket. Q. Stuck in your belt? A. Yes, sir. Q. And when she started on you pulled it out and shot her in the back? A. Yes, sir. I just went haywire."

Appellant further stated that after the shooting he threw the gun in the yard and went down an alley to the next street and down a side street to another alley where he removed and left his jacket. He proceeded from there across a railroad bridge to the Missouri Pacific railway yards in North Little Rock where he caught a train which he thought was leaving town. When he discovered the train was not going out of town, he walked up the tracks within three or four miles of Jacksonville and "slept out" that night. He came into Jacksonville the next morning and procured a newspaper from which he learned that the police were looking for him. After drinking some beer, he telephoned Chief Fink that he was ready to surrender and the call became disconnected. Shortly thereafter Officer Garner appeared and took him into custody. Appellant also admitted that on the morning of the killing he stopped a man about four or five blocks from the University Hospital and inquired as to its location, and that he was standing on the corner near the hospital and asked a lady across the street if that was the University Hospital. He also stated that he thought Mrs. Barner was in Arkansas when he entered his plea of guilty to bigamy, and that she did not appear against him, but had told him that she had informed the authorities and he felt that she was responsible for his going to the penitentiary.

The State introduced in evidence a photograph of the nude back of deceased taken at a funeral home shortly after the killing showing the points of entry of five bullets in the left arm and back of deceased. The coroner who was called to the scene soon after the shooting described the fatal bullet wounds and pointed out

on the back of the prosecuting attorney the points of entry of the bullets.

A letter from appellant to Jack Barnard and wife of Little Rock, who had known appellant for seven or eight years, was properly identified and introduced in evidence by the State. The letter was dated March 20, 1949, from Corsicana, Texas. In this letter appellant professed his love for, and intention to marry, Barnard's sister-in-law and, in reference to deceased, stated: "If that dam dirty Sallie Mae sent or brought my things over I hope you will keep them there for me. She was scared to death when I contacted her. I've had my revenge on her for she will always be afraid I may harm, hurt or murder her to keep her in suspense and knowing her conscience hurts her is payment to me. I wouldn't have her on a platter of diamonds & gold."

Mrs. J. M. Bizzell, mother of deceased, who lives near Austin, Lonoke County, Arkansas, testified that she was acquainted with appellant's handwriting and identified letters that he had written to her and her daughter. She identified a letter written by appellant to deceased from Bryan, Texas, on January 15, 1947. The letter reads: "Dearest Sallie Mae: Hope you are well and are really happy. I want you to live high for it won't last long. Why? I've written and written you—no answer. I love you above life itself. I'm coming up there. I won't say when or how soon. But the little (25) I have of yours—*I'm going to use it. Yes, use it* on you then turn it on my-self. So help me 'God' I am. If I can't have you no other on earth will. I'll be seeing you. Your husband & Little boy, R. L. Smith."

A letter from appellant to Mrs. Bizzell dated April 8, 1949, from Marshall, Texas, was introduced in which appellant informed Mrs. Bizzell that he would be at her home on April 12th or 13th and warned her to have Mrs. Barner there and stated that if she was not there, "I'll see her wherever she is. I'm not fooling. I mean to see her and get what belongs to me." Mrs. Bizzell also found two notes addressed to her in appellant's handwriting together with a picture of deceased on the front porch of

her home on the morning of April 14, 1949. The notes were dated April 13, 1949. The first note reads in part: "When you wake up and find this I hope I have Sallie—will if she is in Little Rock. If so she wont ever come home again. Dam her rotten soul. Yes you know who I am. Caused me to serve 3 yrs. and she Sallie will pay for it too. I hate you all."

The second note is in part as follows: "No writing paper so wrote on this where I'd parked my car and brought it back—yes—I've a new Buick and money to ruin Sallie Mae. I'll be made happy to see her ruined too dam her . . . I'll find her before Sunday too wait and see—Ha, Ha, Old woman."

On the front of the picture of deceased left on Mrs. Bizzell's porch the following appears in appellant's handwriting: "Whore, whore, whore. I'll get even with you if I die for it. I hate your very guts," and on the back of the picture: "Here's your prostitute daughter's picture. I'll have her before Sunday 17th. I'm paying $500 in Little Rock to find her."

Mrs. Bizzell further testified that a few days before her daughter was killed the latter requested that witness send her a belt, purse, social security card, Bible and handkerchief belonging to appellant and that she did so.

Appellant offered no testimony.

The first three assignments of error challenge the sufficiency of the evidence to support the verdict. It is argued that the confession of appellant furnished the only evidence as to Mrs. Barner's death and conclusively shows that appellant acted without malice and deliberation in the killing which only amounted to voluntary manslaughter. Without commenting on the testimony as detailed above, we hold that it was sufficient, when considered as a whole and in the light most favorable to the State, to show a malicious, deliberate and premeditated killing, and that it fully warranted the jury in returning a verdict of murder in the first degree.

It is next contended that the court erred in permitting the introduction of the photograph of the nude back

of deceased taken shortly after the killing. It was stipulated that the photograph had been accurately taken and correctly portrayed the number and location of the wounds on deceased's back. But it is argued that the photograph did not shed any light as to appellant's guilt or innocence and is so gruesome as to inflame and prejudice the minds of the jury against the appellant. Upon the admission of the photograph in evidence the court admonished the jury as follows: "It is the duty of the Court to admonish this jury, however, that you are not to allow your feelings to be wrought up over observing this photograph. It is not introduced in evidence for the purpose of inflaming the minds of the jury against the defendant—that has no part in the case. It is merely introduced as a fact so you may see the area, extent and location of the wounds and that is all. The Court admonishes you very definitely not to let your minds become inflamed by this picture."

The admission in evidence of photographs of victims of murder has been sanctioned by this court and by courts of other jurisdictions in numerous cases. The general rule is stated in Vol. 2, Wharton's Criminal Evidence (11th Ed.), p. 1320-1, as follows: "Admissibility of photographs does not depend upon whether the objects they portray could be described in words, but rather on whether it would be useful to enable the witness better to describe, and the jury better to understand, the testimony concerned. Where they are otherwise properly admitted, it is not a valid objection to the admissibility of photographs that they tend to prejudice the jury. Competent and material evidence should not be excluded merely because it may have a tendency to cause an influence beyond the strict limits for which it is admissible."

In the case of *Nicholas* v. *State,* 182 Ark. 309, 31 S. W. 2d 527, cited by the author in support of the above rule, this court said: "Appellant's next assignment of error is that the prosecuting attorney was allowed to introduce as an exhibit to the jury a picture of the deceased taken immediately after his death, and before his removal from the scene of the tragedy. It is argued that,

because this picture showed the awful gunshot wound in all its gruesomeness inflicted upon the deceased by appellant, it tended to arouse the passions of the jury, and thereby prevent a fair and impartial trial. The picture was nothing more than a description of the fatal wounds received by deceased at the hands of appellant. The character of the wound inflicted upon deceased by one charged with his murder is always admissible in evidence, and we know of no rule limiting the description thereof to word of mouth. No authority is cited by appellant in support of his contention that the character of the wound may not be shown by a genuine photograph. We do not think the most accurate method of reflecting a truth should be eliminated, but, just to the contrary, such a method should be approved and accepted." See, also, *Simmons* v. *State,* 184 Ark. 373, 42 S. W. 2d 549; *Higdon* v. *State,* 213 Ark. 881, 213 S. W. 2d 621; *Black* v. *State,* 215 Ark. 618, 222 S. W. 2d 816.

Appellant relies on the case of *Garrett* v. *State,* 171 Ark. 297, 284 S. W. 734. In that case the court observed there was no necessity for the introduction of the photograph, since there was nothing about the location of the wounds which the photographs tended to elucidate. It was further held that there was nothing about the photograph of a nature so gruesome as to inflame the passions of the jury and that this was demonstrated by the fact that the defendant was only convicted of the lowest degree of homicide.

The admission and relevancy of photographs must necessarily rest largely in the discretion of the trial judge. *Higdon* v. *State, supra.* It cannot be denied that the photograph in the instant case represents clearer and more understandable evidence than oral testimony. The fact that it was cumulative to the coroner's testimony does not affect its materiality. *State* v. *Nelson,* 162 Ore. 430, 92 Pac. 2d 182. An examination of the photograph discloses nothing of a particularly gruesome character. It shows the back, left arm and back of the head of deceased. The face is not shown and there is no blood or mutilation of the body except the five scattered bullet

marks inflicted by appellant. We find no abuse of discretion in the admission of the photograph.

Appellant made a general objection to the admission of the confession. The trial court followed the approved practice of retiring to chambers to determine admissibility. Appellant offered no evidence to refute proof by the State showing that the confession was voluntarily made without force, threats, or promises of reward or leniency. While appellant was not advised that he was entitled to counsel, it was shown that he made no request for counsel. It is insisted that the failure to notify appellant of his right to counsel rendered his confession inadmissible. We held to the contrary in the recent case of *Thomas* v. *State,* 210 Ark. 398, 196 S. W. 2d 486, where we adopted the general rule to the effect that a confession is not inadmissible merely because accused was not informed that he was entitled to consult counsel.

It is next insisted that the court erred in permitting the introduction of the several letters and notes written by appellant and the picture of deceased that was left on Mrs. Bizzell's porch with the two notes. The trial court correctly ruled that the letters and picture were admissible for the purpose offered by the State, namely, to show malice and premeditation on the part of appellant. *Bolling* v. *State,* 54 Ark. 588, 16 S. W. 658; *McElroy* v. *State,* 100 Ark. 301, 140 S. W. 8; 23 C. J. S., Criminal Law, § 850, p. 42.

Appellant also insists that the letters and picture were inadmissible because they were calculated to impeach the confession. It seems to be well settled by our cases and those from other jurisdictions that, while the accused is entitled to have his entire statement admitted in evidence, including any self-serving or exculpatory declaration, it is for the jury to say what weight should be given to the several parts of the statement and they may believe that part which charges the accused and reject that part which tends to exculpate him. It is within the jury's province to accept such portions of the testimony in the whole case, including the confession, as they believe to be true and disregard that which they

believe false. *Frazier* v. *State,* 42 Ark. 70; *Brewer* v. *State,* 72 Ark. 145, 78 S. W. 773; *McLemore* v. *State,* 111 Ark. 457, 164 S. W. 119; *King* v. *State,* 117 Ark. 82, 173 S. W. 852.

It is also contended that the court erred in refusing to give appellant's Requested Instructions Nos. 1, 2, 3, 4, and 5. Requested Instructions 1, 3 and 4 deal with manslaughter, presumption of innocence and reasonable doubt, and were fully covered by the instructions given.

Defendant's Requested Instructions Nos. 2 and 5 are as follows: No. 2. "You are instructed that if you find that the defendant was provoked to commit the assault on the deceased which he did commit by a passion consisting either of anger or fear to such an extent that he was unable to resist or to refrain from the committing of such assault, then he would be guilty of one of the degrees of manslaughter which has just been defined to you, and he would not be guilty of murder in the first degree." No. 5. "You are instructed that if you find that at the time the defendant committed the assault as alleged in the information he had become so wrought up or that his mind was in such condition that he temporarily was not capable of knowing and realizing right from wrong nor what would be the nature and probable consequences of the acts performed by him, then he would not be legally responsible for such assault and your verdict would be for the defendant. This is true even though you might find that the defendant is not at this time insane or that he was not insane prior to the assault committed."

The trial judge did not instruct the jury on involuntary manslaughter nor was he requested to do so. Appellant did not interpose the plea of insanity. But if he had done so, the instructions as requested did not correctly state the law. In the leading case of *Bell* v. *State,* 120 Ark. 530, 180 S. W. 186, the court said: "Where one is on trial for murder in the first degree and the State proves the killing under circumstances that would constitute murder in the first degree if the homicide was committed by a sane person, then if the killing is admit-

ted and insanity is interposed as a defense such defense cannot avail unless it appears from a preponderance of the evidence, *first,* that at the time of the killing the defendant was under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing; or, *second,* if he did know it, that he did not know that he was doing what was wrong; or, *third,* if he knew the nature and quality of the act, and knew that it was wrong, that he was under such duress of mental disease as to be incapable of choosing between right and wrong as to the act done, and unable, because of the disease, to resist the doing of the wrong act which was the result solely of his mental disease. . . .

"But it must be remembered that one who is otherwise sane will not be excused from a crime he has committed while his reason is temporarily dethroned not by disease, but by anger, jealousy or other passion; nor will he be excused because he has become so morally depraved 'that his conscience ceases to control or influence his actions.' In other words, neither so-called 'emotional' nor 'moral' insanity will justify or excuse a crime."

In *Korsak* v. *State,* 202 Ark. 921, 154 S. W. 2d 348, it was held that one may be excused as an insane person only when his mind has become diseased and because of such disease he has lost power to distinguish between right and wrong. It was there said: "But if one's conduct was not induced by this mental condition, but from the excitation of the lower passions, whether of hate, prejudice, desire for revenge, or lascivious desire, he is responsible for his act. Frenzy is not insanity."

While there was little in the evidence to show that the killing was "upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible," the trial court instructed the jury on voluntary manslaughter in the language of the statute (Ark. Stats., 1947, §§ 41-2207 and 41-2208). Moreover, a person cannot take advantage of a provocation invited and brought about by his own unlawful aggression, 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. *Noble* v. *State,* 75 Ark. 246, 87 S. W. 120. Instruction No. 2, requested by appellant, entirely ignored the idea of malice and permitted the jury to reduce the crime to manslaughter even though they found that appellant brought on the difficulty maliciously and with the specific intent to kill. As this court said in *Price* v. *State,* 114 Ark. 398, 170 S. W. 235: "The omission is an important one, for if defendant sought the difficulty with malice against the deceased and assaulted the latter, or used opprobious epithets toward him for the purpose of bringing on the difficulty, he cannot claim the benefit of a sudden passion aroused by an assault made by the deceased in consequence of the appellant's own conduct." We find no error in the court's refusal to give the requested instructions.

Complaint is also made relative to the verbiage of the court's instruction on the form of the verdict in the event of a conviction on the charge of murder in the first degree. It is sufficient to say that no objection was made to the instruction in the trial court, and it cannot now be urged in this court. *McKenzie* v. *State,* 26 Ark. 334; *Alexander* v. *State,* 103 Ark. 505, 147 S. W. 477; *Johnson* v. *State,* 127 Ark. 516, 192 S. W. 895.

After argument of counsel the court stated that he had neglected to instruct the jury relative to malice and the confession introduced by the State and gave additional instructions covering these issues. After his objection that the additional instructions were given out of time, counsel for appellant accepted the court's invitation to further argue to the jury the issues raised by the additional instructions. The additional instructions correctly stated the law and the giving of them did not, under the circumstances, constitute reversible error. *Manasco* v. *State,* 104 Ark. 397, 148 S. W. 1025.

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

WOODLAWN SCHOOL DISTRICT NO. 6 *v.* BROWN.

4-8951 223 S. W. 2d 818

Opinion delivered October 31, 1949.

[redacted]

DuVal L. Purkins, for appellant.

FRANK G. SMITH, J. Appellees who are residents and taxpayers within Woodlawn School District No. 6 of Cleveland County, filed a complaint containing the following allegations. Woodlawn district school is situated on State Highway No. 15, 2 miles north of Calmer in Cleveland County with which highway a number of public roads connect—some improved, others not. Their children attend this school and buses are used to transport the school children from their homes to the school, and from the school back to their homes. There are among numerous others three public roads intersecting Highway 15, one at Pansey, and another county road running west from Rye connecting with Highway 15 at that point. Pupils are not picked up and discharged on these roads, nor on another county road running west from Friendship Church, connecting with Highway 15; that 50 pupils living on the 3 county roads mentioned are forced

to walk for from a short distance to as much as two miles from their homes to Highway 15 to receive bus transportation. This constitutes a gross discrimination against the children living on those roads which the school directors have been asked to correct, but which they have not done. It was prayed that a writ of mandamus issue, compelling the district to furnish bus transportation to the pupils living on the three roads wherein discrimination is alleged to exist.

The state's educational policy of abolishing small school districts and consolidating them into larger ones has resulted in the organization of Woodlawn School District No. 6 of Cleveland County, which covers the eastern part of that county. The district extends from Jefferson County line on the north to the Saline River and the Bradley County line on the south, a distance of 35 miles, and varies in its width from 3 to 5 miles. There are both white and negro children in the district, and it is attempted to furnish equal accommodations to the children of those races, and the case presents no question of discrimination in that respect.

The average daily attendance of the white pupils at the schools is from 444 to 450, and 92% of the children are transported daily to and from the school. For this purpose the district operates 5 school buses, carrying an average of 90 children per load, and under the schedule of their operation no child must leave home before daylight or arrive at home, upon returning from school, after nightfall.

It is difficult to understand the testimony as to the location of the homes of the complaining parties and others, even with the aid of a map, which the witnesses had before them when testifying, and impossible to do so without it.

Upon rendering judgment the court said: "Gentlemen, the Court is going to hold this, that it has no power to control the discretion of the Board of the School's Superintendent in determining the schedule of its routes; that this Board has made splendid progress in the development of this school district; but in doing that it has

developed transportation on certain parts of the district faster than it has on others, and the others or some of it with as good physical road condition as that part upon which it is now furnishing transportation for the children to the homes; that it is financially impossible for the district at this time to purchase another bus whereby it could give transportation to all of the children in the district over which a bus could physically traverse; that there is an unintentional discrimination between some of the pupils and I am going to grant the petition effective the first day of the fall term of school next fall giving the Board that length of time to provide another bus over the district over which the bus can travel.''

That recital was incorporated in the judgment which directed the district to provide another bus to improve the service.

The testimony fully sustains the finding that the district was not financially able to give better service, and shows that this could not be done without shortening the school term. The district operates 5 buses for white pupils, one of which is not paid for, and it is contemplated with anticipated state aid to acquire another bus when better service can be supplied.

The court was eminently correct in holding that it was without power to control the discretion of the school board in preparing the bus schedules, and disclaimed any intention of doing so, yet such is the effect of the order from which is this appeal. The court found, and the testimony supports the finding, that equal service was not being afforded to all the children of the district, but that this was unintentional. It might be added that the undisputed testimony shows this was unavoidable.

The greatest inequality of service appears in the case of patrons living in the south end of the district, whose children must walk from one to two miles to the bus stop, and then ride daily 16 or 17 miles on a bus to the school, but those patrons are not the ones complaining, although the service furnished them is not as good as that furnished the patrons who are complaining. Granting the relief prayed would probably, if not cer-

tainly increase the discrimination against the residents in the south end of the district.

The court found in effect that the directors were doing the best they could with what they had, under the circumstances, and we think their discretion which is being honestly exercised should not be interfered with, although equal facilities are not furnished all the children in the district, no one of whom is compelled to walk a greater distance than two miles to obtain bus service.

The judgment of the court below will therefore be reversed and the petition dismissed.

HARTZOG *v.* DEAN.

4-8952 223 S. W. 2d 820

Opinion delivered October 31, 1949.

Marcus Evrard, for appellant.

Oscar Fendler, for appellee.

HOLT, J. A jury awarded appellee, T. F. Dean, a commission of $1,000 for his services in the sale of appellants' residence property in the city of Blytheville, Arkansas. From the judgment is this appeal.

For reversal, appellants question the sufficiency of the evidence to support the verdict, argue that the court erred in denying their request for an instructed verdict in their favor, at the close of appellee's testimony, and contend that error was committed in giving instructions 1 and 2, and in refusing to give appellants' offered instructions 1 and 2.

There appears to be but little, if any, dispute as to the material facts.

About July 1, 1948, appellant, Hartzog, acting for himself and his wife, as joint owners, entered into an oral contract with appellee, a real estate dealer, to sell their residence for $24,000, and to pay a commission of 5% on the gross price received. No time limit was specified and the listing was not exclusive. Appellee advertised the property for sale both by radio and newspaper. A short time later, Hartzog reduced the selling price to $22,000.

About three or four weeks after the property had been listed with him, Dean contacted E. M. Holt who was familiar with the property, wanted it, and became interested in its purchase, but not at the price of $24,000.

Dean testified: "He (Holt) had never lost interest in the house. Mr. Holt was interested in the house because he wanted the house. He said he knew the house, because the house used to belong to Eddie B. David, he said he knew the house when he had his home there. Q. And he was interested in buying it if the price could be made right A. Yes, sir."

Thereafter, about August 1, 1948, Dean called Hartzog on the phone at Sikeston, Missouri, and Hartzog agreed to reduce the price to $22,000.

The testimony further shows that Dean informed Hartzog that Holt was a good prospect and that he, Holt, was interested in buying the property but not at

$22,000. He gave this information to Hartzog before Hartzog sold the property to Holt. Holt testified: "Mr. Holt, if it hadn't been for Doc Dean putting you next to this deal, would you have ever known about the Hartzog home being up for sale? A. Well, he is the first and only one who ever told me about it, until Mrs. Hartzog called my wife." He would not pay $22,000 for the property. Hartzog was at home when Holt and his wife went to look at the house. Holt further testified: "Well, now since Mr. Evrard has brought up the fact you discussed Doc Dean, or mentioned Doc Dean to Mr. Hartzog, you did mention him to him on some occasion? A. Yes. Q. Do you recall any telephone conversations where you mentioned Doc Dean's name or he mentioned Doc's name to you? Do you recall any telephone conversations where it was mentioned A. Yes. That was the first call after we were over at the house on Saturday. When he came back there I told him the price was too high, and he said . . . I asked him if he couldn't cut it to twenty thousand dollars ($20,000), and then I might consider it, then he made the statement himself that if he sold it himself probably he wouldn't have to pay Doc Dean."

After Hartzog returned to Blytheville from Missouri, he sold the property to Holt for $20,000.

Considering and weighing the evidence in the light most favorable to appellee, as we must, we hold that there was substantial testimony to warrant the jury in finding that appellee, Dean, was the procuring cause of the sale of the property to Holt. In the circumstances, the fact that appellant, Hartzog, sold the property to Holt and completed the deal, on modified terms, is immaterial.

The governing rule, long established and oft repeated by this court, is clearly stated in *Scott v. Patterson & Parker,* 53 Ark. 49, 13 S.W. 419. It was there said: "The law is well settled that in a suit by a real estate agent for the amount of his commissions it is immaterial that the owner sold the property and concluded the bargain. If, after the property is placed in the

agent's hands, the sale is brought about or procured by his advertisements and exertions, he will be entitled to his commissions. Or if the agent introduces the purchaser or discloses his name to the owner, and through such introduction or disclosure, negotiations are begun, and the sale of the property is effected, the agent is entitled to his commissions, though the sale may be made by the owner." *Long v. Risley,* 208 Ark. 608, 188 S.W. 2d 132.

And, in *Stiewel v. Lally,* 89 Ark. 195, 115 S.W. 1134, this court said: "We find nothing in the law as stated by the authorities which declares that the procuring agent shall be denied his compensation on account of a modification of the original terms as proposed to the agent."

"The general proposition is well established that if property is placed in the hands of a broker for sale at a certain price, and a sale is brought about through the broker as a procuring cause, he is entitled to commissions on the sale even though the final negotiations are conducted through the owner, who in order to make a sale accepts a price less than that stipulated to the broker. The law will not allow the owner of property sold to reap the fruits of the broker's labor and then deny him his just reward." *Murphy v. Bradley,* 200 Ark. 208, 138 S. W. 2d 791, 128 A. L. R. 427.

Since we hold, as indicated, that the jury was warranted in finding on substantial evidence in favor of the appellee, the court did not err in denying appellants' request for an instructed verdict.

"A case should not be withdrawn from the jury unless it can be said as a matter of law that no recovery can be had upon any reasonable view of the facts which the evidence tends to establish." *Neal v. St. Louis, Iron Mountain & Southern Railway Co.,* 71 Ark. 445, 78 S. W. 220, (Headnote 1).

Among the instructions given by the court were the following: "1. You are instructed, Gentlemen, that where there is no exclusive listing, as in this case, the owner

has the right to sell the property himself. If he sells to a purchaser who was induced to buy by the efforts of the broker, the broker is entitled to a commission, even though the final negotiations are conducted through the owner who, in order to make the sale, accepts a price less than that stipulated by the broker. This rule, however, is subject to this exception:

"When the contract between the broker and the owner expressly makes the payment of commissions dependent upon the obtaining of a certain price for the property the broker cannot recover, even though the owner sells at a less price to a person to whom the broker first offered the property, unless the broker is prevented from making the sale at the stipulated price by the fault of the owner."

"II. Therefore, if you find from the evidence in this case that the property in question was listed with the plaintiff, Dean, as a real estate broker, to be sold by him at a certain price, and you further find that the payment of commissions was conditioned upon the receipt of that price, your verdict should be for the defendants, unless you find that the broker, Dean, was prevented from selling the property at the stipulated price by the fault of the owner, Hartzog."

Appellants' objection to these instructions was "upon the ground that there is no evidence in this record from which the jury could find that the plaintiff was prevented from selling the property at a price equal to that which he was authorized to accept, * * * and that all reference to that matter should be stricken from the instructions."

Based on the evidence, and the above authorities, these instructions correctly declared the law and submitted to the jury the theories of both parties. We find no error in either of them.

The court did not err in refusing to give appellants' requested instructions 1 and 2 for the reason that, as indicated, all matters and issues had been fully covered by the instructions given.

Finding no error, the judgment is affirmed.

ABRAHAM *v.* TURNER.

4-8955 223 S. W. 2d 830

Opinion delivered October 31, 1949.

[redacted]

Marcus Evrard, for appellant.

Claude F. Cooper, for appellee.

ED. F. MCFADDIN, Justice. This is an action on account for services rendered. Appellant, Abraham, orally employed appellee, Turner, to pump the fluid from appellant's cesspool. Appellee and his helper used a motor and other equipment, and worked from 7:30 a. m. until 11:00 p. m. before completing the work. The parties were unable to agree on a settlement. Appellee sued for $880 and testified that, at the time of the employment, appellant agreed to pay $1.00 per barrel for the emptying of the cesspool. Appellant testified that no definite price was stated, and claimed that he owed appellee only $87.50 for the work done. The case was submitted to a jury under instructions admitted to be correct. The jury returned a verdict for appellee for $200. Appellant claims the verdict is excessive; and that is the only question on this appeal.

Washa v. *Harris,* 167 Ark. 186, 266 S. W. 944, was an action *ex contractu* (as here); and, in discussing the jury verdict, we said:

"It must be conceded that the verdict does not appear to be consistent with either theory of the case;[1] but we cannot say that it is unsupported by the testimony . . . and we will not disturb the verdict, because the jury's finding on the facts against appellant sustains the verdict, and would support a larger recovery against him. . . ."

[1] That is, either appellant's or appellee's theory.

See, also, *Fulbright* v. *Phipps,* 176 Ark. 356, 3 S. W. 2d 49, and *Larimore* v. *Howell,* 211 Ark. 63, 199 S. W. 2d 320.

In the case at bar, if the jury had given full effect to the testimony of appellee and his witness, the verdict could have been for $880. If the jury had given full effect to the testimony of appellant and his witness, the verdict could have been for only $87.50. Under our system of justice it is the province of the jury to pass on disputed questions of fact; and—following the holding in the above-quoted case—we will not disturb the verdict in this case.

Affirmed.

LAWHON *v.* AMERICAN CYANAMID & CHEMICAL CORP.

4-8936 223 S. W. 2d 806

Opinion delivered October 31, 1949.

Rolland A. Bradley and *Francis T. Donovan,* for appellant.

Ashley Cockrill, for appellee.

George Rose Smith, J. This suit was brought by the appellants, Cullen and Willie Jane Lawhon, against the appellees, American Cyanamid & Chemical Corporation (herein called the Corporation) and American Cyanamid Company (called the Company). In the trial court the case was decided on demurrer to the complaint.

It is alleged that in 1943 the appellants bought 400 acres of land in Pulaski County, subject to outstanding mineral ownerships and to a twenty-five year bauxite lease. (We interpret the complaint to mean that appellants acquired no interest in the bauxite, and this opinion is written on that assumption.) The lease, a copy of which is attached to complaint, was executed in 1933 by the former owners of the land to the appellee Corporation. It is averred that in 1944, after appellants had bought the surface interest, the appellees entered the

premises and began mining bauxite. Four grounds for relief are stated in the complaint:

(1) The appellees in their mining operations have drained Rauch Lake, the water supply for appellants' livestock;

(2) The appellees have deprived appellants of the use of specified parts of their property by depositing thereon huge and unsightly piles of overburden;

(3) The appellees have failed to supply appellants with a plat and log of each test for bauxite, as required by the lease;

(4) The appellees have failed to release to appellants all lands upon which no bauxite has been found, as required by the lease.

In response to the complaint the appellees filed a combined motion to dismiss and demurrer. The Corporation moved to dismiss, on the ground that it has transferred its lessee interest to the Company, withdrawn from the State and surrendered its corporate charter. The Company in the same pleading demurred to the complaint, upon the ground that a cause of action is not stated and that the complaint is barred by limitations and laches.

The chancellor sustained the demurrer as to the first and second counts in the complaint and overruled it as to the third and fourth. All parties refusing to plead further, a decree was entered dismissing the first two counts and directing the appellees to comply with the lease provisions described in the remaining two counts. The entire case is brought to us by appeal and cross-appeal.

We turn first to the fourth count in the complaint. The lease provides that "as soon as lessee has explored the above described land, in conformity to the terms of this lease, it will release to lessors all of said premises upon which it finds no bauxite and/or such as it does not desire to mine." The appellees contend that only the lessors can enforce this clause of the lease; the appellants construe it as a covenant running with the land.

Few questions have given rise to greater conflict in the decisions than that of what covenants run with the land. In spite of the widely divergent views that have been expressed as to some types of covenant, there is fairly general agreement upon the principles applicable to the covenants involved in this case. If a covenant is of value to the covenantee by reason of his occupation of the land, ordinarily it is regarded as running with the land. Tiffany on Real Property (3rd Ed.), § 854. Our own cases have defined a covenant running with the land as one that benefits the land itself. *St. L., I. M. & S. Ry. Co. v. O'Baugh,* 49 Ark. 418, 5 S.W. 711; *Bank of Hoxie v. Meriwether,* 166 Ark. 39, 265 S.W. 642. The two views just stated are entirely harmonious, for a covenant that may be said to benefit the land itself is of value to the covenantee primarily because he is entitled to occupy the land and enjoy the benefit.

The covenant now under consideration requires the lessee to release lands upon which no bauxite has been found or which it does not desire to mine. The intent is manifestly to benefit the surface owner in his occupancy of the property, since the release enables him to cultivate or make other use of the released land without fear of being interfered with by mining operations. Under the rules stated above this covenant runs with the surface ownership and may therefore be enforced by the appellants. The demurrer was properly overruled as to the fourth count.

The covenant relied upon in the third count provides that the lessee shall furnish to the lessors a log of each test made upon the premises, a chemical analysis of all samples taken, and a plat showing the location of all tests made. These provisions of the lease are of no concern to the surface owner, their purpose being to supply the lessors with information about the lessee's development of the leasehold and the progress of mining operations. This covenant is enforceable by the lessors and their successors, not by the surface owners. The demurrer to this count must be sustained.

The first count alleges that in violation of the terms of the lease the appellees drained a lake on appel-

lants' cattle lot. The phrase "in violation of terms of the lease" is a conclusion of law, not admitted by the demurrer. *Wood v. King,* 57 Ark. 284, 21 S.W. 471. We must therefore examine the lease to see whether the facts that are stated—the draining of the lake on the cattle lot—show a violation of the lease. There is no specific prohibition against the draining of surface water. The lessee is given power to open and maintain mines, to remove bauxite, to remove overburden, and to do various other acts in connection with the powers granted. This authority is broad enough to include the draining of a lake if necessary in the course of removing the bauxite.

Appellants insist, however, that these powers do not extend to interference with the cattle lot, because of this clause in the lease: "The premises surrounding the present homestead of lessors, such as yards, gardens and lot for cattle, shall not be disturbed by lessee during the lifetime of lessors, unless by mutual consent." Ordinarily this covenant would run with the land, under the principles already stated. But the authorities agree that the parties to a covenant, by indicating their intention to that effect, may prevent a covenant from running even though it would otherwise do so. Tiffany, *supra,* § 854. We think this clause does show an intention to make the covenant personal to the lessors. It refers to their present homestead and is to be effective only during their lives. While the covenant is of value to the lessors because of their occupancy of the land, the benefit is intended to be peculiar to them and not to extend to succeeding owners of the property. Since the right to enforce this covenant did not pass to appellants, the first count does not state a cause of action.

The remaining count concerns interference with appellants' occupancy of the premises, occasioned by the piling of overburden upon the property. As we have seen, this is the type of covenant they may enforce if a violation of the lease is stated in the complaint. The lease has two clauses with reference to the disposition of the overburden that accompanies strip-mining. Paragraph 1 authorizes the lessee to remove overburden "and

to deposit same at such places on said land as it may deem convenient." Paragraph 9, however, states: "If in the discretion of lessee it may be necessary to remove overburden in its mining of bauxite, said overburden shall be placed on said premises so as not to inconvenience the other occupants of said premises or the public." It is our duty to reconcile these apparently conflicting clauses if possible, so that effect will be given to each. This can be done only by holding that the broad authority granted in Paragraph 1 is limited to the extent set forth in the later paragraph. Construed liberally upon demurrer, the complaint sufficiently alleges a violation of the lease as so interpreted. The demurrer to the second count must be overruled.

Only a few words need be said in answer to the contention that the complaint discloses on its face that the statute of limitations has run. This argument is directed primarily to the first count, to which the demurrer has already been sustained. The counts which state causes of action are not barred on the face of the pleadings, for the development of the proof may show that the injuries asserted are of a continuing nature.

Counsel for both sides treat the Corporation as a party to this appeal, but we do not see how it is involved. It merely filed a motion to dismiss, upon which there appears to have been no hearing or other action. Even though the motion to dismiss was combined with the Company's demurrer, its allegations cannot be considered as true in passing upon the demurrer; for our code practice, like the common law, does not recognize a speaking demurrer. *Percifull v. Platt,* 36 Ark. 456. It follows that this opinion goes only to the controversy between appellants and the Company.

We affirm the chancellor's disposition of the first and fourth counts; in other respects the decree is reversed and the cause remanded.

McFaddin, J., concurs.

HILL *v.* BARNARD.

4-8944 224 S. W. 2d 31

Opinion delivered November 7, 1949.

M. V. Moody and *Elmer Schoggen,* for appellant.

Byron Bogard, for appellee.

ED. F. MCFADDIN, Justice. Appellees (the widow and heirs of A. A. Barnard) being in possession, filed suit to have their title quieted to residence property in North Little Rock. They claimed under a tax deed issued in 1936 and their continuous possession thereafter. Appellants (some being children, and some step-children of E. N. Hill) resisted the confirmation, claiming to be the real owners of the property, and asserting that any tax title acquired by A. A. Barnard necessarily inured to the benefit of appellants. The Chancery Court entered a decree quieting appellees' title, and the correctness of that decree is the issue on this appeal.

It is admitted that E. N. Hill was in charge of the property in 1931, and that he agreed for A. A. Barnard to live there. It is also admitted that in 1936 Barnard, while still an occupant, purchased the State's tax title, and continued in possession until his death in 1940; and also that his family has made valuable improvements while remaining in possession until the present time.

Appellants claim that since Barnard was the tenant of Hill, Barnard could not acquire a title adverse to Hill without first surrendering possession of the property; and they cite, *inter alia, Clemm* v. *Wilcox,* 15 Ark. 102; *Taylor* v. *Marble Savings Bank,* 196 Ark. 1179, 119 S. W. 2d 746; *Beloate* v. *Hathcoat,* 208 Ark. 1100, 188 S. W. 2d 619; *Denton* v. *Denton,* 209 Ark. 301, 190 S. W. 2d 291. Appellants also urge that Barnard had agreed to pay the taxes, and that therefore the tax title which he acquired necessarily inured to the benefit of appellants. *Hunt* v. *Gaines,* 33 Ark. 267 and *Zimmerman* v. *Franklin County Bank,* 194 Ark. 554, 108 S. W. 2d 1074 are two of the many cases so holding. On the other hand, appellees claim that Barnard never agreed to pay the taxes on the property, and was therefore free to acquire the State's tax title; and they cite *Billingsley* v. *Lipscomb,* 211 Ark. 45, 199 S. W. 2d 313,[1] which holds that a tenant in possession may acquire a *tax title* and assert it against the landlord.

The decisive question then becomes: what was the 1931 contract between Hill and Barnard under which Barnard went into possession of the property? If Barnard agreed to pay the taxes, then the appellants are entitled to prevail. If he did not so agree, then the appellees are entitled to prevail. The contract between Barnard and Hill was parol, and the testimony is in the sharpest dispute as to the contents. Appellants' witnesses testified that Barnard agreed to pay the taxes in lieu of rent. Appellees' witnesses testified that Barnard did not agree to pay the taxes; that he agreed to (and did) pay rent of $8.00 per month until 1936; and that with Hill's knowledge and acquiescence Barnard acquired the tax title in 1936 and thereafter paid no further rent.

The decision of the sharply disputed fact question, concerning the responsibility for the payment of taxes, is determinative of this case. The testimony was heard *ore tenus,* and the Chancellor thus personally heard the witnesses testify and observed their demeanor on the witness stand. In that respect the situation here is as it was in *Murphy* v. *Osborne,* 211 Ark. 319, 200 S. W. 2d

[1] See, also, *Sims* v. *Petree,* 206 Ark. 1023, 178 S. W. 2d 1016.

517. The language there used is likewise the conclusion here:

"The chancellor observed the demeanor on the witness stand, the inflection in the voice and the hesitancy or rapidity of the words flowing from the mouth of the witness. The chancellor thus had an opportunity to see more than the mere words on the printed page which, alone, come to this court. With the testimony in this case in hopeless conflict, we cannot say that the Chancery Court decided against the preponderance of the evidence."

Affirmed.

FOLSOM *v.* STATE.

4581 224 S. W. 2d 44

Opinion delivered November 7, 1949.

Rehearing denied December 5, 1949.

Greenhaw & Greenhaw, for petitioner.

G. T. Sullins and *Rex W. Perkins,* for respondent.

GEORGE ROSE SMITH, J. By petition for *certiorari* Joe Folsom asks us to set aside or modify his punishment for contempt of the Washington Chancery Court. The proceeding is a continuation of that considered in *Carnes v. Butt, Chancellor,* 215 Ark. 549, 221 S. W. 2d 416, decided June 20, 1949.

The original complaint was filed by Carl Tune against C. E. Carnes, individually and as a representative of the International Hod Carriers' Building and Common Laborers' Union, Melvin Ham as president of Local No. 107, and Local No. 107 itself. The complaint alleged unlawful interference by the union and its members with plaintiff's performance of a contract to build a warehouse in Fayetteville. The plaintiff's prayer was for an injunction against the defendants, and their officers, agents and members. By consent a temporary injunction was issued on May 4, 1949. Six persons were later cited and punished by the chancellor for their contempt of court in disregarding the temporary injunction. In the earlier opinion, *supra,* we refused to set aside these convictions.

On July 8 petitioner was ordered to show cause why he should not be punished for having violated the injunction. The proof was somewhat more fully developed than in the case of the six original contemnors. It now appears that a standing order of the Washington Chancery Court provided that all docket entries were to be transcribed by the clerk upon the court's record as orders of the court. When the temporary injunction was issued the chancellor made this entry in his docket:

"Orders of the Court

"Carl Tune, Plaintiff,

v.

C. E. Carnes, *et al.,* Defendants.

"5-4-49—By agreement of counsel, temporary restraining order herein is issued. Deft. files motion in short for order requiring filing of bond preliminary to

issuance of restraining order. Hearing on motion on oral evidence. Motion overruled."

At the hearing on May 4 the defendants were represented by an attorney, but they later employed additional counsel. The latter visited the courthouse on May 6 and examined the clerk's file in the case. They learned that no bond for the temporary order had been filed, but they did not examine the docket upon which the above entry appeared. The clerk testified that he had read the docket entry to one of these attorneys during a telephone conversation on May 5.

Petitioner, Carnes, and all the attorneys then held a conference. No one mentioned the fact that the order had been entered by consent. Petitioner and Carnes were advised that the injunctive order was void for want of a bond. Relying upon that advice the petitioner, who is secretary and business agent of Local No. 107, directed members of his union to resume their picketing. Some of the men inquired about the possibility of being arrested, but petitioner assured them that the order was void and that he would assist in the picketing and go to jail with them.

The chancellor found that petitioner, with knowledge that the injunction had been issued, had directed his men to resume picketing, in violation of the court's order. Petitioner was adjudged to be in contempt, fined $1,000 and sentenced to imprisonment for six months.

A number of petitioner's contentions are based on the premise that our decision in the *Carnes* case should be overruled. This we decline to do. That decision follows the holding and reasoning of the United States Supreme Court in *United States* v. *United Mine Workers of America,* 330 U. S. 258, 67 S. Ct. 677, 91 L. Ed. 884. For us to answer these contentions of petitioner would involve a mere repetition of the principles announced in the case cited.

It is argued that our statute makes the giving of bond a jurisdictional condition to the issuance of a temporary injunction. Ark. Stats. (1947), § 32-207. It is

true that we have so held when no question of consent was presented. *Harahan Viaduct Imp. Dist.* v. *Martineau,* 172 Ark. 189, 288 S. W. 10. But the requirement of a bond is for the protection of the persons enjoined. We can see no reason why they may not, by consenting to the order, waive the protection otherwise provided by the statute. See the *Carnes* opinion, *supra.*

It is suggested that the quoted docket entry shows that the defendants' consent to the injunction was conditioned upon the plaintiff's giving bond. There being no testimony to this effect, we have only the docket entry itself to support this suggestion. It does not necessarily bear the construction now urged. For all we can tell from the language used, counsel first agreed to the order and later asked that a bond be required. The chancellor may have concluded that the defendants could not later complain of an order entered by consent, so that it would be idle to require a bond to secure a nonexistent claim for damages. The docket entry does not recite that the defendants' consent was conditional. We do not feel justified in reading such a provision into its language, especially as the author of the entry did not so construe it at the hearing below.

Petitioner contends that counsel for the appellee unnecessarily encumbered the record with extraneous matter, the cost of which should not be charged to appellant. Petitioner offered to introduce the transcript of the testimony of four witnesses in the Carnes case, but upon the plaintiff's objection the court ruled that the entire record had to be offered. Three of the four witnesses whose transcribed testimony was offered were present in the courtroom and could have been called to testify. Counsel for plaintiff offered to withdraw his objection to the recorded testimony of the fourth witness if petitioner would call those present to testify in person. Petitioner then introduced the entire record in the earlier case, though objecting to the court's ruling. In these circumstances it can hardly be said that one side was more responsible than the other for the enlargement of

the record; so we do not disturb the chancellor's allocation of costs.

It is finally insisted that the punishment is excessive. We agree that it is. The fact that petitioner acted on the advice of counsel is of course not a defense to the charge, but it does lessen the seriousness of the offense. The penalty in a case of this kind, however, serves a dual function. Not only is the contemnor to be punished for his conduct, but, as we said in *Poindexter v. State,* 109 Ark. 179, 159 S. W. 197, 46 L. R. A., N. S. 517, the dignity and authority of the court must be vindicated. Reliance upon the advice of counsel affects the first consideration, but it is nevertheless true that in the eyes of the general public the court's order has been flouted. We have concluded that the judgment should be modified by a reduction of the fine to $500 and of the sentence to thirty days in jail. It is so ordered.

LEFLAR, J. I dissent on the ground that the punishment now imposed upon the defendant, though reduced from that fixed by the Chancellor, remains excessive.

It does not appear from the record in this case that the defendant personally acted in bad faith. He participated in peaceful picketing, but he knew that peaceful picketing was lawful unless it was enjoined by a valid order of the Court. It does not appear that, at the time of his participation, he knew that a consent injunction against such picketing had been issued, though he had made at least some effort to find out about the Court's order. The punishment herewith imposed appears to me to be heavier than is necessary for protection of the ends emphasized by the majority opinion, high and important though they be.

WAFFORD *v.* BUCKNER.

4-8971 224 S. W. 2d 35

Opinion delivered November 7, 1949.

Rehearing denied December 5, 1949.

[redacted]

A. D. Chavis, for appellant Walsh, and *Jay W. Dickey,* for appellants Wafford and Haskins.

Henry W. Smith, for appellee.

LEFLAR, J. The lands involved here were before this Court in *Walsh* v. *Buckner,* 209 Ark. 320, 190 S. W. 2d 447, decided four years ago. A statement of the facts in the earlier case is essential to an understanding of the present litigation. That case arose from a bill in equity brought by Walsh in Jefferson County Chancery Court to quiet title to eighty acres of wild and unimproved land. The bill was in proper form for a regular *in rem* proceeding to quiet title, and the notice required by law was duly published. Mrs. Lena Buckner, a named defendant, filed a cross-complaint asking that the title be quieted in her, her claim being based primarily on adverse possession. The Chancellor found for the cross-complainant and entered a decree quieting the title in her. On Walsh's appeal, this court held for Walsh as to the north forty acres of the tract, concluding that Mrs. Buckner did not establish adverse possession thereof. As to that tract, it was ordered that the decree below be

reversed. As to the south forty-acre tract (which is the land involved in the present litigation) this Court held that Walsh failed to show good title in himself because of an outstanding interest in the Reinberger heirs, and then declared that "this decree [of the Chancery Court] as to that tract will be affirmed." The mandate sent from the Supreme Court to the Chancery Court accordingly ordered reversal of the Chancellor's decree as to the north forty acres, but recited that ". . . it is the opinion of the court that there is no error in so much of the proceedings and decree of said chancery court in this cause as held that appellant [Walsh] failed to establish in himself title to the [south forty acres]. It is therefore ordered and decreed by the court that so much of said decree be and the same is hereby affirmed." Thereafter Walsh and Mrs. Buckner through their attorneys (who represent the same parties in the present litigation) agreed to a Supplemental Decree, which was signed by the Chancellor on January 5, 1946, quieting title in the south forty acres in Mrs. Buckner and in the north forty acres in Walsh.

On December 9, 1946, Walsh executed to Wafford and Haskins a warranty deed covering the entire eighty acres. He based his right to do this, as to the south forty acres, on a quitclaim deed from the Reinberger heirs, who now testify that they were making no claim to the land, but were willing for a consideration to quitclaim any interest they might have in it.

The grantees subsequently learned of the decree quieting title to the south forty acres in Mrs. Buckner, and brought the present action against Walsh to recover on the covenant of warranty, naming Mrs. Buckner a defendant also. By cross-complaint Mrs. Buckner sought to have the deed from Reinberger to Walsh and that from Walsh to Wafford and Haskins cancelled as clouds on her title to the south forty acres. A grantee from Mrs. Buckner also intervened, his interest being identical with hers.

Walsh's defense was that the portion of the Supplemental Decree quieting Mrs. Buckner's title in the south

forty acres was a mistake, that the Supreme Court was mistaken in ordering that the title be so quieted, that the Chancellor was mistaken in following the Supreme Court's mistaken order to that effect, and that he was mistaken when he agreed, through his attorney, to the wording of the Supplemental Decree.

The Chancery Court rejected this defense. Its holding was that the Supplemental Decree was in accordance with the Supreme Court's opinion and mandate, and was effective to quiet title in the respective forty-acre tracts according to its terms. Wafford and Haskins were allowed recovery against Walsh on the covenant of warranty, and the deeds from the Reinberger heirs to Walsh and from Walsh to Wafford and Haskins were cancelled, as to the south forty acres, as clouds on Mrs. Buckner's title thereto. From a decree to this effect Walsh now appeals. Wafford and Haskins join in the appeal, presumably for the purpose of making sure that all issues affecting them are settled.

The decree of the Chancery Court is correct. The Supplemental Decree of January 5, 1946, was in accord with the opinion and mandate of this court, and the matters determined therein became *res adjudicata.* If there was error in this court's judgment it should have been brought to our attention in the petition for rehearing. The decree entered in accordance with this court's mandate may not be collaterally attacked either by persons who were directly parties to it or by those whose interests were bound by it as the judgment in a proceeding *in rem.* Ark. Stats. (1947), §§ 34-1901, *et seq.* This includes persons not specifically named as defendants in the title quieting suit, the governing *in rem* and publication statutes having been complied with. *Kulbeth* v. *Drew County Timber Co.,* 125 Ark. 291, 188 S. W. 810; *Champion* v. *Williams,* 165 Ark. 328, 264 S. W. 972. And see *Ballard* v. *Hunter,* 204 U. S. 241, 27 S. Ct. 261, 51 L. Ed. 461.

The decree is affirmed.

HENDERSON *v.* OZAN LUMBER COMPANY.

4-8959 224 S. W. 2d 30

Opinion delivered November 7, 1949.

Wendell Epperson and *Alfred Featherston,* for appellant.

Tompkins, McKenzie & McRae, for appellee.

ED. F. MCFADDIN, Justice. This litigation is between the holder of an unrecorded timber deed and the subsequent purchaser of the land. The controlling question is whether such purchaser had notice of the timber deed prior to his acquisition of the land. The law on the point is well settled. In *Millman Lumber Co.* v. *Bryant,* 213 Ark. 277, 209 S. W. 2d 878 we reviewed many of our earlier cases, and quoted with approval the rule stated in Devlin on Real Estate, 3rd Ed., § 725:

" '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 knowledge 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.' ''

Appellant recognizes the law to be as quoted, but claims that the facts are in his favor; that is, he claims that the chancery court erred in finding that the appellant had sufficient notice of the prior deed to Ozan Lumber Company (hereinafter called ''Ozan.''). Thus we are brought to a consideration of the facts.

In 1945, LeRoy Denton, being the owner of the land in question, conveyed the timber to appellee, Ozan, by a deed which allowed ten years for timber removal. This deed was not recorded. In 1946, Denton conveyed the land to appellant, Henderson, and neglected to insert language in the deed to show the previous sale of the timber. When Henderson cut some of the timber Ozan filed this suit for injunction and damages. Henderson testified that when he purchased the land, he received no information or notice from anyone that the timber had been sold to Ozan; but his testimony was controverted by two witnesses, being LeRoy Denton and Laymon Lamb.

Denton testified that Henderson received his deed at the bank, and then added:

''A. When I walked out of the bank, Henderson remarked to me about the length of time.

Q. That was after the deed had been executed?

A. Yes, I know that was after the deed was made. That goes to prove that he knew about it. He wasn't asking me about it.

Q. After you left the bank, Henderson remarked what?

A. 'Reckon we can get them to cut the timber off before ten years?' ''.

Lamb, who negotiated the sale from Denton to Henderson, testified as to his conversation with Henderson prior to the delivery of the deed:

"Q. Was there anything said about the timber at that time?

A. I told him the timber did not go, that LeRoy had already sold the timber to Ozan.

Q. That the timber had been sold to Ozan Lumber Company?

A. That is right."

Thus it was a fact question as to whether Henderson, when he purchased the land, had notice that the timber had been sold to Ozan with ten years' right of removal. The chancellor saw the witnesses and heard them testify;[1] and we cannot say that his finding is contrary to the preponderance of the evidence. Neither can we say that there was any error in the amount of damages found by the chancellor to be due Ozan.

Affirmed.

SUTTERFIELD *v.* SMITH.

4-8966 223 S. W. 2d 1018

Opinion delivered November 7, 1949.

[1] See *Murphy* v. *Osborne,* 211 Ark. 319, 200 S. W. 2d 517.

John B. Driver and *Ben B. Williamson,* for appellant.

Chas. F. Cole, for appellee.

HOLT, J. Appellee, C. L. Smith, sued appellants, two of four joint makers of a promissory note. One of the makers is now deceased and another is living in another State. The note was executed November 16, 1931, in the amount of $195 and was due one year from its date with 10% interest. Four credits appear on the back of the note, aggregating $64.65. There was a $1.00 credit October 15, 1938, and another credit of $1.00 October 1, 1943, which was the last.

This suit was begun October 27, 1947. Appellants specifically pleaded, and defended primarily on the ground that the note was barred by the 5 year Statute of Limitation (Ark. Stats. (1947), § 37-209) at the time of the institution of the suit, and this presents the controlling and decisive question here.

It appears undisputed that each of the $1.00 payments, *supra,* was made by a third party, J. W. Green, to the owner of the note, appellee, Smith. Green testified positively that these two payments were made by him to Smith out of his own pocket and that "I don't know whether they (meaning appellants) knew it or not" and "I paid it to Mr. Smith. I don't know whether or not he knew where it came from." Both appellants, Garland Sutterfield and W. E. Sutterfield, testified positively that they did not authorize, and knew nothing about, these two $1.00 payments.

W. E. Sutterfield testified relative to the $1.00 payment on October 15, 1938: "No, sir; I never did know it was made; no such payment," and further "Q. On October 1st, 1943, did you pay J. W. Green the sum of One Dollar on that note? A. No, sir. Q. Did you know it was ever paid? A. No, sir; I never did know it was made; no such payment."

Garland Sutterfield testified: "Q. Did you give this money on October 15, 1938, One Dollar, and one on October 1, 1943, One Dollar, if you paid either one of these

dollars on the note? A. No, sir. Q. Did you authorize anybody to pay it for you? A. No, sir; I did not. Q. Did you know that these two dollars had been made on the note? Credited on the note? A. No, sir; I did not."

There was evidence that Green had been agreed upon by the parties to deliver to appellee, Smith, any payments to be made on the note from appellants to appellee and that the first and second payments credited on the note were paid to Smith by appellants in this manner. As indicated, we find no evidence in this record that either of the $1.00 payments was made with the knowledge or consent of either of appellants, or of any one of the joint makers of the note, nor is there any evidence that any of the joint makers assented to these credits, or ratified the last credit mentioned above, or in fact either of the $1.00 credits. On the evidence presented, Green was at most a special agent to deliver any payments which appellants desired to make to appellee, Smith. Green was not obligated on the note. In the circumstances, the two $1.00 payments which he voluntarily made from his own funds, without the knowledge, consent or acquiescence of any one of the joint makers of the note would not be binding on appellants.

The case of *McAbee* v. *Wiley,* 92 Ark. 245, 122 S. W. 623, strongly relied upon by appellee, is clearly distinguishable. In the present case, the facts are essentially different. As was pointed out in the opinion in the *McAbee* v. *Wiley* case: "There was testimony tending to prove that the defendant saw the indorsements on the note with their dates, and actually read them himself; and, after having thus read them, he admitted their correctness and assented to their actual indorsement on the note. There was therefore sufficient evidence to sustain the verdict of the jury." We find no such evidence in the present case.

Having reached the conclusion that there was no substantial evidence that warranted the jury's verdict, and judgment based thereon, we hold that the trial court erred in refusing appellants' request for a directed verdict in their favor at the close of all the testimony.

Accordingly, the judgment is reversed and the cause dismissed.

AMERICAN LIFE INSURANCE COMPANY *v.* MOORE.

4-8969 223 S. W. 2d 1019

Opinion delivered November 7, 1949.

Paul L. Barnard and *Linwood L. Brickhouse,* for appellant.

Ben B. Williamson, for appellee.

GEORGE ROSE SMITH, J. Judgment was recovered below upon a group accident policy issued by appellant to appellee Moore. The claim arose from the death of Dink Looney, one of Moore's employees and the husband of appellee Docia Looney. For reversal it is contended only that a verdict should have been directed for the insurer.

Looney's employer is a sawmill operator. While cutting timber on May 31, 1948, Looney accidentally sustained a compound fracture of his right leg. He was taken to a hospital for an operation by which the fracture was reduced. The leg was placed in a cast, and after eleven days the patient was returned to his home with instructions to remain in bed. On the night of July 12 Docia Looney heard her husband make an unusual noise and went at once to his bedside. In her words,

"I just saw his deathly look all over his face, and he was turned blue, and he died in less than ten minutes."

Dr. U. S. Monroe had been called immediately, but did not arrive until after Looney's death. After examining the body and learning the history of the case he attributed death to a pulmonary embolism resulting from the fracture. The medical witnesses define an embolus as a clot of blood or other matter that becomes detached from its point of origin and enters the blood stream. The pulmonary artery is so small that it may be completely obstructed if the embolus lodges there. This condition, known as pulmonary embolism, stops the circulation of blood to the lungs and causes almost instant death.

On cross-examination Dr. Monroe admitted that there are cases known to the medical profession in which pulmonary embolism has been caused other than by accidental injury or surgery. In this case an autopsy would have been required to determine the cause of death with certainty. Nevertheless, Dr. Monroe reiterated his opinion that Looney's death resulted from pulmonary embolism caused by the accidental injury. On the other hand, appellant's medical witness—who stated that he was as familiar with the subject as the average physician—testified that an embolism never occurs more than three weeks after the injury. In his opinion, based on his own experience and the textbooks he had examined a few days before the trial, it was not possible for an injury sustained on May 31 to produce pulmonary embolism on July 12—an interval of forty-two days. This witness was unable, however, to state the cause of Looney's death.

This conflicting expert testimony presented a question for the jury. As we said in a similar situation, in *Mid-Continent Life Ins. Co.* v. *Chappell,* 174 Ark. 712, 294 S. W. 4, when medical men differ about the matter the verdict is not contrary to natural or scientific principles, nor is it based upon what is not and could not be true.

Appellant insists that Dr. Monroe's testimony is speculative, since he admitted the possibility that death was due to some other cause. But medicine, like the law, is not an exact science. If mathematical certainty were required, a surgeon would act at his peril in advising his patient to undergo an operation. The law does not compel adherence to a standard so precise. The effect of Dr. Monroe's testimony is that in his opinion the most probable cause of death was a pulmonary embolism attributable to the fractured leg. He stated that Looney had not had any other illness or any symptom of a heart ailment that might have brought about his sudden death. A physician of forty years' experience, he had examined the body and learned the insured's case history. No alternate theory has been proposed by appellant. We are unwilling to say that Dr. Monroe's testimony is conjectural merely because his opinion did not preclude every other possible cause of death.

Affirmed.

CHATFIELD *v.* CARTER BROTHERS EQUIPMENT COMPANY.

4-8960 223 S. W. 2d 1021

Opinion delivered November 7, 1949.

David L. Ford, for appellant.

Franklin Wilder, for appellee.

MINOR W. MILLWEE, Justice. Appellant, W. R. Chatfield, owns and operates the Chatfield Implement Company at Sanger, Texas. Appellee, Carter Brothers Equipment Company, is an Arkansas corporation engaged in a similar business at Fort Smith, Arkansas.

Appellant filed this suit against appellee in the Sebastian Chancery Court alleging that L. H. Martin, doing business as The L. H. Martin Tractor & Implement Company in Fort Smith, Arkansas, was indebted to appellant in the sum of $2,839.18 as balance due on the purchase price of two hay balers which appellant sold to Martin in July, 1946, for $5,400; that in November, 1947, L. H. Martin transferred his entire stock of machinery and equipment to the Martin-Carter Tractor & Implement Company, an Arkansas corporation, without complying with the Bulk Sales Law; that the Martin-Carter Co. subsequently changed its name to Carter Brothers Equipment Company; that appellee's stockholders were the principal stockholders in the Martin-Carter Co.; and that appellee's officers and agents knew of the transfer from L. H. Martin to the Martin-Carter Co. and further knew that the Bulk Sales Law had not been complied with by either Martin or the appellee. Appellant asked for cancellation of the transfer and assignment of the stock of merchandise by L. H. Martin to the Martin-Carter Co.; that appellee be declared a trustee in possession of said stock of merchandise; and that appellant be awarded judgment against appellee for the balance due on the L. H. Martin account.

The answer of appellee contained a general denial and alleged that appellant sold the balers to John Pirre, Jr. of Okmulgee, Oklahoma, after representing to said buyer that the balers were new when in fact they were old, used and not in good working order. The

answer admitted the sale and transfer of the stock of merchandise by L. H. Martin to the Martin-Carter Co. in November, 1947, and stated that the Bulk Sales Law had been fully complied with in said sale and transfer.

Trial resulted in a decree denying the relief prayed and dismissing appellant's complaint. The court held that appellee was an innocent purchaser without knowledge of appellant's claim against L. H. Martin; and that appellee had complied with the Bulk Sales Law "to the best of its ability".

The evidence discloses that in October, 1947, L. H. Martin was operating an implement business in Fort Smith and needed additional capital to carry on his business and pay debts. On October 31, 1947, Martin entered into a written agreement with W. H. Carter and Clyde Carter, brothers, in which Martin was to sell the Carters an undivided 2/3 interest in his business for a stipulated cash consideration. It was also agreed that the parties would form a corporation in which each would be the owner of 1/3 of the stock. Pursuant to the agreement, L. H. Martin on November 1, 1947, furnished the Carters with a complete inventory of the business and a verified statement of Martin's creditors and indebtedness in which the alleged debt to appellant was not listed. The Martin-Carter Tractor & Implement Company, a corporation, was duly formed and on November 29, 1947, L. H. Martin transferred and sold all his interest in the L. H. Martin Tractor & Implement Company to the corporation. Notice was given to the creditors named in the verified statement furnished by Martin and all debts listed therein were paid by the corporation. In March, 1948, Martin sold his 1/3 of the stock in the corporation to the Carters and the name of the corporation was subsequently changed to Carter Brothers Equipment Company.

W. H. Carter, who acted for himself and his brother in the negotiations, testified that he knew nothing about appellant's claim against L. H. Martin prior to formation of the Martin-Carter Co. and the transfer of the property to the corporation; that prior to the transfer

he caused an audit to be made of the books of the L. H. Martin Co. and that there was nothing in this audit or the records of the company showing the claim of appellant; and that he learned of the claim for the first time in December, 1947, when appellant came to Fort Smith to collect the claim from Martin.

There is considerable conflict in the testimony as to whether L. H. Martin purchased or authorized the purchase of the hay balers from appellant, but we agree with the chancellor's conclusion that the testimony as a whole indicates the validity of the indebtedness. The evidence is also conflicting as to whether appellant misrepresented the condition of the balers to the agents of L. H. Martin. Martin is not a party to this suit.

The question for determination is whether appellee, Carter Brothers Equipment Company, is liable for the debt of L. H. Martin to appellant under our Bulk Sales Law (Ark. Stats. (1947), §§ 68-1501 to 1504, inclusive). There is considerable division in the authorities as to the applicability of the Bulk Sales Law to transactions whereby a corporation or partnership has been organized to take over and carry on a business. Anno. 96 A. L. R. 1213.

We think the question of appellee's liability in the instant case is settled by the principles announced in *McKelvey* v. *John Schaap & Sons,* 143 Ark. 477, 220 S. W. 827. In that case McKelvey purchased a retail drug business from John Schaap & Sons, but failed to pay two notes given for the purchase price. Subsequently McKelvey, his wife and son-in-law entered into a partnership agreement for operation of the business and sold the business to W. P. Meyers. In deciding that Meyers was not liable for the McKelvey debt this court said: "It is unimportant to consider the effect of the organization of the copartnership between McKelvey and his wife and West, to take over and operate the business. The authorities seem to be divided on the question whether or not the formation of a corporation or copartnership for the purpose of taking over and operating a business, or whether a sale of an interest in a

business, falls within the operation of the Bulk Sales Law. The authorities on that subject are collated in L. R. A. 1917D, p. 623, and in L. R. A. 1918C, p. 932.

"In any event, appellant Meyers is liable, if at all, on his failure to comply with the Bulk Sales Law, and the undisputed evidence is that there was a compliance with the law on his part with respect to demanding and receiving a list of the creditors of his vendor. It is true that the debt to appellee was not listed, but the statute is not fairly open to the construction that a purchaser who, in good faith, demands and receives a list of creditors should be held liable where the vendor has either by fraud or inadvertence omitted the name of a creditor. The authorities seem to be unanimous so far as they go in holding that under such circumstances the vendee is not liable . . .

"We think it is a reasonable interpretation of the statute to say that if the purchaser proceeds in good faith he is not liable, notwithstanding omissions from the list of creditors. There is nothing in the present case to show bad faith on the part of Meyers. It does not appear that he had any information that appellees claimed to be a creditor of the copartnership from which he made the purchase, or that he was informed that appellee had any claims against the copartnership, or even against McKelvey. He demanded and received a list of creditors, and all of the debts so listed were paid in full . . ." See, also, *Swafford* v. *Ketchum,* 177 Ark. 1152, 9 S. W. 2d 806.

So here, appellee's liability, if any, must be predicated upon its failure to comply with the Bulk Sales Law. Assuming, without deciding, the applicability of the Bulk Sales Law, we think the preponderance of the evidence—if not the undisputed testimony—supports the trial court's conclusion that appellee and its predecessor, Martin-Carter Tractor & Implement Company, sufficiently complied with the statute. If fraud was committed by L. H. Martin in omitting the name of appellant as a creditor, there is an absence of proof that the Carters, who were principal stockholders in the cor-

poration, knew anything about the claim at the time of the transfer of the business. It is also undisputed that the purchaser here demanded and was supplied with a verified list of the creditors and indebtedness of L. H. Martin prior to the transfer and that said creditors were notified and their claims promptly paid. On these facts the trial court correctly concluded that appellee was an innocent purchaser, without knowledge of appellant's claim, and complied with the Bulk Sales Law.

Affirmed.

HOLT, J., not participating.

ANDERSON *v.* CHANDLER.

4-8956 223 S. W. 2d 983

Opinion delivered November 7, 1949.

E. K. Edwards, for appellant.

Wendell O. Epperson and *F. B. Clement,* for appellee.

GRIFFIN SMITH, Chief Justice. Kirk Anderson, John Frachiseur, and Harmon Chandler orally agreed that as

partners they would buy and sell live stock and other personal property as Dierks Stock Commission Company. Unexplained losses occurred during the operational period beginning April 13, 1946, and ending with dissolution of the partnership February 10, 1947. Anderson and Frachiseur, contending that Chandler was active manager in charge of receipts and disbursement, sought an accounting, their position being that irrespective of any evidence showing that a shortage $1,756.49 came about through Chandler's affirmative act of misappropriation, he should be required to repay to each of his former partners a third of the loss because financial management had been entrusted to him.

With the exception of minor adjustments not material to this opinion,[1] of which Chandler does not complain, the Court found that G. G. Hoiston, who was joined with Chandler as a defendant, was liable for $1,137.24 because as bookkeeper he had not satisfactorily explained the shortage; that Anderson and Frachiseur should each receive $568.62 of the principal judgment, that costs should be paid from a balance of $583.15 on deposit in the Bank of Dierks, and that the remainder of the deposit should be divided equally between Anderson, Frachiseur, and Chandler. Hoiston has not appealed.

In arriving at net earnings and sums unaccounted for, the Chancellor relied largely upon an audit made by John Moore, who was employed by Anderson and Frachiseur. The contention of these two, who are the only appellants, is that because Chandler lived closer to Dierks than either of them, it was mutually agreeable that he supervise partnership activities, hence, after the first of June, 1946, financial matters were left entirely with Chandler.

During the first operational period, ending with May, Frachiseur's daughter, Helen, acted as bookkeeper. The records she maintained are not criticized. When she left the first of June, Hoiston was employed. He is

[1] An item of $37.20 representing purchase price of a cow, and a cash withdrawal of $3.92, were charged to Chandler in the decree that directed him to pay Anderson and Frachiseur $13.70 each.

Chandler's uncle. Appellants insist they were not consulted when Hoiston was engaged. They also testified that in treating Chandler as treasurer they acted in response to oral arrangements. Since Hoiston is insolvent and the amount awarded cannot be collected from him, they urge that it was error not to hold Chandler liable when it was shown that other members of the association did not handle the money, and were not expected to do so.

Plans of the partners contemplated sales at auction or otherwise, to be held principally at Dierks each Saturday. Farmers having stock or other personal property placed it with the Commission Company, and a percentage charge would be made for the services rendered. After a few weeks this was reduced from four to three percent.

The largest losses sustained by the sales company occurred when Chandler, on advice of one or both of the appellants, signed checks in blank and turned them over to George Meadows and John Garvin upon their agreements to buy for resale at the Dierks auction. They appear to have bought extensively and to have sold, but not through the commission company. When the checking privilege was withdrawn Meadows had not accounted for $776.56, and Garvin owed $2,056.30, a thousand dollars of which was paid later. Anderson, on cross-examination, was asked if it were his practice to permit men like Garvin and Meadows to take the company's checks and buy cattle for resale, and replied, "Yes, on commission." Frachiseur admitted that he "recommended" Meadows to his associates.[2]

Although Hoiston testified that certain transactions consummated by Frachiseur or Anderson were presumptively profitable and that proceeds were not brought to him, the Chancellor was warranted in finding Hoiston's liability to be $1,137.24. But there was no testimony that Chandler received any of the shortage. When sales were made on Saturdays, Hoiston listed the checks and money,

[2] The obligations of Meadows and Garvin were not an issue in the trial, but transactions with them were testified to for the purpose of showing the activities of appellants.

handed them to Chandler, and Chandler usually took them to the bank on Monday. The cashier testified it was Chandler's invariable custom to present the list when a deposit was made, the only variations being in matters of addition, exchange charges, etc. Notes covering overdrafts were made by Chandler when necessary.

Moore, the auditor, testified that the books were of no aid in determining how the shortage occurred. A question asked of him was, "Suppose a [book entry] shows that a mule sold for more than it actually brought: you would not know about that, would you?" There was a negative answer. Neither would the books reflect a loss the company might sustain through sale of live stock.

On cross-examination Frachiseur admitted that on at least one occasion he and Chandler bought 26 head of cattle through the commission. The transaction showed a substantial profit. When asked if the two kept the money this witness replied, "Yes, sir, [but] we shouldn't have done it. We got several 'bawlings-out' from Kirk." Frachiseur was asked if he knew of a single instance in which Chandler had failed to procure a duplicate deposit slip for money or checks given him by Hoiston, and replied that he did not. He did not, during the partnership period, check to find out how the finances were being handled. Because of other business, he "left that to [Chandler] and Hoiston—they were handling the money."

From the weight of evidence the Chancellor could have found that the employment of Hoiston was acceptable to appellants. For a long period of time they knew what his duties were. There was no testimony from which it could be adjudged that Chandler's information was such that in not proceeding more expeditiously to check against Hoiston an obligation to appellants was violated to such an extent that personal liability should attach. If in giving employment to his uncle at a compensation of $5 per week Chandler imposed upon his partners, a like situation arose when Frachiseur and Anderson recommended Garvin and Meadows to him.

Since we are unable to say that by a preponderance of the evidence Chandler is shown to have wrongfully inflicted loss upon his business associates, the decree and judgments must be affirmed.

WRIGHT *v.* FORD.

4-8965 224 S. W. 2d 50

Opinion delivered November 14, 1949.

Virgil Evans, McMath, Leatherman, Schoenfeld & Whittington and *James W. Chesnutt,* for appellant.

R. J. Glover and *C. T. Cotham,* for appellee.

GRIFFIN SMITH, Chief Justice. Appellants challenge the Court's right, after term, to set aside an order of confirmation. The Judge expressly found that fraud was not practiced upon the Court in procurement of the judgment.

The property bid in by appellee is part of an estate under Probate administration. R. D. Wright died intes-

tate in April, 1947. His widow remarried, and as Mrs. Georgia L. Hoover petitioned for allotment of dower. In the proceedings for assignment it became necessary to sell property known locally as Wright's Tourist Court, fronting on Albert Pike Highway. Appellee Ford owned valuable realty near the tourist court, and during R. D. Wright's lifetime had endeavored to purchase the lot involved in this litigation.

The commissioners were directed to lay off property for the widow's dower, but in doing so to exclude her homestead. In Mrs. Hoover's petition, and in the Court's order, the Wright lands were described as being on Thornton Street, running west 200 feet along the highway. The homestead would extend 100 feet from Thornton Street.

When the commissioners reported that they could not, without prejudice to the widow and heirs, recommend the assignment of dower in kind, they were ordered to sell all of the property except the homestead. Ford personally appeared at the sale and made the highest bid, raising his nearest competitor by $100 with an offer of $19,000.

November 22, 1948—twelve days after the sale was concluded—action of the commissioners was confirmed and execution of a deed was ordered. December 10th Ford filed with the Probate Clerk a petition to vacate the order of confirmation, alleging, in effect, that a discrepancy of five feet and failure of the commissioners to accurately describe the tourist court property, and to truly advertise it, rendered the transaction unconscionable and void. According to the petition, the commissioners had power to sell only 95 feet of the frontage on Albert Pike Highway, etc. The only public notice, Ford alleged, was a display advertisement signed by Wood and Chesnutt as attorneys, as distinguished from the Court's order that the commissioners cause legal notice to be printed for twenty days in a newspaper of general circulation. In an amendment to his pleading, Ford asked that the purchase price be proportionately abated if the Court should find that confirmation should not be vacated.

In a demurrer and response to the petition, Mrs. Hoover and others in interest asserted (1) that the petition did not allege facts sufficient in law to justify the relief, and (2) they denied that Ford was in any way misled. They affirmatively alleged that appellee not only knew where the true boundaries were, but that in making the sale the commissioners publicly announced that the printed advertisements were erroneous; therefore, in buying, Ford actually received the property he intended to acquire. The response and demurrer were verified, but Ford's petition was not. No action was taken by the Court during the term at which the confirmation order was made, nor does the record disclose an attempt to get consideration. When the December term began witnesses were heard, and a judgment vacating the action of confirmation was entered.

Ford testified that he considered the property to be highly desirable, and that he was willing to bid liberally for it, but this willingness was predicated upon his belief that the highway frontage was 100 feet. He mentioned a shortage in the rear measurement, but did not regard this as important as the "underage" of five percent mentioned in the petition. Approximately a week before the bidding, Ford went to Judge Scott Wood, who then represented Mrs. Hoover, and asked for a plat. Judge Wood sent him to another party, but explained that Mrs. Hoover would be glad to show where the lines were. Ford says he talked with Mrs. Hoover and relied upon the corners she indicated. A stone, painted white and set in the ground for ornamental purposes, figured in the discussions.

R. S. Smith, the commissioner who conducted the sale, testified that when the bidding began he had a copy of the advertisement. When he read the figures showing 100 feet along the highway, some one spoke up and said "ninety-five." Smith thought he made some facetious remark as to his own inability to read correctly. Continuing, he testified: "Public attention was called to the fact that the plat showed only 95 feet. The plat was handed out to any one who was interested." Smith was

of opinion that Ford was present when the discrepancy announcement was made. He made the first bid, and there had been an announcement of the five-foot variation before that time.

The order of confirmation contains a recital that the property was duly advertised as provided by law, and that all jurisdictional requirements were met. Judge Wood, as a witness for the appellants, verified the fact of legal publication, although it is conceded that the description called for 100 feet.

We think a preponderance of the testimony places Ford in a position where it is inconceivable that he did not hear the discussions regarding front-foot shortage; and on the purely factual issue we would be compelled to say that when his bids were made the situation was such that he must have known what was being done.

A Court's control of its judgments and decrees during the term is inherent, and exists without reference to any statute. *Wells Fargo & Co. Express* v. *W. B. Baker Lumber Co.,* 107 Ark. 415, 155 S. W. 122. But, except as authorized by statute, this control ends when the term expires, and one seeking relief must find his right in a subdivision of Pope's Digest, § 8246, 2 Ark. Stats. 29-506, [or if in equity by bill of review. See *Long* v. *Long,* 104 Ark. 562, 149 S. W. 662], *Bank of Russellville* v. *Walthall,* 192 Ark. 1111, 96 S. W. 2d 952. The fourth statutory ground authorizing avoidance is for fraud practiced on the Court in procuring the judgment or decree. It is this subdivision that appellee relies upon, in addition to his contention that the Court may act within discretionary limits at a subsequent term where the motion to vacate is filed at the judgment or decree term.

Appellee is entirely correct in saying that the Court's discretion to vacate an improper judgment or decree, if exercised before lapse of the term, will not be controlled on appeal. We think, however, that this discretion ends with the term unless there are extraordinary circumstances from which an inference can be fairly

drawn that the parties in interest knew it was intended that action on the motion be carried over. Unless this intent is clearly disclosed, an innocent person might be adversely affected. Certainly one dealing with real property and finding of record, *prima facie,* a final order, should not suffer at a later date because action was taken in a way not authorized by law, and at a time when the Court's discretion had ended.

A phrase tending to support appellant's contention that with filing of the motion during term the Court had a right to act at the following term, is found in *Young* v. *Young, Guardian,* 201 Ark. 984, 147 S. W. 2d 736. It was there said that "In the instant case the motion to vacate was made before the May term of Poinsett chancery court had been succeeded by the December term, and the order setting the [probate] judgment aside was not void for want of jurisdiction." This Court reversed the action of the trial court in vacating the judgment. Assuming that comment on jurisdiction in the Young case was not *dictum,* still the record shows that the motion to vacate, although filed during the trial term, was verified.

Our attention has not been called to any case where an unverified motion, filed during term and carried over, was treated as sufficient when dealt with at the subsequent term. The requirement for statutory compliance was stressed in *Merriott* v. *Kilgore,* 200 Ark. 394, 139 S. W. 2d 387, where it is indicated that an unverified motion to vacate could not be treated as a complaint.

Quoting from *McDonald* v. *Olla State Bank,* 192 Ark. 603, 93 S. W. 2d 325, appellant says that "this principal [of sustaining the trial court's discretion] was later upheld in *Jaynes* v. *State,* 212 Ark. 410, 206 S. W. 2d 7. One of the points urged in the McDonald case was that, construed from a judicial standpoint, the decree was rendered in November, during the October, 1934, term of court. Insistence on this date was predicated upon certain written memoranda dated November 29. This Court, however, concluded that "the cause of action was primarily adjudicated April 15, 1935," . . . [and] "It follows from this determination that appellee's motion

to vacate, filed on September 9, 1935, fell within the April, 1935, term of said court." In the Jaynes case it was held that Circuit Court did not abuse its discretion in refusing to vacate a judgment; but there the motion was filed and acted upon during the same term.

An opinion written by Chief Justice McCulloch—*Moore* v. *Price,* 101 Ark. 142, 141 S. W. 501—would from the facts recited lend substance to appellant's position, but this apparent support is dissipated by an examination of the original transcript which shows that the motion was not under the statute, but, as expressed by the petitioner, was to be treated as a bill of review.

Relief to which the plaintiff, at the time of trial, was legally entitled in his personal injury suit, was denied in *St. Louis & N. A. R. Co.* v. *Bratton,* 93 Ark. 234, 124 S. W. 752, on the railroad company's appeal from an order, *nunc pro tunc,* made at a subsequent term. In the circumstances of the case the plaintiff had originally been entitled to have the judgment made a lien upon the defendant's property. In this Court's opinion, upholding the railroad company's contention that the trial Court was without power to declare the lien in the manner attempted, Judge Frauenthal said:

"In order to give to the records of a court the utmost sanctity and an absolute verity, the common law declared that no judgment could be amended after the term at which it was rendered. But where the entry through some plain error fails to correspond with the judgment that was actually rendered, the principles of justice obviously require that it should be corrected; and therefore the rule of the common law has been modified in modern practice to that end. . . . [But] under the guise of amendment, there is no authority to revise a judgment, or to correct a judicial mistake, or to adjudicate a matter which might have been considered at the time of the trial, or to grant an additional relief which was not in the contemplation of the Court at the time the judgment was rendered."

In view of the Court's express finding that fraud was not practiced in procurement of the judgment, the

action vacating it could not be sustained even if the motion had been verified; but since the statutory formality of verification was not complied with so that, at the succeeding term, the motion could have been treated as a complaint and within the statute, and since there were no extraordinary circumstances showing that jurisdiction had been retained, our holding goes only to the proposition that the Court was without power to vacate the order of confirmation.

Reversed with directions to reinstate the order of confirmation.

ROACH *v.* ARKANSAS FARMERS MUTUAL FIRE INSURANCE COMPANY.

4-8990 224 S. W. 2d 48

Opinion delivered November 14, 1949.

Charles L. Farish, for appellant.

Thad Tisdale and *D. D. Panich,* for appellee.

LEFLAR, J. Plaintiff Roach brought this action to recover on a policy of fire insurance issued by defendant Company on a house and furnishings owned by

plaintiff. Defendant denied liability on the ground of plaintiff's breach of certain clauses in the policy, and particularly a clause which provided that the Company should "not be liable for loss occurring . . . (d) while the insured shall have any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." At the trial a jury was impanelled and evidence heard, but at the close of the evidence, after argument in chambers, the Circuit Judge instructed the jury to return a verdict for the defendant. The Judge based this instruction upon plaintiff's violation of the clause just quoted, and for the record stated: "The uncontradicted testimony as the Court heard [it] is to the effect that a policy of insurance was issued by the Southern Farmers Mutual Insurance Company, which was the third policy of insurance issued on this identical property of plaintiff, which was issued without notice or consent of the [defendant] Company, and for that reason under the provisions of the policy, as the Court interprets it, would have voided any liability as far as the [defendant] Company is concerned."

Plaintiff's own testimony showed, without contradiction, that he had originally taken out a $3,000 policy with the Massachusetts Fire & Marine Insurance Company on his house and furnishings. Then he took out the present policy for $3,000 with defendant Company, defendant having knowledge of the earlier policy with the Massachusetts Company. Thereafter, unknown to defendant, plaintiff took out a third policy on the house, for $2,000, with the Southern Farmers Mutual Insurance Company. Defendant did not learn of this third policy, bringing the total insurance up to $8,000 on a house and furnishings worth according to the most liberal testimony about $8,800, until after a fire which totally destroyed the insured property. Defendant subsequently denied liability under its policy.

After the fire, representatives of all three companies told plaintiff that he was overinsured. Agents of the Massachusetts Company and the Southern Farmers Company told him that if he would agree to a re-

duction of his total coverage from $8,000 to $5,000 they would pay off their proportionate shares of the smaller total. This he agreed to, and settlements were made accordingly. It is possible that he expected defendant Company to agree to the same arrangement, but he does not now contend that defendant did so agree, and there is no evidence in the record of any such agreement by defendant nor of any conduct which would subject defendant to the agreement.

The policy clause quoted above, upon which the Circuit Judge based the judgment appealed from, is valid. In *Milwaukee Mechanics' Lumber Co.* v. *Gibson,* 199 Ark. 542, 134 S. W. 2d 521, a substantially identical clause was sustained and enforced, the court saying: "The rule in this state and practically all of the states is to the effect that a clause in a policy to the effect that the procurement of additional insurance without the consent of the insurer renders the policy void is a valid provision." The earlier cases of *Planters Mutual Insurance Co.* v. *Green,* 72 Ark. 305, 80 S. W. 151, and *Nabors* v. *Dixie Mutual Fire Insurance Co.,* 84 Ark. 184, 105 S. W. 92, are to the same effect. And see *Vance,* Insurance (2nd Ed.) 725. The plaintiff did not deny that he had violated this clause. The evidence was clear that he had violated it, and there was no evidence that he had not violated it. In this state of the evidence the Circuit Judge was justified in directing a verdict for the defendant.

The plaintiff also asserts that the Circuit Court committed error in not entering judgment for plaintiff by default on the first day of the March, 1949, term of court. He alleges an agreement that defendant's answer would be filed by that date so that the case could proceed to trial during the term. The answer was not filed until the next day, and the Court thereafter overruled plaintiff's motion for judgment by default. The case was then set for trial on a later day in the term, on which day it was tried. There was no error in this. "It is discretionary with the court to allow or reject a belated answer. It will be presumed that reasons satisfactory to the trial court were shown for the delay."

Blauvelt v. *Blauvelt,* 199 Ark. 710, 714, 136 S. W. 2d 201, 203.

The judgment of the Circuit Court is affirmed.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY *v.* LOGUE.

4-8976 224 S. W. 2d 42

Opinion delivered November 14, 1949.

E. G. Nahler and *Warner & Warner,* for appellant.

James R. Hale, for appellee.

George Rose Smith, J. The appellees, a married couple, own a home near Fayetteville, on property that is 100 feet west of U. S. Highway 71. Their lot is separated from the highway by the appellant's 100-foot railroad right of way. In about 1943 Mr. Logue began negotiating with appellant for a private road and grade crossing to provide direct access to the highway. During a period of years Logue's efforts to obtain a private crossing were unsuccessful, and on October 31, 1947, this suit was filed in the county court to compel the establishment of the desired crossing. Ark. Stats. 1947, § 76-110. The county court found that the proposed road is necessary to give appellees a means of ingress and egress. It ordered that the road and grade crossing be constructed at the appellees' expense. On appeal the circuit court, sitting as a jury, affirmed the order.

The decisive question is whether the appellees already have a means of access to the highway. About 170 yards south of their property there is a public crossing leading to the highway. To reach this crossing the appellees must travel across the front part of three lots abutting the railroad right of way, these lots being owned respectively by Angus Allen, Velda Sweetser and Arthur Allen. Appellant contends that the appellees now have an easement across these lands; the appellees deny this.

It is admitted that there is a private road across the three lots, which the Logues have been using, whenever it is passable, since 1935. This use was originally permissive, the lots having been owned by Mrs. Logue's brothers. In 1947 Angus Allen, the Logues' next door neighbor, applied for a loan on his property, but the title attorney was doubtful about his means of ingress and egress. An agreement was prepared, by which Arthur Allen gave an easement to Mrs. Sweetser, Angus Allen and Logue. Mrs. Sweetser in turn gave an easement to Angus Allen and Logue, and Angus Allen gave one to Logue. All these easements were conditioned upon the railroad's declaring what was then a private crossing to be a public one. The Logues' three neighbors signed the agreement on July 17, 1947, and it was

recorded on November 8, 1947. Later Arthur Allen and Mrs. Sweetser executed an additional grant to Angus Allen, by which the location of the road was described by metes and bounds.

It is the appellees' position that their neighbors' grant of an easement has never been accepted, so that their use of the road is still permissive. The agreement includes a paragraph reciting that Logue accepts the easement and agrees that it provides ingress to and egress from his land. When the other neighbors executed the agreement and presented it to Logue, he refused to sign it. In his own words his refusal was for these reasons:

"A. Because I didn't know it would ever be—I didn't know there would ever be anything done about a public crossing there—there hasn't been nothing done in my favor, sir.

"Q. I believe you testified you had been negotiating with the railroad off and on since when?

"A. I believe '43 was the first that I asked.

"Q. And you had gotten nowhere?

"A. Yes, sir.

"Q. And that was the reason you refused to sign it—you didn't know whether it ever would—whether they ever would do anything?

"A. That's right."

Logue later testified that he didn't believe he would have signed the agreement had he known that the railroad was going to make it a public crossing, but it is fairly inferable that his attitude was affected by his pending negotiations for a private crossing, which would have been impeded if he had agreed that the easement agreement gave him access to the highway. The appellant did in fact declare the existing crossing a public one and erected signs to that effect.

Upon these facts, which are not disputed, must it be held as a matter of law that the appellees have an

easement connecting their property with the public crossing? The answer must be in the affirmative. In legal effect the agreement created an appurtenant easement upon a condition precedent. Logue declined to sign the agreement because he did not think the condition—the declaration of a public crossing—would ever occur. Nevertheless the other parties, without rewriting the contract to exclude Logue from its benefits, placed it on the public records. The appellant has made the crossing public.

We are aware that a grant must be accepted by the grantee, but Logue's refusal was not an unqualified one. He simply thought that the condition would never be performed. A grantee's acceptance is usually contemporaneous with delivery, but there may be a continuing delivery, as where the conveyance is left with a third person or is placed of record. *Vaughan* v. *Godwin,* 94 Ind. 191. The latter is the situation here. We think it clear that the appellees are estopped to refuse the proffered easement and then to rely upon their own refusal as a basis for saying that they are wholly without ingress or egress. If it were shown that the Allens and Mrs. Sweetser had withdrawn their offer a different situation would be presented, but that suggestion is not made.

The remaining questions present little difficulty. It is argued that the existing easement is void because the agreement does not describe it by metes and bounds. Exact description is unnecessary, however, if the grant designates the easement as such and sufficiently describes the servient estates. *Fulcher* v. *Dierks Lbr. & Coal Co.,* 164 Ark. 261, 261 S. W. 645.

The appellees contend that the road to the public crossing is not usable, their testimony being that the land is so wet that the road is impassable during all but two months of each year. But they also admit that this condition is not irremediable. The evidence, taken most favorably to the Logues, shows that the road can be culverted and graveled at a maximum cost of $350, making it serviceable the year round. As against this

figure, the lowest estimated cost for the additional grade crossing is $400. It is true that the present road, when repaired, will be somewhat more inconvenient than a direct crossing; the appellees will have to travel 170 yards farther and pass through three gates in the process. But mere inconvenience is not the test under this statute; another's land may be taken only upon a showing of reasonable necessity. *Mohr* v. *Mayberry*, 192 Ark. 324, 90 S. W. 2d 963. In view of the increased hazard to appellant and to the public that an additional crossing must entail, reasonable necessity has not been shown.

Reversed and dismissed.

McFADDIN and LEFLAR, JJ., dissent.

[redacted]

WILLBANKS *v.* BIBLER.

4-8975 224 S. W. 2d 33

Opinion delivered November 14, 1949.

[redacted]

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

Reece Caudle and *Richard Mobley*, for appellee.

MINOR W. MILLWEE, Justice. The question presented by this appeal is whether appellees are entitled to an extension of time to cut and remove timber beyond that specified in a timber deed from appellants. The chancellor found that the preponderance of the evidence showed the making of a valid extension agreement and that appellees relied upon appellants' agreement to cut the timber. Appellees were granted an additional 90 days within which to cut and remove the timber.

Appellants, H. C. Willbanks and wife, Novella, own 110 acres of land in Pope County as tenants by the entirety. Appellees are five members of the Bibler family who are engaged as partners in the sawmill business under the name of Bibler Brothers. On July 23, 1946, appellants, in consideration of $900 paid, executed and delivered a deed to appellees conveying all pine timber over seven inches in diameter on the 110-acre tract. It was provided that the timber should be cut and removed within one year from the date of the deed.

It is undisputed that soon after execution of the deed the parties agreed that appellants should have the job of cutting and skidding the timber for appellees at $7.00 per thousand feet. Appellants cut a part of the timber in the fall of 1946 under this agreement.

The testimony on behalf of appellees is to the effect that appellants then requested permission to cut another tract of timber known as the Rose tract before they finished cutting the timber in controversy; that this permission was granted and that appellants on several occasions before and after expiration of the one-year period stated and agreed that the time for cutting and removing the balance of the timber in controversy should be extended. Odus Bibler testified that the partnership had advanced money to appellant, H. C. Willbanks, to buy the Rose tract and that Willbanks wanted to cut it before he finished cutting the 110-acre tract; and that it was agreed that the time for cutting the timber on the 110-acre tract should be extended in order that this might be done.

Glen Bibler, another partner, testified that he went to Willbank's home about June 1, 1947, and asked H. C. Willbanks when he was going to cut the balance of the timber and the latter stated in Mrs. Willbanks' presence that he would start cutting in a few days. He also went back in September, 1947, and offered to send a crew out to cut the timber, but Willbanks stated that he wanted to cut it himself but had been delayed; that he would start cutting in about two weeks and reassured Bibler that he could have all the time he wanted to remove the timber. The Biblers also testified that shortly before and after expiration of the one-year period they sent others interested in hauling the timber to see appellants. These parties corroborated the testimony of appellees as to appellants' agreement to extend the time.

Appellants testified that they stopped cutting the timber on directions from appellees. They denied the statements attributed to them by appellees' witnesses and denied that there was any agreement on their part to extend the time beyond that fixed in the deed. Shortly before the institution of the present suit, appellee, Glen Bibler, received the following letter from appellant, H. C. Willbanks: "Mar. 30-48. Mr. Glen Bibler: Please send me a statement of what I owe you on that $40 you had on the Books. There was some Lumber and some log cutting that goes on that account. About this timber on my place. Most of this that's not cut is on Land that my wife's mother deeded to her and she won't let me cut it. So you might as well forget this timber. That's why I haven't cut this timber long ago. Homer Willbanks."

Mrs. Willbanks testified that the uncut timber was on land which her mother deeded to appellants jointly.

It is, of course, competent for the parties to a timber deed to extend the time fixed for cutting and removal of the timber sold, and general rules govern the validity of agreements providing for such extensions. 54 C.J.S., Logs and Logging, § 19c (1) (a). There is considerable division in the authorities as to whether such extension agreements may be entered into orally. 34 Am. Jur.,

Logs and Timber, § 34. This court is committed to the rule that parties who make a written contract may, subsequent to its execution, modify it and substitute a valid oral agreement therefor. *Dodson* v. *Wade,* 193 Ark. 534, 101 S. W. 2d 182; *Ferguson* v. *The C. H. Triplett Co.,* 199 Ark. 546, 134 S. W. 2d 538.

In *Valley Planing Mill Co.* v. *Lena Lumber Co.,* 168 Ark. 1133, 272 S. W. 860, the court said: "The general rule is that a material modification of a contract within the statute of frauds must be in writing in order to be valid and binding. Such a contract cannot be modified in essential parts by parol agreement so as to be valid against a plea of invalidity under the statute of frauds. *Arkmo Lumber Co.* v. *Cantrell,* 159 Ark. 445, 252 S. W. 901. There is a marked difference, however, between a modification of a written contract in the essentials required to meet the statue of frauds and an agreement for a substituted method of performance not within the statute. The former is required to be in writing in order to be enforceable as against a plea of the statute of frauds, whereas the latter is valid if in parol. The reason of the distinction is that the purpose of the statute of frauds is to require contracts to be certain and definite which it attempts to regulate, but does not attempt to regulate a substituted mode of performance thereof not within the statute."

A valid agreement for an extension was held to have been shown in *Arkansaw Trading Co.* v. *Southwestern Veneer Co.,* 160 Ark. 286, 254 S. W. 488, where the court said: "What was said between the parties amounted to an agreement between them for an additional year in which to remove the timber. The fact that appellee forbore its legal right to remove the timber within the two-year period constituted sufficient consideration to support the extension of time accorded appellee by appellant. *Nothwang* v. *Harrison,* 126 Ark. 548, 191 S. W. 2."

In *Cooksey* v. *Hartzell,* 120 Ark. 313, 179 S. W. 506, the appellant purchased certain timber from Young under a deed allowing two years in which to remove. Within the two-year period Young sold the land to ap-

pellee who agreed to remove the timber for appellant at a stipulated price. After appellee failed to carry out his oral agreement, he interfered with the crew sent by appellant to cut the timber. This court held that the time for cutting did not run against the appellant's rights until the interference was removed.

The recent case of *Hurley* v. *Horton,* 213 Ark. 564, 211 S. W. 2d 655, involved a sale of timber by the appellant to the appellee under a contract providing a reasonable time to remove. In that case we said: "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 [appellee] was told that more than a reasonable time to remove the timber would not thereafter be granted."

The holdings in the Cooksey and Hurley cases, *supra,* are in accord with the general rule that failure to remove timber within the time fixed by the deed or contract is excused where such failure is caused by the act of the vendor. 54 C.J.S., Logs and Logging, § 19 c (2) d. This rule is based on the principle that he who prevents the doing of a thing shall not avail himself of the nonperformance he has occasioned. 34 Am. Jur., Logs and Timber, § 36.

It is admitted that appellants, after delivery of the deed, agreed to cut the timber for appellees at a stipulated price. Whether appellees' failure to remove the timber was occasioned by acts of the appellants, and, whether appellees were misled by repeated representations that the time for removal of the timber would be extended, were highly disputed questions of fact. We think the preponderance of the evidence supports the conclusion of the chancellor on these issues and the decree is, therefore, affirmed.

STUART *v.* BEAM.

4-8920 224 S. W. 2d 7

Opinion delivered November 14, 1949.

Bates, Poe & Bates, for appellant.

J. F. Quillin, O. R. Smith and *E. K. Edwards,* for appellee.

HOLT, J. July 28, 1941, Jackson Stuart died intestate, leaving as his sole heirs, ten living children and children of a deceased son, Lester Stuart. Appellant, Luther Stuart, was one of the sons of Jackson Stuart and the appellees constitute the remainder of the heirs. At his death, Jackson Stuart left a 316 acre farm, and the present suit was instituted by appellees to partition this acreage.

Appellant, in a separate answer, alleged that in 1923, following his mother's death, his father, Jackson Stuart, orally contracted with him that if he, appellant, would move into his father's home, on the land in question, and care for him during the remainder of his life, as consideration, he would give to Luther Stuart the 316 acre farm, the gift of conveyance to become effective upon the death of Jackson Stuart. He further alleged that he had performed his part of said contract and asked for specific performance. Appellant filed answer and cross-complaint to which appellees replied denying appellant's claim. Upon a hearing, there was a decree

in favor of appellees and directing partition as prayed. This appeal followed.

The primary and decisive question is one of fact.

In 1923, appellant, one of the sons of Jackson Stuart, with his family, seven in all, moved into the home of his father, on the land in question, where they lived during his father's lifetime. They had been living in a "two-room, boxed house." His father's house was larger, more comfortable, was two stories, and contained five rooms. When Jackson Stuart's wife died in 1923, he was in need of some one in the home.

It appears to be conceded that appellant took good care of his father, and in fact, appellees commend him for the attention and care which he and his family bestowed. What appellees do earnestly insist, however, is that Jackson Stuart never entered into any agreement such as appellant contends here.

The evidence is voluminous. We do not attempt to set it out in detail, for to do so would serve no useful purpose.

In brief, appellant testified that the oral agreement was entered into between him and his father in 1923. There were no witnesses to this agreement. His wife and daughters testified, in effect, that they did not know of this alleged 1923 contract, but that some time in 1938, Jackson Stuart told them he wanted them to have the home when he died. There was some evidence tending to corroborate this testimony. Appellant found the farm well equipped with work animals, milk cows, chickens, and farm equipment. Most of the food for appellant and his family was produced on the farm. His father was a fairly successful farmer, was not without financial means, and paid for a substantial part of the food and groceries not supplied by the farm. During the period from 1923 to 1941, while appellant lived with his father, he accumulated more than 250 acres of land and dealt in livestock to his profit.

Appellees appear to have known nothing of appellant's claim of ownership of the farm until his answer was filed in the present suit.

We now point out briefly specific acts of appellant following his father's death that strongly tend to contradict his testimony as to the alleged oral agreement.

February 18, 1943, appellant filed his verified claim "for services rendered in keeping and caring for Jackson Stuart, deceased, during his lifetime—$3,000." There was evidence that appellant tried to buy the interest of appellees in the land subsequent to his father's death. On another occasion, following his father's death, appellant, in a conversation with his brother, Morgan Stuart, in Fort Smith, offered to purchase the farm for $2,500. Appellant testified: "Q. You fixed a value of $2,500 on it once? A. No. I never told any of them that I would give $2,500 for the place, I just asked them what they would take."

In order to prevail, it devolved upon appellant to prove by clear, cogent, satisfactory and convincing evidence, the execution of a valid oral contract with Jackson Stuart, his father. This rule has been many times announced by this court.

We said in the recent case of *Crowell* v. *Parks,* 209 Ark. 803, 193 S. W. 2d 483: "It has long been the rule of this court that a valid oral contract to make a will or a deed to land may be made, but that the testimony to establish such a contract must be clear, cogent, satisfactory and convincing. One of the latest cases so holding is *Jensen* v. *Housley, Admr.,* 207 Ark. 742, 182 S. W. 2d 758, where a number of our former cases are cited. Among the cases so cited is *Kranz* v. *Kranz,* 203 Ark. 1147, 158 S. W. 2d 926, in which we said, 'it is not sufficient that he establish it (the oral contract) by a preponderance of the testimony, but that he must go further and establish the contract by evidence so clear, satisfactory and convincing as to be substantially beyond a reasonable doubt.' "

Appellant agrees that the rule above announced is correct, but insists that the testimony adduced by him measures up to it.

The trial court found from all the testimony that appellant had failed to meet the burden of proof imposed

upon him, and we are clearly of the view that the court was correct in so finding.

Accordingly, the decree is in all things affirmed.

FOSTER *v.* FOSTER.

4-8974 224 S. W. 2d 47

Opinion delivered November 14, 1949.

Warren E. Wood and *Griffin Smith, Jr.,* for appellant.

T. J. Gentry, for appellee.

ED. F. MCFADDIN, Justice. The Pulaski Chancery Court granted the husband a divorce,[1] and awarded the wife alimony of one hundred dollars per month. Being dissatisfied with the award, the wife has prosecuted this appeal, and asks that the amount be increased. Her counsel succinctly said:

"The sole issue on appeal is whether the alimony award of $100 was correct and supported by a preponderance of evidence."

There is no necessity to detail all the facts concerning the marriage and the separation. The record

[1] The ground for divorce was that the parties had lived separate and apart for three consecutive years, etc. See the 7th ground for divorce in § 34-1202, Ark. Stats. (1947).

shows that the wife has previously received substantial sums by way of property settlement, and that at the time of the trial the husband had a net monthly income of only $315.02 after deductions; and from this $315.02 he was to pay the appellant the alimony of $100 per month. From the testimony in this record, it appears that the wife needs more money; if the husband's income were greater, then a larger award would be justified. The court has power to modify the award under a showing of changed circumstances.[2] On the record now before us, however, we cannot say that the chancery court abused judicial discretion in fixing the alimony at $100 per month. In *Lewis* v. *Lewis,* 202 Ark. 740, 151 S. W. 2d 998 the sole question on appeal was, as here, the amount of alimony award; and we there said:

"This court has many times announced the rule that in fixing the amount of alimony to be awarded a wide discretion rests with the trial court and unless there appears to be a clear abuse in the exercise of this discretion it will not be disturbed by this court. In fixing the amount of alimony, of foremost consideration is the ability of the husband to pay. Consideration should also be given to the station in life of the parties . . . ."

We adjudge all costs against the husband; but we decline to allow additional attorneys' fees. Affirmed.

ALLEN *v.* LANGSTON, SHERIFF.

4-8957 224 S. W. 2d 377

Opinion delivered November 14, 1949.

[2] *Holmes* v. *Holmes,* 186 Ark. 251, 53 S. W. 2d 226; *Boniface* v. *Boniface,* 179 Ark. 738, 17 S. W. 2d 897; *Green* v. *Green,* 168 Ark. 937, 272 S. W. 655.

John C. Sheffield and *Burke & Burke,* for appellant.

Daggett & Daggett, for appellee.

HOLT, J. November 2, 1948, the electorate of Lee County, following the provisions of Constitutional Amendment No. 7 (Initiative and Referendum), adopted Initiated Act No. 2 which authorized the levy by the Quorum Court of a tax on the vehicles described in said act. Thereafter, the Quorum Court of said county undertook to levy the tax provided by the act.

December 28, 1948, appellants brought the present suit to enjoin the enforcing of the act and the collection of the tax provided therein, primarily on the grounds that the order of the Quorum Court undertaking to levy, and authorizing the collection of the tax, was void and that the Initiated Act in question was unconstitutional and void.

January 11, 1949, Brinkley-Marianna Bus Line, Inc. intervened. Answers were filed and on January 17, 1949, the cause was submitted and a decree rendered dismissing the appellants' complaint and the intervention for want of equity, but impounding all funds collected by appellee under the act pending appeal. This appeal followed.

By stipulation, the issues presented here are: (1) The sufficiency of the ballot title of Act No. 2, (2) The constitutionality of the Act, (3) The levy of the tax, and (4) The reasonableness of the rates.

Since we have reached the conclusion that the Act in question is unconstitutional and void, in the circumstances, we find it necessary to consider only the second issue above.

Pertinent provisions of Act 2 are: "Title—Initiated Act No. 2. "An Act to authorize the Quorum Court of Lee County, Arkansas, to levy a privilege tax upon all vehicles customarily maintained and/or operated in Lee County, Arkansas, for the privilege of operating said vehicles upon the county roads: to provide for the collection and expenditure of the revenue derived from such tax, and for other purposes.

"Be it enacted by the people of Lee County, Arkansas:

"I. The Quorum Court of Lee County, Arkansas, is hereby authorized to levy a tax on the privilege of operating vehicles on the public roads of the County, such tax to be according to the following rates and schedules, in words and figures, to-wit: Passenger Cars—$10.00, Trucks (½ to ¾ Ton)—$15.00, Trucks (1 Ton)—$20.00, Trucks (1½ and 2 Ton)—$30.00, Trucks (2½ Ton and larger)—$50.00, Tractor Truck, including Trailer—$50.00, Farm Trailers—$5.00, Tractors—$12.50, Wagons and Buggies—$2.00, Passenger Buses—$75.00. * * *

"II. All revenues derived from the levy and collection of the tax hereinafter authorized to be levied shall be credited to the County Road Fund and shall be used exclusively in the County for the purpose of constructing, maintaining and repairing public roads and bridges in Lee County, Arkansas.

"III. The privilege tax hereby authorized may be levied by the Quorum Court at any regular meeting or any special term which the County Judge, in vacation, may direct to be held after the effective date of this Act. The tax shall be in the form of an annual tax and shall be

levied and adopted by a majority vote of said Quorum Court. The Resolution adopting and levying such tax shall be recorded in the Minutes of the Meeting of the Court, and shall thereafter be held to constitute a valid levy of such privilege tax.''

Section 5 of the Act provides: Every person * * * who shall desire * * * to keep, maintain, and/or customarily operate within the boundaries of Lee County, Arkansas, any such vehicle on the public roads or the County, shall pay the tax, etc.''

Section 6 of the Act provides: ''Every person * * * who shall use or operate any vehicle, as above described, on the public roads of the County * * * without having paid such privilege tax, shall be guilty of a misdemeanor, etc.''

Amendment 7 to our Constitution provides: ''The initiative and referendum powers of the people are hereby further reserved to the legal voters of each municipality and county as to all local, special and municipal legislation of every character in and for their respective municipalities and counties, but no local legislation shall be enacted contrary to the Constitution or any general law of the State, and any general law shall have the effect of repealing any local legislation which is in conflict therewith.''

Our State Legislature in 1929 enacted Act 65, ''An Act to Amend and Codify the Laws Relating to State Highways.'' That act provided: § 75-201 Ark. Stats. (1947), a state license tax on motor vehicles, and Section 23 (c). ''There is hereby levied a privilege tax of 5 cents on each gallon of motor vehicle fuel sold in the State, or purchased for sale in the State for the purpose of propelling any motor vehicle on the public roads or highways in the State. * * * Section 37. It is intended by this statute to impose a tax upon the owners of all motor vehicles using a combustible type of engine, upon the public roads and highways, by requiring them to pay for the privilege thereof, in addition to the usual license fee, the sum of five (5) cents per gallon for the motor vehicle fuel used * * *. * * * Section 61. The

county courts of the respective counties in the State are delegated the power to levy upon all wagons and other vehicles not required to pay a license under this act, which are kept in that county and are operated upon a part of the state highways or county roads, a privilege tax for such use of the public highways, and may levy such tax on a class of vehicles according to the products they are usually engaged in hauling, including wagons, hauling logs, lumber, stave bolts, timber products, ores or any other produce or commodity whatever, and may fix such taxes on one or more classes of such vehicles, or their customary loads, that may be by the respective county court deemed best for the privilege of using the public roads of the county and the wear and tear caused thereto. Such schedule of privilege shall be fixed not oftener than once a year, and shall be payable quarter yearly for the privileges for the ensuing quarter year. * * * Provided, that all vehicles whose gross weight and tonnage is less than 4,500 pounds shall be exempt from the provisions of this Act."

Section 75-237 Ark. Stats. (1947) (§ 13, Act 134 of 1911) provides: "No owner of a motor vehicle, who shall have obtained a certificate from the Secretary of State (Commissioner) as hereinbefore provided, shall be required to obtain any other license or permits to use and operate the same, nor shall such owner be required to display upon his motor vehicle any other number than the number of the registration issued by the Secretary of State (Commissioner) * * *."

Appellants state their position as follows: "We concede that the legislature has the right to tax privileges in such manner as may be deemed proper, and further, that the Legislature may delegate this taxing power to the County. However, it is the contention of appellants that the Legislature, having levied a tax on the privilege of using the roads of the State, including those of Lee County, has exercised full control over this subject and that the County is without authority to levy a tax on the same privilege. As stated another way, appellants contend that the levy of a privilege tax on the use of the roads of the State by the Legislature pre-

cludes the levy of a privilege tax on the use of the roads of Lee County by the Quorum Court, of Lee County."

We think it clear from the above enactments that the Legislature intended to, and did, levy a tax generally upon the privilege of using the roads of this State by motor propelled vehicles and in so doing fully covered, by general enactment, the field of taxation of the privilege of so using the roads, and did not grant to the counties the right to tax motor vehicles but only reserved to them the right to tax wagons and other vehicles under certain limitations. In other words, the reservoir of power to levy the tax here is in the Legislature and a county is denied this power to tax unless the Legislature first grants to it such power, expressly or by fair implication.

"Under the Initiative and Referendum Amendment (Amendment No. 7) the people of the county could not enact a law contrary to a general law which operated uniformly throughout the State" *Tindall* v. *Searan,* 192 Ark. 173, 90 S. W. 2d 476.

Appellee appears to concede the general, or State wide effect of the law now in force, (quoting from his brief): "It may not be denied that the tax levied by the State under each and every one of the various acts cited by appellants is, beyond doubt or quibble, a privilege tax levied for state revenue purposes, and, therefore, falls wholly within the 'State field'."

The implication and effect of § 61 (§ 75-201-Ark. Stats. 1947) above, as we interpret it, is to deny to counties the right to tax this privilege on motor driven vehicles.

The construction of this court placed upon our earliest gasoline tax act (Act 606 of 1921) in *Standard Oil Company of Louisiana* v. *Brodie,* 153 Ark. 114, 239 S. W. 753, applies with equal force here. There it was said: "When the interpretation of this statute is approached in conformity with the rules thus stated, (regarding statutory construction) it is easy to discover in the language an intention on the part of the lawmakers

to impose a tax, not on property, but on a privilege, so as to bring the enactment within constitutional limits. The tax is not imposed on the sale or purchase of gasoline, nor on the gasoline itself, nor even on the use of gasoline. On the contrary, the final and essential element in the imposition of the tax is that the gasoline purchased must be used in propelling a certain kind of vehicle over the public highways. In the final analysis of this language it comes down to the point that the thing which is really taxed is the use of the vehicle of the character described upon the public highway, and the extent of the use is measured by the quantity of fuel consumed, and the tax is imposed according to the extent of the use as thus measured."

Following this decision which recognized that a tax on gasoline was a privilege tax levied upon the privilege of using the public roads of the State, Act 65 of 1929, above referred to, was enacted.

Also of significance is Act 63 of 1931 wherein the Legislature again declared, in language similar, in effect, to that used in Act 65 of 1929, that the gasoline tax was a tax on the privilege of using the roads of the State and further provided that: "Section 1 (e). All tax derived from motor vehicle fuel under the provisions of paragraph (c) of this act, after deducting of any refund for motor vehicle fuel used for agricultural, industrial or domestic purposes, shall be divided, five-sixths being deposited in the state treasury to the credit of State Highway Fund and one-sixth being deposited in the state treasury to the credit of a fund to be known as 'County Highway Fund', * * *" and also gave to the counties 12½% of the proceeds of all bonds and notes sold by the State and provided the method of distribution of the "County Highway Fund." All of which points unerringly to the conclusion, as we have indicated, that our Legislature has by general law fully covered the field of taxing the privilege of using the highways of the State by motor vehicles, saving only to the counties the right to tax "wagons and other vehicles" not covered by the General law.

As above noted, before a county would be entitled to tax the privilege sought by Lee County to tax here, the right, so to do, must be first delegated expressly or by fair implication by the Legislature. This the Legislature has not done.

Amendment No. 7 says: "No local legislation shall be enacted contrary to the Constitution or any general law of the State, and any general law shall have the effect of repealing any local legislation which is in conflict therewith." So the people of Lee County were without power to enact Act No. 2, by which they sought, in effect, to tax twice the same privilege of using the public roads of the County by motor vehicles, and which is obviously a local act and contrary to the general law of the State.

Section 75-237 Ark. Stats. (1947) above, was construed by this court in *Helena* v. *Dunlap,* 102 Ark. 131, 143 S. W. 138, as to its general effect and application. In that case, the City of Helena sought to impose a privilege tax on any resident owning and using vehicles of every kind (except bicycles) upon the city streets. We there held that the City was without authority to impose the tax in so far as it applied to motor vehicles, for the reason that the Legislature by general legislation had covered the entire field in so far as motor vehicles were concerned. It was there said: "The later act was evidently intended to cover the whole subject, and its provisions are full and complete in that respect. * * * Motor cars are large, powerful and capable of great speed; and, if carelessly handled, are very dangerous to the travelling public. They can be run a great distance in one day, and it is well known that the owners of automobiles do not confine the use and operation of their cars to the limits of the city or town in which they reside; but frequently drive long distances in the surrounding country and to other cities and towns. On the other hand, it is well known that vehicles drawn by horses or other animals are chiefly used in the city where their owners reside. Therefore the Legislature saw fit to leave to cities of the first class the authority to tax resident owners on the privilege of using vehicles drawn by mus-

cular power, and to provide new and exclusive rules and regulations as to the use and operation of motor vehicles. As to the wisdom and expediency of passing the act, we have no concern. The statute is plain, and was within the power of the Legislature to enact." Section 19-3506 Ark. Stats. (1947), giving cities the right to tax motor vehicles was enacted in 1919 after this decision in 1912, but the principles of law announced in that case apply here.

While the Initiated Act here in question imposes a privilege tax of $2.00 on "wagons and buggies," we hold that this provision must fail along with the other nine separate tax levies in § 1 of the Act above, for the reason that it seems apparent that the people of Lee County had no intention of separating and enforcing the provision as to wagons and buggies in the event the remaining tax on motor vehicles was declared void and of no effect.

In *Oliver* v. *Southern Trust Co.,* 138 Ark. 381, 212 S. W. 77, this court said: "But if its (the statute's) purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion. And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them," and in *Oliver & Son* v. *Chicago, Rock Island & Pacific Railway Company,* 89 Ark. 466, 117 S. W. 238, this court said: "The test should be the sufficiency for practical working purposes of that portion of the act remaining after the provisions of the Constitution have been applied."

Accordingly, the decree is reversed and the cause remanded for further proceedings consistent with this opinion.

GEORGE ROSE SMITH, J., concurring. Although I completely agree with Justice HOLT's learned opinion, I should like to add a few lines in an attempt to refute a plausible theory now advanced by the appellee.

This theory is bottomed upon our holding in *Dozier* v. *Ragsdale,* 186 Ark. 654, 55 S. W. 2d 779, and later cases upholding county salary acts. In the *Dozier* case the voters of Union County had adopted an initiated salary act. Opponents of the measure contended that it was contrary to a general law of the state, since Act 216 of 1931 had fixed the salaries for the various counties in accordance with existing general and special legislation. We held, however, that Act 216 was not a general law within the meaning of the Initiative and Referendum Amendment. We concluded that the county electorates were free to legislate in local salary matters, even though the General Assembly had by a single statute fixed the salaries for all counties.

The appellee now contends that the effect of the *Dozier* opinion is to vest in cities and counties all legislative power in purely local matters that is otherwise denied to the General Assembly by Amendment 14 to our constitution, which prohibits local or special acts. If this contention is correct, Amendments 7 and 14 together operate to establish in Arkansas a system similar to that generally known as Home Rule. No longer is it necessary for a city or county to base its local legislation only upon authority delegated by the General Assembly; the power exists unless it is denied by general law. A city has, for example, the power to levy an income tax unless a state law prohibits that action.

This theory is wholly untenable. The effect of the Initiative and Referendum Amendment is merely to make the electorate a legislature coordinate with existing legislative bodies. In the case of a state-wide initiated act, the power of the people is co-extensive with that of the General Assembly. But in the case of a local electorate, such as the inhabitants of a city, the power to initiate ordinances is merely co-extensive with that of the city council. There must still be a state statute delegating

authority in local matters before the city or county electors are permitted to act. This conclusion is inevitable when one realizes that the initiative and referendum are intended to go hand in hand. Neither is ordinarily broader than the other. Yet the power of referendum is needed only if the local legislative body has been delegated the authority to act in the first instance. So of the initiative. It may be noted that a contention exactly like the appellee's has been made and rejected in Oregon, after whose system of initiative and referendum our own is modeled. *Carriker* v. *Lake County,* 89 Ore. 240, 171 P. 407, 173 P. 573.

Dozier v. *Ragsdale* and other salary act cases present a fact situation almost unique. A state law fixing county salaries is general in the sense that it applies to all seventy-five counties, but it is local in the sense that it is tailored to the needs of each particular county. It is really a combination of seventy-five local acts embraced in a single statute. To deny the power of initiated action in such cases would be to deny the power of referendum in essentially local matters, since a single dissatisfied county could not expect the voters as a whole to reject the statute in a state-wide election. Hence this exception to the rule requiring delegated authority for local action—an exception inherent in the very scheme of the Initiative and Referendum—must be recognized in cases like *Dozier* v. *Ragsdale,* in which the state statute is general only because it is fitted to local conditions in every one of the seventy-five counties. But this exception cannot be extended to support the theory that cities and counties now have uncontrolled sovereignty in all matters of local concern.

MILLWEE and LEFLAR, JJ., join in this opinion.

MONTGOMERY WARD & COMPANY *v.* METZGER.

4-8968 224 S. W. 2d 368

Opinion delivered November 14, 1949.

David L. Dickson and *Moore, Burrow, Chowning & Mitchell,* for appellant.

Rose, Dobyns, Meek & House, for appellee.

MINOR W. MILLWEE, Justice. Appellees are members of the Metzger family who own certain business property at Main and Fourth Streets in the City of Little Rock. On October 12, 1934, appellant, Montgomery Ward & Co., as tenant, leased the property from appellees, or

their predecessors in title, for an original term of approximately ten years. The lease provided for payment of fixed rent at the annual rate of $15,600 payable in equal monthly installments.

Other provisions of the lease material to the issues are as follows: "14. In addition to the fixed rental, Montgomery Ward & Co., Inc., shall annually pay a percentage rental equal to 2½% of the gross retail sales (less exchange, allowances, returns, mail order sales and sales taxes) made by it on the leased premises during each lease year in excess of an annual basic sales total of $624,000. The basic sales total shall apply *pro rata* if percentage rent is payable for a period less than a lease year. Payments of percentage rents shall be made within sixty (60) days after the expiration of the year for which made. Before the expiration of 60 days after the expiration of the said period, the tenant shall furnish to the landlord a verified statement showing the computation of the percentage rent for that period; which statement shall be deemed accepted by the landlord, and conclusive, unless within three (3) months after it is furnished the landlord shall cause applicable records to be audited, at the landlord's expense, by a certified public accountant, in a manner which does not unreasonably interfere with the conduct of the tenant's business. . . .

"19. It is contemplated by the parties that the tenant will expend, before or at the time it moves into the leased premises, $30,000 in arranging the fronts and the interior thereof, in improvements that will become part of the building in which the leased premises are situated; such expenditure to be for improvements exclusive of trade fixtures; and the landlord agrees to contribute to such expenditure the sum of $5,000 to be paid in cash substantially at the time the tenant pays for the last of such improvements, and in addition thereto, to allow credits on the first amounts that may be owing to landlord for percentage rents on gross sales (being that which is in addition to the fixed rental herein stated, after deduction hereinbefore stated for rent paid for space not hereby leased) of one-half of the amount

paid by tenant for such improvements to the amount of $20,000 or less; the intent being that the credits on percentage rents to be so given tenant by the landlord shall not exceed $10,000. In addition to the foregoing, the landlord shall at their own expense furnish the necessary material and perform the following work according to the plans and specifications therefor to be furnished by tenant and approved by landlord; such approval not to be unreasonably withheld: 1. Install sub-floor on first floor. 2. Install iron window guards on all skylights. 3. Combine present gas lines in demised premises and connect same to Gas Company mains through one meter.

"20. The tenant shall have the right to extend this lease for an additional 10 years at the same rents and on all the other same terms as herein set forth, on giving to the landlord a notice in writing at least four months before the expiration of the first period of this lease stating its intention to extend. If extended for such second ten-year period, the tenant shall have the right to extend this lease for a third period to and including July 31st, 1964, on giving written notice to the landlord of its intention to extend, at least four (4) months before the expiration of said second period, such extension of this lease to be according to all of its terms and conditions as herein set forth and at the same rate of rent unless the landlord shall, within 45 days after receipt of said notice from the tenant require arbitration proceedings in order to determine the fair rental value of the premises. . . ."

There is also a provision that the lease shall be strictly construed "neither against the landlord nor the tenant." The improvements contemplated by section 19 of the lease were made by appellant at a cost of $30,000 of which $5,000 was contributed by appellees, or their predecessors in title. Prior to the expiration of the original term, appellant exercised its option to extend the lease for an additional ten years commencing October 12, 1944. During the first ten years of the lease the annual gross sales reported by appellant were less than the basic minimum of $624,000 and consequently no percentage rentals accrued or were paid during that period.

The total gross sales reported by appellant for the lease year ending in October, 1945, the first year of the extended period, exceeded the basic minimum of $624,000 and appellant withheld percentage rentals for that year in the amount of $3,278.60 claiming the right to use same for partial reimbursement for its expenditure for improvements in accordance with paragraph 19 of the lease.

The gross sales reported for the year ending October, 1946, also exceeded the basic minimum and appellant withheld percentage rentals for that year amounting to $6,721.40 which, added to the amount withheld for the previous year, made a total of $10,000, the maximum amount provided for in paragraph 19 of the lease.

On December 22, 1947, appellees filed this suit against appellant in the Pulaski Circuit Court alleging facts substantially as hereinabove stated and, "that paragraph 19 of the lease was intended to and did permit deductions from the percentage rental provisions only during the original ten year period of the lease." It was further alleged that demand had been made upon appellant for payment of the $10,000 which it withheld for reimbursement for improvements. Judgment was prayed for said sum together with interest, costs and all proper relief.

Appellant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action against appellant. The trial court overruled the demurrer. Appellant stood upon its demurrer and declined to plead further, whereupon the court rendered judgment against appellant in said sum of $10,000 with interests and costs. This appeal follows.

The truth of the facts above stated and as alleged in appellees' complaint is admitted on demurrer. The question for determination is whether appellant's right to take credit for improvements out of the first percentage rentals due, as provided in paragraph 19 of the lease, is confined to percentage rentals becoming due during the first ten-year period of the lease only or is carried over into the extended period.

Appellant exercised its option to extend the lease for an additional ten years under paragraph 20 which provides that the new ten-year period shall be "at the same rents and on all the other same terms as herein set forth." Appellees concede that the lease in question provides for an "extension" as distinguished from a "renewal" of a lease. The distinction is recognized in our decisions. In *Neal* v. *Harris,* 140 Ark. 619, 216 S. W. 6, the court said: "Both the textwriters and the adjudicated cases make a distinction between a covenant in a lease for a renewal and a provision therein for the extension of the term at the option of the lessee. In the latter case upon the exercise of the option by the lessee there is granted a present lease for the full term to which it may be extended and not a lease for the lesser period with the privilege of a new lease for the extended term." The following statement from Underhill on Landlord and Tenant, Vol. 2, par. 803, was also approved by the court: "So, where a lease gives the lessee a renewal at his election, and he elects to continue, a present demise is created which is subject to all the conditions and covenants of his former lease, and it is not necessary that a new lease should be executed. In the absence of an express provision that a new lease is intended to be executed, the presumption is that no new lease is intended, but that the lessee is to continue to hold under the original lease." The cases of *Keith* v. *McGregor,* 163 Ark. 203, 259 S. W. 725, 36 A. L. R. 311, and *Beasley* v. *Boren,* 210 Ark. 608, 197 S. W. 2d 287, are to the same effect.

There is only one lease in the instant case and the extended term was provided for therein "at the same rents and on all the other same terms" as set forth in said lease. Unless there is some language in the lease indicating a contrary intention, the "same rents and on all the other same terms" include the right of appellees to receive percentage rentals as set out in paragraph 14 as well as appellant's right to recapture one-half the amount expended in improvements "on the first amounts that may be owing to landlord for percentage rents on gross sales," as provided in paragraph 19. The improve-

ments were for the mutual benefit of both parties and became a part of the building under the specific provisions of paragraph 19. It was contemplated that the parties should equally bear the expense of these improvements if and when percentage rentals accrued in the amount of $10,000. Appellees say that the parties apparently thought there would be percentage rentals during the first 10-year period and it was out of the first of those rentals that appellant was to withhold the sum of $10,000. If so, it could have easily been provided that appellant's right to recapture should be limited to that period. This was not done and the right to recapture was extended to the "first amounts that may be owing to landlord for percentage rents on gross sales."

Appellees also say: "If in an extended term the appellant is relieved of its obligation to expend $25,000 on the building, then its right to reimbursement out of extended term rents also expires, for otherwise there would be no extension 'on *all* the other same terms,' but an extension on part of the same terms." It is thus argued that there is no language in the lease indicating that a part but not all of the provisions of paragraph 19 were to survive the original term. This argument ignores the fact that appellant was required by paragraph 19 to expend $30,000 in improvements "before or at the time it moves into the leased premises" and further provides that the landlord shall contribute $5,000 to such expenditure for improvements "substantially at the time the tenant pays for the last of such improvements." These provisions of the lease were fully performed at the very beginning of the first 10-year term and the provision for extension would not, of course, apply to obligations already fully performed. But there was no performance of appellant's right of recoupment for improvements during the first ten years and the lease cannot be fairly construed as limiting appellant's right to withhold percentage rentals to that period.

No cases have been cited by the parties that are exactly in point. There are cases, however, involving the extension of leases which are analogous to the prob-

lem in the instant case. Annotations found in 37 A.L.R. 1245 and 163 A.L.R. 711 deal with the question whether an extension or renewal of a lease operates to extend an option to purchase contained in the original lease. While there is some division of authority on the question, the annotator states the following as the rule deducible from a great majority of the cases: "Where the original lease, or agreement to lease, provides for an extension of the term, at the tenant's election, an option therein contained to purchase during the term is likewise extended." 163 A.L.R. 712. In the earlier annotation the case of *Grummer* v. *Price,* 101 Ark. 611, 143 S. W. 95, is cited in support of the rule. That case involved an extension of a lease by endorsement and this court held there was an extension of the whole contract, including the option to purchase.

In the case of *Hadad* v. *Tyler Production Credit Assn.,* 212 S. W. 2d 1006 (Tex.), it was held (Headnote 4): "Where five-year lease gave lessee option to renew lease for additional five-year period, and during term of lease parties entered into a supplemental agreement in writing giving lessee right to make certain alterations in building at lessee's sole cost and right to sub-lease up to 60 per cent of the building, and it was provided that supplemental agreement should be and become a part of the original lease, and lessee gave timely notice to exercise option to keep premises for an additional five-year period, lessee had right to sublet up to 60 per cent of the building during second five-year period, since the lease and supplemental agreement were one contract." The court said: "It is our conclusion and it is so held that when plaintiff timely gave the notice that it exercised its option for a renewal for an additional five years at the maximum rental, its rental rights for such additional period vested in it without the necessity of formally executing a new lease."

The Missouri court followed the same line of reasoning in *Wright* v. *Logan,* 25 S. W. 2d 799, where it was held (Headnote 1): "Where lease provided that it should remain in force for period of ten years, with

privilege granted to lessee on notice to extend lease in all of its terms for period of five years from expiration thereof, lessor could not have enforced lease for fifteen years without consent of lessee, and could not have terminated lease of own accord, lease being unilateral in its terms, but option for five-year extension was as much a part of lease as any other element therein, and lease was in effect a present demise for full term of fifteen years, and entitled plaintiff, reserving percentage of rents received under lease, to receive percentage of rent received during five-year extension of lease." It is also the general rule that a covenant to renew a lease which makes no provision as to the terms and conditions of the renewal is deemed to imply a renewal for the same rental, terms and conditions as provided in the original lease. 32 Am. Jur., Landlord and Tenant, § 965; Anno. 30 A.L.R. 577, 68 A.L.R. 158; *Nakdimen* v. *Atkinson Imp. Co.,* 149 Ark. 448, 233 S. W. 694.

Under the undisputed facts admitted by the demurrer and the unambiguous terms of the lease, we conclude that appellant's right to withhold percentage rentals to reimburse itself for the improvements made, carried over into the extended period of ten years. The judgment of the circuit court is, therefore, reversed and the cause remanded with directions to sustain the demurrer to the complaint.

George Rose Smith, J., not participating.

Missouri Pacific Transportation Company *v.* Inter City Transit Company.

4-8958 224 S. W. 2d 372

Opinion delivered November 21, 1949.

L. M. Crouch, Jr., Thomas Harper, Harvey G. Combs, Thos. B. Pryor, Jr., and *Henry Donham,* for appellant.

James T. Gooch and *Milton McLees,* for appellee.

LEFLAR, J. Inter City Transit Company (hereinafter called Inter City) has for some years been operating as a common carrier of passengers, mail, baggage, newspapers and light express over U. S. highways 64 and 65 between Little Rock and Morrilton, serving those cities and communities between them. This operation was under permits granted by the Public Service Commission in 1941, 1942 and 1943, which permits were subject to various limitations both as to the time during which they should continue and the character of service authorized by them.

On April 29, 1948, Inter City filed a new application, the one now in controversy, for a certificate of public convenience and necessity authorizing it to operate between Little Rock and Fort Smith over U. S. highways 64 and 65 and between Russellville and Fort Smith over State highways 7 and 22. By amendment the application prescribed "closed door" operation over certain portions of the routes. Protests were filed by Missouri

Pacific Transportation Company (hereinafter called Missouri Pacific), by Crown Coach Company (hereinafter called Crown) and by various others; though Missouri Pacific and Crown represent the only protestants involved in this appeal. Missouri Pacific operates bus lines over the identical routes covered by Inter City's application, with numerous schedules in each direction daily. Crown operates bus lines between Little Rock and Fort Smith on State highway 10, a parallel route, also between Alma and Fort Smith as part of its Fort Smith-Joplin service. Crown's operation would compete with the transportation offered by Inter City's application only on through service between Little Rock and Fort Smith and on U. S. highway 64 between Fort Smith and Alma. Missouri Pacific would compete with all aspects of the service offered by Inter City's application.

At the hearing before the Public Service Commission, Inter City produced 119 witnesses in support of its application, and protestants offered the testimony of some 157 witnesses. The transcript before this Court is some 1,100 pages in length. Most of the applicant's witnesses testified as to the inadequacy of present passenger transportation service for local travelers between the cities which lie between Little Rock and Fort Smith on highways 64, 65 and 22. These witnesses testified that buses now rendering this local service were often so crowded that passengers were required to stand in the aisles, that buses already full often failed to pick up would-be passengers standing beside the highway or waiting in small communities, and that service was particularly poor at certain peak periods in the early morning and late afternoon when students and teachers were going to and coming from school and workers were going to and coming from their places of employment. The testimony tended to show that the through schedules maintained by Missouri Pacific, numerous though they were, were not (and possibly could not be) geared to the demands of this peak-period local traffic. Such testimony was given, for example, as to the service from Russellville to Little Rock, from Pottsville to Russellville, from

Atkins to Conway, from Morrilton to Russellville, from Conway to Morrilton, from Menifee to nearby towns, from Blackwell to Conway and other towns, from Conway to Dardanelle, from Morrilton to Little Rock, from Piney to nearby towns, and similarly as to travel to and from Clarksville, Knoxville, Lamar, London, Coal Hill, Hartman, Mulberry, Dyer, Paris, Delaware, Alma, Dardanelle, Charleston, Ratcliff, Subiaco, Branch and other communities. These were located all along those parts of highways 64, 65 and 22 covered by Inter City's application. The testimony just mentioned constitutes by no means an exhaustive list of the evidence offered on the applicant's behalf; it is merely illustrative. Missouri Pacific offered in evidence the testimony of many witnesses to the effect that its service along the contested routes was either excellent or adequate. Numerous exhibits were put in evidence by all parties. Crown gave convincing evidence of the excellence of its service along highway 10.

The Commission's findings of fact based on this evidence were as follows:

"As stated, numerous witnesses appeared in support of and in opposition to the proposed operation. It is noted, however, that no public witnesses from Fort Smith, Little Rock or North Little Rock appeared in support of the application. Applicant's witnesses were primarily concerned in securing additional service which would enable them to arrive at and depart from points along the proposed route at times coinciding with their hours of work or school. In many instances schedules presently being operated do not afford residents along the proposed routes the opportunity of using public transportation. For example, a person living in Paris who is employed in Fort Smith, working from 9:00 a. m. until 5:00 p. m. would have to leave Paris at 6:50 a. m. arriving in Fort Smith at 8:10 a. m. He would have to wait in Fort Smith until 7:15 p. m. before he could leave and arrive in Paris at 8:27 p. m. The same situation, with variations, exists at most points now served by protestants.

"The record shows, and it should be borne in mind, that protestant, because of its extensive operations, is forced to arrange schedules to connect at Little Rock or Fort Smith with its own or those of its connecting carriers. This procedure is generally accepted as prudent operating practice on the part of large carriers because it affords the necessary convenience to the long distance traveler of short lay-overs; however, it can be readily seen, and we cannot ignore the fact that such method of arranging operating schedules cannot possibly take into consideration the necessity or convenience of the worker or student whose patronage of a public transportation system is almost solely limited to a distance of rarely in excess of thirty (30) miles. Evidence introduced by applicant herein is almost entirely limited to the needs and convenience of the public residing along the proposed routes which requires a service of local or interurban character."

On the basis of these findings of fact the Commission reached the following conclusions:

"(a) The applicant is fit, willing and able, financially and otherwise, to conduct the operations herein proposed.

"(b) The present and future public convenience and necessity require the type of service as proposed by this applicant.

"(c) The granting of this application, subject to the amendments hereinbefore set out, will not materially affect the financial position of protestants herein.

"(d) The certificate to be granted should be restricted against handling traffic originating in Little Rock, North Little Rock destined to Fort Smith and, in the reverse direction, against traffic originating in Fort Smith destined to Little Rock and North Little Rock."

The order entered by the Commission authorized Inter City to operate in accordance with its application over highways 64, 65, 7 and 22, with closed doors between certain towns as specified in the amended application,

and with the added limitation, in accordance with item (d) in the conclusions just quoted:

"(c) No passengers originating in Fort Smith, Arkansas, destined to Little Rock and/or North Little Rock, Arkansas, or originating in Little Rock or North Little Rock and destined to Fort Smith, Arkansas, may be handled by Inter City Transit Company."

The permit granted was to supersede the authority given to Inter City by all prior permits, and was thereafter to be the sole permit under which Inter City would operate.

On appeal by the protestants to the Circuit Court, the Commission's order was affirmed with one change. That change appears from the following paragraph in the Circuit Court's judgment:

"The Court, upon review, finds from the facts and circumstances contained in the record that the certificate to be granted appellee should contain an additional limitation to the effect that, should a future showing be made that the continued operation of appellee over the routes in issue would entail a destructive rather than a healthy competition, and that public convenience and necessity would be best served by operation of only one carrier over such routes, the Commission might cancel appellee's certificate, and, in determining whether this should be done the fact that appellant pioneered the route would be a factor in the situation to be considered by the Commission."

The limitation contained in the quoted paragraph of the judgment has been approved by this Court in *Southwestern Greyhound Lines, Inc.,* v. *Missouri Pacific Transp. Co.,* 211 Ark. 295, 200 S. W. 2d 772, and is clearly a proper one. Inter City does not now appeal from its inclusion in the permit.

Missouri Pacific and Crown, and other interests represented by Missouri Pacific, appeal from the judgment of the Circuit Court. This Court has quite recently, in *Wisinger* v. *Stewart,* 215 Ark. 827, 223 S. W. 2d 604, decided on October 17, 1949, had occasion to restate the

proper scope of judicial review of fact findings of the Arkansas Public Service Commission. That case sets out our rule that the *de novo* review prescribed by the governing statute, Ark. Stats. (1947), §§ 73-133 and 73-134, is similar to that employed by this Court in chancery appeals. Accordingly it was concluded that "This Court's proper task, in the light of this state of the law, is to inquire whether the determination of the Commission was contrary to the weight of the evidence."

The Commission's findings of fact have already been quoted herein. They were to the effect that (1) there is no proved inadequacy of present service nor public need for additional service for through traffic between Fort Smith and Little Rock or North Little Rock, and (2) there is inadequacy in the present service and a public need for additional service of a local or interurban character along the highways covered by the application.[1] The evidence on Inter City's behalf, summarized earlier in this opinion, amply supports these findings of fact by the Commission, and we cannot say that they are contrary to the weight of the evidence.

Whether the permit granted by the Commission to Inter City, to operate in accordance with the application, is fully responsive to and in keeping with the fact findings just summarized is a more difficult question. A mere addition of more through schedules between Little Rock and Fort Smith will scarcely meet the needs recited in the findings of fact. Those needs appear all along the named highways at about the same time, the peak periods in the morning when children are going to school and adults are going to work and in the afternoon when school is out and work is ending for the day. A schedule leaving Little Rock at a time when it might care for such peak period traffic, perhaps from Little Rock to Morrilton, would travel the remaining two-thirds of its journey to Fort Smith at hours when present services are apparently adequate. The initiation by Inter City of a half dozen such runs in each direction during each 24-hour period would fail by far to meet the specific needs, and

[1] See *Santee* v. *Brady*, 209 Ark. 224, 232, 189 S. W. 2d 907, 911.

would increase unjustifiably the service available at times when need for it has not been shown to exist. Perhaps the service needed can be rendered through "turn-around schedules," whereby each of several buses might at the same time run round trips on one-fourth or one-fifth, for example, of the entire route, the whole fleet of buses thus covering the whole route in both directions during each peak period, and making connections with each other at their turn-around points. It may be that this would be too difficult an operation to schedule. This Court cannot and does not undertake to say. That is the sort of thing that may properly be referred to the Public Service Commission, an agency set up as expert in this special field, with experience and facilities appropriate to the solution of such problems as this. Our conclusion is that the case must be returned to the Commission with directions to modify the permit by requiring Inter City to submit and maintain schedules which will substantially meet the needs the Commission has found to exist and which will not to a substantial extent compete with Missouri Pacific's service in aspects as to which need has not been found to exist.[2]

Crown has asked that the wording of the Commission's restriction against the handling by Inter City of through passengers between Little Rock and Fort Smith, previously quoted herein, be changed to read: "No passengers originating in or passing through Fort Smith, Arkansas, and destined to Little Rock and/or North Little Rock, Arkansas, or beyond, or originating in or passing through Little Rock or North Little Rock, Arkansas, and destined to Fort Smith, Arkansas, or beyond, may be handled by Inter City Transit Company." Crown

[2] This conclusion is supported by a long line of decisions of this Court, including *Mo. Pac. R. Co.* v. *Williams*, 201 Ark. 895, 148 S. W. 2d 644; *Potashnick Truck Service, Inc.*, v. *Mo. and Ark. Transp. Co.*, 203 Ark. 506, 157 S. W. 2d 512; *Taylor* v. *Black Motor Lines*, 204 Ark. 1, 160 S. W. 2d 859; *Potashnick Truck System* v. *Fikes*, 204 Ark. 924, 165 S. W. 2d 615; *Mo. Pac. Transp. Co.* v. *Gray*, 205 Ark. 62, 167 S. W. 2d 636; *Santee* v. *Brady*, 209 Ark. 224, 189 S. W. 2d 907; *Schulte* v. *Southern Bus Lines*, 211 Ark. 200, 199 S. W. 2d 742; *Southwestern Greyhound Lines* v. *Mo. Pac. Transp. Co.*, 211 Ark. 295, 200 S. W. 2d 772; *Arkansas Express, Inc.*, v. *Columbia Motor Transp. Co.*, 212 Ark. 1, 205 S. W. 2d 716; *Arkansas Motor Freight Lines* v. *Batesville Truck Line*, 214 Ark. 448, 216 S. W. 2d 857; *Wisinger* v. *Stewart*, 215 Ark. 827, 223 S. W. 2d 604, decided October 17, 1949.

also asks that there be added to the order a further paragraph, along the same lines, as follows: "No passengers originating in or passing through Alma, Arkansas, and destined to Little Rock, Arkansas, or beyond or originating in or passing through Little Rock, Arkansas, and destined to Alma, Arkansas, or beyond, may be handled by Inter City Transit Company."

The effect of the first of these changes would be to correct what may have been merely an oversight by the Commission in defining through passengers. It would, for example, prevent Inter City from competing with either Crown or Missouri Pacific for passengers traveling from Tulsa through Fort Smith to Little Rock or beyond, as well as for passengers whose whole trip is limited to the Little Rock-Fort Smith journey. There is no evidence in the record supporting need for additional schedules for any through passengers, whether their trips are limited to the Fort Smith-Little Rock mileage or are longer. It is not reasonable to say that Inter City should be forbidden to carry a passenger who is going from Fort Smith to Little Rock only, but should be allowed to carry one who is going on from Little Rock to Pine Bluff. As far as the service Inter City wishes to offer is concerned both passengers are in the same category. The phrasing proposed by Crown is more in keeping with the Commission's finding of fact and should be substituted as requested. Similarly, there is a total absence of evidence in the record showing need for additional service for through passengers between Alma and Little Rock, and the paragraph just quoted relating to such service should be incorporated in the order.

Crown has also asked that the order provide that "No passengers shall be handled between Fort Smith, Arkansas, and Alma, Arkansas, or any intermediate points, by Inter City Transit Company." This we cannot require. There is evidence in the record showing an inadequacy in local service in and out of Alma similar to the inadequacy in local service shown elsewhere along highways 64, 65 and 22. We cannot say that the Commis-

sion's finding of need for this local service is contrary to the weight of the evidence.

The order of the Public Service Commission is approved, subject to the modifications required by this opinion, and the judgment of the Circuit Court is modified and the case remanded to the Circuit Court, to be by it sent back to the Commission for action in accordance herewith.

ELLIOTT *v.* FOSTER.

4-8981 224 S. W. 2d 353

Opinion delivered November 21, 1949.

Chas. W. Garner, for appellant.

J. E. Lightle, Jr., for appellee.

GRIFFIN SMITH, Chief Justice. When a truck Raymond Elliott was driving for G. W. Garner turned left on Highway No. 30 to enter a side road, it was struck from the rear by a passenger car driven by R. W. Foster.

Each vehicle was damaged, but neither operator received a personal injury. Foster sued Elliott and Garner for $400 and procured judgment for $203.09. In a cross-complaint Garner asked for $200 covering repair bills, but the jury found against him. Elliott and Garner have appealed from the money judgment against them, while Garner—contending that undisputed evidence entitled him to $84.69 for damage done to his truck—has appealed from the judgment disallowing that item.

Foster's testimony is that he was driving at 40 or 45 miles an hour at a distance of approximately 200 feet behind the truck. He pulled to the left, intending to pass. The truck was not going more than 30 miles an hour, and it was not necessary that speed of the overtaking car be increased in order to go around the truck. The highway in front was clear for a considerable distance. According to Foster the accident was caused by Elliott's act of suddenly turning to the left without giving a signal of intent. This occurred when the trailing car was 35 or 40 feet behind the truck. Foster says he was then on the left of the concrete and had not sounded his horn. The dirt road Elliott endeavored to take crosses an embankment or levee, but entrance to the road was not visible to Foster before the emergency arose. He testified that Elliott's sudden movement required him to turn quickly to the right, so when the impact occurred the rear car was almost right of center —perhaps eight or nine inches to the left of the median line.

On cross-examination Foster testified that he "had it in mind" to sound his horn before actually passing; but when the truck turned, his entire attention was required to prevent a greater and more direct impact.

Elliott was sure that when at a distance of about a hundred feet from the intended turn he held out a hand with fingers pointing to the levee road. The turning movement had been executed to a point where the front wheels were well on the dirtway, "and the next thing I knew that car hit my truck and turned it over." At the time Elliott turned, the truck speed, he says, was about

eight miles per hour. He had just shifted to second gear as the side road was "headed for". These questions and answers could well have influenced the jury:

Question: "Before starting to make the turn, did you slow your truck down?" A. "Yes, sir." Q. "You slowed your truck right in the middle of the highway?" A. "Well, no." Q. "You had a rear-view mirror on that truck?" A. "That is right." Q. "Did you ever look out?" A. "No, I didn't look back, but I gave my signal." Q. "You just stuck your hand out and turned, regardless of what was coming?" A. "Well, that is right."

The testimony of persons interested in the result of litigation, and particularly of those who would profit by a verdict, is not to be treated as uncontradicted. *McDonald* v. *The Olla State Bank,* 192 Ark. 603, 93 S. W. 2d 325; *Strickland* v. *Missouri Pacific Transportation Company,* 195 Ark. 950, 115 S. W. 2d 830. This simply means that in the case at bar the jury could have believed that Elliott actually gave the signal, but acted too late; that he extended his left arm in a way that ordinarily would have been sufficient in point of time, but did it in a careless and ineffectual manner; or, finally, that no signal was given, even though the witness may have thought he acted promptly and sufficiently. Likewise, the jury could have believed, as Foster testified, that Elliott was traveling 30 miles an hour, contrary to Elliott's assertion that he was "just jogging along." From competent evidence that the jury had the right to accept, it could have found that Elliott did nothing to warn Foster that a turn was intended, therefore a signal by Foster was not reasonably required before the emergency made such action both useless and impracticable. Under well established rules of evidence the conflicting factual status was for the jury's determination.

Appellant complains of a failure to instruct that a verdict could not be returned unless facts upon which it was based were sustained by a preponderance of the evidence. Final summation by the trial Judge included the

following: "You have previously been given instructions on the credibility of witnesses and the preponderance of the evidence. I think you understand these instructions, and it will not be necessary to give them unless the parties want them given again."

At first glance the comment appears inconsistent, but when the last word, "again", is given its obvious meaning, it reflects the Court's belief that the two subjects had been touched upon in a manner quite sufficient to inform the jury in respect of legal requirements. It is certain that counsel for appellants was courteously invited to make any request or suggestion deemed pertinent. His failure to do this at a time when such a request, presumptively, would have been effective should not now avail the complaining parties of an advantage that would reverse the judgments when the corrective process was waived during the trial period.

The only instruction in which "preponderance" is mentioned is No. 4, given at appellants' request. It told the jury that if by such weight of evidence Foster was shown to have been guilty of negligently operating his car, that his negligence, if any, was the sole and proximate cause of the collision, and that without such negligence the collision would not have occurred, then Garner would be entitled to a verdict for $84.69, "provided you further find . . . that . . . Raymond Elliott was not guilty of negligence *which contributed to the cause of the collision.*"

Appellants further complain that the Court erred in telling the jury through plaintiff's Instruction No. 1 that if Elliott's negligence either caused Foster's damage *or contributed to it,* etc. The argument is that these instructions were inherently wrong because the jury was informed that mere contribution by Elliott to the cause resulting in damage would subject the defendants to liability.

Argument strikingly similar to appellants' position in the case at bar was advanced in *Hurley* v. *The Gus Blass Company,* 191 Ark. 917, 88 S. W. 2d 850. One of the instructions there made it the plaintiff's duty to ex-

ercise reasonable care for her own safety, and it told the jury that if her actions failed to meet that standard, or if her conduct "contributed in any degree, however slight, to her injury, then she cannot recover damages from the defendant." The Court's comment, in an opinion written by Mr. Justice HUMPHREYS, was expressed in a quotation from *Little Rock & Fort Smith Ry. Co.* v. *Miles,* 40 Ark. 298-332, 48 Am. Rep. 10: "The test of contributory negligence is, Did the negligence contribute in any degree to produce the injury complained of?" The Hurley-Gus Blass case was cited in *Shipp* v. *Missouri Pacific Transportation Co.,* 197 Ark. 104, 122 S. W. 2d 593, where it was said that conformity to the stricter dogmas of technical construction would have been better served had the jury been expressly directed to find whether the plaintiff's action was one of negligence. "But," says the opinion, "this is exactly what the jury did determine. This determination was made in the light of facts and circumstances which acquired evidential value because of the substantial nature of the testimony, and [the facts and circumstances] were considered under instructions not susceptible of misunderstanding. To reverse this judgment and remand the cause for want of a prescript which could not enlighten the jury by even a shadowy quantum would be placing ritual above substance."

While the issues discussed in the Shipp case and in the case at bar are not the same, reasoning used in the former is applicable here. In appellee's Instruction No. 3 the jury was told that if Elliott turned from the highway without observing statutory signals, this conduct was evidence of negligence, [and] if *such* negligence, if any, "caused or contributed to cause" the collision, there should be a verdict for the plaintiff, provided the jury further found that the plaintiff was "free of negligence which contributed to the damage". Appellants' Instruction No. 4 told the jury that if Foster's negligence was the proximate cause, there should be a verdict for Garner, provided Elliott was not guilty of negligence "which contributed to the cause of the accident".

Our conclusion is that each party was willing to use the expressions now complained of when their inclusion in an instruction would be beneficial, but appellants see harm when the reading is from a different angle. In these circumstances the alleged prejudice should not be taken advantage of, even though language of more appropriate form might have been used.

Affirmed.

ROSCOE *v.* WATER AND SEWER IMPROVEMENT DISTRICT No. 1.

4-9100 224 S. W. 2d 356

Opinion delivered November 21, 1949.

McMath, Whittington, Leatherman and *Schoenfeld,* for appellant.

Wood & Chesnutt, for appellee.

GRIFFIN SMITH, Chief Justice. Appellant is a property-owning taxpayer residing within Water and Sewer Improvement District No. 3 of Garland County. He sought in a class suit against the District's Commissioners and others to prevent a sale of bonds, alleging (a) that Act 41 of 1941 restricts the issuance of notes or bonds to costs arising from preliminary work, as distinguished from substantive construction, and (b) that the pledge executed by the District attempts to delegate powers that can be legally performed by the Commissioners only. The Chancellor dismissed the complaint for want of equity.

The proposed improvements, lying partly within and partly beyond the Hot Springs city limits, would be made at a cost of $105,000 with money supplied by Reconstruction Finance Corporation. The 4% bonds would be secured by pledge of betterments aggregating $215,630, such betterments to draw 6% interest. Serial bonds over a period of twenty years are authorized if the proceedings are valid.

First—Scope of Act 41.—Ends sought to be achieved by the enactment of 1941 are discussed in *Murphy* v. *Cook,* 202 Ark. 1069, 155 S. W. 2d 330. The Act appears as Ch. 7. "Suburban Improvement Districts", in Ark. Stats., §§ 20-701 to 729, inclusive. Section 16 of the Act reads:

"In order to meet preliminary expenses to do the work the board may issue the negotiable notes or bonds of the district". Appellees insist, and the trial Court found, that the legislative intent was to provide means "to meet preliminary expenses *and* to do the work". We agree that the omission of "and" was a clerical misprision. The Act contains 28 sections, not counting the emergency clause, and when considered in the light of purposes expressed in the related parts, the conclusion is inescapable that the lawmakers were dealing with a general or "over-all" plan respecting the subject-matter, and there was no thought of implementing preliminary work by exclusive treatment, thereby requiring separate

proceedings to be independently pursued before the primary objective could be attained.

The title of an Act is in no sense controlling, and, like a preamble, or emergency clause, it may be looked to for the purpose of ascertaining a meaning not fully expressed in the Act proper, yet—as we have so often said[1]—where there is doubt as to the legislative intent, due either to ambiguous phrases or a suggested word omission, and where the missing word can be appropriately supplied by determining from the title, preamble, or other collateral phrases just what the lawmakers intended to accomplish, it is then proper to consider any or all of these collateral aids.

Tested by this rule, we find that Act 41 was designed to provide "for the formation of suburban improvement districts, for . . . the building and extending water systems, [and] building and extending gas pipe lines"; [and—by the preamble] "Whereas, . . . persons residing outside cities and towns are not permitted [under existing statutes] to form [suburban improvement districts of the kind here at issue] and are thus prohibited from [receiving] benefits of funds from the Government of the United States, [therefore] it is declared to be the purpose of this Act to make provision for formation of improvement districts on the outside of and adjacent to cities having a population of 5,000 or more".

As an indication of the legislative concept that actual improvements should be made under authority of Act 41, the right is given by § 4 "to sell or lease the improvement" made by the Commissioners, etc. Section 5 mentions "assessed value of lands after the improvement is made"; section 11 authorizes further levies of benefits "if the tax first levied shall prove insufficient to pay the bonds, both principal and interest,

[1] *Western Union Telegraph Company* v. *State*, 82 Ark. 302, 101 S. W. 745; *Roachell* v. *Gates*, 185 Ark. 350, 47 S. W. 2d 35; *State ex rel. Attorney General* v. *Chicago Mill & Lumber Corporation*, 184 Ark. 1011, 45 S. W. 2d 26; *Cherry* v. *Leonard*, 189 Ark. 869, 75 S. W. 2d 401. These are but a few of the cases holding that Courts have power to find, from affirmative language of an Act and collateral matters essentially affecting it, that a specific purpose existed.

issued by the board of commissioners on account of such improvement, as hereinafter provided"; § 14 requires all contractors "to give bond for the faithful performance of such contracts as may be awarded them", and permits the commissioners to sell "all unnecessary material and implements that may be on hand and which may not be necessary for the completion of the improvement under way, or which may have been completed". Section 15 imposes a duty on the board to have the amount of work done by any contractor estimated from time to time . . . by its engineer, "and the board shall draw its warrants in favor of the contractor for not more than 90% of the amount of work so reported, reserving the remainder until it has been ascertained that the work is completed according to the contract and is free from liens." Then follows § 16, relating to preliminary expenses—the matter from which "and" is omitted. The second sentence of § 16 authorizes the board to *also* issue to the contractors who do the work negotiable evidences of debt, bearing interest at not exceeding six percent, but "no bonds, under the terms of this Act, shall run for more than thirty years"; and (§ 18) "The district shall not cease to exist upon the completion of the improvement, but it shall continue for the purpose of . . . keeping it in repairs". Section 22 provides for payment of preliminary expenses "if for any reason the improvement contemplated by any district organized under this Act is not made".

The history of Act 126 of 1923 and an amendment of 1927 is to be found in the opinion written by Chief Justice JOHNSON, June 11, 1934. *Texarkana-Forrest Park Paving, Water, Sewer, & Gas District No. 1* v. *State* [*for the use of*] *Miller County,* 189 Ark. 617, 74 S. W. 2d 784. The decision was by a divided Court, and it is suggested by counsel for appellee here that the legislative purpose, when Act 41 of 1941 received consideration, was to create a remedy replacing the 1923 enactment; hence its essentials were in all respect copied, but in a manner avoiding the vice pointed to in the Miller County case. This is stressed in the *Murphy-Cook* opinion through the statement of Mr. Justice

HUMPHREYS, who said that "Act 41 of the Acts of 1941 is fashioned after and is almost an exact copy of Act 126 of the Acts of 1923 in all important particulars".

Inclusion of *and* in the questioned sentence is necessary if the Act is to be the instrumentality for carrying into effect the essentials so frequently mentioned in the several sections. Result must be the same whether rules of interpretation, or of construction, are invoked. See Cooley's Constitutional Limitations, 8th Ed., ch. 4.

Second—Delegation of Power.—Appellant contends that certain language in the Board's resolutions and pledge delegates authority to the trustee not authorized by Act 41. The objection is anticipatory. Assuming, for the purpose of discussion, that expressions in the documents confer authority, *prima facie,* not expressly authorized by the Act, we must not assume that if the contingencies arose, the actual procedure would be contrary to statutory authorization. All rights of the bondholders, upon the one hand, and property-owners and the district upon the other, are safeguarded by the Act, and there is no legal presumption that, in the enforcement of rights, authority of the statute will be abandoned in favor of contractual treatment materially in conflict with Act 41.

Affirmed.

H. C. PRICE CONSTRUCTION COMPANY *v.* SOUTHERN.

4-8985 224 S. W. 2d 358

Opinion delivered November 21, 1949.

Wright, Harrison, Lindsey & Upton, for appellant.

Hugh Conway, Josh W. McHughes and *J. H. Carmichael,* for appellee.

George Rose Smith, J. This claim under the Workmen's Compensation Act arises from the appellee's partial blindness. It is conceded that he has only thirty per cent vision in his right eye and mere light perception in the left. The Commission denied the claim, in the belief that the appellee's condition did not arise out of and in the course of his employment. Ark. Stats. (1947), § 81-1305. The Circuit Court reversed the action of the Commission. For us the only inquiry is whether there was substantial evidence to support the Commission's rejection of the claim.

The appellee, a man of sixty, had been employed at intervals by the appellant for about fifteen years. On the evening of July 26, 1947, his eyes began to pain him; "it felt like two balls of sand in there." He remembered that at about ten o'clock that morning, during his work in the laying of a pipeline, he had been exposed to a bright flash from an electric welding torch. In the past he had suffered occasional eye trouble from similar incidents, but had been able to obtain relief by home remedies. In this instance he tried these without success, and on July 29 he was taken to Dr. Raymond Cook, an ophthalmologist.

Dr. Cook testified that the appellee's right eye was red and painful. Its internal pressure was found to be sixty-one millimeters, as compared to normal pressure of twenty-five millimeters. The left eye was normal in both inner tension and outward appearance. Examination disclosed adhesions in the interior of each eye, binding the pupils to the lenses. Dr. Cook prescribed an ointment and hot packs, which relieved the pain to some extent. On August 5 the patient returned to have the prescription refilled and was told by Dr. Cook, after another examination, that his condition would probably require an operation.

During the next few days the appellee's vision almost failed. On August 8 he telephoned his family in

Enid, Oklahoma, to come and get him, that he was blind. An operation was performed in Enid on August 11, to save the eyesight that still remained. Since then the appellee has consulted other physicians, but it is indicated that his condition will probably grow worse.

Heightened outward pressure in the eyeball is known as glaucoma. The disputed question in this case is whether the appellee's glaucoma was caused or aggravated by the flash of light on July 26. Dr. Cook testified that in his opinion it was not. He attributes the appellee's disability to the adhesions within his eyes. In his judgment, which in this respect is not disputed, these adhesions could not have formed in three days; their existence goes back for at least six months and perhaps for twenty years. Such adhesions may eventually obstruct the circulation of the fluid in the eye. When that happens the internal pressure rises very rapidly, with attendant pain to the patient. Dr. Cook's disregard of the welding flash as a contributing factor to the glaucoma is based on two considerations: First, he found no evidence of electric conjunctivitis—the normal consequence of a flash burn. Second, glaucoma was originally present only in the right eye, whereas in nearly every case the eyes are affected alike by an electric flash, because a person looks at an object with both eyes. The other medical witnesses agree that such injuries are not usually confined to one eye alone.

Dr. Cook's conclusion is not shared by other physicians who testified. In their view the welder's light either did contribute or may have contributed to the appellee's disability. The testimony cannot be reconciled. It is not, however, the function of the courts to weigh the evidence in compensation cases. *J. L. Williams & Sons, Inc.,* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82. The legislature has entrusted to the Commission the power to speak the final word in controversies of fact, just as a jury must assume that responsibility in suits at common law. It is immaterial that we might reach a different conclusion if we were permitted to try the case anew. That authority has not been given to us. The

evidence in support of the Commission's action is of the character required by the statute, and we have no choice except to sustain the denial of the claim.

The judgment is reversed and the cause remanded with instructions to affirm the action of the Commission.

SYKES v. DICKERSON.

4-8992 224 S. W. 2d 360

Opinion delivered November 21, 1949.

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

Wiley W. Bean, for appellee.

LEFLAR, J. Defendant Sykes, an automobile dealer, in November, 1945, sold a second hand truck to plaintiff Don Dickerson, a minor then 17 years old, for $1,250. Sykes admittedly knew that Dickerson was a minor. Dickerson paid $500 cash down, and made further payments variously estimated from $200 to $361.90. It was contemplated that he would use the truck in hauling lumber, and for some months he did so, as an aid to self-support. He then went into the Army for a time, parking the truck

at his mother's home when he left. His mother and older brother later turned it back to Sykes, who testifies that he subsequently resold it for "$550, the balance due me." Second hand truck prices had dropped substantially in the meantime.

In 1947 the minor by next friend brought the present action to disaffirm the contract of purchase and secure back from Sykes the amount, allegedly $861.90, which he had paid for the truck. The defendant demurred specially to the complaint on the stated ground "that his right to disaffirm . . . exists only after said minor has reached the age of majority." This demurrer was properly overruled. An infant's contracts relating to personal rights or personalty may be disaffirmed by him while he is still an infant. *St. Louis, I. M. & S. Ry.* v. *Higgins,* 44 Ark. 293; *Maddox* v. *Hamp Williams Hdwe. Co.,* 181 Ark. 403, 26 S. W. 2d 85; Williston, Contracts (Rev. Ed., 1936) § 235.

At the trial before the jury, two principal fact issues were urged by defendant. These were (1) that the contract for sale of the truck was really not with the plaintiff minor, but rather with the minor's mother, a competent adult, and (2) that if the contract was with the minor it was a contract for a necessary on which the plaintiff would be bound despite his minority. Under instructions presenting both of these issues the jury returned a verdict for the plaintiff minor, in the amount of $450, and judgment was entered accordingly. Defendant's appeal relies on the two issues just stated. Neither party objects to the amount of the verdict.

As to whether defendant's contract was with the minor or with his mother, there was ample evidence to justify the jury in finding either way. The jury was properly instructed upon the issue. Its verdict is controlling here.

The remaining contention is that an automobile truck purchased by a minor for the purpose of use in making a living for himself is a necessary, so that the minor would be liable for it. This contention would in Arkansas today have to be based on the Uniform Sales

Act, § 2, Ark. Stats. (1947) § 68-1402, which provides: "Where necessaries are sold to an infant . . . he must pay a reasonable price therefor. Necessaries in this section means goods suitable to the condition in life of such infant . . . and to his actual requirements at the time of delivery." The statutory definition of the term "necessaries" appears to be the same as that previously applied at common law in this state, though none of our earlier cases exactly involves the present facts.

The Arkansas court has several times held that an automotive vehicle was not a necessary, though in each instance the circumstances were different from those of this case. See *Arkansas Reo Motor Car Co.* v. *Goodlet,* 163 Ark. 35, 258 S. W. 975 (pleasure car wrecked by minor before disaffirmance); *Crockett Motor Co.* v. *Thompson,* 177 Ark. 495, 6 S. W. 2d 834, (car used for pleasure and to ride a few miles to town and back); *Maddox* v. *Hamp Williams Hdwe. Co.,* 181 Ark. 403, 26 S. W. 2d 85 (truck purchased by minor for use of brother). The closest Arkansas case on its facts is *Haynie* v. *Dicus,* 210 Ark. 1092, 199 S. W. 2d 954, where a minor had purchased a "milk route" and truck. The decision there was that whether these items were necessaries was a question of fact and the finding in the lower court, that under the circumstances they were "necessaries," was sustained. The same procedure essentially was followed in the Circuit Court in the instant case. The jury was instructed as to the meaning of the term "necessaries" and was told to find for the defendant if the truck was a necessary. Under this instruction the verdict was for the plaintiff.

"Whether the nature of a contract is such that it can, under any circumstances, be regarded as a contract for necessaries, is a question of law; but if the court decides that under some circumstances such a contract might be for necessaries, it then becomes a question of fact for the jury whether it was so in the particular case." Williston, Contracts (Rev. Ed., 1936) § 241. There have been some intimations by legal writers that automotive vehicles purchased for business purposes would

never be deemed necessaries where an infant is concerned. Compare 43 C. J. S. 190, 192. We do not so hold. Cases cited in support of that generalization have usually reached the result by reason of the peculiar facts in the individual case, or because of express findings of fact by jury or trial judge that a car was not a necessary for a particular infant.

Our conclusion is that the procedure followed in the Circuit Court was correct. The judgment is affirmed.

WALLIS *v.* STUBBLEFIELD.

4-9007 225 S. W. 2d 322

Opinion delivered November 21, 1949.

Rehearing denied January 16, 1950.

Claude Duty, for appellant.

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

MINOR W. MILLWEE, Justice. Appellee, Hugh Stubblefield, owns and operates the Farmers Market at Fayetteville, Arkansas. Appellant, Marie Wallis, is engaged in the raising of broiler chickens on a large scale in Washington and Madison counties. Appellee brought this action in circuit court to recover $6,367.98 allegedly due for chicken feed sold to appellant. In her answer and

cross-complaint, appellant admitted purchasing the feed from appellee, but alleged that much of it was wet, molded, inferior in quality and unfit for the use for which it was sold, and that upon feeding it to her chickens, they became diseased and their growth thereby retarded to appellant's damage in the sum of $10,000.

By agreement of the parties, there was a trial before the court, sitting as a jury, which resulted in judgment against appellant and the garnishees, Claudine and Lester Lindley, in said sum of $6,367.98.

For reversal appellant argues that the judgment is against the preponderance of the evidence, but this is not the test. Where a jury is waived and the case is tried before the judge sitting as a jury, his finding on a question of fact is as conclusive on appeal as a jury verdict and will not be disturbed, if there is any substantial evidence to sustain the finding. *Johnson* v. *Spangler,* 176 Ark. 328, 2 S. W. 2d 1089; *Peterson* v. *Garland County,* 188 Ark. 1167, 65 S. W. 2d 18. In determining whether there is substantial evidence to support the judgment, we must, therefore, give the evidence adduced on behalf of appellee the strongest probative force that it will reasonably bear. *Wall* v. *Robling,* 207 Ark. 987, 183 S. W. 2d 605.

Appellant admitted purchasing the feed and there is an absence of proof that it was inferior in grade. Appellant testified that appellee agreed to supply feed for 25,000 chickens; that he furnished a good standard brand until the chickens were about eight weeks old; and that he then delivered chops, oats and egg pellets which he represented as being a good substitute for the higher priced standard brand. Although appellant stated that she had been growing chickens about eight or ten years and knew that the change in feed constituted bad feeding practice, she further stated that she relied on the representations of appellee in using the feed; that some of it was wet and moldy, but she fed most of this to her hogs; that the chickens became diseased and some of them died; and that the change of feed caused loss of

growth of about one pound per chicken on those marketed.

Lester Lindley, one of the garnishees, testified that he purchased 13,000 of the chickens from appellant; that the chickens weighed about two pounds each when they should have weighed three pounds; and that he sold them for 33c a pound which was 3c under the market price. He also stated that he had a conversation with appellee about the time of the sale in which the latter stated that he had "talked (appellant) into the notion" of buying the cheaper feed and thought he had saved her some money.

The evidence on behalf of appellee was to the effect that he only sold appellant the kind of feed she ordered; that it was delivered dry and in good condition; that any damage from dampness or moisture was caused by appellant's leaky buildings or from storing the feed in the same room with the chickens; that the chickens suffered no unusual sickness and most of them were normal in size and quality; and that some of them were barebacked and suffered from colds, a condition caused by overcrowding and poor ventilation.

Appellee denied that he made any representation to cause appellant to change feed and stated that this was done of her own accord. He further stated that appellant made no complaint as to the condition or quality of the feed until after institution of this suit. There was evidence that appellant refused to sell part of the chickens at a price 2c higher than the market price when it was suggested that payment should be made to appellee and appellant jointly. There was also evidence by experienced growers that the change in feeds did not constitute a bad feeding practice.

Appellant insists that the testimony of Lester Lindley, garnishee, in reference to the conversation with appellee is wholly undisputed and fully established the fact that appellee caused a change of feeding which resulted in damage to appellant. While appellee was not questioned with reference to the alleged conversation with Lindley, he did positively deny that he made any repre-

sentation to appellant or had anything to do with the selection of the feed sold. Lester and Claudine Lindley, as garnishees, filed an answer stating an indebtedness to appellant in the sum of $2,406.50. The answer was controverted and there is no appeal from the court's finding that the Lindleys were indebted to appellant in a sum exceeding the amount of the judgment.

It is thus noted that testimony bearing on the cross-complaint filed by appellant is conflicting. When considered in the light most favorable to appellee, the evidence is substantial and sufficient to support the judgment.

Affirmed.

FEARS *v.* FUTRELL.

4-8998 224 S. W. 2d 362

Opinion delivered November 21, 1949.

[redacted]

E. H. Tharp and *Lee Ward,* for appellant.

Phil Herget and *Kirsch & Cathey,* for appellee.

ED. F. MCFADDIN, Justice. The question for decision is whether the chancery court was correct in holding that appellee's rights as a mortgage creditor are superior to appellant's rights as a judgment creditor.

On August 15, 1946, appellant, Fears, obtained judgment against R. E. Coleman in the Chancery Court of Greene county for an amount in excess of $10,000. The lands here involved are in Lawrence county; and a certified copy of the Greene county judgment was not filed in Lawrence county (under § 29-130 Ark. Stats. 1947) until October 1, 1948. Prior to the last-mentioned date the rights of appellee, Futrell, arose, as follows:

1. On November 13, 1947, Futrell loaned Coleman $3,200, and as security received, and immediately recorded, a deed of trust from Coleman and wife, covering certain described real estate in Lawrence county, Arkansas. This deed of trust, which did not purport to be security for any subsequent indebtedness, will be hereinafter referred to as the "1947 instrument."

2. On January 15, 1948, Futrell loaned Coleman and wife an additional $3,000, and received from them a promissory note bearing this notation:

"It is agreed and understood that this note is secured by mortgage, already given one the house and 58 lots in West Walnut Ridge, known as the Billingley Estate."

We will hereinafter refer to this note as the "1948 instrument."

As previously stated, Fears had a certified copy of the Greene county judgment filed in Lawrence county on October 1, 1948. Then on January 20, 1949, Futrell [1]

[1] Maurice Cathey was named as trustee in the 1947 instrument, and therefore was joined as a party plaintiff with Futrell. But we will continue to refer to Futrell as the "plaintiff" or the "appellee."

filed the present suit to foreclose both the 1947 instrument and the 1948 instrument, and to have both decreed superior to Fears' judgment. As regards the 1948 instrument, Futrell alleged:

". . . that said note, and the agreement thereon endorsed, constituted an equitable mortgage upon the lands as first hereinabove described, . . ." (being those described in the 1947 instrument).

By answer Fears alleged that, prior to November 13, 1947, Futrell "had actual personal knowledge" of Fears' judgment; and that such knowledge rendered Futrell's rights inferior to Fears' judgment. When the chancery court sustained Futrell's demurrer to the said answer, Fears refused to plead further; and a decree was entered adjudging Futrell's rights to be superior in all respects to Fears' judgment. This appeal challenges that decree.

I. *As to the 1947 Instrument, but Little Need be Said.* Fears' judgment against Coleman in Greene county was not a lien on Coleman's lands in Lawrence county until a certified transcript of the judgment was filed in Lawrence county; and that date was October 1, 1948. So Futrell's mortgage on the Lawrence county lands antedated the filing of Fears' judgment in that county. In his answer Fears did not allege that the dealings between Futrell and Coleman were in bad faith or in pursuance of any scheme to defraud creditors. In the absence of such a claim, the holding in *M. & F. Bank* v. *Harris,* 113 Ark. 100, 167 S. W. 706 is not applicable. Futrell's actual knowledge of the Greene county judgment against Coleman did not prevent Futrell from dealing with Coleman in good faith. Those dealings, as consummated by the 1947 instrument, are superior to the subsequently filed judgment. The chancery court was correct in so holding.

II. *As to the 1948 instrument, Claimed by Futrell to be an Equitable Mortgage, a More Extended Discussion is Necessary.* The notation on the note read:

"It is agreed and understood that this note is secured by mortgage, already given one the house and 58

lots in West Walnut Ridge, known as the Billingley Estate."

The verified complaint alleged—and Fears' answer did not deny—that the 58 lots were the same property as that described in the 1947 instrument; so the identity and sufficiency of the description of the property, covered by the notation, cease to be questions in this case.

In *Apperson* v. *Burgett,* 33 Ark. 328 Mr. Justice EAKIN, speaking for this court in 1878, said:

"According to the principles established in this court nearly a quarter of a century ago, and since maintained without question, the lien of the judgment was subject to all valid liens upon the lands *at the time of the rendition,* whether recorded or not. It bound only what the debtor then had, and was effective only to prevent future alienations or incumbrances."

Mr. Justice EAKIN said "at the time of rendition," because in that case the lands were in the same county in which the judgment was rendered; and because the statutes of Arkansas then in force (§ 3603-4, Gantt's Digest of 1874) did not provide for a circuit court judgment to be filed in another county. It was not until March 17, 1891, that there was enacted what is now § 29-130, Ark. Stats. (1947), whereby a circuit or chancery court judgment may be filed in another county and accomplish lien results. So Mr. Justice EAKIN's language "at the time of rendition", when applied to the case at bar, really means "at the time of filing in the county in which the lands are located." Read in such light, the language indicates that a prior valid lien, though unrecorded, is superior to a subsequently filed judgment.

In *Snow Bros. Hdw. Co.* v. *Ellis,* 180 Ark. 238, 21 S. W. 2d 162, we again considered the nature of a judgment lien; and Mr. Justice KIRBY said:

"A judgment lien, however, does not attach to the land, but is a lien on the real estate owned by the defendant—the judgment debtor's interest in it—and, if that interest be subject to any infirmity or condition by

reason of which it is eliminated or ceases to exist, the lien attached thereto ceased with it. *Howes* v. *King,* 127 Ark. 511, 192 S. W. 883; § 6299, C. & M. Digest; 15 R. C. L., § 255, p. 798."

In the above quotation we cited with approval 15 R. C. L. 798, which reads:

"The lien of a judgment is subject to prior liens, and will not prevail over prior equitable claims on the same property. It is subject to every equity which existed against the land in the hands of the judgment debtor at the time of the rendition of the judgment, and courts of equity will protect the equitable rights of third persons against the legal lien, and will limit such lien to the actual interest which the judgment debtor has in the estate."[2]

The effect of our holdings,[3] as applied to the case at bar, is: if the 1948 instrument is sufficient to constitute an equitable mortgage, then Futrell's claim is superior to the judgment rights of Fears.

What language is necessary to create an equitable mortgage. In *Bell* v. *Pelt,* 51 Ark. 433, 11 S. W. 684, 4 L. R. A. 247, 14 Am. St. Rep. 57, we held that an equitable mortgage was created by language on a promissory note which, after a description of the land, said:

". . . vendor's lien is hereby reserved on said land for the purchase money." Mr. Justice HEMINGWAY, speaking for the court in that case, said:

"Mr. Pomeroy says that, where an instrument manifests an intent to charge or pledge property, real or personal, as security for a debt, and the property is so described that the thing intended to be charged or pledged can be sufficiently identified, it is held that a lien follows. 3 Pom. Eq., § 1237. An attempt to create a security in legal form having failed, equity will give

[2] Language to the same general effect may be found in 31 Am. Juris. 39.

[3] For some other cases, see *Carroll* v. *Evans,* 190 Ark. 511, 79 S. W. 2d 425; *Citizens Bank & Trust Co.* v. *Garrott,* 192 Ark. 599, 93 S. W. 2d 319; and *Tolley* v. *Wilson,* 212 Ark. 163, 205 S. W. 2d 177, and cases there cited.

effect to the intention of the parties and enforce the lien as an equitable mortgage. Any agreement that shows an intention to create a lien is in equity a mortgage."

In *Arkansas Cypress Shingle Co.* v. *Meto Valley Railway Co.*, 97 Ark. 534, 134 S. W. 1195, we again held that an equitable mortgage was created by language on a promissory note. Mr. Justice WOOD, speaking for this court, quoted with approval this language:

"'. . . a lien created by contract, and not sufficient as a legal mortgage, will generally be regarded as in the nature of an equitable mortgage. The form of the contract is immaterial. Though a lien may not be expressed in terms, equity will imply a security from the nature of the transaction, and give it effect as such, in furtherance of the agreement of the parties, if there appears an intention to create a security.'"[4]

Applying the rationale of our holdings to the case at bar, it is clear that the notation on the 1948 instrument was sufficient to constitute an equitable mortgage, because the notation said: "It is agreed . . . that this note is secured by mortgage . . . on the house and 58 lots . . ." This was an agreement to create a lien, and as such was a valid equitable mortgage. Therefore: since (a) it is not denied that the description of the property, referred to in the notation, is sufficient; and since (b) prior equitable mortgages are superior to subsequently recorded judgments; and since (c) the notation on the 1948 instrument was sufficient to constitute an equitable mortgage, it follows that the chancery court was correct in sustaining the demurrer to the appellant's answer. Affirmed.

[4] See, also, *McGuigan* v. *Rix*, 140 Ark. 418, 215 S. W. 611, and Hughes on Arkansas Mortgages, §§ 13 and 14.

BURNS *v.* VAUGHAN.

4-9005 224 S. W. 2d 365

Opinion delivered November 21, 1949.

Sloan & Sloan, for appellant.

Barrett, Wheatley & Smith, for appellee.

GEORGE ROSE SMITH, J. The basic facts in this case are quite similar to those in *Chapman Chemical Co.* v. *Taylor,* 215 Ark. 630, 222 S. W. 2d 820, decided June 27, 1949. On the morning of July 10, 1947, appellant Burns caused his rice crop to be sprayed by airplane with 2,4-D chemical dust. This dust is harmless to narrow leaved plants but deadly to those having broad leaves. It has unusual carrying powers, as it vaporizes in the air and may travel for miles. Here the dust drifted to the appellees' farms, a mile or more away, and damaged their growing cotton. They recovered judgments below in amounts not questioned here. The manufacturer of the

chemical was also a defendant, but it made default and did not appeal from the judgments against it.

Appellant's principal contention is that he should have received a directed verdict. It was settled by the *Taylor* case, *supra,* that one who uses a dust of this kind is not liable to his neighbors in every case; negligence must be shown. There the Elms Company, which used the dust, was not shown to have had notice of its remarkable drifting power. The company's manager had consulted one versed in such matters and had been told that the chemical was all right. That case went to the jury, and we upheld a verdict for the Elms Company.

Here the evidence as to notice is materially different. Another rice farmer, living a few miles from appellant, had released 2,4-D by airplane about two weeks before appellant used the dust. Damage to other crops had occurred. The earlier incident seems to have been a matter of general knowledge in the vicinity, and appellant admits that he knew of it. The county agricultural extension agent had a considerable fund of information on the subject, which appellant could have obtained for the asking. See 7 USCA § 342. Too, the appellant testified that he knew that the dust was dangerous and instructed his pilot not to release it if there was any wind. During the dusting operations a breeze arose, but the pilot continued to release the dust until appellant succeeded in stopping him. We think this evidence was sufficient to make the issue of negligence a matter for the jury.

The other contentions require only a few words. There was a dispute as to whether the breeze that arose was blowing toward or away from the appellees' lands. Appellant offered a Weather Bureau certificate showing the direction of the wind that day in Batesville, Little Rock and Memphis. The relevancy of this information is certainly open to question; but we need not decide this issue, for the appellant did not except to the court's refusal to admit the certificate. It happened that the certificate reached the jury room by mistake, a circumstance relied on by appellant for reversal. We

hardly see how he can complain of the jury's having seen evidence that he wanted them to see. In any event, however, the only proof that the jury saw the certificate is in the form of affidavits by several jurors. Of course this is not a permissible method of impeaching the verdict. *Griffith* v. *Moseley,* 70 Ark. 244, 67 S. W. 309.

Margaret Walker, an appellee, had employed Arthur White to make a crop on her land, under an agreement that he should receive half the proceeds after all expenses were paid. It is argued that Mrs. Walker should have been permitted to recover only half the damage to her crop. We have frequently held, however, that under such an arrangement title remains in the landowner until the division is made. The landowner is the proper plaintiff in an action for conversion of the gathered crop, *Hammock* v. *Creekmore,* 48 Ark. 264, 3 S. W. 180, and the reasoning applies even more strongly when the injury is to a growing crop.

Affirmed.

[redacted]

IRBY *v.* DRUSCH.

4-9010 224 S. W. 2d 366

Opinion delivered November 21, 1949.

[redacted]

Arthur Sneed, for appellant.

Ira C. Langley and *E. G. Ward,* for appellee.

DUNAWAY, J. This is an appeal from an order of the Chancery Court of the Eastern District of Clay County, dated January 21, 1949, entering a decree *nunc pro tunc* in a 1928 foreclosure suit in that court. The decree *nunc pro tunc* was entered on motion of one Emil Drusch, plaintiff, in cause No. 2610, *Emil Drusch* v. *Lee Ridenour, et al.* This decree *nunc pro tunc* was entered over the objection of appellants, W. O. Irby and wife, Ollie Irby, who intervened in the instant proceeding by Drusch.

At the time Drusch filed his motion seeking a decree *nunc pro tunc* in cause No. 2610 there was pending in the Clay Chancery Court, Eastern District, cause No. 4619, wherein Emil Drusch is also plaintiff, and Subsidiary Drainage District No. 23 of the St. Francis Drainage District of Clay and Green counties, Arkansas, W. O. Irby and wife, Ollie Irby, and others are defendants. In the latter suit the Irbys claim ownership of part of the land involved in the 1928 foreclosure suit. The Irby's claim to title derived from a 1943 deed from the Drainage District and *mesne* conveyances. They were not parties to the original action in case No. 2610 and claim no interest through the parties thereto.

Intervention of the Irbys in the *nunc pro tunc* proceedings was objected to by Drusch on the ground that they had no interest in the original action and claimed no rights arising therefrom. Interveners argued that no decree *nunc pro tunc* could be entered, because the decree of foreclosure in cause No. 2610, if there actually was a decree, was void. This contention was based upon an allegation that no affidavit for warning order was filed in that action for obtaining constructive service on the defendants, all of whom were non-residents of this State.

In the *nunc pro tunc* proceedings, no effort was made to obtain service on the original defendants in cause No. 2610, and no notice was given them.

The chancellor found that a decree of foreclosure had been rendered on November 26, 1928, in that cause, and ordered the entering of the *nunc pro tunc* decree sought by Drusch.

Whether or not the decree of foreclosure in cause No. 2610 was void for want of proper affidavit for obtaining constructive service on the defendants in that action, it is not now necessary to decide. The question is raised here by the Irbys, who were not parties to the foreclosure suit, and claim no interest in the lands in litigation through those who were. The Irbys are not proper parties to raise the question. We have, of course, recognized that decrees may not be amended *nunc pro tunc* after the lapse of much time, where intervening rights of third parties would render such a procedure inequitable. *Kory* v. *Less,* 183 Ark. 553, 37 S. W. 2d 92. But the right to object on this ground is limited to third parties whose interests might be prejudiced by the decree *nunc pro tunc.* That is not true here. Our holding that the Irbys are not proper parties to attack the validity of the foreclosure decree in the present proceeding in cause No. 2610, does not affect their right to do so in any other action where they are properly parties and their rights are affected.

The record shows that no notice was given to the parties against whom the decree *nunc pro tunc* was entered. The court's order was therefore erroneous for notice must first be given to parties to the original action when *nunc pro tunc* relief is sought. *Simpson* v. *Talbot,* 72 Ark. 185, 79 S. W. 761; *Bridwell* v. *Davis,* 206 Ark. 445, 175 S. W. 2d 992.

The cause is remanded for proceedings consistent with this opinion.

SIMPSON *v.* BURGE.

4-8994 224 S. W. 2d 830

Opinion delivered November 21, 1949.

Rehearing denied December 19, 1949.

R. W. Tucker, for appellant.

J. J. McCaleb and *W. D. Murphy, Jr.,* for appellee.

DUNAWAY, J. Whether Folz H. Simpson possessed testamentary capacity at the time of execution of a purported will, is the issue in this case. The Independence Probate Court found that he did not, and denied probate of the will. From that order comes this appeal.

Simpson died in Independence County on July 4, 1948, after an illness which had lasted from the time of a stroke he suffered on or about May 12, 1945. He was survived by a daughter, the contestant of the will—appellee, here; and by a son, contestee and appellant. The will in question was executed in the evening of December 4, 1945, at decedent's home where he lived with his son. The instrument was prepared by a Batesville attorney at the request of decedent's son, who came to his office and told him the disposition of property desired by the elder Simpson. One hundred dollars was to be bequeathed the daughter, and the balance of the estate, valued according to the testimony at from $20,000 to $25,000, was to go to the son. Some time in the evening of December 4, 1945, the attorney who was employed and paid by the son went to decedent's home. Since decedent was unable to write, because of his illness, he made his mark on the instrument which had been read or explained to him by the attorney. The attorney witnessed his mark, and two attesting witnesses subscribed their signatures to the document. All three testified that decedent could not carry on a conversation, and that he declared this to be his will by

nodded or grunted assents to the attorney's questions. The purported will was then sealed in an envelope and given to the son, who took it the next day to the office of the Probate Clerk of Independence County, where it remained until after the death of Folz Simpson.

These facts are undisputed. The rest of the testimony as to the decedent's condition of health and mental capacity from the time of his disabling stroke in 1945 until his death in 1948, is in hopeless conflict. To detail the statements of all the witnesses would serve no purpose.

Generally, the witnesses for the contestant testified that decedent had been mentally incompetent continuously from May 12, 1945, until he died, that he did not recognize them when he was visited, that he could not talk. One impressive part of contestant's case was the testimony of a friend of the son, who when requested to come to the house to witness the elder Simpson's will, refused to do so because he did not think the father had the required mental capacity. He had known decedent for years and saw him frequently just prior to the execution of the will.

Against this testimony, many witnesses appeared for contestee to state that they had seen decedent during his illness, and that in their opinion he was competent. Most of them reached this conclusion on the basis of brief conversations had with him from time to time. Almost all admitted he could not talk and carry on a conversation, but could make them understand such things as whether the son was on the farm or had gone to town. The testimony as to decedent's knowledge of his affairs and his relationships was limited to this.

Most significant was the testimony of the attorney who prepared the will. On cross-examination, after describing the circumstances attending decedent's signing his mark to the will, he made these statements, ". . . he was not able to discuss it with his faculties like they were." "Nothing was said there to indicate to me whether he was competent or incompetent." Then after

stating that he would have brought a doctor along had he known in advance decedent's condition, the attorney gave this answer to a question of whether decedent knew the contents of the will and knew what he was doing: "I would not say that he did or that he did not, that is, I would not say that he didn't know either." . . . "I can say that he knew he was making his mark, but now as to whether he knew what he was making his mark for I could not say."

Contestant, of course, had the burden of showing that a will executed with due formalities and properly proved was in fact executed by a person lacking in testamentary capacity. *Gray* v. *Fulton,* 205 Ark. 675, 170 S. W. 2d 384; *Parette* v. *Ivey,* 209 Ark. 364, 190 S. W. 2d 441. Our authorities on what constitutes testamentary capacity—ability on part of testator to retain in memory without prompting the extent and condition of his property; to comprehend to whom he is giving it; and to appreciate the deserts and relations to him of those whom he excludes from his will—are fully discussed in earlier cases. See *Pernot* v. *King,* 194 Ark. 896, 110 S. W. 2d 539; *Shippen* v. *Shippen,* 213 Ark. 517, 211 S. W. 2d 433. The applicable law is clear.

Appellant's allegations of errors on the part of the trial judge as to admissibility of evidence on the main issue have all been carefully considered. Unless from the competent evidence in the record it appears that the finding of the probate court is contrary to the preponderance of the testimony, the judgment below should be affirmed. *Boyland* v. *Boyland,* 211 Ark. 925, 203 S. W. 2d 192. We cannot say that the preponderance of the evidence does not support the finding of testamentary incapacity.

Affirmed.

CHAVIS *v.* HILL.

4-8997 224 S. W. 2d 808

Opinion delivered November 21, 1949.

Rehearing denied December 19, 1949.

A. D. Chavis, for appellant.

Reinberger & Eilbott, for appellee.

HOLT, J. This action was instituted by appellant, A. D. Chavis, to establish alleged title, the right to possession and rents of Negro residence property in the city of Pine Bluff. Appellee's answer was a general denial and upon a trial, the court found all issues in favor of appellee and dismissed appellant's complaint for want of equity. From the decree is this appeal.

Appellant admitted that he was basing his claim to title and right to possession of the property in question solely on a quitclaim deed from Sam and Fannie Word to him (A. D. Chavis) dated June 27, 1939, and recorded November 26, 1945. Appellant testified: "Is this deed (meaning the quitclaim deed above) the only evidence you have of title to this property? A. Yes, that is right." Therefore, in order to prevail he must do so on the strength of this quitclaim deed.

The record discloses that this property, by proper procedure, prior to the above quitclaim deed to Chavis, had been sold to Paving District No. 102 of Pine Bluff and title confirmed in the District January 4, 1938, subject only to the right of the owner to redeem within the statutory period of five years (Ark. Stats., 1947, § 20-1144); *Brasch* v. *Mumey,* 99 Ark. 324, 138 S. W. 458, Ann. Cas. 1913B, 38, and *Cutsinger* v. *Strang,* 203 Ark. 699, 158 S. W. 2d 669. The property was not redeemed.

September 9, 1940, Fannie Word executed deed to the property to Hattie Watson, while title was still in District No. 102. September 16, 1940, District No. 102 executed its deed to the property to Hattie Watson, and thereafter on March 28, 1944, Hattie Watson executed deed to the property to Sam Word. Sam Word died May 21, 1945, and his wife died May 3, 1947.

The deed in question was captioned "Quitclaim Deed." The granting clause provided: "We, Sam Word and Fannie Word, for and in consideration of the sum of fifty ($50) dollars, to us in hand paid, by A. D. Chavis, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, and quitclaim unto said A. D. Chavis, and his heirs and assigns, forever, the following lands: (Describing the property here involved). . . ." The habendum clause provided: "To have and to hold the same unto said A. D. Chavis and unto his heirs and assigns forever, with all the privileges and appurtenances thereunto belonging." We hold that this instrument was, in effect, a Quitclaim Deed.

If the word "quitclaim" or any other word other than the statutory words "grant, bargain and sell" (Ark. Stats., 1947, § 50-401) appears in the granting clause, then the presence of such other words will take the conveyance out of the statute, if such other words, in their natural legal meaning are inconsistent with the legal import of the statutory words. Our cases of *Reynolds* v. *Shaver,* 59 Ark. 299, 27 S. W. 78, 43 Am. St. Rep. 36, and *Doak* v. *Smith,* 137 Ark. 509, 208 S. W. 795, are cases in which deeds were so held to be outside the statute. So here, in addition to the statutory words, the words "con-

vey and quitclaim'' were used, which we hold took the conveyance out of the statute.

We must construe the deed from its four corners in determining the intention of the parties. Here, it is admitted by Chavis that he prepared the deed himself, and in his own handwriting. The grantors could neither read nor write. No words such as ''warrant, defend or title,'' appear in the deed. It would have been an easy matter to have placed in the deed a clause of an expressed warranty had such been intended.

In these circumstances, appellant, Chavis, acquired no title to the property by virtue of the quitclaim deed from the Words for the reason that at that time title rested in District No. 102. The only interest the grantors then had was their right to redeem within the five-year statutory period. As indicated, they did not exercise this right. The fact that Sam Word later on March 28, 1944, secured a deed to the property from Hattie Watson did not strengthen Chavis' claim of title to the property for the reason that after-acquired property rights do not pass under a quitclaim deed such as we have here. (*Wells* v. *Chase,* 76 Ark. 417, 88 S. W. 1030.)

Accordingly, the decree is affirmed.

GRIFFIN SMITH, C. J., concurs.

FORBUS *v.* GIBBS.

4-9000 224 S. W. 2d 790

Opinion delivered November 21, 1949.

Rehearing denied December 19, 1949.

Brockman & Brockman, for appellant.

Jay W. Dickey, for appellee.

MINOR W. MILLWEE, Justice. Appellant, Charles H. Forbus, is a veteran of the First World War and resided with his wife, Clara Belle, in the City of Little Rock, Arkansas, in 1926. On December 17, 1926, appellant was adjudged incompetent by the Pulaski Probate Court and Mrs. Forbus was appointed guardian of his person and estate, which consisted of compensation paid by the Veterans Administration in amounts varying from $50.63 to $73.12 monthly.

In 1932, appellant and his wife moved to Pine Bluff, Arkansas, and the guardianship was transferred to the Jefferson Probate Court. On February 1, 1932, the property involved in this suit was purchased from R. C. Cutrell, brother of Clara Belle Forbus. The property is described as, "Lots 5 and 6, Block 16 of Cockrill's Addition, South of the Railroad, to the City of Pine Bluff, Arkansas." The deed was executed to Clara Belle Forbus as guardian of appellant and recites a consideration of $2,000 payable in 100 promissory notes in the sum of $20

each. The notes were signed by the guardian and the sale was approved by the Jefferson Probate Court on June 28, 1932.

Abe Barre held a lien on the property in the sum of $1,000 and the first 50 notes were payable to the order of R. C. Cutrell at the Simmons National Bank in Pine Bluff, Arkansas, to discharge this lien. The second series of 50 notes was dated January 1, 1937, and payable to the order of R. C. Cutrell at the National Bank of Commerce in Pine Bluff. A vendor's lien was retained in the deed to secure the purchase money notes, taxes and insurance. Clara Belle Forbus filed annual accountings showing receipts and disbursements of guardianship funds prior to her death intestate on May 18, 1945.

Appellee, Thelma Gibbs, is the daughter and sole heir of Clara Belle Forbus and stepdaughter of appellant. On August 22, 1945, the Pulaski Probate Court ordered the sanity of appellant restored pursuant to a petition filed by him in his own right and by appellee as his next friend. Appellee, as personal representative of her mother, also filed a final report and accounting in the guardianship proceedings in the Jefferson Probate Court on September 7, 1945. The report was duly confirmed and the guardian's bondsmen discharged.

The last of the notes given in payment of the purchase price of the property was paid in July, 1941. However, the lots forfeited for nonpayment of assessments due Paving District No. 77 of Pine Bluff and two separate deeds were executed by the district to Clara Belle Forbus, individually. The first deed was executed on October 10, 1940, and recites payment by the grantee of $76.50 in delinquent taxes on lot 6. The second deed was executed September 18, 1944, in payment of delinquent taxes on lot 5 in the sum of $257.95.

Appellant instituted this suit against appellee on December 9, 1947, alleging that funds of his estate were used in payment of the consideration recited in the deeds from the paving district; that said deeds should be construed as redemption deeds and reformed so as to show

that the redemptions were in fact made by Clara Belle Forbus, as guardian, rather than individually.

In her answer appellee alleged that Clara Belle Forbus, during her lifetime, paid the greater portion of the purchase price from her own funds derived from the operation of said property as a boarding and rooming house; that Clara Belle Forbus also used her own funds in redeeming the property from the paving district; that the property should be impressed with a lien for repayment of the amounts paid for said deeds from the paving district and that appellee's proper interest in the property by reason of her mother's payments on the purchase price should be confirmed.

Appellant filed a pleading containing a general denial of the allegations of the answer and further alleged that appellee's action was barred by the three-year statute of limitations. A demurrer and a motion to require appellee to make her answer more definite and certain were apparently never acted upon by the chancellor.

After a trial the court, among other things, found: "That Clara Belle Forbus operated a rooming and boarding house and operated a laundry, and that funds belonging to her in the sum of $859.45 were used to pay taxes, installments on the purchase price, and for improvements made to said property, and that the plaintiff should pay to the defendant, as administratrix, the sum of $859.45, and upon said payment being made to the defendant, all right, title, claim, interest and equity of the said Thelma Gibbs, individually and as administratrix, in and to the above described property, should be divested out of her and vested absolutely in the plaintiff, Charles H. Forbus, and title quieted and confirmed in him." Judgment was accordingly rendered in favor of appellee as administratrix in said sum of $859.45 and the property ordered sold in satisfaction thereof. Both parties have appealed.

On the direct appeal appellant earnestly contends that the court erred in finding that appellee was entitled to judgment in any sum, while appellee contends that she

is entitled to a definite undivided interest in the property on account of the payment of purchase money. Appellee concedes that the testimony as to contributions in the form of improvements and purchase money is too uncertain and fragmentary to establish the payment of a definite amount by mother, but insists that the case should be remanded to the chancery court to determine such amount and appellee's interest in the property fixed accordingly.

The evidence discloses that appellant was employed at various jobs from time to time during the pendency of the guardianship and that Clara Belle Forbus also contributed to the running of the household at times by keeping boarders and roomers on the property which was purchased as a home for both. The only receipts reported by Clara Belle Forbus, as guardian, were the monthly payments to appellant by the Government, but the guardian's accountings reflect that at least three-fourths of the purchase price of the property and a large portion of the taxes and insurance were paid out of the guardianship funds. The considerations for the tax deeds from the paving district to Clara Belle Forbus, individually, were not paid out of guardianship funds. While the evidence is conflicting as to whether appellant or his wife and appellee made these payments, we think the preponderance of the evidence supports the conclusion that they were made by Mrs. Forbus and appellee out of their separate funds.

It is observed that the trial court rendered judgment for appellee in the sum of $859.45 for taxes, purchase money and improvements without designating the amount allowed for each. The evidence is insufficient to show payments by Clara Belle Forbus individually of any definite amounts on the purchase price or for improvements to the property. In fact, appellee made no claim for improvements in her answer and the trial court sustained objections to some of the proof on this issue. It is true that appellee testified that her mother paid $600 on the purchase price of the property before arrangements were made to use appellant's compensation from the

Veterans Administration. This testimony is refuted by the guardianship accountings filed by Clara Belle Forbus which clearly show that the first $1,000 represented in notes was paid from appellant's compensation from the Government, and there was no cash payment made when the property was purchased. Since we conclude that the evidence is insufficient to warrant a finding in appellee's favor for payments of purchase money and improvements, we find it unnecessary to discuss the other questions raised on those issues.

Appellant also contends that appellee's right to an equitable lien for taxes under the deeds to Clara Belle Forbus from the paving district is barred by the three-year statute of limitations (Ark. Stats., 1947, § 37-206). We are cited to *Person* v. *Cogbill,* 180 Ark. 664, 22 S. W. 2d 161, and cases of similar import which involve claims for tax liens by parties out of possession of the property. In the case at bar the property was in the joint possession of appellant and Clara Belle Forbus. The sale was prompted by the desire of the seller to provide a home for his sister who, aside from her duties as guardian, had her own equitable interest to protect. The guardianship reports reflect that funds from that source were unavailable for the discharge of the delinquent paving taxes and deeds were issued to Clara Belle Forbus individually upon payments made by Mrs. Forbus and appellee. This is a suit by appellant to reform the deeds to Clara Belle Forbus who occupied the property jointly with appellant until her death in 1945. We have held that a statute limiting the time for bringing an action against the purchaser to recover land sold at a judicial sale is inapplicable against a person in possession of the property in dispute. *Plant* v. *Prouse,* 208 Ark. 486, 187 S. W. 2d 5. See, also, *Plant* v. *Johnson,* 208 Ark. 217, 185 S. W. 2d 711.

Moreover, there is evidence to the effect that appellee's delay in making claim for refund of the consideration paid for the paving district deeds was occasioned by appellant's representation that he wanted appellee to have the property and would will it to her. In *Metro-*

politan Life Ins. Co. v. *Williams,* 197 Ark. 883, 125 S. W. 2d 441, the court said: "It is a general rule that where one has deceived another or where, through active wrong or negligence, he misleads another and causes him not to file suit, the statute is tolled or suspended until it is discovered that the representations were false. If a defendant intentionally or negligently misleads plaintiff by his representations and causes him to delay until the statutory bar has fallen, the defendant will be estopped from pleading the statute of limitations. *Missouri Pacific Rd. Co.* v. *Davis,* 186 Ark. 401, 53 S. W. 2d 851; *Wright* v. *Lake,* 178 Ark. 1184, 13 S. W. 2d 826."

While Clara Belle Forbus, as guardian of her husband, could not adversely acquire title to the property of her ward through purchase of the property from the improvement district, it does not follow that she was also precluded from claiming a refund of tax payments made from her own funds in order to protect the interests of both. We, therefore, conclude that appellee is entitled to recover the consideration paid for the tax deeds from the paving district. The decree is accordingly modified on direct appeal and the judgment reduced to $334.45, the amount paid for the tax deeds. In all other respects the decree is affirmed.

WISE *v.* CRAIG.

4-8967 226 S. W. 2d 347

Opinion delivered November 21, 1949.

Rehearing denied December 19, 1949.

[redacted]

Bridges, Bridges, Young & Gregory and *John Harris Jones,* for appellant.

Reimberger & Eilbott, for appellee.

Ed. F. McFaddin, Justice. This appeal necessitates construction of the will of Mrs. Jane A. Slaton, who died in 1909 survived by a son and daughter. The portions of the will germane to this case are lettered by us as paragraphs A, B, C and D for convenient reference, and read:

A. "I have heretofore deeded to my son, Marshall H. Slaton, some of my lands and for this reason, and for other reasons which I deem it unnecessary to state here, but which he will no doubt fully understand, I do not will to my said son any part of my property, and I do not wish him to be an executor of this will."

B. "Subject to the payment of my just debts and funeral expenses I will, devise and bequeath to my daughter, Sallie K. Hooker, all my property of every kind, real, personal and mixed to have and to hold said personal property absolutely and to have and to hold said real estate during her natural life. At present she has no children but if she should die leaving children or other descendants it is my will that said land shall go to her said children or other descendants share and share alike, *per stirpes,* in fee simple."

C. "If my said daughter should die leaving no issue her surviving then it is my will that said lands shall go in remainder in fee simple share and share alike to my following named nephews and nieces, namely: Mrs. Sallie Craig, Dr. Marshall McGehee (of Ga.), Frank O. McGehee, Mrs. Mattie M. Park, Mrs. Sallie Hunt, and Miss Mamie M. McGehee, the first three above named being the children of my deceased brother, Samuel M. McGehee, and the last three being the children of my deceased brother, the Rev. J. W. McGehee."

D. "In case any of my said nephews and nieces are dead at the time of the death of my daughter, Sallie, then the descendants of such deceased devisee shall take such share as would have gone to such nephew or niece if living."

No child was ever born to Sallie K. Hooker, and in 1947 she died without issue. All of the six named nephews and nieces died prior to the death of Sallie K. Hooker; so we are concerned with the rights of those who claim as descendants of the six nephews and nieces named in paragraph C of the will.

1. Mrs. Sallie Craig left children who are some of the appellees.

2. Dr. Marshall McGehee left children who are some of the appellees.

3. Frank O. McGehee left children who are some of the appellees.

4. Mrs. Mattie M. Park left no children or issue; but her heirs at law are the appellants.

5. Mrs. Sallie Hunt left three children, being the appellants, Sara Hunt Wise, Mary Hunt Huddleston and Martha Hunt.

6. Miss Mamie M. McGehee left no children or issue, but her heirs at law are likewise the three appellants.[1]

After the death of Sallie K. Hooker, the real estate of Mrs. Slaton was sold by order of the court in this proceeding; and the distribution of the proceeds is the present controversy. It is conceded that appellants, as the descendants of Mrs. Sallie Hunt, are entitled to her portion of the proceeds; but appellants contend, *inter alia,* that the remainder (under paragraphs C and D of the will) vested in the six nephews and nieces immediately on the death of Mrs. Slaton, and that appellants, as the heirs at law of Mrs. Mattie Park and Miss Mamie

[1] The fourth appellant, G. A. Huddleston, appears in the case only as the husband of the appellant, Mary Hunt Huddleston.

McGehee, are entitled to receive the portions that would have gone to Mrs. Park and Miss McGehee. Appellees contend that the remainder (under paragraphs C and D of the will) was *contingent* and did not vest until the death of Sallie K. Hooker; and that since Mrs. Park and Miss McGehee predeceased Sallie K. Hooker and left no descendants, the interest of Mrs. Park and Miss McGehee lapsed and the proceeds of the property should be divided into four main portions, instead of six. This interpretation would give the appellants together one-fourth of the estate, whereas the appellants contend that they are entitled to one-half of the estate. The chancery court held with appellees; and this appeal challenges that holding.

In construing the will of Mrs. Slaton, we are to decide: (I) the meaning of the word "descendants" as used in paragraph D of the will; (II) whether the remainder to the nephews and nieces (as mentioned in paragraphs C and D) was a vested or contingent remainder; and (III) whether conveyances between the parties during the lifetime of Sallie K. Hooker constitute a "practical interpretation" to be followed in this case.

I. *Descendants.* Mrs. Slaton used this word several times in her will. In paragraph B she said in two instances, "children or other descendants" in referring to her daughter, Sallie K. Hooker. In paragraph C, again speaking of her daughter, Mrs. Slaton used the expression "no issue her surviving." Finally, in paragraph D, Mrs. Slaton, in speaking of nephews and nieces, said, "the descendants of such deceased devisee." With these instances in mind, it is clear that Mrs. Slaton used the word "descendants" as being *the children or the issue of the person designated.* Such is the generally accepted meaning of the word. Webster's New International Dictionary defines a descendant as "one who descends, as offspring, however remotely." Bouvier's Law Dictionary defines descendants as: "Those who have issued from an individual, including his children, grandchildren and their children to the remotest degree."[2]

[2] See, also, the word "descendants" in Anderson's Law Dictionary, p. 348. See, also, "descendant" in 18 C. J. 792; and also in 26 C. J. S. 984.

We hold that the "descendants" of deceased nephews and nieces in paragraph D of Mrs. Slaton's will do not refer to any children of any brothers and sisters of such deceased devisee, but refer only to children or issue of such deceased devisee; and since Mrs. Park and Miss McGehee died without descendants or issue, the share of such deceased devisees cannot pass to appellants as devisees under the will, because they are not "descendants" of Mrs. Park or Miss McGehee.

II. *Vested or Contingent Remainder.* Appellants next claim that the estate that passed to Mrs. Park and Miss McGehee (as well as to the other four named nephews and nieces) under paragraphs C and D of the will was a vested remainder rather than a contingent remainder; and—appellants insist—that as a vested remainder the shares of Mrs. Park and Miss McGehee passed to the appellants as the heirs at law of such persons. We have many cases on contingent remainders.[3] To list all of them would require many paragraphs; to discuss all of them would be a work of supererogation. What Mr. Justice McHaney said in *Hurst* v. *Hilderbrandt,* 178 Ark. 337, 10 S. W. 2d 491, is apropos:

"The subject of vested and contingent remainders has formed the basis of prolific decisions of courts of last resort, textwriters and annotators. We will not undertake an extensive review of the cases touching on this subject, not even those of our own courts."

Mr. Justice McHaney in *Hurst* v. *Hilderbrandt, supra,* then quoted with approval from 23 R. C. L. 500:

" 'The broad distinction between vested and contingent remainders is this: In the first, there is some person *in esse* known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate, and whose right to such remainder no contingency can

[3] For a few, see: *Eversmeyer* v. *McCollum,* 171 Ark. 117, 283 S. W. 379; *Walker* v. *Wilmans,* 176 Ark. 251, 3 S. W. 2d 303; *Hurst* v. *Hildebrandt,* 178 Ark. 337, 10 S. W. 2d 491; *National Bank* v. *Ritter,* 181 Ark. 439, 26 S. W. 2d 113; *Deener* v. *Watkins,* 191 Ark. 776, 87 S. W. 2d 994; *Adams* v. *Eagle,* 194 Ark. 171, 106 S. W. 2d 192; *Prall* v. *Prall,* 204 Ark. 1074, 166 S. W. 2d 1028; *Liberty Central Trust Co.* v. *Vaughan,* 167 Ark. 219, 267 S. W. 361.

defeat. In the second, it depends upon the happening of a contingent event, whether the estate limited as a remainder shall ever take effect at all. The event may either never happen, or it may not happen until after the particular estate upon which it depended shall have been determined, so that the estate in remainder will never take effect.' ''[4]

Measured by the said test, quoted and approved by this court, it is clear that the remainder to the nephews and nieces under paragraphs C and D was a contingent remainder. In fact, it was an alternative contingent remainder, as stated in 33 Am. Juris. 611:

''Alternative remainders limited upon a single precedent estate are always contingent. Such remainders are created by a limitation to one for life, with remainder in fee to his children, issue, or heirs, and, in default of such children, issue, or heirs, to another or others. . . .''

In *Greer* v. *Parker,* 209 Ark. 553, 191 S. W. 2d 584, we quoted the classic statement from *Doe* v. *Considine,* 6 Wall. (U. S.) 458, 18 L. Ed. 869, as follows:

'' 'A devises to B for life, remainder to his children, but, if he dies without leaving children, remainder over, both the remainders are contingent; but, if B afterwards marries and has a child, the remainder becomes vested in that child, subject to open and let in unborn children, and the remainders over are gone forever.' ''

Measured also by the test of the foregoing statement, the remainder to the nephews and nieces (under paragraphs C and D of the will) was clearly a contingent remainder, because the said nephews and nieces were all in the ''remainder over'' class (since Mrs. Slaton devised her property to Sallie K. Hooker for life, remainder to her issue in fee simple; but if she died without issue, then the remainder over was to go to the named nephews and nieces). Sallie K. Hooker never had any children, so the remainder did not ''vest in such child subject to open.'' The remainder to the named nephews and nieces re-

[4] This language from Ruling Case Law is also found verbatim in 33 Am. Juris. 551.

mained contingent during the lifetime of Sallie K. Hooker,[5] and vested only on her death. The named nephews and nieces had only a contingent remainder, which, on the death of Sallie K. Hooker in 1947, went to those then alive or to the "descendants" of such of them who had died leaving descendants. In 33 Am. Juris. 618 the rule is stated:

"Where the interest of a remainderman is contingent on his surviving the life tenant, and he dies during the continuance of the life estate, he takes no interest in the land under the remainder and no interest therein devolves upon his heirs."

Therefore, we hold that the appellants, as the heirs at law of their two aunts, Mrs. Park and Miss McGehee, cannot claim any interest in the estate of Mrs. Slaton by virtue of being such heirs at law, since the said two aunts died "without descendants," and the contingent remainder was never vested in the lifetime of the said two aunts of appellants. The will of Mrs. Slaton (giving full effect to its provisions) therefore meant, that if Sallie K. Hooker never had children and died without descendants, then upon her death the remainder would vest in the nephews and nieces named in paragraph C of the will in as many shares as there were such named nephews and nieces alive or "descendants" *per stirpes* of those who had died. Since two of the named nieces died without descendants, the estate was necessarily divided into four major shares.

III. *Practical Interpretation.* Finally, appellants offered proof that during the lifetime of Sallie K. Hooker the nephews and nieces named in paragraph C of Mrs. Slaton's will joined with Sallie K. Hooker in making transfers of *some other property* of the estate of Mrs. Slaton; and appellants insist that those transfers constitute specific recognition that the remainder to such nephews and nieces was vested rather than contingent. Appellants place considerable emphasis on this argument,

[5] In a footnote to *Love* v. *McDonald,* 201 Ark. 882, 148 S. W. 2d 170, Arkansas cases are cited to sustain the statement: ". . . the presumption being that there may be issue so long as life continues."

citing us to the topic entitled "Practical Construction by Parties" found in 57 Am. Juris. 725 and the annotation entitled "Practical Construction Placed on Will by Parties Interested" found in 67 A. L. R. 1272.

There are several reasons why appellants' argument concerning "practical interpretation" has no significance in this case: "First, what Sallie K. Hooker and the named nephews and nieces did might tend to show *their understanding* of the testator's intention, but our task is to ascertain from the four corners of the will the *intention of the testator.* What others thought that intention to be might be erroneous. Of course, if estoppel were the issue, then what the parties did would be highly important. But the intention of the testator is to be ascertained from the will itself, and not from what others understood the will to be.

Secondly: Even the authority cited by appellants (i. e., 57 Am. Juris. 725) says:

". . . this principle of practical construction is applicable only where the will involved is actually ambiguous. . . ."

As we stated in topic II, *supra,* the will of Mrs. Slaton *clearly* created a contingent remainder in the named nephews and nieces. We have no necessity to resort to any "practical construction" doctrine to ascertain that intention; and we certainly could not accept any "practical construction" doctrine contrary to the clear intention of the testator.

Finally: What Sallie K. Hooker and the contingent remaindermen did regarding other property merely shows an effort by contingent remaindermen to convey their interest in property,[6] and the effectiveness of that effort is not the point for decision in this case. At most, such effort cannot be used to defeat Mrs. Slaton's clear intention of creating a contingent remainder in the named nephews and nieces in the property concerned in this suit.

[6] See Vol. II, p. 87, Ark. Law Review for a discussion in "Alienability of Contingent Remainders."

We therefore reach the conclusion that the decree of the chancery court on the order of distribution is in all things correct. Affirmed.

SCHUMAN *v.* WINN, ADM.

4-8977 224 S. W. 2d 538

Opinion delivered November 28, 1949.

U. A. Gentry and *Wm. J. Kirby,* for appellant.

June P. Wooten, for appellee.

GEORGE ROSE SMITH, J. This case involves the validity of a sale by which Street Improvement District No. 508 of the city of Little Rock sought to acquire title to 17.60 acres of land. Appellant bought the property from the District after the owners' time for redemption had expired. The appellees are the successors in title to those who owned the land when it was sold to the District. The chancellor held the sale void and canceled the appellant's deed from the District.

The appellees assert a number of defects in the District's foreclosure proceedings, but a single issue is all that need be discussed. When the District was formed

the land in controversy was described as "Pt. SE SW Sec. 33, T. 2N R 12W." It is conceded by appellant that this part description was void and invalidated the proceedings unless it was cured in the manner to be mentioned. Assessments were levied for the years 1930 to 1934, inclusive, all under the same void description. None were paid. Various suits were brought by the District to collect delinquent assessments, but only the fourth suit is thought by appellant to have been free from the original defect.

The fourth suit was filed on July 26, 1937, to enforce the 1934 assessment. Four days before that suit was brought the District had attempted to correct the description by proceeding under Ark. Stats. (1947), § 20-409. That statute provides that where land has been incorrectly described or wholly omitted from the original assessment list, the assessors may file a certificate of correction with the city clerk. It is then the clerk's duty to publish notice that the corrections have been made and that the property owners may appeal to the city council within ten days. Here the District undertook to follow this statute. We do not decide whether there was a sufficient compliance with the statutory procedural requirements.

The key question is this: When a description is corrected in the manner authorized by the above statute, does the correction operate retroactively to validate tax levies that were void when made, or is the proceeding purely prospective, creating a valid basis only for assessments to be levied in the future? From a mere reading of the statute we should be reluctant to hold that the effect of a correction is retroactive. This case illustrates the injustice of that interpretation of the Act. The description was so indefinite that the landowners could not have learned from the assessment list that their property was being taxed. Yet if the correction had retrospective effect, the taxpayers would be compelled to pay all delinquent assessments, together with penalties, costs and attorney's fees, even though they were not at fault in failing to pay the assessments when due. The case would be even stronger as to lands wholly omitted in the first

instance, yet the statute seems to apply alike to both situations as far as retroactivity is concerned.

Whatever doubts we might otherwise have as to the meaning of this Act are completely dispelled when we examine its statutory history. This corrective procedure was originally authorized by Act 406 of 1907. That Act provides that when the certificate containing the corrected description is filed with the city clerk, "such description shall relate back to the filing of the assessment in the first instance, and shall have the same force and effect as if correctly assessed and described and filed at that time." When in 1929 the legislature amended the statute to read as it does now, the sentence purporting to make the correction retrospective was not re-enacted. It is perfectly clear that the General Assembly intended for the 1929 amendment to eliminate the harsh consequences of retroactive procedure. It follows that the District's action in correcting the description of appellees' lands in 1937 did not cure the fatal defect in the 1934 assessment.

Affirmed.

DIERKS LUMBER & COAL COMPANY *v.* HORNE.

4-8995 224 S. W. 2d 540

Opinion delivered November 28, 1949.

Wootton, Land & Matthews, Elbert Cook and *Watson, Ess, Whittaker, Marshall & Enggas,* for appellant.

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

DUNAWAY, J. In an action by appellant, Dierks Lumber & Coal Company, against E. H. Horne, appellee, for an accounting for the wrongful and willful cutting of timber from its lands, and converting this timber into light poles, the chancellor found that Horne had so converted 426 poles. The court found the value of these poles to be Twenty-four Hundred Seventy ($2,470) Dollars and gave appellant judgment for this amount, less the sum of Thirty-six ($36) Dollars found to be due on Horne's cross-complaint for damage by employees of Dierks to certain poles owned by Horne.

Upon filing the action Dierks sought an equitable garnishment of funds due Horne in the hands of Arkansas Power & Light Company, and later of funds due him by one Leo Moudy. Both garnishments were issued.

On appeal appellee admits he was a willful trespasser, as found by the chancellor, and both parties agree that the finding below as to value per pole was correct. Therefore, the only questions presented to us for decision are:

(1) How many poles did Horne or his agents and employees cut and remove from appellant's lands?

(2) Was appellee wrongfully deprived of the use of moneys due him on account of the garnishments obtained, thus entitling him to damages?

Appellant is the owner of lands in Garland and Montgomery Counties. In the spring of 1946, Horne, under contract with the Arkansas Power & Light Com-

pany, began to cut, peel and deliver poles to the Power Company from lands owned by it in these counties. While Horne was conducting his operations, Dierks discovered that some of these poles were being cut from its lands. The trespass was brought to Horne's attention, and discussions ensued between Horne and Dierks' superintendent as to the damages due by reason of the wrongful cuttings.

Dierks' contention is that Horne had cut and removed 1,947 poles from its lands, instead of 426 as found by the court. The figure claimed was arrived at in this manner: After the trespass was discovered, representatives of Dierks went upon the lands where the cutting had been carried on, together with men supposedly designated by Horne, to count all stumps of trees cut within the past ten or twelve months. One full day's count resulted in a tally of 1,567 stumps. The next day, when the Dierks employees resumed the count, the other men did not reappear. Dierks did not know their identity, and Horne denied ever having sent them. This count by the Dierks men alone brought the total to 1,683. Subsequent checks made in the same way were the basis for Dierks' final claim of 1,947 poles.

The only direct testimony as to the number of poles cut by Horne from Dierks' lands, which was given by men formerly employed by Horne in doing the actual cutting and hauling, supported the finding of the court below.

Appellant argues that Horne admitted cutting 1,683 poles, and that the chancellor erred in not finding for it for at least this number. That appellee made such an admission is urged on the basis of these circumstances: After appellant had arrived at the count of 1,683 poles, a statement to this effect was sent to Horne, who then came to see appellant's superintendent. This conference took place after Horne had first discussed the matter with Q. C. Shores of the Power Company. (On previous occasions when Horne had wrongfully cut timber from Dierks' lands, the Power Company had settled with Dierks on a stumpage basis. The testimony is in

conflict as to whether Horne or the Power Company ultimately bore the expense of these settlements.) Dierks' superintendent testified that Horne did not dispute the number of poles taken, as listed in the statement submitted to him, but said the amount of money claimed therefor was too high. Horne testified that he had not disputed the number, but that on the other hand he had never admitted its correctness—that because of disagreement as to value, they never reached the point of discussing the number of poles taken.

The trial court found against appellant's contention that Horne had admitted taking 1,683 poles. Unless the preponderance of the testimony is to the contrary, we will not disturb the chancellor's findings on appeal.

There is no testimony of any affirmative admission by appellee. While it is true that an admission may be presumed even from the acquiescence or silence of a party, *Brown* v. *Brown,* 16 Ark. 202, it must clearly appear that the circumstances demanded something more than silence on his part. Here there is no proof that Horne knew the number of poles actually taken, or had the necessary information on which to dispute the number contended for by appellant.

The burden of proof is on the plaintiff in a case such as this, to show by a preponderance of the testimony the quantity and value of timber cut by the defendant. *Stoneman-Zearing Lumber Co.* v. *McComb,* 92 Ark. 297, 122 S. W. 648. As we said in that case at page 298: "Bare proof that some of the timber was cut by appellant's men is not sufficient to charge it with responsibility for all the timber missing from the land during an indefinite period of two or three years."

From a careful study of the record we cannot say that the chancellor's finding as to the number of poles taken from appellant's lands by Horne is contrary to a preponderance of the testimony.

As to the second question, appellee complains of the issuance of equitable garnishments on the ground that insolvency was not alleged and proved. Although

Horne's insolvency was not specifically alleged in the complaint, the proof in the case showed that his properties were mortgaged and that he was in debt. The trial court found that the garnishments issued in the cause were properly issued. Of course, as contended by appellee, proof of insolvency is essential to a resort to the remedy of equitable garnishment. *Henslee* v. *Mobley,* 148 Ark. 181, 230 S. W. 17. The chancellor's finding that the equitable garnishments were properly issued, necessarily involved a finding that appellee was insolvent. The proof in regard to his financial condition was sufficient to support such a finding. Appellee cannot now complain of appellant's initial failure to allege insolvency. By not raising the question at or prior to the trial he waived the failure of appellant's complaint to contain such allegation. *Newell Contracting Co.* v. *Elkins,* 161 Ark. 625, 257 S. W. 54. Since in equity the pleadings will be considered amended to conform to the proof, *Mack* v. *Marvin,* 211 Ark. 715, 202 S. W. 2d 590, the chancellor's action with respect to the garnishments was proper.

The decree is in all things affirmed.

OWEN *v.* CENTRAL CLAY DRAINAGE DIST.

4-8996 224 S. W. 2d 529

Opinion delivered November 28, 1949.

L. V. Rhine and *Carl L. Hunter,* for appellant.

Verlin Upton and *Charles Frierson,* for appellee.

GRIFFIN SMITH, C. J. Commissioners of Central Clay Drainage District petitioned for a levy of one percent against existing benefits, proceeds to be used for maintenance, including a Government-constructed levee. The County Court order of denial was responsive to protests by sixty-two landowners. When the Commissioners appealed, Circuit Court permitted withdrawal of remonstrances and substitution of a motion to dismiss. The motion, treated as a demurrer, was overruled.

Background of the Controversy.—Drainage District No. 8. of Clay County existed in a somewhat nebulous state when, by Special Act No. 317 of 1911, appellee, hereafter referred to as Central, was created. Expressed intention was that it should succeed District 8. Central, however, was designated a drainage *and levee* district. Section 32 of Act 317 deals with a main system of drains and levees "for the protection of lands, taken as a

whole." Seemingly it was felt that before satisfactory results could be obtained a somewhat comprehensive levee and drainage system would have to be constructed. Responsive to this thought the right was given to create a subsidiary district, to be paid for from assessments made pursuant to authority conferred by § 6 of the Act.

By Act 149, approved March 11, 1913, overflow threats were to be met with a levee "upon or near" the east bank of Black River, the levee to run northward into Missouri to Giles' Bluff. The Commissioners were empowered to "combine" with individual landowners or with authorities in Missouri, and were told that they might expend such sums as were necessary "for the construction of said levee, and for maintenance thereof."

The complaint here alleges that in 1938 the U. S. Government built slightly more than thirteen miles of levee "along the Black River" within Central territory. Central's Commissioners obligated the District to supply right-of-ways, and to maintain the levee after construction had been finished. The cost was $125,000, all paid by the Federal Government; whereupon the Commissioners gave evidence of the maintenance obligation by formal resolutions dated March 22, 1938.

It is shown by the complaint that bushes, small shrubs, and kindred growths, ought to be removed from the levee, requiring moderate annual expenditures; also that guards or patrols are needed during high water periods. By way of persuasion, Government engineers have disclosed a plan for extensive dredging of Cache River, the work to extend well into Clay County, and with obvious benefits to landowners in Central, where an estimated $220,000 would be spent.

Other allegations in the District's petition, which on demurrer must be taken as true, show large benefits from Government activities, and alternative damage to existing installations if the maintenance program should be defeated. When completed in 1919 the drainage system embraced 90,000 acres, with assessed benefits of $689,359. The original construction included a 25-mile

main ditch near the channel of Cache River. There are approximately 90 miles of laterals.

The last assessment was made in April, 1939. All bonds, with interest, have been paid, and the benefits have not been exhausted. Maintenance costs were met for all years through 1947, but funds are now lacking for upkeep, including the obligations assumed under the 1938 resolutions.

Legal Points at Issue.—Appellants expressly disclaim a purpose to question power of the Board to maintain the levee under its agreement with the Government, but insist that procedure must be according to Act 203 of 1927, Pope's Digest, §§ 4526-'27-'28, Ark. Stats., §§ 21-518-'19-'20. This would require the Commissioners to file plans relating to the additional undertaking, treating it as new construction. In that way assessment would await petitions showing approval by a majority in numbers, value, acreage, etc. See *Cox, et al.* v. *Drainage District No. 17 of Craighead County,* 208 Ark. 755, 187 S. W. 2d 887; *Indian Bayou Drainage District of Lonoke County* v. *Dickie,* 177 Ark. 728, 7 S. W. 2d 794. The cited decisions hold that residuary betterments are available for maintenance of original construction; but, conversely, if assessments on these betterments are for expansion or structural enlargements — building not contemplated when landowners participated in the proceeding or were given that right—then an apportunity for expressions is a prerequisite, and jurisdictional.

The Demurrer, and Allegations of the Complaint.—When complaint allegations are given their natural meaning, the District says its Commissioners allowed the levee to be built as an additional safety measure, securing existing drainage facilities; that the levee is a part of the terrain with which the District must deal at this time, and that irreparable injury will attend failure to maintain it as a necessary complement of the drainage system, procured without original cost.

When Central's predecessor (District No. 8) was taken over, levee construction was authorized. It was

emphasized two years later when the Commissioners were told that they might "combine" with others in procuring protection through levee construction along Black River. But we cannot, as appellee suggests, take judicial cognizance that the construction made in 1938, and the levee authorized in 1913, are in effect the same. While the purpose to protect lands was doubtless the same in each instance, identity of construction is lacking. It is appropriate—using that term in the sense of expediency—to consider what the General Assembly of 1913 contemplated when it implemented the parent Act of 1911. That intent, however, must appear from a definite subject matter, such as Chief Justice McCulloch spoke of in *Bonner* v. *Jackson,* 158 Ark. 526, at p. 531, 251 S. W. 1. It was proper, said he, for the Court to compare Acts 111 and 166 of 1923, "for the reason that they dealt with somewhat kindred subjects," each having to do with the legislative plan to create a Central Judicial District of Woodruff County.

Judge McCulloch also said in the Bonner-Jackson opinion that the Court would take judicial notice of "the map of the State" in verifying boundaries, where appropriate evidence supplied by the record leaves to the judicial authority the mere task of drawing conclusions from data not susceptible of successful contradiction. Applying this rule to the case at bar, we find sanction in Act 149 of 1913 of discretionary expenditures involving "such sums as may be necessary for the construction of said levee, and for the maintenance thereof."

This work, of course, was to be an original undertaking, and the legislative language, strictly interpreted, would restrict expenditures to "said" levee and its upkeep. Grant that the so-called Government levee, from a structural and protective standpoint, is materially different from the conceptions of Act 149, does it follow as a matter of law that when the Commissioners in 1938 agreed to the maintenance now complained of there was want of power or an abuse of discretion?

It is true that at the time the Government work was done the Commissioners were without express power to

build levees such as we have here as a supplemental undertaking or as an extension of drainage, without first procuring landowner consent. Records before the trial court are silent concerning any over-all plan of the Government in constructing the thirteen miles with which we are dealing and in exacting a Commission pledge of maintenance. The embankment may have been an engineering necessity in aid of navigation, contributing in some essential to broader Government plans. If rights of the District that the Commissioners could not alienate or impair were disregarded when entry was made and when upkeep was promised, the simple recourse to injunction afforded adequate protection to injured parties.

As the matter stood in February, 1949, when County Court was asked to charge betterments with a one percent annual levy, the structure was a topographic fact. It was just as much a part of the District as were its ditches and drains; and, according to admissions of the demurrer, maintenance is so integrated with upkeep problems as a whole that failure to preserve the levee would expose drainage to deterioration on a scale wholly disproportionate to the relatively small cost of the work proposed.

If it be a fact that there was no statutory authority for the contract made in 1938 *when* it was made, that is not true now; nor was it in February, 1949, when the petition was filed. By Act 213 of 1945, Ark. Stats., § 21-570, *et seq.*, drainage districts are permitted to construct, reconstruct, repair and replace levees, and to construct setbacks, etc. Section 2 of the Act authorizes such districts to "maintain and keep in proper repair any levee which may be constructed, reconstructed, repaired or replaced within said district by the Federal Government for the benefit of the land within said district, and to further obligate [itself] to keep its drainage ditches and their outlets free of obstructions." See, also, Act 124 of 1947, Ark. Stats., § 21-572.

In the instant appeal we find a district having within its area in 1949 a construction admittedly made in aid of drainage,—and supplied without cost to the landowners.

Whether the levee was legally put there in 1938 is not the issue here; nor do we suggest that it was illegally constructed. It is now an integral part of the drainage system, and maintenance is admittedly necessary.

Under the facts shown by this record, we hold that work the Commissioners propose to do falls under the provisions of § 4481 of Pope's Digest, Ark. Stats., § 21-533, as found by the trial Court.

The judgment of May 9, 1949, filed June 2d, is affirmed.

McGaha *v.* State.

4580 224 S. W. 2d 534

Opinion delivered November 28, 1949.

Claude F. Cooper, for appellant.

Ike Murry, Attorney General, and *Jeff Duty,* Assistant Attorney General, for appellee.

MINOR W. MILLWEE, Justice. Appellant was charged with murder in the first degree in the killing of H. G. Blanchard. The jury found him guilty of murder in the second degree and fixed his punishment at eight years in the penitentiary. This appeal is from the judgment rendered on the jury's verdict.

There is little dispute in the evidence. Appellant and deceased were carpenters who worked out of the E. C. Robinson Lumber Co. at Blytheville, Arkansas. Appellant came to the company's place of business in the afternoon of June 19, 1948, where he engaged in a quarrel with deceased. Appellant accused deceased of "double-crossing" him by employing another man to help deceased on a $60 construction job, when he had promised to give the job to appellant. After saying, "I ought to slap your damned head off—I believe I'll do it," appellant slapped at deceased and missed him. He then slapped deceased in the face knocking him backward eight or ten feet. Deceased called to Boyne Haywood, an employee of the lumber company, who was standing nearby and said, "Haywood—don't let him hit me." Haywood intervened and said to appellant, "Don't hit a man 30 years older than you are," and walked back to the carpenters' shop with appellant.

Deceased's nose was bleeding as he left and went to the city hall where he made complaint to the police and a warrant was issued for appellant's arrest. The Chief of Police telephoned the lumber company and appellant was told to report to the city hall. After deceased had been gone about an hour, he returned to the lumber company where appellant had remained.

Deceased stood in a driveway between two buildings of the company talking to a painter and another carpenter. When appellant saw deceased, he threw off his hat, ran and lunged at him and threw or knocked deceased down on some platform scales as he started into the company office in an attempt to avert the attack. Bystanders pulled appellant off deceased and escorted him into the office. Appellant then remarked, "By God, I think I'll go back and finish him up," and rushed back through the office door and struck deceased in the mouth with his fist knocking him down on the concrete floor of the driveway where he lay unconscious and motionless. Appellant then said, "Now, I guess that's the end of it," and walked into the office and said: "There he is, Haywood." Appellant was arrested at his home about an hour later.

Deceased was taken to a hospital where he died the following morning. The doctor attributed death to a cranial cerebral hemorrhage resulting from a fracture at the base of the skull. There was a laceration at the back of the head and blood from the nose was diluted with spinal fluid indicating the skull fracture. There was also evidence that the left side of deceased's face was bruised and swollen; that his lips and mouth were black and swollen and his nose was mashed flat. Deceased was 69 years of age and in good health prior to the killing. He made no hostile demonstration toward appellant and sought to avoid any difficulty with him at the time of each of the three assaults. Appellant was drinking, but was not visibly intoxicated.

The first three assignments of error in the motion for new trial challenge the sufficiency of the evidence to support the verdict. We think it proper to consider

these assignments in connection with assignments 11, 12 and 14 which allege error in the court's refusal to give appellant's Requested Instructions Nos. 2, 3, and 5. The requested instructions would have in effect told the jury that appellant, under the evidence adduced, would be guilty of no greater offense than manslaughter.

It is argued that, since no weapon was used and the parties had previously been on good terms, there is insufficient evidence to sustain a conviction for any offense greater than involuntary manslaughter. Appellant relies on the cases of *McClendon* v. *State,* 197 Ark. 1135, 126 S. W. 2d 928, and *Bone* v. *State,* 200 Ark. 592, 140 S. W. 2d 140, where convictions for the crime of murder were reduced to seven years imprisonment for voluntary manslaughter. It is true that the defendant in each of the cases cited used a weapon, but the evidence further disclosed that the killing resulted from a sudden fight provoked by the deceased who was the aggressor and was armed with a pistol.

Since death is not the natural or probable result of a blow with the fist, it seems that no intent to kill will, under ordinary circumstances, be presumed though death results from an assault thus committed. But it has been held in many cases that an assault without a weapon may be attended with such circumstances of violence and brutality that either malice or an intent to kill will be implied. Anno. 15 A. L. R. 675, 24 A. L. R. 666. In *State* v. *John,* 172 Mo. 220, 72 S. W. 525, 95 Am. St. Rep. 513, the defendant struck deceased once on the jaw with his fist causing deceased to fall, striking his head on the pavement and resulting in his death. The court sustained the conviction for murder in the second degree and said: "The court properly instructed the jury that a man is presumed to intend the natural and probable consequences of his acts. . . . . A strong, brawny man will not be allowed to approach an unoffending citizen in a public highway and deal him a deadly blow with his fist in a vital part, and when death, the natural consequence of his act, ensues, be heard to say that he merely intended to punish him, and not to kill him."

In *Ballentine* v. *State,* 198 Ark. 1037, 132 S. W. 2d 384, also cited by appellant, the defendant knocked deceased down with his fists and then kicked and stamped him to death. A conviction for murder in the second degree was sustained and it was held that the evidence was sufficient to have supported a conviction for murder in the first degree. The court said: "Murder in the first degree is defined by statute, § 2969, Pope's Digest, as 'all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, malicious and premeditated killing, or shall be committed, in the perpetration of or in the attempt to perpetrate,' certain crimes named. The statute then says, § 2970, Pope's Digest; 'All other murder shall be deemed murder in the second degree.' 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.' "

Since a specific intent to kill is not an essential element of second degree murder under our decisions, the real question here is whether the killing was done with malice, express or implied. The trial court fully instructed the jury on all degrees of homicide and upon the issue of malice, which is a question of fact to be determined by the jury from all the circumstances in the case. Wharton on Homicide (Third Ed.) § 104. The jury was warranted in finding that appellant made repeated violent attacks upon a much older man who offered no resistance whatsoever, but attempted to avoid each difficulty. It was for the jury to determine whether considerable provocation appeared or whether the circumstances of the killing manifested an abandoned and wicked disposition on the part of appellant. There is ample evidence to support the conclusion of the jury on

this issue. It follows that the evidence is sufficient to support the judgment and that the trial court correctly refused appellant's Requested Instructions 2, 3 and 5.

It is next contended that the trial court erred in overruling appellant's motion for continuance in which he alleged that court was not properly in session for the reason that: (1) "Said term of court is an adjourned term, and the same failed when said court opened another term of court in the same county in this same circuit," (2) "Court is in session in the Osceola District of the same county, in the same circuit, and two terms of court cannot be in session in the same county at the same time," and (3) "That the order of adjournment was not made according to law." The proof on the motion discloses that June 1, 1949, was an adjourned day of the regular April, 1949, term of court, and that on April 15, 1949, the clerk, at the direction of the circuit judge, entered an order adjourning court until June 1, 1949. There is an absence of proof that court was in session in the Osceola District of the same county at the time complained of. In fact, the evidence is to the contrary. Insofar as the record here discloses, the holding of court in the Chickasawba District of Mississippi County at Blytheville did not in any way interfere with the holding of any other court. Therefore, the court was properly in session under the provisions of Ark. Stats. (1947), §§ 22-311, 22-312. *Thomas & Carter* v. *State,* 196 Ark. 123, 116 S. W. 2d 358.

It is next argued that the court erred in reinstructing the jury as to the different degrees of homicide and that the court's instruction as to the propriety of reaching a verdict was calculated to coerce the jury. After deliberating for a time, the jury reported at 4:50 p. m. that they were divided 10 to 2 and understood the evidence and instructions. The court instructed the jury as to the propriety and importance of reaching a verdict and no objection was made to the instruction given. At 5:50 p. m. the jury reported agreement on the question of defendant's guilt, but that they were unable to agree on the degree of the offense or the punishment, whereupon the court excused the jury for dinner. Upon re-

convening at 7:00 p. m. the court proceeded to reinstruct on the different degrees of homicide in order that the jury might be enabled, if possible, to determine the degree of offense. Appellant duly objected to "reinstructing the jury on the same issues that have already been given." After the jury had retired, appellant objected to the following instruction: "This case has been pending in this Court since the 26th day of October, 1948. We have spent a day and a half in the trial of it. Eventually it is going to have to be settled by a jury of citizens of this District of the County. As I indicated before, I don't expect any juror to forego or give up any fixed or firm opinion he may have after hearing the testimony in the case, but a juror ought not to have such pride of opinion that he is unwilling to reason with his fellow jurors and try honestly to reach a verdict. A juror ought to be an open-minded man—open to conviction. And he ought to hear, patiently and considerately, the arguments of his fellow jurors. And it is possible that one of them may be able to call to his attention some part of the evidence overlooked by him, and if you are an open-minded man, when it has been called to your attention it might be such as to convince you. The only purpose we have here is to try and determine what is right and to do what is right under the law and the evidence.

"You gentlemen have indicated to me that there is no disagreement among you as to what the evidence shows, and I have tried to make the several degrees of homicide plain to you. Now it is a proposition of applying the evidence to the law and writing a proper and righteous verdict in accordance with the instructions that have been given to you by this Court.

"In view of the time that we have taken in the trial of this case, and the expenses necessary in the trial of any case of this character, I am going to ask that you gentlemen again return to the jury room and try, if possible, to reach a proper verdict in this case." The jury returned a verdict at 9:45 p. m.

The trial court did not err in reinstructing on the degrees of homicide after the jury reported agreement

on the question of defendant's guilt as to some offense. It is within the province of the presiding judge to give further instructions when, in the exercise of proper discretion, he regards it necessary to do so in the furtherance of justice, and it is not always necessary in such cases that he should repeat the whole charge. *Pless* v. *State,* 102 Ark. 506, 145 S. W. 221; *Harrison* v. *State,* 200 Ark. 257, 138 S. W. 2d 785. Since the court only reinstructed on the issues upon which the jury had not agreed, there was no abuse of discretion in doing so without repeating the whole charge.

We do not agree with appellant's contention that the language of the instruction above stated tended to coerce the jury. This court has repeatedly held that the trial court may detail to the jury the ills attendant upon a disagreement, the expense, the length of time the case has been pending, the length of time it has taken to try the case, and that the case will have to be decided by some jury and in probability upon the same testimony. *Stepp* v. *State,* 170 Ark. 1061, 282 S. W. 684, and cases there cited. We have also held that it is proper for the trial court to warn the jury to lay aside pride of opinion and consult with each other for the purpose of harmonizing their views, if possible, under the evidence, and that it is their duty to apply the law as given by the court to the facts and deal with each other in a spirit of candor in order to arrive at a verdict. *Jackson* v. *State,* 94 Ark. 169, 126 S. W. 843; *Mallory* v. *State,* 141 Ark. 496, 217 S. W. 482; *Benson* v. *State,* 149 Ark. 633, 233 S. W. 758; *Murchison* v. *State,* 153 Ark. 300, 240 S. W. 402; *Clarkson* v. *State,* 168 Ark. 1122, 273 S. W. 353. We find nothing in the remarks of the court calculated to unduly influence the jury or to operate as an invasion of the province of the jury, and similar instructions have been approved in many cases. Nor do we agree that the language, "A juror ought to be an open-minded man—open to conviction," would be interpreted by an intelligent juror to mean that any juror holding out for anything besides a conviction of the defendant was not doing his duty.

We have examined other assignments of error in the motion for new trial and find them to be without merit. It is our conclusion that the record is free from prejudicial error and the judgment is, therefore, affirmed.

VENEGAS *v.* MASCORRO.

4-8987 224 S. W. 2d 532

Opinion delivered November 28, 1949.

Claude F. Cooper, for appellant.

ED. F. MCFADDIN, Justice. This is a controversy between the mother and the father, each seeking the custody of their baby, 13 months of age at the time of the trial. The chancery court awarded the custody to the mother, and that ruling is challenged by this appeal. Our cases hold that an order awarding the custody of a child is appealable;[1] and that on appeal we try the case *de novo* on the record, and reverse the decree of the

[1] *Weatherton* v. *Taylor,* 124 Ark. 579, 187 S. W. 450; *Clayton* v. *Clayton,* 166 Ark. 597, 267 S. W. 128.

chancery court if we find it to be contrary to the preponderance of the evidence.[2]

In the light of these holdings, we examine the testimony in the case at bar. Appellant, Maximilian Venegas, then aged 22 and Lena Mascorro, then aged 16, were married in 1946. Their child—a boy named Esmeriljildo Venegas, and whose custody is the subject of this litigation—was born in November, 1947, in the home of Maximilian's parents in Mississippi county. In 1948, Lena Mascorro Venegas, a minor, by her next friend, Joe Mascorro, filed suit for divorce and for the custody of the child. The chancery court heard the testimony *ore tenus,* and denied Lena Venegas a divorce, but awarded her the custody of the child. The decree recites this finding:

"The court further finds that the plaintiff is unable to find work to support herself and child in the State of Arkansas and that she does not have a suitable home in the State of Arkansas in which to rear said child and that it is her intention to take said child to Weslaco, Texas, where she and said child will reside with her father. That by so doing she will remove said child from the jurisdiction of this court. That before she removes said child from the jurisdiction of this court she should be required to post bond with the Clerk of this court in the sum of three hundred dollars, conditioned upon her returning said child to the jurisdiction of this court in the event this cause should be reversed in the Supreme Court and the custody of said child should be awarded to defendant."

As previously stated, the sole question is the custody of the child. The evidence shows that Pedro Mascorro, the father of Lena Venegas, owns his home and place of business in Weslaco, Texas, where he has lived for 38 years; that this home, containing three bedrooms, is occupied by himself, his wife and their 12-year-old daughter. Pedro Mascorro testified that he and his wife would be happy to have Lena Venegas and her baby live

[2] *Blake* v. *Smith,* 209 Ark. 304, 190 S. W. 2d 455; *Reynolds* v. *Tassin,* 209 Ark. 890, 192 S. W. 2d 984.

in the home in Weslaco, and that he is financially able to provide support for them. On the other hand, appellant and his witnesses testified that the baby would be properly reared if the court awarded the custody to Maximilian Venegas, who would have his sister care for the baby in the home of Maximilian's parents. It is of particular significance that none of the appellant's witnesses testified adversely either to the sufficiency of the home of Pedro Mascorro or to the proper support he would provide for the child.

The chancellor, after having seen and heard the witnesses, reached the conclusion that the mother should have the custody of the 13-months old baby. To list all the cases wherein the custody of a child of tender years has been awarded to the mother, is unnecessary.[3] The polestar in child custody cases is the determination of what is the best interest of the child. We cannot say that the chancellor's decision is contrary to the preponderance of the evidence on this question, so the order is affirmed.

In the appellant's brief there were references to matters claimed to have occurred since the decree, and not shown in the record. We have not considered such allegations, as they should be addressed to the chancery court. Affirmed.

MORLEY, COMMISSIONER OF REVENUES *v.* CASSINELLI.

4-9097 224 S. W. 2d 828

Opinion delivered November 28, 1949.

Rehearing denied December 19, 1949.

[3] In *Reynolds* v. *Tassin*, 209 Ark. 890, 192 S. W. 2d 984, a few of such cases were listed to support the statement: ". . . this court has always been reluctant to deprive a child of tender years of the care and affection of his mother."

[redacted]

O. T. Ward and *H. Maurice Mitchell,* for appellant.

Alston Jennings, for appellee.

HOLT, J. August 10, 1949, following a hearing before the Arkansas State Commissioner of Revenues, the beer permit previously issued to appellee, V. E. Cassinelli, operator of a restaurant known as the Brass Rail in Little Rock, was by order of the Revenue Commissioner suspended for a period of 60 days. The grounds on which the Commissioner based the suspension order were that the evidence showed that appellee sold beer to minors, and allowed whiskey to be drunk, in his restaurant.

The appellee filed complaint, and sought injunctive relief in the Pulaski Chancery Court, and alleged among other things "that the testimony taken at the said hearing before the Commissioner was insufficient to justify the suspension ordered by the defendant; that the action of the defendant in attempting to suspend plaintiff's permit is arbitrary and unlawful; that said action was taken without cause and that the plaintiff has at all times conducted his said business in a proper and lawful manner."

His prayer was that the suspension order be declared void and the Revenue Commissioner permanently re-

strained from interfering with appellee's business, or the sale of beer by appellee.

From the decree granting the relief prayed is this appeal.

At the outset we must bear in mind that we are dealing here with a permit to sell beer, and not a liquor permit. While Act 108 of the Legislature of 1935 provides for an appeal to the Pulaski Chancery Court from an order of the Revenue Commissioner affecting a liquor permit (Ark. Stats., 1947, § 48-317), we find no provision in that act for an appeal to the Chancery Court of Pulaski County from an order of the Commissioner revoking or suspending a beer permit. The act specifically provides that beer that does not contain more than 5% of alcohol by weight is excepted from the provisions of the act and shall be regulated as provided by Act No. 7 of the 1933 Extraordinary Session of the Legislature. Article 1, § 6 of Act 108 (now Ark. Stats., 1947, § 48-107) provides in part: "The word 'malt' shall mean liquor brewed from the fermented juices of grain and containing more than five (5%) per centum of alcohol by weight. Beer containing not more than five (5%) per centum of alcohol by weight and all other malt beverages containing not more than five (5%) per centum of alcohol by weight are not defined as malt liquors, and are excepted from each and every provision of this act.

"It is further provided that malt and vinous beverages containing more than 3.2% of alcohol by weight and not more than 5% of alcohol by weight shall be taxed and regulated as provided for malt and vinous beverages containing not more than 3.2% alcohol by weight under the provisions of Act No. 7 of the Acts of the Extraordinary Session of the General Assembly of 1933, approved August 24, 1933, (§§ 48-501 to 48-527)."

So the procedure affecting the suspension of the beer permit is governed by Act 7 of 1933, *supra,* which also contains no provision for an appeal to a Chancery Court. Any aggrieved person must proceed by some other method, such as injunction or *certiorari.*

While the language used in the decision of this court in *Blum* v. *Ford, Commissioner of Revenues,* 194 Ark. 393, 107 S. W. 2d 340, would seem to uphold the right of appeal in the present case to the Pulaski Chancery Court from the order of the Commissioner, we hold the following language, in the opinion: "Act 108 above referred to provides that the dealer may appeal to the chancery court, and that is what the appellants did in this case," is *dictum* and was unnecessary to the opinion. As a matter of fact, in that case, as in the present case, injunctive relief was sought to prevent the cancellation of the beer permit and there had been in fact no appeal taken. The procedure followed there was proper and resulted in a denial of the injunctive relief sought. It was there said: "Selling beer is a privilege, and not a right, and the state has an absolute right to control it or to require the Commissioner of Revenues to administer the act and enforce it, and if necessary to accomplish these purposes, he may cancel or revoke a permit that has been issued. . . . He cannot do this arbitrarily, but can only do it after an investigation that discovers violation of the law by the permittee."

The Commissioner, in revoking or suspending a permit, must always act with sound discretion, and when that discretion is once exercised, unless a clear abuse thereof is shown, or it is shown that he is acting arbitrarily, his discretion will not be controlled by the courts. The Commissioner's power, however, is not absolute, but is always subject to review as heretofore indicated.

In the present case, there was ample evidence that appellee knowingly sold beer to minors in his place of business contrary to the provisions of Ark. Stats. (1947), § 48-529. Whether the sales were made through appellee's employees, as here, or by appellee himself, makes no difference.

The principles of law announced in the case of *Bell* v. *State,* 93 Ark. 600, 125 S. W. 1020, apply here. In that case, beer was sold by an employee, or agent, of a saloon keeper in violation of a liquor license law, and it was there said: "The owner or proprietor of a saloon is re-

sponsible for the illegal sales of liquor made by his servants and agents within the scope of their general employment; and under the above section of Kirby's Digest the employer is criminally liable if he makes an unlawful sale of liquor by such servant or agent or if he is interested in such sale. As is said in the case of *Robinson* v. *State,* 38 Ark. 641: 'The law says to persons wishing to engage in selling spirituous liquors, or to be interested in sales thereof, you must be careful in the selection of your partners or servants, and watchful of their conduct in your business; for, if they make forbidden sales, you are responsible.' "

Accordingly, the decree is reversed and the cause remanded with directions to reinstate the order of the Revenue Commissioner.

DUNAWAY, J., disqualified and not participating in the decision.

HILL *v.* WILSON.

4-8983 224 S. W. 2d 797

Opinion delivered November 28, 1949.

Gordon & Gordon and *S. Hubert Mayes,* for appellant.

Phil Loh and *Lynn Wilson,* for appellee.

LEFLAR, J. This is an action for damages brought by four plaintiffs against two defendants for injuries suffered in a collision of three motor vehicles on a public highway.

On April 15, 1948, the three motor vehicles were traveling in a westerly direction, perhaps fifty yards apart, on U. S. highway 64 about two miles west of Morrilton, approaching Point Remove bridge. The front vehicle was a heavy Diesel-powered truck pulling what is called a low-boy, a broad platform on wheels designed for hauling bulky or unwieldy loads that cannot readily be carried on ordinary motor trucks. On the low-boy was a large power shovel, or dragline, with the bucket suspended above and behind the rear of the low-boy. This vehicle and equipment were owned and operated by defendant D. B. Hill. B. A. Kimbrough, Hill's employee, was the driver. The second vehicle was a Hudson passenger car owned and driven by plaintiff J. B. Wilson, then head of the English department at State Teachers

College, Conway. In addition to Wilson, the passengers in this car were his wife, plaintiff Lois Wilson, and plaintiff Mrs. Alice Smith. The third vehicle was a 1½-ton Chevrolet truck heavily loaded with green lumber. It was owned and driven by defendant Julian Snider.

After the Diesel driver, Kimbrough, got on the Point Remove bridge he decided that he would stop his truck in order to be certain that a car coming toward him from the west would be able to pass him on the bridge. This was because his equipage was much wider than an ordinary automobile, extending somewhat across the center line onto the left half of the highway. Kimbrough testified that he slowed down gradually; Mr. and Mrs. Wilson and Mrs. Smith testified that he stopped suddenly, with no observable signals. Mr. Wilson according to uncontradicted testimony then brought his car to a quick stop, or very nearly to a stop, in an apparently safe position some five or ten feet behind the overhanging bucket of the steam shovel. Wilson's car was in good mechanical condition and he had it under proper control at the time. There is no serious contention by defendant Hill that Wilson was guilty of contributory negligence in stopping his car as he did. As Wilson brought his car to a stop, it was struck violently from behind by Snider's truck, and forced forward into the rear end of the low-boy and the power shovel. The effect might be described as accordion-like, as far as Wilson's car was concerned. Mr. and Mrs. Wilson both suffered substantial and painful injuries, and Mrs. Smith received injuries which were extremely serious and required long hospitalization and treatment.

The three injured persons brought action against Hill and Snider as joint defendants. Glenn Smith, husband of Mrs. Alice Smith, joined as a plaintiff also, asking damages for loss of the services, companionship and society of his wife and medical and hospital bills paid on her account. At the trial, after evidence as summarized above, plus undisputed evidence of Glenn Smith's expenditures for medical care and hospitalization for Mrs. Smith, the jury returned verdicts against

defendant Hill in favor of Mr. Wilson for $1,250, Mrs. Wilson for $500, and Mrs. Smith for $12,000, and for defendant Hill in Mr. Smith's suit. A verdict returned for Mr. Wilson against Snider is not involved in this appeal. Judgment was rendered in accordance with the verdicts on November 29, 1948. On February 16, 1949, plaintiff Glenn Smith moved that the judgment against him be set aside. Six days later the Circuit Judge granted Smith's motion. This was during the same term of court at which the trial was held. Defendant Hill appeals on the grounds (1) that there should have been a directed verdict for him in all the cases because the evidence showed in him no negligence that was the proximate cause of the injuries proved and (2) that the Circuit Judge erroneously vacated the judgment in Hill's favor in the Glenn Smith case.

(1) There was ample evidence offered to support the jury's finding that defendant's driver was negligent, and that his negligence was directed toward persons in the vehicles immediately behind him on the highway and others having interests in such vehicles or their occupants. The jury was entitled to believe the plaintiffs' testimony that Kimbrough stopped defendant's truck on the bridge suddenly and without observable signals, under circumstances creating an appreciable risk that vehicles immediately behind it might be piled up on it. If Wilson's car had not been struck from behind but rather, being driven by Wilson with due care, had run into the back of defendant's vehicle because Wilson could not stop it in time to avoid a collision after defendant's sudden stop, the jury could unquestionably have found that the defendant's negligence was the proximate cause of injuries suffered in the collision. The added fact here, which by defendant's claim makes the instant case different from the one supposed, is that Snider's truck, the third vehicle in line, is deemed to have been driven negligently. The argument is that Snider's negligence was a new and independent intervening cause, so unconnected with defendant's prior negligence as to be the sole proximate cause of plaintiffs' injuries.

Negligence in a tort defendant is one thing, and proximate causation as a relation between negligence and injury is a separate and different thing. Yet the two things shade into each other.

Actionable negligence itself is a relational concept. There is no such thing as "negligence in the air." Conduct without relation to others cannot be negligent; it becomes negligent only as it gives rise to an appreciable risk of injury to others. Acts done in a vacant field or by a lone traveler on a highway may not be negligent; the same acts done in a crowded city or in heavy highway traffic may well be negligent. The concept of actionable negligence is relational because an act is never negligent except in reference to, or toward, some person or legally protected interest.[1] In other words, a negligent act is one from which an ordinary prudent person in the actor's position—in the same or similar circumstances—would foresee such an appreciable risk of harm to others as to cause him not to do the act, or to do it in a more careful manner. The jury was clearly justified in finding that defendant, through his driver, was negligent *toward* the plaintiffs.

Defendant contends, however, that this negligence was not the proximate cause of plaintiffs' injuries. If after, or as, plaintiffs' car was brought to a stop behind defendant's truck, a third person had negligently fired a bullet into plaintiffs' car, or had while dynamiting a nearby stump thrown a boulder on plaintiffs' car, or had without stopping driven another car out of a sideroad into plaintiffs' car, the defendant's argument would be easier to sustain. If any such intervention had occurred, it would have been easy to find that it was truly an independent intervening act not aided or risked by defendant's negligent act. Such a wholly independent intervening act could be held to be the sole proximate cause of resultant injuries.

[1] *Palsgraf* v. *Long Island R. R. Co.*, 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253. "The ideas of negligence and duty are strictly correlative." *Thomas* v. *Quartermaine*, L. R. 18 Q. B. D. 685, 694. See Pollock, Law of Torts (13th Ed., 1929) 468; Prosser, Torts (1941) 178; Winfield, Duty in Tortious Negligence (1934), 34 Columbia L. Rev. 41.

If on the other hand the intervening act be one the likelihood of which was definitely increased by the defendant's act, or one which in fact was caused by the defendant's act, it is not a superseding proximate cause of injuries incurred by reason of it.

"An intervening act of a human being . . . which is a normal response to the stimulus of a situation created by the actor's negligent conduct is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about." Restatement, Torts, § 443. "The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about if, (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or (c) the intervening act is a normal response to a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent." Restatement, Torts, § 447. Compare Green, Rationale of Proximate Cause (1927), with Beale, The Proximate Consequences of an Act (1920), 33 Harvard L. Rev. 633. And see Prosser, Torts (1941) 352.

The Arkansas cases having to do with the effect of intervening forces upon proximate causation are collected and analyzed in (1947) 1 Ark. L. Rev. 148. Of them, defendant relies principally upon *Gage* v. *Harvey,* 66 Ark. 68, 48 S. W. 898, 43 L. R. A. 143, 74 Am. St. Rep. 70; *Pittsburgh Reduction Co.* v. *Horton,* 87 Ark. 576, 113 S. W. 647, 18 L. R. A., N. S. 905; *Arkansas Valley Trust Co.* v. *McIlroy,* 97 Ark. 160, 133 S. W. 816, 31 L. R. A., N. S. 1020; and *Arkansas Power & Light Co.* v. *Marsh,* 195 Ark. 1135, 115 S. W. 2d 825.

In *Gage* v. *Harvey,* 66 Ark. 68, 48 S. W. 898, 43 L. R. A. 143, 74 Am. St. Rep. 70, it was held that a saloon keeper would not be liable for the loss of money

forcibly taken from plaintiff's pockets by a thief while plaintiff was drunk. The theory of plaintiff's action was that the saloon keeper had caused him to get drunk by improperly selling him too much liquor, thus making him easy prey for a thief. The answer to this argument is that though "the sale and consumption of the liquor may have furnished the opportunity or occasion for the wrongful act of the third person," it is not the proximate cause of the loss unless the defendant as a reasonable man would have foreseen that such a wrongful act by a third person might occur as a result of defendant's conduct. See Restatement, Torts, §§ 448, 449. It is enough now to distinguish *Gage* v. *Harvey* that it involved an intervening deliberate criminal act by a third person, whereas no such criminal intervention occurred in the instant case.[2]

The defendant's negligence in *Pittsburgh Reduction Co.* v. *Horton,* 87 Ark. 576, 113 S. W. 647, 18 L. R. A., N. S. 905, was in discarding loaded dynamite caps on a dump pile where a small boy, Charlie Copple, picked them up. The intervening negligence was in Charlie's parents, who probably knew what the caps were, but allowed Charlie to keep them around the house for about a week, even handling them for him. Later Charlie traded the caps to a 13-year-old schoolmate, in whose hand one of them exploded while he was playing with it. The hand had to be amputated. The intervening negligence of Charlie Copple's parents was held to render defendant's prior negligence not the proximate cause of the schoolmate's injury. The dangers created by defendant's original act and Charlie's innocent reaction to it had come to rest, a situation of apparent safety had developed when the dynamite caps came under the control of competent adults who knew what they were and had ample time and opportunity to guard against the dangers inherent in them. That they would not take proper precautions was a new danger not within the area of appreciable risk created by defendant's act; it was a sort of intervening

[2] That intervening deliberately criminal acts of third persons will not always break the chain of causation is illustrated by *Southwestern Bell Telephone Co.* v. *Adams,* 199 Ark. 254, 133 S. W. 2d 867. But see *Strong* v. *Granite Furn. Co.,* 77 Utah 292, 294 Pac. 303, 78 A. L. R. 465.

conduct which would not have been reasonably anticipated even by one who might have foreseen every event in the series up to the time when Charlie openly took the dynamite caps into his miner father's home.

Arkansas Valley Trust Co. v. *McIlroy,* 97 Ark. 160, 133 S. W. 816, was nothing more than an ordinary case of contributory negligence. The plaintiff's own negligence occurred after the defendant's, and was a proximate cause of his own injury. The typical case of contributory negligence is that in which the plaintiff's and the defendant's negligence concur as proximate causes of injury to the plaintiff, in which case recovery by the plaintiff is denied. Such cases give little aid in solving the problem presented when concurrent negligences combine to produce injury to a non-negligent third party.

In *Arkansas Power & Light Co.* v. *Marsh,* 195 Ark. 1135, 115 S. W. 2d 825, the remaining case principally relied upon by defendant here, a judgment against the defendant company was affirmed in this court. The defendant had in 1931 dug a hole near a street curb, leaving it open and unguarded. W.P.A. workers later stuck a post in the hole as a warning marker, but small boys at play broke off the post. In 1935 the plaintiff's wife fell into the hole and was injured. The holding was merely that no intervening act had occurred to break the chain of proximate causation running directly to defendant's original act.

Though Arkansas has heretofore had no case in which the act intervening after a defendant's negligence occurred exactly as did Snider's when he crashed into the back of plaintiff Wilson's car on Point Remove bridge, there have been some in which the facts were similar. In *Healey & Roth* v. *Balmat,* 189 Ark. 442, 74 S. W. 2d 242, the defendant negligently parked an ambulance on a highway so as to leave only a narrow space for passing, then a third person, driving recklessly, collided with the ambulance and injured plaintiff, a bystander. The injured man's judgment against defendant was sustained. Also see *Coca-Cola Bottling Co.* v. *McAnulty,* 185 Ark. 970, 50 S. W. 2d 577, (defendant negli-

gently parked truck so as to obstruct highway causing plaintiff at side of highway to be struck by car negligently driven by third person; recovery sustained). The analysis properly employed in those cases seems equally applicable here.

Other jurisdictions have passed upon sets of facts more nearly identical to those here involved. In *Judd* v. *Rudolph,* 207 Iowa 113, 222 N. W. 416, 62 A. L. R. 1174, it was held that the driver of an automobile who by his negligence placed another car and its driver in a position where they were struck by a third car, which collision would not have occurred had it not been for the first driver's negligence, is liable for the injuries sustained by the driver of the second car, irrespective of negligence in the driver of the third machine. To the same general effect see *Morrison* v. *Medaglia,* 287 Mass. 46, 191 N. E. 133; *Walker* v. *Stecher,* 219 Minn. 152, 17 N. W. 2d 317; *Paup* v. *American Telephone & Telegraph Co.,* 124 Nebr. 550, 247 N. W. 411; *Davenport* v. *Evans,* 360 Pa. 74, 60 Atl. 2d 30; *Caylor* v. *B. C. Motor Transport,* 191 Wash. 365, 71 Pac. 2d 162. It is quite clear that though the damage immediately complained of be inflicted by another car driven negligently, the first driver whose negligence created an appreciable risk of the subsequent collision may be held liable for it.

We conclude that the intervening negligent act of Snider in the instant case cannot be held as a matter of law to have been the sole proximate cause of the injuries suffered by plaintiffs when Snider's truck crashed into the rear of Wilson's car. The question was properly left to the jury under instructions setting out our law as to the nature of negligence and proximate causation. It was permissible for the jury here to find that the act of defendant's driver in stopping his truck suddenly was a substantial factor in producing plaintiffs' injuries, and also to find that a reasonable man would have foreseen a possibility of the happening of the sort of intervening act which did take place and that the possibility was substantially increased by the defendant's act.

(2) Defendant's other contention on appeal is that the Circuit Judge improperly vacated the judgment in Hill's favor in the Glenn Smith case, in which Mr. Smith sought damages for loss of the services, companionship and society of his wife and on account of medical and hospital bills paid for her.

The motion to vacate the judgment was in the nature of an application for new trial. Since the judgment was rendered on November 29, 1948, and the motion to vacate came on February 16, 1949, it was filed after the lapse of the fifteen days which the statute allows for motions for new trial. Ark. Stats. (1947), § 27-1904. However, "as the record is silent as to the considerations that controlled the court in permitting the motion to be filed and remain of record, it must be presumed that they were legally sufficient to justify such action, and that it was made to appear that the delay was unavoidable." *Fordyce* v. *Hardin,* 54 Ark. 554, 556, 16 S. W. 576, followed in *Metropolitan Life Ins. Co.* v. *Thompson,* 203 Ark. 1103, 160 S. W. 2d 852, and numerous other cases. The motion must be taken as having been properly filed.

If the Circuit Judge in acting on the motion had set the judgment aside for the sole and express reason that it was inconsistent with the judgment in Mrs. Smith's favor in her companion suit, his act of setting aside only the one judgment and leaving the other in effect might have been questionable. There is substantial authority that the proper procedure in such situations is to set both judgments aside, leaving it to a future jury to resolve the inconsistency, on the theory that it is a jury function and not the judge's job to determine what the facts were. *Swiencicki* v. *Wieczerzak,* 6 N. J. Misc. 145, 140 Atl. 248; *Reilly* v. *Shapmar Realty Co.,* 267 App. Div. 198, 45 N. Y. Supp. 2d 356; *Gladd* v. *Paslawski,* 157 Pa. Super. 489, 43 Atl. 2d 570. *Contra, Ramer* v. *Hughes,* 131 S. C. 490, 127 S. E. 565. But the Judge's order in the instant case does not reveal that this apparent inconsistency was the sole reason, or even a reason, for his act of setting aside the Glenn Smith judgment. His order is silent as to his reasons. "We have repeatedly held

that, during the term of court at which a judgment is rendered, the court has the inherent power to set aside the judgment, and it may do so without stating any cause. . . . We know of no case . . . that prohibits a court from controlling its orders and judgments during the term in which they were entered. It therefore becomes unnecessary to set out the evidence taken on the motion to set aside the judgment." *Union Sawmill Co.* v. *Langley,* 188 Ark. 316, 319, 66 S. W. 2d 300, 302. To the same effect: *Wells Fargo & Co.* v. *W. B. Baker Lbr. Co.,* 107 Ark. 415, 155 S. W. 122; *Driver* v. *Treadway,* 175 Ark. 1028, 1 S. W. 2d 84; *Stinson* v. *Stinson,* 203 Ark. 888, 159 S. W. 2d 446. We need not decide the question whether, when inconsistency of verdicts is the sole reason for setting a judgment aside, the judge must set both aside or may select one only to be vacated. It is enough that in Arkansas "courts have the inherent power to control, or to set aside, their judgments or decrees, without assigning cause, at the same term at which they were rendered." *Security Bank of Branson, Mo.,* v. *Speer,* 203 Ark. 562, 157 S. W. 2d 775.

The judgments and order of the Circuit Court are in all respects affirmed.

George Rose Smith, J., dissenting. I am unable to concur in the reason given for allowing the trial court to set aside the judgment against Glenn Smith. It is said that since the court's order is silent as to the ground upon which the judgment is vacated, we cannot assume that the trial court's reason was the inconsistency between the verdict for Mrs. Smith and that against her husband. It does not seem to me that the record supports this conclusion.

In his motion Smith pointed out that the jury had awarded damages to his wife and yet had failed to allow compensation for medical expenses that were established by undisputed testimony. The prayer in the motion was that the judgment against Smith be set aside. The court's order recites that the motion is presented to the court and that after hearing argument of counsel the court vacates the judgment. To me the only reasonable

conclusion is that the court acted in response to, and upon the ground stated in, the motion.

This conclusion is strengthened when we remember that in effect this was a motion for new trial. We have held in cases without number that a party filing a motion for new trial abandons all assignments of error not contained in the motion. See, for example, *Ferguson* v. *Ehrenberg,* 39 Ark. 420. Hence Smith abandoned all grounds for new trial except the inconsistency between the verdicts. I think it necessarily follows that the court relied on that ground in vacating the judgment.

If I am correct in my view, then we must decide the additional question of whether the trial court has the power to set aside only one of two inconsistent verdicts. As indicated in the court's opinion, the great majority of the cases elsewhere hold that both verdicts should be set aside, since no one can tell which one truly represents the jury's intention. Here the jury for reasons of its own may have decided to include the medical outlay in the verdict for Mrs. Smith. Of course the jury had no right to adopt such a course under the court's instructions, but neither had it any right to return conflicting verdicts. If my supposition is true, then a second trial for Glenn Smith may result in a double recovery of these medical expenses. I am aware, however, that the minority rule permits what was done in this case, and by this dissent I do not intend to express my own preference between the two lines of authority. My only thought is that the question should be faced and decided.

SALSBURY *v.* OLIPHANT.

4-8993 225 S. W. 2d 329

Opinion delivered December 5, 1949.

Rehearing denied January 16, 1950.

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

George Rose Smith, J. This is a boundary dispute between neighbors whose lands lie along a 1320-foot line separating two forty-acre tracts. The appellants' land is on the west, the appellee's on the east. Although the parties do not respectively own the entire forty-acre tracts, their common boundary line comprises the full 1320 feet. We are asked to review the chancellor's action in fixing a line that admittedly does not conform to the original United States survey of the two forties.

It is unnecessary for us to summarize the pleadings in order to state the issues. The present controversy really begins with a consent decree that was entered in this case on October 7, 1948. By that decree the court directed that "W. C. Smith or some other competent surveyor be employed to survey and establish the line" between the litigants' lands. It was further ordered that the surveyor report his findings as soon as possible so that a final decree might be entered.

Pursuant to this consent decree the appellants employed W. C. Smith, the designated surveyor. Smith reported to the court that he had found stone monuments marking both ends of the line separating the forty-acre tracts. These markers were of the kind used by surveyors and had evidently been set by man. Smith testified that he had verified the position of the markers with reference to established section corners and had

found the stones to be accurately placed. A straight line connecting the two monuments would therefore represent the correct boundary. That line would run about thirty feet east of the boundary asserted by the appellee and would take away a thirty-foot strip previously claimed by him.

Smith's survey was not satisfactory to the appellee, who filed a pleading in which he stated that he was having a correct survey made by R. W. Shreve. It turned out, however, that Shreve's survey was even more favorable to the appellants than Smith's had been. The appellee then abandoned his reliance upon the Shreve survey and shifted to an assertion that by adverse possession he had acquired title up to the line that he had first relied upon. At this point in the case the chancellor ruled that the October consent decree did not contemplate that the parties would be irrevocably bound by the report of the surveyor employed pursuant to the decree. The chancellor decided to view the lands himself, and after doing so he fixed a line that begins at the southern end of a fence between the lands and runs due north for 1320 feet. While this line follows neither the fence nor either one of the surveys, the final decree recites "that it would be equitable" so to fix the boundary. Both parties objected to the decree, and an appeal and cross appeal were taken.

We may lay aside the testimony concerning the appellee's adverse possession, for by his failure to file a brief in this court he has abandoned his cross appeal. *Dunham* v. *Phillips,* 154 Ark. 87, 241 S. W. 361. The issue in the case was clearly defined by the consent decree. In effect that decree was an agreement that the parties would accept the true boundary line as established by a competent surveyor. We think that the submission of the matter to a surveyor implies that the line is to be fixed with reference to the United States survey, from which the land descriptions themselves are derived.

We cannot approve the trial court's procedure in fixing the boundary line upon equitable considerations

rather than upon a surveyor's measurements. In matters affecting the title to land it is of the first importance that the law should achieve the greatest possible degree of certainty—a goal that can hardly be attained if boundaries are to depend upon the conceptions of equity held by the various courts. Here the parties agreed to determine the true line. That agreement narrows the issue to a matter presenting little difficulty. W. C. Smith's discovery of existing monuments that tie in perfectly with recognized section corners is the most convincing fact in the record. If necessary we should accept Smith's testimony in preference to the rather vague report made by Shreve, but we need not make a choice. The appellants ask only that the line be established according to Smith's findings, even though Shreve's survey is more favorable to them. We think they are entitled to what they ask.

The decree is reversed and the cause remanded for the entry of a decree consistent with this opinion.

RANDOLPH *v.* RANDOLPH.

4-9012 224 S. W. 2d 809

Opinion delivered December 5, 1949.

Max M. Smith, for appellant.

Brockman & Brockman, for appellee.

HOLT, J. The parties to this action are the children and sole heirs of F. S. and Maggie Randolph, both now

deceased, (Mr. Randolph having died in 1938 and Mrs. Randolph in 1942). At their death these parents owned a 200-acre farm in Cleveland County.

October 29, 1943, six of the children, Henry, Malcolm, and James Randolph, Lavicie Randolph Attwood, Edna Randolph Wilson and Olive Randolph Strahan conveyed their interest in this property by warranty deed to their brother, Joe R. Randolph. Following the execution and receipt of this deed, Joe took possession, sold 40 acres of the tract, and dealt with the property as his own.

December 2, 1946, appellants, Henry Randolph and his sister, Lavicie Attwood, brought the present suit, alleging, in effect, that they, together with their brothers and sisters, executed the deed to the land to their brother, Joe, under an oral agreement and understanding with him that after a sale of the timber from the property and the payment to the other heirs of $10 per acre for their interests, Joe would convey to Henry Randolph an undivided one-half interest in said land. They further alleged that Joe obtained the deed fraudulently with the intent to cheat Henry out of his interest in the property; that Henry received no consideration for executing the deed in question; that Joe and Henry had entered into a partnership agreement to handle the land and by taking title in himself, Joe had established a resulting trust in favor of Henry.

They prayed that Joe be declared a trustee for Henry, that he be required to convey said interest to Henry, and for damages.

Joe and his wife, Lelia, answered with a general denial.

Upon a hearing, the trial court found all issues in favor of appellees and dismissed the complaint of appellants for want of equity.

This appeal followed.

Appellants say: "The evidence in this case is of that clear, cogent, satisfactory and convincing type that brings

the action within that class of cases where equity will declare a resulting trust."

The primary and decisive question is one of fact.

The evidence disclosed that at the time Mr. and Mrs. Randolph, parents of the parties here, died intestate, they owned the 200-acre farm here involved. Prior to their deaths, they had given and conveyed to their son, Henry, 40 acres of land. There is no evidence of a similar gift to any of the other children. This farm was commonly known as hill land and in a run-down condition. The dwelling house was also in a poor state of repair. Some of the children desired to sell their respective interests for a consideration of $10 per acre. Joe and Henry discussed buying the interest of the other heirs, but Malcolm would not agree to his brother, Henry, receiving any share or interest in the property and so advised his brother, Joe. All of the heirs except Henry and Mrs. Attwood were willing to sell their interest direct to Joe and finally, according to Joe's version and other evidence tending to corroborate him, Henry relinquished any and all claim or interest in the land to Joe and signed and executed the deed in question to Joe. Mrs. Attwood, together with the other four heirs also executed the deed to Joe. Mrs. Attwood and Henry both knew at the time they signed the deed that their brother, Malcolm, had executed the deed with the understanding that Henry was to receive no interest in the property. Mrs. Attwood testified that she wanted her interest divided equally between Joe and Henry because "they had done things for Mamma and Papa that she could not do."

Henry testified that his and Joe's original plan was to sell the timber on the place and with the proceeds buy out the other heirs, and he, Henry, was to get half of the land and Joe the other half. Joe presented the plan to the other heirs, but Malcolm refused to sign the deed if he, Henry, were to get any part of the land; that upon receipt of this information from Joe that he and Joe agreed that the deed should be made to Joe by all the heirs and that he and Joe would divide the property later, and further: "Then what I am getting at, Mr.

Henry, is did you have in your mind that when Joe went down to get Malcolm to sign the deed to his part, that he would mislead Malcolm into believing you were not in on the deal to get him to sign the deed? A. That's what we agreed upon."

Joe testified: "And so brother Henry told me if I would go ahead and buy the others out he would sign it over to me and get out of it, so I did it."

Joe further testified that he was present when each of his brothers and sisters signed the deed and represented to each that he, Joe, was buying it for himself outright and that he had no agreement with Henry to deceive Malcolm and thereby get him to sign the deed. He testified that he did not agree with Henry to divide the property with him after he had procured the deed to it.

We do not attempt to detail all of the testimony. Some of it is in conflict. It suffices to say, however, that upon consideration of all the evidence, we think it falls far short of establishing a resulting or constructive trust by that clear, cogent and convincing evidence required.

"Resulting trusts arise where the legal estate is disposed of or acquired, not fraudulently or in the violation of any fiduciary duty, but the intent, in theory of equity, appears or is inferred or assumed from the terms of the disposition, or from the accompanying facts and circumstances, that the beneficial interest is not to go with the legal title." *Stacy* v. *Stacy,* 175 Ark. 763, 300 S. W. 437.

In the very recent case of *Roller* v. *Roller,* 214 Ark. 382, 216 S. W. 2d 399, we held that (Headnote 3): "A resulting trust will be decreed only on evidence that is clear, cogent and convincing." This rule has been many times announced by this court.

Here, as indicated, the evidence, we think, is not sufficient to show that the beneficial interest was not to go with the legal title or that Joe would acquire the property and hold any part of it in trust for Henry. Nor was the evidence sufficient to meet the test required that would warrant a court of equity to grant specific per-

formance of a parol contract to convey land, which is the same as that required to establish a resulting trust.

In *McNutt* v. *Carnes,* 213 Ark. 346, 210 S. W. 2d 290, we said: "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."

No error appearing, the decree is affirmed.

REDDELL *v.* STATE.

4586 224 S. W. 2d 812

Opinion delivered December 5, 1949.

J. E. Lightle, Jr., for appellant.

Ike Murry, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

LEFLAR, J. Defendant Reddell was convicted of second degree murder and sentenced to serve a term of 21 years in the penitentiary. The evidence indicated that he engaged in a general pool room fight, apparently initiated by him, in which he took on several antagonists concurrently, and that in the course of the fight he seized a cue stick and struck one Ed Williams on the head with it, from which blow Williams died in a few hours.

In the course of cross-examination of the defendant, the State undertook to show that he had previously been in frequent trouble with the law. The following colloquy took place when he was on the witness stand before the jury:

"Q. You were out in Bent, Oregon? A. Yes, sir. Q. In 1946, weren't you? A. Yes, sir. Q. About October, 1946, you were arrested there for assault and battery, weren't you? (Objection by counsel.) The Court: The objection is overruled. (Exception saved.) Q. Is that true? A. That is true. Q. Were you ever in Susanville, California? A. I was. Q. You were arrested for assault with a deadly weapon there, weren't you? (Objection by counsel.) The Court: The objection is overruled. (Exception saved.) Q. On September 17, 1946, were you arrested for assault with a deadly weapon? A. No, sir. Q. Were you arrested anywhere for assault with a deadly weapon? A. Assault to attempt to do great bodily harm. Q. What place in California was that? A. Susanville."

Defendant was not asked whether he was convicted after these arrests, nor whether he had done the acts for which the arrests were made.

It is well settled in Arkansas that the defendant as a witness may not be questioned about mere previous arrests, indictments, or charges filed against him. The mere fact that a charge has been made, as distinguished from the doing of a criminal act or a conviction therefor,[1] tends to prove nothing as to the credibility of the witness. *Johnson* v. *State,* 161 Ark. 111, 255 S. W. 571; *Wray* v. *State,* 167 Ark. 54, 266 S. W. 939; *Jutson and Winters* v. *State,* 213 Ark. 193, 209 S. W. 2d 681. And see 3 Wigmore, Evidence (3d Ed., 1940) § 980a.

The judgment is reversed and the case remanded.

[1] In general, on the scope of cross-examination and the impeachment of witnesses in Arkansas, see (1948) 2 Ark. L. Rev. 212, and (1949) 3 Ark. L. Rev. 40, 48.

WEAVER *v.* FIRST NATIONAL BANK OF MEMPHIS, TRUSTEE.

4-8978 224 S. W. 2d 813

Opinion delivered December 5, 1949.

Snowden, Davis, Brown, McCloy & Donalson and *Rieves & Smith,* for appellant.

Hale & Foglemen and *Chandler, Shepherd, Heiskell & Williams,* for appellee.

Ed. F. McFaddin, Justice. This case involves the Menasha Outing Club and the efforts of the majority of the members, to sell the club property, against the wishes of the appellant, now the only objector. The principal question for decision is whether unanimous consent of the members is required to dispose of the property. In order to answer that question and the others, it is necessary to state some of the history of the club and its type of organization, and the manner in which this litigation reaches this court.

FACTS

First: In 1902 the Menasha Outing Club (hereinafter called "Menasha") was organized. It was and is a club with by-laws and membership certificates. Pertinent sections of the by-laws read as follows:

"Article I. The purposes of this Club are to afford opportunity to its members for healthful recreation and relaxation from business cares and pursuits, and to cultivate gentlemanly intercourse and pleasant social relations.

"Article II. The domicile of the Club shall be in the City of Memphis, Shelby County, Tenn.; its clubhouse on the property of the club in Crittenden County, Arkansas, or such place or places as the members shall from time to time select.

. . .

"Article VIII, Section 1. There shall be an Executive Committee, consisting of seven. The first three shall be the three officers of the Club, namely, President, Vice-President, and Secretary & Treasurer. The remaining four shall be elected at the annual meeting of the Club.

The Executive Committee shall have the power to accept the resignation of any officer of the Club, or member of said committee, and to fill all vacancies that may occur from any cause in the offices or membership of the committee.

. . .

"Article XI, Section 1. A certificate of membership shall be issued to each and every member of the Club by the President and Secretary thereof, and said certificate shall entitle the holder to every privilege of the Club, and to rights of ownership in its properties and assets, subject to the provisions hereinafter stated.

"Article XI, Section 2. Any member shall have the right to dispose of his certificate of membership to anyone to whom he may elect to sell the same, provided said party is not objectionable to the Club. . . . In the event of a sale and transfer of the certificate of membership hereunder, it shall carry with it all the rights and privileges of the original owner; provided always, however, that before any membership in the Club shall be sold to any person who may be a non-member, the Club shall have the first right and option to buy said certificate to membership upon the same terms upon which said certificate is to be disposed of to any non-member.

"Article XI, Section 3. Any member of the Club shall have the right to devise or bequeath his certificate of membership to any person he may desire, subject to the qualification stated in Section 2 hereinbefore, and should any member die without making such disposition of his certificate, then it shall become a part of his estate, to be distributed as the law directs, subject to the provisions of Clause 2 hereinabove, giving the Club the option to buy the same.

. . .

"Article XI, Section 6. It is further understood and agreed by and between all parties hereto, that the holder of this certificate, in consideration of its issuance to him, shall and does hereby bind himself, his heirs, representatives and assigns, to forever release and forego all right

to a partition or division of the Club property by process of law, or otherwise, in the courts of Arkansas, or elsewhere, unless the same shall be so directed by the Club, and any assignee of this certificate shall take it with this understanding and agreement upon his part.

. . .

"Article XV. Ten members of the Club present shall constitute a quorum for the purpose of doing any business for which the meeting is called. No member shall be entitled to hold more than one certificate of membership.

"Article XVI. These by-laws may be amended at any meeting of the Club called for that purpose, or at the annual meeting by a majority vote of the membership present.

"Article XVII. All called meetings of the membership of the Club shall be made by the Secretary upon the authority of a majority of the Executive Committee or ten members calling for same by written request to the Secretary, and five days' notice shall be given of all such called meetings."

Second: Being desirous of owning real estate, and evidently realizing that title would have to be held by a trustee Menasha in 1902 duly designated the Memphis Trust Company as such trustee. The declaration of trust reads in part:

"It is further provided that the trust relation hereby formed and made, may be dissolved:

"First: By the liquidation, insolvency and failure of the Memphis Trust Company.

"Second: By a resolution duly passed by a majority in attendance of the members of the said Menasha Outing Club, at any regular meeting of the members of said Club, or at any special meeting called for that purpose, and the said resolution so passed shall be signed by the President of the said Club and presented to the proper officer or officers of the Memphis Trust Company, and said resolution so presented, shall be its au-

thority for making a transfer any conveyance of all, or any part, of the property of the said Club so vested in said Trustee, to any person or corporation designated in said resolution, and no charge shall be made for the execution and delivery of the said Deed of Conveyance by the said Trustee."

Third: Under said declaration of trust, Menasha acquired and held, in the name of the trustee, several hundred acres of land. The Memphis Trust Company subsequently changed its corporate name to "Bank of Commerce & Trust Company"; and then in 1945—desiring to liquidate—executed a quitclaim deed to First National Bank as trustee of Menasha. This deed specifically described all of the real estate, and recited:

"To have and to hold said premises, with all appurtenances thereunto belonging, unto the said party of the second part, as such trustee, and its successors in trust, to be held in accordance with the by-laws of said Menasha Outing Club.

. . .

"The title to the above described land is held by the party of the first part, as trustee for Menasha Outing Club, a voluntary unincorporated association. The execution of this deed has been authorized and requested by said Menasha Outing Club, acting by its President and Secretary."

Fourth: In May, 1948, a majority of the members of Menasha decided that the lands had become too valuable to be retained for club purposes, and should be sold and the net proceeds distributed among the 26 certificate holders (*i. e.,* members), who were all of the shareholders of Menasha. Accordingly, a meeting was duly called for such purpose, and all shareholders were present in person or by proxy; and a majority voted to sell the lands. Some question arose as to the power of the majority to bind the non-consenting minority to a sale of the properties; and in an effort to obviate that question, another meeting of the entire membership was duly

called to consider an amendment to the by-laws by adding the following language to § 6 of Article XI:

"The property of the club may be conveyed or ordered sold in part or as a whole at any lawful meeting of the club by the vote of a majority of the holders of certificates of membership in the club present at such meeting in person or by proxy, and the decision of such majority shall be binding on each and every member or holder of a beneficial interest in such property for the purpose of conveying the whole title therein to the purchaser."

Fifth: All members were notified of such meeting and its specific purpose, and at the meeting the amendment was adopted by a vote of 20 to 2. At a still later meeting—held on August 31, 1948, and also after due notice to all members, and attended by 23 of the 26 members—a resolution was unanimously adopted directing the officers and trustees of Menasha and also the First National Bank of Memphis, as the trustee holding legal title to the property, to join in a deed conveying all the lands and property to the purchaser whose proposition had been accepted. The resolution is lengthy, but reads in part:

"4. The President and Secretary, and/or the members (or a majority of the members) of the Executive Committee, and/or C. Thornton French, S. E. Ragland and John R. Flippin, as a Committee with respect to sale of property of Menasha Outing Club, or any of them, are hereby specifically authorized and directed to do any and all acts, and to institute (alone or with others) any and all legal actions, as they may be advised are necessary, desirable or proper for the perfecting or establishment of any right to effect disposition of Club property pursuant to the said contract of sale to Mrs. Mary King Kuhn, and/or to carry out the obligations and undertakings of Menasha Outing Club thereunder, and to bring about the complete performance of such contract by all parties thereto; . . .

"5. That each member or holder of certificate of membership voting in person or by proxy in favor of this

resolution does hereby expressly consent to the transfer and conveyance, as a part of and under the terms of such sale, of any individual undivided share or ownership which such member or holder of certificate of membership may have or hold in such property, real or personal, of said Menasha Outing Club, as fully as though such transfer and conveyance were made directly by such member or holder of certificate of membership in person."

Sixth: Thereafter, appellant and two other dissatisfied members of Menasha—being the three members not present at the said meeting of August 31st—served notice on the First National Bank and the proposed purchaser, that the title sought to be conveyed would be defective because these three dissenters refused to agree to the sale. The First National Bank, as trustee, and five of the trustees of Menasha (including its president and secretary) then filed the present suit against the appellant, Weaver, and the other two dissatisfied certificate holders. The complaint alleged, *inter alia,* the facts heretofore detailed, and prayed:

"2. That the Court construe the trust under and pursuant to which the plaintiff, the First National Bank of Memphis, Trustee, holds as trustee the legal title to real estate of and on behalf of said Menasha Outing Club, and that the Court advise said plaintiff, the First National Bank of Memphis, Trustee, whether said plaintiff may or may not lawfully execute a conveyance of all of such real estate, held by it in trust for Menasha Outing Club, upon instructions of the proper officers of such Menasha Outing Club given pursuant to regular action and approval of more than a majority of the holders of certificates of membership outstanding of said Menasha Outing Club, but without unanimous action and approval of such holders of certificates of membership then outstanding.

"3. That plaintiffs have a decree, to the effect that all of the property, real and personal, of Menasha Outing Club, and any and all interests, legal or equitable, in such property, may lawfully be sold and conveyed by said The

First National Bank of Memphis, Trustee, and/or by Menasha Outing Club, acting through its President and Secretary, specifically upon authorization of such sale and conveyance by action in regular meeting of a majority of those holders of certificates of membership in Menasha Outing Club outstanding, and specifically without requirement or necessity that such sale and conveyance of such real and personal property of said Menasha Outing Club be approved and authorized, or joined in, unanimously by all holders of such certificates of membership in said Menasha Outing Club; and that any claim of defendants, to the effect that no sale of property of Menasha Outing Club may be made except by unanimous consent of all members, is without foundation in law and of no force and effect."

Seventh: To this complaint the three defendants interposed demurrers which were overruled. The defendants elected to stand on the demurrers, and final judgment was entered in accordance with the prayer of the complaint. The other two defendants abandoned any appeal; and Weaver, as sole appellant, prosecutes the appeal to this court, presenting not only the question previously stated—*i. e.,* whether unanimous consent of the members is required to dispose of the property—but also the questions discussed in Topic II.

OPINION

I. *Menasha's Type of Organization.* If Menasha were a pure partnership, then in the absence of partition, unanimity of consent would be required to allow valid disposition of the realty.[1] If Menasha were a corporation, then decisions could be made by less than all, unless specific provisions stated otherwise. Modern law has recognized many various forms of organizations in the range between the pure partnership and the corporation. For illustration, there are joint stock companies, associations, clubs, joint ventures, business trusts, religious societies, etc.[2] Each of these separate organizations has

[1] See 47 C. J. 758.

[2] See 7 C. J. S. 19; see also 14 C. J. S. 1280.

some of the attributes of a pure partnership and some of the attributes of a corporation; and it is generally necessary to examine the particular organization to see if, in regard to the question at issue, the organization more nearly resembles a pure partnership or a corporation. Thus, in *Doyle* v. *Kennedy,* 154 Ark. 573, 243 S. W. 66, we found that the joint stock company there in question still had partnership liability imposed on its shareholders; while in *Beets* v. *Hackathorn,* 159 Ark. 621, 252 S. W. 602, we found that the business trust there in question had exempted its shareholders *(cestui que trust)* from individual liability, but had not exempted the trustees from such liability.

We have quoted in some detail from Menasha's by-laws and other documents contemporaneous with its inception, because in *Harris* v. *Ashdown Potato Curing Assn.,* 171 Ark. 399, 284 S. W. 755, in discussing the nature of the organization there in question, we said:

"It was competent to prove anything that the parties said or did in the formation of the association in order to determine what the nature of the association was, . . ."

Menasha was not organized for profit (and profit is an ingredient of a joint stock company),[3] but for the pleasure of its members. There was no attempt made to have Menasha become a corporation, as was done in the case of Green River Club involved in *Rives* v. *McGaughey,* 210 Ark. 558, 197 S. W. 2d 49.

In 7 C. J. S. 19 cases from many jurisdictions are cited to sustain this statement:

"An 'association' is a body of persons acting together, without a charter, but upon the methods and forms used by corporations, for the prosecution of some common enterprise."

The complaint alleges, and the demurrer admits:

[3] In 48 C. J. S. 880 this definition appears: "A joint stock company is an association of individuals for purposes of profit, possessing a common capital contributed by the members composing it, such capital being divided into transferable shares."

[redacted]

". . . that said Menasha Outing Club is an unincorporated association formed in the year 1902 for the purpose of affording its members recreation through hunting and fishing, . . ."

To review and discuss all the cases cited in the excellent briefs would unduly extend this opinion. When we consider the provisions of the 1902 by-laws and other documents of Menasha in the light of our cases previously cited and the standard definition of an unincorporated association, it is clear that Menasha, as an unincorporated association, was to be governed in all respects by the vote of the majority. Article XI, sections 1 and 2 of the by-laws provide for the issuance of certificates and the transfer thereof. Article XI, section 6 provides that each certificate holder released "all right to a partition or division of the club property by process of law." Article XV provided that ten members of the club should constitute a quorum "for the purpose of doing any business for which the meeting is called." Article XVI provided that the by-laws might be amended at a meeting "by a majority vote of the membership present."

Furthermore, there is the fact that in 1902—when Menasha was organized and a trustee was selected to hold legal title to the property[4]—the Declaration of Trust provided that the trustee might transfer "all, or any part," of the club property upon the authority of "a resolution duly passed by a majority in attendance of the members" of Menasha, etc. It was then understood that unanimity of consent was not required for the sale of the property of the club. The original plan of Menasha was government by "the rule of the majority"; and we find nothing in the by-laws or subsequent actions of the club members to show any effort to change that original plan.

The fact that the quitclaim deed to First National Bank contained no such provision as that found in the 1902 declaration of trust is immaterial, because the powers of the majority—as reflected by the original transactions herein—were not restricted by the wording

[4] See *Lael* v. *Crook*, 192 Ark. 1115, 97 S. W. 2d 436.

of the conveyance from one trustee to another. Appellant has not claimed or intimated that any fraud, whim or caprice entered into the actions of the majority in making the sale of the properties; nor is it claimed that the price to be received from the property is other than full value. The question is, whether the majority in good faith may sell the property against the wishes of a lone dissenter. We hold that the chancery court correctly overruled the demurrer on that issue.

II. *Other Questions.* There are other questions presented by appellant which we find to be without merit.

1. Appellant insists that, since Menasha was organized as a hunting and fishing club and the bank held the title as trustee, therefore the shareholders could not sell the property and terminate the trust. But Menasha was not a religious or charitable trust dedicated to public good; instead, it was an association for the exclusive benefit of its own members; the fact that a trustee was used to hold legal title to the property did not convert Menasha into a religious or charitable trust that could not be terminated by the shareholders.

2. Appellant points out that all 26 shareholders of Menasha were not parties to this suit, and contends that necessary parties were omitted. Appellant's argument is:

"At common law and under Arkansas law a club, being a voluntary unincorporated association, cannot maintain or defend an action in its own name, and all the members must be made parties since such bodies in the absence of statute, have no legal entity distinct from that of their members. *Baskins* v. *United Mine Workers of America,* 150 Ark. 398, 234 S. W. 464; *District No. 21, United Mine Workers of America,* v. *Bourland,* 169 Ark. 796, 277 S. W. 546. A club or association must, as a general rule, sue in the names of all its members regardless of how numerous they may be. 5 C. J. Associations, § 102, pp. 1365-1366. Associations generally act in accordance with the principles of agency requiring specific appointment and no delegation of discretion. *No. La. Baptist Ass'n* v. *Milliken,* 110 La. 1002, 35 So. 264; Mechem on

Agency, 2nd Ed., Vol. 1, §§ 187, 192-193; Williston on Contracts, Vol. V, §§ 307, 308."

Appellant evidently overlooks the following facts which, together, constitute a complete refutation of the argument:

a. The First National Bank as trustee is a party to the suit, and has the right to ask a court of equity for instructions concerning its powers and duties as trustee; and only the three dissenters ever questioned the Bank's right to perform the wishes of all the other members.

b. Banks, Erck, French, Ragland[5] and Spigener, as five of the trustees of Menasha (and Banks and Erck as president and secretary) are parties to this suit; and the resolution of August 31, 1948, provides that the president and secretary and a majority of the executive committee could bring this suit for Menasha, and that each certificate holder voting for the resolution consented and agreed to the conveyance "as fully as though such transfer and conveyance were made directly by such member . . . in person." All of the members of Menasha voted for this resolution except the appellant and the two other dissatisfied certificate holders who were parties in the court below. In short, all the other shareholders of Menasha have agreed to the sale of the property, and it would be idle to join in as parties those who are in accord with what the trustees are attempting to do. Therefore, for the reasons herein stated, all necessary parties were before the court.

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

[5] By stipulations now filed in this court it is shown that Ragland died after the submission and argument of the cause in this court. Nevertheless, we decide the case in view of the facts that (a) the death occurred after the submission and (b) a majority of the trustees of Menasha still remain as appellees to represent Menasha in the suit, along with its president and secretary.

SHAVER *v.* MCKAMEY.

4-9019 224 S. W. 2d 819

Opinion delivered December 5, 1949.

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

Harrell Simpson, for appellee.

DUNAWAY, J. This appeal arises from a verdict and judgment awarding the plaintiff, J. L. McKamey, the sum of $661.93 as the balance due on a commission for the sale of the Ritz Theater and its fixtures in Reyno, Arkansas, which property was sold by Harland R. Shaver, appellant.

Appellee, McKamey, entered into an oral contract in May, 1947, to act as broker to obtain a purchaser for the theater business. The property was sold on June 30, 1947, for the sum of $11,073.86. Appellee's action was based on his allegation that appellant had agreed to pay him as commission for his services five per cent of the first $10,000, plus fifty per cent of any amount above $10,000 received for the property. Appellant denied that any definite rate of commission had been agreed upon in advance of the sale, and contended on the other hand, that after the sale was consummated appellee had accepted a check for $375 as full payment of the commission due.

The check in question, dated July 16, 1947, had endorsed on its face "For—Commission in full settlement

on Ritz Theater Sale'' in the handwriting of Shaver. McKamey admitted cashing the check, which he received by mail while he was in a hospital, but denied that the endorsement set out was on the check at that time. Testimony as to the bank records indicated that the check actually did bear these words on its face. McKamey had written several unanswered letters asking about his commission, but no specific sum was mentioned in these letters. The evidence was undisputed that there had been no discussion between the parties concerning the amount of commission due, from the time of the sale until after the check had been cashed.

Appellant complains of a number of things in connection with the trial: A statement made by the court to the jury at the beginning of the trial concerning the issues in the case, questions asked various witnesses, the instructions given and the court's failure to give additional instructions. No objection was made at the trial to the court's statement now complained of, nor did appellant object to the instructions as given or request the court to give any further instructions. Failure to save any exceptions to the actions of the trial court on these matters eliminates them from consideration on appeal.

As to only one point urged by appellant was objection made and exception duly saved. That was on the question of whether it was proper to permit the introduction of evidence concerning commissions customarily charged by real estate brokers in sales similar to the one in this case. In *Greer* v. *Laws,* 56 Ark. 37, 18 S. W. 1038, which also involved a dispute as to the amount of commission due for the sale of real estate, this question was settled. We there held that where the direct evidence was conflicting, it was competent to prove the customary charge by real estate men in such transactions, as bearing upon the probable truth of what was alleged on either side as having been the agreement between the parties.

The judgment is affirmed.

BAKER *v.* EIBLER.

4-8991 224 S. W. 2d 820

Opinion delivered December 5, 1949.

Bailey & Warren, for appellant.

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

LEFLAR, J. This appeal arises from a bill in equity brought by Antonius P. Eibler, both in his individual capacity and as executor for his brother Charles Eibler, to recover certain money allegedly received by defendants from Charles Eibler and improperly retained by them. Defendants admit receiving the money from

Charles, but contend that it was a gift *causa mortis* from Charles to defendant Lawren Baker, which gift became complete upon the death of Charles a few weeks after possession of the money was transferred by Charles to Baker. The Chancellor found for plaintiff Antonius Eibler and decreed that defendants pay to him $54,000, the amount found to have been received by Baker from Charles Eibler and not returned. Defendants have appealed.

Charles and Antonius Eibler were elderly and eccentric bachelors who had lived all their lives on a farm near Ludlow, Missouri. They were wealthy and penurious recluses who seldom spent money for clothing, improvements for their home, or other purposes not absolutely necessary to sustain life. Another brother, Valerian, had died in the thirties leaving all his property to the two surviving brothers. Two sisters, not sharing their brothers' eccentricities, had long since married and established homes in another state. They maintained little contact with their bachelor brothers.

Defendants Lawren Baker, a rural mail carrier, and his wife moved to Ludlow in 1938 and rented a house from the Eiblers. Gradually a close relationship developed between the two families. The Bakers took care of the brothers, particularly of Charles, when they were ill, helped them with their business affairs, worked with them on their farm, took them in the Baker car on business trips, and made themselves generally useful, never charging the Eiblers anything for their services. At times Charles Eibler when ill lived temporarily in the Baker home, usually sleeping on a cot in the bathroom, a location which apparently suited his tastes. Charles is reported to have told several people that Lawren Baker was his best friend.

On December 17, 1945, Charles Eibler, being in his last illness, executed a will leaving all his property to his brother Antonius. There was testimony that this was in keeping with a prior understanding between the brothers. Two days later, on December 19, 1945, Charles apparently handed $120,000 in cash—120 $1,000 bills—

to Lawren Baker. According to Baker's testimony, and that of Mrs. Baker, Charles told them that $60,000 of this belonged to Antonius, and was to be held by Baker for Antonius, and that the other $60,000 belonged to Charles and was thereby being given to Baker as a gift effective on Charles' death. The Bakers testified that Antonius was present when this transaction occurred and that he knew all about it. This Antonius denies. Charles died on January 9, 1946.

The history of this $120,000 is peculiar, as were its owners. It had been a part of a deposit to the Eiblers' credit in a small Missouri bank, apparently withdrawn by cashier's check just prior to each annual personal property tax assessment date, then redeposited after the assessment day was safely passed. In 1942 the Eiblers with Baker present withdrew $120,000 from the bank and put it in $1,000 bills in a safety deposit box which Baker helped secure for them in Kansas City. After a year the Eiblers, because they were unwilling to pay the $6.00 annual charge for the safety deposit box, brought the money to their home. The evidence is not clear as to how it was kept all the time from 1943 until December, 1945, but apparently it was in fruit jars behind a loose rock in a wall part of the time, and possibly in a trunk in the Baker home part of the time. There was evidence that it was kept by Lawren Baker at his home during the latter part of the period. Additional amounts were also kept with it some of the time. An explanation given by Antonius for this method of handling the money was that Baker had told them that since they were of German descent the government, or the F. B. I., might take their money away from them if it was learned that they had so much.

The estate of Charles Eibler, with Antonius Eibler as executor, was promptly administered in the Probate Court of Livingston County, Missouri, of which John M. Gallatin was Probate Judge. Defendant Lee Baker, Arkansas lawyer son[1] of Mr. and Mrs. Lawren Baker, as-

[1] Lee Baker died subsequent to the trial of this case in the Chancery Court, and his administratrix has been substituted as defendant.

sisted his father and Antonius Eibler constantly in handling the affairs of the estate. When the inventory was filed it showed the estate as having assets of only some $23,000, and Judge Gallatin questioned its accuracy. After some delay Lawren Baker told Judge Gallatin of the $60,000 gift which he said he had received from Charles. There is evidence that Antonius subsequently testified before Judge Gallatin that the gift to Baker had been made by Charles. There is also in the record a letter to Judge Gallatin, apparently never received by him, and apparently written by Antonius Eibler from Lee Baker's dictation while Antonius was in a hospital recovering from an operation, stating that the gift had been made. This letter is in such language as a lawyer might use in describing a gift *causa mortis,* language to the use of which Antonius Eibler was himself quite unaccustomed. At about this time it was called to the attention of all concerned that a gift tax of ten per cent, or $6,000, would have to be paid by the estate of Charles Eibler on the alleged gift to Lawren Baker. The Bakers and Antonius Eibler agreed that this would be handled through payment by Antonius as executor of the estate, but that Lawren Baker would at once turn back to the executor, from the funds in his hands, the $6,000 amount of the tax. This was done, and a "Report of Appraiser" setting out the assets and debts of the estate and reciting the gift and the payment of the tax thereupon, signed by Judge Gallatin as Appraiser, was duly filed with the Probate Clerk of Livingston County. Judge Gallatin himself testified, in the present suit, to the regularity of these proceedings.

Sometime during the following summer (1946) the Bakers and Antonius ceased to be friendly. The sisters and some members of their families paid a visit to Antonius at Ludlow and, upon learning what had happened, apparently questioned the disinterestedness of the Bakers' friendship. Demand was made upon Lawren Baker that he return the money to Antonius. About July 25, 1946, Lawren paid to Eibler the sum of $69,061.10 in cash, and received from Eibler a receipt acknowledging

payment of this amount "which is the money received which belongs to me and which Mr. Baker was keeping for me." Nothing in the evidence indicates how this total was arrived at as the sum supposedly due from Baker to Eibler, nor is there any evidence that would with consistency explain both a $60,000 gift and a $69,061.10 repayment. There is a strong inference available from the evidence that this was merely the total amount which Baker was able to get together in a hurry when he was subjected to unexpected pressure to return what he had received from Charles Eibler. Lee Baker was present when his father made this payment to Antonius, and it may be inferred that the wording of the receipt signed by Antonius was phrased by the younger Baker. After these events Mr. and Mrs. Lawren Baker remained in Arkansas with their son until the trial of this case.

Antonius Eibler's first suit against Lawren Baker was commenced in the Federal Court for the Eastern District of Arkansas, on the theory that Baker was a resident of Arkansas and that there was diversity of citizenship creating Federal jurisdiction. Baker however testified that he was still a resident of Ludlow, Missouri, and was staying in Arkansas only temporarily, with the result that the Federal proceeding was dismissed, but not until Eibler had opportunity to file the present action in the state court. Both Mrs. Lawren Baker and Lee Baker were made parties defendant, the reason being that they were alleged to have in their possession part of the money received by Lawren Baker from Charles Eibler, or other assets directly traceable thereto. The Chancellor's determination that plaintiff should recover $54,000 from the Bakers is now appealed from.

A preliminary question presented is whether the testimony of Lawren Baker and Mrs. Lawren Baker, as to the making of the gift by Charles Eibler to Baker, was admissible in evidence. This question arises under the so-called "dead man statute" (Arkansas Constitution of 1874, Schedule, § 2) which provides that "in actions by or against executors, administrators, or guardians in which judgment may be rendered for or against them,

neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party.'' It is suggested that Antonius Eibler's attorneys waived the Bakers' possible incompetency to testify concerning the alleged gift by propounding interrogatories to them about the gift, also that the fact that Antonius was a party plaintiff in his individual capacity, as well as in his capacity as executor, made the Bakers' testimony admissible because the ''dead man statute'' applies only to suits ''by or against executors, administrators, or guardians.''[2] A decision on these questions is not necessary in this case. The Bakers were allowed to testify fully in the Chancery Court and their testimony is set out in the transcript. Given its fullest effect, it would not on *de novo* review of all the evidence entitle us to set aside the Chancellor's findings.

The claim of a gift *causa mortis,* where a confidential relationship exists, as undoubtedly was the case here, imposes a heavy duty of proof on the claimant. A rebuttable presumption arises from the mere existence of the relationship that the gift was obtained by undue influence or improper means. The burden is on the alleged donee to rebut this presumption and to establish that the claimed gift was fairly and properly made to him. *Gilmore* v. *Lee,* 237 Ill. 402, 86 N. E. 568, 127 A. S. R. 330; *Wakefield* v. *Wakefield,* 37 Cal. App. 2d 648, 99 Pac. 2d 1105; *Baber* v. *Caples,* 71 Ore. 212, 138 Pac. 472, Ann. Cas. 1916C, 1025; *In re Moyer's Estate,* 341 Pa. 402, 19 Atl. 2d 467; *McBride* v. *Mercantile-Commerce Bank & Trust Co.,* 330 Mo. 259, 48 S. W. 2d 922. And see *Leo N. Levi Memorial Hospital Assn.* v. *Caruth, Admr.,* 213 Ark. 1, 208 S. W. 2d 983. Plaintiffs attacked the alleged gift in the principal case on two grounds: (1) that no gift was in fact ever made by Charles Eibler to Lawren Baker, and that Baker was merely keeping the money for the brothers, and (2) that if a purported gift was made Charles lacked the mental capacity to make it

[2] For an extended and careful discussion of the "dead man statute" and decisions under it, see Bethell, The "Dead Man Statute" in Arkansas (1941) 9 U. of Ark. Law School Bulletin 63.

effectually. The obligation to produce convincing evidence was on the defendants on these issues. Unless the preponderance of the evidence is contrary to the Chancellor's finding that defendants have failed to sustain this heavy duty of proof, the decree must be affirmed.

No good purpose would be served by a detailed review of the huge mass of testimony contained in the record in this case. It has already been briefly summarized herein, and reference to a few significant aspects of it will indicate that there was ample basis for the Chancellor's conclusions.

The only direct evidence that the alleged gift was made was that of Mr. and Mrs. Lawren Baker, who of course were interested witnesses, and their testimony was directly contradicted by the equally interested opposing witness Antonius Eibler who they say was present when the gift was made, but who emphatically denies that he was present or that any gift was made. Apart from the Bakers' actual possession of the money, the only directly corroborating evidence, as to the making of the gift, was that which developed from the probate proceedings for the estate of Charles Eibler. Probate Judge Gallatin's testimony in this connection was the most convincing offered by defendants, but much of the information upon which his testimony was based came from the Bakers themselves. When Antonius Eibler testified before Judge Gallatin about the alleged gift, if he did so testify, Antonius was in the presence and possibly under the dominating influence of the Bakers. It could readily be inferred that he participated in a deception concerning the gift because he believed, by some warped reasoning for which the Bakers may have been in part responsible, that he could thereby save money on inheritance taxes, and that he continued with the deception for a time afterwards because he was afraid of the consequences of retraction, until other relatives came in to disabuse his troubled mind. The letter that he wrote concerning the gift, apparently at Lee Baker's dictation, which was apparently retained by the Bakers "as evidence" without ever being shown to the addressee, is susceptible to

the same explanation. It does not appear to be a free and voluntary statement on Antonius' part.

An item in the evidence not hereinbefore mentioned is that Lawren Baker made a loan to his son Lee Baker of $20,000, admittedly from Eibler money, receiving from Lee a mortgage and twenty promissory notes for $1,000 each, all these instruments bearing the date of November 23, 1945, a date prior to that on which Lawren Baker claims to have received the gift from Charles Eibler. This tends to show that he already had got hold of the Eibler money and was using it as his own, that the claim of gift was merely a cover for what he had done already. True, the Bakers claim that the $20,000 was not actually paid to Lee until six or eight months later, and that the instruments were pre-dated for some unexplained reason. But it was shown that the $20,000 was loaned to Lee Baker to enable him to pay off a debt which was due on November 23, 1945, and the inference was reasonable that he did use it to pay off the debt on that date. Lawren Baker was extremely vague in his testimony concerning this entire transaction.

Lee Baker was not only a party to this loan, but he was regularly present after Charles died, at all important transactions involving Eibler money or the probate of the Charles Eibler estate, and even before the death of Charles Eibler was the frequent advisor of his father and the Eiblers concerning Eibler business and legal matters. He made numerous trips to Ludlow, Missouri, in this connection. He was an active participant in many of the transactions which were questioned in the instant suit, and undoubtedly planned a number of them. He could presumably have produced conclusive evidence, by way of receipts or other documents, or the oral testimony of payees, as to when he actually received the $20,000 that his father loaned to him. Throughout the trial of this case in the Chancery Court he was present in the court room, yet he did not take the stand as a witness.

The evidence taken as a whole tends to show that Charles Eibler did not make a gift of $60,000 to Lawren Baker. But if there had been a purported gift, the long

continued queer conduct of Charles, coupled with the fact of increasing mental weakness growing out of his death-bed illness, plus the confidential relationship that had developed between him and Lawren Baker, made it difficult for defendants to sustain their burden of showing competence in Charles Eibler on December 19, 1945.

We cannot say that the preponderance of the evidence is contrary to the Chancellor's finding. The decree of the Chancery Court is affirmed.

BUCKNER *v.* SEWELL.

4-8984 225 S. W. 2d 525

Opinion delivered December 5, 1949.

Rehearing denied January 23, 1950.

Bernard Whetstone, for appellant.

Mahony & Yocum, C. E. Wright and *Neill C. Marsh, Jr.,* for appellee.

GRIFFIN SMITH, Chief Justice. Forty acres, wild and unimproved in 1927 and for many years thereafter, were included in Joe Buckner's trust deed to N. C. Marsh, executed December 23, 1927, securing a note for $250 payable to J. W. Edwards. At that time the land was assessed for $120, but appraisers certified that it was worth $4 per acre in 1931. Oil discoveries in the Cairo area (Shuler Field) of Union County—two-thirds of a mile from the property Buckner conveyed in the trust deed—have given the tract a lease value of from $500 to $1,000 per acre, and a royalty value of $1,000 per acre.

In September, 1948, Buckner alleged in his equitable proceeding that Edwards sold the note and assigned the trust deed to H. P. Sewell, who on March 7, 1931, undertook to foreclose under power contained in the deed, with Sewell as purchaser for $107. Insistence is that the sale was void, hence Sewell is a mortgagee in possession, and as such must account for rents and profits. The appeal is from a decree dismissing for want of equity. Buckner asserts (a) that the Court abused its discretion in forcing a trial prematurely; (b) the several foreclosure irregularities complained of rendered the sale void; (c) the mortgagor was so obviously weakminded as to require the solicitude of equity and a determination, under the facts disclosed, that mental insufficiency occasioned delay in adopting a remedy, hence *laches* ought not to be invoked; (d) where a sale is void, limitation statutes cannot be pleaded against the mortgagor — particularly where there is mental deficiency.

Sequence of Transactions After 1927.—In February, 1929, Buckner evidenced his indebtedness to Edwards by a note for $318, secured by deed of trust on personal property. Similarly, an indebtedness of $269.80 was secured in 1930. Livestock and the crop Buckner expected to produce in 1928 were included in the 1927 deed, but neither, as security, enters into the litigation here. Buckner's action in paying Sewell $30 for three or four of the cows described in the foreclosure is urged as conduct indicating acquiescence in the procedure.

In 1937 Sewell and his wife delivered to Neil C. Marsh, Sr., and Neil C. Marsh, Jr., their warranty deed to an undivided 1/128th interest in the oil, gas, and other minerals, subject to a lease executed by the Sewells in 1935 to Lion Oil Company. In February, 1944, Carter Oil Company procured from the Sewells an oil and gas lease, with warranty, the consideration being $300. In October of the same year Marsh and his son leased to Carter Oil Company.

First—(a)—Premature Trial.—In a petition filed October 22, 1948, in consequence of the complaint of September 20th, the Carter Company mentioned its mineral leases and asked that the plaintiffs' cause be set for early trial, *lis pendens* having been filed with the complaint. Carter expressed fear that undue delay in adjudicating the claims would prove costly. The record discloses that when Carter asked for consideration of the motion its answer had been filed. Sewell and the Marshes had also answered, while Ida Edwards, wife of J. W., had entered a disclaimer of interest.

Carter's counsel, when the petition was filed—or during the same day—called it to the Court's attention while appellants' attorney was present. The Chancellor found that issues had been joined, and favored expeditious consideration, but permitted Buckner and his wife to amend from time to time as circumstances might warrant. Trial was set for November 16.

November 5th the plaintiffs filed a 36-page complaint amendment. Other pleadings followed, including a stipulation that Carter Oil Company had settled with

Buckner, and that as to the Oil Company there should be dismissal with prejudice. Although the plaintiffs had (October 22) excepted to the order advancing the cause, they appeared November 16th, and without renewing the motion asked assistance of a procedural nature, including a request that a substitute trustee be named. The present contention is that necessity for an early hearing terminated when the Carter Company was eliminated.

By amendatory Act of 1929, Ark. Stats., (1947), § 27-1719, Chancery Courts are given a broader discretion in arranging their dockets; and, subject to the statutory limitations, the 90-day period for pleadings may be reduced. The dominant consideration is whether issues have been joined. The 1929 amendment was discussed in an opinion written by Mr. Justice McHaney, *Sisk* v. *Becker Roofing Co.,* 183 Ark. 101, 34 S. W. 2d 1078, who expressed the Court's construction that Act 37 was intended to eliminate delay, and to make it possible for either party "to get a trial without waiting 90 days after issue joined". See *Burks* v. *Cantley,* 191 Ark. 347, 86 S. W. 2d 34; *McMorella* v. *Greer,* 211 Ark. 417, 200 S. W. 2d 974.

Counsel for appellant think (1) that because records incidental to actions of the trustee who in 1931 foreclosed the 1927 trust deed were not found until a few days before trial, and (2) that without appreciable aid from an incompetent client, and (3) that due to other factors—such as an opportunity to study transactions covering more than 20 years—and (4) that owing to extreme poverty of Buckner as contrasted with the alleged financial sufficiency of defending parties, denial of the full 90 days was an abuse of discretion.

Our conclusion is that the Chancellor, as an original undertaking, was in a superior position to pass upon these matters, and that the burden of showing prejudicial results has not been met. There is a presumption that when litigation has been started those activating it have fortified themselves in respect of essential facts. In the case at bar the utmost diligence is disclosed. Exhaustive investigations are reflected in careful and compre-

hensive pleadings. At no time did the Court act oppressively. On the contrary the record affirms a painstaking course impartially pursued; hence the suggestion of undue haste is without force.

Second—(b)—Validity of the Foreclosure.—Seven reasons are grouped to support the claim that title did not pass under the trustee's deed: (1) It was improper to sell the realty without mentioning two subsequent deeds covering personal property; (2) illegal charges treated as "costs" and "services" were included; (3) personal property in the 1927 deed was not exhibited at the sale; (4) cash was demanded, whereas the advertisement called for a credit of three months; (5) the loan was usurious; (6) there was want of due process; (7) the notice of sale was insufficient.

Appellees concede that unauthorized costs of $1.50 were added, and that an overplus of 78c may have been wrongfully applied, but they insist that the total of $2.28 is *de minimus* and could not invalidate the deed. Since our disposition of the case does not require consideration of the items complained of, their materiality and force in different circumstances are neither affirmed nor rejected.

Third—(c)—Buckner's Mental Status.—Appellants' amendment to their complaint alleges that Joe Buckner, a Negro 67 years of age at the time of trial, was then and had always been patently inferior mentally. This abnormality, they say, prevented him from understanding the meaning of things he was asked to sign, particularly in relation to time and figures. So handicapped, he did not know that more than one trust deed had been executed, nor did he comprehend "that he was financed [by Edwards] for more than two years, [and this is true] in spite of record evidence presented herein". The charge of weakmindedness was made by Bernard Whetstone as solicitor, "and in the additional capacity of *amicus curiae,* and by way of explanation of the delay in offering the information contained in the amendment to the complaint."

Buckner testified that he had never been seriously ill—had only suffered occasionally from headaches and had sustained a rupture; no "tainted blood" or anything of that kind. The land in question was inherited from his father. In an attempt to show mental weakness, counsel caused appellant to explain that a house he had built as a home was erroneously located on property not within the 40-acre tract. Appellant could not name the countries "on our side" in the last World War, but "thought he remembered hearing it talked that there was another war about twenty or thirty years ago". He did not know what countries were on our side at that time. He knew that in a mortgage "they take your stuff, all you own". When asked how old he was fifty years ago, the witness replied that he would have to count it up. He could count money, but sometimes got mixed up a little, and needed glasses when counting. Counsel for appellant put money before Buckner and asked him to count it in the Court's presence. It was stated (for the record) that the units were one fifty dollar bill, two tens, a five, four ones, a 50c coin, a quarter, two dimes, and four pennies. Buckner made an error of $1, counting the displayed money as $100.99 instead of $99.99. He could read a little, but did not consider himself educated. As a boy he had gotten but slight training, not beyond the third reader, but could write and sign his name. Can read a little from the Bible, and otherwise.

Margaret E. Fitch, testifying before the Court, discussed a test she said was given Buckner October 27, 1948, (without appellees' knowledge) to determine his intelligence quotient. Mrs. Fitch, as a psychologist, holds a Ph. D. degree from Cornell. Between 1937 and 1945 she served with the Psychological Corporation of New York City. At the request of industrial employers, general mental inquiries known as the Revised Beta Tests were given in order to make job classifications. The test was usually taken by ignorant English-speaking people, mostly adults. When the tests were applied to Buckner, he scored 19 of a possible 123 points. Mrs.

Fitch thought that the experiments, taken as a whole, placed the subject in an 11½-year age group.

While the Chancellor did not by any express language find that Buckner was mentally capable of transacting business, this is the effect of the decree. Litigation would be endless and transactions insecure if courts were permitted to balance the business finesse, trading experience, literary aptitude, and such other factors against or in favor of persons whose transactions are subject to judicial review, and then by merely finding that one was smarter than the other, adjudge that a transaction was inequitable and therefore unconscionable. It is only where the degree of mental insufficiency disables the complaining person "from appreciating the invasion of his rights or prevents him from seeking relief from the wrong" that equity will exercise its jurisdiction. Compare the facts here with *McIntire* v. *Pryor,* 173 U. S. 38, 19 S. Ct. 352, 43 L. Ed. 606; *Wright* v. *Fisher,* 65 Mich. 275, 32 N. W. 605, 8 Am. St. Rep. 886.

In the case at bar the trial Court had a right to consider the appellant Buckner's actions and his condition in 1927 when he asked Edwards, another Negro, to advance money for use in making a crop. Edwards was hesitant in taking legal action. For personal reasons he assigned the trust deed and sold the note to Sewell. His version of discussions with Buckner was before the Chancellor, as were other acts indicating an understanding by appellant of what he was doing and why he delayed in testing a remedy. Buckner admitted attending the sale in El Dorado, but says he didn't know he had a right to bid. This explanation was contradicted by appellant's admission that he talked with some one who told him the sale was being conducted by the trustee, and that he went to borrow money for use in bidding. Upon returning half an hour later he "didn't see anybody at all".

Appellant also stated that while the property was being auctioned he listened the best he could, "but my mind was so ramshacked that I couldn't hold anything in it". When asked whether, at the time, he knew what

was being done, the reply was, "Well, not altogether". He just went ahead in the hope that he could get his land back some day. Later Buckner went to Sewell and asked what he (Buckner) would have to do to get his cows back. Sewell told him $30 would be required, "so I went back to the man I was staying with and got the money and went and got the cows". Later he asked Sewell about redeeming the land, "and was told it would take a thousand dollars".

Buckner admitted that he "made a contract with Judge A. D. Pope to get the land back". The record shows that Pope's complaint named Sewell, Edwards, and Marsh as defendants. *Lis pendens* was filed March 22, 1937. The complaint asked cancellation of the trustee's deed of March 20, 1932. Other conduct of Buckner, when considered with things that have been mentioned, was sufficient to sustain a finding that, while Buckner's knowledge was no doubt confined to mere familiarity with the rudiments of such business transactions, the deficiency went more to his intelligence than it did to strict mentality incapacity.

Approval of the strict rule asked by appellant's counsel would pose difficulties not heretofore thought justified. *Beaty* v. *Swift,* 123 Ark. 166, 184 S. W. 442, is pertinent. The Court's opinion by Mr. Justice Frank G. Smith holds that an ignorant and illiterate person may acquire property and may convey it, "provided he knows what he is doing and understands and appreciates the transaction in which he is engaged".

An 87-year-old man's capacity to execute a mineral deed was questioned when heirs of W. L. Johnson alleged that he was senile, weak in body and mind, and otherwise deficient when the transaction occurred in 1937. In sustaining the Chancellor our opinion, *Johnson* v. *Foster,* 201 Ark. 518, 146 S. W. 2d 681, cites cases holding that if the maker of a deed, will, or other instrument, possesses sufficient mental capacity to retain in his memory, without prompting, the extent and condition of his property, and to comprehend how he is disposing of it, to whom it is to go, and upon what

consideration, then it may be upheld. Almost identical language is in many of the opinions of this and other courts. *Walsh* v. *Fairhead, Executor,* 215 Ark. 218, 219 S. W. 2d 941.

Fourth—(d)—Limitation Statutes.—In his finding of facts and declarations of law Judge HAYNIE ascertained that about $100 was due on the Buckner-to-Edwards note when the trust deed was foreclosed. Irregularities occurred in making the sale, and collateral proceedings incident to the foreclosure should not be condoned. But, said the Chancellor, the action taken in 1937 had as an objective the same result as that sought in 1948. Buckner's admission that he "employed" Pope is highly persuasive of the plaintiff's understanding that Sewell claimed the property under any construction, and it cannot be said that when the suit was being prepared Buckner was ignorant of his attorney's purpose; nor could he have believed that Sewell was not notoriously hostile to the relationship now sought. Buckner's 1937 suit had been set for trial June 14. With dismissal for want of prosecution went judgment against the plaintiffs for cost; and Buckner, if mentally competent, could not thereafter be heard to say he did not think Sewell was claiming adversely.

Appellees now concede that their plea of *res judicata,* based upon dismissal, cannot be sustained, but they emphasize essential facts attending the transaction as fixing a point of time from which limitation statutes could be pleaded.

Fifth—Tax Payments—Laches—Estoppel.—A trustee's deed, whether valid, void, or voidable, is color of title unless facts in avoidance appear on the face of the instrument. Sewell paid taxes under the deed for sixteen consecutive years, and he also paid for 1930 and 1931. In respect of the first payments Buckner testified that after the sale he "went to see about them, . . . and the man told me they had been paid". After that he let "Mr. Horace (presumptively Horace P. Sewell) make the payments". When asked if he "just walked off the land and left it, and didn't pay any

attention to it for seventeen years", Buckner replied, "I was studying about it: it was on my mind".

Although Act 66 of 1899, Ark. Stats., (1947), § 37-102, was a legislative design to encourage tax payments "and to protect persons who pay them", *Schmeltzer* v. *Scheid,* 203 Ark. 274, 157 S. W. 2d 193,[1] rights acquired through tax payments are not restricted to instances where the sale was made by collecting authorities. In *Towson* v. *Denson,* 74 Ark. 302, 86 S. W. 661, it was said that payment of taxes on unimproved and unenclosed land under color of title for seven years, if consecutive, "constitutes an investiture of title". See, also, *Koonce* v. *Woods,* 211 Ark. 440, 201 S. W. 2d 748. Cases dealing with tax payments are collected in *Burbridge* v. *Bradley Lumber Company,* 214 Ark. 135, 215 S. W. 2d 710. All are to the effect that an investiture follows such payments when all statutory requirements are met, and that the title so acquired is fee simple.

What, then, of Sewell's tax payments for more than seven years after appellants, through notice in a judicial proceeding, had been informed that the deed-holder claimed to be the owner? The Sewells, as defendants in 1937, formally asserted that the sale was valid. They also alleged possession, and detailed their reasons for believing title was good. If in support of appellants' argument, it should be conceded that irregularities attending the sale rendered it voidable—creating the relationship of mortgagor with the mortgagee in possession from 1931 until 1937—certainly during the succeeding eleven years appellants were under no misgivings regarding adverse claims, and the maxim "Once a mortgage, always a mortgage", is without compelling force.

The opinion in *McFarland* v. *Miller,* 211 Ark. 962, 203 S. W. 2d 404, discusses the general rule that the purchaser at a *void* foreclosure sale is presumed to hold as mortgagee in possession; but it is also said that this principle does not apply where the purchaser takes pos-

[1] The Schmeltzer-Scheid opinion, p. 276, says that "Legislation of this character had its inception in this state in the passage of Act 65 of the Acts of 1899, p. 117." The Act number is 66, and "65" is clearly a typographical error.

session as owner, and where the facts are such that the mortgagor, or owner of the equity of redemption, must have known that the purchaser was holding adversely. The opinion quotes from *Norris* v. *Scroggins,* 175 Ark. 50, 297 S. W. 1022. Mr. Justice WOOD, speaking for the Court, cited with approval an excerpt from Jones on Mortgages, 2nd Ed., and stressed the statement that the statute of limitation does not begin to run against the right of redemption "until actual notice is given such owner by the party in possession . . . that he claims to hold in some other right than that of mortgagee or assignee of the mortgage, or he clearly makes it known by his acts that he holds adverse to the mortgage".

Whether changes during the eighteen-year period—such as death of the trustee in 1942, death of Edwards, to whom the original note was given, the death long ago of one of the appraisers, imperfect recollection of the two surviving appraisers and of the Justice of the Peace who appointed them—whether these things worked an estoppel against Buckner we do not determine. What we do decide is that with dismissal of the 1937 suit Buckner very definitely knew that Sewell intended to resist all attempts to recapture the property. This conduct of continuing inactivity justified Sewell in relaxing any vigilance he otherwise might have shown. The decree could be upheld under the seven-year statute of limitation, or because of *laches.*

Affirmed.

LIGON *v.* MILHOLLAND.

4-8999 224 S. W. 2d 825

Opinion delivered December 5, 1949.

Osborne W. Garvin, for appellant.

Henry E. Spitzberg, for appellee.

HOLT, J. Appellant, Howard C. Ligon, doing business as Ligon Brothers Concrete Products Company, is a manufacturer of concrete building blocks, in Arkadelphia.

Appellees, Texas A. Milholland and his wife, Joyce, own a lot in Little Rock on which a business building was erected.

Appellee, George W. Spruce, is a building contractor and individually contracted, in writing, with the Milhollands to erect the building on their lot for a consideration of $3,800, but failed to complete the construction and the work was taken over and completed by the owners, the Milhollands, at a cost far in excess of the contract price.

Arkansas Concrete Products Co., Inc., was a manufacturer of concrete building blocks and George W. Spruce its president.

The present action was instituted by appellant against appellees for $864.65 as balance due on the purchase price of concrete blocks used in the construction of the business building in question owned by appellees in the city of Little Rock, and asked that a lien be declared in favor of appellant on said property to secure payment.

Appellees denied that they owed appellant anything and specifically interposed the defense that appellant had executed a written waiver of any claim of lien, which would bar the action.

From a decree dismissing appellant's complaint for want of equity is this appeal.

During the progress of the construction of the building, the machinery of the Arkansas Concrete Products Co., Inc., broke down and Spruce, on behalf of the Arkansas Concrete Products Co., of which he was president, ordered the necessary blocks from appellant, in Arkadelphia, to be delivered to it at its plant in North Little Rock, but in compliance with Spruce's instructions, since the Milholland building was some four or five miles nearer appellant than the plant of the Arkansas Concrete Products Company, appellant made all deliveries to the site of the construction, and thereafter appellant billed the Arkansas Concrete Products Co., Inc., for the purchase price of all of said blocks.

When the Milhollands concluded that Spruce would not be able to complete the contract for the consideration of $3,800, they stopped the work. At that time it appears T. A. Milholland had paid Spruce $2,971.02 and had obligated himself to pay for building materials in the amount of $1,048.05, which he later paid. There were also a number of laborers who had not been paid their wages. It thus became certain that to complete the building would require the expenditure of a sum far in excess of the contract price agreed upon with Spruce. Mr. Milholland then, under his personal supervision, proceeded to complete the construction of the building at a cost, as indicated, greatly in excess of the contract price.

Before proceeding, however, to complete the building at his own expense, Milholland demanded of Spruce that he furnish him a list of all outstanding claims and that he must have waivers of liens from any material furnishers, or laborers, who had been satisfied, and to this end he furnished Spruce with waiver forms.

The evidence reflects that R. S. Ligon, appellant's brother, delivered the last load of building blocks which Spruce had ordered from appellant about April 16, 1948, and on this occasion signed the following instrument which Spruce presented to him: "WAIVER OF LIEN—We, the undersigned, who have furnished material or performed labor, or may hereafter furnish material or perform labor on the footing, foundation, and walls located on the following described property, to-wit: 2706 W. 11th St., Little Rock, Arkansas, do hereby waive our statutory lien which we may now have on said property or may hereafter have on said property by virtue thereof and agree to look to the contractor personally for the payment of our claim or claims. Material Furnished By: s / Ligon Bros. by R. S. Ligon."

On this same day, R. S. Ligon returned to appellant's plant in Arkadelphia and informed his brother that he had signed the waiver.

It further appears that Spruce notified appellee, Milholland, of the execution of the waiver of the lien by appellant and thereupon Milholland began the work of completing the building at a cost of nearly twice the sum for which Spruce had agreed to construct it.

Appellant, Howard Ligon, testified, in effect (quoting from appellant's abstract): "The next to the last or the last load, my brother, who was my truck driver, told me he had signed a release for Spruce on the representation that Spruce had to have the release signed to get his money on the job. I came to Little Rock to see Spruce and asked why he had my brother sign the release. Spruce told me Milholland told him he had to get it signed to get his money, that he would get paid in the next two or three days and would send me a check. Spruce gave me a check with the statement that he would have the money in the bank in two or three days. I agreed to hold the check and he in turn was to phone me to send it through. I didn't hear from Spruce and I kept calling him and he kept saying he was going to get his money any day and he never called me to send the checks through."

"My brother informed me that he had signed the waiver and delivered it to Spruce; I don't remember whether I told him he did or didn't have authority. I did not ask for the return of the waiver; if Spruce would make out the check I would be glad to hold it until he got the money to take it up. I didn't call Mr. Milholland and tell him the waiver was revocable and void and he should destroy it. . . . The checks were signed by George W. Spruce, President. Spruce told me that he had to get the release signed to get his money and that Milholland demanded the waiver before Spruce could get his money. . . . The reason I didn't demand the return of the waiver is because Spruce gave me the checks and assured me the money would be paid and that Milholland refused to pay Spruce until this waiver was executed. The waiver has been in my possession for several months."

It thus appears from appellant's own testimony that he did not demand that Spruce surrender the waiver, but instead demanded checks for the amounts due him by the Arkansas Concrete Products Co., Inc., and upon being informed by Spruce that he did not have sufficient money to pay, appellant demanded that the checks be made out and he would hold them until Spruce should direct him to present them for payment. In fact, Spruce gave him two checks, one in the sum of $115, and one in the sum of $864.65, the checks being signed: "Arkansas Concrete Products Company by George Spruce, President, and Lee Farris, Secretary."

Appellant knew that the waiver had been executed by his brother, as demanded by Milholland, and what it contained, and with this knowledge he went to Little Rock some days later, contacted Spruce knowing that his brother had delivered the waiver to Spruce and not denying his brother's authority to execute the waiver, or requesting its return, accepted the above checks to be paid in the future.

In the circumstances, we hold that the above waiver executed by appellant's brother was binding on appel-

lant and effectively waived whatever lien claim that appellant might have had on the property in question.

We conclude, therefore, that the preponderance of the evidence is not against the findings of the trial court, and accordingly, the decree is affirmed as to Texas A. Milholland and his wife, Joyce H. Milholland.

Appellant, however, contends that he is entitled to a personal judgment for the amount in question against the appellee, George W. Spruce. We agree with this contention.

While appellant does not in the prayer of his complaint specifically ask for judgment against George W. Spruce, he alleged in his complaint: "That he sold and delivered to the defendant, George W. Spruce, contractor for the defendants, Texas A. Milholland and Joyce H. Milholland, materials of the value of $864.65, between the 5th day of April, 1948, and the 16th day of April, 1948; an itemized account of said materials sold and delivered is attached thereto, made a part hereof and marked 'Exhibit A'; that said materials were furnished for and used in the construction of a building owned by the said defendants, Texas A. Milholland and Joyce H. Milholland, on the following property in Pulaski County, Arkansas, to-wit: (describing the property here involved)."

This allegation of facts was sufficient to warrant a personal judgment against George W. Spruce, in view of the testimony adduced, without any prayer at all, since it is the allegation of facts, in the body of the complaint, and not in the prayer for relief, which constitutes the cause of action.

The testimony here, which appears to have been fully developed, we hold, justified a judgment against Spruce.

In *Realty Investment Company* v. *Higgins,* 192 Ark. 423, 91 S. W. 2d 1030, this court said: "But it is the statement of facts, and not the prayer for relief which constitutes the cause of action; and the court may grant any relief which the pleaded facts warrant under a prayer

for general relief or without any prayer at all; but the courts will not suffer the plaintiff to take a decree that is not responsive to the issues nor justified by a full development of testimony. *Baldwin* v. *Brown,* 166 Ark. 1, 265 S. W. 976."

So much, therefore, of the decree as denied appellant a judgment against George W. Spruce personally is reversed and the cause remanded with directions for further proceedings consistent with this opinion, in all other respects the decree is affirmed.

HUNTER *v.* HUNTER.

4-9014 224 S. W. 2d 804

Opinion delivered December 5, 1949.

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

J. J. Montgomery and *J. H. Brock,* for appellee.

MINOR W. MILLWEE, Justice. This is a controversy between a father and his two sons. Appellee, Pat E. Hunter, brought suit against appellants, Theron Hunter and Fred Hunter, to cancel two deeds executed to appellants by Earl Hyden and wife, purporting to convey a tract of land in Johnson county containing 120 acres. This appeal is from a decree granting the relief prayed.

Appellants have not properly abstracted the pleadings and exhibits. From the abstract furnished by appellee and the testimony adduced at the trial, the following facts appear. Appellee was engaged in the mercantile business at Coal Hill, Arkansas, under the name of Hunter Trading Company for several years prior to 1944. Wyatt West owned 120 acres of land when he died intestate in 1936 indebted to appellee on a store account in the sum of $792.42. At the time of his death, West was also indebted to G. W. Elkins, another merchant at Coal Hill, in the sum of $472.50. The Elkins indebtedness had been reduced to judgment prior to West's death and Elkins assigned the judgment to appellee in September, 1936.

Appellee was appointed administrator of West's estate and the 120-acre tract of land belonging to said estate was sold by order of the probate court in satisfaction of the two claims held by appellee. Earl Hyden, a clerk in appellee's store, became the purchaser at the administrator's sale held in December, 1936. Appellee, as administrator, executed a deed to Hyden and Hyden and wife in turn executed a deed to appellants, Theron Hunter and Fred Hunter on January 1, 1937. The purchase by Hyden at the administrator's sale and the execution of the deed to appellants were at the instance and under the direction of appellee. Hyden paid nothing for the land and the consideration for the sale was the amount of the indebtedness from the West estate

to appellee. The deed to appellants of January 1, 1937, was delivered by Hyden to appellee who put it away with other private papers where it was found by his wife when appellee became seriously ill in 1944. The deed was never recorded. Appellants were non-residents of Arkansas at the time and apparently knew nothing about the execution of the deed until some time in 1944.

On November 7, 1944, Earl Hyden and wife executed and delivered a quitclaim deed conveying the lands to appellee and this deed was duly recorded. On December 20, 1946, Earl Hyden and wife executed a second quitclaim deed of the land to appellants, Theron Hunter and Fred Hunter, the instrument reciting that it was given to correct the deed of November 7, 1944. Appellee remained in possession of and paid taxes on the land until a receiver was appointed in another suit sometime after 1944.

The chancellor made special findings including the following: "Though there has been no pleading or evidence challenging the validity of the probate sale of these lands for the purpose of paying the debts of the estate of Wyatt West, the court assumes that the object of Pat E. Hunter, the administrator, in having Earl Hyden bid it in at the sale and then execute a deed to his two sons, was because of the prohibition of the statute of him as administrator being interested in its purchase. . . .

"The undisputed evidence is that Pat E. Hunter accomplished a sale of the land to satisfy a debt due himself, and that these sons did not pay any part of the consideration or costs or pay any taxes, all of these having been paid by Pat E. Hunter, who held the possession of the land until the appointment of a receiver. Earl Hyden never had any interest in the land except a bare legal title, the equitable ownership being in Pat E. Hunter who used him only to accomplish whatever object he had in view, and his retention of the deed that he had Earl Hyden to execute was just as effective as if he had destroyed it, and had Earl execute a deed direct to

him, and until he delivered the deed to his sons and they accepted it, no title passed to them.''

The court then held that the deeds to appellants dated January 1, 1937, and December 20, 1946, should be cancelled as a cloud upon appellee's title and a decree was entered accordingly.

We think the preponderance of the evidence supports the conclusion reached by the trial court. We hasten to observe, as did the chancellor, that the validity of the 1936 probate sale of the land is in no manner challenged by the parties to the instant suit. It is clear that appellee furnished the consideration for the purchase of the land at the administrator's sale in December, 1936, and that Earl Hyden was only a nominal purchaser who acted throughout the proceedings as the agent of his employer. Hyden furnished no money and had no interest in the transaction except to do the bidding of appellee. Appellee retained possession of the land and the unrecorded deed to appellants, and the evidence is insufficient to show his intention to effect, or appellants' intention to accept, a delivery of the deed.

Appellant, Fred Hunter, filed no answer to the complaint of appellee. In a separate answer filed by Theron Hunter he alleged that he and his brother became the owners of the land under the deed of January 1, 1937; that after he learned that said deed had not been placed of record, he had Earl Hyden execute the deed of November 7, 1944, and that the scrivener by mistake made the deed to Pat E. Hunter instead of Pat T. Hunter, the name of Theron Hunter. He also alleged that the deed of December 20, 1946, was executed to correct this mistake. Theron Hunter, who still resides in California, did not testify and the proof is insufficient to sustain the allegations of his answer; nor is there any explanation as to why he would have the deed of Nov. 7, 1944, made to himself when he was contending that he and his brother were joint owners of the land.

This court has held that there is no delivery of a deed unless what is said and done by the grantor and

grantee manifests their intention that the instrument shall at once become operative to pass the title to the land conveyed and that the grantor shall lose dominion over the deed. *Maxwell* v. *Maxwell,* 98 Ark. 466, 136 S. W. 172; *Van Huss* v. *Wooten,* 208 Ark. 332, 186 S. W. 2d 174. In *Bray* v. *Bray,* 132 Ark. 438, 201 S. W. 281, the court said: "We have said that the question of delivery is generally one of intention as manifested by acts or words, and that there is no delivery unless there is an intention on the part of both of the actors in the transaction to deliver the deed in order to pass the title immediately to the land conveyed, and that the grantor shall lose dominion over the deed." See, also, *Woodruff* v. *Miller,* 212 Ark. 191, 205 S. W. 2d 181.

It is also the general rule that where there is an agreement or agency to purchase land for another and the principal furnishes the consideration for the conveyance which the agent takes in his own name, a resulting trust arises in favor of the principal. *Home Land & Loan Co.* v. *Routh,* 123 Ark. 360, 185 S. W. 467, Ann. Cas. 1917C 1142; 54 Am. Jur., Trusts, § 212. Although the nominal grantor, Earl Hyden, apparently lost dominion over the deed, it was turned over to appellee, his principal, who retained the instrument without the manifestation of an intent that the deed should become operative to pass title to the appellants.

Insofar as the rights of the parties to the instant suit are concerned, we conclude that the legal effect of the transactions affecting the deed to appellants of January 1, 1937, is the same as though appellee himself had executed the deed direct to appellants and retained it without delivery. Since the preponderance of the evidence warrants the conclusion that the deed was void for want of delivery, the deed from Earl Hyden and wife to appellee dated November 7, 1944, vested title to the land in appellee as against the claims of appellants.

It follows that the trial court correctly cancelled the deeds to appellants dated January 1, 1937, and December 20, 1946, and the decree is accordingly affirmed.

MECHANICS LUMBER COMPANY *v.* ROARK.

4-9016 224 S. W. 2d 806

Opinion delivered December 5, 1949.

[redacted]

Wright, Harrison, Lindsey & Upton, for appellant.

Digby & Tanner, for appellee.

GEORGE ROSE SMITH, J. On September 21, 1944, the appellee fell from a ladder while at work and sustained a broken hip and a broken heel. He filed a claim under the Workmen's Compensation Act and received compensation payments for eighty-four weeks. In December, 1946, it was determined that the appellee had pernicious anemia, and in the following February he filed a claim for additional compensation. The Commission denied the second claim upon the ground that neither the original injury nor the attendant hospitalization caused or contributed to the appellee's anemia. On appeal the circuit court reversed the order and allowed the claim.

The issue before the Commission was one of fact. Four physicians testified. Dr. Shuffield had treated the appellee after his injury but had not examined the patient after it was known that he had anemia; so we do not regard Dr. Shuffield's testimony as bearing directly on the issue. Dr. Phipps, who was the appellee's physician when the diagnosis of anemia was made, testified that in his opinion the fracture or the two-month period of consequent immobilization in a cast brought about the appellee's present disease. He stated that

the cause of pernicious anemia is unknown, but he found a logical connection between a bone injury and a disease affecting the red corpuscles, for the corpuscles are formed in the bone marrow.

After the first hearing the Commission directed that the claimant be examined by two specialists, Dr. Greutter and Dr. Watson. Both these physicians reported that there was no causal connection between the original injury and the existing malady. They agree with Dr. Phipps' statement that the cause of pernicious anemia is unknown. The onset of the disease is usually a gradual process. Ordinarily it first manifests itself in people in their fifties or later periods of life. Appellee was sixty-seven when the condition was first recognized. In response to questions by members of the Commission Dr. Greutter said there is a speculative possibility that the accident or the immobilization hastened the onset of the disease, but he could not state as his professional opinion that this was a probability. Dr. Watson said that he was unable to associate the pernicious anemia with the trauma.

Thus it is seen that the testimony of the medical witnesses is in direct conflict. One finds a causal connection between the original injury and the disease. Another admits the possibility but doubts if there was in fact any connection. The third does not recognize the possibility. As we have frequently said in situations of this kind, such conflicting testimony presents a question of fact to be determined by the Commission. Had the Commission chosen to accept Dr. Phipps' theory, neither this court nor the circuit court would have had the power to set aside an award of compensation. But the Commission took the opposite view, and the courts are without authority to reverse its conclusion. *J. L. Williams & Sons, Inc.*, v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82.

The judgment is reversed and the cause remanded with instructions to affirm the Commission's action.

FRIEDMAN *v.* HAMPTON.

4-9008 224 S. W. 2d 794

Opinion delivered December 5, 1949.

[redacted]

R. B. Chastain, for appellant.

Harper, Harper & Young and *Pryor, Pryor & Dobbs,* for appellee.

GRIFFIN SMITH, Chief Justice. I. J. Friedman is a licensed attorney of Fort Smith who deals extensively in real property. E. S. Friedman is his wife, and J. F. White, a resident of New York, is the married daughter

of the two. T. R. Parks, Negro, is employed at a mine, and prior to trial of the case at bar became separated from his wife, Elizabeth.

By contract of March 1, 1945, E. S. Friedman "bargained to sell" to T. R. and Elizabeth Parks "and unto their heirs and assigns" the house and lot identified as "523 10th St., City Addition to Ft. Smith", for $2,500. Title was retained until all payments should be made, and a lien in favor of the seller was created "on all personal property now in or to be placed in said house". The language creating the lien was written into a prepared form in a way that left clarity dangling by an obviously insecure lifeline, as may be observed from the footnote.[1]

In her complaint of December 31, 1948, Nell Hampton alleged that T. R. and Elizabeth Parks had by indorsement of November 4th, for a valuable consideration, assigned the contract to her, and under this assignment she acquired all rights of the purchasers. Her suit was to require the seller to accept payment of any balance the Court found due, and to compel execution of a deed. I. J. Friedman, sometimes signing his communication "owner" of the property, and on other occasions subscribing as agent of his wife, had demanded possession, coupled with a statement that the property could be sold for $5,000. As a matter of fact, the Friedmans joined in a deed November 19, 1948, conveying to Jeanne F. White, their daughter.

The answer filed on behalf of I. J. Friedman March 1, 1949, alleged that he sold the property to the Parks

[1] The entire sentence reads: "The [Friedmans] have this day bargained to sell unto the [Parks] and unto their heirs and assigns, the following described real estate, situated within the County of Sebastian, Arkansas, to-wit: Lot 523 No. 10th St., City of Ft. Smith, Ark., for the price and sum of $2,500, of which the said [Parks] have paid given a lien on all personal property now in or to be placed in said house, including all other payments dollars cash in hand, and have executed their joint notes of even date herewith, each for the sum of $2,500, bearing interest at the rate of 8% per annum from the date until paid, and payable as follows: $20, payable the 1st day of each month thereafter until paid in full, with 8% interest per annum from date until paid, also taxes, ins., int., water and all necessary repairs to keep the place in good condition. The $20 per month is to include payments for everything [the Parks] have to pay [to the Friedmans] but to be added to the principal and all to become of this contract."

for $2,500, payable $20 March 1, 1945, and $20 on the first of each month thereafter until paid in full, "with interest at 8% per annum from date until paid". Title to said property was retained by I. J. Friedman. Soon after the contract was made Parks' wife left him, taking with her some of the household goods upon which a lien had been impressed, hence, as to Elizabeth, she had abandoned the undertaking. Although T. R. remained "in the house", he made default by failing, during 1945, 1946, and 1947, to pay insurance, water bills, and taxes. He also failed to pay the monthly installments when due, and money paid by an insurance company to Parks covering storm and water damages was "converted". In addition, repairs were not made, necessitating expenditures by the seller, etc.

Friedman further alleged that on February 3, 1947, he gave notice that the contract had been breached, and coupled this notice with a demand for possession. Again —February 20, 1948—there was written demand for surrender of the property, effective March 1. What is claimed to be a copy of this notice was filed as an exhibit, and "pursuant to this notice T. R. Parks surrendered possession . . . to I. J. Friedman, but was to remain in said dwelling house as a tenant and pay a monthly rental of $20, payable in advance". On January 30, following, Parks is alleged to have deposited $10 to Friedman's account in City National Bank, causing the receipt to be marked "rent". Parks had requested the bank teller to make similar indorsement on all deposit slips. Friedman tendered a copy of the letter he claimed to have written January 31 acknowledging the $10 deposit, but referred to the payment as having been made "today".

The acceleration clause of the contract is copied in the margin.[2]

[2] ". . . But if the purchase money . . . is not paid at the time and in the manner herein specified, [then] upon the first default made in said payments, all of said notes remaining unpaid shall at once become due and payable, and the obligations resting on [Friedman] shall become null and void, and the money theretofore paid on account of said purchase shall remain with and be the property of [Friedman] and shall be considered as so much rent paid by [Parks] for the use of said property from the date of this instrument to the date of such default in payment."

Decretal findings were that when the contract was made, title was in I. J. Friedman, who held for the benefit of his wife. As agent for Mrs. Friedman, and acting for himself, I. J. Friedman placed Parks in possession. Actual payments had equaled $20 per month through November, 1948. Mrs. Hampton's tender of contractual obligations was refused, as was her offer to pay all balances as though each item were currently due. Property of relatively small value, consisting of individually-owned bedclothing, was taken by Elizabeth Parks when she left her husband. If this constituted a breach of the contract, said the Court, subsequent acceptance of payments with knowledge of what had occurred constituted waiver. While monthly payments were not regularly made, forfeiture because of delinquencies had been condoned; nor had money paid by the insurance company for storm and water damages been converted. There was an express finding that Parks did not agree to surrender possession as purchaser, hence the relationship of landlord and tenant was not created. When Friedman was given credit for taxes, insurance, water rentals, repairs, interest, etc., the net balance was $2,688.98.

In a motion asking for amendment of the decree, Friedman alleged that the contract did not provide for a lump sum payment, but, rather, for $20 per month, "which includes insurance, taxes, water rent, and repairs". In a second effort to reopen, tender was made of deposit slips, showing *prima facie,* that beginning with January 23, 1948, and concluding with October 8th, ten "rent" deposits were made, aggregating $95. Before January the bank's indorsement had been, "On contract".

I. J. Friedman's explanation of the contract is that prior to March, 1945, because of prolonged illness, he was compelled to discontinue the practice of law, in which he had been engaged since 1913. Ownership of rent houses—most of them being in poorly developed areas—necessitated supervisory work that Friedman could not do, and since Mrs. Friedman did not want to personally collect from tenants, it was agreed between

husband and wife that all tenants should be given an opportunity to purchase on a basis comparable with rent; hence low valuations were fixed. When a sale proposal was made to Parks and his wife, a printed form was submitted in duplicate. The tentative buyers declined to sign unless all items of upkeep, such as taxes, insurance, water rental, etc., were included. This, say the Friedmans, "in effect made the contract a lease for life." Certain changes are alleged to have been made on the contract copy left with Elizabeth Parks.

There was introduced as trial evidence a so-called Homestead Affidavit, conformable to Act 247 of 1937, and Amendment No. 22 to the Constitution. It is dated April 6, 1944, and was signed by T. R. Parks, who assured authorities he was sole owner of the property, hence as a homestead it was tax exempt to the extent of the valuation fixed by law. This transaction is emphasized by appellee as evidence of Friedman's purpose to use Parks as an instrumentality of convenience, and as tending to impeach the claimed course of fair dealings.

Significant, also, is the statement of account, showing the amount Friedman says was due January 20, 1948. Listing the $2,500 note, interest for a year to March 1, 1946, was $200; insurance, $16.50; water, $60, and taxes, $18.88, the total being $2,795.38, against which $240 representing twelve $20 payments was credited. Without incurring any expense for repairs or upkeep, the year-end balance was $55.38 greater than in the beginning. Interest on $2,555.38 was then charged to March 1, 1947, ($204.43) and this, with water and taxes as in 1946, brought the total to $2,855.19, showing a balance of $2,615.19 after payments of $240. Then, for the first *ten months* of 1948, interest of $192.39 was charged. With other items the total was given as $2,896.56, with credits of $185.00, leaving a net balance of $2,711.56. Although the point is not raised by appellee, there is an apparent interest overcharge of $18.05. The balance of $2,615.19 is taken as a basis for calculations for a period of ten months, with $192.39 the result. This should be $174.34, reducing the total from $2,711.56 to $2,693.51. However,

other computations were made by the trial court in the light of testimony legally sufficient to sustain the final total of $2,688.98 arrived at.

We think the Chancellor correctly found that the contract, (in the hands of Negroes as to whom the proof shows ignorance and a reliance upon Friedman) was sufficiently ambiguous to justify Parks in believing that necessary repairs would be made by the sellers, and that monthly payments of $20 would be the extent of affirmative obligations, hence the letter of February 3, 1947, alleging a failure to maintain repairs and attempting to terminate the contract, did not accomplish the purpose intended; nor is there sufficient evidence to overturn the trial Court's finding that Parks did not agree to surrender his rights and become a tenant. The contention that Elizabeth Parks removed her bedding is too prurient for serious consideration. According to I. J. Friedman's correspondence, the real property had attained a value of $5,000, or $4,500 if sold by a commission agency. After Elizabeth Parks moved from the premises, her husband rented rooms for $40 per month. It is Friedman's thought that increased payments should have been made when Parks' income was thus augmented. The roomers were more or less transient and this income was but temporary. Still, the answer is that Parks had an equitable interest, and a right to let the space.

When it was demonstrated that payments under the contract were insufficient to discharge the assumed obligations, Friedman could not convert the agreement "into a perpetual lease" by standing on the alternative proposition: that having failed to oust Parks, the original status should be decreed. Such a course would make the assignee pick up where Parks left of, with a debt more than two hundred dollars greater than in the beginning. It would overlook the financial absurdity that by no process of rationalization could the seller have intended the agreement to be what the title expressed—"A Contract to Sell Real Estate".

In these circumstances the Chancellor was justified in reforming the instrument by a requirement that the seller do what he persuaded the buyer to believe—that a home could be ultimately acquired.

Affirmed.

STROUD *v.* FRYAR.

4-9082 225 S. W. 2d 23

Opinion delivered December 12, 1949.

Yingling & Yingling, for appellant.

Gordon Armitage, for appellee.

ED. F. MCFADDIN, Justice. This case grows out of a situation created by the adoption of Initiated Act No. 1

of 1948,[1] commonly called the School District Reorganization Act.[2]

Appellants, Stroud *et al.,* brought suit in the chancery court of White County against appellees, Fryar, *et al.,* who are the members of the White County Board of Education. The amended and substituted complaint alleged: that on June 1, 1949, there were eleven school districts in White County, each having less than 350 children of school age on March 1, 1949, as reflected by the 1948 school enumeration; that by reason of Initiated Act No. 1 of 1948 these eleven districts were automatically formed into one school district (which we will refer to as the "United" District); that section 2 of said Initiated Act requires the County Board of Education to call an election to choose the directors of the United District; that instead of calling such election, the White County Board of Education, by order of June 2, 1949, dismembered the United District by annexing all, or the greater portion, of its territory to several other school districts that were not a part of the United District; and that the County Board of Education thereby rendered nugatory section 2 of the said Initiated Act. The prayer of the complaint was that the orders dismembering the United District (by annexing its territory to other districts) be set aside; and that the defendants be required to call an election to choose the school directors of the United District, as provided by section 2 of the Initiated Act.

The defendants filed a demurrer, which the chancery court sustained "for want of jurisdiction of this court of this cause of action." The plaintiffs did not suggest that the demurrer be treated as a motion to transfer to law, nor did they request that the case be so transferred. Rather, when the complaint was dismissed "for want of jurisdiction," the plaintiffs excepted and prayed an appeal to this court. So the question here

[1] The Act in its entirety may be found on page 1414, *et seq.,* of the printed acts of 1949.

[2] Acts 324 and 452 of the 1949 Legislature involve situations arising out of Initiated Act No. 1 of 1948. Those acts and their validity are not germane to the questions here involved. They are mentioned as a matter of information.

is whether the chancery court had jurisdiction, tested by the allegations of the plaintiffs' amended and substituted complaint.

At the outset, it is clear that (1) if the White County Board of Education was required at all events to call an election under section 2 of the Initiated Act, then the appellants are entitled to some form of relief; but that (2) if the Initiated Act allows the County Board of Education to proceed as it did, then defendants cannot be enjoined. So the question is, whether the Initiated Act allows the County Board of Education to proceed as the complaint alleges that it did in this case. We are therefore required to ascertain the power of the County Board of Education under the Initiated Act; and in so doing we study the entire Act to ascertain the legislative[3] intent.

Initiated Act No. 1 of 1948 was adopted by the People at the general election on November 2, 1948. In effect, it classifies school districts, as regards the number of children of school age therein, to be of two kinds: (1) those containing 350 or more such children on March 1, 1949, as reflected by the 1948 school enumeration; for brevity, we refer to these as "Large" Districts; they are not imperatively affected by the Act; and (2) those containing less than 350 such children on March 1, 1949, as reflected by the 1948 school enumeration; for brevity, we refer to these as "Small" Districts; they are the ones directly and vitally affected by the Act.

Section 1 of Initiated Act No. 1 provides, in effect, that on June 1, 1949, there would be formed in each county a United District,[4] to be composed of all the "Small" Districts in such county. From the adoption of the Initiated Act until March 1, 1949, each Small District was privileged to proceed towards annexation or consolidation independent of the Initiated Act. In other words, the Small Districts were given a period of grace in

[3] Even though this was an initiated act, nevertheless, we use the expression "legislative intent", because the people take the place of the legislature in the adoption of initiated acts.

[4] As previously explained, we use the term "united" to indicate the district that was automatically formed by the union of all the small districts.

which to endeavor to join with other districts under existing laws. But when the United District came into existence on June 1, 1949, the Small Districts were thereby automatically integrated into it, and lost their previous status as separate school districts.

Section 2 provides for the election of school directors in the United District. The County Board of Education is to call the election, to be participated in by "qualified electors residing in the territory of the new[5] district."

Section 3 requires the County Board of Education to "study the entire school program of its county"; and then the Act contains this highly important language:

"If it is found that some or all portions of the new (1) School District as created herein can be served more effectively and more efficiently by another district or districts, the County Board of Education with the consent of the Board of Directors of the school district to which such annexation is proposed, is hereby authorized and directed to make such annexation or annexations."

This quoted language gives the County Board of Education power to take any or all territory of the United District and annex such territory to any Large District or Districts, conditioned only on the consent of such larger Districts so affected; and conditioned on approval of the State Board of Education if annexation be across a county line. There is no provision in the Initiated Act requiring the County Board of Education—before the directors could have been chosen for the United District—to obtain the consent of any of the patrons in the United District as a prerequisite to such annexations. This conclusion is determinative of this case, because the dismemberment of the United District was accomplished before there could have been any election of directors in the United District. We use the election of directors as the decisive date in this case, because the action of the County Board of Education here challenged occurred before any such election could have been held. We are not here required to decide whether

[5] This means the United District, as we use that term.

school consolidation or annexation laws, existing independently of Initiated Act No. 1, would apply in matters of annexation *after* the directors have been chosen for the United District. That question is reserved.

Section 3 of the Initiated Act also provides for appeal, reading:

"Appeals from the action of any County Board of Education on matters of annexation as authorized herein may be filed within thirty days from the date of such action with any court of competent jurisdiction."

Section 4 says "*except as otherwise provided in this Act* all matters of reorganization and annexation of school districts undertaken under the provisions of this Act shall be in accordance with existing laws." (Italics our own.) The italicized language thus clearly exempted from the provisions of the existing laws such reorganizations and annexations as might be accomplished under section 3 of the Initiated Act before the school directors could have been chosen in the United District; and this italicized language emphasizes the conclusion we have reached in regard to the power of the County Board of Education in the case at bar.

So, to summarize: The County Board of Education of White County had the power, under Initiated Act No. 1, to proceed in the manner alleged in the complaint. The wisdom of the Initiated Act is not a matter for the courts to decide; the People made that decision in adopting it. The constitutionality of the Act is not argued in this litigation, and it does not necessarily present itself. In view of the facts stated in the complaint—*i.e.*, the dismemberment of the United District before its directors could have been elected—appellants have no grounds for seeking an election in such district.

It follows that the chancery court ruled correctly in denying the appellants' petition for injunction. Affirmed.

ARKANSAS NATIONAL BANK OF HOT SPRINGS, TRUSTEE *v.* MAYER.

4-9023 225 S. W. 2d 331

Opinion delivered December 12, 1949.

Rehearing denied January 16, 1950.

Wootton, Land & Matthews, for appellant.

H. A. Tucker and *C. T. Cotham,* for appellee.

GEORGE ROSE SMITH, J. Thekla Mayer, a resident of Hot Springs, died in 1921. By her will Mrs. Mayer created a trust and directed that the trust income be used to pay certain annuities (totaling $2,400 a year) to four named nieces and nephews. These payments were made until 1932, but since that year the income has not been sufficient to pay the annuities in full. In 1947 the four beneficiaries brought this action for an interpretation of the will. The chancellor construed the will to mean that the *corpus* of the trust may be invaded whenever the annual income is insufficient to pay the entire $2,400.

To compensate for deficient payments in the past the chancellor gave the appellees judgments totaling $18,170, to be paid from the *corpus,* and directed the trustee to pay the full amounts in the future until the trust terminates either by its terms or by exhaustion of the trust estate. The trustee has appealed.

Mrs. Mayer's will is a fairly long document that need not be quoted in its entirety. The bulk of the estate, after the payment of debts and legacies, is bequeathed to the appellant as trustee. Then follow these paragraphs:

"*Item nine.* I direct that said trustee shall keep my estate together and use so much of the income therefrom as may be necessary to carry into effect the following provisions:

"I direct that it pay to each of my nephews and nieces, the children of my brother, Theodore Mayer, an annuity of Six Hundred Dollars ($600) per year; said amounts to be paid to each of them in monthly installments of Fifty ($50) Dollars each and the receipt from said beneficiary shall be sufficient voucher for said trustee.

"The names of said nephews and nieces being Matilda R. Mayer, Fannie Mayer, Leopold Mayer and Simon J. Mayer.

"I further will and direct that said amount shall be paid to my said nieces and nephews above mentioned as set forth as long as said named persons shall live.

"At the death of any one of said beneficiaries, then the amount such person has been receiving under the provisions of this my last will shall be equally divided among the surviving beneficiaries, thus increasing the annuity of such survivors by said amount. This plan shall continue as long as any of said four named persons shall live so that the last of said persons living will receive (at the death of all of the others) the annuity provided by this will, to-wit: the sum of Twenty-Four Hundred ($2,400) Dollars per annum, and when any one or more of them has died the said sum of $2,400 to be

distributed equally among the survivors. Provided, however, that in the event that any one of said four named nieces and nephews shall die leaving a child or children surviving him or her, the proportion which would be paid to the deceased one of them shall be paid to the child or children of such deceased one or to the duly authorized guardian of such child or children and be expended for the use and benefit of such child.

"*Item ten.* At the death of all or the last of my said nieces and nephews mentioned and described in item eight of this my will, I will and direct that said trustee shall divide my estate equally among the children of said nephews and nieces, said children to take *per stirpes* and not per capita, and said property to vest in them absolutely and forever.

"*Item eleven.* I most earnestly request the trustee herein named to care for my brother, Theodore Mayer, who is of unsound mind. Said trustee is to furnish to my said brother any small amount of spending money he may need, any clothing, food or delicacies which he may require for his comfort and pleasure, all of which is left to the discretion and good judgment of said trustee. The amounts thus expended are to be taken from the income of my estate. At the death of my said brother said trustee is to have him properly buried in West Point, Georgia, as is set forth in another item of this will. All the expenditures authorized in this will for my brother Theodore are to be a first charge against my said estate and are to be paid even at the expense of the other legacies and expense authorized herein."

The appellees, in defending the trial court's construction of the will, rely principally upon the characterization of each beneficiary's interest as an "annuity." Authorities are cited to show that an annuity is a fixed sum of money payable periodically, as distinguished from "income" or "profits," which may vary in amount from year to year. We shall not take time to analyze the many cases cited. No court has ever held that the use of the word "annuity" necessarily and invariably authorizes withdrawals from the trust capital to supplement net

income. The use of the term is certainly an indication that the settlor of the trust contemplated a fixed income to the beneficiary, but it is not conclusive. As Professor Bogert has pointed out, the problem is still that of ascertaining the fundamental purpose of the donor. Bogert on Trusts and Trustees, § 813.

As an additional reason for affirmance the appellees rely on the fact that during Mrs. Mayer's lifetime she sent ten dollars a month to Simon Mayer, one of the beneficiaries, who is partially disabled. It is true that this generosity on the part of Mrs. Mayer indicates to some extent a desire to provide for Simon Mayer's support, but again the implication is not conclusive. Item seven of the will gave Simon a life estate in Mrs. Mayer's homestead. As far as the annuities are concerned, he is treated just the same as the other three beneficiaries. It is evident that any especial interest that the testatrix had in Simon's welfare was demonstrated by the life estate in the homestead rather than by the annuity.

Thus there are two intimations, neither of which is decisive, that the testatrix intended to authorize inroads upon the *corpus* to supplement reduced income. When, however, we examine the will for indications of the opposite intention, we find the language so compelling that we have no hesitancy in deciding that the power to make withdrawals from the principal does not exist. There are at least four factors in the testamentary scheme that point unmistakably to this conclusion.

First, the testatrix directed in Item nine that the trustee "shall keep my estate together." This instruction clearly means that the estate is to be kept intact for the duration of the trust. But withdrawals from capital almost inevitably become progressively larger each year, for the income naturally decreases as the principal is diminished. In this case the *corpus* was worth less than $37,000 when this suit was brought. If about half that amount is used to pay the appellees' judgments and the other half with its income is used to make payments of $2,400 a year, it is pretty certain that the estate will be

exhausted within about ten years. Yet the testatrix has directed that her estate be kept together.

Second, in the same sentence in Item nine the testatrix went on to say that the trustee should use "so much of the income . . . as may be necessary" to provide the annuities for her nieces and nephews. The whole annuity plan follows and depends upon the introductory statement that it is to be accomplished by the use of income. Of course this statement could have been qualified by subsequent language authorizing a recourse to principal, but we think that something more than a mere reference to annuities would be needed to broaden the original limitation.

Third, by Item ten a remainder is created in the children of the life beneficiaries. It is significant that this item and the preceding one use the identical phrase; that is, Item nine directs that "my estate" be kept together, while Item ten directs that upon the death of the last life tenant "my estate" be divided among the remaindermen. Together the two clauses establish a unified scheme, but it is a scheme that would be nullified if withdrawals from capital were permitted.

Fourth, by Item eleven the testatrix provided for the support of her insane brother, Theodore, and stated explicitly that his care is to be a first charge against the estate, to be honored even at the expense of the other beneficiaries. The record does not disclose whether Theodore is still alive, but for the purpose of this case it makes no difference. Our task is to determine Mrs. Mayer's intention at the time she executed this will, nearly thirty years ago. Her brother's welfare was her first consideration. Whether he is still alive is immaterial in ascertaining with what intent Mrs. Mayer chose the language of her will. In the absence of any provision directing a modification in the trust upon Theodore's death, we must assume that his sister meant for her original plan to continue for the duration of the trust. Yet, as we have seen, inroads upon the *corpus* would consume the estate within a few years. When the estate is gone Theodore will be—or would be if he had survived

—without any means of support. Thus the result of capital invasions would be to defeat what the testatrix clearly stated to be her primary intention.

We conclude that the chancellor erred in his construction of the will. The decree is accordingly reversed.

JONES *v.* CALDWELL.

4-9013 225 S. W. 2d 323

Opinion delivered December 12, 1949.

Barber, Henry & Thurman, for appellant.

Rose, Dobyns, Meek & House, for appellee.

DUNAWAY, J. Did enactment of § 24 of the Uniform Sales Act change the common-law rule in Arkansas that an infant may disaffirm a contract of sale of personal property and recover the property from a third party who was an innocent purchaser for value without notice from the infant's transferee? We hold that § 24 of Act 428 of the Acts of the General Assembly of 1941 (Ark. Stats., 1947, § 68-1424) did change the common-law rule and that is determinative of this appeal.

On October 28, 1948, Renaford Caldwell, a minor, by Rena S. Caldwell, as next friend, brought this action against Herbert and Kent Jones, used car dealers, to recover possession of a Ford automobile. Plaintiff alleged his original purchase of the car in Hot Springs and his subsequent sale of it to one Harold Duke, who in turn sold it to defendants. Three defenses were set up: (1) The minor plaintiff was not owner of the car, but it was bought by an uncle, an adult. In selling the car, plaintiff merely acted as agent for his uncle, and therefore could not maintain this action. (2) If the plaintiff was in fact the owner of the car, it was a necessary. (3) The car had passed into the hands of an innocent purchaser and § 24 of the Uniform Sales Act prevented recovery by the minor.

Section 24 of Act 428 of the Acts of 1941 reads as follows: "*Sale by One Having a Voidable Title.* Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title."

The trial court submitted to the jury two special interrogatories in the form of a special verdict:

1. "Q. Did Renaford Caldwell own the 1948 Ford coupe, or have a special interest therein entitling him to the possession thereof, at the time he traded it to Harold C. Duke?

A. Yes.

2. Q. Was the 1947 Ford coupe received by Renaford Caldwell from Harold C. Duke, Jr., a necessary to Renaford Caldwell?

A. No."

The jury, after answering the questions as shown, returned a general verdict in favor of the defendants. Upon plaintiff's motion for a judgment *non obstante veredicto,* the court set aside the general verdict and entered judgment for plaintiff. From that judgment comes this appeal.

The court refused the following instruction requested by appellants:

"If, from a preponderance of the evidence in this case, you should find that the defendants purchased the automobile in question in good faith, for value and without notice of the seller's defect of title, if any, then your verdict will be for the defendants."

This instruction was based upon appellants' contention that under the quoted section of the Uniform Sales Act, appellee could not recover if the jury found appellants to be innocent purchasers for value without notice of the voidable title Duke had acquired from Renaford Caldwell.

There is no dispute as to the applicable law prior to enactment of the Uniform Sales Act. A minor's contracts are voidable, not void. *Tobin* v. *Spann,* 85 Ark. 556, 109 S. W. 534, 16 L. R. A., N. S. 672; *Davie* v. *Padgett,* 117 Ark. 544, 176 S. W. 333. An infant could disaffirm his contract of sale and recover his property, even from an innocent purchaser for value without notice from the infant's transferee. *Harrod* v. *Myers,* 21 Ark. 592, 76 Am. Dec. 409; *Rowe* v. *Allison,* 87 Ark. 206, 112 S. W. 395.

Against this background the Legislature adopted the Uniform Sales Act. Section 24 plainly provides that any seller of goods who has a voidable title thereto may pass good title to one who buys in good faith, for value, and without notice of the seller's defect of title. There is

no exception made in favor of infants. We think the Legislature meant what it said in plain, direct language. Had the General Assembly intended any exception in favor of infants, the Act would have included one.

It is argued that § 2 of the Uniform Sales Act (Ark. Stats., 1947, § 68-1402) recognized the right of an infant to rescind even against a *bona fide* purchaser for value. That section reads as follows:

"*Capacity—Liabilities for Necessaries.* Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

"Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

"Necessaries in this section means goods suitable to the condition in life of such infant or person, and to his actual requirements at the time of delivery."

Thus in dealing with the question of capacity to make contracts, when a special rule as to infants was contemplated, it was specifically stated. This clearly shows that it was recognized that the rights of infants would be affected by the Act. We think the mention of infants in § 2 and not in § 24 indicates an intent *not* to preserve the common-law exception, rather than the view urged by appellee.

Our conclusion is supported by Professor Williston, who was one of the drafters of the Uniform Sales Act. In his work on Contracts he says:

"Though a transaction with an infant is merely voidable, it is unlike contracts voidable for fraud or other equitable ground in this respect; even a *bona fide* purchaser for value of property formerly belonging to an infant, without notice that the seller acquired title directly or indirectly from an infant, cannot retain the property if the infant elects to rescind his transfer of title . . . since the personal power of the infant is a legal

power, which can be exercised against anyone. This rule has, however, been changed in the Uniform Sales Act, which makes no exception in favor of infants to the rule that a *bona fide* purchaser for value from one who has a voidable title acquires a good title. . . ." 1 Williston on Contracts (1936 Ed.), § 233. To the same effect see 2 Williston on Sales (1948 Ed.), § 348.

We have found only two cases from other jurisdictions where the courts have specifically discussed the effect of § 24 of the Uniform Sales Act on the common-law rule here under consideration. In both instances they have expressed the view taken by this court. See *Carpenter* v. *Grow,* 247 Mass. 133, 141 N. E. 859; *Casey* v. *Kastel,* 237 N. Y. 305, 142 N. E. 671, 31 A. L. R. 995. Although the Sales Act was not specifically mentioned in the opinion, the Supreme Court of Iowa, where the Uniform Sales Act had been adopted, stated in *Kuehl* v. *Means,* 206 Iowa 539, 218 N. W. 907, 58 A. L. R. 1359, that where a minor parts with his property on a contract valid until disaffirmed, third parties becoming innocent purchasers thereof for value are entitled to protection as such.

Under our decision, appellants were entitled to the instruction requested, and it was error for the court to refuse it. The judgment is reversed and the cause remanded for a new trial.

Mr. Justice McFaddin dissents.

Mr. Justice George Rose Smith not participating.

Quality Motors, Inc., *v.* Hays.

4-9025 225 S. W. 2d 326

Opinion delivered December 12, 1949.

Frank Snellgrove, Jr., and *Charles Frierson,* for appellant.

Ivie C. Spencer and *Homer E. McEwen,* for appellee.

DUNAWAY, J. Johnny M. Hays, by his next friend, Dr. D. J. Hays, brought this suit to disaffirm his purchase of a Pontiac automobile and recover the purchase price of $1,750 from defendant Quality Motors, Inc.

On January 21, 1949, Johnny Hays, a minor sixteen years old, went to the Quality Motors, Inc., to inspect and test a Pontiac car. When E. C. Buttry, salesman for Quality Motors, raised the question of Johnny's age, he was told that Johnny's father in New York had sent him the money to buy the car. The salesman then refused to sell unless the purchase was made by an adult. Johnny left the salesman and returned shortly

with Harry R. Williams, a young man twenty-three years of age, whom he met that day for the first time. Johnny then gave to Quality Motors, Inc., a cashier's check on the Citizens Bank of Jonesboro, in the sum of $1,800 which was made payable to him, in payment for the car. A bill of sale was made to Harry Williams. The salesman then recommended a Notary Public who could prepare the necessary papers for transferring title to the car to Johnny, and drove the two boys to town for this purpose. Williams did transfer title, and the Pontiac was delivered by the salesman to Johnny at Arkansas State College, where Dr. Hays, Johnny's father, was a teacher.

When Dr. Hays learned of his son's purchase he called E. C. Perkins, one of the owners of Quality Motors, Inc., on the night of January 25, 1949. Perkins knew nothing of the transaction and suggested that Dr. Hays call the motor company the next morning. On the morning of January 26, Dr. Hays talked to the salesman who had handled the transaction, and asked that defendant company take the car back. This the defendant refused to do. No physical tender of the car was made; Johnny had it out of town. The car was returned to Jonesboro on January 26, when Dr. Hays had his son arrested; it was then stored in a hangar at Arkansas State College. On January 27 Dr. Hays again called Quality Motors, Inc., and was informed the car would not be taken back. He then went to the office of his attorney where he once more called Quality Motors, Inc., and was told by W. E. Ebbert, one of the owners, that they would not accept the car and return the consideration for its purchase, but would try to sell it for him if they could.

Suit was filed on February 2, 1949. That same day plaintiff's attorney wrote the defendant a letter stating that return of the car had been refused, but that the automobile was in storage and would be turned over to Quality Motors, Inc., at any time it would be accepted.

On February 12, 1949, while Dr. Hays was out of town, Johnny found the car keys and bill of sale and took the car to Kentucky where his grandmother lived.

On March 21, he returned to Jonesboro and asked Quality Motors for an estimate on repairs to the car which had been in a wreck. On this occasion he had an extended conversation with Buttry and Ebbert, who tried to persuade him to leave the car there and not go back to Kentucky as he told them he planned to do at once. At this time Quality Motors was still refusing to accept the car and return the purchase price. The suggestion was that the car be left with them for repairs "until this thing is settled." Johnny made a telephone call to his mother and immediately departed for Kentucky where the car was in a second and more serious wreck. At the time of trial the car was in Kentucky, subject to a repair bill for $557, and an attachment for $125, and not in running condition.

The special chancellor ordered the plaintiff to return the car within seven days and withheld final decree until this was done. When the wrecked car was returned, recovery of $1,750 from defendant was decreed.

Defense of this suit was based on these contentions: (1) The sale was to Harry Williams, of lawful age, and not to Johnny Hays, a minor. (2) There was no proper tender of the car. (3) Johnny's action in taking the car after suit was filed to disaffirm the contract of purchase and in wrecking it twice were tortious acts for which he is liable. (4) A minor's contract can only be disaffirmed by the minor and the proof here shows he was resisting disaffirmance.

The special chancellor found that the car was to all intents and purposes sold to the plaintiff, a minor. Appellant does not question this finding on appeal.

Appellant is correct in asserting that the right to avoid contracts is personal to the infant and that he must make the election to disaffirm his contract. *Davie* v. *Padgett,* 117 Ark. 544, 176 S. W. 333; *Crutcher* v. *Barnes,* 207 Ark. 768, 182 S. W. 2d 867. But it is also held in the *Davie* case that the infant's legal action must be brought by his next friend or guardian. In the case at bar Johnny Hays testified positively that he desired to disaffirm his purchase and return the car to the seller.

The record does not support appellant's argument that the father is attempting to disaffirm over the objections of his infant son. The action was properly brought.

The law is well settled in Arkansas that an infant may disaffirm his contracts, except those made for necessaries, without being required to return the consideration received, except such part as may remain in specie in his hands. [But see No. 9013—*Jones et al.* v. *Caldwell,* ante, p. 260, 225 S. W. 2d 323—where the rights of an innocent purchaser are discussed.] *Stull* v. *Harris,* 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741; *Arkansas Reo Motor Car Co.* v. *Goodlett,* 163 Ark. 35, 258 S. W. 975. The facts in the latter case are similar to those in the instant case: A court of equity there decreed the recovery of the total amount paid on a car by a minor who returned it in a wrecked and practically valueless condition.

We do not find any merit in appellant's contention that no proper tender of the car was made when appellee sought to disaffirm his purchase. The undisputed testimony shows that Dr. Hays and his attorney offered to return the car on several occasions, but were informed that appellant would not accept it. That it was not actually delivered to Quality Motors when the suit was filed is appellant's own fault. The law does not require that a tender be made under circumstances where it would be vain and useless. *Hollowoa* v. *Buck,* 174 Ark. 497, 296 S. W. 74; *Read's Drug Store* v. *Hessig-Ellis Drug Co.,* 93 Ark. 497, 125 S. W. 434.

Appellant's most serious contention is that the plaintiff is liable for damages to the car which occurred while he was driving over the country, after he had slipped the car from its storage place and while the suit to disaffirm was pending. In order to obtain any relief on this score, it must be shown that plaintiff was guilty of conversion in taking the automobile. Conversion is the exercise of dominion over property in violation of the rights of the owner or person entitled to possession. *Thomas* v. *Westbrook,* 206 Ark. 841, 177 S. W. 2d 931. In advancing this argument appellant is in an inconsistent position. In its answer, appellant denied sell-

ing the car to appellee, and was stoutly insisting that it did not have to take the car back. If that was true appellant was not the owner of nor entitled to possession of the car. Until the court decreed return of the car and recovery of the consideration paid, plaintiff still had title to the car. One cannot be liable for conversion in taking his own property.

The situation in the case at bar is easily distinguishable from that in *Smith* v. *Moschetti,* 213 Ark. 968, 214 S. W. 2d 73, relied upon by appellant. There Smith, a minor, bought an automobile with money furnished by Moschetti, with the agreement to deliver the car to Moschetti. Instead, Smith fraudulently converted the car to his own use. In affirming a judgment for the money advanced in purchasing the car we said (at p. 974): "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."

In the *Moschetti* case the minor held the car as trustee or bailee for the real owner against whom the tort was committed; in the instant case Quality Motors, Inc., was insisting at the time of the alleged conversion by Johnny Hays, that it did not have to accept return of the car. Ebbert, one of the owners of Quality Motors, Inc., testified that during his conversation with his employees in regard to keeping the car in the shop after the first wreck, he told them they could not make Johnny leave it. "Well, it's not our car," was his statement at that time. In these circumstances it certainly cannot be said appellee's possession was that of a bailee or trustee.

Appellant knowingly and through a planned subterfuge sold an automobile to a minor. It then refused to take the car back. Even after the car was wrecked once, it was in appellant's place of business, and appellant was still resisting disaffirmance of the contract. The loss

which appellant has suffered is the direct result of its own acts.

The decree is affirmed.

COMBS *v.* EDMISTON.

4-9026 225 S. W. 2d 26

Opinion delivered December 12, 1949.

Geo. F. Edwardes, for appellant.

Charles H. Morton, Jr., and *Arnold & Arnold,* for appellee.

MINOR W. MILLWEE, Justice. Appellants are husband and wife and prosecute this appeal from an order of the Miller Probate Court denying and dismissing their petition to adopt a child. We will refer to the mother of the child as appellee, she having intervened in the adoption proceedings with her father as next friend.

Appellee was an unmarried nurse 19 years of age and resided in a nurses' home at Hodge, Louisiana, where the child in question was born on September 26, 1948. On the night of birth the child was taken to the Volunteers of America, a maternity home at Shreveport,

Louisiana. On September 28, 1948, the maternity home delivered the child to appellants who live near Fouke in Miller County, Arkansas.

Dr. Earnest Blume of Jonesboro, Louisiana, the attending physician, and two nurses, who were friends of appellee, testified that the child was taken to Shreveport at the insistence and with the consent of appellee. Appellee stated that she was under the influence of chloroform at the time and denied any recollection of having given such consent. On October 2, 1948, appellee went to Dr. Blume's office for a physical checkup and was presented with a written consent for the child's adoption. Appellee signed the instrument which was witnessed by Dr. Blume and F. S. Crowson. The instrument was also signed by a notary public who did not see appellee sign the paper, but testified that appellee acknowledged her signature and stated that she understood what she was signing. There was no affidavit attached to the instrument and appellee testified that she signed it without reading it after Dr. Blume represented to her that it was a birth certificate. The written consent was mailed to appellants by the Volunteers of America on October 5, 1948.

Appellee's father, a Baptist minister and timber contractor, residing near Hodge, Louisiana, learned of the child's birth about two or three weeks thereafter. The father and grandfather of appellee made several trips to Dr. Blume's office in an effort to locate the child and ascertain the contents of any writing appellee might have signed. They also made several trips to Shreveport, Louisiana, in an effort to locate the child. The authorities in charge of the maternity home followed a rule of not permitting the mother to ascertain the identity of the prospective adoptive parents. On January 22, 1949, Dr. Blume wrote appellee's father that he had been advised by a person connected with the institution that appellants had the child and their address was furnished. Within 48 hours after receipt of this information appellee, her father and grandfather appeared at appellants' home and asked for the child but appellants declined to surrender it.

The record does not show the date of the filing of appellants' *ex parte* petition for adoption in the Miller Probate Court. The petition was verified October 9, 1948, and alleged that appellee had signed a verified consent to the adoption and that said child would become neglected, delinquent and dependent unless adopted by appellants. On March 2, 1949, appellee, with her father as next friend, filed an intervention in which it was alleged that appellee was a minor under the laws of Louisiana; that she was not made a party or notified of the adoption proceeding; that she did not consent to the adoption and appellants had been so notified; that any alleged consent was not freely and voluntarily given and was obtained while appellee was ill, distressed, under duress and in a critical condition of mind and body; and that such alleged consent was withdrawn. It was prayed that a writ of *habeas corpus* issue for return of the child to appellee and that the petition for adoption be denied.

At the hearing on May 5, 1949, it was stipulated that appellants were of unquestioned moral standing and financially able to give the child the advantages of a good home. The proof also shows that appellee is from a good Christian home and there is no evidence of promiscuity on her part. After birth of her child appellee moved to Ruston, Louisiana, where she is employed as a nurse and resides with her aunt. Her parents reside near Hodge, Louisiana, and are also willing and able to provide a good home for the child.

The trial court found that the appellants were suitable in every respect to adopt the child and that they had properly complied with the laws relating to adoption. The court further found that appellee had signed a verified consent to the adoption, but that she withdrew her consent before the entry of an interlocutory order and that it would be to the best interests of both the child and appellants to deny the adoption.

For reversal appellants contend that the written consent of adoption signed by appellee became irrevocable and that the trial court, therefore, erred in holding

that such consent could be withdrawn before an interlocutory order was entered. Appellee insists that the consent herein was ineffective because it lacked mutuality, was not freely and voluntarily given and was not verified. She further contends that if the consent was validly executed, she had the right to withdraw it at any time before entry of a final decree of adoption.

We do not determine the correctness of the trial court's finding that appellant fully complied with our adoption statute (Ark. Stats. 1947, §§ 56-101 to 56-120, inclusive). Except in certain contingencies not involved in the instant case, § 56-106 requires "the written consent verified by affidavit" of the parents or, in the case of illegitimacy, of the mother. Section 56-108 provides that at the expiration of the 30 day period for defendants to file answers, as provided in § 56-104, the court shall proceed with a hearing and enter a temporary decree, and that the petitioners may apply for final decree after six months from the entry of said temporary decree. This section of the statute further provides that before a temporary decree is entered the court should find, among other things, "that there is proper consent to the adoption" and "that it is for the best interest of the child that such adoption be made."

There is some diversity of opinion among the authorities on the question of whether a natural parent, whose consent to the adoption of a child is a prerequisite to a valid adoption, may effectively withdraw such consent before the adoption has been finally approved by the court. There are two extensive annotations on the question in 138 A. L. R. 1038, and 156 A. L. R. 1011. The general rule is stated in the first annotation as follows: "The rule in a majority of the jurisdictions wherein the question has arisen is that a natural parent's consent to the proposed adoption of a child, duly given in compliance with a statute requiring such consent as a prerequisite to an adoption, may be effectively withdrawn or revoked by the natural parent before the adoption has been finally approved and decreed by the court. Re White, 300 Mich. 378, 138 A. L. R. 1034, 1 N. W. 2d 579; Re Nelms (1929), 153 Wash. 242, 279 P. 748. And see

State ex rel. Platzer v. *Beardsley* (1921), 149 Minn. 435, 183 N. W. 956; Re Anderson (1933), 189 Minn. 85, 248 N. W. 657; *Fitts* v. *Carpenter* (1939; Tex. Civ. App.), 124 S. W. 2d 420." See, also, 2 C. J. S., Adoption of Children, § 21 a(4).

In the second annotation in 156 A. L. R., *supra,* it is said: ". . . that the trend of the more recent authority is toward the position that where a natural parent has freely and knowingly given the requisite consent to the adoption of his or her child, and the proposed adoptive parents have acted upon such consent by bringing adoption proceedings, the consent is ordinarily binding upon the natural parent and cannot be arbitrarily withdrawn so as to bar the court from decreeing the adoption, particularly where, in reliance upon such consent, the proposed adoptive parents have taken the child into their custody and care for a substantial period of time, and bonds of affection, in the nature of a 'vested right,' have been forged between them and the child." The same trend is noted by the textwriter in the 1949 Cum. Annual Pocket Part to 2 C. J. S., Adoption of Children, § 21a (4), *supra.* But several more recent decisions are also there listed as following the general rule as first stated. Among these are *Green* v. *Paul,* 212 La. 337, 31 So. 2d 819; *Wright* v. *Fitzgibbons,* 198 Miss. 471, 21 So. 2d 709; Application of Graham, 239 Mo. App. 1036, 199 S. W. 2d 68; *French* v. *Catholic Community,* 69 Ohio App. 442, 44 N. E. 2d 113; Adoption of Capparelli, 180 Ore. 41, 175 Pac. 2d 153.

The principal cases cited in support of the trend away from the general rule are *Wyness* v. *Crowley,* 292 Mass. 461, 198 N. E. 758; *Lee* v. *Thomas,* 297 Ky. 858, 181 S. W. 2d 457; and In re Adoption of a Minor, 79 U. S. App. D. C. 191, 144 F. 2d 644. In the first two cases the mother waited more than 15 months after giving consent to the adoption and surrendering the child to petitioners before undertaking to withdraw consent. Matters of equitable estoppel were invoked against the mother in denying the right of withdrawal. The third case above cited involved the interpretation of an adop-

tion statute enacted by Congress for the District of Columbia.

It has also been said that, from a consideration of the cases generally, the question whether the natural parent may revoke consent previously given depends upon all the circumstances of the particular case, which may include such a variety of matters as the terms of the particular statute; the circumstances under which the consent was given; the length of time elapsing, and the conduct of the parties between the giving of the consent and the attempted withdrawal; whether the withdrawal was made before or after institution of adoption proceedings; the nature of the natural parents' conduct with respect to the child both before and after consenting to its adoption; the "vested rights" of the proposed adoptive parents with respect to the child; and, in some cases, the relative abilities of the adoptive parents and the natural parent to rear the child in a manner best suited to its normal development, and other circumstances indicative of what the best interests of the child require. Anno. 156 A. L. R., *supra.*

Insofar as the decision here is involved, it is unnecessary to determine whether in all cases consent, previously given, can be arbitrarily revoked at any time before a final order of adoption is made. In the instant case, the consent was withdrawn before an interlocutory order had been entered under a statute which requires a finding by the court that "there is proper consent" at the time such temporary order is made. There can be no doubt that appellee was acting under pressure of embarrassing and humiliating circumstances at the time she signed the consent for adoption. She was a member of a good Christian family and was doubtless fearful of the scandal, shame and unhappiness that might be expected to follow to her child, family and self if she kept the child. Under the pressure of events, she also misjudged the depth of tolerance displayed by a compassionate father. Appellee, her father and grandfather diligently sought to learn the identity of appellants and the whereabouts of the child shortly after execution of the written consent and immediately asked

for its return upon receipt of such information. The consent was revoked before the lapse of a period of time sufficient to show "vested rights" in favor of the adoptive parents with respect to the child. The grounds of estoppel usually invoked in those cases where withdrawal of consent has been denied are not present here. Under all the circumstances, we conclude that the written consent executed by appellee should not be adjudged a final and irrevocable act and was effectively withdrawn before entry of an interlocutory order.

The judgment of the Probate Court is, therefore, correct and is affirmed.

C. & L. RURAL ELECTRIC COOPERATIVE CORPORATION *v.* MCENTIRE.

4-8970 225 S. W. 2d 941

Opinion delivered December 19, 1949.

Rehearing denied February 6, 1950.

S. Hubert Mayes and *Rose, Dobyns, Meek & House,* for appellant.

Brockman & Brockman and *Bridges, Bridges, Young & Gregory,* for appellee.

GRIFFIN SMITH, Chief Justice. McEntire, a construction company employe, was seriously burned and permanently impaired when he came in contact with an electrically-charged wire. Three defendants have appealed from his judgment for $40,000.

. . .

C & L Rural Electric Coöperative Corporation operates in Lincoln and other counties as owner of transmission lines and appurtenances. It had an extensive reach in 1947 when new demands prompted expansion. Existing installations had been built by three contractors, one being Delta Construction Company of Clarksdale, Miss. The Federal Government advanced $363,000 through Rural Electrification Administration, acting by an Administrator whose official status with C & L was evidenced by written contract embracing enumerated standards of efficiency. The Administrator required C & L, in its plan for expenditure of the money, to retain certain authority. A supervisor could be named by the Government agency, and the contractor was bound to comply with all reasonable directions that might be given, either by C & L, or the supervisor.

Dickinson & White, electrical engineers, were employed by C & L to draft expansion plans with specifications; also to let the contract on behalf of C & L, and to supervise construction. Dickinson & White employed E. A. Knoch and Warren A. Ramsey to oversee the work, Delta having procured the contract.

On the nineteenth of June, 1947, McEntire, who was then 26 years of age, met with the misfortune resulting

in the litigation. A primary wire on the pole he had climbed carried 7620 volts of undisclosed amperage. His inadvertent contact with it caused burns that later destroyed tissues, nerves, and the circulatory structure of each hand, necessitating amputation four or five inches below the elbows when infection developed. Continuing pain prompted a second operation on the left arm. Comparatively slight injuries to other parts of the body attended the accident, with partial blindness for several hours.

. . .

Paul Strode was a Delta superintendent who worked in close coöperation with Knoch and Ramsey. Delta's temporary offices in Star City were within two or three blocks of quarters occupied by C & L.

On the morning of the nineteenth McEntire's assistant was Clinton K. Baggett. Each would make wire connections when directed to do so. The duty immediately at hand took them twelve miles south on the Star City-Monticello highway where they left the main thoroughfare and went by a known route to Pole No. 249. The place had been designated by Work Order No. 314, prepared by Ramsey and given to Strode. Four poles were mentioned in the order, but we are concerned only with what was done when No. 249 was reached. Pertinent parts of the memorandum are shown in the footnote.[1]

When the clean-up note was issued, Ramsey, Strode, Delta, Dickinson & White, and C & L, knew that the pole was "hot," or they were in possession of facts or had access to data from which the information could have been had.

It will be observed that in sequence of transactions Rural Electrification (the Government) dealt with C & L; C & L employed Dickinson & White; Dickinson & White, on behalf of C & L, negotiated the contract with Delta, but also employed Ramsey; Ramsey prepared the inspection or work orders and gave them to Strode, who

[1] ". . . Pole No. 249. Lower El-2 for proper cond-clearance. Complete A-6 assembly on north and south line. Install El-1 on north side of pole."

was Delta's man, and Strode gave them to appellee. The questions are: Were Dickinson & White independent contractors employed by C & L? If the contract on its face tended to create that relationship, was it the purpose to restrict activities of Dickinson & White to the paper preliminaries, such as plans and specifications, procurement of the contract, and supervision of the contractor's work as to results alone, and without participation in or interference with the means and methods by which results were accomplished? (a) Was the contract Dickinson & White made for C & L with Delta, embracing as it did express implementation through services of these Engineers, trilateral as to scope—thus insuring overlappings throughout, or (b) did C & L and Dickinson & White as employer and agent, and Delta as the producer of a finished construction, each leave to the other complete freedom of action regarding means and methods? Conversely, if the contracts as such were legally sufficient to make Dickinson & White independent Engineers and Delta an independent contractor, did inter-party actions destroy this design to such an extent that the appellants are bound by the misconduct causing appellee's misfortune? [2]

Contract Between C & L, and Dickinson & White.—The Engineers agreed to render necessary services ". . . in respect of rephasing, conversion, rebuilding, or rehabilitation of existing lines, [and] the enumeration of specific duties and obligations . . . shall not be construed to limit the general undertakings of the Engineer."

Supervision of construction required the Engineer to inspect all materials and to reject any found inferior to specifications. The Engineer was also to supervise "the manner of the incorporation of the materials in the project and the workmanship with which such materials shall be incorporated. . . . The Engineer shall notify C & L and the Administrator when the project, or any

[2] A nonsuit was taken as to Knoch. Delta, protected under Workmen's Compensation Law, was not a defendant. American Casualty Company, Delta's insurer, intervened to claim rights of reimbursement.

part thereof, shall be ready to be energized. Whenever C & L and the Administrator shall notify the Engineer that the project, or such section thereof, may be energized, the Engineer shall, when directed to do so by C & L, cause the project, or such section thereof, to be energized."

Contract Between C & L, and Delta.—All materials, tools, machinery, equipment, labor, transportation, "and other means necessary [to fulfillment of the contract]" were to be supplied by Delta. All reasonable precautions for the safety of employes engaged in the work were to be taken, with care for safety of the public. From commencement until completion, or until C & L should take possession if at an earlier date, control was with the Contractor, who was responsible for "all risks in connection with the construction of the project and the materials to be used therein." The Contractor was obligated to constantly supervise all work. To this end a competent Superintendent "would be present at all times during working hours where the construction is being carried on, [and] directions and instructions given to [such] Superintendent by the Engineer shall be binding on the Contractor. [C & L] reserves the right to require the removal from the project of any employee of the Contractor if in the judgment of the Engineer such removal shall be in order to protect the interest of [C & L]. The Engineer or the Supervisor, if any, shall have the right to require the Contractor to increase the number of his employes and to increase or change the amount or kind of tools and equipment if at any time the progress of the work shall be unsatisfactory to the Engineer or Supervisor."

Purpose of the Contracts.—The undertakings contemplated by C & L in 1947 could best be carried out with Government coöperation and borrowed money. But rules of Rural Electrification were such that it could not, or would not, advance funds without retaining the interim control it thought would be necessary to assure satisfactory completion of the project, hence the requirement regarding Engineers. This is made certain by language in the contract between C & L and Delta that "Prior to

the completion of the project C & L, upon written notice to the Contractor, *approved in writing by the Administrator,* may test the construction . . . by temporarily energizing any section or sections thereof. During the period of such test the section or sections of the project so energized shall be considered as within the possession and control of C & L," etc. In a paragraph of definitions "Engineer" is one employed by C & L, "with the approval of the Administrator, to supervise the construction of the project." "Completion" means full performance by the Contractor, evidenced by a certificate . . . signed by the Engineer "and approved in writing by the Administrator." Other language discloses an intent that Rural Electrification should exercise a measure of control throughout the construction period, and this control was something more than a right to demand that the work, when done, should meet all specifications.

Acts and Circumstances Affecting Appellee.—Transactions directly connected with appellee's attempt to make repairs on Pole No. 249 were these: When Strode, as Delta's servant, handed McEntire the clean-up order prepared by Ramsey, there was nothing to indicate that the pole carried "hot" wires. On former occasions similar orders had affirmatively shown that "live" wires were to be dealt with when that condition existed; hence McEntire assumed it would be safe to climb at the time he did to discharge the task assigned.

Appellee testified that when a note was received showing hot wire connections, he marked it "REA," which meant that C & L employes were to do the work. This custom was verified by Lynn Thomasson, C & L manager, who testified that on occasions the Engineer issued such clean-up orders and gave them to Strode, with copies to C & L. Question: "At the time you received these copies did you go immediately and deënergize the line and wait for the work to be done, or did you wait?" Answer: "We would wait for the Superintendent to notify us *when* he would be ready to do that particular job—I mean Strode, Delta's Superintendent." Question: "Tell me whether, to your knowledge, a large

or a small number of clean-up notes would be issued daily?" Answer: ". . . After Delta built a line, the Engineers would come back at their convenience, I believe, and make the final inspection—no, not the *final,* [but] *an* inspection. [They would] then issue notes to the Contractor, and then they would go again after they had made the clean-up, to make the final inspection."

From Thomasson's testimony it would seem that Ramsey, or some one acting for him, had inspected Pole No. 249 and discovered necessity for the repairs later intrusted to McEntire. Ramsey conveyed this information to Strode in a clean-up note.

On the question of prompt attention to such notes, Thomasson said it was possible for Strode or some other Superintendent to receive a clean-up note, attended by failure of the sender to supply C & L with a copy, and still the work might be performed. Question: "I am talking about a case where you [did] receive a copy—a copy, let us say, that is dated today: was there any way for you to tell when the work would be done by Delta?" Answer: "No."

There was this further testimony by Thomasson: "I believe you said that a copy of the clean-up notes would be delivered to you?" Answer: "That is right. They were supplied by Dickinson & White, [but] came through the mail." The copies were retained in the C & L files.

It was Ramsey's practice, or the practice of others acting for Dickinson & White, to show on the clean-up notes, when live wires were to be encountered, that the work ordered to be done was on an "existing" pole. To Thomasson such a notation meant that the pole was "hot." When a memorandum of this kind came it was placed in the construction file. There was no further action until the Contractor notified C & L when *that* work would be done. A copy of the notice relating to Pole 249 was actually received by C & L and was placed in the Company's files. Question: "If you have a copy [of the clean-up note] . . . and there is no notation

saying *existing pole,* would you take that to mean it was a 'cold' pole?'' Answer: ''Yes, sir.'' [Later Thomasson said he did not receive the note in question until after the accident.]

It was C & L's duty to ''deaden'' or ''deënergize'' a pole when information came that it was to be worked on. Thomasson verified a statement he made soon after the accident occurred: ''Pole 249 was part of a line turned over to us and energized a year ago. All of [our] employes were, of course, aware of this. Whether the Engineer knew of this, and took it into consideration when having the final work done on this 'tie-in,' I do not know.''

Defending counsel, in addressing the trial Court, argued that there was no evidence showing that Dickinson & White or their employes directed McEntire to work on this pole, or that they had a right to do so. On the contrary, the attorney thought it had been clearly developed that the Engineer's duty was to tell the Contractor ''what remained to be done.'' In other words, said he, the clean-up notes [sent by Ramsey to Strode, and by Strode given to McEntire] were informal in character. They were not orders or ''directives''; neither were they instructions—hence, it was error to assume that the Engineer commanded appellee to work on a specified pole.

Dangerous Instrumentality—Absolute Liability.—While Courts in general recognize the dangerous potentiality of electricity, affirmance of this case is reached without extending to those dealing with it the doctrine of non-delegability in respect of construction. There are many situations where a builder like C & L could appropriately pass to another full responsibility to produce a result like the one objectively planned here; nor is there anything in the nature of the work making it impracticable for a promoter or owner to employ engineers in an independent capacity under a contract to inspect and advise, short of participation in means and methods. Many cases involving master and servant, and employer and independent contractor, are cited in *Moore and*

Chicago Mill & Lumber Co. v. *Phillips,* 197 Ark. 131, 120 S. W. 2d 722. The principles affirmed in that case are not affected by our findings here that under the facts Dickinson & White—(capable engineers fully competent to let the contract for C & L, and able to apply under the contract all details of inspection requisite to compliance with Delta's commitments)—engaged in managerial activities somewhat in excess of engineering work, as under the contract it became their duty, and served in a *liaison* relationship with the Government, with C & L, and with Delta. Intrusive and overlapping acts compose a course of conduct inconsistent with aloofness from means-and-method participation. This may have been necessary because of the Government's insistence on following its loan to the completed system. In supplying construction cost with one hand, Rural Electrification's fundamental purpose to develop retarded areas with the other, could—from the agency's point of view—be more substantially served by fixing on the borrower express obligations, including a right to say what kind of supervision there should be, and on what evidence the Contractor would be acquitted at work's end. Although the Government contract with C & L is not in the record, these matters are satisfactorily disclosed by portions of the Dickinson & White undertakings on behalf of C & L.

Specific and General Acts.—Bearing in mind that No. 249 was an "existing" pole, one energized and in use for more than a year, some consideration must be given to Dickinson & White's right of interference, or their duty to supervise and make safe, the identical instrumentality that caused injury.

Supplementary to engineering work on the new installations, Dickinson & White were under a duty, in case of necessity, to "rephase," convert, rebuild, or rehabilitate the old lines. *The enumeration of specific duties entrusted to them would not limit the general undertakings.* Assuming that "general undertakings" were those to be implied from the nature of the project, yet collateral to this so-called over-all conception there was a separate contract for construction. It included the in-

spection of materials and rejection of those thought to be inferior, or perhaps a warning to the Contractor that if used in such circumstances, final approval would be withheld. But the *manner* of putting materials into the project, and the workmanship "with which such materials shall be incorporated" were duties imposed on the Engineer. While these words might not of themselves, in all cases, deprive a contract of its independent status, additional support for a three-way tie-in is found in the contract between C & L and Delta.

By affirmative language the Contractor was bound to do some of the same work required of Dickinson & White, that is, "to constantly supervise all work." This was assured by Delta's promise to have a competent Superintendent present "at all times during working hours where the construction is being carried on." Directions and instructions given Delta's Superintendent by Dickinson & White were binding on the Contractor. Not only this, but C & L (*not* Dickinson & White) could remove from the project any person employed by the Contractor if the Engineer thought this action would protect C & L's interests. Finally, the Engineer could require the Contractor to increase the number of employes, augment the equipment used, "or change the amount or kind of tools," etc.—the only condition precedent being that work progress was not satisfactory to the Engineer.

Independent Contractor, Master and Servant.—In defining independent contractor, Mr. Justice DONHAM said in *Wilson* v. *Davison,* 197 Ark. 99, 122 S. W. 2d 539, that we had repeatedly held that ". . . it is the right to control and direct that determines whether one is a servant." In support of the statement attention was called to *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Gillihan,* 77 Ark. 551, 92 S. W. 793, where Mr. Justice MCCULLOCH's language was: "In general, . . . the liability of the company depends upon whether . . . it has retained control and direction of the work." The Wilson-Davison opinion was handed down Nov. 28, 1938. The Moore-Chicago Mill case, *supra,* came three weeks

later and cited the Gillihan decision, but not *Wilson* v. *Davison.* In April, 1938, which, of course, was before *Wilson* v. *Davison,* Mr. Justice DONHAM wrote the opinion in *Meyer* v. *Moore,* 195 Ark. 1114, 115 S. W. 2d 1087. He quoted Mr. Justice BUTLER's language in *Ice Service Co.* v. *Forbess,* 180 Ark. 253, 21 S. W. 2d 441: "The conclusion as to the relationship must be drawn from all the circumstances in proof; and, where there is any substantial evidence tending to show that the right of control over the manner of doing the work was reserved, it becomes a question for the jury whether . . . the relationship was that of master and servant."

In writing the opinion in *Rice* v. *Sheppard,* 205 Ark. 193, 168 S. W. 2d 198, Mr. Justice ROBINS used *Moore Lumber Co.* v. *Starrett,* 170 Ark. 92, 279 S. W. 4, as authority for the proposition that in determining whether a person employed to do a certain task is an independent contractor or a mere servant, the vital test is the control reserved by the employer in respect of the work that is to be done.

Thus, it does not appear that mere retention of the right to require the contract-holder to discharge an unsatisfactory employe, or to increase or decrease the number of those working on the job, is alone sufficient to change what was honestly intended by all parties to be an independent contract, and convert it into a master and servant status. Retention of the right is merely a circumstance to be considered with other evidence. Of course the case would be different if the actual fact of discharge or substitution contributed directly to the injury.

The instructions here left it to the jury to find (a) whether C & L knew that McEntire and others were at work on its lines, or (b) whether, in the exercise of ordinary care, C & L should have anticipated that Delta workers might be at Pole 249 at the time in question; (c) whether Ramsey issued the clean-up notes with the intent that Delta servants should act upon them, and that previously such notes had shown whether wires

on a pole indicated for attention were energized; (d) whether the work order issued by Ramsey was insufficient to put McEntire on notice that the premises were dangerous, and (e) whether, if such failure to warn were found, it constituted negligence when considered with other facts and circumstances, thereby constituting the proximate cause of plaintiff's injuries. If these things were found to be true, and McEntire was not guilty of contributory negligence, a verdict could be rendered against Dickinson & White, and C & L.

It is our view that the course of conduct admitted by Thomasson, when considered with the contracts and other evidence, justified the jury in considering, (a) the consequences that might reasonably have been anticipated when clean-up notes were sent by mail to an address not more than three blocks away; (b) logical inferences arising from C & L's admission that after receiving the notes it would remain inactive until Delta's Superintendent gave a second warning showing with exactness when the danger would be approached; (c) the independent fact that C & L, and its servants only, had a right to neutralize the lines; (d) whether there was causal connection between Ramsey's failure to designate No. 249 as an "existing pole," C & L's admitted practice of awaiting word from Delta *after* certain work had been indicated, and McEntire's actions in response to the note Strode gave him; (e) whether C & L, as a party to the way "existing" poles were being shown, and cognizant of the risk a worker ran in responding to written directions to work on one, knowingly allowed Delta to disregard its duty to keep a superintendent *constantly* on the job "where work was being done," and finally whether (f) in condoning Delta's neglect to maintain such supervision, and in entrusting collateral duties to Dickinson & White, there was failure to exercise on behalf of appellee that degree of care required by the relative situations of the parties and the facilities each had in respect of the other.

Affirmed.

Mr. Justice LEFLAR and Mr. Justice DUNAWAY dissent from the Court's action in affirming the judgment as to C & L Rural Electric Coöperative Corporation. Mr. Justice GEORGE ROSE SMITH did not participate in the consideration or determination of the case.

ROUNDS & PORTER LUMBER COMPANY *v.* BURNS.

4-8979 225 S. W. 2d 1

Opinion delivered December 19, 1949.

Alvin S. Buzbee, Edward L. Wright and *J. Wirth Sargent,* for appellant.

Aubert Martin and *DuVal Purkins,* for appellee.

GEORGE ROSE SMITH, J. The appellant is a Kansas corporation that owns about thirty retail lumber yards in Kansas and Oklahoma. This suit was filed by the appellee to hold the appellant liable for failure to account for lumber valued at $8,000. The defense is that the appellee's cause of action is against another corporation, the Taylor Oak Flooring Company. The chancellor found that the appellant had so dominated and controlled the

Flooring Company that the separate entities of the two corporations should be disregarded. The appellee recovered judgment for $5,830.76, and this appeal followed.

The events leading to this suit extend over a period of about nine months, beginning in October of 1947 and ending in the following July. The appellee was the owner of real property on which there was stored rough and finished lumber worth $12,000. On October 22 he leased the land to Manning Taylor. By the terms of the lease the lessee became the lessor's agent to sell the finished lumber and to process and sell the rough lumber. The lessee agreed to account to the appellee for the proceeds of sale, with certain deductions for the lessee's services. The appellee contends that a full accounting has not been made, and the trial court upheld his view.

It is shown that Taylor, a young man under thirty, was not financially able to pay the rentals under the lease or to undertake the task of processing the lumber. In the month of December he interested the appellant in organizing the Taylor Oak Flooring Company to take over the lease and to enter the business of manufacturing flooring. Half the capital stock was issued to Taylor (partly in his wife's name), in return for which he assigned the lease to the new corporation and contributed machinery and equipment. For the other half of the stock the appellant contributed its check for $30,000. It is argued that Ralph M. Rounds, president of the appellant, was actually the original stockholder, but we think the trial court was justified in concluding that the corporation in fact subscribed the stock. The appellant is a closely held family corporation, and the stock was not issued to Rounds individually until March 12. The corporation, however, had paid the money almost three months earlier, and it is shown that the agreement to incorporate listed the corporation as the original stockholder.

The Flooring Company was in financial difficulties almost from the day it began business. Taylor, who was the company's general manager, withdrew various sums from the corporate treasury, for which he gave promis-

sory notes of doubtful value. When an audit was made as of April 30, it was shown that operations to that date had resulted in a loss of almost $29,000 and that in addition Taylor owed the company about $21,500. Even so the company was apparently still solvent, having begun business with assets valued at $60,000. Had the company been liquidated at once it appears that its creditors would have been paid but that the stockholders would have lost the greater part of their investment.

On May 11, after the audit had been made, the corporate directors met and in effect surrendered control of the company to the appellant. Mrs. Taylor resigned as a director and was replaced by R. W. Elliott, one of appellant's employees. Taylor resigned as general manager and was succeeded by Elliott. Taylor's stock was pledged to the company to secure his indebtedness. While Taylor continued as a director he does not appear to have attended subsequent meetings. Also on May 11 the appellant advanced $35,000 to the Flooring Company and took as security a blanket chattel mortgage on all its assets. The result of the May 11 directors' meeting was that the officers and employees of the appellant assumed the control and management of the Flooring Company.

Now of course a parent corporation is not liable for the debts of its subsidiary merely because the parent holds the controlling interest or because the two are managed by the same officers. *Lange* v. *Burke,* 69 Ark. 85, 61 S. W. 165; Powell, Parent and Subsidiary Corporations, § 6 (a, b). It is only when the privilege of transacting business in corporate form has been illegally abused to the injury of a third person that the corporate entities should be disregarded. Powell, *supra,* § 3. One of the surest indications of such abuse, however, is the fact that the executives of the subsidiary, instead of acting independently in its interest, take their orders from the parent corporation in the latter's interest. *Ibid.,* § 6 (j). As we said in the *Lange* case, *supra,* the directors cannot lawfully manage the affairs of one of the corporations in the interest of the other.

In this case the evidence shows pretty clearly that after May 11 the affairs of the Flooring Company were conducted in subservience to the interests of appellant. It is undisputed that flooring was sold to the appellant at a substantially lower price than that charged in sales to third persons. Appellant attempts to explain this favored treatment by differences in the quality of the flooring, but there is ample evidence that this was not the reason for the reduced price. Charlene Kight, an office employee of the Flooring Company, testified that the grade was the same. She further said that a regular price list was used in making sales to outsiders, but when sales were made to appellant the prices were given to her. The new general manager, Elliott, although a former employee of the appellant, resigned within two months. In a letter he explained his resignation: "It became evident to me after two months here that at the prices for flooring, at which I am required to sell to the Rounds & Porter Lumber Company, I can neither make a profit nor pay off any creditors and for that reason I protested to the Rounds and Porter Company and resigned."

When we compare the subsidiary's financial condition on the date appellant took control with its condition when it voluntarily petitioned for a reorganization in bankruptcy on July 24, we find convincing evidence of fraud. It is well known that unsecured creditors must rely primarily upon current liquid assets for the safety of their claims, since the value of fixed assets ordinarily shrinks in the slow process of converting them into cash. As Graham and Katz put it in their book, Accounting in Law Practice (2d Ed.), § 229: "The greater the proportion of current assets composing .. . . net worth, the more sure is the position of the creditor. The greater the proportion of fixed assets, the more likely is it that the process of realization will be slow and subjected to a large risk of shrinkage in values."

According to the audit of April 30—the basis on which the appellant ousted Taylor and assumed control—the principal liquid assets were lumber and flooring valued at $52,000, in round numbers. Part of this lumber

and flooring was in storage, and the warehouse receipts were pledged to the appellant's bank in Wichita, Kansas, to secure advances exceeding $29,000. The bank was the only secured creditor. A large number of the unsecured creditors were lumber dealers, whose accounts came to a total of about $40,000. Thus when the appellant advanced $35,000 on May 11 the subsidiary's liquid position was far from hopeless, and, as we have seen, the concern was solvent.

After appellant had controlled its subsidiary for less than two months the picture had changed completely. The balance sheet of June 30, which was attached to the bankruptcy petition, shows that only $11,000 worth of lumber and flooring was still on hand. Of course the bank had been paid, as the pledged warehouse receipts had to be redeemed to make the stored lumber available; but the unsecured creditors had not similarly profited by the appellant's management. On the contrary, the lumber dealers' accounts had risen from $40,000 to over $54,000.

Other liquid assets had also decreased. The subsidiary's accounts receivable dropped from $1,200 on April 30 to $400 on June 30. On the latter date the balance sheet showed about $3,600 in the bank and $29.52 in petty cash. When the bankruptcy petition was signed twenty days later the appellant's secretary stated on oath that the petitioner had no cash at all.

The chancellor was justified in concluding that during its two months of control the appellant stripped the Flooring Company of its liquid assets. In this process at least $55,000 worth of lumber and flooring ($41,000 of the original inventory plus $14,000 later bought on credit) had been sold—apparently at a loss, since the company's financial position declined to actual insolvency. Not only was the appellant the principal purchaser of this flooring; it was paying a price substantially less than that paid by third persons. Finally, the appellant emerged as the only secured creditor, with a mortgage on fixed assets valued at $81,000 on June 30. In the bankruptcy petition it proposed an arrangement by

which the unsecured creditors would receive between fifteen and twenty per cent on their claims.

We think the evidence supports the chancellor's conclusion that the appellant wrongfully manipulated the Flooring Company to its own advantage, at the expense of the appellee. Under the principles already stated, this conduct entitles the appellee to a judgment directly against the parent corporation, without regard to the separate entity of the subsidiary.

Affirmed.

MEYER *v.* SEIFERT.

4-9018 225 S. W. 2d 4

Opinion delivered December 12, 1949.

Appellants *pro se.*

Wm. Gibson and *M. F. Elms,* for appellees.

LEFLAR, J. Appellant G. A. Meyer on behalf of himself and other property owners filed this bill in equity for a mandatory injunction to require the removal of a non-fireproof building erected by defendants Seifert and Mahle, under a permit granted by the other defendants (City of Stuttgart, Ark., and the Mayor, City Clerk, and Aldermen of said city, in their official capacities) within a fire zone in which the erection of such buildings was prohibited by city ordinances. The Chancery Court refused to issue the injunction, and plaintiff appeals.

City Ordinances No. 277 and 386 of the City of Stuttgart clearly prohibit the erection of the frame building here involved at the place where it was erected. The first question[1] before us is whether the "permit" relied upon by defendants, authorizing the erection of the building as and where it was erected, is valid. The ordinances in their relevant clauses contain nothing except a flat prohibition against non-fireproof construction. In other sections Ordinance No. 277 sets up procedures for the issuance of permits for exceptional construction of certain special types within fire zones, but there is nothing in either ordinance that authorizes anybody—either the City Council, the Mayor, or any other official or body—to make exceptions to its general prohibition against the erection of frame buildings such as the one now in question within the "fire limits" specified by the ordinances. The "permit" relied upon by defendants was approved by a resolution passed by majority vote of the City Council at a regular meeting, the resolution not being in the form of nor enacted as an ordinance.

[1] No attention is given herein to a question raised as to the propriety of appellant's representation in this court, the matter having been satisfactorily explained in the briefs.

The general zoning law of Arkansas (Ark. Stats., 1947, §§ 19-2804 to 19-2807, inclusive) contains a provision (in § 19-2806) whereby the City Council or a commission created by it may grant special permission for exceptions in particular instances. Another enactment appearing in Ark. Stats. (1947), §§ 19-2802 and 19-2803, authorizes cities to prohibit the erection of buildings within their limits except after issuance of permits in the manner prescribed by the City Council. The Stuttgart fire zone ordinances, however, were not enacted under the authority of either of these statutes, and the permit procedures authorized by them are irrelevant here. See *City of Stuttgart* v. *Strait,* 212 Ark. 126, 205 S. W. 2d 35. These ordinances were enacted under the authority conferred upon cities to guard against destruction of buildings from fire, by Ark. Stats. (1947), § 19-2801. This statute sets out no procedure whatever for issuance of permits. It does not prohibit cities from enacting fire zone ordinances containing provisions for issuance of permits in cases deemed exceptional; rather, it leaves the matter up to each city. There is nothing in the statute that prescribes a method for issuance of permits for exceptions if a city does not wish to authorize exceptions.

May a City Council, when neither the ordinance nor the basic statute authorizes permits for exceptions to the ordinance, nevertheless by resolution grant such permits? We believe not. The problem is not unlike that presented by any general law, one prohibiting arson, for example. If the lawmaking body chooses to include no exceptions in the law, and no provision for authorizing exceptions, then permits to violate it cannot be granted by anybody, not even by the very lawmaking body that enacted the law. The law can be changed or set aside only by a new enactment having the same or greater quality and dignity.

Numerous cases involving city ordinances so hold. "It is well settled that an ordinance cannot be repealed, or amended, or suspended by a resolution." *People ex rel. Raymond* v. *Latham,* 203 Ill. 9, 67 N. E. 403, 408. In

G. W. Mart & Son v. *City of Grinnell,* 194 Iowa 499, 187 N. W. 471, a theatre owner sought to avoid an ordinance prohibiting Sunday shows, relying in part on a resolution passed by the City Council allowing him to operate on Sunday. The court rejected the argument, saying "If a repeal of the ordinance was intended, it was not repealed. An ordinance is not affected by resolution, nor may it be amended or changed in this manner. An ordinance is amended, repealed or suspended by an ordinance only." *State* v. *Jordan,* 149 La. 312, 89 So. 15, held that a City Council resolution discharging a municipal employee in a manner contrary to a general city ordinance was ineffectual. *Risteen* v. *Clements,* 31 Ind. App. 338, 66 N. E. 924, held that a liquor store permit granted by a town council without compliance with the terms of an ordinance previously adopted by the council was invalid, using this language: "When the [council], clothed with local and limited powers of sovereignty, have enacted an ordinance or local law, thus prescribing a general and permanent rule, they have no authority to set aside or disregard the ordinance except in some manner prescribed by law. . . . They simply represent the municipality, and with the ordinance in force they had no authority to issue a license except as provided by the ordinance." And see *Stratton* v. *Warrensburg,* 237 Mo. App. 280, 167 S. W. 2d 392. It is our conclusion that these decisions are sound, and that the permit issued by the Stuttgart City Council in violation of its general ordinances was invalid.

A second contention urged by the defendants is that equity is without power, or should not exercise the power, to enjoin maintenance of the prohibited structure. The argument is that the ordinance prescribes criminal punishments, making violation a misdemeanor punishable by fine of not less than $10 nor more than $100 for each day of violation, and that this remedy is exclusive. That equity will not act to restrain ordinary violations of the criminal law, but will leave the task of enforcing the criminal laws to courts having criminal jurisdiction, is basic learning in our legal system. But is equally basic

that if grounds for equity jurisdiction exist in a given case, the fact that the act to be enjoined is incidentally violative of a criminal enactment will not preclude equity's action to enjoin it.

In one of the most publicized cases that ever arose in Arkansas, Chancellor Martin enjoined the holding at Hot Springs of a world championship heavyweight prizefight between James J. Corbett and Robert Fitzsimmons. *State ex rel. Atty. Genl.* v. *Corbett, Fitzsimmons, et al.*, Martin's Chanc. Decisions 366. Judge Martin conceded that ordinarily equity does not enjoin the commission of crimes, but pointed out that it does issue such injunctions where property interests are involved, and emphasized the prospective property injuries threatened by the prizefight, notably the payment of money by purchasers of tickets of admission to the illegal enterprise, losses by bettors, the use and congestion of some buildings which might be harmful to other adjoining buildings, and the possible loss of property to thieves, pickpockets and similar gentry who might come to the state for the fight. The most frequently quoted statement of the rule in Arkansas appears in *State* v. *Vaughan,* 81 Ark. 117, 126, 98 S. W. 685, 690, 118 Am. St. Rep. 29, 11 Ann. Cas. 277, 7 L. R. A., N. S. 899, where, after denying the injunction in the particular case, Chief Justice HILL added: "On the other hand, if the public nuisance is one touching civil property rights or privileges of the public, or the public health is affected by a physical nuisance, or if any other ground of equity jurisdiction exists calling for an injunction, a chancery court will enjoin, notwithstanding the act enjoined may also be a crime. The criminality of the act will neither give nor oust jurisdiction in chancery." Accord: *Hudkins* v. *Arkansas State Board of Optometry,* 208 Ark. 577, 187 S. W. 2d 538; *State ex rel. Atty. Genl.* v. *Karston,* 208 Ark. 703, 187 S. W. 2d 327; *State ex rel. Hale* v. *Lawson,* 212 Ark. 233, 205 S. W. 2d 204. Hundreds of cases in other states are to the same effect. See *State ex rel. Smith* v. *McMahan,* 128 Kans. 772, 280 Pac. 906, 66 A. L. R. 1072 (injunction against widespread practice of criminal usury); *Fitchette* v.

Taylor, 191 Minn. 582, 254 N. W. 910, 94 A. L. R. 356 (injunction against unauthorized practice of law); *State ex rel. Crow* v. *Canty,* 207 Mo. 439, 105 S. W. 1078, 15 L. R. A., N. S. 747, 123 Am. St. Rep. 393, 13 Am. Cas. 787 (injunction against illegal bull fights).

It is characteristic of most instances in which injunctions against criminal acts are sustained that the threat of punishment after the event will not have a very strong deterrent effect upon the offender. As to some acts, this is because the criminal punishment is small and unimportant as compared with the benefits or profits expected to be gained from the criminal act. Oftentimes the act is a recurrent or continuing one, necessitating numerous successive petty prosecutions if the regular criminal procedure is to be followed. Frequently the acts are such that it is difficult to get jury convictions, either because local juries are prejudiced against the enforcement of the particular law involved, or for some other equally practical reason. In effect these considerations point to (1) the practical inadequacy of the available legal (criminal) remedy, and (2) interference with property or other equitable protectible interests of the plaintiff or, if he has sued in a representative capacity, of a substantial group of the general public.

The decisions on the specific type of invasion of rights involved in the instant case are in accord with these principles. Many cases hold that a nearby property owner, for himself and others similarly situated, may enjoin the violation of building codes, zoning laws or similar enactments, on showing substantial threat of injury to his and their property. *Kaufman* v. *Stein,* 138 Ind. 49, 37 N. E. 333, 46 Am. St. Rep. 365; *Caskey* v. *Edwards,* 128 Mo. App. 237, 107 S. W. 37; *Fitzgerald* v. *Merard Holding Co.,* 106 Conn. 475, 138 Atl. 483, 54 A. L. R. 361; *Rice* v. *Van Vranken,* 225 App. Div. 179, 232 N. Y. Supp. 506; *Smith* v. *Collison,* 119 Calif. App. 180, 6 Pac. 2d 277. The case of *Lewis* v. *A. Hirsch & Co.,* 192 Ark. 209, 90 S. W. 2d 976, is not contrary to these cases. The *Hirsch* case merely held that one who sued as a citizen and taxpayer only, who did not claim to own any property

or show any prospective injury to himself, would not be granted an injunction against construction of a building in violation of a fire zone ordinance. It is true that in *Swaim* v. *Morris,* 93 Ark. 362, 125 S. W. 432, 20 Am. Cas. 930, there is language to the effect that such an injunction would be denied a property owner, but that case, a 3-2 decision, turned primarily on the majority's holding that the ordinance under which the plaintiff sought relief was an invalid enactment. And in *Van Hovenberg* v. *Holman,* 201 Ark. 370, 144 S. W. 2d 718, this court held squarely that an injunction should be sustained on behalf of a plaintiff property owner restraining defendant's erection of a filling station in a restricted zone in violation of a city ordinance. There we said: "But the primary and fundamental purpose of the ordinance was to prohibit operation —not to punish. It is definitely settled that equity will not interfere to stay proceedings in a criminal matter. Here, however, the relief sought is abatement of unauthorized conduct. If it should be held that penalty of the ordinance deprived equity of jurisdiction, then any person desiring to proceed in violation of law could pay the maximum fine and become immune thereafter except as to damages. This is not the law."

The plaintiff made a substantial showing of probable damage to his own and other adjoining properties through increased fire hazards arising from maintenance of defendants' building where they have placed it in violation of the Stuttgart fire zone ordinance. This constitutes a proper case for equitable relief, as against defendants Seifert and Mahle. As to them, the decree is reversed and remanded. It is not shown that a decree against the City of Stuttgart, its Mayor, City Clerk and Board of Aldermen would afford any relief to the plaintiff, therefore the decree is affirmed as to them.

4-9021 225 S. W. 2d 15

Opinion delivered December 12, 1949.

[redacted]

Surrey E. Gilliam, for appellant.

Claude E. Love, for appellee.

HOLT, J. Appellee, Hunt, brought this suit against appellants to recover $944.94 which he had paid, on the purchase price of $2,544.94, on a new Reo truck. His complaint alleged that the "truck was guaranteed by the defendants to give satisfactory service in hauling logs, which the defendants knew the truck would be used for, and for which use the defendants added special equipment and guaranteed the truck to do the job, and the truck being new, also carried the standard warranty against defects in workmanship or material, which warranty was in effect etc.," that the truck was "built of such faulty and inferior material and of such faulty workmanship as to be worthless to plaintiff," . . . that he complained to defendants, that they made several efforts to put the truck in condition to do the work

but were unable to do so, and that he returned the truck and demanded that his money be refunded.

Appellants' answer was a general denial and by way of cross complaint sought to recover from appellee on an open account $270.22.

A jury awarded appellee $771.15, and awarded $147.48 to appellants on their cross complaint, whereupon the trial court, after deducting the $147.48, allowed appellants, entered a judgment for $623.67 in favor of appellee. This appeal is from that judgment. There was no cross appeal.

The action was based on an alleged express warranty that the truck in question would perform satisfactorily and "do the job" for which it was purchased, and that it was suited for the purpose and use of hauling logs. Hunt was at the time engaged in the saw mill business.

The following factory warranty was given appellant when the truck was delivered to him: "PARTS AND LABOR WARRANTY—There will be no charge for parts deemed defective by the Manufacturer during the first 4000 miles of operation, or during the first ninety (90) days after delivery—whichever shall first occur. There will be no charge for labor in replacing such defective parts during this period."

Hunt testified: "Well, I came by their place one afternoon, and I got to talking with Mr. Harris; and I had just bought a Studebaker truck a few days before that. While I was talking to him he got after me to sell me a Reo truck; and he said it would out-perform my Studebaker truck; and he told me what it would do, about the specifications of the truck, and how strong it was made, and what a motor it had in it. And I turned to go out on the street, and he said it had a Red Seal Continental motor in the truck; and I knew enough about that motor, that they were supposed to be a good unit. And we talked on; and I told him I could use another truck in my business, if it would do the job; and I told him: 'don't sell me something that will not work; I have to

have something to work with to make the payments on it.' And he guaranteed it would do the job. . . .

"Yes, sir; they told me that they would guarantee me it would do more than the Studebaker ever did—all of the salesmen talk that way—that is all right; that is supposed to be salesmanship. I didn't particularly go for that. He was going to make it do more than the Studebaker, and I knew what the Studebaker would do. He told me it had a Red Seal Continental motor in it, and it was heavier than the Studebaker, but I found out later there was no Red Seal motor in it. . . .

"And I told him the truck wouldn't work, I could not make any money out of it, and it wouldn't work; every day I started out with it, it had failed to do the job. . . . Q. Within the ninety (90) day period from the time you bought the truck you refused to take it back —to take the truck back, unless they would put in a new motor? A. I didn't say anything about a new motor; I said I wouldn't take the truck as it was. Q. You said you wanted a new motor? A. I said a new truck, not a new motor. Q. You turned down the whole truck? A. I was turning back the whole truck, and all my notes were paid up. They wanted to deliver the truck back to me and I refused it."

Appellants had a factory man come from Little Rock to work on the truck and he put in a new timer chain.

Hunt further testified that he took the truck to the woods the following day after its purchase and "loaded it up and when we started out, I know we didn't have on a big load,—but the truck could not get away. . . . I kept on trying the truck on smaller loads, thinking maybe it would get to working and do better, and pull out, but it never would."

Appellants' mechanic who had worked on the truck in question testified that due to its long wheel base it was not suited for hauling logs. Another witness testified that he had had seven years driving trucks, in hauling logs, and worked for appellee, Hunt. He was the

first to drive the Reo truck and drove it about a week and a half, that he could not pull six or seven hundred feet of logs on it—the springs would not support the load, and he quit the job because he could not operate this truck.

B. J. Brown testified that he next drove the truck and when he put 800 feet of logs on it, the body dropped down on the drive shaft and the truck would not move, and that even with a lighter load the springs dropped down until the cross beam almost cut the drive shaft in two.

Another witness testified that 2,800 feet of oak lumber (which was a small load) was placed on the truck and it wouldn't pull and that they had to push it to get it started.

We do not attempt to detail all the testimony. We think what we have set out above was substantial, and sufficient to warrant the jury in finding that the truck would not perform, or do the work in accordance with the representations of appellants which, in the circumstances, amounted to an express warranty.

"To constitute an express warranty it is not necessary that the word 'warrant' be used, but may be based on the statements of the seller as to the quality or condition of the chattel he is selling. . . . The court then quoted with approval from 24 R. C. L. (Sales) § 437, as follows: 'To constitute an express warranty the term "warrant" need not be used; no technical set of words are required, and it may be inferred from the affirmation of a fact which induces the purchase and on which the buyer relies and on which the seller intended that he should do so, but it has been said that the words used must be tantamount to a warranty, and not dubious or equivocal.' " *Ives* v. *Anderson Engine & Foundry Company,* 173 Ark. 112, 292 S. W. 111.

Appellants earnestly argue, however, that there was error in the court's giving the following instruction over their objections and exceptions: "You are instructed that if you find from a preponderance of the

testimony, that the defendants or their authorized agents guaranteed to plaintiff, that the motor in the truck in question, would be a Continental Red Seal Motor, when in fact the truck was delivered with a Reo Gold Crown Motor, and if you further find such motor was substantially inferior to the motor contracted for, and you further find that because of such variance plaintiff returned the truck and rescinded the contract, then your verdict will be for the plaintiff.''

We think this contention must be sustained.

It will be observed that this instruction submits to the jury the question whether the Reo Gold Crown Motor with which the new truck was equipped ''was substantially inferior to the motor contracted for,''—that is a Continental Red Seal Motor.

We find no allegation in appellee's complaint that the truck in question was equipped, or was to be equipped, with a Red Seal Continental Motor, nor do we find any evidence in this record to the effect that the Reo Gold Crown Motor with which the truck was equipped, was inferior to a Red Seal Continental Motor.

This instruction was, therefore, prejudicial to appellants and there was error in giving it.

Accordingly, the judgment is reversed and the cause remanded.

McFaddin, J., not participating.

Miller *v.* Kansas City Southern Railway Co.

4-8950 225 S. W. 2d 18

Opinion delivered December 13, 1949.

J. F. Quillin, for appellant.

Hardin, Barton & Shaw, for appellee.

GRIFFIN SMITH, Chief Justice. A spur track in the Town of Potter now operated by Kansas City Southern was laid before 1907, and within limitations has been continuously used as intermittent necessity required. It traverses property purchased in 1936 by Mrs. Lora Miller, described by metes and bounds. Marcus L. Miller is Lora's husband and maintains a mercantile business in a building on his wife's property. An extension, spoken of as a front porch, is so near the railroad spur that joint use of the area between store and track causes conflict. This resulted in a suit by the Railway Company to acquire by condemnation "some additional lands". Apprehending that enlarged use responsive to the Railroad's complaint would extend onto the store porch, Mrs. Miller's answer and cross-complaint alleged damages of $25,000. She also claimed that trackage use of 120 feet of her land should be compensated at $150 per year, or $1,800 for the time she had been the owner. Marcus Miller intervened. Practical use of the store, he said, would be lost if land in front of it should be taken as proposed. Resulting damage would be $10,000. A final plea was that value of the Miller residence back of and virtually adjoining the store would be impaired.

By amendment of January 20, 1948, the plaintiff asserted its ownership of property described as a "team track", with eight and a half feet on either side, meas-

ured from track center. Nine months later a second amendment was filed, in which the Company abandoned its allegation that Mrs. Miller owned the land. As cross-defendant it claimed title to the so-called team track, "and to the ground used in and on account of same". There was, in addition, a plea of adverse possession under the seven-year statute. On issues thus joined the jury's verdict was that "title is in Kansas City Southern".

Lost Title—Presumption of Grant.—Although appellee's argument for affirmance rests primarily upon adverse possession, there is insistence that the nature of its occupancy, the obvious purpose prompting construction of the spur, apparent acquiescence in unrestricted use for more than forty years, and knowledge by Mrs. Miller that the track was in place when she bought the land—each element constituted notice to her that the Company claimed by purchase or prior condemnation.

We are not convinced that the Company has brought itself within the rule of presumptive evidence discussed in the citation from Greenleaf, 16th Ed., vol. 1, par. 45. The author's conclusion was that while mere lapse of time does not raise a conclusive legal bar to title where the sovereign's rights are involved, yet, if the adverse claim could have had a legal beginning, "juries are advised to presume such commencement, after many years of uninterrupted adverse possession or enjoyment". See *State* v. *Taylor,* and the cases there discussed by Mr. Justice HART, 135 Ark. 232, 205 S. W. 104. But, where the State is concerned, or where the sovereign undertakes to profit because of the negative nature of the records, there is another rule. It is that after payment of taxes in good faith for not less than fifteen years the presumption of a grant may be one of law, as distinguished from one of fact. *Deniston* v. *Langsford,* 211 Ark. 780, 202 S. W. 2d 760.

Facts relating to occupancy are ordinarily for a jury's consideration in determining probabilities, for "No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined,

until time has involved them in uncertainty and obscurity, and then ask for an inquiry".

If Kansas City Southern had shown a custom of recording and keeping its deeds, or of preserving records of condemnation, its plea of presumptive grant would have been more tenable under a showing that such documents had been lost without its fault, as, for instance, that a courthouse vault had burned, or that its own files had suffered. But according to original pleadings the Company did not believe that it had bought or condemned the right-of-way; nor did the evidence it introduced go to the essential consideration that time had militated against such proof. Considering all of the circumstances here, a grant could not be presumed.

Adverse Possession — Seven-Year Statute. — Evidence was sufficient to go to the jury on this issue. Mrs. Miller's tax receipts for twelve years, showing payment on land across which the road ran, were offset by appellee's proof of assessments embracing the trackage. Appellants argue that because assessments by the Arkansas Public Service Commission[1] were on a mileage basis, nothing essential to right-of-ways was included, and trackage alone was evaluated. For this reason, they say, land beyond crosstie ends was not assessed. This contention, standing alone, would have to be rejected. We think, however, that the Company's own witnesses bind it to the narrower limits.

Potter, it must be remembered, is a small community. It lies six miles south of Mena, and the Railroad Company's activities there, respecting use of incidental facilities, have not been pretentious. The spur runs through lands beyond Mrs. Miller's. Three lines are shown on the plat: "Main Line, Passing Track, and Team Track". M. A. Eddy, Company trainmaster, was asked about the team track right-of-way. The question was, "We are talking about that little track: the one that comes off of the passing track and goes out some two hundred feet—how much right-of-way [goes with] that

[1] Now Arkansas Tax Commission. See Act 191, approved Feb. 28, 1949, p. 592.

track, [or] what clearance would be required on the team track?'' Answer, ''It would take six feet from the center of the track.[2]

In testifying to objections by Miller to use of the area between store and track, Eddy said that he received a letter, perhaps in April, 1946. Pursuant to it the Company gave instructions that the activities be discontinued. Eddy thought it had ''always been understood'' that the Railroad Company was permissively using the land, ''and we are using the land now like we have always used it''. On redirect examination one of appellee's attorneys asked Eddy if it were contemplated that ''this loading proposition'' should be placed farther down—perhaps on the Allen or Keener property—and he said that was his understanding, and it ''was the purpose of this suit''.

Eldon D. Pence, the Company's general agent, mentioned plans for extending the team track through to a connection with the passing track, or the main track. Standard ''public clearance for cars'', according to Pence, calls for eight feet from track center.

Sufficiency of the Evidence.—When the Railroad Company sought to condemn in 1947, substance of its complaint was a denial of what it later claimed. It is fairly inferable that if the Millers had not advanced extravant damage claims, suit would have proceeded as it began. There can be no doubt that the Company had for more than forty years claimed a right to use the trackway as such, and the question is, What bordering land went with it, if any? Was it the actual space that track-on-ties occupied? or was there, in addition, hostile notice that Company necessities incident to land actually used extended to adjacent footage sufficient to meet reasonable needs auxiliary to loading and unloading

[2] Eddy was asked what use was contemplated through enlarged facilities, and he replied: "We want to use it for team track purposes and for the convenience of our patrons in disposing of bad order cars, or for storing outfits in case that we would have construction work to do along the line of some kind, it is necessary we have a track to place outfits away from the team track patrons". [The term "team track" was defined as "Where we 'spot' any commodities that might be—that *will* be—unloaded by trucks or teams"].

wherever cars should be spotted? Was the former course of conduct, when tested by the Company's current purpose to use an undetermined area as necessity suggested, consistent with what it now proposes, and was that conduct sufficiently adverse, hostile, and of general knowledge?

The Company is saying, in effect, that it *may* engage in construction work elsewhere on its lines; that something now contemplated as a probability, but not required for more than a quarter of a century, might necessitate additional space, and that "outfits" should have places "away from track team patrons".

The jury found that title to all of the disputed land was "in" Kansas City Southern, and the Company was entitled to possession. If the purpose was to predicate the verdict upon a lost grant, or to title in fee, it is not factually supported; if upon adverse possession, then the use-right for railroad purpose, with reversion to the fee owner should the easement be abandoned, is the usual rule.

With facts varying somewhat from Miller's problem here, Mr. Justice WOOD's opinion in *St. Louis S. W. Railway Company* v. *Davis,* 75 Ark. 283, 87 S. W. 445, is of assistance in ascertaining extent of appellee's rights. Davis had built a sawmill near the railroad, stacked lumber on part of the claimed easement, and then fenced the property so invaded. Held, that in the absence of a grant, . . . or donation, and without appropriation under charter powers, a railroad company will not acquire title by prescription or adverse possession to more land than it takes and holds by actual occupancy. There, as here, it was not shown that when entry was made permission given by the proprietor "extended to any portion of the land other than that covered by the track".

In *Little Rock & Fort Smith Railway Company* v. *Greer,* 77 Ark. 387, 96 S. W. 129, the appellant claimed a 99-ft. right-of-way, extending 49½ feet from track center. It was held that Greer had a cause of action for special damage occasioned by the railroad company's act in building an embankment. Oscar L. Miles, one of

the South's ablest attorneys, contended on behalf of the railroad that the holding was in conflict with *Hot Springs Railroad Company* v. *Williams,* 45 Ark. 429. The opinion was written by Mr. Justice WOOD, but on rehearing Judge MCCULLOCH said, in speaking for the entire Court: "Where a railroad corporation lawfully acquires a right-of-way over any land, either by grant, prescription, or condemnation, such acquisition covers all damages, present and prospective, resulting to the owner whose land is invaded, this upon the theory that full compensation is allowed at the time, and can be recovered only once. This principle applies, however, only to one whose land has been invaded, and to the extent only of such invasion. One whose land has not been previously taken under voluntary grant, prescription, or condemnation, may recover compensation for damage whenever the same accrues; and where there is a new or additional taking, damages therefor may be recovered. According to the agreed statement of facts in the case, the railroad company never acquired a right-of-way by grant or condemnation. *Its acquisition by prescription was, therefore, only to the extent of the actual taking, which was the land covered by the roadbed, and no more*".

Uncertainty regarding the amount of land intended to be held, whether adversely or under an assumed grant, is reflected here by railroad company witnesses. Trainmaster Eddy thought six feet each way from track center had been taken, not eight and a half feet as appellee contends. General Agent Pence thought of sixteen feet—eight each way. No witness testified that for a period of seven years or more the use of any area beyond that occupied by the track and ties had been of a kind to put adjacent proprietors on notice that something more was being claimed than use of the track as a means for moving cars from point to point. It follows that under the Davis decision, supported by the Greer case and others of like import, possession in the controversy here ceased at tie's end on each side of the track.

Since all issues appear to have been fully developed, that part of the judgment denying recovery on the in-

tervention and cross-complaint will be affirmed, but we reverse so much of the judgment as quiets title in the railroad to property beyond actual trackage, as heretofore defined. Because title to real property is involved, the cause is remanded with directions that the judgment be modified to the extent indicated. It is so ordered.

Mr. Justice HOLT dissents in part.

HOLT, J. I respectfully dissent. In the majority opinion appears this language: "No witness testified that for a period of seven years or more, the use of any area beyond that occupied by the track and ties had been of a kind to put adjacent proprietors on notice that something more was being claimed than use of the track as a means for moving cars from point to point. * * * It follows that possession in the controversy ceased at ties end on each side of the track."

There appears to be no proof in the record as to the length of the crossties, the distance between the rails, or the width of boxcars. Therefore, as I construe the law, we may take judicial notice, since we are dealing here with the operations of a standard gauge American railroad, that such ties are 8 feet long, the rails 4 feet 8½ inches apart, and the maximum width of boxcars used is 10 feet 8 inches. Such cars obviously must extend out beyond the rails and ends of the ties on either side for a considerable distance.

The text writer in *23 C. J.*, page 67 (§ 1824) bb, has this to say on the question of judicial notice: "Courts take judicial cognizance of matters of general knowledge relating to the grade and gauge of railroads, the necessity of repairs and replacements, the duties of section men, and that the ties of a railroad track usually project, slightly, in some instances, and more in others, above the surface of the track. * * * Judicial notice is taken of the construction of railway carriages, and of conspicuous features of railroad rolling stock such as the extension or projection of engines and cars beyond, and outside of, the rails on which they run."

The jury found, on proper instructions, that appellee had used, and claimed adversely, a right-of-way 8½ feet from the center of the track on each side, or 17 feet in width, in its operation. Appellee had used and maintained this 17 ft. space since 1907, or for more than 40 years, and no one had ever questioned its title. Although appellee appears to have no record title, or deed, in the circumstances, I think a presumptive grant was clearly established.

"Generally a grant will be presumed on proof of an adverse, exclusive and uninterrupted possession for 20 years and such rule will be applied as a *presumptio juris et de jure,* whether by possibility a right may be acquired in any manner known to law." *45 Fed. Supp.* 681.

We never reverse when there is substantial evidence to support the jury's verdict, as here.

The land described in appellee's complaint was 17 feet wide as measured 8½ feet from the center of appellee's railway track to each side, and the trial court instructed the jury that if it should find that the railway company took possession of the land described in its complaint and "has for a greater period than seven years openly, continuously, adversely and exclusively had the possession of said property" then as a matter of law, the property now belongs to appellee.

There was substantial evidence that 17 feet of land was used by the railroad "for clearance" and in its operations. Obviously, brakemen and employees must have some space beyond the ends of the ties to perform such duties as mounting cars, alighting therefrom and making couplings.

M. A. Eddy testified that 17 to 17½ feet was necessary, and so used, and the jury, by its verdict, has so found.

We, therefore, are not called upon to guess as to the width of the property actually claimed and used by the railroad.

From a practical standpoint, how could appellee operate, or clear its freight cars, on this track on a space

measured by the length of a crosstie of the standard length of 8 feet?

The jury, by its verdict, presumably composed of practical men, evidently thought that it could not be done.

Each case must be governed by its own facts and I think that there was substantial evidence here to warrant the jury's finding that the railroad was entitled to the 17 feet which it had actually claimed and used in its operations adversely for more than 40 years.

This court said in *Memphis & Little Rock Railroad Company* v. *Organ,* 67 Ark. 84, 55 S. W. 952: "The possession of the railroad company, although wrong in the beginning, may ripen into a right by virtue of the continuance of the wrong for the requisite statutory period. As seven years' adverse possession, under the statutes of this state, will bar an action to recover lands, it will be sufficient to bar the action to enforce the claim of the owner against the land or to enjoin the railroad company from using it until just compensation is made, as in that time the right necessary to support the action will be divested, and there will be no basis upon which it can be maintained.' 51 Ark. 271; citing: *Howard* v. *State,* 47 Ark. 431, 2 S. W. 331; *Patton* v. *State,* 50 Ark. 53, 6 S. W. 227, where it was held by this court that 'a road becomes established as a public highway, by prescription, when the public, with the knowledge of the owner of the soil, has claimed and continuously exercised the right of using it for a public highway for the period of seven years, unless it was so used by leave, favor or mistake.' In the Patton case it was said, 'the right to a public highway acquired in this manner is based upon adverse possession for the full statutory period of limitation.' The same doctrine applies with equal force to railroads. In both cases the land is taken and appropriated and used as a highway for the public benefit. We know of no reason why the same limitation should not prevail in both cases."

The judgment should be affirmed.

Opinion delivered December 19, 1949.

Marshall Purvis and *Walter M. Purvis,* for appellant.

Ike Murry, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

HOLT, J. On information charging the crime of burglary, a jury found appellant, Pope, guilty and assessed his punishment at a term of five years in the State Penitentiary. From the judgment is this appeal.

Appellant argues ten grounds for reversal.

—(1)—

Appellant says that he "admits that an offense was sufficiently charged under Arkansas Statutes, (1947), § 41-1001, but states that appellant was not tried under this section," but was tried under § 41-1004. We cannot agree. Section 41-1001 provides: "Burglary is the unlawful entering a house, tenement, railway car, automobile, airplane, or other building, boat, vessel, or water craft with the intent to commit a felony or larceny."

The information (omitting formal parts) accused "the defendant, Harry M. Pope, of the crime of burglary committed as follows, to-wit: The said defendant on the 18th day of December, 1948, in Garland County, Arkansas, did unlawfully, willfully and feloniously break and enter a certain building known as Crawford's Pharmacy, the same being situated at 1008 Park Avenue, Hot Springs, Garland County, Arkansas, with the intent to commit a felony therein, against the peace and dignity of the State of Arkansas."

The court instructed the jury in Instruction No. 2: "You are instructed that burglary is the unlawful entering of a house, tenement, railway car, automobile, airplane, or other building, boat, vessel or water craft with intent to commit a felony or larceny," and in No. 7:

"You are instructed that if you find from the evidence beyond a reasonable doubt that the defendant in Garland County, Arkansas, and within three years before the filing of the information in this case, that the defendant did unlawfully enter or aid or abet in unlawfully entering the building occupied by the Crawford Drug Store, with the intent to commit any felony that it will be your duty to fix his punishment at imprisonment in the penitentiary for not less than two nor more than seven years."

Obviously, we think the court based its instructions on § 41-1001 and the issues were tried under this section and not under § 41-1004. Under § 41-1001 it makes no difference whether the burglary charged was committed in the day time or at night. Since appellant concedes that the information was based on § 41-1001, we proceed to examine his second argument that the evidence was not sufficient to support the verdict, and that it rested on "speculation and conjecture."

—(2)—

The evidence was to the following effect: Having information of a disturbance at Crawford's Drug Store in Hot Springs, at about one o'clock a. m. of December 17, 1948, a number of police officers proceeded to that place and en route they noticed a late model maroon Hudson automobile leaving the scene. The car bore a Texas license tag, KD-5453 (which Officer Rowe noted on an envelope) and apparently was being driven in low gear, without lights. As they approached the drug store, three of the officers proceeded to the rear and placed a spotlight in a position to light up the alley way. Another officer proceeded to the front and as he approached the door of the store, he observed two men leaving the building from the rear into the alley. Shots

were exchanged, resulting in the death of one of the men named Short, and the capture of his confederate, Bryant, and the serious wounding of Officer Ermey. The rear door of the drug store had been pried open, the drawers of the prescription counter had been pulled out and ransacked.

The following day, appellant, Pope, was arrested at the Coronado Courts near Hot Springs, and in a garage adjacent to his cabin, the maroon Hudson automobile, above referred to, and observed at the scene of the crime the night before, was found. Papers on Pope's person indicated that the car belonged to him. A "sport" shirt upon which was stenciled the name of Bryant was found in Pope's possession, and a search of the automobile revealed a purse containing data identifying it as belonging to Bryant.

Bryant, offered as a witness by the State, had prior to the trial made a written and oral statement detailing appellant's connection with the burglary of the drug store, from the time appellant had "cased" the premises until the criminals were apprehended. On the stand, Bryant denied the truth of his previous statements or admissions. The complete written statement, at appellant's request, was read to the jury. The weight to be given to Bryant's testimony and its credibility, in the circumstances, were matters for the jury's consideration.

While it is true Bryant was an accomplice, the court told the jury, by proper instructions, to which appellant interposed no objection, that appellant could not be convicted on the uncorroborated testimony of any accomplice. Instruction No. 3, which the court gave, contained this language: "You are instructed that the defendant in this case cannot be convicted on the uncorroborated testimony of any accomplice and that the amount of corroborating evidence which should be required is a question solely for the jury, and it is sufficient, if there is such evidence, to warrant you in convicting the defendant, provided it, taken with all the other evidence in the case convinces you of his guilt beyond a reasonable doubt."

As pointed out, appellant made no objection to this instruction, and made no request for any instruction on the question of Bryant's being an accomplice.

Without attempting to detail all of the testimony, that above set out, when viewed in the light most favorable to the State, as we must, was ample to support the jury's verdict of guilty.

—(3)—

Appellant says that error was committed in the direct examination of Officer Rowe. It appears that on the night in question this officer observed the license number of appellant's car and wrote it down on the back of an envelope, and using this as a memorandum to refresh his memory, testified that the car was "a maroon Hudson, has a license KD-5453 Texas tag." The envelope was not introduced in evidence. This particular car was shown by the evidence to have been connected with the burglary. The court, therefore, committed no error.

—(4)—

Appellant next complains that the direct testimony of Chief of Police, Watkins, which was to the effect that, in searching appellant's car, a concealed, unmarked bottle, containing forty or fifty quarter grain morphine tablets, was discovered, was incompetent and prejudicial, for the reason that it was not shown where the narcotics came from, and it had not been shown that they came from the Crawford Drug Store. This evidence that appellant had this morphine in his possession when arrested was permissible as bearing upon motive and intent. The evidence shows that appellant possessed the morphine in question illegally under the provisions of our "Uniform Narcotic Drug Act," Ark. Stats. (1947), §§ 82-1001—82-1023, and was subject to criminal prosecution.

Here, the evidence shows that the building in which the burglary was committed was a drug store, and the drawers of the prescription case had been ransacked. This evidence was proper, as indicated, as bearing upon

appellant's intent to commit a felony or larceny under § 41-1001.

This court in *Stone* v. *State,* 162 Ark. 154, 258 S. W. 116, used the following language, applicable here: "It is true that the general rule is that evidence of a distinct offense cannot be admitted in support of another offense; but there are several exceptions to the general rule. One of the exceptions is that, when it is necessary to fix the intent of the accused, or to prove the motive for the offense charged against him, such testimony is admissible. It is no objection to its admission that it discloses other offenses that are subject to indictment. The exceptions to the general rule as to the admission of evidence of collateral crimes, when the evidence of the extraneous crime tends to identify the accused as the perpetrator of the crime charged, or to show the intent with which the defendant committed it, is as well settled as the general rule itself."

—(5)—

Appellant next argues that the court erred in permitting State's counsel to state in the presence of the jury at the beginning of the trial that "the defense has already stated to the court, and offered to stipulate, that the burglary took place on Park Avenue."

The record reflects that appellant objected to this statement as being prejudicial and asked that the jury be admonished to disregard it. The court appears not to have ruled on appellant's objection, nor did appellant ask for a ruling. The objection was therefore waived.

In *Clardy* v. *State,* 96 Ark. 52, 131 S. W. 46, this court said: "The proper manner in which to make and preserve an objection to the introduction is, first, to make the objection at the time the testimony is offered or to ask its exclusion at the time it is given and to obtain a ruling of the court thereon, and then to except to an adverse ruling."

—(6)—

Appellant next insists that the court erred "in permitting this case to go to the jury * * * when there

was no testimony offered at the trial by the State as to who owned Crawford's Pharmacy or was interested therein other than that a robbery had been reported * * * and no proof of criminal intent or of narcotics or anything else of value taken."

In effect, here again appellant questions the sufficiency of the evidence. It was not necessary, under the statute above, to prove the ownership of the drug store which was burglarized. It was no defense that the felony or larceny intended to be committed was not completed. The guilty purpose is the essence of the offense. This court said in *Sanders* v. *State,* 198 Ark. 880, 131 S. W. 2d 936: "* * * 'When no property of any value is discovered by the accused after he has forcibly broken and entered the building with felonious intent, the better rule is that he is guilty of burglary, since the guilty purpose is the essence of the offense.' 4 R. C. L. 436; *Davis and Thomas* v. *State,* 117 Ark. 296, 174 S. W. 567. This court has decided in a number of cases that the offense of burglary is complete, even though the intention to commit a felony is not consummated. *Duren* v. *State,* 156 Ark. 252, 245 S. W. 823."

—(7)—

Next, appellant says the trial court erred in making the statement to the jury presently set out.

The record discloses that while a witness, Jeanette Short Brown, (former wife of the deceased Short) was testifying as to her relationship to the deceased Short and of her coming to Hot Springs in the car with appellant to claim Short's body, the following occurred: "Q. Did you have any conversation with Pope, coming down to Hot Springs, about this thing that happened down here? A. No, sir. Q. Did Harry say to you that he almost got caught down here at Hot Springs? MR. PURVIS: I object to that, your Honor, as a declaration against interest. THE COURT: Objection overruled. The defendant is present and has an opportunity to rebut that. MR. PURVIS: Note my exceptions."

It will be noted that appellant's objection was predicated on the claim that the alleged statement to the witness was a declaration against interest and was not based on the ground that the trial judge's statement was a comment on appellant's failure to testify. It was the duty of appellant to call specifically to the court's attention the particular error complained of, or the reason for his objection, and this he failed to do.

In *Bell* v. *State,* 120 Ark. 530, 180 S. W. 186, we find this language, applicable here: "It was held in *Powell* v. *State,* 74 Ark. 355, 85 S. W. 781, that an objection, to be effective, must be specific so as to apprise the trial court of the particular error complained of by the objection. See, also, *Clardy* v. *State,* 96 Ark. 52, 131 S. W. 46."

—(8)—

Next it is contended that the trial court erred in giving Instruction No. 2 set out above. This contention is untenable for the reasons covered in Assignment No. 1 above.

—(9)—

Next error is alleged in the giving of the following instruction: "It is not necessary that the evidence of an accomplice be corroborated on every point on which he has testified, but if you believe from the evidence that he is corroborated, as to the commission of the crime charged and on any point tending to connect the defendant with the commission of the offense and if the evidence with this corroboration is sufficient to satisfy your mind beyond a reasonable doubt that the defendant is guilty then you would be authorized to so find," for the reason, says appellant, "that said instruction is too general in its terms and not applicable to this case for the reason that there is no testimony in the record of an accomplice to be corroborated."

We find no merit in this contention for the reason that witness, Bryant, certainly an accomplice, testified in the case, as pointed out in our consideration of Assignment No. 2, above, and it was not error to give this in-

struction, in the circumstances, based on § 43-2116. (*Powell* v. *State,* 177 Ark. 938, 9 S. W. 2d 583.)

—(10)—

Finally, appellant argues that the court erred in giving State's Instruction No. 7. The court told the jury in this instruction that if they found "that the defendant (appellant) did unlawfully enter or abet in unlawfully entering the building occupied by the Crawford Drug Store, with the intent to commit a felony," then they should convict.

Appellant's objection to this instruction was that it opened the question as to whether he broke into and entered the building for the purpose of committing a felony and that the information failed to apprise him of the specific offense with which he was charged. The information here is substantially in the language and within the meaning of the statute, § 41-1001, and clearly charged appellant with the crime of burglary. (*The Kansas City Southern Railway Co.* v. *State,* 194 Ark. 80, 106 S. W. 2d 163.)

A number of other assignments of alleged errors were properly preserved in appellant's motion for a new trial. We have examined them and find all to be untenable.

The judgment is affirmed.

TERRY *v.* LITTLE ROCK CIVIL SERVICE COMMISSION.

4-9011 225 S. W. 2d 13

Opinion delivered December 19, 1949.

O. W. Pete Wiggins and *Melbourne M. Martin,* for appellant.

T. J. Gentry, for appellee.

GRIFFIN SMITH, Chief Justice. During the war emergency Everett Terry served thirteen and a half months on the Little Rock Police Force under an original appointment as special patrolman. Then through error he was certified to be eligible for permanent appointment as a regular patrolman. The Commission's action in this respect was taken June 16, 1944, with notice to Terry the following day. A month later it was ascertained that the promotion was based upon a misconception of Act 28 of 1933. Believing that its power of temporary appointment had not been exhausted, the Commission informed Terry that he could be retained for the special purpose first in view. The determination was impliedly acquiesced in by Terry when he promptly returned to the special position. On June 8th, 1948, the Commission directed Chief Marvin Potts to inform Terry that his services were no longer required.[1]

[1] Reasons given were that "The war is over; Camp Robinson has been closed; suitable men who can meet the qualifications of Patrolman on the Police Force of the City of Little Rock are obtainable, and [it has been found] that the emergency [is at an end]. Because of this fact, Mr. Everett Terry, having no Civil Service status, but only the status of a temporary wartime emergency employe, [must be discharged"].

Twice, after receiving notice in 1944 that his position was temporary, Terry took Civil Service examinations, but fell substantially short of passing grades. There is no suggestion that the Commission acted fraudulently in grading the papers.

Circuit Court very properly ordered that records of all official transactions be certified for the purpose of determining whether, as the petitioner contends, void acts of the Commission affirmatively appear. See *Hall* v. *Bledsoe,* 126 Ark. 125, 189 S. W. 1041. It was not a case falling within the provisions of the Civil Service Law, § 5, giving the right of appeal, trial *de novo,* and Circuit Court relief to one wrongfully discharged by the Police or Fire Department, or to one whose rank has been reduced. Terry does not contend that he qualified for a permanent position under Civil Service rules, or as Act 28 directs. Appellant bases his rights solely on the ground that having been employed specially for more than a year, and having been told that his status was permanent, the Commission was estopped to deny its own acts.

Our view is that if appellant had any rights in the circumstances here, they were reviewable within apt time after notice by the Commission that it erred in promoting him, and that his status then and for the future would be what it was before the mistake occurred.

Ordinarily a governmental agency is not estopped by the unauthorized acts of its agents. *Wallace* v. *Hill,* 135 Ark. 353, 205 S. W. 699; *Southwestern Distilled Products Co., Inc.* v. *State, etc.,* 199 Ark. 761, 136 S. W. 2d 166; Bishop on Contracts, 2d Enl'g'd Ed., p. 419.[2]

Act 28, in part, was construed in *Connor* v. *Ricks, Mayor,* 213 Ark. 768, 212 S. W. 2d 552. In discussing some of the duties enjoined, the opinion says: "Section 3, in language ordinarily construed to be mandatory, is a commission to the Board [of Civil Service Commis-

[2] For other cases on estoppel, pertinent here, see *Superior Bath House Co.* v. *McCarroll,* 200 Ark. 233, 139 S. W. 2d 378; *Hollis & Co.* v. *McCarroll,* 200 Ark. 523, 140 S. W. 2d 420; *Board of Directors of St. Francis Levee District* v. *Fleming,* 93 Ark. 490, 125 S. W. 132, 659, cited in *Hubble* v. *Grimes,* 211 Ark. 49, 199 S. W. 2d 313.

sioners] 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 in that case]."

Subdivision 4 of § 3, referred to in the Connor case, tells the Commission to include in the rules provision "For the creation of eligible lists for each rank of employment in [the Police and Fire] departments in which shall be entered the names of the successful candidates in the order of their standing in the examination. No person shall be eligible for examination for advancement from a lower to a higher rank until he shall have served at least one year in the lower rank, except in case of emergency, which emergency shall be decided by the Board of Commissioners. . . . No temporary appointment (subdiv. 8) shall continue longer than sixty days, nor shall successive temporary appointments be allowed except in times of grave danger of which the Commission shall decide."

Appellant believes that four years of service as a special patrolman were of more value to the City, as evidence of his qualifications, than the minimum requirement of a year served in a lower bracket. But we must not lose sight of the fact that in permitting Terry to serve successive 60-day periods, justification must be found in the eighth subdivision of § 3—the existence of grave danger, "of which the Commission shall decide." Appellant is in no position to insist that the Commission abused its discretion when (a) in order to employ him it decided that grave dangers existed, or when (b) in continuing his services it took note of a continuing emergency. The difficulty of his position is that to claim any of the rights here asserted he must have acquired a Civil Service status within the Act and within the Commission's authorized rules. His misfortune is that when the emergency ceased his rights likewise terminated. The

Commission not only had the right to correct the error it had made, but it was under a duty to do so.

Affirmed.

HAMM *v.* HOWARD.

4-9024 225 S. W. 2d 333

Opinion delivered December 19, 1949.

Rehearing denied January 16, 1950.

Lee Ward, for appellant.

William B. Howard and *Horace Whitsitt,* for appellee.

LEFLAR, J. This case involves a decree by the Chancellor awarding to appellees Howard and Whitsitt, attorneys at law, a fee of $200, the award being against both Roe Hamm and his wife Mrs. Marie Hamm. Only Mrs. Hamm appeals.

On March 12, 1949, appellee Howard filed for Roe Hamm a bill in equity for an accounting and dissolution of partnership against Mrs. Hamm. At that time Hamm and his wife had been separated for one week. Previously they had worked together in a liquor store, inherited by her from a former husband, in which the bill asserted that they were partners. Appellee Whitsitt became associated in the case with Howard shortly thereafter. Both attorneys had contingent fee contracts with Hamm. On March 23 Mrs. Hamm filed her answer and cross-complaint in which she (1) denied that a partnership existed or that her husband had any interest in the liquor store, and asked that his bill for dissolution and accounting be dismissed, (2) asked for a divorce, and (3) asked for return of a truck which was security for a loan on which she was jointly liable with her husband. Thereafter the Chancellor separated the divorce proceeding from the rest of the suit, and ordered it set for hearing by itself. On April 5, one month after they separated, Mr. and Mrs. Hamm resumed marital relations. She directed her attorney to dismiss her divorce proceeding. It was several days, possibly a week or more, before Howard and Whitsitt learned of this reconciliation. There were then some negotiations concerning payment of a fee by Roe Hamm to Howard and Whitsitt, but no agreement was reached.

On May 11 appellees filed a motion asserting that Mr. and Mrs. Hamm, as plaintiff and defendant in the suit filed by appellees for Mr. Hamm, had compromised and settled that suit without the consent of their attorneys, so that under Act 59 of 1941 (Ark. Stats., 1947, § 25-301)

the attorneys were entitled to a "judgment for a reasonable fee or compensation against all of the parties to such compromise or settlement." They were anxious to have a judgment against Mrs. Hamm as well as her husband, apparently because the husband was insolvent. Evidence on the motion was heard on May 31. Thereafter the Chancellor entered against both Mr. and Mrs. Hamm the judgment for a $200 fee from which Mrs. Hamm now appeals.

Section 25-301 gives to lawyers a comprehensive right to collect reasonable fees not only from their own clients but from opponents against whom suit was filed on a client's behalf, if there is without the attorney's consent a compromise or settlement of the claim sued on. Defining the terms "compromise or settlement", the statute provides: "Any agreement, contract or arrangement between litigants or any conduct of the one seeking affirmative relief at the instance or procurement of his adversary which deprives such litigant of his asserted right against his adversary shall constitute a compromise or settlement of his cause of action within the meaning of this section." For this statutory right to a fee to be sustained it is not necessary that the lawyer show that his suit would have been successful. *Slayton* v. *Russ,* 205 Ark. 474, 169 S. W. 2d 571, 146 A. L. R. 64. The lawyer need not even show that the client received any consideration for the settlement or compromise; "he is only required to show any agreement or arrangement between the parties to the lawsuit, which would deprive the litigant of his asserted right against his adversary." *Missouri Pacific Transp. Co.* v. *McDonald,* 206 Ark. 270, 174 S. W. 2d 944.

The question before us in this appeal is whether there is in the record sufficient evidence to sustain a finding that there was a compromise or settlement, as defined in the preceding paragraph, of the claim for accounting and dissolution of the asserted partnership. For one thing, the suit had never been dismissed; it was still pending when the motion for a fee was heard. Both Mr. and Mrs. Hamm testified that nothing had been done

about it, that they in effect ignored it. Mrs. Hamm while on the witness stand denied, as she always had, that there was any partnership, but said she was willing for the suit to be tried and had made no agreement that would prevent its being tried. Her husband likewise testified that there was no agreement about the suit, but admitted that his wife had always been sole owner of the liquor store and that his suit was groundless. Both Howard and Whitsitt testified at length, each questioned by the other, and their testimony revealed a substantial amount of work done on the case, clearly justifying the amount of the fee awarded to them. But neither of them at any time gave any affirmative testimony to the effect that the partnership claim as such had been compromised or settled. Nor did any other witness.

The Arkansas attorney's fee statute is not satisfied by mere proof that the parties have lost interest in their litigation. There must be a compromise or settlement, something "which deprives such litigant of his asserted right against his adversary." The only actual evidence that such a termination of rights has occurred between Roe and Marie Hamm is the fact that after a separation during which the partnership claim was asserted they have resumed their marital relationship and she has dropped her divorce proceeding. But the law shares society's strong interest and policy in favor of the preservation of marriages, particularly including those in which there is a reasonable possibility of re-establishing unions already threatened by separation. We are unwilling to penalize an honest resumption of the marital relationship by declaring that it alone subjects a party thereto to the non-contractual obligation created by § 25-301, nor do we believe that the legislature so intended. We hold that to sustain the claim for an attorney's fee, to be collected from the opposing party in a case such as the one now before us, there must be evidence of compromise or settlement apart from and in addition to the fact of resumption of marital relations alone.

This does not deprive appellees of their right to the full amount of the fee allowed, against their client Roe

Hamm. As to the appellant Marie Hamm, however, the decree is reversed and the motion dismissed.

CAMPBELL *v.* SELIG.

4-9015 225 S. W. 2d 340

Opinion delivered December 19, 1949.

Rehearing denied January 16, 1950.

Linwood L. Brickhouse and *D. K. Hawthorne,* for appellant.

Meehan & Segraves and *M. F. Elms,* for appellee.

DUNAWAY, J. In the first appeal of this cause it was held that appellant Campbell and appellee Selig were tenants in common in the ownership of certain filling station property in the City of Stuttgart, Arkansas. The cause was remanded with directions to state the account between them. See *Campbell* v. *Selig,* 212 Ark. 168, 205 S. W. 2d 848. As stated there in the opinion by Mr. Justice FRANK G. SMITH: "The transactions between the present parties were numerous, intricate and confusing."

On this second appeal only the facts necessary to an understanding of the issues now to be decided will be stated. The real property in question was acquired sometime prior to the execution of a written agreement between Campbell and Selig on April 15, 1930. At that time the property was mortgaged, title was in Selig, and an additional $3,000 was required from Campbell for his interest to equal that of Selig. In addition to the $3,000 required by Campbell for the filling station property, he was also in need of $3,500 in connection with some rice-farming operations in which he was engaged. To obtain the necessary funds a $6,500 loan was made at The People's National Bank of Stuttgart, which loan was secured by a deed to the bank of a one-half interest in the filling station property and a chattel mortgage on Campbell's rice crop. In accordance with the agreement already referred to, $3,000 was deposited in the filling station bank account. This was ultimately used toward payment of the prior mortgage on the Campbell-Selig property. After re-paying only $500 of the $6,500 loan, Campbell left Stuttgart, and was not heard from again in connection with the property in question until he filed this suit for an accounting in 1944. Without detailing the financial transactions by which Selig paid off the indebtedness against the filling station property, including the $6,000 obligation of Campbell, it is sufficient to state that by 1941 this had been accomplished and Selig held legal title to the property.

In 1944 a complete audit of the account of the Home Filling Station on the books of The People's National Bank, from April 15, 1930, to August 22, 1944, was made by Hennegin, Croft & Company, accountants. This audit reflected that on April 15, 1930, the date of the agreement between Campbell and Selig, there was a balance of $1,424 in this account.

On remand of this cause after the first appeal, a Master was appointed to state the account between Campbell and Selig. The manner in which he arrived at the amount due from Campbell to Selig is stated in the Master's Report: "In arriving at my conclusions, I

have used figures provided in the audit report of Hennegin, Croft & Company for the period April 15, 1930, to August 22, 1944, without further verification. All transactions from August 23, 1944, to May 31, 1948, have been reviewed by me and all items of consequence have been verified by reference to supporting documents.''

Exceptions to the report were filed by both parties, and Selig filed an amended answer and cross-complaint in which he claimed he was due an additional credit for the $1,424 item above mentioned, as a loan by him to the business from his personal funds. He also claimed a reasonable compensation for his services through the years in attending to the property during Campbell's extended quiescence. Campbell claimed that the $1,424 belonged to the business just as the real property did, and denied that Selig was entitled to any compensation for his personal services.

At the trial the parties agreed that certain corrections should be made in the final account as reported by the Master. Judgment was entered for the agreed balance in favor of Selig, as shown by the corrected report, in the sum of $3,102.19 with interest at six per cent from October 1, 1948, the date to which said report covered. The court also found for Selig on the issues raised by his cross-complaint.

It is the allowance of these two additional items by the chancellor of which appellant complains: (1) The sum of $1,424 together with one-half the interest thereon at five per cent compounded from April 15, 1930, to October 1, 1948. (2) The sum of $2,800, which was charged as Campbell's share of a reasonable compensation allowable to Selig for managing the property since April 15, 1930.

As to the $1,424 item we do not think that the chancellor's finding that this money belonged to Selig personally and was advanced by him as a loan to the partnership was against the preponderance of the evidence. Selig testified that he had personally borrowed this money and deposited it in the filling station account, because the rents from the property were not sufficient

to meet the obligations of the business. Campbell did not testify at the trial of this issue.

That interest may properly be charged on a loan to a partnership by one of the parties was decided in *Phelps* v. *Davis,* 173 Ark. 108, 291 S. W. 995. Mr. Justice McHaney there said at page 111: "We therefore adopt the rule that a partnership may be liable for interest to a partner who makes advances to or for the account of the firm, where there is a special contract to that effect, or where, from the facts and circumstances surrounding the case, it may reasonably be implied that the firm was to pay interest for the advances." Here Campbell departed, leaving Selig to handle the financing and refinancing of their mortgaged property as best he could. Campbell certainly understood that interest would have to be paid on borrowed money. In these circumstances, the reasonable implication was that the partnership was to pay interest on the loan from Selig, just as on other loans. It was further held in the *Phelps* case that interest at six per cent per annum is the proper charge.

Therefore, the proper allowance to Selig as to this item is $1,424, plus one-half the simple interest thereon at six per cent per annum from April 15, 1930, to October 1, 1948, together with interest on this total amount from October 1, 1948, at six per cent per annum.

We hold, however, that the chancellor erred in allowing Selig compensation for his services in caring for the property. The general rule is that a tenant in common is not entitled to compensation for services rendered in the care and management of the common property in the absence of an agreement or understanding to that effect. *Keithline* v. *Keithline,* 106 Colo. 400, 105 P. 2d 1086; *Larkin* v. *McCabe,* 211 Minn. 11, 299 N. W. 649; *Von Herberg* v. *Von Herberg,* 6 Wash. 2d 100, 106 P. 2d 737; *Lake* v. *Perry,* 99 Miss. 347, 54 So. 945; *Staples* v. *Pearson,* 230 Ala. 62, 159 So. 488, 98 A. L. R. 852.

In *Dunavant* v. *Fields,* 68 Ark. 534, 60 S. W. 420, where a tenant in common sought to recover for improvements made in clearing the common lands, we said at page 543: "In the case at bar, the plaintiff was al-

lowed for his outlay of money in making improvements, but he was not allowed for his personal services, which he insists should be paid him. * * * the law would not permit him to go further than to seek reimbursement for money actually paid out on the improvements, in the absence of a contract authorizing him to make them.'' There is no evidence whatever in the instant case that Campbell agreed to compensate Selig for his managerial services.

The decree appealed from is affirmed in part, reversed in part, and the cause remanded with directions to enter judgment in accordance with this opinion.

BOSSEN *v.* WOMAN'S CHRISTIAN NATIONAL LIBRARY ASSOCIATION.

4-9070 225 S. W. 2d 336

Opinion delivered December 19, 1949.

Wootton, Land & Matthews, for appellant.

Bessie N. Florence, Sidney S. Taylor and *David B. Whittington,* for appellee.

MINOR W. MILLWEE, Justice. The question for determination is whether the trustees of a charitable trust may sell land owned and held for library purposes and use the proceeds to construct a library building and turn the building over to a permanent tax supported library organization.

On April 2, 1949, appellee, Woman's Christian National Library Association, accepted appellants' offer to purchase Lots 11 and 12 of Block 127 of the Hot Springs Reservation, Garland County, Arkansas, for the sum of $32,000. The written agreement provided that appellee would furnish an abstract showing good title and convey to appellants by warranty deed. Upon examination of the abstract of title furnished by appellee, the attorneys for appellants refused to approve the title on the ground that appellee held the lands in trust for library purposes and could not convey good title to appellants. Upon appellants' refusal to comply with the terms of their offer to purchase, appellee instituted this suit for specific performance of the sale agreement. In their answer appellants alleged that appellee was holding the lands in trust and could not convey a marketable title to appellants free of the trust and free of liens and encumbrances.

The case was submitted to the chancellor upon the pleadings and a stipulation, which includes the following facts: Appellee is a benevolent corporation organized in 1881 under the provisions of Act 51 of 1875 which, as amended, now appears in Ark. Stats., (1947), § 64-1301 *et seq.* In 1883 appellee acquired the lots in controversy from the United States Government for $100. The government conveyed to appellee in fee simple with no restrictions upon alienation or conveyance. Articles 10 and 11 of appellee's Constitution and Articles of Incorporation provide: "ART. X. Literature. The object of

this association shall be to provide books, newspapers and magazines of such character as will afford instruction and diversion but such books and papers as are demoralizing in their tendency or subversive of religion shall not be admitted.

"ART. XI. Building. The object of this association is to provide a suitable and attractive building where the literature of the Association may be permanently lodged and where suitable lectures on such subjects as are not in field of political or theological controversy and other entertainments not in conflict with the objects of the association may be given."

Appellee has held the lands in trust for library purposes since 1883 during which time it has been financially unable to erect a library building upon said lots. The lots have been rented from time to time and are now under lease to an oil company which maintains a filling station upon the property. Appellee's only income consists of annual rentals of $1,800 from said lots and approximately $600 yearly in library subscriptions and fines. This income has heretofore been used to maintain a public library in rented property, but is insufficient to provide an adequate library for the City of Hot Springs and there is no likelihood of such income being materially increased. Acting through its Board of Directors, appellee has determined that the objectives of its trust could best be carried out by ceasing to operate a general library and using the proceeds of the sale of said lots in the erection of a suitable library building for the purpose of housing the Garland County Free Library.

The Garland County Free Library is operated by the Garland County Library Board, a legally constituted tax supported body organized under Amendment 38 to the Constitution of 1874 and Act 244 of 1927. The Board owns no library building, but a local tax is levied for maintenance of a library and the board is authorized to receive on behalf of the county any gift for building purposes. Appellee has disposed of its books and other personal property to said board.

It also appears that the lots in question are now unsuitable for library purposes and that Garland County owns a suitable site near the courthouse and schools of the city which has been properly dedicated in perpetuity for library purposes and for use by the Garland County Library Board. Appellee and the Garland County Library Board have entered into a written agreement whereby appellee is to sell the two lots and use the proceeds in the erection of a building upon the lots set aside to the Garland County Library Board and, upon completion of said building, to convey same to the Board in trust for library purposes. The Board agrees to properly maintain and operate in said building a free public library for the use of the citizens of Garland County.

The trial court held that appellee could convey to appellants a marketable title to the two lots free of any trust, liens or encumbrances and ordered specific performance of the sales agreement. The court specifically found that the agreement by appellee and the Garland County Library Board represented the only practical manner in which appellee could discharge its trust obligations to provide a suitable library building for the people of Garland County.

Appellee is the same corporation involved in *Woman's Christian Nat'l. Lib. Ass'n.* v. *Fordyce,* 79 Ark. 532, 86 S. W. 417, and *Fordyce* v. *Woman's Christian Nat'l. Lib. Ass'n.,* 79 Ark. 550, 96 S. W. 155, 7 L. R. A., N. S. 485. In the last case cited the court found that the property here involved was held by appellee in the nature of a charitable trust and could not be sold under execution issued on a judgment rendered for the misfeasance or malfeasance of its agents or trustees. Special Justice U. M. Rose, speaking for the court, said: "The Library Association is organized purely for charitable purposes. It has no capital stock, no provision for making dividends or profits, and is as unselfish as any enterprise can be . . . " The court further said: "Being public utilities of a very high order, charities are intimately associated with the State, which exercises over them through its courts a watchful supervision, so that their property,

funds and revenues shall not be diverted to any improper purpose, and that trustees and agents shall perform the duties assigned to them with honesty and fidelity, and for the best advantage of the charitable uses designated by the donor or donors. For these ends the chancery courts have an original and an inherent jurisdiction . . . Devises for charitable purposes that are void at law are often sustained in chancery. 2 Story, Eq., § 1170. Where a literal execution of a charitable devise becomes inexpedient or impracticable, the court will execute it as nearly as it can according to the original purpose. *Id.*, § 1169. The court will supply all defects of conveyances where the donor has capacity to convey unless the mode of donation contravenes some statutory provision. *Id.*, § 1171."

In 10 Am. Jur. Charities, § 51, it is said: "The American Law Institute takes the position that the trustee of a charitable trust can properly sell trust property if a power of sale is conferred in specific words, or such sale is necessary or appropriate to enable the trustee to carry out the purposes of the trust, unless such sale is forbidden in specific words by the terms of the trust or it appears from the terms of the trust that the property was to be retained in *specie*. Even a prohibition against the sale will not prevent the court from authorizing the trustee to make sale, in case of necessity arising from unforeseen change of circumstances, and to apply the proceeds to the purposes of the trust. Thus, where the circumstances existing at the time of the creation of a charitable trust have changed to such an extent that in order to carry out properly the charitable intention of the donor, it is necessary to dispose of the trust property and devote the funds to the acquisition of a more suitable location, a court of equity will authorize the sale of the property." See, also, Restatement, Trusts, Vol. 2, §§ 380, 381 and 399; Bogert, Trusts and Trustees, Vol. 2, § 438.

There are many cases from this and other jurisdictions in which courts of equity have applied the *cy pres* doctrine in the execution of a charitable trust or devise. "The meaning of the doctrine of *cy pres* is that when a

definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close approximation to that scheme as reasonably practicable; and so, of course, it must be enforced, and the reason or basis for the doctrine is to permit the main purpose of the donor of a charitable trust to be carried out as nearly as possible where it cannot be done to the letter." 14 C. J. S., Charities, § 52. Some of the cases in which this court has applied the doctrine are: *McCarroll* v. *Grand Lodge of I. O. O. F. of Arkansas,* 154 Ark. 376, 243 S. W. 870; *State ex rel. Attorney General* v. *Van Buren School District No. 42,* 191 Ark. 1096, 89 S. W. 2d 605; *State National Bank of Texarkana* v. *Bann,* 202 Ark. 850, 153 S. W. 2d 158.

In *McCarroll* v. *Grand Lodge of I. O. O. F. of Arkansas, supra,* this court cited many cases in which the *cy pres* doctrine has been applied and quoted with approval as follows from the case of *Sailors Snug Harbor* v. *Carmody,* 211 N. Y. 286, 105 N. E. 543: "No general rule can be enunciated as to the manner in which the *cy pres* doctrine will be applied. Each case must necessarily depend upon its own peculiar circumstances. Inadequacy of the trust fund to accomplish the purpose of the testator in the manner originally intended may, however, justify the scheme of the charity being changed . . ." In the Van Buren case, *supra,* a Methodist school was made beneficiary of a charitable trust and ceased operation. The *cy pres* doctrine was applied and the court directed the trustees to devote the *corpus* of the trust to another Methodist school.

In *State National Bank of Texarkana* v. *Bann, supra,* the testator directed in his will that the trustees build and operate a hospital. The revenue became insufficient to operate the hospital and this court upheld the chancery court in authorizing the trustees to sell the property and contribute the proceeds to another charitable hospital under the *cy pres* doctrine. The court said: "The appellees are unable to provide an adequate plant with their own funds or to even operate the old one. Con-

fronted with this situation, they applied to the chancery court to administer the trust under the *cy pres* doctrine, or the doctrine of approximation, and, pursuant thereto, have formulated the plan in the contract they have entered into with the Sisters of Charity and the so-called Trustees of Memorial Hospital by which they will pool their assets with those of the others, build a charity and pay hospital to be operated by a well known charitable organization, which practically insures its perpetuity. . . . We cannot cause this trust to be executed in the precise manner contemplated by the testator, but we can apply the trust fund to another charity as nearly as possible like that mentioned in the will . . ."

We have not overlooked the case of *Atkinson* v. *Lyle,* 191 Ark. 61, 85 S. W. 2d 715, in which a divided court held the *cy pres* doctrine inapplicable where the instrument creating the trust contained a positive prohibition against selling or encumbering the property devised. While the holding in that case conflicts in part with the Restatement rule as quoted from Am. Jur., *supra,* the facts are readily distinguishable from those in the instant case. The Constitution and Articles of Incorporation of appellee contain no specific prohibition against sale of the trust property. Moreover, appellee is clothed with broad powers under the provisions of Ark. Stats., (1947), § 64-1306 in the matter of acquiring and disposing of its real and personal property in order to carry out the objects and purposes of the corporation.

We conclude that the trial court correctly authorized the sale of the lots by appellee for the purposes indicated under the *cy pres* doctrine. It is stipulated that appellee is financially unable to maintain a library adequate to community needs and that the subject lands are unsuitable for a library site. If appellee erected a library building on said lots it would be without sufficient funds to operate a library. The Garland County Library Board has sufficient tax income to maintain an adequate public library and also has a suitable site for a building but is without funds to erect it. The original founders of appellee did not contemplate the changed conditions

which have rendered their lands unsuitable as a library site nor did they foresee the maintenance of libraries from public taxation. The sale of the lands and execution of the agreement with the Library Board will enable appellee to assist in providing a suitable library building for the community and thereby discharge one of its principal objects after 68 years of endeavor.

The decree of the chancery court directing specific performance of the sale agreement between appellee and appellants is, therefore, affirmed.

JACKSON *v.* STATE.

4585 225 S. W. 2d 522

Opinion delivered December 19, 1949.

Rehearing denied January 23, 1950.

George F. Edwards, for appellant.

Ike Murry, Attorney General, and *Jeff Duty,* Assistant Attorney General, for appellee.

ED. F. MCFADDIN, Justice. This is the second appeal by appellant from convictions of burglary and grand larceny. The first conviction was reversed because the trial court allowed to be introduced the accomplice's plea of guilty. See *Jackson* v. *State,* 215 Ark. 420, 220 S. W. 2d 800. Upon remand the prosecuting attorney filed an information in lieu of the previous indictment. This practice has been sanctioned. See *Cole et al.* v. *State,* 211 Ark. 836, 202 S. W. 2d 770 and 214 Ark. 387, 216 S. W. 2d 402. The trial on July 11, 1949, resulted in a mistrial; and on July 16, 1949, there was conducted the trial from which comes the present appeal. The motion for new trial now before us contains 29 assignments which we will group and discuss in topic headings.

I. *Motion for Continuance.* At the trial on July 16th the appellant moved for a continuance until the court reporter could transcribe the testimony given at the trial on July 11th by the witness, James Darby. Appellant wanted to use such transcribed testimony to impeach Darby when he might testify in the present trial. In the hearing on the motion for continuance the court reporter testified:

"Q. Were you able to prepare the transcript of the testimony of Mr. Darby:

A. No, sir; I looked it over and it was too long to get through due to my other court business, so I couldn't get it out. I will read any part of it you would like to hear."

It thus appears that the defendant (appellant) all the time had available at the trial the court reporter, who could be called to read Darby's former testimony if appellant desired to use it to impeach Darby. In view of this fact, the trial court did not abuse its discretion in refusing the continuance. See *Banks* v. *State,* 185 Ark. 539, 48 S. W. 2d 847, 82 A. L. R. 1051.[1]

II. *Motion to Quash the Jury Panel.* Some or all of the jurors on the regular panel (that is, the panel selected by the jury commissioners) as provided by §§ 39-208 and 39-220 Ark. Stats. (1947) had formed opinions from hearing the testimony of the witnesses in the trial of July 11th; so the trial court had the sheriff summon enough bystanders to complete the panel of jurors for the trial of July 16th. Such completion was accomplished pursuant to § 39-218 Ark. Stats. (1947). Appellant then moved to quash the last-mentioned panel, because it had not been selected by the jury commissioners. The trial court was correct in overruling the motion; because the trial panel as used was selected exactly in the manner provided by § 39-218 Ark. Stats. (1947). See, also, *Hallum* v. *Blackford,* 202 Ark. 544, 151 S. W. 2d 82.

III. *Sufficiency of the Evidence.* The witness, James Darby—night watchman of Foreman, Arkansas—testified that he saw appellant carry the cash register out of the backdoor of Mrs. Capps' store at 3:45 a. m.; that appellant dropped the cash register when he saw witness; and that appellant and his confederate ran to, and escaped in, an old Chevrolet car on which the tail light was not burning. The witness positively identified the appellant. The facts of the breaking and entering of Mrs. Capps' store and the removal of the cash register were shown by other witnesses. Mrs. Capps identi-

[1] See also West's Arkansas Digest, Continuance, § 7, and Criminal Law Key No. 586 *et seq.*, for a collection of cases on the trial court's discretion in such matters.

fied appellant as a man who had visited her store during business hours the day preceding the night of the burglary. Another witness testified that, on the day preceding the burglary, he sold appellant a flashlight. This same flashlight was found in the car in which appellant and his accomplice were arrested within one hour of the burglary; and the car was as described by James Darby. To detail all of the evidence is unnecessary. We conclude that it was amply sufficient to support the conviction of burglary and also to support a conviction for grand larceny; but we reverse the conviction for grand larceny for the reasons now to be discussed.

IV. *The Grand Larceny Conviction.* The appellant was tried for both burglary and grand larceny. As regards the latter offense, the trial court without objection instructed the jury:

"Larceny is the unlawful and felonious stealing, taking and carrying away the personal property of another with the intent to deprive the true owner of his property, and if the value of the property exceeds the sum of $10, the charge is Grand Larceny."

After the jury had deliberated for some time it returned with a verdict of guilty of burglary (punishment assessed at three years) and a verdict of not guilty of grand larceny. The jury was not discharged.[2] Instead, it was sent outside of the hearing of the court, and a lengthy colloquy ensued between the court and the attorneys for the State and appellant. Appellant's attorney moved for an acquittal on both charges, saying, *inter alia:*

"Having found him not guilty of grand larceny, he could not be guilty of burglary on the evidence in this case."[3]

The appellant's motion was denied; and the court then recalled the jury and ascertained that it was confused as to the extent of asportation required to constitute larceny. Thereupon the court read to the jury

[2] See *Levells* v. *State,* 32 Ark. 585.

[3] Of course, the crimes of burglary and grand larceny are separate, as we will discuss in topic V, *infra.*

all the instructions that had previously been given, and added to the State's instruction No. 2 the following language concerning the extent of asportation:

"And it is immaterial for how great a distance, if any, this defendant may have carried the property unlawfully taken with the intent to appropriate it to his own use and deprive the true owners thereof."[4]

The court then directed the jury to retire to the jury room for further consideration of its verdict. Appellant's attorney seasonably requested, but was denied, the right to reargue the case to the jury after the said additional instruction was given concerning asportation. Such refusal to allow reargument is one of the assignments in the motion for new trial.

We hold that under the facts in this case the court committed reversible error in refusing to permit appellant's attorney to make an argument on the matter of asportation after the giving of the additional instruction. In *Manasco* v. *State,* 104 Ark. 397, 148 S. W. 1025, after the argument had been closed and the court had recessed for the noon hour and then had reassembled, the court amended an instruction. On appeal it was urged that reargument should have been permitted after the giving of the amended instruction; and we said:

"The court, having given the instruction, should have permitted appellant's counsel, if he desired, to argue the instruction as amended; but he did not make a specific request of the court to grant him such permission, and he cannot complain here for the first time that it was error in not allowing him to argue the instruction as amended. It does not appear that he asked permission of the court to argue the instruction after it had been amended. If he had made such request, and the court had refused it, then he would have been in an attitude to have the alleged error reviewed here.

[4] This instruction on the extent of asportation was probably modeled after the one approved in *Banks* v. *State,* 133 Ark. 169, 202 S. W. 43. For other cases on asportation, see West's Arkansas Digest, Larceny, section 17; and see also 36 C. J. 750.

As previously stated, in the case at bar the request was seasonably made and exception duly preserved to the refusal.

In the recent case of *Smith* v. *State,* 215 Ark. ....., 223 S. W. 2d 1011, we noted that the trial court properly allowed reargument after the giving of additional instructions. So our holdings point to the conclusion that, generally, reargument should be permitted after the giving of additional instructions involving a question not covered by the other instructions. Such also is the trend of holdings in other jurisdictions. In 64 C. J. 246 this statement appears:

"Where after the argument, and even after the submission of the case to the jury, a new phase of the case is presented by additional instructions, counsel should be permitted to reargue the case as to that phase or branch of it, upon seasonable request; . . ."

The extent of the asportation necessary to sustain grand larceny was a point not covered in the previous instructions. So, naturally, appellant's counsel wanted to be allowed to discuss to the jury the evidence on that issue. The attempted verdict of not guilty *before* the additional instruction and the verdict of guilty *after* the additional instruction make clear that the additional instruction was responsible for the verdict. The failure of the court to allow appellant's counsel to reargue the case can therefore be said to have been prejudicial.

Of course, trial courts possess—as they should—considerable discretion concerning the argument. *Vaughan* v. *State,* 58 Ark. 353, 24 S. W. 885, illustrates such discretion. But it would be a dangerous precedent to approve the practice of refusing a seasonable request for additional argument when a new instruction is given after the case has gone to the jury. The result would be as Judge FRANK G. SMITH—so long the Dean of our court—quoted in *Byler* v. *State,* 210 Ark. 790, 197 S. W. 2d 748:

" 'Twill be recorded for a precedent and many an error by the same example will rush into the state. It cannot be."

The Court of Appeals of Missouri in *Clancy* v. *City of Joplin,* 181 S. W. 120, in speaking of the refusal of the trial court to allow reargument after giving additional instructions, said:

". . . but, when it is deemed necessary to make these changes at this stage of the case, great care should be taken that, if any new issue is thus injected into the case, the litigants be permitted to argue that to the jury. If any other course is pursued, we may unconsciously, little by little, drift into a practice that would seriously jeopardize the rights of the parties and encroach upon the practice so long prevailing and recognized in this state."

We conclude that under the facts in this case the trial court committed error in refusing to allow appellant's counsel the privilege of further argument after the giving of the amended instruction; and for this error the judgment of conviction for grand larceny is reversed.

V. *The Conviction for Burglary.* As previously quoted, counsel for appellant insisted in the trial court that the appellant could not be found guilty of burglary unless he also be found guilty of grand larceny. But our cases do not support such contention. See *Ragland* v. *State,* 71 Ark. 65, 70 S. W. 1039; *Sanders* v. *State,* 198 Ark. 880, 131 S. W. 2d 936; *Ingle and Michael* v. *State,* 211 Ark. 39, 198 S. W. 2d 996; and *Creek* v. *State,* 214 Ark. 429, 216 S. W. 2d 787.

Section 41-1001 Ark. Stats. (1947) defines burglary as:

". . . the unlawful entering of a . . . building, . . . with the intent to commit a felony or larceny."

In the case at bar the evidence, as previously reviewed, amply sustains the conviction for burglary, which could certainly have been committed even if there had been no larceny. Apparently the jury misunderstood the original instructions, and attempted to bring in a verdict of not guilty in the grand larceny case; but the jury clearly understood the instruction as to burglary, and all the

time was returning a verdict finding the appellant guilty of that offense. The appellant was not entitled to re-argue the burglary issue to the jury, because the additional instruction related only to the asportation element of the grand larceny charge. So we affirm the judgment of conviction of burglary.

VI. *Other Assignments.* The motion for new trial contains assignments as to admission of evidence, argument of counsel and other proceedings in the course of the trial. It would unduly extend this opinion to discuss each of these assignments. We have studied them, and find them to be without merit.

Conclusion: We affirm the conviction for burglary; but—because of the error indicated—we reverse the conviction for grand larceny and remand to the trial court the cause concerning grand larceny. If the State desires to retry the appellant on the remanded cause, it may do so.

IN RE SAMUEL H. WILSON, INCOMPETENT.

4-9027 225 S. W. 2d 691

Opinion delivered January 9, 1950.

Warren E. Wood and *Griffin Smith, Jr.,* for appellant.

G. B. Colvin, for appellee.

Ed. F. McFaddin, Justice. This appeal seeks to reverse the judgment of the Perry Probate Court, which declared Samuel H. Wilson to be an incompetent and appointed a guardian for him. The facts regarding this unfortunate octogenarian are recited in our opinion in *Wilson* v. *Williams,* 215 Ark. 576, 221 S. W. 2d 773, which was an attempt to present, by petition for prohibition, the questions now before us on this appeal. Since this is a continuation of the same controversy, we refer to that opinion for a statement of the facts.

I. *Appellant claims that the adjudication of January 12, 1949, finding Samuel H. Wilson to be incompetent, was void because Wilson was not allowed to be present during the entire proceedings in the Probate Court.* The Probate Judgment of January 12, 1949, recites " . . . the presence in open court of the said Samuel H. Wilson . . .", but the testimony at the hearing of January 12, 1949, reflects that Wilson was in court only a portion of the time; and appellant urges that the temporary exclusion of Wilson rendered void the adjudication of incompetency. We find it unnecessary to decide this point, because the record contains a subsequent adjudication of Wilson's incompetency determined at a hearing when he was all the time present.

On April 28, 1949, Frank M. Wilson, as a nephew of Samuel H. Wilson, filed a petition in the Perry Probate Court alleging that Samuel H. Wilson was then sane, and praying that the court so find and adjudge. On that petition a hearing was held on April 29, 1949. Witnesses who testified were Frank M. Wilson, Mrs. Esther V. Wilson, Samuel H. Wilson (the alleged incompetent), Dr. Stanley Gutowski, and Dr. R. A. Jones. At the conclusion of the hearing the court found:

"That the said Samuel H. Wilson, incompetent, has been present in court during all of the time of this hearing and that neither he nor the attorney for Frank M. Wilson, Petitioner, has requested a jury to hear and determine the evidence; that after hearing all of the evidence, the court finds the said Samuel H. Wilson to be incompetent, that the fact of said incompetency is not doubtful and that it is not necessary to have a jury to inquire into said facts; that the said Samuel H. Wilson, incompetent is at the time of this hearing incapable of conducting his own affairs and handling his estates, real and personal, and that the petition herein should be denied."

A comparison of the evidence presented at the hearing on January 12, 1949, with that of April 29, 1949, discloses that at each hearing there was a legally sufficient inquiry into the mental condition of Samuel H. Wilson, and that the evidence at *each* hearing supported the adjudication of incompetency. In short, on the evidence heard on April 29, 1949, the Perry Probate Court was justified in making an adjudication of incompetency of Samuel H. Wilson even if there had never been a previous legal adjudication. So we hold that if any error [1] were committed in excluding Samuel H. Wilson from a portion of the hearing of January 12, 1949, such error was cured by having him present during the entire hearing of April 29, 1949, and that based on the testimony of the latter hearing the Probate Court was justified in adjudicating Samuel H. Wilson to be an incompetent.

II. *Appellant claims that the Probate Court committed error on January 12, 1949, in appointing the Sheriff of Perry County as guardian of Samuel H. Wilson, Incompetent.* Mr. Baylor House was Sheriff of Perry County on January 12, 1949, and the Court appointed him as the guardian of the incompetent. House made bond and entered into the discharge of his duties as such guardian. Appellant cites § 57-122 Ark. Stats. 1947,

[1] We leave undecided whether such exclusion would have been reversible error under the facts here presented.

as statutory inhibition against the sheriff being the guardian of the incompetent. That section reads:

"No clerk, sheriff or judge of probate or justice of the county court shall be appointed a guardian or curator in the county where he resides; nor shall any judge, justice of the county court, clerk of a court of record, sheriff or deputy of either, or attorney at law, be taken as security for any guardian or curator."

But the Section above quoted comes from § 20 of Act 78 of the Act of April 22, 1873, and that Act relates to *minors* and not to insane persons or incompetents. At the time of the appointment of the Sheriff as guardian of the incompetent, Samuel H. Wilson, there was no statutory inhibition against a sheriff being the guardian of an incompetent. The general rule is that in the absence of statutory inhibition a public official may be appointed guardian. See 44 C. J. S. 127, "Insane Persons," § 42, (4).

On January 12, 1949, the Sheriff of Perry County was not legally disqualified from being appointed guardian in this case; and prior to the time of the hearing on April 29, 1949, Sheriff Baylor House departed this life. This latter fact removes from consideration in this case the effect of the inhibition contained in 1949 Probate Code [2] against a sheriff acting as guardian of an incompetent.

The judgment of the Probate Court, as here challenged, is in all things affirmed.

Chief Justice not participating.

[2] That is § 194 of Act 140 of the Acts of 1949, as found in § 57-607 of the 1949 Cumulative Pocket Supplement of Ark. Stats. 1947.

CLIFTON *v.* GUEST.

4-9006 226 S. W. 2d 61

Opinion delivered January 9, 1950.

Rehearing denied February 13, 1950.

[redacted]

Brockman & Brockman, for appellants.

Coleman, Gantt & Ramsey, for appellees.

GRIFFIN SMITH, Chief Justice. The question is whether J. H. Culpepper, as executor under his uncle's

will, exercised on behalf of all beneficiaries that fine sense of impartiality and unselfishness the law enjoins upon fiduciaries.[1]

Our view is that when Culpepper's wife, Addie, concluded to purchase the several shares representing interests in the testator's realty and paid from a joint husband-and-wife bank account, the executor's position became too complicated to admit of disinterested services; hence, without being conscious of fraudulent conduct, Culpepper condoned sales at prices substantially below reasonable values.

. . . . . .

By will M. L. Culpepper directed that his widow receive the statutory allowance and that certain relatives share the residue. Following the testator's death November 8, 1944, one of the named beneficiaries died, survived by four heirs. Early in 1945 the executor wrote all interested persons. Nature of the property, he said, precluded division in kind, making a sale imperative. He thought the realty could be sold for $12,000. The inventory listed it at $13,610, and personalty at $535.25.

None of the devisees offered to purchase on a personal basis, or to buy for the benefit of others. About a year after the executor's letters were written, his wife proposed to pay $300 per share. Nine accepted and executed quitclaim deeds February 4, 1946. Mrs. Guenther, residing in California, demanded $450 for the deed she executed March 16, 1946. These conveyances vested in Mrs. Culpepper 41/56ths of the dower-free realty, leaving 15/56ths in others. Mrs. Hilton and E. D. Hall talked personally with J. H. and Addie Culpepper, and with the executor's attorney. Hall testified that he and Mrs. Hilton were told by Culpepper that a quitclaim deed should be signed "so that we can go ahead and take the property over". Mrs. Culpepper, in handing her check to Hall, said it was all she could afford to pay, "but whenever it's straightened out I will see that you all get more". Mrs. Hilton testified that when she signed the deed Culpepper remarked that "they" would

[1] See *Acker* v. *Watkins*, 199 Ark. 573, 134 S. W. 2d 526.

pay $300 "at that time". Mrs. Hilton said the share was worth more, and Culpepper commented, "Sure, all we want is to get possession where we can sell it".

On January 30th, 1945, the executor wrote: "Any heir that is interested in making me a price for which he or she will give a quitclaim deed . . . and receive settlement before the year is out" [may do so]. There was the assurance that such an offer would be considered. On March 12, 1946, Culpepper wrote that the estate was worth $6,412.26 after the widow's allotment had been deducted. He laid emphasis upon the fact that "ten of the fourteen parts have been sold". At this time the executor told the four to whom he was writing that the property had been valued at more than the first estimates, making it possible to offer $450 for outstanding shares, and to allocate $150 more to each of those who had sold for $300.

May 26, 1946, Culpepper wrote R. D. Watkins: "I suppose you know that ten of the fourteen parts have been sold *to one disinterested party and that is out of my hands*".

August 1, 1946, Addie Culpepper wrote that in order to make anything out of the property it had to be sold separately, "so I offered $300 [to] each for a deed and told them I would pay more for each one after I sold the property, or part of it. . . . So you see it was not my intention in the first place to pay only $300 for each share. I only asked for a chance to sell and get some money to pay with". She closed by saying that the property could have been sold six months ago for more than it would currently bring.

The action brought by Mrs. Helen Hall Clifton and others was a prayer that the deeds be cancelled, with restoration of interests. The Court quieted title in Mrs. Culpepper to an undivided 41/56ths interest. Mrs. Clifton, Mrs. Jerald, and Jimmie Hall were each decreed 5/56ths. A sale was directed, proceeds to be divided according to the interests so found.

The evidence suggests a reasonable likelihood that when the executor-husband and his wife first began nego-

tiating, there was no purpose to do more than place title in one person, the idea being to sell to the best advantage of all. It was originally thought by Culpepper that the widow's dower was a third, leaving approximately $8,000 for distribution. When it was found that the widow took half, the remaining $6,000 as estimated would not supply an appreciable sum when divided with fifteen. However, under Culpepper's management, rents on the four apartment buildings were increased from $55 to $110 per month. Appellants refer to gross rents of $6,080.[2] Culpepper admitted that he wrote all of the letters in longhand, and his wife typed them. Mrs. Culpepper testified: "I personally had nothing to do with writing the letters [and] Mr. Culpepper had nothing to do with buying the interests. That was a matter of mine".

In his inventory Culpepper listed the apartment house at $5,500, and two other houses at $1,550. In testifying, he said the apartment building was worth $11,000, but might not bring more than $9,000. He thought the other two were worth $4,000. Nine hundred dollars in cash credited to the testator was not mentioned in the inventory. Two notes—one for $1,035, the other for $1,070—had been paid, although no claim had been filed against the estate. Culpepper then added, "When I say 'we' I refer to Addie and myself. She did most of the collecting of the rents".

Although the executor, on cross-examination, admitted a purpose to equalize all beneficiary payments, his wife stoutly maintained that the original proposals were predicated upon prompt acceptance. Having failed to secure the interests within what she considered a reasonable time, the purpose to acquire became adverse.

The Chancellor was perhaps correct in thinking the purchases did not have their inception in a plan to defraud. But the facts show that all parties were closely related by blood or marriage. It is true that applicable statutes do not expressly prevent the wife of an executor

[2] The decree was rendered Dec. 20, 1948. The method by which the total of $6,080 is arrived at is not shown.

from buying lands owned by devisees of the trust, and conditions could arise justifying a Court's approval of such transactions. But the difficulty here is more fundamental. Throughout the trial the executor persisted in declaring a purpose to treat all beneficiaries alike. He had seemingly done an excellent job in putting the property on an improved revenue basis, and quite naturally felt—though he did not express it—that something was due for these services. When his wife stepped into the act with a joint bank account, Culpepper's loyalty to his trust was subjected to an unequal test. If he helped Addie by failing to inform the beneficiaries regarding better values, he indirectly served himself; but if he counseled with the testator's relatives to hold for a while and see what the market for realty would do, he chanced, upon the one hand, being wrong about the rise, while upon the other hand, if right, the wife's prospective profits might be lost through failure of the devisees to sell. In either event his dilemma was genuine, although the law recognized but one duty; and in construing the law we also must adhere to the philosophical observation so aptly made by St. Matthew when he discussed a servant's duty to his master.[3]

There is a conclusive presumption that when a testator names an executor, the person so designated, in accepting the trust, becomes the dead man's living agent, bound in all respects to act for those provided for in the will. There is no divided ground upon which he may stand partly with the beneficiaries (and the creditors, if such there be) and partly with those who would derive subversive advantage from the trust. Our Reports have many cases sustaining the strict rule of accountability. To allow Mrs. Culpepper to retain the advantages she contends for, some shares no doubt paid for with proceeds of estate rentals, would weaken the policy Courts strive to maintain in cases like this, and a precedent sapping at public policy would be the result.

[3] Matthew 6:24.

Reversed, with directions to set aside the conveyances, for the benefit of all who have complained.[4]

OPINION SUPPLEMENTED.

February 13, 1950

GRIFFIN SMITH, Chief Justice. In the petition for rehearing it is urged that the opinion does not expressly direct those who sold their interests to refund to Mrs. Culpepper the amounts they severally received, with interest. While our thought is that the necessity for repayment is implicit in the decision, we do not object to the suggested amendment when limited to the principal. Interest, however, would not be payable, since appellants' rights relate back to the time the deeds were executed.

HOCH *v.* RATLIFF.

4-9020 226 S. W. 2d 39

Opinion delivered January 9, 1950.

Rehearing denied February 13, 1950.

[4] Appellees moved for dismissal because, as it was alleged, the transcript did not affirmatively show that an appeal was prayed, hence none could have been granted. The Clerk's records show that on June 13th partial transcript was filed. *Certiorari* issued for completion, with return July 2d. When the abbreviated transcript was filed June 13th, summons was issued. June 15th counsel for appellees waived service. In making the indorsement "appeal granted" the Clerk undertook to treat as appellants all who were adversely affected by the decree, giving to the appeals the same force they would have had if the appeals had been granted by the Chancery Court.

[It was stipulated that the property should be sold. It was also agreed that certain corrections in property descriptions be made].

Wood & Chesnutt, for appellants.

H. A. Tucker, for appellee.

OPINION

MINOR W. MILLWEE, Justice. On February 17, 1948, appellee, M. C. Ratliff, filed a petition in the chancery court pursuant to Ark. Stats. (1947), §§ 34-1918 to 34-1925, for confirmation of a tax title to the West ½ of the NE¼ of Section 2, Township 2 South, Range 19 West in Garland County, Arkansas. The petition alleged that appellee acquired title to the lands under a clerk's tax deed of November 14, 1945, based on a collector's sale in November, 1943, for the delinquent taxes of 1942; that the time for redemption had expired; that there was no one in possession claiming adversely to appellee; and that he had paid the taxes for two years after expiration of the right of redemption and for three consecutive years immediately prior to the filing of the petition for confirmation. In affidavits filed with the petition and introduced at the trial, appellee and two others stated that he had been in open, notorious and adverse possession of the land "for a great number of years," and since the date of purchase.

Appellants are non-residents and the widow and heirs of A. A. Hoch, deceased. They owned the lands at the time of the tax sale to appellee. The response and cross-complaint of appellants admitted possession of the

lands by appellee but alleged that he and his father, Will Ratliff, were in possession as tenants of the appellants under an agreement to pay the taxes for which the lands forfeited; and that the purchase by appellee was pursuant to a conspiracy between appellee and his father whereby the latter permitted the lands to become delinquent and arranged for appellee to purchase at the 1943 tax sale. Appellants further alleged that the tax sale was void for certain defects and irregularities and asked for cancellation of the clerk's deed to appellee. The reply of appellee contains a general denial of the allegations of the response and cross-complaint.

The evidence discloses that the lands in question are situated about 1½ miles from the farm of Will Ratliff, father of appellee. In 1929 A. A. Hoch, through a local agent, leased the land to Will Ratliff for a year with option to renew for four additional years at a rental of $50 per year. Will Ratliff held the land for five years and continued to rent the lands from year to year thereafter at the same rental until some time prior to the sale of the lands for taxes in 1943. After the death of A. A. Hoch in 1937 rents were paid to appellant, Harry A. Hoch, until about 1941.

Will Ratliff testified that he had nothing to do with the tax payments and had no agreement with appellants or their father relative thereto; that he learned that Ike Kempner had purchased the lands at the 1941 tax sale and so advised Harry A. Hoch who instructed Ratliff to redeem the lands and deduct the amount from the annual rent, which was done; that he also wrote Hoch about the lands becoming delinquent for the 1941 taxes but received no answer, and that he had nothing to do with the lands since.

Appellee is 32 years of age and married about 10 or 12 years ago. He lives in a house which he built on his father's place and operates a small dairy which is stocked with a herd made up of his own and his father's cattle. He assisted his father in farming until the latter became disabled about five or six years before the trial. He testified that a neighbor informed him that

the land was delinquent and that the purchase at the 1943 tax sale was made without the knowledge of his father after the latter had quit working the land; that he sowed a meadow on it in 1945 and had been in possession of and used the lands since. Appellee redeemed the land in May, 1943, and has paid all taxes accruing on the lands since his purchase at the tax sale in November, 1943.

Appellant, Harry A. Hoch, resides in Pennsylvania and represented appellants in renting the lands after the death of his father in 1937. In his deposition he stated that Will Ratliff paid the taxes out of rents but gave no specific instances of such payments. Although he testified that he expected Will Ratliff to pay the 1942 taxes, he declined to say there was any agreement as to tax payments and stated that he had no dealings or transactions with either appellee or his father relative to the lands in question.

It is undisputed that appellee was never a tenant of, or had any dealings with, the appellants or A. A. Hoch, deceased, concerning the lands in question. However, appellants contend that appellee knew that his father was still a tenant when he purchased at the tax sale in 1943; that he also knew that his father was obligated to pay the taxes out of rent; and that the two entered into a conspiracy to deprive appellants of their land by the forfeiture and sale to appellee.

In the recent case of *Sims* v. *Petree*, 206 Ark. 1023, 178 S. W. 2d 1016, we said: "It is well settled that a tenant may become the purchaser of the rented premises at a tax sale, or may purchase same from the state. 'A tenant is not bound, . . . to see that the taxes assessed upon the land are paid; and if the land be forfeited for nonpayment of taxes, . . . and the tenant become the purchaser, he may set up such title against his landlord.' (Headnote) *Bettison* v. *Budd,* 17 Ark. 546, 65 Am. Dec. 442; *Ferguson* v. *Etter,* 21 Ark. 160, 76 Am. Rep. 545; *Ray* v. *Stroud,* 204 Ark. 583, 163 S. W. 2d 173. A tenant may not, while in possession of land under a rental agreement, claim that his possession

is adverse to the rights of his landlord. *Dickinson* v. *Arkansas City Improvement Co.,* 77 Ark. 570, 92 S. W. 21, 113 Am. St. Rep. 170. But this court has held that one who enters as tenant is not precluded from subsequently holding adversely to his landlord. *Gee* v. *Hatley,* 114 Ark. 376, 170 S. W. 72." See, also, *Billingsley* v. *Lipscomb,* 211 Ark. 45, 200 S. W. 2d 510; *Hill* v. *Barnard, ante,* p. 29, 224 S. W. 2d 31.

Since appellee was never a tenant of appellants or A. A. Hoch, deceased, the question here is whether he was nevertheless under obligation or duty to pay the taxes for which the lands forfeited and whether he fraudulently conspired with his father to deprive appellants of their land. From the testimony above set out, the chancellor evidently concluded that appellee acted in good faith and refused to hold that the tax purchase was part of a fraudulent scheme to deprive appellants of their property. It is elementary that fraud is never presumed but must be proved to entitle the party asserting it to the relief prayed. We cannot say that the finding of the chancellor is against the preponderance of the evidence.

Appellants also contend that the 1943 tax sale was void because of certain defects and irregularities. The defects relied upon are: (1) the insufficiency of the clerk's affidavit to the assessor's report of assessment required by Ark. Stats. (1947), § 84-447; and (2) the sale of the land as one tract under Act 170 of 1935 when the taxes were extended against the land as two separate tracts. Appellee insists that the invalidity of the tax sale is immaterial under the provisions of Ark. Stats. (1947), § 34-1419, which limits to two years the time for commencing actions for the recovery of lands sold by the collector for nonpayment of taxes. This statute was construed in *Ross* v. *Royal,* 77 Ark. 324, 91 S. W. 178, and the following statement from that case has been approved in many subsequent cases: "The statute under consideration is plainly a statute of limitation, and begins to run, not from the date of sale, but from the date actual possession is taken under the deed. *Haggert* v. *Ramey,* 73 Ark. 344, 84 S. W. 703; *McCann* v. *Smith,* 65

Ark. 305, 45 S. W. 1057. Actual possession of land taken and held continuously for the statutory period of two years under a clerk's tax deed or donation deed [or donation certificate] issued by the Commissioner of State Lands bars an action for recovery, whether the sale be merely irregular, or void on account of jurisdictional defects." In *Honeycutt* v. *Sherrill, Trustee,* 207 Ark. 206, 179 S. W. 2d 693, we held that the fact that the sale by which the State obtained title was a nullity did not affect the validity of the title of one who entered upon the land under a deed from the State and held adversely for two years.

It is argued by appellants that § 34-1419, *supra,* being a statute of limitation must be pleaded in equity, unless the pleadings on their face show that it applies, and that appellee failed to plead the statute. We think the pleadings in the instant case disclose the applicability of the statute. The affidavits of appellee and two other persons were filed with the petition for confirmation and specifically assert that appellee had been in adverse possession of the lands "for a great number of years." It is undisputed that appellee has openly held possession of and cultivated the lands since he purchased from the state and there was a sufficient showing of adverse possession for two years under the 1945 clerk's deed.

The decree of the trial court confirming appellee's title and dismissing the cross-complaint of appellants is supported by the preponderance of the evidence, and is affirmed.

GRAUMAN *v.* JACKSON.

4-9038 225 S. W. 2d 678

Opinion delivered January 9, 1950.

Peter A. Deisch, C. L. Polk, Jr. and *David Solomon, Jr.,* for appellant.

A. M. Coates, for appellee.

George Rose Smith, J. An 1885 statute provides that the purchaser of the receipt of any ginner, warehouse-holder, cotton factor or other bailee of farm products shall not be held to be an innocent purchaser of such produce as against a landlord's lien. Ark. Stats. 1947, § 51-205. The principal question in this case of first impression is whether the above statute, to the extent that it purports to give the landlord priority over the purchaser of a negotiable warehouse receipt, has been repealed by the Uniform Warehouse Receipts Act, adopted in 1915. *Ibid.,* §§ 68-1201—68-1258.

The facts may be stated in a few sentences. In the spring of 1948 the appellee rented land to Walter Harris and took his note for $1,000, representing rent in the amount of $472.50 and also the tenant's future indebtedness for money and supplies to be furnished by the landlord for the making of a crop. In the fall the appellee

permitted Harris to gin four bales of cotton in his own name and to deposit them in a bonded warehouse. The warehouse receipt for the bale now in controversy is a negotiable bearer receipt, which recites that the cotton was received from Walter Harris. Harris obtained a sample of the cotton and sold the warehouse receipt to the appellant, who made no investigation of Harris' title other than to inquire if any one else had an interest in the cotton. The reply was in the negative. Harris later left the State without having paid his debt to the appellee—who now contends that the appellant holds the property subject to the landlord's statutory lien.

We dispose first of a preliminary contention that the appellant could not have been an innocent purchaser for the reason that the tenant's note was secured by a deed of trust upon the crop. If the deed of trust had been properly executed and filed this contention would be sound; for the Uniform Act, as it affects this case, provides that the negotiation of a warehouse receipt carries only such title to the goods as the person making the negotiation either had or had ability to convey to a *bona fide* purchaser. Ark. Stats., § 68-1241. Of course Harris could not have conveyed an unencumbered title to the cotton itself if the deed of trust gave constructive notice of a contractual lien. But this deed of trust was defective in two respects. First, it was not recorded, and in filing it with the circuit clerk the appellee failed to endorse on it the required statement that it was to be filed but not recorded. Ark. Stats., § 16-201; *Gasconade Development Co.* v. *McIlroy Bk. & Tr. Co.*, 195 Ark. 404, 112 S. W. 2d 653. Second, this printed form contained blank spaces for the description of a crop, but these spaces were not filled in; so in fact the deed of trust conveyed only certain mules and equipment that were specifically described. Hence the instrument did not give constructive notice of a contractual lien on the cotton, and the court below erred in refusing to instruct the jury to that effect.

Upon the principal question the language of the Uniform Act is altogether free from ambiguity. Under

the terms of the Act, as we have seen, by negotiating the receipt Harris conveyed such title to the cotton as he had the ability to convey to a *bona fide* purchaser. It has long been the law in Arkansas that the landlord's statutory lien is defeated if the tenant sells the crop to an innocent purchaser. *Hunter* v. *Matthews,* 67 Ark. 362, 55 S. W. 144. The 1885 statute laid down a different rule when the tenant sells merely a bailee's receipt, as distinguished from the crop itself, but that statute is in direct conflict with the Uniform Act whenever a negotiable warehouse receipt is involved. We have no doubt that the Uniform Act did repeal the earlier statute in part. The purpose of the later Act is to create throughout the nation a uniform system of law governing the business transactions to which it applies. The Act has now been adopted in all forty-eight states. It is evident that the desired uniformity cannot be achieved if the Act is subordinated to pre-existing legislation in each state. It must also be observed that this same conflict between the Uniform Act and a landlord's lien statute has arisen in three other jurisdictions, and in all three the Uniform Act has prevailed. *Salt River Valley Water Users' Ass'n* v. *Peoria Ginning Co.,* 27 Ariz. 145, 231 P. 415; *Buelow* v. *Abell,* 9 La. App. 624, 121 So. 657; *McGee* v. *Carver,* 141 Miss. 463, 106 So. 760. The goal of uniformity manifestly requires the various courts to give serious consideration to one another's views in the interpretation of this legislation.

The appellee insists that our holding in *Lynch* v. *Mackey,* 151 Ark. 145, 235 S. W. 781, compels us to concede the landlord's priority. But in that case the passage of the Uniform Act was completely overlooked, in the opinion as well as in the briefs. That decision must be regarded as a mere reassertion of the law as it existed before the Uniform Act was adopted. Further, in the later case of *Commodity Credit Corp.* v. *Usrey,* 199 Ark. 406, 133 S. W. 2d 887, we expressly recognized the possibility that the Uniform Act had partly repealed the 1885 statute, but we found the decision of that question not necessary to the disposition of the case.

The remaining issue concerns the appellant's duty to investigate Harris' title before purchasing the receipt. The appellant contends that he should be protected if he acted honestly, while the appellee argues that a purchaser must be charged with whatever information a reasonably prudent man would have obtained in the circumstances. We think the appellant's view is the correct one and that upon a retrial the jury should be instructed upon that theory.

With respect to negotiable instruments in general, it has long been the rule that the purchaser is required to be honest rather than to be free from negligence. This is the test embodied in the Uniform Negotiable Instruments Act. Ark. Stats., § 68-156; *Holland Banking Co.* v. *Booth,* 121 Ark. 171, 180 S. W. 978. When warehouse receipts and bills of lading were made negotiable by uniform legislation, one would have expected the draftsmen of these acts to give to the purchaser the same protection that existed in the case of bills and notes. We think this was done, for both acts contain this provision: "A thing is done 'in good faith' within the meaning of this act when it is in fact done honestly, whether it is done negligently or not." Ark. Stats., §§ 68-1153 and 68-1258.

We find only two cases that have analyzed this question under the Warehouse Receipts Act, and they reach opposite conclusions. We much prefer the reasoning of the Tennessee court in *Starkey* v. *Nixon,* 151 Tenn. 637, 270 S. W. 980, where it was said: "It seems to us that the test of notice imposed by this statute is the same as that imposed by section 56 of the Negotiable Instruments Act."

In the other case, *City Nat. Bk. of Decatur* v. *Nelson,* 218 Ala. 90, 117 So. 681, 61 A. L. R. 938, the majority's blunt statement that the Uniform Act was not intended to overturn the well-understood meaning of a *bona fide* purchaser is to us unconvincing. Rather, we agree with the view ably expressed by Somerville and Brown, JJ., dissenting: "The fallacy here . . . is in the assumption that there had been heretofore only one definition of a

bona fide purchaser. On the contrary, there have been two distinct and conflicting definitions for more than 100 years . . ., the one applicable to purchasers of property and non-negotiable instruments, and the other to purchasers of negotiable instruments . . . The obvious purpose of § 58 of the Uniform Warehouse Receipts Act is to make clear which of these two variant definitions or theories should be applied to *bona fide* purchasers of negotiable warehouse receipts, and it clearly adopts the rule applicable to negotiable instruments in general; that is, the rule of *honesty* as opposed to the rule of *negligence*. In excluding negligence it rejects the very heart of the common-law rule; and in making honesty the test it adopts the very heart of the negotiable instruments rule."

Reversed.

McFaddin, J., dissents.

Alexander *v.* Mason.

4-9030 225 S. W. 2d 680

Opinion delivered January 9, 1950.

L. B. Smead and *J. Bruce Streett,* for appellants.

O. E. Westfall and *R. K. Mason,* for appellees.

Dunaway, J. This appeal comes from a decree quieting title to a tract of land in Calhoun County in appellees,

who are the widow and children of one Dr. E. L. Hathcock, deceased. Appellants, L. R. Alexander and his wife, went into possession of the land in litigation under a contract for sale and bond for title executed by Dr. Hathcock. Copy of contract for sale and bond for title, dated May 19, 1932, was made a part of appellees' complaint, in which they alleged that appellants were in possession of the land in question, and that an indebtedness was owing under said contract in the sum of $1,775.48 plus interest at ten per cent. from May 19, 1932. Appellees prayed judgment for this amount, and asked that said judgment be decreed a lien upon the lands and that the lien be foreclosed and the lands sold.

It is undisputed that appellants went into possession of the lands involved under a contract with Dr. Hathcock. There is a conflict as to whether the 1932 contract alleged by appellees was the original contract, or whether an earlier contract had been entered into in 1922 between the Alexanders and Dr. Hathcock. Appellants claim their possession started in 1922, but that the original bond for title was lost in a fire which destroyed their home on this property in 1934. The amount of the indebtedness now due under the contract of sale is also in dispute.

The Chancellor found that the contract of May 19, 1932, was a novation of any prior agreements between Dr. Hathcock and the Alexanders; that the Alexanders had remained in possession of the lands in question since the execution of the 1932 contract, but that they had forfeited their right to purchase said lands and are now in possession merely as tenants. The Court decreed cancellation of the contract of sale as a cloud on appellees' title, and quieted title to said lands in appellees.

Appellants admit that they are indebted to appellees, and that appellees are entitled to a judgment for the amount of the indebtedness and interest now owing and to foreclosure of the lien therefor if the debt is not paid within a reasonable time to be fixed by the court. They contend, however, that the Chancellor erred in

decreeing cancellation of the contract of sale and quieting title in appellees without first determining the amount of indebtedness due and giving appellants an opportunity to satisfy this indebtedness.

Appellants' contention is correct. As stated in the recent case of *Weaver* v. *Gilbert,* 214 Ark. 800, at p. 804, 218 S. W. 2d 353: "Since the early decision of *Smith* v. *Robinson,* 13 Ark. 533, this court has consistently held that the legal effect of the execution of a bond for title is to create the relationship of mortgagee and mortgagor between the vendor and vendee." And quoting from the opinion in *Higgs* v. *Smith,* 100 Ark. 543, 140 S. W. 990, we further said in the Weaver case: "It has also been uniformly held that the remedies of the vendor, after failure of the vendee to pay in accordance with the stipulation of the contract, are to proceed at law for recovery of the debt, or to sue to recover possession for the purpose of collecting rents and profits, or to proceed by a bill in equity to foreclose the equity of redemption and sell the lands for the payment of the debt, and also that the vendee has the right to proceed by bill in equity to redeem." The earlier authorities are fully cited in the Weaver case and in *Williams* v. *Baker,* 207 Ark. 731, 182 S. W. 2d 753.

It follows that the Chancellor erred in cancelling the contract of sale and in quieting title in appellees. The decree is reversed in part and the cause is therefore remanded for the court to determine the amount of appellants' indebtedness, which will be a lien upon the lands in question, to be foreclosed if not paid within a reasonable time to be fixed by the chancery court. The decree is in other things affirmed. Appellees will pay the costs of this appeal.

COOK, ADMR. *v.* TALBERT.

4-9037 225 S. W. 2d 682

Opinion delivered January 9, 1950.

[redacted]

Harper, Harper & Young, for appellant.

George W. Johnson and *Hardin, Barton & Shaw,* for appellee.

OPINION

MINOR W. MILLWEE, Justice. Appellee, B. A. Talbert, brought this action against Cecil McNew to recover money alleged to be due on a contract entered into between them March 24, 1947. In the contract sued upon Talbert sold to McNew 99 shares of stock in the Arkansas Lime & Stone Company, a corporation, at $50 per share or a total purchase price of $4,950. Under the terms of the contract McNew agreed to furnish Talbert 3,000 tons of limestone of certain specifications at a net price of $1.65 per ton, that sum to be retained by Talbert until he had been paid the total purchase price of $4,950. The contract further provided that in the event that McNew failed to furnish sufficient limestone to Talbert to amount to 3,000 tons on or before January 1, 1948, then McNew would pay the balance due for said stock in cash.

In his complaint Talbert alleged that McNew had paid $701.25 on said contract by delivery of 425 tons of limestone, but had otherwise failed to perform his part of the contract although Talbert had complied therewith by transferring the stock to McNew. McNew died during the pendency of the action which was revived against appellant as administrator of McNew's estate.

The answer of the administrator admitted execution of the contract but denied other allegations of the complaint. The answer further alleged that McNew was at all times up to January 1, 1948, ready, willing and able to furnish Talbert with a sufficient quantity of limestone described in said contract necessary to discharge the payment thereof, but that Talbert breached the contract by refusing to accept same and thereby prevented McNew from performing the terms of the contract. By agreement of the parties, the case was tried before the circuit judge, sitting as a jury, resulting in judgment in favor of appellee.

The judgment recites: "The court further finds that the said Cecil McNew furnished 425 tons of said limestone, at $1.65 per ton, in the amount of $701.25 to be credited upon plaintiff's claim, and that the said defendant willfully failed and refused to furnish the balance of said limestone, as required under said contract, and the court further finds that under the said contract agreement between the said plaintiff and defendant, there is now due and unpaid the sum of $4,248.75, with interest from the 24th day of March, 1947, at the rate of 6% per annum."

For reversal appellant contends that the undisputed evidence shows that McNew at all times was ready, willing and able to perform his agreement to furnish the limestone under the contract, but that appellee's failure to order or purchase limestone constituted a breach of the contract which prevented McNew from performing his part of the contract.

We view the evidence under the well established rule that the finding of the circuit court, sitting as a

jury, on an issue of fact will not be disturbed on appeal where there is evidence legally sufficient to sustain it even though the finding appears to be contrary to the preponderance of the evidence. *Harris* v. *Ray,* 107 Ark. 281, 154 S. W. 499. We have also said that the finding of the circuit judge, sitting as a jury, on a question of fact is as conclusive on appeal as a jury verdict and will not be disturbed, if there is any substantial evidence to sustain the finding. We must also give the evidence adduced on behalf of appellee the strongest probative force that it will reasonably bear in determining whether there is substantial evidence to support the judgment. *Wallis v. Stubblefield, ante, p.* 119, 225 S. W. 2d. 322.

The plant of the Arkansas Lime & Stone Company was located at Valliant, Oklahoma, and was operated by McNew after his purchase of Talbert's stock. The plant produced crushed agricultural limestone which was sold to farmers through the AAA program of the federal government. The limestone is a soil conditioner and the government paid a part of the purchase price under the program. It is undisputed that Talbert ordered, and McNew furnished, 425 tons of limestone under the contract up to June 1, 1947. Government appropriations for assistance in the program expired about June 1, 1947, but again became available about a month later.

Reed Thomas, who purchased part of the limestone furnished to Talbert, testified that shortly after government appropriations again became available in July, 1947, he talked with McNew over the telephone in regard to further purchases and McNew told him he had moved his equipment away and was operating a coal mine at Mansfield, Arkansas, and was not shipping out any more limestone. McNew also told Thomas he was making more money out of the coal business than he was out of limestone, that it would not pay to move the equipment back to the limestone plant, and that he couldn't sell Thomas any more limestone.

Appellee stated that he made repeated requests to McNew for limestone after July, 1947, and that McNew

declined to furnish it. There was other evidence on behalf of appellee tending to show that McNew abandoned the limestone operations in July, 1947.

The limestone plant was located about two miles from the railroad and the 425 tons furnished under the contract were hauled from the plant by McNew and loaded on railroad cars in accordance with the agreement of the parties. It was shown that there was a stockpile of 429 tons of limestone at the Valliant plant in September, 1948, but there was also evidence that this limestone did not meet the specifications set out in the contract. While there was some evidence that McNew was able and willing to furnish limestone after July, 1947, there is an absence of proof that he actually tendered to Talbert any limestone after June 1, 1947, or that Talbert declined to accept limestone after that date.

Under the terms of the contract McNew agreed to furnish Talbert 3,000 tons of limestone of certain specifications prior to January 1, 1948, or, in the event of his failure to do so, to pay the balance of the purchase price of the stock in cash. McNew's obligation to furnish 3,000 tons of limestone under the contract required more than his mere willingness and ability to do so. The obligation to furnish required at least a tender of limestone and a refusal to accept it before Talbert could be said to have breached the contract. "Tender is an offer to perform a condition or obligation coupled with the present ability of immediate performance, so that were it not for the refusal of cooperation by the party to whom tender is made the condition or obligation would be immediately satisfied." Williston on Contracts, Rev. Ed., Vol. 6, § 1808. At § 1810 of the same work in a discussion of the essential characteristics of tender it is said: "There must be an unconditional offer to perform, coupled with a manifested ability to carry out the offer, and a production of the subject matter of the tender . . ." In the early case of *Day* v. *Lafferty,* 4 Ark. 450, the court held that a tender of a debt, payable in specific articles, cannot be made after the day of payment. The case of *McFarlane* v. *York,* 90 Ark. 88, 117 S. W. 773, involved a contract similar to the one

here and under which the defendants were privileged to pay a note in coal. It was held that the right to pay in coal ended on maturity of the note under the plain terms of the contract and that defendants were liable to plaintiff in cash for the balance due.

When considered in the light most favorable to appellee, the testimony in the instant case is substantial and sufficient to support the trial court's finding that McNew willfully failed to furnish 2,575 of the 3,000 tons of limestone on or before January 1, 1948, as required by the contract, and consequently became liable for the balance due on the purchase price of the stock in cash. The judgment is therefore correct, and is affirmed.

DANIELS *v.* JOHNSON.
IN RE ESTATE OF J. W. EDWARDS.

4-9001 226 S. W. 2d 571

Opinion delivered January 9, 1950.

Rehearing denied February 27, 1950.

J. S. Brooks, M. P. Matheney and *Silas W. Rogers*, for appellant Daniels.

Abbott & Abbott, for appellant Jones.

C. M. Martin and *Wilson & Kimpel,* for appellees.

LEFLAR, J. This is a proceeding brought under section 21 of Act 297 of 1945 (Ark. Stats., 1947, section 62-1301) for determination of heirship of one J. W. (Jim) Edwards' estate, having a value variously estimated in counsels' briefs at $125,000 to $3,000,000. Three competing groups of claimants, apart from the widow, assert rights to heirship. The estate being non-ancestral and there being no children, it is conceded that the widow takes one-half, under Ark. Stats., 1947, section 61-206; the claims here urged are as to the other one-half. Under Act 297, section 21, the determination of heirship arrived at is "*prima facie* evidence of the facts therein found," but does not finally conclude the rights of persons not parties to the proceeding.[1] The Act provides that "any executor or administrator may make a final distribution of an estate upon such determination and shall, thereupon, together with the surety upon his bond, be discharged from liability arising from such determined interest."

J. W. (Jim) Edwards was the son, born about 1868, of two former slaves, "Old Joe" Edwards[2] and Aveline Edwards. A brother "Tede" or "Tete" and a sister Lizzie, born of the same parents, died without descendants long before Jim Edwards' death in 1946. Jim Edwards himself had no children.

There is no specific evidence in the record that "Old Joe" and Aveline went through a marriage ceremony, but there is in the record a great deal of testimony, in the form of hearsay statements from members of the family, also neighborhood repute, that they were married, that they cohabited as husband and wife, that they were locally regarded as being married, and that they had become husband and wife at once after the end of the War Between the States, apparently in

[1] This 1945 procedure for the determination of heirship is now superseded by the somewhat different provisions of § 173 of Act 140 of 1949, appearing in Ark. Stats. (1949 Supp.), § 62-2914.

[2] J. W. (Jim) Edwards' father was called "Old Joe" by the family to distinguish him from one of his sons, also named "Joe," who was the father of one of the parties to the present litigation.

1866, and continued so until "Old Joe's" death some time before 1876. Aveline died in 1876.

The three competing groups of claimants to Jim Edwards' estate may be identified as (1) the descendants of five children born to "Old Joe" Edwards and one Patsy Gant, hereinafter referred to as the "Patsy line"; (2) the descendants of five children born to "Old Joe" Edwards and one Susan Wroten, hereinafter referred to as the "Susan line"; and (3) the descendants of one Sophronia, sister of Jim Edwards' mother Aveline. The assumed existence of the relationships stated in this paragraph is based largely upon family hearsay and neighborhood repute, to be examined more fully hereinafter.

As to the "Patsy line," the testimony indicates quite definitely that "Old Joe" and Patsy were both slaves of the Gant family, that they lived in adjoining cabins in the Gant back yard, and that over a period running approximately from 1856 to 1864 five children were born to them. These five children, all girls, half-sisters of Jim Edwards, predeceased Jim, but their descendants are identified. There is in the record considerable evidence, in the form of family hearsay, that Patsy and "Old Joe" had gone through a form of slave marriage ceremony called "jumping the broom."

As to the "Susan line," the testimony indicates with equal definiteness that Susan was a slave of the Wroten family, who lived some six or eight miles from the Gants, and that during a period from about 1850 to about 1863 five children were born to them. These five children, half-brothers and half-sisters of Jim Edwards, all died before Jim died, but their descendants are likewise identified. Similarly, the record contains substantial family hearsay testimony that "Old Joe" and Susan were married by "jumping the broom" together and that they regarded each other as husband and wife, though their slave status prevented them from seeing each other as regularly as "Old Joe" saw Patsy in the Gant back yard.

Sophronia's relationship as sister of Aveline, Jim Edwards' mother, is likewise shown by family hearsay and neighborhood repute, and her descendants are identified.

The claim of Sophronia's descendants, apart from a contention based on Ark. Stats., 1947, section 61-111, which will be dealt with later in this opinion, is on the theory that Jim Edwards' half-brothers and half-sisters in the "Patsy line" and the "Susan line" were all illegitimate, that Jim Edwards was himself the illegitimate child of "Old Joe" and Aveline, and that Jim Edwards' heirs could therefore by reason of the illegitimate relationships be traced only on his mother's side. Ark. Stats., 1947, section 61-103. On this theory Sophronia's descendants would take the whole disputed estate. This is on the assumption that the legitimation statutes, Ark. Stats., 1947, section 61-104 (the general legitimation act) and section 55-236 (validating marriages and legitimizing children of Negroes and mulattoes as of Feb. 6, 1867) are inapplicable to the several sets of facts involved in this case.

The Probate Judge, in the order now appealed from, found in favor of the claimants in the "Susan line," against those in the "Patsy line," and against those who claimed through Sophronia. This involved findings that Jim Edwards was the legitimate son of "Old Joe" and Aveline, that the children of "Old Joe" and Susan were legitimate, and that the children of "Old Joe" and Patsy were illegitimate.

To pass on the validity of these findings it is first necessary to determine whether the legitimation statutes apply to the facts such as these. It is clear that the policy of this state is to recognize as legitimate the children of void, even bigamous, marriages. *Evatt* v. *Miller,* 114 Ark. 84, 169 S. W. 817, L. R. A. 1916C, 759. It has been indicated that the general legitimation statute, section 61-104 ("The issue of all marriages deemed null in law, or dissolved by divorce, shall be deemed and considered as legitimate") did not apply to slave marriages. The section was first enacted in 1838, when slave unions

were not recognized as legal marriages, and in *Gregley* v. *Jackson,* 38 Ark. 487, it was said by EAKIN, J., that "the act has no reference to the marriages of slaves." That point need not be decided now, however, since we have concluded that section 55-236 does apply here.

Section 55-236 was enacted on Feb. 6, 1867, to replace an act adopted less than two months earlier, Act 13 of Dec. 20, 1866, which provided simply that "The marriages of all persons of color, who now live together as husband and wife, are hereby declared to be legal, and their children legitimate." It was at once realized that the 1866 enactment failed to cover the many children of slave marriages not actually subsisting as marriages on Dec. 20, 1866, whereupon the 1867 act (section 55-236) was enacted. It provides:

"All Negroes and mulattoes who are now cohabiting as husband and wife, and recognizing each other as such, shall be deemed lawfully married from the passage of this act, and shall be subject to all the obligations, and entitled to all the rights appertaining to the marriage relation; and in all cases, where such persons now are, or have heretofore been so cohabiting, as husband and wife, and may have offspring recognized by them as their own, such offspring shall be deemed in all respects legitimate, as fully as if born in lawful wedlock."

It is obvious that, since "Old Joe's" relationships with Patsy and Susan had ceased prior to Feb. 6, 1867, the legitimacy of their children will have to be established, if at all, under that part of section 55-236 which declares that "in all cases where *such persons* now are, or *have heretofore been so cohabiting,* as husband and wife, and may have offspring recognized by them as their own, such offspring shall be deemed in all respects legitimate . . ." Sophronia's descendants contend that the words "such persons" refer back to the subject clause "All Negroes and mulattoes who are now cohabiting as husband and wife, and recognizing each other as such," therefore cannot refer to persons no longer cohabiting in 1867. We cannot accept that interpretation

of the statute. In our view the words "such persons" refer back to the sentence subject "All Negroes and mulattoes" only. This was the view taken in *Gregley* v. *Jackson,* 38 Ark. 487, which held that the 1867 act legitimized the children of parents already dead when the act was passed. It was there said that the Act of Dec. 20, 1866 "was, at once, felt to be a very incomplete settlement of the question of inheritances. There were many thousands of men in the State belonging to the emancipated class, who were the offspring of former *quasi* marriages, which no longer existed when the law was passed, whose relations might acquire property and die intestate. The (1866) law did not apply to such cases, of which this is one. To meet such cases, and to provide a more general and uniform system of inheritance, a law was drafted by one of the present members of this court, then a member of the Legislature, which was passed on the sixth of February, 1867 . . . it would be a very narrow, and exceedingly literal construction of this act to exclude from its scope those children, whose parents, although then dead, had cohabited as husband and wife, and recognized them as their offspring. The act is not in derogation of the common law. It is in aid of it—applying its rules of inheritance to what was really a new people, amongst whom there had been formerly no marriages, no property, nor any rules of inheritance whatever. It had in view the complete homologation of all *legal* rights of all classes in the state . . ." As to the power of the State in 1867 to confer the status of legitimacy upon the children of "Old Joe" by Patsy and Susan, all the parties, both parents and children, were then domiciled in Arkansas, which fact was more than sufficient to give this State legislative jurisdiction to do what Act 35 of 1867 purported to do as to the persons involved in this case. It is not necessary now to determine what effect, if any, the Arkansas enactment could have had upon persons not domiciled here when it was enacted.

The evidence introduced at the trial in the Probate Court for the purpose of establishing the relationships of the various claimants to "Old Joe" Edwards and his

son the decedent Jim consisted largely, as already stated, of family hearsay passed down from parent to child concerning relationships within the family groups, plus statements which older members of the families said they had heard made by Patsy and Susan themselves concerning their marital relations with "Old Joe" Edwards. About two score of witnesses gave testimony of this character. In addition there were some witnesses who had lived their lives in the same community with the families involved and knew the community reputation as to their relationships. Notable among these was Mrs. Nancy Britt, child of the Gant family which owned "Old Joe" and Patsy, born in 1853 and therefore nearly 96 years old at the date of trial yet with a memory clear even in small details concerning the slaves with whom she played in her childhood. Patsy Gant was the "black mammy" who cared for Mrs. Nancy Britt until the end of the War terminated their relationship when Nancy was about 12 years old. Mrs. Britt's acquaintance with her family's former slaves and their relatives and descendants continued down through the years to the present. Mrs. Britt testified to many facts as of her own knowledge, but she also testified as to general reputation in the community concerning other facts. Was this hearsay testimony by family members and by neighbors such as Mrs. Britt properly admitted? We hold that it was.

The rules relating to admissibility of evidence concerning pedigree, family history, and reputation of family relationships are among the oldest and most elaborately developed of all the hearsay rule exceptions. Arkansas has from early times been more free than most states in admitting such evidence. In *Kelly's Heirs* v. *McGuire,* 15 Ark. 555, 604, we said: "Hearsay, or, as it is generally termed, reputation, is admissible in all questions of pedigree. And the phrase, 'pedigree,' embraces not only descent and relationship, but also the facts of birth, marriage and death, and the times when these events happened. . . . Declarations of members, or relatives of the family, or general repute in the family, are good evidence to establish marriage, death,

birth, heirship, and the like, and may be proved by others as well as surviving members of the family." In *Wilson* v. *Brownlee,* 24 Ark. 586, 91 Am. Dec. 523, it was conceded that declarations by others than members of the family were admissible, though in that case the declaration of a complete stranger was rejected. The modern rule, which we accept, is that declarations concerning the whole range of pedigree facts are admissible in evidence when made by members of the family or by any other persons closely associated with members of the family as servants, masters and mistresses (like Mrs. Nancy Britt), neighbors, business partners, or the like, the association being such as to give them access to family facts on a basis similar to that afforded family members. See Wigmore, Evidence (3rd Ed., 1940), sections 1486, 1487; "It is not necessary to maintain that the statements of *any friend* are always admissible; but it is desirable to disavow any limitation which would exclude the statements of one whose intimacy with the family could leave no doubt as to his sufficient knowledge, equally with the family members, of the facts of the family history."

It is also well established in Arkansas that community reputation is admissible as evidence of marital status. *Farmer* v. *Towers,* 106 Ark. 123, 152 S. W. 993; *Thomas* v. *Thomas,* 150 Ark. 43, 233 S. W. 808; *Martin* v. *Martin,* 212 Ark. 204, 205 S. W. 2d 189. The reasons for admitting such evidence of reputation are as genuine in slave marriage cases as where other marriages are involved. *Williams* v. *Williams,* 226 Ky. 13, 10 S. W. 2d 477; *Spaugh* v. *Hartman,* 150 N. C. 454, 64 S. E. 198. Neighborhood reputation of other facts of family history such as race, legitimacy, the existence of relationships, birth, death and the like may be properly admitted as evidence entitled to some consideration in determining such facts. Wigmore, Evidence (3rd Ed., 1940), section 1605. We of course do not hold that such hearsay evidence when admitted has any conclusive or binding effect, but only that it may be admitted for what it is worth. The evidence of this character heard in the Probate Court in this case was properly received.

Giving all the evidence its proper weight, what is the status of the groups of children, and their descendants, produced from the several unions in which "Old Joe" Edwards engaged?

Before any claim can be made upon Jim Edwards' estate by the "Patsy line" or the "Susan line," it must be established that Jim was the legitimate son of "Old Joe" and Aveline. If Jim was illegitimate, his descent will be on his mother's side only, and the descendants of Sophronia will take all. Ark. Stats., 1947, section 61-103. The Probate Judge found that he was legitimate, and we believe that the evidence supports that finding. The union with Aveline had, according to the evidence, already commenced prior to enactment of the Act of Feb. 6, 1867, and was the only one of "Old Joe's" unions then subsisting. That Act (Ark. Stats., 1947, section 55-236) provided that all Negroes then cohabiting as husband and wife, and recognizing each other as such, should be deemed lawfully married. Jim Edwards, born to "Old Joe" and Aveline about 1868, was therefore from birth the legitimate child of a legal marriage.

The Probate Judge also found as a fact that the children of "Old Joe" and Susan were legitimized by the latter part of the same 1867 enactment which declared legitimate the offspring of Negroes who had "heretofore" cohabited as husband and wife and who recognized such offspring as their own. The evidence here again was ample to sustain the findings of fact, both as to prior cohabitation as husband and wife and as to recognition of the children. There was much affirmative evidence introduced to establish both facts. The only evidence relied upon to negative either of these facts was to the effect that slave marriages were not legal marriages at all, but merely unions of convenience. That, however, was conceded by all concerned; that was the reason why the Act of Feb. 6, 1867, was enacted to legitimize the children of all such informal unions. We hold that the children of "Old Joe" by Susan were properly found to have been legitimized by the Act of 1867.

The Probate Judge found that "Old Joe's" children by Patsy were illegitimate. We believe that finding to be contrary to the preponderance of the evidence. The evidence that "Old Joe" and Patsy cohabited over a period of about eight years as husband and wife is at least as strong as the evidence of similar cohabitation, during a partially over-lapping period, with Susan. Perhaps it is stronger; they both lived in the Gant back yard and had constant access to each other. Evidence of the custom of the times indicates that masters were more inclined to encourage unions on the premises than those which required slaves to be absent from the home plantation. The evidence is absolutely uncontradicted that five children were born to "Old Joe" and Patsy in the Gant's back yard, and that these children were recognized by "Old Joe" as his own. The hearsay testimony in the record to the effect that Patsy told younger members of her family that she had "jumped the broom" with "Old Joe" is larger in quantity than the similar testimony concerning his "jumping the broom" with Susan, and both batches of testimony are about equally credible. Mrs. Nancy Britt testified: "Everyone in the community said that when a slave man and woman were having children they were considered married. They generally lived in the same house or near each other . . . Q. When he took up with Patsy, he called that marrying her? A. I suppose so. That is the way they did in those days . . . Q. And you say Joe and Patsy were living on the same place and were living there and had children as man and wife? A. Yes." It is true that Mrs. Britt in her testimony insisted that "Old Joe" and Patsy were not married, but this only establishes that they were not married in the legal sense that was impossible in any event for slaves. We hold that the evidence establishes for the children of Patsy and "Old Joe" the same status of legitimacy under the Act of Feb. 6, 1867, as is established for the children of Susan and "Old Joe."

It is contended, however, that the descendants of Jim Edwards' Aunt Sophronia take under the provisions of Act 117 of 1937, section 1, now Ark. Stats., 1947,

section 61-111, despite legitimacy of Old Joe Edwards' children by Patsy, by Susan, and by Aveline. Section 61-111 reads as follows:

"The estate of an intestate, in default of a father and mother, shall go as follows: one-half to the brothers and sisters, and their descendants, of the father; and the other one-half to the brothers and sisters, and their descendants, of the mother; provided, that if such line of either the father or the mother shall be extinct, then the entire estate shall go to such line of the other. This provision applies only where there are no kindred, either lineal or collateral, who stand in a near relation, and does not apply to ancestral estates."

The theory of the section's asserted applicability is that Jim Edwards left no father or mother surviving him (nor children, nor brothers and sisters) therefore under the section the estate must be divided half and half between the decedent Jim Edwards' father's line and his mother's line. We have concluded that § 61-111 is inapplicable to this case. In order to make clear the meaning of this ambiguously phrased enactment, however, it is necessary to trace its history from the beginning.

Its origin was in chapter 49, § 11 of the Revised Statutes of 1838. It there read:

"The estate of an intestate, in default of a father and mother, shall go, first, to the brothers and sisters, and their descendants, of the father; next to the brothers and sisters, and their descendants, of the mother. This provision applies only where there are no kindred, either lineal or collateral, who stand in a *nearer* relation" (italics ours.)

The section remained unchanged until 1933, though in Crawford & Moses' Digest (1921) § 3481 the word "nearer" was by the compilers inadvertently made to read "near". This error was by continuing inadvertency repeated in Act 52 of 1933, § 3, and in Act 117 of 1937, § 1, both of which undertook to make in the law changes which had no relation to the words "near" or

"nearer". We hold that the word "near" as it erroneously appears in § 61-111 should be and is "nearer". This is in keeping with our decision in *Graves* v. *Burns,* 194 Ark. 177, 106 S. W. 2d 602, to the effect that the words "or their descendants" unintentionally omitted from § 1 of the same Act 52 of 1933 should be reinserted in the statute in accordance with the obvious legislative intent. The word "near" in the statute would be meaningless; the word "nearer" gives to the section the meaning which it has always had. Such correction of a statute to make it correspond with obvious legislative intent is permissible. *Roscoe* v. *Water & Sewer Improvement District, ante,* p. 109, 224 S. W. 2d 356.

Confusion might also arise under § 61-111 from the fact that the words "This provision applies only where . . ." follow a clause reading "*provided,* that if such line of either the father or mother shall be extinct, then the entire estate shall go to such line of the other," and might be assumed to constitute a limitation on the latter clause only. That is not the true meaning of the limitation. The words "This provision applies only where . . ." appear in the original Article 49, § 11, of the Revised Statutes (as above quoted), and there clearly constitute a limitation on the entire section. They have the same effect in § 61-111, the current version of the enactment. The correctness of this interpretation is made still clearer by reference to the emergency clause of Act 117 of 1937, which reads: "Because an error was made in Act No. 52 of 1933, there is much uncertainty as to the line of inheritance where persons die *without leaving descendants or brothers and sisters* (italics ours); and since it is to the best interests of the State that the laws of descent and distribution be clearly defined . . ." (etc.). Since *Graves* v. *Burns, supra,* has held that under § 61-101 descent and distribution "to the brothers and sisters" includes "[or their descendants]", it is clear that the limiting words "This provision applies only where there are no kindred, either lineal or collateral, who stand in a [nearer] relation . . ." in § 61-111 make that section apply only when there are no such "nearer" kindred alive. It is as though § 61-111

read: "The estate of an intestate, in default of [descendants, or brothers or sisters or their descendants, or] a father and mother, shall go as follows . . ." This gives § 61-111 its proper function, which is to define the manner of descent and distribution of non-ancestral estate under the third sub-paragraph of § 61-101.

Since decedent Jim Edwards left surviving him the descendants of numerous half-brothers and half-sisters (who under § 61-112 take the same as brothers and sisters of the whole blood) the descendants of Jim's mother's sister Sophronia, who are more distant kindred, can take nothing under § 61-111.

When Jim Edwards died, all of his brothers and sisters were dead. His nearest relatives were nephews and nieces, the sons and daughters of his brothers and sisters. Under Ark. Stats., 1947, §§ 61-101 and 61-109, the estate is to be so divided that each nephew and niece of Jim Edwards will take the share which would have descended to him had all the nephews and nieces who died leaving issue alive at Jim's death been still living. *Garrett* v. *Bean,* 51 Ark. 52, 9 S. W. 435. Thus the issue of the nephews and nieces who were dead will take the respective shares which their parents, if living, would have received. In other words, the estate of Jim Edwards, after setting aside the widow's part, is to be divided into as many shares as there were nephews or nieces either alive at Jim's death or, being dead, then having descendants alive. One of such shares is to go to each of the nieces and nephews then living, and one share is to go in accordance with § 61-109 to the descendants of each nephew or niece who then was dead. The nephews and nieces, being those who are in the nearest degree of consanguinity to the intestate, take *per capita;* the descendants of those dead take *per stirpes.*

The judgment and order of the Probate Court are modified and remanded.

NICHOLS *v.* LEA.

4-9033 225 S. W. 2d 684

Opinion delivered January 9, 1950.

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

J. H. Brock and *George F. Hartje,* for appellees.

HOLT, J. In December, 1947, appellants, J. R. and H. A. Nichols, brothers, and residents of Texas, sold and delivered (from their trailer truck), to appellees, Lea and Hogan, partners operating a gasoline station in Conway, Arkansas, $975 worth of anti-freeze in sealed one-gallon containers. The evidence shows that at the time of the sale, appellants represented to appellees that the anti-freeze was as good as Prestone, a well-known, standard anti-freeze, that it had the same base (Ethylene Glycol) as Prestone, would mix with other anti-freeze then on the market, and was suitable and fit for the use intended.

Relying on these representations, appellees purchased the anti-freeze and shortly thereafter, and before any sale had been made by appellees, they became suspicious of the quality and fitness of the anti-freeze and of appellant's representations, and took one of the sealed gallon containers to the Laboratory of the Arkansas State Teachers College, where a chemical analysis was made which showed, in effect, that the product was not of a Prestone base, but contained five pounds of calcium chloride per gallon, which when coming in contact with iron and other metals caused them to disintegrate, corrode and slough off, and was unsuited for use in automobiles, the intended use.

Following this information, appellees filed suit to recover from appellants the purchase price, $975, alleging that the warranties above noted were made by appellants, that they were false, that the anti-freeze was unfit and unsuitable for use in automobiles, was not as good as Prestone, did not possess the same base and would not mix with other anti-freeze, that it was totally worthless for any use, and after filing bond, caused appellants' truck to be attached.

Appellants later filed a forthcoming bond, retained possession of the truck, and removed it to Texas.

Appellees, B. H. and L. F. Ray, also in December, 1947, filed a separate suit against appellants, containing similar allegations, to recover $320 for anti-freeze which they had purchased from appellants. They also caused an attachment to be issued against appellants' trailer truck. Appellants also filed a forthcoming bond in this suit.

The facts in each case were practically identical and they were consolidated for trial, the only factual difference being that in the Ray case, appellants had made an additional representation that the anti-freeze in appellants' delivery truck at the time of the sale to the Rays was the same as that in the gallon containers and gave them a sample thereof from their truck. A chemical analysis of this sample was made which showed that it was of good quality but that it was not the same as the

anti-freeze contained in the gallon containers sold to appellees, which was analyzed and shown to have a base twenty-eight to thirty per cent calcium chloride.

Appellants' answers were a general denial and in cross-complaints sought judgments for damages. The causes were submitted to the jury under proper instructions, verdicts were returned in favor of appellees for the full amounts claimed, and from these judgments is this appeal.

(1)

Appellants first question the sufficiency of the evidence.

The evidence appears to be in the sharpest conflict. However, when viewed in the light most favorable to appellees, as we must, we cannot say that there was no substantial evidence to warrant findings by the jury that appellants, in inducing the sales, had made false statements amounting to warranties as to the quality and fitness of the anti-freeze for the purpose and use intended, and that appellees should recover.

"To constitute an express warranty it is not necessary that the word 'warrant' be used, but may be based on the statements of the seller as to the quality or condition of the chattel he is selling. . . . The court then quoted with approval from 24 R. C. L. (Sales) § 437, as follows: 'To constitute an express warranty the term "warrant" need not be used; no technical set of words are required, and it may be inferred from the affirmation of a fact which induces the purchase and on which the buyer relies and on which the seller intended that he should do so, but it has been said that the words used must be tantamount to a warranty, and not dubious or equivocal.' " *Ives* v. *Anderson Engine & Foundry Company,* 173 Ark. 112, 292 S. W. 111. See, also, *Harris* v. *Hunt, ante,* p. 300, 225 S. W. 2d 15.

(2)

Appellants next contend that the court lacked jurisdiction.

It appears that appellants in a number of pleadings, in each case, asserted that they were appearing for the sole purpose of challenging the validity of attachments of their truck, the services of summons on them, and the jurisdiction of the court as to their persons and property.

We think it unnecessary to determine the validity of the attachment proceedings, or the services of summons on appellees, for the reason that appellants entered their appearance in each case for all purposes by filing, along with their answers, cross-complaints in which they sought to recover judgments for damages from appellees. By filing these cross-complaints and seeking affirmative relief, they entered their appearance for all purposes and waived any defect in the service of summons or the attachment proceedings and subjected themselves to the court's jurisdiction.

In these circumstances, the general rule is stated in 3 Am. Jur., under the topic "Appearances," § 18, page 792, in this language: "The filing of a set-off, a counterclaim, a demand in recoupment, or a cross petition, is such an assumption of the role of actor in a suit as will constitute a general appearance, even though the defendant asserts therewith an objection to the jurisdiction of the court, and submits the person of the defendant to the jurisdiction of the court to all intents and purposes as fully and completely, and with the same force and effect, as if the summons had been duly and personally served on him within the jurisdiction of the court," and in *Linton* v. *Heye,* 69 Neb. 450, 95 N. W. 1040, 111 Am. St. Rep. 556, in an opinion by the Supreme Court of Nebraska, cited in support of the above text, it was held: (Headnote) "Jurisdiction—appearance.—If lack of jurisdiction does not appear on the face of the record, the defendant may plead to the jurisdiction or unite a plea to the jurisdiction with his other defense to the action, without waiving his right to insist on the lack of jurisdiction of the court, but this rule is limited to cases where the plea goes to defeat a recovery by the plaintiff, and does not extend to cases where the plea is

joined with a cross-complaint or counterclaim, necessitating a trial on the merits of the issues tendered by the pleadings.''

In our own case of *Federal Land Bank of St. Louis* v. *Gladish,* 176 Ark. 267, 2 S. W. 2d 696, we quoted with approval the following from 2 R. C. L., p. 340. ''There are numerous cases in which the defendant has been held to waive any question of jurisdiction over his person by taking some step to contest the cause upon the merits after his motion on special appearance has been overruled. One seeking to take advantage of want of jurisdiction in every such case must, according to these decisions, object on that ground alone. He must keep out of court for every other purpose. If he goes in for any purpose incompatible with the supposition that the court has no power or jurisdiction on account of defective service of process upon him, he goes in and submits for all the purposes of personal jurisdiction with respect to himself, and cannot afterwards be heard to make objection. . . .

'' 'A defendant appearing specially to object to the jurisdiction of the court must, as a general rule, keep out of court for all other purposes. In other words, he must limit his appearance to that particular question or he will be held to have appeared generally and to have waived his objection. If he takes any step consistent with the hypothesis that the court has jurisdiction of the cause and the person, such special appearance is converted into a general one, whether it is limited in its terms to a special purpose or not.' 4 C. J. 1319. . . .

''The appellant in this case, by filing a counterclaim and asking for affirmative relief, asking the court to give it judgment, thereby enters its appearance and waives any defect there might be in the service, or any failure to get proper service, if there was such failure. In other words, the defendant, by filing a counterclaim and asking affirmative relief in the court, thereby subjected itself to the jurisdiction of the court, whether it had been served at all or not.''

Finding no error, the judgments are affirmed.

MAXWELL *v.* STATE.

Criminal 4587 225 S. W. 2d 687

Opinion delivered January 9, 1950.

W. Harold Flowers, E. V. Trimble and *L. Clifford Davis,* for appellant.

Ike Murry, Attorney General, and *Arnold Adams,* Assistant, for appellee.

GRIFFIN SMITH, Chief Justice. Appellant is a Negro twenty years of age. By information the State charged that on July 20th, 1949, he raped Mrs. Walter Nichols, a white woman whose husband was a plantation tenant residing south of Hope near Highway 29. The crime is alleged to have occurred shortly after eight o'clock in the morning while Mrs. Nichols was otherwise alone. Her testimony was that Herman stopped by the house,

tapped lightly at the front porch, and asked for a drink of water. He made incidental inquiries and went away, but shortly returned and requested matches.

Substance of Mrs. Nichols' testimony from this time is that the caller, whom she had not formerly known, demanded in an insinuative manner whether she "had anything for him". Her indignant "No" was followed by the Negro's aggressive act in coming onto the porch after she had asked him several times to go away. As she withdrew into the house Herman followed, an open knife in his right hand. Through fear she did not make an outcry. Herman's actions were accompanied with the remark, "I came here for something and I am going to get it before I leave". Mrs. Nichols was pushed to a bed where the rape took place while Herman held the knife in a threatening position, saying he would use it if an outcry should be made. He also threatened to kill her if others were later told what had happened.

Appellant, while admitting the sexual act, insisted that he had been repeatedly solicited. On at least three occasions before July 20th Mrs. Nichols, he said, had broached the subject of copulation, but he told her he was afraid to have such relations with a white woman. On the day in question Mrs. Nichols called as he passed the house and asked if he had "thought it over—about having sexual intercourse with a white woman if you had a chance?" She then told him that if he didn't consent "I will scream, and the house will be surrounded". In these circumstances, and through fear of what might happen if Mrs. Nichols should falsely accuse him, he consented.

The jury did not believe this story of enticement, but chose to accept the explanations made by Mrs. Nichols; and the evidence was sufficient to sustain the conviction.

The controlling question before us, however, is not one of evidence, although an understanding of the factual background is helpful in determining whether

appellant's motion for a continuance ought to have been granted.

The defendant was arrested seven or eight hours after he left the Nichols home. Because of public resentment in Hempstead County he was taken to a jail elsewhere and kept until August 4th. Then a certified copy of the information was served on him in the courthouse at Hope. The record indicates that he was again taken out of the county, but was brought back two days later for arraignment. Being unable to pay for legal services, the accused was offered and impliedly accepted counsel by appointment. Six members of the local bar were asked to represent him: Lyle Brown, Albert Graves, W. S. Atkins, John P. Vesey, John L. Wilson, Jr., and Talbot Field, Jr. Trial was set for Monday, August 8th. The attorneys when appointed petitioned for an order committing the defendant to State Hospital for observation and examination, stating that the defense of insanity would be interposed.

In denying the request for commitment, the Court also appointed Doctors Don Smith, G. E. Cannon, J. G. Martindale, L. M. Lile, J. W. Branch, Jim McKenzie, and George H. Wright, to determine whether there were reasonable grounds for believing the prisoner to be insane. Act 256, approved March 8, 1949. The order required these physicians—none of whom qualified as a psychiatrist or mental expert—to make their report at nine o'clock Monday morning. All joined in a certificate dated Sunday, August 7th, finding the subject sane, or as it was expressed, "without psychosis".

In their motion for continuance—all concurring—the attorneys urged that insufficient time had been allowed for preparation. They did not, until mid-morning Saturday, know that the Court had appointed them for the defense. Presumptively the motion was drafted Saturday afternoon or Sunday—although filing date is the 8th—for it recites that the physicians had not reported on the sanity tests.

Urged as justification for continuance was the impracticability of interviewing the prisoner, who could

not be seen without a four-hour notice to the peace officers. On Sunday morning these custodians informed counsel that Herman could be seen at three o'clock that afternoon. The resulting conference lasted two hours, ending at five o'clock.

It is alleged in the motion that the defendant persisted in his claim that relations with Mrs. Nichols were invited, thus contradicting published reports of a voluntary confession. Other than the time employed on Sunday, the only opportunity for preparation was from late Saturday until that day ended, "consisting of a few daylight hours"; therefore, urged the attorneys, "In order to give the defendant the defense to which he is entitled, it will be necessary to interview a number of witnesses in Hempstead County, one or two witnesses in Logan County, [also] to check certain records in this county, and to make a detailed study of the area surrounding the scene of the alleged crime, since the movements of the defendant before and after his presence at the home of the prosecuting witness are vitally important".

An additional ground for continuance, urged defending counsel, was pregnancy of the prosecuting witness, who expected to be delivered of child early in September.[1] Argument was that the delicate situation created by a combination of alleged rape and preëxisting pregnancy would hinder vigorous cross-examination; or, conversely, if full justice in this respect should be done the defendant by subjecting the prosecuting witness to protracted examinations, nervous reaction might impair her health, cause a miscarriage, or affect the child's physical status. Medical testimony on this issue did not sustain the points, hence the Court correctly ruled against the so-called hazards.

. . . . . .

In felony cases it is the Attorney General's duty to present the State's belief, when he is so convinced, that

[1] Inferences deducible from assertions in the motion, and from testimony given by Mrs. Nichols, point to conception some time before Mrs. Nichols married her present husband. She first married James Russell in 1945, but they separated and were divorced in December, 1947. The marriage to Nichols occurred March 21, 1949, and, [cross-examination] "I expect the baby on the first of September".

the appeal record does not contain reversible errors. Here there is reliance on some of our own decisions that unverified motions for postponement are properly overruled. Again, it is generally held that a defendant's claim that he needs a witness—one who is not named—will not be favorably considered unless it is shown that the witness is within the court's jurisdiction, or can be procured. In such cases substance of the testimony and its relevancy must be brought to the Court's attention. *Smith* v. *State,* 181 Ark. 592, 26 S. W. 2d 899; *Brickey* v. *State,* 148 Ark. 595, 231 S. W. 549. We do not impair these holdings. Nor are we unmindful of the trial Court's difficult position. The Judge was asked to continue until the regular October term, while at the same time it was shown that the prosecutrix—if the child's birth should be "late", as so frequently occurs—might not be available to testify. It is convincingly shown that public hostility to the defendant made prudent procedure imperative. The Court, therefore, had to deal with realities as they were found. That Judge Bush honestly thought that nothing of advantage to the accused would be gained by delay, except the value of abstract time, there is little doubt; hence his action in expediting the trial is not to be criticized, notwithstanding our conclusions in mature review that the motion ought to have been granted.

The six lawyers designated for the defense are representative of the State's best talent. None anticipated appointment, and not one desired it. Some were so busily engaged Saturday in professional or official duties that they could not meet for consultation until late in the day.[2] The trial Judge, in some of his statements, recognized the limitations that were being imposed; and he did not, when the unverified motion was presented, overrule it for want of formality. But even this defect, 'though not then an issue, was cured when Talbot Field, Jr., as a sworn witness in respect of the motion, said that he believed the factual allegations were true.

[2] Lyle Brown, one of the attorneys, is Mayor of Hope. John P. Vesey, another defense lawyer, was City Attorney.

But primarily the Court was confronted with reputable attorneys who had no choice but to recognize, first, that the law was dealing with the life of a colored man for whose right to be heard regarding reasonable extenuations they were responsible, while secondly, as an arm of the Court, the State's dignity and society's welfare had to be maintained. They carefully balanced these considerations, then in all earnestness told the Court that they could not appropriately defend the prisoner without knowing more about the case.

Our Constitution, Art. 2, § 10, says that one accused criminally shall enjoy the right to a speedy and public trial. The guarantee has sometimes been cited in justification of the public's right to have its laws administered without injurious delays. But the fundamental purpose was to expedite adjudications so that none could fairly say that the right to an acquittal was being stifled because those charged with official duties preferred to procrastinate, meanwhile keeping the accused under a cloud—a result as severe in some cases as conviction would be in others.

Our trial Courts usually show sound judgment in requiring speedy disposal of criminal charges; but sometimes, as here, the very fact of well-intentioned dispatch injures the judicial process, though every conscious intent be otherwise.

Reversed, with directions that the cause be retried.

Mr. Justice McFaddin and Mr. Justice Dunaway did not participate in the consideration or determination of the appeal.

Parker *v.* Fenter.

4-9039 225 S. W. 2d 940

Opinion delivered January 16, 1950.

[redacted]

Kenneth C. Coffelt, for appellant.

LEFLAR, J. This is an action by appellee Fenter against Parker for cutting and converting timber from Fenter's land. Plaintiff claimed double damages under Ark. Stats., (1947), section 54-203, on the theory that defendant had done the cutting "knowingly." The jury returned a verdict for the plaintiff for $300. Defendant appeals.

Plaintiff's evidence indicated that defendant cut the timber in question without having first procured the survey by the county surveyor prescribed by Ark. Stats., (1947), section 54-201. Plaintiff's instruction No. 1 given by the trial judge over defendant's objection told the jury, in the words of section 54-201, that it was defendant's duty to procure this survey before doing any cutting, and added that his failure to do so made him guilty of cutting plaintiff's timber "knowingly within the meaning of the laws of this state." This was incorrect. We have held in *Peek* v. *Henderson,* 208 Ark. 238, 185 S. W. 2d 704, and again in *Lewis* v. *Mays,* 208 Ark. 382, 186 S. W. 2d 178, that the jury may properly be instructed that failure to comply with section 54-201 may be considered as bearing upon the willfulness or innocence of a defendant who cuts and removes timber from the land of another. But we have not held that failure to procure the statutory survey is absolutely binding and conclusive evidence that the defendant cut the timber "knowing" it to be on the land of another. The requirement of knowledge as a prerequisite to liability for double damages is a real requirement, not to be fictitiously satisfied. The instruction in effect took the issue of knowledge out of the jury's hands, and told them that failure to comply with the statute was equivalent to actual knowledge. The jury should have been required to find defendant's *scienter* as an independent fact, being allowed to consider his non-compliance with the statute merely as evidence of that fact.

It being necessary to reverse the case on this ground, other alleged errors need not now be considered. The case is remanded for new trial.

BYFORD *v.* GATES BROTHERS LUMBER COMPANY.

4-9044 225 S. W. 2d 929

Opinion delivered January 16, 1950.

Mann & McCulloch, for appellant.

Norton & Norton and *Harrelson, Harrelson & Cannon,* for appellee.

GEORGE ROSE SMITH, J. In this case the trial judge directed a verdict for the plaintiffs, Gates Brothers Lumber Company and L. J. Boatner. The appellant, Mrs. L. G. Byford, contends that the court should have directed

a verdict in her favor or at least have submitted the case to the jury.

The pivotal question is whether Mrs. Byford bound herself to settle certain debts owed by her daughter, Dorothy Cole, to the appellees. Mrs. Cole and her husband owned a residence and a restaurant in Forrest City, both properties being subject to a mortgage held by G. C. Duncan. Duncan sued to foreclose and obtained a foreclosure decree on November 1, 1948. The appellees had furnished labor and materials for an uncompleted skating rink on the restaurant property, and in the decree they were given judgments for their claims and second liens on the restaurant tract. To marshal the assets the chancellor ordered that the residence property be sold first. The sale was advertised for November 30.

At this point Mrs. Cole appealed to her mother, the appellant, for assistance in saving the home. On November 16 Mrs. Byford, through her former attorney, submitted separate offers of settlement to the attorneys for the appellees. Each offer referred to the other and made it a condition that both be accepted. We discuss only the offer to Gates Brothers, as it presents the more difficult of two similar problems. The Gates Brothers judgment against the Coles was for $4,036.92. In her letter Mrs. Byford offered to pay Gates Brothers $3,000 and to obtain authority from Duncan and the Coles to release to Gates Brothers the lumber in the unfinished rink. In return Gates Brothers was to satisfy its judgment and have the foreclosure decree modified so that the restaurant property would be sold first. The letter concluded: "Please advise whether or not this is acceptable to your client."

On November 19 the attorneys for Gates Brothers replied:

"We are authorized by Gates Bros. to accept the settlement offered in your letter to us dated the 16th inst., provided, the cash settlement is paid promptly and a reasonable time is allowed for removal of the lumber from the skating rink, which I suggest should be 90 days

in view of the season of the year we are in. We assume that you will prepare whatever papers you consider necessary for modification of the decree and we will co-operate for Gates Bros. however may be necessary."

The next day Boatner's attorneys wrote a somewhat similar letter of acceptance. Mrs. Byford's attorney then prepared a petition asking that the decree be amended to provide that the restaurant should be sold first and that Gates Brothers should be given ninety days to remove the lumber. This petition was approved by the attorneys for all concerned. On November 26 the chancellor signed an order modifying the decree, but it was agreed that the order be withheld from the record until the settlements were consummated. On the day before the sale Mrs. Byford informed her attorney that she would not continue with the proposed settlements. The properties were sold on November 30 for less than the mortgage debt; so the appellees' second liens proved worthless.

At the conclusion of the testimony below the court first denied the plaintiffs' motion for a directed verdict. The defendant then moved for a directed verdict, and the trial judge expressed the view that it had become his duty to direct a verdict for one side or the other, even though the defendant had additional instructions to offer. Upon that theory he directed a verdict for the plaintiffs. The court's view was erroneous, *Pacific Mut. Life Ins. Co.* v. *Carter,* 92 Ark. 378, 123 S. W. 384, 124 S. W. 764, but that fact is immaterial if the proof warranted a peremptory instruction for the plaintiffs. We think that it did.

The appellant's most forceful argument is that the Gates Brothers letter did not amount to an acceptance of the proposed settlement for the reason that additional terms were suggested. We recognize the familiar rule that if the offeree proposes new conditions he is really making a counter-offer that must in turn be accepted by the other party. But it is well settled that the offeree's acceptance is not conditional merely because it recites terms that would in any event have been implied from the original offer. Rest., Contracts, § 60. That is the situa-

tion here. Gates Brothers asked that the money be paid promptly and that a reasonable time be allowed for removal of the lumber. Since the sale that Mrs. Byford sought to avert was only eleven days away, it is evident that the offer itself contemplated prompt payment by Mrs. Byford. And the law would allow a reasonable time for removal of the lumber; so this requirement in the acceptance added nothing to the contract. Even though Gates Brothers "suggested" that ninety days would be a reasonable time, there still came into existence a binding contract by which Gates Brothers could remove the lumber within a period fixed by law as reasonable, whether greater or less than ninety days. See Rest., Contracts, § 62.

Upon this point our earlier cases are controlling. In *Bushmeyer* v. *McGarry,* 112 Ark. 373, 166 S. W. 168, an offer to sell land provided that the abstract of title would be left with an Oklahoma bank, but the letter of acceptance directed that the abstract be forwarded to the vendee in Arkansas. The seller did forward the abstract but later attempted to avoid the contract on the theory that the vendee's counter-proposal had not been accepted. We upheld the contract, saying: "It is true the letter of acceptance introduces a change in details, in that . . . it is asked in this letter that the abstract be forwarded for inspection. Now, that was not a substantial change in the terms, but merely a detail which the defendant promptly acceded to by forwarding the abstract as requested. It was not such a change as amounted to a qualification of the original offer." To the same effect is *Skinner* v. *Stone,* 144 Ark. 353, 222 S. W. 360, 11 A. L. R. 808.

It is contended that Mrs. Byford cannot be said to have been in default until the appellees actually placed the supplemental decree of record and satisfied their judgments. These contracts, however, were plainly bilateral rather than unilateral, the respective promises being mutually dependent. In such a case it is not necessary that one party complete his performance in order to put the other in default. The appellees had obtained the

court's approval of the modified decree and were fully prepared to carry out their bargain when the appellant repudiated her obligation. "A tender [of performance] conditional on contemporaneous performance by the defendant is sufficient and necessary." Williston on Contracts, § 832.

There were several objections to rulings upon matters of evidence, but we find no semblance of prejudicial error. The testimony adduced by both sides is entirely free from material conflict. It is shown without dispute that the contracts were made, that the appellees tendered performance, and that the appellant defaulted. The obligation being to pay money, there is no question as to the measure of damages. (Gates Brothers bought the lumber at the sale; its value is not involved here.) *Leach* v. *Smith,* 25 Ark. 246. Only issues of law were presented below, and the court's peremptory instruction for the appellees was a correct determination of these issues.

Affirmed.

STEPHENS *v.* LEDGERWOOD.

4-9034 226 S. W. 2d 587

Opinion delivered January 16, 1950.

Rehearing denied February 20, 1950.

[redacted]

Norton & Norton, for appellant.

Earl J. Lane, for appellee.

ED. F. MCFADDIN, Justice. Appellee, being in possession of a farm of two hundred and forty (240) acres in St. Francis County, brought this suit to quiet his title. Appellant contested the suit. From a decree quieting appellee's title there is this appeal.

FACTS

Some time prior to 1897 J. H. Dennis, Sr., the owner of the lands herein involved, died intestate, survived by a son herein referred to as Dr. Dennis,[1] and a daughter herein referred to as Mrs. Perle Stephens,[1] the appellant. Appellant then conveyed all her interest in these lands to Dr. Dennis, whose wife was Mrs. Elizabeth Dennis. In 1932 two deeds were recorded in St. Francis County, each dated July 10, 1931, and being: (a) a general warranty deed from Dr. Dennis and Mrs. Elizabeth Dennis, his wife, to Gibson Witt, Jr.; and (b) a general warranty deed from Gibson Witt, Jr., an unmarried person, to Mrs. Elizabeth Dennis.

Each of these deeds (which we will refer to as the "1931 deeds") described the lands as:

". . . the following lands lying in St. Francis County, Arkansas: The North Half of the Southeast Quarter (N½ SE¼) of Section Three, Township Four, *South,* Range Three *West,* containing eighty acres; Also the Northeast Quarter of Section Five, Township Four, *South,* Range Three *West,* containing one hundred and sixty acres." (Italics our own).

The land involved in this suit and which the appellant had conveyed to Dr. Dennis are described as follows:

[1] In 1897 Dr. Dennis was not a physician, and Mrs. Stephens was not a married woman; but such later became the status of each, and we use these convenient designations for easy identification.

"The North Half (N½) of the Southeast Quarter (SE¼) of Section Three (3), Township Four (4) *North,* Range Three (3) *East* AND the Northeast Quarter (NE¼) of Section Five (5), Township Four (4) *North,* Range Three (3) *East.*" (Italics our own).

In short, it will be observed that each of the 1931 deeds recited the Township as *South* instead of *North,* and the Range as *West* instead of *East.* These statements in the 1931 deeds, as to the direction of the Township (from the Base Line) and Range (from the 5th Principal Meridian), give rise to this suit.

Dr. Dennis departed this life in 1935 intestate and childless, survived by his widow, Mrs. Elizabeth Dennis, and his sister, Mrs. Perle Stephens, the appellant. Mrs. Elizabeth Dennis exercised full ownership and control of the lands until her death in 1945. By her will, she devised the lands herein to the appellee, V. S. Ledgerwood, who immediately entered into possession; and in February, 1949, filed this suit to quiet his title.

The appellant, in contesting the suit, makes these claims: (a) that the 1931 deeds described no lands in St. Francis County; (b) that Dr. Dennis died as the owner of these lands which descended, a portion to his widow and a portion to his sister; (c) that the possession of Mrs. Elizabeth Dennis from 1935 (the death of Dr. Dennis) to 1945 (the time of her death) was the same as that of a co-tenant with appellant; (d) that no notice or knowledge was brought home to the appellant from 1935 to 1945 that Mrs. Elizabeth Dennis was holding the lands adversely to the appellant; (e) that limitations did not begin to run against appellant until appellee took possession in 1945; and (f) therefore, the applicable statute of limitations is not available to appellee. As previously stated, the Chancery Court quieted appellee's title; and the correctness of that decree is assailed by this appeal.

OPINION

We agree with the Chancery Court. All of appellant's contentions are based on the theory that Dr. Den-

nis was the owner of the lands at the time of his death, and that Mrs. Elizabeth Dennis entered into possession of the lands as the widow of Dr. Dennis. But the evidence shows that Mrs. Elizabeth Dennis went into possession of the lands before the death of Dr. Dennis. The witness Alderson testified that his father rented the lands from Mrs. Elizabeth Dennis in 1933 and 1934.

"Q. During the time . . . your father rented the land, did anyone other than Mrs. Dennis ever make any claim to the land? A. No. Q. Mrs. Dennis held the land out as her property? A. Yes. Q. And received the rentals from it? A. Yes."[2]

The appellant answered questions as follows: "Q. Did you know that your brother deeded this property to his wife back in '31? A. I heard that. Q. You knew that? A. Yes. . . . Q. Assuming Dr. Dennis made a deed to this land to Mrs. Dennis, when did you find it out? A. I would have never done anything as long as Elizabeth lived. . . . Q. With reference to Dr. Dennis' deed to his wife—when did you find out (if you ever did) that Dr. Dennis had made a deed to his wife? Before or after she died? A. I believe it was after. I am not certain."

Thus, not only was there positive evidence that Mrs. Elizabeth Dennis went into exclusive possession of the lands prior to the death of Dr. Dennis, but, furthermore, the appellant would not definitely state that she was unaware of the deed from Dr. Dennis to Mrs. Elizabeth Dennis even during the lifetime of Dr. Dennis. We conclude that the possession of Mrs. Elizabeth Dennis did not commence as widow of Dr. Dennis, but commenced

[2] In addition to the above quoted excerpt, the witness, John W. Alderson, Jr., also testified on this point as to when his father rented the land from Mrs. Dennis: "Q. State to the Court the years in which you rented the land and from whom. A. My father died in '42 and from his death until '47 or '48, we rented it from Mrs. J. W. Dennis. Prior to that, my father rented it from Mrs. Dennis for six or seven years—from '33 or '34. Q. From '33 or '34 up until '47, you or your father rented the land from Mrs. Dennis? A. Yes. . . . Q. What year did you say you all first rented the place? A. It must have been between '33 and '35. It was before Mr. Ed Taylor died. Q. When did Mr. Ed Taylor die? A. I don't know, but he suggested that we rent it from them. Q. You could have gone on there in '33, '34, or '35, for the first time? A. Yes."

in 1932 by reason of another claim;[3] and that the 1931 deeds were admissible in evidence as throwing some light on Mrs. Elizabeth Dennis' possession which began in 1932.

The evident purpose of the 1931 deeds was to pass the title of some lands, somewhere, from Dr. Dennis to Mrs. Dennis by the medium of Gibson Witt, Jr., a third party.[4] Definite lands were in the contemplation of the parties. The deeds recited that the lands were in St. Francis County; but they could not be in St. Francis County and be situated in Township 4 *South,* Range 3 *West.* In *Rogers* v. *Magnolia Oil & Gas Company,* 156 Ark. 103, 245 S. W. 802, we held that the Section, with Township and Range directions, constituted a sufficient description of the land without any designation of the county. In *Chestnut* v. *Harris,* 64 Ark. 580, 43 S. W. 977, 62 Am. St. Rep. 213, and *Beck* v. *Anderson-Tully Company,* 113 Ark. 316, 169 S. W. 246, we held descriptions to be sufficient which gave the County and the Section, Township, and Range, even though the directions of the Township and Range did not appear. It is unnecessary to discuss these cases, or to decide whether the designation of the County is inferior or superior[5] to the *direction calls for the Township and Range*; because (a) Mrs. Elizabeth Dennis was in exclusive possession of the lands prior to the death of Dr. Dennis, and (b) the admission in evidence of the 1931 deeds supports the conclusion that she entered into possession by virtue of conveyance from Dr. Dennis.

[3] In *Jones* v. *Thomas,* 124 Mo. 586, 28 S. W. 76, the wife had entered into possession of lands under an order awarding them to her in a divorce proceeding. Later the husband died and it was discovered and conceded that the order (awarding the lands to the wife in the divorce case) was void. The Supreme Court of Missouri held that the wife's possession was acquired during the lifetime of the husband and continued to be protected by limitations and that the death of the husband did not convert the wife's possession to the status of a widow claiming dower. We cited the Missouri case with approval in *Bride* v. *Walker,* 206 Ark. 498, 176 S. W. 2d 148. In Jones on "Arkansas Titles," § 1475, this is stated: "As a general rule, when a statute commences to run, it continues to do so until the bar is complete, notwithstanding intervening disability." And see also *Freer* v. *Less,* 159 Ark. 509, 252 S. W. 354, which holds that where a person's possession commenced prior to the death of the ancestor, such death did not halt the statute.

[4] The record here contains no explanation as to why these descriptions were used in these deeds; and there was no effort to reform the descriptions.

[5] See 26 C. J. S. 221.

There remains only the question of whether the appellee made sufficient allegations and proof to have his title quieted. We conclude that he did. He alleged and proved the exclusive and adverse possession of Mrs. Elizabeth Dennis from 1932 to 1945, her devise to him, his exclusive possession from 1945 to 1949, and payment of taxes by him and his predecessor for more than 15 years. In *Robeson* v. *Kempner,* 182 Ark. 746, 32 S. W. 2d 616, a suit to quiet title, we said:

"Our statutes do not require that plaintiffs in suits of this character be required to set out therein their chain of title. In ejectment suits the statutes make such requirements. In suits in equity to quiet titles allegations of ownership are sufficient upon which to base or found the actions."

In 44 Am. Jur. 69, in the topic "Quieting Title," it is stated:

"Where the complainant is in possession of the property, title may be established by a deed which is doubtful or defective; he is not bound to show, as is a claimant in a possessory action, a title which is perfect as against all the world."

In 51 C. J. 175, in the topic "Quieting Title", the text states:

"A defective deed is sufficient to enable plaintiff to sue where the defect is due to a mistake against which the law would afford relief; and even where the deed does not cover the land in dispute, and plaintiff does not present a case entitling him to reformation of such deed, the infirmity is cured by conveyance of his grantor's interest to him before commencement of the action."

The decree of the Chancery Court is affirmed.

George Rose Smith, J., dissenting. The majority's conclusion hinges upon the finding that Mrs. Dennis, in the belief that she owned the land, took possession during her husband's lifetime. We have recognized the possibility of a wife's holding land (other than their residence)

adversely to her husband's title, even though they are living together in harmony. *Evans* v. *Russ,* 131 Ark. 335, 198 S. W. 518. If Mrs. Dennis took possession before Dr. Dennis died in 1935, her continued possession after his death would have been referable to her claim of ownership rather than to her dower right and would have vested title in her after seven years. See *Jones* v. *Thomas,* 124 Mo. 586, 28 S. W. 76, cited by the majority.

But this reasoning no longer applies if Mrs. Dennis did not take possession until Dr. Dennis' death. She would then have entered the land as a tenant in common with the appellant and would have to show that notice of her adverse holding was brought home to her cotenant. That showing has not been made. Hence the finding that Mrs. Dennis took possession before her husband died is the very basis of the majority view. Without detailing the testimony it is enough for me to say that I think the very clear preponderance of the evidence shows that Dr. Dennis continued in possession until his death, and I therefore dissent.

MERCURY INSURANCE COMPANY *v.* MCCLELLAN.

4-9036 225 S. W. 2d 931

Opinion delivered January 16, 1950.

Wright, Harrison, Lindsey & Upton and *Edward Lester,* for appellant.

Dowell H. Anders and *DuVal L. Purkins,* for appellee.

MINOR W. MILLWEE, Justice. Appellees, Monroe McClellan and James C. McKinney, filed separate actions against appellant, Mercury Insurance Company, to recover losses on two automobile insurance policies. By agreement the two cases were consolidated and tried before the circuit judge, sitting as a jury, upon the pleadings and stipulations of fact. The insurance company has appealed from judgments rendered in favor of appellees.

Appellant insured McClellan's Chevrolet truck on October 20, 1948. The truck was damaged by collision on December 26, 1948. On December 31, 1948, appellant accepted proof of loss in the net sum of $183.55 and a draft was issued in payment of the loss. Appellee then placed the truck in the garage of Anderson Body and Paint Shop at Warren, Arkansas, for repairs. On January 3, 1949, the truck was in said garage, in the process of being repaired, when a devastating tornado struck the city. The tornado destroyed the garage building and the insured truck was moved in an upright position about four feet and the wall of the garage and a timber fell on it, damaging it substantially.

The policy under which appellant insured McClellan's truck contains the following provisions as to coverage or risks insured against:

Item 3. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

	COVERAGES	LIMITS OF LIABILITY (Insert Amount or "Actual Cash Value")	RATE	PREMIUM
A	Comprehensive (Loss of or damage to the Automobile, except by Collision or Upset but including Fire, Theft and Windstorm)	$	$	$
B	Collision or Upset 80% Collision or Upset Convertible Collision or Upset (Additional Payment $)	Actual Cash Value less $50.00 . . . which deductible amount shall be applicable to each Collision or Upset		$66.00 $ $
C	Fire, Lightning and Transportation	Actual Cash Value	$12	$26.80
D	Theft (Broad Form)	Actual Cash Value	$	$3.35
E	Windstorm, Earthquake, Explosion, Hail or Water	$	$	$
F	Combined Additional Coverage	$	$	$
G	Towing and Labor Costs Endorsements	$10 for each disablement $	 $	$ $
		TOTAL PREMIUM		$96.15

It is noted that the risks insured against are shown by the amount of the specific premium charge listed opposite each item of coverage and include items B, C, and D, but do not include item A, "Comprehensive" or item E, "Windstorm, Earthquake, Explosion, Hail or Water". Under "Insuring Agreements" in reference to coverage B the policy provides: "Collision or Upset: To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile (but only for the amount of each such loss in excess of the deductible amount, if any, stated in the declarations as applicable hereto)."

On October 28, 1948, appellant insured McKinney's Ford automobile under a policy containing the same coverage as set out in McClellan's policy, to-wit: Collision or upset, $50 deductible; fire, lightning and trans-

portation; and theft (Broad Form). On January 3, 1949, McKinney's automobile was parked in front of his residence in Warren, Arkansas. The automobile was picked up by the tornado, rolled over several times, and then blown into the top of a nearby tree. The vehicle was completely destroyed.

The two policies of insurance designated as loss payees each appellee and the Warren Bank "as interest may appear". The bank had made loans to the appellees with the truck and automobile as security and was made party defendant to each suit.

To sustain the judgments in their favor appellees contend that the damage to their vehicles by the tornado was a risk covered by the policy which insures against damage by collision of the vehicle with another object or by upset of the vehicle; that it is undisputed that McClellan's truck was damaged by the wall and timber falling upon it; that McKinney's automobile was upset and thrown against a tree; and that these losses were by "collision" and "upset" respectively, which are hazards clearly covered by the terms of the policies.

Appellant disclaimed liability on both policies on the ground that the losses did not result from collision or upset but resulted from windstorm, a hazard not covered by the policy.

The question for determination, therefore, is whether the losses sustained were by collision or upset within the meaning of the policy. There are no Arkansas cases on the question but determinations against the contention of appellees have been made in three jurisdictions. In *O'Leary* v. *St. Paul Fire & Marine Ins. Co.* (Texas Civ. App.), 196 S. W. 575, the defendant insured plaintiff's automobile against damage by being in a collision with certain expressed exceptions which did not include windstorm. The car was damaged when the garage in which it was stored was caused to collapse by a severe storm. In denying liability the court said: "The car was in a garage. The second floor of the building or garage falling upon the car caused the damage. Surely it cannot

be said that it was the intention of the parties, as ascertained from the terms of the policy, that the word 'collision' was broad enough to cover such damage as occurred in the instant case, and that appellee would be called upon to pay a loss caused by the falling of a building upon the car while the car was being left in the same. . . .

"We agree with appellant that a policy of insurance will be construed most strongly against the company. However, we do not believe that a forced construction and one clearly not within the intention of either party should be placed upon the language used in the policy. We do not believe, in the case at bar, that there was a 'collision' within the ordinary meaning of that term, and we are of opinion that appellant should not be permitted to recover upon said policy in the instant case."

In *Ohio Hardware Mut. Ins. Co.* v. *Sparks,* 57 Ga. App. 830, 196 S. E. 915, the court was called upon to construe a policy insuring against accidental collision where a storm blew away the garage in which the automobile was stored and by its force caused a telephone pole to fall upon and damage the automobile. The policy in that case provided for coverages substantially similar to those involved in the instant case. The Georgia court held that the pole falling upon the automobile was not a "collision" as contemplated by the policy. In reaching that conclusion the court noted that there were cases sustaining recovery for damage caused by an object falling on an automobile insured against collision, but said: "While the word 'collision,' as defined by lexicographers, might be strained to include any impact of one body with another, the word in an insurance policy must be construed in accordance with what the parties to the contract must reasonably be said to have contemplated as to the coverage." After determining that the damage was brought about by the tornado which the court found to be an act of God and not an accidental collision within the meaning of the policy, the court further said: "Another consideration that impels us to the conclusion that the damage in question was not reasonably

in contemplation of the contract is that, although the opportunity of being indemnified against damage by storm or tornado was afforded the insured, he chose not to avail himself of that item of coverage, but contented himself with being protected against loss or damage due to 'accidental' collision or upset, fire, lightning, transportation, theft, robbery, and pilferage, from which it must reasonably be deduced that any damage from a falling object, immediately associated with or in the sphere of the action of a storm or tornado, was not to be included in the coverage. The context may always be looked to for a proper construction of what was in the minds of the parties at the time of entering into the contract."

The Louisiana court followed the same line of reasoning in denying liability in *Chandler* v. *Aetna Ins. Co.,* 188 So. 506, where the insured automobile was damaged when a house was blown against it by a tornado and the policy insured the automobile against "collision or upset" but not against "windstorm."

In *Atlas Assur. Co.* v. *Lies,* 70 Ga. App. 162, 27 S. E. 2d 791, the facts were that the wind blew a large tree onto the front of insured's moving automobile and the court held that the damage was within coverage of the policy as having been caused directly by "windstorm" and was not excluded from coverage as having been caused by "collision" as contended by the insurance company.

In their excellent brief, appellees have cited us to cases holding in effect that in determining whether there has been a collision within the meaning of insurance policies on automobiles, it is immaterial whether the motion which causes the automobile to collide with some other object derives from a force applied by a human agency or some natural force, such as gravity. The seeming contrariety of decisions on the question is due more to the different factual situations involved in each case than to the legal reasoning employed by the courts. This is demonstrated by the following statement found in 45 C. J. S., Insurance, § 797 d (5): "According to some cases the striking of an automobile by an object falling onto it from above is a collision within the meaning of a collision

policy. Recovery on a collision policy has been denied, however, on the ground that the occurrence was not a collision within the coverage of the policy, where the damage to the insured automobile was caused by the falling on it of the second floor of the garage in which the car was kept, or where the damage was caused by the falling of hail on the insured automobile. So it has been held that the occurrence is not an accidental collision and, therefore, is not within the coverage of a policy insuring against accidental collision where the damage is caused by the falling of an object on the insured automobile as the result of a windstorm or tornado."

The first sentence in the foregoing statement is based on the decision in *Universal Service Co.* v. *American Ins. Co.,* 213 Mich. 523, 181 N. W. 1007, 14 A. L. R. 183, where the scoop of a steam shovel fell or was dropped onto a truck. The second sentence is based on the O'Leary case, *supra,* where a windstorm caused the collapse of the garage, and the case of *American Automobile Ins. Co.* v. *Baker* (Tex. Civ. App.), 5 S. W. 2d 252, where the damage was by falling hail. In support of the third sentence the textwriter cites the Ohio Hardware Mutual and Chandler cases, *supra,* which involve facts strikingly similar to those in the cases at bar.

Appellees also contend that if appellant intended to except loss by tornado it should have excepted coverage E from B just as it excepted coverage B from coverage A. It is also argued that since windstorm was expressly excluded as a collision or upset risk in coverage A under "Insuring Agreements," the same exception should have been made as to coverage B under the following rule: "A collision clause is strongly construed against the insurer upon the basis that, if it desired to insert exceptions precluding liability under the circumstances presented, it should have done so by inserting such exceptions as would limit the effect of the general terms employed." Appleman, Insurance Law and Practice, Vol. 13, § 7465. Appellant says the exclusion of windstorm as a collision or upset hazard in coverage A is but further evidence of the intention of the parties when the contract is construed

as a whole. We do not regard either contention as controlling here.

In *Witherspoon* v. *Lumbermen's Mut. Ins. Co.,* 211 Ark. 844, 203 S. W. 2d 185, the insured sought recovery when his truck was damaged by being operated after the oil had drained out of the crankcase when the truck was overturned. The comprehensive coverage for which a premium was paid included loss or damage to the vehicle except by collision or upset. It was held that the loss relating to risks against collision or upset, for which no premium had been paid, was not included in the liability of the company. We there restated the rule announced in *Fowler* v. *Unionaid Life Ins. Co.,* 180 Ark. 140, 20 S. W. 2d 611, as follows: "It is also a well-settled rule in construing a contract that the intention of the parties is to be gathered, not from particular words and phrases, but from the whole context of the agreement. In fact, it may be said to be a settled rule in the construction of contracts that the interpretation must be upon the entire instrument, and not merely on disjointed or particular parts of it. The whole context is to be considered in ascertaining the intention of the parties, even though the immediate object of inquiry is the meaning of an isolated clause."

While the tornado was the efficient and proximate cause of the loss and damage, and that fact is important in determining the intention of the parties, we do not regard it as absolutely controlling in determining liability. The liability of appellant depends upon whether the losses sustained were the result of a risk or hazard against which the appellees were covered by the policies. In a case involving the liability of an insurance carrier, Judge Cardozo said: "General definitions of a proximate cause give little aid. Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract. It is his intention, expressed or fairly to be inferred, that counts." *Bird* v. *St. Paul Fire & Marine Ins. Co.,* 224 N. Y. 47, 51, 120 N. E. 86, 13 A. L. R. 875.

The right of appellees to recover and the liability of appellant to pay, must be determined by the intention of the parties as expressed in the policy. We must assume from the stipulations of fact that appellees only intended to avail themselves of the sort of protection which the policy shows they purchased. We think it is clear from the language and terms of the policy that appellees did not intend to pay for, and appellant did not intend to accept, the risk for insurance against losses arising from windstorm or tornado. Item 3 of the policy expressly limited the insurance to the coverages for which appellees paid a specific premium. They paid no premium for coverage A or coverage E, either of which afforded protection against loss by windstorm. Since appellees paid no premium for windstorm coverage we think it is clear that the parties intended that damages resulting therefrom should be excluded. The only material difference in the policies here and those in the Ohio Hardware Mutual and Chandler cases, *supra,* is that the policies in the case at bar authorize an additional coverage A which afforded appellees the additional opportunity of being indemnified against damage by tornado or windstorm.

We conclude that the losses sustained by appellees did not result from a hazard covered by their policies. The judgments are accordingly reversed and the causes dismissed.

LEISTER *v.* CHITWOOD.

4-9050 225 S. W. 2d 936

Opinion delivered January 16, 1950.

Bland, Kincannon & Bethell, for appellant.

Partain, Agee & Partain, for appellee.

DUNAWAY, J. The sole question for our decision is whether the will of D. L. Z. Chitwood was attested by two witnesses as required by our statute. From a finding of the Crawford Probate Court that the will was executed in the manner and form required by law comes this appeal.

D. L. Z. Chitwood, a retired insurance man, over eighty years of age, who resided in Mulberry, Crawford County, Arkansas, died at about five o'clock the morning of September 1, 1948. Sometime during the night of August 31—September 1, 1948, an instrument purporting to be his last will and testament was executed. On September 9, 1948, R. J. Chitwood and Atha Chitwood appeared before the probate clerk and signed an affidavit as proof of execution of the will. After due notice by publication, on October 1, 1948, the will was admitted to probate in common form. Auten M. Chitwood, Sr., was appointed administrator with the will annexed. On December 7, 1948, Esma Leister, a sister of the decedent, began this action contesting the probate of the will on the ground

that it was not attested by two witnesses as required by law.

There is no question of fraud or lack of testamentary capacity. It is admitted that the testator executed the instrument in question, that it expressed his wishes in regard to the disposition of his $20,000 estate, and that Atha Chitwood subscribed the will in accordance with the statutory requirements. It is also admitted that R. J. Chitwood, the second attesting witness, signed the instrument but appellant contends that he did so under circumstances which did not fulfull the requirements of the statute.

The formalities prescribed by law for the execution of wills are set out in Ark. Stats. (1947), § 60-104:

"Second: Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or should be acknowledged by him to have been so made to each of the attesting witnesses.

"Third: The testator, at the time of making subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his will and testament.

"Fourth: There shall be at least two attesting witnesses, each of whom shall sign his name as a witness at the end of the will, at the request of the testator."

The testimony of the two attesting witnesses as to the execution of the will is in hopeless conflict. The version of Atha Chitwood, who is the wife of appellee, Auten Chitwood, Sr., administrator and principal beneficiary under the will, may be briefly summarized as follows: On the evening of August 31, 1948, Atha and Auten Chitwood, distant cousins of the testator, were at his home where he had been confined to his bed for some time. R. J. Chitwood and his wife Kitty, old friends of the testator who were living with him in his home, were also present at the house that evening. In the late afternoon, the testator's doctor had called on him, and informed him that no prognosis of his future condition could be

made, but that a change for better or worse could be expected very shortly. Early in the evening, R. J. and Kitty Chitwood departed from testator's sickroom, leaving Auten and Atha. The testator then informed them that he desired to make a will. Auten was instructed to contact T. J. House, a local banker, with whom the testator had earlier discussed preparing his will for him. Several phone calls were made to the House home, but he could not be located. Testator then dictated his will to Atha, who wrote it down in pencil on a single sheet of tablet paper. The instrument in question, dated August 31, 1948, closed with this attestation clause, also dictated by the testator: "We now sign as witnesses to the last will of D. L. Z. Chitwood at his request."

Testator then asked Auten to get R. J. to come in and witness the will. When Auten and R. J. returned the testator said, "Riley, (R. J.) this is my will, and I want you to sign it." Testator then sat up on the side of his bed and signed the will. After the testator had signed, he handed the paper to Atha, who signed and in turn handed it to Auten. Auten then signed, and handed it to R. J., who sat down at a desk and affixed his signature. R. J. went back to his room, while Auten and Atha remained until the testator died at about five o'clock the next morning. Atha testified that the execution of the will occurred about nine o'clock.

R. J. Chitwood, on direct examination as a witness for appellant, gave this testimony as to the execution of the will: On the evening in question, he and Kitty were in testator's room, until they retired about ten o'clock, leaving Auten and Atha there. No mention of a will was made by the testator. Sometime between four and five o'clock the next morning, they were awakened by Atha and told to come to testator's room. R. J. arrived some few minutes before Kitty, and went to the bed where testator was lying on his side and laid his hand on him. Testator did not speak. Auten then handed him a paper and told him testator wanted him to sign it. Testator did not tell him it was his will, and R. J. did not *think* testator asked him to witness it. Nor did he *think* anyone else

signed at that time, but he *believed* there was another signature on it. He could not say whether testator knew he signed it or not, but he did sign in the room where he was sick. While the witness was sitting at the desk affixing his signature, Dr. Kirksey, testator's physician, came in, and shortly thereafter at five o'clock pronounced testator dead.

The Proof of Will was executed by R. J. Chitwood and Atha Chitwood at the court house before the clerk of the Probate Court of Crawford County. In said affidavit they swore that they were the subscribing witnesses to the will of D. L. Z. Chitwood; that in their presence he declared it to be his last Will and Testament and subscribed his name thereto in their presence; and that at testator's request they signed said will in his presence and in the presence of each other.

The testimony of R. J. Chitwood was taken by deposition. Atha Chitwood testified in person at the trial of this cause. Not only was their testimony conflicting as to the execution of the will, but also as to their execution of the Proof of Will. R. J. Chitwood admitted signing the affidavit, but he could not say positively whether it was read to him before he signed; he could not remember whether he swore to the truth of its contents. On the other hand Atha Chitwood testified that the affidavit had been read to them before they signed, and that they were sworn by the clerk at the time of its execution.

Henry Batchelor, the clerk, testified that R. J. Chitwood read the affidavit, to which the will was attached. In addition, the clerk testified that in response to his question: "Is this your signature and that of Mr. D. L. Z. Chitwood?" R. J. Chitwood said, "Yes, Doc asked me to sign it," and then explained that "Doc" was D. L. Z. Chitwood.

Appellant argues that the testimony of Atha Chitwood as to the execution of the will cannot be believed because of her husband's substantial interest in the estate if the probate of the will stands. It is conceded, however, that she is a competent subscribing witness un-

der our decision in *Rockafellow* v. *Rockafellow,* 192 Ark. 563, 93 S. W. 2d 321. In considering the credibility of this witness we recognize the possible influence on her of having a sizable bequest to her husband dependent upon her testimony. Although on appeal probate proceedings are tried *de novo* we will give consideration to the findings of the probate judge, who heard the oral testimony and had an opportunity to study the expressions, demeanor and general attitude of the witness.

The statute above quoted is, of course, mandatory and must be complied with before a will can be admitted to probate. *Johnson* v. *Hinton,* 130 Ark. 394, 197 S. W. 706; *Graves* v. *Bowles,* 193 Ark. 546, 101 S. W. 2d 176. In the instant case, sufficient proof of execution was made before the probate clerk to entitle the will to probate in the absence of any evidence to the contrary.

The will having been admitted to probate in common form, appellant had the burden of overcoming the presumption of its due execution. In *Anthony* v. *College of the Ozarks,* 207 Ark. 212, at page 219, 180 S. W. 2d 321, we said: "The applicable rule, as stated in 68 C. J., 982, § 749, is as follows: 'No presumption of the due execution of a will arises from the mere production of an instrument purporting to be a last will and testament. . . . Where, however, in proceedings for the probate of an instrument as a will it appears to have been duly executed as such, and the attestation is established by proof of the handwriting of the witnesses or otherwise, although their testimony is not available, or they do not remember the transaction, it will be presumed, in the absence of evidence to the contrary, that the will was executed in compliance with all the requirements of law, including those relating to publication, attestation in the presence of the testator, and the affixing of the testator's signature prior to those of the witnesses'."

The means of satisfying the requirements of the provisions of our statute here in question were fully discussed by this court in the early case of *Rogers et al* v. *Diamond,* 13 Ark. 474. There we said: ". . . each of the attesting witnesses must sign his name as a wit-

ness, at the request of the testator, but such request might be inferred from the attendant circumstances in proof by signs or gestures as well as words: as in *Rutherford* v. *Rutherford,* (1 Denio 33, 43 Am. Dec. 644), by the testator desiring the witness to be sent for to attest the execution of his will, or from a request made to such witness by another person in the testator's presence. If there be any evidence from which the jury might infer a request, that as a question of fact ought to be submitted to them"[1] (page 487), and at page 489: "Publication under the statute is necessary to give effect to a will; but it means that the testator, having capacity to make a will, shall understand that the instrument which he is about to execute, is a testamentary disposition of his property, and that he shall, at the time, communicate to the witnesses, that he does so understand it. The statute says he shall declare it; but in *Remson* v. *Brinkerhoff,* (26 Wend. 325) 37 Am. Dec. 251, NELSON, C.J., said that no particular form of words is necessary, and that it would be unwise, if not unsafe, to speculate upon the precise mode of communication, as every case must depend upon its own peculiar circumstances. The fact of publication, therefore, is to be inferred or not, from all the circumstances attending the execution of the will; all that is said and done as part of the *res gestae.*"

In the case at bar, one of the attesting witnesses, Atha Chitwood, told a consistent, straightforward story of the execution of the will. The other, R. J. Chitwood, gave testimony full of inconsistencies. It should be noted that this witness was eighty years of age, and was ill himself at the time his deposition was taken; in fact he had just returned from a doctor's office. His own comment to one of the attorneys questioning him was: "I can't recall about it for sure. If you had come earlier or later, I would have done a better job of this than I can now." After first saying that he did not *think* anyone else signed the will when he did, R. J. Chitwood on cross-

[1] Under our present procedure, of course, there is no jury and the fact question is determined initially by the trial court based upon a preponderance of the evidence. On the trial *de novo* on appeal we use the same standard.

examination said he *thought* he saw Atha Chitwood sign it.

In his deposition R. J. Chitwood made this statement in regard to his signing the will: "I am not trying to dodge behind anything. What makes this so hard, I thought at the time this thing occurred, I was doing absolutely the thing that D. L. Z. wanted done and I still think I was, I am solid and firm in it and I never expected to hear anything from it later; I thought that was the way he wanted it and now since it has come up, it brings a lot of different shadows on it and it puts a different light on part of it and I am still just as firm in my opinion that I did what D. L. Z. wanted done and I did it because D. L. Z. wanted it done."

In the case of *Evans* v. *Evans*, 193 Ark. 585, 101 S. W. 2d 435, we said at page 590: "The validity of the will depends upon whether it was executed as the law requires, and does not depend on the memory of a witness . . . it is not essential that due execution of the will be proved or established by the testimony of all or any of the subscribing witnesses so produced and examined. Execution may be sufficiently proved where one witness testifies positively to the requisites of execution, and another does not recollect, or denies some of the requisites."

It must be remembered in considering the testimony of R. J. Chitwood as given in his deposition, that it was in conflict with his earlier sworn statement made before the probate clerk just eight days after the execution of the will. It is also in conflict with his statement to the clerk that "Doc asked me to sign it."

The testimony of Atha Chitwood was in part corroborated by the testimony of the Mulberry telephone operator that between eight and ten o'clock in the evening of August 31, 1948, Auten Chitwood did make several calls to the residence of T. J. House. Dr. Kirksey's testimony discredited the account given by R. J. Chitwood in that the doctor testified that when he arrived at the D. L. Z. Chitwood house he met this witness in the hall and that the testator was already dead. R. J. Chitwood

was not sitting at the desk signing the will as he had testified.

The situation, as here, where one of the subscribing witnesses denies the existence of certain facts necessary for legal execution of a will, is discussed in 2 *Page on Wills* (Lifetime Ed.), § 758. There it is stated: "The testimony of the subscribing witnesses which denies the performance of one or more of the facts which are necessary to the validity of the will is, at best, to be received with caution, and to be viewed with suspicion. . . .

The subscribing witnesses are especially discredited where they testify in favor of the will at probate and against it at contest; or where they hesitate and evade before denying the validity of the execution of the will" (page 473).

The evidence adduced in this case presented a fact question as to the due execution of the will for decision by the court. The weight to be given the presumption of due execution, it being undisputed that the testator and two witnesses had subscribed the will; and the weight to be given the testimony of the witnesses concerning the transaction were for the court to determine. On appeal the judgment of the Probate Court will not be disturbed unless it is against the preponderance of the evidence. *Gray* v. *Fulton,* 205 Ark. 675, 170 S. W. 2d 384. The finding of the Probate Court that the will of D. L. Z. Chitwood was duly executed was not against the preponderance of the evidence.

Affirmed.

SPRINGDALE MONUMENT COMPANY *v.* ALLEN.

4-9032 226 S. W. 2d 42

Opinion delivered January 16, 1950.

Rehearing denied February 13, 1950.

Harper, Harper & Young and *J. W. Durden,* for appellant.

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

HOLT, J. This claim, under the Workmen's Compensation Act, 319 of 1939, as amended, (now Ark. Stats. 1947, §§ 81-1301-81-1349) was begun by W. H. Allen in March 1947, for disability benefits. He alleged that he had become disabled as a result of accidental injuries which he sustained March 29, 1946, while employed by appellants, and growing out of said employment.

Shortly thereafter, Allen died and the claim was then treated as one for death benefits on behalf of appellees. Allen's widow and minor child.

A hearing before a single member of the Commission resulted in a favorable award to them.

On an appeal to the full Commission, at which the evidence before the single commissioner and also additional evidence was presented and considered, an

award to appellees was denied, in a unanimous opinion, by the Commission. Thereupon, appellees appealed to the Washington Circuit Court, which reversed the action of the full Commission and awarded death beenfits to appellees.

This appeal followed.

The primary and decisive question presented is one of fact,—that is, was there substantial evidence to support the full Commission's rejection of appellees' claim for death benefits? We hold that there was.

Appellees based their claim on the allegation that W. H. Allen (37 years of age), while employed by appellants, and as a result of said employment, sustained an injury in March, 1946, which resulted from being struck in the testicle by a chain and that the trauma, or blow, caused cancer and aggravated or caused a pre-existing cancer in Allen's testicle to become active, which brought about his death June 20, 1947.

Appellees earnestly contend that the trauma, or blow, which Allen received "either caused a teratoma (tumor) or expedited the development of a pre-existing teratoma which ultimately caused his death."

W. H. Allen received what appeared to be a minor injury to his left testicle March 29, 1946. He continued work and did not consult his family physician, Dr. Hathcock of Fayetteville, until April 2, 1946. On June 10th thereafter, Dr. Hathcock removed the diseased organ and about four inches of cord, which were sent to a pathologist, and after analysis, he reported teratoma, highly malignant, and cancerous. About June 15, 1947, it was discovered that Allen had cancer of the lungs and his death followed June 20, 1947.

Much medical testimony was presented, which was highly conflicting.

Dr. Hathcock, a general practitioner of unquestioned standing and ability, testified, in effect, that his first examination of Allen revealed no signs of any injury or trauma; that he and the medical profession did not know

the cause of cancer; that some hold that trauma is the cause or might be the exciting cause of cancer, and that it is true in many cases that teratoma may transpose to the lungs rapidly. In short, his opinion was that he did not know whether trauma was a factor which could cause teratoma to develop or not, that it might have some relation or be purely coincidental.

Dr. H. Fay H. Jones of Little Rock, a recognized specialist in the field of urology, with some 30 years experience, testified, in effect, that in his opinion the blow, or trauma, which Allen received had nothing to do with Allen's cancerous condition, in the instant case. (Quoting from his testimony): "Q. I wish you would please give the Commission your opinion as to whether or not the blow which he is alleged to have received from that chain caused a teratoma which was found? A. I don't think it did. I think it was already there before he had his injury. Q. Then that being true the striking with the chain would have had nothing to do with the resulting carcinoma? A. No. . . . Q. Would you say the striking of the chain, if he was struck in the manner testified to, did not produce a teratoma? A. In my opinion it did not. Q. And the resulting condition would have developed anyway? A. That's right. Q. Would it have aggravated it so that it would have caused it? A. It wouldn't aggravate it. It would, maybe bring it out a little quicker. Sometimes we see them with no injury at all and suddenly begin growing. Q. By that you mean it would have come to his attention quicker? A. That's right, by striking him."

Practically all of the medical testimony was to the effect that the teratoma metastasized to the carcinoma or cancer of the lungs.

Dr. J. D. Southard of Fort Smith, another specialist in urology, after quoting from many outstanding medical authorities and treating the subject at length, summed up his opinion as follows: ". . . the teratoma and general metastasis could not have been as a result of the claimed injury, particularly in view of the minor nature of the injury."

Dr. Carl Wilson, also a specialist in urology, of the Holt-Krock Clinic of Ft. Smith, summarized his opinion based on the record in the present case, as follows: "The question as to whether a teratoma can be aggravated by injury has never been settled. . . . It is impossible for trauma to produce a teratoma. Whether trauma can aggravate a previously existing teratoma is a question that has not been definitely decided as yet. Competent authorities may be found on both sides of the question. The consensus of opinion now is that it probably has little to do with the condition. It is my own personal feeling that it plays little, if any, part."

From the above testimony, we are unable to say that there was no substantial evidence to support the findings and action of the full Commission. We hold that the Washington Circuit Court erred in holding otherwise.

We said in the case of *Meyer* v. *Seismograph Service Corporation,* 209 Ark. 168, 189 S. W. 2d 794: "The rule is firmly established that the findings of the Commission, which is the trier of the facts, will not be disturbed on appeal to the circuit court if supported by substantial testimony. Act 319 of 1939, § 25 b; (Citing many cases). . . . 'In a long line of decisions since the passage of the act here in question, the rule has been clearly established that the finding of the Commission shall have the same binding force and effect as the verdict of a jury, or of a circuit court sitting as a jury, and when supported by substantial evidence, such findings will not be disturbed by the circuit court on appeal to that court or on appeal to this court.' . . . The Commission had the right, just as a jury would have had, to believe or disbelieve the testimony of any witness." See also, *Harris Motor Company* v. *Pitts,* 212 Ark. 145, 205 S. W. 2d 21 and *Mechanics Lumber Company* v. *Roark, ante,* p. 242, 224 S. W. 2d 806.

When we give to the testimony its strongest probative force in favor of the action of the full Commission denying the award, as we must do, we are unable to say that such action was not based on some substantial testimony.

Accordingly, the judgment of the Washington Circuit Court is reversed and the cause remanded with directions to affirm the action or order of the full Commission.

MILLWEE and LEFLAR, JJ., dissent.

JONES *v.* TINDALL.

4-9045 226 S. W. 2d 44

Opinion delivered January 16, 1950.

Rehearing denied February 13, 1950.

E. J. Butler and *Hale & Fogleman,* for appellant.

J. L. Shaver, for appellee.

LEFLAR, J. This case, consolidated with another, was before this court in *Tindall* v. *Jones,* 212 Ark. 860, 208 S. W. 2d 173. In the 1947 trial from which that appeal arose the Chancellor decreed that a certain loan made by C. A. Tindall to Will and Isabella Jones was usurious, and that notes and a deed of trust incident to the loan should

be forfeited and cancelled. Because much of the evidence was vague and uncertain, the case was reversed and remanded for further development, though the companion case, with essentially similar evidence more fully developed, was affirmed. At the new trial, the Chancellor held the loan not usurious and allowed recovery by the plaintiff lender. Defendants appeal.

Will and Isabella Jones, elderly Negroes, had bought a 40-acre farm in Cross county from Howard Curlin of Crittenden county, their former residence, on an installment payment basis. Mr. Curlin died in 1941, and Mrs. Curlin, his administratrix, was trying to settle up his estate. The Jones debt had been reduced, but Jones was behind in his payments. Mrs. Curlin was not pressing for immediate payment, but Jones knew the situation and was anxious to satisfy the debt.

One H. K. Gish of Memphis, Tennessee, was traveling about east Arkansas in his car seeking to make secured loans to Negroes. Gish came to Will Jones' farm and solicited a contract to lend Jones money. Thereafter he had Will and Isabella Jones come to his office in Memphis where on October 20, 1943, the Joneses signed a series of twelve promissory notes, due over a six-year period, and a deed of trust conveying their 40-acre farm as security for the notes. Six of the notes purported to be for principal, and six for interest. The six notes for principal totaled $4,250; the six notes for interest, figured at six per cent, totaled $1,177.08. The notes were made out in favor of plaintiff, C. A. Tindall; Gish's name does not appear upon them. The Joneses testify that they did not know, and were not told, what the totals were, either of principal or interest, at the time the instruments were executed. They testify that they were borrowing the money for the sole purpose of paying off the Curlin debt, the amount of which Gish had checked with Mrs. Curlin, and they assumed that the principal notes totaled that amount, with the interest notes extra. Will Jones' testimony was:

". . . I just signed my name. . . . Q. Did you read the papers? A. I was so glad I just signed

my name. . . . Q. How much money did he tell you he was letting you have? A. He didn't make no personal amount. Q. Did he give you any money? A. Nothing at all, just wrote me up and signed me up. Q. What did they do with the money? A. Paid Mrs. Curlin."

The amount which Jones owed Mrs. Curlin, and the amount paid to her from the proceeds of this Memphis loan, was $2,990.51. This figure is uncontradicted and cannot be contradicted. It is fixed by Mrs. Curlin's testimony, by her attorney, and by their records, and is admitted by plaintiffs. The Joneses claim that this is all they received for their notes for $4,250 principal and $1,177.08 interest.

It appears that Will Jones paid the first pair of notes, for $400 principal and $262.08 interest, to Tindall when they were due, then went to Tindall's office to pay the second pair of notes a year later but before paying inquired as to how much he still owed. When he was told that he still owed $3,850 principal and over $900 interest he denied that he owed any such amount and refused to make the second payment. Tindall then brought the present suit for foreclosure of the deed of trust.

At the first trial Tindall contended that he was a *bona fide* purchaser of the notes and deed of trust from Gish, and that Gish was not his agent but an independent lender. A mass of evidence establishes the contrary. It suffices now, however, to recall that this court in its earlier opinion on these facts, 212 Ark. 860, 208 S. W. 2d 173, held that Gish acted as Tindall's agent in making the loan. In keeping with this determination, an amendment to plaintiff's complaint filed after the case was remanded refers to the $2,990.51 paid to Mrs. Curlin as being "part of the $3,800 which the said C. A. Tindall loaned to Will Jones and Isabella Jones."

At this stage Tindall assumed that the Jones loan was his own from the beginning, but contended that the principal sum of the loan actually was $3,800. This was supported, at least in a sense, by the fact that Tindall

actually gave Gish, through an intermediary, a check for $3,800 when the loan was closed. Tindall through his own testimony explained that the $450 difference between the $4,250 principal sum of the notes and the $3,800 outlay was a "discount," the profit above six per cent interest which he hoped to make on the transaction. This difference was not used to pay Gish for his work or to pay any other expenses connected with the loan.

To support plaintiff's claim under this theory of the facts, a detailed calculation of interest at ten per cent on $3,800 was included in the briefs, showing that for the six-year period of the loan, with credit for payments to be made as due, ten per cent interest would make a total $59.89 larger than the $5,427.08 sum of the original notes ($4,250 plus $1,177.08). In other words, if the loan was actually for $3,800, the total repayment promised by Jones would not be usurious. By the same calculation, if the loan to Jones was a little less than $3,800, even $100 less, the transaction would be usurious.

When the case was first submitted to this court (212 Ark. 860, 208 S. W. 2d 173) the record and the testimony were badly confused. This was particularly true of the testimony of Will and Isabella Jones. They spoke of the Curlin debt as being roughly $3,000, and then referred to another $400, or $700 or $800, or more, that they had received from Gish at another time. There was testimony indicating that another and separate loan had been made by Gish to Jones, and it was not clear whether Will and Isabella Jones were talking about both loans together, or only the one currently sued on. If they were testifying about the one only, their own testimony indicated that there might not be usury. McHaney, J., speaking for the court said: "The Jones case follows the same pattern as the Sims case.[1] Notes and a deed of trust

[1] In the Sims case (also 212 Ark. 860, 208 S. W. 2d 173) it was shown that Sims received $1,900 but signed notes to Tindall for $2,600 plus six per cent interest, the excess being divided between Tindall and Gish. The loan was declared void on account of the usury. It was further shown that this pattern was customary in Tindall's business, the record showing that ten such loans to Negro landowners, all with notes executed in amounts larger than actual borrowings, had been negotiated by Gish for Tindall in East Arkansas in the fall of 1943.

were executed to appellant for a larger amount than the borrower asked for or received. But the testimony of Will Jones and his wife as to the actual amount received by them under the loan is too indefinite and uncertain to justify a finding of usury. . . . Whether appellees meant they received the sum stated above out of the loan made by appellant, or whether they received said amount from both loans, we are unable to say."

At the new trial, the testimony of both Will and Isabella Jones was definite. They testified that the only money paid in their behalf from the first loan was the $2,990.51 received by Mrs. Curlin. They also testified definitely that there was a second loan, this one from Gish and not Tindall, on which they received $400 but executed notes for $700. The existence of this second loan was clearly proved; the second mortgage securing it was on record in the Cross county recorder's office. It was dated January 1, 1944, a few months after the date of the first loan. The total testimony of the Joneses, at both trials, is now susceptible to one interpretation only —they say that they received only $2,990.51 from the plaintiff's loan. The ambiguity that previously existed in their testimony is now resolved. Evidence that plaintiff's loan was actually for $3,800 must be found elsewhere if at all.

At the second trial plaintiff presented the testimony of one I. H. Rena, a neighbor of Will Jones, that Jones owed him something like $370 or $380 and that he had in the fall of 1943 received from someone in Memphis a check paying off the Jones debt in full. Rena did not remember who sent him the check, or who signed it, or why it was sent to him from Memphis. Jones testified that he had never owed Rena that much, and that he had always paid Rena what he owed him from time to time from other sources. Assuming, however, that Rena was paid off by Tindall or Gish from the proceeds of the first loan, that would make a total, at the most, of $3,370.51 paid to Jones' use, and that is the sum total of the evidence.

It is proved that Tindall wrote a check for $3,800 when he accepted the Jones notes for $4,250 and interest.

The check was payable to his agent. If the check or its proceeds were disbursed for the benefit of Jones, it seems that Tindall or his agents could produce the evidence to prove it. They offered no such evidence. Gish was not even called as a witness.

Tindall's testimony is definite that he gave his agent Gish nothing except the $3,800. If Gish paid out the whole $3,800 to Jones' use, then Gish's labors were free; he received no pay for working up the loan. He was under no pressure or compulsion to work for nothing; Tindall testified, as to how Gish might be getting paid: "I knew nothing of the details of it." If Gish kept none of the $3,800 for himself and for expenses incurred in working up the loan, it was because he chose voluntarily to serve without reward. It is permissible to infer that this was not the case. Without doubt Gish retained for himself a substantial part of the $3,800. We conclude that Will Jones did not receive $3,800 from the loan made on October 20, 1943.

Though the instruments here involved were executed and payable in Tennessee, they included the following provision:

"The property herein described being located in the State of Arkansas, this deed of trust and the notes and indebtedness hereby secured shall, without regard to the place of contract or of payment, be construed and enforced according to the laws of the State of Arkansas, and with reference to the laws of which state the parties to this agreement are now contracting."

This clause was in evident keeping with the intent of both parties. Though parties to a contract may not by their expressed intent cause their contract to be governed by the law of a state which has no substantial connection with the contract, they may select the law of a state which has such relation to the contract as Arkansas has to this one. Here Arkansas is the domicile of the borrower, the situs of the security, and the place where the preliminary negotiations for the loan were conducted. Those facts being present, the intent of the parties may

properly fix the law of Arkansas as the law governing their contract. *Lanier* v. *Union Mortgage, Banking & Trust Co.,* 64 Ark. 39, 40 S. W. 466; *McDougall* v. *Hachmeister,* 184 Ark. 28, 41 S. W. 2d 1088, 76 A. L. R. 1463. This they have done.

The Arkansas law as to the effect of usury is clear. The Arkansas Constitution, Article 19, section 13, declares that "all contracts for a greater rate of interest than ten per cent per annum shall be void, as to principal and interest, and the General Assembly shall prohibit the same by law." This was implemented by Act 39 of 1887 (Ark. Stats., 1947, section 68-609) avoiding mortgages, deeds of trust and other liens purporting to secure usurious loans.

Finally, assuming invalidity of the usurious obligation sued on, it is suggested that perhaps the plaintiff can be subrogated to the Curlin debt and lien which were discharged from funds provided by plaintiff's usurious loan. The facts are that plaintiff took no assignment of the Curlin lien, nor did he want one. He took his own deed of trust from Will and Isabella Jones, an instrument patterned to his own plans. That was the security he relied upon. The same contention was presented in *Trible* v. *Nichols,* 53 Ark. 271, 13 S. W. 796, 22 Am. St. Rep. 190, where the plaintiff made a usurious loan to the defendant, paying part of the proceeds to a prior mortgagee of defendant's land to discharge a non-usurious debt secured by the prior mortgage. In that case, the usurious lender actually took a deed (construed as a transfer of the security interest) from the prior mortgagee. The holding was that the usurious lender took nothing from the attempted subrogation. Speaking for the court, COCKRILL, C.J., said: "One who seeks protection under the equitable doctrine of subrogation must come into court with clean hands. It is not applied to relieve one of the consequences of his own wrongful or illegal act. Where therefore the claim to subrogation grows out of an agreement which is void by reason of usury, it furnishes no basis for the equitable doctrine." And see *Roe* v. *Kiser,* 62 Ark. 92, 34 S. W. 534, 54 Am. St.

Rep. 288; *City National Bank* v. *Riggs*, 189 Ark. 123, 70 S. W. 2d 574. To allow subrogation under the circumstances of the present case would be to defeat a main objective of the usury laws. Probably the most fertile field for the usurer's operations is that in which necessitous debtors seek a means for discharging valid debts previously incurred. If the usurer were subrogated to the rights of such prior creditors he would have a backlog of assurance not contemplated by our constitutional and statutory inhibitions against usury.

The decree of the Chancery Court is reversed and, the cause having been fully developed, plaintiff's action is dismissed and the Chancery Court is directed to give the defendant the relief to which he is entitled under the cross-complaint.

FOGGS *v.* CRUTCHER.

4-9041 226 S. W. 2d 48

Opinion delivered January 16, 1950.

Rehearing denied February 13, 1950.

Wayne Foster, for appellant.

Byron Bogard, for appellee.

GRIFFIN SMITH, Chief Justice. Foggs as owner of city property permitted it to forfeit for state and county taxes. Crutcher, as purchaser from the Land Commissioner, defends validity of the sale.

Four adjoining lots once belonging to the McEachin estate were assessed at $100 each for 1945. They were bought by the state at the Collector's sale November 13, 1946. Conveyances completed before the sale divided the four lots between three purchasers. C. S. Armstrong took the west third, Mable Carter the east third, and Nicholas Foggs the middle third. Two days after the November sale Armstrong applied to the County Assessor for apportionment of his tax liability under Act 359 of 1925, Ark. Stats., § 84-1209. Following a practice or custom of assessing in multiples of $5, the Assessor certified the west third to Armstrong at a valuation of $135. Mable Carter's east third was separately evaluated July 9, 1947, and she paid on $135. Each transaction was certified to the County Clerk.

It is stipulated that when the Carter apportionment was made the Assessor placed a valuation of $135 on the middle third, but did not certify this to the Clerk.

The Foggs third was certified to the state December 31, 1948, at the Assessor's uncertified valuation of $135. Crutcher purchased from the Commissioner January 4, 1949, before the state's title was confirmed. Foggs contends that the Assessor had no right to value his lot for more than a third of $400. Act 359, he says, is of no avail to the state because, if used against him as attempted here, there was want of due process because notice of the Assessor's purpose to change the assessment was not given. The statute directs the Assessor, upon written request, to segregate any part of a tract claimed by the petitioner, and to certify to the County

Clerk what part of the entire tax the designated portion shall bear. This certificate is recorded in a Tax Apportionment Book. Reference to this book must be made opposite the description as it first appears on the general assessment list. For his services in making the apportionment and certifying it, the Assessor may charge $1. Persons interested in the land, including any claiming the remnant, have recourse to a court of chancery if action be taken during the period allowed for redemption.[1] A condition is that tender of an amount sufficient to redeem the claimed interest must be made.

After the Assessor, under Act 359, had certified the Armstrong and Carter interests, Foggs' remaining third was untouched when the County Clerk transmitted to the Land Commissioner his official list of forfeitures.[2] The records kept by the Clerk did not show the Assessor's revised valuation of $135 until after suit was filed May 2, 1949. If Foggs, within the two years allowed for redemption, had undertaken to pay the delinquencies apportionable to him, an Assessor's certificate would have been necessary, costing $1. While the Assessor's intent to value Foggs' remnant at $135 is clearly indicated, the official act of reassessment was not completed. At all times after Carter's redemption in July, 1947, the record of delinquencies and forfeitures showed that the four lots sold for $100 each, that Armstrong and Carter redeemed on revised assessments of $135, and that of the aggregate of $400 in valuations, $130 was not paid on.

This is not a case where property sold for an illegal assessment; neither does it involve erroneous costs or unauthorized exactions. Owners of realty are under a duty to assess. At some period after the 1945 assessments were made, Foggs knew he owned the middle third

[1] If the first redemption is made less than three months before the period of redemption has expired, the remaining parties in interest are given three months "from the time of such redemption in which to bring [suit], but such three months shall not extend their time for redeeming."

[2] The Clerk's list is first certified to the Circuit Clerk as Recorder, where it is entered, thus vesting title in the State. The Clerk then transmits the certificate to the Land Commissioner. Pope's Digest, § 13876, Ark. Stats., § 84-1314.

of the combined lots. At *any* time after July 9, 1947, he had access to official records where the facts of uncontested reapportionments were reflected. Had he gone to the Assessor for a certificate, the valuation of $135 would have been disclosed. The redemption period did not expire until November 14, 1948, so the landowner had nearly a year and a half for action. Within that time there were at least two remedies: First, through petition to the Assessor, he could have asserted that the tentative untransmitted notation was unauthorized and unjust, and that the assessment should have been—as is now contended—$133.33. Failing in this, he could proceed by mandamus to compel the Assessor to certify an assessment of $133.33, or attempt by injunction to prevent a larger assessment. Alternatively, he could disregard the Assessor under his contention that Act 359 ignores due process. In this way a Clerk's certificate to the Treasurer of taxes unpaid on the combined lots would have reflected a residual assessment on $130. If the Clerk refused to issue the certificate, the taxpayer was not without recourse.

We cannot assume that the Clerk would not certify what his records actually showed, for there is nothing in the trial stipulation indicating that this official had knowledge of the Assessor's notation on this lot.

But suppose, for illustration, that Foggs, within the time allowed by Act 359, had asked for a certificate, paying the dollar fee: on a valuation of $135 the 1945 tax, penalty, and cost was $6.98, the tax alone being $5.85. Had the valuation been $133.33, the tax was ascertainable by dividing $5.85 by $135 and multiplying $133.33 by the result, or .0433. This gives $5.7731, or $5.77 when aggregate mills of less than half a cent are disregarded. To this tax, cost of 57¢ and penalty of 55¢ are added, making $6.89. For 1946, 1947, and 1948 costs and penalty were not chargeable, so $5.77 is multiplied by three to give $17.31, as against $17.55 charged by the Land Office. In each case a state deed added another dollar to the cost. Under a forfeiture for $135, anticipatory confirmation fee was $2.45, while for $133.33 it

would be $2.42. Crutcher purchased for $27.98,—a sum for which Foggs could have redeemed as late as January 3, 1949. Had the transaction been on the basis of $133.33, the price would have been $27.62—a difference of 36¢. Since the statutory fee of $1 for an Assessor's certificate was not included, actual redemption could have been effectuated for *64 cents less* than the correct totals even when the assessment was $135.

Appellants' position is somewhat anomalous. The only method by which Foggs could proportionately redeem is provided by Act 359, which by its terms invests the Assessor with discretion, an abuse of which would be corrected by a court of chancery; yet Foggs rests his cause upon a process by which certificate fees were paid by two others who caused the segregation, then he attacks the Act because it did not require that he be personally notified of facts within his constructive knowledge.

Forfeiture and sale having been under correct descriptions and for a proper amount, and not under the tentative assessment of which appellants complain, we agree with the Chancellor that the sale was neither void nor voidable under the facts shown by stipulation. The adjustments complained of were subject to judicial review at a time when all rights, whatever they may have been, could have been fully protected.

Act 359 does not deny due process. There is no constitutional requirement that notice of assessments be given in a particular way. On the contrary, the General Assembly could dispense entirely with publication as the term is ordinarily construed. *Carle* v. *Gehl,* 193 Ark. 1061, 104 S. W. 2d 445. In that case Mr. Justice Butler said for a unanimous Court: "The Legislature could not dispense with the necessity for the listing and assessing of the property under a valid description, or for the levying of the tax upon the property according to its value at a rate not in excess of constitutional limits, or for a sale of the property under proper description by the collector thereunto duly authorized for delinquent and unpaid taxes, or for the sale of the property by the collector under the power".

These comments were made in discussing Act 142 of 1935—an Act that did not dispense with publication, thus leaving compliance with former laws a part of due process.[3]

In *Hagar* v. *Reclamation District,* 111 U. S. 701, 4 S. Ct. 663, 28 L. Ed. 569, Mr. Justice Field of the United States Supreme Court wrote of taxation in its relation to due process. An excerpt from the opinion is printed in the margin.[4]

Affirmed.

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[3] For cases dealing with publication and notice, see *Moses* v. *Gingles,* 208 Ark. 788, 187 S. W. 2d 892; *Burbridge* v. *Crawford,* 195 Ark. 191, 112 S. W. 2d 423; *Thomas* v. *Branch,* 202 Ark. 338, 150 S. W. 2d 738; *Cecil* v. *Tisher and Friend,* 206 Ark. 962, 178 S. W. 2d 655; *Matthews* v. *Byrd,* 187 Ark. 458, 60 S. W. 2d 909; *Benham* v. *Davis,* 196 Ark. 740, 119 S. W. 2d 743; *Hirsch and Schuman* v. *Dabbs and Mivelez,* 197 Ark. 756, 126 S. W. 2d 116.

[4] Said Mr. Justice FIELD: "Of the different kinds of taxes which the state may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business), and generally specific taxes on things or persons or occupations. In such cases the legislature in authorizing the tax fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold and he be thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is therefore invaded. . . . But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officer in estimating the value acts judicially, and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments. The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed if the tax be not paid, by a sale of the delinquent property, is due process of law." [In the case before us Act 359 supplies due process by allowing an appeal to Chancery].

ALMA CANNING COMPANY *v.* RORIE.

4-9051 226 S. W. 2d 64

Opinion delivered January 23, 1950.

[redacted]

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

G. W. Lookadoo, for appellee.

DUNAWAY, J. Appellee Rorie brought this action against appellant Alma Canning Company and Safeway Stores, Inc., to recover damages allegedly sustained as a result of eating string beans prepared and canned by appellant and sold to appellee by Safeway. A demurrer by Safeway was sustained at the close of appellee's testimony and the cause as to that defendant dismissed. Appellee recovered judgment against appellant for $1,500.

The sufficiency of the evidence to sustain the verdict and judgment and certain instructions given by the trial court at the request of appellee are challenged on this appeal. The view we take of the case makes it unnecessary to discuss any of the assignments of error except the sufficiency of the evidence.

The evidence, viewed in its light most favorable to appellee, is substantially as follows: At the time of the incident alleged in his complaint, Rorie was a student at Ouachita College. On or about April 30, 1948, he purchased from Safeway in Arkadelphia two cans of string beans packed by appellant. For their noon meal on Monday, May 3, 1948, appellee's wife opened, heated

and served one of the cans of beans. After taking a few bites of beans he noticed a bitter flavor and on examining the serving dish of beans he discovered a worm, which he described as "a green worm with lots of legs" about an inch or an inch and a quarter long. On seeing the worm, appellee immediately lost his appetite and was sick; within thirty minutes he became nauseated and began vomiting. Later in the afternoon he again became "awfully nauseated", with "cramping and griping" in the lower part of his abdomen. He then went to see Dr. J. N. Pate who gave him some medicine. That night he again suffered cramping, nausea and vomiting; his bowels became loose and he passed some blood. He remained sick and vomiting for several days and was unable to attend classes. From May 3, 1948, when the beans were eaten until February 3, 1949, the date of the trial of this cause, appellee suffered periodic spells of nausea and diarrhea.

A few minutes after Rorie found the worm he went next door and brought a fellow student, Dan Barry, in to view his find. Appellee then took the bowl of beans containing the worm to the biology building at the college for the purpose of having the instructor determine whether there was anything toxic in the beans. On the way to the laboratory, the beans were displayed to Wesley Pool, another student. No microscopic examination or chemical analysis was ever made of the worm or the beans to determine the presence of any poisonous or deleterious substance. Both Barry and Pool testified they could not see that appellee was sick.

From appellee's own testimony it was established that he had contracted some gastro-intestinal disease while serving in the United States army prior to his discharge in 1946, and that he continued to suffer from this ailment throughout the year 1947, with periodic spells of nausea and diarrhea. During this period he was examined by a number of physicians and at times a special diet was required for him.

Two doctors testified at the trial, Dr. J. N. Pate, who saw appellee on May 3, 1948, when he had eaten the

beans and who had not seen him again until a day or two before the trial of this cause, testified that Rorie was treated by him on that occasion. Dr. Pate did not testify that eating the beans caused appellee's illness. Dr. R. L. Bryant, the Rorie family physician, who had examined appellee on December 23 and December 31, 1948, at appellant's request, testified as to his examination and findings. It was his opinion that appellee's condition was due to nervousness and inability to eat certain foods. Both these doctors stated that any bacteria in the can of beans would have been destroyed by the process of cooking for twenty-five minute at 240 degrees Fahrenheit, as had been testified to by officials of appellant concern.

There is no testimony whatever in the record tending to show that the can of beans packed by appellant contained any poisonous or deleterious substance which caused appellee's illness. The situation in the instant case is indistinguishable from that in the case of *Jonesboro Coca-Cola Bottling Co.* v. *Hambrooke,* 206 Ark. 385, 175 S. W. 2d 387, where we said at page 386: "We think this evidence insufficient to make a case for the jury. There was no evidence that the presence of a bobby pin in a bottle of Coca-Cola would render it deleterious or harmful for human consumption and there was no evidence that the presence of such pin in the bottle here involved rendered the drink unfit for consumption or that it did cause her illness. No analysis was made of the remaining contents of the bottle, or at least no evidence was produced to show that such an analysis was made. True it is that she drank of the Coca-Cola and, in a short time became sick—not until after she had discovered the bobby pin—but this is not sufficient to show that the Coca-Cola was poison or deleterious. . . . The evidence is wholly lacking that the foreign substance caused or could have caused appellee's illness." See, also, *Coca-Cola Co.* v. *Wood,* 197 Ark. 489, 123 S. W. 2d 514; *Jonesboro Coca-Cola Co.* v. *Young,* 198 Ark. 1032, 132 S. W. 2d 382.

The verdict of the jury was necessarily based on pure speculation and conjecture. The court erred in

refusing to direct a verdict for appellant at its request. The judgment is reversed, and it appearing that the cause has been fully developed, it is dismissed.

Justices MILLWEE and LEFLAR concur in the conclusion that the judgment should be reversed, but on the ground that there was material error in an instruction given to the jury at the trial rather than on the ground stated in the majority opinion. This would mean that the case should be reversed and remanded for new trial rather than dismissed.

ROY *v.* NOTESTINE.

4-9052 226 S. W. 2d 66

Opinion delivered January 23, 1950.

Fletcher Long, for appellant.

Harold Sharpe and *E. J. Butler,* for appellee.

MINOR W. MILLWEE, Justice. Appellant, M. A. Roy, is engaged in business at Memphis, Tennessee, as Roy Butcher Supply Company. In April, 1946, appellant entered into a conditional sales contract with appellee, Thomas W. Notestine, who was in the process of opening a frozen food plant at Forrest City, Arkansas.

The original contract provided for the sale by appellant to Notestine of over $10,000 worth of refrigeration equipment to be used in the proposed plant. By agreement there were subsequent omissions and substitutions of certain items called for in the original contract, resulting in approximately $7,000 worth of equipment actually being sold and installed.

The contract contained the usual provisions for reservation of title in the seller until payment of the purchase price which was evidenced by a note payable in monthly installments. There was a balance of $1,065.84 due and unpaid on the contract on May 17, 1947, when Notestine procured a loan of $36,000 from appellee Reconstruction Finance Corporation through a Forrest City bank. This loan was secured in part by a chattel mortgage on all equipment used in operating the frozen food plant including the equipment sold by appellant.

In the summer of 1948 Notestine defaulted in his payments due under the RFC loan, executed a bill of sale of the property to W. E. Shaver and left Forrest City. The mortgage to RFC contained the usual covenants of absolute ownership. On August 23, 1948, RFC filed suit against Notestine and Shaver to foreclose its mortgage and a receiver was appointed to take charge of and operate the plant. Although constructive service was had on appellee Notestine, he subsequently entered his appearance in the suit. RFC had no knowledge of the contract between appellant and Notestine; and appellant

acquired actual knowledge of the RFC mortgage prior to the institution of the foreclosure suit.

On October 18, 1948, appellant intervened in the foreclosure suit and asked for judgment against appellee Notestine for the unpaid balance of the purchase price under the conditional sales contract and, "That her lien under the conditional sales contract be declared a first lien on all equipment sold thereunder."

On October 26, 1948, a foreclosure decree was entered in favor of RFC and sale of the mortgaged equipment was ordered subject to the unadjudicated claim and rights of appellant as to that part of the equipment involved in the conditional sales contract. This order was approved by appellant. RFC became the purchaser of the mortgaged property at the foreclosure sale held on November 24, 1948, subject to the unadjudicated claim of appellant.

On November 20, 1948, appellant filed an amendment to her intervention which contains the following material allegations: "2. Intervener abandons her cause of action and prayer for judgment for the balance due on the conditional sales contract as against defendant Notestine.

"3. Intervener prays a first lien on the receiver's proceeds from the sale of all equipment sold by intervenor on conditional sales contract, as against defendant Notestine, the receiver, and plaintiff Reconstruction Finance Corporation."

The answer of appellee Notestine to the intervention alleged that appellant had by her pleadings elected to affirm the sale and sue for the purchase money rather than replevin the property and, therefore, was not entitled to a lien on the property or the proceeds of the sale.

After a hearing the trial court entered a decree on February 3, 1949, dismissing the intervention of the appellant. The court found that appellant had by her actions and pleadings elected to sue for the balance of the indebtedness due under the conditional sales contract

thereby waiving her right to the property and that she was not entitled to a first lien on the proceeds of the foreclosure sale of equipment sold by appellant to Notestine. The court further found that appellant was entitled to personal judgment against appellee Notestine for the balance due under the conditional sales contract, but the award of such judgment was refused by appellant because the court would not declare it to be a first lien on said property.

This appeal challenges the correctness of the trial court's conclusion that appellant, by her actions and pleadings, became bound by her election in pursuing alternative and inconsistent remedies. The rule which has been applied in numerous cases is stated in *Loden* v. *Paris Auto Co.,* 174 Ark. 720, 296 S. W. 78, as follows: ". . . where a vendor of chattels has reserved the title until the purchase price is paid, on breach of condition he has two remedies: One is to retake the chattel and thereby cancel the debt, and the other is to sue for the debt and thereby waive his title to the property. So, in such a case the vendor has the right to elect which remedy he will pursue, and, having elected to pursue the one, he is precluded from pursuing the other." Thus, if a seller sues for the unpaid balance of the purchase price, he has waived his title and cannot thereafter maintain an action of replevin. *Olson* v. *Moody, Knight & Lewis, Inc.,* 156 Ark. 319, 246 S. W. 3. In aid of the second remedy the seller may invoke the provisions of Ark. Stats., (1947), §§ 34-2301 to 34-2303, which provide that where a seller brings an action for the unpaid balance of the purchase price, he may have the specific goods attached pending the outcome of the action. *Coblentz & Logsdon* v. *L. D. Powell Co.,* 148 Ark. 151, 229 S. W. 25.

In *Neal* v. *Cone,* 76 Ark. 273, 88 S. W. 952, an effort to enforce a specific attachment for the purchase money was held to be inconsistent with a claim of title to the property itself, the court saying: "This statute only gives the vendor of personal property in an action brought for the recovery of the purchase money the right to seize the property purchased while it is in the posses-

sion of the vendee. It does not give him a lien which he can enforce at law by seizing the property after it has passed into the hands of third parties who have purchased the same for value, although such parties may have notice before their purchase that the purchase money has not been paid." See, also, *Butler* v. *Dodson,* 78 Ark. 569, 94 S. W. 703.

In *Fox* v. *Arkansas Industrial Company,* 52 Ark. 450, 12 S. W. 875, a general attachment had been issued against personal property prior to a suit by the seller seeking to attach it for the unpaid purchase price under the above-mentioned statute. The court held that the privilege granted the seller by the statute did not take precedence over the rights of the prior attaching creditor and that said seller only acquired the right of a second attaching creditor.

In *Halporn* v. *Clarendon's Hardwood Lumber Co.,* 64 Ark. 132, 40 S. W. 784, the court held that it was too late for a seller to obtain a specific attachment to enforce payment of the purchase money under a conditional sales contract after the property had been placed in the hands of a receiver by order of the court.

There is some conflict in the authorities as to whether the mere commencement of an action constitutes an irrevocable election to pursue alternative and inconsistent remedies. The rule followed by this court is stated in *Belding* v. *Whittington,* 154 Ark. 561, 243 S. W. 808, 26 A. L. R. 107, as follows: "The doctrine of our own court is in accord with the view that where there has once been an election between alternative and inconsistent remedies not occasioned by a mistake or ignorance of material facts, but as the result of a deliberate choice of election between the two, the party making such choice cannot afterwards recant, dismiss his pending action and invoke another remedy in the same or a different forum, even though no positive disadvantage or injury has resulted to the other party. We believe the better reason is to hold one to a deliberate choice once made between inconsistent remedies, where that choice involves nothing more than the determination by the party as to which of

two remedies will best subserve his purpose. . . ." See, also, Anno. 6 A. L. R. 2d 31.

We think appellant's action as disclosed by her intervention constituted an election to treat the sale as absolute and recover the balance of the purchase price. She had not filed the amendment to her intervention when the property was sold at the foreclosure sale and delivered to RFC subject to her unadjudicated claim. While she did not specifically plead §§ 34-2301 to 34-2303, *supra,* her prayer for a first lien did not change the nature of the action as one to recover the purchase price. *H. V. Beasley Music Co.* v. *Cash,* 164 Ark. 572, 262 S. W. 656. Moreover, appellant did not ask for return of the property in either the intervention or the amendment thereto and thereby waived her reservation of title under our decisions.

Appellant also contends that appellee Notestine is precluded from relying on the doctrine of election of remedies by the terms of the conditional sales contract. The effect of the provision relied upon is that the seller shall not be bound by the election rule and that the beginning of a suit for the purchase price shall not "prevent the taking of possession of said property by the seller." The case of *Franklin Sav. Bank* v. *Garot,* 69 Fed. 2d 487, is cited in support of the contention. The contract involved in that case contained provisions for both a mortgage and conditional sale of the property and the court declined to pass on the question whether a provision of the contract amounted to a waiver by the buyer of the right to rely on the rule of election of remedies. It is also unnecessary to pass on the question here for the reason that appellant has not asked for possession or return of the property at any stage of the proceedings.

It follows that the trial court correctly dismissed appellant's intervention upon her refusal to accept personal judgment against appellee Notestine, and the decree is, therefore, affirmed.

4-9009 226 S. W. 2d 579

Opinion delivered January 23, 1950.

Rehearing denied February 27, 1950.

Pickens, Pickens & Ponder, for appellant.

C. M. Erwin and *Millard Hardin,* for appellee.

ED. F. MCFADDIN, Justice. This is a controversy between parents for the custody of their children. Appellee, Joe Roberts, married appellant, Thelma Holden, in Jackson County, Arkansas, in August, 1938; and these five children are of that union: Winnie May, a girl, 9

years old;[1] Billie Joe, a boy, 7 years old; Betty Jo, a girl, 5 years old; Lewis Dillard, a boy, 4 years old; and Joe D., a boy, 2 years old.

The husband and wife lived together until December 7, 1945, when Joe Roberts went to the Pacific Coast. The baby, Joe D., was born shortly thereafter. From California Joe Roberts sent back a waiver in his wife's divorce suit and also an agreement to pay her $50 per month for the support of the five children. On October 25, 1946, the Jackson Chancery Court awarded the wife a divorce; and the decree also contained this language:

"That five children were born to their union: Winnie May Roberts 7 years old, Billie Joe a boy 5 years old, Betty Jo 3 years old, Lewis Dillard 2 years old, and J. D. Roberts 3 months old, whose custody the plaintiff is awarded permanently. That for support of said children she is being paid $50 per month and the defendant is hereby assessed the sum of $50 per month, until further orders of the Court, for the support of said children."

On November 27, 1946, appellee, Joe Roberts, remarried. He is living with that wife, and no children have been born to them. Appellant, Thelma Roberts, married Riley Heisler in Jackson County, Arkansas, on January 2, 1948, and is living with him. A child of that marriage was born on October 17, 1948. Joe Roberts appears to have accumulated three or four thousand dollars in California. Until February, 1948, he paid the $50 per month for the support of his children. When he learned of Thelma Roberts' marriage to Heisler, Joe Roberts ceased sending money; but at times which suited him, he sent to the children such articles of clothing as he and his second wife selected, and also sent some fruits, nuts, and candy. A total of approximately fifty dollars in money was sent to either Thelma Roberts or the children from February, 1948, to the date of the trial below.

In May, 1948, Joe Roberts and his second wife came to Jackson County, Arkansas, and contracted to purchase

[1] We list the ages as shown by the testimony given in the Chancery Court in December, 1948.

a farm preparatory to cultivating the same in 1949. After so locating, Joe Roberts, without consent of Thelma Roberts or court order, took one of the children, Betty Jo, to his home. On November 22, 1948, Thelma Roberts[2] filed petition for citation for contempt against Joe Roberts because of his failure to make the regular $50 payments each month.

Joe Roberts defended the citation by testifying that the total value of the clothes, fruits, nuts, candy, etc., he had given to his children (together with a small amount of cash he had sent them) equaled or exceeded the monthly payments of $50. In addition to defending the citation for contempt, Joe Roberts petitioned the Court to award him the custody of all five of the children. The Chancery Court released Joe Roberts from contempt and awarded him the custody of all five of the children. From that decree the mother, Thelma Roberts, brings this appeal.

In his findings, the learned Chancellor emphasized the great burden resting on courts in child custody cases. We agree with him concerning the far reaching import of these cases; but under our system of jurisprudence the Chancery Court tries the case in the first instance and this Court tries it *de novo* on appeal. With all deference to the conclusions reached by the learned Chancellor, we find ourselves unable to agree with them.

I. *Support of the Children.* When the Chancery Court entered the order on October 25, 1946, directing Joe Roberts to pay $50 per month to Thelma Roberts for the support of the children, it was an order for the payment of money and not for the sending of clothes, fruits, nuts, and candy. In 34 C. J. 687, and in 49 C. J. S. 1022, in discussing the medium of payment of a judgment, this language appears:

"Except where a judgment by its own terms provides otherwise, a judgment for the payment of money can be satisfied only in money, unless the owner of the

[2] Although she is now Mrs. Heisler, she has been styled in this case "Thelma Roberts"; and we will continue to use that appellation.

judgment chooses to accept property, securities, or some other thing of value. . . . In order that the acceptance of something other than money may operate as a satisfaction, there must be a positive and express agreement to accept the substitute for direct payment of the judgment.''

There was no agreement of any kind by Thelma Roberts to accept the parcels sent the children as partial satisfaction of the monthly payments due for support. Such parcels were received as gifts to the children; and because of the parent-child relationship the mere acceptance cannot be used to infer an agreement. In short, the clothes, etc., sent the children cannot be claimed by Joe Roberts as credits on the support money due. The fact that the decree ordered the father to pay a certain sum to the mother each month for the support of the children did not affect the father's common-law obligation to support his children. See *McCall* v. *McCall,* 205 Ark. 1123, 172 S. W. 2d 677, and see also 27 C. J. S. 1206.

In *McCourtney* v. *McCourtney,* 205 Ark. 111, 168 S. W. 2d 200, custody of the children was awarded the mother and the father was directed to pay her a definite amount each month for the support of the children. Thereafter, the father had the custody of one child for several months and asked credit on the judgment for the expenses incurred by him for the child's upkeep during such period. We refused to allow such credit because the father had voluntarily taken the child in his own home and the expenses paid by him for the care of that child could not be claimed as a partial payment on the judgment for support. The rationale of that holding is applicable to the case at bar.

The learned Chancellor said that Joe Roberts, in sending the parcels, probably thought he was sending the equivalent of the money judgment; and for that reason the Chancellor concluded that Joe Roberts was not in contempt. The Chancellor observed:

''Of course, he should have come in and asked the permission of the court instead of taking his own 'shot'

at it, and while he sent them plenty of clothes and fruit and candy, they did have to be fed, and the mother and her father and her husband have had to feed them."

So the fact remains that Joe Roberts owes the support money from February, 1948, less any sums he sent Thelma Roberts[3] and less the $100 the Chancellor ordered him to pay to avoid contempt. On remand the Chancery Court will (a) determine the balance due on the support money, as herein basically adjudged, and (b) direct Joe Roberts to pay it; and the matter of contempt may then be pursued in the event of failure of payment.

II. *Changed Conditions.* The order of October 25, 1946, awarded the custody of the children to the mother, Thelma Roberts; and in the present case the burden is on Joe Roberts to show that such a change in conditions has occurred as to make a change of custody to be for the best interests of the children. In *Thompson* v. *Thompson,* 213 Ark. 595, 212 S. W. 2d 8, the late and beloved Mr. Justice Robins said:

"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."

In *Blake* v. *Smith,* 209 Ark. 304, 190 S. W. 2d 455, we said:

"The party seeking a modification of a divorce decree awarding custody of a minor child assumes the

[3] It is uncertain from the record how much, if any, he paid to Thelma Roberts. The Chancery Court can so determine on remand.

burden of showing such a change in conditions as to justify such modification. *Kirby* v. *Kirby, supra,*[4] and *Seigfried* v. *Seigfried,* (Mo. App.), 187 S. W. 2d 768."

In the light of these holdings, the question now before us becomes: What changed circumstances are shown in this case to justify a holding that a change of custody is for the best interests of the children? The learned Chancellor said:

"There isn't any question in my mind about the mother of these children being a good woman, nor is there any question about her present husband being a good man; and there is no question but that they have looked after these children as well as they could and as well as most anybody else would in the same circumstances. There is no question in my mind about them morally—any of them—and there is no question about any of that at all."

Thus, the morality and good character of the mother and stepfather are settled. The mother had been sick prior to the trial: she had influenza; but there is no evidence that her health has been permanently impaired.

One of the main reasons urged for the change in custody was that Joe Roberts had accumulated some money in California and returned to Arkansas and used his money to make a part payment on a farm; and thus had a larger and more commodious home than that of the mother. It occurs to us that if Joe Roberts had regularly paid the $50 per month for the support of the children the mother would have been financially able to afford them better care, and Joe Roberts would not have had so much money to use as down payment for the farm. The financial affluence of a father is a poor substitute for mother love.[5]

Without prolonging this opinion by discussing each item suggested as a change in conditions, we conclude

[4] 189 Ark. 937, 75 S. W. 2d 817.

[5] *Cole* v. *Heritage,* 206 Ark. 986, 178 S. W. 2d 61, was a child custody case between grandparents, but we there indicated that material abundance of one party was not sufficient to cause a change of custody.

that the evidence is insufficient to support the order here made which took children of tender years from the mother and gave them to the father. The polestar in a child custody case is the determination of what is for the best interest of the child;[6] and in following that course, we have always been reluctant to deprive a child of tender years of the care and affection of his mother.[7] Particularly is this true in a case, such as the one at bar, in which the mother has had continuous care of these children since their birth and in which she and her present husband have been found by the Chancellor to be good people who have "looked after these children as well as they could and as well as most anybody else would in the same circumstances."

The decree awarding the custody of the children to the father is therefore reversed; and the custody issue is remanded to the Chancery Court with directions (a) to award the custody of the children to the mother, with the father to have the right to visitation, and (b) to require the father to make regular payments for the support of the children.

III. *Ex Parte Statement.* For guidance in future cases, we deem it proper to point out the correctness of the ruling of the Chancery Court in this case excluding what purported to be a report submitted by a welfare worker. At the request of some undisclosed person the County Welfare Worker made an investigation and report concerning living conditions, etc., of Joe Roberts and Thelma Roberts. A four-page, single-spaced, unsigned, typewritten report was offered in evidence by Joe Roberts; and the Chancery Court excluded it. The report was not competent. The welfare worker who prepared the report did not testify. It comes into this record as an *ex parte* statement; and learned counsel for appellee, in arguing the case before this Court, frankly and candidly conceded that the trial court was correct in excluding the report. In *Trannum* v. *George,* 211 Ark. 665, 201 S. W. 2d 1015, we pointed out that a report,

[6] *Venegas* v. *Mascorro, ante,* p. 173, 224 S. W. 2d 532.

[7] *Reynolds* v. *Tassin,* 209 Ark. 890, 192 S. W. 2d 984.

just such as the one here, was "hearsay" and not admissible in evidence. We adhere to that holding.

The judgment of the Chancery Court is reversed and the cause is remanded with directions to the Chancery Court to enter a decree in accordance with this opinion.

LEFLAR, J., dissenting. This dissent relates only to that part of the majority opinion which reverses the Chancellor's award of custody of the children to their father.

The majority opinion states that "the polestar in a child custody case is the determination of what is for the best interest of the child," a principle borne out by many wise decisions of this court in days gone by. Failure to apply the principle here is the reason for this dissent.

The effort to decide who is at fault for poor care of children is a hopeless task when illness and poverty share the causal role. Thelma Heisler, mother of the children here, undoubtedly did the best she could. Her new husband was an unskilled day laborer, sometimes employed, sometimes not. His wages were low. A sixth baby was born to the 27-year-old mother after she remarried; she has been sick since the sixth baby came; her cousin testified that the work had been "too much for her" since then; after that she couldn't keep the house or the children clean and do all the other work that had to be done. The new husband's mother lived with them, making nine in the family. The house in which they lived was a crude three-room structure. One of the rooms, the kitchen, leaked so badly they couldn't use it, so "we have the kitchen in the front room now." The third room was the bedroom, and was upstairs. It had three beds where the nine of them slept, "but we moved downstairs while the baby is so little." "We didn't have a garden this year."

The majority opinion mentions the fact that appellee in May, 1948, "without consent of Thelma (appellant) or court order took one of the children, Betty Jo, to his home." The evidence indicates this child was sick when the father took her. Concerning this Thelma testified: "I have not been well, and I couldn't get up to dress her

or any of them." The father testified that Thelma agreed that he might take the child to the doctor, and then "she had to have certain treatment regularly, and I knew we had more time to get her well and take care of her than they did." As to the health of the other children Thelma's new husband testified that they had bad colds and "the baby had them sores on him like Mr. Roberts said."

With this must be contrasted the home which appellee father has to offer his children. With the $3,600 savings which he accumulated in California after he and Thelma were divorced in 1946 he paid $1,200 down on a $5,000 farm and is arranging a long-time F.H.A. loan for the balance; he has bought a tractor and other equipment, cows, chickens and hogs for the farm; he has bought good furniture for the house. The farmhouse has electricity; there are three bedrooms; it will make a good home for children to grow up in. It is near a church and a school. Ninety acres of the 192-acre farm are in cultivation, and appellee is an experienced farmer, hardworking and ambitious.

Appellee and his new wife are childless. His love for the children cannot be questioned, any more than can their mother's. His wife has given much tangible evidence of genuine regard for the children, and hopes to treat them as her own.

Technically the case should be looked at as of the date of trial, but it is a fact, admitted in oral argument here, that since the Chancellor's decree was rendered in December, 1948, the children have been living with their father, and for over a year they have grown accustomed to the standards of his home. The majority not only denies them those standards; it returns them to the home of the mother and step-father after they have come to know a better life.

The Chancellor heard the evidence and saw the parties and witnesses in this case. He knew the facts better than the cold record can show them to this court. He put the welfare of the children ahead of parental fault and concluded that "the children will be better off . . . and grow up to make better citizens if the Court allows the

father to take them and raise them." This court should reverse the Chancellor only if the weight of the evidence is contrary to his findings. It is my opinion that the evidence justified his finding of changed conditions, and that his decree should be affirmed.

GEORGE ROSE SMITH and DUNAWAY, JJ., join in this dissent.

FULK *v.* GAY, TRUSTEE.

4-8961 226 S. W. 2d 69

Opinion delivered January 23, 1950.

Baucum Fulkerson and *Rose, Dobyns, Meek & House,* for appellant.

Barber, Henry & Thurman, for appellee.

SCOTT WOOD, Special Justice. This is an action to determine who should receive the funds in the hands of a trustee at the termination of the trust. The trust was created to carry out a debt adjustment plan in a proceeding under the National Bankruptcy Act.

STATEMENT OF THE CASE

The events culminating in this litigation began in May, 1929, when Augustus M. Fulk and other members of his family borrowed $362,500 from a bank and mortgaged certain Little Rock real property to secure the loan. The bank transferred to various persons the notes which had been given as evidence of this indebtedness. The debtors failed to pay or reduce the indebtedness and in April, 1936, filed a debt adjustment proceedings in the Bankruptcy Court. Their first proposal was not accepted, but the proceedings were continued. In March,

1940, the debtors filed what they designated, "Amended and substituted proposal". This last proposal was accepted by the noteholders and the court approved the plan April 22, 1940. The indebtedness at that time amounted to $362,500 principal and $57,450 interest.

Paragraph numbered II of the proposal is:

"The total indebtedness, principal of $362,500, and one-half of the interest, shall be $391,225, and shall be refinanced for a maximum period of 5 years at 4%. (Original notes bore 6%). The other half of the interest, $28,725, shall be waived by the noteholders".

The proposal provides that after the proposal is accepted by the creditors and approved by the Bankruptcy Court, its material provisions should be included in an indenture to be executed by the parties. This indenture was executed. Each of its paragraphs bears the same number as the corresponding paragraph in the proposal and contains practically the same words.

The indenture:

"Par. II. The new notes aggregating $391,225 have been executed and dated Nov. 1, 1939, bearing interest at 4%, maturing on or before five years after their date."

In Paragraph III (a) (1) the debtors "grant, bargain, sell and convey to T. J. Gay as trustee for the noteholders" the same property which had been included in the original mortgage. This paragraph has the usual granting clause, the usual warranty, relinquishment of dower and waiver of redemption clauses. The defeasance clause is contained in paragraph XV, which will be mentioned hereafter.

"Par. III (a) (2). Debtors have executed and placed in the hands of Commercial National Bank four separate warranty deeds conveying to T. J. Gay, trustee, the lands that are included in the mortgage.

"Par. III (b). If at the end of five years from and after Nov. 1, 1939, the full amount of indebtedness then due shall not have been paid in full, all the said deeds

of conveyance shall be by said escrow agent forthwith delivered to, and they shall be accepted by the said T. J. Gay, trustee, or his successor in trust for and in behalf of each and all of the noteholders and their assigns; and in such case all liability and obligation of each and all of the debtors in respect to the above mentioned indebtedness shall immediately expire and terminate. That is to say, delivery and acceptance of the said deeds shall be full discharge and satisfaction of all obligation and liability of the debtors to the noteholders.

"Par. IV. During the five-year period all of the properties shall remain in the hands of the trustee, who shall manage and supervise them generally and who shall manage and supervise them especially with respect to the obtaining of tenants, the negotiating and executing of leases, the collecting of rentals, the payment of taxes, the procurement of insurance and payment of premiums therefor, the making of repairs and the disbursing of all monies derived from the said properties in accordance with this instrument."

Also in paragraph IV there is a provision requiring the trustee to set up a reserve for "taxes, insurance premiums and regularly recurrent expenses"; and Par. IX requires the trustee to accumulate a reserve of $5,000 for preserving and protecting the property in case of emergency.

"Par. V. Funds remaining in the hands of the trustee after the establishment of these reserves shall be disbursed by him as follows: 1. To payment of interest coupons; 2. The balance of funds in the trustee's hands at the end of each six months period shall be employed in the purchase of notes by the trustee. All such purchases shall be made upon tenders."

Paragraph VI provides for release of each of the various parcels of real property if the debtors sell them at certain specified prices.

Paragraph VII authorizes the trustee to sell any or all of the various parcels of property at not less than certain specified prices, $300,000 for one, $85,000 for

another, $85,000 for another, and $40,000 for another. If the trustee could have sold for these prices he would have realized $118,775 more than the mortgage debt.

"Par. XII. It is the intent and purpose of all parties hereto that in the event the debtors shall have failed at the expiration of five years to pay in full all amounts then due, the noteholders may acquire merely upon making demand upon the escrow agent and without the necessity for litigation or other court proceedings of any kind or character whatsoever, good title to all the lands herein above referred to free and clear from all and every right, title, claim and interest of each and all of the debtors and of all other persons who have at any time been obligated upon or in respect of any of the notes.

"Par. XV. If on or before five (5) years from the date hereof all or any of the first parties shall pay or cause to be paid in full the said principal sum of Three Hundred Nine-one Thousand Two Hundred Twenty-five Dollars ($391,225.00), together with all interest, the trustee shall endorse upon the margin of the record a notation stating that said indebtedness has been paid in full and that a lien of this indenture has been fully satisfied and discharged."

It will be noted that the mortgage which is included in the indenture does not contain the usual power of sale and that the delivery of the deeds was intended to pass the title to the property, thereby doing away with the necessity for foreclosure proceedings. This arrangement was made in the bankruptcy proceedings and was approved by the Bankruptcy Court which had the power to prescribe the manner in which the title should pass.

The trustee took possession of the property, managed it and collected the rents under the agreement. He never solicited tenders. Appellants admit that there were no funds on hand to require a call for tenders until six months before the end of the five-year period, but they say that they think there were sufficient funds six months before the end to justify calling for tenders. How-

ever, the accountant on whom both parties rely, testified that there was not enough in the trustee's hands to justify a call for tenders until the end of the last six months of the five-year period; and we find this to be true.

According to appellants' contention, at the end of the last six months, there was available for the purchase of notes upon tenders, the sum of $25,308.08. Appellees insist that there was only the sum of $16,205.23 on hand at that time. The difference between these two figures is made up of credits for attorneys' fees and taxes claimed by the trustee to which appellants have objected. No part of the principal was paid either by the makers of the notes or the trustee.

The trustee paid all of the interest up to the date of maturity; but he did not deliver to the noteholders or to the Commercial National Bank where the notes were made payable, the balance in his hands at the end of the five-year period or any part of it. Neither did he show on his books that the balance had been credited to the noteholders. But on November 1, 1944, the day after the maturity of the notes, the four deeds were delivered to the trustee by the escrow agent, Commercial National Bank. The notes were delivered up sometime later and the various noteholders, at the time they surrendered their notes, received certificates of interest showing their respective interests in the property which had been conveyed to their trustee. The trustee, T. J. Gay, continued as trustee for those who owned the property, he being the grantee in the deed as trustee for them. He continued to carry the funds which are in dispute in his name as trustee. Later, all of the property was sold in different sales from which the trustee, for the owners, realized the total sum of $340,654. If the amount now in controversy were added to this, the creditors would still lack about $14,000 of collecting their notes.

Appellants filed this suit in the Pulaski Chancery Court in August, 1945, claiming that the debt was satisfied when the trustee took down the deeds; that the surplus money left in the hands of the trustee was the property of appellants, since it had not been applied on

the notes, and they prayed for an accounting and judgment for all surplus moneys in the trustee's hands. Appellants do not challenge the right of the escrow agent to deliver the deeds, or question the title of the grantee.

The Chancery Court, in January, 1947, sustained a motion to dismiss the complaint on the ground that the Bankruptcy Court has exclusive jurisdiction of the matter in controversy. On appeal to this Court, the decree of the Chancery Court was reversed and the cause was remanded for hearing on the merits. 212 Ark. 151, 205 S. W. 2d 24. After hearing the evidence the Chancery Court dismissed the complaint for want of equity and the plaintiffs appealed.

OTHER FACTS—AND OPINION

The decision of the case turns on the interpretation of the proposal made by the debtors and accepted by the noteholders and the indenture which was executed by the parties to put the proposal into effect.

Appellants submit two propositions:

1. By failing to solicit tenders as required by the mortgage (indenture) the trustee abandoned the only method whereby the surplus funds held by him on November 1, 1949, could become the property of the noteholders; and they, therefore, should be paid to the appellants.

2. Even without the provision for solicitation of tenders, appellants would be entitled to the funds in litigation because the trustee did not apply them to the payment of the notes, and by taking down the deeds the notes were paid, leaving the title to the surplus funds in appellants.

Appellants' first proposition:

Appellees admit that during the five-year period the solicitation of tenders afforded the only way that the surplus funds could be used to reduce the principal; but they insist that the tender provision does not apply to

the funds held by the trustee at the end of the five-year period.

Paragraphs IV of the indenture and IV (a) of the proposal provide, "During the five-year period, all of the properties shall be and remain in the hands of the trustee who shall manage and supervise them generally, and especially with respect to obtaining of tenants, collection of rentals . . . and the disbursing of all monies derived from said properties in accordance with this instrument".

Paragraph V of the indenture (same number in proposal) provides, "The balance of funds in the trustee's hands at the end of each six months period shall be employed in the purchase of notes by the trustee. All such purchases shall be made upon tenders."

All of the provisions of paragraph V relate to disbursements which are authorized and limited to the five-year period by paragraph IV.

Paragraph II of the proposal states that the indebtedness "Shall be refinanced for a maximum period of five years".

Paragraph III (b) of the indenture (same number in proposal) provides, "If, at the end of five years from and after November 1, 1939, the full amount of indebtedness then due shall not have been paid in full, all of the said deeds shall be by said escrow agent forthwith delivered to and accepted by the trustee . . . and in such case, all liability and obligation of the debtors . . . shall immediately expire and terminate".

Appellants concede that calling for tenders would have continued the trust arrangement beyond the end of the five-year period. As authority for such extension of time, they rely on the following language in paragraph XII of the proposal and indenture: "In the event that the debtors shall have failed at the expiration of five years to pay the full amounts then due, the noteholders may acquire merely by making demand on the escrow agent . . . good title to all of the lands". Appellants

construe this language to mean that the noteholders had the right to demand the delivery of the deeds on or after November 1, 1944, but appellants say that the noteholders should have delayed their demand long enough to enable them to take the steps necessary through solicitation of tenders to enforce their rights in respect to the net income held by the trustee on the day the notes matured. The parties, for several years before the substituted proposal was accepted, had been trying to work themselves out of their financial difficulties by agreeing on some equitable plan by which the noteholders could collect their notes and the debtors could pay them. The first plan was offered in April, 1936, and, as appellants say, "After the debtors and creditors skirmished, advanced and withdrew in the Bankruptcy Court over a period of years, they reached an agreement satisfactory to all". We hold that, according to the clear meaning of the language of this agreement supported by the circumstances of the case, the trust was to end on November 1, 1944, and that nothing remained to be done after the five-year period, except the closing of the trust by application of the security. As we construe the language quoted from Paragraph XII, it does not require demand by the note holders before the escrow agent must deliver the deeds. It is clear that the parties intended that the trust should terminate five years after the date of the notes if it had not come to an end by payment of the notes before that time. After default in payment of the notes it was the duty of the escrow agent to deliver the deeds upon demand of the trustee and proof that a balance was due to the note holders after all proper credits.

Appellants call special attention to the fact that the agreement does not in express terms state what must be done with the funds on hand at the end of the trust and argue that this fact indicates that it was the intention to use it in the purchase of notes under the terms of the tender clause and in no other way. It is true that the surplus on hand November 1, 1944, is not expressly mentioned; but in this connection it should be noted that the only disbursements authorized by the express words of

the agreement are those which had to be made before the notes were in default. The only act expressly provided for after default was the delivery of the deeds by the escrow agent to the trustee as the final act of the arrangement. Since one of the main purposes of the plan was to reduce the debt by application of rents, it would appear on the first glance at the agreement that some express provision should have been made for application during the time before maturity of all funds collected during the five-year period; but there were some difficulties in the way of the application of these funds on hand on the date of maturity. It would have been difficult for the trustee to calculate before the end of the five-year period the expenses which would have to be paid out of these moneys and he could not calculate immediately what he would receive from tenants whose rentals were on a percentage basis. For these reasons the parties probably chose to treat the surplus at maturity merely as a part of the security; and the usual and customary way of handling cash security is to apply it on the debt after default, before appropriating the real property.

As we interpret the agreement, the trustee was bound to strike a balance at the end of the five-year period and if, after crediting the debt with all net income from sales of property and from rents, nothing was "then due", it was his duty to mark on the margin of the record of the mortgage "a statement that the debt had been paid in full", as required by paragraph XV. On the other hand, if after giving all proper credits there was "then due" a balance in favor of the noteholders, the escrow agent was required by the terms of paragraph III to "forthwith deliver the deeds to the grantee named therein".

The language used in paragraph XII was merely to emphasize the intention shown throughout the plan that the property was to belong to the noteholders at the end of the five-year period, if the debt was not paid by that time, and that they would not have to go to court to get it.

The plan required the balance of funds at the end of each six months period "during the five-year period" to be used in making purchases of notes after the solicitation of tenders and required the trustee to give notice to the noteholders of the amount on hand for such purchases. It is obvious that these things could not be done with the funds held at the end of the last six months period "during the five-year period" as required by paragraph IV of the indenture. Since the funds in litigation could not have been applied to the purchase of notes under the tender plan without extending the trust beyond the five-year period in violation of paragraph IV of the indenture, and upsetting the five-year plan, we hold that the tender clause does not apply to them.

The Bankruptcy Court seems to have held the same opinion, as shown by its findings: "The court doth find that it is the intent of all of the debtors and all of the creditors that the said arrangement shall, in the event of default of the debtors in the performance of any of the requirements imposed on them (one of which was payment of the notes in five years), make wholly unnecessary the resort to court by the creditors, whether by foreclosure or any other form of procedure whatever for the purpose of investing in the person named by them as grantee in the deeds full, complete, indefeasible and fee simple title". Language of the same import and in some parts identical as used at seven or eight different places in the proceedings as if to emphasize by much repetition that the parties intended that the noteholders should own the property if their notes remained unpaid at the end of the five-year trust.

Appellants' second point:

Since neither the proposal nor the indenture makes specific mention of the surplus funds on hand at the time the notes mature, the disposition to be made of them must be controlled by the intention of the parties as shown by the whole agreement and the circumstances under which it was made. *Bennett Lumber Co.* v. *Walnut Lake Cypress Co.*, 105 Ark. 421, 151 S. W. 275; *Love* v.

Couch, 181 Ark. 994, 28 S. W. 2d 1067; *Scrinopskie* v. *Meidert,* 213 Ark. 336, 210 S. W. 2d 281.

As was said by this Court in *Bennett Lumber Co.* v. *Walnut Lake Cypress Co., supra,* "The purpose of all interpretation is to ascertain and give effect to the intention of the parties to the contract as expressed in their writing, and in doing this it is necessary to consider the circumstances surrounding the making of the contract, its subject, the situation and relation of the parties, and the sense in which, taking these things into consideration, the words used would be commonly understood".

In the instant case, the debtors and creditors had been trying to get together on a plan which would enable the debtors to pay and to the creditors to collect their notes. As stated by appellants in their brief, "On April 6, 1936, the Fulks, in a desperate effort to work out an equitable settlement with their noteholders, filed a debt adjustment proceeding in the Bankruptcy Court". By that procedure they hoped to pay their debt and save at least a part of their mortgaged property. If the several properties could have been sold for the selling prices set up in the indenture they would have saved themselves under the plan $118,775 in addition to what the trustee could save during the period of the trust to apply on the debt out of the rents. All parties agreed that the application of the rents to the debt formed a vital part of their plan. No doubt the noteholders would not have accepted the proposal of the debtors if it had not required the rents to be appropriated for payment of the debt. The debtors in the mortgage which was included in the indenture granted, bargained and sold to the trustee for the noteholders the title to the property as security for the debt and placed the trustee in control and management of it for the express purpose of applying the net rents to the debt. The tender clause does not apply to the monies on hand at the end of the trust, but the rents were part of the security. The lien of the mortgage covered them. *Denham* v. *Lack,* 200 Ark. 455, 139 S. W. 2d 243; *Cantley* v. *Turner,* 191 Ark. 607, 87 S. W. 2d 42. There is nothing in the agreement to indicate that

the surplus at the end of the trust is not to be applied to the satisfaction of the debt, or that any error of judgment on the part of the trustee could cause the noteholders to lose this valuable security.

Appellants rely on the law applicable to mortgagees in possession and say: "Even in the absence of the tender solicitation provision, and relying solely on the law applicable to a mortgagee in possession, we could contend that, the mortgage debt having been cancelled by the delivery of the escrowed deeds before the accumulated rents became the property of the noteholders through their application on the debt, such funds now belong to the Fulks". In their argument they recognize the principle of law that a mortgagee or his trustee in possession owes the mortgagor the duty of accounting for the rents, but they say that it takes an application of the rents upon the debt to transfer the ownership from the mortgagor to the mortgagee, and cite: *Integrity Trust Co.* v. *St. Rita Building & Loan Association,* 112 Pa. Supr. Ct. 343, 171 Atl. 283; Jones on Mortgages, Vol. 2, § 1115 (5th Ed.).

The facts in the instant case distinguish it from those included in appellants' citations and appellants' citations are not applicable. The principle which should be applied here is set out in *Greer* v. *Turner,* 47 Ark. 17, 14 S. W. 383. In that case, the creditors held a mortgage on the debtors' crop and the point at issue was whether the proceeds of 41 bales of cotton which had been delivered to them as a part of the crop had been applied on the debt. This Court, after referring to the evidence on the question, said: "But we are not left to depend on the uncertain and fallible memories of witnesses deposing as to transactions which have almost faded from their minds. On the 4th day of November, 1873, Watkins executed to Greer & Baucum a mortgage on this identical crop of 1873. It conveys to them the whole of the crop to secure his indebtedness to them. Here was a specific appropriation, setting apart and designation by act of the parties. It was not necessary for Greer & Baucum to proclaim from the housetop, as each bale of cotton

was sold in the market, that they had applied the proceeds to Watkins' mortgage or to do any act in order to fix their rights. The law would compel their application to the purposes that the parties had destined them by their solemn agreement, and neither party could have changed the appropriation without the consent of the other."

That all of the net rents were destined to be applied to the debt in the instant case no one denies. The only point raised is that they were not applied before the deeds were delivered by the escrow agent. We hold that the trustee was bound to apply the rents to the debt before taking down the deeds. When the parties agreed that, "If, at the end of five years the amount then due shall not have been paid in full," the deeds shall be delivered in full satisfaction of the obligation, they meant the amount remaining after all monies received on sale of property and the net rents had been applied on the debt. They meant that the plan would work both ways, whether the obligation was satisfied by payment of money or by delivery of the deeds, the amount to be satisfied was the balance after all proper credits. The result would be the same whether the surplus that is in litigation be treated as funds which should have been applied to reduce the debt before default or merely as security to be applied after default. We will apply the equitable doctrine that equity treats that as done which should have been done. Suppose, for example, that the trustee had sold the lot on which the sale price was set at $300,000 and also sold one of the $85,000 lots. By these sales the debt would have been reduced to about $6,000 and he would have had more than enough on hand to pay the balance. In that case, no one could successfully contend that it was not incumbent on the trustee to apply the surplus rents to the satisfaction of the debt and pay the balance to appellants. Whether the amount to be applied wiped out the debt or left a large balance due to the noteholders, it was the duty of the trustee to apply it before taking the deeds in satisfaction of the obligations.

It was the duty of the bank which served as escrow agent to demand of the trustee, before delivering the deeds, some sort of a statement proving that the debt had not been paid after application of all proper credits. Possession of the deeds by the trustee to whom the property was conveyed is *prima facie* evidence that a statement was made which was sufficient to convince the escrow agent that the debt had not been paid. Since the trustee was not required to follow any particular form in making application of the moneys in his hands a simple credit on the account in his statement to the escrow agent would suffice. As has been stated, on the day the deeds were delivered to him, November 1, 1944, the trustee may not have been able to show the exact amount of rents to be credited on the debt, but he could have shown the approximate amount. Since the debt was at that time $391,225 and the amount in the trustee's hands to be applied on it was, according to appellant's figures, about $25,000, and according to appellee's calculations, about $14,000, the statement which was made must have sufficed to show that a large balance was still due to appellees. No one has accused the trustee or the escrow agent of acting in bad faith. The appellants do not say that they have suffered any injury by premature delivery of the deeds. As previously mentioned all of the property was sold by the trustee after he received the deeds and the amount which was received for the property has been paid to the creditors. After the full amount here in question is also credited on the account the appellees will still lack about $14,000 of collecting their debt.

Appellees insist that the debtors in the instant case had nothing more than a right of redemption and could make no claim to any of the surplus on hand November 1, 1944, unless they redeemed. They say the case is controlled by *Danenhauer* v. *Dawson,* 65 Ark. 129, 46 S. W. 131, 44 L. R. A. 193, in which the Court held that one who purchased land at a sale made under the power in a mortgage and went into possession had a right to keep the rents during the period of redemption and that the mortgagor,

unless he redeemed the land, had no right to make the purchaser account for the rents. Mr. Justice HOLT agrees with appellees.

Since, under the opinion of the Court, the appellants have no interest in the funds that are in controversy, we have not considered the objections made by the appellants to the credits which were claimed by the trustee.

The decree of the Chancery Court is correct and it is affirmed.

Justices MINOR W. MILLWEE, ROBERT A. LEFLAR and Special Justice FRED M. PICKENS, dissent.

Justices GEORGE ROSE SMITH and EDWIN E. DUNAWAY, disqualified and not participating.

FRED M. PICKENS, Special Judge, dissenting. Unable to concur in the decision reached by the majority of this court, and without unduly extending the record, I would like to present the minority's views.

We agree with the majority that this decision turns upon an interpretation of the trust indenture, the Federal Bankruptcy Court Order, and the Proposal (referred to as the "Amendment and Substituted Proposal") since all are integral parts of the same agreement and transaction even though executed at different times. We, too, think the purposes and intention of the parties can be discovered from the series of instruments as a whole, for, as the majority state, there was no express provision as to what was to become of the fund now in litigation at the end of the five-year period.

Referring to the pertinent sections or Paragraphs of the Indenture and Proposal for brevity's sake we construe Par. III (b) of the Indenture and Proposal, Par. XII of the Indenture and Proposal and Par. V of the Indenture and Proposal in the light of all other circumstances and verbiage somewhat differently.

Par. V relates to the disposition of any balance of funds on hand at the end of every six months period. This was to enable the Fulks, the mortgagors, to reduce their

debt—which was for the mortgagors' benefit—and thus it must have certainly been contemplated by all parties at the time of execution that the balances would accrue to the mortgagors' benefit—as well as to that of the noteholders.

Some of the majority feel the law of a mortgagee in possession is controlling and cite *Denham* v. *Lack,* 200 Ark. 445, 139 S. W. 2d 243, and *Cantley* v. *Turner,* 191 Ark. 607, 87 S. W. 2d 642. We do not believe this decision can properly be governed by those cases which are still good law. As we view it, the law of a mortgagee in possession is applicable when there is no controlling agreement between the parties. Here, the agreement and the acts performed under the agreement do away with the applicability of the pronouncements in the above decisions. On November 1, 1944, when the deeds were "taken down" by the Trustee, the noteholders received an absolute title to the land in full and complete satisfaction of the debt. Prior to that date, the law governing a mortgagee in possession might have controlled—on that date, after receipt of the deeds by the Trustee, this law no longer controlled, for the deeds had been taken from escrow. As a matter of fact the agreement itself provided that if taking down the deeds were necessary the law of a mortgagee in possession should no longer apply (Par. XII of the Indenture and Proposal). The agreement was, as we see it, that from the time the deeds were taken from the escrow agent, the land belonged absolutely to the noteholders in satisfaction of the debt, and that at that time the previous mortgage character of the transaction ended. Thus, foreclosure process, redemption, or any other process whereby the debtors might claim to have the lands sold and the excess turned back to them was excluded. The question of whether or not parties can contractually circumvent the normal mortgage foreclosure and redemption processes under the Arkansas law is not before this court for consideration, for we believe that all parties being properly before the Federal Court, all parties entering into the judicial proceeding in that Court whereby proposal was finally accepted and the Federal Court Order signed by Judge Thomas C. Trimble formally approving the proposal and the creditors' agreement, and the execution of the inden-

ture in faithful compliance with that Federal Court Order exclude that question.

We think that Pars. III (b) and XII provide that the noteholders were to receive absolute title to the land on November 1, 1944, unless the debt were satisfied prior thereto—that the noteholders did so receive that absolute title, extinguishing the debt prior to the application of the funds in litigation here towards the debt.

The majority draw the conclusion that the Trustee must have credited the balance to the noteholders in some manner, otherwise the Bank would not have delivered the deeds held in escrow to the Trustee—assuming without deciding this be pertinent, that conclusion is not substantiated by the record. The records show that the funds were not applied toward satisfaction of the notes prior to extinguishment—we think that would cut off the rights of the noteholders in this fund, and arguments contending that the so-called tender provisions do not apply to the funds held by the Trustee at the end of the five-year period fails, in our opinion, to take into consideration the entire transaction and we believe that Par. V of the Indenture and Proposal referred to each and every six-months period during the trust—not just the first nine six-months periods.

The noteholders had the right to demand delivery of the deeds placed in escrow—this they did—on November 1, 1944—thus, upon the exercise of that right the liability and obligation of the debtors was extinguished as provided by Par. XII, and as there was no provision for the disposition of the balance on hand held by the Trustee, we think the noteholders lost any right they might have had upon delivery of deeds to the Trustee.

The majority emphasize the repetitive feature of several clauses in the Indenture and Proposal relative to the noteholders owning the property if their notes remained unpaid at the end of the five-year trust. Assuming repetition strengthens their conclusion, we find that the notes did not remain unpaid at the end of the five-year trust (the question of who is the loser financially being imma-

terial, as we see it)—on the contrary by the express provision throughout the Indenture and Proposal—the notes were to be paid by delivery of the deeds.

Simply because there is nothing in the agreement indicating that the surplus at the end of the trust was not to be applied to the satisfaction of the debt is not sufficient reason, in the minority's view, to rationalize negatively that it was solely for the benefit of the noteholders. The case of *Greer* v. *Turner,* 47 Ark. 17, 14 S. W. 383, and the case of *Danehauer* v. *Dawson,* 65 Ark. 129, 46 S. W. 131, 44 L. R. A. 193, have no application here, in our opinion. We believe the cause should be reversed in accordance with our interpretation of the entire transaction between these parties and that this fund now in the hands of the Trustee should be paid to the Fulks. I am authorized to state that Justices MILLWEE and LEFLAR join with me in the above opinion.

LEE *v.* CRITTENDEN COUNTY.

4-9054 226 S. W. 2d 79

Opinion delivered January 23, 1950.

Herman Spears, for appellant.

Hale & Fogleman, for appellee.

HOLT, J. Appellee, Crittenden County, sued appellant, Construction Company, to recover damages to its radio tower alleged to have been caused by the negligence of appellant in the construction and maintenance of its wooden elevator tower or shaft which it was alleged fell against appellee's radio tower during a windstorm.

Appellant answered with a general denial and further defended on the ground that any damages suffered by appellee were due solely to a severe windstorm, "that is to say an Act of God."

A jury trial resulted in a verdict for appellee in the amount of $1,353.16, and from the judgment is this appeal.

Appellant first questions the sufficiency of the evidence.

Appellant, under a contract to remodel the county jail, had erected a wooden elevator tower or shaft about 40 ft. in height, about 7 ft. square at the base, and slightly smaller at the top. The corner posts were 4 x 4's, resting on boards 2 x 12. The tower was braced by 2 x 6's and guyed by two ¾ in. sea grass ropes. "A. There were no stakes driven there" (at the base of the tower). It contained an elevator platform which rested near the second floor window of the jail at the time the tower fell.

The corner posts showed marks, or evidence, of having been struck by some object. There was also a board 2 x 6 around the bottom of the tower, which sat on the ground.

Witness, Cecil Goodwin, described the radio tower: "A. The radio is Motorola equipment and the tower is made out of angle iron in triangle form, three ways strapped together with strips of metal. It is 195 feet tall, it has five guy wires from each angle of the triangle form and those guy wires are anchored to a dead-man and each dead-man has about one-half a yard of concrete in the hole and the base of the tower is about seven feet deep filled with concrete; probably one and a half to two yards of concrete in the base."

On the night of December 31, 1947, shortly following a severe "though not unprecedented" windstorm, it was discovered that the wooden elevator tower above had been blown over and had fallen across the guy wires attached to the radio tower, causing it to "buckle" and fall. With the exception of the three lower 20 ft. sections of the radio tower which were left standing, the tower had buckled and fallen. "The anchors were all intact, the ground was not even broken" at the base of the radio tower. There was evidence that this radio tower would withstand a wind velocity of 100 miles per hour and that the windstorm in question was not strong enough to have caused it to fall.

Also in evidence were certain photographs made on Sunday following the mishap on Wednesday night before, which fairly reflected the surroundings, the condition of the radio tower, its guy wires and the elevator shaft as they existed immediately after their fall.

We do not attempt to detail the evidence. It suffices to say that when we consider and weigh all the testimony, in the light most favorable to appellee, as we must do, we are unable to say that there was no substantial evidence from which the jury could have found, and must have found, that appellant was negligent in the construction, operation and maintenance of its wooden elevator shaft, as alleged.

Appellant next argues that there was error committed in permitting the introduction of certain photographs which "were taken four days after the windstorm occurred." We cannot agree. "As a general rule photographs are admissible in evidence when they are shown to have been accurately taken, and to be correct representations of the subject in controversy, and are of such a nature as to throw light upon it." *Sellers* v. *State,* 91 Ark. 175, 120 S. W. 840.

There was evidence tending to show that these pictures were accurately taken before material changes had occurred and fairly reflected conditions existing following the fall of the wooden elevator and the radio tower and were of such nature as to throw some light on the matter in controversy.

"The admission, relevancy and materiality of photographs as evidence is left to the discretion of the trial judge and, unless that discretion has been abused, his ruling will not be disturbed," (Headnote 5) and in the body of the opinion: "Photographs are admissible in evidence in criminal cases upon the same principles and rules governing their admission in civil cases." *Higdon* v. *State,* 213 Ark. 881, 213 S. W. 2d 621.

In the circumstances, we think no abuse of discretion has been shown.

Next, appellant insists that the testimony of Riley Goodwin was improperly admitted for the reason that he "was not an expert, could not qualify as an expert, and knew nothing about what he was attempting to testify about." This witness testified (from appellant's abstract): "That he is associated with Wincharger Corporation in the erection of towers, has been engaged in this work for about two years, has erected approximately 100 such towers, his experience in such work, 'has been very general'; that since his arrival in Marion (presumably the day before trial), he examined cables and anchor points of the tower, found them to be in good condition; that the manner of construction of this tower is better than usual in that it has 'concrete anchors, which are not very common.' "

He further testified that the radio tower in question was designed to withstand a wind velocity of 100 miles per hour. "I have seen them that have taken it"; that he knew the effect of wind on towers of the same design and construction as the one here involved.

Over appellant's objection, the witness was permitted to testify further as follows: "From your experience or work on towers of similar type and from your knowledge of towers of similar construction and stress will you tell the jury what would cause a tower to fold as that one has in that picture. A. I would say that something like this, it would be caused by some object or something besides a wind, something like an airplane flying into it or something like that or unusual pull on the guy wires from a certain direction. Q. Assuming that the tower in question is standing erect, properly guyed and a heavy object falls upon one of the guy wires, what would be the effect on the section of the tower to which that guy wire is attached? A. In the case of a heavy object falling on a guy wire the guy wire will act as a fulcrum the guy wire would act as a lever and it would cause it to buckle, like you break a stick over your knee. . . . Q. From your knowledge and information acquired in the construction of these towers and towers of similar type to the one in use here, can you tell this jury, under a high wind velocity which would part first the tower, or the buckles, or the guy wires or anchor holders? A. In any instance the guy wires or anchors will give way before the tower, if they don't give way the tower won't fall either. . . . Q. I show you an elevator shaft, which it has been testified is composed of four by four corner posts and is, according to the testimony, some forty feet high and some five to six or seven feet square at the base and at the top of this elevator shaft, according to the testimony, was a pulley to lift the platform or lift that was made out of steel and floored with two-inch boards, what effect would a tower or elevator shaft have falling across the guy wires such as we have here? A. If the weight was sufficient it would act, as I said before, as a

lever on the guy wires beneath and would cause it to pull in that direction and cause it to jack-knife."

"The determination of whether a non-expert witness has sufficient knowledge of the matter in question or had sufficient opportunity for observation so as to be qualified to give his opinion or conclusion is largely within the discretion of the trial court and not ordinarily reviewable upon appeal, unless clearly erroneous." 20 Am. Jur., page 646, § 773.

From the above, we hold that the court did not abuse its sound discretion in permitting witness Goodwin to testify and express his opinion or expert judgment, in the circumstances, for the reason that he had shown himself to possess sufficient qualifications and information to qualify him to state an inference or give his expert judgment.

In 32 C. J. S., under Evidence, Division "F. Subjects of Skilled Inference or Expert Judgment," § 530 d., page 232, the rule is stated as follows: "A person having special knowledge or skill in matters of mechanics may state an inference or judgment as to such matters. Although the point covered by the inference is precisely the one on which the tribunal is to pass, the inference or judgment of one possessing special knowledge or skill, although he has received only a practical training in matters of mechanics, may be received where, and only where, the triers of fact are not competent to draw the correct inference from the facts. Among inferences which have been regarded as receivable are . . . the cause of certain results; such as a break in a machine or device, the particular operation of mechanical appliances, or defective work by machinery; the reason for an accident; what certain effects indicate; what is required in order to attain a given result; the effect or results of certain things; the strength of materials."

There was no error, therefore, in admitting this testimony.

Next, appellant contends that the court erred in refusing to permit the jury "to inspect the timber which

constituted the elevator shaft," or tower. This was also a matter within the sound discretion of the court and we think no abuse thereof has been shown here.

This wooden elevator tower was one that could be and frequently was disassembled and has been under the control and in the possession of appellant for more than a year before the trial in this case. Appellant, Lee, testified: "Q. That tower was torn down and the timber stacked up? A. That is right. Q. Those timbers were not handled with any idea of preserving them in that condition? A. No. Q. They were—have been loaded and unloaded and moved and used for more than one year since the occurrence of that fall, you didn't wrap them or preserve them to keep them from the normal wear and tear from using and hauling? A. No, we didn't."

We think no abuse thereof has been shown.

Finally, appellant argues that the court erred in not giving his requested Instruction No. 3, which he says would have presented to the jury appellant's theory of the case, and further says: "There was ample evidence on the part of the appellant that the elevator was properly constructed, securely braced, properly maintained, and inspected from day to day and that the appellee's damage was not the result of any negligence of the defendant, but was due to an Act of God."

This contention is untenable for the reason that in their instructions, the court fully covered the applicable law to the facts in the case. In Instruction No. 6, the court said: "You are told that if you find that the defendant, his agents, servants, or employees, were negligent in the erection or maintenance of the elevator shaft and that such negligence was a cause of the injuries complained of, then the plaintiff is entitled to recover in this case, unless you find from a preponderance of the evidence that the damage was occasioned by reason of an 'Act of God,' without the concurrence of any negligence on the part of the defendant, his agents, servants, or employees.

"Under the law an 'Act of God' is a violent disturbance of the elements, such as a storm, tempest, or flood, and it must be the immediate, proximate, and sole cause of the loss or damage, not concurred in by the negligence of the defendant, his agents, servants, or employees. Therefore, unless you find that the defendant and his employees were free from fault, and that their acts of negligence, if any, did not contribute to or cooperate with the windstorm in causing the damages herein sued upon, your verdict would be for the plaintiff," and the converse was clearly given in Instruction No. 7 that followed.

The rule of law in this State is well settled by this court in *St. L. S. W. Ry. Co.* v. *Mackey,* 95 Ark. 297, 129 S. W. 78. It was there said: "If the injury was produced by the combined effect of the act of God and the concurring negligence of defendant, then it would be liable therefor. Where two concurring causes produce an injury which would not have resulted in the absence of either, the party responsible for either cause is liable for the consequent injury, and this rule applies where one of the causes is the act of God. This court, in *City Electric St. Ry. Co.* v. *Conery,* 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262, announced this rule, as stated in the syllabus: 'The concurring negligence of two parties make both liable to a third party injured thereby if the injury would not have occurred from the negligence of one of them only.' (Citing cases.)

"The act of God which excuses must be not only the proximate cause but the sole cause. And where the act of God is the cause of the injury, but the act of the party so mingles with it as to be also an efficient and cooperating cause, the party will be still responsible. In 1 Shear. & Redf. Neg. (4th Ed.), § 39, the rule is thus stated: 'It is universally agreed that if the damage is caused by the concurring force of the defendant's negligence and some other cause, for which he is not responsible, including the act of God, . . . the defendant is nevertheless responsible if his negligence is one of the

proximate causes of the damage.' *Vyse* v. *Chicago, B. & Q. Ry. Co.,* 126 Ia. 90, 101 N. W. 736."

"The act of God which excuses must be not only the proximate cause, but the sole cause." *Arkansas Land & Lumber Co.* v. *Cook,* 157 Ark. 245, 247 S. W. 1071, (citing *St. L. S. W. Ry. Co.* v. *Mackey,* 95 Ark. 297, 129 S. W. 78, and *St. L. I. M. & S. Ry. Co.* v. *Steel,* 129 Ark. 520, 197 S. W. 238).

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

CHOATE *v.* MARTIN.

4-9055 226 S. W. 2d 52

Opinion delivered January 23, 1950.

Lloyd E. Darnell and *M. C. Lewis, Jr.,* for appellant.

McMath, Whittington, Leatherman & Schoenfeld, for appellee.

LEFLAR, J. Plaintiff Martin sued to recover from defendant Choate a $500 deposit incident to a contract for purchase of land by Martin from Choate. The defendant failed to answer. The Chancellor after hearing evidence rendered judgment by default for the plaintiff. Defendant appeals.

Defendant does not deny the fact of his default in the Chancery Court. He relies upon our holdings to the

effect that even after default a defendant may appeal from a judgment rendered on a complaint which fails to state facts sufficient to constitute a cause of action. *Railway Co.* v. *State,* 58 Ark. 39, 22 S. W. 918; *Barnhill* v. *Polk,* 89 Ark. 117, 115 S. W. 937; *Wilson* v. *Overturf,* 157 Ark. 385, 248 S. W. 898; *Thompson* v. *Hickman,* 164 Ark. 469, 262 S. W. 20. The question now before us therefore is whether the plaintiff's complaint stated a cause of action.

The complaint set out a contract for the sale of certain residence property on Lake Hamilton near Hot Springs, the defendant seller to furnish an abstract showing marketable title. It recited a $500 deposit of earnest money by plaintiff, as called for by the contract. It recited prior representations by defendant's agent that the seller owned a fee simple title to the land. It then recited a "reservation clause" which appeared in one of the deeds in defendant vendor's chain of title, as shown in the abstract later furnished by defendant, as follows:

"Reserving unto the grantor herein however, and unto its successors and assigns forever, the right to use and to appropriate and to clear of brush and trees and other obstructions and to submerge by water, all lands lying in the above mentioned quarter quarter section below the elevation of 400 feet above mean sea level and also the right to clear of trees, brush and other obstructions as far above 400-foot elevation above mean sea level as may be required by the Federal Power Commission or any other legal and constituted authority. It is hereby expressly reserved, however, to the grantor, its successors and assigns, the right to flood any part of said lands by waters or water impounded by a dam or dams now or hereafter constructed and/or maintained across the Ouachita River under authority of the Federal Power Commission or any other legally and duly constituted authority."

The abstract further showed, according to the complaint, that this reserved right of inundation is now vested in the Arkansas Power & Light Company. The

complaint asserted that plaintiff had no prior notice of the existence of this reservation, that by reason of it the abstract failed to show the marketable title contracted for and that plaintiff's request for return of the $500 deposit had been refused by defendant, then prayed judgment for the amount of the deposit.

Defendant's argument is that lake-front property in Garland County is generally subject to such reservations as this, and that titles there are commonly deemed marketable despite such reservations. It is said that taken as a whole they are deemed beneficial rather than burdensome to the land to which they attach. The idea appears to be that the proper maintenance of the lakes is aided by them.

That may well be true, and we do not hold that it is not true. It is however a matter of fact to be established by evidence, and not a matter of law. The sufficiency of the complaint must be passed upon by this court in terms of the law of Arkansas generally, and we hold that a reserved right of inundation such as is described in the words quoted in this complaint, the existence of which right is unknown to the buyer of land, renders the title not marketable as to him under the circumstances recited in this complaint. *Huyck* v. *Andrews,* 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432; *Cosby* v. *Danziger,* 38 Cal. App. 204, 175 Pac. 809; *Porter* v. *Ridge,* 310 Mich. 425, 17 N. W. 2d 239.

Had the defendant answered and introduced evidence in the Chancery Court, he might have established that his title was marketable. This he did not choose to do. It is too late for him now to offer his evidence in this court.

The decree of the Chancery Court is affirmed.

KELLEY *v.* CARTER.

4-9040 226 S. W. 2d 53

Opinion delivered January 23, 1950.

Melvin T. Chambers, for appellant.

Wade Kitchens and *W. H. Kitchens, Jr.,* for appellee.

GRIFFIN SMITH, Chief Justice. Sarah Kelley, a Negress 70 years of age, signed and acknowledged a deed to real property and one of the grantees received it in her

presence. The Chancellor found that the grantor's acts were induced by unreasonable importunities of stepchildren who would profit by the conveyance. Sarah suffered from advanced cancer; and, as the Court found, she was in excruciating pain when spokesmen for the grantees "worried her" into signing.

Sarah had been married to Walter Kelley seventeen years when he died in 1944. Each had children by a former spouse: Walter eleven, Sarah eight.[1] Prior to 1927 Walter had contracted with W. W. Sorrels for the purchase of eighty acres of relatively poor land. The last of his series of notes for $894.20 matured in November, 1924. Minerals were excepted.

Appellants contend that their father's inability to meet the installments, or to pay taxes, resulted in a request for assistance. Roy Kelley, living in Chicago, took the lead in acting for his brothers and sisters, and in consequence of his personal call on Sorrels in Columbia County additional time was procured. A number of the children joined their father in a new note and advanced $50 for the first payment.

Roy Kelley testified that Mrs. Sorrels took certain mineral rights to cover the difference between $50 and the balance of $150 constituting the cash payment. His father, Roy said, went to F. W. Souder, purchaser of timber, "and he paid off the $100 and the papers were released to him."

Souder testified that he bought timber from Walter Kelley. Sorrels had a note against the land "with a whole string of names on it—a number of the Kelleys." Souder, without initial objection, was permitted to testify that Sorrels told him he had made a deed to the land in Walter's favor, and that it was held in escrow by a bank. The Kelley heirs, Souder said, had assisted their father in buying the land, but the timber accounted for "quite a bit" of the purchase money. A note executed by the Kelleys had been given Souder by Sorrels after

[1] Ollie Sharp, one of Sarah's sons, declined to participate in the controversy.

the timber had been taken, and Souder, in turn, gave the note to W. H. Kitchens.[2] Attached to it was a sheet of paper containing names. The sheet had been removed when Souder was questioned in court.

The $50 payment mentioned by Roy Kelley is probably the item of $53 discussed by counsel for appellants, who says that an indorsement on the note accounts for the credit, and that it lends substance to what Roy's understanding was.

The record shows that two deeds were made by Sorrels and his wife. The first, executed and acknowledged August 2, 1940, conveys to Walter B. and Sarah Kelley. It was filed for record Feb. 10, 1945. The second deed is dated Dec. 3, 1945, and was acknowledged the same day. It conveys the land to Sarah and her heirs.

The 1940 deed was acknowledged before George W. Sorrels, a Notary Public. The indorsement shows that Sorrels' commission ran until April 16, 1947. It is insisted that the deed could not have been acknowledged in 1940 by one holding a commission good until 1947, since appointments are for a term of four years; therefore, say appellants, "it is plain to see that this deed was executed after Walter Kelley had died [in 1944], but was dated August 2, 1940."

The second deed (1945) recites that the instrument executed in 1940 was lost after being placed in escrow, "and the purpose of this deed is to reflect facts as of August 2, 1940."

We agree with appellants that the expiration date in question is an irregularity; and, *prima facie,* it creates a presumption that it was made by a seal adapted to use after the deed was executed. This might have been explained at trial, but the inference was not developed. Official records in the office of the Secretary of State, of which we take judicial notice where the matter is required by law to be recorded, show that George W. Sorrels was a Notary Public by appointment of April 17,

[2] The reference relating to delivery of the note was seemingly to W. H. Kitchens, Jr., although the identity is not clear.

1939, and qualified nine days later. He was again appointed to a four-year term[3] April 17, 1943, and qualified April 23. The 1939 appointment expired when Sorrels qualified under the new appointment in 1943, so an acknowledgment taken in 1940 would normally show that the commission expired in 1943 instead of 1947.

Appellant cannot prevail because of this irregularity. While the law requires that expiration date of the commission be shown, the statute is directory, a proviso being that no acknowledgment shall be held invalid for failure to comply with the mandate. Ark. Stats., § 12-1406. Nor is the fact that the 1940 deed was not filed until February 10, 1945, of more significance than to add weight to appellants' suspicion that the instrument was actually prepared after Kelley died. This was another matter in respect of which the trial court would have been receptive to proof—something that conjecture will not supply on appeal.

Treating the first deed as valid, it created an estate by the entirety, with the fee vesting in Sarah as survivor. The second deed was no more than expressions by Sorrels and his wife affirming execution of the first deed and acknowledging that payment had been made.

This brings us to a consideration of the deed from Sarah to appellants, and requires a determination of its validity. Here the testimony is so sharply in conflict, and self-interest is so obvious, that the result must turn largely upon admissions against interest, physical facts, and the testimony of third persons.

On the physical side it is conclusively shown that Sarah was dying of cancer. She signed the deed a few days more than two months before passing away Oct. 24, 1947. Acknowledgment was by C. T. Owen, who was admittedly procured by two of the Kelley brothers. When Owen consented to go to Sarah's home, he did not know how ill she was. He later realized the seriousness of her condition, and in testifying said that he would not want his own mother to transact business in similar circum-

[3] Arkansas Statutes Annotated (1947), § 12-1401.

stances, nor would he have gone with the Kelley boys had the full picture been before him.

Sarah told Owen—he had known her most of her life—that she was in misery, and asked if she must sign the deed. He told her his function was that of a notary, and declined to give advice. The Kelleys who were present told Sarah she had received all of the personal property and had been living on the place for several years. They "felt like" she ought to give them a deed. Some discussions, spoken of by Owen as a little argument, occurred before the deed was signed. When the Kelleys told Sarah she [and *her* children] had gotten all of the personal property, Sarah said, "If we did get it we paid for it; and the land, I paid for it myself." Interpolating, one of the boys said, "Yes, but somebody helped you, didn't they?" and Sarah replied, "If you will go on and let me alone I will give you a deed to it if you will pay me back what I have been out." The witness added that Sarah did not say what amount she had spent, but when she expressed this willingness to act, Owen took her hand and guided it while the signature was affixed—"for she couldn't write very well."

C. Z. Couch, merchant, identified a mortgage given by Walter and Sarah in April, 1941, covering the realty and some personal property, including live stock. It secured $400 for supplies, such as groceries, etc. After Walter died, $195.36 was paid in discharge of the obligation as it then stood. Appellees insist that they gave their mother the money she used in retiring the mortgage.[4]

There was ample evidence, including the testimony of an attending physician, that Sarah suffered intense and continuous pain before and after August. Drugs were sometimes administered; bleeding was profuse. Some witnesses thought Sarah was wholly incompetent,

[4] In 1938 the Columbia Chancery Court, in an action by W. W. Sorrels and his wife against Walter Kelley, quieted Sorrels' title to the land, subject to Kelley's right to pay $216 before Dec. 31 of that year and take the property. In 1946 the Chancery Court set aside a state tax deed to the property, finding that on that record Sarah was the owner.

others had not observed any impairment. On the single issue of mental incapacity we would not hold with appellees, but when the entire transaction is considered it is readily seen that appellants did not, when the deed was delivered or procured,[5] or at any time after Sarah's death, meet the condition mentioned by her: repayment of what she had spent. The most satisfactory evidence of this was the testimony of Couch that the merchandising debt discharged after Walter's death was $195.36. Roy Kelley insisted that he "gave" Sarah twelve dollars about the time the deed was signed, but he did not say it was a part of the obligation impliedly assumed. On the contrary, he denied any promise by asserting that the deed was voluntarily executed.

Affirmed.

LOPEZ *v.* WALKER.

4-9046 226 S. W. 2d 56

Opinion delivered January 23, 1950.

[5] The word "delivered" is not used in a legal sense.

Lloyd E. Darnell, Campbell & Campbell and *John H. Lookadoo,* for appellant.

Hebert & Dobbs, for appellee.

ED. F. MCFADDIN, Justice.. This case involves the custody of a little boy, "Gerry" Walker, who was born in June, 1945. The appellant (now Mrs. Lopez) is the child's mother; the appellees (Mr. and Mrs. Roy H. Walker) are the child's paternal grandparents. We will refer to the parties as the "mother" and the "grandparents". The child's parents were divorced (on the grounds of indignities) in Garland County, Arkansas, on May 4, 1948; and the divorce decree recites:

". . . that defendant[1] shall have the custody of said child during the months of September to May inclusive of each year hereafter and the said paternal grandparents the custody of said child for the months of June, July and August of each year hereafter;"

On September 8, 1948, the mother filed petition for the exclusive custody of the child; but the grandparents resisted. The cause was heard by the Chancery Court on December 20, 1948, and a decree was entered refusing to change the previous custody order. The mother brings this appeal.

The law applicable to a case of this kind has been stated in many of our opinions. In *Blake* v. *Smith,* 209 Ark. 304, 190 S. W. 2d 455, we said:

"The party seeking a modification of a divorce decree awarding custody of a minor child assumes the burden of showing such a change in conditions as to justify such modification. *Kirby* v. *Kirby, supra,*[2] and *Seigfried* v. *Seigfried* (Mo. App.), 187 S. W. 2d 768."

In *Thompson* v. *Thompson,* 213 Ark. 595, 212 S. W. 2d 8, the late and beloved Mr. Justice ROBINS said:

"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 modifi-

[1] That is, the child's mother.

[2] 189 Ark. 937, 75 S. W. 2d 817.

cation 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."

The evidence in the case at bar shows two changes in conditions, which, concurring as they do, clearly warrant an order awarding the mother the exclusive custody of the child. These two changes are: the changed situation of the mother, and the abduction of the child by the father.

I. *Changed Situation of the Mother.* During the entire life of the child, the father has been with him only a short time.[3] The mother, whose good character has never been questioned, was obliged to work; and for some time she and the child made their home with the grandparents (appellees). When she and the child lived elsewhere, she left him with "professional caretakers" while she was at work. Under such conditions, the division of custody was a reasonable agreement recognized by the court at the time the divorce decree was granted.

But on July 20, 1948, the mother married Dr. Joe Lopez, who is a graduate of Louisiana State University Medical School and has interned in several hospitals and worked at a public health center. In August, 1948, there was only one physician in the town of Amity, Arkansas, and he was advanced in years. The Lions' Club of Amity, as a community project, persuaded Dr. Lopez to locate there for the practice of medicine. He did locate in Amity in September, 1948; and at the time of the trial below had already established a practice which would gross him between ten and twelve thousand

[3] The grandfather (one of the appellees) said of the child: "He never knew his own Daddy. He would look at me and call me 'Daddy'."

dollars per year. Dr. and Mrs. Lopez have their home in Amity, and the child has his own room in that home. Mrs. Lopez is a regular attendant at Sunday School and Church. Friends and neighbors who have observed Dr. Lopez and Gerry together, from September 15, 1948, to the time of the trial below, gave most convincing testimony about the love of Dr. Lopez for the child. Jack Lacy, past president of the Amity Lions' Club, testified:

"Well, the doctor is very devoted to Gerry. In fact there are very few people in Amity but what think he is the father of the child. He carries him with him every place he possibly can, and they play and they romp together and I have never seen anything except a very close relationship between them. In fact he seems to be more devoted than most fathers and gives him more care, probably because he is a medical man and knows what is necessary, but he does seem to give him exceptional care and devotion."

Dr. Lopez testified:

"Q. Are you in a position to adequately provide for your wife and her son? A. Yes. Q. Do you want her to have full and complete custody of the child? A. Yes; I think it is really a necessity for the child's welfare and for her welfare. Q. What is your relationship with the child? Do you love the child yourself? A. He is to me just like he was my own son."

He further gave this evidence as to why divided custody was not for the best interest of the child:

"Q. What was the condition of the child when you first got him back, after he had been to Washington? A. Well, the child was pretty upset. We couldn't leave him alone at any time without him thinking that we were going to leave him. We had quite a good deal of trouble trying to convince him he would be safe in his own bed at night; he didn't want to go to sleep by himself because he had the idea his mother might not be there the next day or that he would probably be in a strange home, and he was definitely upset for about two

months after he got there. Q. What is his condition now, Doctor? A. I think he feels like he is in a home. He feels like he is in a place where he belongs. Q. Would you say the child is perfectly normal now? A. Yes, he is a perfectly normal child now.''

While each child custody case presents an individual and distinct problem, nevertheless, previous cases do serve to guide us in succeeding cases. *Miller* v. *Miller*, 208 Ark. 1058, 189 S. W. 2d 371, was a child custody case between the father and the maternal grandmother. By consent, the custody of the child had originally been awarded to the grandmother. Later the father remarried, established a home, and petitioned for the exclusive custody of the child. On the showing there made as to the best interest of the child, we awarded the custody to the parent in preference to the grandmother. A stronger case is made here for the custody to be awarded the mother: (a) because of the tender age of the child; and (b) because the mother, now happily remarried, has a home where the child may have the love and affection of his mother and the guidance of a stepfather who, as shown by his own testimony and that of other witnesses, is devoted to the child.

II. *Abduction of the Child By the Father.* In accordance with the May, 1948, decree, the grandparents had the custody of the child during June, July, and August of that year. They were to return him to the mother on September 1st. On August 30, the child's father[4] arrived in Hot Springs from Washington, D. C., and on the afternoon of August 31st he abducted[5] the child and took him to Washington, D. C. Mrs. Lopez had Ralph W. Walker arrested for kidnapping, but he resisted extradition. The grandfather went by airplane to Washington and brought the child back to Hot Springs. In short, the child's father (being the son of the appellees) deliberately spirited the child away from the grandparents, in order to keep them from returning the child

[4] The child's father is Ralph W. Walker, and he is the son of the appellees, Mr. and Mrs. Roy H. Walker.

[5] This abduction explains the nervousness of the child, as testified to by Dr. Lopez, and previously quoted.

to the mother the next day. The grandparents are good people. They love Gerry, and were in no wise parties to the unlawful actions of their son; but, nevertheless, Ralph W. Walker is their son, and they frankly state that they propose "to stand by him." If custody were awarded the grandparents for three months, then the child's father could easily repeat his unlawful performance; whereas he would certainly be somewhat deterred by the fact of the mother having the exclusive custody of the child.

CONCLUSION

The record before us discloses a sincere love of the grandparents for the child. The record indicates that Mrs. Lopez will encourage the child to reciprocate such love, and that she will allow the child to visit the grandparents, and will invite them to visit the child in her home. We reverse the decree and remand the cause to the Chancery Court with directions to enter a decree awarding the exclusive custody of the child to the mother, Mrs. Lopez, conditioned that the grandparents, as well as the child's father, will have the right of visitation as that term is understood in such cases. This being an equity case, we are at liberty to award costs as we deem fair; and we have concluded that the appellant will pay the costs.

JACKSON *v.* GILBERT.

4-9053 226 S. W. 2d 59

Opinion delivered January 23, 1950.

Warner & Warner, for appellant.

Bland, Kincannon & Bethell, for appellee.

George Rose Smith, J. On January 1, 1948, H. M. Shelby leased thirty-seven acres of land to the appellee for coal mining purposes. On December 17 of that year the appellant bought the land from Shelby and later filed this suit to cancel the lease. The chancellor's denial of relief led to this appeal.

Various grounds for cancellation are presented by the appellant, the first being that the description of the land is void for indefiniteness. Although the lease, as reformed below, contains a valid description of the property, a subsequent provision of the lease reads: "This contract is to cover only such parts of the above described land as the preliminary drilling shows can be profitably worked. . . ." It is contended that the latter provision renders the description void for uncertainty, but the fallacy in that view is that the later clause was not intended to be a description. The next succeeding paragraph requires the lessee to begin test drilling within six months. When read together these two clauses constitute not a description but a contractual provision binding the lessee to explore the thirty-seven acres and to confine his mining operations, with their attendant inconvenience to the lessor, to those areas that can be worked with profit. We see no objection to such an agreement; in fact we enforced a similar covenant in *Lawhon* v. *American Cyanamid & Chem. Co., ante,* p. 23, 223 S. W. 2d 806, decided October 31, 1949.

It is contended by the appellant that the lessee failed to begin the drilling of test holes within six months, as the lease requires. It is shown, however, that the appel-

lee sank three test holes in May and June, and it may be inferred that additional information about the location of the coal was derived from examination of an old mining pit on the premises. We think the testimony supports the chancellor's conclusion that the appellee sufficiently performed his duty to begin exploration within six months.

The appellant alleges the violation of a provision requiring the lessee to begin the establishment of a plant within the first year. It is shown that the appellee began stripping overburden with a bulldozer on December 21 and removed four tons of coal on December 23. He then decided that the bulldozer was not suitable, and a dragline was brought in on December 30. The appellee has exposed from 70 to 100 tons of coal and has dug a pit of substantial dimensions. Tool boxes, dragline covers and sheds have been installed. The lease does not define the "plant" that is to be established. We think the requirement is met by the installation of such machinery and equipment as are appropriate to the development of the leasehold. The lease itself permits the lessee to remove the top vein of coal "by the steam shovel process or other equally good processes." We agree with the trial court's view that the appellee is not shown to have violated this covenant.

Finally, it is urged that the lessee has not fulfilled his implied obligation to continue development so that the appellant may receive the royalties that are the chief inducement for a lease of this kind. See *Mansfield Gas Co.* v. *Alexander,* 97 Ark. 167, 133 S. W. 837. The lease gave the lessee a full year in which to begin operations; so any breach of the implied covenant must be found to have occurred after December 31, 1948. The appellee testified that he was continuing his stripping operations in the early days of January. The appellant filed suit in the federal court on January 6, but that suit was later dismissed and the present one instituted on February 17. As the duty of development is suspended during the pendency of the lessor's suit to cancel the lease, *Winn* v. *Collins,* 207 Ark. 946, 183 S. W. 2d 593, no violation of

the implied covenant in question can be said to have yet occurred.

Affirmed.

BYRD *v.* EATMAN.

4-9066 226 S. W. 2d 356

Opinion delivered January 30, 1950.

Willis & Walker, for appellant.

Ernie E. Wright, for appellee.

LEFLAR, J. Appellants sued to rescind a contract under which they had undertaken to purchase from defendants certain city lots in Mountain Home for $3,500. The ground relied upon for rescission was that the deed executed by defendants under the contract actually conveyed to plaintiffs only 139,568 square feet of land whereas the contract contemplated transfer of lots containing 187,577.5 square feet, a shortage in square footage of 48,009.5, representing slightly more than one-fourth in area of the lots. In Chancery Court the plaintiffs' bill for rescission was denied and dismissed, and they appeal.

It appears that the vacant city lots which appellees undertook to sell to plaintiffs actually were as large as they were represented to be, but that the deed may not have conveyed all of the area covered by the lots. The deed employed the description of the lots which was used on the plat filed in the Courthouse, describing them by

their numbers—"lots numbered 17, 18, 19, 20, 21, 22, 29, 30, 31, 32, 33, 34, 41, 42 and 43 in College Heights Addition to the Town of Mountain Home, Ark., as shown by the recorded plat thereof." Then followed the inaccurate language, both in the deed and in the plat: "The same being a part of the W½ SE¼ SW¼ of Sec. 4, Twp. 19 North, Range 13 West." Actually, the major part of the lots (apparently 139,568 sq. ft.) as they were laid off on the face of the earth was as described in the deed, in the southeast quarter of the southwest quarter of section 4, but another part along the west edge of lots 19, 20, 31, 32 and 43 (apparently 48,009.5 sq. ft.) was in the adjoining forty acres, the southwest quarter of the southwest quarter of section 4. Possibly a small part of the difference in square footage may have been in some roads or alleys at the edge of the land, rather than in the adjoining forty acres, but if so it does not affect the result here. The main dispute arises from the fact that more than one-fourth in size of the lots as they lie physically is in an area other than that referred to in the deed and plat descriptions.

The evidence indicated that the sellers had been in possession of the physical area covered by the lots, both in the southeast quarter of the southwest quarter, and in the adjoining quarter of a quarter-section on the west, since they acquired the lots by deed from one Morton in 1929, more than 19 years before the sale to appellants. The Morton deed contained the same inaccuracy in description as does the deed to appellants. Whether appellees acquired title by adverse possession during this 19 years we do not now decide. We now decide only that the contract between the present parties contemplated conveyance by appellees to appellants of the whole of the lots in question, including the portion which in fact lies in the adjoining forty acres, and that on this basis there is no substantial shortage, and perhaps no shortage at all, in the area of the lots sold.

We expressly point out that this determination does not prejudice in any respect appellants' possible right to

secure a reformation of appellees' deed to make it describe the lots accurately, nor does it prejudice any right that appellants may have to sue for breach of the covenant of warranty contained in appellees' deed if appellees should be ousted from the part of the lots which lie in the adjoining quarter of a quarter-section, or any other part of the lots, by reason of superior title in another.

With this understanding, the decree of the Chancery Court is affirmed.

HOT SPRINGS STREET RAILWAY COMPANY *v.* ADAMS.

4-9042 226 S. W. 2d 354

Opinion delivered January 30, 1950.

House, Moses & Holmes and *Thomas C. Trimble, Jr.*, for appellant.

J. H. Lookadoo, James T. Gooch and *Agnes Ashby*, for appellee.

GEORGE ROSE SMITH, J. The appellees, O. Fred Adams and his wife, recovered judgments totaling $10,500 for personal injuries and property damage sustained in a collision between their car and a bus operated by the appellant. We discuss two of the appellant's contentions, as one necessitates a reversal and the other

goes to the question of whether the case should be dismissed.

On the latter point it is contended that the defendant below was entitled to an instructed verdict because its negligence was not proved and Adams' contributory negligence was established as a matter of law. This argument must be rejected. The appellees, residents of Clark County, were driving along Central Avenue in the city of Hot Springs at about noon on June 29, 1948. Adams, who had not traveled this street before, saw just ahead a traffic signal that intermittently flashed a red light. He testified that he threw out his hand and stopped as quickly as possible. A second or so later the appellant's bus struck the rear end of his car, knocking the vehicle fifteen feet or more and causing the injuries and property damage complained of.

The appellant's argument is based mainly on its proof that this traffic signal is merely cautionary and that the Hot Springs police have never required drivers to come to a halt before proceeding past the light. But the statute sanctions a failure to stop only when the cautionary light is yellow; drivers are required to stop before passing a flashing red light. Ark. Stats. (1947), § 75-506. Adams was a stranger to Hot Springs; it is not intimated that he knew the local custom with reference to this traffic signal. Consequently he was not necessarily negligent in making a quick stop, as he could assume that any vehicle behind him would be driven in anticipation of his making the stop required by law. The jury were warranted in concluding that the appellant's bus driver was negligent in not foreseeing that the Adams car might come to a standstill before continuing past the signal light.

Second, it is asserted that a juror failed to reveal information while the jurymen were being selected. The appellant's attorney inquired whether any members of the panel had been represented by any of the plaintiffs' attorneys. Two veniremen answered in the affirmative, and after some additional interrogation the court excused them both. Later on, while the jury was consid-

ering its verdict, the appellant's counsel examined the files in the circuit clerk's office and learned that another juror, S. D. Calloway, was represented in a pending suit by J. H. Lookadoo, one of the appellees' attorneys. When the jury brought in its unanimous verdict the appellant moved for a mistrial and questioned Calloway about his pending case. Calloway said he had not mentioned it because he thought it had been settled, and later said, "I didn't understand it [the question], I guess." When the motion for a new trial was presented Calloway testified that he held up his hand when the veniremen were questioned about Mr. Lookadoo's having been their attorney, but the appellant's lawyer did not ask him any questions.

We believe that the trial court's failure to declare a mistrial was an abuse of discretion constituting reversible error. Even if we accept Calloway's statement that he held up his hand, it is perfectly clear that he knew his gesture had not attracted the attention of appellant's counsel. Both his action in raising his hand and his assertion that he thought his case had been settled show beyond any doubt that he understood the inquiry that was being put. The appellant was entitled to the information sought, as a basis for a peremptory challenge if not as a ground for challenging for cause. In these circumstances the juror's duty of candor extends well beyond a ready acquiescence in the supposition that counsel has decided not to pursue his inquiry. The very theory of an impartial jury trial demands that the juror take positive action to bring his possible disqualification out into the open when the question is raised. "Nothing can destroy the integrity of juries more effectively than to allow prejudiced jurors to sit in a case." *Anderson* v. *State,* 200 Ark. 516, 139 S. W. 2d 396. For us to approve the denial of a mistrial in this case would, we think, be a disservice to our system of jury trials.

Reversed and remanded.

4-9049 226 S. W. 2d 566

Opinion delivered January 30, 1950.

Reinberger & Eilbott, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

Holt, J. Appellee, a resident of Little Rock, and employed by the Peerless Engraving Company, sued appellant, Construction Company, to recover damages of $5,000 for alleged personal injuries and $1,000 damages to his automobile, alleged to have been caused by the negligence of appellant. Appellant's answer was a general

denial and affirmatively pleaded that whatever damages appellee received were due solely to his own contributory negligence. A jury trial resulted in a verdict for appellee for $2,000, and from the judgment is this appeal.

For reversal, appellant first questions the sufficiency of the evidence and earnestly contends that appellee was guilty of contributory negligence as a matter of law and that the court erred in refusing appellant's request for an instructed verdict at the close of the testimony. Appellant, in its brief in this Court, does not contend that it was free of negligence.

On October 13, 1947, appellee, driving to Magnolia on U. S. Highway 79, on arriving at Camden, noted and undertook to follow certain detour signs and after returning to Highway 79, and traveling some distance, came to a point where workers serving appellant were engaged in unloading and spreading gravel from trucks which were moving in and out. He was cautioned to "take it easy in this area where they are spreading gravel and trucks hauling." This construction area extended for about ¾ of a mile. Appellee testified that after he passed this area where the gravel was being spread, the road was in good condition for six or seven miles to the scene of the mishap and there was no construction work taking place in this six or seven mile stretch. After leaving this area, appellee resumed his speed of approximately forty miles per hour, and while so traveling slightly down grade on a wide curve to the left, the road appeared to be a continuous stretch to the crest of a slight hill just beyond the curve. He did not observe that in the curve and just before the bottom of the hill was reached, a gap or opening had been left for a bridge and provision had been made for motorists to leave the main roadway by making a left turn on a descending side road over a narrow bridge. There were no warning or detour signs directing traffic around this portion of the highway with the exception of a barricade of unpainted boards immediately in front of the gap. The road was being used for traffic and a great many cars were passing over it. Appellee testified that as he approached the gap, an approaching

vehicle stirred up some dust which obscured his vision and he could not tell whether the barricade was on the road or at the side of the highway and did not see it until he was right on it and then he immediately pulled his car to the left to the side road in an attempt to get on the bridge but succeeded in getting only his left wheels on the bridge and he and his car were thrown into the ravine. Appellee's car was practically demolished and he received personal injuries. Some days following the mishap, the following sign was erected on the right side of the curve: "Bridge out—Detour 300 ft."

Photographs of the scene of the mishap, surroundings and of the wrecked automobile were in evidence. There was evidence that the portion of Highway 79 where the mishap occurred, although no construction work was being carried on at this point at the time, was under appellant's control and responsibility in accordance with the following provision of appellant's contract with the State. "7.9. Barricades, Warning and Detour Signs. 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."

Whether we would be warranted in saying, as a matter of law, in the circumstances here, that the appellee was guilty of contributory negligence and therefore could not recover has given us some concern.

After a careful consideration of all the testimony, however, and viewing it in the light, as we are required to do, most favorable to appellee and keeping in mind

"that where fair-minded men might honestly differ as to the conclusion to be drawn from facts, either controverted or uncontroverted, the question at issue should go to the jury" (*D. F. Jones Construction Co., Inc.* v. *Lewis,* 193 Ark. 130, 98 S. W. 2d 874), we are unable to say that the jury was not warranted in finding that appellee was free of any negligence that contributed to the mishap. At least, we are unable to say that a question was not made for the jury. See *Hill* v. *Whitney,* 213 Ark. 368, 210 S. W. 2d 800.

The record reflects that at the time of the damages to appellee complained of, he carried collision insurance on his automobile with the State Farm Mutual Automobile Insurance Company (with a $25 deductible clause) and his employer, the Peerless Engraving Company, was subject to the Arkansas Workmen's Compensation Act and the Maryland Casualty Company was its insurance carrier. The State Farm Mutual Insurance Company paid appellee damages to his automobile in the amount of $764.50 and the Compensation Commission awarded appellee $27 and his medical and hospital bills, in the amount of $164, which were paid by the Maryland Casualty Company prior to trial.

Appellant filed a motion in which he asked the court "to require that the State Farm Mutual Automobile Insurance Company be made a party plaintiff to this cause of action, and that the Maryland Casualty Company either be made a plaintiff or else any damages or compensation paid to the plaintiff by that Company be stricken from the complaint." This motion was denied by the court.

Appellant argues that both of these insurance companies were necessary and indispensible parties plaintiff to the suit. It appears that appellee had agreed with the compensation insurance carrier, Maryland Casualty Company, to recognize and honor its statutory lien and it did not intervene. The State Farm Mutual Insurance Company did not ask to be made a party plaintiff. In these circumstances, courts generally appear to be divided on the question whether the insurance

companies are necessary parties plaintiff in an action against a tort-feasor.

The question presented appears to be of first impression here. After a careful review of the authorities, we have reached the conclusion that the sounder reason and better view supports what appears to be the majority rule, that where, as here, an insurance company has only partially reimbursed an insured for his loss, the insured is the real party in interest and can maintain the action. An insurance company would be a proper party plaintiff should it so request, or intervene, but it would not be a necessary or indispensible party. The interest of the insurance carrier here, Maryland Casualty Company, is protected and preserved by statute.

Ark. Stats. (1947), § 81-1340, provides: "Third party liability.—(e) Liability unaffected. (1) The making of a claim for compensation against any employer or an insurance carrier for the injury or death of an employee shall not affect the right of the employee, or his dependents, to make claim or maintain an action in tort against any third party for such injury, but the employer or his insurance carrier shall be entitled to reasonable notice and opportunity to join in such action. If they, or either of them join in such action, they shall be entitled to a first lien upon two-thirds of the net proceeds recovered in such action that remain after the payment of the reasonable cost of collection, for the payment to them of the amount paid to, and to be paid, by them as compensation to the injured employee."

As indicated, this insurance carrier, upon notice, had agreed to accept appellee's promise to recognize its lien and it elected not to intervene.

The State Farm Mutual Insurance Company made no request to be made a party plaintiff. We hold in the circumstances that appellee's action was a single cause of action, that he was the real party in interest, and that appellant was not concerned with any rights or interests of appellee in the insurance contracts here.

Our statute provides: (Ark. Stats. 1947, § 27-801) "Every action must be prosecuted in the name of the real

party in interest, etc.,'' and section 27-806 provides: ''All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.''

Under these statutes, the insurance companies here would not have been improper parties, but, as indicated, they were not essential or necessary parties. They could have become parties had they so desired. The general rule is stated in *29 Am. Jur.* 1016, in this language: ''Under statutes providing that every action must be prosecuted in the name of the real party in interest, it is generally held that if the insurance paid by an insurer covers only a portion of the loss, the insurer is not the real party in interest, but rather, the right of action against the wrongdoer who caused the loss remains in the insured for the entire loss, and the action must be brought by him in his own name. This rule has been said to rest upon the theory that the insured sustains toward the insurer the relation of trustee, and also upon the right of the wrongdoer not to have the cause of action against him split up so that he is compelled to defend two actions for the same wrong,'' and in 46 C. J. S. 190, as follows:

''Where the loss exceeds the amount of the insurance, so that payment under the insurance contract constitutes but a partial satisfaction of the damages sustained, leaving a residue to be made good by the wrongdoer, it has been held that insured may maintain in his own name the action against the tort-feasor, which may be for his own benefit and for the benefit of insurer. In such case insured may recover the full amount of the loss for which the tort-feasor is liable and insurer is not a necessary party. Indeed, it has been held that in such case the action must be brought in the name of insured, as the right of action for the whole loss remains in him. Where the action is brought by insured in his own name against the wrongdoer to recover the full amount of the loss, he sustains toward insurer the rela-

tion of trustee, in respect of such portion of the amount recovered as the former under his contract has been compelled to pay."

Here, the appellee, insured, holds the proceeds of his judgment against appellant as trustee and must account to the insurance companies as their interests may appear. The Annotator in 140 A. L. R., page 1246, under "Right of Insurer to share in recovery by insured against tort-feasor" used this language: "The cases involving the question of the right of an insurance company which has paid a claim for property damage to an insured automobile to share, under principles of subrogation, in the proceeds of a recovery against or settlement with the tort-feasor in favor of the insured are unanimous in upholding the right of the insurer so to share."

Next appellant contends that there was error in admitting in evidence a photograph showing the effect of dust created by a moving vehicle. Appellee testified that his vision had been obscured at the time of the mishap by dust from a car near the barricade. The picture taken after the mishap is of dust created by a moving car, which appellee testified was substantially the same as that portrayed in the picture and which confronted him at the time of the mishap. The admissibility of this photograph, in the circumstances, was within the sound discretion of the court. "The admission, relevancy and materiality of photographs as evidence is left to the discretion of the trial judge and, unless that discretion has been abused, his ruling will not be disturbed." *Higdon* v. *State,* 213 Ark. 881, 213 S. W. 2d 621 (Headnote 5). See, also, *Powell Brothers Truck Line, Inc.* v. *Barnett,* 196 Ark. 1082, 121 S. W. 2d 116.

With the photograph admitted, the issue became one of fact for the jury to decide as to whether appellee was correct in his testimony. We find no error here.

Appellant argues that the court erred in giving the following instruction: "In the absence of notice to the contrary, a motorist may assume that the way is reasonably safe for travel and he is not required to anticipate

unusual obstructions on a public highway. The erection and maintenance of a sign to the effect that a motorist proceeds or travels at his own risk does not relieve a highway contractor of his duty of exercising ordinary care for the safety of the traveling public, and Mr. Mizell did not assume, because of said sign, any risks arising from any negligence, if any, of defendant, McGeorge Contracting Company."

We do not think that this instruction was an incorrect declaration of the law applicable to the facts here. The rule is stated in 40 C. J. S. 317 in this language: "In the absence of notice to the contrary a traveler on a highway open to the public ordinarily has a right to rely on the assumption that the highway is in a reasonably safe condition for travel and free from obstructions, and he need not keep his eyes constantly fixed on the road or path of the highway, or look far ahead for defects which should not exist."

This was but one of many instructions and when all are considered, as they must be, we find no prejudicial error.

Next appellant contends that the court erred in permitting Mrs. Mizell (appellee's wife) to testify "with reference to detour signs placed by the Highway Department and also to testify as to the absence of detour signs."

Mrs. Mizell testified, in effect, that three or four days following the mishap, she made a trip over the same road where the mishap occurred and that there were no signs indicating that the road stopped or that the bridge was out. There was evidence that the road and surroundings were in practically the same condition as when the mishap occurred and that there had been no material changes.

Appellant's witness, Robinson, testified: "Q. In the week following the accident, was there any change made in the condition of the road as you approached the scene of this accident? A. No, none other than

regular routine patrol work and the bridge contractor was moving in."

The president of appellant company, Dickinson, testified: "Q. Was there any change in the condition of the road the week after the accident? A. The physical condition wasn't changed. Q. And so far as signs and things like that, there had been no change at all? A. Been no change at all."

Mrs. Mizell also testified as to the absence of signs.

We hold that there was no error in admitting this testimony in the circumstances.

Finally, appellant argues that the court erred in permitting appellee, over his objections, "to testify regarding detour signs along U. S. Highway 79 because under the evidence it was not the duty of the defendant to post or maintain said signs."

We think this contention untenable and fully answered and covered by what we have said in answer to appellant's first contention above.

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

HUTCHESON *v.* CLAPP.

4-9068 226 S. W. 2d 546

Opinion delivered January 30, 1950.

Gean & Gean, for appellant.

Harper, Harper & Young, for appellee.

MINOR W. MILLWEE, Justice. Appellants, W. L. Hutcheson, W. L. Hutcheson, Jr., and Hutcheson Wholesale Shoe Company, Inc., were plaintiffs in the circuit court in an action against appellee, Kenneth G. Clapp, doing business as Packard Fort Smith Company, and J. H. Bryan. Plaintiffs alleged that in March, 1949, J. H. Bryan, while acting within the scope of his employment as the agent and servant of appellee Clapp, negligently drove an automobile into and damaged three automobiles, one of which belonged to each of the plaintiffs, while said cars were parked on a residential street in the City of Fort Smith.

Clapp and Bryan filed separate answers containing a general denial of the allegations of the complaint. A jury trial resulted in a verdict for the plaintiffs against the defendant, J. H. Bryan, in the total sum of $850, and against plaintiffs and in favor of appellee, Kenneth

G. Clapp. J. H. Bryan has not appealed. Plaintiffs have appealed from the judgment rendered on the jury's verdict in favor of appellee.

Insofar as the liability of J. H. Bryan is concerned, the evidence is substantial and sufficient to sustain a finding that the damages to appellants' automobiles resulted from the negligent operation of an automobile by Bryan while under the influence of intoxicating liquor.

At the time of the collision Bryan had been employed for about three months as a car salesman by appellee Clapp. Appellee offered evidence to establish two defenses: (1) that Bryan was an independent contractor for whose negligence Clapp would not be liable, and (2) that even if Bryan was a servant of Clapp and not an independent contractor, he was not acting within the scope of his employment at the time of the collision.

Appellants' first contention for reversal is that the trial court erred in submitting to the jury the question whether Bryan was an independent contractor because appellee did not plead the independent contractor relationship as a defense in his answer. It has been held that the defense of independent contractor is not an affirmative defense and need not be specially pleaded but may be raised under a general denial. *Texas Pipe Line Co. of Oklahoma* v. *Willis,* 172 Okla. 148, 45 Pac. 2d 138; 57 C. J. S., Master and Servant, § 614. Moreover, this court has held that where the case has been tried upon a certain issue not tendered by an answer and evidence was introduced concerning it without objection, the answer will be treated as having been amended to conform to the proof and plaintiff may not challenge the sufficiency of the answer on appeal. *Athletic Tea Co.* v. *McCormack,* 159 Ark. 405, 252 S. W. 7; *Fairbanks-Morse & Co.* v. *Hogan,* 201 Ark. 1114, 148 S. W. 2d 162. There was much testimony introduced without objection at the trial relating to the question whether Bryan was an independent contractor or a servant of appellee and the answer will be treated as having been amended to conform to the proof on this issue.

The court gave appellee's requested instruction No. 7 over the general objection of appellants. The instruction reads: "If you find from the evidence that at the time of the collision the defendant, J. H. Bryan was an independent contractor, then you are instructed that the defendant, Kenneth G. Clapp, cannot be liable for the alleged acts of negligence, if any, of the said J. H. Bryan. An independent contractor is one who is employed to perform a specific task without any control or supervision from the employer except as to the result of the work accomplished, and in this case if you find that the said J. H. Bryan, even though you find he was employed by the said Kenneth G. Clapp as an automobile salesman, chose his own method of performing his work, furnished his own means of working, and was not responsible to the said Kenneth G. Clapp except as to the results produced, and that he paid all of his expenses of his employment and chose his own means, time and place of working, then in that event he would be an independent contractor, and if you find that he was such an independent contractor at the time alleged, your verdict must be for the defendant, Kenneth G. Clapp."

Appellants argue that the undisputed testimony shows that J. H. Bryan was an employee of appellee as a matter of law and that it was, therefore, error to submit the issue of independent contractor to the jury. There was evidence that Bryan worked for appellee as a car salesman under an oral agreement and on a commission basis. The automobile he was driving at the time of the collision was sold to him by Clapp on the "demonstrator plan". Under this arrangement Bryan was required to purchase a new Packard automobile every six months. The car was sold to Bryan at cost and the purchase was financed through a credit corporation to whom Clapp indorsed Bryan's note. Bryan paid his own personal expenses including all operating expense of the automobile. There was also evidence that Bryan was privileged to work when and where he pleased within the nine counties constituting his territory and that appellee had no right to direct the manner in which Bryan kept and controlled the car.

However, there was other testimony, which was disputed, to the effect that Bryan was required to attend daily sales meetings and on certain days to take turns with other salesmen in working on the floor all day and that on such days another salesman could use Bryan's automobile. There was also evidence that Bryan could be discharged by appellee at will and that the car operated by Bryan had the dealer's license of appellee on it.

This evidence, together with other testimony which will not be detailed here, resulted in a disputed question of fact as to whether Bryan was an independent contractor or the servant of appellee at the time of the collision. We have repeatedly held that if the contract is oral, and if more than one inference can fairly be drawn from the evidence, the question should go to the jury to determine whether the relationship is that of employer and independent contractor or that of master and servant. *Wright* v. *McDaniel,* 203 Ark. 992, 159 S. W. 2d 737; *Ozan Lumber Co.* v. *Tidwell,* 210 Ark. 942, 198 S. W. 2d 182. We conclude that the trial court properly submitted the issue to the jury. There is substantial evidence to support the verdict when the conflicting testimony is viewed in the light most favorable to appellee, and this court cannot set the verdict aside even though it may be against what we might conceive to be the preponderance of the evidence.

It is next insisted that the above-mentioned instruction does not correctly define an independent contractor. Appellee cites *Wilson* v. *Davison,* 197 Ark. 99, 122 S. W. 2d 539, and numerous other cases where we have set out and approved the following definition: "An independent contractor is one who, *exercising an independent employment,* contracts to do a certain piece of work according to his own methods, and without being subject to the control of the employer, except as to the result of the work." It is noted that the instruction given conforms to this definition except for omission of the phrase in italics. This omission did not, in our opinion, render the instruction inherently erroneous and, in the absence of a specific objection, we hold that the trial court did not err in giving the instruction as requested.

Appellants also contend that the court erred in refusing to give their requested instruction No. 9 which reads: "You are instructed that § 6620 of Pope's Digest of the laws of the State of Arkansas provides: 'Any person who shall misuse a dealer's license tag herein provided for by using the car to which it is affixed for any other purpose than demonstrating it for sale shall be denied the privilege of using a dealer's license tag on cars he may have for demonstration purposes, for a period of one year after such misconduct.'

"So, therefore, if you find from the preponderance of the evidence that defendant Clapp permitted defendant Bryan to use defendant Clapp's dealer's license tag at the time and place mentioned in the complaint, then you may take this fact, with all the other facts in the case, into consideration in determining whether or not defendant Bryant was at said time in the furtherance of defendant Clapp's business."

Section 6620 of Pope's Digest, *supra,* was enacted as Sec. 26 of Act 65 of 1929. By Act 386 of 1939 the legislature covered the field of registration of motor vehicles. Section 12 of said act, which now appears in Ark. Stats. 1947, § 75-112, relates to the issuance of dealer's licenses and superseded §§ 25 and 26 of said Act 65 of 1929. (See Compiler's notes to § 75-112, *supra.*) The provisions of § 75-112 are materially different from the superseded statute (§ 6620 of Pope's Digest, *supra*). It thus appears that the requested instruction is based upon a statute which has been superseded by a later act containing materially different provisions. For this reason, the trial court did not err in refusing the requested instruction. Appellants cannot complain of the action of the court in refusing an instruction which was in part incorrect. *Randleman* v. *Taylor,* 94 Ark. 511, 127 S. W. 723, 140 Am. St. Rep. 141.

Appellants also contend that reversible error was committed in the giving of appellee's requested instructions Nos. 3, 4, 5 and 6 over the specific objection that said instructions were repetitious and unduly emphasized the defense that appellee would not be responsible for

the negligence of Bryan unless the latter was engaged in the furtherance of appellee's business at the time of the collision. While the instructions complained of were applicable to separate phases of the evidence, there was unnecessary repetition of the particular defense which we have held to be improper. The question here is whether there was such undue emphasis of the repeated matter as to mislead the jury and call for a reversal of the judgment. Although the court's charge to the jury was not unduly lengthy in the instant case, the situation here is otherwise similar to that in *Furlow* v. *United Oil Mills*, 104 Ark. 489, 149 S. W. 69, 45 L. R. A., N. S. 372, where the court said: "The court gave a very lengthy charge to the jury, in which are numerous separate instructions relative to the various issues involved in the case. Some of these instructions are repeated, and while this repetition might seemingly lay undue stress upon the matters therein embraced, and for that reason was bad practice and improper, yet in this case we can not say that prejudice has resulted sufficient to call for a reversal on that ground." See, also, *Goodin, Adm'x* v. *Boyd-Sicard Coal Co.*, 197 Ark. 175, 122 S. W. 2d 548. So here, we cannot say that the repetition is of such flagrant character as to warrant a reversal of the judgment.

It is also insisted that the court erred in sustaining appellee's objection to the following question asked J. H. Bryan while testifying on behalf of appellants: "Q. In whose business were you engaged at the time you struck those automobiles?" The court sustained appellee's objection to the question as calling for a conclusion of the witness. There was no offer to show what the answer of the witness would have been. The direct testimony of an agent on the witness stand, as distinguished from proof of his extrajudicial statements, is of course admissible to prove his authority and the extent thereof where his powers and duties have not been reduced to § 691(c), as follows: "In receiving the testimony of the alleged agent to prove or disprove the fact of agency, the alleged agent to prove or disprove the fact of agency, the general rule that a witness must testify to facts and

not to conclusions is applicable, and hence it is not competent for the agent to give his opinion or state his conclusion as to the fact of agency; but he may state the facts and circumstances concerning the various transactions between himself and the alleged principal, leaving the court and the jury to determine, under the facts disclosed, whether or not he was such agent."

The witness Bryan was permitted to testify without objection that he was returning to his home from a trip made for the purpose of selling an automobile at the time of the collision. He also stated other facts from which the jury could have found he was engaged in the furtherance of appellee's business at the time. The following is typical of such testimony: "Q. And what business—in what business were you engaged at that time? At the time you were going home and the time you had this accident? A. I was going home from a demonstration. Q. From Lieutenant Culp? A. To him, yes sir." An answer to the question objected to merely called for a conclusion or opinion of the witness upon one of the issues the jury was called upon to decide. The objection was properly sustained.

Appellants also complain of the court's failure to instruct the jury that the burden was upon appellee to prove that Bryan was an independent contractor. There was no request for such instruction. The failure of the trial court to submit an issue to the jury is not error where no request has been made for such instruction. *State Life Ins. Co.* v. *Ford,* 101 Ark. 513, 142 S. W. 863.

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

McFaddin, J., dissents.

4-9043 226 S. W. 2d 551

Opinion delivered January 30, 1950.

Jake Brick and *Cecil B. Nance,* for appellant.

Hale & Fogleman, for appellee.

LEFLAR, J. This is an action by the holder of record title[1] to recover land from defendants whose claim is based on adverse possession. The case was tried twice in the Circuit Court. At the first trial the jury's verdict was for defendants, but a motion for new trial was granted because of procedural error, and the case was tried anew. At the second trial the jury again returned a verdict for defendants, and judgment was entered accordingly. Plaintiff appeals.

Plaintiff's title is traced by inheritance from H. A. McGee who in turn held from one Dykeman. Defendant D. W. Wallace received a deed to the land from a different claimant of title in 1923, and offered evidence that he had possession of the land from that time on. Plaintiff likewise gave evidence that she and her predecessors in title had possession during at least part of the time when Wallace claims to have been in adverse possession.

The legal requirements for adverse possession have been stated many times by this court. "In order that

[1] Both parties held deeds to the land, but the Circuit Judge found as a matter of law that plaintiff's record title was good, and this finding is not appealed from.

adverse possession may ripen into ownership, possession for seven years must be actual, open, notorious, hostile, exclusive, and it must be accompanied with an intent to hold against the true owner." *Stricker* v. *Britt,* 203 Ark. 197, 209, 157 S. W. 2d 18, 23; *Ringo* v. *Woodruff,* 43 Ark. 469. Adverse possession thus maintained for the statutory seven-year period vests title in the adverse possessor as completely as would a conveyance from the holder of a valid record title. Ark. Stats. (1947), § 37-101; *Hart* v. *Sternberg,* 205 Ark. 929, 171 S. W. 2d 475. Whether the necessary period of adverse possession has been maintained is a question of fact in each particular case.

The evidence introduced by defendants was to the effect that Wallace took possession of the premises, a one-acre lot with a very poor house on it, at the time he received his deed from a prior possessor in 1923. Defendants' evidence indicated that one Winnie Tucker rented the house from Wallace for a time in 1923, that a family named Gordon rented it from Wallace in 1924, that William Davy lived in it as Wallace's tenant in 1925, that John Tarple had possession as his tenant around 1930 and 1931, and that it was rented to others under Wallace's continuing supervision until 1935. There was evidence that in 1935 Wallace engaged in a dispute with H. A. McGee, apparently concerning the land now in question, and that McGee, a white man, threatened Wallace with physical violence. Wallace, a Negro about 70 years old at the time, left the country at once after this incident, and did not return until after McGee died in 1941. Evidence as to who was in possession during this six-year period was conflicting, but the great weight of the evidence indicated that those in possession were tenants of McGee. At any rate, when Wallace returned to Arkansas in 1941, a tenant named John G. Goodman was on the premises. Wallace at once gave Goodman notice to vacate, and Goodman moved off promptly, Wallace at the same time resuming possession. Plaintiff Mrs. Montgomery, as successor in title to McGee, learned at once of this change of possession.

After Wallace retook the land, he conveyed it to his son Ralph. Ralph put up a well-constructed four-room house on the premises and has used it as his residence since that time. The present action was brought in 1947.

The jury was properly instructed as to the nature of adverse possession and its possible effects as applied to the evidence in this case. Appellant does not now contend that the instructions were erroneous. The appeal depends solely on the sufficiency of the evidence to sustain the verdict. In this situation, we must view the evidence in the light most favorable to appellees (defendants), and if there is any substantial evidence in the record to support the verdict we must affirm. We must do this even though it might appear to us that the preponderance of the evidence is contrary to the verdict. *Hartzog* v. *Dean, ante,* p. 17, 223 S. W. 2d 820.

The summary of the case, set out above, shows that there was evidence in the record that defendant Wallace from 1923 until 1935 kept possession of the premises either in himself or his tenants. The jury could permissibly have accepted this testimony and have found from it that Wallace's possession, continuing for more than seven years, satisfied the definition of adverse possession and therefore vested title in him. McGee's possession for the six years from 1935 to 1941 was not long enough to divest the title thus found to have vested in Wallace. The retaking of possession by Wallace in 1941 was under his preëxistent title. The jury having so found, on sufficient evidence, we cannot disturb their verdict.

The judgment is affirmed.

MORLEY, COMMISSIONER OF REVENUES *v.* FIFTY CASES OF WHISKEY.

4-9067 226 S. W. 2d 344

Opinion delivered January 30, 1950.

O. T. Ward, H. Maurice Mitchell and *Ike Murry,* Attorney General, for appellant.

L. L. Mitchell, for appellee.

DUNAWAY, J. Appellants, Dean R. Morley, as Commissioner of Revenues, and the State of Arkansas appeal from an order of the Circuit Court of Nevada County, directing that fifty cases of whiskey which had been seized

as contraband under the alcoholic control laws of this state be returned to their owner, a resident of the dry State of Oklahoma.

The facts as stipulated by counsel are as follows: On or about November 27, 1948, the Sheriff of Nevada County stopped an automobile, driven by one O. J. Bounds, south of Prescott, Arkansas. Fifty cases of whiskey, bearing revenue stamps of the State of Louisiana, but on which the Arkansas excise tax had not been paid, were removed from the car. Bounds had purchased the liquor in Shreveport, Louisiana, and was transporting it to Oklahoma. He did not have a permit from the Revenue Commissioner of the State of Arkansas to transport liquor through this state. Nevada County, Arkansas, is a "dry" county.

In addition to the stipulation, the only proof in the case was an invoice from the Blue Grass Liquor Store in Shreveport, apparently introduced by agreement, showing that one F. U. B. Derrick, of Tabler, Oklahoma, was consignee of the whiskey in question.

The original action for forfeiture of said whiskey was begun in the Nevada Circuit Court by the State of Arkansas on relation of the Prosecuting Attorney of the Eighth Judicial District, alleging violation of several sections of the Arkansas alcoholic control laws. The Commissioner of Revenues intervened, alleging that said whiskey was being transported through Arkansas in violation of the provisions of Act 423 of the Acts of 1947 (Ark. Stats. §§ 48-920—48-933); that said whiskey was declared to be contraband in accordance with § 6 of said act and should be delivered to the Commissioner.

Although four separate violations of the law were alleged as the basis for forfeiture of the liquor, we deem it necessary to discuss only one. In Ark. Stats. (1947), § 48-404, it is provided that it shall be unlawful for any person to transport liquor into the state, without first having obtained a permit from the Commissioner of Revenues. All liquor found in the possession of any person

violating any alcoholic control law of this state is declared to be contraband which shall be seized and forfeited under the provisions of Ark. Stats., § 48-925 (§ 6 of Act 423 of the Acts of 1947).

The procedure upon seizure of liquor found in possession of one violating the foregoing sections of our statutes is set out in Ark. Stats., § 48-926 through § 48-929: Said liquor shall be turned over immediately to the Commissioner of Revenues in Little Rock. Within three days after receipt of same, he shall cause to be published in a newspaper having statewide circulation, a notice, to appear twice within a thirty day period, fifteen days apart. Said notice shall contain a list of the liquors seized, the approximate retail value thereof, the person if known from whom taken, the place where seized, and the advice that said liquors will be sold by the Commissioner thirty days from the first published notice. Within the thirty day period, anyone claiming any interest in said liquors may file a written petition requesting a hearing before the Commissioner to determine his rights therein. Within ten days from this request a hearing must be held, unless good cause for delay is shown, at which the witnesses shall be sworn and the testimony recorded. The Commissioner is required to make written findings of fact and enter his order on same, within fifteen days after completion of said hearing. An appeal may be taken to the Circuit Court of Pulaski County within fifteen days after the Commissioner's order has been entered, by lodging a transcript of the record of the hearing held before the Commissioner. No new evidence is heard by the Circuit Court on appeal. A further appeal may be taken to the Supreme Court.

Appellee seeks to sustain the order of the trial court on three grounds:

(1) Act 423 of the Acts of 1947 (Ark. Stats., § 48-920 through § 48-933) is a local act violative of Amendment No. 14 of the Constitution of the State of Arkansas because certain of its provisions apply only to "dry" counties.

(2) This Act violates Art. 7 § 11 of our State Constitution in taking jurisdiction from the Circuit Courts and placing it in the Commissioner of Revenues.

(3) Condemnation of the whiskey in question under the procedure set forth would deprive the owner of his property without due process of law, in violation of Art. 2, § 8 of the State Constitution.

We find all of appellee's contentions to be without merit. Since our decision is based on the law violation committed by Bounds in failing to obtain from the Commissioner of Revenues the required permit to transport liquor, we will not set out the provisions of the statutes which were violated by having the fifty cases of whiskey in a "dry" county under the circumstances in this case. The creation of additional offenses for possessing more than one gallon of liquor in "dry" counties, except under conditions prescribed by the Commissioner, clearly did not make Act 423 of the Acts of 1947 a local or special act. For the purpose of better enforcing the laws of this state in regard to the sale of alcoholic beverages, the Legislature made distinction between possession of quantities of liquor in counties where its sale is legal, and those in which it is prohibited. The legislative classification thus made was certainly appropriate and germane to the subject and was based upon substantial differences in situation. The reasonable relation between the subject matter of the limitation and the classification made, plainly meets the test of a general act as laid down in *Simpson* v. *Matthews,* 184 Ark. 213, 40 S. W. 2d 991. For an excellent discussion of "Special and Local Acts in Arkansas", see 3 Ark. Law Review 113.

From a careful consideration of the procedure hereinabove outlined to be followed upon the seizure of contraband whiskey, it is obvious that the Legislature did not attempt to make a "court" of the Commissioner of Revenues or to vest in him any judicial power in contravention of our Constitution. The hearing prescribed before the Commissioner is merely a preliminary step to the adjudication of the issue of forfeiture of the contraband by the

Circuit Court. The procedure here provided can be well-described in language of the United States Supreme Court, discussing a comparable situation in the case of *U. S.* v. *Ritchie,* 17 How. 525, 15 L. Ed. 236, quoted with approval in *Civil Service Com. of Van Buren, Ark.* v. *Matlock,* 206 Ark. 1145, 178 S. W. 2d 662 at page 1150: "It is also objected that the law prescribing an appeal to the district court from the decision of the Board of Commissioners is unconstitutional; as this Board, as organized is not a court under the Constitution, and cannot, therefore, be invested with any of the judicial powers conferred upon the general government. (Citing cases.) But the answer to the objection is, that the suit in the district court is to be regarded as an original proceeding, the removal of the transcript, papers, and evidence into it from the Board of Commissioners being but a mode of providing for the institution of the suit in that court. The transfer, it is true, is called an appeal; we must not, however, be misled by a name, but look to the substance and intent of the proceeding."

It is well settled that an action for condemnation of contraband liquor as forfeited property is a proceeding in rem. *Ferguson* v. *Josey,* 70 Ark. 94, 66 S. W. 345; *Kirkland* v. *State,* 72 Ark. 171, 78 S. W. 770, 65 L. R. A. 76, 105 Am. St. Rep. 25, 2 Ann. Cas. 342, *Leach* v. *Cook, Com. of Rev.,* 211 Ark. 763, 202 S. W. 2d 359. It was further decided in the *Leach* case that although the liquor there involved was seized in Chicot County, the Commissioner had the right to proceed in rem for its condemnation in the Pulaski Circuit Court, the jurisdiction where the liquor was held at the time the action was instituted. It had been contended, as here, that the condemnation action must be in the county where the liquor was seized. In that case the Commissioner was proceeding under authority of Act 357 of the Acts of 1941, which provided that all liquors confiscated anywhere in the state be turned over to the Commissioner, and that the order of condemnation be by any "court of competent jurisdiction". In the act under consideration in the case at bar, the Legislature has gone further and placed the exclusive jurisdiction for

liquor condemnation proceedings by the Commissioner in the Pulaski Circuit Court. As already pointed out, the fact that the Circuit Court action is instituted by an appeal from the Commissioner's order is immaterial. The end legal result is the same as that approved by this court in the *Leach* case.

The procedure prescribed by the statute for a claimant to have his rights in confiscated liquor determined in no way deprives him of his property without due process of law. The rights of a person in property of this kind were discussed by this court in *Kirkland* v. *State,* supra, where an attack was made on the constitutionality of Act 13 of the Acts of 1899. That act provided for the confiscation and destruction of illegal liquors on order of chancellors, circuit judges, justices of the peace, mayors and police judges, "provided, that any persons on whose premises or in whose custody any such liquor may be found under warrant of this act shall be entitled to his day in court before said property shall be destroyed." Of this proviso we said in the *Kirkland* case, at page 176, (first quoting from the earlier case of *Ferguson* v. *Josey,* supra): " 'This clearly means that the owner of such liquor shall be entitled to a fair and legal trial, with all the usual incidents thereto, for the purpose of ascertaining and determining whether his property has been forfeited, before it shall be destroyed; that he, or his agent in legal custody, shall have notice of the charge of the guilty purpose upon which his property is declared to be unlawfully held, a time and opportunity to prepare his defense, an opportunity to meet the witnesses against him face to face, and the benefit of the legal presumption of innocence.' The latter clause of the sentence quoted enumerates usual incidents of a fair and legal trial. A jury is not mentioned, and it is not necessary to constitute a fair and legal trial. In no case is a trial by jury expressly or impliedly required, or necessary to a full and complete enforcement of the act."

The procedure under Act 423 here challenged certainly gives the owner of any seized liquor full oppor-

tunity for a fair and legal trial. It is undisputed that the whiskey in question was in Bounds' possession being transported without a permit from the Commissioner of Revenues in violation of the law. The validity of requiring such a permit was upheld in *Duckworth* v. *State,* 201 Ark. 1123, 148 S. W. 2d 656, aff'd 314 U. S. 390, 62 S. Ct. 311, 86 L. Ed. 294, 138 A. L. R. 1144. The whiskey should therefore have been turned over to the Commissioner in accordance with the mandate of the Legislature; the lower court was without jurisdiction to make the order appealed from.

The judgment is accordingly reversed, and the cause remanded with directions that the fifty cases of whiskey be delivered to the Commissioner of Revenues or his agents.

ADAMS *v.* HEFFINGTON.

4-9048 226 S. W. 2d 352

Opinion delivered January 30, 1950.

George F. Hartje, for appellant.

Guy H. Jones, for appellee.

GRIFFIN SMITH, Chief Justice. Heffington sued Dr. Adams, alleging that dental work negligently done caused an illness, and unnecessary pain and suffering. From a judgment for $250 the defendant has appealed.

Appellant's excellent brief correctly states the law respecting surgeons, men of medicine, and dentists when charged with professional negligence and where the only evidence is that the patient did not recover, or the malady was not halted, or a secondary and seemingly related infirmity occurred, etc. We have said that the practice of medicine, surgery, and the use of an X-ray therapeutically, are inexact sciences, and therefore *res ipsa loquitur* as a rule of evidence does not apply. *Brown* v. *Dark,* 196 Ark. 724, 119 S. W. 2d 529; *Routen* v. *McGehee,* 208 Ark. 501, 186 S. W. 2d 779.

. . . .

Appellant is a dentist who has practiced in Heber Springs, Quitman, Greenbrier, Conway, then at Beebe and back in Conway. As a result of arrangements made July 29, 1948, Dr. Adams agreed to extract Heffington's teeth for $25, and the amount was paid. The patient, however, did not want all of the work done at one time.

According to Dr. Adams, he initially extracted three of Heffington's upper teeth, and a deciduous root.[1] A molar was spoken of as having been badly infected. The patient was suffering from chronic sinus trouble and some pyorrhea. In preparing for the extractions Dr. Adams blocked the nerves to prevent pain. One tooth was broken, requiring use of a rotary instrument called a "burr". By this method a small groove or "rim" was cut around what is called the process structure; then an "elevator" was used to remove the root. There was no drilling on or in the tooth, as the term is ordinarily used. On the contrary, says Dr. Adams, the burr was applied to the outside of the tooth remnant as a means of provid-

[1] Dr. Adams explained: "A deciduous root is one that is not a permanent tooth or a baby tooth. . . . The permanent teeth [sometimes] do not come out in time, [and] the permanents push [the deciduous] teeth down where they don't belong; they are wedged in the gums on down between the teeth."

ing a more secure hold for the other instrument. When the upper portion of the tooth broke, Heffington was told what had occurred. An inference deducible from Dr. Adams' testimony is that the patient acquiesced in what was being done. Heffington was told to use warm salt water several times a day as a mouthwash. It was appellant's professional judgment that Heffington was suffering from sinusitus before the teeth were extracted and when he returned at a later date.[2] These conditions frequently improve or the disease may entirely disappear when teeth infected near the antrum are removed. Sometimes root infection causes puncture, or the root itself may be so near the sinus that an opening is left when extraction occurs.

Dr. Adams admitted that he did not use an X-ray before making the extractions, nor did he think it necessary to X-ray the area to determine whether any fragments remained. The opening from which the teeth were removed was sufficient for him to see with the naked eye, and to appraise results. Neither did Dr. Adams think it necessary to refer his patient to a medical man. Part of his testimony on that issue is shown in the margin.[3]

Finally, Dr. Adams asserted that in extracting the three teeth he broke only one; that he removed the root in the manner formerly explained, and the deciduous root was a separate transaction; but, "I told the patient there were deciduous roots left in there, and [asked] him to come back so I could finish the work."

Dr. J. O. Gregson, dentist, a witness called by the plaintiff, testified that he extracted "about" three roots

[2] Dr. Adams testified that on one occasion Heffington called and explained that he was not then ready to have the dental work finished. A charge of $8 was made for what had been done, and $17 was refunded. There was no complaint at that time that the work had been done in a non-professional manner.

[3] Cross-examination of Dr. Adams: Q. "Do you drill people for sinus trouble?" A. "[Yes, sir,] if the teeth bother them." Q. "Are you qualified to treat sinus trouble?" A. "If the teeth are bothering the sinus, that is [a] dentist's work." Q. "When you pull teeth and they become infected, when does that cease to be a dental question and become a medical question?" A. "I don't know about it becoming a medical question." Q. "If he continued to grow worse, would you send him to a medical doctor?" A. "I didn't send him to a medical doctor."

from Heffington's upper right jaw after July 29. Position of the roots was ascertained by use of the X-ray. One sliver had a groove in it, and it appeared to have been drilled. Fragments exhibited to the witness seemed to be those he had removed, and (indicating) "this is one here that had the hole down through it. . . . It came from the upper right first molar. . . . I extracted the root by cutting the gum and using an elevator. There is no point in using a drill when you don't need it, and I didn't need a drill. . . . I took roots out on two different occasions. . . . I could tell that bone was left in the gum if I had broken it off".

Testimony of dentists called by the defendant justified the jury in believing that the roots complained of were negligently left in Heffington's jaw, and that one was drilled through. These witnesses, in identifying the tool or instrument marks, thought that a drill, as distinguished from a burr, had been utilized.

Conceding that the defendant was sufficiently trained, and that his experience was such as to make him a competent dentist, the testimony was legally sufficient, on appeal, to sustain the charge that remnants of roots were carelessly left in circumstances showing need for their removal. In any event, the jury was justified in finding that Heffington's prolonged inconvenience and the attending pain were brought about by appellant's failure to find what others so promptly discovered. Certainly there was substantial evidence in contradiction of Dr. Adams' assertion that the fragments were not parts of the broken tooth.

The explanation Dr. Adams says he made to his patient, and the treatment claimed to have been given, cannot be harmonized with what appellee says. If Heffington's statements are true, the extractions and attending treatment were insufficient to the point of negligence. In important particulars Heffington is supported by one or two of the dentists called by the defendant.

Affirmed.

JACKSON *v.* BOSTIAN.

4-9073 226 S. W. 2d 585

Opinion delivered February 6, 1950.

[redacted]

Carroll W. Johnston, for appellant.

Gordon & Gordon, for appellee.

HOLT, J. Appellant, Jackson, and appellee, Bostian, were competing lumber dealers, and also engaged in trucking operations in Morrilton, Arkansas.

The present suit was instituted by appellant against appellee originally to recover $6,000 for an alleged breach, by appellee, of a written contract between them, under the terms of which appellant agreed to purchase from appellee a truck and trailer, an Interstate Commerce (ICC) permit, and also a permit to operate trucks in the States of Oklahoma, Missouri and Kansas. The consideration for the truck and trailer was $3,500, for the ICC permit $2,000, the three States permit $500, or a total of $6,000, which appellant placed in escrow in a Morrilton bank to be delivered to appellee following fulfillment of certain conditions set forth in the contract.

The case comes to us on direct appeal and cross-appeal.

Upon a trial, the court made certain findings of fact which were embraced in the decree, and which we think were not against the preponderance of the testimony.

We do not attempt to detail the facts, but we here adopt the following recitals from the decree: "On the 7th day of November, 1947, the plaintiff, Jackson, and

the defendant, Bostian, entered into a written sale and purchase contract, the pertinent provisions of which are as follows:

" '(1) The party of the first part (Bostian) has sold to the party of the second part (Jackson) one 1946 Model 1½ ton GMC truck and Fort Smith semi-trailer, together with ICC permit No. 107404.

" '(2) The party of the second part (Jackson) agrees to pay party of the first part (Bostian) $6,000 for the above described truck, trailer and permit. This $6,000 is hereby deposited with the escrow agent to be delivered to party of the first part (Bostian) when and as following conditions are met (a) When notice has been received from Bureau of Motor Carriers that ICC permit No. 107404 has been transferred from Buddy Bostian to Ward J. Jackson, escrow agent shall immediately pay over to party of first part $5,500, Buyer (Jackson) to pay expense of State transfers; Seller (Bostian) pays expense of ICC transfer. (b) When transfer has been made and official notice given that said transfer has been made to Ward J. Jackson in the States of Missouri, Oklahoma and Kansas, escrow agent shall pay to party of first part (Bostian) the balance of the purchase price of $500 and shall deliver to party of second part (Jackson) Bill of Sale herein referred to.

" '(3) The parties agree from the date of the contract the truck and trailer shall be operated by the party of the first part (Bostian) who shall collect all income from such operation and pay out all expenses necessary to operation thereof, and that when the $5,500 has been paid over by the escrow agent to party of the first part (Bostian) that he shall render to party of second part (Jackson) an itemized statement of income and expenses of operation of said equipment and shall pay to party of second part (Jackson) the net money received from such operations, said $5,500 shall be paid upon receipt from Seller (Bostian) stating interim operation has been settled between them.

" 'Time not having been made an essence of this contract, then on December the 14th, 1948, the date of the order of the Interstate Commerce Commission approving the transfer, or as soon thereafter as the parties received notice thereof, the whole of the $5,500 would have become payable, less the net amount received by Bostian from the operation of the truck and trailer as provided in said contract.

" 'The delay in procuring the transfer of the ICC permit appears to have been no fault of the parties, as prior to the date of the contract, they had joined in an application to the Commission for such transfer and some time in August, 1948, had been notified that such petition has been dismissed without prejudice. Thereafter on October the 18th petition of Bostian was filed for re-consideration of the order of dismissal which resulted in the order of transfer above referred to, so it is unnecessary for the Court to comment on the action or inaction of either party resulting, if it did, in the delay in procuring a transfer of the ICC permit, as each appears to have acted in good faith.'

"That the ICC permit No. 107404 belongs to the plaintiff Jackson as of the date of its transfer and he can take such action as he may desire as to keeping it current or having it cancelled.

"That the consideration for the transfer of the permits in the States of Oklahoma, Kansas and Missouri has failed and the $500 held in escrow by the agent should be returned to the plaintiff Jackson.

"That on or about the 15th day of January, 1948, the plaintiff and defendant entered into a verbal agreement whereby the defendant Bostian agreed to keep the 1946 model 1½ ton GMC truck and Fort Smith semi-trailer mentioned in the escrow agreement, and to permit plaintiff Jackson to draw down the sum of $3,500.

"That on or about December 18th, 1948, the escrow agent, First State Bank, paid to the plaintiff Jackson said $3,500. That of the balance of $2,000 held by the escrow agent, the same should be paid over to the de-

fendant Bostian, less $210.37 net profits from the operation of the truck and trailer as per contract, which amount should be paid by the escrow agent to the plaintiff, Jackson.

"That the entire cost of this proceeding is apportioned between the parties plaintiff and defendant on a 50-50 basis.

"IT IS THEREFORE considered, ordered, adjudged and decreed that the Escrow Agent, First State Bank, Morrilton, Arkansas, pay to the plaintiff, Ward J. Jackson, the sum of $710.37, and to the defendant, George T. (Buddy) Bostian, the sum of $1,789.63, and that the entire cost of this proceeding be apportioned against the parties, plaintiff and defendant, on a 50-50 basis.

"The plaintiff prays and is hereby granted an appeal to the Supreme Court, and the defendant prays and is hereby granted a cross-appeal."

Having reached the conclusion that the findings of the trial court were not against the preponderance of the evidence, the decree is correct and is affirmed both on direct and cross-appeal.

WALLS *v.* BOYETT, ADMX.

4-9079 226 S. W. 2d 552

Opinion delivered February 6, 1950.

Reid & Roy, for appellant.

Denver L. Dudley, for appellee.

MINOR W. MILLWEE, Justice. Mrs. Dorothy Bell Schultz was critically injured in an automobile accident in or near the City of Blytheville, Arkansas, about 2:00 a. m. January 5, 1946, and died nine days later. The car in which she was riding at the time with some other young people was being driven by her "date," Raymond Crawford. Mrs. Schultz was taken to Walls Hospital, which is owned and operated by appellant, Dr. J. M. Walls, in the City of Blytheville. She remained at the Walls Hospital until two days before her death, when she was removed to another hospital.

Appellee, Ethel Boyett, mother of Mrs. Schultz, qualified as administratrix of her daughter's estate and brought suit against Raymond Crawford, driver of the automobile, Ira Crawford, owner of the car, appellant, J. M. Walls, as owner of Walls Hospital, and Virgil Walls, business manager of said hospital. The complaint charged that the negligence of Raymond Crawford in the operation of the automobile, coupled with the negligent acts and lack of proper attention and treatment by appellant, Dr. J. M. Walls, resulted in the

death of Mrs. Schultz. Dr. Walls and Virgil Walls were also charged with false imprisonment by refusing to permit Mrs. Schultz to be removed to another hospital.

At the time of submission of the case to the jury all defendants and issues in the case had been eliminated by demurrer, or other pleadings, except the charge against appellant for alleged negligence in the treatment and attention given deceased while a patient in the hospital. The liability of appellant for damages was limited by the able trial judge to compensation to deceased's estate for conscious pain and mental suffering, if any, sustained by deceased as the result of the negligent conduct of the appellant. In this connection the jury was instructed that there was no testimony showing that appellant was in any way responsible for the death of Mrs. Schultz, and that the burden was upon appellee not only to show that appellant or the hospital attendants were negligent in the treatment and attention given, but also to prove that damages resulted from such negligence.

The jury returned a nine to three verdict in appellee's favor for $500. On this appeal from the judgment rendered on the verdict, appellant has abandoned all assignments of error except those which assert that the evidence was insufficient for submission of the case to the jury and that the trial court erred in refusing to direct a verdict for appellant. There is no cross-appeal.

Appellee alleged in her complaint that when her daughter was taken to appellant's hospital, she was placed in a corridor open to the public gaze where she remained until the eighth day without medical treatment except for occasional hypodermics.

Mrs. Schultz was admitted to Walls Hospital about an hour after the accident. The hospital was crowded and there was no regular room available. Mrs. Schultz was placed upon a metal folding cot in a room which had formerly been used as a doctors' dressing room and lounge. She was removed to a private room and placed

on a regular hospital bed when such room became available two days later.

According to the testimony of appellant, which appears to be undisputed, Mrs. Schultz was suffering from a fractured skull, a massive brain hemorrhage, broken back, partly severed spinal cord, fractured right arm and paralysis from her shoulders down. She had three lacerations across one side of her throat exposing the jugular veins with the small jugular severed and her tongue was cut almost in two. She also had one collapsed lung as a result of previous tubercular trouble. Appellant and the surgical nurse were summoned upon Mrs. Schultz's arrival at the hospital. Appellant, with the nurses' assistance, sutured the lacerations, reduced the fractured arm by application of a plaster splint, administered tetanus antitoxin and sedatives and removed broken glass from several parts of the patient's body. The next morning appellant noticed the development of pneumonia which was soon cleared up by penicillin shots.

Appellee and her sister remained with her daughter most of the time while she was in the hospital. In her testimony appellee made numerous charges of mistreatment and inattention. Many of these were in the nature of conclusions of a worried and distraught mother and were shown upon her own cross-examination to be without substantial basis in fact. She testified that her daughter was placed upon a cot without a mattress; that she was not properly washed and bathed; that appellant should have operated on her head; that there was no need for the plaster cast on her arm; that X-rays should have been made; that the patient had no bowel movement; that she was not fed; and that she was neglected generally by attendant nurses. On cross-examination, she stated that she was not making any criticism of appellant for putting a cast on deceased's arm; that the nurses would come in and give deceased shots and take her temperature; that she was given glucose and penicillin shots, which cured the pneumonia; and that they tried to give her epsom salts through her nose but she would not take it.

She further testified on cross-examination: "Q. You have told us though they hadn't done anything— A. He hadn't. Q. But you are charging him with— A. I ain't charging him with nothing. He'se over the nurses. He had them doing the things. He got mad because I got a room—that would be the truth. He couldn't take it. He just went right out and didn't say a word. Q. Yet they were there working with your daughter, trying to help her? A. After he had seen it. That's all I could say. Q. But you forgot to tell us they had done that? A. No, sir; I didn't forget. You just didn't ask me. You forgot to ask me that. I know everything they done. Q. Are you remembering the fact that penicillin was given repeatedly? A. They gave her about two shots of it. They said they done had it broke. Q. And if they gave more than two shots of penicillin you have forgotten it then? A. No. That's the onliest time they give her anything, unless she got to hollering so loud. Then they would come in and give her a hypo. Q. If the doctor were to tell you that repeated hypodermics, taken in your daughter's condition, would be dangerous to her recovery, would you believe that? A. They ought to know what they are doing, but they really gave her them. Q. I thought you were objecting because they didn't give them often enough. A. Didn't give what often enough? Q. Didn't give her hypodermics often enough. A. No, I didn't object because they didn't give them often enough. I didn't object to that. It looks like they could have given her something besides a shot. If they had just done something, tried to get her better, or take any interest in her. Mr. Reid, it was the interest part. They didn't take any more interest in her, no more than if she had been a hog. Q. You mean giving her hypos they didn't take any interest in her? A. I didn't think the nurse should give her a shot and then walk on out. I didn't reject nothing—anything they done. Not one thing. Q. And in giving her the glucose they were not taking an interest in her? A. If they had only tried to do something for her. I knew she needed it. I had to take so much myself. She was starving to death.

"Q. Tell me just exactly now what is your criticism? What did they do, or didn't do, to your daughter that you complain of? A. Mr. Reid, I can't even tell you how that was—how they were to me. There weren't nothing done for Dorothy—if they had just made an effort to pull her up from there. If there had been I wouldn't have been up here. Q. What did you want him to do? A. Do something for her. Come in there and treat her like she was a human—like I was treated when I was up there with an operation; come in and see if she was better or worse. Q. What was it they did that wasn't like they treated you? A. Because they didn't do anything for her. Mr. Dudley: What is it? A. What I didn't like about it, he said. Because they didn't give her— Mr. Reid: Q. Didn't give her what, Mrs. Boyett? A. They just didn't give her attention. They didn't show her no respect, as if she was a human, Mr. Reid. You know that is just pitiful, to let anybody like Dorothy just lay there and be treated that way . . .

"Q. Tell me, please, where he failed to show respect? A. In not coming in and seeing her hisself, or letting the nurses come in and telling me, like a mother should be told: 'Mrs. Boyett, Dorothy is better, and we have hope for her.' I could have stood it. I just watched and wished for something. Q. Let's pin it down then: You wanted them to come in and sympathize with you? Is that it? A. No—no: I did not. I've been in other hospitals. I've been in other hospitals—you could get the record of it I just wanted them— Q. Well now, what is it you say they didn't do? They didn't tell you she was going to get well, or was not going to get well, or didn't show you sympathy? Is that the trouble? A. No—no. I knowed she couldn't live unless something was done for her. Her head should have been operated on and this place raised up. He didn't do that."

Dr. Walls and the nurses testified that Mrs. Shultz was unconscious at all times while she was in the hospital. On cross-examination appellee testified: "Q. Mrs. Boyette, from the time your daughter entered the hospital until the time she left she was in an unconscious condition, wasn't she? A. Absolutely; yes, sir." On

re-direct examination she stated: "Q. Now, I don't know whether you caught the question or not, but Mr. Reid asked you if she was unconscious at all times,— A. Oh, yes. Q. After she was brought to the hospital? A. Yes. Mr. Dudley, Lord, I would have give the world if she had spoke just one word to me. Q. You said this morning she recognized you— A. I would say 'Dorothy, honey, do you know who this is?' She would say 'Mama.' That's all in the world she said. If she tried to talk her eyes just glittered like that. But she couldn't talk. She was out."

It is well settled under our decisions that a physician or surgeon in the treatment of patients is required to possess and to exercise that degree of skill and learning ordinarily possessed and exercised by members of his profession in good standing, practicing in the same line, and in the same general neighborhood, or in similar localities; and he must use reasonable care in the exercise of his skill and learning and act according to his best judgment in the treatment of his patients. *Dunman* v. *Raney,* 118 Ark. 337, 176 S. W. 339; 41 Am. Jur., Physicians and Surgeons, § 82.

In *Gray* v. *McDermott,* 188 Ark. 1, 64 S. W. 2d 94, Chief Justice JOHNSON, speaking for the court, said: "The uncontradicted testimony in this case shows that the deceased received from his attending physicians, including Dr. Gray, the degree of skill and learning ordinarily possessed and exercised by members of their profession in good standing in this neighborhood, and that they used reasonable care in the exercise of their skill while attending him after he was shot, and that they exercised their best judgment in administering their services. This is all that is required of physicians and surgeons in this State. It may be that some outstanding surgeon could have or would have done something for Mr. McDermott that was not done by these physicians, but this is purely speculative in so far as this record is concerned. Moreover, this is not the test to be applied in cases of this kind. Reasonable care, skill and learning is all that is required."

It is equally well settled that the keeper of a hospital is liable for damages if he fails to perform some duty which he owes to the patient and the patient is injured as a result of this failure; and the extent and character of this duty depend on the circumstances of each particular case. *Durfee* v. *Dorr,* 123 Ark. 542, 186 S. W. 62.

Such questions as whether the plaster cast should have been placed on the fractured arm, X-ray made, or an operation performed were obviously issues requiring scientific knowledge to determine. *Gray* v. *McDermott, supra.* The uncontradicted medical testimony of appellant, Dr. Husband and Dr. Hubener was that approved and proper treatment was given; that the nature and extent of the injuries were ascertainable and known without the use of X-ray and that the patient's restless condition rendered it dangerous and difficult to obtain proper pictures; that surgery was not only inadvisable but would have in all probability hastened death; and that rest and quiet offered the best hope of recovery. Dr. Hubener treated the patient after removal to the second hospital. While he stated that he took X-ray pictures, he also testified that this was done to please appellee rather than from any clinical benefits to be derived therefrom; that the patient had an acute brain injury and little chance of survival from the beginning.

If it be said that the jury was warranted in finding negligence on the part of appellant, or his attendants, on the disputed questions of whether there was a mattress upon the cot first used, the bed linens were properly changed, the patient properly bathed and similar charges of inattention, the question remains as to whether there was substantial evidence to show that Mrs. Schultz endured conscious pain or mental suffering by reason of said negligence. If there was such conscious pain and suffering, in addition to the suffering which the patient's existing critically injured condition would have caused her, and there is sufficient evidence to show that the increased pain was caused by the negligence of appellant, the verdict should stand. *Durfee* v. *Dorr,* 131 Ark. 369, 199 S. W. 376. After con-

sideration of the evidence in the light most favorable to appellee, we conclude that the evidence is insufficient to show that Mrs. Shultz suffered additional conscious pain or mental suffering on account of the acts or omissions charged. As we view the evidence, it is virtually undisputed that deceased was never conscious while she was in the hospital. We find no substantial evidence affording a basis for a reasonable inference by the jury that additional conscious pain or suffering proximately resulted to deceased on account of the negligence of appellant or the hospital attendants. It follows that the verdict rests on speculation and conjecture.

The judgment is, therefore, reversed. Since the cause of action seems to have been fully developed, it is dismissed.

COVINGTON, ADMINISTRATOR *v.* COVINGTON.

4-9083 226 S. W. 2d 557

Opinion delivered February 6, 1950.

J. B. Milham, for appellant.

John L. Hughes and *O. Wendell Hall, Jr.*, for appellee.

DUNAWAY, J. This appeal comes from a judgment of the Saline Probate Court allowing a claim of appellee, J. W. Covington, against the estate of his deceased brother, C. H. Covington, Sr., who died early in 1947.

The claim, filed in due time but disallowed by the administrator, was for a total of $283.33 which sum represented the balance due by decedent on what was an alleged running account with appellee beginning May 25, 1929. The administrator denied the account as to all items claimed since April 17, 1943, and pleaded the Statute of Limitations as a bar to recovery of any items prior to that date. Since 1943, the only items claimed by appellee were as follows:

1946		Debit	Credit
February	8—½ bu. corn (chickens)	$0.75	
April	2—5 gals. water McClenden Springs	.50	
April	12—3 gals. water McClenden Springs	.30	
May	6—2 gals. water McClenden Springs	.20	
August	26—By hay wire by C. S. Covington		$1.28

In order to avoid the bar of the Statute of Limitations it was necessary for the appellee to prove the existence of a mutual open account current between himself and the deceased. Proof of such an account

would make the period of limitation for the whole account begin at the time of the last item proved. *Dover Mercantile Co.* v. *Myers*, 180 Ark. 576, 21 S. W. 2d 972.

The proof as to the account was this: Appellee introduced, over objections of appellant, an account book showing items of debit and credit extending over a period commencing May 25, 1929, and ending with the items above listed in the year 1946. Over appellant's objections, appellee testified that the item of $1.28 on September 26, 1946, was a credit allowed decedent for some baling wire obtained by appellee; that the last settlement between the brothers was in the fall of 1928 and that the account was correct. Appellee's son testified that on August 16, 1946, he was visiting at home and went to his uncle's house to get some baling wire. This witness further testified that *he* knew his father kept an account of frequent transactions with his uncle, and that the $1.28 credit item was for the baling wire. Appellee's daughter testified that her father kept a record of his transactions with her uncle. Two other witnesses testified as to financial transactions between the two brothers, and identified checks of the Covingtons dated at various times in the 1930's. It will be noted that the only testimony as to the actual account claimed and the items therein was that of the claimant himself.

Appellant's contention is that appellee's testimony was incompetent as violative of the Dead Man's Statute (Const. Sched. § 2, 1 Ark. Stats. p. 187) which reads: "In civil actions no witness shall be excluded because he is a party to the suit or interested in the issue to be tried. Provided, that in actions by or against executors, administrators, or guardians in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party. Provided, further, that this section may be amended or repealed by the General Assembly." In a similar situation we held such testimony incompetent in *Johnson, Adm.* v. *Murphy,* 204 Ark. 980, 166 S. W. 2d 9. It was further held in the *Johnson* case that the

mere fact that payments have been entered on an account book and appear as credits is insufficient, standing alone, to prove that payments were in fact made by the deceased to a claimant against his estate.

Appellee argues that his account book, together with the testimony of witnesses other than himself, is sufficient to sustain the allowance of his claim as being one based on a mutual account. He contends that the account book was properly introduced even though his testimony in identifying and explaining it is held incompetent, under the provisions of Act 293 of the Acts of 1949. The title of that act is "An Act to Provide for the Introduction in Evidence in the Courts of this State of Records Made in the Regular Course of Business and for Other Purposes." It is unnecessary to decide whether the type of account book here sought to be introduced (a single 154-page ledger showing scattered accounts of individuals over a period of twenty years) was within the terms of this Act relating to records "made in regular course of any business." We have concluded that, conceding the admissibility of the account book, there is not sufficient competent evidence under the ruling of the *Johnson* case to sustain the judgment of the probate court. Proof that the deceased and his brother had numerous business transactions over a twenty-year period; and that the claimant's children knew he kept some kind of an account is no proof of a mutual account. A mutual account was defined in *St. Francis Valley Lbr. Co.* v. *Orcutt,* 174 Ark. 282, 295 S. W. 713, where we said at page 286: "On the other hand, mutual accounts arise where each party has rendered services or sold articles of property to the other with the expressed or implied understanding that their respective claims shall, upon settlement, be offset to the extent of the smaller claim. * * * The more usual definition of mutual accounts is a reciprocity of dealing, charges, and credits on both sides, each party having a cause of action against the other." Certainly the only additional proof in the case, the mere fact that the deceased let his nephew take some baling wire from his barn, without any showing that this was done by him

as payment on a debt due appellee, adds nothing to the bare record of appellee's account book as showing a mutual account.

It follows that the plea of limitations should have been sustained. The judgment is, therefore, reversed and the cause dismissed.

BASS *v.* WILLEY.

4-8986 226 S. W. 2d 980

Opinion delivered January 30, 1950.

Rehearing denied March 6, 1950.

John M. Henderson and *Arthur R. Macom,* for appellant.

Virgil R. Moncrief and *John W. Moncrief,* for appellee.

ED. F. MCFADDIN, Justice. The only question to be decided on this appeal is whether the Chancery Court was correct in refusing to set aside a decree rendered at a former term. Other questions, injected into

the record and briefs, concern (a) accretion and avulsion, and (b) determination of County boundary lines. These matters, however, are not necessary to a decision of the stated question; and are mentioned for the purpose of negativing any idea that this opinion decides them.

FACTS

On March 25, *1946,* the Chancery Court of Arkansas County rendered a decree in favor of Willey and against Bass. On March 24, *1947* (one day less than one year after the rendition of the 1946 decree), Bass filed a motion to vacate the 1946 decree. From a refusal of the Chancery Court to vacate the said (1946) decree, Bass brings this appeal. We chronologically list the steps leading up to the present litigation:

1. In 1931 these parties had litigation in the Chancery Court of Arkansas County concerning lands adjacent to those in the present suit. Willey named Bass as a defendant in a suit to quiet Willey's title to land then claimed to be accretion to Sec. 36[1] immediately north of Sec. 1.[2] The Chancery Court refused the confirmation, and Willey appealed. We dismissed the appeal for noncompliance with Rule 9. See *Willey* v. *Bass,* 186 Ark. 1198, 53 S. W. 2d 225. We will refer to this as the 1931 suit.

2. In 1933 Willey filed another suit against Bass, alleging that certain lands described as being Sec. 1, Twp. 8 S., Rg. 4 W. in Arkansas County had been purchased by Bass at a tax sale in 1927; that Willey had purchased the said lands from Bass[3] in 1930 and had immediately rented the lands to Bass by written lease; and that Bass was cutting timber from the lands and should be enjoined. That case was transferred to the Circuit Court and Willey took a voluntary non-suit in 1940. We will refer to this as the 1933 suit.

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[1] and [2] Sec. 36 is in Township *7* S., Range 4 W.; and Sec. 1 (here involved) is in Township *8* S., Range 4 W.

[3] Bass had purchased the lands in the name of his minor son, and procured a probate Court order authorizing the sale to Willey. Bass then individually rented the same land from Willey.

3. On March 26, 1945, Willey filed suit against Bass alleging (a) that Willey owned the lands described as Sec. 1, Twp. 8 S., Rg. 4 W. in Arkansas County, and (b) that Bass was threatening to cut and remove timber therefrom, etc.; and prayed for an injunction and an accounting. On March 25, 1946 (one day less than one year from the filing) a decree was rendered against Bass, reciting personal service,[4] etc., and stating, *inter alia*:

"WHEREFORE, it is by the court considered, ordered and decreed that the defendant, T. P. Bass, his agents and employees and all persons holding from or under him, be and they are forever and perpetually enjoined and restrained from cutting or severing or disturbing any timber on Section One (1), Township Eight (8) South, Range Four (4) West, and/or the accretions adjoining same or contiguous thereto, all in the Southern District of Arkansas County, Arkansas, and they are perpetually enjoined from removing any timber therefrom:" We will refer to this suit as the 1945 suit, and the decree as the 1946 decree.

4. On March 24, 1947 (one day less than one year after the entering of the 1946 decree) Bass filed in the 1945 suit a motion to vacate the 1946 decree. This motion was filed long after the lapse of the term of court at which the decree was rendered; and the motion was not verified, as required by § 29-506 Ark. Stats. (1947). But, on September 22, 1947, Bass filed a pleading—entitled "Demurrer and Answer"—which was verified, and which sought to set aside the 1946 decree on the theory that there were then no lands in Arkansas County legally describable as being Sec. 1, Twp. 8 S., Rg. 4 W.[5] We refer to Bass' pleading as the 1947 motion.

[4] The personal service on Bass is not disputed in this appeal.

[5] Bass pointed out the tendency of the Arkansas River to shift its current and change its banks. He claimed that in the period from 1819 to 1918 land originally described as Sec. 1, Twp. 8 S., Rg. 4 W. in Arkansas County entirely lost its identity as sectionized lands, in that it disappeared because of the erosion of the river. Then, he claimed that from 1918 to 1947 the Arkansas River changed its course and, either by accretion or avulsion, lands came into existence located on the map as were those originally described as Sec. 1, Twp. 8 S., Rg. 4 W. in Arkansas County. Appellant claims, *inter alia*, that

5. The Chancery Court proceeded to have an extended hearing on Bass' 1947 motion.[6] Evidence was allowed on many questions; but the facts as to estoppel are determinative, as will be hereinafter mentioned. On December 1, 1948, the Chancery Court entered a decree which contained findings[7] far beyond the issue, of whether the 1946 decree (enjoining Bass from cutting and removing timber) should be vacated. Bass has appealed from the said decree of December 1, 1948.

OPINION

There is not involved in this case any question about the power of the Chancery Court to modify a permanent injunction because of changed conditions. (See 28 Am. Jur. 494 and Annotation in 136 A. L. R. 766.) The only question to be decided is whether the Chancery Court was correct in refusing to vacate the 1946 decree: which had enjoined Bass from cutting timber from the same lands which he had conveyed to Willey by the 1930 deed and had subsequently rented from Willey by written contract. We hold that the Chancery Court was correct (a) because of our statutes, and (b) because of the doctrine of estoppel.

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these new formed lands are accretions to other continuously existing riparian lands, and cites such cases as *Wallace* v. *Driver*, 61 Ark. 429, 33 S. W. 641, 31 L. R. A. 317, and *Bush* v. *Alexander*, 134 Ark. 307, 203 S. W. 1028.

Against the foregoing appellee claimed, *inter alia*, that the lands sectionized as "Sec. 1, Twp. 8 S., Rg. 4" in Arkansas County never entirely disappeared and that the lands here involved are the original Sec. 1. It is not necessary to decide any of these matters of erosion, accretion and avulsion.

[6] Charles F. Willey died testate pending the hearing; and the cause was revived, in the name of W. H. Willey, his beneficiary and executor.

[7] The Chancery Court indicated that the decree might have some effect on the boundary lines between Arkansas County, Lincoln County and Desha County; but we do not attach any such importance to the decree. Entirely beyond the purview of the present litigation are such questions as:

(a) Whether the land in the bow of the river became an "island" by accretion or avulsion;

(b) Whether the middle of "Moody old River" is the County boundary line;

(c) Whether Cook's point is in Arkansas County; and

(d) Whether "Cook's cut-off of 1926" worked a change in the county boundaries.

The 1946 decree affected only lands that had been north and east of what had been the channel of the Arkansas River prior to the 1918-1946 changes.

I. As to the *statutes*, little need be said: Section 29-506 Ark. Stats. (1947) lists the grounds on which a court may vacate a judgment or decree after the expiration of the term. Bass made no case for relief on any of these grounds.

II. We come then to the *doctrine of estoppel*. Bass claims that the 1946 decree is void on its face.[8] It enjoined him from trespassing on lands in Sec. 1, Twp. 8 S., Rg. 4 W. in Arkansas County; and he says that no such sectionized lands existed in 1946, because he claims that the original sectionized lands had disappeared by erosion and the re-formed lands were accretions to other lands. But this very adroit contention fails to take into consideration the facts previously mentioned,[9] and involved in the 1933 suit, and brought out in the 1945 suit which resulted in the 1946 decree. We mention these facts:

A. In 1927 Bass purchased, at a delinquent tax sale, certain lands described as Sec. 1, Twp. 8 S., Rg. 4 W. in Arkansas County.

B. In 1930 Bass—while in actual or constructive possession of certain definitely pointed out and mutually understood lands—conveyed them to Willey describing the lands as Sec. 1, Twp. 8 S., Rg. 4 W. in Arkansas County.

C. Bass then rented from Willey the same lands described the same way, and

D. The lands which the 1946 injunction decree covered were the same lands that Bass had conveyed to Willey in 1930 and rented from Willey.

Whether the lands involved in the 1946 decree should have been described as Sec. 1, Twp. 8 S., Rg. 4 W. in Arkansas County or should have been described as accre-

[8] Appellant cites *McDonald* v. *Fort Smith & Western Railroad Company*, 105 Ark. 5, 150 S. W. 135, as follows: "A judgment rendered by a court without jurisdiction is void; and to have such jurisdiction, the court must have jurisdiction both over the subject matter of the suit and the parties thereto." From this appellant argues that there was no land—i.e. Sec. 1—in existence over which the court had jurisdiction.

[9] See the facts recited in paragraph numbered 2 of the chronological listing, *supra*.

tions to some other lands is immaterial. The fact remains that, regardless of description, Bass had conveyed certain definite lands to Willey and rented the same definite lands from Willey and had no right to cut timber therefrom. Bass used his own language in describing the lands he purported to convey to Willey and to lease from him; and cannot now be heard to claim against Willey that no such lands existed. In short, Bass is estopped.[10]

The recital of the facts makes the estoppel so clear that exhaustive citation of authorities is unnecessary. It is well established that a grantor cannot dispute the existence of property mentioned in his conveyance. (See *Rogers* v. *Bollinger,* 59 Ark. 12, 26 S. W. 12.) Even if it had been claimed that when he conveyed to Willey, Bass was acting as guardian of his minor son and therefore was not personally estopped by the conveyance made in his representative capacity,[11] nevertheless, Bass—as an individual—rented the same land from Willey; and as tenant is estopped, under such circumstances,[12] to deny the landlord's title to the leased premises. (See *Lewis* v. *Harper,* 149 Ark. 43, 231 S. W. 874.)

For the reasons herein stated, the Chancery Court was correct in refusing to vacate the 1946 decree.

Affirmed.

Ed. F. McFaddin, Justice. In his petition for rehearing appellant points out:

(1)—That in 1946 Bass was enjoined from trespassing, etc. on the lands described as follows: "Section one (1), Township eight (8) South, Range four (4) West and/or the accretions adjoining same or contiguous thereto, all in the Southern District of Arkansas County, Arkansas";

[10] In 31 C. J. S. 196, there are many cases cited to sustain the statement: "A grantor is estopped to assert anything in derogation of his deed."

[11] It is not necessary for us to decide in this case whether a grantor in a representative capacity is estopped individually by contents of a deed. See 21 C. J. 1104.

[12] Tenant's right to purchase a tax title is not involved in this case. See *Billingsley* v. *Lipscomb,* 211 Ark. 45, 200 S. W. 2d 510, and *Hill* v. *Barnard, ante,* p. 29, 224 S. W. 2d 31.

(2)—That in 1947 Willey had a surveyor named Kramer undertake to locate "on the ground" the lands as described above; and

(3)—That at the trial in December, 1948, there was considerable evidence adduced as to whether Kramer's survey was correct.

From the above items, appellant says that by our opinion in this case, we have inferentially approved the Kramer survey; and because of such approval appellant asks a rehearing.

We deny a rehearing; but in order to remove any doubt, we point out that we did not approve the Kramer survey, or any other survey made subsequent to the decree of 1946; we held that the 1946 decree should not be vacated.

CONNER *v.* BURNETT.

4-9059 226 S. W. 2d 984

Opinion delivered February 6, 1950.

W. F. Reeves and *Opie Rogers,* for appellant.

N. J. Henley and *J. F. Koone,* for appellee.

GEORGE ROSE SMITH, J. This is a companion case to *Sitton* v. *Burnett,* also decided today. That case involved Sitton's salary during a period when he was serving as *de facto* marshal of the city of Clinton. He has since become a *de jure* officer, by moving into the city and being elected to the office. This taxpayer's suit was brought by the appellee to enjoin the city council and city treasurer from paying Sitton a salary of $250 a month for his services as city marshal. It is the appellee's contention that a city of the second class is not authorized to pay its marshal a salary. The council members, treasurer and Sitton appeal from a decree granting the injunction.

The appellee relies upon Ark. Stats. (1947), § 19-1104, which imposes certain duties upon the marshal of every city of the second class and provides that he "shall receive the like fees as sheriffs and constables in similar cases." The appellee argues that the city council is without power to vary or increase the compensation fixed by this statute.

We think this point of view fallacious in that it fails to take into account the other provisions of the original Act. The cited statute is § 50 of an act of March 9, 1875—a comprehensive statute governing cities and towns. When we examine this law in its entirety we are convinced that the General Assembly intended to and did authorize cities of the second class to pay their marshals a salary, as the city of Clinton has done.

Section 51 of the Act in question (Ark. Stats., 1947, § 19-1025) empowers cities of the first class to fix salaries for their municipal officers, but nowhere in this extensive statute is similar power expressly given to cities of the second class or to incorporated towns. We have held, nevertheless, that the statute does by implication delegate that power to these smaller municipalities. In *Weeks* v. *Texarkana*, 50 Ark. 81, 6 S. W. 504, we upheld a salary that was being paid by an incorporated town to its recorder. There we said: "The statute has not in express terms authorized the council of an incorporated town to remunerate the services of its recorder. Never-

theless, as onerous duties are devolved upon him, requiring time and labor for their performance, such power may be fairly inferred as essential to the purposes of the incorporation. Otherwise the efficiency of the municipal government might be crippled and the best interests of the town suffer, from the impossibility of procuring a competent man, who would give his services gratuitously."

The particular section relied on by the appellee imposes four specific duties upon the marshal, these duties being (1) to suppress riots and disturbances, (2) to apprehend disorderly persons, (3) to pursue and arrest fugitives from justice, and (4) to apprehend any person in the act of committing an offense. The section then provides that the marshal shall receive the same fees as sheriffs and constables. This evidently means that he shall receive the same fees for performing the specific duties enumerated in the section.

The Act itself contemplates that other duties may be assigned to the marshal. Section 49 directs the election of a marshal, recorder and treasurer, who "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." Ark. Stats., § 19-1103. Section 6 authorizes the establishment of a city watch or police, whose duties we think might well be assigned to the marshal. *Ibid.*, § 19-1701. A later statute has conferred additional powers upon cities of the second class, many of which involve added duties for the law enforcement officer. *Ibid.*, § 19-2305. Upon the reasoning of the *Weeks* case, *supra,* the city is authorized to pay for these services.

Our language in *City of El Dorado* v. *Faulkner,* 107 Ark. 455, 155 S. W. 516, Ann. Cas. 1915A, 708, supports our present conclusion. That suit for salary was brought by a deputy marshal of the city of El Dorado, then a city of the second class as shown by the records of the Secretary of State. The deputy failed to prove that his salary had been authorized by ordinance, and in holding for the city we said: "The burden was upon the plaintiff to

prove the existence of an ordinance obligating the city to pay him a salary as deputy marshal for, in the absence of such an ordinance, he is, under the statute, entitled only 'to receive the like fees as sheriffs and constables.' ''

In the case at bar the plaintiff below neither alleged nor proved that Sitton discharges only the four duties specified in the particular section relied upon. The burden of proof was upon the appellee, and in the absence of evidence to the contrary we may reasonably assume that Sitton enforces State and municipal criminal laws, performs the ordinary duties of a peace officer, and in other respects discharges the various duties that are usually expected of a city marshal. It is within the power of the city to pay a salary for these services.

Reversed and dismissed.

[redacted]

MORLEY, COMMISSIONER OF REVENUES *v.* BERG.

4-9102 226 S. W. 2d 559

Opinion delivered February 6, 1950.

[redacted]

O. T. Ward, for appellant.

Gaughan, McClellan & Gaughan, for appellee.

DUNAWAY, J. Under the provisions of Ark. Stats. (1947) 10-1001, sand and gravel (and other minerals not here involved) may be taken from the beds or bars of navigable rivers in the state upon procuring the consent of the Commissioner of Revenues, who shall issue licenses or permits for such removal under certain conditions prescribed in the statutes, with the advice and approval of the Attorney General. The licensee is required to pay a royalty to the state for sand and gravel removed commercially, and in addition a severance tax is levied. The right of the Commissioner to bring an action for collection of royalties due the state under this statute, and his right to seek an injunction against persons alleged to be unlawfully removing sand and gravel are presented for our determination on this appeal.

The precise issues for decision can best be seen by a somewhat detailed chronological statement of the facts leading up to the present action instituted by appellant, Morley. On April 24, 1947, Otho Cook, Commissioner of Revenues, acting under authority of the above statute, granted to one J. W. Sanders the exclusive right to remove sand and gravel from certain sections of land in Ouachita and Calhoun counties traversed by the Ouachita River. This permit was to continue for as long a time as sand and gravel were commercially produced, production to begin within one year, and was to terminate six months after commercial production ceased. In October, 1947, Berg, appellee herein, was enjoined from taking gravel from the lands included in the Sanders permit and judgment was rendered against him for gravel already removed, in an action brought against him in the Ouachita Chancery Court by Sanders, in which Cook, Commissioner, intervened without objection.

On September 24, 1948, Cook, Commissioner, granted an exclusive permit to remove sand and gravel to A. Roy Allen and C. C. Allen covering part of the

lands originally included in the Sanders permit. Notice of cancellation of permit as to these lands was sent to Sanders on September 29, 1948, by Cook. Subsequently, Sanders instituted an action against the Allens asking judgment for gravel removed by them and seeking an injunction against their further operations on the lands included in their permit, it being Sanders' contention that his original exclusive permit covering said lands had not been legally cancelled. On January 12, 1949, Morley, who had succeeded Cook as Commissioner of Revenues, intervened, praying that the Sanders permit be declared valid and subsisting and that the Allens be enjoined. On motion of the defendants Allen, Morley's intervention was dismissed on the ground that the state had no interest in the suit, and that if it did, action on behalf of the state must be taken by the Attorney General rather than the Commissioner. The Attorney General then asked that the State of Arkansas be made a party and that the Commissioner's intervention be reinstated as that of the State. The court refused to reinstate the intervention, but continued the case indefinitely to allow time for the State to plead. Within a few weeks the cause was dismissed without prejudice on motion of the plaintiff, Sanders. In view of this action, Morley did not appeal from the dismissal of his intervention.

On March 24, 1949, the Commissioner sent to the Allens a notice of cancellation of their permit, setting forth therein that said permit had been issued without authority because of the outstanding valid permit covering the same acreage previously issued to Sanders. The next step in the controversy was the filing of the instant action by Morley against Berg and the Allens, who were alleged to be employees of Berg. The complaint alleged the unlawful taking by Berg of sand and gravel from the lands in dispute, and sought judgment for the amount of royalty and severance tax due the state on this account; it was further alleged that the Allens were claiming the right to remove sand and gravel under a void permit; and concluded with a prayer for a temporary restraining order, and on final

hearing a permanent injunction, against all the defendants, enjoining them from further removal of sand and gravel from the lands here involved.

Defendants' motion to dismiss this complaint was based on two contentions: (1) The issues here involved are the same as in the earlier case of *Sanders* v. *Allen* discussed above, and the ruling of the court dismissing Morley's intervention therein is *res adjudicata* as to the Commissioner's right to maintain the present action against the defendants. (2) The Commissioner of Revenues is without authority to maintain such an action; it must, under the Constitution, statutes and common law be brought in the name of the State of Arkansas by the Attorney General. The Chancellor sustained the motion on both grounds and dismissed the complaint. Hence this appeal by the Commissioner.

On the issue of *res adjudicata,* we think the contention of the defendants is without merit for two reasons. First, there is no showing that the issues in the two actions are the same. Indeed Berg, one of the defendants in the instant case, who is alleged to be unlawfully removing gravel, was not even a party to the earlier suit. The first suit was one between private parties as to their rights, in which it is true the Commissioner sought to intervene; but in the present suit the action is on behalf of the state to collect royalties, severance taxes and penalties alleged to be due it, and to protect the state's interest in its property, which is allegedly being unlawfully taken. In addition, the earlier suit was dismissed without prejudice shortly after the court's ruling dismissing the Commissioner's intervention; the question of his right to intervene in a non-existent lawsuit became moot.

Whether the Commissioner of Revenues may maintain the present action, or whether it must be brought by the Attorney General is the other question for decision. Appellees argue that under the Constitution, statutes and common law, only the Attorney General can proceed for the relief here sought. Art. VI, § 22, of the Constitution provides that the "Attorney General shall perform such

duties as may be prescribed by law, . . ." The authority of the Attorney General to bring various legal actions was discussed fully by this court in *State, ex rel. Atty. Gen.* v. *Karston,* 208 Ark. 703, 187 S. W. 2d 327, where we said at page 707: (after quoting Art. VI, § 22, of the Constitution)

"The Constitution thus gave the Legislature the right to state the powers and duties of the Attorney General; and § 5582 of Pope's Digest (§ 6 of Act 131 of 1911) says:

" 'Nothing in this act shall relieve the Attorney General of discharging any and all duties now required of him under the common law, or by any of the statutes of this state, . . .'

"From this section it is clear that the Legislature has placed on the Attorney General certain statutory duties, and also 'all duties now required of him under the common law.' "

And quoting further from the opinion at page 708, we said: ". . . it is generally held that in the exercise of his common-law powers, an Attorney General may not only control and manage all litigation in behalf of the state, but he may also intervene in all suits or proceedings which are of concern to the general public."

Clearly then the Attorney General could bring an action such as the one here in question, if authority to do so were granted by statute, or under his common-law powers unless such authority was specifically taken from him by the Legislature. On the other hand the same authority to bring suit could be vested in the Commissioner of Revenues if the Legislature so desired. There is no constitutional inhibition against this as argued by appellees. The question then is simply whether the Legislature has in fact given the Commissioner this authority.

A brief discussion of the early Legislative Acts governing the taking of sand and gravel from the beds and bars of navigable rivers will be helpful in a determination of this question. Prior to 1913, the riparian owners

were allowed to take sand and gravel without any permit or license. By Act 265 of the Acts of 1913, such taking could only be made upon obtaining the consent of the Attorney General. Removal of sand and gravel without this consent was made a misdemeanor. The next Legislature changed the royalty rates and in addition to the criminal penalties already provided for unlawful taking, added a provision that the Attorney General might bring suit to recover the price of sand and gravel removed without payment of the required royalty. Constitutionality of these statutes was upheld in *State, ex rel. Moose* v. *Southern Sand & Material Co.,* 113 Ark. 149, 167 S. W. 854; *Johnson Sand & Gravel Co.* v. *Quarles,* 121 Ark. 601, 182 S. W. 283.

Control over these sand and gravel leases remained in the hands of the Attorney General until the creation of the Department of Revenues in 1925. By Act 88 of the Acts of 1925, § 14 (Ark. Stats., 1947, § 84-1705) it was provided: "The duties imposed upon the Attorney General of the State of Arkansas under § 6789 of Crawford & Moses' Digest (§10-1001, Ark. Stat., 1947) of granting permits and leases for the removal of sand, gravel, oil and coal from the beds and bars of navigable rivers and lakes of the State of Arkansas, the collection of the revenue derived therefrom be and the same are hereby transferred to the Department of Revenues immediately after the appointment of the Commissioner of said Department, and all books and records of the same now in the office of the Attorney General shall be transferred and removed to said Department of Revenues."

Since this enactment the Legislature has from time to time added to the list of minerals subject to lease and made changes in royalty rates, but the powers of the Commissioner in granting permits have remained the same as when this authority was vested in the Attorney General. This statute together with § 1 of Act 131 of the Acts of 1935 (Ark. Stats., 1947, § 84-1719) hereinafter quoted, covers the legislative grants of authority to the Commissioner here under consideration: "The Revenue Commissioner of the State of Arkansas is here-

by given authority to promulgate any and all regulations, rules and orders which he may deem necessary to effectively collect all taxes, penalties, delinquencies, defaults and other monies required by law to be collected by the State Revenue Department, and suits may be filed in the name of the Commissioner of Revenues and at his instance to recover money due and payable to the State and collectible by him. Within ten (10) days after any amount of money is due and payable the Revenue Commissioner shall take steps to collect the same."

We think the Legislature clearly intended to give the Commissioner the same authority in dealing with the State's property as involved in the case at bar that was previously given the Attorney General. That the Commissioner may sue in his name to recover not only taxes but "other monies" required by law to be collected by him is plainly stated in Ark. Stats., § 84-1719. This would certainly include money due on royalties. Since the Legislature has charged the Commissioner with the responsibility of determining who shall take the minerals from lands in the navigable streams of Arkansas, subject to the approval of the Attorney General; and has authorized suit in his name to collect monies due therefrom, we think his authority to ask an injunction to prevent continued illegal taking of State property in such a suit is merely a necessary incident to the effective carrying out of duties specifically given him.

We do not hold that the Attorney General might not maintain on behalf of the State a similar suit in circumstances he deemed appropriate; nor do we pass on the merits of the allegations in the complaint. We do hold that the Commissioner had authority to maintain the action here brought, and that the Chancellor erred in dismissing the complaint.

The decree appealed from is reversed and the cause remanded with directions that the complaint be reinstated for a trial on the merits of the cause.

4-9080 226 S. W. 2d 562

Opinion delivered February 6, 1950.

Martin K. Fulk, Leffel Gentry and *U. A. Gentry,* for appellant.

Ralph Ray and *Rose, Dobyns, Meek & House,* for appellee.

LEFLAR, J. This is an action by Scroggin Farms Corporation (hereinafter called Scroggin) to recover the value, above loan and storage charges, of certain cotton stored in Commodity Credit Corporation (hereinafter called Commodity) warehouses in 1938 and 1939. Assignments of the right to the cotton had originally been executed by defendants Gash and Bryant, who grew the cotton, and had after various successive reassignments come into Scroggin's hands. In the latter part of 1940 Gash and Bryant assigned the same cotton rights a second time to defendant Howell, who in 1941 received the cotton from Commodity. The present action against Howell, Gash and Bryant was commenced Sept. 26, 1945. In the Chancery Court it was held that plaintiff Scroggin's cause of action was barred by the three-year statute of limitations (Ark. Stats., 1947, § 37-206). Plaintiff appeals.

Gash and Bryant, producers of the cotton, pledged it to Commodity as security for government (Commodity) loans. The arrangement called for the cotton to be stored in an approved warehouse, with warehouse receipts issued to Commodity. The producer had the right to redeem his pledge by repaying the loan plus storage and incidental charges. At the time cotton prices were low and no profit could be gained from redemption. Speculators in cotton futures, however, were willing to pay a small amount for assignments of these redemption rights, in the hope that prices would rise, and Scroggin secured such assignments of the redemptive rights of Gash and Bryant.

On April 3, 1940, while the price of cotton was still down, Commodity tried to eliminate the interests of such speculators as Scroggin by issuing an order that all prior assignments must be turned in to Commodity for redemption by July 31, 1940, and that Commodity would thereafter honor only such assignments as were executed on a new "Form R." Many holders of prior assignments then secured new "Form R" assignments from the original producer-assignors, but Scroggin chose not to do so, being advised by his attorney that Commodity's effort to "freeze out" the holders of old assignments was ineffectual. This advice proved to be sound, it being later held that the rights of assignees under the old assignments were still good. *John M. Parker Co.* v. *May,* (C. C. A., 5th) 128 Fed. 2d 1020; *Harris* v. *Commodity Credit Corporation,* (E. D., Ark.) 47 Fed. Supp. 681.

Subsequent to July 31, 1940, Commodity, assuming that its "Form R" order was valid, notified Gash and Bryant that they still had redemptive rights in their cotton. Gash and Bryant, acting under the same assumption, executed new assignments of their redemptive rights, on "Form R" blanks, to defendant Howell. Howell turned in his "Form R" assignments to Commodity and received the cotton some time before July 31, 1941, the expiration date for these redemptive rights.

On July 25, 1941, appellant Scroggin presented the old assignments to Commodity and asked to redeem the

cotton. Commodity turned them down. Scroggin knew that someone had redeemed the cotton covered by the assignments, at least by July 31, 1941, because the price had by then gone up so that redemption was profitable. Scroggin's principal witness, Oliver Scroggin, testified that he tried on July 25, 1941, and later also, to find out who had the new assignments and had exercised the right of redemption, but that he did not find out who they were until May 24, 1943, when Commodity disclosed Howell's name in its answer to a suit filed by Scroggin against Commodity on a related matter.

Scroggin contends that the three-year statute of limitations (§ 37-206) could run against it only from that date, and that its right was therefore not barred when this suit was commenced on Sept. 26, 1945. This is on the theory that the assignment to Howell by Gash and Bryant was in the nature of a fraud upon Scroggin, concealed until May 24, 1943, and not the sort of open taking of goods or chattels to which § 37-206 immediately applies.

Alternatively, Scroggin contends that its cause of action is not controlled by § 37-206 at all, but rather by the five-year statute of limitations (§§ 37-209 and 37-213) applicable to actions on written contracts. This is on the theory that its rights are based on the original written assignments executed in 1938 or 1939 by Gash and Bryant and that the cause of action arose when in 1941 Commodity violated these rights by delivering the cotton to Howell and refusing to deliver it to plaintiff. If the cause of action arose in 1941 the five-year statute would not have barred it when action was begun in 1945.

(1) It is proper to consider first the question of which section of the statute of limitations applies here. We conclude that § 37-206 is applicable. The wrong complained of is the taking, or conversion, of plaintiff's cotton. The assignment to plaintiff by Gash and Bryant put the title in plaintiff (subject of course to Commodity's superior interest) and was a completely executed transaction. The right Scroggin now claims against Gash and Bryant is the same right it had against

all the world—the right not to have its cotton stolen or otherwise improperly taken. That is not a contract right; it is an ownership right, and violation of the right is a conversion to which under our law the three-year statute of limitations is applicable. *Thomas* v. *Westbrook,* 206 Ark. 841, 177 S. W. 2d 931.

Apart from that, appellant's argument points out no express clause or proviso in the writing which defendants' resale has violated. Appellant relies rather upon breach of an implied warranty of title which is deemed to be discoverable from defendants' assignment. We need not decide whether or not this implied warranty is to be read into the contract; it is enough that it is not written into the contract. The three-year statute (§ 37-206) applies to actions on all contracts, expressed or implied, which are not in writing, and has regularly been applied to incidental obligations implied from written contracts. *Dismukes* v. *Halpern,* 47 Ark. 317, 1 S. W. 554; *Hazel* v. *Sharum,* 182 Ark. 557, 32 S. W. 2d 315. Appellant's argument to the contrary is based upon *Sims* v. *Miller,* 151 Ark. 377, 236 S. W. 828, and *Louisville Silo & Tank Co.* v. *Thweatt,* 174 Ark. 437, 295 S. W. 710, both cases in which the five-year statute of limitations was deemed applicable to actions on warranties contained in written contracts of sale. It must be noted, however, that in neither of these cases is it shown that the suit was on an implied warranty, as distinguished from a warranty actually contained in the writing. Our conclusion is that the five-year statute does not control the type of warranty that might by implication be spelled out in the present case.

(2) Nor can we accept the contention that the existence of Scroggin's cause of action was so concealed, either by defendant Howell or by defendants Gash and Bryant, as to toll the running of the statute of limitations in the manner prescribed by Ark. Stats., § 37-229, or otherwise.

The classic language on this point in Arkansas is that of Wood, J., in *McKneely* v. *Terry,* 61 Ark. 527, 545, 33 S. W. 953: "No mere ignorance on the part of the plaintiff of his rights, nor the mere silence of one who is

under no obligation to speak, will prevent the statute bar. There must be some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself. And if the plaintiff, by reasonable diligence, might have detected the fraud, he is presumed to have had reasonable knowledge of it." See *Meacham* v. *Mid-South Cotton Growers Assn.,* 196 Ark. 78, 115 S. W. 2d 1078; *Kahn* v. *Hardy,* 201 Ark. 252, 144 S. W. 2d 725; *Manka* v. *Martin Metal Mfg. Co.,* 153 Kans. 811, 113 Pac. 2d 1041, 136 A. L. R. 653.

In the present case, Commodity knew that Howell had the reassignments from Gash and Bryant, and some of Commodity's employees testified that they would have given Scroggin Howell's name had Scroggin pressed a request for it. The testimony on behalf of Scroggin indicates that no great diligence was exercised to discover, either from Commodity or from other sources, who had received delivery of the cotton under the reassignments. The information apparently could have been secured from Commodity, but even if it could not, it should at any time have been an easy matter to ask Gash and Bryant about it. Gash and Bryant were local farmers, their names were on the assignments held by Scroggin and they were designated thereon as the producers of the cotton and the assignors from whom Scroggin traced its claim; Scroggin knew that any reassignments that existed must have been made, under the "Form R" set-up, immediately by Bryant and Gash. The fact was that Bryant and Gash had made their second assignments to Howell, and he had reassigned to no one else. Yet there is no evidence in the record that Scroggin ever inquired of Bryant and Gash who their assignee was. We cannot say that the Chancellor's finding, that "by the exercise of due diligence the plaintiff could have ascertained the name of the second purchaser as early as July, 1941," is contrary to the preponderance of the evidence.

Our conclusion that the three-year statute of limitations bars the plaintiff's action is substantially supported by the decision in *Scroggin Farms Corporation* v.

McFadden, (C. C. A., 8th) 165 Fed. 2d 10, a proceeding brought by the same plaintiff, the appellant here, against another defendant whose position was essentially the same as that of the defendant Howell here. The Federal Court sitting in the Eastern District of Arkansas had held that Scroggin's claim against that defendant, for taking delivery of cotton from Commodity under second assignments like those held by Howell, was barred by the three-year statute of limitations. The suit against that defendant had been filed on the same day as was the present suit, and the background of prior diligence by Scroggin was identical. The Circuit Court of Appeals affirmed the judgment of the District Court, saying (at p. 18): "No decision from Arkansas cited to us appears to be contrary to the generally recognized law that the mere ignorance of his rights on the part of plaintiff suing for conversion of his personal property will not toll the statute of limitations and that a defendant does not commit a concealment by mere silence or failure to publish the fact that he is taking personal property. He must be guilty of some trick or contrivance tending to exclude suspicion or prevent inquiry. There must be reasonable diligence on the part of a claimant to personal property taken in conversion and the means of knowledge are the same in effect as knowledge itself."

The decree of the Chancery Court is affirmed.

Justices McFaddin, George Rose Smith and Dunaway did not participate in the decision of this case.

Sitton *v.* Burnett.

4-9058 226 S. W. 2d 544

Opinion delivered February 6, 1950.

W. F. Reeves and *Opie Rogers,* for appellant.

J. F. Koone and *N. J. Henley,* for appellee.

HOLT, J. December 1, 1948, appellee, Burnett, a resident and taxpayer of Clinton, on behalf of himself and other parties similarly interested, brought this action alleging that appellant, Sitton, "between May, 1946, and April, 1948, while serving said city as marshal, *de facto,* was paid by the disbursing officer of said city, the sum of $3,000, $1,000 of which was in excess of the salary at which he had been employed, out of the funds collected as taxes paid to the collector of Van Buren County by the taxpayers of said city and by said collector paid into the treasury of said city; . . . that the defendant was a *de facto* officer during the time he received said sum and not legally entitled thereto; that said sum was paid to the defendant as a salary for his services as marshal in the absence of a law authorizing the payment by a city of the second class to a marshal of such a city a salary; that the defendant received and used said sum for his own benefit and refuses to return any part of it to said city."

He further alleged that appellant had used some of the money in acquiring and improving certain real property. He sought a decree for $3,000 on behalf of the city of Clinton and a lien on the above property.

Appellant answered with a general denial.

The trial court found that appellee was entitled to recover the amount claimed, but denied his right to a lien. From that part of the decree awarding appellee $3,000, appellant has appealed. There was no cross appeal.

The facts appear not to be in dispute. Sitton was employed by the City Council of Clinton, a city of the second class, at a stipulated salary, to serve as its marshal, and served in that capacity from May 1, 1946, to April 1, 1948. He was paid for his services a total of $3,000, his salary having been increased at intervals during the period of service in the total amount of $1,000. At no time was he a resident of Clinton or a qualified elector therein. He had not been elected to the position by a vote of the people.

A phase of this case was before us recently in *Thomas* v. *Sitton,* 213 Ark. 816, 212 S. W. 2d 710, and we there held: "The city marshal of a city of the second class must, under art. 19, § 3 of the Constitution, possess the qualifications of an elector (Headnote 3). Appellee not being a resident of the city of Clinton was ineligible to hold the office of city marshal of that city (Headnote 4). The Legislature having provided that the marshal of cities of the second class shall be elected by the qualified voters of the city, the city council of the city of Clinton was without authority to employ appellee as its marshal. Pope's Digest, § 9801 (Headnote 5). Appellee being a *de facto* officer only is not entitled to the salary provided for the services of city marshal (Headnote 6)."

For reversal, appellant first argues that appellee (1) was without authority to prosecute the action, and (2) that the court lacked jurisdiction.

(1) This court in *Samples* v. *Grady,* 207 Ark. 724, 182 S. W. 2d 875, in effect held against both of these contentions. In that case in construing art. 16, § 13, of our Constitution, which provides: "Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants

thereof against the enforcement of any illegal exactions whatever," and after reviewing many previous decisions of this court, it was held that a taxpayer, in circumstances similar in effect to the present case, had the right to bring and prosecute a suit in equity. It was there said: "A remedy is afforded in equity to taxpayers to prevent misapplication of public funds on the theory that the taxpayers are the equitable owners of public funds and that their liability to replenish the funds exhausted by the misapplication entitle them to relief against such misapplication. *Fergus* v. *Russell,* 277 Ill. 20, 115 N. E. 166. See, also, *McCarroll, Commissioner of Revenues,* v. *Gregory-Robinson-Speas, Inc.,* 198 Ark. 235, 129 S. W. 2d 254, 122 A. L. R. 977."

(2) Appellant next argues that since he was concededly a *de facto* officer, had performed the duties of the office of marshal in good faith, and there was no adverse claimant, or *de jure* officer claiming the salary, he, appellant, was entitled to said salary and could not be required to make refund.

We cannot agree.

Appellant would be correct in this contention but for the fact that we have a statute denying him the right claimed,—§ 7371, Sandels and Hill's Digest, § 14331, Pope's Digest, and now Ark. Stats. (1947), § 34-2208, which provides: "Recovery of fees received by usurper. —Where the usurper has received fees and emoluments arising from the office or franchise, he shall be liable therefor to the person entitled thereto, who may claim the same in the action brought to deprive him of the office or franchise, or in a separate action. If no one be entitled to the office or franchise, the same may be recovered by the State and paid into the public treasury. (Civil Code, § 530; C. & M. Dig., § 10331; Pope's Dig., § 14331)."

This court in *Stephens* v. *Campbell,* 67 Ark. 484, 55 S. W. 856, in construing the effect of the above statute, announced the controlling rule as follows: "Under the statutes of this State, an officer *de facto,* without legal

title to the office, is a usurper (*Lambert* v. *Gallagher,* 28 Ark. 451; *Wheat* v. *Smith,* 50 Ark. 266-273, 7 S. W. 161), and can be removed from office by 'an action by proceedings at law instituted against him, either by the State or the party entitled to the office.' Where he 'has received fees and emoluments arising from the office,' he is liable therefor to the person entitled thereto, who may claim the same in the action brought to deprive him of the office, . . . or in a separate action. If no one be entitled to the office, . . . the same may be recovered by the State, and paid into the State Treasury. Sandels & Hill's Digest, § 7371. The fees are not his, and he is not entitled to hold them. If he collects any fees for services rendered, he holds them at sufferance.'' This rule has been many times reaffirmed by this court. See *Davis* v. *Wilson,* 183 Ark. 271, 35 S. W. 2d 1020.

''Counties, cities, etc., are political subdivisions of the state, and are included in the term 'state,' which is the concrete whole. *State* v. *Levy Court,* Del., 43 A. 522, 524, 1 Pennewill, 597.'' (Words and Phrases, Permanent Edition, Vol. 40, page 6.)

In 93 A. L. R., page 286, the Annotator under subdivision b, ''Right of public to recover back salary paid to *de facto* officers,'' says: ''In Arkansas, the statutes provide that if no one is entitled to an office, any salary, fees, or emoluments which have been paid to a *de facto* holder thereof 'may be recovered by the state.' *Stephens* v. *Campbell,* (1900), 67 Ark. 484, 55 S. W. 856, applying Sandels and Hill's Dig., § 7371, in the case of a *de facto* police officer.''

We conclude, therefore, that under the above statute, and the decisions of this court, on the record presented, the decree of the trial court was correct and must be, and is affirmed.

HARRELL *v.* PERKINS.

4-9069 226 S. W. 2d 803

Opinion delivered February 6, 1950.

Rehearing denied March 6, 1950.

Henry J. Burney, for appellant.

Paul E. Talley and *Wayne W. Owen,* for appellee.

ED. F. MCFADDIN, Justice. The creditor filed this mortgage foreclosure suit and sought acceleration of the entire mortgage indebtedness. The only question for decision is whether the Chancery Court ruled correctly in refusing to enter a decree for such acceleration.

On April 25, 1947, C. R. Perkins, and wife, executed a mortgage, on a house and lot in the City of Little Rock, to H. H. Harrell (the appellant) to secure a note for $12,500. The note was payable in monthly installments of $82.81; and both the note and mortgage contained an acceleration clause. The one in the note reads:

". . . if default be made at any time in payment of any of said installments for a period of 60 days, all of the remaining installments not then due shall at the option of the holder at once become due and payable, for the purpose of foreclosure."

Mrs. Leola Blanchard (the only appellee) purchased the property from Mr. and Mrs. Perkins and assumed the mortgage indebtedness held by Mr. Harrell. All monthly payments were made on the note to and including March 25, 1948. Thereafter, no monthly payments were made due to the facts hereinafter to be stated.

On October 8, 1948, Mr. Harrell filed suit to foreclose his mortgage and claimed the acceleration of maturity of the entire note. Mr. and Mrs. Perkins defaulted; but Mrs. Blanchard resisted Mr. Harrell's claim to acceleration. She alleged due and proper tender to Mr. Harrell of all the past due monthly payments and interest; and she claimed that because of such tender, and because of Mr. Harrell's conduct, equity should not declare the entire indebtedness to be due. The Chancery Court entered a decree (a) allowing Mrs. Blanchard to pay all the monthly payments in default, together with interest and costs of the suit, and (b) refusing to give effect to Mr. Harrell's declaration that his entire note be due and payable. From that decree Mr. Harrell has appealed: and the only issue is his right to accelerate the maturity of the entire note.

We affirm the decree of the Chancery Court, because Mr. Harrell is estopped from claiming the acceleration of the monthly payments. The evidence discloses that in February and March, 1948, when there were no monthly payments in default, Mr. Harrell "as the aggressor" urged Mrs. Blanchard to obtain a loan elsewhere and pay off his entire note. He first offered to take a discount of $493.41; and a few days later he offered a discount of $729.98. His letter to her of February 25th shows that he clearly understood that she was to get an FHA loan [1] and use the proceeds thereof to pay his note. After having mentioned the FHA loan, Mr. Harrell closed that letter with this language:

[1] This means a loan from the Federal Housing Administration.

"Will be out of town at least until Saturday, but in the meantime I thought that you might be able to go ahead with the preliminaries, and see if this can be worked out to our mutual benefit. You know, without my saying it, that I will be grateful to you for your action along this line."

In his letter to Mrs. Blanchard of March 20, 1948, (while there were no monthly payments in default) Mr. Harrell increased the offered discount to $1,000 if Mrs. Blanchard would obtain a loan and pay him in full.

As previously mentioned, Mr. Harrell understood that Mrs. Blanchard was to get an FHA loan to pay him. Because of Mr. Harrell's insistence, Mrs. Blanchard undertook to get an FHA loan, but was confronted with a long series of requirements. In order to meet these, she made property improvements costing in excess of eleven thousand dollars. Mr. Harrell lived adjacent to Mrs. Blanchard's property and knew all that was occurring; and while the improvements were being made Mr. Harrell admits that he told Mrs. Blanchard in June or July: ". . . just let the payments go and we will settle the whole thing at the same time"—that is, that she need not make the monthly payments until the FHA loan be consummated, and he be then paid from such proceeds.

But after Mrs. Blanchard had made improvements in excess of $11,000, and while she was awaiting the closing of the FHA loan, Mr. Harrell "changed his tune" and sought to foreclose his entire note. On October 1, 1948, Mrs. Blanchard and her attorney made a tender of all defaulted monthly payments, together with interest, but this tender was refused; and on October 8 Mr. Harrell filed the present suit. At the trial it was stipulated "that on several occasions prior to this date and on this date, that the defendant is able, ready and willing to, and does and has tendered all the monthly payments that are in arrears, together with the accrued interest," and together with all court costs.

In the light of the foregoing evidence, and other of like tenor, it is clear that it would be unconscionable for

Mr. Harrell to accelerate his entire indebtedness. In *Johnson* v. *Guaranty Bank,* 177 Ark. 770, 9 S. W. 2d 3, we had occasion to discuss the nature of an acceleration clause; and this language is used:

"The stipulation for accelerating the time of payment of the whole debt may be waived by the mortgagee, especially when it is made to depend upon his option. A court of equity will also relieve against the effect of such provision, where the default of the debtor is the result of accident or mistake, or when it is procured by the fraud or other inequitable conduct of the creditor himself. Pomeroy's Equity Jurisprudence, 4 Ed. vol. 1, § 439." [2]

In 70 A. L. R. 993 there is an Annotation, "Grounds of relief from acceleration clause in mortgage"; and in that Annotation cases from many other jurisdictions are cited to sustain this conclusion:

"It is held, apparently without dissent, that a court of equity has the power to relieve a mortgagor from the effect of an operative acceleration clause, when the default of the mortgagor was the result of some unconscionable or inequitable conduct of the mortgagee."

The case at bar comes within the last clause of the quotation from *Johnson* v. *Guaranty Bank* (*supra*)—that is, equity will relieve against acceleration when the creditor's conduct has been responsible for the debtor's default. Mr. Harrell persuaded Mrs. Blanchard to seek an FHA loan to pay his note; he knew she was expending large sums in improvements; she offered him the monthly payments, pending the completion of the FHA loan requirements, and he refused them. Under these circumstances, equity should not decree an acceleration of maturity of the entire note.

Affirmed.

[2] Also see Pomeroy's Equity Jurisprudence, 5 Ed., § 439.

FLETCHER *v.* FERRILL.

4-9062 227 S. W. 2d 449

Opinion delivered February 6, 1950.

Rehearing denied March 20, 1950.

Chas. F. Cole and *W. D. Murphy, Jr.*, for appellant.

Joe J. McCaleb and *Goodwin & Riffel*, for appellee.

GEORGE ROSE SMITH, J. This case involves the construction of a deed executed in 1923, by which J. W. Fletcher conveyed to a Masonic Lodge certain business property in the city of Batesville. In the deed Fletcher first reserved a life estate in himself. He then provided that when the property came into the possession of the Lodge it should be used exclusively for the benefit of a specified orphans home and school, "and when it ceases to be so used, or when said home and school shall be moved from Batesville, Arkansas, said property shall revert to the heirs of the said J. W. Fletcher." The parties concede that this deed created a determinable fee in the Lodge. See *Taylor* v. *School Dist. No. 45 of Searcy County,* 214 Ark. 434, 216 S. W. 2d 789.

Fletcher died in 1930, leaving a will that named his widow, the principal appellant, as his residuary devisee. The Lodge took possession of the property upon Fletcher's death and used the rents for the benefit of the orphanage until 1948. In that year the orphanage ceased to exist, and the Lodge at once disclaimed any further interest in the property. The question now is whether the title then passed to the appellant as residuary devisee or to the forty-eight appellees, who are Fletcher's heirs under the statutes of descent and distribution. The chancellor decided in favor of the heirs, plaintiffs below.

The principal question is whether the language of the deed, "said property shall revert to the heirs of the said J. W. Fletcher," created *(a)* a possibility of reverter in Fletcher himself or *(b)* an executory limitation to Fletcher's heirs, which would become a possessory interest upon termination of the determinable fee. We must first decide, however, whether a possibility of reverter is an interest that can be devised by will in Arkansas; for, if it is not, then the appellant's claim under

the will obviously cannot be sustained. The early English cases held that a possibility of this kind cannot pass by will, but the opposite result has been reached in the great majority of American jurisdictions. Rest., Property, § 164, Comment *c*, and § 165, Comments *a* and *f*. This holding is practically uniform in states having a statute like ours, which empowers the testator to devise real property "and all interest therein." Ark. Stats. (1947), § 60-102. Unquestionably the American rule carries out the grantor's intention more often than does the English rule. That is, if a landowner should convey property to a school, to be held as long as used for school purposes, he would undoubtedly assume that he still had an interest in the land and would be dismayed to learn that he could not leave that interest to any one he pleased—that it must inevitably go to his heirs at law, regardless of his own wishes. Yet that would be his unhappy position under the English doctrine. We have no hesitancy in following the American cases and holding that the broad language of our statute permits the testator to devise a possibility of reverter.

Returning to the principal question, we think the deed created a possibility of reverter in Fletcher rather than an executory interest in his heirs. This inquiry really narrows down to whether the word "heirs" is here a word of limitation or one of purchase. If it is a word of purchase, then the appellees took by virtue of the deed itself and not by inheritance from Fletcher. But if the word is one of limitation the title passed first to Fletcher's estate and thence to the appellant as residuary devisee.

In holding that the word is one of limitation rather than of purchase we stress the fact that Fletcher reserved a life estate in himself. In those circumstances there was no occasion for him to use the customary phrase—"the property shall revert to the grantor and his heirs" (in which the word is clearly one of limitation)—for it was unnecessary for him to provide for a possible reverter during his own lifetime. Thus there is a marked similarity between a reversion to the grantor's heirs in a deed

that reserves a life estate and a reversion to the grantor *and* his heirs in a deed intended to transfer immediate possession.

Our holding in *Wilson* v. *Pharris,* 203 Ark. 614, 158 S. W. 2d 274, tends to support our present conclusion. There the grantor, after reserving a life estate in herself, conveyed to her daughter a life estate upon condition subsequent. The deed provided that upon the happening of the condition the property should revert "to the said grantor's heirs." We held that the grantor still owned the fee and could convey it during her life tenancy. This was of course a recognition that the right of re-entry was in the grantor at least during her lifetime.

Even if we should sustain the appellees' contention that in the case at bar the word "heirs" was used in the deed as a word of purchase, we should still have to decide the case in the appellant's favor. Under that construction the deed would vest a determinable fee in the Lodge, and upon termination of that estate the title would pass directly to the appellees, not by inheritance from Fletcher but by virtue of the executory limitation in the deed. The appellees would thus have had an executory interest in the property throughout the existence of the determinable fee. It is well settled, however, that such an executory interest is not a vested estate and therefore must vest within the period allowed by the rule against perpetuities. Gray, The Rule Against Perpetuities, 4th Ed., § 41; Simes, Future Interests, § 768; Rest., Property, § 44, Comment *o,* and § 229, Illustration 8. On the other hand, it is equally well settled that the retention by the grantor of a possibility of reverter does not offend the rule against perpetuities, even though the reverter may not take place for an indefinite period in the future. Gray, § 41; Simes, § 507; Rest., § 372.

The leading case on this point is quite similar to the present case, if Fletcher's deed be construed as containing an executory limitation to his heirs. In *First Universalist Society of North Adams* v. *Boland,* 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231, the deed provided that the grantee should hold the land as long as it should be

devoted to the doctrines of the Christian religion, and when it was diverted from that use the title should vest in certain named persons. The court held that the limitation over was void for remoteness, and therefore a possibility of reverter remained in the grantor. We are not aware of any decision to the contrary. In the present case it is evident that the Lodge's determinable fee might have continued for a period far in excess of that allowed by the rule against perpetuities, and hence an executory limitation to Fletcher's heirs would necessarily be void. This leaves the possibility of reverter in the grantor, as an interest not conveyed by the deed. Thus it is clear that the appellant must prevail under either construction of this instrument.

The decree is reversed, and, as the title to real property is involved, the cause is remanded for the entry of a decree in accordance with this opinion.

HOLT and MCFADDIN, JJ., concur.

ED. F. MCFADDIN, Justice (concurring). The majority opinion holds: (1) that the wording in the deed made by Mr. Fletcher was insufficient to show his intent that the reversion should pass to his heirs, rather than to his estate; and (2) that even if the word "heirs" was a word of purchase, instead of limitation, still the appellees would lose under the application of the rule against perpetuities. I dissent from the first holding made by the majority, but agree with the second; hence this concurring opinion.

I believe that it was the purpose and intent of J. W. Fletcher, when he executed the deed on December 5, 1923, to create at that time what may be called "three estates": (a) a life estate in himself; (b) a remainder in the Grand Lodge, in trust for the Masonic Orphans Home; and (c) a reversion, on the failure of the trust, to the heirs at law of J. W. Fletcher. Concerning this (c) estate, I believe that the words in the deed, "shall revert to the heirs of said J. W. Fletcher" mean what they said. In short, I believe that the word "heirs" was used as a word of purchase, rather than of limitation. I am im-

pelled to this conclusion by the wording of the deed which, omitting caption, description, signature and acknowledgment, is as follows:

"In consideration of the benefits which have accrued to the community of Batesville, Arkansas, on account of and by reason of the Masonic Orphans Home and School of Batesville, Arkansas, and of Most Worshipful Grand Lodge of Arkansas Free and Accepted Masons, and for the pleasure and satisfaction to me and for the benefit of the present and future occupants of Batesville, Arkansas, Masonic Orphans Home and School, and to *carry out the wishes of Mrs. Fenton G. Fletcher, my deceased wife, I convey and warrant* unto the Most Worshipful Grand Lodge of Arkansas Free and Accepted Masons, the following described property, to-wit:"

(Here is description of property)

"That I, J. W. Fletcher, the grantor herein, does and shall retain during his natural life the exclusive right to and possession of said property and the entire control and management thereof and shall have and retain all the rents and profits from said property during said time as fully and completely as if he were absolute owner thereof, that said property when it comes into the possession of said Most Worshipful Grand Lodge of Arkansas, Free and Accepted Masons, shall be used solely and exclusively for the benefit of said Masonic Orphans Home and School of Batesville, Arkansas, and when it ceases to be so used, or when said Home and School shall be moved from Batesville, Arkansas, *said property shall revert to the heirs of the said J. W. Fletcher.* The Grantee herein when it comes into possession of said property shall have the right to rent or lease it for any legitimate purpose, but all the income from said rent or lease must accrue to and be used for the benefit of said Masonic Orphans Home and School of Batesville, Arkansas.

"WITNESS my signature this 5th day of December, 1923."

(Italics are our own.)

J. W. Fletcher said he was seeking to "carry out the wishes of Mrs. Fenton G. Fletcher, my deceased wife." The deceased wife certainly could not have intended that the reversion in the property should be willed by J. W. Fletcher to a subsequent wife because the first wife had no assurance that there would ever be a second wife. I think the wishes of the deceased wife—as stated in the consideration clause—carry over to the reversion clause: so I believe that it was J. W. Fletcher's intention to let the property revert to whomsoever his heirs might be at the time of the reversion; and that this deed is one of those infrequent instruments in which courts—to correctly effectuate the grantor's intentions—hold that the word "heirs" is a word of purchase, rather than of limitation.

But, having reached that conclusion, I am met with the rule against perpetuities which renders the reversion void. Such is the second holding made in the majority opinion; and with that holding I agree.

In 1923 when the deed was executed, J. W. Fletcher in effect attempted to convey to his heirs an estate in fee on condition: *i. e.,* he conveyed the fee to whomsoever might be his heirs at law when the condition (*i. e.,* the termination of the Masonic Orphans Home) became an actuality. That actuality might, or might not have happened "within the life or lives in being and twenty-one years and the period of gestation" from the date of the deed because no one could tell when, if ever, the Masonic Orphans Home would cease to exist. So the said heirs mentioned in the deed of December 5 might not receive the property within the period limited by the rule against perpetuities. Therefore, the conveyance to the "heirs" was and is void as offending against the perpetuities rule.

The point is made clear in 41 Am. Jur. 75, in § 31 of the Topic "Perpetuities and Restraints on Alienation." In that topic it is first pointed out:

"A possibility of reverter which remains in a grantor or his successor in interest, or in a testator's heirs or devisees, where there has been created a fee

simple determinable, is not subject to the rule against perpetuities. Thus, a conveyance of land to a school district upon condition that the land be used only for school purposes, the land to revert to the grantor if the district ceases to use the land for school purposes or uses it for any other purpose, does not violate the rule against perpetuities, as the possibility of reverter vests in the grantor, which he may convey and which descends to his heirs or which he may transmit by will."

That foregoing quotation states the law as applied by this Court in such cases as: *Coffelt* v. *Decatur School District,* 212 Ark. 743, 208 S. W. 2d 1, and *Williams* v. *Kirby School District,* 207 Ark. 458, 181 S. W. 2d 488.

Then the Topic in 41 Am. Jur. 76 continues in this language:

"But if the instrument creating the determinable or conditional fee provides for a limitation over to a third person following the expiration of a determinable fee or the cutting off of a defeasible fee, the rule against perpetuities applies for the limitation over, sometimes called an executory limitation or conditional limitation, arises by virtue of the grant or devise and goes to a third person rather than merely remaining in the creator of the estate or his successors in interest. For example, it has been held that a devise of a house and land to deacons of a church and their successors forever, on condition that the minister or eldest minister of said church shall constantly reside in and dwell in said house during such time as he is minister of said church, and in case the same is not improved for that use only, then the bequest to be void and of no force, and said house and land then to revert to the nephew of testatrix, is a conditional limitation to the nephew, and not a devise on condition, and as such is void for being too remote."

The last quotation states the law applicable to the case at bar because, here, the reversion was to the heirs of J. W. Fletcher as words of purchase, and the said heirs were "third persons," the same as the nephew, within the foregoing quotation; and therefore the reversion was void as offending against the perpetuities rule.

For the reasons herein stated I concur with the result reached by the majority; and I am authorized to state that Mr. Justice HOLT joins me in this concurrence.

ON REHEARING

GEORGE ROSE SMITH, J. In our original opinion we held that a possibility of reverter can pass by will in Arkansas. In a petition for rehearing the appellees insist that this holding conflicts with a statement in *LeSieur* v. *Spikes,* 117 Ark. 366, 175 S. W. 413, to the effect that a possibility of reverter is "not a disposable interest." Lest there be any uncertainty concerning land titles we add these additional paragraphs to make it perfectly clear that there is no inconsistency between the two opinions.

No will was involved in the *LeSieur* case. There the owner of land had conveyed to Dixie Lesieur and the heirs of her body, which of course left a possibility that the land would revert to the grantor if Dixie LeSieur left no bodily heirs. The grantor later executed a deed to a second grantee. We remarked that a possibility of reverter is not a disposable interest, but the statement was merely *dictum.* Dixie LeSieur in fact was survived by heirs of her body and therefore it was unnecessary to decide whether a possibility of reverter can be transferred by deed.

But even if the remark had not been *dictum* there would still be no conflict between that case and this one. Whether a possibility of reverter can be conveyed by *deed* depends upon the statutes and decisions governing *inter vivos* conveyances. At most the *LeSieur* case could have involved that situation only. But whether such a possibility can be devised by *will* depends upon the statute of wills. "Alienability and inheritability are distinct characteristics, which . . . are not necessarily coexistent, and . . . the existence of or absence of either characteristic is not determinative of the existence of or absence of the other. Some confusion seems to have arisen . . . from the failure clearly to recognize this fact." *Copenhaver* v. *Pendleton,* 155

Va. 463, 155 S. E. 802, 77 A. L. R. 324. In the case at bar we express no opinion as to whether a possibility of reverter (*a*) can be conveyed by deed or (*b*) can pass by inheritance under our statute of descent and distribution. We have merely followed the majority and better reasoned rule, that a statute of wills like ours permits the *devise* of such a possibility.

Rehearing denied.

ESKRIDGE *v.* ESKRIDGE.

4-9057 226 S. W. 2d 811

Opinion delivered February 6, 1950.

E. R. Parham and *Alston Jennings,* for appellant.

Robinson & Park, for appellee.

GRIFFIN SMITH, Chief Justice. Charges of domestic infidelity[1] made by the wife were found sufficient when she was granted a divorce from Harrold Eskridge October 6, 1948. Thus twenty-five years of married life ended in circumstances showing a requirement by Mrs. Eskridge for surgical removal of a growth then thought to be malignant, but which was found otherwise. The

[1] The term "infidelity" is not used in a sense other than a failure to observe marriage vows, since the record here does not disclose testimony brought to the Court's attention when the decree of divorce was rendered.

husband married October 7th—one day after the divorce —and for half a year paid monthly alimony of $125, then petitioned for relief. He alleged changed conditions and inability to maintain himself on an income of $316.75 and pay from it what the original decree required.[2]

The divorce property settlement took into consideration Mrs. Eskridge's medical needs and allowed her $1,462.50 in bonds, $500 of which went for surgery and hospitalization. The husband was permitted to retain money and securities about equal to what the wife would have after paying contemplated bills. She was also given the household furniture and custody of two children—Julian, then 23 years of age, and Marita, 16. Julian was physically injured at birth and has never been able to work productively. Marita is a high school junior.[3]

We agree with the Chancellor that no change should be made. Appellant, in effect, says he and his present mate cannot live on $191.75, therefore his former wife, who has not fully recovered, and his afflicted son, and his high-school daughter, should be compelled to yield some part of $125. This, he thinks, could be offset if the boy went to work, although the testimony is that a doctor advised the young man to give up his last position because the drugstore work was injurious. The decretal order of 1948 contains a finding that "Julian is sick, dependent, unable to help himself or to help his mother, and that he is entitled to maintenance from the defendant." Nor are we in accord with appellant's suggestion that the difficulty could be solved by withdrawing part of the award, thereby compelling appellee to seek employment. *Jones* v. *Jones,* 201 Ark. 546, 145 S. W. 2d 748. The undisputed testimony is that appellee maintains a home for the children, cooks, cleans house, does the

[2] Appellant is a skilled mechanic, employed for 14 years by the Rock Island Railway system. He is entitled to hospitalization, retirement benefits, and other accruals not included in the item of $316.75.

[3] A paragraph appearing in the October decree is: "The defendant is hereby enjoined and restrained from molesting the plaintiff in any manner, from going about her or the children, from attempting to approach or talk to her, or from contacting her in any manner." [The clear implication is that threats of bodily harm had been made, or that the husband had been improperly forcing his attentions on the plaintiff].

washing, sews, and that she is without training for remunerative work.

Counsel's professionally competent work in presenting the petition for modification is not underestimated. It is a service none could have performed more loyally. The difficulty lies in appellant's behavior in its relation to continuing obligations he first assumed. It had been judicially determined that he wrongfully breached the marital contract after participating in its benefits for a quarter of a century. Equity's plan does not contemplate punishment, and if denial of appellant's prayer had atonement for its purpose a different answer could be given. But we are dealing with economic necessities pledged against reciprocal values—values the wife is not shown to have withheld; and we must recognize society's concern for the two children, notwithstanding the father's willingness to withdraw from them.

Affirmed.

Supplemental Opinion, February 16, 1950.

GRIFFIN SMITH, Chief Justice. Appellee's motion of October 11, 1949, asked that costs and an attorney's fee be allowed. It was passed for consideration when the appeal should be submitted, but was overlooked when the opinion of February 6th was written. Our records do not disclose a response to the motion. We accept as correct appellee's verified statement that necessary costs were $28.56. In addition to provisional fee by the trial court in favor of the attorney, the further sum of $50 is awarded. Appellant is directed to pay $18.56 February 15th, and $20.00 on the 15th of March, April, and May.

STREET IMPROVEMENT DISTRICT NO. 419 *v.* LEWIS.

4-9170 226 S. W. 2d 813

Opinion delivered February 6, 1950.

Townsend & Townsend, for appellant.

L. P. Biggs, for appellee.

GRIFFIN SMITH, Chief Justice. Bond obligations of Street Improvement District No. 419, Little Rock, have been paid and a surplus fund is held by the Commissioners. This surplus includes proceeds from the 1947 assessments, which were final. Katherine D. Lewis paid on a designated lot for that year, but sold the property May 12, 1949, to a grantee who is not identified in the record here. When the District, acting subsequent to the delivery of Mrs. Lewis' deed, announced that a distribution of surplus money would be made under authority of Act 350 of 1949,[1] Mrs. Lewis sought by injunction to prevent what she thought would be an illegal diversion if the dividend or *pro rata* distribution should be paid to the one owning the legal title when the apportionment was made. Mrs. Lewis contends that in paying throughout

[1] The Act provides that when a District has paid its bonded indebtedness and a surplus has accumulated from assessments or the sale of unredeemed property, the money may be refunded *pro rata* "to the property owners of such district." Section 2 of the Act defines property owner as "the holder or holders of the legal title at the time such refund is made." Section 3 excludes from the Board's consideration "any real estate or parts or parcels of real estate which are delinquent at the time such refund is made." [The complaint, as copied for the record, mentions Act 340 of 1949. This is obviously a typographical error, as all parties in discussing the applicable statute refer to Act 350 of 1949].

the years, and particularly by discharging the final lien in 1947, she acquired a vested interest in the surplus fund, hence the General Assembly was powerless to legislate otherwise.

District No. 419 demurred to the complaint. Street Improvement Districts No. 438, 540, and 541, intervened, alleging that the status of each in respect to refunds was similar to that of the primary defendant. They also demurred.

When the demurrers were overruled and the defendants refused to plead further, a decree was entered directing that "the defendant district" should distribute ratably to property owners who paid the 1947 assessments. The interveners were ordered to recognize as rightful claimant "the property owners who paid the last levy on the assessment of benefits."

The nature of improvement districts, including known and unknown variants, prevents a mathematically accurate determination of all financial factors when benefits are assessed. It has been held that payment by the property owners of an originally estimated amount carries with it the District's reciprocal promise of *pro rata* refunds when the primary venture has ended. *Thibault* v. *McHaney, Receiver,* 127 Ark. 1, 192 S. W. 193.[2]

As expressed in the brief, appellee rests her claim of right upon the relationship of debtor and creditor. This status [she says] became fixed when the surplus came into existence; and, since the Act seeks to substitute one creditor for another "without hearing and without notice," there is want of due process—"just a legislative fiat that funds paid to the District by 'A' shall be repaid to 'B'."

It is suggested that support for the trial court's invalidation of Act 350 is implicit in our holding that a district could not take funds intended for construction and use them in making repairs. *Paving District No. 5* [*of Ft. Smith*] v. *Fernandez,* 142 Ark. 21, 217 S. W. 795.

[2] There were two appeals in this case. See *Thibault* v. *McHaney,* 119 Ark. 188, 177 S. W. 877.

Act 579 of the Special Acts of 1919 authorized the application challenged by Fernandez. The ground upon which the decision rests is that building streets in the first instance, and maintaining them after the initial undertaking has been completed, are separate undertakings of such a distinct nature that statutory procedure has been prescribed, the basis of which is consent of the taxpayers.[3] The 1919 Act had the effect of adding to the property the burden of maintenance. Since this could not be done in the manner undertaken, there was the implied obligation to refund, mentioned by Judge FRANK SMITH.

All essential improvement district proceedings, whether taken before or after organization is completed, are *in rem*. In determining how the improvement shall be paid for there is a legal finding of benefits. Notice of assessment, sale for non-payment,—these relate directly to the land as distinguished from individual or corporation ownership. There is no personal liability. A District's surplus, in the sense dealt with here, ordinarily comes about when ready funds are needed near the end of a bond maturity period to offset delinquencies, including taxes not collected from property foreclosed on. Because obligations have been paid with money realized from levies that would have been unnecessary had collections been uniform, the principle is urged that when the surplus accrues it imperatively becomes an asset for *pro rata* distribution, and the legislative attempt to control its application, if prejudicial to those who actually paid, is an invasion of constitutional rights.

Act 350 does not impair a vested right. After its enactment property owners were charged with notice that refunds would go to the person having legal title at the time such refund was made, and *that time* is when the Board formally adopts its resolution directing disbursement. If the parties wish to make a different arrangement, this may be effectuated by contract between grantor and grantee showing allocation or full assignment, and this assignment when filed with the Commis-

[3] See Ark. Stats. (1947), § 20-317.

sion and evidenced by its receipt, would afford protection; but if, without such private arrangement, the owner conveys subsequent to the effective date of Act 350, the transaction is with notice of the law's provisions, and the grantor's interest passes with the realty.

Reversed.

[redacted]

TUCKER *v.* PEACOCK.

4-9029 227 S. W. 2d 929

Opinion delivered February 13, 1950.

Rehearing denied April 10, 1950.

[redacted]

O. E. Gates and *Wilson, Kimpel & Nobles,* for appellant.

C. T. Sims, James A. Ross and *Ovid T. Switzer,* for appellee.

HOLT, J. This litigation involves the title and ownership of seventy-four acres of land in Drew County and a bank deposit of $960.21.

Appellant, Mrs. Lila Tucker, was a niece of D. C. Peacock, who died intestate, without issue, February 2, 1947. He had never married. His brother, Luther Peacock, was appointed administrator of his estate.

The appellees are Luther M. and E. M. Peacock, Jr., brothers of D. C. Peacock, together with the heirs of Mae Peacock Johnson, a deceased sister of D. C. Peacock. D. C., Luther, E. M. Jr., and Mae Peacock (Johnson) were born of the marriage of Dr. E. M. Peacock and Lucy L. Peacock.

The land here was acquired by deed by Dr. Peacock in 1887 and, at the time of purchase, he and his wife executed a mortgage on the land to Dallas Miles. About 1901, Dr. Peacock deserted and abandoned his wife and his four children, all minors, and has not been heard from since. The mortgage to Miles was foreclosed and sale was had January 11, 1902. Mrs. Miles purchased and conveyed to J. M. Hoover, who in turn executed to Mrs. Lucy Peacock, the mother of the minor children, bond for title, agreeing that she might purchase this land on payment of approximately $199.40, plus interest and costs, within a period of four years. With the aid of her children, Mrs. Peacock purchased and received a deed from Hoover. Mrs. Peacock and her children, including D. C. Peacock, continued to live on the land until January, 1930, when Mrs. Peacock died. Thereafter, D. C. Peacock continued to occupy the property until he died suddenly February 2, 1947. At his death, D. C. Peacock left a bank account of $960.21. He had received a deed to this tract of land from his mother December 18, 1928.

The present suit was brought by appellant to enforce specific performance of an alleged oral contract between her and D. C. Peacock, (quoting from appellant's brief) "by which and under which she was placed in possession of the lands and personal property of D. C. Peacock, with the specific understanding and agreement that upon the death of D. C. Peacock, title to the real estate would vest fee simple title in Mrs. Lila Tucker, and that any and all personal property owned by him at the time of his death, would become the absolute property of Mrs. Lila Tucker."

Appellees answered with a general denial.

Following a patient and extended hearing, the trial court found that appellant was entitled, under an oral contract with her uncle, D. C. Peacock, to one-fourth of the land here involved and to one-fourth of $350 worth of timber sold from the land by D. C. Peacock and which he had deposited in the above bank account. A decree was entered in accordance therewith.

On direct appeal, appellant contends that the court erred in refusing to award her all of the land involved here, together with the bank account, and on cross-appeal, appellees earnestly argue that appellant failed to establish, by the necessary proof, the oral contract in question, and was therefore not entitled to any interest whatever in the seventy-four acres of land or to any part of the bank account, and that the court erred in holding otherwise.

We have reached the conclusion, after reviewing the testimony, that appellees' contention on their cross-appeal must be sustained. It therefore becomes unnecessary for us to determine other questions presented.

The rule is well established, and many times announced by this court, that in order for appellant to establish title and ownership of the land involved here, and the value of the timber removed by D. C. Peacock on an oral contract, the burden was on her to establish execution of that contract by a higher degree of proof than a preponderance of the testimony. She was required to show its execution by clear, cogent, and decisive testimony. It must be so strong as to be substantially beyond reasonable doubt. We hold she has failed to meet this burden. See *Walk* v. *Barrett,* 177 Ark. 265, 6 S. W. 2d 310, and cases there cited.

The evidence is voluminous and some of it conflicting.

Appellant, in effect, testified that her uncle, D. C. Peacock, orally agreed with her that if she would move on the land in question, keep house for him, do his cooking, washing and ironing, and tend to his personal needs, the

seventy-four acre tract and all his personal property would become hers at his death.

A witness, Edgar Burks, testified that on one occasion he heard D. C. Peacock make a proposition to appellant, his niece, that if she would move back to his home, "do his washing, ironing, and cook him three hot meals a day, he would give her everything he had," and also said: "That is all I ask you to do for me," that he was not going to batch.

Appellant's husband, Vance Tucker, (who subsequent to 1937 had served a penitentiary term for theft of hogs) testified that he was present and heard the above conversation between his wife and her uncle, D. C. Peacock. No one else was present. There was other evidence tending to corroborate the above testimony.

On behalf of appellees, there was evidence that shortly after the death of D. C. Peacock, his brothers, Luther and Erastus, together with some of the children of Mae Peacock Johnson, visited appellant, Lila Tucker, and her husband, and walked over the land. On that occasion, appellant's husband, Vance, inquired as to the value of the land and said he would pay $2,500 for it. Also, appellant, Lila Tucker, asked Luther Peacock (her uncle and administrator) to buy the property in and let her and Vance have it. Luther made no promise. Thereafter, Lila Tucker wrote Luther Peacock a letter in which she attempted to make arrangements to rent the place for the year 1947.

Witness, Henry Lytle, testified that some time in 1942, he heard a conversation between Erastus and his brother, D. C., in which D. C. asked Erastus why he did not move on the old place (the seventy-four acres involved here) with him and do the cooking, and that D. C. Peacock told Erastus at that time, "if it (the home place) is ever sold, you know your part of it is there and if you outlive me you know you and the other heirs will get it * * *." Witness further testified that in 1946 he heard Erastus Peacock say to his brother, D. C. Peacock, "Carl, that timber you sold, did you ever divide the timber money

with Luther and the other boys, I have not seen any of it? D. C. said, 'that money is in the bank, every dime of it. We are going to have to do some fencing and it is the duty of Luther and the Johnson boys and you to help pay the expenses and that money is going to be paid on the building of the fences and repairs.' " This witness also heard Vance Tucker say: "Well, it's here (the land) for them now, I am going to turn it over to them."

E. H. Lytle, a neighbor of D. C. Peacock during his lifetime, heard D. C. tell his brother, Erastus, (while at witness' house): "Erastus, I am getting old and you will be old some day and neither of us have any family. If I die before any of you did, it will go to you and Luther and my sister's children," and about two years later, witness heard D. C. say to Erastus: "It's there, if you want your part, come on up and live with me, but I would rather not tear it up and sell it. You want a home and I want a home and neither of us have a family."

J. V. Hayes, an 84-year-old brother of Mrs. Lucy Peacock, testified that he had lived near the old Peacock home for many years and that D. C. Peacock, shortly before his death, said in his presence to witness' wife, Dora Hayes: "Aunt Dora, I ain't satisfied and I just came to see you and Uncle Vol. I ain't satisfied. I ain't treated right in my own home. * * * I am a good mind to sell the old place and give the rest of the heirs their part and go live with Luther or go to McGehee, I have money enough to live on and pay for a little place without selling the old place, but I will sell it and wipe things out up there if I can. I was thinking about making a will, but I could not do that, because the old place does not belong to me any more than the other heirs, and I am going to leave it if I can't sell it, I am going to leave it."

We do not detail all the testimony. It suffices to say that when all of the evidence presented is measured and considered in the light of the above rule, we hold that it falls far short of establishing the oral contract between appellant and D. C. Peacock, in question. As indicated, while the evidence is somewhat conflicting, however, of

strong significance is the fact that appellant's husband, Vance Tucker, after the death of D. C. Peacock, tried to buy the land from appellees, and the further fact that his wife tried to induce Luther, as administrator, to bid the property in (in case of a sale) and let them acquire it, and in addition, she also wrote a letter to the administrator requesting that she be permitted to rent the property for the year 1947, all of which strongly tends to contradict her claim of ownership and that a valid oral contract had been entered into between her and her uncle.

As to the remainder of the bank account, but little need be said. As we read the record, it supports the trial court's finding and decree to the effect that there was no evidence introduced showing a delivery of the bank account to appellant. The decree recites: "At the time of the death of D. C. Peacock, he had on deposit to his credit and in his name the sum of $960.21 in the Commercial Loan & Trust Company, a bank of Monticello, Arkansas, and plaintiff alleges that said deposit vested in her upon the death of D. C. Peacock under the terms of the oral contract, giving his property to her. But the Court finds that no evidence was introduced showing that a delivery of said deposit had been made by the deceased to the plaintiff, by muniments of title, or otherwise during his lifetime, and the title to said deposit did not pass or vest in the plaintiff, but is a part of the assets of the Estate of D. C. Peacock in the hands of the Administrator."

In *Stifft* v. *W. B. Worthen Company,* 176 Ark. 585, 3 S. W. 2d 316, this court said: "The elements necessary to constitute a valid gift *inter vivos* were stated by this court in *Lowe* v. *Hart,* 93 Ark. 548, 125 S. W. 1030, to the effect that the donor must be of sound mind, must actually deliver the property to the donee, must intend to pass the title immediately, and the donee must accept the gift."

Accordingly, the decree is affirmed on direct appeal. On cross-appeal, the decree is reversed and the cause remanded with directions to dismiss appellant's complaint for want of equity.

ALSTON *v.* STATE.

4-9077 226 S. W. 2d 988

Opinion delivered February 13, 1950.

Rehearing denied March 13, 1950.

[redacted]

G. C. Carter and *Mark E. Woolsey,* for appellant.

Ike Murry, Attorney General and *Robert Downie,* Assistant Attorney General, for appellee.

DUNAWAY, J. Appellant Alston was permanently enjoined from operating his cafe where beer was sold and from further operation of his adjoining dance hall located in the town of Altus, Arkansas. From the findings of the Franklin Circuit Court that appellant's operations constituted a public nuisance and the judgment abating this nuisance, comes this appeal.

On February 21, 1949, the Prosecuting Attorney of the Fifteenth Judicial District, proceeding under Ark. Stats. (1947), §§ 34-101 *et seq.*, filed a "Petition for Closing Order" alleging that appellant's establishment, known as "Jim Jack's Place" was operated as a public nuisance because of various violations of the law occurring there. The court entered a temporary closing order upon the filing of the petition. An amended petition was filed alleging additional grounds for closing appellant's business. All allegations were denied by the proprietor, and at the trial of the cause on March 3, 1949, the alleged and controverted law violations suffered on the premises were these: (1) Drunk and intoxicated persons are allowed to congregate about the premises; (2) beer and other intoxicating beverages are sold to minors; (3) fights, affrays and other public disturbances occur late at night; (4) persons and vehicles congregate about the place in such a manner as to constitute a traffic hazard; (5) loud and boisterous noises disturb the neighborhood; (6) beer is sold in a place where dancing is permitted on the same premises, in violation of § 40, Revised State Beer, Wine and Liquor Regulations, (1946) promulgated by the Commissioner of Revenues, said Regulations having the force and effect of law.

The court found that many intoxicated persons had been about the premises and a number arrested for drunkenness; that on two occasions beer was served to minors; that there had been some fights; that empty liquor bottles had been found scattered about the premises; that crowds of from 150 to 400 or 500 came to appellant's place of business; that no special permit authorizing dancing where beer was served had been obtained in accordance with the

Revenue Commissioner's Regulations. The judgment of the court concluded with this language:

"All of defendant's operations were in violation of the laws of our State and against the well being of the citizenship of Altus and the surrounding communities, and constituted a public nuisance.

"It is therefore the order and judgment of the court that the defendant and all other persons are enjoined permanently from the further operation of the sale of beer or other intoxicants and dancing in the property here involved."

This cause was tried in the Circuit Court. The statute (Ark. Stats. 1947, § 34-102) confers jurisdiction to abate public nuisances on both Chancery and Circuit Courts and provides (Ark. Stats. 1947, § 34-105) that the proceedings "shall be conducted in accordance with the procedure of the courts of chancery where not otherwise expressly provided herein." That the scope of our review in cases of this kind is the same as in chancery appeals was stated in *Click* v. *State,* 206 Ark. 648, 176 S. W. 2d 920. The question before us then is whether the preponderance of the testimony supports the findings of the lower court that appellant's business constituted a public nuisance.

The pertinent language of the statute under which this action was brought is as follows: (Ark. Stats. 1947, § 34-101) "The conducting, maintaining, carrying on, or engaging in the sale of alcoholic liquors, including wines and beer of all kinds, in violation of any of the laws of this State, in any building, structure, or place within this State, and the conducting, maintaining, carrying on, or engaging in the operation of any so-called roadhouse or other similar place of entertainment, or of any so-called tourist camp, or of any public dance hall or place, in violation of any of the laws of this State, * * * are hereby declared to be public nuisances, and may be abated under the provisions of this act (§§ 34-101—34-110). Any person, persons, firm or corporation conducting, maintaining, carrying on, or engaging in any of the businesses or occupations

or undertakings aforesaid, who shall suffer or permit violations of any of the laws of this State in, upon or about the premises operated by him, them, or it, shall be deemed and held to be conducting, maintaining, carrying on, and engaging in the said business, or occupation, or undertaking in violation of the laws of this State."

It will be noted that this statute declares to be a public nuisance a place where the proprietor and his agents engage in certain affirmative acts violative of the law. Such a place of business may also be a nuisance, even in the absence of affirmative unlawful acts on the part of the proprietor or his agents and employees, if he "shall suffer or permit violations of any of the laws of this State" on or about the premises. This court has frequently affirmed judgments abating as public nuisances enterprises such as the one in the case at bar, where there was no direct proof of willful law violations by the proprietor; but in these cases there has always been an allegation and proof of "frequent" violations, or of violations taking place "repeatedly" and as a "common occurrence" on the offending premises. See *Portman* v. *State ex rel. Wood,* 204 Ark. 349, 162 S. W. 2d 67; *Click* v. *State, supra*; *Digiacomo* v. *State,* 194 Ark. 24, 105 S. W. 2d 78. Unless a proprietor or those acting for him are shown to have committed some of the acts proscribed, or are shown to have acquiesced in allowing violations of the law by others, more than an isolated or occasional violation by some outsider is required before a person's place of business can be abated as a nuisance on the theory that he "suffered or permitted" such violations.

The nature of the showing which must be made to establish a place as a public nuisance under statutes similar to our own has been discussed by the courts of other jurisdictions. In *State* v. *Bernweiser,* 39 Wyo. 314, 271 Pac. 13, the Supreme Court of Wyoming said at page 15:

"The fact that liquor has been sold once, or even oftener, in a building, does not necessarily establish the character of the building as a common nuisance. The test of a nuisance is not the number of sales, or the length of

time liquor is kept, but whether the place is maintained for keeping and selling in the sense of the statute. In the equitable proceeding for injunction, the court is dealing with a place of a forbidden character and not with a forbidden act of sale. *United States* v. *Ward* (C.C.A.), 6 F. 2d 182. For the punishment of a mere forbidden act of sale, the statutes providing for criminal prosecution furnish an adequate remedy. *Barker* v. *United States* (C.C.A.), 289 F. 249; *Muncy* v. *United States* (C.C.A.), 289 F. 780. Before a court of equity should declare a place a common nuisance under the statute, it should be convinced that the place has been used for the forbidden purpose habitually, continuously, or recurrently.

"* * *, it is not necessary, in order to show a nuisance, that there shall be direct evidence of a series of sales throughout any particular period. Sales on a single day, or even a single sale, may be made in such circumstances as to justify the inference that use of the building in making the sale or sales proved was a part of a habit or practice."

The same standard of proof was stated by the Supreme Court of Tennessee in *State* v. *James,* 177 Tenn. 21, 145 S. W. 2d 783 at page 785: "The logical test which ought to be applied in every case, is not the number of sales which the evidence establishes was made but whether the evidence taken as a whole indicates recurrent acts which amount to a nuisance, * * *."

The cafe in question is in a room about 30 by 40 feet and the dance hall occupies a space of about 40 by 80 feet in the same building. There is no door inside the building from one room to the other, and the outside entrances to the two rooms are about 20 feet apart.

The testimony introduced by the state to establish the existence of the nuisance alleged is as follows: Four boys, whose ages were 15, 18, 19 and 20 years, testified that on January 24, 1949, they went together into appellant's cafe and sat in a booth. The two younger boys drank coca-colas, while the two older boys each had one bottle of beer. These boys testified that some man whom

they had met in their home town of Clarksville, but whose name was unknown to them, had bought the beer and given it to them. Their positive testimony was that this man was not a clerk of appellant, and that he left the place after giving the beer to them. The 19 year old boy further testified that he had beer given to him on one or possibly two previous occasions; that on one of these occasions someone, not an employee of appellant, had brought a beer outside to him where he was sitting in a car. This is the only testimony that beer or any alcoholic beverage was ever consumed on the premises by minors. There was no evidence whatever that any sales of beer had ever been made to minors, and no proof that on the occasions above described appellant or his employees knew that any beer had been given to minors. In fact one of the State's witnesses testified that he had once tried to buy beer but was refused because he was a minor.

Sheriff Bill Russell testified that when appellant first started business there was some difficulty because of cars parking too close to the shoulder of the highway. This situation was corrected by the establishment of a parking area across the highway and the hiring of a man to park the cars. Clearance along the highway had been good since the problem was called to appellant's attention. The Sheriff further testified that he had made "occasional" arrests at the place. The only fight he recalled was one which occurred after appellant had closed for the night and this took place in a filling station about 100 feet down the road from appellant's building. As to finding empty whiskey bottles about the premises, the Sheriff testified he found eight bottles, some of which were in the parking area across the highway, and this was the day after the place had been closed by the temporary order. The Sheriff also testified that the most arrests for drunkenness he had made here on a Saturday night was three, and on some Saturday nights no arrests at all were made. His testimony further was that during his two years as Sheriff none of the neighbors had complained of noises or disturbances at appellant's place, and that he had never received

any complaints from citizens of Altus that this was a disorderly place of business.

James Shelton, marshal of Altus and deputy sheriff, gave this testimony: He spent part of every night at "Jim Jack's Place," where on Saturday nights there were sometimes as many as 400 people. During the past year he had made some arrests here, usually on Saturday nights and mostly for drunkenness. He recalled one fight starting inside the place, but this was stopped after "one lick" was struck. The only other fight he recalled was one on the outside. Appellant did not sell beer to minors and the witness never saw any minors drinking beer, though he had seen a number of young people in the cafe where sandwiches and soft drinks were sold. His testimony for the State concluded with the statement that the dance hall "is not a disorderly place."

Jim Hyde, another witness for the State, testified that he was a deputy sheriff who worked at "Jim Jack's Place" on Friday and Saturday nights for eight or ten weeks. He described "one or two little rows", which were stopped just as they began. This witness further said that on some Saturday nights as many as four or five persons were arrested for drunkenness, while on other Saturday nights there were none. He stated that sometimes at this place, as at other beer taverns, people who had been drinking before arriving would become noticeably intoxicated after having a bottle or two of beer, and would have to be removed. On cross-examination, this witness admitted that only two people had been taken out of the cafe in a drunken condition to his knowledge, and that one middle-aged woman had been removed from the dance hall. He stated that he had never received any complaints that this was a disorderly place.

Lee Cannady, who lived in Altus 600 feet from appellant's place, testifying for the State, said that he was disturbed at night by the cars passing his house on the highway. "Q. You haven't noticed any fighting or any other disturbances? A. No sir." . . . "Q. You are not objecting to his place of business? A. No, sir."

This was all the proof made to show that appellant was maintaining a public unisance.

A large number of witnesses testified on behalf of appellant, some as to conditions existing according to their own observations and others as to the general reputation of the place as being orderly. Only a brief general statement of their testimony will be given. The mayor, recorder and two aldermen of Altus; the tax assessor of Franklin County and his deputy, a deputy sheriff, two school teachers, several business men and numerous others testified that the general reputation of the place as being orderly was good. The deputy sheriff testified that from his own personal knowledge he knew that many persons who had been arrested around "Jim Jack's Place" for drunkenness had arrived there intoxicated and were arrested before they ever entered the cafe or dance hall. The revenue inspector for Franklin County testified that he had recommended the issuance of appellant's beer license, and had inspected the place from time to time. As to the sale of beer on the same premises where dancing was permitted, he testified that the practice under this regulation was not to require a special permit where there is no entrance connecting the room in which beer is sold with the dance hall.

We have concluded that the findings of the trial court are against the preponderance of the testimony. Giving the State's testimony its strongest probative value, the proof is that drunks were arrested from time to time. There is no proof that they became intoxicated in appellant's place of business or that they were permitted to congregate there. Indeed, the testimony of the deputy sheriffs is that appellant arranged to have them on hand the nights large crowds were present for the very purpose of removing intoxicated persons and preventing them from congregating about his place.

The State relies on the case of *Digiacomo* v. *State, supra,* in arguing that sale of beer to minors has been sufficiently established in the instant case. The facts in that case were far different: There two young girls, 13 and 17 years of age, testified that on several occasions

they had been in Digiacomo's combination meat market and cafe where they had been served beer. The defense was made that the girls' escorts bought the beer and that the proprietor had given orders that no beer was to be sold to minors. The proof was undisputed, however, that the minors drank the beer at a table "close to the counter" while employees of the place "were standing right there" and that a waitress had served them the beer. It was held that in these circumstances the employer was responsible for the sales made by his employees. The distinction between that situation and the one here shown is obvious. There is no proof that anyone connected with appellant's business either knew or could have known of the isolated instances where a minor consumed one bottle of beer.

Disregarding completely the testimony as to the good reputation of appellant's place of business, the undisputed evidence shows no violations of the law by appellant or his agents, and recurrent permitted violations by others upon his premises are not shown by a preponderance of the testimony.

The judgment is reversed and the cause dismissed.

The Chief Justice and Mr. Justice HOLT dissent; Mr. Justice MCFADDIN dissents in part.

GRIFFIN SMITH, Chief Justice, Dissenting. If this were a criminal proceeding of a kind requiring proof of intent and evidence of guilt beyond a reasonable doubt it *might* be possible to agree with the Court's majority. But since we have not the pardoning power, and are permitted merely to construe and declare the law, I must respectfully dissent from a determination that in effect creates, by judicial fiat, a middle ground in the nature of a refuge between conduct denounced by the General Assembly and freedom from statutory interdictions.

Act 109 of 1915, a part of which appears as Ark. Stats., § 34-105, presupposes that it is possible to engage in the sale of intoxicating drinks without violating the law; but (§ 1) engaging in illegal sales is declared to be a public nuisance, "and may be abated under the provisions of this Act."

That there were violations of the law is all but admitted.

What were the facts?

While amplification of the testimony by more extensively abstracting it would shed a great deal of light upon customs and practices, it is not necessary to go beyond the majority opinion to find the answer. Four boys, whose ages were 15, 18, 19 and 20 years, respectively, were in the grog shop. The two younger testified that they drank coca-cola, while the others had beer, "bought for them by some man from their home town whom they did not know"; and, says the opinion, "their positive testimony was that this man was not a clerk of appellant, and that he left the place after giving the beer to them". The 19-year-oldster testified that on previous occasions he had received gift-beer—"some one" having brought it to him where he was waiting on the outside in a car. The opinion says:

"There was no evidence whatever that any sales of beer had ever been made to minors, and no proof that on the occasion above described appellant or his employes knew that any beer had been given to the minors."

The effect of this statement is to say that the trial Court must gullibly accept as true the obviously evasive answers of these boys, who were attempting to protect appellant. The trial Court, and we, are not to exercise that degree of discretion ordinarily applied to situations like this, where credibility itself becomes a matter of evidence, and where doubtful conclusions are resolved in favor of the judge who heard the witnesses, appraised their attitudes while testifying, and gave credence or denied it as the clarity suggested.

But there was other evidence. A Town Marshal and Deputy Sheriff, after testifying that he "loafed around all of those drinking places", was asked if he had made any arrests at appellant's place during the past year, and replied that he had. Question: "Tell the Court what arrests were made for." Answer: "Mostly for drunkenness." Question: "How many arrests did you

ordinarily make on Saturday night?'' Answer: ''Three or four.''

It further developed that the Marshal who testified was on appellant's payroll for $30 per month, *and that half of all arrests made in the Town of Altus occurred at or around Alston's place.*

Highlights in the Town Marshal's testimony, *as abstracted by appellant,* include these statements:

''. . . On Saturday night and other nights there are dances at Alston's place. . . . Some Saturday nights there would be from 150 to 400 people there. . . . I have made arrests for a fight now and then—a little disturbance, but not much. . . . On the inside a fellow hit a fellow, but we got him out before the fight started. . . . I have seen drinking on the outside in automobiles, but I try to stop it. . . . I have seen whiskey bottles lying around on the outside, [and] I have seen them all over the town. I have seen young people under twenty-one years of age at the dance hall [adjoining Alston's place and operated by him] and [at] the beer place. . . . Except for one disturbance on the outside and the one fight on the outside I did not observe anything else except a few arguments. I have seen about fifteen or sixteen young people, under twenty-one years of age, sit in the beer place until the dance starts. We have a curfew law and people under eighteen are not supposed to hang around after ten o'clock. . . . Didn't think Alston sold beer to persons under twenty-one. . . . The dance hall is not a disorderly place''.

Jim Hyde, a Deputy Sheriff, testified: ''I made a good many arrests for drunkenness. . . . I have seen boys under the age of twenty-one in the beer and cafe parts. . . . The young people range from fifteen or sixteen years up. . . . They usually gather about 7:30 or 8:00 o'clock in the beer joint or cafe; the dance didn't start until eight. Some of these young people would go into the dance and some wouldn't. I helped arrest two boys under nineteen for drunkenness. Neither of these was in the dance that I know of. I have never arrested

a girl there under age, but I took one drunk woman, ['Blondie', we called her] out of the dance hall. She was 35 or 40, or maybe older than that. 'Blondie' was supposed to be from California". The witness did not know her.

Continuing his testimony, the witness Hyde said: "As to the arrests made for drunkenness about this place, *it happens very often* that fellows go get whiskey and then come in a beer joint. When he comes in you think he is sober, and when he drinks a bottle or two of beer he gets drunk as a lord. . . . Some of those arrested at Alston's place for drunkenness got drunk in some other place in town and then came down there. I have seen them come to this place and they would be pretty drunk when they got there".

Questions by the Court: "A moment ago, in describing the manner in which these persons became drunk, you stated that 'it happened that some came in there when they had been drinking whiskey, then they would buy a bottle or two of beer and sit there fifteen or twenty minutes, and they would be drunk', is that correct? Answer: "Yes, sir." The Court: "Then you said you noticed some men come in and sit on stools and drink beer and become drunk?" Answer: "Yes, sir." The Court: "Have you observed that in [Alston's] place?" Answer: *"That happens in all of these beer places"*. The Court: "You are saying that this happened in Mr. Alston's place, and has also happened in other places?" Answer: "Yes, sir! We drag them away from the counter where we see them drinking and take them to jail". [The witness later stated that "Mr. Shelton took two out"] . . . "We picked up two or three boys who said they were nineteen years old. I have never seen the eighteen-year-old girls there."

Excerpts from testimony abstracted by the Attorney General serve to emphasize the conduct complained of by the State:

Sheriff Bill Russell: "Alston runs a cafe and beer parlor and has a skating rink and dance hall. . . .

Alston asked me to deputize Ellis Lauhon, and he stays there all the time. Lauhon is Recorder of the Town of Altus, elected by the people". As a Deputy Sheriff, (paid by Alston on the basis of $5 for each night he worked "directing parking") Lauhon thought "that when a car drove up and some one got out and we found it necessary to arrest them before they were in Alston's place, it was plain to know that they got drunk in some other place."

From the abstracted testimony of Jim Hyde: (Question on cross-examination relating to drunks on stools): "They could have gotten drunk at some other place in town and they come in down there?" Answer: "That is right; some of them fell when they came in". Question: "You have never observed them selling beer to minors?" Answer: "Only what these boys said". Question: "Did you say there was a night when it seemed that everybody was drunk?" Answer: "No, sir! I said drunks run something like traffic on the highway—you can see lots of it sometimes, and then none for awhile. . . . About five is as many as we ever took [to jail on a single night]. We did bring up six, but one got away. . . . Mr. Shelton and I walked through once in awhile, and you can tell when they are getting drunk. . . . I am not singling out Mr. Alston's place; [the illustration] applies to all of them. . . . I think Jim [Alston] wants his place run 'nice', because he never makes a kick about us getting anybody".

Against this testimony and other evidence somewhat similar, there is appellant's denial and the testimony of these who do not pretend to have personal information, that they have heard that Alston runs an orderly place and that he does not permit law violations.

There is no suggestion that the proceedings against Alston were motivated by political prejudice, personal unfairness, or because of spitefulness. The record clearly reflects that the Prosecuting Attorney's conduct was motivated by a desire to discharge his official duties in circumstances showing extreme difficulty in meeting

local unwillingness to testify against a resident. For this Mr. Partain is to be commended. The proof does not justify us in nullifying the Prosecuting Attorney's work in behalf of public morals and law enforcement by lightly brushing aside proven violations of law because there were but few and appellant's financial investments were heavy.

I think the unintentional error of the majority opinion is its assumption that a protracted course of illegal conduct must be established before it can be said that a case has been established by preponderating evidence. One can not read statements of the prosecuting witnesses without concluding that their official duties upon the one hand and their personal friendship upon the other had coalesced to an extent subsidizing intellectual frankness—something always to be suspected where the State must rely upon testimony of someone who is paid by the defendant.

And yet, in spite of this procedural difficulty, there is implicit in the examinations all that the prosecution was required to show. In addition there is positive testimony—not inferences, that near-drunks were served with beer while occupying stools at the counter, that minors drank—admittedly on occasions; that half of the arrests made in the entire town occurred on appellant's premises, where empty whiskey bottles were scattered; that young people, from age fifteen up, congregated to become patrons of the same proprietor's dance hall when it should open, where "Blondie's" conduct, both before and after arrest, was not calculated to promote admiration for grog-shop deportment or inspire juvenile respect for the kind of entertainment recommended by the State.

The sale of intoxicants, as has so often been said, is a mere license, as contrasted with a right. The State may attach any condition it chooses, and the seller must abide the consequences of his own mistakes as well as the misconduct of those with whom he surrounds himself, either as agents, employes, or invitees. His obligation is not only that he will not violate the law, but

that he will not permit it to be violated on or within the business environments of the place he operates.

ED. F. MCFADDIN, J., (dissenting). From a reading of the transcript in this case, I reach the following conclusions:

(1)—There is sufficient evidence of sales of liquor to minors to justify the injunction against the beer parlor. The evidence in this case, as to drinking by minors in the beer parlor, is similar to the evidence in *Digiacomo* v. *State,* 194 Ark. 24, 105 S. W. 2d 78; so I dissent from the majority holding as regards the beer parlor.

(2)—There is not sufficient evidence to support the injunction closing the dance hall; and on that issue I agree with the majority.

NATIONAL FARM LOAN ASSOCIATION OF MARIANNA *v.* MOYE.

4-9064 226 S. W. 2d 968

Opinion delivered February 13, 1950.

Hal B. Mixon and *G. V. Head,* for appellant.

Burke & Burke, for appellee.

MINOR W. MILLWEE, Justice. The question for decision is whether a stockholder of a solvent national farm loan association, having paid in full his federal land bank loan, is entitled to retirement of his association stock at par or at book value.

In August, 1922, appellee, J. M. Moye, obtained a $4,000 loan from The Federal Land Bank of St. Louis through the Lee County National Farm Loan Association, a national farm loan association organized under the Federal Farm Loan Act (12 U. S. C. A. §§ 636-1012). In obtaining the loan appellee purchased stock in said association in the amount of five per cent of the loan and of the par value of $200 as required by 12 U. S. C. A. § 733.

In 1937 said association consolidated with two other associations organized under the Federal Act to form Delta National Farm Loan Association. Thereupon appellee's stock in the old association was cancelled and he was issued stock in Delta of the par value of $200. At the time of said cancellation, Lee County National Farm Loan Association was indebted to The Federal Land Bank of St. Louis in an amount which exceeded association assets by $158,136.87, said indebtedness representing losses sustained by the land bank on loans made by the bank through the association and indorsed by it pursuant to 12 U. S. C. A. § 761.

In May, 1941, appellee obtained a loan of $8,000 from the Federal Land Bank of St. Louis through Marianna National Farm Loan Association and purchased stock in said association of the par value of $400 as required by the Federal Act. At the time of this loan the Marianna Association had reserves and surplus aggregating $676.74 of which amount the sum of $156.88 constituted legal reserves which the association was required by 12 U. S. C. A. § 911 to set aside.

On April 15, 1947, Delta National Farm Loan Association and Marianna National Farm Loan Association consolidated to form National Farm Loan Association of Marianna, the appellant. Appellee's stock in each of the consolidating associations was cancelled and he was issued two stock certificates in appellant for shares having a par value of $200 and $400, respectively. This consolidation was part of a general plan for reorganization and rehabilitation of national farm loan associations in the Sixth Farm Credit District and was made pursuant to consolidation agreements of March 4, 1947, entered into by each of the two consolidating associations with The Federal Land Bank of St. Louis. Under the agreement between Delta and the land bank, the latter released and discharged the former from its indebtedness to the bank in an amount which exceeded association assets by the sum of $327,229.30. The Marianna National Farm Loan Association was solvent at the time of consolidation and had no unpaid liabilities to the bank.

Appellant also agreed with the land bank to establish and maintain over a five year period, insofar as it is able, initial cash reserves, in addition to the legal reserve required by 12 U. S. C. A. § 911, equal to one-half the sum obtained by multiplying the outstanding volume of loans made through appellant by the reserve percentage used by the bank in the reserve area in which appellant is located. The land bank's reserve percentage in the reserve area was 8.02 per cent, thus making the appellant's reserve requirement 4.01 per cent. As a part of its rehabilitation plan, the land bank paid to the associations in the Sixth Farm Credit District a 30 per cent dividend on their stock in the bank in order to enable the associations to set aside a substantial portion of the reserves required under the reorganization agreements.

During the time appellee was a stockholder in Lee County and Delta National Farm Loan Associations no dividends were paid. As a stockholder in Marianna National Farm Loan Association, appellee received dividends as follows: 4% on November 20, 1944; 5% on September 30, 1945; and 5% on May 31, 1946.

On May 16, 1947, appellee paid the balance remaining due on his two loans. As a part of said payment on the $4,000 loan, stock owned by appellee in appellant of the par value of $200 was retired and cancelled at par, and the amount of $200 was credited to appellee as a final payment on the loan. In the same manner appellee's stock in appellant of the par value of $400 was cancelled and retired at par and $400 credited to appellee as a final payment on the $8,000 loan. Appellee gave appellant a check for the balance due on the two loans less the $600 credit for the par value of his stock.

On May 31, 1947, appellant declared and paid to its stockholders a 5% dividend. Appellee was a member of appellant's board of directors from the date of appellant's organization until May 16, 1947, and, for several years prior thereto, had been a director of Marianna National Farm Loan Association.

This suit was instituted by appellee against appellant on January 22, 1948, as one to recover dividends declared or which should have been declared on earnings of the association which allegedly accrued prior to May 31, 1947. However, at the trial on November 11, 1948, it was stipulated that, under the pleadings, appellee might seek recovery of the difference between the par value and book value of the stock cancelled on May 16, 1947. It was also agreed that on said date appellant's stock had a book value of $6.30 for each $5.00 share of stock, if a certain indemnity account credit was not to be considered in determining book value.

The trial court entered a decree finding that appellee's stock had a book value of $756 on May 16, 1947, for which credit should have been given on his indebtedness instead of the par value of said stock actually allowed in the amount of $600. Judgment was accordingly rendered in appellee's favor for the sum of $156 and the association has appealed.

The provisions of the Federal Farm Loan Act pertinent to the instant controversy are found in §§ 7 and 8 of

said act and appear in 12 U. S. C. A. § 721, and 12 U. S. C. A. § 733, respectively. 12 U. S. C. A. § 721 provides: "Whenever any national farm loan association shall desire to secure for any member a loan on first mortgage from the Federal Land Bank of its district it shall subscribe for capital stock of said land bank to the amount of 5 per centum of such loan, such subscription to be paid in cash upon the granting of the loan by said land bank. Such capital stock shall be held by said land bank as collateral security for the payment of said loan, but said association shall be paid any dividends accruing and payable on said capital stock while it is outstanding. Such stock may, in the discretion of the directors, and with the approval of the Farm Credit Administration, be paid off at par and retired, and it shall be so paid off and retired upon full payment of the mortgage loan. In such case the national farm loan association shall pay off at par and retire the corresponding shares of its stock which were issued when said land bank stock was issued."

12 U. S. C. A. § 733 provides: "No persons but borrowers on farm land mortgages shall be members or shareholders of national farm loan associations. Any person desiring to borrow on farm land mortgage through a national farm loan association shall make application for membership and shall subscribe for shares of stock in such farm loan association to an amount equal to 5 per centum of the face of the desired loan, said subscription to be paid in cash upon the granting of the loan. If the application for membership is accepted and the loan is granted, the applicant shall, upon full payment therefor, become the owner of one share of capital stock in said loan association for each $100 of the face of his loan, or any major fractional part thereof. Said capital stock shall be paid off at par and retired upon full payment of said loan. Said capital stock shall be held by said association as collateral security for the payment of said loan, but said borrower shall be paid any dividends accruing and payable on said capital stock while it is outstanding."

It is clear from these provisions that when a borrower obtains a loan from a Federal Land Bank he is required to subscribe for stock in the association equal, at the par value thereof, to 5 per cent of the amount of his loan and that said stock "shall be paid off at par value and retired upon full payment of the loan." (12 U. S. C. A. § 733, *supra.*) When the borrower subscribes for stock at par and obtains his loan, the association likewise subscribes for stock in the land bank at par to the amount of 5 per cent of said loan. When the loan is paid in full, the association's stock in the bank must also be paid off and retired at par. (12 U. S. C. A. § 721, *supra.*)

Appellee concedes that he is only entitled to the par value of his stock if the language of the act is to be followed literally, but contends that the decree finding him entitled to the book value of the stock should be sustained on the authority of *Western Clay National Farm Loan Association* v. *Lilly,* 189 Ark. 1004, 76 S. W. 2d 55, 95 A. L. R. 1506, and *Knox National Farm Loan Association* v. *Phillips,* 300 U. S. 194, 57 Sup. Ct. 418, 81 L. Ed. 599, 108 A. L. R. 738. Appellee construes these cases as holding that a stockholder in an insolvent association is entitled to receive the actual value or book value of his stock when he pays his loan, and says: "If the stockholder is only entitled to actual value of his stock when it is worth less than par, it must follow as a natural consequence that he is entitled to actual value when the stock is worth more than par."

In the Lilly case, *supra,* a borrower who had paid his loan in full sued the association for the par value of his stock. The association was insolvent. This court followed and quoted at length from the opinion in *Byrne* v. *Federal Land Bank,* 61 N. D. 265, 237 N. W. 797. The gist of the holdings in both cases is found in the following statements in the Byrne case which were approved by this court in the Lilly case: "While the statute requires the retiring of the shares at par, it contemplates a solvent institution. . . . The statute contemplates that when the loan is paid the stock shall be cancelled, and the necessary corollary of this is that the par value of the stock be returned; but it

is evident from the statute that Congress had in mind the possibility that such Farm Loan Association may become insolvent. . . . When we consider the act as a whole, it is apparent Congress did not intend the Farm Loan Association to pay off the stock at par when it had nothing with which to pay the stock."

In the Lilly case it was said: "We know of no rule of law, and have been cited none by counsel, which permits a stockholder in an insolvent corporation to withdraw his capital investment at par." The borrower also contended that the 1923 amendment to the Federal Farm Loan Act, found in 12 U. S. C. A. § 966, disclosed a legislative intent that the borrower's stock should be retired at par upon full payment of the loan, regardless of the solvency or insolvency of the association. This court rejected this contention, saying: "We cannot agree with this contention. We are convinced that the amendment of 1923 has application to solvent local associations only which are in process of voluntary liquidation. Any other construction of the amendment nullifies and destroys the clear intent and purposes of the original act, and would nullify and destroy the whole theory of cooperation by the borrowers which is significantly demonstrated by all provisions of the original act. If a borrower be permitted to pay off his loan and withdraw his capital stock at par value in an insolvent association, there is no cooperation left."

The holding of the U. S. Supreme Court in *Knox National Farm Loan Assn.* v. *Phillips, supra,* is stated as follows in Note 2, 12 U. S. C. A. § 721: "A national farm loan association is under no obligation to retire stock upon the repayment of a mortgage loan made to the shareholder and the Federal Land Bank is under no obligation to retire the corresponding shares of bank stock subscribed for by the association when the association is insolvent and the withdrawing member would thus receive a preference over others." In discussing the complementary character of §§ 721 and 733 of 12 U. S. C. A., *supra,* Justice CARDOZO, speaking for the court, said, 300 U. S. (194, 57 S. Ct. 421): "The association is not to retire its own shares and repay to the subscriber the amount of his

subscription until the land bank has retired the corresponding shares of bank stock subscribed for by the association, and has paid back to the association the par value thereof. Only thus can the association be put in funds wherewith to make payment to its own subscribers . . ." This language indicates that the statute requires both the bank and the association to retire their stock at par.

The effect of the decisions in both the Lilly and Phillips cases, *supra,* is that an association member who has paid his loan in full has no right of action against the association for recovery of the par value of his shares if the association is insolvent. The cases do not hold that a borrower in such case may recover the book value, nor is "par value" as used in the act interpreted to mean "book value." The clear implication of both decisions is that the borrower is only entitled to recover the par value of his stock upon final payment of his loan when the association is solvent, as in the instant case.

Although there have been several amendments to the Federal Farm Loan Act, §§ 721 and 733 of 12 U. S. C. A. have been left intact and we find nothing in any of these amendments which could be construed as changing the plain terms of said sections. Appellee says the 1937 amendment (12 U. S. C. A. § 967) demonstrates an intention that the stockholder upon payment of his loan should be entitled to the actual or fair book value of stock upon cancellation. This amendment applies to insolvent associations and authorizes the Farm Credit Administration to provide for the appointment of a conservator of such associations. It also provides that an insolvent association may retire its stock at fair book value if the stockholder is willing to accept it, but it does not require that this be done. The amendment was passed shortly after rendition of the decision of the U. S. Supreme Court in the Phillips case, *supra,* for the evident purpose of providing for stock retirement in insolvent associations and without changing §§ 721 and 733, *supra,* which relate to stock retirement in solvent associations.

It is also clear from the legislative history of the Federal Act that Congress fully understood and intended that stock in a solvent association should be retired at par upon final payment of the loan. On March 28, 1916, Senator McCumber of North Dakota, in discussing the bill which was subsequently enacted as the Federal Farm Loan Act, made the following statement (53 Cong. Rec. 4994): "In other words, if a farmer wants to borrow $2,000 he must first spend a hundred dollars to entitle him to that privilege. Of course, that hundred dollars, on which he will have to pay interest to someone, may be a complete loss. The provision is that it will be returned to him when the loan is paid."

In the House of Representatives on May 9, 1916, Mr. Hastings of Oklahoma made the following statement with reference to the purchase and retirement of stock (53 Cong. Rec. 7703): "The members may borrow 60 per cent of the value of their farm lands and 20 per cent of their insured permanent improvements through the association by subscribing for stock in the local association to the amount of 5 per cent of the desired loan. The local association in turn subscribes for a like amount in the Federal land bank. This stock is capable of paying dividends, and is paid off at par when the loan is paid."

On May 9, 1916, Senator Caraway of Arkansas, in explaining the bill at length, said (53 Cong. Rec. 7772): "Each borrower must subscribe and pay for stock in the association equal to 5 per cent of the amount that he wishes to borrow. This stock he must carry as long as he is indebted to the association. When he shall have paid his debt and canceled out his mortgage, the stock is canceled, and he is returned its par value." Other discussions showing that the provisions in the act for retirement of stock at par had the full sanction of Congress are found in 53 Cong. Rec. 6693, 6697, 6791, 6792, 7713-14, 7881, 7915, 7992, and 10109.

Appellee also stresses the cooperative features of the Federal Act and argues that if a stockholder is required to accept par for his stock he may thereby be precluded

from sharing in earnings which the association may maintain in the form of excessive reserves and surplus. On the other hand appellant points out the inequities that are likely to result from stock retirement on the basis of book value. It is not unlikely that inequities may result in individual cases regardless of rule to be applied. A consideration of these matters involves the wisdom or policy of the Act with which the courts are not concerned where the meaning of a statute is clear and unambiguous. *McDonald* v. *Wasson,* 188 Ark. 782, 67 S. W. 2d 722; *Thompson* v. *U. S.,* 246 U. S. 547, 38 Sup. Ct. 349, 62 L. Ed. 876.

Appellant was solvent on May 16, 1947, when appellee fully paid his loan. Under the plain wording of 12 U. S. C. A. § 721 and 12 U. S. C. A. § 733 which administrators of the Federal Farm Loan Act have followed for 32 years, we conclude that appellee was entitled to retirement of his association stock at par and not at book value upon full payment of his loan. In short, insofar as solvent associations are concerned, the statute means what it plainly says.

Appellant's abstract of the record sufficiently complies with Rule 9(b) of this court and appellee's motion to dismiss the appeal on this ground is denied.

The decree is reversed and the cause remanded with directions to dismiss the complaint and enter judgment for appellant.

ROBBINS *v.* PAGE.

4-9085 227 S. W. 2d 145

Opinion delivered February 13, 1950.

Rehearing denied March 20, 1950.

H. B. Covington and *E. L. Hollaway,* for appellant.

Robt. J. White, for appellee.

Ed. F. McFaddin, Justice. Appellee, Page, filed this action against appellant, H. E. Robbins,[1] under the Forcible Entry Statute. (§ 34—1501 *et seq.* Ark. Stats. 1947.) Upon issue joined, the case was tried to a jury and a verdict returned for Page. Robbins has appealed; and presents questions which relate to (1) sufficiency of the evidence, and (2) correctness of instructions.

I. *Sufficiency of the Evidence.* Page was in possession of certain lands lying east of Big Piney Creek, and for more than fifteen years had considered the creek as his boundary line. Robbins purchased lands west of the creek and claimed that his deed called for approximately nineteen acres east of the creek. When Robbins had a surveyor locate the supposed boundary line east of the creek, Page notified Robbins by registered mail:

"I am advised that you recently made a survey to determine the east line of" . . . (a 40 acre tract) . . . "and are contemplating erecting a fence along this line.

"This letter is to advise you that I am the owner of all that part of the" . . . (40 acre tract) . . .

[1] Robbins' son was also named as a party but H. E. Robbins is the real defendant and appellant.

"lying east of the middle of Big Piney Creek, and have been the owner and in possession thereof for many years. I cannot permit such a fence, nor can I recognize any claim of title you may make to that property. Will you please in the future refrain from going upon the lands lying east of the Creek for any purposes."

Notwithstanding this letter, Robbins erected a fence along the supposed line being on the lands in Page's possession east of the creek; and at that time Robbins told the witness, Riggs, that he would give Page no trouble if Page gave him no trouble. When Page removed the fence that Robbins had erected, Robbins, armed with a shotgun, went to the place where the fence had been and held a conversation with the witness, McMinn. The latter testified that Robbins said, he had heard in Clarksville about his fence being taken down and he came to see about it, and that Page ". . . ought to have known what he was doing before he took this fence down." A few days after the foregoing conversation with McMinn, Robbins and his son erected another fence along the line claimed by him, and Robbins continued to hold possession of the disputed lands. While these matters were happening, the wire on a cross fence, that Page had on the land, was cut into small bits and the fence destroyed.

Thereupon Page filed this action, claiming that Robbins was guilty of Forcible Entry in erecting the second fence and holding possession thereafter. Page testified:

"A. Well, I heard that Mr. Robbins was going to erect his fence and he said it wasn't going to be torn down any more.

Q. Then what happened?

A. Well, he built another fence up through the field and was seen down there with a gun—I didn't want to have any trouble with the man, so I brought this suit.

. . . . .

Q. Why didn't you tear down the second fence?

A. I didn't want to have any trouble with the man.

Q. Did you expect trouble if you did?

A. Yes, sir.

. . . . .

Q. Now you say you didn't remove that fence because of your fear of trouble with him?

A. Yes, sir. He had cut my fence down and part of the wire was gone."

Appellant insists that his entry on the land, at the time of the building of the second fence, was "without force"; and that the entry was peaceable and he was entitled to retain possession. But from the evidence, as heretofore detailed, we reach the conclusion that a jury question was made as to the extent of force used by Robbins in making his entry. When a man, armed with a shotgun, enters on lands and makes the remarks that Robbins made, and then proceeds to rebuild his fence and hold possession against the previous possessor, a jury may reasonably find that all such conduct is not that of peace and friendship, but rather of force and aggression.

In *Douglas* v. *Lamb,* 157 Ark. 11, 247 S. W. 77, Mr. Justice Wood, speaking for this Court, discussed the extent of force required to make a case under our statutes:

"Appellant next contends that there was no testimony tending to prove that the appellant took possession of the land in controversy by force. The appellees brought this action under § 4837 of Crawford & Moses' Digest, and under that section force is the gist of the action. *Miller* v. *Plumber,* 105 Ark. 630, 152 S. W. 288, and cases there cited. Actual physical violence upon the person in possession by the one who takes possession is not a prerequisite to the maintenance of the action, but 'if the demonstration of force is such as to create a reasonable apprehension that the party in possession must yield to avoid a breach of the peace, it is sufficient. It is not necessary that the party be actually put in fear. There need only be such a number of persons or show of force as is calculated to deter the person in possession from undertaking to send them away or to retain his possession.' 11 R. C. L., § 23, pp. 1160-

1161. To determine whether or not force was used, the personnel and situation of the parties and the circumstances surrounding them at the time must all be taken into consideration."

We conclude that the evidence in the case at bar was legally sufficient to take the case to the jury and to support the verdict that was rendered.

II. *Instructions.* Appellant complains of the wording of Instructions 11 and 12, against each of which there was only a general objection. The Court instructed the jury as to the nature of the action, the issues, the burden of proof, the statutory definition of Forcible Entry, the amount of force required, and other appropriate matters. Then, in Instruction 11, the Court told the jury that, in the light of the foregoing instructions, if it found from the predominance of the evidence that

". . . the plaintiff was in peaceable possession of the lands involved in this action, and that the defendants without legal right, forcibly, as defined by the court, entered upon the lands and took possession of the same and illegally and without legal right continued in the wrongful possession of such lands and refused to deliver the possession of such lands to plaintiff, then if you so find, your verdict should be for the plaintiff for the recovery of the lands in question."

In Instruction 12, the Court told the jury that if it found

". . . that the defendants entered into possession of the controverted lands on or about May 1, 1948, peacefully and under a claim of right, and not as a result of a forcible or hostile entry, and that the entry was not hostile and as alleged by the plaintiff, or that the plaintiff at the time of the alleged entry was not in possession of the lands involved, then your verdict should be for the defendants."

When we consider these two instructions in the light of the entire fourteen that were given, we reach the conclusion that the appellant's point is not well taken. It is clear, from reading the instructions, that the learned Circuit Judge was thoroughly conversant with, and instructed

the jury in the language of, our cases on Forcible Entry, some of which are: *Grammer* v. *Blansett,* 93 Ark. 421, 124 S. W. 1037; *Miller* v. *Plummer,* 105 Ark. 630, 152 S. W. 288; *Douglas* v. *Lamb,* 157 Ark. 11, 247 S. W. 77; *Holzman* v. *Gattis,* 195 Ark. 773, 114 S. W. 2d 3; *Wall* v. *Robling,* 207 Ark. 987, 183 S. W. 2d 605.

We find the instructions in this case to be clear and comprehensive and covering every phase of the case.

Affirmed.

[redacted]

WHITE *v.* PAGE.

4-9075 226 S. W. 2d 973

Opinion delivered February 13, 1950.

Rehearing denied March 13, 1950.

[redacted]

Bland, Kincannon & Bethell, for appellant.

Alfred J. Hall and *Gean & Gean,* for appellee.

ED. F. MCFADDIN, Justice. Appellant, Mrs. Addie White, filed suit, seeking to rescind a contract between herself and Mr. and Mrs. Page, and recover $1,250 which she claimed she had paid. The Chancery Court dismissed the complaint for want of equity, and this appeal challenges the correctness of that decree.

FACTS

Mr. and Mrs. Roland Page owned, in Fort Smith, a house and lot mortgaged to Mrs. Bertha Crandall, Trustee, for a balance of $6,700.16, payable at the rate of $50 per month. The Pages occupied the front apartment of the house, and the rear apartment was occupied by a tenant. On August 30, 1948, the Pages contracted to sell the property to Mrs. Addie White, for a total consideration of $8,750.16 which was to be handled as follows:

$1000.00 Cash to the Pages on the signing of the contract.

$6700.16 Assumption of the Crandall mortgage.

$1050.00 Balance to be paid to the Pages in monthly installments of $100.00 beginning October 1, 1948.

The sellers retained possession of the property until October 1, 1948, at an agreed credit of $50. No deed was to be delivered to Mrs. White until she had fulfilled the said contract, which provided, *inter alia:*

"Until the obligations of this contract have been performed by the buyer, she agrees to maintain and pay for premiums on the fire and tornado insurance on improvements on said property in the sum of $7,750 . . . and the buyer is to pay all general taxes and assessments for local improvements coming due subsequent to this date." (These same requirements were contained in the Crandall mortgage.)

The contract also contained the following forfeiture clause:

"Should the buyer herein fail to carry out the terms and conditions of the contract with said Trustee, or should the said buyer default in any two or more of the above monthly payments, then, at the option of the sellers herein, the entire balance due them shall immediately become due and payable, and if not paid within ten days, all rights of the said buyer, and payments made under this contract, shall be forfeited, and this agreement become null and void."

On October 1, 1948, the Pages paid Mrs. White $50 for rent, and made arrangements with her to continue to occupy the front apartment at $35 per month; which they paid to her for several months. Mrs. White also collected in cash the rent of $35 a month from the tenant in the other apartment. But Mrs. White, after repeated demands, failed to pay the fire insurance premium of $42 as well as payments on the Crandall mortgage due in December and January and thereafter. Furthermore, Mr. Page gave Mrs. White $40.95 to pay the current taxes and these she also failed to pay. Mrs. Page testified as follows:

"Q. Did you have a conversation with Mrs. White concerning whether or not she was going to carry out the contract with you and your husband on or about the 1st of November of last year?

A. Yes sir. I called her at Charleston, Arkansas, and told her we needed our money; that we had bills to pay and she said she didn't intend to pay us any more until she sold the house.

Q. Did she pay any more?

A. No sir.

Q. That was about the 1st of November of 1948?

A. Yes sir, just a little after that.

Q. Do you know whether or not she collected rents off of this property after you had this telephone conversation?

A. She collected on the back apartment until January 31st. She collected for the month of January." Mrs. White made no payments to the Pages after the above mentioned conversation; and on January 5, 1949, the Pages sent Mrs. White (she was then in Oklahoma) a registered letter reading:

"Since you have failed to pay insurance, and failed to pay Mrs. Crandall on her mortgage, and you have failed to make the three last payments of $100 each due us on your contract with us concerning Lot 5, Block 74, Original City of Fort Smith, Arkansas, you are advised that if you do not pay the entire balance of said contract within ten days from the receipt of this letter all your rights under said contract shall be forfeited and said contract void."

Mrs. White received the letter but made no payments in response to it; and in February, 1949, the Pages—after paying all the delinquencies on the Crandall mortgage, as well as the insurance premium and the taxes—sold the property to Mrs. Mary Owens for a total consideration of $7,661.43, being calculated as follows:

Amount of Crandall mortgage and interest	$6561.43
Cash to Mr. and Mrs. Page	$1100.00

When there are considered the taxes, insurance, and Crandall payments, which the Pages had to pay on account of Mrs. White's delinquency, it becomes evident that the Pages actually received less money by selling the property to Mrs. Owens than they would have received if Mrs. White had fulfilled her contract.

On April 13, 1949, Mrs. White filed this suit in the Chancery Court, claiming that the Pages had breached their contract with her by (a) remaining in the front apartment after October 1st, and (b) conveying the property to Mrs. Mary Owens in February, 1949. Mrs. White sought recovery of $1,250 which she claimed was the total of the amount she had paid the Pages and Mrs. Crandall. Mrs. Mary Owens was made a party defendant, and she answered, claiming that she bought the property from the Pages in good faith and for

value. In their answer the Pages stated that Mrs. White had breached the contract, and they had availed themselves of the forfeiture provision recited in it. The case was heard *ore tenus,* and the facts developed as above stated; and the Chancery Court entered a decree dismissing Mrs. White's complaint for want of equity. Mrs. White has appealed.

OPINION

Mrs. White alleged that the Pages had breached the contract in two instances: (I) they remained in possession of the front apartment after October 1st; and (II) they conveyed the property to Mrs. Owens in February, 1949.

I. *Possession.* As to this, little need be said. Mrs. White made an agreement with the Pages that for a monthly rental of $35 they could remain in the front apartment after October 1st. They settled with her for such rental by selling her some of their furniture, and by crediting her indebtedness to them. Under such circumstances, Mrs. White cannot be heard to say that the Pages breached the contract by remaining in possession.

II. *The Conveyance to Mrs. Owens.* The Pages did not breach their contract by making a deed to Mrs. Owens, if in fact they had a right to forfeit the Page-White contract. Stated in its simplest terms, the issue is this: if the forfeiture clause in the contract be valid, then under the facts did the Pages have a right to forfeit the contract with Mrs. White? Learned counsel for appellant contends that the contract between Mrs. White and the Pages was a Bond for Title and that she became an equitable mortgagor of the premises, and that her rights could only be terminated by a foreclosure in equity; and in support of such contention we are cited to these cases: *Smith* v. *Robinson,* 13 Ark. 533; *Hall* v. *Denckla,* 28 Ark. 506; *Holman* v. *Patterson's Heirs,* 29 Ark. 357; *Robertson* v. *Read,* 52 Ark. 381, 14 S. W. 387, 20 Am. St. Rep. 188; *Corcorren* v. *Sharum,* 141 Ark. 572, 217 S. W. 803; *Robbins* v. *Fuller,* 148 Ark. 173, 229 S. W. 8; *Judd* v. *Rieff,* 174 Ark. 362, 295 S. W. 370.

If the contract here were a "Bond for Title"—as that expression is used in the cited cases—then there would have to be a foreclosure in this case. We conclude, however, that the contract between the Pages and Mrs. White is not the equivalent of a Bond for Title, but is a mere executory contract with a forfeiture clause and that because of her defaults Mrs. White's interest was forfeited under the provisions of the contract. We have many cases recognizing that a purchaser's rights under an executory contract affecting real estate may be forfeited pursuant to the contract and without proceedings in law or equity. Some such cases are: *Ish* v. *Morgan,* 48 Ark. 413, 3 S. W. 440; *Souter* v. *Witt,* 87 Ark. 593, 113 S. W. 800, 128 Am. St. Rep. 40; *Friar* v. *Baldridge,* 91 Ark. 133, 120 S. W. 989; *Three States Lumber Co.* v. *Bowen,* 95 Ark. 529, 129 S. W. 799; *Wade* v. *Texarkana Building & Loan Association,* 150 Ark. 99, 233 S. W. 937.

In *Ish* v. *Morgan, supra,* Chief Justice COCKRILL said of the contract there involved:

"The vendee here has in effect agreed that his rights shall depend upon the scrupulous adherence to the engagement he made . . ."

In *Three States Lumber Company* v. *Bowen, supra,* Chief Justice MCCULLOCH said:

"While equity will not ordinarily enforce forfeitures, still, where the payment of the price of the land is by express letter of the contract made a condition upon which the sale depends, courts of equity will not refuse to follow the terms of the contract; for to fail to do so would be to make a contract for the parties which they had not made themselves."

It is therefore clear that our cases recognize the potential validity of a forfeiture clause in an executory contract for the sale of land.

In *Friar* v. *Baldridge, supra,* there was involved a contract for the sale of land, and the contract contained a forfeiture clause. Mr. Justice FRAUENTHAL, speaking for the Court, said:

"Parties may enter into a valid contract relative to the sale of land whereby they may provide that time of payment shall be of the essence of the contract, so that the failure to promptly pay will work a forfeiture. *Ish* v. *Morgan,* 48 Ark. 413; *Quertermous* v. *Hatfield,* 54 Ark. 16, 14 S. W. 1096; *Block* v. *Smith,* 61 Ark. 266, 32 S. W. 1070. But the final effect of such an agreement will depend on the actual intention of the parties, as evinced by their acts and conduct; and such a breach of the contract as would work a forfeiture may be waived or acquiesced in. The law will strictly enforce the agreement of the parties as they have made it; but, in order to find out the scope and true effect of such agreement, it will not only look into the written contract which is the evidence of their agreement, but it will also look into their acts and conduct in the carrying out of the agreement, in order to fully determine their true intent."

The contract in the case at bar did not state in express words "time is of the essence"; but our cases hold that evidence may establish such fact in the absence of a specific statement in the contract. In *Three States Lumber Company* v. *Bowen, supra,* we quoted with approval from *Cheney* v. *Libby,* 134 U. S. 68, 10 S. Ct. 498, 33 L. Ed. 818:

"Time may be made of the essence of the contract 'by the express stipulations of the parties, or it may arise by implication from the very nature of the property or the avowed objects of the seller or the purchaser.' "

In the case at bar the contract required Mrs. White (1) to keep the property insured, (2) to promptly pay the taxes, and (3) to make the payments on the Crandall mortgage promptly as they became due. These three matters were essential and "time was of the essence" as to them: a fire occurring during lapsation of insurance might destroy most of the security and leave no funds for re-building; failure to pay taxes might lead to loss of all the property; and Mrs. Crandall testified that she *insisted* that the monthly payments be promptly made on her mortgage. So we reach the conclusion

that "time was of the essence" as to these three matters, even though it was not "of the essence" as to the payments to the Pages. This latter is true because of the holding in such cases as *Butler* v. *Colson,* 99 Ark. 340, 138 S. W. 467; *Smith* v. *Berkau,* 123 Ark. 90, 184 S. W. 429; and *Feibelman* v. *Hill,* 141 Ark. 297, 216 S. W. 702.

We therefore conclude that the Page-White contract was not a Bond for Title; that the forfeiture clause was valid; that the Pages had a right to declare Mrs. White's interest to be forfeited for failure to pay the insurance premiums, the taxes, and the installments on the Crandall mortgage; and that the Pages acted fairly and reasonably and reaped no excessive profit from the forfeiture and subsequent re-sale to Mrs. Owens. Therefore the decree is affirmed.

WOODS *v.* WOODS.

4-9081 226 S. W. 2d 961

Opinion delivered February 13, 1950.

Norton & Norton and *O. H. Hargraves,* for appellant.

Mann & McCulloch, for appellee.

LEFLAR, J. In this action plaintiff as devisee under the will of Dr. Albert Woods sought to recover 40 acres of land near Colt, Ark., from defendant Burdette Woods who claims a superior title thereto. The Chancery Court found for defendant and plaintiff appeals.

Dr. Albert Woods left the Colt community in the early 1900s to practice medicine in Oklahoma. He was then without question the owner of the 40 acres now in litigation. He at that time arranged with his brother Wrightor to occupy the land, Wrightor to pay the taxes and keep up the improvements as rent. Wrightor's occupancy continued for a good many years, but in 1927 when Albert returned to the old home for the funeral of a sister Minnie he turned the land over to another brother, William, under the same arrangement as to rent. The testimony is uncontradicted that William agreed to pay the taxes and keep up the improvements in return for the use of the land.

Actually, the land had been forfeited to the State for unpaid taxes in 1921. William, despite his agreement, paid no taxes until 1936. In that year he bought in the State's tax title, having himself named as grantee in the tax deed. Thereafter he paid the taxes in his own name. Albert apparently knew nothing of this until William died early in 1945, or at least not until a short time before William's death. In the meantime William had on June 6, 1944, conveyed the 40 acres by deed to defendant Burdette Woods, who was in possession. William was living with Burdette on the land when William died. Albert himself died in December, 1946, leaving a will devising all his land to a daughter on whose behalf the present action is maintained. The facts thus far set out are proved by substantially uncontradicted testimony, and are practically admitted by both parties.

The plaintiff introduced testimony to show that William Woods, at the time he executed his deed to Burdette Woods in June, 1946, was mentally incompetent. The testimony on this point was sharply divergent, but we cannot say that the preponderance of the evidence was contrary to the Chancellor's finding that William was sane. We do not disturb the finding on that issue of fact.

Plaintiff also gave evidence that after William's death Burdette executed a rent note covering the 40 acres now in question, the rent note being in favor of

Wrighton (who testified he was acting as his brother Albert's agent) and that the transaction included an undertaking by Burdette to relinquish the 40 acres at the end of the term of the lease. Burdette denied that the rent note covered this 40 acres or that there was any undertaking by him to relinquish it. He said that the rent note covered other land only. Here again the chancellor found the facts in Burdette's favor, and we cannot say that the finding was against the preponderance of the evidence.

The remaining question in the case is one of law, as to whether under the facts here it was permissible for William to acquire the tax title for himself as against his landlord brother Albert.

It is well settled in Arkansas that a tenant who is not himself obligated to pay the taxes on the leased premises may buy in the tax title for himself and thus acquire a title good as against his landlord. *Sims* v. *Petree,* 206 Ark. 1023, 178 S. W. 2d 1016; *Billingsley* v. *Lipscomb*, 211 Ark. 45, 200 S. W. 2d 510; *Hill* v. *Barnard, ante,* p. 29, 224 S. W. 2d 31. Contrariwise, it is equally well settled that a tenant or other occupant who is under a duty to pay the taxes on the premises he occupies may not by failing to pay them permit a tax sale and buy in the land for his own benefit. If he does purchase the tax title under such circumstances, his purchase is deemed to be in the nature of a redemption for the benefit of those to whom he owed the duty to pay the taxes. *Hunt* v. *Gaines,* 33 Ark. 267; *Zimmerman* v. *Franklin County Savings Bank & Trust Co.,* 194 Ark. 554, 108 S. W. 2d 1074; *Wright* v. *Davis,* 195 Ark. 292, 111 S. W. 2d 565; *Smith* v. *Davis,* 200 Ark. 547, 140 S. W. 2d 126.

The present case appears to fall in a middle ground between these two situations. The tenant William had undertaken to pay the taxes, but no taxes were due because the land had already been forfeited to the State for taxes that should have been paid in an earlier year. For eight years or more William took advantage of this situation, unknown to landlord Albert, and paid no taxes

at all. But in 1936 he paid the only thing in the nature of taxes that was due, the amount required to take up the State's tax title plus current taxes on the land. We believe that under the circumstances this payment was in furtherance of the duty to pay taxes that he owed to his landlord brother, and that the duty and relationship were such that William could not, as against his brother, acquire title to the land in this fashion. We hold that the redemption inured to Albert's benefit and that the beneficial title was in him.

William's deed to Burdette did not cut off Albert's title. It is not denied that Burdette took with knowledge of the essential facts, nor that the conveyance to Burdette was by way of gift merely. The title being still in Dr. Albert Woods at his death, it passed by his will to plaintiff his daughter.

The decree of the Chancery Court is reversed and the cause is remanded for further proceedings in accordance herewith.

SCRAFFORD *v.* RIGGS.

4-9072 226 S. W. 2d 963

Opinion delivered February 13, 1950.

Geo. M. Booth, for appellant.

S. L. Richardson, for appellee.

GRIFFIN SMITH, Chief Justice. The Chancery Court, acting in circumstances disclosing unusual difficulties, but exercising commendable directness in giving effect to the testator's most probable purpose, divided the estate of Abraham H. Riggs into two allotments. The first included those definite parts of the whole expressed in ninths, plus specific dollar bequests. The result was subtracted from the net estate and treated as residuary for distribution among all of the beneficiaries, and, as to proportions, in the same respect that the amount each received from the first allotment bore to the total of such allotment.

Stated somewhat differently, the proportionate share of the net estate allowable to each claimant was determined by reducing to a common dollar denominator each individual's share, thus creating the first allotment. Thereafter, the proportion so determined was used as the basis for finding what each beneficiary's share in the second allotment would be.

The nine persons remembered in the will[1] were (a) Sanford U. Riggs, (b) Alford G. Riggs, (c) Christine Smart,[2] (d) Lettie Riggs Scrafford, (e) Clifford Riggs, (f) Pearl Chastain, (g) Rosa McDowell Riggs, and (h) Christiana Thompson and her husband.

Assuming that the net estate available for distribution would be between $17,000 and $18,000, the Chancellor used $18,000 as a hypothetical base. Because (a), (b), and (c) were each to receive "an undivided one-ninth of

[1] Christiana Thompson's husband, Dewey, is included in the nine names.

[2] The bequests were: Sanford U. Riggs and Alford G. Riggs, 1/9th each; Christine Smart, 1/9th plus $200; Lettie Riggs Scrafford, $100; Clifford Riggs and Pearl Chastain, $200 each; Rosa McDowell Riggs, $1,000; Christiana Thompson and husband, $1,500. [In referring to Christine Smart we have at times mentioned her as (c-1) and (c-2). The first, (c-1) identifies the 1/9th willed to this beneficiary, while the second, (c-2) is the additional item of $200].

all of my estate of every nature whatsoever, both real and personal, wheresoever situated", each of the three was credited with $2,000—a total of $6,000. But Mrs. Smart, (c), was to have one-ninth plus $200, so for the purpose of tabulation she is shown as (c-1) and (c-2). Those three persons, representing four bequest parts, would take $6,200. Specific amounts given (d), (e), (f), (g), and (h),—aggregating $3,000—would, when added to the $6,200, leave $8,800 for the secondary apportionment.

There can be little doubt that, up to this point, the Chancellor put into effect what the testator primarily intended; but the difficult problem is to decide whether failure of the will-maker to say with exactness what should be done with the remainder resulted in partial intestacy, or whether sufficient intent may be implied from the language used to justify a distribution along the lines Abraham H. Riggs most probably had in mind.

The will affords no guide respecting the testator's knowledge of values, although he must have understood that there were but few debts and that the net amount would be substantial. He was nearly seventy years of age and had spent more than forty years in Idaho. During most of six years preceding execution of the will he was at Boise, near an adopted daughter, but did not occupy the same residence. While in Idaho Riggs executed a will prepared by a competent attorney, the content of which is not disclosed by the record. As shown by witnesses whose testimony is competent as narrative only, Riggs spent his last few weeks with relatives near Pocahontas, Ark., with whom he was on good terms. G. W. Million, spoken of as "Judge", was the scrivener who served Mr. Riggs when the last will was drawn. It is not disputed that Million used the Idaho will as a guide, copying the style and form. He then placed the old document in a stove, where it was destroyed by fire.

All parties to the controversy here, during trial, treated the probated will as a valid instrument. There had been a petition for partition of certain lands, with

sale, and a request that proceeds be paid to the executor. Chancery Court was then asked to construe the will; and the action taken in response to this request is the subject of controversy.

. . . .

Immediately following Item 10 of the will—the bequest to Christina Thompson and her husband, Dewey—there is this language: "The above [bequests] are made retroactive so that each beneficiary [shall] receive in proportion as the value of the estate shall increase or diminish. It is my desire that the beneficiaries mentioned herein shall receive my entire estate after the payment of my debts, such as necessary expenses of the administration and execution of this, my last will and testament".

While a witness was testifying that, in copying from the old will, Judge Million reached a certain point and then began deviating, there was an objection by counsel for appellees [Mr. Richardson] to consideration of what the testator told Judge Million regarding the changes that were to be made. Mr. Booth, representing the appellant, remarked, "The will shows that it follows the regular procedure or language of the [old] will form for a time, and then it changes completely". The Chancellor: "It is the Court's understanding that nobody is attacking this will. If this is error you should set me straight". Mr. Richardson: "My whole reason for putting this testimony in is that counsel [for appellant] made an argument that the testator thought he [had] disposed of all his property, and based it on $4,800. I am putting on this testimony to refute their contention". Mr. Booth: "The only reason that I asked the question is that the law looks behind the scene. I am not trying to contradict the will; but things are mixed up, and I am trying to throw some light on the interpretation. We just want the truth of what was intended".

From this colloquy we must assume that the will, as such, had been accepted; and, as expressed by Mr. Booth, the inquiry went to the single proposition of ascertaining what was intended.

It will be observed that Mr. Richardson had told the Court that appellant's contention, as presented by Mr. Booth, "was based on $4,800". There is no explanation of this figure. Neither attorney tells how the amount was presented for consideration in making the computations. By analogy, however, there is an answer, and that answer suggests a formula differing from the one used by the Chancellor. It will be discussed later.

What the Chancellor did was to take three ninths plus $200, plus $3,000, from $18,000, and subject the remaining $8,800 to the following apportionment:

Using the smallest bequest—$100 to (d)—as a unit, it was divided into 18,000 for 180 units. If [said the Chancellor] a single unit equaled this bequest to appellant, then twenty units would equal a ninth of $18,000, or the sums awarded, respectively, to (a) and to (b); twenty-two units would equal the two awards to (c)—as elsewhere stated, (c-1) and (c-2); two units would go to (e) and the same to (f), while (g) would receive ten units, and (h) fifteen. Then, dividing the remainder of $8,800 by 92 in order to ascertain the proportion, it is found that (d),—with one unit worth $100 when $9,200 was considered — is entitled to a one/92d part of $8,800, or $95.652. Other interests were arrived at in the same manner. Results are disclosed by the appended table, showing first and second allotments:

	First Allotment	*Second Allotment (95.652%)*	*Total*
(a)	$2,000	$1,913.04	$ 3,913.04
(b)	2,000	1,913.04	3,913.04
(c)—(1x2)	2,200	2,104.34	4,304.34
(d)	100	95.65	195.65
(e)	200	191.30	391.30
(f)	200	191.30	391.30
(g)	1,000	956.52	1,956.52
(h)	1,500	1,434.78	2,934.78
	$9,200	$8,799.97	$17,999.97

To show that the Chancellor did not arbitrarily settle on the first seemingly workable equation suggested, we might deal speculatively with what was prob-

ably being discussed when Mr. Richardson mentioned $4,800; for there could be this ratio:

A ninth to each of the two brothers and the sister, (a), (b), and (c-1), would account for three ninths, or a third of the whole. The remaining two-thirds were not dealt with by the testator on a fractional basis, but in terms of dollars. The aggregate of dollar bequests, $3,200, would therefore constitute the remaining two-thirds, since the intention was to dispose of the entire estate *in ninths plus dollars*. Consequently, if $3,200 be two-thirds, one-third would be $1,600, and $1,600 added to $3,200 make $4,800, or three thirds.

Another equating method, not mentioned in the briefs, may be stated this way: Deduct $4,800 from the net $18,000 estate, and $13,200 remains. One ninth of $13,200 is $1,466.67. For purposes of comparison, $1,466.67 will be tentatively credited to each of the first three beneficiaries, (a), (b), and (c-1), denoting their respective shares in the first allotment. The sum of these three ($4,400) combined with $3,200 apportionable to (c-2) and (d) through (h) yields $7,600, and might be dealt with as the first allotment. Assuming that a basis is thus provided for apportioning the net estate, and that it likewise settles the proportion for distributing the remainder of $10,400,—that is, $18,000 less $7,600—the table below shows the result:

	First Allotment	*Second Allotment*	*Total*	*Difference Between This Method and Chancellor's*
(a)	$1,466.67	$ 2,007.02	$ 3,473.69	$439.35
(b)	1,466.67	2,007.02	3,473.69	439.35
(c)	1,666.66	2,280.69	3,947.35	356.99[1]
(d)	100.00	136.84	236.84	41.19
(e)	200.00	273.69	473.69	82.39
(f)	200.00	273.69	473.69	82.39
(g)	1,000.00	1,368.42	2,368.42	411.90
(h)	1,500.00	2,052.63	3,552.63	617.85
	$7,600.00	$10,400.00	$18,000.00	

[1] The first three items in the "difference" column, aggregating $1,235.67, are minus, showing what these three would lose by this method as distinguished from the Chancellor's method. The last four are plus, indicating what the dollar beneficiaries would gain. [In dealing with fractional cents, mills have been omitted, hence *exact* results do not always correspond].

Impressed, as we are, by the testator's affirmative declaration that each named beneficiary should receive in proportion as the estate may increase or decrease in value, and that all of it should go to those who were mentioned, it must be held that the Chancellor was justified in using as a basis for apportionment the method that best suited this end. If appellant's theory is correct, and the will is inoperative except as to the specific items of three ninths plus $3,200, the residue would go under the law of descent and distribution, to be participated in by "34 or 40 nephews and nieces".[2] They were not mentioned. But since those who were to receive *the entire estate* were clearly identified, this wish cannot prevail if there is partial intestacy. The Chancellor was further fortified by appellant's assurance that she only wanted the truth of what was intended.

Affirmed.

LEFLAR, J., concurs.

MORLEY, COMMISSIONER OF REVENUES *v.* SUN EXPORT COMPANY.

4-9121 226 S. W. 2d 805

Opinion delivered February 13, 1950.

[2] Appellant's brief, p. 7.

O. T. Ward, H. Maurice Mitchell and *Chas. E. Ramsey,* for appellant.

House, Moses & Holmes and *Catlett & Henderson,* for appellee.

HOLT, J. Appellee, Sun Export Company, a corporation, brought this action seeking to restrain the Revenue Commissioner of Arkansas, from revoking its permit, as a "Wholesale Exporter," under the provision of Act 223 of the Arkansas Legislature of 1949. From the decree of the trial court permanently enjoining the Commissioner from "interfering in any manner with the business, or with the receipt and storage and selling of distilled spirits, wine and malt beverages for export, out of the State of Arkansas, by appellee, to restore said permit, and to sell any and all necessary stamps to be affixed to said export shipments by appellee, comes this appeal.

There is little, if any, dispute as to the material facts.

Act 223 became effective March 2, 1949, and § 1 provides: "(a) Any person, firm or corporation may apply to the Commissioner of Revenues for a permit, as a 'wholesale exporter' of spirituous liquors, to receive, store and sell for export purposes. * * * If the Commissioner shall grant the application, he shall issue a permit in such form as shall be determined by the rules and regulations established by the said Commissioner. Such permit shall contain the description of the premises to be used by the applicant, and in form and in sub-

stance shall be a permit to the person, firm, or corporation therein specifically designated to import, receive, store and to sell only for export out of the State of Arkansas to licensed wholesalers, of spirituous liquors of states other than Arkansas, for sale in states other than Arkansas, or retailers of spirituous liquors licensed under the laws of states other than Arkansas.

"(b) Any licensee, under such reasonable rules as may be adopted by the Commissioner of Revenues, as a wholesale exporter of spirituous liquors, shall sell, deliver, or transport only to (1) wholesalers or retailers or holders of special tax stamps issued outside of the State of Arkansas for export out of the State of Arkansas."

"Section 4. The Commissioner of Revenues shall have all power now vested in the Department of Revenues or the Commissioner of Revenues with respect to the issuance of the permits provided for or authorized by this Act, and to fully perform each and every duty imposed upon the Commissioner by this Act, or any other law of this State, and its own rules and regulations, and shall have the sole discretion of determining the advisability of issuing permits thereunder. Each applicant for a permit for wholesale export license under this Act shall pay the sum of Fifteen Hundred Dollars ($1,500) per annum for each permit so issued for the privilege of engaging in the wholesale export business, and no permit shall be transferable or assignable, and may be revoked for cause for violation of any rules of the Commissioner of Revenues or any laws of this State."

Thereafter, the Commissioner issued to the appellee, and three other dealers, export permits, appellee's was to expire June 30, 1950.

On October 10, 1949, after proper notice, the Commissioner conducted a hearing for the purpose of determining whether all of these permits should be revoked. At this hearing, two of the permit holders, located in Fort Smith, and another in Fayetteville which had not begun operations, voluntarily, surrendered their permits

and ceased to operate, and appellee's was revoked. The two Fort Smith exporters had been making most, if not all, of their sales to parties in Oklahoma.

Appellee, Sun Export Company, operated under its permit from Lake Village and while most of its sales went into the State of Mississippi, the record discloses that it made seven sales to Oklahoma parties. Both Oklahoma and Mississippi were, and are "dry" States by law.

Mr. H. M. Judd testified: "A. I am now keeping books on the export houses in the State. Q. In that capacity, do you receive copies of invoices of whiskeys shipped by the export houses from Arkansas into other states? A. I do. * * * Q. Mr. Judd, in your records do you find shipments of whiskey from the Sun Export Company billed into the State of Mississippi? A. Quite a few, yes, sir. Most of it goes into Mississippi. * * * Do you recall the date of the last shipment into the State of Mississippi? A. I believe it was the 4th or 5th of this month, one day last week. Q. Since you went back to your office a moment ago did you determine the exact number of shipments that the Sun had made into the State of Oklahoma? A. I did. Q. How many were there? A. Seven."

Oklahoma Statutes Anno., Title 37, ch. 1, § 1, provide: "* * * It shall be unlawful for any person, individual or corporation to furnish, except as in this chapter provided, any spirituous, vinous, fermented or malt liquors, or any imitation thereof or substitute therefor, or to manufacture, sell, barter, give away or otherwise furnish any liquors or compounds of any kind or description whatsoever whether medicated or not which contain more than three and two-tenths (3.2%) per cent of alcohol, measured by weight, and which is capable of being used as a beverage, * * *; or to ship, or in any way convey, such liquor from one place within the state to another place therein except the conveyance of a lawful purchase as herein authorized; or to solicit the purchase or sale of any such liquors, etc. A violation of any provisions of this section shall be a misdemeanor, and shall be punished by a fine of not less than

fifty dollars ($50) nor more than five hundred dollars ($500), * * *. Section 38. * * * It shall be unlawful for any person in this State to receive directly or indirectly any liquors, the sale of which are prohibited by the laws of this State, from a common or other carrier. It shall also be unlawful for any person in this State to possess any liquors, the sale of which are prohibited by the laws of this State, received directly or indirectly from a common or other carrier in this State. This section shall apply to such liquors intended for personal use, as well as otherwise, and to interstate as well as intrastate shipments or carriage."

The action of the Commissioner in revoking the permit of the appellee could be sustained by us solely because of the seven Oklahoma sales made by the appellee.

The statutes of Mississippi are similar in effect to the Oklahoma statutes, *Mississippi Code 1942 Anno.*, Vol. 2, ch. 3, §§ 2613-2642, inclusive.

Amendment 21 of the Constitution of the United States provides: "Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Following the effective date, December 5, 1933, of this Amendment 21, the following Federal statutes were enacted, *United States* Statutes at Large, Vol. 62, ch. 645, (June 25, 1948), § 1262, page 761. "Whoever imports, brings, or transports any intoxicating liquor into any State, Territory, District, or Possession in which all sales, except for scientific, sacramental, medicinal, or mechanical purposes, of intoxicating liquor containing more than 4 per centum of alcohol by volume or 3.2 per centum of alcohol by weight are prohibited, otherwise than in the course of continuous interstate transportation through such State, Territory, District, or Possession or attempts so to do, or assists in so doing, shall (1) If such liquor is not accompanied by such permits, or licenses therefor as may be required by the laws of such State, Territory, District, or Possession or (2) if

all importation, bringing, or transportation of intoxicating liquor into such State, Territory, District, or Possession is prohibited by the laws thereof, be fined not more than $1,000 or imprisoned not more than one year, or both.

"In the enforcement of this section, the definition of intoxicating liquor contained in the laws of the respective States, Territories, Districts, or Possessions shall be applied, but only to the extent that sales of such intoxicating liquor (except for scientific, sacramental, medicinal, and mechanical purposes) are prohibited therein."

The very purpose of the above federal statutes was to enforce the provisions of Amendment No. 21, which, —*Tucker* v. *United States,* 123 Fed. 2d 280,—"* * * guarantees Federal protection to 'dry' states against liquor-law violations directed from outside their borders. The bill (above statutes) extends this affirmative protection to States which forbid all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume (3.2 per cent by weight)."

It thus appears that any sale made by appellee to an Oklahoma or Mississippi dealer for resale in those states does not have the sanction of the federal government, irrespective of any technical formalities that the government may have adopted in respect of a hands-off policy where the federal liquor tax has been paid, stamps procured, etc. Nothing that the government has done can have the effect of legalizing the sale of liquor in Oklahoma or Mississippi.

It will be noted that Act 223, above, specifically limits appellee's business "to import, receive, store and to sell only for export out of the State of Arkansas to licensed wholesalers, of spirituous liquors of states other than Arkansas, for sale in states other than Arkansas, or retailers of spirituous liquors licensed under the laws of states other than Arkansas."

We think it must be obvious, therefore, that the Legislature never intended that any sales be made by

appellee into any state, the laws of which prohibited the sale of liquor, or the licensing of wholesalers, retailers or any one else to deal in intoxicating liquors.

Mr. Hale Jackson, appellee's president, testified: "Q. In other words, you keep not only a record of the places to which shipments of whiskey are taken, but you know personally the people who receive those shipments? A. Yes, sir. * * * Q. Then the State of Mississippi gets a record of the sales you make into Mississippi, the State of Arkansas gets a record of the sales you make into Mississippi, and the Federal Government gets a record of the sales you make into Mississippi? A. Correct."

There are references in appellee's brief to a so-called "black market" tax in Mississippi and an inferential contention that in consequence of this legislation those who purchase liquors in Arkansas for sale in Mississippi have statutory protection. The Act in question is Ch. 139, *General Laws of Mississippi,* approved March 31, 1944. It is entitled: "An Act to discourage black markets by imposing a tax equal to ten per cent of the gross proceeds of sales, retail or wholesale, of any tangible property, articles or commodities whatsoever, the sale or distribution of which is prohibited by law." The Act does not repeal the existing liquor laws. The Black Market Tax presupposes the unlawful character of the business upon which the tax is levied, and is in no sense a condonation or license.

In these circumstances, we hold that the action of the Revenue Commissioner in revoking appellee's permit was clearly within the discretion given him under § 4 of Act 223. The act, as we construe it, neither directly, nor by implication, attempts to legalize shipments from this State into any State contrary to the Federal statutes, or the laws of such State. While our State Legislature is our policy making body, we certainly must assume that it was never its intention that this Sovereign State should, through its agents, or officials, become a party to any act involving, or contributing to, a violation of either Federal or State Statutes.

Accordingly, the decree is reversed and the order of the trial court is dissolved.

DENISTON *v.* WEBB.

4-9076 226 S. W. 2d 809

Opinion delivered February 13, 1950.

A. D. Chavis, for appellant.

John E. Hooker, for appellee.

GRIFFIN SMITH, Chief Justice. Robert Deniston, who was plaintiff below, appeals from the Court's finding that he was not entitled to an undivided half interest in lands within the south half of block twenty-seven, etc.

When the S. Geisreiter property adjoining Pine Bluff was platted as a subdivision, a part then thought to be unimportant was disregarded because it was cut by gulleys, ravines, and other malformations to such an extent as to render it of little value for residential or commercial purposes. Therefore, says the complaint, "it was left unplotted—was thrown away, so to speak—and not put on the tax assessment rolls until recently."

Because ownership of the Geisreiter lands was nonresident, the estate was represented locally by Frank W. Berry. R. B. Webb, for a recited consideration of

$25.00, procured from the owner, through Berry, a quit-claim deed dated August 2, 1948. The conveyance was to Felton Webb, who is R. B.'s son.[1]

Appellant's claim rests upon the dealings he alleges were had with Webb, beginning in the spring of 1948 when Webb approached him to borrow $25 for use in buying the land. At that time each thought that title was in the State. Appellant refused to make the loan until something more definite as to the title could be ascertained; whereupon appellee, after a visit to the Land Office, reported that there had not been a tax forfeiture. Appellant then informed Webb that he would make further investigations in an effort to find "how and where they might get a deed".

In testifying to his part in the transaction, Berry said that "some time last Spring" Webb had asked him if it would be possible to procure a deed. He thought the conversation occurred "about February". Presumptively Berry communicated with his principal, for on July 20th Webb paid $20, and later took care of the balance. Although Berry says he told Webb the land was too rough for *any* use, the purchaser industriously contrived a pile-supported building for a storehouse, thereby enhancing the value of the realty by several hundred dollars.

Appellant thinks that Webb impliedly acquiesced in his (appellant's) suggestion that a second survey be made. This occurred after the two had discussed a survey that Webb was familiar with. Appellant at that time thought the drawing was worthless, and that it would give way to a survey by a competent man whom appellant paid.

We agree with counsel for appellant that the case, as developed, became factual, and that the only question is, On which side does the evidence preponderate?

Clearly, the Chancellor was correct. Appellant is almost alone in asserting that the negotiations were such as to create a common enterprise. The element of

[1] All references to "Webb", or "appellee" are to R. B. except when otherwise shown.

time is highly persuasive. It discloses independent activities by appellee as early as February and March when appellant was not known in the deal.

Affirmed.

JEFFRIES *v.* STATE, USE OF WOODRUFF COUNTY.

4-9086 226 S. W. 2d 810

Opinion delivered February 13, 1950.

W. J. Dungan, for appellant.

J. Ford Smith, for appellee.

GEORGE ROSE SMITH, J. This is the second appeal in this case. We briefly restate the facts. In 1928 the appellant sold 32½ acres of land to Woodruff County, for $3,250. The deed restricted the use of the property to "county purposes" and provided that the land would revert to the grantor if its use for county pur-

poses should be abandoned. The county took possession in 1928, but in 1947 the appellant re-entered the property, contending that it was not being used for the specified purposes. The county then brought this suit for possession and for damages resulting from the appellant's having retaken the property. Upon the first appeal we held that the deed conveyed a fee simple upon condition, 212 Ark. 213, 205 S. W. 2d 194—a holding that is now the law of the case. We reversed the circuit court's action in sustaining the county's demurrer to the defendant's answer. After remand the defendant obtained a transfer to equity.

At the trial the appellant testified that at first he refused to sell the land to the county, in 1928. He owned other land adjacent to this tract, and his wife did not want strangers farming the property in controversy. Appellant finally agreed to the sale only because he was assured by the county's attorney that the wording of the deed would prevent the county from renting the land for agricultural use. Nevertheless, it is undisputed that the county has almost continuously rented all but two acres of the property for farming. The appellant himself testified that except for a year or two the county has farmed out the land ever since its purchase. His decision to declare a forfeiture in 1947 was due to the action of the county's tenant in permitting cattle to run at large and damage crops on lands owned by appellant.

Thus for more than eighteen years the appellant made no objection to the county's practice of leasing the greater part of the property to farm tenants. During all these years the appellant knew what was being done and thought the terms of the deed were being violated. As he said at the trial, "I never did think they had any right to farm it." Even if a breach was proved, which we do not decide, it has been waived. We have uniformly held that a forfeiture for breach of condition is not favored, "and slight circumstances will often be seized upon to prevent such forfeitures." *Kampman* v. *Kampman,* 98 Ark. 328, 135 S. W. 905; see also *Bain* v. *Parker,* 77 Ark. 168, 90 S. W. 1000, and *Terry* v. *Taylor,*

143 Ark. 208, 220 S. W. 42. Of course a waiver of forfeiture will be found more readily when the grantee has created an element of estoppel by changing his position after the grantor's failure to re-enter, but that is not essential. In the *Kampman* case a delay of two years was held to be a waiver, although the opinion reflects no change in the grantee's position. It has generally been recognized that the grantor's mere inaction will constitute a waiver when continued for longer than the period of limitations. *Bredell* v. *Kerr,* 242 Mo. 317, 147 S. W. 105; *Hannah* v. *Culpepper,* 213 Ala. 319, 104 S. 751. For nearly three times the period of our statute of limitations the appellant acquiesced in conduct that he now complains of as a breach of the condition. The chancellor correctly declined to approve a forfeiture.

There was error, however, in the award of $600 damages to the county. The county proved that if the appellant had not retaken the land it would have been used as a storage place for vehicles. For want of this land the county actually used a less centrally located tract. The damages claimed were measured by the increased expense to the county that was occasioned by its drivers having to travel farther to get their vehicles. This, however, is not the measure of damages for the wrongful detention of land. The plaintiff is ordinarily entitled only to the reasonable rental value of the premises. *Fort Smith Warehouse Co.* v. *Friedman-Howell & Co.,* 111 Ark. 15, 163 S. W. 175. As there was no proof on this point we must set aside the county's money judgment and dismiss this phase of the case. In other respects the decree is affirmed, the parties to bear their own costs.

WATTS & SANDERS v. MYATT, COUNTY TREASURER.
WATTS & SANDERS *v.* SEARCY COUNTY.

4-9087 226 S. W. 2d 800

Opinion delivered February 13, 1950.

N. J. Henley and *W. F. Reeves,* for appellant.

Eugene W. Moore and *Opie Rogers,* for appellee.

LEFLAR, J. Two cases are consolidated here. One is mandamus brought by Watts and Sanders against Myatt as County Treasurer of Searcy County to compel him to honor a warrant for $360 given Watts and Sanders as rent for certain offices leased by them to the County for occupancy in 1949 by its Welfare department. The other case is an appeal from the County Court of Searcy County, to the Circuit Court, from an allowance by the first court of the $360 item to Watts and Sanders. The Circuit Court held against Watts and Sanders in both cases, and they appeal.

Searcy County had leased the offices, a fairly large three-room suite in a new office building, for the year

1948 at an annual rental of $360, and they had been occupied by the County Welfare Department. In October or early November, 1948, the retiring County Judge, John W. Griffith, orally agreed to rent the same offices for the same purpose for the year 1949 for $360. The Quorum Court meeting on Nov. 15, 1948, appropriated $400 for expenses, including rent, to be incurred by the Welfare Department in 1949. On Dec. 7, 1948, Judge Griffith issued a County Court order allowing the $360 to Watts and Sanders as rent on the offices for 1949. Thereafter the County Clerk issued a warrant to Watts and Sanders for the $360, and on Jan. 1, 1949, it was presented to Treasurer Myatt for payment. He refused to pay it. During January, 1949, the new County Judge, Z. B. Ferguson, ordered the Welfare Department to move to a room in the Courthouse, and this move was made at the end of January, 1949. There was evidence that the leased offices remained vacant thereafter, and that the county welfare director retained a key at least for some time. Watts and Sanders then at once brought their mandamus action against Treasurer Myatt to require him to honor the warrant. At the same time County Judge Ferguson permitted Myatt to intervene in the County Court proceeding in which the $360 had been allowed, and then granted Myatt an appeal therefrom to the Circuit Court.

The Circuit Court held that no binding contract for the lease had been made; that Watts and Sanders should receive $30 as rent for the offices for the month of January, 1949; that "to pay said warrant out of the appropriation of $400.00 for the Welfare Department would deplete said appropriation until said department could not operate and should be disallowed for this reason"; and that the claim should be disallowed for the further reason that "the Court should not allow an account in any amount until the material had been furnished at the time of the claim or the allowance." There was no finding that the transaction was improvident or in any wise fraudulent. The conclusion was that the $360 warrant be cancelled.

It is established that an outgoing County Judge has authority to bind his successor contractually for the following year. "The expiration of the term of the individual who was county judge at the time the contracts were executed did not invalidate the contracts." *Cleveland County* v. *Pearce,* 171 Ark. 1145, 287 S. W. 593. But it is equally well established that a County Judge, acting merely as a county official, has no power in Arkansas to make contracts binding upon the county; to make such contracts binding it is necessary that they be approved by the County Court. *Lyons Machinery Co.* v. *Pike County,* 192 Ark. 531, 93 S. W. 2d 130. The Constitution requires that county contracts be made by the County Judge acting in his judicial capacity and not in his executive capacity. *Rebsamen, Brown & Co.* v. *Van Buren County,* 177 Ark. 268, 6 S. W. 2d 288. Judge Griffith's purported contract with Watts and Sanders, in October or early November, was not made by him in his judicial capacity. Unless it was formalized by a later County Court order, it was ineffectual.

On Dec. 7, 1948, the County Court of Searcy County issued a formal order, through Judge Griffith, allowing the sum of $360 to Watts and Sanders as rent for the Welfare offices for the year 1949. Was this such a formalization of the contract as to make it binding on the County?

A county contract ineffectual because made only by the County Judge in his executive capacity may be bindingly ratified by subsequent approval by the County Court. *Leathem & Co.* v. *Jackson County,* 122 Ark. 114, 182 S. W. 570, Ann. Cas. 1917D, 438. Such ratification may be by allowance of a claim for payment under the contract. *Wilcox* v. *McCallister,* 186 Ark. 901, 56 S. W. 2d 765; *Watson & Smith* v. *Union County,* 193 Ark. 559, 101 S. W. 2d 791. That was what happened on Dec. 7, 1948, in the present case. As of that date the contract was ratified.

The County Court order of Dec. 7, 1948, was appealed to the Circuit Court and there set aside. Was that action proper?

A citizen and taxpayer claiming to be aggrieved by an allowance made by the County Court may intervene in the proceedings before the County Court, even after the allowance has been made, and file an appeal to the Circuit Court. *Van Hook* v. *McNeil Monument Co.,* 101 Ark. 246, 142 S. W. 154; *Ladd* v. *Stubblefield,* 195 Ark. 261, 111 S. W. 2d 555. The intervention of County Treasurer Myatt in the present proceedings, and his appeal to the Circuit Court, were based on this rule, and were therefore permissible. The appeal before the Circuit Court is a *de novo* proceeding. Ark. Stats., 1947, §§ 27-2006, 27-2007. The Circuit Court therefore acted properly in hearing the appeal. The remaining question is whether its judgment was correct.

The Circuit Court's findings have already been recited herein. First among them was the conclusion that no binding contract for the lease had been made. It has already been seen that a contract was achieved by the County Court's ratification of Dec. 7, 1948, and this ratified contract must stand unless other findings of the Circuit Court invalidate it.

The next finding was that $30 should be paid to Watts and Sanders for January rent. This may be taken as having no bearing on whether a contract existed, though in a sense it recognized the contract.

Next was the finding that "to pay said warrant out of the appropriation of $400.00 would deplete said appropriation until said department could not operate and should be disallowed for this reason." This finding was based on evidence that other expenses of the Welfare Department, for heat, lighting telephone and the like had run to $186 the previous year, plus the assumption that similar expenses would ensue in 1949. That is an assumption that neither this Court nor the Circuit Court could make. The $360 allowance was well within the $400 appropriation, and was the only charge against the appropriation which had been presented when the question was raised. Illegality of allowances in excess of the appropriation would be a matter for consideration when excessive claims were presented.

Finally, there was the finding that the warrant should be cancelled "because under the laws the Court should not allow an account in any amount until the material had been furnished at the time of the claim or the allowance." This finding was presumably based upon Ark. Stats., 1947, § 17-703 which requires proof, before claims are allowed by a county court, "that the services charged for or materials furnished, as the case may be, were actually rendered or furnished." This requirement was fully satisfied in the present case. The thing contracted for was a leasehold interest in the premises for the term of one year. A leasehold interest in realty is a very real and tangible thing. It has legal existence as actually as does a five-ton truck or a cubic yard of gravel. At once upon the ratification of the contract with Watts and Sanders on Dec. 7, 1948, the County became and was the owner of a leasehold interest in certain realty for the term of one year from Jan. 1, 1949. The "services charged for or materials furnished . . . were actually rendered or furnished" in this case as of the moment when the contract was completed by the formal ratification.

None of the Circuit Court's findings justify setting aside the contract made by the County Court. The judgment of the Circuit Court is reversed and the cases remanded for action in accordance with this opinion.

BLAKE *v.* COMMERCIAL FACTORS CORPORATION, INC.

4-9088 226 S. W. 2d 986

Opinion delivered February 20, 1950.

C. Floyd Huff, Jr., for appellant.

Guy B. Reeves, for appellee.

MINOR W. MILLWEE, Justice. Appellant, H. L. Blake, formerly operated a wholesale merchandise brokerage business at Little Rock, Arkansas. In 1944 and 1945 he bought several shipments of merchandise from Gainor Sales Company of Philadelphia, Pa., which he resold to retailers. The instant controversy involves two such shipments made on March 1, 1945, and March 5, 1945. On September 19, 1946, the Gainor Sales Company assigned its account against appellant to appellee, Commercial Factors Corporation.

This suit was filed by appellee on May 7, 1948, for recovery of the balance alleged to be due on appellant's account in the sum of $1,498.78. An answer filed by former counsel for appellant denied the material allegations of the complaint and alleged that the claim was barred by the three year statute of limitations (Ark. Stats., 1947, § 37-206). A trial before the circuit judge, sitting as a jury, resulted in judgment for appellee for $1,219.39.

The first two assignments in the motion for new trial allege that the court erred in refusing to sustain

appellant's plea of the statute of limitations. At the commencement of the trial appellant made an oral motion for dismissal on this ground. In response thereto counsel for appellee stated that former counsel for appellant had agreed at a pretrial conference to withdrawal of the plea of the statute of limitations and to a trial on the merits. Appellee's counsel also stated that documentary evidence would be introduced to show that the statute was tolled. Thereupon, the court withheld a ruling on the motion until all the testimony was heard, at which time the motion was overruled on the ground that the statute had been tolled.

The invoice of March 1, 1945, lists 597 dozen rayon panties at $2.25 per dozen and 20½ dozen hose at $4.25 per dozen, the total invoice price amounting to $1,438.38. The invoice of March 5, 1945, was for 24 dozen part wool gloves and 84 dozen handkerchiefs at a total invoice price of $242.40. The invoices provide: "No claims allowed unless made within five days after receipt of goods."

The merchandise included in the order of March 1, 1945, was sold to appellant as "seconds" on samples previously submitted and was inspected by appellant when received. Upon receipt of the merchandise listed in the invoice of March 5, 1945, the 24 dozen part wool gloves were returned. In response to a letter of July 30, 1945, appellant wrote the Gainor Sales Company on August 5, 1945, as follows: "Your Invoice dated March 1st is correct, however your Invoice March 5th. We returned the wool Gloves, and if you will straighten the Invoice out and send me the corrected amount due you, with proper adjustment, etc., we will mail you our check, otherwise we pay our Lawyer by the year and he has already told me what to do. Your account is the last outstanding one on our Blake Supply Company books."

In order to continue or revive a cause of action and remove it from the bar of the statute of limitations, there must be either an express promise of the debtor to pay the debt, or an acknowledgment of the debt, from which a promise to pay is to be implied; or a conditional promise to pay the debt and evidence that the condition

has been performed. *School District* v. *Cromer,* 52 Ark. 454, 12 S. W. 878, 6 L. R. A. 510; *Morris* v. *Carr,* 77 Ark. 228, 91 S. W. 187. In *Street Imp. Dist. No. 113 of Hot Springs* v. *Mooney,* 203 Ark. 745, 158 S. W. 2d 661, we held (Headnote 2): "In determining whether there has been a sufficient acknowledgment in writing to toll the statute of limitation, the question to be determined is the intention of the debtor. It is generally held to be sufficient if, by fair construction, the writing constitutes an admission that the claim is a subsisting debt, and if the acknowledgment is unaccompanied by any circumstances repelling a presumption that the party intended to pay."

When the letter of August 5, 1945, is considered in the light of the above rules, we think the trial court was warranted in holding that it established a new period from which the statute of limitations began to run. There was a clear acknowledgment of the correctness of the invoice of March 1, 1945. A promise to pay the account was made contingent upon the allowance of credit on the invoice of March 5, 1945, for return of the gloves. It is undisputed that this condition was performed by proper credit in the amount of $174 for the returned merchandise.

The last three assignments in the motion for new trial challenge the sufficiency of the evidence to support the judgment. In this connection the trial court found that appellant sold the 597 dozen rayon panties for $1,063.86 and appellant argues that there is no proof to sustain such finding. There is considerable variance in the testimony of appellant and his statements in letters to Gainor Sales Company on this issue. Since the evidence is sufficient to show there was a completed sale by appellant's receipt, inspection and acceptance of merchandise at a price in excess of the amount of the judgment, we find it unnecessary to decide whether the trial court correctly determined the amount appellant actually received for the goods.

Appellee contends that it is entitled to judgment for the full amount sued for, but there is no cross-appeal.

The judgment is affirmed.

GATHINGS *v.* JOHNS.

4-9091 226 S. W. 2d 978

Opinion delivered February 20, 1950.

[redacted]

James E. Hyatt, Jr., and *A. F. Barham,* for appellant.

Graham Sudbury, for appellee.

LEFLAR, J. Plaintiff Johns sued to enjoin defendant Gathings from trespassing on a strip of land approximately eighteen inches wide and 200 feet long which lies along the north side of plaintiff's residence property where it adjoins defendant's farm. Plaintiff also asked that title to the strip of land be quieted in him. The Chancery Court gave plaintiff the relief which he sought, and defendant appeals.

Plaintiff's house was built on a corner lot in Luxora. The lot originally had a 105-foot frontage on Main St., and a 200-foot depth. One Bowen owned the adjoining area at the north edge of plaintiff's lot, 25 feet wide and 200 feet deep, and he in 1926 sold this 25-foot lot to plaintiff. The purchase gave plaintiff a total frontage of 130 feet on Main St. At once upon acquiring the 25-foot lot in 1926, plaintiff put out a hedge on the north edge of it, on a line which he and the owner of the adjacent land took to be their boundary. The hedge extended back about 75 feet from Main St.; a fence was put up along the rest of the 200-foot length of the north side of the lot. The hedge continued in place until 1944, by which time it had apparently spread out so much that

it covered up several feet of the adjoining farm land on the north of it.

This adjoining land on the north was in 1943 purchased by defendant Gathings. Gathings in 1944 cut down the hedge. Also in 1944 Gathings with some of his employees undertook to measure off the 130-foot front of plaintiff's residence lots, and called plaintiff out of his house to watch them do so. At this time they put in some iron pipes to mark the boundary as they measured it. The defendant introduced testimony to the effect that the plaintiff then agreed that the line they marked should be their boundary; the plaintiff's testimony denied any such agreement. The strip between this new line and the center of the hedge and continuing fence—about 18 inches wide—is the land now in dispute.

Plaintiff's possession of the strip of land from 1926 to 1944 was ample to make him owner of it, regardless of paper title, if the possession was adverse. Defendant contends that it was not adverse, on the theory that plaintiff intended to claim only to the true boundary, wherever that was, and was not claiming unconditionally the ownership of the land up to the center of the hedge and the fence. See *Wilson* v. *Hunter,* 59 Ark. 626, 28 S. W. 419; 43 Am. St. Rep. 63; *Goodwin* v. *Garibaldi,* 83 Ark. 74, 102 S. W. 106. Plaintiff gave testimony that his claim was unconditional and that his possession was under absolute claim of title. It is true that he said he only claimed what he bought, and added, "I don't rob nobody and don't steal nobody." But at the same time he was very specific in asserting that he had bought up to the center of the hedge and that he had never at any time recognized a possibility that the line might be anywhere else. Other testimony substantially supported that of the plaintiff. We cannot say that the Chancellor's finding of fact, to the effect that plaintiff held adverse possession of the strip, is contrary to the preponderance of the evidence. Comparable recent cases include *Hickey* v. *Faucette,* 214 Ark. 560, 217 S. W. 2d 253; and *Carter* v. *Roberson,* 214 Ark. 750, 217 S. W. 2d 846.

Defendant also contends that plaintiff is bound to the line laid off in 1944 because he agreed to it. This is on the theory that "where there is doubt or uncertainty or a dispute has arisen as to the true location of a boundary line, the owners of the adjoining land may, by parol agreement, fix a line that will be binding upon them." *Furlow* v. *Dunn,* 201 Ark. 23, 144 S. W. 2d 31; *Peebles* v. *McDonald,* 208 Ark. 834, 188 S. W. 2d 289. Plaintiff flatly denied that he made any such agreement, and there is other evidence that he did not. Again we cannot say that the Chancellor's finding in the plaintiff's favor is contrary to the preponderance of the evidence.

It should be pointed out that a determination that plaintiff owns the land to the center line of the old hedge gives him no right to maintain a spreading hedge extending over and onto the defendant's adjoining land. His boundary stops sharply at the line fixed by the Chancellor's decree.

That decree is affirmed.

NUTT *v.* STURGIS.

4-9022 226 S. W. 2d 976

Opinion delivered February 20, 1950.

J. C. Cole, for appellant.

McMillan & McMillan and *W. H. Glover,* for appellee.

DUNAWAY, J. Appellants brought this action as the heirs at law of Josiah and Mary Nutt, alleging that a warranty deed executed on March 17, 1924, by Josiah Nutt and Mary Nutt, his wife, conveying 105 acres of land in Hot Spring County to one S. B. Horne, was in reality an equitable mortgage. They alleged fraud in the procurement of said deed, and prayed that the original deed, together with the deeds of subsequent transferees, be cancelled as clouds on appellants' title. They further alleged that since 1927, appellee, C. F. Sturgis had at various times caused the removal from said land of several thousand dollars worth of timber, and prayed an accounting for the timber alleged to have been wrongfully taken.

Appellees denied that the warranty deed was in fact an equitable mortgage and further pleaded laches and payment of taxes on wild and unimproved lands under color of title for more than seven years in bar of the action.

The facts may be briefly stated: During a period of several years prior to March 17, 1924, Josiah and Mary Nutt had become indebted to one G. A. Chamberlain in the sum of $1,571.36, which indebtedness was secured by a mortgage on the lands here in question and certain chattels. On March 17, 1924, S. B. Horne paid this indebtedness in full and was given a warranty deed to the property. On the same date, Josiah and Mary Nutt executed another instrument, reciting payment of the mortgage indebtedness by Horne; and containing the further recitals that Horne was to cut from said lands timber of the value of $1,000; and that if the Nutts paid the sum of $571.36, in five installments as set out in the instrument, Horne was to reconvey these lands to them. This language was contained in said instrument: ". . . in the event one payment is due and unpaid, then this option to purchase is void."

At the time of execution of the deed, Josiah and Mary Nutt lived on this land, but moved away "awhile" afterward and made no further payments of taxes. Josiah Nutt died December 16, 1927, and his wife on

January 25, 1928. The lands are wild, unenclosed timber lands.

Horne conveyed the property by warranty deed on April 19, 1924, to Robey and Sturgis Brothers, and assigned to them the above-described "note". Both instruments were filed for record in Hot Spring County January 6, 1925. Through various conveyances between the other appellees, record title has been in C. F. Sturgis since July 6, 1927. The record reflects that since 1924 all taxes have been paid each year by Horne or the Sturgises.

The complaint in this cause was filed July 13, 1948. Appellants attempt to explain their long delay in asserting their claim by saying that it was not until January, 1947, that they discovered in an old trunk the document upon which they rely to prove that the warranty deed to Horne was in effect only a mortgage.

The Chancellor dismissed the complaint for want of equity, finding that there was no fraud in the execution of the deed; that Josiah and Mary Nutt had only an option to repurchase and were not equitable mortgagors, and sustaining the plea of laches.

We agree that there was no evidence of fraud in connection with the execution of the warranty deed to Horne. It is unnecessary to discuss the question of equitable mortgage in view of our conclusion on the question of limitations.

Even conceding that the deed was given only as security for the payment of a debt, appellants' cause of action is barred by limitations. The applicable rule was discussed in the recent case of *Buckner* v. *Sewell, ante,* p. 221, 225 S. W. 2d 525, where we said: "The opinion in *McFarland* v. *Miller,* 211 Ark. 962, 203 S. W. 2d 404, discusses the general rule that the purchaser at a *void* foreclosure sale is presumed to hold as mortgagee in possession; but it is also said that this principle does not apply where the purchaser takes possession as owner, and where the facts are such that the mortgagor, or owner of the equity of redemption, must have known

that the purchaser was holding adversely. The opinion quotes from *Norris* v. *Scroggins,* 175 Ark. 50, 297 S. W. 1022. Mr. Justice Wood, speaking for the Court, cited with approval an excerpt from Jones on Mortgages, 2nd Ed., and stressed the statement that the statute of limitation does not begin to run against the right of redemption 'until actual notice is given such owner by the party in possession . . . that he claims to hold in some other right than that of mortgagee or assignee of the mortgage, or he clearly makes it known by his acts that he holds adverse to the mortgage' ". We there sustained a plea of limitations by the grantee of a mortgagee in possession who had paid taxes on wild, unimproved land under color of title for more than seven years, where the mortgagor had actual notice of the adverse claim of ownership for more than seven years.

In the instant case, it was appellants' contention that their father thought he was executing a timber deed. The testimony was that all of the appellants knew of its execution at the time. Appellants knew that their parents moved away from the land, and that thereafter appellees paid the taxes for over twenty years, and from time to time cut and sold timber therefrom. The testimony of appellant, Alex Nutt, shows conclusively that they had actual notice of appellees' claim of ownership. This witness, who was present when the deed was executed, testified that he tried to keep his father from signing, but that Horne insisted it was only a timber deed. After testifying as to this, appellant said: ". . . and then they went to claiming they had a warranty deed when he died. Q. When was that? A. I don't know how long. Q. About twenty years ago? A. Yes, been a good while."

This case comes squarely within the rule in the *Buckner* case. The Chancellor was correct in dismissing the complaint.

Affirmed.

GRYTBAK *v.* GRYTBAK.

4-9094 227 S. W. 2d 633

Opinion delivered February 20, 1950.

Rehearing denied March 20, 1950.

[redacted]

Geo. E. Pike, for appellant.

Milton G. Robinson, for appellee.

MINOR W. MILLWEE, Justice. At the time of their marriage on May 10, 1936, in Arkansas County, appellant, Emma Grytbak, was a widow with one son 16 years of age and appellee, O. E. Grytbak, was a widower with

a daughter 11 years of age. In June, 1937, appellee purchased a home in Stuttgart, Arkansas, for which he paid $300 in cash and assumed certain debts against the property. The indebtedness was discharged by appellee in December, 1938, by the use of funds derived from cashing his soldier's bonus and the sale of a small tract of land he owned in another state. The deed was executed and delivered to appellee on the same date. The parties and the two children resided in the home at Stuttgart until May, 1939, when appellant left appellee, taking with her certain household goods which she owned at the time of the marriage.

On March 30, 1948, appellant sued appellee for divorce on the grounds of three years separation without cohabitation and general indignities on the part of appellee which allegedly forced her to leave home in 1939 and live apart from appellee. Appellant asked for temporary alimony, attorney's fees and a share of the home property at Stuttgart. Appellee answered denying the allegations of the complaint and pleading the statute of limitations as a bar to the charge of general indignities. He also filed a cross-complaint asking for a divorce on the grounds of desertion, three years separation without cohabitation, and general indignities.

After hearing the testimony, the chancellor entered a decree dismissing appellant's complaint, granting a divorce to appellee upon his cross-complaint on the ground of three years separation without cohabitation and ordering appellee to pay a fee of $100 to appellant's attorney. Both parties have appealed.

In the decree appealed from the chancellor found: ". . . that the failure of the marriage, and the separation of the parties, was brought on largely by the acts of the plaintiff; that she was principally at fault, and that defendant and cross-complainant was the injured party. . . ." This finding was made pursuant to the 7th sub-section of Ark. Stats. (1947), § 34-1202, which provides that in a suit for divorce on the ground of three years separation, the question of who is the injured party

may only be considered in the settlement of property rights and the question of alimony.

On the direct appeal appellant insists that the court's finding that appellee was the injured party is against the preponderance of the evidence and that she is, therefore, entitled to a division of the real and personal property acquired during the marriage under the provisions of Ark. Stats. (1947), § 34-1214.

It would serve no useful purpose to review the conflicting evidence upon which the court based its finding. There is no evidence of immoral conduct on the part of either party and counsel for appellant correctly states in his brief: "There is testimony to the effect that there was some quarreling and bickering between the parties based upon jealousy for their respective children and the little ups and downs which go with all married life." But the preponderance of the evidence does not, in our opinion, support appellant's charges and present contention that appellee did not furnish adequate food for appellant and her son; that she was not allowed to buy her own clothing; that she was compelled to work too hard; that appellee discriminated against her son; and that he constantly nagged at appellant. Some differences arose between the parties because appellant entertained religious scruples against the manner in which appellee's daughter dressed and cut her hair, and some jealousy existed because appellee's daughter made better grades at school than appellant's son.

In an effort to determine the cause of separation the chancellor questioned appellant as follows: "Just what did bring about the actual leaving, something usually happens. What happened, did you have a big quarrel? A. No, we just disagreed. He was always nagging and would sometimes puff up and be mad two or three days, and I would say 'Have I done something to wrong you?' I loved my home and I wanted to stay, but I was forced to leave."

When the parties married appellee owned some household furniture, an old model automobile and the

tract of land which he sold to acquire the home place at Stuttgart. During the three years they lived together, appellee worked for daily wages as a drag line operator. They accumulated no additional property or savings during this period and there is no proof that appellee spent his earnings foolishly or for any purpose except to support the parties and their two children.

Sometime after the separation appellee acquired a drag line of his own and began work on a contract basis. He bought another drag line shortly before the institution of this suit. The two machines cost $10,000 but were used and require expensive repairs. Appellee testified that his net income for 1948 was less than $600 but he was somewhat evasive as to his actual earnings. While the parties lived together, appellee's earnings were supplemented by maintenance of a garden and truck patch on 6 of the 8 lots comprising the home place.

The case of *Ray* v. *Ray,* 192 Ark. 660, 93 S. W. 2d 665, is one in which a divorce was granted to the husband on his cross-complaint and this court upheld the chancellor's action in refusing to award the wife certain real and personal property acquired by the husband during the marriage. It was there said: "Since appellant has been determined at fault in the wrecking of the matrimonial venture, she is entitled to no part of appellee's property as a matter of law, 9 R. C. L., p. 497, § 319; § 3511, Crawford & Moses' Digest [Ark. Stats., 1947, § 34-1214], and her further assistance from appellee rests entirely within the discretion of the chancery court. *Pryor* v. *Pryor,* 88 Ark. 302, 114 S. W. 700, 129 Am. St. Rep. 102; *Clyburn* v. *Clyburn,* 175 Ark. 330, 299 S. W. 38." The court then modified and approved an award of alimony made by the chancellor. See, also, *Clarke* v. *Clarke,* 201 Ark. 10, 143 S. W. 2d 540.

In the Pryor and Clyburn cases, *supra,* it was held that a chancery court has the power to allow alimony to a wife against whom a decree of divorce is granted. In the instant case it was appellant's primary contention in the trial court that she was entitled to the divorce and was the injured party within the meaning of the

7th sub-section to § 34-1202, *supra*. She apparently did not press her claim for alimony and there is no specific finding in the decree as to alimony. While the chancellor found that appellant was principally at fault in the separation, the evidence does not warrant the conclusion that she was altogether to blame or that appellee was not partially responsible for the separation. It was shown that appellant contracted tuberculosis about three years after the separation and appellee took her to the sanatorium at Booneville, Arkansas, in his automobile and rendered other assistance in her illness, but has never tried to get her to come back to him.

Under all the circumstances, we think justice would be best served by modification of the decree to allow appellant alimony in the sum of $20 per month from the date of the decree. This allowance is, of course, subject to modification by the chancellor to meet changes in the situation and condition of the parties.

We find no merit in appellee's cross-appeal from the allowance of the fee to appellant's attorney. Except for the modification as to alimony the decree is affirmed on both the direct and cross-appeals.

ON REHEARING

Appellee insists that, by modifying the decree to allow alimony to appellant, we have arbitrarily granted her relief on an issue that was not before the trial court. Cases are cited which state the familiar rule that issues not presented in the trial court cannot be raised for the first time on appeal. In her complaint appellant alleged that she was without funds to support herself and pay the costs of litigation and prayed for temporary relief out of funds belonging to appellee and for all other equitable relief. Appellee denied that she was entitled to anything. With the issues thus joined, much of the testimony was directed to appellee's financial condition and ability to pay. We have held that the statement of facts in a complaint or cross-complaint, and not the

prayer for relief, constitutes the cause of action, and that the court may grant whatever relief the facts pleaded and proved may warrant, in the absence of surprise to the complaining party. *Albersen* v. *Klanke,* 177 Ark. 288, 6 S. W. 2d 292. We conclude that the facts pleaded and proved warrant the allowance of alimony, and that appellee is not in position to plead surprise.

HUNT *v.* STATE.

4589 226 S. W. 2d 967

Opinion delivered February 20, 1950.

Ike Murry, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. Haskell Sitton, City Marshall at Clinton, received bodily injuries shortly after midnight April 8, 1948, when Wesley Hunt, from a position in Sitton's yard, fired with a shotgun through Sitton's bedroom window.

The Information charged an assault with intent to kill, and the defendant has appealed from a penitentiary sentence of seven years.

During the day before the shooting Hunt drove his car to a point near the Clinton bus station, where he met Luther McClure. He then met Night Marshal Leslie Jones, to whom complaint was made that he was being "framed" on a bootleg charge. The two walked over

to where Sheriff Casinger and his wife and son had parked their car. Sitton was in the back seat. Some explanations were made to Hunt in an effort to convince him that there was no ground for his charge that "they had framed him," whereupon Hunt used profane language to emphasize his bitterness toward Sitton. The Sheriff testified that Hunt drew a blackjack from his pocket and struck Sitton with it. Casinger then "pistol whipped" Hunt, inflicting a scalp wound. Sitton, who also had a blackjack, handed it to Jones. The Sheriff stepped between Hunt and Sitton as Hunt arose and assumed a threatening attitude, thus preventing further trouble. Hunt admitted the dispute, but claimed he was unarmed, and that the did not know who struck him. Two guns were in his parked automobile.

That night Hunt went to Sittons home with a shotgun. He was accompanied by Luther McClure. Sitton testified that he was awakened by Leslie Jones, who warned him to be quiet, that "Wes Hunt is out here with a shotgun".[1] Sitton, who had gone to the door when Jones [or McClure] called, stepped back to a table and picked up his pistol, having just reached for it when the first shotgun blast came. He was hit in the left hand, wrist, and arm with sixteen pellets. Sitton returned the fire, aiming toward the flashes of two other shots. Sitton's wife and two children were in the house with him.

When arrested at McClure's home about sunup, this conversation [as testified to by State Policeman Buford Chambers] took place:

Chambers, addressing Hunt: "Wes, don't you know you nearly killed Haskell Sitton last night?"

Hunt: "I went up there to do that. I didn't intend to waste one load".

Chambers: "You did a pretty good job".

[1] The testimony mentions Jones and McClure. It is susceptible of the construction that the questioning attorney inadvertently said "Jones" when he meant McClure. This, however, is not of controlling importance, but is mentioned merely in extenuation of a seeming inconsistency. Jones testified that he went to Sitton's house when he saw lights from an approaching car. He was sitting on a fender of Sitton's car when appellant and McClure drove up.

Hunt: "Thank you!"

Appellant's defense was that he was laboring under an irresistible passion following the bus station encounter, but even so, he intended only to fight Sitton as "man to man"—with his fists. Sitton, he said, fired first, and then the shotgun was used in self-defense.

It is not necessary to mention other testimony, a great deal of which corroborates the State's chief contentions. Appellant has not filed a brief, but his very capable counsel, with commendable frankness, did not quibble over the instructions. As a matter of fact, sufficiency and fairness of the instructions were not challenged. Affirmed.

LONG *v.* STATE.

4598 227 S. W. 2d 166

Opinion delivered February 20, 1950.

Flowers, Davis & Flowers, for appellant.

Ike Murry, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

HOLT, J. A jury convicted appellant, Ike Long, on two charges: (a) for drunkenness in a public place (Ark. Stats., 1947, § 48-943) and (2) for resisting an officer (Ark. Stats., 1947, § 41-2801) and assessed his punish-

ment on the first charge at a fine of $50 and 30 days in jail, and $150 and a 90 day jail sentence on the second. This appeal followed.

For reversal, appellant contends that the evidence was not sufficient to support the verdicts, and that the punishment assessed on the public drunkenness charge is in excess of that provided under § 41-1422, Ark. Stats. (1947).

At the outset, we are confronted with the State's insistence that appellant has failed to abstract the record in compliance with Rule 9 of this Court, which requires that an "abstract and abridgment of the transcript shall set forth the material parts of the pleadings, proceedings, facts and documents upon which appellant relies, together with other matters from the record as are necessary to an understanding of all questions presented to this Court for decision. The abstract shall contain full reference to pages of the transcript."

We agree with appellee's contention.

The offenses charged are misdemeanors and under the above rule, we are not required to explore the record to determine whether error was committed. Here, the record covers some 140 pages and appellant's abstract and brief cover approximately three pages. No attempt was made to abstract any of the testimony, the instructions, or the motion for a new trial. It will therefore be presumed that the testimony was legally sufficient to support the verdicts and that there was no error in the instructions. We consider, therefore, the errors, if any, that appear on the face of the record. This court said in *Van Hook* v. *Helena,* 170 Ark. 1083, 282 S. W. 673: "The offense charged is a misdemeanor, and we are not therefore required, as in felony cases, to explore the record to see whether error was committed. We are only required to consider the assignments of error properly presented under the rules of the court, and, when the brief filed in appellant's behalf is thus considered, it appears that no complete abstract of the testimony is presented, that the instructions given in the case are not

set out, and that no instruction is objected to as having been erroneously given. It will therefore be conclusively presumed that the testimony was legally sufficient to support the verdict, and that no error was committed in giving or in refusing to give instructions," and in *Eveland* v. *State, use of Fossett,* 189 Ark. 517, 74 S. W. 2d 221:

"A motion for a new trial is essential to a review of alleged errors not apparent on the face of the record. The improper admission or exclusion of testimony is not an error apparent on the face of the record, but is one which must be brought upon and into the record by a proper bill of exceptions after a motion for a new trial has been filed calling the attention of the court to the alleged error.

"If there was a motion for a new trial, it has not been abstracted, and the alleged error has not been called to our attention as the rules of this court require, and it is not, therefore, properly presented for our consideration."

The answer to appellant's contention that excessive punishment was assessed on the public drunkenness charge, is that appellant was convicted under Art. 6, § 10, Act 108 of 1935 (now Ark. Stats., 1947, § 48-943) and not under § 41-1422 (Act 44 of 1909) as appellant contends. The former § 48-943 fixes the punishment at a fine of from $5 to $100 or by imprisonment of from five to thirty days, or by both fine and imprisonment. Article IX of the 1935 Act provides that "all laws or parts of laws in conflict herewith are hereby repealed, etc." Section 48-943 (Act 108 of 1935) is therefore controlling.

Affirmed.

SIMPSON, ADMINISTRATOR *v.* WEATHERMAN.

4-9098 227 S. W. 2d 148

Opinion delivered February 20, 1950.

Rehearing denied March 20, 1950.

C. A. Fuller, for appellant.

Festus O. Butt, for appellee.

DUNAWAY, J. Whether the widow of Silas Weatherman, deceased, is entitled to dower in his estate is the question for decision on this appeal.

Silas Weatherman died in April, 1948, while a resident of Carroll County, Arkansas. His last will and testament was duly admitted to probate and appellant, Dick Simpson, was appointed administrator with the will annexed. In his will Weatherman made this provision for his wife:

"SECOND: To my wife, Louisa Weatherman, I give the sum of Five Dollars, being in full for all interest in my estate, she and I having heretofore made former financial settlement wherein she received all that portion of my estate which she was then, or would hereafter become entitled to."

The remaining provisions of the will are not material to this appeal.

Appellee, Louisa Weatherman, filed a Petition of Intervention renouncing any claim under the will, claiming a widow's share of the estate. The Administrator answered, setting up as a defense to her claim for dower, a property settlement made between Weatherman and his wife in California on February 9, 1937.

At the time this property settlement was made there was pending in the Superior Court of Orange County, California, a suit for separate maintenance and property settlement filed by appellee. Under the terms of the property settlement agreement she was to receive property of the approximate value of $30,000, which was more than half of all their community property. The agreement is a lengthy document, prepared by counsel for the parties, only the pertinent parts of which will be set out.

In the following paragraphs quoted from the agreement "party of the first part" refers to Weatherman, and "party of the second part" to his wife:

"WHEREAS, it is the mutual desire of the parties to this agreement to make a permanent, complete and

final adjustment of all of their property and legal rights of every and any nature whatsoever.

"NOW, THEREFORE, it is hereby contracted and agreed by and between the parties hereto as follows, to-wit:

"(1) The party of the second part, for and in consideration of the covenants and agreements hereinafter contained, does by these presents absolutely and forever relinquish, release, surrender, quit claims, transfer, grants and convey to the party of the first part all the right, title and interest she may now have as a joint tenant, tenant in common or otherwise, and any and all right, title and interest she may now have or hereafter acquire as the wife of the party of the first part in and to all that certain real and personal property described as follows, to-wit:

. . . . .

"(3) And it is further expressly contracted and agreed that neither party hereto may, can or will in any manner or way contest or oppose the probate of the other's will whether heretofore or hereafter made or interfere with the other, their heirs or assigns in the exercise of the rights of property herein stipulated and agreed to.

"(4) . . . and said second party does hereby specifically waive and relinquish any and all right to a probate homestead, out of the estate of the said first party or any other homestead whatsoever.

. . . . .

"(7) And it is further covenanted and agreed that upon the execution of this agreement and the consummation thereof by the delivery of the personal property hereinbefore enumerated, that this agreement shall be, and is, a complete and final adjustment of all the property and legal rights of the parties hereto, and neither party shall, or will hereafter make any other or further claim than herein stipulated and agreed to.

"(8) It is further understood and agreed that a reconciliation between the parties hereto, or future co-

habitation between the parties hereto shall not impair and effect any of the terms and conditions of this contract, but that this contract shall be and become permanent and binding on the parties hereto in spite of any future cohabitation between the parties.''

In accordance with the provisions of the agreement the property specified was conveyed by the parties to each other. Subsequently, Weatherman lived at the family residence in Buena Park, California, from 1937 until 1944, except for periods when he was hospitalized in the Santa Fe Railroad Hospital. There was testimony, including that of the two grown Weatherman sons, that Mr. and Mrs. Weatherman ate at the same table and lived together as man and wife. It was testified that Weatherman paid his wife $30 per month for board. The testimony of one of the sons was that his father agreed to make such payments for board but did not in fact do so.

In 1944 Weatherman returned to his old home in Arkansas where he lived until his death. There was some testimony that his wife would not permit him to come back home. One of the sons admitted that his father had written for his personal effects, all of which were then sent to him in Arkansas. There was no further communication between Silas Weatherman and his family during his lifetime.

Appellee's claim to dower is based upon the contention that the property settlement agreement was abrogated by the subsequent resumption of marital relations and cohabitation of the parties. The validity and legal effect of this agreement are determined by the law of California, where the contract was made and the acts occurred which it is argued abrogated the agreement. We will give effect to the contract in accordance with the law of California unless it is opposed to the public policy of this state.

It is well settled in California that separation agreements, including property settlements, between estranged spouses are valid and enforceable. Such contracts are, however, always subject to judicial scrutiny to determine

whether they were procured through undue influence or fraud on the part of the husband. See *Auclair* v. *Auclair,* 72 Cal. App. 2d 791, 165 Pac. 2d 527. A distinction is recognized between executed and executory features of such agreements in determining whether a resumption of marital relations abrogates the contract made by the parties. The effect of subsequent cohabitation is discussed in the case of *Whitlow* v. *Durst,* Cal. Dist. Court of Appeal, 121 Pac. 2d 810, at page 812:

"The general rule governing the situation is thus stated in 9 Cal. Jur., § 165, pages 827 and 828: 'Subsequent reconciliation coupled with cohabitation in pursuance thereof operates to avoid an agreement for separation, at least, as to all features remaining executory. The law attaches such consequence upon the theory that the consideration for the deed has failed, inasmuch as the maintenance of the wife thereupon becomes obligatory upon the husband. But to avoid a contract of separation, the reconciliation must be permanent and be followed by cohabitation. It must be a reconciliation that restores the former relations of the parties. Mere copulation without occupying the same habitation and dwelling there as husband and wife is by no means sufficient to sustain such a conclusion.'

"Another statement of the rule is found in 30 C. J., § 847, page 1066: 'Strictly speaking, a contract of separation is annulled and avoided, not solely, or necessarily as a matter of law, by a subsequent reconciliation, cohabitation, or resumption of the marital relation, but rather by the intentional renunciation of the agreement which the reconciliation and resumption of the marital relation sometimes evidences. Subsequent cohabitation has the effect of avoiding the contract so far, and only so far, as it establishes an intention to renounce the agreement.' "

In the case of *Bengochea* v. *Bengochea,* 94 Cal. App. 647, 271 Pac. 760, it was argued, as here, that a property settlement was abrogated by the fact of the spouses resuming marital relations. After pointing out that the wife had received the agreed share of property and had

not sought to rescind the agreement after the reconciliation, the court held that the cohabitation of the parties did not of itself abrogate the settlement.

Appellee cites several cases from California where separation agreements were held to have been cancelled by resumption of marital relations by the husband and wife. In all of these cases, however, the courts found that there was a definite oral agreement to cancel the previous written agreement; or that the acts of the parties showed an intent to abrogate the executory features of the contracts, such as an agreement to live apart and to pay sums monthly for maintenance. The California authorities are discussed in the light of this distinction in *Mundt* v. *Conn. General Life Ins. Co.,* 35 Cal. App. 2d 416, 95 Pac. 2d 966.

The agreement in the case at bar contained no provision whatever that the parties were to live apart or that the settlement was made in contemplation of that. It simply recited that because of "unhappy differences" they desired to make a full and final settlement of their property rights. When the transfer of the agreed property was mutually effected, the contract was completely executed. There remained no executory features to be abrogated. We do not think the evidence establishes any intent by the parties to abrogate the settlement agreement which contained the paragraph above quoted specifically providing that future cohabitation would not have that effect. It follows that the widow is not entitled to dower if the California contract is enforceable here.

The leading case in Arkansas on separation agreements is *Carter* v. *Younger,* 112 Ark. 483, 166 S. W. 547. There we said at page 489:

"Where the parties to a valid separation agreement afterward come together, and live together as husband and wife, where their conduct toward each other is such that no other reasonable conclusion can be indulged than that they had set aside or abrogated their agreement of separation, then such agreement should be held as annulled by the parties to it, and their marital rights deter-

mined accordingly.'' The rule that whether a reconciliation operates to annul the provisions of a separation agreement depends upon the intent of the parties as shown by their acts was reaffirmed in *Sherman* v. *Sherman,* 159 Ark. 364, 252 S. W. 27.

Enforcement of the California contract in this case would not be at variance with the announced rules of law in this state. We therefore hold that appellee has no rights in the estate of the deceased except under the will. The judgment is accordingly reversed and the cause dismissed.

BARHAM *v.* GATTUSO.

4-9090 227 S. W. 2d 151

Opinion delivered February 20, 1950.

Rehearing denied March 20, 1950.

James E. Hyatt, Jr., and *Marcus Evrard,* for appellant.

T. J. Crowder, for appellee.

GEORGE ROSE SMITH, J. This case involves the boundary line between the north half and the south half

of an improved lot in the city of Osceola. The question is whether the boundary should be fixed along the center line of the lot or along a partition that is 3.4 feet north of the center line.

The appellant, as plaintiff, brought the action against Frank Gattuso and his tenant. Gattuso died before trial, and the cause was revived against his heirs, the appellees. The trial court fixed the boundary in accordance with the partition, which resulted in awarding the disputed 3.4-foot strip to the appellees, who own the south half of the lot.

Gattuso was formerly the owner of the entire lot in question. At some time before July 24, 1939, he erected a small building on the southern part of the lot, and a little later he added a room at the north end of the building. A door was cut in the partition that separates the original building from the annex. Gattuso operated a restaurant in the entire building, using the south part for white patrons and the annex for colored patrons.

On July 24, 1939, Gattuso sold the north half of the lot to Frank Williams, who on the same day conveyed an undivided half interest therein to the appellant. At that time none of the parties seem to have known whether the partition between the two sections of the restaurant was exactly on the center line of the lot, though the appellant testified that he supposed it was. Gattuso did not surrender possession of any part of the restaurant building after the sale in 1939; instead, he continued to occupy the north half of the lot as a tenant of appellant and Williams. A letter that constituted an informal lease referred to that part of the building "located on the north half" of the lot as being the property rented to Gattuso.

In May of 1945 the appellant bought Williams' undivided half interest in the north half of the lot. On July 16 appellant notified Gattuso that the lease would be terminated on July 18. Gattuso objected to being evicted on such short notice, and it was then agreed that

he would surrender possession on August 17, which he did.

This suit was filed by appellant a week later, on August 24, 1945. The verified complaint alleged that the partition was actually on the plaintiff's half of the property. It was further alleged that before filing the suit the plaintiff had gone upon the property with a workman to move the partition to the correct boundary line. Gattuso resisted this proposal and countered by asserting that the true line was really three feet north of the partition. Gattuso and his tenant, according to the complaint, entered the room north of the partition and piled boxes along the wall as a means of asserting ownership to the line claimed by Gattuso. The plaintiff obtained a temporary order requiring Gattuso and his tenant to remove these boxes and to refrain from entering the north room during the pendency of the suit.

At the trial the appellant developed his proof about as we have narrated the facts, except that he did not testify about having gone on the lot with the intention of moving the partition southward. Instead, he stated that the north room was vacant for about thirty days after Gattuso moved out on August 17 and that Gattuso then began this controversy by piling the boxes along the north side of the partition. In this respect we cannot accept the appellant's recollection of the facts. The suit was filed on August 24; so thirty days could not have elapsed after Gattuso moved out on August 17. Further, the appellant had employed a surveyor to determine the true boundary, and the surveyor's notes show that the survey was made on July 18 and 20. It is evident that the period of thirty days was between the survey and the beginning of the dispute. Since the appellant verified his complaint on August 24, when the events were fresh in his memory, we accept his original allegation that he began the controversy by attempting to move the partition.

The preponderance of the testimony shows that the partition is actually 3.4 feet north of the true center line. Of the three surveyors who testified, one fixed the line as being 3.4 feet south of the partition and another as

"more than three feet" south of it. Their testimony outweighs that of the third surveyor, who did not connect his survey with established monuments. The chancellor held, however, that by acquiescence the parties had established the partition as the boundary.

The appellees make two contentions to support the decree of the trial court. First, it is asserted that adjoining landowners may settle a boundary dispute by an oral agreement followed by possession in accordance therewith. *Payne* v. *McBride,* 96 Ark. 168, 131 S. W. 463, Ann. Cas. 1912B, 661. But the difficulty here is that there is no evidence whatever to show that the parties agreed upon the partition as a boundary. Appellant testified that he supposed the partition was on the center line, but it is not shown that his supposition was communicated to Gattuso, shared by Gattuso, or acted on in any way. On the contrary, when the dispute arose Gattuso took possession to a line three feet north of the partition and held that possession until this suit was brought.

Second, it is contended that the parties have by their conduct established the partition as the boundary. Neither the deeds nor the lease referred in any way to the partition; the land was described simply as the north half of the lot. In this respect the case differs from *McCall* v. *Owen,* 212 Ark. 984, 208 S. W. 2d 463, where the deeds referred to a fence that was not actually on the true line. We held that the grantees were bound by this reference; but the rule is different when the conveyance uses only a legal description, and it is later found that the fence or other monument is not accurately placed. *Buckley* v. *Gadsby,* 51 Cal. App. 289, 196 Pac. 908; *Trout* v. *Grubbs,* (Tex. Civ. App.) 1 S. W. 2d 950. In the latter situation the case is like any other in which adjoining landowners, through ignorance rather than by agreement, recognize an erroneous common boundary. Possession must then be adverse and must continue for the statutory period of seven years in order to ripen into title. *Harris* v. *E. B. Mooney, Inc.,* 211 Ark. 61, 199 S. W. 2d 319. This suit was brought within less than seven years after

Gattuso sold the north half of the lot; so title by acquiescence cannot have been acquired.

The appellant asserts a claim for damages that have accrued while he has been deprived of possession. As to the period before Gattuso's death the claim has been waived. Upon Gattuso's death the claim became a demand against his estate, but the appellant revived the action against the heirs only and stated in his petition for reviver that Gattuso's administrator was not a necessary or proper party. The evidence is not sufficient to enable us to assess the remaining damages, especially as to the period following the trial below. We accordingly reverse the decree and remand the cause for the entry of a decree in accordance with this opinion and for the allowance of such damages as may be proved at another hearing.

LOCAL NO. 802 *v.* ASIMOS.

4-9061 227 S. W. 2d 154

Opinion delivered February 20, 1950.

Rehearing denied March 20, 1950.

George F. Edwardes, for appellant.

Shaver, Stewart & Jones, for appellee.

Ed. F. McFaddin, Justice. The Miller Chancery Court, on petition of appellees, permanently enjoined appellants from picketing appellees' restaurant; and this appeal seeks a dissolution of the injunction.

Appellees Asimos and Scott are partners, operating the Jefferson Coffee Shop in Texarkana, Arkansas. It is located at the corner of Front Street and State Line Avenue, with an entrance on each street. Thirty-four persons are employed in the Coffee Shop, which is open twenty-four hours of each day. The business is entirely intra-state, and no question of inter-state commerce arises in this case. Appellant, Local No. 802 of the Hotel and Restaurant Employees and Bartenders Union, (an affiliate of the American Federation of Labor) is a Union for waitresses of any and all restaurants in Texarkana, Arkansas-Texas. In addition to the Local No. 802, other appellants include the officers of the said local. For convenience, we will hereinafter refer to the appellees as "Jefferson" or ""Coffee Shop", and to the appellants, either individually or collectively, as the "Union".

In 1927 Jefferson had a contract with either the present Union or some predecessor local; and again in 1942 Jefferson bargained with the Union. The failure to continue the bargaining in each instance seems to have been due to the inability of the Union to hold its members. A few weeks prior to May 3, 1949, an officer of the Union asked Jefferson to sign a contract with the Union as the bargaining agent of Jefferson's em-

ployees. Only one Jefferson employee was a member in good standing of the Union. Six or eight other employees, in months or years previous, either had joined, or signed application cards to join, but had abandoned the affiliation.

Jefferson discussed the Union request with some of its employees and was told that few of them had any desire to make the Union the bargaining agent. The employees were satisfied with their working conditions. Jefferson conveyed this information to the Union and was advised that ". . . if Jefferson did not recognize the Union, the Jefferson employees would be called out". The Union official reported Jefferson's attitude to a regular meeting of Local No. 802, and it was voted to call a strike of Jefferson's employees and to establish a picket line in front of the Coffee Shop, in order to enforce collective bargaining by Jefferson with the Union.

At 1:00 a. m., May 3, 1949, the Union established a picket line on the sidewalk in front of the Jefferson Coffee Shop. There were two pickets: one girl walked slowly in front of each of the doors of the Coffee Shop; and each girl carried a placard reading: "Jefferson Coffee Shop Refuses to Bargain with Employees' Local 802". As soon as the picketing commenced, three or four employees of Jefferson left their work. Several employees refused to return to work, either because they were frightened by the assembled crowd, or because they had relatives in some Union and were reluctant to cross the picket line.

About thirty minutes after the picket line had been established, a man named Murphy entered the Coffee Shop as a patron, and, after being served with food, went out on the sidewalk, where a group of twenty-five or thirty people had assembled. Murphy gives this version: A man named Pruitt made the remark, "Anybody who goes in there and eats is a dirty scab"; that after other words of like import, Murphy struck Pruitt, and a fight ensued; and that officers quickly took both men in custody. Pruit gives this version: He was employed as

floor manager at Chaylors Night Club and had an argument with Murphy at that place earlier in the evening; that when Murphy saw Pruitt at the Coffee Shop, they renewed their previous quarrel, which was in no wise connected with the picketing. Although Murphy denied ever having seen Pruitt before the Coffee Shop difficulty, he did admit having been to Chaylors Night Club about two months prior to the Coffee Shop encounter; and Murphy's pugilistic instinct and willingness to engage in an affray is reflected by the following question and answer on cross-examination:

"Q. Mr. Witness, what are you smiling about?

A. Mr. Lawyer, I was thinking about how I would like to punch you in the nose."

In addition to the facts previously detailed, the evidence further showed (1) that the Murphy-Pruitt fight was the sole act of violence occurring during the entire time of the picketing; (2) that at several times a crowd—actuated by curiosity and estimated from twenty-five to a hundred—gathered on the sidewalk in front of the Coffee Shop; (3) that there was no mass picketing (being only one picket at each door); (4) that sometimes a picket would walk so close to the door of the Coffee Shop that a patron would be impeded in entering; and (5) that because of the picketing the volume of business of the Coffee Shop materially decreased, and the appellees suffered financial loss.

The picketing began at 1:00 a. m. on May 3 and continued until 5:30 p. m. on May 5, at which time the Chancery Court granted a temporary restraining order against all picketing. On June 17 the temporary order was made permanent in the injunction decree (here challenged) which reads in part as follows:

"IT IS THEREFORE by the Court considered, ordered and adjudged that the defendants and each of them be and they are hereby permanently and forever restrained, enjoined and prohibited from in any manner interfering with the employees of the plaintiffs and from in any manner interfering with any person who

may desire to enter the employ of plaintiffs by way of threats, personal violence, intimidation or other means calculated or intended to prevent such person or persons from entering or continuing in the employ of plaintiffs or calculated or intended to induce any such person or persons to leave the employ of the plaintiffs; from picketing plaintiffs' place of business and from patroling the abutting sidewalks or boycotting plaintiffs' business by the display of placards, distributing circulars, handbills or otherwise; from interfering, intimidating, boycotting, molesting or threatening in any manner the patrons or prospective patrons of plaintiffs or other person or persons seeking to enter plaintiffs' place of business; from congregating or loitering about and congregating on the sidewalks or streets abutting plaintiffs' place of business, or at other places, with intent to interfere with the employees of plaintiffs with intent to cause them to leave the employ of plaintiffs or to interfere with or obstruct plaintiffs' place of business in any manner, or induce the public not to deal with plaintiffs; from interfering with the free access of employees and patrons to and from plaintiffs' place of business and from obstructing the sidewalk in front of plaintiffs' place of business; from giving any directions or orders to individuals, committees, associations or otherwise, for the performance of any such acts or threats which would in any manner impede, obstruct or interfere with the regular operation and conduct of plaintiffs' business."

So much for the statement of the case. The appellant (Union and its officers) claims that the injunction decree violates the right of free speech guaranteed under the Fourteenth Amendment of the Federal Constitution. This contention, made in the lower court and reiterated here, presents the Federal question on which our opinion must necessarily be based.

We have decisions of our own in which permanent injunctions were granted against picketing. These cases are: *Local* v. *Stathakis,* 135 Ark. 86, 205 S. W. 450, 6 A. L. R. 894; *Riggs* v. *Tucker Duck & Rubber Company,* 196 Ark. 571, 119 S. W. 2d 507; and *Local* v. *Jiannas,* 211

Ark. 352, 200 S. W. 2d 763.[1] Each of these opinions was written by that outstanding jurist, Mr. Justice FRANK G. SMITH, who recently retired from this court after thirty-seven years of service. The opinions in these three cases have charted the course of our jurisprudence on the questions involved: but in each of these cases the injunction was upheld because there had been law violations and repeated acts of violence. The Supreme Court of the United States has recognized in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287, 85 L. Ed. 836, 61 S. Ct. 552, 132 A. L. R. 1200, that an injunction prohibiting picketing is justified where there is a background of law violation and acts of violence.

In addition to our own opinions, as previously mentioned, there are certain United States Supreme Court cases which involve the right of free speech as intertwined with picketing cases. Some of these are:

Senn v. *Tile Layers Union,* 301 U. S. 468, 81 L. Ed. 1229, 57 S. Ct. 857; *Thornhill* v. *Alabama,* 310 U. S. 88, 84 L. Ed. 1093, 60 S. Ct. 736; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies* (called "the Meadowmoor case"), 312 U. S. 287, 85 L. Ed. 836, 61 S. Ct. 552, 132 A. L. R. 1200; *American Federation of Labor* v. *Swing,* 312 U. S. 321, 85 L. Ed. 855, 61 S. Ct. 568; *Bakery and Pastry Drivers Local* v. *Wohl* (called "the Bakery case"), 315 U. S. 769, 86 L. Ed. 1178, 62 S. Ct. 816; *Cafeteria Employees Union* v. *Angelos* (called "the Cafeteria case"), 320 U. S. 293, 88 L. Ed. 58, 64 S. Ct. 126; *Lincoln Federal Labor Union* v. *Northwestern Iron Company* and *Whitaker* v. *North Carolina,* 335 U. S. 525, 69 S. Ct. 251; *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 69 S. Ct. 684.

A careful study of these cases has led us to the conclusion herein to be stated. In considering any case involving a right claimed under the Federal Constitution, we must necessarily be guided by the decisions of the United States Supreme Court construing such constitutional provision because, as observed by Mr. Justice

[1] In 1 Arkansas Law Review 281, there is an article entitled "Injunction Against Picketing in Arkansas."

McHaney, in *Berry* v. *City of Hope,* 205 Ark. 1105, 172 S. W. 2d 922,

". . . still the Supreme Court of the United States is the final arbiter of the construction to be given that document which all of us are sworn to support, and we must follow the majority view as expressed in said cases."

Here the picketing done by the Union is claimed to be protected by the right of free speech, as guaranteed by the Fourteenth Amendment to the United States Constitution.

That the injunction granted by the Miller Chancery Court is extremely broad and far-reaching, is readily apparent from a reading of it, as heretofore copied. That the Supreme Court of the United States has upheld picketing in cases similar to the one at bar, is likewise readily apparent from a reading of the cases of that Court, as heretofore cited. Therefore, in the light of the Federal cases, appellees' learned counsel, in the brief, and in the oral argument, sought to defend the broad language of the injunction on the three grounds which we now mention:

1. Appellees claim that there had been law violations and acts of violence at the picket line. If the picketing had resulted in violence, unlawful acts, or breaches of the peace, then the case at bar would fall within the rule of our own decisions in the Stathakis case,[2] the Riggs case,[3] and the Jiannas case,[4] and the injunction against the picketing would find Federal approval in the Meadowmoor Dairy case, *supra.* But here we find only one act of violence—*i. e.* the Murphy-Pruitt fight—and we are not convinced that it grew out of the picketing. At most, it was an isolated instance. Neither was there mass picketing, so as to block access to the Coffee Shop. The fact that the two pickets walked near the doors, and at times impeded entrance, is a matter that will be subsequently mentioned as susceptible to specific in-

[2] 135 Ark. 86, 205 S. W. 450, 6 A. L. R. 894.
[3] 196 Ark. 571, 119 S. W. 2d 507.
[4] 211 Ark. 352, 200 S. W. 2d 763.

junction; but certainly those acts are not sufficient to justify a permanent injunction against all picketing. The fact that a crowd of from twenty-five to one hundred people—actuated by curiosity—gathered on the sidewalk outside the Coffee Shop, is not alone sufficient to justify a permanent injunction: the Coffee Shop was located near the railroad station and the bus terminal, where travelers are expected to come and go. There is nothing to show that the crowd was disorderly or engaged in any violence. In short, the facts in the case at bar do not bring it within the rule of our own cases previously mentioned, or the Meadowmoor Dairy case from the United States Supreme Court.

II. Appellees claim, to quote from their own brief, ". . . the picketing was unlawful in that it had an unlawful objective—the coercion of the execution of a closed-shop contract proscribed by statute law." Amendment No. 34 to the Arkansas Constitution provides:

"Section 1. No person shall be denied employment because of membership in or affiliation with or resignation from a labor union, or because of refusal to join or affiliate with a labor union; nor shall any corporation or individual or association of any kind enter into any contract, written or oral, to exclude from employment members of a labor union or persons who refuse to join a labor union, or because of resignation from a labor union; nor shall any person against his will be compelled to pay dues to any labor organization as a prerequisite to or condition of employment.

"Section 2. The General Assembly shall have power to enforce this article by appropriate legislation."

Acting under this Amendment, the General Assembly adopted Act 101 of 1947 (See § 81-201, *et seq.* Ark. Stats. 1947) which provides, *inter alia,*

". . . no person . . . firm . . . or labor organization shall enter into any contract to exclude from employment . . . persons who are not members of, or who fail or refuse to join, or affiliate with, a labor union . . ."

In *Lincoln Federal Labor Union* v. *Northwest Iron Company,* and in *Whitaker* v. *North Carolina,* 335 U. S. 525, 69 S. Ct. 251, the United States Supreme Court on January 3, 1949, upheld the constitutionality of a Nebraska constitutional amendment, and also a North Carolina statute, each similar to our amendment and statute just quoted. In *Giboney* v. *Empire Storage Company,* 336 U. S. 490, 69 S. Ct. 684, the United States Supreme Court on April 4, 1949, affirmed a judgment that enjoined picketing which had as its purpose the violation of a State law. On the authority of these Federal cases the injunction in the case at bar could be sustained in some form, if the appellees had shown that the Union was picketing the Jefferson Coffee Shop in an effort to compel the execution of a "closed-shop" contract. There was an allegation to such effect in the complaint, but a denial of it in the answer.

A careful search of the entire record fails to disclose a single line of testimony by anyone to the effect that a closed-shop contract was ever mentioned, or demanded by the Union, or any of its officials, in any of the conversations with the appellees concerning the Jefferson Coffee Shop. So, in the absence of all such evidence, we cannot hold that the picketing in the case at bar had anything to do with a closed-shop contract. In short, the injunction cannot be upheld on appellees' second contention.

III. Finally, appellees seek to uphold the injunction by this contention:

"Because no labor dispute existed between appellees and their employees, and there was in progress no strike which might have justified peaceful picketing."

Appellees are correct in stating the fact that no labor dispute existed between the Jefferson Coffee Shop and its employees. The record clearly shows that only one Jefferson employee was in good standing in the union, and the other Jefferson employees did not desire to join. The absence of a labor dispute—in the sense that the term is ordinarily used—was a fact that apparently

weighed most heavily with the learned Chancellor in granting the injunction because in his opinion he made these observations:

"We have a situation here where a group of people operate a restaurant and it seems to have been operated very peacefully. Nobody connected with the restaurant as an employee or as an owner was having any trouble between themselves. They were getting along all right. . . . I don't understand the law to be that if a man or company and all its employees are peacefully working together that any particular person or individual connected with any organization has any right to go down and demand that the people that work in there or the people operating it shall or shall not be connected with the union. . . . I just don't believe the law ever was intended for any group of men to come in and say, 'You are either going to join the union and bargain so that we can regulate prices and conditions of labor or we will close your place of business.' That doesn't sound right to me."

Thus, the learned Chancellor was evidently of the opinion that until the employees went on strike, there could be no picketing; and that in the absence of a labor dispute, the Union had no right to establish a picket line. In this view the Chancellor was probably following the text found in 31 Am. Jur. 950 in the Topic, "Labor," § 236:

". . . picketing by union, in the absence of any dispute between an employer and his employees, is unlawful where the purpose is to compel the employer to contract with the union, to adopt the hours of work and scale of wages favored by the union, to recognize the union, . . ."

There is nothing in the record to show that the attention of the Chancellor was ever called to either of the two United States Supreme Court cases now to be discussed. As heretofore observed, we are under oath to obey the United States Constitution; and the interpretation of that document, as made by the United States Supreme Court, is binding on us. That tribunal has decided that

there may be picketing in the entire absence of a labor dispute.

In *Bakery and Pastry Drivers* v. *Wohl,* 315 U. S. 769, 86 L. Ed. 1178, 62 S. Ct. 816, there were some peddlers of bakery products, each of whom drove his own vehicle and solely operated his own business, and employed no helper. The Union undertook to compel these peddlers to work only six days a week and employ a Union driver for the seventh day. In order to accomplish its purpose, the Union picketed the bakery from which the peddlers bought their products, and picketed the vehicles in which the peddlers delivered products to the patrons. The peddlers did not belong to the Union, and did not want to join the Union, or make a contract with it. Yet the Supreme Court of the United States upheld the Union's right to picket, as herein stated; and this decision was based on the right of freedom of speech guaranteed by the Fourteenth Amendment. The majority opinion of the United States Supreme Court contains this language:

"We ourselves can perceive no substantial evil of such magnitude as to make a limit to the right of free speech which the petitioners sought to exercise."

In other words, the Union was allowed to do the picketing in this case, under the claimed right of freedom of speech, because there was no mass picketing, there were no acts of violence, and there were no breaches of the peace connected with such picketing.

Again, in *Cafeteria Employees* v. *Angelos,* 320 U. S. 293, 88 L. Ed. 58, 64 S. Ct. 126, Angelos and other partners owned and operated a cafeteria, conducting the business without the aid of any employees. The Labor Union picketed the cafeteria in an attempt to organize it. The picketing was done by the parading of one person at a time in front of the premises, and carrying a sign which gave the impression that the cafeteria was unfair to organized labor. Angelos obtained an injunction in the State Court against such picketing. Certainly there was no labor dispute based on existing or past transactions because Angelos and his partners had no em-

ployees. Yet the Supreme Court of the United States, after pointing out that there was no mass picketing, and that there had been no acts of violence in connection with the picketing, upheld the union's right to engage in such picketing on the grounds of freedom of speech guaranteed by the Fourteenth Amendment of the United States Constitution.

The Bakery case and the Cafeteria case, just discussed, are cases that rule here. In the case at bar there was an absence of violence, law violations, or breaches of the peace (growing directly out of the picketing); there was no mass picketing; the signs carried by the pickets were not libelous or false; there is no proof that there was a demand for a closed-shop. In short, there is no fact present in the case at bar to distinguish it from the Bakery case and the Cafeteria case, just discussed, so we must hold that there can be peaceful picketing[5] even in the absence of a labor dispute relating to persons presently employed; and we must dissolve in part the injunction granted by the Chancery Court.

CONCLUSION

There is one item in the injunction that must be sustained, and that relates to the action of one of the two pickets in walking so near the entrance of the Coffee Shop that the patrons were hindered from entering. Under the facts in this case, and due to the location of the Coffee Shop, and the width and use of the sidewalk, we hold that neither of the two pickets should have been allowed to approach at any time nearer to the entrance of the Coffee Shop than the outer edge of the sidewalk. We modify the injunction to prevent any picket from approaching nearer to any entrance of the Coffee Shop than the outer edge of the sidewalk. In all other respects the injunction must be dissolved.

The decree of the Chancery Court is reversed, and the cause is remanded with directions to proceed in a manner not inconsistent with this opinion.

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[5] For Annotations on various phases of picketing, see these: 132 A. L. R. 1218, 137 A. L. R. 1108, 147 A. L. R. 1076, 2 A. L. R. 2d 1196. For Law Review articles, see 56 Harvard Law Review 180, 513, 532. Also 41 Michigan Law Review 1037 and 42 Michigan Law Review 706.

STAUB *v.* MUD SLOUGH DRAINAGE DISTRICT NO. 1.

4-9095 227 S. W. 2d 140

Opinion delivered February 20, 1950.

Rehearing denied March 20, 1950.

Phil Herget and *Kirsch & Cathey,* for appellant.

Charles Frierson and *L. V. Rhine,* for appellee.

GEORGE ROSE SMITH, J. This is an action brought by the appellee to condemn a right-of-way for a levee to be built by the federal government. The district proposes to take 28.92 acres of the appellant's land. Three appraisers, appointed under Ark. Stats. 1947, § 35-1102, filed their report allowing the appellant a total of $5,669.20 as the value of the land taken and as damages to his remaining lands. Both the district and the appellant excepted to the appraisers' award. As required by the statute, § 35-1103, the case was then tried before a jury, which fixed the amount due appellant at $2,000. The appellant assigns several errors which he thinks led to his receiving an inadequate sum for his land and damages.

The proposed levee is part of a comprehensive plan to provide protection against the overflow of the St. Francis River. The appellant's land is now protected

by a levee previously built by the appellee along the river. It has been determined, however, that this levee is too close to the river; the new levee will be set back at some points for several miles. This levee will cross the appellant's land and will leave the greater part of it on the river side of the levee.

In spite of the fact that most of the appellant's land will not be protected from the river by the new levee, the district contended below that the levee will benefit these lands. The district's proof tended to show that in the past the appellant's land has usually been flooded not by the St. Francis itself but by two tributary streams that pass in the vicinity of the appellant's property on their course to the river. The new levee, together with a wide drainage ditch on its land side, will divert these streams before they reach the appellant's property and thus eliminate the principal source of past inundations.

In accordance with the district's theory of the case the trial court instructed the jury to deduct from the appellant's damages any benefits that might result from the construction of the new levee. This instruction was erroneous. When an improvement district takes part of a tract, any benefits that accrue to the remainder will eventually be paid for in the form of special assessments. If these same benefits are also deducted from the compensation to be paid for the land taken or damaged, the landowner is forced to pay twice for the benefits received. Consequently we have uniformly held that benefits cannot be offset against damages in improvement district cases. *Gregg* v. *Sanders,* 149 Ark. 15, 231 S. W. 190, 17 A. L. R. 59; *Miller Levee Dist. No. 2* v. *Dale,* 172 Ark. 942, 290 S. W. 948.

It is immaterial that in this case the government will pay the cost of constructing the levee. If the government were bearing the entire cost of the project, there might be merit in the suggestion that special benefits should be deducted. But the district must furnish the right-of-way and must maintain the levee when completed. The district can meet these obligations only by levying assessments against lands benefited by the im-

provement. As it would be speculation to attempt to isolate the benefits resulting from the right-of-way and from maintenance, as distinguished from those accruing from construction alone, we think the general rule in improvement district cases, forbidding the offset of benefits against damages, must be applied in this case.

A second contention relates to damages for the obstruction of appellant's natural drainage. Heretofore in times of flood the water on appellant's property has drained into a slough crossing his land. It is contended that the new levee will obstruct this slough and cause water to collect and remain on the land. Estimates differ as to the extent to which a drainage ditch will alleviate this condition. The trial court instructed the jury, in the language of the statute, that damages might be awarded for the obstruction of natural drainage, "not to exceed the cost of artificial drainage." Ark. Stats., § 35-1103. The appellant questions the constitutionality of this clause of the statute.

The validity of this clause was termed doubtful by Horace Sloan in his work on Improvement Districts in Arkansas, § 602. Our Constitution, Art. 2, § 22, provides that private property shall not be taken or damaged for public use without just compensation. We have recognized that just compensation must be a full and fair equivalent for the loss sustained. *Cribbs* v. *Benedict,* 64 Ark. 555, 44 S. W. 707. In some instances artificial drainage might be equally as good as, or even superior to, natural drainage; but in others it might not be practical to provide an artificial system that would be equally as effective as natural drainage. In the latter case an award equal to the cost of inferior artificial drainage could not be considered as just compensation for the injury caused by the obstruction of natural drainage. At the trial below the appellant testified that artificial drainage would not be as satisfactory as natural drainage and that any system of artificial drainage would be dependent upon his obtaining permission to dig a drainage ditch across his neighbor's land.

Further, the statute does not allow any consideration of the cost of maintaining an artificial system, for a later section provides for a recovery "not to exceed the cost of constructing artificial drainage." § 35-1108. No doubt in some cases the cost of artificial drainage might represent just compensation to the landowner, and in such a situation the jury could base its verdict upon that cost, even without the statutory language in question. But in other cases—including the present one if the jury credits the appellant's testimony—a verdict limited to the cost of constructing artificial drainage would not provide the compensation that the Constitution requires. We accordingly hold that this clause of the statute is unconstitutional.

Other errors are assigned, but we think the trial court's decision upon each of the other points was correct. We therefore omit a discussion of these questions.

Reversed.

PETERSON *v.* BROWN.

4-9089 227 S. W. 2d 142

Opinion delivered February 20, 1950.

William K. Harris and *Daily & Woods,* for appellant.

Lawson Cloninger and *Myles Friedman,* for appellee.

HOLT, J. Appellee, a food broker, resided in New Iberia, La. Appellant, a resident of Ft. Smith, was, prior to September, 1945, operating a canning plant in Sallisaw, Okla., processing and packing, in tin cans, mustard and turnip greens.

July 9, 1945, appellee purchased, through appellant's broker, 1,000 cases of mustard greens and 500 cases of turnip greens. Shipment was made from Sallisaw on July 9th and delivery was made not later than July 16th, 1945, to appellee at New Iberia. A part of the shipment was stored in a warehouse in New Iberia and the remainder in a warehouse in Alexandria. Appellee sold to customers from these warehouses the above canned goods, over a period of approximately two years, or until the stock, of these canned goods at New Iberia, had been reduced to 225 cases, and that at Alexandria to 45 cases.

Appellee brought the present action September 4, 1948, more than three years from the date of sale, or delivery. He alleged in his complaint, in effect, breach on the part of appellant of an implied warranty that the goods were merchantable, fit for resale, and for human consumption; that the 225 cases in New Iberia were seized August 20, 1947, condemned and destroyed under the provisions of the Federal Pure Food and Drugs Act (21 U. S. C. A. 342 (a) (3)) and the 45 cases at Alexandria were likewise seized on February 25, 1948, and later destroyed. He sought to recover $714.12 in damages.

Appellant's answer was a general denial and affirmatively pleaded the three year Statute of Limitations as a complete bar to the suit. A jury trial resulted in a verdict for appellee for $704.29, and from the judgment is this appeal.

For reversal, appellant strongly contends that appellee's cause of action was barred by the three year Statute of Limitations, and that the court erred in refusing his request to so instruct the jury.

We have reached the conclusion that this contention must be sustained.

The sale in question was made July 9, 1945, and delivery made not later than July 16, 1945. The present suit was filed September 4, 1948, more than three years and one month from the date of sale, or delivery. The contract of sale was oral and the three year Statute of Limitations applies (Ark. Stats., 1947, § 37-206). The primary and decisive question here is: When did this statute begin to run, or from what date must it be computed?

In this case, there was no allegation of fraud or any proof thereof, and we have been unable to find any evidence in the record that would toll the statute, or that would establish a new date, subsequent to July, 1945, from which the statutory period should be computed.

The general rule, subject to exceptions, which we do not find present here, appears to be that any breach of warranty of soundness, kind or quality is broken when made and the statute of limitations begins to run from the date of the sale. In 37 C. J. 836, the rule is stated as follows: "Where unsound personal property is sold with a warranty of soundness, the warranty is broken as soon as made and the statute begins to run from the date of the sale, not from the time when the buyer sustains consequential damage. Likewise where goods are warranted to be of a certain kind or quality, but are not of that kind or quality, the warranty is broken when made and the statutory period is computed from the date of the sale, not at the time when special or consequential

damage results, or from the date when the breach is discovered; and this, although meanwhile the buyer is wholly unable to ascertain whether the goods comply with the warranty."

Appellee concedes that the above is the general rule and says that the court "has stated in previous decisions that the Statute of Limitations ordinarily commences to run when the cause of action accrues, and that a plaintiff's ignorance that a cause of action exists will not prevent it from running," but that the present case falls within exceptions to the general rule, and further says: "This court has not passed upon the question directly, but decisions made by this court indicate that it would hold that the Statute of Limitations would begin to run only when a latent defect in personal property is discovered, or reasonably should have been discovered."

He then cites and relies strongly upon *Louisville Silo & Tank Co* v. *Thweatt,* 174 Ark. 437, 295 S. W. 710, and the case of *P. H. Sheehy Co.* v. *Eastern Importing & Mfg. Co.,* 44 App. D. C. 107 (L. R. A. 1916F, 810), to which reference was made in the Thweatt case. Our construction, however, of our holding in the Thweatt case tends strongly to support the above general rule, and appellant's contention.

In that case, there was involved the sale of a steel granary to be used in storing rice, and we held, on one of the actions therein, that the Statute of Limitations was tolled by the seller's promise to make repairs and that the statute therefore began to run from the date following the last effort to make repairs. In the present case, as pointed out above, there is no proof of anything that would toll the statute.

In the Thweatt case, this court said: "Ordinarily a cause of action for breach of warranty in the sale of personal property accrues upon the delivery of the property, the warranty being broken when made, and the statute of limitations runs from the date of delivery. This is true because the commencement of the limitation is contemporaneous with the origin of the cause of action."

There we recognized and announced the general rule, and a minority rule.

The Sheehy Co. case (a canned goods case) was referred to only as supporting the minority view.

We also recognized and affirmed the rule that, in the absence of fraud, contract, (or evidence sufficient to toll the statute), an action for breach of implied warranty of fitness of personal property accrues from the date of sale, and delivery, the warranty being broken when made and the limitations statute runs from that date. In the Thweatt case, there was evidence from which it was held the statute had been tolled and it was there said: "We hold therefore that, while the statute of limitations ordinarily begins to run against an action for breach of warranty upon the sale and delivery of a chattel which does not comply with the warranty, yet the statute is tolled so long as the vendor insists that the defect can be repaired and is attempting to do so."

In the comparatively recent case of *Liberty Mut. Ins. Co.* v. *Sheila-Lynn, Inc.*, 185 Misc. 689, 57 N. Y. S. 2d 707, the Supreme Court of New York said: "The traditional doctrine is that a cause of action for breach of warranty of quality and fitness normally accrues at the time of the sale, notwithstanding the fact that the purchaser may not then be aware of the existence of any cause of action. Williston on Sales, § 212-a. 'Inability to ascertain the quality or condition of property warranted to be, at the time of the sale, a particular quality or in a certain condition, has never been allowed to change the rule as to the time when a right of action for a breach of the warranty occurs.' "

In the case of *Krueger* v. *V. P. Christianson Silo Co.*, 206 Wis. 460, 240 N. W. 145, which involved an agreement and effort to repair, similar in effect to the situation in the Thweatt case, above, the Supreme Court of Wisconsin, held, in effect, as this court held in the Thweatt case, that the limitation on an action for a breach of warranty should be computed from the date the silo was completed, but that subsequent promise and efforts to repair tolled

the statute as in the Thweatt case. It was there said: "A cause of action on contract, whether for damages or otherwise, commences to run from the time of the breach, whether the facts are known to the party having the right or not and if the latter, whether through ignorance, neglect or mistake of such party or fraud of his adversary. There is no exception. (Citing cases.) . . .

"Ignorance of his rights on the part of the person against whom the statute has begun to run, will not suspend its operation. He may discover his injury too late to take advantage of the appropriate remedy. Such is one of the occasional hardships necessarily incident to a law arbitrarily making legal remedies contingent on mere lapse of time."

In the case of *I. Kennard & Sons Carpet Company* v. *Dornan,* 64 Mo. App. 17, where there was involved a warranty of a happening of something in the future, or an act that would toll the statute, that court announced the general rule in this language: "The general rule unquestionably is that in all personal actions for the violation of an express or implied contract the statute begins to run from the date of the wrong, and not from the date of the damages caused by it. The wrong and not the damage constitutes the cause of action. Such has been the rule since an early day (*Sheriff of Norwich* v. *Bradshaw,* 1 Croke Eliz. 53), and that distinction is emphasized in the leading case of *Wilcox* v. *Plummer,* 4 Pet. 177, 7 L. Ed. 821."

In the Wilcox case, the U. S. Supreme Court held that the statute (of limitations) runs "from the time of the injury, that being the cause of action, and not from the time of damage or discovery of the injury."

We hold, therefore, as indicated, that the three year Statute of Limitations, in the circumstances here, began to run from the date of sale and delivery of the goods in question, and since appellee's action was not begun until more than three years following the sale and delivery, it was barred.

Appellee earnestly argues that appellant failed to file his motion for a new trial within the time required by our statute (Ark. Stats., 1947, § 27-1904), which provides: "The application for a new trial, . . . shall be made within fifteen (15) days after the verdict or decision was rendered, unless unavoidably delayed; provided . . ."

Appellee says that "under the statute it was mandatory upon the appellant to file his motion for a new trial within the time fixed in said statute (15 days) unless unavoidably delayed, that the trial court arbitrarily and erroneously extended the time for the filing of said motion." He therefore contends that the motion for a new trial and bill of exceptions should be stricken from the record and the judgment affirmed since no error appears upon the face of the record.

We cannot agree.

The record reflects that the judgment here was rendered June 10, 1949, and on June 17th thereafter, the court, on appellant's oral motion, entered its order granting appellant until July 11th, within which to file his motion for a new trial. Appellant filed his motion on July 6, 1949, well within the time allotted. The record further reflects the following court order: "Now on this 18th day of June, 1949, comes the defendant by his attorneys, Daily & Woods and William K. Harris, and asks permission of the court to be allowed until July 11th, 1949, to file motion for new trial, and the Court, after hearing all the evidence and being well and sufficiently advised in the premises doth grant the defendant until July 11, 1949, to file Motion for New Trial."

It further appears that appellant's reasons for requesting an extension of time were that the court reporter was unable to furnish list of exceptions within the statutory period and that appellant's counsel was busily engaged in other court trials. We find, in the circumstances, no abuse of the trial court's discretion in granting to appellant the extension of time indicated.

In circumstances, similar in effect, to those presented here, we held in the comparatively recent case of *Mis-*

souri Pacific Railroad Company v. *Moore,* 199 Ark. 1035, 138 S. W. 2d 384, that the court did not abuse its discretion in extending the time for filing motion for a new trial, but on the other hand that a failure to grant the time requested "would have been arbitrary and an abuse of discretion." See, also, *Metropolitan Life Insurance Company* v. *Thompson,* 203 Ark. 1103, 160 S. W. 2d 852.

Accordingly, the judgment is reversed, and since the cause appears to have been fully developed, it is dismissed.

VALLEYFIELD GIN COMPANY *v.* ROBINSON.

4-9056 227 S. W. 2d 168

Opinion delivered February 27, 1950.

Holland & Taylor and *Reid & Roy,* for appellant.

Gene Bradley, for appellee.

DUNAWAY, J. This appeal involves a determination of the rights in the proceeds of certain cotton grown in Dunklin County, Missouri, and sold in Mississippi County, Arkansas, as between three chattel mortgagees, one of whom also claims a landlord's lien for advances.

Suit was filed in the Mississippi Chancery Court by the Caruthersville Production Credit Association against the Valleyfield Gin Company and Jack Finley Robinson, doing business as Dixie Gin Company, for the alleged conversion of cotton grown in 1947 on 80 acres of land in Dunklin County, Missouri, by one Cecil Crenshaw, on which it was alleged plaintiff had a chattel mortgage to secure a balance of $901.98 and interest for money loaned Crenshaw to make that year's crop. Plaintiff will hereinafter be referred to as CPCA, and the defendants as Valleyfield and Dixie respectively. The defendants admitted buying Crenshaw's cotton, but denied the validity of plaintiff's mortgage. Both alleged the CPCA mortgage was void for uncertainty of description,

and in addition that plaintiff had waived any lien it may have had by consenting to sale of the cotton by Crenshaw. Each contended that it had a valid mortgage on crops of Crenshaw grown on separate 40-acre tracts farmed by this tenant, and that they had taken the cotton on account for money advanced by them, in good faith for value without actual notice of plaintiff's mortgage. Dixie also interposed the defense that it had taken an assignment of a rent contract from Crenshaw's landlord and that it therefore had a landlord's lien for advances, which took priority over all the chattel mortgages. Plaintiff and Valleyfield both denied the validity of the alleged assignment of the landlord's lien for advances. Valleyfield further alleged that in the event of any recovery by plaintiff it should be required first to satisfy its claim out of proceeds in the hands of Dixie.

The various chattel mortgages were recorded in this order: CPCA, March 6, 1947; Valleyfield, March 26, 1947; Dixie, May 15, 1947. The date of the alleged assignment of the landlord's lien to Dixie was January 23, 1947.

The Chancellor found that CPCA's mortgage was valid and that there had been no waiver of the lien thereof; that said mortgage was prior to that of Valleyfield and rendered judgment against this defendant for $708.85, the net value of the cotton received by this gin. The court further found that Dixie had a landlord's lien superior to plaintiff's mortgage and gave judgment against Dixie for $42, which was the value of cotton bought from Crenshaw by Dixie in excess of its loan to him.

Plaintiff and Valleyfield appeal from the decree insofar as it is adverse to them.

These are the questions for decision on this appeal:

(1) Was the description in CPCA's mortgage sufficient to create a valid lien on Crenshaw's crop or was the mortgage void for uncertainty?

(2) If the mortgage was valid, did CPCA waive its lien by permitting Crenshaw to sell his cotton?

(3) If CPCA had a valid mortgage lien which was not waived, did Dixie have a prior landlord's lien enforceable in Arkansas?

(4) If CPCA is entitled to recover from both gins, should it be required to proceed first against Dixie before seeking satisfaction from Valleyfield?

The mortgage of CPCA covered a truck, livestock and certain crops to be grown by Crenshaw. The provision of the mortgage which included the crops reads as follows:

"All crops of any and every nature whatsoever now or hereafter planted, grown, cultivated, produced, harvested or gathered by the mortgagor, or for him, or in which he may have an interest, during the year 1947, on the Copper-Ross farm, upon which Cecil Crenshaw resides, located 4-3 miles W and ..... miles ..... of Hermondale in the County of Dunklin, State of Missouri, consisting or to consist of at least 48 acres of Cotton, 22 acres of corn and beans, 1 acre of hay, 1 acre of sorghum, and 8 acres of pasture, being all crops which the mortgagor owns or may own in which he has or may have an interest in said state for said year."

During the year in question Crenshaw rented two 40-acre tracts of land. One was known as the "Marie Ross" farm, which was the farm mentioned in the mortgage to Valleyfield. The other 40-acre tract was owned by George M. Lee; it was as to this farm that Dixie's mortgage and claimed landlord's lien related. It is the contention of the gin companies that since there is no single farm known as the "Copper-Ross" farm as described in CPCA's mortgage, the mortgage is void for uncertainty.

The validity and effect of a mortgage of a chattel are determined by the law of the place where the chattel is situated at the time the mortgage is executed. *Bonner* v. *Stroud Bros. Gin,* 172 Ark. 569, 289 S. W. 766. The question of sufficiency of description in chattel mortgages has been before the courts in Missouri many times. The test of sufficiency of description was suc-

cinctly stated in the case of *Humphrey Savings Bank* v. *Carpenter,* 213 Mo. App. 390, 250 S. W. 618 at page 619: ". . . in such cases the description of the property in the mortgage must be such that a third person, aided by inquiries that the instrument itself suggests, could identify the property." In holding that parol testimony was admissible to show the sufficiency of a challenged description the court said in the case of *Bruce* v. *Kays,* 222 Mo. App. 77, 1 S. W. 2d 214 at page 215: "The rule seems to be that, if a chattel mortgage is not wholly insufficient as to description, and the description is such that a third party, aided by inquiries suggested by the instrument, can identify the property, then the chattel mortgage should be admitted in evidence and parol testimony received to identify the property."

Does the description in the mortgage in the instant case meet this test? At the trial it was shown that Crenshaw lived on the "Marie Ross" farm; that 80 acres was all the land he was farming; and that both places he was working were near Hermondale in Dunklin County. It is argued that no one inquiring for the "Copper-Ross" farm could ever have located the land owned by George M. Lee. That is true if the inquiry made were so limited. But certainly one attempting to locate in Dunklin County the 80 acres where Crenshaw lived and was making a crop, could by any reasonable effort have found the forty acre place where he resided and the additional land he was farming. Several cases are cited by the gin companies holding insufficient descriptions covering crops on certain amounts of land where the mortgagor was actually farming a greater acreage: for example, a mortgage was given on "75 acres of corn to be planted in the spring of 1921"; the evidence showed 100 acres of corn had been planted. This was held insufficient because there was no way of knowing which 75 acres were to be mortgaged. See *Klebba* v. *Missouri Meerschaum Co.,* 213 Mo. App. 390, 257 S. W. 174. But that is not the situation in the instant case. Here the proof is that 80 acres were all Crenshaw had planted; and the mortgage included all his crops to be grown on 80 acres in Dunklin County. In *White* v. *Meiderhoff,*

220 Mo. App. 171, 281 S. W. 101, a description was held sufficient in a mortgage covering 100 acres of wheat on a certain described farm, where in fact wheat was planted on 150 acres. The proof was that on one side of the road there was a 100-acre field and across the road another 50-acre field. After repeating the rule hereinabove discussed, the court said the question of sufficiency of description was for the jury to decide under all the facts and circumstances. In the instant case the Chancellor found the description sufficient. We think this finding is supported by the evidence; and that CPCA had a valid lien on all of Crenshaw's cotton.

Was this lien waived? The proof on this point showed that Crenshaw had sold practically all his cotton before CPCA knew of it. There is some dispute as to whether one of CPCA's agents then consented to the tenant's sale of the remaining few bales. CPCA's manager denied the agent's authority to consent, even if such consent had in fact been given by him, which the agent denied. As in *Moffett* v. *Kent,* (Supreme Court of Mo.) 5 S. W. 2d 395, the question of waiver here is one of fact. The Chancellor found that there had been no waiver. This finding is supported by the preponderance of the testimony.

The next question is whether Dixie had a landlord's lien for advances superior to the lien of CPCA's chattel mortgage. The facts in regard to the assignment to Dixie of the Lee-Crenshaw rent contract, as established by Dixie's witnesses, are these: The rent contract was entered into between Crenshaw and Lee on December 24, 1946. On January 23, 1947, Lee (by agent) made this endorsement on the back of said contract: "I hereby transfer my landlord lien to Dixie Gin Company for the purpose of them furnishing Cecil Crenshaw and they are to pay all indebtedness now owed by him, contract assigned in full. George M. Lee by (s) AMH 1/23/47." This transaction occurred after Robinson (*i. e.* Dixie) agreed to furnish Crenshaw for the year 1947 in order to get his ginning business. Prior to the assignment Robinson (*i. e.* Dixie), in December, 1946, agreed to pay Lee's agent $75 for some hay which Crenshaw was to

buy from him. Payment was made in March, 1947, after Crenshaw got the hay in December, 1946.

Valleyfield and CPCA earnestly insist that Dixie can have no lien for advances; that the statutory right to make advances to a tenant and the lien given therefor are personal to the landlord and cannot be transferred to another. Dixie claims to have become the landlord by the assignment of the rent contract; CPCA and Valleyfield deny that this assignment created the relationship of landlord and tenant between Dixie and Crenshaw.

Dixie's claim to a landlord's lien is based upon the following sections of Missouri Revised Statutes Annotated (1939):

Section 2976: "Every landlord shall have a lien upon crops grown on the demised premises in any year, for rent that shall accrue for such a year * * *."

Section 2977: "Every landlord shall have a superior lien, against which the tenant shall not be entitled to any exemption, upon the whole crop of the tenant raised upon the leased or rented premises to reimburse the landlord for money or supplies furnished to the tenant to enable him to raise and harvest the crops or to subsist; and may enforce his lien against the property wherever found."

Section 2988: "Any person to whom rent is due, whether he have the reversion or not or his personal representative or assignee, may receive such rent; whatever be the estate of the person owning the land, or though his estate or interest in it be ended."

The last quoted section was included in the Missouri Revised Statutes of 1855 and relates to other sections dealing generally with the remedies for the collection of any *rents* due. The landlord was given a lien for *rent* in Missouri (§ 2976, *supra*) as early as the Revised Statutes of 1835. It was held in *Matthews, Stubblefield & Co.* v. *Nation and Pulse,* 69 Mo. App. 327, that this section (2988) gave to the assignee of a landlord the same rights of action to recover rent as are given

the landlord, and the right to enforce a landlord's lien for rent. To the same effect that a landlord's lien for rent is made assignable by this statute see *Freeman* v. *Ruth,* 215 Mo. App. 398, 257 S. W. 500.

These cases are not decisive of the question in the case at bar for we are not considering an assignment of a landlord's lien for rent. The rent has been paid, and it is only a claimed lien for advances with which we are concerned. The statute giving a landlord a lien for advances was not enacted until 1925. Whether that lien is assignable, either as to advances already made by the landlord, or as to advances to be made in the future, has not been passed upon by the courts of Missouri.

We find only one case in which the rights given a landlord under the later statute are discussed. See *Kennard* v. *McCrory,* 234 Mo. App. 626, 136 S. W. 2d 710. In that case a landlord sought to recover from the purchaser of cotton from his tenant, the amount due him for supplies advanced in raising the crop. After pointing out that prior to 1925, a landlord could only proceed against a purchaser from a tenant for rent, and not for supplies advanced, the court stated that the remedies for enforcing the liens under the two statutes were not the same; that § 2977 gave only a right to enforce the lien against the property where found and created no personal right against the purchaser, as in the case of rent. At page 716 the court said:

"These sections create the lien and specifically provide for the remedy. They create a new and independent cause of action in derogation of the common law. * * * The statute both gives the right of action and provides the remedy where none existed at common law, and, where an action is brought under the statute, it can only be maintained subject to the limitations and conditions imposed thereby." While the question of assignability of a lien for advances was not discussed, the court clearly indicated that the only rights created by the statute were those specifically set out therein.

The general rule as stated in *Leslie* v. *Hinson,* 83 Ala. 266, 3 So. 443 at page 444 is: "But the landlord can neither relinquish nor transfer to another his right to make advances to the tenant, and thus vest in that other the lien which he could have asserted, had he made the advances. The right is statutory, and the statute does not embrace such a case."

Since we have concluded that under the law of Missouri a landlord's lien for advances cannot be assigned to cover advances to be made in the future by another, unless the relationship of landlord and tenant existed between Dixie and Crenshaw, Dixie had no lien superior to that of CPCA. Dixie's owner testified that he agreed to furnish Crenshaw in order to gin his cotton. The endorsement on the rent contract stated that the assignment was "for the purpose of them (Dixie) furnishing Cecil Crenshaw." The gin records introduced by Dixie showed each bale carried under this heading "Crenshaw; Emory; Lee." (Emory was Crenshaw's share-cropper.) Out of each of the eleven bales ginned and bought at Dixie one-fourth of the proceeds was taken out as Lee's rent. We think the conclusion supported by the record in this case is that the assignment of Lee was intended as no more than a waiver of his lien for rent, made to induce Dixie to furnish his tenant. We hold, therefore, that CPCA's lien was paramount.

This brings us to the final question raised by Valleyfield. Should the equitable doctrine of marshalling be invoked? Valleyfield urges the application of the inverse-order-of-alienation theory. Dixie contends this would be appropriate only in a case involving land. It is unnecessary to discuss these contentions for we think the theory of apportionment as applied by the Supreme Court of Louisiana in the case of *White Company* v. *Hammond State Lines,* 180 La. 962, 158 So. 353, would be most equitable in the circumstances of this case. Both Dixie and Valleyfield could have avoided their present situation by checking the chattel mortgage records before advancing money to Crenshaw. As between themselves neither was prejudiced in any way by the ad-

vances of the other; all of the cotton bought by each gin came from the crop on the farm covered by its chattel mortgage. Hence there is no greater equity on the side of one than the other. They should be required to satisfy the judgment in favor of CPCA in the proportion which the net amount received by each gin bears to the total net proceeds of the mortgaged cotton sold to both by Crenshaw.

The decree is accordingly affirmed in part, reversed in part, and the cause remanded for action in accordance with this opinion.

LEO J. AMBORT & SONS *v.* BRATTON.

4-9071 227 S. W. 2d 617

Opinion delivered February 27, 1950.

Rehearing denied April 3, 1950.

Wright, Harrison, Lindsey & Upton, for appellant.

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

DUNAWAY, J. Appellee, W. C. Bratton, operates a filling station at Arkadelphia, Arkansas, and in connection therewith repairs automobile and truck tires. Appellant, Leo J. Ambort & Sons, is a corporation engaged in the fruit and vegetable produce business at Little Rock, Arkansas.

Gordon Holland, one of appellant's truck drivers, was returning to Little Rock from Texas with a load of produce on December 29, 1948, when the inside left trailer tire became flat. Holland drove to appellee's station and asked appellee if he could fix the flat. Upon receiving an affirmative reply, Holland parked the truck and appellee proceeded with the repair job. After the tire had been repaired and while appellee was in the act of placing the tire and wheel on the trailer axle, the tire blew out or exploded causing the outer or lock rim to fly off and strike appellee in the face inflicting serious and painful injuries.

Appellee filed this action for damages against appellant alleging in his complaint: ". . . that the plaintiff, while exercising all reasonable care and precaution as any reasonable, prudent person would under the same or similar circumstances, took the casing off the rim, but noticed that the rim was sprung and he called the driver of the defendant's truck's attention to this and the defendant's truck driver, acting for the defendant at the time, told the plaintiff that yes, he knew it was sprung and that it had been that way for some little time, but that it was all right, and that they had had it examined and to go ahead and put the casing back on the rim and put 80 pounds of air in the casing.

"The plaintiff, believing what the defendant's agent said, and assuming that he knew what he was talking about, put the casing back on the rim and put 78 pounds of air in the casing and started rolling the casing back to the truck to put it on the truck and the casing blew out because of this defective and sprung condition of the rim and injured the plaintiff as follows. . . ."

A demurrer to the complaint was overruled and appellant answered with a general denial and pleas of

assumed risk and contributory negligence. A jury trial resulted in a verdict and judgment in appellee's favor for $20,000. This appeal follows.

The principal contention for reversal of the judgment is that a verdict should have been directed in appellant's favor because the evidence is insufficient to show actionable negligence on its part. In testing the sufficiency of the evidence to support the verdict we must, of course, consider the testimony in the light most favorable to appellee. After stating that he repaired the tire and started to put it back on the wheel, appellee testified: "A. Yes, sir, I looked at the rim and I noticed it was sprung and I called Mr. Holland and he came back out from the stove. It was in the winter time and cold that night and he was in the station by the stove. I called him out there where I was fixing the tire, and I showed him it was sprung. It was a two ply rim—that is what I call those that have one single metal rim, but this one had a metal rim and then a smaller lock rim that goes with it and I showed him the smaller one—that was the one that seemed to be sprung. Q. Was it sprung? A. Yes, sir. . . . .

"Q. Go ahead. A. Well, he said, 'he knew it was sprung, but it had been inspected and was all right'—'they had the trucks inspected and that it wasn't dangerous,' and I dismissed it from my mind figuring he knew more about it than I did. Q. Would you have proceeded to fix the flat and put the tire and casing on if he had not told you it had been inspected and it was all right? . . . A. I would not have put it back on because I have refused to put them on that were sprung."

On cross-examination appellee explained in detail the mechanics of repairing and assembling truck tires and the method used on the occasion in question. He stated that he had worked in service stations for approximately eleven years; that he had four or five years experience in handling truck tires and rims; and that he catered to truck business at his service station. He further testified: "Did you ever work with or around sprung rims before? A. You mean had I seen them

before? Q. Yes, or worked with them? A. Yes, sir. Q. I believe you said you had refused to put them on? A. Yes, sir, I have refused to until they get another rim. Q. Why was that? A. Because the rim was sprung and the guy admitted it and I had him to get another. Q. Is a sprung rim dangerous to use? A. Dangerous to use? Q. Yes. A. They are. Q. Have you ever had one blow before? A. Yes, sir, I have. That is the reason I watch them so close. Q. And this rim was sprung? A. Yes, sir. Q. And in your opinion it was dangerous? A. As far as I knew it was dangerous. Q. It was dangerous to use if it was sprung? A. Yes, as far as I knew it was dangerous. Q. You not only thought it was dangerous but you knew it was dangerous before you started working with it? A. Yes, sir. It was dangerous. That was the reason I said something to him about it, and he said it had been inspected and I figured he knew more about it than I did. Q. But in your opinion it was still sprung and dangerous to use? A. As far as I was concerned it was. Q. When you use a sprung rim and one sprung like that one that night, what is likely to happen? A. You mean what happens? Q. Yes. A. The same thing I have here. Q. The blowing off is the dangerous part of it? A. Yes, sir. . . ."

Our decision in the case of *Sallee* v. *Shoptaw,* 210 Ark. 600, 198 S. W. 2d 842 is controlling in the case at bar. In the *Sallee* case the situation was very similar to that here presented. A truck was taken into the service station where Shoptaw worked. After Shoptaw had repaired a "flat" tire and was replacing it on the truck, there was an explosion caused by a defective lock-rim, resulting in the death of Shoptaw. An action was brought to compensate his estate for his death on the theory that the owner of the truck was negligent in delivering to the service station for repair a tire mounted on a defective rim. In holding that the defendant there was entitled to a directed verdict we said at page 603:

"Irrespective of the technical legal relationship created when Kincade (the driver of the truck) went to the filling station for repairs—whether employer and independent contractor, master and servant, bailor and

bailee—the naked fact remains that Shoptaw, acting for his principal, received the truck for the purpose of repairing the tube. The so-called 'dangerous condition' it is contended Kincade knew of, or by the exercise of ordinary care could have become informed, related to the tire and rim upon which Shoptaw worked, and the condition was such as might have pertained to any rim in the circumstances here disclosed. It must be held, therefore, as a matter of law, that Shoptaw assumed the incidental risks.''

Appellee argues that the *Sallee* case is distinguishable because there it was not shown that the defect in the rim had been discovered prior to the accident, while here it had been discovered and appellee proceeded to inflate the tire only after appellant's driver assured him that it would be safe to do so. Appellee then relies upon cases involving recovery of damages from a master for injuries sustained by a servant who proceeded with dangerous work upon the assurance of safety given by the foreman or other person in charge of the work.

The relationship in the instant case was not that of master and servant. Appellant's driver did not attempt to direct the manner in which the tire was repaired. In taking the truck into his place of business to repair the tire, appellee was a bailee for hire. The duty of appellant, as bailor, in the situation was fully discussed in the concurring opinion of Mr. Justice McFaddin in the *Sallee* case. There it was said at page 606:

'' '. . . where the bailor delivers an article to another for work to be performed upon it, as in the case of a chattel left to be repaired, there is authority for the rule that the bailor owes to the bailee a duty to disclose any condition of the chattel known to him, and unknown to the bailee, from which danger to the bailee, his property, or his servants might reasonably be anticipated during the work upon the chattel in the manner known to be intended, and if he (bailor) fails to give such warning, he is liable for injuries resulting therefrom without negligence on the part of the bailee. It seems, however, that the bailor's duty ceases with such notifi-

cation; he is not bound further to tell or teach the bailee how to avoid the danger.' ''

The testimony of appellee, as set out rather fully herein, is that he discovered the sprung rim and called it to the attention of appellant's driver. Appellee, a man of many years experience in tire repair work, then testified that although he knew from his own experience that sprung lock-rims were dangerous to handle and although he knew at the time this one was dangerous he went ahead with the work. In these circumstances it is clear that appellee had full knowledge and appreciation of the danger involved, and assumed the incidental risks of the work he undertook.

The trial court erred in denying appellant's motion for a directed verdict. The judgment is reversed and the cause dismissed.

Mr. Justice McFaddin and Mr. Justice Millwee dissent.

Nail *v.* Combs.

4-9099 227 S. W. 2d 173

Opinion delivered February 27, 1950.

Claude Duty, for appellant.

Vol T. Lindsey, for appellee.

Griffin Smith, Chief Justice. Appellee is a licensed realtor doing business as West Walnut Street Land Com-

pany. Appellant owned and occupied a residence in Rogers, Arkansas. As a professional trader he buys and sells extensively.

Appellant listed his home with appellee, to be sold for $16,000 and appellee produced a buyer ready, willing, and able to perform; but appellant, when appellee sued for the stipulated commission of $800, contended the contract was procured by fraud. The misleading act [says appellant] was appellee's statement that he had seen Mrs. Nail—appellant's wife—and that she had unconditionally agreed that the sale be made, whereas in truth Mrs. Nail had acquiesced only on condition that a suitable place be found for her to move into, or that a desirable building lot be found.

At trial there was substantial testimony that the contract was not qualified. This presented a question for the jury, resulting in a verdict for the full amount claimed.

Appellant's plea for reversal rests on the Court's refusal to submit his Requested Instructions 3 and 4, through which the jury would have been told that if in procuring the contract appellee made false representations of a material character, there could have been no meeting of the minds; hence, in these circumstances, a recovery would not lie.[1]

The motion for a new trial asserts that the Court erred in giving Plaintiff's Requested Instructions 2, 3, 4, 5, 6, 7, 8, and 9. In his brief appellant says: "The only instructions we will copy are those to which exceptions were taken at the time". These were Nos. 2, 3, 6, and 8. But in the motion for a new trial it was asserted that Nos. 4, 5, 7 and 9 *were given,* and there is the claim that "the defendant at the time excepted".

It will be observed that in his brief appellant is still treating Instructions 4, 5, 7, and 9 as having been given,

[1] The exact language of Requested Instruction No. 4 is: ". . . It is the duty of a real estate broker or agent to make disclosures of the terms of pending negotiations, so that the seller may act advisedly in determining whether or not a proposal is satisfactory"; otherwise the commission would not be earned. Requested Instruction No. 4 would have told the jury that in determining liability consideration should be given all facts and circumstances leading up to the contract.

and that they were not objected to, although the record shows they were refused and that in his motion for a new trial there is an attempt to preserve the alleged objections—none of which was specific. Other instructions were given by the Court, but have not been abstracted.[2]

Since the motion for a new trial is at variance with the record, and because it also contradicts the abstract, we are not able to say that error was committed in giving or refusing instructions. The situation would be different if an abstracted instruction inherently wrong had been brought forward by a specific or general objection.

Affirmed.

SCHUMAN *v.* PERSON.

4-9105 227 S. W. 2d 160

Opinion delivered February 27, 1950.

Wm. J. Kirby, for appellant.

Lee Miles, for appellee.

MINOR W. MILLWEE, Justice. Appellee, Rosetta Person, a colored woman, purchased Lots 15 and 16, Block 3, Harrington's Industrial Addition to the City of Little

[2] In fairness to appellant it should be stated that these do not have a bearing on the controverted issue, although to ascertain this fact it was necessary to turn to the transcript as distinguished from an abstract of the record.

Rock, Arkansas, as a home in December, 1915. A part of her house is located on each of said lots. Appellee paid and was properly credited with payment of the general taxes on both lots from 1916 to 1949 except the 1945 taxes on Lot 16 in the amount of $1.47.

Appellant, Manie Schuman, purchased Lot 16 at the collector's sale on November 14, 1946, for non-payment of the 1945 taxes and obtained a clerk's deed to the lot on December 22, 1948.

Appellee instituted this suit against appellant on March 19, 1949, to set aside the 1946 tax sale of Lot 16 and to cancel the clerk's deed to appellant alleging that she, in good faith, attempted to pay the 1945 taxes on both lots but, through mistake or oversight of the collector, the taxes on Lot 16 were not paid and that she did not discover the mistake until February 23, 1949.

Appellant answered with a general denial and alleged his ownership of the lot under his tax purchase and deed from the clerk.

The chancellor found the issues in favor of appellee and entered a decree holding the 1946 tax sale of Lot 16 void and cancelling the clerk's deed to appellant. Appellee's tender and payment into the registry of the court of the taxes, penalty, interest and costs in the amount of $1.82 was directed to be paid to appellant upon his request.

Appellee was the only witness at the trial. Her testimony is to the following effect: In 1946 she received separate statements from the collector for the 1945 taxes on Lots 15 and 16 which she took to the collector's office and presented at the window with more than enough money to pay the amounts of $8.33 for Lot 15 and $1.47 for Lot 16. The deputy collector took her money and handed back her change with the two tax bills and she went away thinking she had paid the taxes on both lots. She had pursued the same practice over the years prior to 1946 and paid the taxes on both lots in the same manner after that year without error. She did not discover that the deputy collector had failed to take out the taxes

on Lot 16 in 1946, or that the lot had sold for the 1945 taxes until she was so informed by the collector when she went to pay her 1948 taxes in February, 1949. She frankly stated that in paying taxes she was always "kinda careless" in checking the amount of change or making inspection of tax bills to ascertain if they were marked paid, the clear inference from her whole testimony being that she is not well versed in business transactions and relied implicitly on the collector in such matters.

Justice HART, speaking for the court in *Robertson* v. *Johnson,* 124 Ark. 405, 187 S. W. 439, said: "It is the settled rule in this State that an attempt to pay taxes made in good faith by the landowner or his agent, and frustrated by the mistake, negligence or other fault on the part of the collector renders the subsequent sale of the land for the non-payment of taxes void. *Hickman* v. *Kempner,* 35 Ark. 505; *Gunn* v. *Thompson,* 70 Ark. 500, 69 S. W. 261; *Scroggin* v. *Ridling,* 92 Ark. 630, 121 S. W. 1053; *Knauff* v. *National Cooperage & Woodenware Co.,* 99 Ark. 137, 137 S. W. 823." The same principle has been applied in *Kinsworthy* v. *Austin,* 23 Ark. 375; *Fleischer* v. *Wappanocca Outing Club,* 118 Ark. 287, 176 S. W. 312; *Forehand* v. *Higbee,* 133 Ark. 191, 202 S. W. 29; and *Mixon* v. *Bell,* 190 Ark. 903, 82 S. W. 2d 33.

In *Gunn* v. *Thompson, supra,* the defendant taxpayer correctly described his land to the collector, but handed the latter his deed which by mistake described a tract belonging to another. Without saying anything to the taxpayer, the collector made out a tax receipt crediting the taxes on the tract described in the deed and the mistake was not discovered by the illiterate taxpayer until after the land was sold to another for the taxes and the period of redemption had expired. This court upheld a decree holding the tax sale void.

In *Scroggin* v. *Ridling, supra,* the court held: "Where the owner of land in good faith attempted to pay the taxes on all of his land, but by the collector's mistake the taxes on a part of it were not paid, the owner will be entitled to redeem the land." In that case Ridling

correctly described to the collector the 180-acre tract upon which he wished to pay taxes. In making the receipt the collector by mistake left out a 40-acre tract. Ridling, supposing the receipt was correct, paid the taxes for several years not knowing that the 40-acre tract had been sold for taxes. It was held that Ridling made a *bona fide* attempt to pay all the taxes which was frustrated by the collector's mistake and a tax deed to Scroggin was cancelled.

Appellant insists that appellee, by her carelessness in failing to count her change and inspect the statement, should be charged with notice of the collector's mistake. The cases of *Gilley* v. *Southern Corporation,* 194 Ark. 1134, 110 S. W. 2d 509, and *Redfern* v. *Dalton,* 201 Ark. 359, 144 S. W. 2d 713, are cited in support of this contention. In the Gilley case an agent of the corporation, in attempting to redeem all of its delinquent lands, testified that he handed the clerk sufficient money to do so and also gave him a slip of paper furnishing a clue which, if pursued, would have described all the lands so to be redeemed, and that the clerk failed to pursue the directions on the slip of paper fully and omitted a 60-acre tract from the redemption certificate. This testimony was contradicted by that of the clerk and this court held that the preponderance of the evidence showed that the mistake or fault was that of the agent of the landowner rather than that of the clerk. In the case at bar it is not denied that appellee furnished the collector a proper description of her land in full.

In *Redfern* v. *Dalton, supra,* the owner paid to the county clerk an amount sufficient to redeem his land from a delinquent sale for 1933 taxes and enough more to pay 1934 taxes with the request that both be paid, but the clerk only redeemed for the 1933 delinquency and returned the balance to the owner so that the 1934 taxes were not paid. In holding a sale for the 1934 taxes valid after confirmation, this court emphasized the fact that there was no tender of money to the collector, who was the proper person to receive the 1934 taxes, and said: "It suffices here to say that the taxes were not paid, nor

were they tendered to the official authorized to receive them, as was the case in *Mixon* v. *Bell, supra.*" In the case at bar the tender was made to the collector who was the official authorized to receive the 1945 taxes. Both the Gilley and Redfern cases involved attacks upon tax sales after confirmation while there has been no confirmation of the sale in the case at bar.

In *Schmeltzer* v. *Scheid,* 203 Ark. 274, 157 S. W. 2d 193, we also held that "one may not discharge his obligation to pay his taxes by showing that he thought he had paid them unless his misapprehension was induced by some officer charged with the duty of collecting the taxes."

We think the facts in the instant case bring it within the rule stated in *Robertson* v. *Johnson, supra,* and that the chancellor's finding, that appellee made a *bona fide* attempt to pay the 1945 taxes on Lot 16 which was frustrated by the oversight or mistake of the collector, is not against the preponderance of the evidence. Certainly the circumstances support the conclusion that appellee honestly thought she had paid the taxes on both lots. Whether this misapprehension was induced by the fault or oversight of the collector depends upon the correctness of appellee's testimony. If her testimony is to be credited, the fact that the collector failed to take out and credit her with payment of the smaller tax of $1.47 instead of the larger amount made it less likely for the error to be detected, especially by one who relied upon the superior knowledge and ability of the officer in the transaction. The equities are all with the appellee and the decree is affirmed.

JOHNSON *v.* LION OIL COMPANY.

4-9065 227 S. W. 2d 162

Opinion delivered February 27, 1950.

J. Bruce Streett and *Keith & Clegg,* for appellant.

Davis & Allen, for appellee.

George Rose Smith, J. In April, 1947, A. B. Turner and Walter Keith owned the leasehold interest in oil and gas leases upon 120 acres of land. They made an oral contract with the appellants, Johnson and Stewart, by which the appellants agreed to drill oil wells on the property in return for a half interest in the leasehold estate. The appellants were experienced in drilling oil wells but were not qualified to handle the administrative and accounting procedures involved in the operation of a producing well. For that reason they asked the appellee, Lion Oil Company, to assume half the responsibility for performance of the Turner-Keith contract. After some negotiations the appellee agreed to this proposal, and on May 31 a written agreement was entered into by the appellants, the appellee, and Turner and Keith.

Within the next few months five producing wells were brought in. On November 29 the appellee bought the remaining half interest held by Turner and Keith, for $56,000. In this suit the appellants contend that under the contract of May 31 they and the appellee were

joint adventurers—a fiduciary relationship. It is urged that the appellee was precluded from buying for itself the outstanding interest in the subject matter of the joint venture and that the appellants are entitled to share in the appellee's purchase upon payment of their half of the amount paid to Turner and Keith. The appellee meets this argument by insisting that the parties are tenants in common rather than joint adventurers and that in any event the appellants are barred by laches. The chancellor rejected the plea of laches but held that the joint adventure was limited to the half interest acquired by the contract of May 31 and did not extend to the other half originally retained by Turner, and Keith. He accordingly dismissed the appellants' complaint.

The problem presented arises from the terms of the May 31 contract and from the actions of the parties to that contract. The instrument provided that within thirty days the appellants and the appellee would begin drilling a well and would diligently carry it to a specified depth. If the well proved to be a dry hole the appellants and the appellees were required to bear the entire drilling expense. If, however, production of oil were attained, Turner and Keith were bound to pay half the drilling expense, and thereafter the oil would be divided equally between Turner and Keith on the one hand and these litigants on the other. Not only were the present litigants required to risk the expense of drilling the first well; they bound themselves either to continue the development of the leasehold at their own risk or to surrender any undeveloped acreage to Turner and Keith.

The first five wells were producers. In early November, J. E. Howell, a vice president of the appellee, telephoned appellant Johnson and said that Turner and Keith had indicated some desire to sell their half interest. Howell asked Johnson to let the appellee know if either of the appellants heard anything more about a possible sale, and Howell promised in turn to keep the appellants informed, saying, "If anything further develops I will get in touch with you." Johnson agreed to

this suggestion. The appellants then went to a bank and arranged for a $55,000 loan to be ready to pay their share if the sale should materialize. Nothing else occurred until November 29, when the appellee bought the Turner-Keith interest without notice to the appellants. Thereafter the appellants insisted that they were entitled to share in the purchase and eventually brought this suit to compel the appellee to let them participate.

As to the half interest originally acquired by the contract of May 31, the chancellor rightly held that these litigants were joint adventurers. By that agreement they joined forces in an extremely hazardous undertaking. Should any well prove unproductive they were equally bound to share drilling expenses that are conceded to have been about $32,000 for each well. But should the venture be successful, large profits were to be expected.

The appellee's contention that the parties were tenants in common is based principally upon our decision in *State ex rel. Atty. Gen.* v. *Gus Blass Co.,* 193 Ark. 1159, 105 S. W. 2d 853, where we said that the elements of a partnership must be present in a joint adventure. The appellee points to various provisions in the May 31 contract that are thought to be inconsistent with a true partnership, such as a clause that the parties' interests shall be assignable, a clause that their liability shall be several rather than joint, etc. We do not find this line of reasoning persuasive. To begin with, we did not say in the *Gus Blass Co.* case that a joint venture must contain every element of a partnership, for then there would be no difference between the two. What we said was that a joint adventure is "in the nature of a partnership of a limited character," and we then examined the agreement in question to determine whether it was sufficiently similar to a partnership to constitute a joint adventure.

But even accepting the partnership analogy we doubt if the clauses relied on by the appellee, if placed in a true partnership agreement, would be fatal to the relation of partners. The conception of a partnership, both at common law and under the Uniform Partnership

Act, is not rigid but flexible. It covers a wide variety of business enterprises and allows the partners some leeway in drawing their agreement. The Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." Ark. Stats. 1947, § 65-106. As long as the agreement creates the basic structure of a partnership, we think the parties may insert details that would be treated differently by the Act in the absence of the contractual provisions. Take, for example, the clause in the present contract that makes the interests assignable. We find nothing in the Uniform Act that transforms a partnership containing a provision such as this into a tenancy in common without partnership incidents. It seems plain that the original relationship would continue to be a partnership until one partner did assign his interest. Indeed, the Act seems to recognize this view, as it contains a section setting forth the rights of the assignee of a partner's interest. § 65-127. The same thought applies to the other clauses stressed by the appellee. Those clauses guard against certain contingencies, but until those contingencies arise we think the joint adventure continues to exist. Thus the appellants were not required to see that the agreement complied precisely with the Uniform Act as a condition to reliance upon the honesty and good faith of their coadventurer. The relationship itself justified them in assuming that the appellee would conform to the standard expected of a fiduciary, regardless of precautionary provisions that the attorneys put in the contract.

The next question is whether the obligations of this joint adventure extended to the outstanding Turner-Keith interest. This issue has given us much concern, although our task has been lightened by the complete candor with which the witnesses testified and by the unusual excellence of the briefs. Without here reviewing the many authorities cited, we adopt the view expressed by the majority in *Meinhard* v. *Salmon,* 249 N. Y. 458, 164 N. E. 545, 62 A. L. R. 1. There Salmon had obtained a valuable 20-year lease upon hotel property, with a provision that as lessee he would make ex-

tensive alterations in the building. Salmon persuaded Meinhard to contribute capital to the venture in return for roughly a half interest in the lease. Salmon was to be the managing partner in the venture, which proved to be highly profitable. When the lease was about to expire the lessor offered to Salmon a new lease upon the hotel and upon much additional property. Salmon took the new lease for his own benefit without notice to his coadventurer. The court held that Meinhard was entitled at his option to share in the new lease. In language familiar to every student of law CARDOZO, C. J., said: "Joint adventurers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. . . . The pre-emptive privilege, or, better, the pre-emptive opportunity, Salmon appropriated to himself in secrecy and silence. He might have warned Meinhard that the plan had been submitted, and that either would be free to compete for the award. . . .The trouble about his conduct is that he excluded his coadventurer from any chance to compete, from any chance to enjoy the opportunity that had come to him alone by virtue of his agency. This chance, if nothing more, he was under a duty to concede. The price of its denial is an extension of the trust at the option and for the benefit of the one whom he excluded. . . . A managing coadventurer appropriating the benefit of such a lease without warning to his partner might fairly expect to be reproached with conduct that was underhand, or lacking, to say the least, in reasonable candor, if the partner were to surprise him in the act of signing the new instrument. Conduct subject to that reproach does not receive from equity a healing benediction."

The parallel in the instant case is almost exact. It is true that the appellee did not act wholly in secret; its conduct no doubt complied with an average standard

of practical honesty. But the appellee was a fiduciary and had agreed to keep the appellants informed of its progress in attempting to acquire the Turner-Keith interest. Of course the statute of frauds is a bar to the enforcement of that promise if treated as a contract to sell an interest in land, but it does illustrate the complete confidence that existed. With that assurance there was no occasion for the appellants to do anything more than to prepare themselves to share in the purchase; common sense indicated that the coadventurers should not compete with each other in the bidding. Howell was out of the city on November 29 and did not attend to the actual purchase, but we feel sure that he would have been subject to reproach, as CARDOZO put it, had he been surprised in the act of purchasing the outstanding interest. That prick of conscience—or a sense of good sportsmanship, as the chancellor expressed it—pretty well indicates to a fiduciary that he is going beyond the limits permitted.

We agree with the chancellor's rejection of the plea of laches. Not later than February 12, and perhaps earlier, the appellants first asked to share in the purchase. The suit was brought within ten months after November 29. Two circumstances are relied upon to show that even this delay was too long. First, the price of crude oil rose about 25% on December 7, eight days after the purchase. An advance in price had been announced in Texas on November 27, however, and it is not unreasonable to assume either that a similar rise would follow in Arkansas or that the Texas price would have to be reduced to meet competition. In any case, however, the appellants were entitled to a reasonable time in which to decide whether it was wise to demand a share in the newly purchased interest. The appellee was keeping the records of production and was in a more favorable position to know what the Turner-Keith interest was worth. We do not think that an increase in value that took place while the appellants were determining the wisdom of the purchase should be charged against them on the score of laches.

Second, a sixth producing well was drilled about a month before suit was brought. In some instances we have held that even a very short delay may be fatal when values fluctuate as rapidly as they do in oil fields. In *Stewart Oil Co.* v. *Bryant,* 153 Ark. 432, 243 S. W. 811, a delay of only thirty-two days was too long. But here the sixth well was not a wildcat venture in which success multiplied the value of the property overnight. Five wells had already been productive, and it is evident that the sixth had good prospects of success. No doubt the last well did add some value to the leasehold, but we do not think the proportionate increase was so great as to be of decisive importance on the issue of laches.

Reversed.

GRIFFIN SMITH, C.J., dissents.

COOK, COMMISSIONER OF REVENUES *v.* U. S. FIDELITY & GUARANTY COMPANY.

4-9096 227 S. W. 2d 135

Opinion delivered February 27, 1950.

H. Maurice Mitchell and *O. T. Ward,* for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

LEFLAR, J. This is an action brought by the State Commissioner of Revenues on a burglary insurance policy issued by defendant company. The Circuit Court sitting without a jury held for the defendant, and plaintiff Commissioner appeals.

The insurance policy was issued by defendant to E. Ritter & Co. of Marked Tree, Ark., as the insured, but it contained provisions (Paragraph B) including within its coverage property owned by third persons, under some circumstances, and provided for payment by the insurance company directly to such third persons in event of a loss covered by the policy.

Early in January, 1947, M. B. Miller, County Inspector for the State Revenue Department, secured permission from E. Ritter & Co. to place in Ritter's safe at night a cigar box containing money collected by Miller for the State, and this was done for several nights up to and including the night of Jan. 11-12, 1947. On that night burglars entered the Ritter building and broke open the safe, taking therefrom considerable money which belonged to Ritter as well as the cigar box full of money belonging to the State. The cigar box that night contained, the parties agree, the sum of $1,576.06. The State has already recovered $1,000 on account of this loss under another insurance policy. The present suit was brought to recover the remaining $576.06.

The policy contained a standard proof of loss clause, requiring that written proof of loss be furnished to the insurance company within sixty days from the date of discovery of any loss. Ritter furnished to the company the required proof of loss within the designated time, as to Ritter's own losses, but not as to the State's loss. Ritter's claim was paid off by defendant in due course. No formal proof of loss was ever furnished to defendant by the State, but on March 24, 1947, some 10 or 12 days after expiration of the 60-day period allowed for proof of loss, plaintiff made a request that the defendant make payment to plaintiff on the policy. The defendant in turn denied liability on or about March 27, 1947.

Plaintiff contends that the function of the proof of loss clause was served when defendant actually learned of the loss, the facts being otherwise undisputed, and that a third party like the plaintiff, unacquainted with the terms of the contract, should not be held subject to its provisions until he learned of his rights under it.

Whether the plaintiff had rights under the contract we do not now decide. A contract for the benefit of a third party to whom neither of the contracting parties is indebted may be enforced in Arkansas. *Freer* v. *Putnam Funeral Home, Inc.,* 195 Ark. 307, 111 S. W. 2d 463. But a third party may not recover upon a contract under which the parties did not intend to benefit him, one under which he is a mere incidental beneficiary. *Carolus* v. *Arkansas Power & Light Co.,* 164 Ark. 507, 262 S. W. 330. Whether this insurance contract places this plaintiff in the first group or the second is not hereby determined. Our holding is that, assuming that the plaintiff has rights under the contract, he still cannot recover because he has not complied with the proof of loss requirement in the contract.

The proof of loss clause was a valid part of the insurance contract. Similar clauses have been many times sustained and enforced in this court. *Teutonia Ins. Co.* v. *Johnson,* 72 Ark. 484, 82 S. W. 840; *New York Life Ins. Co.* v. *Moose,* 190 Ark. 161, 78 S. W. 2d 64; *Home Life Ins. Co.* v. *Swaim,* 200 Ark. 819, 142 S. W. 2d 209; *Brotherhood of Railroad Trainmen* v. *Drake,* 204 Ark. 964, 165 S. W. 2d 947. The insurance company's right to rely upon non-compliance with the clause is not waived by a general denial of liability asserted by the company after the period for filing a proof of loss has expired. *Smith* v. *American National Ins. Co.,* 111 Ark. 32, 162 S. W. 772; *Illinois Bankers' Life Assn.* v. *Byassee,* 169 Ark. 230, 275 S. W. 519, 41 A. L. R. 379. The clause is a part of the contract under which plaintiff claims, and he cannot ignore it in making his claim. When we assume that plaintiff has rights as a third party beneficiary under this contract, we assume no more than that he has the rights which the contract specifies, subject to the conditions which it specifies.

He cannot ask further that the contract be remade to confer upon him a right denied by its terms. As a volunteer, he either takes the contract as it is, or not at all.

The judgment is affirmed.

HALSELL *v.* DRAINAGE DISTRICT NO. 17, MISSISSIPPI COUNTY.

4-9163 227 S. W. 2d 136

Opinion delivered February 27, 1950.

Marcus Evrard, for appellant.

Graham Sudbury, for appellee.

ED. F. MCFADDIN, Justice. The question, as stated in the briefs, is: "Has Drainage District No. 17 the power and authority to purchase a dragline and equipment to be used by the District in cleaning out and maintaining its drainage system?"

Drainage District No. 17 was created a Special District by Acts 103 and 261 of 1917. Later, by Act 227 of 1927, it received the additional powers possessed by general districts organized under Act 279 of 1909. Then, Act 95 of 1947 (See § 21-575, Ark. Stats., 1947) provided, *inter alia:*

"Boards of commissioners of drainage districts organized under the laws of Arkansas are hereby author-

ized upon petition of the majority of the property owners in their districts or upon petition of the owners of the majority of the property in their district to purchase, lease, or rent . . . machinery, equipment and material to be used in repairing, deepening, widening and clearing the ditches of their districts."

Appellant, as a property owner, filed this suit for an injunction, alleging:

"Said Drainage District No. 17 is about to purchase, and is threatening to purchase, for use in connection with the maintenance and widening of its ditches, certain expensive equipment, consisting of a dragline, excavating machine and other heavy equipment, and to pay therefor out of the funds of the district raised by the taxation of the real estate within the district; all of which is about to be done without authority under the law and in violation of the provisions of Act No. 95 of the Acts of the General Assembly of the State of Arkansas for the year 1947. Unless it is restrained and enjoined from doing so, said district, acting through its Board of Directors, will purchase such equipment and will expend funds of the district, realized from the taxation of the real estate, in payment therefor."

In its answer, the District admitted that it was about to make the purchases, as alleged, but asserted:

"Defendant District specifically denies that purchase of machinery contemplated by it would be in violation of provisions of Act 95 of the Acts of 1947."

. . .

"Defendant District states that there is within said District 138,980 acres of land; that said District has received petitions, requesting the purchase of the machinery mentioned in plaintiff's complaint, signed by the owners of 75,389 acres, or 54.2 per cent of the lands within said District; . . . that said petitions therefore represent a majority in acreage within Defendant District. . . ."

The plaintiff demurred to the answer, and when the demurrer was overruled, the plaintiff refused to plead fur-

ther. Thereupon a decree was rendered dismissing the complaint, and this appeal followed.

Even though the parties have discussed other legislation as authority for the purchases contemplated by the District, we find it unnecessary to consider any legislation except Act 95 of 1947 because it is sufficient authority in itself for what the District proposes to do on petition of a majority in acreage of the District. The said Act provides that the Commissioners shall be authorized to purchase machinery, equipment, etc., "upon petition of the owners of the majority of the property in their District." The Act 95 of 1947 used the quoted words in the light of the law under which any district might have been organized that was seeking to invoke said Act. The words "owners of the majority of the property in their District" mean—as applied to District No. 17—the majority "either in numbers or in acreage or in value of the holders of real property"; because the general law under which this District operates (Act 279 of 1909, as amended, and now found in § 21-502, Ark. Stats., 1947) provides that the District could come into existence by a majority "either in numbers, or in acreage or in value."

No question is presented in this case as to bondholders. The answer of the District alleges that the Commissioners had a petition signed by a majority in acreage of the property holders in the District, so the Commissioners had the right to make the purchase under Act 95 of 1947; and this holding makes it unnecessary for us to consider whether the Commissioners had the authority under any previous legislative enactment.

Affirmed.

TENNISON *v.* TENNISON.

4-9084 227 S. W. 2d 138

Opinion delivered February 27, 1950.

Shaver, Stewart & Jones, for appellant.

Smith & Sanderson, for appellee.

GRIFFIN SMITH, Chief Justice. The Court refused to reduce payments of maintenance and alimony, and the former husband as petitioner has appealed.

. . . .

When Mrs. Jimmie Tennison procured a divorce in 1935 there was incorporated in the decree a plaintiff-defendant stipulation regarding the property settlement. The Court found that the husband had complied with paragraphs 2, 3, 4, and 5 of the contract by executing deeds, making payments, or by delivery.[1]

[1] The executed contract covered a cash payment of $5,000, an attorney's fee of $250, plus court costs and other expenses, conveyance to Mrs. Tennison of the Texarkana home, bill of sale for household furnishings and an automobile, and payment of the first installment of $200 on alimony-maintenance.

That part of the decree relating to future payments is: "By consent of the parties . . . it is ordered that the defendant shall, . . . until and unless this decree is modified, . . . pay to the plaintiff $200 per month for support and maintenance of herself [and the four children]; . . . said sum, however, shall be subject to reduction by order of this Court, upon the death or remarriage of plaintiff, or upon any other changed condition, upon proper application to this Court. . . . Hereafter plaintiff shall have no other . . . right to claim any other . . . sum . . . than the monthly allowance here made, or the monthly allowance which may hereafter be fixed by the Court under this consent decree".[2]

Shortly after the petition was filed counsel for appellee submitted interrogatories and asked that certain information be given under oath. Specifically, it was requested that a financial statement be submitted. Appellant moved to strike, asserting that his financial condition had nothing whatever to do with a determination of the issue. Supplementary to the interrogatories it was sought by subpoena *duces tecum* to bring up for inspection certain records pertaining to Tennison's interests in corporations with which he was connected. In overruling the motions the Chancellor said that counsel for the petitioner had stated—as a reason for the denial—that his client was able to pay any sum that might be adjudged.

At trial the petitioner's financial condition was again made the subject of inquiry, and in open Court Tennison affirmed what his attorney had asserted. He did not know with reasonable certainty what his net worth was. His business records were so complicated that a great deal of time would be required to ascertain the true situation. For the same reasons Tennison did not know or would not say what his net annual income was, but rested on the proposition that his stipulation of ability to pay was all that the Court was entitled to.

[2] One of the four children died shortly before trial. The others are: James D. Tennison, Jr., 31 years of age, married and residing in Memphis, Tenn.; Jack Craig Tennison, 28, married and residing in West Memphis, Ark.; Alys Jo, 22, married.

There is no cross-appeal, and we do not pass upon the prejudicial nature of this attitude. Materiality of the information was first addressed to the trial Court. In the circumstances here appellee has waived the exception predicated upon her contention that the records sought by subpoena and responses to the interrogatories were improperly denied.

Appellant's admission, under persistent questioning, that his present net worth is fifty percent greater than in 1935, is important.[3] It supports what the Chancellor seemingly found: that payments have not been an inequitable hardship. The remaining question was whether, under the divorce decree, petitioner was entitled to a reduction on the ground that an adjustment was contemplated by the parties and by the Court.

Appellant correctly says that the property settlement (not an issue here) reflected an accord between husband and wife, and was contractual. In the absence of fraudulent inducement affecting its execution, the agreement could not be modified by judicial action. *McCue* v. *McCue,* 210 Ark. 826, 197 S. W. 2d 938. But, with complete earnestness, counsel for appellant insist that clear language in the decree shows mutual contemplation that a downward revision would be made if, upon application with appropriate notice, the Court should be convinced that the reason for maximum compliance had terminated.

We must reject appellant's argument that retention of jurisdiction for a single purpose, to be determined in a particular way, was contractual. Where monthly or periodic payments are directed the indeterminate nature of the decree carries with it the Court's power of enforcement. Courts of equity have inherent power to enforce decrees awarding alimony, and may do so "by punishing as for contempt". *Harvey* v. *Harvey,* 186 Ark. 179, 52 S. W. 2d 963.

The changed conditions mentioned in the decree must be construed to mean conditions that, in good con-

[3] Whether the "net" inferentially alluded to in discussing appellant's annual income was before or after taxes was not disclosed. The reference to $25,000 was not made a point of controversy.

science, would justify the relief. In the case at bar no such showing was made, and the Chancellor correctly dismissed the petition.

Affirmed.

RENFRO *v.* STATE.

4590 227 S. W. 2d 447

Opinion delivered February 27, 1950.

Rehearing denied March 27, 1950.

Batchelor & Batchelor, for appellant.

Ike Murry, Attorney General, and *Jeff Duty,* Assistant Attorney General, for appellee.

GEORGE ROSE SMITH, J. The appellant was convicted below of having stolen certain tools that belonged to the Reconstruction Finance Corporation. He contends that the RFC's ownership was not proved by the State and that an instruction was erroneous.

An RFC employee, whose duty it was to look after the corporate property, testified that the RFC acquired

title to these tools by foreclosure of a mortgage given by the Byrd White Company. The RFC had kept a record of the serial numbers of the tools, which corresponded exactly with those on the tools said to have been stolen. Other testimony showed that the tools had been stored in a locked shed near the home of Jim Newton in Crawford County, that the tool shed had been broken into and the tools taken, and that the next day the appellant was apprehended in Oklahoma, on his way to California, with the tools in his possession. The appellant admitted having taken the tools but testified that he owned them when he was working for the Byrd White Company. When he left the company's employ in January of 1948 he was unable to take his tools with him, but he finally located them in May of 1949 and was simply repossessing his own property when he took the tools. He denied having broken into the shed, saying that there had been no lock on its door. This conflicting testimony presented an issue of credibility for the jury, who evidently disbelieved the appellant's explanation.

This is the instruction complained of: "You are instructed that the possession of property recently stolen without explanation of that possession is evidence which goes to you for your consideration under all the circumstances in the case to be weighed as tending to show the guilt of the one in whose possession such property is found, but such evidence alone does not imperatively impose upon you the duty of convicting the defendant even though it be not rebutted." We have approved this instruction in at least six earlier cases, the most recent being *Threadgill* v. *State,* 207 Ark. 478, 181 S. W. 2d 236. On two occasions we have pointed out that the word "imperatively" might better be omitted from this instruction, but in both those cases we held that this formal defect in the wording of the instruction should be brought to the trial court's attention by a specific objection. *Barron* v. *State,* 155 Ark. 80, 244 S. W. 331; *Atwood* v. *State,* 184 Ark. 469, 43 S. W. 2d 70.

In the case at bar, as in the earlier cases, there was no specific objection to the instruction.

Affirmed.

FILTINGBERGER *v.* STATE.

4591 227 S. W. 2d 443

Opinion delivered February 27, 1950.

Rehearing denied March 27, 1950.

Batchelor & Batchelor, for appellant.

Ike Murry, Attorney General, and *Robert Downie,* Assistant Attorney General, for appellee.

ED. F. MCFADDIN, Justice. Appellant was convicted of the crime of bigamy (§ 41-801, Ark. Stats., 1947) and prosecutes this appeal. The motion for new trial con-

tains thirteen assignments which we group and discuss under topic headings.

1. *Insufficiency of the Evidence.* Viewing the evidence in the light most favorable to the State (as we do on appeals in criminal cases),[1] the testimony reflects that appellant was legally married to Geneva Adams Filtingberger at the time he married Jo Ann Layton in Crawford County, Arkansas, on April 9, 1949. Geneva Adams Filtingberger had a divorce action pending against the appellant in Chautauqua County, Kansas, but he knew that no divorce decree had been granted. It was not granted until May 24, 1949, so there is no doubt that the second marriage was contracted before the dissolution of the first.

Appellant's defense was, that at the time of the second marriage, he was suffering from a "temporary mental black-out," resulting from an injury sustained in 1942, and was therefore not criminally liable for his acts. The jury verdict disposed of the fact question involved in such defense; so we hold the evidence is sufficient to sustain the verdict.

II. *Alleged Errors in the Admission of Evidence.* The court admitted in evidence (a) a duly certified copy of the marriage license of appellant and Geneva Adams Filtingberger issued in 1943, and (b) a certified copy of the divorce decree of May 24, 1949, between the same parties. Appellant's objection was that the instruments did not identify him as the same Robert Filtingberger referred to in the documents. Tentative admission of the documents into the record was not prejudicial when followed by subsequent identifying testimony. Whatever doubt there might have been regarding the identity of the defendant was supplied by (1) the testimony of the former sheriff of Chautauqua County, Kansas, and (2) the defendant's own testimony. It was clearly shown —in fact practically admitted—that the person on trial was the same one referred to in the two instruments introduced in evidence.

[1] See cases collected in West's Arkansas Digest, Criminal Law, § 1144 (13).

III. *Urging the Jury to Reach a Verdict.* After the jury had deliberated for several hours and had been unable to reach a verdict, the court urged the jurors to make a further effort to decide the case. The remarks of the Court concluded in this language:

"No person is ever required to do violence to his conscience in deciding a lawsuit and reaching a verdict, but every juror is expected to fully deliberate and do all he can to come to a correct conclusion that is consistent with his conscience and sense of right."

The appellant objected to the language and action of the Court in urging the jury to reach a verdict. We find no error was committed in this matter. A careful study of the Court's language shows that it was well within the rules recognized by us in such cases as *Bell* v. *State,* 81 Ark. 16, 98 S. W. 705; *Benson* v. *State,* 149 Ark. 633, 233 S. W. 758; *Lane* v. *State,* 171 Ark. 180, 283 S. W. 353; and *Smith* v. *State,* 205 Ark. 833, 170 S. W. 2d 1001.

IV. *Suspended Sentence.* The jury returned this verdict:

"We, the Jury, find the defendant guilty of Bigamy and place his sentence three years in the State Penitentiary and recommend that the court suspend this sentence."

The trial court received the verdict but refused to suspend the sentence and appellant claims error, citing *Pendleton* v. *State,* 211 Ark. 1054, 204 S. W. 2d 559. The cited case does not support the claim. In the case at bar there was no instruction of any kind concerning a suspended sentence. The jury's verdict was the first mention of it. There was no "bargaining by the court for a verdict"; neither was there anything to indicate that the jury was misled or thought that its recommendation would be binding on the court. Section 43-2324, Ark. Stats., (1947), is the applicable statute regarding suspension of sentence.

V. *Other Assignments.* We have examined all the other assignments in the motion for new trial and find no error.

Affirmed.

BRADSHAW *v.* ATKINS.

4-9104 227 S. W. 2d 441

Opinion delivered February 27, 1950.

Rehearing denied March 27, 1950

Brockman & Brockman, for appellant.

J. T. Wimberly and *W. B. Alexander,* for appellee.

HOLT, J. Appellant and appellee were married in October, 1921, and separated in May, 1942. March 19, 1946, appellant sued for a divorce alleging in her complaint that she and her husband had lived separate and apart, and without cohabitation, for more than three years prior thereto. She further alleged that appellee "owns eighty acres of land near Star City, Lincoln County, Arkansas, and that the plaintiff has not released her dower rights thereto." Her prayer was that "she have a decree of divorce and for her equities in any property owned by the defendant, and for other general and proper relief."

May 7, 1946, appellant was awarded an uncontested divorce on the ground alleged, and the decree contained this recital: "That the defendant owns eighty acres of land near Star City, Lincoln County, Arkansas, and that the plaintiff has not released dower and homestead rights thereto; that plaintiff's rights in and to said real estate should not be determined and declared at this time. * * * IT IS, FURTHER * * * DECREED BY THE COURT that the question of dower and homestead, and alimony in and to any real estate owned by the defendant at this time be, and the same is hereby, held in abeyance, and the court doth retain jurisdiction of this cause for the purpose of making such further orders concerning plaintiff's rights in and to said real estate as shown by evidence to be submitted by the parties hereto. (Signed) Harry T. Wooldridge, Chancellor, This 7th day of May, 1946."

Following the rendition of this decree, the following was added by appellant's attorney and signed by appellee: "I, James Bruce Atkins, hereby consent to the terms of this decree as disposition of real property owned by me. (Signed) James Bruce Atkins."

July 2, 1947, appellee filed his petition in the above divorce suit alleging that since the above decree, appellant had remarried and that his consent embodied in the above decree therefore became void because of said marriage and prayed "for an order vacating and setting aside the agreement of petitioner in said decree that plaintiff's homestead and dower rights in petitioner's lands be held in abeyance, and that plaintiff take nothing thereunder."

Appellant answered, admitting her remarriage, but denied all other allegations. There was also a demurrer by appellee, but no action appears to have been taken on either the petition or the demurrer.

In March, 1949, appellant filed motion in the original divorce suit to award her dower in accordance with the provisions of the above divorce decree. The trial court denied her any right to dower, the decree reciting: "That the clause in said decree to the effect that the

questions of dower and homestead and alimony in and to any real estate owned by the defendant be held in abeyance and the court retained jurisdiction of said cause for the purpose of making such further orders concerning plaintiff's rights in and to such real estate, as shown by evidence to be submitted by the parties thereto, was effective only so long as this court had the inherent right to control its orders during term time; that the term of court at which said decree was entered has long since lapsed and that said decree became final upon the lapse of said term and amounted to a full adjudication of the rights of the parties thereto; that the present motion to award dower is tantamount to a subsequent action for dower, which plaintiff is without right to maintain because of said former adjudication of the rights of the parties."

A decree was accordingly entered.

This appeal followed.

We think there was error in the decree. The record shows that appellant, in her divorce action, alleged that appellee owned the 80 acres of land in which she had not released her dower rights, and prayed for a divorce and "for her equities in any property owned by the defendant and for other general and proper relief." The divorce decree, as noted above, recited, in effect, that appellee owned 80 acres of land, that appellant had not released "her dower rights thereto" and then specifically reserved jurisdiction to determine the question of appellant's rights, if any, in appellee's property at a later date.

In these circumstances, the lapse of the term at which the divorce decree was granted, did not take away the court's power, or jurisdiction, to consider and determine appellant's dower or property rights, if any, at a later term, in accordance with the expressed provisions and reservation contained in the divorce decree above.

Our holding in the recent case of *Guier* v. *Guier*, 200 Ark. 552, 139 S. W. 2d 694, is controlling. In the Guier

case, the court entered its decree and order retaining jurisdiction to adjust any property rights, on the last day of the term, and at a subsequent term determined the question of property rights. We there said: "Clearly the trial court had control over the cause and its decree during the term same was rendered. The learned chancellor, therefore, had the right on September 1, 1939, the last day of the March term of the court during which the decree of divorce was granted to appellant, to enter the decree set out, *supra,* in which he refused to set aside the divorce decree, but modified the decree to the extent that jurisdiction of the cause was retained for the purpose of hearing and determining the property rights between the parties 'and for such further orders as may be proper to adjust the rights of the parties thereto.' Thereafter upon a final hearing, the court determined and settled the property rights between the parties."

Appellee contends that the decision of this court in *Taylor* v. *Taylor,* 153 Ark. 206, 240 S. W. 6, is against appellant's contention and controlling.

We cannot agree. That case is clearly distinguishable. There, there was no prayer in the complaint to adjust property or dower rights, and there was no reservation in the decree that such property rights be determined and adjusted at a later date.

Here, under the specific reservation in the divorce decree above, appellant sought an adjudication, of whatever interest she might have, in appellee's property under the provisions of § 34-1214, Ark. Stats. (1947). She, as indicated, was entitled to have this adjudication made.

Accordingly, the decree is reversed and the cause remanded for further proceedings consistent with this opinion.

4-9093 227 S. W. 2d 623

Opinion delivered March 6, 1950.
Rehearing denied April 3, 1950.

Embry & Sutton and *Campbell & Campbell,* for appellant.

Hebert & Dobbs, for appellee.

ED. F. MCFADDIN, Justice. This appeal necessitates the determination of (1) the validity of an order of adoption made in 1911, and (2) the effect of subsequent legislation concerning matters of adoption.

Appellant, Mrs. Gloria Crawford Dean, was born in Garland County, Arkansas, in 1908, the child of Mr. and Mrs. Charles W. Bond, and was named "Nettie Bond". The child's mother died in the early part of 1911; and on October 2, 1911, Bert Crawford, and Mrs. Eva Crawford, his wife, filed petition in the Garland Probate Court to adopt Nettie Bond. The petition, omitting caption, signature and jurat, reads:

"Comes Bert Crawford and Eva Crawford, his wife, and asks this Honorable Court to make an order adopting Nettie Brown Bond, a minor, and state:

"That they are *bona fide* residents of Hot Springs, Garland County, Arkansas, for more than one year. That they desire to adopt Nettie Brown Bond, a female minor child of C. W. Bond, of the age of three years; that the mother of said child is dead; that it has no property coming to it; that the father of said minor consents that this order be made:

"Wherefore petitioners ask that said order be made and that they be permitted to adopt said minor and that it be permitted to take and be known by the name Gloria Brown Crawford."

On the petition, there was this statement with a signature and jurat:

"C. W. Bond being duly sworn states: that he is the father of said above mentioned minor; that all the facts above set out are true, and that he is willing and requests that this order of adoption be made."

The record of the Garland Probate Court of October 11, 1911, contains the following order:

"Comes Bert Crawford and Eva Crawford, his wife, and file in open Court their petition asking that they be permitted to adopt Nettie Brown Bond, a minor, a child of three years of age.

"And it appearing to the Court that the mother of the said child is dead and that the father, C. W. Bond, has given his written consent to said adoption, that said child has no property coming to it, that the said Bert and Eva Crawford are of good moral character and financially able to care for and maintain said minor child, said petition is by the Court granted.

"It is therefore by the Court considered, ordered and adjudged that from and after this date the said Nettie Brown Bond shall take the name and be henceforth known to the world as Gloria Brown Crawford; and shall be entitled to and receive all the rights and interest in the estate of the said Bert and Eva Crawford just the same as she was a natural heir of said petitioners."

We shall refer to the foregoing as "the order of adoption" or "adoption order," even though we hold (in § 1, *infra,*) that this order was not legally sufficient to effectuate adoption. The Crawfords took Nettie Bond into their home; and she became known as "Gloria Brown Crawford," and under that name attended school in Garland County for several years. By 1916, Mr. and Mrs. Crawford had separated, and even though Mrs. Crawford owned a home in Hot Springs, she professed herself financially unable to support the child and arranged to have Gloria (then eight years of age) go to Agra, Oklahoma, to live with a Mr. and Mrs. King. Mrs. Crawford was not related to the Kings; and a mutual friend had located the King home for the little girl. The appellant testified that she had intermittent correspondence with Mrs. Crawford until 1918; but after that year there was never any further contact between Mrs. Crawford and the child that she had attempted to adopt.

Gloria Brown Crawford continued to live with the Kings in Oklahoma. She was known as "Nettie King" and was educated by, and continued to live with, them as a daughter until her marriage in 1926. They had no

children, and though they never adopted Nettie, they gave her an Oklahoma farm. Just when and how this gift came about is not developed in the evidence.

Mrs. Eva Crawford continued to live in Hot Springs and, by remarriage, her last name became Priddy. She died intestate in Garland County, Arkansas, on February 2, 1947, leaving an estate of both realty and personalty; and an administrator of her estate was appointed on February 19, 1947. Her nieces and nephews, the appellees, are her heirs-at-law, unless appellant's adoption be held valid. When the nephews and nieces attempted to obtain a quitclaim deed from appellant in 1947, she learned of the death of Mrs. Crawford and the possibility of her inheritance. Thereupon—on September 13, 1948—appellant filed intervention in the administration proceedings in Garland County, and claimed the entire estate of Mrs. Eva Crawford Priddy, because of the 1911 adoption proceedings.

On November 24, 1948, the nephews and nieces (appellees) filed answer to the intervention and attacked the validity of the 1911 adoption order. This pleading was the first instrument filed in any court that questioned the validity of said adoption. There was a hearing in the Probate Court on the said intervention of appellant; and the facts were developed, as heretofore stated. The Probate Court adjudged the adoption to be void and dismissed the intervention. From that judgment there is this appeal, presenting the questions now to be discussed.

1. *Validity of the Adoption Order.* Act 28 of 1885 (found in § 1142 *et seq.*, Sandels and Hill's Digest of 1894; § 1341 *et seq.* of Kirby's Digest of 1904; and § 252 *et seq.*, Crawford and Moses' Digest of 1921) prescribes the jurisdictional essentials of a valid order of adoption. This 1885 Act was the law in 1911 when the order here involved was made, so we test the validity of the adoption order by that Act. (See *Dean* v. *Smith,* 195 Ark. 614, 113 S. W. 2d 485.)

One of the requirements of the 1885 Act was that the proceedings for adoption be conducted in the county

in which the minor resided. There is nothing in the order of adoption in the case at bar to show the county of residence of the minor; and we have repeatedly held that the allegation as to such residence must appear on the face of the order of adoption, or the order may be attacked collaterally. The first such case so holding was *Morris* v. *Dooley*,[1] 59 Ark. 483, 28 S. W. 30 and 430. Another case, so holding is *Minetree* v. *Minetree*, 181 Ark. 111, 26 S. W. 2d 101. In the last cited case, many other cases are listed as following the law recognized in *Morris* v. *Dooley*. The correctness of the holding in that case is not open to reconsideration by us at this time. There are many cases of this Court which hold to be void orders of adoption similar to the one at bar when the order failed to recite the residence of the minor. The case of *Morris* v. *Dooley* is directly in point, and we decline to overrule it; so we hold that the purported order of adoption made by the Garland Probate Court in 1911 is void on this collateral attack, because neither the order, nor the petition, showed that the minor, Nettie Bond, was a resident of Garland County, Arkansas, at the time the order was made.

II. *Motion for Order Nunc Pro Tunc.* By trial amendment the appellant asked the court to correct, by order *nunc pro tunc,* the defect in the 1911 order of adoption. The trial court was correct in refusing to grant this request. The function of an order *nunc pro tunc* is to have the record recite *now* what actually occurred *then.* In *Citizens Bank* v. *Commercial Bank,* 118 Ark. 497, 177 S. W. 21, we said: "The purpose of a *nunc pro tunc* order is to make the record reflect the transaction that actually occurred. . . ." In *Liddell* v. *Landau,* 87 Ark. 438, 112 S. W. 1085, we said of the power to correct a record *nunc pro tunc*: "This power can never be used to make the record speak what it should have spoken but what it did not in fact speak; . . ." (See, also, *Hall* v. *Castleberry,* 204 Ark. 200, 161 S. W. 2d 948.)

[1] In the Southwestern Reporter this case is styled *Morris* v. *Pendergrass, Administrator.*

The evidence in the case at bar completely fails to show that any evidence was offered at the adoption proceedings in 1911 as to the residence of the minor. It is not for the court to decide now where Nettie Bond actually resided in 1911; the question is whether the court in 1911 heard evidence to show that the minor then resided in Garland County. There is in the record now before us no evidence on which a *nunc pro tunc* order could be based; and the trial court was correct in refusing to make it.

III. *Act 137 of 1935 and Act 369 of 1947.* Appellant claimed in the trial court, and reiterates here, that the various changes made in the adoption laws since 1911 have either cured, or rendered impervious to attack, the defect in the adoption order in this case. It is true that the Legislature has made several revisions and changes in the adoption law. Some of these are: Act 137 of 1935 (see § 254, *et seq.*, Pope's Digest); Act 157 of 1935 (see § 260, Pope's Digest); Act 328 of 1937 (see § 262, Pope's Digest); Act 369 of 1947 (see § 56-101 *et seq.*, Ark. Stats. 1947); and Act 408 of 1947 (see the note following § 56-112 Ark. Stats. 1947). We held in *Dean* v. *Smith,* 195 Ark. 614, 113 S. W. 2d 485, that the law in effect at the time of the purported adoption governed the validity and effect of the order. In the light of the above case, we examine the above Acts for either a curative Act or a statute of limitations; and then we determine the possible effect of such act or statute on the case at bar.

Sec. 10 of Act 137 of 1935 (found in § 264, Pope's Digest) reads:

"After a decree of adoption shall have been made and the child shall in fact have been adopted and the relation of parent and child has continued for the period of two years, the decree of adoption shall not be questioned by reason of any jurisdictional or procedural defects."

Section 13 of Act 369 of 1947 (found in § 56-112, Ark. Stats. 1947) reads:

"No action shall be brought to set aside an adoption decree for any procedural or jurisdictional defect except within two (2) years after its rendition, if the adopted person has in fact lived with the adopting parents that length of time, except on one of the grounds specified in section 11 (Sec. 56-110). (Acts 1947, No. 369, Sec. 13, P. 820)."

Appellant claims that each of these enactments makes the 1911 order of adoption impervious to attack because Nettie Bond lived with the Crawfords more than two years after the said order. We hold that each of these sections, as quoted above, is entirely prospective—*i. e.*, it relates to the effect to be given orders of adoption made *after* the enactment of said law (being 1935 and 1947 respectively)—and since the order here involved was made in 1911, these prospective Acts can afford no relief to the appellant.

IV. *Act 408 of 1947.* The caption of this Act reads:

"An ACT to Amend the Present Adoption Law and to Provide a Statute of Limitations in Such Proceedings and for Other Purposes."

Insofar as the statute purports to amend portions of the adoption laws, there is some question as to which is controlling as between (a) certain sections of Act 369 of 1947, and (b) sections 1, 2, and 4 of Act 408 of 1947. That question is posed in the note following § 56-112, Ark. Stats. 1947; but the answer to the question is not necessary to a decision in this case. We are here concerned with § 3 of said Act 408 of 1947, which purports to be a statute of limitations affecting adoption orders rendered theretofore or thereafter; and, as such a statute of limitation, § 3 is distinct legislation and different from anything in Act 369 of 1947, which, as we have said, is entirely prospective. Said § 3 reads in part:

"No decree or order of adoption heretofore made, or which may hereafter be made, by any court shall be subject to question or attack either for irregularities or jurisdictional defects at any time after two years from the date of the making of the same in the event the child

has in fact lived with the adopting parents for that length of time; . . . Provided, further, that this Act shall not apply to any suit now pending, seeking to invalidate any such decree or order or to any suit brought for said purpose within six months from the effective date of this Act."

Thus, the Act gave six months for suit to be filed to question the validity of any order of adoption theretofore rendered, under which the child had, in fact, lived with the adopting parents for as long as two years. The entire matter of adoption is statutory, and the Legislature in said § 3 enacted that when (a) adopting parents had kept a child for two years under a court order, and (b) no proceeding be filed within that time to challenge the order, then the adoption should be considered beyond attack. Said § 3 is not an attempt to merely make valid a void order; rather, it provides in effect that if parties had in good faith attempted to adopt a child under formal order of the Probate Court and had thereafter kept the child for two years without any proceeding to challenge the court order, then the adoption becomes perfected.

Persuasive of the contention that § 3 is a statute of limitations, that purpose is stated not only in the caption of the Act, but, also, a six months period is provided to allow challenge to be made of adoption proceedings which occurred more than two years prior to the effective date of the Act. We have a statute (§ 34-1419 Ark. Stats. 1947) which provides that no action shall be brought to recover lands sold at a tax sale if the purchaser (a) entered possession under an instrument containing a valid description, and (b) remained in possession for as long as two years. In a limited sense this § 3 of Act 408 may be likened to a two year statute of adverse possession of a child held under a court order intended to be an order of adoption. It is a salutary statute, evidently intended to overcome some of the hardships occasioned in exceptional cases by the holdings in *Morris* v. *Dooley, supra,* and *Minetree* v. *Minetree, supra.* These hardships were pointed out in the dissenting opin-

ions in each of the cases. So we hold that § 3 of Act 408 of 1947 is a valid statute of limitations in matters of adoption.

V. *Effect of Act 408 as Applied to This Case.* The Probate Court order attempting to adopt the appellant was entered in 1911, and appellant remained with the Crawfords until 1916 which was more than the two years provided by Act 408. But, unfortunately for the appellant, said § 3 of Act 408 gives her only partial assistance. This is because Mrs. Eva Crawford Priddy died on February 2, 1947; and Act 408 of 1947 did not become effective until March 28, 1947, that being the day it was approved.

Our statute provides that immediately upon the intestate's death, the title to *real estate* descends to the heirs at law, subject to the widow's dower* and the payment of debts. See § 61-101 Ark. Stats. 1947. The two sections (§ 62-411 and § 62-911, Ark. Stats. 1947), concerning lands as assets in the hands of the administrator, have been uniformly construed to mean that the title to the lands passes direct to the heirs on the death of the intestate, subject to the rights of the administrator to have the Probate Court sell the lands if such be necessary to pay the debts of the deceased. See *Hopson* v. *Oxford,* 72 Ark. 272, 79 S. W. 1051; *Jones* v. *Jones,* 107 Ark. 402, 155 S. W. 117; *Doke* v. *Benton County Lbr. Co.,* 114 Ark. 1, 169 S. W. 327; *Campbell* v. *Smith,* 167 Ark. 633, 268 S. W. 359 and 880; and *Miller* v. *Watkins,* 169 Ark. 60, 272 S. W. 846.

In the case at bar, the title to the *real estate* of Mrs. Eva Crawford Priddy vested in the appellees, as her heirs at law, immediately on her death on February 2, 1947, subject to the husband's curtesy if he was alive; and the Act 408 of 1947 was not adopted until March 28, following. It therefore could not retrospectively operate to divest appellees' title to the real estate of Mrs. Priddy. So, as regards the *real estate,* the appellant cannot prevail.

* If the decedent be a married woman—as here—then the words "widow's dower" become "husband's curtesy." See § 61-228, Ark. Stats. (1947).

As regards the *personalty* of the estate of Mrs. Priddy, a different situation exists; because the title to the personal property of an intestate becomes vested in the personal representative when appointed (*i. e.* the administrator in this case), and remains so vested until distributed upon proper orders of the Probate Court. See § 62-1302 Ark. Stats. 1947. In *Jensen* v. *Housley,* 207 Ark. 742, 182 S. W. 758, Mr. Justice ROBINS, speaking for this Court, said:

"The right of possession of the personal property of a decedent vests in his administrator upon his appointment. In the case of *Lambert* v. *Tucker,* 83 Ark. 416, 104 S. W. 131, we held: 'An administrator is entitled to possession of the personal property of his intestate as against the widow and heirs.' The rule is thus stated in C. J. S., Vol. 33, p. 1341: 'It is well established that as a general rule the legal title to personal property of which decedent died possessed does not vest at his death in his next of kin or distributees, . . . but vests, for the time being, in his executor or administrator, . . .' *Whelan* v. *Edwards,* 31 Ark. 723; *Pryor* v. *Ryburn,* 16 Ark. 671; *Lemon's Heirs* v. *Rector,* 15 Ark. 436; *Oldham* v. *Melton,* 205 Ark. 240, 168 S. W. 2d 387."

The administrator of the estate of Mrs. Eva Crawford Priddy was appointed on February 19, 1947. He took charge of the personalty and continues to hold it. The heirs at law have received no title to the personalty. Their claim to it is in the same status as though Mrs. Priddy was still living—*i.e.* subject to be changed by legislative action. On March 28, 1947, the Legislature enacted § 3 of Act 408 which gave the heirs at law of Mrs. Eva Crawford Priddy six months from that day within which to contest the adoption of appellant by Mrs. Eva Crawford Priddy. No such contest was filed within the time limit. It was not until November 24, *1948,* that the heirs filed their answer to the appellant's intervention in this case, and then for the first time questioned the adoption. That was too late under the plain provisions of § 3 of said Act 408; so appellant's adoption by Mrs. Eva Crawford Priddy is sufficient—because of

said § 3 of Act 408—to award appellant the personalty but not the realty.

It follows that the appellant is entitled to all of the personal property of the estate of Mrs. Eva Crawford Priddy remaining after payment of debts and costs of administration, but is entitled to none of the realty. The judgment of the Probate Court is therefore reversed as to the personalty, and the cause is remanded, with directions to proceed in accordance with this opinion. All costs of the proceedings are adjudged against the appellees.

AMERICAN REPUBLIC LIFE INSURANCE CO. *v.* PRESSON.

4-9101 227 S. W. 2d 969

Opinion delivered March 6, 1950.

Talley & Owen and *Robert L. Rogers II,* for appellant.

Bates, Poe & Bates, for appellee.

GRIFFIN SMITH, Chief Justice. September 1, 1945, American Republic insured Clyde E. Presson, naming Dovie Presson as beneficiary.[1] The principal sum of $1,250 was payable if death occurred through accidental means. In addition, monthly benefits were due upon proof of disability because of sickness or as a result of accidental injury. Quarterly premiums of $15 were payable in advance. There was no period of grace.

The insured was accidentally shot October 30, 1948, and died from the wound the day it was inflicted. The Company denied liability under the plea that the policy lapsed March 10, 1948, when the period for which a payment made the preceding December expired. Appellee prevailed on her proof that unpaid disability claims in respect of which the Company had notice were sufficient to carry the policy to the insured's death. Under appellee's theory the funds wrongfully withheld should have been applied to the quarterly premiums due the 10th of March, June, and September. If the illness alleged existed and the Company had notice in a manner substantially complying with policy requirements, the benefits were sufficient to pay the premiums.

Appellant's summation of the appeal is stated as follows: (a) The Company's check or draft, for $81.48, dated December 30, 1947, and cashed a month later, compensated disability from October 6 to November 1;[2] (b) competent proof did not show that Presson filed a claim

[1] The policy bore the indorsement, "Initial term expires December 10, 1945."

[2] The Company's audit covering the illness disclosed an allowance of $46.62 from Oct. 6 to Oct. 20, "confining" disability at $3.33 per day; Oct. 20 to Nov. 1, non-confining disability at $1.66 per day, $19.92; Oct. 6 to Nov. 14, additional hospital allowance, 9 days at $1.66 per day, $14.92; total, $81.48.

after November 1, and the Court erred in permitting Mrs. Presson to testify regarding correspondence; (c) indorsement of the check created an estoppel, and the plaintiff could not go behind the decedent's signature acknowledging payment; (d) the draft constituted full payment; (e) even if the plaintiff be permitted to question complete payment, there was failure to comply with a policy provision that notice of disability must be given within ten days.

Appellee says there is substantial testimony to show that the compensable illness began July 1, 1947, and continued until the first of November. From October 6th to the 14th Presson was in a hospital. He returned home on the 14th and was ill until November 11. According to at least one of the witnesses, the insured went to his place of business and possibly did some light work the first week in November, but got wet, suffered a relapse, and was bedridden until the third week in December.

On defendant's motion proof of disability between July 1 and October 6th was rejected because the plaintiff, prior to trial, had not demanded production of the claimant's original letters or notices of disability; nor, said the Court, could the plaintiff prevail on a claim covering the period in question without showing compliance with the policy provision excluding payment for any period greater than ten days before notice. These rulings were not appealed from.

The certificate executed by Dr. E. J. Brown gave July 1 as the beginning of Presson's illness and November 1 as the termination. Dr. Geo. Holitik, who also treated Presson, certified to substantially the facts covered by Dr. Brown.

Mrs. Elizabeth Pittard, claims auditor for the Insurance Company, testified that under this proof Presson would have been entitled to compensation from July 1 to November 1 at the rate of $3.33 per day "if he had notified us".[3] She explained that failure of the insured

[3] This would have amounted to $406.26. However, the answer does not take into consideration the 60-day limitation on payments provided

to give the contractual notice "deprived us of the right of finding out [what his actual condition was"].

When the Court ruled that the claim covering illness prior to November 1 could not be considered, plaintiff's counsel argued that notice of illness subsequent to November 1 had been given and that the amount due under this claim was sufficient to keep the policy in force.

The discrepancies and inconsistencies affecting notice, proof, and the period covered by payment cannot be harmonized. Dr. Brown's certificate was dated November 4th. It was "notarized" December 5. Presson's disability, it stated, began July 1. Dr. Holitik died before the trial began.

A Company letter of October 10 acknowledged receipt of Presson's request for claim blanks, but explained that they were not being sent because the insured did not say whether his disability was caused by illness or accident. The letter did not mention the date of Presson's communication. Four days later the Company wrote that "in accordance with [your] request" claim forms were being enclosed. Nothing was said respecting the Company's objection of October 10,[4] but on November 17 the Company wrote its acknowledgment of Presson's "completed claim blanks". There was the observation that "improper blanks were mailed to you". Another set of forms was enclosed, together with an additional physician's blank; for [wrote the Company] "We note that you had two attending physicians".

Appellee's testimony was that "prior to this the Company sent back some more forms". These were for use in certifying the time claimant had spent in a hospital. Drs. Holitik and Brown "filled out forms, too,

for in Part H of the policy, nor does it differentiate between the classes of compensable liability.

[After Mrs. Pittard had stated that the physicians' certificates disclosed the illness that was being discussed, counsel for appellee said: "In other words, what you are telling this jury is that you knew [the insured] had a disability, but you were depriving him of those benefits because he had not notified you?" The answer was, "That is right"].

[4] Mrs. Pittard, for the Company, testified that the October 10th letter was returned with the word "illness" written on it twice.

and just a few days after this, . . . notice of the relapse the insured had suffered was sent; asked for blanks [for that purpose], but didn't receive any". Appellee was quite certain that the letter of November 17 dealt with the claim her husband had made for the initial phase of the relapse period.

On the fifteenth of December the Company wrote again, stating that it had received claim forms "relative to your illness". There was the assurance that the matter would receive attention "as soon as routine investigations are completed".

On cross-examination Mrs. Presson again mentioned that the claim referred to in the Company's letter of the 17th was for November. A letter requesting forms for use in December was likewise written and posted, but the Company ignored it.

The trial judge, in an attempt to clarify Mrs. Presson's testimony, said: "When [your husband] wrote for the claims in November, they sent *those* to him and he filled them out—is that true?" The answer was, "Yes, sir". Immediately preceding this question Judge Wood had said: "*This* is what Dr. Holitik says here, but I understand you to say that Mr. Presson filed a request for blanks for November, and also for December, and did not get them—did he do that?" Answer: "He did not get any answer."

Mrs. Pittard, as auditor for the Company, was handed an undated letter from the insured in which he wrote, "Please send me blanks to make my claim". She testified that the insurance files disclosed an envelope postmarked at Waldron October 9th, 1947. It was her understanding that the undated letter came in the envelope and that the Company's letter of October 10 was the reply; "but," said the witness, "I can't swear that the letter came out of that envelope".[5]

There was nothing on the check of December 30th showing what period of illness the remittance covered.

[5] Mrs. Pittard's refreshing frankness as a witness is of a highly commendable character.

With the record in this condition, the jury could have reasoned that Dr. Brown's certificate of November 4th was returned by the insurer for a formal acknowledgment (as shown by the December 5th dating); that following its second receipt by the Company nearly a month passed before the draft was written, and that perhaps it was retained in the insurance files for several weeks. Mrs. Pittard spoke of signing it, but did not mention the time of mailing. Since it was not cashed until January 31, 1948, there was an unexplained hiatus. In the meantime notices of disability continuing through November and into December had—according to Mrs. Presson—been sent the Company, with a request for blank forms that were not sent.

The policy does not require as a condition precedent to the validity of a claim that *proof* be submitted, although the claim will not be paid until that is done. Written *notice* is sufficient. It then becomes the Company's duty (§§ 3 and 4, General Provisions) to furnish the forms for proof purposes. Result here is that if the notices were actually sent, and there was failure to supply the forms, the claimant was excused in respect of other delays while that status continued.

It is true that the only evidence that notice was given came through Mrs. Presson, an interested party whose testimony will not be treated as undisputed. But the fact-finders chose to accept Mrs. Presson's statements, and the result must stand unless physical facts contradict her or unless the matters testified to are so visionary that it can be said as a matter of law that the statements would not be credited by any reasonable person. For the same reasons Mrs. Presson's testimony regarding the nature, extent, and disabling effect of her husband's sickness after November 1st supports a finding that the compensation withheld was sufficient to pay the three quarterly installments aggregating $45.

Summation of the appeal includes a contention that "Appellee would have this Court believe that [letters were written] asking for blanks, that the blanks were sent in, and that all of these just vanished into thin air at appellant's doing".

That is not the point. "This Court" is not permitted to project the result on what it believes or disbelieves when substantial testimony has been accepted by the jury.

Final argument is that Mrs. Presson ought not to have been allowed to testify that she saw her husband write the November and December letters, and that they were posted. We are cited to the opinion of April 25, 1949, and our action in reversing an insurance judgment and remanding the cause because the insured's wife was permitted to read from carbon copies of letters she allegedly had written to two Companies. *Continental Casualty Company* v. *Speer*, 219 S. W. 2d 763, 215 Ark. 174.

The principles are dissimilar and so are the facts. In the Speer case depositions had been taken with an opportunity to cross, and there was no intimation in any question or answer that the insured received replies to his originals and that these Company letters had been lost when fire destroyed the insured's residence, but that the copies were preserved. The insurer was placed at a prejudicial disadvantage when, without notice, the copies were offered in circumstances where it could not be heard in denial or explanation. The defendant pleaded surprise and requested reasonable time for communication with the home office, no competent witness being present. The motion was overruled. In holding that a continuance should have been granted we said that reasonable foresight did not require the defendant to anticipate that an issue not raised by the pleadings and not hinted at in the interrogatories would be added.

In the case here Mrs. Presson did not read from letter copies, nor did she testify that the defendant had written letters, or communicated by writing in other form, and that the primary evidence had been lost—as did Mrs. Speer. Mrs. Presson's statements were in support of facts within her own knowledge: her husband had written letters, she read what he said, and she knew that the letters had been mailed. Under plain terms of the policy liability could not be incurred in the absence of notice.

Affirmed.

LANGSTON v. HARPER.

4-9112 227 S. W. 2d 973

Opinion delivered March 6, 1950.

[redacted]

Jay W. Dickey, for appellant.

Bridges, Bridges, Young & Gregory, for appellee.

HOLT, J. Appellee sued Nelson Langston, doing business as City Delivery Company, and J. T. Beavers, an employee of Langston, for personal and property damages resulting from a collision between one of Langston's trucks and appellee's automobile. A jury, in separate verdicts, awarded appellee $1,050 against each of the defendants. Appellant, Langston, has appealed from the judgment against him. There is no appeal by Beavers.

For reversal, appellant challenges the sufficiency of the evidence to support the verdict. He argues that there was no evidence that J. T. Beavers was within the scope of his employment, or about his master's business, at the time of the mishap, or at the time of the collision between appellant's truck and appellee's automobile, but that in fact Beavers was on a mission of his own and

using appellant's truck without authority. There is no complaint as to the amount of the verdict, or as to the instructions.

The evidence on behalf of appellee, briefly stated, is to the following effect: Appellant was engaged in the truck delivery business in Pine Bluff, delivered mail to and from trains, and was engaged in other delivery business. He operated both day and night and his employees had no fixed hours, but continued to work until deliveries were completed. The mishap here involved occurred November 23, 1948, at about 5:30 a. m., a mile or so from Pine Bluff. J. T. Beavers, an employee of appellant, was driving appellant's truck at the time. Charles Easterling was the night driver and J. T. Beavers was his helper. Floyd Beavers was a day driver and a brother of J. T. Beavers. The truck here in question was being used for both day and night deliveries. J. T. Beavers and Floyd lived together in an apartment in Pine Bluff. There was evidence that the night driver on occasions, after completing his work, drove the truck to Floyd Beavers' apartment for his use as day driver. The extent of this practice was in dispute. Easterling testified: "We stopped taking the truck to Floyd after he (meaning appellant) told us to." Appellant admitted on cross-examination that the truck in question had been delivered to Floyd on "one or two mornings" but "I thought I had stopped it."

Walter Cook, on behalf of appellee, testified that shortly after the collision here in question, appellant said to him: "These night drivers, these employees, had been driving the truck over to the apartment where the day driver, Floyd Beavers, and J. T. Beavers lived," and that "they had been in the habit of doing that" and further: "A. Mr. Langston said that Mr. Easterling gave permission to Mr. Beavers, J. T. Beavers, to take the truck to Buck (Floyd) Beavers, the day driver who J. T. Beavers lived with."

The above testimony is in direct conflict with that offered by appellant.

Giving to this testimony its strongest probative force in favor of appellee and the jury's verdict, as we must, it presents a situation where the jury was warranted in finding that the truck in question, owned by appellant, was being driven by his employee, J. T. Beavers, Easterling's night helper, to the home of his brother, Floyd, for Floyd's use as a day driver, that appellant knew of this practice and that J. T. Beavers was within the scope of his employment when the truck he was driving negligently collided with appellee's automobile. J. T. Beavers did not testify in the case.

It is a well settled rule in this State that when it is shown that the automobile causing the damage belonged to the defendant and was operated at the time by an employee, as here, there is created a reasonable presumption that the employee, driver, was acting within the scope of his employment at the time of the collision. This presumption is rebuttable and may be overcome by the defendant and is a question for the jury to determine.

In *Casteel* v. *Yantis-Harper Tire Company,* 183 Ark. 912, 39 S. W. 2d 306, we again announced the rule in this language: "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. * * * But, as we have often said, the presumption arising which we are now considering is not one of law but of fact to be deduced from all the testimony, and the question as to whether it has, or has not, been overcome is equally a question for the jury." See, also, *Ford & Son Sanitary Co.* v. *Ransom,* 213 Ark. 390, 210 S. W. 2d 508, as to when this presumption may disappear.

As indicated, while the testimony is in sharp conflict, we are unable to say that there was no substantial evidence to warrant the jury's finding that at the time of the collision, J. T. Beavers, the truck driver, was about his master's business and driving appellant's truck.

Affirmed.

BYRD *v.* BROOKS.

4-9110 227 S. W. 2d 961

Opinion delivered March 6, 1950.

Warren E. Wood and *Griffin Smith, Jr.*, for appellant.

E. L. Hollaway, for appellee.

LEFLAR, J. This litigation grows out of a claim by appellee William Brooks against the State of Arkansas for the price of certain cotton seed allegedly sold by Brooks to the State, and used by the State at the penitentiary farm, many years ago. Brooks in 1923 received a payment of $14,023.68 on his claim, and since that time has made constant efforts to secure from the State the balance, with accumulated interest, of what he asserted to be due him.

The Arkansas General Assembly in 1943 appropriated certain sums for the use of the State Claims Commission in discharging valid claims against the State, the appropriation including (it is agreed by the

parties hereto) $74,852 which was allocated to the Brooks claim. At that time this was the amount, including interest, which Brooks asserted was due him. Under this enactment the claimant would not necessarily receive the whole amount of his claim, nor even receive any part of it; the statute rather authorized the payment of such amount, up to the appropriated maximum, as the Claims Commission should find to be properly owing on the claim. Apparently the Commission took no action on the Brooks claim, or at least did not allow it, during the year and a half after enactment of the statute.

On Nov. 4, 1944, Brooks entered into a written contract with appellant Clyde Byrd, a lawyer, whereby Byrd undertook to represent Brooks as his attorney in securing payment of the claim in return for a fee of one-third of the amount collected. This contract included a clause reserving to Brooks the right to disapprove and reject "any settlement made for an amount less than the present appropriation". At the time this contract was made Byrd was a member of the Senate of the General Assembly of Arkansas. Thereafter, either by Byrd's procurement or by arrangement with Brooks, appellant G. W. Lookadoo, also a member of the Senate and a lawyer, came into the case to assist Byrd.

On Dec. 21, 1944, the claim was presented to the Commission, and it voted to award Brooks the sum of $15,405 in full settlement. A voucher in that amount was issued payable to Brooks and Byrd jointly. Brooks promptly refused to accept the settlement. Byrd received and held the $15,405 voucher for some time but he alone could not cash it and Brooks refused to join him in cashing it. The 1945 General Assembly, of which Senators Byrd and Lookadoo were members, reappropriated the amount of the award so that it could be paid during the next biennium, but Brooks continued his refusal to compromise.

Complaint in the present case was filed by Brooks in Pulaski Chancery Court on Sept. 8, 1947. The complaint alleged that Byrd and Lookadoo were applying

to the State Fiscal Control Board (which had succeeded to the functions of the Claims Commission) for reissuance of the $15,405 voucher as two separate vouchers, one for $10,270 (two-thirds) payable to Brooks, the other for $5,135 (one-third) payable to Byrd and Lookadoo, and that according to his information the Board was preparing to comply with this request. The complaint concluded with prayers that Byrd and Lookadoo be restrained from proceeding with their application for separate vouchers and that the Board be restrained from issuing them. After service on Governor Ben Laney, for the Board of Fiscal Control, and on Byrd (but not on Lookadoo) a default decree was on Sept. 30, 1947, rendered by the Chancery Court granting the prayers of the complaint.

After the end of the term of court at which this decree was rendered, Byrd and Lookadoo filed their petition asking that the decree of Sept. 30, 1947, be set aside and the cause heard anew on its merits. By decree entered on May 26, 1949, the Chancellor dismissed this petition, and the present appeal is taken from that order of dismissal.

The first ground relied upon by appellants for vacating the original decree is that defendant Lookadoo had not been served in the proceeding. This would be a good reason for setting aside a judgment under Ark. Stats., 1947, § 29-506. In answer, Brooks contended that he had no contract with Lookadoo, but only with Byrd, and that any interest which Lookadoo had in the transaction was only under a contract with Byrd to share in Byrd's contract with Brooks. This was supported by the fact that only Byrd's name, and not Lookadoo's, appeared on the original voucher issued after the Dec. 21, 1944, hearing, even though much of Lookadoo's work on the case had then already been done. The claim of a separate contract, apart from Byrd's, was not overtly asserted until much later, though the contract must have come into existence, if at all, sometime prior to Dec. 21, 1944. The Chancellor heard considerable evidence on the question of whether Lookadoo himself had a contract with Brooks, rather than merely an interest in Byrd's

contract. There was evidence both ways. We are unable to hold that his conclusion, that there was no such separate contract, was against the preponderance of the evidence. The Chancellor's determination of this point must therefore stand.

Appellants argue much more strenuously that the Chancellor mistakenly held that he had no power to set aside the injunction decree, save on statutory grounds, after the end of the term of court at which it was rendered. This argument is based on our holding in *Stane* v. *Mettetal,* 213 Ark. 404, 210 S. W. 2d 804, to the effect that a chancery court has power, entirely apart from the statutory limitations prescribed by § 29-506, to vacate or modify a previously granted injunction, even after lapse of the term, provided no vested rights of the parties be abrogated by its action. The difficulty with the argument is that it is not contradicted by the Chancellor's decree here appealed from. There is no statement in the decree, nor elsewhere in the record, indicating that the Chancellor thought he lacked the power to vacate or modify the earlier injunction. The holding in *Stane* v. *Mettetal* certainly was not that a Chancellor is required to vacate an injunction decree every time that he is asked to do so; it is only that he is empowered to exercise his judicial discretion on the basis of evidence presented to him. He *may* set the injunction order aside, or amend it, *if* he is convinced that a different order is justified. In the present case the Chancellor heard all the evidence offered to sustain the petition. There is nothing in the record indicating a refusal to hear any proffered evidence. After hearing all the petitioner's evidence, the Court remained unconvinced. Under *Stane* v. *Mettetal* this was clearly permissible. The Chancellor has not abused his discretion in the matter.

This Court is of the view that a possible further ground for affirmance, strongly urged by appellee, should be mentioned in our opinion. This is that the contract here in question, involving as it does an undertaking by members of the General Assembly to aid in securing payment by the State of a claim which is the

subject of legislative appropriation of funds, is void as against public policy. Since the case must be decided on other grounds, we do not now pass on the validity of the contract. We mention this to make it clear that we have not, by inference or otherwise, approved it as valid. Neither do we pass on the constitutionality of the 1943 and 1945 acts creating a Claims Commission.

The decree of the Chancery Court is affirmed.

(NOTATION BY THE CHIEF JUSTICE.—I declined to participate in the discussions preliminary to the decision of this case, or to cast a vote, for the reason that in 1933 and until September 1936 my position as State Comptroller placed me on the Claims Commissions created in 1933 and 1935. As Comptroller and *ex officio* member of the Commissions, I conducted official investigations into the Brooks claim. On the strength of documentary evidence and personal testimony submitted by Mr. Brooks [supplemented by very definite statements by Capt. John T. Burkett] my Commission vote was cast to reject the demand. None of these matters was mentioned by me to any member of the Court until after the decision was made.)

CALLAHAN *v.* LYMAN.

4-9119 227 S. W. 2d 964

Opinion delivered March 6, 1950.

Ernest Briner, for appellant.

McMath, Whittington, Leatherman & Schoenfeld, for appellee.

DUNAWAY, J. Appellants, as taxpayers, filed suit in the Saline Chancery Court seeking to enjoin appellee, Joe Lyman, from serving as County Supervisor of Schools, and to enjoin the other appellees, as Chairman of the County Board of Education, County Clerk, and County Treasurer of Saline County from executing any voucher or warrant in payment of Lyman's salary. The original complaint, filed June 27, 1949, alleged that Lyman did not possess the qualifications for the position required by Act 146 of the Acts of 1949, but that by virtue of a contract entered into with the County Board of Education on December 11, 1948, he would assume that position on July 1, 1949, unless enjoined. By amendment to the complaint filed July 7, 1949, it was alleged that Lyman was then attempting to perform the duties of County Supervisor, and that the contract with the Board was invalid because no vacancy had existed at the time the contract was executed.

Lyman filed a demurrer to the complaint. On October 6, 1949, the Chancellor overruled a motion by the plaintiffs for a default judgment against the other defendants who had not answered, and dismissed the complaint as not stating facts sufficient to constitute a cause of action. From this action of the trial court comes this appeal.

On December 11, 1948, the Saline County Board of Education entered into a contract with Joe Lyman, agreeing to employ him as County Supervisor of Schools for a term of two years, beginning July 1, 1949, for an annual salary of $3,300. At the time this contract was executed the required qualifications for County School Supervisors were set out in Ark. Stats. (1947), § 80-217. That section required, among other things not material in the case at bar, three years experience as a school administrator or five years experience as a teacher. Lyman met all the requirements of the law at that time.

The General Assembly changed the required qualifications for this position by enactment of Act 146 of 1949, which was approved February 23, 1949. The title of that act is "An Act to Place the Salaries of County School Supervisors on the Same Basis as Teachers of the State, to Adjust the Requirements for New Appointments for This Office, and to Provide Additional Duties." Section 3 of this Act, relied on by appellants as disqualifying Lyman, reads as follows:

"Section 3. Effective July 1, 1949, and thereafter when a vacancy occurs in the office of the County School Supervisor in any county of the state any person selected and employed to fill said vacancy must have filed with the County Board before his selection and employment, a certificate issued by the State Board of Education reflecting conclusively that such person has the following qualifications:

. . . . . .

"2. He must have not less than five years' experience as a school teacher, within the last eight years exclusive of military service immediately prior to his selection and employment. At least three years of such experience must be of a school administrative nature. . . . ."

Lyman did not meet the new requirements in that he had only four and one-half years experience instead of the required five.

Ark. Stats. (1947), § 80-217 specifically gave the County Board of Education authority to enter into the contract employing Lyman. On December 11, 1948, the Board by its contract selected and employed a duly qualified County School Supervisor who was to begin performance of his duties on July 1, 1949. Thereafter Act 146 was enacted. It will be noted that this was an act ". . . to Adjust the Requirements for New Appointments . . ." In § 3, which changed the requirements as to teaching experience, it was provided that "*Effective July 1, 1949, and thereafter* when a vacancy occurs . . . *any person selected and employed* to fill

said vacancy . . ." must meet the requirements therein set out.

In the case at bar Lyman had already been appointed, with his term to begin July 1, 1949. There was thereafter no necessity for any person to be "selected and employed"; the board had already selected and employed him on December 11, 1949, in accordance with the then existing law. We have concluded that the Legislature intended the new requirements to apply only in case of persons employed after the effective date of Act 146.

In view of the construction we place upon § 3 of Act 146 it is unnecessary to decide the other issues raised in the brief, whether a County Supervisor is an "officer" or "employee", and the question whether equity has jurisdiction in such a cause which would depend upon a determination of the first question.

The decree is affirmed.

KIMPEL, GUARDIAN *v.* GARLAND ANTHONY LUMBER CO.

4-9115, 4-9109—consolidated 227 S. W. 2d 932

Opinion delivered March 6, 1950.

Rehearing denied April 10, 1950.

Wilson, Kimpel & Nobles, for appellant.

Mahony & Yocum and *C. E. Wright,* for appellee.

George Rose Smith, J. Case No. 4-9115, a proceeding under the Workmen's Compensation Act, was consolidated here with No. 4-9109, a common law action. In the first case Jethro Johnson's father, stepmother, and younger brother seek to recover compensation for Jethro's accidental death. It is admitted that his death occurred in the course of his employment by the appellee lumber company. The Commission denied compensation, finding that the father and brother were not dependent on the decedent and that the stepmother's claim was filed too late. The circuit court affirmed the Commission.

There were three hearings before the Commission. The material facts bearing on the claim of Jethro's father, Leonard Johnson, are not disputed. Leonard is a tenant farmer whose earnings have provided not more than a meager subsistence for his family. Jethro, who was eighteen years old when he was killed in 1946, was earning about $30 a week. At the first hearing Leonard testified that every week he directed Jethro to surrender his entire pay. Leonard said that this arrangement was to continue during Jethro's minority, and because Jethro was a minor Leonard "commanded" his earnings. Leonard used the money to supplement his own income and gave back what he could spare to Jethro, usually $10 a week or more. Jethro frequently used part of these returned funds to buy groceries for the family table.

Upon these facts the Commission held that Leonard Johnson was not dependent upon Jethro. In its opinion the Commission reasoned: "A father under the law in most circumstances has a right to the earnings and wages

of a minor child in return for his duty under the law to support and protect the minor child. This does not establish the fact that the parent is a dependent of the child but rather that the child is a dependent of the parent, needing the protection of the parent both for his person and his property." The Commission added that Leonard is an able-bodied man, but the decision was put on the ground that "the wages and earnings of Jethro were 'commanded' simply because Jethro was a minor and that was the 'understanding' between Jethro and his father."

We think the Commission was mistaken in its conclusion that a father's assertion of his common law right to his child's earnings precludes the possibility of the father's being a dependent under the Compensation Act. The statutory definition of an employee expressly includes a minor, and a parent is among those entitled to receive benefits in death cases. Ark. Stats. 1947, §§ 81-1302 (b) and 81-1315 (c). It must also be observed that for the purpose of receiving compensation a minor ceases to be a dependent himself when he attains the age of eighteen. § 81-1315 (d). Here the Commission said that the facts proved not that the father was dependent on the son but that the son was dependent on the father. Yet Jethro was eighteen and could not have qualified as a dependent under the Act if Leonard had been the decedent. We think it clear that the Act does not embrace the common law rules of dependency, at least as to minors who have reached eighteen. We realize that in some instances compensation is not payable to any one at all, for the reason that the employee had no dependents within the statutory definitions, but we hardly think the legislature meant for that situation to exist in every case of an unemancipated minor who has attained eighteen. Such a conclusion would mean that for a period of three years (age eighteen to age twenty-one) the compensation insurance that the employer must carry upon a minor employee would usually be useless as far as death benefits are concerned.

Here the uncontradicted testimony would have established a case of partial dependency if Jethro had been twenty-one or more. Partial dependency is all that is necessary to establish a claim under the Act. *Crossett Lbr. Co.* v. *Johnson,* 208 Ark. 572, 187 S. W. 2d 161. (The 1948 amendment, reducing the amount payable to one only partly dependent, is not involved here. Ark. Stats., § 81-1315 (i), as amended.) In the view we take of the Act, the undisputed facts necessitate an award in favor of Leonard Johnson.

There is substantial evidence to support the Commission's finding that Jethro's brother was dependent upon his father alone. At the third hearing there was testimony that Jethro often gave his brother a dollar or two before turning his pay over to Leonard. This testimony contradicts Leonard's earlier statement that he required Jethro to surrender his entire pay, but even if believed it proves only that Jethro made small gifts to his brother. Jethro's stepmother did not file her claim within one year after Jethro's death, as required by the Act, and objection thereto was promptly made. § 81-1318. We accordingly affirm the denial of compensation to the stepmother and brother. We reverse the circuit court's action in the case of Leonard Johnson and remand the cause with directions that the Commission be instructed to enter an award in favor of Leonard Johnson.

Case No. 4-9109 is an action at law based on the appellee's asserted negligence in causing Jethro's death. It was brought upon the theory that this remedy is still available if Jethro was not covered by the Compensation Act. Since we have held that he was it is unnecessary to consider this case, the statutory remedy being exclusive. § 81-1304. The circuit court's dismissal of the negligence action is affirmed.

GRIFFIN SMITH, Chief Justice, concurring in part. In reversing that part of Case No. 4-9115 relating to Jethro's alleged contributions to his father, I would remand. We have formerly held that findings of facts in compensation cases are not made here. The Commis-

sion's dual treatment of dependence involves both law and fact and from my point of view the findings and declarations do not show that the result rests solely on a misconception of the law. I would therefore give the Commission an opportunity to say whether, under the facts, a case was made.

FAVER *v.* GOLDEN, JUDGE.

4-9161 227 S. W. 2d 453

Opinion delivered March 6, 1950.

Warren E. Wood and *Griffin Smith, Jr.,* for petitioner.

Max M. Smith and *DuVal L. Purkins,* for respondent.

MINOR W. MILLWEE, Justice. Petitioner, Early Faver, and Buck Cavin were rival candidates for the office of director in the annual school election held in Woodlawn School District No. 6 of Cleveland County on September 27, 1949. Faver was certified as the successful candidate on October 4, 1949, and a 26 mill school tax was also certified as having failed of passage. On October 14, 1949, Buck Cavin and others filed a petition with the Cleveland County Board of Education to contest said election. Faver and the other contestees filed a response alleging that the petition to contest was not filed within the time required by law. The County Board of Education held that the action was filed too late and dismissed the contest. On appeal, the circuit court on November 23, 1949, ruled that the contest was filed in time and ordered the cause to stand for trial.

Early Faver and the other petitioners filed the instant action in this court on December 13, 1949, seeking a writ of prohibition to restrain the Cleveland Circuit Court from further proceeding and alleging the foregoing facts. The response admits the truth of these facts, but denies that the circuit court is without jurisdiction or that the petitioners' remedy by appeal is inadequate.

Petitioners contend that the contest petition by Buck Cavin and others before the County Board of Education was filed too late under the provisions of § 30 of Act 169 of 1931 which they contend is the statute governing the time for filing contests of school elections. The pertinent part of said § 30 reads: "Any contest of any results of any election in any school district shall be brought within fifteen days after such election, if the results thereof shall have been certified to the county clerk five days previously, or within five days after such results have been certified, and not thereafter. The county board of education shall hear and decide all contests, and make their findings thereon, and such findings shall be conclusive, subject to appeal by the losing party, to the Circuit Court within ten days. . . ."

It is undisputed that the contest involved in the instant case was filed October 14, 1949, more than 15

days after the election held on September 27, 1949, and more than five days after the certification of the results on October 4, 1949. If this statute governs, the petition for contest was filed too late and the county board was without jurisdiction to proceed and the circuit court, therefore, acquired no jurisdiction on appeal.

Act 169 of 1931 contained 198 sections and dealt with all phases of school affairs. Subsequent acts have repealed or amended many sections of the original act, but many of them are still in effect. Although § 30 has not been specifically repealed, it was not carried forward in our present digest on the theory that it was superseded by § 11 of Act 30 of 1935 (Ark. Stats. 1947, § 80-311). See parallel reference tables to said section in Ark. Stats. (1947), Vol. 8, p. 1236. While certain parts of § 30 of Act 169 of 1931 were changed and superseded by the 1935 act, there is no reference in said act to the subject of school election contests and that portion of § 30 above quoted was not changed or repealed by the 1935 enactment.

It is the contention of respondent that said § 30 of Act 169 was repealed by Act 406 of 1947. Section 1 of said act now appears as Ark. Stats. (1947), § 3-1203 and reads: "All actions to contest the election of a person to any county, city or township office shall be commenced within twenty (20) days after the General Election at which any such person was elected."

Respondent also relies on § 1 of Act 56 of 1949 (Ark. Stats. 1947, § 80-317) which provides: "Hereafter the County Board of Election Commissioners shall be charged with the responsibility of selecting Judges and Clerks of all school elections held in the several counties of this State. Said County Board of Election Commissioners shall also be authorized and empowered to make all necessary arrangements for conducting school elections and the general election laws, insofar as applicable, shall apply to school elections."

Following the adoption of Act 169 of 1931 this court held the 15 day limitation contained in § 30 applicable in school election contests. *Koser* v. *Oliver,* 186 Ark.

567, 54 S. W. 2d 411; *Shimek* v. *Janesko,* 188 Ark. 418, 66 S. W. 2d 626. This court has also recently held that the county board of education is the proper forum for contesting school elections as provided in said § 30. *Attwood* v. *Rogers, County Judge,* 206 Ark. 834, 177 S. W. 2d 723; *Casey* v. *Burdine,* 214 Ark. 680, 217 S. W. 2d 613.

Respondent relies on the case of *Ferguson* v. *Wolchansky,* 133 Ark. 516, 202 S. W. 826, where it was held that the office of school director was included within the designation "county officer," within the meaning of a statute providing for the contest of the election of such officers. But the court was careful to point out that this conclusion was reached because the legislature had not provided otherwise, saying: "There is no other specific provision for the contest of the office of school director, and we think that that office is included within the designation of county offices within the meaning of the statute." The General Assembly did make specific provision for contest of the election of school directors subsequent to the decision in that case and Act 234 of 1919 providing that such contests should be heard by the County Board of Education was upheld in *Stafford* v. *Cook,* 159 Ark. 438, 252 S. W. 597, in an opinion by Chief Justice McCulloch, who also wrote the opinion in the Ferguson case.

Thus, the question for decision is whether general statutes dealing with county officers and general elections, such as Act 406 of 1947 and Act 56 of 1949, have repealed specific provisions for the contest of the election of school directors as provided in § 30 of Act 169 of 1931. We have held that a general law does not apply where there is another statute governing the particular subject, irrespective of the dates of their passage. *Lawyer* v. *Carpenter,* 80 Ark. 411, 97 S. W. 662. It is also well settled that repeals by implication are not favored and that two statutes should be construed so as to give effect to both, if possible. Where a general act takes up the whole subject anew and covers the subject matter included in a prior special act and it is evident that the legislature intended to make the new act con-

tain all the law on the subject, then the general act will be held to repeal the prior special act. *King* v. *McDowell,* 107 Ark. 381, 155 S. W. 501. Act 406 of 1947 does not mention school elections or contests of such elections. To hold that the legislature intended by the act to repeal § 30 of Act 169 of 1931, would be out of harmony with the reasoning of the court in the Ferguson and Stafford cases. If Act 56 of 1949, when considered with Act 406, governs as to school election contests, then such contests would have to be filed in a forum other than the County Board of Education contrary to our holding in *Attwood* v. *Rogers, supra.*

Respondent also relies on the case of *Casey* v. *Burdine, supra,* where we said that the parties seemed to have conceded that Act 406 of 1947 governed as to the time for instituting the contest. In that case we upheld the circuit court in dismissing the contest because it was filed in the wrong forum and a consideration of the applicability of § 30 of Act 169 of 1931 was not necessary to the decision and was not raised.

It is with considerable reluctance that we conclude that § 30 of Act 169 of 1931 has not been repealed insofar as the time for filing school election contests is concerned. If the contestants were able to substantiate the charges set out in their contest petition, they have a meritorious case and may have been misled by *dictum* in the Casey case, *supra.* It is also true that the remedy by prohibition is discretionary with the court and is used cautiously. But it would manifestly be unfair to respondent and the litigants to now refuse the writ knowing that the case would have to be dismissed on final appeal because filed too late, if the contestants should prevail in the trial court. Issuance of the writ depends on the inadequacy, rather than the absence, of the remedy by appeal. *Monette Road Imp. Dist.* v. *Dudley,* 144 Ark. 169, 222 S. W. 59. Hence, we have held that the great expense of money and length of time required in an election contest render the remedy by appeal inadequate as to petitioners. *Murphy* v. *Trimble, Judge,* 200 Ark. 1173, 143 S. W. 2d 534.

Since it appears that the circuit court was without jurisdiction to hear the contest because it was not filed within the time required by law, the writ must be granted, and it is so ordered.

The Chief Justice and Justice DUNAWAY not participating.

Justice MCFADDIN dissents.

FARRELL-COOPER LUMBER COMPANY *v.* MASON.

4-9116 227 S. W. 2d 445

Opinion delivered March 6, 1950.

Sharp & Sharp, for appellant.

Jno. S. Gatewood, for appellee.

MINOR W. MILLWEE, Justice. Appellee, Earl L. Mason, sustained critical and permanent injuries on July 10, 1948, while unloading logs on the mill yard of Farrell-Cooper Lumber Company at Brinkley, Arkansas. His claim for compensation before the Arkansas Workmen's Compensation Commission was controverted by the lumber company and its insurance carrier, Consolidated Underwriters, on the ground that appellee was an independent contractor and not an employee of the lumber company at the time of injury. Hearings before a single commissioner and the full commission resulted in a finding that appellee was an employee of the lumber company and the allowance of his claim for medical and compensation benefits. On appeal to circuit court the award of the commission was affirmed. The lumber company and its insurer have appealed.

Under our decisions, the commission's finding that the relationship of employer and employee existed between the lumber company and appellee at the time of the injury must be sustained, if supported by substantial evidence.

Appellee is 27 years of age and has a sixth grade education. He was engaged in buying and selling logs to Farrell-Cooper Lumber Co. and other mills for about three years prior to April, 1948. He owned a truck, tractor, loader and cutting implements used in logging operations and maintained his own crew. In April, 1948, appellee entered into an oral agreement to cut and haul timber for Farrell-Cooper Lumber Co. for which he was to be paid by the thousand feet. Two tracts of timber owned by the company were cut and hauled under this agreement and appellee and his crew were working on a third tract in Prairie County known as the "DeValls Bluff job" at the time of his injury.

Although appellee was paid by the thousand feet, he was required to turn in a payroll to the lumber com-

pany every two weeks showing the rate of pay and hours worked by himself and each member of his crew. He testified that the company had a woods foreman on the first tract who supervised the cutting and directed him as to dimensions and different places to haul and unload the logs; that some logs were culled for which he received no pay; that he increased the number of his crew several times at the direction of representatives of the company; that the company loaned him $1,000 to purchase a second truck which representatives of the company suggested that he buy; that the company advanced money to him and members of his crew from time to time; arranged and paid for their gasoline accounts and paid appellee's board. The company kept records of such advances which, with payments on the $1,000 loan, were deducted each two-weeks period when the company settled with appellee who in turn paid the members of his crew according to the record kept by the company. There was also evidence that the company had the right to discharge appellee at will and that he could terminate the contract any time he chose to do so.

The following statement from the opinion of the commission reflects the manner of handling the payment of social security and unemployment insurance taxes and workmen's compensation and public liability insurance on appellee and members of his crew: "By arrangement with the Farrell-Cooper Lumber Company a payroll record was turned in to their office by Mason every two weeks, showing the number of hours worked by each member of Mason's crew on each of the days within the two weeks' period, and the hourly rate of pay. Earl Mason's name appeared on this same payroll and opposite his name was set out an hourly rate of pay of sixty or seventy cents, and the number of hours he worked on each day within the two weeks' period. From this information the respondent, Farrell-Cooper Lumber Company, figured the wage due each crew member, and Mason, from which they deducted Social Security and Unemployment Insurance taxes, and remitted these taxes to the offices where

the taxes were payable. From the same record the respondent, Farrell-Cooper Lumber Company, deducted $7.392 from each $100 of the gross payroll for Workmen's Compensation and Public Liability Insurance. After calculating the amount of logs hauled by Earl Mason and his crew during the two weeks' period, a check was given to Mason for the amount of logs hauled at the agreed amount per thousand feet, from which was deducted the Social Security and Unemployment Insurance taxes and the premium on Workmen's Compensation and Public Liability bought by the truck drivers and charged to and paid for by the Farrell-Cooper Lumber Company. From the net check received by Mason he paid his crew members in accordance with a copy of the payroll sent back to him. This was the arrangement from the time Mason began hauling logs at so much per thousand in April, 1948, and continued through to the time of Mason's injury on July 10, 1948, and for a few days afterwards until the job was completed, upon which he was working at the time of his injury."

A representative of the lumber company testified that remittances from the company to the insurance carrier for compensation insurance showed that appellee and members of his crew were carried along with and remitted for like the company's other payroll of employees and under the same policy of insurance; that the company promptly notified the insurance carrier of appellee's injury; and that payment had been made for his compensation insurance. One member of appellee's crew was injured prior to July 10, 1948, and this was reported to the insurance carrier and compensation benefits were paid.

We have said that no hard and fast rule can be formulated to determine in every case whether a workman is an employee or an independent contractor and that each case must be governed by its own peculiar facts. We have also held that in determining whether a workman is an employee or an independent contractor the compensation act is to be given a liberal construction in his favor and any doubt is to be resolved in

favor of his status as an employee. *Irvan* v. *Bounds,* 205 Ark. 752, 170 S. W. 2d 674; *Parker Stave Company* v. *Hines,* 209 Ark. 438, 190 S. W. 2d 620. In the Irvan case, the court also held: "The power of an employer to terminate the employment at any time is incompatible with the full control of the work which is usually enjoyed by an independent contractor and is a strong circumstance tending to show the subserviency of the employee."

Evidence that an employer pays workmen's compensation or liability insurance on a workman is a circumstance to be considered in determining whether said workman is an employee and thus subject to the employer's right and power to control. *Delamar & Allison* v. *Ward,* 184 Ark. 182, 41 S. W. 2d 760; *Ozan Lumber Co.* v. *McNeely,* 214 Ark. 657, 217 S. W. 2d 341, 8 A. L. R. 2d 261.

The case of Parker Stave Company v. Hines, *supra,* involved facts similar in part to those in the instant case. We there said: "The fact that appellee was paid by the thousand and furnished his own truck tends to indicate that he was an independent contractor. On the other hand, the fact that the employment was to run for no specified time, and the further fact that the stave company could terminate the relation at any time, without liability, are features which indicate that appellee was an employee."

We are asked to determine whether the fact that the lumber company paid the insurer a premium for workmen's compensation insurance on appellee and his crew changed appellee's status from that of an independent contractor to an employee. To make such finding we would have to ignore other evidence before the commission which tends to indicate the employer-employee relationship and which the commission had a right to consider in making its findings. Evidence that the lumber company could discharge appellee at will; that the company required him to increase the number of his crew from time to time; paid social security and unemployment insurance taxes and liability

insurance on appellee and his men; and the manner in which the company made loans and advances to appellee and members of his crew—these were all facts which the commission had a right to consider in determining the relationship. In our opinion there was sufficient evidence to sustain a finding that the company reserved and exercised a degree of control over the work of appellee consistent with his status as an employee.

The judgment is, therefore, affirmed.

BACHUS *v.* BACHUS.

4-9120 227 S. W. 2d 439

Opinion delivered March 6, 1950.

Neva B. Talley and *J. Harrod Berry,* for appellant.

Otis H. Nixon, for appellee.

GEORGE ROSE SMITH, J. On August 4, 1948, the Pulaski Chancery Court granted the appellant a divorce from her husband, the appellee. The couple had made a written contract by which they settled all property rights and agreed that the appellant would receive $200

a month as alimony and support for their four children. The chancellor approved this contract and incorporated it in the divorce decree.

No pleadings were filed after the entry of the decree, but at a later term of court the chancellor entered the order from which comes this appeal. This order recites that the parties appeared in person and by their attorneys, "and the court being well and sufficiently advised as to all matters of law and fact herein" adjudges (*a*) that the appellee is not in arrears in his payments, (*b*) that the appellee is to pay $150 a month until further orders of the court, and (*c*) that he pay a fee of $25 to the attorney then representing the appellant. The order concludes with a notation of the appellant's exceptions and prayer for appeal. The allowance of the attorney's fee is not before us, there being no cross appeal.

The court erred in reducing the amount of the monthly payments. The parties to a divorce action may agree upon the alimony or maintenance to be paid. Although the court is not bound by the litigants' contract, nevertheless if the court approves the settlement and awards support money upon that basis there is then no power to modify the decree at a later date. *McCue* v. *McCue,* 210 Ark. 826, 197 S. W. 2d 938. If changed circumstances should subsequently render the payments inequitable the court may decline to enforce by contempt proceedings the payment of a greater sum than the circumstances warrant, thereby remitting the plaintiff to her remedy at law to collect the balance due under the contract. *Pryor* v. *Pryor,* 88 Ark. 302, 114 S. W. 700, 129 Am. St. Rep. 102.

We think the chancellor was also in error in declaring that the appellee was not in arrears. The appellant concedes that some testimony—"very little"—was taken when the order was entered, but no reporter was present to record this evidence. The appellee insists that in view of this confession of an incomplete record we must assume that the evidence was sufficient to support the challenged order.

The difficulty, however, is not merely that there is no evidence in the record; there is also lacking any pleading to which the judgment might be said to be responsive. Our Civil Code requires that pleadings be in writing. Ark. Stats. 1947, § 27-1101. The purpose of this requirement is to enable each party to know what issues are to be tried. *Beasley* v. *Haney,* 96 Ark. 568, 132 S. W. 646. Even before the Code was adopted we recognized the need for written pleadings in any case when a statute contemplated their use. In *Neal* v. *Newland,* 4 Ark. 459, Newland brought suit against Meeks Neal and attached certain property. Benjamin Neal obtained leave to interplead and assert a claim to the property. The case was continued at his request, but at the next term it was tried without the interplea having been filed. In reversing the judgment we said that there was no issue for the court to try. "This proceeding by way of interpleader partakes of an equitable character. Its object is to save unnecessary litigation, because the title can be tried and determined with the same facility as if a new action was instituted. But such interpleader must be in writing, and embody sufficient matter to make up an issue . . . and support a verdict and judgment. This was not done. There was no action in court."

Under the Code we have adhered to the same rule. In *Rosewater* v. *Schwab Clothing Co.,* 58 Ark. 446, 25 S. W. 73, it was held reversible error for the trial court to allow an oral answer. "The code requires all pleadings in the circuit court to be in writing. . . . If, therefore, it was necessary to answer the interplea at all, the answer could not properly be an oral one, except by consent." In the *Beasley* case, *supra,* we said: "In the case at bar the answers of the garnishees were not properly denied; and the court erred in permitting an oral denial thereof. In the absence of a written traverse of the answers of the garnishees there were no issues thereon joined for trial, and the court was in error in proceeding to a trial before the issues were properly made." See also *Berlin* v. *Cantrell,* 33 Ark. 611, 614.

These decisions control the present case. Here the order does not show whether the parties appeared upon their own initiative, or by the court's direction, or for some other reason. In the absence of any written pleadings or of an agreement that they be waived by consent, it does not appear that the appellant knew in advance what issues were to be tried. Under the statute she was entitled to that information. She objected to the order at the time and took an appeal. Without pleadings or testimony we have no way of testing the correctness of the chancellor's order. We therefore set it aside and remand the cause for trial upon such issues as the parties may raise by appropriate pleadings. The appellant's attorneys are allowed a fee of $100 for their services.

BLACK *v.* STATE.

4622 227 S. W. 2d 629

Opinion delivered March 9, 1950.

Joe W. McCoy and *W. H. Glover,* for appellant.

PER CURIAM. Two matters have been presented on behalf of Thomas Edwin Black, whose death sentence, unless stayed, will be carried out Friday. One is an appeal from the action of the Jefferson Circuit Court in refusing, by mandamus, to require Superintendent Lee Henslee of the Arkansas Penitenitary to empanel a jury to inquire into the sanity of the petitioner.[1] The second pleading is a petition to this Court for permission to ask the Pulaski Circuit Court for a writ of error *coram nobis.* With each transaction there is a prayer that the execution be stayed.

In appealing from the Jefferson Circuit Court judgment a bill of exceptions was not tendered, nor was any part of the record presented other than a certified copy of the judgment. This was sufficient to confer jurisdiction. Diminution of the record was suggested, resulting in *certiorari.* The Clerk of the Jefferson Circuit Court has supplied the deficiencies, including an approved bill of exceptions. These have been examined by the Judges of this Court. We agree with Judge PARHAM that the only issue in Jefferson County was whether Superintendent Henslee abused his discretion when he found that there was no factual basis for the suggestion of insanity.

The effort to procure a new trial through use of the writ of error *coram nobis* assumes as a matter of fact that Black was insane at the time of conviction, insane at the time the crime was committed, and that he had been insane for many years. The method of proving these allegations would be through what is claimed to be newly discovered evidence,—evidence of conduct it is now claimed points conclusively to insanity periodically recurring, with temporary loss of memory and forgetfulness.

[1] Ark. Stats., § 43-2622. See *Howell* v. *Kincannon,* 181 Ark. 58, 24 S. W. 2d 953; *Howell* v. *Todhunter,* 181 Ark. 250, 25 S. W. 2d 21; *Shank* v. *Todhunter,* 189 Ark. 881, 75 S. W. 2d 382.

At the trial resulting in Black's conviction the Court had before it a report made by psychiatrists attached to State Hospital. It showed that the accused had been sent to the Hospital for mental observation. The findings were that Black was without psychosis. When tried, the defendant testified in his own behalf.

An examination of the record brought up for review fails to establish the mental deficiency urged in extenuation; nor would the so-called new evidence it is now contended would throw light on conduct and the accused's condition close, in point of time, to the murder, be sufficient to overcome the defendant's own explanation of how the killing occurred.

From a careful review of all of the record (which reached this Court Thursday morning—and which was considered by the Judges who read from the transcript aloud, in relay), we have concluded that the appeal is without substantial merit and that the judgment should be affirmed.

We are also agreed that the showing made in the proceedings preliminary to a request for retrial is not sufficient, under our decisions and the law, to justify affirmative action.

A competent jury, a skilled trial judge, and efficient defense counsel, were participants in the judicial proceedings resulting in Black's conviction. On appeal to this Court the opinion, written by Mr. Justice Frank G. Smith, reviewed in detail all of the allegations of error. The judgment was unanimously affirmed. Four energetic members of the bar, still giving to their client that full measure of service-devotion that fidelity to the profession and belief in the justness of their cause provoked, took the cause to the United States Supreme Court, where *certiorari* was denied.

We are agreed that the defendant has had every legal right to which the law entitles him, and that the record is without error.

The judgment of Jefferson Circuit Court is affirmed. We also dismiss the petition for leave to apply to Pulaski Circuit Court for writ of error *coram nobis*.

Mr. Justice DUNAWAY disqualified and did not participate in the consideration or determination of either of the causes.

NICHOLSON, COPELAND AND BEAN *v.* CITY OF FORREST CITY.

4592-4593-3454 228 S. W. 2d 53

Opinion delivered March 6, 1950.

Joe Van Derveer and *Norton & Norton,* for appellant.

T. J. Gentry, Amicus Curiae.

LEFLAR, J. Three separate cases are consolidated on this appeal. The three appellants, defendants below, were each convicted and fined ten dollars and costs in the Police Court of Forrest City for violation of the occupation tax ordinance of that city. On appeal to Circuit Court the Judge, trying the cases without a jury, again found each defendant guilty and reimposed the same sentence. The defendants now appeal to this Court.

Ordinance No. 603 of Forrest City levies certain "annual privilege licenses" as follows:

"Photographers: $11.00 per year.

"Photograph salesman which means each person engaged in selling photographs, photograph coupons or certificates or any other medium of exchange for photographs. $25.00 per year.

"All other persons engaged in soliciting the sale of additional photographs, known as 'Proof Passers': $15.00 per year."

The ordinance further provided for a criminal fine of not more than $50.00 nor less than $10.00 for each day during which any person should violate its provisions. The ordinance was made a part of the general occupation tax law of the city, though it was added thereto by separate and subsequent enactment.

The three defendants here were respectively a photographer or cameraman, a photograph salesman, and a "proof passer," all employed by Olan Mills, Inc., a Tennessee corporation engaged in the photography business with its principal place of business in Chattanooga, Tenn. Olan Mills, Inc., has secured authority as a foreign corporation to do business in Arkansas, and is doing business here and in some nine other states.

Its method of doing business, in which the three defendants in this case participated, is similar to that of the old-style "drummer," except that for efficiency's sake its employees work in teams or squads.

In a team there will be one or more salesmen (like defendant Copeland) who canvass or solicit orders in a municipality for photographs. All orders are accepted for future delivery, to be manufactured, finished and processed in Chattanooga, Tenn. When the order is taken the customer pays fifty cents down and is notified where and when to appear for his "sitting" or "exposure", this usually being in a room rented at a local hotel. At the time set, a cameraman (like defendant Nicholson) takes the "exposure" and collects an additional fifty cents deposit. The exposed negatives are then mailed to the company's plant in Chattanooga where they are developed and proofs are made. These proofs are then mailed to an employee called a "proof passer" (like defendant Bean), the customer being at the same time notified by mail of the date on which the "proof passer" will show the proofs to him. The customer on that date selects from the proofs the picture he wants, one copy of which he is to receive in return for the $1.00 previously paid by him. It is the "proof passer's" job to sell additional copies to the customer. Orders taken are mailed to Chattanooga where the finished photographs are then manufactured and mailed directly to the customer.

The acts done by defendants Copeland, Nicholson and Bean at Forrest City were the acts just described. Their acts admittedly fall within the scope of Forrest City's Ordinance No. 603.

The validity of the ordinance as applied to their acts is attacked under the commerce clause (Art. 1, § 8, par. 3) of the Constitution of the United States. It is agreed that "not all burdens upon interstate commerce, but only undue or discriminatory ones, are forbidden" by this clause, but defendants contend that the ordinance as applied to them does impose undue and discriminatory burdens upon the processes of interstate commerce.

The case of *Nippert* v. *City of Richmond,* 327 U. S. 416, 66 S. Ct. 586, 90 L. Ed. 760, 162 A. L. R. 844, decided by the United States Supreme Court in 1946, appears to be controlling here. That case held invalid a $50 annual license tax levied by ordinance of the City of Richmond, Va., on the privilege of engaging in business as a solicitor, as applied to a person soliciting orders for women's dresses to be shipped to local buyers by an out-of-state seller. The defendant had without paying the license tax solicited orders in Richmond for five days for a $2.98 garment and had transmitted orders thus taken to a Washington, D. C., manufacturer who filled the orders by mail. A conviction for violation of the Richmond ordinance was reversed and set aside.

In the *Nippert* case, as in the present cases, the ordinance made no distinction between out-of-state solicitors, or solicitors for out-of-state sellers, and local solicitors for domestic sellers. On its face the ordinance and the tax operated equally upon solicitors for interstate sales and solicitors for intrastate sales. It levied a $50 annual tax on each. The City of Richmond took the view that the ordinance was non-discriminatory as between interstate and intrastate commerce, therefore imposed no improper burden on interstate commerce, and came within the rule that interstate commerce may be made to "pay its way" in the local tax field. *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876. The Supreme Court pointed out, however, that the tax sustained in the *Berwind-White* case was a sales tax on sales completed in New York, levied on a percentage basis, therefore burdening each interstate sale thus completed just as much as a corresponding local sale was burdened, and no more. Not only was the tax non-discriminatory on its face; it was also non-discriminatory in its practical effect as well. Contrariwise, the Richmond tax, superficially the same on all solicitation whether for interstate or intrastate sales, in average practice imposed much the heavier burden on salesmen for extrastate sellers. "So far as appears a single act of unlicensed solicitation would bring the sanction into play. The tax

thus inherently bore no relation to the volume of business done or of returns from it." (327 U. S., at 427). If such a tax might be levied by one town, it might be levied by ten towns, or twenty, or all the towns in a state, or all the towns in all the states to which a seller's commerce might extend. "A day here, a day there, five days now and five days . . . several months later, with a flat license tax annually imposed [in each town] lacking any proportion to the number or length of visits or the volume of business or return, can only mean the stoppage of a large amount of commerce which would be carried on either in the absence of the tax or under the incidence of one taking account of these variations. . . . Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern." (327 U. S., at 430, 431). The possibility that a solicitor of interstate sales might stay in one town for many months, or for the whole year, and thus actually be not burdened more by the tax than would a local full-time salesman, was deemed not enough to validate the ordinance; the known nature of much interstate selling by itinerant solicitors negatives such permanence in location, and the enactment was not to be saved by the mere possibility of exceptional non-discriminatory cases under it.[1] The established local solicitor of intrastate business whose normal situation enables him to work in one community for an entire year with only a single privilege tax payment is by the enactment given a tremendous tax advantage over the average itinerant in his less localized solicitations for interstate business.

It is suggested that, though the Forrest City tax be bad as to those who solicit orders for photographs—the salesmen and the "proof passers"—it may yet be

[1] The decision in the *Nippert* case was essentially a reaffirmation of a long line of decisions, the so-called "drummer cases," holding similar state and municipal enactments to be void under the commerce clause. The first of this line of cases was *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 7 S. Ct. 592, 30 L. Ed. 694, and it was followed often, as in *Crenshaw* v. *Arkansas*, 227 U. S. 289; *Rogers* v. *Arkansas*, 227 U. S. 401, 33 S. Ct. 398, 57 L. Ed. 569; and *Real Silk Hosiery Mills* v. *Portland*, 268 U. S. 325, 45 S. Ct. 525, 69 L. Ed. 982. Citations are collected in *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 56 at note 11, 60 S. Ct. 388, 84 L. Ed. 565, 128 A. L. R. 876.

sustained as to cameramen. This is on the idea that the cameraman engages in a series of tangibly physical local acts, acts subject to local police regulation, acts that do not necessarily in their nature belong to the chain of interstate commerce, acts that are separate and individually identifiable apart from the commerce that is interstate. All this is true, but it is equally true of the acts of a salesman; every statement just made about what a cameraman does can as well be made about what a solicitor does. Both are commerce; if the commerce of which they are a part be interstate, then both are a part of the interstate commerce. Whether a tax levied on one act or the other is an improper local interference with interstate commerce depends not so much upon what element in the commerce is taxed as upon how the tax affects the whole of the commerce. "It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax." (327 U. S., at 423.) If an annual privilege tax on cameramen will have less detrimental effect than will a similar tax on salesmen upon the interstate commerce in which all the defendants together are engaged, then the suggestion may have validity.

It is hard to see how its detrimental effect will be any less. The cameraman's activity is the central feature, the key occurrence, in the interstate transaction which the contract between the customer and Olan Mills, Inc., calls for. If a cameraman working for Olan Mills, Inc., is required to pay $11 for the privilege of doing five days work—or for the privilege of doing ten or twenty days work, assuming that the same cameraman might return to the same town two or three times in one year—he is subjected to a tremendous tax disadvantage as compared with the local cameraman who works all year long in one place under a single $11 privilege tax payment. This disadvantage has as much relation to interstate commerce in photographs as does the same disadvantage imposed on salesmen who solicit orders

for the photographs which the cameraman takes.[2] Both disadvantages enable a local intrastate photographic business to operate more cheaply than an interstate business like Olan Mills, Inc., as far as taxes are concerned. In similar cases from other states it has even been asserted that this may have been the motive for such enactments.

It has also been suggested that the amounts of the annual burdens imposed by the Forrest City ordinance—$25, $15, and $11—are sufficiently less than the $50 annual burden imposed by the Richmond ordinance to enable us to distinguish the cases, or that at least the $11 annual burden is sufficiently less. If it be recognized that a cameraman who works a week in each of fifty towns during a year might have to pay fifty times $11 for the privilege of doing his year's work, while an intrastate photographer who spends the whole year in one town would pay but one $11 tax for the same privilege, the burden ceases to appear small. The possibility of having to pay the tax in fifteen towns, or in eight or ten, involves a burden that cannot be called negligible. Even the fact of paying it in one town in return for the privilege of doing five days work, or perhaps two days work, is a substantial burden when compared with the local photographer's privilege of working 365 days on payment of the same amount. Actually, several United States Supreme Court cases have invalidated discriminatory privilege taxes which were fixed in comparably low amounts. Fair examples include *Caldwell* v. *North Carolina,* 187 U. S. 622, 23 S. Ct. 229, 47 L. Ed. 336 ($10 yearly license tax on selling or delivering photographs or frames); *Brennan* v. *City of Titusville,* 153 U. S. 289, 14 S. Ct. 829, 38 L. Ed. 719, ($1.50 for one day, $5 for one week, $10 for three months, $25 for one year license tax on non-local sellers of pictures); and *Asher* v. *Texas,* 128 U. S. 129, 9 S. Ct. 1, 32 L. Ed. 368, ($35

[2] Discriminatory state taxation of local acts other than selling as such has been held violative of the commerce clause when the act taxed is an inseparable part of interstate commerce. See *Caldwell* v. *North Carolina,* 187 U. S. 622 (framing and delivery of photographs after interstate sales); *Rogers* v. *Arkansas,* 227 U. S. 401 (delivery of buggies in state after interstate sales); *Best & Co.* v. *Maxwell,* 311 U. S. 454 (display of samples in a hotel room).

annual occupation tax on drummers.) The evil of such taxes lies not so much in their amount as in their discriminatory character. If in its practical effect a tax even smaller than $11 a year were discriminatory against interstate commerce it would be unconstitutional.

As was pointed out in the *Nippert* case this conclusion clearly does not mean that there can be no valid taxes levied on acts or things which are in the course of interstate commerce. "There is no lack of power in the state or its municipalities to see that interstate commerce bears with local trade its fair share of the cost of local government, more especially in view of recent trends in this field." (327 U. S., at 433). Under such cases as *McGoldrick* v. *Berwind-White Co., supra; Western Livestock* v. *Bureau of Revenue,* 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944; and *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 52 S. Ct. 548, 76 L. Ed. 1038, it is permissible today to levy local taxes on activities connected with interstate commerce which were once generally thought to be immune from state taxation. See, also *Beard, Collector* v. *Vinsonhaler,* 215 Ark. 389, 221 S. W. 2d 3; *cert.* denied, 338 U. S. 863, 896, 70 S. Ct. 146. There is no indication as yet, however, that the immunity will be soon withdrawn as far as levies such as those sought to be imposed by the Forrest City ordinance are concerned. *Nippert* v. *City of Richmond, supra.* If privilege taxes are to be levied on acts which are part of the processes of interstate commerce, they will have to be so calculated that in their practical effect they will not substantially discriminate in favor of comparable activities in intrastate commerce which compete economically with the interstate activities that are taxed. The law does not require that exact equality in treatment be achieved, but it does prohibit clear inequality.

The judgments are reversed and the cases are dismissed.

SMITH GRIFFIN, Chief Justice, and MCFADDIN, J., dissent in part as to No. 4592.

MILLWEE, J., not participating.

ED. F. MCFADDIN, J. (Dissenting). I dissent from so much of the majority holding as concerns the photographer Nicholson; because I am of the opinion that as to him the judgment should be affirmed for either of two reasons:

(1)—His work was localized to such an extent that it was removed from interstate commerce; and

(2)—Even if his work was in interstate commerce, nevertheless, the tax of $11 per year was not "an undue burden on interstate commerce."

To elucidate:

(1)—Nicholson transported his picture-taking equipment into Forrest City, rented quarters for a studio, required patrons to come to the studio, and there posed them for their pictures. These acts are far more than those of a solicitor or a proof-passer. *Nippert* v. *Richmond** is the authority for the holding that the solicitor, Copeland, and the proof-passer, Bean, were engaged in interstate commerce; the so-called "Drummer Cases," mentioned in the footnote to the majority opinion, also support the conclusion that the solicitor and proof-passer were engaged in interstate commerce. But neither in the Nippert case* nor in any of the "Drummer Cases" do I find a situation comparable to that of the photographer, Nicholson, in the case at bar. The majority, in holding that he was engaged in interstate commerce, is going further than the Supreme Court of the United States went in the Nippert case.* It is my opinion that the photographer's work was localized to such an extent that it was removed from interstate commerce; and for this reason his conviction should be affirmed.

(2)—But, even if the photographer, Nicholson, was in interstate commerce in performing all of the matters mentioned, still I am not willing to say that a tax of $11 per year, required to be paid by him, would be "an undue burden on interstate commerce"; and $11 per year is the tax involved in the case at bar. In *Nippert* v. *Richmond** the tax was $50 per year. Somewhere, be-

* 327 U. S. 416, 90 L. Ed. 760, 66 S. Ct. 586, 162 A. L. R. 844.

tween fifty dollars and zero, there is an amount that ceases to be "an undue burden on interstate commerce"; and $11 seems to me as such an amount. *Nippert* v. *Richmond** recognizes that interstate commerce must pay its way. Here is the language:

"As has been so often stated but nevertheless seems to require constant repetition, not all burdens upon commerce, but only undue or discriminatory ones are forbidden. . . .

"There is no lack of power in the State or its municipalities to see that interstate commerce bears with local trade its fair share of the cost of local government, more especially in view of recent trends in this field, *McGoldrick* v. *Berwind-White Coal Min. Co.*, 309 U. S. 33, 84 L. Ed. 565, 60 S. Ct. 388, 128 A. L. R. 876, *supra*."

Until the United States Supreme Court holds that a municipality cannot collect any occupation tax except one based on income—and *Nippert* v. *Richmond** does not so hold—then I am unwilling to deny municipalities the right to collect a mere tax of $11 per year from transient photographers, when (a) local photographers pay the same amount, and (b) there is no evidence that a tax based on income would be less than the $11 per annum.

For these reasons I respectfully dissent from so much of the majority opinion as reverses the judgment of conviction against the photographer, Nicholson.

RICE *v.* STATE.

4599 228 S. W. 2d 43

Opinion delivered March 6, 1950.

Rehearing denied April 3, 1950.

Hebert & Dobbs, for appellant.

Ike Murry, Attorney General, and *Arnold Adams,* Assistant Attorney General, for appellee.

DUNAWAY, J. As a result of an altercation between appellant and one Glenn Hickey, appellant was charged with the offense of "Assault with Intent to Kill" by information filed by the Prosecuting Attorney. At the time of trial the charge was reduced to "Assault with a Deadly Weapon" on motion of the State and without objection by appellant. The trial resulted in a conviction, the jury returning the following verdict: "We, the jury find the defendant guilty of assault with a deadly weapon and as a punishment fine him in the sum of $1,000 and sentence him to serve *none* imprisonment."

Appellant, Royal A. Rice, is president of the Bank of Montgomery County at Mount Ida, Arkansas, and Glenn Hickey is a merchant there and a stockholder in the bank. Prior to the difficulty between these parties on July 25, 1949, out of which the criminal charges against appellant arose, they had been involved on opposite sides in litigation for control of the bank.

On July 25, Hickey was notified by employees of the bank that his account was overdrawn in the amount of $58.24. He sent over for deposit checks drawn on

out-of-town banks totaling $709.39. Later that day Hickey was advised that these checks could only be accepted for collection and could not be credited to his account until they had been cleared by the out-of-town banks. He then deposited $1,000 in cash. About 2:00 p. m. Hickey went to appellant's private office in the bank, where a heated argument ensued over the refusal of the bank to credit Hickey's account with the checks in question. Rice insisted that he had acted on instructions of the Bank Commissioner, whereupon Hickey accused him of lying and used considerable profanity in expressing his opinion of appellant. Appellant then picked up a glass paper-weight about the size of a baseball, at which point Hickey told him he "didn't have the guts to use it." Joe Rice, appellant's brother who was also in the room, made some remark to Hickey, who then cursed him as he had appellant Roy Rice. Joe Rice and Hickey engaged in a scuffle and fight, while appellant ran into the next office and returned with a gun which he "leveled" at Hickey, according to the state's testimony. Hickey testified that he broke loose from Joe Rice and fell to the floor, covering his face with his hands and arms. Several others, including Glenn Hickey's brother, Sam, heard the scuffling and came into the room; they removed Glenn Hickey and asked appellant not to shoot.

The various witnesses for the State and for the defendant were in agreement that there was quite an argument as well as some scuffling in appellant's office. Glenn Hickey admitted cursing the Rice brothers, but testified that they started the fighting and that appellant assaulted him with the pistol. Appellant on the other hand, denied pointing the gun at Hickey, testifying that he had the gun only for self-defense if it became necessary.

Appellant urges three grounds for reversal. Since this is a misdemeanor appeal, all assignments of error not argued in the brief are waived, *Branton* v. *State*, 214 Ark. 861, 218 S. W. 2d 690, and we will consider only these three points.

The first contention is that the verdict was void because both fine *and* imprisonment are mandatory under the provisions of Ark. Stats. (1947) § 41-605, and the jury in the instant case imposed only a fine. Appellant is correct in his interpretation of the statute. See *Allgood* v. *State,* 208 Ark. 699, 177 S. W. 2d 928. However, he was not prejudiced by the failure of the jury to add a term of imprisonment to the fine assessed. An accused cannot complain of errors not prejudicial to him. *Bishop* v. *State,* (Ark.) 14 S. W. 88.

Appellant's second contention is that the jury was subjected to improper influences after retiring to deliberate on its verdict. This assignment of error was made in the motion for new trial, and the trial court heard testimony on the point. P. E. Dobbs, one of appellant's attorneys, testified that he was outside the courthouse and looked through a window and saw the jury in the jury room; that he could see different jurors as they wrote their verdicts on slips of paper; that there was a large crowd of people standing about on the courthouse lawn in view of the jury; that the bailiff in charge of the jury opened the door to the jury room, asked how they were getting along and told them "there is no use for you to have a hung jury". The bailiff denied this, testifying that he went to the jury room after consultation with the court to tell the jurors that if they wanted further instructions they would have to return to the courtroom. There was no testimony that any of the people outside the courthouse attempted to communicate with the jury or made any demonstration of any kind.

The trial court found from substantial testimony that the jury had not been subjected to any improper influence. The rule in regard to granting a new trial when a charge is made of improper influence on the jury, was stated in the opinion by Mr. Justice Wood in *Freels* v. *State,* 130 Ark. 189, at p. 197, 196 S. W. 913:

"But in all such cases the presiding judge must have a wide discretion in dealing with the situation as he finds it to prevent, where it is in his power, in the first

place, the trial jury from being brought in contact with any outside conditions that are in the least calculated to exert an undue influence upon them. And in the second place, to set aside a verdict of conviction where anything occurs without his knowledge and beyond his power to prevent, that was well calculated to produce a verdict that in his judgment was tainted by passion, sympathy, prejudice, corruption, or any other sinister influence whatever, and therefore not responsive to the law and the evidence. Unless it appears that the trial judge has abused his discretion in dealing with all such matters this court, after he has ruled upon such issues, will not disturb his finding.''

No abuse of discretion is shown in the case at bar.

Finally, appellant urges that the evidence was insufficient to sustain the verdict. On appeal we must view the testimony in the light most favorable to the State. Although the appellant and his witnesses gave one version of what happened during the fracas, the Hickey brothers and others positively testified that Joe Rice started the physical fighting and that appellant ''leveled'' the gun at Glenn Hickey. The disputed question of fact was one for the jury, which they resolved against appellant on substantial testimony.

The judgment is affirmed.

STOUT *v.* HEALEY.

4-9106 228 S. W. 2d 45

Opinion delivered March 6, 1950.

Wm. J. Kirby, for appellant.

Robinson & Parke, for appellee.

HOLT, J. This action involves the title to "Lot 3 of Joseph McCoppin's Subdivision of Lots 1, 2, 3 and 4. Block 27, Fulton's South Addition to Little Rock, Arkansas," which forfeited and was sold to the State for failure to pay the 1940 taxes levied against it. January 3, 1944, the State sold said property to W. I. Stout, Trustee, who in turn conveyed to Joe Cohn, both of whom were agents of Manie Schuman. The State filed suit to confirm title, and on October 10, 1944, appellees, John J. Healey, and his wife, Stella, in apt time, filed intervention before the confirmation of the sale in which they attacked the sale on many grounds, but relied "only upon the allegations that the description of the property in controversy was so defective, incomplete and unintelligible in the advertisement of delinquent lands that said lands could not be identified and that, therefore, there was a failure to advertise said land for sale as required by law, and consequently a failure of notice to the appellees that their property was delinquent and subject to sale."

Appellants answered admitting the forfeiture, sale and the execution of the above deeds, denied all other material allegations and "specifically pleaded the bar of § 13883 of Pope's Digest against the alleged defects in the tax sale."

Upon a trial, the court found the issues in favor of appellees, and from the decree comes this appeal.

For reversal, appellants first argue that the court erred in admitting in evidence a certified copy of the publications of the delinquent lands, lots, etc. in Pulaski County, Arkansas, as advertised in the Arkansas Gazette on October 25 and November 1, 1941, including a purported description of the property here in question. These published descriptions in the Gazette were as follows: "Joseph McCoppins Subdivision of Lots in City of Little Rock — Young Men's Building Association — Lots 1, 2, 3, 4, blk. 27 Fulton s, lot 3." The correct description of appellees' property here involved, as above indicated, is "Lot 3 of Joseph McCoppin's Subdivision of Lots 1, 2, 3, 4, Block 27, Fulton's South Addition to the City of Little Rock." In the circumstances, these Gazette publications were properly admitted in evidence.

We must bear in mind that the procedure in a tax sale such as this, is, in effect, *ex parte, Brodie* v. *Skelton,* 11 Ark. 120.

The only notice that the property owner has is the publication. He was not served with process or summons. The publication was therefore intended to be a substitute for personal service and there must be a substantial compliance with all requirements as to publication. It is not contended that the publications in the Gazette were not made as certified by the Gazette. To deny the property owner the right to introduce this published list of the lands advertised for sale for the purpose of showing that his property was not advertised as the law requires, or was so improperly described as to amount to no notice to him, would be to deny him the right to prove any irregularity. This evidence was therefore admissible under the provisions of Ark. Stats. (1947), § 15-105, "Proof of publication—Affidavit and copy of publication."

In the Brodie case, *supra,* this court said: "Now actual service here is not pretended, but the application is to amend and uphold and heal defects in a service,

which, if perfect, could at best be constructive; and to conclude the rights of the appellants by force of law, while that law was not complied with. Such *ex parte* proceedings must be substantially complied with, and cannot be held to less strictness, before they can have any force. We perceive no sensible point at which we can stop, short of dispensing with publication altogether, if we once commence a dispensation, first with one, and then with another requisite of law; and the best rule is to require a compliance with every requisite or let all other acts and substitutes stand for nothing in a case where the rights of parties are liable to be taken away without any actual notice of the proceedings. * * * We therefore cannot dispense with any requisite of the law in making publication; and until it is shown that all the requisites are complied with, we must treat this, as well as every other decree, as void and inoperative on the rights of the parties concerned."

The correct description identified appellees' property (Lot 3) as located in "Fulton's South Addition," but as published and advertised in the Gazette, it was described as being in "Fulton s, lot 3." The record reflects that there are two Joseph McCoppin's Subdivisions, and one McCoppin's Subdivision. There is also in existence both a "Fulton's addition" and a "Fulton's South Addition." Which was intended in the publication? Could the average land owner, or a person of average intelligence, identify his property from the advertised description? We think not. In using the small letter "s" and not the capital letter "S" commonly and properly used as an abbreviation for "South," the average person would be justified in concluding no mistake was made in using the small "s" but that the apostrophe had been inadvertently omitted and the description, "Fulton's Addition" was intended. Since appellees owned no property in that addition, the description did not describe their property, was no notice to them, and therefore the sale was void, and we so hold.

This court in *Cooper* v. *Lee,* 59 Ark. 460, 27 S. W. 970, said: "It is said that the purposes in describing the land

are: 'First, that the owner may have information of the claim made upon him or his property; second, that the public, in case the tax is not paid may be notified what land is to be offered for sale for the non-payment; and, third, that the purchaser may be able to obtain a sufficient conveyance.' Cooley on Taxation (2d Ed.) 405. A description of land in a tax proceeding that does not sufficiently identify it 'defeats one of the most just and obvious purposes of the statute—that of giving the owner notice that his land is to be sold, so that he may pay the tax and prevent the sale,' or at least redeem his land before the expiration of the time allowed for that purpose. To effect the laudable purpose of protecting the owner, the description should be such as will be readily understood by persons even ordinarily versed in such matters. A description which is intelligible only to persons possessing more than the average intelligence, or the use and understanding of which is confined to the locality in which the land lies, is not sufficient. *Schattler* v. *Cassinelli,* 56 Ark. 172, 19 S. W. 746."

Appellants also contend that appellees are barred by Ark. Stats. (1947), § 84-1118 (formerly § 13883, Pope's Digest) from questioning the tax sale at this late date. We cannot agree. Here, no contention is made that appellants had been in adverse possession of the lot in question. Appellees intervened before confirmation and have proceeded under Ark. Stats. (1947), § 84-1322, as was their right.

In *Standard Securities Company* v. *Republic Mining & Manufacturing Company,* 207 Ark. 335, 180 S. W. 2d 575, we said: "Appellee also argues that appellant's suit was barred by the two-year limitations statute, § 13883 of Pope's Digest. This contention, we think to be untenable for the reasons set out in *Cecil* v. *Tisher and Friend* (206 Ark. 962, 178 S. W. 2d 655). There is no claim by appellee, the holder of the tax deed, of actual adverse possession of the land in question for two years. (§ 8925, Pope's Digest.)

Affirmed.

Justice George Rose Smith concurs.

Justice Leflar dissents.

GEORGE ROSE SMITH, J., concurring. I should like to mention one additional point which the majority think it unnecessary to discuss. In a fairly long line of decisions we have said that the county clerk's certificate is the sole evidence that may be introduced to show that the notice of sale was published. See, for example, *Cook v. Ziff Colored Masonic Lodge No. 119,* 80 Ark. 31, 96 S. W. 618. I add this concurrence only to say that I do not regard those decisions as controlling the present case.

In the earlier cases the fact situation was the converse of that now presented; that is, the clerk's certificate of publication was in some way defective, and extrinsic evidence was offered to show that the notice had been correctly published. We held that the statute required the clerk to make a complete and permanent record of the proceedings, which could not be supplemented by outside evidence. But here the notice contained a void description, yet the clerk erroneously certified that the property had been properly advertised. If extrinsic evidence is excluded in this situation a landowner whose land was completely omitted from the published notice is precluded from showing that he did not receive the notice required by the statute. As I do not think the legislature meant to give such conclusive effect to an error on the part of the clerk, I consider our earlier expressions to have been *dicta* to the extent that they might be thought to apply to the present situation.

LEFLAR, J. I respectfully dissent. It seems to me that the property description, as published in the Arkansas Gazette on Oct. 25 and Nov. 1, 1941, was clear enough that any person acquainted with Little Rock real estate would know that it applied to the lot owned by appellee and could not apply to any other lot either in Little Rock or anywhere else.

It is stated that there were other additions and subdivisions in the city of Little Rock with which, under the description employed, there might have been confusion.

The description employed was:

"Joseph McCoppins Subdivision of Lots in City of Little Rock—Young Men's Building Association—Lots 1, 2, 3, 4, blk. 27 Fulton s, lot 3." (The Young Men's Building Association was appellee's immediate vendor.)

There is in Little Rock a "Joseph McCoppin's subdivision of Lots 23, 24, 25, 26, Block 27, Fulton's South Addition to Little Rock, Ark.," but the difference between "lots 1, 2, 3, 4" and "lots 23, 24, 25, 26" makes it impossible to confuse this with the published description.

There is a "McCoppin's Subdivision of Block 10, Wat Worthen's Addition to Little Rock, Ark." That is not even slightly similar to the published description employed in this case.

There is a "Fulton's addition to the City of Little Rock, Ark." But there is no Joseph McCoppin Subdivision in it, and no one acquainted with Little Rock realty, reading the published description employed in this case, would think that it related to that "Fulton's Addition." The only McCoppin subdivisions that are in a Fulton Addition are parts of "Fulton's South Addition."

"Fulton's South Addition to the City of Little Rock, Ark." affords no basis for confusion, because it is the area of which the lot now in question is actually a part.[1]

If the published description of land advertised for tax sale is actually inaccurate, or if it is so incomplete as not to describe the land at all, the tax sale based on it should be set aside. But if the description is sufficient to identify the land conclusively to one who knows its proper description and who also knows any other descriptions with which it might be confused, then the description is adequate. The law does not require that the description be sufficient to identify the land to an owner who does not know the correct description either of his own land or of other land with a somewhat similar description, just as it does not require that the descrip-

[1] This analysis of Little Rock real estate descriptions is based not on judicial knowledge but rather on evidence introduced by appellee in the trial below for the purpose of establishing inadequacy of the published description.

tion identify the land to one who cannot read. It seems to me that in the present case the majority of the court are requiring a degree of perfectness in description that goes beyond practical usefulness in identifying land, and approaches dangerously the standard of perfection for perfection's sake.

KELLEY *v.* DAVIS.

4-9127 227 S. W. 2d 637

Opinion delivered March 13, 1950.

J. E. Lightle, Jr., for appellant.

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

DUNAWAY, J. This appeal presents but one question: Was the Chancery Court in error in holding that Erman Kelley, appellant's ward, was competent at the time he executed a note and deed of trust to appellee, H. J. Davis, on January 2, 1948?

Early in 1947 Erman Kelley, accompanied by a brother, Vernon, went to see Davis, a merchant and farm implement dealer, about negotiating a loan. Vernon, who had previously had business dealings with Davis, requested that he make the loan and discussed with him the value of the farm lands to be mortgaged as security for the proposed loan. A loan of $2,200 was thereafter made, and on February 21, 1947, Erman Kelley executed a note

for that amount, secured by a mortgage on 320 acres of land in White County. Kelley paid the interest when the note became due, but requested a renewal of the loan and additional credit in the amount of $500 to cover advances to be made during the crop year of 1948. On January 2, 1948, a new note for $2,700 was executed, secured by a deed of trust on the above-described land. As further security for the payment of this indebtedness on April 2, 1948, Erman Kelley executed a chattel mortgage on his crop in favor of Davis.

Upon default in payment this foreclosure suit was filed January 21, 1949. On March 14, 1949, a default decree was taken against Erman Kelley; on April 11, 1949, appellant, as guardian of Erman Kelley, filed an intervention alleging that there had been no service of summons on his brother and that he was incompetent at the time the note and deed of trust were executed. The court set aside the default decree for lack of proper service, but at the conclusion of the trial of the cause found that Erman Kelley was competent, dismissed the intervention and confirmed the decree of foreclosure of March 11, 1948. The guardian has appealed.

It was shown that Erman Kelley had been a patient at the Veterans Administration Hospital, North Little Rock, Arkansas, from July 7, 1946, until November 1, 1946, with a diagnosis of dementia praecox, mixed type. After he was discharged against medical advice upon request of his family, he was never again hospitalized, nor was a guardian appointed for him until after the rendition of the foreclosure decree of March 11, 1948. He was drawing one hundred per cent disability compensation from the Veterans Administration, and was engaged in various farming operations in 1947 and 1948. This much is undisputed. The balance of the testimony is in sharp conflict.

Appellant's further proof may be briefly summarized: A psychiatrist for the Veterans Administration testified that on the basis of three examinations made by him over a period of a year and one-half, it was his opin-

ion that Erman Kelley had been incompetent at the time of his release from the hospital and at all times since. Several members of Erman Kelley's family testified that he was not competent, giving numerous details which it is unnecessary to set out here. Two neighbors testified that they had noticed a change in Erman after the war and that they thought something was wrong with him.

Appellees' proof of Erman's competency was based upon the testimony of numerous lay witnesses who had had business contacts with him during 1947 and 1948. Appellee Davis testified as to the transaction in which the notes and mortgages were executed. The Notary Public who took the acknowledgment of both mortgages testified that he discussed their terms and general conditions with Erman and that he noticed nothing to indicate mental unbalance. A merchant, music teacher, farmer, banker and lawyer all testified that in their business dealings with him they saw nothing to indicate that Erman was incompetent. According to the testimony of these witnesses Erman Kelley had bought farm equipment, rented land, testified in court in two lawsuits, discussed with the banker a new loan, and done many other things which we need not detail, all tending to show that he was competent to conduct his business affairs. With part of the proceeds of the Davis loan he had paid off a pre-existing mortgage on his lands.

The legal test of competency for the purpose here under consideration was fully discussed in *Schuman* v. *Westbrook,* 207 Ark. 495, 181 S. W. 2d 470, where we said at page 499 (quoting from *Pulaski County* v. *Hill,* 97 Ark. 450, 134 S. W. 973): "But the question in all such cases where incapacity arising from defect of the mind is alleged is, not whether the mind is itself diseased or the person is afflicted with any particular form of insanity, but rather whether the powers of the mind have become so affected, by whatever cause, as to render him incapable of transacting business like the one in question. As a general rule, it may be stated that, in order to have that measure of capacity required by law to be of sound mind, a person must have capacity enough to compre-

hend and understand the nature and effect of the business he is doing; . . ."

A question of fact is thus presented. We cannot say that the Chancellor's determination that Erman Kelley was competent when the instruments in question were executed was against the preponderance of the testimony.

The decree is affirmed.

SOUTHERN NEWSPAPERS, INC., *v.* MISSOURI PACIFIC RAILROAD COMPANY, GUY A. THOMPSON, TRUSTEE.

4-9122 227 S. W. 2d 639

Opinion delivered March 13, 1950.

C. T. Cotham, for appellant.

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

HOLT, J. Appellant sued appellees to recover damages to a linotype machine, alleged to have resulted from appellees' negligence in failing to transport said property —interstate—"safely without damage." Appellees filed a motion, and an amended motion, to dismiss, to which appellant demurred. The trial court sustained appellant's demurrer and, within the five days allowed, appellees answered, interposing a general denial and affirmatively pleaded as a defense, the non-compliance of appellant with the following provision in the Uniform Bill of Lading issued by the initial carrier, upon which the shipment was accepted: "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing the Bill of Lading, or the carrier on whose line the loss, damage, injury or delay occurred, within nine months after the delivery of the property, etc., or, in case of failure to make delivery, then within nine months after reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when the notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim, or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

The trial court, sitting as a jury, determined the issues, thus joined, in favor of appellees, and from the judgment is this appeal.

Stipulated facts were to the following effect: On October 11, 1945, the Mergenthaler Linotype Company shipped from Brooklyn, N. Y., the linotype machine in question, with the Uniform Bill of Lading attached, to appellant as consignee at Hot Springs, Arkansas. The shipment arrived at appellees' freight depot in Hot Springs October 29, 1945, and, at appellant's request,

"the machine was examined (by appellees' agent) and was found damaged." On the same day, October 29th, appellant, following the inspection "received and accepted said machine from the agent of the Missouri Pacific Railroad Company at Hot Springs, Arkansas, and paid the freight charges on the same." Thereafter, on February 17, 1947, appellant filed written claim with appellees for damages.

The primary and decisive question presented is: Did the provision in the Bill of Lading, above, providing that written notice of claim for damage must be presented within nine months after delivery of the shipment, apply in the circumstances here, and if so, has appellant complied with this provision? We hold that the provision did apply and that appellant failed to comply therewith and the trial court was correct in so holding.

It is undisputed that no written claim was filed with appellees until about fifteen months after the shipment was accepted and received by appellant, long after the nine months' period provided in the Bill of Lading had expired. In fact, verbal notice only was given, and relied upon by appellant, and this was not sufficient. The primary purpose of the time limit in the Bill of Lading was to prevent an unlawful preference by the carrier to the shipper. This time limit could not be waived by appellees in the circumstances. The transportation service to be performed was that of a common carrier under published tariffs, and the above provision, or rule, was a part of the tariff. See Title 49, U.S.C.A., § 20(11), note 282.

We said in *Kusin* v. *C. R. I. & P. Ry. Co.,* 168 Ark. 293, 270 S. W. 597: "In *Chicago, Rock Island Ry. Co.* v. *Williams,* 101 Ark. 436, 142 S. W. 826, this court had under consideration a provision in a bill of lading similar in all essential particulars to that under review here. In that case, we said: 'In the present case the requirement is not merely for notice to the carrier that damage has resulted, but it is that the claim for the "loss, damage or delay" shall be presented within the stipulated time. The purpose of the requirement is to give the carrier timely opportunity to investigate the claim for damage after the same has

been presented. This involves the right to investigate the contents of lost packages and the value of lost articles, as well as the facts bearing upon the question of its liability. . . .' In the recent case of *Davis* v. *Henderson,* 266 U. S. 92, 45 S. Ct. 24, 69 L. Ed. 182 (Arkansas case), the Supreme Court of the United States held (quoting syllabus): 'A tariff rule, approved by the Interstate Commerce Commission, providing that orders for cars given the carrier's local agent must be in writing, cannot be waived by the carrier through the agent's acceptance of oral notice from the shipper.' In the opinion the court said: 'There is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. The rule was a part of the tariff.' "

The "Interstate Commerce Act," Title 49, Transportation, § 20, par. 11, as amended, provides: "Provided further that it shall be unlawful for any such receiving or delivering carrier to provide by rule, contract, regulation, or otherwise, a shorter period for the filing of claims than nine months, etc." See, also, *St. Louis, Iron Mountain and Southern Railway Co.* v. *Starbird,* 243 U. S. 592, 37 S. Ct. 462, 61 Law Ed. 917, (an Arkansas case) and *Texas & N. O. R. Company* v. *Rosenblum* (Court of Civil Appeals of Texas) 195 S. W. 2d 443, in which the Starbird case is cited.

But, says appellant, the above par. 11 of § 20, relied upon by appellees, makes the following exceptions in the matter of notice and filing of claims: "Provided, however, that if the loss, damage or injury complained of was due to delay or damage, while being loaded, or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required, as a condition precedent to recovery."

Appellant argues that this section is controlling here and that neither notice of appellant's claim nor the filing thereof was required. The answer to this contention is that this provision, on which appellant relies, was, by an amendment to § 20, par. 11, enacted by the Congress

of the United States April 23, 1930, chap. 208, 46 Stat. 251, repealed, and has no application here.

Finally, appellant says "that the trial court by its order and judgment . . . , in which it sustained the demurrer and response of the plaintiff (appellant) and overruled the motion to dismiss as amended, was without jurisdiction to try this cause on its merits, as said Order and Judgment became and was *res judicata* of the only legal defense made by the defendants to this action."

We think this contention clearly untenable for the reason that appellees' motion to dismiss, as amended, was in effect a demurrer to appellant's complaint and when the trial court sustained appellant's demurrer to appellees' amended motion to dismiss, then the court properly allowed appellees time to file its answer, which appellees did within the five days allowed. This action of the trial court was in compliance with our Civil Procedure Statutes, Ark. Stats. (1947), § 27-1117: "Amendment of complaint after demurrer.—If the court sustains the demurrer, the plaintiff may amend, with or without costs, as the court may order. § 27-1118. Demurrer overruled—answer or reply.—Upon a demurrer being overruled the party demurring may answer or reply."

The issues, as above indicated, were not joined until the filing of appellees' answer. No final judgment had been made.

"The rules of *res judicata* are not applicable where the judgment is not a final judgment. . . . Thus, an order sustaining or overruling a demurrer is not a final judgment, although a final judgment may be entered thereafter on the order." (Restatement of the Law,—Judgments,—page 161, § 41.)

Affirmed.

METTETAL *v.* STANE.

4-9125 227 S. W. 2d 636

Opinion delivered March 13, 1950.

[redacted]

J. G. Moore, for appellant.

E. R. Parham, for appellee.

GEORGE ROSE SMITH, J. This is a continuation of a suit brought in 1942 by the appellees, H. C. and Anna Stane, to enjoin the appellants, J. E. and Mary Mettetal, from interfering with the Stanes' use of a road that crosses the Mettetals' land. When the case was tried in 1942 the chancellor issued a permanent injunction protecting the appellees' right to use the road. A few years later the appellants filed a motion to vacate the decree, alleging that the county had offered to construct an alternate route for the appellees. The Stanes at first resisted this motion on the ground that the court could not modify its decree after the lapse of the term, but on the

first appeal we rejected that contention. 213 Ark. 404, 210 S. W. 2d 804.

The issues raised by the motion to vacate the decree were then tried on the merits. The proof shows that contiguous tracts in Perry County are owned by H. C. Stane and Mary Mettetal, who are brother and sister. Their parents were John and Demmie Stane. H. C. Stane's tract was formerly owned by Demmie Stane, while Mrs. Mettetal derives her title from her father, John Stane. The road in question has been used by the occupants of the H. C. Stane farm for many years. In about 1934 the Mettetals installed a gate at the point where the road enters their land. Nevertheless the Stanes continued to use the road until 1942, when the appellants locked the gate. This suit was then brought, and after the first trial in 1942 the chancellor restrained the obstruction to the appellees' passage across the appellants' property. At the second hearing, on the motion to vacate, the appellants introduced proof to show that the county is now willing to provide the appellees with another road giving access to the main highway. The chancellor refused to vacate the injunction.

The decisive question is whether the appellees' right to use the road in controversy is an easement of necessity. If so, it is familiar law that the easement terminates with the cessation of the necessity that brought it into being. Tiffany on Real Property, 3rd Ed., § 819. The issue would then be whether the county's offer of a new route has eliminated the appellees' need for the old road. But if the easement did not arise from necessity the appellees' position is materially different. In the latter case the easement is a vested property right that the appellees are entitled to assert by virtue of their ownership of the dominant estate, and it makes no difference that an equally satisfactory way may have been tendered by the county.

The chancellor correctly held that the easement did not spring from necessity. An easement of necessity can be raised only out of land granted or reserved by the grantor, not out of land owned by a stranger. *Boulliou*n

v. *Constantine,* 186 Ark. 625, 54 S. W. 2d 986. In this case the Stanes and the Mettetals acquired their titles from different sources; the essential element of prior common ownership is lacking. Further, the proof does not show how this road originally came into existence. It had been used for at least twenty years before the appellants decided to lock the gate in 1942. This use created an easement by prescription. The appellants contend that the installation of the gate interrupted the prescriptive period, but that issue was concluded by the 1942 decree. That decree enjoined the appellants' interference with the easement and necessarily involved a finding that the easement still existed.

It is argued that the 1942 decree is also conclusive as to all matters that existed before its entry and that therefore we should not examine the earlier history of the road to determine its character. This argument would be sound if the decree had adjudicated the nature of the easement, but in that respect the decree is silent. We see no objection to re-examining the facts that led to the decree in order to determine what kind of easement it protected. Not only the facts but also the original pleadings confirm the conclusion that the road was not established as a matter of necessity. That being true, the appellees own an appurtenant easement that they may use regardless of the substitute road proposed by the county.

Affirmed.

ROGERS *v.* MOSS.

4-9107 227 S. W. 2d 630

Opinion delivered March 13, 1950.

Brockman & Brockman, for appellant.

H. K. Toney, Coy M. Nixon and *Sam M. Levine,* for appellee.

Ed. F. McFaddin, Justice. This case stems from a dispute between appellant, Rogers, and appellee, Koonce, as rival purchasers of a forty-acre tract (hereinafter called "the land"). The appellee, Billie Moss, a Negro, is the common source of title.

FACTS

In March, 1942, Billie Moss contracted to sell the land to his brother, Andrew Moss, for a consideration of $450. A form of contract was used under which Andrew Moss rented the land from Billie Moss and executed to him nine promissory notes, each for $50, due serially and annually on January 1 of each year thereafter, until all should be paid in full. The contract further provided that if the nine notes, and interest, and subsequent accruing taxes be paid promptly when due, then Billie Moss would execute to Andrew Moss a warranty deed conveying the land; and that if default be made by Andrew Moss in any respect for as long as ninety days, the contract would become void and Billie Moss might repossess the premises. There was no restriction against Andrew Moss assigning the contract.

All nine notes were left by Billie Moss with Mr. Russell Hollis, whom he authorized to receive the pay-

ments and in turn pay the proceeds to a designated creditor of Billie Moss. It is conceded by all parties that Andrew Moss made the payments to and including January, 1945, but a disputed question of fact is presented as to defaults after that date. On January 10, 1948, Andrew Moss made the following endorsement on the contract:

"For and in consideration of $277.73, the within contract is assigned to F. J. Rogers this the 10th day of January, 1948.

(Signed) Andrew Moss."

Appellant, Rogers, ascertained from Russell Hollis that the balance due on the contract was $277.73 (the last four notes and interest and an insurance item); and when Rogers paid this amount to Hollis, Andrew Moss made the above mentioned assignment, receiving no money for it. At one place in the record, Rogers indicated that he gave Andrew Moss the right to repurchase from him; and at another place Rogers stated that he gave Andrew Moss the free rent of the premises for the year 1948. At all events, the $277.73 mentioned in the assignment was paid by Rogers to Hollis and by Hollis to the previously designated creditor of Billie Moss. When Rogers demanded a deed from Billie Moss, in accordance with the contract, the latter claimed that Andrew Moss had never paid the notes due in January, 1946, and 1947; that by mutual consent Billie and Andrew had cancelled Andrew's claimed rights under the contract; and that Billie had repossessed the land and allowed Andrew (his elder and disabled brother) to remain in possession of the house as a brotherly act. Billie Moss, through a real estate broker—Kimber, who seems to have been his *de-facto* banker—sold the land to appellee, Koonce, by deed of April 12, 1948, and Koonce placed a tenant in possession of the land.

On April 29, 1948, Rogers filed this suit, seeking to compel Billie Moss to specifically perform the Andrew Moss contract held by Rogers. Koonce and his tenant, as well as the real estate agent—Kimber—were made

defendants. The issues were joined, the evidence was heard *ore tenus,* and a decree was rendered, dismissing Roger's complaint for want of equity. This appeal ensued.

OPINION

Appellant insists that the contract between Billie Moss and Andrew Moss was a *contract of sale,* citing *Friar* v. *Baldridge,* 91 Ark. 133, 120 S. W. 989, and other cases, many of which are listed in our recent case of *White* v. *Page, ante,* p. 632, 226 S. W. 2d 973 (decided February 13, 1950). Appellee claims that the contract between Billie Moss and Andrew Moss was a *rent contract* and cites *Thomas* v. *Johnston,* 78 Ark. 574, 95 S. W. 468, and *Smith* v. *Carter,* 213 Ark. 937, 214 S. W. 2d 64. It is unnecessary for us to decide between these contentions because even if the contract was one of sale (as claimed by appellant), nevertheless Andrew Moss had surrendered his rights thereunder long before his dealings with Rogers.

Both Billie Moss and Andrew Moss testified that Andrew failed to make the payments due in January, 1946, and thereafter; and that in 1946 they cancelled the contract by mutual consent, and that Billie Moss allowed his elder and disabled brother, Andrew, to remain on the land as a brotherly act. The Negroes spoke of the contract as being "dead" because of the defaulted payments. Mr. Kimber's testimony supports the contention that the contract was cancelled by mutual consent. Further, the fact that Billie Moss, in 1946, listed the land with Kimber to sell, lends credence to the conclusion that Andrew Moss' contract had been terminated long before Rogers paid the $277.73 on January 10, 1948. So, on the facts, we cannot say that the Chancellor was in error in holding—as he necessarily did—that the contract was cancelled by mutual consent. This is one of those cases where the evidence is in the sharpest of dispute; and from a reading of the entire record, we cannot say that the Chancellor's decision is contrary to the preponderance of the evidence. See *Murphy* v. *Osborne,* 211 Ark. 319, 200 S. W. 2d 517.

Appellant, however, urges that the cancellation between Andrew and Billie was oral and therefore insufficient; and in support of such contention appellant cites *Friar* v. *Baldridge,* 91 Ark. 133, 120 S. W. 989, in which we held that a parol rescission of a contract for the sale of land was within the Statute of Frauds. But even if the Moss contract be one for the sale of land, nevertheless it must be remembered: that this is the type of case in which the Statute of Frauds has to be pleaded, if relied on as a defense, and it was not so pleaded by any party in the present case.

The case at bar is similar in many respects to that of *Williams* v. *Jones,* 208 Ark. 303, 186 S. W. 2d 160, in which a contract for the sale of land had subsequently been rescinded by parol. Mr. Justice McHaney, speaking for this Court, said:

"On the question of the right to cancel by parol agreement a prior written contract of sale and purchase of real estate, appellants cite *Carter* v. *Mums,* 55 Ark. 73, 17 S. W. 445, and *Friar* v. *Baldridge,* 91 Ark. 133, 120 S. W. 989. . . . Appellants did not plead the statute of frauds as an affirmative defense in their answer and we have held that it cannot be availed of unless pleaded. *S. H. Kress Co.* v. *Moscowitz,* 105 Ark. 638, 152 S. W. 298, and cases there cited. . . . We have several times held that a verbal rescission of a written contract is not invalid as being within the statute under certain circumstances. In *Atkinson* v. *Thomas,* 138 Ark. 47, 210 S. W. 779, it was held that such a 'rescission of an option contract to purchase land is available in equity to repel a claim upon that contract.' See, also, *Eagle* v. *Pettus,* 109 Ark. 310, 159 S. W. 1116; *Robertson* v. *Lain,* 168 Ark. 210, 269 S. W. 574."

There is, however, one point that necessitates a reversal; and that relates to the $277.73 which Rogers paid to Hollis, and which Hollis paid to a creditor of Billie Moss. As to the payment by Rogers, there has been a complete failure of consideration, and he is entitled to a return of his money. Kimber, the real estate man—and

de facto banker for Billie Moss—testified that he offered to return the money to Rogers; but the decree makes no reference to such tender being made in court. Therefore, the decree is reversed and the cause remanded for the Chancery Court to enter judgment that Rogers, upon surrender by him of any check he may have, recover of Billie Moss and Kimber the $277.73, without interest. In all other respects the decree is affirmed. The costs of this appeal are assessed against Billie Moss and Kimber; the costs of the lower court are assessed against Rogers.

PLEASANT VIEW SCHOOL DISTRICT No. 4 *v.* KINCANNON, JUDGE.

4-9124 227 S. W. 2d 941

Opinion delivered March 13, 1950.

John J. Cravens, Jeta Taylor and *Mark E. Woolsey,* for petitioner.

Yates & Yates and *Wilson & Starbird,* for respondent.

ED. F. MCFADDIN, Justice. This is an original proceeding in this Court seeking a writ of prohibition to

prevent the Franklin Circuit Court from hearing Cause No. 1100 pending in that court.

FACTS

Chronologically, these events occurred:

(1) After the adoption of Initiated Act No. 1 of 1948[1] (considered by us in *Stroud* v. *Fryar, ante,* p. 250, 225 S. W. 2d 23) Pleasant View School District No. 4 of Franklin County (hereinafter called "Pleasant View") was increased by the addition to it of the pupils and territory of six other school districts; but, even with such additions, Pleasant View had only 327 children of school age, according to the figures of the 1948 school enumeration. However, Pleasant View claimed that 54 school children had been omitted from the enumeration, and that with these 54 added, Pleasant View had 381 children of school age and thus was "a large district," as those words were defined in *Stroud* v. *Fryar, supra.*

(2) Accordingly, on May 30, 1949, Pleasant View filed Cause No. 1095 in the Ozark District of the Franklin Circuit Court, naming as defendants the Franklin County Board of Education, the individuals composing such Board, the Franklin County School Supervisor, and the Treasurer of Franklin County. The complaint alleged the facts as stated in paragraph 1, *supra,* and the prayer was for a *writ of mandamus* to compel the defendants to recognize and deal with Pleasant View as "a large district." The cause was set for trial to be conducted on June 6, 1949, in the Court House in Ozark; but the parties to the cause, by consent (which is now claimed to have been secretly made), tried the case before the Circuit Judge in Chambers[2] in Van Buren, Arkansas, and treated affidavits as depositions. The result was that as of June 6, 1949, what purported to be a judgment of the Franklin Circuit Court, Ozark District, was entered of

[1] This Act in its entirety may be found on P. 1414 *et seq.* of the printed Acts of 1949.

[2] It is not necessary to consider here the question of the power of a Circuit Judge to hear causes in chambers or in vacation. Section 22-433 Ark. Stats. 1947 relates only to Chancellors and see *Young* v. *Young,* 201 Ark. 984, 147 S. W. 2d 736.

record, finding that Pleasant View in fact had 381 children of school age as of March 1, 1949, and granting the *writ of mandamus* as prayed. The effect of this purported judgment in Cause No. 1095 was to make Pleasant View "a large district" as defined in *Stroud* v. *Fryar, supra.*

(3) On June 9, 1949—three days after the purported judgment in Cause No. 1095—Cause No. 1100 was filed in the Franklin Circuit Court, Ozark District. The plaintiffs were Ed Morrell and sixty-one other citizens, taxpayers, and patrons in Pleasant View. In effect, the complaint in Cause No. 1100 alleged that the judgment in Cause No. 1095 had been procured by fraud practiced on the Circuit Judge; that the sixty-two plaintiffs had assembled at the Court House in Ozark to be present at the trial on June 6; that the attorneys for the plaintiffs and defendants in Cause No. 1095 had agreed to try the case before the Circuit Judge in chambers to avoid a public hearing; that Cause No. 1095 was in effect a "framed suit" [3] to accomplish a desired result; and that Pleasant View in fact had only 327 children of school age, and at all times was "a small district" within the purview of Initiated Act No. 1 of 1948. The prayer was that the

[3] Among other things, the complaint in Cause No. 1100 contained these allegations:

"That said purported judgment and order of said court is void and of no force and effect for the reason that it is the result of a fraud practiced upon the judge of the court in obtaining said order; . . . that the pretended judgment of the Franklin Circuit Court was the result of said misrepresentation and deception to the judge of said court in chambers in the City of Van Buren, Arkansas; that because of said misrepresentations and fraud upon the trial judge, said pretended judgment is wholly void and without force and effect; . . . in order to avoid their testimony, the attorneys in the case made arrangement by telephone to meet the judge of said court at chambers in the City of Van Buren, Arkansas, and there procured said void and illegal order. That said plaintiffs (in Cause No. 1100) were prevented from appearing as witnesses and from informing the Court of the true state of facts existing by said maneuver on the part of the attorneys in said cause. That these plaintiffs were present at the time and place theretofore set for the trial for the purpose of appearing as witnesses, or, if necessary, to intervene in said cause to protect their rights as patrons of the several districts, but were prevented from so doing by the failure of the court to convene at said time and place and by the illegal transfer of said hearing to the chambers of the judge of said court. That said action in transferring said hearing out of the County constituted a fraud upon the Court and upon the rights of the school patrons of said area."

judgment in Cause No. 1095 be set aside as void and that the plaintiffs have other relief. The defendants named in Cause No. 1100 were all of the plaintiffs and defendants in Cause No. 1095 and also the individuals acting as directors of Pleasant View. The Treasurer of Franklin County was a party defendant in both Cause No. 1095 and 1100 in order that the disbursement of public funds would be affected by the judgment sought in each case.

(4) On September 19, 1949, (a term of the Franklin Circuit Court subsequent both to the purported judgment in Cause No. 1095 and to the filing of the complaint in Cause No. 1100) the directors of Pleasant View demurred to the complaint in Cause No. 1100. The demurrer was overruled the same day, and the cause set for trial on November 14, 1949. Thereupon, Pleasant View and the individuals composing its Board of Directors filed in the Supreme Court this petition for writ of prohibition, seeking to prevent the Ozark District of the Franklin Circuit Court from entertaining any further proceedings in Cause No. 1100.

The petitioners, in their briefs now before us, argue:

(a) That Cause No. 1100 is an attempt to attack the corporate existence of Pleasant View, and that *quo warranto* brought by the State is the only available remedy for such an attack;

(b) That Cause No. 1100 is an attempt by individuals to oust the directors of Pleasant View, and that only the State can institute ouster proceedings;

(c) That the term of the Ozark District of the Franklin Circuit Court, in which the purported judgment was entered in Cause No. 1095, lapsed on the opening of the new term on September 19, 1949; and

(d) That prohibition is the proper remedy for petitioners.

OPINION

We deny the petition for prohibition. The plaintiffs in Cause No. 1100 were not attempting a *quo warranto* proceeding or an ouster proceeding, as claimed by the

petitioners in the case at bar: rather, the plaintiffs in Cause No. 1100 were attempting to vacate the judgment in Cause No. 1095 as procured by a fraud alleged to have been practiced on the Court. The fourth subdivision of § 29-506, Ark. Stats. (1947), permits such an attack. The complaint in Cause No. 1100 was verified as provided by § 29-508, Ark. Stats. (1947), so the lapse of the February, 1949, term becomes immaterial.

The allegations, as to the fraud in the procurement of the judgment in Cause No. 1095, are of such a serious and far-reaching nature that the Franklin Circuit Court should certainly have the right to hear the evidence to be offered in support of such allegations. If the allegations of fraud in the procurement of the judgment be proved false, then the petitioners herein have not been hurt by having all the facts presented to the Court which rendered the judgment so attacked. On the other hand, if the charge of fraud in procurement be found true, then the trial court that rendered the judgment can consider what, if anything, should be done in the premises. The allegation of fraud in the procurement raises a fact question which could not be settled by demurrer.

At all events, a writ of prohibition should not issue in this case for these additional reasons:

(1) The complaint in Cause No. 1100 presented a fact question as to whether the judgment in Cause No. 1095 was procured by fraud; and we have repeatedly held that the Supreme Court does not "undertake to determine facts upon petitions for writ of prohibition." See *Simms Oil Co.* v. *Jones,* 192 Ark. 189, 91 S. W. 2d 258; *Twin City Lines* v. *Cummings,* 212 Ark. 569, 206 S. W. 2d 438, and *Capital Transportation Co.* v. *Strait,* 213 Ark. 571, 211 S. W. 2d 889.

(2) The remedy by appeal is entirely adequate as to whatever judgment the Franklin Circuit Court may render in Cause No. 1100, and the writ of prohibition will not issue by this Court if the remedy by appeal be adequate. *Kastor* v. *Eliott,* 77 Ark. 148, 91 S. W. 8; *Macon*

v. *LeCroy,* 174 Ark. 228, 295 S. W. 31; *Safeway Cab & Storage Co.* v. *Kincannon,* 192 Ark. 1019, 96 S. W. 2d 7.

Therefore the writ of prohibition is denied.

PRUITT TRUCK & IMPLEMENT COMPANY *v.* FERGUSON.

4-9111 227 S. W. 2d 944

Opinion delivered March 13, 1950.

Robert L. Hyder and *Northcutt & Northcutt,* for appellant.

Robert N. Maxey and *P. C. Goodwin,* for appellee.

LEFLAR, J. This is a replevin action to recover a truck to which plaintiff Pruitt claims title. The Circuit Court, sitting without a jury, held for defendants, and plaintiff appeals.

Plaintiff, an auto dealer in West Plains, Mo., there on July 17, 1948, traded the truck to W. L. Craft. In part payment Craft transferred to plaintiff another truck, and gave plaintiff a note and check for the $200 balance. The check could not be cashed and the note was never satisfied, so that the $200 balance still remains unpaid. Plaintiff did not assign to Craft the certificate of title which under Missouri law (Mo. Rev. Stats., 1939, § 8382) must be assigned by the seller to the buyer of a motor

vehicle as a condition to effective sale thereof. Plaintiff Pruitt's testimony was that by their agreement the certificate of title was not to be executed until Craft finished paying for the truck, that he was to retain title till paid in full. Craft brought the truck to Arkansas, apparently secured an Arkansas license for it, and used it here for some months. During this time he incurred bills which remained unpaid, and his creditors brought a Justice of the Peace Court attachment proceeding against Craft for the amount of their claims. Defendant Ferguson as Constable attached the truck and later sold it under the attachment; defendant Wadley purchased it at the attachment sale; and defendant Roberts stored it on Wadley's behalf thereafter. Plaintiff Pruitt filed this replevin suit prior to the attachment sale, and defendants had notice of his claim before the sale, though he filed an amended complaint after the sale naming Wadley and Roberts as additional defendants.

The judgment of the Circuit Court in the present action was to the effect that plaintiff had no Missouri title which could prevail over the Arkansas attachment and the sale thereunder.

The question of what title interests in the truck existed by reason of the Missouri trade between plaintiff and Craft is governed by the law of Missouri, the place where the chattel was physically located when the transaction occurred. Restatement, Conflict of Laws, §§ 258, 260; *Wray Bros.* v. *H. A. White Auto Co.,* 155 Ark. 153, 244 S. W. 18. By the same token, the effect on the title of later transactions occurring when the truck was located in Arkansas is to be determined by Arkansas law. *Forrest* v. *Benson,* 150 Ark. 89, 233 S. W. 916; *Motors Security Co.* v. *Duck,* 198 Ark. 647, 130 S. W. 2d 3.

The Arkansas law of Conflict of Laws necessarily recognizes the validity of foreign-created titles in chattels brought into this state, and under our law not even a sale to a *bona fide* purchaser here will cut off such a prior legal title. *Public Parks Amusement Co.* v. *Embree-McLean Carriage Co.,* 64 Ark. 29, 40 S. W. 582; *Hinton* v.

Bond Discount Co., 214 Ark. 718, 218 S. W. 2d 75. If in the present case Pruitt retained title to the truck under Missouri law his title would not be cut off by the Arkansas attachment sale. The purchaser at the attachment sale would get only whatever interest Craft had. Our principal question therefore is as to what title interests existed in Pruitt and Craft respectively by reason of their Missouri transaction.

Section 8382 of the Missouri Statutes, as already stated, requires that on sale of a motor vehicle the certificate of title be transferred, with a proper assignment on the back, to the buyer. The statute provides that "it shall be unlawful" to buy or sell an automobile without transfer of the certificate, and that any such sale "shall be fraudulent and void." The Missouri courts have interpreted the section strictly, and hold that the buyer gets no title if the statute is not complied with. They hold that the title remains unqualifiedly in the seller until the certificate passes. *State ex rel. Connecticut Fire Ins. Co.* v. *Cox,* 306 Mo. 537, 268 S. W. 87, 37 A. L. R. 1456; *Perkins* v. *Bostic,* 227 Mo. App. 352, 56 S. W. 2d 155; *Anderson* v. *Arnold-Strong Motor Co.,* 229 Mo. App. 1170, 88 S. W. 2d 419; *Universal Credit Co.* v. *Story,* (Mo. App.) 128 S. W. 2d 654; *Robertson* v. *Central Mfrs. Mut. Ins. Co.,* 239 Mo. App. 1169, 207 S. W. 2d 59; *Peper* v. *American Exch. Bk.,* 357 Mo. 652, 210 S. W. 2d 41. There are many other Missouri cases to the same effect.

Under those Missouri cases there is no room for difference of opinion as to who had title to the truck after the Missouri transaction between Pruitt and Craft on July 17, 1948. The title was still in Pruitt.

Appellee contends that the judgment below can be supported on the authority of *Seward* v. *Evrard,* (Mo. App.), 222 S. W. 2d 509. In this case a car was sold in Missouri by Seward to one Stokes, without assignment of the certificate of title. Stokes secured an Arkansas license and registration certificate on the car, then took it to St. Louis and there sold it to a *bona fide* purchaser. A draft given by Stokes to Seward in payment for the car was uncollectible, and Seward sought by replevin to

recover the car. The holding was that Seward was estopped to set up his title as against the *bona fide* purchaser. Estoppel was based on the fact that Seward had knowingly put it in the power of Stokes to vest himself with the apparently perfect title that misled the purchaser.

In the instant case no comparable basis for estoppel exists. When Pruitt's car was sold at the attachment sale in the action brought against Craft the defendants already had notice that Pruitt was claiming title to it. There was no *bona fide* purchase nor any similar innocent acquisition of a title claim in reliance on a misleading situation of Pruitt's creation. The factual basis for estoppel that was present in *Seward* v. *Evrard* is absent here. See *Forrest* v. *Benson,* 150 Ark. 89, 233 S. W. 916.

Plaintiff Pruitt's title enables him to prevail in this action. According to his testimony the title was retained only as security for payment of the balance due on the car, as under a conditional sale, therefore he will have in the car only such rights, as against Craft's creditors, as Missouri law gives to a conditional seller who retakes the conditionally sold chattel under such circumstances.

The judgment is reversed and the case remanded.

KENNEDY *v.* CLAYTON.

4-9063 227 S. W. 2d 934

Opinion delivered March 13, 1950.

A. A. Poff, J. T. Wimberly, Virgil R. Moncrief and *John W. Moncrief,* for appellants.

Edwin E. Hopson and *Williamson & Williamson,* for appellee.

GRIFFIN SMITH, Chief Justice. Damage to growing cotton through use of a poisonous chemical was alleged. From a judgment for $4,460.78 on demands aggregating $15,727.23 the defendants have appealed and the plaintiffs have cross-appealed. Because of overlapping interests the case was difficult to try; but, in the main, incompetent testimony and erroneous instructions are complained of by the defendants. The record discloses that unusual issues were carefully dealt with by adroit and competent counsel under the guidance of a skilled judge whose rulings were not prejudicial, hence each appeal must be affirmed.

. . .

Howard Clayton, one of the plaintiffs, owns 840 acres west of Arkansas City, some within three miles of the town. Boggy Bayou separates Clayton's holdings from property owned by the parents of Clarence and Eugene Kennedy. The brothers, as equal partners, sharecropped these Kennedy lands in 1947, specializing in rice. They also raised oats and lespedeza.

A threatened infestation, including coffee beans, prompted Clarence and Eugene to dust the growing rice with a poisonous chemical known as 2, 4-D.[1] Two applications were made: one by airplane July 1, when 1,000 pounds were distributed; the other by hand equipment operated from horseback in August—800 pounds. The defendants claimed that with the slight information they had concerning potentiality of 2, 4-D, they did not think it would drift more than 60 or 75 feet unless carried by winds. To guard against this possibility the Kennedys had it applied during the late afternoon of a calm day, thinking these precautions would prove effective.

With transfer of the suit from Desha to Lincoln County, a substituted complaint was filed alleging that 216.1 acres were let by Clayton to the designated tenants under an agreement that the landlord should receive as

[1] The modest chemical name is Dichlorophenoxyacetic acid.

rentals a fourth of the cotton and seed produced.[2] The farm, spoken of as "fairly fresh" buckshot land, had formerly yielded a bale of cotton to the acre. In 1947 the 290.5 acres planted to cotton gave promise of an average crop until, as the complaint alleges, the July application of 2, 4-D was made, affecting all but 74.4 acres. The cotton that escaped was shown to have been planted on land similar in all essentials to that used by the complaining tenants, and to have had the same cultivation, fertilization, and attention. It was therefore used as a basis for determining what yield could have been reasonably expected if the injury had not occurred. All of the plaintiffs had Government crop insurance indemnifying them up to 210 pounds per acre if damage occurred because of drouth, too much rain, insect infestation, or plant disease. Actual per acre production on the unaffected 74.4 area was 399 pounds.[3]

There was substantial testimony in support of the following facts:

The 2, 4-D used by the Kennedys was manufactured by Reasor-Hill Corporation. E. M. Johnson and J. T. Henley, who were engaged in the feed and grain business at McGehee, represented Reasor-Hill as distributors, and prior to July 1 they had recommended to Clarence Kennedy that 2, 4-D be applied. During the morning of July 1 Clarence stopped at the feed and grain store and talked with Roy S. McGehee, a salesman for Reasor-Hill who worked in relationship with Johnson & Henley, and who had previously tried to make a sale when he went to the Kennedy farm with Henley. At that time Clarence Kennedy was told that coffee beans could be economically destroyed or controlled by dusting with 2, 4-D from an airplane. McGehee told Kennedy that in applying the poison the plane "hopper" should be cut off before the

[2] Distribution of the land was: To C. C. Clayton, 82 acres; Joe Britt, 111.3 acres; Leonard Washington, 10.5 acres; G. Dunn, 7.3 acres; Will Ross, 5 acres. Britt sublet 66.6 acres to Scott Dunham, Estella Dunbar, Henry Green, Joe Edwards, Roscie Jenkins, and James Davis. So, in addition to the principal plaintiff, there were eleven co-plaintiffs. [C. C. Clayton is Howard's brother].

[3] Two of the tenant plaintiffs produced more than 210 pounds per acre, and as to them no government indemnity was paid.

canal was reached—approximately 100 yards back in the rice field. This, he said, would effectively prevent the chemical from spreading to other areas. Still later, Johnson and McGehee returned to the farm with W. K. McClendon, an aviator, and the subject of dusting rice was again discussed. In testifying about these conversations at the feed and grain store July 1, Clarence said: "Well, I more or less decided *when* [the chemical] should go on. I went to McGehee that day and talked with Mr. Johnson and the airplane man, and they decided we would put it on in the late afternoon."

There was competent testimony that Clarence Kennedy had been told that the chemical would "drift," that it was "poisonous," and that it was injurious to cotton. While conceding this, Clarence maintained that he had been informed only that the danger was to nearby tracts, hence he was not put on notice that damage might attend the distribution he authorized.

The destructive potentials of 2, 4-D are emphasized in *Chapman Chemical Co.* v. *Taylor,* 215 Ark. 630, 222 S. W. 2d 820. See *Burns* v. *Vaughan, ante,* p. 128, 224 S. W. 2d 365. Appellants, however, say that their information in respect of possible damage attending a drift to other lands was confined to what they had incidentally heard; that in 1947 much less was known about the danger cotton would be subjected to through use of the material; and no one suspected that in an ordinary atmospheric calm 2, 4-D would drift beyond the protective area the defendants had sought to establish when the aviator cut off the distributor feed before reaching the canal. Therefore, say appellants, the Court erred in instructing the jury that they would be liable for a failure to exercise a degree of care "commensurate with the known danger, if any, involved in the use." The words "known danger" are complained of.

An instruction, copied in the footnote, defined negligence in its application to the defendants.[4] Each side ob-

[4] The instruction, in part, was: "If you find from a preponderance of the evidence that the Kennedys had, or in the exercise of ordinary care should have had, knowledge of sufficient facts to have caused

jected: the appellants because, as they insisted, the instruction "left out of consideration any knowledge of the defendants as to any dangers to be apprehended by their acts; . . . and also [omits] the element of time at which the alleged acts occurred, and [the instruction] is abstract." Cross-appellants objected generally, and specifically because liability was based on ordinary care alone.

Another instruction told the jury that if it should find for the plaintiffs, the measure of damage would be "the actual cash value of each of such plaintiff's crop at the time of its destruction, with interest thereon from the date of the injury at the rate of six percent per annum." Only general objections to this instruction were made by the plaintiff. The defendants objected specifically, but for reasons other than the reference to interest.

The principal objections made by the cross-appellants are that the verdict was inadequate, and that the Court erred in not giving certain instructions relating to the ultrahazardous nature of the activity, and in not declaring as a matter of law that liability was absolute when it was shown that the defendants directed use of the chemical.

An initial objection by the defendants came when the Court had finished stating what the issues were. While the record does not show that the trial judge read from the complaint, a comparison of its text with what the Court actually said is conclusive of the contention (not denied) that the complaint was used as a basis for the judicial explanations. *After* the reading had been completed the defendants objected, but did not move that the jury be discharged.

If it should be held (as has sometimes been done) that it was error to read from the pleadings, the answer here is that the objection came too late.

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an ordinarily prudent person, in the same or similar circumstances, to believe that the 2, 4-D dust might reasonably be anticipated to damage the plaintiffs' cotton, and that such dust put out by them did in fact drift upon plaintiffs' cotton and damage the same, then your verdict should be," etc.

Instructions given, refused, and modified, and the objections and discussions attending each, cover 29 pages of the record. The Court, after considering the suggestions offered by each side, summed up the issues and declared the applicable law through independent instructions, to which was added some of the suggested matter. A discussion here of all of the objections would not be useful in setting a precedent. On the whole the jury was correctly informed regarding the applicable law; nor is there substantial merit in the argument that effect of some of the instructions was comment on the facts.

An objection to the form of the verdict discloses apprehension by the defendants that the jury might either disregard defense testimony tending to minimize damage sustained by some of the plaintiffs, or confuse their collective rights in a way to prejudice the defendants. They also expressed fear that inclusion of the words, ". . . with interest at the rate of six percent from [blank]" might lead the jury to believe it could assess interest on an unliquidated demand.

The Court did not err in approving the form of the verdict. The plaintiffs were within the statute authorizing jointure in one action "in respect of or arising out of the same transaction, occurrences, or series of transactions or occurrences where questions of law and fact common to all of them will arise." Ark. Stats., § 27-806.

Howard Clayton, as the plaintiff in chief, had kept detailed records of separate acreages and production, the cost of cultivation, etc. Where cash rent as distinguished from apportionment in kind was provided for, that was disclosed. The University of Arkansas used some of Clayton's land for boll weevil tests. University representatives were frequently on the premises and watched crop conditions, both before and after the poison was permitted to spread.

Howard Clayton, in a carefully prepared tabulation, had entered the name of each tenant, with the number of acres cultivated, the pounds of cotton produced, (including or excluding seed) Government insurance paid on

seed and on cotton, and other cost-finding items. The insurance paid on all claims was deducted, and the net loss apportionable in severalty was ascertained. Clayton testified that as landlord his loss was $3,931.80.

The County Agent examined the cotton after the chemical had been applied. Detrimental effects were observed within two days. Some of the tenants, said Clayton, sustained greater loss than others, severity depending to some extent upon the distance from the bayou. The substance of Clayton's testimony was that the computations he had made included all basic integrants and that they were factually correct.

A statement by Clayton was that during the latter part of June natural fertility of the planted area was supplemented by a per acre allotment of 150 pounds of ammonia nitrogen. Cultivation was of a kind best suited to soil, season, and location of the crop.

Prospects July 1 were that a bale to the acre might with reason be expected. The fact that lands similarly situated and with like cultivation *did* yield a bounteous crop when not touched by the chemical was pointed to in support of the inference that the difference was due to the spread of 2, 4-D.

The trial Court did not deny to the defendants any facility in presenting to the jury their theory of nonliability, and it is difficult to see how a matter with as many involvements as were presented for consideration could have been dealt with in a more expeditious manner or one more responsive to fair play. We agree with the essential finding that if the defendants did not actually know of the probability that 2, 4-D would drift, the knowledge they had should have put them on notice, resulting in an investigation along precautionary lines.

The duty resting upon the defendants to exercise that degree of care "commensurate with the known danger" must be construed with other language used by the Court; and this, as has been pointed out, would be the danger they actually knew of, or the danger factor

they would have found if, as reasonable men with the information admitted or shown by the proof, they had made inquiry.

Another objection is to the Court's failure to permit the jury to say whether McClendon was a servant of the defendants or an independent contractor. The answer must be that it would make no difference. The instrumentality (2, 4-D) was inherently dangerous to cotton. Liability under the facts here could not be shifted.

We do not think Plaintiffs' Instruction No. 8 was susceptible of the objection that it told the jury that if either plaintiff was damaged, all were. What the instruction said was that if there should be a finding of liability "under the instructions of the Court," then the measure of damage for which a verdict should be returned in favor of such plaintiffs "is the actual cash value of each of such plaintiff's crop (singular) at the time of its destruction." [This is the instruction in which interest from date of the injury "at the rate of six percent per annum" was mentioned].

The instruction shows on its face that it was to be read in connection with others, and that *each* plaintiff's damage was to be a matter of individual computation.

Likewise, appellants' objection to the instruction on interest must be rejected. While the general rule is that interest will not be allowed on an unliquidated claim, there are exceptions. See *Gen. Fire Ext. Co.* v. *Beal-Doyle D. G. Co.,* 110 Ark. 49, 160 S. W. 889, Ann. Cas. 1915D, 791. The opinion mentions *St. Louis, I. M. & S. Ry. Co.* v. *Biggs,* 50 Ark. 169, 6 S. W. 724. There the instruction approved by the Court was: "If the jury find for the plaintiff, the measure of damages for any animal they may find to have been killed will be the market value of said animal or animals at the date of said killing, with six percent interest per annum from the time of said killing until the present date."

Argument by the Railway Company in the Biggs case was that while allowance of interest on unliquidated and contested claims is within the discretion of the jury,

"yet it is not allowed as a matter of right or law." The case was decided in 1887, and Mr. Justice WM. W. SMITH in writing the opinion said that "the modern rule" allowing more latitude than had formerly been permitted was adopted in *Kelly* v. *McDonald,* 39 Ark. 387.

The early case of *Crow* v. *State,* 23 Ark. 684, (1861) recognized the jury's right to allow interest in a judgment on a sheriff's bond where the officer had abused a process in his hands. It was held, however, that an instruction was erroneous when it told the jury that interest would be payable as a matter of law.

In the case at bar the instruction said that actual cash value, with interest from the date of injury, was the measure of damage. The objection was general.

A textwriter for American Jurisprudence, v. 15, p. 590, concludes from a review of many cases that, in general, interest is allowable on damages assessed in actions for injury to real property; also, (p. 588) for injury to personalty. Cases dealing with the subject are collected in *Jacobs* v. *United States,* 290 U. S. 13, 54 S. Ct. 26, 78 L. Ed. 142, 96 A. L. R., p. 1, *et seq.* There are also annotations to *Abrams* v. *Rushlight,* 157 Ore. 53, 69 P. 2d 1063, 111 A. L. R., 1292.

A fine statement of the theory upon which interest may be allowed in cases similar to the one with which we are dealing is in the opinion of Mr. Justice MITCHELL, who wrote for the court in *Richards* v. *Citizens' N. G. Co.,* 130 Pa. 37, 18 Atl. 600. The case is cited in a footnote to Sutherland's Treatise on The Law of Damages, v. 1, p. 1139. Judge MITCHELL said: "Interest cannot be recovered in actions of tort or in actions of any kind where the damages are not in their nature capable of exact computation, both as to time and amount. In such cases the party chargeable cannot pay or make tender until both the time and the amount have been ascertained, and this default is not therefore of that absolute nature that necessarily involves interest for the delay. But there are cases sounding in tort and cases of unliquidated damages where not only the principle on which the recovery is to be had

is compensation, but where also the compensation can be measured by market value or other definite standards. Such are cases of the unintentional conversion or destruction of property, etc. Into these cases the element of time may enter as an important factor and the plaintiff will not be fully compensated unless he receive, not only the value of the property, but receive it, as nearly as may be, as of the date of his loss. Hence it is that the jury may allow additional damages in the nature of interest for the lapse of time. It is never interest as such, nor as a matter of right, but compensation for the delay, of which the rate of interest affords the fair legal measure."

Whether the criticized instruction was complete in fullness of explanation may be open to doubt,—that is, whether use of the words "measure of damage" could have been construed as a statement from the Judge that allowance of interest was imperative. If the rational construction indicated mandatory action, the error was inherent and was reached by the general objection. But viewing the transaction from all of its angles, we conclude that the language was not such as to cause the jury to believe that it could not return a verdict without adding interest, therefore the vice ought to have been called to the Court's attention specifically.

Other alleged errors have been argued. They are without prejudicial significance, and the judgment must be affirmed. It is so ordered.

DOBBINS *v.* MARTIN BUICK COMPANY.

4-9126 227 S. W. 2d 620

Opinion delivered March 13, 1950.

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

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

LEFLAR, J. The Martin Buick Company of Cookeville, Tenn., (hereinafter called Martin) brought this action of replevin to recover a Plymouth automobile to which it claimed title. Title was also claimed by defendant Dobbins. The Circuit Court, sitting without a jury, held for plaintiff Martin, and defendant appeals.

One Atkinson had on Feb. 5, 1948, purported to purchase the car from Martin at Martin's place of business in Tennessee, and had fraudulently given Martin a check on a non-existent account in a Georgia bank in payment for it. Atkinson at once took possession of the car, and Martin gave Atkinson an "invoice" identifying the car and stating the price, $1,825. Nothing in the invoice indicated that the price had been paid. No bill of sale was issued to Atkinson, it being Martin's purpose to execute a bill of sale only after the check had cleared.

The check was in due course turned down by the drawee bank, and Martin then began looking for the car. Atkinson had put Martin on the wrong trail by representing himself as a Georgia used car dealer. Actually,

he brought the car at once to Arkansas, and by mail secured on Feb. 9, 1948, an Arkansas state license and a "certificate of registration," commonly called a "pink slip," in his own name.[1] Shortly thereafter Atkinson sold the car to the Baker Automobile Co. (hereinafter called Baker), auto dealers at Searcy, Ark., who bought it in good faith and for value in reliance upon the invoice and the Arkansas "certificate of registration" bearing Atkinson's name. Baker in turn sold the car to defendant Dobbins, who was likewise an innocent purchaser. Later Martin located the car and brought this action to recover it. The facts as just recited are established by stipulation of the parties, and the defendant's appeal involves no dispute concerning them.

It cannot be denied that Martin retained title to the car after Atkinson's fraudulent acquisition of possession under color of purchase in Tennessee. The law of Tennessee, the *situs,* governs the effect of that purported sale upon title to the car. Restatement, Conflict of Laws, §§ 257, 260; *Ghio* v. *Byrne,* 59 Ark. 280, 27 S. W. 243. The law of Tennessee is that under the circumstances the title remains in the defrauded seller. Williams Tenn. Code, Ann. (1934), § 7211; *Young* v. *Harris-Cortner Co.,* 152 Tenn. 15, 268 S. W. 125, 54 A. L. R. 516; *Knoxville Tinware Co.* v. *Rogers,* 158 Tenn. 126, 11 S. W. 2d 874. To this conclusion the parties to this action have virtually agreed. It was Martin's car that Atkinson brought into Arkansas and here sold to Baker at Searcy.

Defendant's contention is that Martin is estopped to deny that Baker (and subsequently Dobbins) acquired good title to the car by the *bona fide* purchase from Atkinson. The theory underlying this contention is that Martin put it in the power of Atkinson to misrepresent himself as owner of the car by vesting Atkinson with such outward *indicia* of ownership as would mislead innocent persons like Baker and Dobbins into thinking that Atkinson owned the car and had full power to sell it. Cases such as *Seward* v. *Evrard,* (Mo. App.) 222 S. W. 2d

[1] This certificate was, of course, issued prior to the enactment of the present Arkansas Motor Vehicle Title Registration Law, Act 142 of 1949, appearing in Ark. Stats. (1949 Supp.) §§ 75-101 *et seq.*

509, are relied upon to support this theory. In *Seward* v. *Evrard,* a car was sold in Missouri by Seward to one Stokes, with title retained in the seller. Stokes secured an Arkansas license and certificate of registration on the car, in much the same fashion as did Atkinson in the present case, then took the car to St. Louis and sold it to a *bona fide* purchaser. Stokes had fraudulently given Seward an uncollectible draft in payment for the car, and Seward brought replevin. The holding of the Missouri court was that under Missouri law Seward was estopped to set up his title as against the innocent purchaser. And see *Crescent Chevrolet Co.* v. *Lewis,* 230 Iowa 1074, 300 N. W. 260. Cf. *Pool* v. *George,* 30 Tenn. App. 608, 209 S. W. 2d 55.

Whether such an estoppel is to be applied against Martin in the present case is to be determined by the law of Arkansas. This conclusion is compelled by two well-established principles in the law of Conflict of Laws.

One of these principles, previously mentioned herein, is that the effect of any given transaction upon title interests in a chattel is controlled by the law of the *situs* of the chattel at the time. Restatement, Conflict of Laws, §§ 255-259; *Motors Security Co.* v. *Duck,* 198 Ark. 647, 130 S. W. 2d 3. Here the auto was located in Arkansas at the time of the sale to an innocent purchaser which assertedly by process of estoppel took title out of Martin.

The other principle is that the legal effect of allegedly wrongful conduct is determined by the law of the place where harm occurs or loss is sustained as a result of the conduct complained of. Restatement, Conflict of Laws, § 377. This principle is most commonly applied in Torts cases, as in *Alabama G. S. R. Co.* v. *Carroll,* 97 Ala. 126, 11 So. 803, 18 L. R. A. 433, 38 A. S. R. 163 (negligence in Alabama caused injury in Mississippi; law of Mississippi governs); *Otey* v. *Midland V. R. Co.,* 108 Kans. 755, 197 Pac. 203 (sparks from engine in Kansas set fire to barn in Oklahoma; law of Oklahoma governs). It is illustrated by *Cameron* v. *Vandergriff,* 53 Ark. 381, 12 S. W. 1092, in which blasting in the Indian Territory caused a rock to fall on and injure the plaintiff in Arkan-

sas, the holding being that these facts gave rise to an actionable Arkansas tort.

This second principle is relevant here only if the asserted estoppel be deemed to sound in tort. "Estoppels *in pais* depend upon facts which are rarely in any two cases precisely the same. . . . A party who by his acts, declarations or admissions, or by failure to act or speak under circumstances where he should do so, either designedly, or with willful disregard of the interest of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed, afterwards, to come in and assert his right, to the detriment of the person so misled. That would be a fraud. . . . Generally it is said that if the owner of property, with a full knowledge of the facts, stands by, and permits it to be sold to an innocent purchaser, without asserting his claim, he will be estopped. . . . The leading idea is that a person shall not do, or omit to do, anything regarding his rights, which if taken advantage of by him, would work a fraud upon another." EAKIN, J., in *Jowers* v. *Phelps,* 33 Ark. 465, 468, quoted in *Williams* v. *Davis,* 211 Ark. 725, 731, 202 S. W. 2d 205, 208. Also see Bigelow, Estoppel (6th Ed., 1913) 6. This does not mean that estoppel is a tort; rather (in its aspect here involved) estoppel is a rule of law which gives relief from harms caused by misrepresentation, Ewart on Estoppel, p. 12, and in that sense it sounds in tort.

That being true, it is proper to apply in estoppel cases the same Conflict of Laws principle that applies in tort cases. The governing law is that of the state in which harm occurs or loss is sustained as a result of the conduct complained of. In this case that is the law of Arkansas.

In *Forrest* v. *Benson,* 150 Ark. 89, 233 S. W. 916, a Texas car owner allowed one Greene to hold possession of his car for two years and to take out Texas car licenses in Greene's own name for these years. Greene brought the car to Arkansas and here sold it to a *bona fide* purchaser. We held that these facts created no basis

for an estoppel against the Texas owner; he was allowed to establish his ownership against the innocent Arkansas purchaser. For similar holdings, see *McIntosh & Beam* v. *Hill,* 47 Ark. 363, 1 S. W. 680; *Russell* v. *Brooks,* 92 Ark. 509, 122 S. W. 649; *Rogers* v. *Scott,* 128 Ark. 600, 194 S. W. 689; *Meyer* v. *Equitable Credit Co.,* 174 Ark. 575, 297 S. W. 846; *Essex City Acceptance Corp.* v. *Pierce-Arrow Co.,* 288 Mass. 270, 192 N. E. 604, 95 A. L. R. 1314.

These decisions preclude a finding of estoppel in the present case unless the invoice which Martin gave to Atkinson constituted a representation that Atkinson had title. In *Garner Mfg. Co.* v. *Cornelius Lbr. Co.,* 165 Ark. 119, 125, 262 S. W. 1011, 1014, we said: "Inasmuch as the (trial) court seems to have treated the invoice as evidencing the contract between the parties, we deem it proper to say, in the language of the Supreme Court of the United States, that 'an invoice is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity and cost or price of the things invoiced, and it is as appropriate to a bailment as it is to a sale; hence, standing alone, it is never regarded as an evidence of title.' *Dows* v. *Nat'l Exchange Bank,* 91 U. S. 618-630, 23 L. Ed. 214; *Sturm* v. *Baker,* 150 U. S. 312-328, 14 S. Ct. 99, 37 L. Ed. 1093." Similar definitions of the term "invoice," from other jurisdictions, are cited in 48 C. J. S. 764.

We conclude that under the law of Arkansas Martin did not vest Atkinson with such *indicia* of title to the car as to estop Martin from setting up his own valid title against an innocent purchaser of Atkinson's nonexistent title. The judgment of the Circuit Court is affirmed.

KELLEY *v.* ACKER.

4-9135 228 S. W. 2d 49

Opinion delivered March 20, 1950.

R. D. Rouse, for appellant.

Tompkins, McKenzie & McRae, for appellee.

MINOR W. MILLWEE, Justice. W. A. McMillian died intestate at Prescott, Arkansas, survived by his widow and two married daughters, the appellant, Mrs. E. M. Kelley, and appellee, Annie Lee Acker. At the time of his death in April, 1938, Mr. McMillian owned a house and lot in Prescott which constituted his homestead. His widow continued to reside in the home until her death in January, 1949. Appellee went to live with her parents about 1929 and has since resided on the property in controversy.

Appellant, who has resided in Tulsa, Oklahoma, for many years, filed this suit against appellee to partition and sell the property, alleging that each owned an undivided half-interest therein, subject to a mortgage indebtedness due Home Owners Loan Corporation in the sum of $495. In her answer and cross-complaint, appellee denied that appellant was entitled to an equal division of the proceeds of the partition sale and alleged that appellee had discharged $739.20 of the mortgage debt to HOLC, and had paid $462.21 in repairs and $109.07 for a hot water heater, which was attached as a fixture to the property; that the amounts paid should be fixed as a lien against the property, and paid her out of the proceeds of the partition sale. In reply, appellant denied that appellee made said payments and further alleged that if she did so, she acted as a mere volunteer, and said payments should be considered as rent for her use and occupancy of the property; and that appellant was entitled to contribution for the rental value of the home since the death of their mother.

Appellee was the only witness at the trial. According to her testimony, she and a minor son went to reside with her parents about 1929. After the death of her father in 1938, she continued to reside with her mother, and during such period earned about $1,000 a year as an expression teacher, while her mother had an income of about $425 a year from an old age pension and small

contributions from a sister. She testified that her mother became an invalid shortly after her father's death and demanded constant attention; that the mother's income was used to defray her medical expenses, to purchase special foods required for her mother, and to pay utility bills; that appellee made all the monthly payments to HOLC from 1938 to 1949 from her separate funds earned as an expression teacher; that appellant made no contribution to their mother's support, except occasional small gifts, and knew that appellee was taking care of her; that she had to conduct her teaching in the home after her mother became an invalid; and that she contributed to the support of her mother and paid none of her own bills out of her mother's income.

The parties stipulated that $739.20 was paid on the mortgage indebtedness to HOLC, from the time of W. A. McMillian's death in 1938 to February, 1949, which payments were applied as follows: $337.04 toward retirement of the principal debt; $184.80, taxes and insurance; and $217.36 to payment of interest on unpaid principal. It was further stipulated that the monthly rental value of the property, from the time of Mrs. McMillian's death to the date of the sale of property on January 15, 1949, was $25.

The Chancellor found that appellee made the payments to HOLC and for the water heater out of her own funds, and that she was entitled to receive $639.20 before division of the partition sale proceeds, which sum represented the $739.20 payment to HOLC, plus $90.00 for the water heater, less $190.00 rental value of the premises since the death of the life tenant. The Commissioner was accordingly directed to pay said sum to appellee before division of the sale proceeds of $2,025.

For reversal, appellant insists that appellee's testimony to the effect that she made the payments above mentioned out of her own separate funds, and at the same time assisted in payment of her mother's living expenses, is incredible, since appellee only had an income of a little more than twice that of her mother. We do not so consider it, and hold that the Chancellor's deter-

mination of this issue is not against the preponderance of the evidence.

It is next insisted that even if appellee made the payments out of her separate funds, she is not entitled to contribution from appellant. We first consider the $337.04 payment of principal on the mortgage debt. It is the rule generally that, as between the life tenant and the owner of a future interest in property, the owner of the life interest is not compelled to pay the principal sum or debt of an encumbrance, and if he does make such payment, he is entitled to reimbursement from the reversioners or remaindermen to the extent of their interests in the property which had been subject to the encumbrance. 33 Am. Jur., Life Estates, Remainders, Etc., § 461; Restatement of the Law of Property, Vol. 1, § 132.

It is also the general rule that an heir who pays a just debt of his ancestor, or who pays more than his proportionate share, is entitled to contribution from his co-heirs. See 26 C. J. S. Descent and Distribution, § 138, where the textwriter says: "In the absence of an express agreement on the part of the heirs to reimburse the heir paying a debt of the ancestor, the right to contribution must arise under the general principles of equity." In *Spurlock* v. *Spurlock,* 80 Ark. 37, 96 S. W. 753, we held that the right of subrogation to one paying a debt for another is extended to widows discharging debts against their husband's estate. In *Jefferson* v. *Edrington,* 53 Ark. 545, 14 S. W. 99, 903, where the widow of a mortgagor who was under no obligation to discharge the mortgage debt, paid it, she was held entitled to be subrogated to the mortgage lien. See, also, *McDaniel* v. *Conlan,* 134 Ark. 519, 204 S. W. 850.

In the instant case, the obligation to discharge the principal of the mortgage debt rested primarily on appellant and appellee, the remaindermen. Under the equitable rules above announced, appellee was entitled to be subrogated to the extent of the principal of the mortgage debt which she paid for the benefit of both; and the Chancellor correctly held that she was entitled to a lien

on the proceeds of the partition sale to the extent of such payment.

We are also of the opinion that the Chancellor correctly allowed contribution for installation of the hot water heater. The rule is well established that although a life tenant must keep the property in repair, he is under no general legal duty to make permanent improvements thereon. 33 Am. Jur. Life Estates, Remainders, Etc., § 456; Restatement of the Law of Trusts, Vol. 1, § 233. Compensation for permanent improvements made by a life tenant cannot ordinarily be recovered from the remaindermen. *Smith and Shoptaw* v. *Stanton,* 187 Ark. 447, 60 S. W. 2d 183.

In *Bowers* v. *Rightsell,* 173 Ark. 788, 294 S. W. 21, the Court said: "It is well settled in this State that in his relation as tenant in common, one has a right to make improvements on the land without the consent of his co-tenants; and, although he has no lien on the land for the value of his improvements, he will be indemnified for them, whether made by himself or those claiming under him, in a proceeding in equity to partition the land between himself and co-tenants, either by having the part upon which the improvements are located allotted to him, or by having compensation for them, if thrown into the common mass . . ."

Appellee installed the hot water heater as a permanent fixture shortly before the death of her mother. The installation of the heater enhanced the value of the property in the sum of $90.00, as of the date the parties' right to occupy the property as co-tenants accrued, which is the proper measure of the amount of recovery. *Staples* v. *Pearson*, 230 Ala. 62, 159 So. 488, 98 A. L. R. 852.

As to appellee's payment of the taxes, insurance and interest on the mortgage debt, a different rule applies. Under Ark. Stats. (1947), § 84-921, the duty rested upon the life tenant to pay the general taxes. Section 84-925 also provides for forfeiture of a life estate for the failure to pay taxes. The general rule is that the remainder-

man, paying taxes during the estate of a life tenant, is not entitled to contribution from his co-tenants. Anno. 48 A. L. R. 594.

We have also held that it is the duty of the life tenant to keep down the interest on encumbrances upon the property of the estate. See *McDaniel* v. *Conlan, supra,* and 31 C. J. S., Estates, § 48. We think the payment of insurance premiums on the mortgaged property falls in the same category as the payment of interest and taxes. See Restatement of the Law of Trusts, Vol. 1, § 233(e). The property was already encumbered by the mortgage when the life tenant came into possession, and the insurance premiums were included in the monthly payments to HOLC. In *Livesay* v. *Boyd,* 164 Va. 528, 180 S. E. 158, where the estate was subject to a mortgage executed by the donor of the life estate and contained a covenant that buildings on the estate should be kept insured, the Court held that the premiums must be paid by the life tenant. Here appellee was occupying the property rent free; and her payments of taxes, insurance and interest on the mortgage debt discharged obligations for which the life tenant was primarily responsible. Under the circumstances, we think such payments should be presumed as gifts to her mother, particularly in the absence of any evidence of an agreement on the part of appellant to be bound by such payments.

The decree of the trial court, allowing contribution for payments by appellee of the principal on the mortgage debt and the value of the hot water heater installed on the property is therefore affirmed. That part of the decree which entitles her to contribution for payments of taxes, insurance and interest on the mortgage debt is reversed and the cause remanded, with directions to enter a decree in accordance with this opinion. The costs of this appeal will be paid equally by the parties.

HOWELL *v.* SIMPSON.

4-9138 228 S. W. 2d 41

Opinion delivered March 20, 1950.

Rehearing denied April 17, 1950.

O. A. Featherston, for appellant.

Tom Kidd, for appellee.

LEFLAR, J. This is a boundary line dispute. Plaintiffs Howell, husband and wife, own land immediately adjoining a 40-acre tract owned by defendant Simpson. Plaintiffs claim that by reason of adverse possession and long acquiescence their ownership extends on the west side to an old fence which has stood for many years on defendant Simpson's land. The Chancellor found that the true boundary was at the line fixed by the deeds under which both parties hold their titles, and not at the old fence. The plaintiffs appeal.

The dispute was brought to a head when defendant Gilmer, under directions from Simpson, cut the merchantable timber on the strip of land at the east edge of Simpson's forty acres, between the old fence and the line fixed by the deeds. The Howells sued for the value of the timber cut and for damage done to the fence, also to require restoration of the fence. Defendants' answer denied that plaintiffs had any title to the strip of land from which the timber was cut.

That Simpson has clear paper title to the strip is not denied. But plaintiffs and their deceased predeces-

sor in title, Pearlie Buster (father of plaintiff Mrs. Howell), have held possession of the strip for over thirty years. Buster himself had possession until 1941; plaintiffs' possession commenced in 1942 and continued for somewhat less than seven years prior to the present suit. If the successive possessions of Buster and the plaintiffs were adverse, title by adverse possession is in the plaintiffs now.

Defendants' contention is that Buster never claimed title to the strip in himself, but always held the view that he was occupying under the permission of the true owner. Defendants' principal evidence to this effect was the testimony of Alfred Featherston, who sold the land to Simpson. Featherston testified that Buster told him that he was not claiming the strip for himself, that he (Buster) wanted the fence moved over so that his stock could get water from a creek that was on Featherston's land, that Featherston gave permission for this, and that Buster executed an affidavit acknowledging Featherston's title (which affidavit was given in evidence.) Other witnesses, neighbors of Buster, testified that he had told them that he did not own the strip adjoining the creek, that he was allowed by the owner to occupy it so his stock could get to the water. One witness who had once cut timber on Buster's land testified that Buster told him not to cut trees from this strip because "that is the other man's land." It was on this evidence that the Chancellor held Buster's possession was permissive, not adverse. Evidence to the contrary was meager. The Chancellor's finding clearly was not contrary to the preponderance of the evidence. Under the facts found, no adverse possession by Buster could be established. *Dial* v. *Armstrong,* 195 Ark. 621, 113 S. W. 2d 503.

Plaintiffs argue that the witness Featherston should not have been allowed to testify because he was an interested party, being liable over on the covenants in his deed to defendant Simpson. The Schedule to the Arkansas Constitution of 1874, § 2, provides otherwise. Interest has long since ceased to render witnesses incompetent.

Plaintiffs also argue that the hearsay evidence concerning statements made by Pearlie Buster, their predecessor in title, was improperly admitted. "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." *Russell* v. *Webb,* 96 Ark. 190, 195, 131 S. W. 456, 458. Also see *Britt* v. *Berry,* 133 Ark. 589, 202 S. W. 830. All the evidence recited above was properly before the court.

Since Buster did not maintain adverse possession of the strip of land in his lifetime, and since plaintiffs did not possess the land for the statutory seven years after they succeeded to Buster's title, defendant Simpson's paper title to the disputed strip remains valid. The decree of the Chancery Court is affirmed.

DENISTON *v.* LANGSFORD.

4-9128 228 S. W. 2d 42

Opinion delivered March 20, 1950.

Rehearing denied April 17, 1950.

A. D. Chavis, for appellant.

Max M. Smith, DuVal L. Purkins and *Paul Johnson,* for appellee.

LEFLAR, J. This is an appeal from a decree allowing appellee $619.10 on account of improvements made and taxes paid on appellant's land while appellee was in possession of it. The decree deducted $107.00 for costs in prior litigation and $48.00 for rent from the $619.10 allowance, making a net award of $464.10 to appellee. The award was made a lien on the land.

The same case has been before this Court twice previously. It originated as a contest over ownership of the land, two town lots in Rison. Appellant claimed under a tax deed from the State based on non-payment of 1931 taxes. Appellee's claim was under a tax deed from the State to one B. W. Thomasson, based on non-payment of 1940 taxes, followed by a warranty deed from Thomasson to appellee. The first trial was in Circuit Court, and we reversed on the ground that appellant's motion to transfer the case to the Chancery Court should have been allowed. 211 Ark. 780, 202 S. W. 2d 760. The case was then retried before the Chancellor, with a decree in appellee's favor, but we again reversed, holding that appellant's was the valid title. 214 Ark. 610, 218 S. W. 2d 83. Our opinion remanded the proceedings with instructions that appellant be given possession of the lots, as prayed by him, "after such accounting for rents, tax payments, and improvements as may be appropriate." This was on the theory that, though appellant owned the land, appellee was entitled under Ark. Stats. (1947) § 34-1423 to reimbursement for the value of improvements made and taxes paid while peacefully occupying it under color of title.

At the third trial it was stipulated that appellee had paid $43.00 in taxes since receiving the deed from Thomasson. There was conflicting evidence as to the amount expended on improvements, though it was admitted that appellee had erected a residence on the lots. Appellee submitted detailed evidence of expenditures for materials and labor, and the Chancellor found $576.10 of allowable outlays in connection with construction of the residence. This included no allowance for appellee's own labor, nor for various other items claimed by ap-

pellee. The two items allowed made up the $619.10 total to which appellee was held entitled.

As a credit to appellant the Chancellor allowed rent of $12 a year for the four years during which appellee had the premises. Appellant asked for $120 a year. Here again the evidence was in conflict. There was substantial testimony that the lots were in a poor part of the town, that the house originally on them fell or was blown down early in appellee's occupancy, and that one dollar a month was all the premises were worth. As to the other item of credit to appellant, $107.00 for costs in the prior litigation, there was no dispute.

In the light of all the testimony we are unable to say that the Chancellor's findings are contrary to the preponderance of the evidence. His findings as to the amounts to be credited to the respective parties by reason of improvements, taxes, costs and rent must stand.

Appellant further contends that appellee did not hold the land under such color of title as is required to sustain a claim to reimbursement for taxes and improvements under § 34-1423. Appellee held under a warranty deed from B. W. Thomasson, and Thomasson held under a void tax deed from the State. Neither of them knew that appellant had title, or that Thomasson's tax deed from the State was ineffective, until after appellee's new house was built. In these circumstances appellee's deed constituted color of title within the meaning of the statute. *Beard* v. *Dansby,* 48 Ark. 183, 2 S. W. 701; *Emerson* v. *Voight,* 196 Ark. 129, 116 S. W. 2d 348. And see *Baiers* v. *Cammack,* 207 Ark. 827, 182 S. W. 2d 938; *Gulley* v. *Blake,* 214 Ark. 578, 217 S. W. 2d 257.

The decree of the Chancery Court is affirmed.

4601 228 S. W. 2d 470

Opinion delivered March 20, 1950.

Rehearing denied March 24, 1950.

[redacted]

G. T. Sullins and *Rex W. Perkins,* for appellant.

Ike Murry, Attorney General and *Arnold Adams,* Assistant Attorney General, for appellee.

HOLT, J. A jury convicted appellant of the crime of sodomy and assessed his punishment at a term of five years in the Penitentiary. From the judgment is this appeal.

For reversal, appellant first earnestly contends that while "Campbell (appellant) committed sodomy" the undisputed evidence shows that he was insane at the time he committed the crime and at the time of trial, and says "under the evidence it became a matter of law as to whether John Campbell was insane."

Strongly supporting appellant's contention was the testimony of a number of prominent and reputable physicians, who are general practitioners. All testified that in their opinion appellant was insane and not responsible

for his acts. None of these physicians had specialized in psychiatry.

On behalf of the State, Dr. Kosberg, a specialist in the psychiatric field, and assistant superintendent of the State Hospital, testified that, following Campbell's commitment to the Hospital for observation, after an examination of him over a period from September 9th to October 13, 1949, he found Campbell sane and responsible for his acts when the crime was committed, and during his stay in the Hospital. "What I am saying is that the man (Campbell) is mentally competent * * *. The fact that an individual is perverted sexually doesn't mean the person—well, doesn't mean that he is mentally incompetent." (Trial was had October 31 and November 1, 1949.)

There was other evidence but this conflicting testimony on the question of appellant's sanity was sufficient to take the case to the jury. There was no error, therefore, in the court's denial of appellant's request for directed verdict, in his favor, at the close of all the testimony.

Appellant makes no serious criticism of any of the instructions which the court gave, but argues that the court erred in refusing to give certain instructions which he requested, and especially Instructions 3 and 4 as follows: (3) "The Court instructs you that in the event you find the defendant not guilty by reason of insanity, that this does not mean that he will be permitted to go free. It simply means that he cannot be sent to the State Penitentiary, by reason of his insanity, but that he will be incarcerated and kept in the State Hospital for Nervous Diseases in Little Rock, which is provided and supported by the State for the mentally incompetent. (4) The Court further instructs you that if you find the defendant not guilty by reason of insanity, that that does not discharge the Information filed against him, but that it merely holds said Information in abeyance, and if the defendant ever regains his sanity, he at that time may be tried on the charge of sodomy."

The court did not err in refusing these instructions. Where, as here, the defense relied upon was insanity, at

the time the crime was committed, these instructions were improper for the reason that they did not properly declare the law. It was no official concern of the jury what procedure might be followed, as to appellant, should he be found not guilty because of insanity.

We have examined the instructions given by the court and think they fully and fairly covered the law applicable to the case.

After reviewing the other instructions requested by appellant, but refused, we hold that they were fully covered by those which the court gave. It could serve no useful purpose to discuss each instruction separately. It suffices to say that we find no prejudicial error.

Affirmed.

WRIGHT *v.* BAXTER.

4-9130 227 S. W. 2d 967

Opinion delivered March 20, 1950.

W. M. Thompson, for appellant.

Chas. F. Cole and *C. T. Bennett,* for appellee.

DUNAWAY, J. Appellants are citizens of Independence County who own property in a Stock Law District created under the provisions of Act No. 368 of the Acts of 1947 (Ark. Stats. (1947), § 78-1404 *et seq.*). They have sought by petition for *certiorari* filed in the circuit court of Independence County to attack the validity of the order of the county court calling the election and the manner in which the election was held and the results thereof were certified.

Six allegations were made in the petition as to matters which it is claimed rendered the creation of the district illegal: (1) The order was made by the County Judge rather than by the county court as required by law; (2) The petitions to the county court requesting the calling of the election did not contain the names of the requisite number of electors of each township; (3) The County Judge was disqualified because he was a resident and land-owner in the proposed district; (4) The question was not placed upon the ballot in large enough type; (5) The County Clerk and Election Commissioners did not properly certify the results of the election and (6) The County Clerk failed to advertise the results of the election properly.

In September, 1948, appellees and others circulated petitions in eight townships asking that the question of creating a Stock Law District in these townships be placed upon the ballot at the general election to be held November 2, 1948. On September 30, 1948, the county court entered an order for this election. At the election a majority of those voting on the question favored the creation of such a district. Within sixty days, as provided by Ark. Stats. (1947) § 78-1412, petitions were presented to the county court by electors from five of the eight townships asking that these five townships be exempted from said district. The County Judge having disqualified, a special County Judge was appointed by the Governor. He denied the exemptions, finding that as to certain of the townships the required majority of electors had not signed the petitions and as to the other townships that they could not be exempted without injury to residents of adjoining townships. Six months

from the time of the election approving the creation of the district, it became unlawful to permit the specified animals to run at large. Ark. Stats. (1947) § 78-1404.

No appeal was taken from the order of the county court placing the question of a Stock Law District on the ballot, or from the order denying the exemption of certain townships. On April 19, 1949, the petition for *certiorari* was filed. The Circuit Judge granted a writ of *certiorari* on April 25, 1949, to bring up for review the records of the county court in the matter. On May 11, 1949, the Chancellor, acting as Circuit Judge on exchange with the regular Circuit Judge, heard the cause.

The trial court sustained a demurrer to the first four allegations of the petition and upon consideration of the record from the county court together with additional testimony, found against appellants as to the other two allegations. The court then quashed the writ of *certiorari,* hence this appeal.

The case at bar is controlled by our decision in *Patterson* v. *Adcock,* 157 Ark. 186, 248 S. W. 904. In that case certain residents of a township included in a stock law district created under an act similar to the one now under consideration, filed a petition for *certiorari* seeking to quash the order of the county court calling the election and the order restraining the running at large of stock after the election. Numerous irregularities were alleged, including the insufficiency of signers of the petition upon which the order for the election was based. In holding that a demurrer to the petition for *certiorari* should have been sustained we said at page 191:

"The county court, or the judge thereof, in making the order for the election and entering the order pursuant to the election acted ministerially, and not in a judicial or *quasi*-judicial capacity. *Thompson* v. *Trice,* 145 Ark. 143, 223 S. W. 667; *Capps* v. *Judsonia-Steprock Road Improvement District,* 154 Ark. 46, 242 S. W. 72.

"The order restraining the running at large of stock was a mere entry of the result of the election as certi-

fied by the election commissioners, and was likewise ministerial in its nature.

"*Certiorari* will not lie to correct a purely ministerial act, even though the performance of the act involves discretion. *Pine Bluff Water & Light Co.* v. *Pine Bluff,* 62 Ark. 196, 35 S. W. 227; *McConnell* v. *Ark. Brick & Mfg. Co.,* 70 Ark. 568, 69 S. W. 559; *State* v. *Railroad Commission,* 109 Ark. 100, 158 S. W. 1076; *Hall* v. *Bledsoe,* 126 Ark. 125, 189 S. W. 1041.

"The statute contains no provision conferring upon the county court authority to hear a contest over the result of the election, but if that court possesses jurisdiction to hear such a contest—which we do not deem it necessary to decide at this time—a review of the judgment in such a contest must be by appeal and not by *certiorari,* unless the judgment is void on its face. *Pritchett* v. *Road Improvement District,* 142 Ark. 509, 219 S. W. 21."

Appellant argues that the order for the election in the instant case was void on its face in that it did not show that the required number of electors had signed the petitions for an election and thus seeks to distinguish the *Patterson* case. In *Fesler* v. *Eubanks,* 143 Ark. 465, 220 S. W. 457 and *State* v. *Phillips,* 176 Ark. 1141, 5 S. W. 2d 362, we did hold that the filing of petitions with the required number of signatures was jurisdictional and that an order for a stock law election which showed on its face that the petition did not meet the statutory requirements was void.

The order in the case at bar reads in part: "Now, on this the 30th day of September, 1948, is presented to the Independence County Court, the petitions purporting to be signed by more than twenty-five per cent of the qualified electors of Washington, Union, Cushman, Ruddell, Jefferson, Barren, Ashley and Gainsboro Townships. . . .

"And from a consideration of said petitions, and from other things, matters and proof before the Court, the Court doth find:

"That said petitions were circulated in each of said Townships simultaneously; that each of said petitions is identical in form and are in effect a single petition; that more than twenty-five per cent of the qualified electors in said Townships, as shown by the election returns from said Township for Governor at the last General Election preceding the filing of said petitions, have signed said petitions . . ."

We think this is a sufficient recitation of the jurisdictional facts sought to be challenged and that the order was not void on its face. The trial court correctly sustained the demurrer.

Affirmed.

POWELL *v.* PACIFIC FINANCE CORPORATION.

4-9141 227 S. W. 2d 965

Opinion delivered March 20, 1950.

Lyle Brown, for appellant.

Graves & Graves, for appellee.

DUNAWAY, J. This is an appeal from the trial court's holding that appellant's statutory lien for repairs to an automobile is subordinate to the vendor's lien claimed by appellee, as assignee of the conditional sales contract of the seller of the car.

On October 20, 1948, Reed's Used Car Exchange sold to James H. Williams an automobile under a contract of conditional sale, whereby Williams took pos-

session of the car and title remained in the vendor until the balance due was paid in full. This contract was immediately assigned to Pacific Finance Corporation, appellee herein, by the seller.

Williams delivered the car to appellant, Earl Powell, Jr., an automobile repairman, on February 26, 1949, and had repair work done totaling $399.75. On Williams' failure to pay this bill, appellant filed an automobile repairman's lien on April 5, 1949. He then filed an action to enforce his lien on June 5, 1949. Appellee thereafter instituted suit to recover the car from appellant, claiming a superior lien by reason of the assignment to it of the title-retaining contract of the vendor.

The case was submitted to the court upon the pleadings and an agreed statement of facts, a jury having been waived. The trial court held that appellee had a superior lien, and the repairman has appealed.

Appellant's claim is based upon Ark. Stats. (1947) § 51-404 which provides: "All . . . automobile repairmen, firms and corporations, who perform or have performed work or labor for any person, or furnished any materials for the repair of any vehicle, . . . , if unpaid for same, shall have an absolute lien upon the product of their labor and upon all such . . . automobiles . . . for the sums of money due for such work and labor, and for materials furnished by them . . . ". It is conceded by appellant that Ark. Stats. (1947) § 51-412 gives the vendor of an automobile who retains title therein a lien superior to the statutory lien given repairmen by Ark. Stats. (1947) § 51-404. The pertinent part of § 51-412 reads as follows: ". . . provided, that the lien herein provided for (repairmen's lien) shall be subject to the lien of a vendor of automobiles, trucks, tractors and all other motor propelling conveyances retaining title therein, for any claim for balance of purchase money due thereon; . . . ". Appellant argues that this section gives priority of lien only to the vendor himself, and not to the transferee of a vendor's title-retaining contract.

The trial court properly held that the appellee was vested with the rights of the conditional vendor and that its lien was superior to that of appellant. In the absence of any express language in the statute to the contrary, it is generally held that the assignee of a conditional vendor of an automobile may enforce the lien of the vendor as against a repairman's lien just as the seller himself could. See *General Motors Acceptance Corp.* v. *Sutherland,* 122 Neb. 720, 241 N. W. 281; *Shaw* v. *Webb,* 131 Tenn. 173, 174 S. W. 273, L. R. A. 1915D, 1141, Ann. Cas. 1916A, 626.

The judgment is affirmed.

HUNTER *v.* JENNINGS.

4-9113 227 S. W. 2d 946

Opinion delivered March 20, 1950.

Ras Priest, for appellant.

Wesley H. Bengel, for appellee.

ED. F. MCFADDIN, Justice. This case originated as a replevin action, filed in the Circuit Court by the First National Bank in Tuckerman (hereinafter called "Bank") against C. C. Jennings, seeking to recover possession of a Ford truck. Jennings made C. H. Hunter and Pete Brannon cross-defendants and had the cause transferred to the Chancery Court. Hunter filed a general denial; Brannon filed no pleading but appeared and testified. The trial in Chancery developed the following facts:

Hunter, a used car dealer, owned a Ford truck, which Brannon desired to test preparatory to possible purchase. On September 30, 1948, Brannon signed a "paper" which he thought was a temporary receipt for the car, but which now develops to have been a title retaining note for $613 with payment due November 1, 1948. After testing the truck a few days, Brannon purchased it from Hunter and made payment in full, but failed to demand the return of the "paper" he had signed. On October 12, 1948, Hunter endorsed in blank the $613 title note and negotiated it to the Bank.

Some time in October, 1948, Brannon, believing and representing that he had fully paid for the Ford truck, traded it to Jennings for $1,000 credit on the purchase of a Chevrolet truck. He disposed of the Chevrolet, and is now insolvent. Upon maturity of the $613 title note, the Bank instituted this replevin action, as heretofore stated. The Chancery Court decreed:

(a)—That the Bank recover the Ford truck from Jennings, unless the Bank be paid the $613 note, plus interest and cost; and

(b)—That if the Bank be not so paid by Hunter and the truck be taken from Jennings, then Jennings should recover judgment against Brannon for $1,000 (the amount Jennings allowed for the Ford truck), and also[1] that Jennings should recover judgment against Hunter for $1,000.

Hunter has appealed from the $1,000 judgment rendered against him in favor of Jennings; and the correctness of that judgment is the sole issue on this appeal.

[1] The decree contemplates, of course, that Jennings will have only one satisfaction of the $1000 judgment.

The application of the equitable doctrine of subrogation entitles Jennings to a judgment against Hunter for the $613, plus interest and costs, if the Ford truck be taken from Jennings, since the truck would belong to Jennings, except for the said title note. If the Ford truck be taken from Jennings by the Bank, the situation will be the same as if Jennings, without being a volunteer, had paid the claim which the Bank held against Hunter as endorser of the note; and Jennings would then stand in the place of the Bank to enforce its endorsement claim against Hunter. In *Home Insurance Co.* v. *Lack,* 196 Ark. 888, 120 S. W. 2d 355, in speaking of the extent of the doctrine of subrogation, we said:

"As a general rule any person who, pursuant to a legal obligation to do so, has paid even indirectly for a loss or injury resulting from the wrong or default of another, will be subrogated to the rights of the creditor or injured person against the wrongdoer or defaulter."

In *Jansen* v. *Perrin,* 179 Ark. 927, 19 S. W. 2d 1105, we applied subrogation in a matter involving real estate; and the principle of subrogation, recognized in our cases as to real estate, has also been applied to personal property. In 60 Corpus Juris 790, in the discussion of subrogation, this appears:

"A purchaser of chattels, encumbered by a deed of trust, on being compelled to discharge the lien in order to protect his interest, is not a mere volunteer, and is entitled to be subrogated to the rights of the holder of the trust deed."

The Mississippi case of *Ellis-Jones Drug Co.* v. *Coker,* 156 Miss. 775, 125 So. 826, 127 So. 283, fully supports the quoted text.

In *Gerseta Corp.* v. *Equitable Trust Co., et al.,* 241 N. Y. 418, 150 N. E. 501, 43 A. L. R. 1320, the New York Court of Appeals held that one, who purchased goods from an insolvent and was later compelled to make further payment therefor to the bank which held title to the goods, was entitled to be subrogated to the rights of the bank in

other collateral held by it against the insolvent debtor. This language shows the basis of the holding:

"Subrogation, an equitable doctrine taken from the civil law, is broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by the latter, so long as the payment was made either under compulsion or for the protection of some interest of the party making the payment, and in discharge of an existing liability."

In the case at bar, Jennings, in surrendering the car to the Bank, becomes entitled to be subrogated to the Bank's right to hold Hunter as endorser on the $613 title note. The case was transferred to equity to avoid a multiplicity of suits; and on the principle of subrogation, the Chancery Court was correct in rendering the judgment in favor of Jennings against Hunter, if Hunter fails to pay the note and thus allows the car to be taken from Jennings. The Chancery Court rendered judgment in favor of Jennings and against Hunter for $1,000, but this judgment should only have been for $613 and interest (as stated in the note held by the bank) and costs. To that extent only the decree is modified: in all other respects it is affirmed; and the costs of this appeal are taxed against Hunter.

BRAKENSIEK *v.* NICKLES.

4-9123 227 S. W. 2d 948

Opinion delivered March 20, 1950.

Wils Davis and *Cecil Nance*, for appellant.

Hale & Fogelman, for appellee.

MINOR W. MILLWEE, Justice. This is an appeal from a judgment in favor of appellee, Robert M. Nickles, in the sum of $2,650 for the death of his eighteen year old wife, who was electrocuted when she came in contact with an electric line maintained on appellant's premises.

Appellant, R. H. Brakensiek, owns and operates a plantation in Crittenden County. Appellee and his father were formerly tenants on appellant's farm. In 1943 appellant purchased some used material from a war prison camp for construction of an electric distribution system to his tenant houses. The Arkansas Power & Light Company maintained a line to appellant's house and headquarters buildings. The tenants did the actual work of constructing the lines from plantation headquarters to the several tenant houses, using the old wire and cross-arms mounted on small willow and sycamore poles about ten or twelve feet high. The line was insulated in some places and bare in others, and was served from the one meter at appellant's house. Appellant maintained the 110 volt line and collected a flat rate of $1.50 per

month from each of the tenant families occupying the fourteen houses connected with the line.

In June, 1947, appellee and his wife lived a short distance from the tenant house occupied by his parents. On the afternoon of June 23, 1947, appellee's wife, Dora M. Nickles, and her mother-in-law, Mrs. Lula Nickles, left the latter's home to go to appellee's home, using a path as a short-cut across appellant's field. In following the path it was necessary to cross a ditch about four feet deep, which ran from the highway west through the field. When the two women reached the ditch they discovered that it was flooded, as the result of a rain storm on the evening before, and they started up the bank of the ditch to a road. When they reached a point near the road the elder woman was walking below the bank of the ditch ahead of her daughter-in-law, who had stopped on the ditch bank to talk to some children playing nearby. Immediately after the elder Mrs. Nickles had walked under the sagging electric wire, she heard her daughter-in-law scream. When she looked back the younger woman was lying on the muddy ground on her back holding the bare electric wire with her hands and died shortly thereafter. A neighbor, who was attracted by the screams of the elder Mrs. Nickles, grabbed the wire at a point where it was insulated, breaking it in two pieces.

Appellant argues only two grounds for reversal. He first insists that a verdict should have been directed in his favor because the undisputed proof shows there was no negligence on his part. Witnesses for appellant testified that the line was caused to sag by being dislodged from a pole when a limb was blown from a tree to which the line was attached during a storm on the night before the tragedy. Appellant testified that he went to Memphis, Tennessee, on the morning after the storm and did not return until after Mrs. Nickles' death. Hence, it is argued that he had no knowledge or notice of the sagging condition of the wire and cannot be charged with failure to repair within a reasonable time. We do not agree that the evidence on this point is undisputed. One witness for appellee stated that the line had become dislodged from the pole near the point where Mrs. Nickles

was killed, and had been sagging within five feet of the ground for seven or eight days prior to her death. He also stated that the dislodged line was being supported by a board about ten feet long which was used as a prop during that time. Another witness stated that he noticed the same condition Friday before Monday when Mrs. Nickles was killed.

We have repeatedly held that it is the duty of persons or companies furnishing electricity to others to exercise ordinary care in the construction of service lines, to see that they are installed in a reasonably safe manner, and to use due diligence to discover and repair defects therein, and that the duty is a continuing one. *Arkansas Light & Power Company* v. *Cullen,* 167 Ark. 379, 268 S. W. 12; *Arkansas Power & Light Company* v. *Bollen,* 199 Ark. 566, 134 S. W. 2d 585. In *Arkansas Gen. Utilities Co.* v. *Shipman,* 188 Ark. 580, 67 S. W. 2d 178, the court approved the following statement from Curtis on Electricity, 699:

"The duty of an electric company in reference to keeping its appliances in safe condition is a continuing one. Not only must it exercise a high degree of care in the original selection and installation of its electric apparatus, but thereafter it must use commensurate care to keep the same in a proper state of repair. The obligation of repairing defects does not mean merely that the company is required to remedy such defective conditions as are brought to its actual knowledge. The company is required to use active diligence to discover defects in its system. In other words, an electric company is bound to exercise due care in the inspection of its poles, wires, transformers and other appliances."

The evidence in the instant case was in conflict as to whether the sagging of the line resulted from the storm or from failure of appellant to properly construct, maintain, and repair the improvised system. If the jury believed appellee's witnesses it was warranted in concluding that appellant failed in his duty either to properly maintain the line or to repair it within a reasonable time after it was dislodged from the pole.

It is next contended that deceased was guilty of contributory negligence as a matter of law. Appellant argues that deceased knowingly chose a dangerous and untraveled way in going along the ditch bank; that she voluntarily took hold of the wire, knowing that it was charged with electricity; and that her own negligence was, therefore, the proximate cause of her injury and death. We think the issue of contributory negligence was properly submitted to the jury. The evidence does not show that deceased voluntarily took hold of the 110 volt line. In *Arkansas Light & Power Company* v. *Cullen, supra,* the deceased voluntarily grasped a 2300 volt line, but had reason to suppose that it was a house wire carrying only 210 volts, and we held that the question whether he was guilty of contributory negligence was properly submitted to the jury.

The test to be applied in determining whether deceased was guilty of contributory negligence is whether she exercised such care as a reasonably prudent person would exercise under the circumstances. In *Southwestern Gas & Elec. Co.* v. *Murdock,* 183 Ark. 565, 37 S. W. 2d 100, the court said:

"In determining whether an injured party was guilty of contributory negligence we simply inquire whether a person of ordinary prudence, without expert knowledge, would have acted as the injured party did. 20 C. J. 372; *Mo. & No. Ark. R. R. Co.* v. *Clayton,* 97 Ark. 347, 133 S. W. 1124."

Even if we assume that deceased voluntarily took hold of the wire, there is no proof that she had expert knowledge of electricity or appreciated the danger of contact with a 110 volt line under the conditions disclosed here.

The facts in the instant case are essentially different from those in *Gullett, Admx.* v. *Arkansas P. & L. Co.,* 208 Ark. 44, 184 S. W. 2d 819, relied on by appellant. The undisputed evidence in that case showed that deceased and a companion were in a boat in high water when they attempted to pass under a 13,000 volt high tension electric line with the lowest of three wires within 18 or 24 inches of the water; and that deceased appre-

ciated the danger of attempting to go under the line by lifting it with his boat paddle.

The trial court refused all instructions offered by both sides, but fully instructed the jury on all issues. We have carefully examined the instructions given and find them at least as favorable to appellant as he was entitled under the law. The instructions given correctly covered the issues involved in appellant's offered instructions, and no error was committed in refusing any of them.

We conclude that the questions of appellant's negligence and the contributory negligence of the deceased were properly submitted to the jury and that the record is free from error.

Affirmed.

AMISANO v. SHAW.

4-9136 227 S. W. 2d 951

Opinion delivered March 20, 1950.

Elmer S. Tackett, for appellant.

C. Floyd Huff, Jr., and *Curtis L. Ridgway,* for appellee.

GEORGE ROSE SMITH, J. In 1947 the appellants, J. P. and Thelma Amisano, leased certain property near the city of Hot Springs to the appellee for a term of five years at a monthly rental of $125. The lease provided that the premises would be used "for a general mercantile business, vending of gasoline and incidentals thereto and for living quarters as same are now being used." In their complaint the appellants alleged that the appellee has opened a liquor store on the property pursuant to an oral modification of the lease by which he was given permission to operate the liquor store in return for a $25 increase in the monthly rent. The prayer was for specific performance of the lease as modified or in the alternative for cancellation of the lease. On the first appeal we held that the complaint was not demurrable. 214 Ark. 874, 218 S. W. 2d 707.

The proof brought out facts not stated in the complaint. It was shown that before the lease was executed the Amisanos had occupied the premises and had used them, among other things, for the retail sale of beer. When Shaw took possession he bought the appellants' stock of about 130 cases of beer and continued this business, with the appellants' approval. There is a sharp dispute in the testimony about the parties' actions when Shaw first proposed to put in a liquor store. Shaw testified that J. P. Amisano willingly assisted him in obtaining a liquor license, and it is admitted that Amisano signed a letter to the Commissioner of Revenues in which he said: "It [the liquor store] would be a great convenience to myself and to the other people living nearby. I, as are most of the others, am a successful business man and have a nice home within a few yards of Mr. Shaw, and his liquor store would save my driving 8 or 10 miles for my liquor." Both the Amisanos testified that this letter was signed only because Shaw promised to execute the amendment to the lease as soon as the liquor license was issued. Shaw denies this, testifying that the Amisanos suggested an increase in the rent but he did not agree to it.

The chancellor was right in refusing to grant the relief sought. On the first appeal we held that by its

terms the lease did not authorize the operation of a liquor store on the premises. But the landlord may waive a forfeiture for the breach of a covenant like this one, and a waiver is ordinarily found when the lessor accepts the payment of rent with knowledge that the lease is being violated. Underhill, Landlord and Tenant, § 402; Tiffany, Landlord and Tenant, § 194 i. If a liquor store is not within the authorization to conduct "a general mercantile business," neither is the retail sale of beer. Yet the appellants have continuously accepted the rent with the knowledge that beer was being sold. If we are to believe Amisano's statement to the Commissioner, he regarded the addition of the liquor store as a convenience rather than as a detriment to the appellants' neighboring property. Since the appellants have acquiesced in the sale of intoxicants on the premises, it is now too late for them to protest an extension of that business. We do not determine the effect of the appellants' waiver upon the appellee's right to exercise his option to renew the lease for an additional five-year term. See *Jones* v. *Epstein*, 134 Ark. 505, 204 S. W. 217; *Felder* v. *Hall Bros. Co.*, 151 Ark. 182, 235 S. W. 789.

Affirmed.

GEORGE *v.* SMITH.

4-9118 227 S. W. 2d 952

Opinion delivered March 20, 1950.

Wilson & Wilson and *Claude Duty,* for appellant.

Eli Leflar, for appellee.

GRIFFIN SMITH, Chief Justice. Effectiveness of the attempt of Peter M. Smith to make a will is the subject of controversy. The document expressed the mutual or reciprocal purposes of two bachelor brothers who, living together, had much in common. They were joint owners of real and personal property, shown in the inventory to be worth slightly more than $10,000.[1] After providing that each should take in succession to the other, the concluding paragraph of the will reads, "If both of the makers . . . should pass away, all of our . . . property shall go to our brother, William I. Smith". The writing was in Peter's hand, dated January 1, 1941. Three weeks later a Notary Public certified that its execution had been acknowledged. Peter died in May, 1948, followed by James in August. William died in February, 1949. Another brother, Henry P., and a sister, Mary George, are now living.

The jointly-signed document was offered for probate September 2, 1948, as the will of Peter M. Smith, but in the petition there is the statement that James died testate. The appeal is from the Court's holding that Peter's property passed under his holographic will.[2]

[1] The joint valuation is inferred because the inventory lists Peter's half as slightly in excess of $5,000.

[2] There is no contention that the Court erred in holding that the will, as to James, was void for want of formality. Other than signatures the writing was in Peter's hand, hence as to James it was not holographic.

Appellants' assignments are three-fold: (a) Joint wills are permissible only when authorized by statute, and Arkansas has none; (b) in jurisdictions where joint, mutual, or reciprocal wills are recognized, they are not effective unless each testator is bound; (c) where joint wills may be probated as the valid act of one of the parties, the uniform requirement is that the instrument must be so drawn that it will stand the test as the testamentary expressions of either; or, if one's act is to be avoided, there must be ground for a judicial finding that the wishes of the testator whose signature is disregarded, should, as to the context, be treated as surplusage.[3]

An early case dealing with joint wills was written by Judge EAKIN in 1879. *Hershy* v. *Clark,* 35 Ark. 17, 37 Am. Rep. 1. Validity of a contract between Abram and Aaron Clark, unmarried brothers, was involved. They had agreed that upon the death of one, the survivor should hold the common property the two had owned, to the exclusion of all others. Upon the death, intestate, of one of the brothers, his heirs claimed what the apportionable share of their dead relative would have been, as against the heirs of the other brother, who died intestate some time after the first brother had passed away.[4] In commenting on this contract the Court said:

"It professes to convey nothing in presenti, and cannot stand as a conveyance; nor can it be held as a mutual covenant. It is unreasonable and against public policy that one should be allowed, by an irrevocable contract, not only to denude himself of all control of all his property . . . which he may at the time possess, but also all he may afterwards acquire. Such a contract would not be enforced either in law or equity. It

[3] "This joint combined contract and will . . . by and between Peter M. Smith and James T. Smith have jointly agreed . . . to write this agreement and will. It is therefore agreed that if either of us should pass away by death the other one shall inherit and come into possession of all of his property and holdings, . . . and it is agreed that we or either of us is to support our brother, William I. Smith, as long as we are financially able to do so and as long as he has an honest, kind, loving, agreeable disposition. . . . If both of the makers of this will should pass away, all of our holdings . . . shall go to our brother, William I. Smith."

[4] See *Steinhauser* v. *Order of St. Benedict,* 194 Fed. 289, at p. 298.

is obvious, too, that the brothers did not intend their obligations to have that force during their lives. . . . It was revocable at pleasure by either".

Nancy Clark was the mother of Abram and Aaron; Sarah Clark was Nancy's unmarried daughter. In 1860 Sarah and Nancy executed a writing intended as their joint will. It was duly witnessed; and it directed disposal of certain property once owned by Abram and Aaron, but provided that the bequests and devises, in respect of use and enjoyment, should be postponed until the death of *both*. A reservation was that the survivor would have sole control, management, and disposal of all the property during her lifetime—the balance, undisposed of at the death of the survivor, "being all that was subject to the provisions of the will".

In commenting on the agreement between Abram and Aaron, the Court said: "Whether, if properly proven, it might not have operated, on the contingency of the death of one of them, as his *separate* will, is a question which does not arise, and upon which we intimate no opinion. No effort was made to prove or sustain it as the will of Abraham, with regard to his share of the joint property".

As to the document executed by Nancy and Sarah, it was held that the effort to make a joint will was nugatory; [for, said the Court] "There can be no such thing as a joint will, to take effect on the death of the survivor. A will must take effect at the death of the testator, and not at a time still in the future".[5]

Judge HART in *Cole* v. *Shelton,* 169 Ark. 695, 276 S. W. 993, said of the first Hershy-Clark case that, in following the common law, the Court had definitely disapproved joint wills where postponement of the benefits was the object. See, also, the opinion of Mr. Justice ROBINS in *Stewart* v. *Tucker,* 208 Ark. 612, at p. 616; 188 S. W. 2d 125.

[5] Ten years later the Hershy-Clark controversy was again before the Court in another form. The opinion was written by Special Judge Geo. P. Smoot, of Prescott, who was appointed by Gov. J. P. Eagle June 9, 1889. See *Clark* v. *Hershy,* 52 Ark. 473, 12 S. W. 1077.

The case of *Nye* v. *Bradford*, 144 Tex. 618, 193 S. W. 2d 165, is extensively annotated in the 169th A. L. R., beginning at page nine. It is there said that the great weight of modern authority is to the effect that an instrument will not be denied probate as a will on the ground that it was executed by two or more persons purporting to sign as testator, or because it contains bequests which are reciprocal, and was executed pursuant to a contract, provided its effect is not dependent upon the death of the survivor in order to be the will of the first one to die.[6]

Following the quotation from A. L. R., copied in the margin here as the sixth footnote, the Hershy-Clark opinion is cited in support of the rule that it is essential to the validity of a will jointly executed by two or more testators "that [it] be effective upon the death of one of the testators so far as it relates to the property of that one"; nor is such a will rendered invalid as the separate will of the first testator who dies if, included in the document, there is a provision that the property is to be divided upon the death of the surviving testator, "where it appears that the paramount intent of the testator was that the instrument could be offered for probate on the death of one of the testators as his will, notwithstanding the division of the property would await the death of the other testator".

Joint or mutual wills form the subject of a note in 61 Harvard Law Review, p. 675. Mutual wills, it is said, are the separate testamentary dispositions of the parties,

[6] At page 17 of the A. L. R. citation it is said: "Both the common law and ecclesiastical courts of England declared joint wills invalid when they first came into litigation. Such was also the rule of the earlier decisions of the courts of this country where the will was not only joint in execution, but joint in substance in the respect that legacies and devises were bequeathed to various persons from a joint fund which derived from the separate property of the testators. The view was that such a will, being joint in substance, is necessarily in the nature of a compact between the testators and lacks the quality of revocability which is inherent in a will, so that it is invalid both in whole and in part and not admissible to probate as a joint will or as the separate will of either testator. Also, reference was made to the practical difficulties of the settlement of the separate estates of the decedents under such an instrument. But such is no longer the law in England. Moreover, the American decisions in support of such view have been directly overruled or limited so strictly as to be overruled in effect".

and have always been recognized as valid. And [says the text-writer] although the early cases were to the contrary, it is now settled that joint instruments will be upheld. It was at one time thought that one co-testator could not revoke a joint will without the consent of the other, [because, as it was believed] "this disability was a fatal denial of the essentially ambulatory character of a will. However, all modern decisions treat a joint will which contains separate dispositions as revocable by either co-testator as to his property, and admit it to probate upon the death of each testator as his separate testamentary disposition".

Continuing the discussion, the Review writer says: "Another objection to the validity of the will was that the instrument did not take effect on the death of the one first dying, and therefore could not in any case be his will, and might be invalid as to the survivor also. Even the more modern decisions have held invalid a joint will which does not become effective until the death of the survivor, whether it bequeaths his separate property or property owned by them in common. . . ."[7]

It will be conceded the cases lean to the rule that if one co-testator is not bound, the other is not. An exception [not wholly in point here] is *Re. Cole,* 171 N. C. 74, 87 S. E. 962, where a holographic will was written by the husband and signed by his wife. It was admitted to probate as the husband's will in spite of the want of formality that would have bound the wife. Some of the cases give effect to the presumption that neither testator would have executed the instrument but for the reciprocal promise of the other. See *Burkhart* v. *Rogers,* 134 Okla. 219, 273 P. 246. The Oklahoma Court cited in reliance *Martin* v. *Helms,* 319 Ill. 281, 149 N. E. 770. In that case the Court spoke of "the peculiar circumstances" attending execution of the will. In *Burkhart* v. *Rogers,* Mr. Justice HEFNER said it was the intention of the husband and wife whose joint will was being construed that the instrument should be effective as to both "and give the survivor the estate of the one dying first".

[7] See Atkinson, Wills, §§ 69, 70; 1 Page, Wills, § 104, 3d Ed.

Our own cases have not established such a barrier, and we are loath to do so unless failure in the particular case would be inequitable through imposition of hardships. Law writers call attention to a dying soldier's fitful writing, "All to Mother", and mention it as one of the shortest known wills. But the last wish preceding death, the purpose, the intent, were dramatically clear, and no formulary was permitted to circumvent the wish.

So, here, Peter and James were not concerned with niceties of the law. Neither knew that when James signed, and when he later acknowledged Peter's writing, that the absence of witnesses would prevent the document from being probated as the will of James. For these reasons we are not willing to say as a matter of law that Peter died intestate. We leave to those who would speculate the task of formulating an answer to the question, "Was Peter's conduct in respect of volition dependent upon the signature of his brother?" The circumstances are unusual, but the justice is clear.

. . . .

From our own decisions, and from an examination of what other Courts have said, and from comments by text-writers, the conclusion comes that we have not ruled against joint wills *per se*. They may be upheld if enjoyment of the property is not postponed "to the death of the survivor".

In the case at bar there remains to be determined whether inclusion of such phrases as those containing "contract", and "agreement", and expressions favoring William, were dominant or incidental—whether the presence of these terms directs the answer that their importance was such that but for the intent their use would suggest the document would not have been executed. We are not called upon to decide whether an enforcible contract was made.

That the writing was intended as a will there can be little doubt. Use of "inherit", and "come into possession", seem synonymous in the provision that "if either of us should pass away by death the other shall

inherit and come into possession of all of his property and holdings''.

There is also this provision: ''If *both* of the makers of this will should pass away, all of *our* holdings'' shall go to William.[8]

It is not improbable—in fact, words justify the inference—that the brothers visualized a common disaster, or concurring death. In dealing reciprocally *with each other,* the words were, ''if *either* of us should pass away by death''.

The survivor's duty to William ''while he retains an honest, kind, loving, and agreeable disposition'' was the expression of a wish only. Fulfillment, therefore, was discretionary. At most, neither Peter nor James intended to impose upon the other more than a moral obligation to look after William during William's good behavior.

Considering the will from all of its angles, we feel that when the instrument was drawn Peter intended, irrespective of other considerations, that James should receive the property. We are unwilling to defeat that plan through the imposition of a technical construction not necessary from a legal standpoint, and a construction that did not occur to either of the participants.

Affirmed.

Mr. Justice Holt and Mr. Justice George Rose Smith dissent. Mr. Justice Leflar not participating.

Holt, J. We have no statute in this State permitting joint wills. We have specifically held such wills invalid in at least two cases presently referred to.

The will above is as follows: ''Rogers, Benton County, Arkansas, January 1st A. D. 1941. This joint combined contract and will entered into this 1st day of January A. D., 1941, By and Between Peter M. Smith and James T. Smith have jointly Agreed while we are of Sound Minds to write this agreement and will. It is

[8] Italics supplied.

therefore agreed that if either of us should pass away by death the other one shall inherit and come into possession of all of his property and holdings wheresoever found in this State or any other. Such as real estate, Personal property, bank stocks, bank deposits, security holdings, notes, bonds, mortgages, and it is agreed that we or either of us is to support our brother William I. Smith as long as we are financially able to do so and as long as he has an honest, kind, loving, agreeable disposition.

"All doctor bills and funeral and burial expenses to be paid by the one that gets the others property.

"If both of the makers of this will should pass away, all of our holdings and property shall go to our brother, William I. Smith. Makers: (s) Peter M. Smith. (s) James T. Smith. Witnesses: Sworn and subscribed to before me, a Notary Public for the above named County and State, this January 22nd, 1941. (s) R. W. Owens, Notary Public. My commission expires March 23rd, 1941."

It is undisputed that at the time this will was made, and also at the death of Peter, Peter and James Smith owned all the property involved as tenants in common. On its face, the will shows that it was a joint will and was so intended to be by Peter and James. They called it "this Joint combined contract and will." They both signed it as such and as I construe it, each thereby agreed and contracted with the other, to pay the debts of the one first to die, look after their brother William, and on the death of the survivor of the two (Peter and James) all of their jointly owned property to go to their brother William, in case they, Peter and James, predeceased him.

The early case of *Hershy* v. *Clark, Ex., et al.,* 35 Ark. 17, should control here. It was there held: (Headnote 1) "A mutual obligation in writing between two tenants in common of personal and real property, that at the death of either the survivor shall have all his interest in the common property which he then has, or may have at the time of his death, conveys nothing in *presenti,* and can

not stand as a conveyance, nor be upheld as a mutual covenant. It is revocable at the pleasure of either, and can have no binding force during their joint lives."

In the body of the opinion, it was said: "On the eleventh of May, 1850, both brothers, being then residents of Pope county, entered into a mutual obligation in writing under seal. After reciting that they had, mutually and by their joint labor and energy, acquired what property they, and each of them, then held and possessed, they thereby agreed, between themselves, that the survivor of them should have, hold and possess, all the interest of both parties in the property, real and personal, which they then owned, to the exclusion of all other persons whatever. * * * The instrument executed between the brothers conveyed nothing in *presenti.* The intention of it is expressly declared to be that the survivor should have all the interest of both parties in the property. * * * There can be no such thing as a joint will, to take effect on the death of the survivor. A will must take effect at the death of the testator, and not at a time still in the future."

In the case of *Cole* v. *Shelton,* 169 Ark. 695, 276 S. W. 993, 43 A. L. R. 1008, Judge HART, speaking for the court, reaffirmed the holding in *Hershy* v. *Clark* in this language: "We do not think the principles of law there decided are controlling under the facts in the case at bar. In that case Abram and Aaron Clark, brothers, had by their joint industry acquired a large amount of personal and real estate, which they held as tenants in common. The brothers entered into a mutual obligation in writing in which each conveyed to the survivor all of his interest in their joint property. Abram died first, and Aaron took charge of their joint property as owner. He made a will giving to his mother and his sister Sarah all of his real estate in two counties. His mother and his sister Sarah took possession of the property under his will after his death. Subsequently they executed a joint will in which they devised the property they had received under the will of Aaron Clark to various persons.

"The court held that the joint instrument between Abram and Aaron Clark and the joint will of Nancy and Sarah Clark should both have been disregarded. Following the common law, the court held that there could be no such thing as a joint will to take effect on the death of the survivor. In each instance, the persons attempting to execute the joint will were the owners of the property intended to be devised as tenants in common, and intended that the will devising their joint property should take effect upon the death of the survivor. Such an instrument can not be proved as the separate will of either of the supposed testators, because it disposes of their joint property, and because it implies an agreement between them which is inconsistent with its revocability and therefore prevents its operation as a will."

In *Frazier et al.* v. *Patterson et al.,* 243 Ill. 80, 90 N. E. 216, 27 L. R. A., N. S. 508, 17 Ann. Cas. 1003, the Supreme Court of Illinois thus defines a joint will: "A will that is both joint and mutual is one executed jointly by two or more persons, the provisions of which are reciprocal, and which shows on its face that the devises are made one in consideration of the other."

In 43 A. L. R. 1010, the annotator, in a note following the reported *Cole* v. *Shelton* case above, says: "The reported case (*Cole* v. *Shelton, supra,* is from a jurisdiction which follows the rule that a joint will which is to take effect only on the death of both testators is invalid," and in 58 Am. Jur., page 462, paragraph 683, the author says: "The policy of the law is generally against the validity of a joint will executed on the condition expressed in it that it is not to be effective as a will, or is not to be probated, until the death of the testator last surviving. Such a will cannot be probated as the will of either testator. Whether the operation of the will is postponed until the death of the survivor in express terms or by necessary implication is immaterial; in either case the will is void and should be refused probate altogether. Effort should not be made to give effect to the instrument as the separate will of the first of the testators to die,

during the life of the survivor, where such would result in defeating the intention of the deceased testator.''

Both of the above Arkansas cases are cited in support of the text.

To uphold this contract and will would, it seems to me, in effect, overrule our holding in *Hershy* v. *Clark* above, which was, as indicated, reaffirmed in *Cole* v. *Shelton* as late as October 1925.

I respectfully submit that the judgment should be reversed.

George Rose Smith, J., dissenting. The cases directly in point hold that when two people execute a joint will by which each leaves his property to the other, the instrument must be valid as to both or it will be valid as to neither. *Martin* v. *Helms,* 319 Ill. 281, 149 N. E. 770; *Burkhart* v. *Rogers,* 134 Okla. 219, 273 Pac. 246. (*In re Cole's Will,* 171 N. C. 74, 87 S. E. 962, cited by the majority, is readily distinguishable, for there the testators' bequests were not to each other but were made jointly to a charitable institution.) I think the case at bar illustrates the wisdom of the rule adopted in other jurisdictions. Had James Smith been the first to die, Peter would have found that he was not entitled to his brother's estate by virtue of the joint will. It seems clear that each brother signed this instrument upon the assumption that the survivor would receive the other's property, and hence if that expectation fails as to one it must fail as to the other. Under the majority's interpretation James had all to gain and nothing to lose, while Peter stood to lose everything and gain nothing. As I cannot believe that Peter would have joined in the instrument had he been aware of its inequality I think we should follow the unanimous trend of authority elsewhere and hold this will invalid as to both testators.

SORKIN *v.* MYERS.

4-9002 227 S. W. 2d 958

Opinion delivered February 20, 1950.

Rehearing denied April 10, 1950.

[redacted]

Wm. J. Kirby, for appellant.

Gaughan, McClellan & Gaughan, for appellee.

GRIFFIN SMITH, Chief Justice. The controversy involves undivided mineral interests that had been severed from the fee, and had forfeited for taxes. Act 221 of 1929, Ark. Stat's, § 84-203. Plaintiffs in six suits alleged invalid assessments and void sales, and asked that deeds issued by the Land Commissioner be cancelled. The Chancellor found, among other vices, that due

process had been denied, hence sales by the Collector were unauthorized. Since we have concluded that assessment methods, the manner of recording assessments, and faulty administrative procedure in dealing with the properties obscured from the taxpayer information that ought to have been conveniently accessible—matters sufficiently prejudicial to require avoidance of the deeds—we do not discuss all of the objections, disclosing numerous irregularities.

The causes were consolidated for trial because M. Sorkin, on April 6, 1944, had purchased all of the so-called forfeitures. He contends that five of the six groups of sales under which title is asserted received confirmation March 20, 1947. While conceding that a decree was rendered, and that it listed the mineral interests here contended for, appellees deny that the order affected them. Our holding here does not depend upon confirmation, or non-confirmation; nor are we concerned with the differences between the various mineral interests—whether royalty, leasehold, overriding, or a comprehensive lease or sale of "all minerals". Such expressions as "overriding", or "term", or "subject to", as used in the oil-producing areas to denote a particular ownership [insofar as this opinion extends] are included in mineral interests.

. . . .

The local plan for collecting taxes on mineral interests did not follow the real property pattern. A special book of "Leases and Royalties' was kept. Where severance from the fee had been effectuated and the mineral interest alone was being dealt with, the transaction appears to have begun when the Assessor turned over his lists and the County Clerk received them for entry. The Clerk, in turn, certified mineral assessments to the Collector, but did not include them in the official record of real property. Rather, there was an attempt to list the presumptive owners alphabetically. As to this, a deputy in the County Clerk's office testified that it was not possible, without checking the entire list of almost four thousand names, to find a particular mineral

interest *by reference to land calls.* In other words, [said this witness] before a taxpayer could satisfy himself that a designated mineral interest he owned (or that some one else owned) was, or was not, on the book, it would be necessary to go over the full list,—"and this results from the fact that there is no order or system with reference to the land calls in assessing the minerals".

Question: "In the event I came to your office for the purpose of ascertaining whether a mineral interest I owned in the southwest quarter of the southwest quarter of section 32, township 15 south, range 17 west, had been assessed, is there any way I could ascertain that fact, or is there any method by which you could determine that fact for me, without inspecting every one of the hundreds of entries in this book?" Answer: "If it wasn't listed under your name, and it wasn't listed under the name of the person you bought it from, there would be no way without checking the entire book". The witness also said that on a number of occasions a name searched for had been found out of alphabetical order.

But the difficulty did not end here. Following the Assessor's recapitulation of ninety pages, and succeeding the Clerk's summary, there were special lists on pages 92 and 93,—about seventy-five names—representing persons, and the mineral interests there assessed. After the general tax book, and the book containing mineral assessments, had been delivered to the Collector, names were added from time to time. "Chances were" that the Clerk would take the books back to his office. However, if but one or two changes were to be made, some one from the Clerk's office usually came to the Collector's office and did the work. The first list, containing more than 3,500 names, showed (in comparison with the second list) a payment ratio of about thirty to one.

. . . .

It has long been the duty of the County Clerk to make and deliver to the Assessor, "in a book prepared for that purpose", an abstract of lands. In listing acre-

age, this abstract "shall commence . . . in the lowest number of township and range in [the] county, and in the northeast corner in each township, and shall proceed numerically with all the sections, townships, and ranges, . . . first setting down all the subdivisions of each section as they belong to individuals, or the whole section together if owned by one person and not divided on account of parcels being of different values". Ark. Stats, § 84-402.

It is interesting to note that this language has been brought from the Act of March 31, 1883, § 85. It was repeated in Act of March 28, 1887, an Act mentioned by Chief Justice HART in *Rives* v. *Woodruff County*, 179 Ark. 1110, 20 S. W. 2d 184. The next appearance is in Act 172 of 1929, then in Act 72 of 1931. As now expressed, the enumerated duties assigned to the County Clerk are followed by a paragraph saying: "No failure to observe any of these requirements shall be held to vitiate any assessment if the land be so described as to be identified".

Authority for assessing mineral interests when severed from the fee was conferred by Act 30 of 1897.[1] Eight years later, Act 303 of 1905,[2] timber was dealt with; but the 1905 enactment appears to have been taken in substance from the Act of 1897, with § 2 as a method directive. It tells the Assessor to evaluate and list these rights, with descriptions, and to enter them *on the real estate tax books*. The assessment must be marked "timber", and if the taxes be not paid ". . . the [interest] shall be advertised with a description of the land as 'timber', giving the character and kind of such timber, . . . and said timber shall be sold as now provided by law for the sale of delinquent lands".

The statute applicable to delinquent mineral interests provides that when a forfeiture occurs these interests ". . . shall in all things be certified to, and redeemed in the same manner as is now provided for the certification and redemption of real estate upon which taxes duly assessed have not been paid".

[1] Ark. Stat's, § 84-203.
[2] Ark. Stat's, § 84-432.

A thread of legislative similarity runs clearly through these related statutes, beginning with 1883 and coming down to 1931. One is not idly considering remote possibilities when he assumes that the lawmakers (although not as specific in dealing with minerals as they were in providing for the assessment of timber) did not leave this seeming hiatus because they thought one class of property was less intimately connected with the land than was the other. We see no logical reason for thinking there was an *intended* variant. The explanation of administrative officers that an alphabetical arrangement is more convenient is not controlling. The minerals, being primarily an interest in the land, are severable *only* because the legislative authority has made them so; yet for taxing purposes they are so closely related to the realty that ownership identification and accuracy make it well-nigh imperative that the mineral listings be subjoined to the land assessments. Any method that destroys this unilateral relationship burdens ready determination when an owner seeks information respecting the status of his interest at a given time.

Appellant contends that the confirmation decree is conclusive of all matters not going to the power to sell, and for this reason he contends that five of the six complaints must of necessity fail.

One of the suits was filed Sept. 25, 1946, with confirmation March 20, 1947—not quite six months after the actions were commenced. The statutory authority for confirmation, § 84-1325, does not of itself cut off all rights. It allows the property owner, by appropriate pleadings filed within a year, to attack the adjudication, in so far as it affects property of the complainant or interveners; and this may be done ". . . either in the same cause in the said Chancery Court, or in a separate cause in the same or any other court of competent jurisdiction, [and] upon any ground which would have constituted a meritorious defense to the complaint upon which the decree was rendered; and any such attack, made within the said one-year period, . . . shall be taken to be [a] direct attack as of the same term when

the said decree was rendered". Actions in derogation of the decree, if brought *after* a year, "shall be taken to be collateral attacks". See Act 423, approved March 31, 1941.

The mineral interests in litigation here were in Ouachita County, and the suit in case No. 5915 was filed within the allowable period. The attack, as to it, was direct, permitting the plaintiffs to avail themselves of any defenses based upon prejudicial irregularities. But our decision rests upon the proposition that the procedure legislatively intended was not followed. Instead, there was a course of well-intentioned administrative conduct that deprived the property owners of the process provided for assessing and selling. This means that the power to sell was lacking.

It is not necessary, in disposing of these cases, to say whether the confirmation decree of 1947 was sufficiently specific to convey the mineral interests; but attention is called to the marginal note.[3]

Affirmed.

[3] Caption of the decree is: "State of Arkansas against delinquent lands in Ouachita County forfeited for non-payment of taxes and sold to the State." Pertinent textual language is: ". . . And no one having appeared to make defense to any of the lands mentioned in the complaint, . . . and the Court being fully advised doth find that the lands hereinafter described, and each and every tract thereof, have heretofore been forfeited and sold to the State; . . . that the time for redemption of said lands [has expired]; . . . that the State of Arkansas is now the owner of said lands, and that the title in and to said lands should be forever quieted, confirmed, and vested in the State in fee simple. . . . Wherefore, it is by the Court . . . decreed that the various sales for non-payment of taxes upon the various tracts of land [be confirmed]." The Clerk was directed to make copies of the decree and send them to the Land Commissioner, "showing the disposition of each tract or parcel of land." Jurisdiction was retained to make further orders "from time to time as to all lands described in the plaintiff's complaint." And finally, title "to said lands and each and every tract thereof as herein described" was confirmed in the State.

The description of confirmed interests was headed, "List of State Lands in Ouachita County Forfeited for 1940 Taxes." Following the list of forfeited lands, but not connected with them descriptively, there is a one-line sub-heading, "Mineral Rights Only." The presumptive owner's name then appears, followed by a survey description of the interest, with such terms as "R. I.", "M. I.", "Lse. I.", etc. In one case the description was, "87/122880 of 1/8 R. I."

ON REHEARING

GRIFFIN SMITH, Chief Justice. In his brief on rehearing appellant, as petitioner, correctly says that but one of the six complaints was filed within a year of confirmation. However, the decree was introduced in evidence. It, with relevant testimony, showed that assessments in all of the cases were made in the same manner. The result we reached was not predicated upon confirmation or the want of confirmation. In discussing the assessments it was said that the power to sell was lacking. The petition for rehearing is denied.

WADLINGTON *v.* STATE.

4596 227 S. W. 2d 940

Opinion delivered March 20, 1950.

Stein & Stein, for appellant.

Ike Murry, Attorney General and *Robert Downie,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. By information Ernest Wadlington was charged with carnally knowing a girl under the age of sixteen years.[1] Ark. Stat's, §

41-3406. He has appealed from a two-year penitentiary sentence.

Wadlington is 24 years of age, married, and the father of two children. The prosecuting witness had been staying with her grandmother. She was in the tenth grade at high school, but would occasionally work at "The Tower," serving food and drinks to patrons who parked in automobiles.

Appellant admits that he had been patronizing drinking places the night of April 8-9, and that he took the girl in his car and drove to a point of seclusion. But he says this was done after a cousin he intended to meet at a road intersection had mysteriously absented himself. So, said the witness, he started out to overtake this cousin, who was also in a car. Appellant testified that when his companion asked why the car was stopped he told her that he was tired, and leaned his head on the steering wheel; "then she punched me and said we had better go home. I then put my arm around her and kissed her, and she said she would get even with me for not taking her home. She again asked me to take her home, and I said, 'o. k., we'll go in a minute'. I was pretty drowsy, so laid my head back on the steering wheel. She got mad and said if I wasn't going to take her home she would walk, and she got out and started. When I tried to get her back in the jeep she started running and fell down. . . ."

The girl testified that her purpose in getting into the car was to show "Ernest" the way to Goodwin's Store, but Ernest turned aside, drove down a hill, and stopped. When he got "fresh" she slapped him, then jumped out of the car and started running. Appellant caught her, used vile language, and finally committed rape.

Sheriff O. E. Bishop and Deputy Prosecuting Attorney J. H. Wharton testified that at a time when appellant thought he was charged with rape only he admitted having sexual intercourse with the prosecutrix.

[1] The prosecuting witness was born July 8, 1934. The crime occurred April 9, 1949, when she was 14 years and nine months old.

Appellant argues, first, that his conviction on the uncorroborated testimony of the accuser should not be permitted to stand. One answer is that his conviction did not rest on that testimony alone. The jury had a right to consider what the Sheriff and Mr. Wharton testified to regarding the defendant's admissions—testimony brought into the record without objection.

The second contention is that the Court erred in sustaining an objection by the Prosecuting Attorney. On cross-examination the prosecutrix had testified that she did not accuse Wadlington until her mother "found out about it", although she had mentioned it to Jack—a deaf and dumb boy with whom she was keeping company.

Question: "And [Jack] went to the Sheriff's office?" A. "No, he went to the Police station". Q. "And you appeared before the Grand Jury?" [Mr. Crumpler, the Prosecuting Attorney: "Objection". The Court: "That is not proper". Mr. Stein, the defendant's counsel: "Save our exceptions"].

Appellant now insists that his purpose was to show that the girl had made contradictory statements, hence credibility was involved, and the testimony was competent. The record does not show this purpose. There was no amplification. Assuming (but *only* assuming) for appellant's purpose that the ruling was erroneous, how can it be said that a yes or no answer to the question, "And you appeared before the Grand Jury?" would have been prejudicial?

Affirmed.

CITY OF LITTLE ROCK *v.* HUNTER.

4-9152 228 S. W. 2d 58

Opinion delivered March 27, 1950.

T. J. Gentry and *Frank H. Cox,* for appellant.

E. R. Parham, for appellee.

DUNAWAY, J. The Pulaski Chancery Court held that the "Zoning Ordinance," Ordinance 5420, of the City of Little Rock, Arkansas, was void insofar as it applies to appellees' property, and permanently enjoined the City and its officials "from in any manner interfering with plaintiffs in the use of said property under the provisions, terms or restrictions contained in said Ordinance No. 5420." The City of Little Rock, the Building Commissioner and Chief of Police have appealed.

Under the provisions of the Zoning Ordinance, which became effective March 17, 1937, appellees' property at 119 South Schiller Street (described as Lot 5, Block 5, Plunkett's Second Addition to the City of Little Rock) was classified or zoned as "B Residence" and limited to one-family residence use.

On April 8, 1942, the Hunters filed an action in the Pulaski Chancery Court in which they alleged that the general use of the property in the neighborhood was not in conformity with a "B Residence" classification, and that the council action in so zoning this property was arbitrary, unreasonable and an abuse of discretion which operated to deprive them of the use of their property without due process in violation of the Federal and State Constitutions. They further alleged that prior to filing the action they had petitioned the City Council to re-

classify the property in conformity with the general neighborhood use; that the petition had been approved by the City Planning Commission, but that the Council refused to amend the ordinance to make the recommended modification. The court, after hearing the evidence, found that numerous duplex apartments had been constructed in the vicinity and enjoined the City of Little Rock from interfering with the construction of a proposed duplex or the use and occupancy thereof, as prayed by the Hunters. The City did not appeal from this decree of February 25, 1943.

The duplex was constructed, and sometime thereafter the Hunters added a third apartment in the basement of said building without obtaining the required building permits and without petitioning the City Council to rezone the property.

On April 28, 1948, the City Engineer granted the Hunters a permit to construct on said premises a residential garage with servants' quarters and storage rooms on the second floor, a permissible use within the terms of the Zoning Ordinance. In violation of the ordinance, however, a four-room garage apartment was constructed and rented. For Mr. Hunter's action in renting this garage apartment contrary to the provisions of the Zoning Ordinance, the City caused his arrest.

The Hunters thereupon instituted the present suit in the Pulaski Chancery Court to restrain the City from interfering with this use of their property and to enjoin the Chief of Police from making any arrests based on violations of the Zoning Ordinance. The original complaint alleged in substance that property in the neighborhood was largely devoted to use in operation of stores, shops, apartments and residences converted to occupancy by more than one family, and that the attempt to limit appellees' use of their property was arbitrary, capricious and discriminatory; that it deprived them of their property without due process and that the ordinance was void. By amendment on the date of trial of the cause, it was further alleged that

under the decree of February 25, 1943, in the earlier action the Zoning Ordinance was void as to the Hunter property, and that said property was not subject to any of the provisions of the ordinance.

The trial court held the classification of appellees' property, in view of the general characteristics of the neighborhood, arbitrary, capricious and discriminatory, and hence void. The Chancellor further held that the effect of the 1943 decree was to void the entire ordinance as far as it related to appellees' property, and granted the permanent injunction herein-above set out.

Appellants rely on three contentions for a reversal: (1) Appellees did not first exhaust their administrative remedies before resorting to the chancery court and the court therefore had no jurisdiction of the cause; (2) The finding of the trial court as to the character of the neighborhood was against the preponderance of the evidence; (3) The court erred in holding the Zoning Ordinance void as to appellees' property and relieving said property from *all* provisions of the ordinance.

Ordinance No. 5420 of the City of Little Rock has been considered by this court on numerous occasions and its validity upheld. It is also well settled that as to particular lots the courts may declare the Zoning Ordinance void upon a proper showing that its application is arbitrary, unreasonable and discriminatory. The cases are fully cited in *City of Little Rock* v. *Griffin,* 213 Ark. 465, 210 S. W. 2d 915. Before the courts will invalidate the classification made by the Zoning Ordinance, however, it is necessary for the property owner first to exhaust his administrative remedies in seeking the zoning re-classification which he contends the facts demand. Until this is done, an action for injunctive relief is prematurely brought. *City of Little Rock* v. *Joyner,* 212 Ark. 508, 206 S. W. 2d 446; *City of Little Rock* v. *Griffin, supra*; *City of Little Rock* v. *Evans,* 213 Ark. 522, 212 S. W. 2d 28.

The Zoning Ordinance, which was introduced in evidence by the City, provides that property may be reclassi-

fied by the City Council upon petition filed by the property owner after fifteen days notice published in a newspaper, and after the petition has been submitted to the City Planning Commission for its recommendation and report. Appellees did not seek a reclassification of their property to permit the construction of the two additional dwelling units, but proceeded without any attempt to comply with the provisions of the ordinance.

Unless the 1943 decree voided any application of the Zoning Ordinance to appellees' property the decree herein appealed from by the City must be reversed. The earlier decree did not in terms nor by inference declare the ordinance *void* as to the property in question. As already quoted in this opinion, it enjoined the City from interfering with appellees' construction and use of a duplex apartment. Although the decree did not specifically so state, the effect of this was to permit the use of appellees' property for a "C" two-family dwelling, under the zoning classification.

Under the Zoning Ordinance the various classifications not only regulate the number of family dwelling units which may be constructed, but determine the permissible height of buildings and minimum lot area requirements. A finding by the court that a two-family dwelling on appellees' property would be in keeping with general neighborhood use, would certainly not justify the conclusion that the property owner might then on his own initiative give his property a multiple-family dwelling classification, and build as many structures as he chose without regard to the valid provisions of the ordinance concerning height and area requirements. The health and safety of the public would be completely ignored by such a holding, as well as the rights of adjoining property owners.

When appellees desired to depart even further from the limitations of the Zoning Ordinance than allowed by the 1943 decree, they should have pursued the remedy provided by the ordinance and sought a reclassification of their property. If this had been sought and refused, the chancery court could then have passed upon the question

of whether the action of the Planning Commission and City Council was arbitrary and unreasonable.

Since we hold that appellees' action was prematurely brought it is unnecessary to pass upon the correctness of the Chancellor's finding as to the character and general use of property in the neighborhood under consideration. The decree is reversed and the cause dismissed, but without prejudice to any further action appellees may bring after properly pursuing their administrative remedies.

RAVN *v.* MCCALLEY.

4-9149 228 S. W. 2d 61

Opinion delivered March 27, 1950.

L. Neill Reed, for appellant.

J. L. Bittle, for appellee.

MINOR W. MILLWEE, Justice. This is a suit on a foreign judgment. On December 2, 1947, appellants, Dorothy G. Ravn, Asger Ravn, Frances Mitchell and Ralph T. Mitchell, obtained a judgment in the Superior Court of the State of California, Riverside County, against appellee, E. W. McCalley, Sr., for personal injuries and property damage in the total sum of $10,510.

The pleadings and judgment in the California court reflect that the cause of action arose out of an automobile collision in that state on March 30, 1946, between an automobile driven by one Harry F. Lowell and a car driven by appellant, Ralph T. Mitchell and in which the other appellants were riding as guests; that the injuries and damages to appellants proximately resulted from the negligence of Lowell, who was driving the automobile with the express or implied permission of the owner, who was alleged to be either appellee, or his son, E. W. McCalley, Jr., or both. Lowell and E. W. McCalley, Jr., were also joined as party defendants in the action and personal service was obtained on them. Appellee was served as a nonresident owner of the automobile under the provisions of § 404 of the California Vehicle Code.

On June 2, 1948, appellants filed the instant suit on the California judgment against appellee in the circuit court of Cleburne County, Arkansas, attaching to their complaint properly authenticated copies of the pleadings, proceedings and judgment of the California court. Appellee filed a motion to dismiss alleging, among other things, that he was a resident of Arkansas at the time of the collision and that the California court did not have or acquire jurisdiction over his person for the reason that he was not the owner of the automobile at the time of the collision.

At the hearing in circuit court, appellee and his wife testified that appellee sold the car involved in the collision to their son, E. W. McCalley, Jr., before the parties moved from California to Cleburne County, Arkansas, in the lat-

ter part of February, 1946; that E. W. McCalley, Jr., was in the Navy in California and while in a naval hospital loaned the car to his friend, H. F. Lowell, who had the collision in March, 1946.

After the hearing the trial court made findings of fact and declarations of law in which he correctly found that appellee was a resident of Arkansas at the time of the collision; that appellants complied with the California nonresident motorist statute (§ 404 of the California Vehicle Code) in obtaining service on appellee; that, under the full faith and credit clause of the Federal Constitution, the California judgment was subject to collateral attack on the ground of lack of jurisdiction of the California court to render it; and that the Cleburne Circuit Court had authority to inquire into the jurisdiction of the California court.

The court further found: "The plaintiffs (appellants) in their complaint filed in the California court sought to bring the defendant (appellee) E. W. McCalley, Sr., within the terms of the Vehicle Code of that state by alleging that 'defendant E. W. McCalley, Jr., or defendant E. W. McCalley, Sr., or both of them, was the owner of the aforesaid Chevrolet automobile.' Paragraph 7. And in paragraph 6 they alleged that 'defendant Harry F. Lowell operated the aforesaid automobile at the aforementioned time and place with the express or implied permission of the owner.'

"But if the defendant E. W. McCalley, Sr., was not, as the proof shows, the owner of the car at the 'time and place,' he was not included within the terms of § 404, and no liability could attach to him.

"Furthermore, an examination of the other provisions of this section fails to show how any liability could attach to him under the circumstances shown by the proof.

"The undisputed testimony shows that he was not the owner of the car on March 30, 1946, and had not been for more than a month. Thus the allegation in the original complaint that he was the owner has failed to bring him within the terms of § 404.

"It is apparent that neither by a strict construction of the section, nor even by a liberal construction thereof, can defendant be held to be included within its terms.

"The California court did not have jurisdiction over him, its judgment against him is void and cannot be the basis of an action in this state against him . . ." The complaint of appellants was accordingly dismissed.

The issue on this appeal is the correctness of the trial court's conclusion that appellee was not the owner of the automobile involved in the collision on March 30, 1946, within the meaning of the California statutes. It is well settled that title to a chattel passes according to the law of the place where the chattel was located at the time of the transaction by which it is claimed the title was passed. Leflar, Conflict of Laws, § 121; Restatement, Conflict of Laws, §§ 258, 260; Beale, The Conflict of Laws, Vol. 2, p. 981; *Pruitt Truck & Implement Co.* v. *Ferguson, ante,* p. 848, 227 S. W. 2d 944. According to the testimony of appellee, the alleged sale of the automobile to his son was made in California where the car was then located and before appellee came to Arkansas. The question of ownership must, therefore, be determined by the law of California.

The following sections of the California Vehicle Code are pertinent. Section 404 (a) provides: "The acceptance by a nonresident of the rights and privileges conferred upon him by this code or any use of the highways of this State as evidenced by the operation by himself or agent of a motor vehicle upon the highways of this State or in the event such nonresident is the owner of a motor vehicle then by the operation of such vehicle upon the highways of this State by any person with his express or implied permission, is equivalent to an appointment by such nonresident of the director or his successor in office to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against said nonresident operator or nonresident owner growing out of any accident or collision resulting from the operation of any motor vehicle upon the highways of this State by himself or agent."

Section 177 (a) provides: "Whenever the owner of a vehicle registered hereunder sells or transfers his title or interest in, and delivers the possession of, said vehicle to another, said owner shall immediately notify the department of such sale or transfer giving the date thereof, the name and address of such owner and of the transferee and such description of the vehicle as may be required in the appropriate form provided for such purpose by the department."

Section 178 provides: "An owner who has made a *bona fide* sale or transfer of a vehicle and has delivered possession thereof to a purchaser shall not by reason of any of the provisions of this code be deemed the owner of such vehicle so as to be subject to civil liability for the operation of such vehicle thereafter by another when such owner in addition to the foregoing has fulfilled either of the following requirements: (1) * * * When such owner has made proper indorsement and delivery of the certificate of ownership and delivered the certificate of registration as provided in this code. (2) * * * When such owner has delivered to the department or has placed in the United States mail, addressed to the department, either a notice as provided in § 177 or appropriate documents for registration of such vehicle pursuant to such sale or transfer."

Section 402 (a) provides: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

Section 186 of the Vehicle Code further provides that no title to a vehicle registered thereunder shall pass until the parties to the attempted transfer shall fulfill the requirements of §§ 177 and 178, *supra*. The California proceedings show, and appellee admitted at the hearing in circuit court, that at the time of the collision there had been no transfer of the certificate of title of the automo-

bile from appellee to his son as required by the California code.

In construing the foregoing sections of the Vehicle Code, the courts of California have repeatedly held that an owner of an automobile, who delivers possession of the car to a vendee without complying with the requirements of §§ 177 and 178, cannot escape liability under § 402 by claiming that he is no longer the owner of the vehicle. *Votaw* v. *Farmers Automobile Inter-Insurance Exchange,* 15 Cal. 2d 24, 97 Pac. 2d 958, 126 A. L. R. 538; *Gutknecht* v. *Johnson,* 62 Cal. App. 2d 315, 144 Pac. 2d 854; *Leplat* v. *Raley Wiles Auto Sales,* 62 Cal. App. 2d 628, 145 Pac. 2d 350. One of the recent decisions on the question is that of *Weinberg* v. *Whitebone,* 87 Cal. 2d 319, 196 Pac. 2d 963, where the court held (Headnote 4): "Owner, having made *bona fide* delivery of possession of motor vehicle to buyer, is not relieved from civil liability for operation of vehicle by buyer or buyer's agent until owner has made proper endorsement and delivery of certificate of ownership in accordance with provisions of vehicle code, or has delivered or mailed to Motor Vehicle Department immediate written notice of transfer or appropriate documents for registration of vehicle pursuant to transfer."

Under California law, if such owner entrusts the car to another, he invests him with the same authority to select an operator which the owner has in the first instance. Hence, such owner is liable, if his permittee consents to the operation of the car by another whose negligence causes the damage. *Haggard* v. *Frick,* 6 Cal. App. 2d 392, 44 Pac. 2d 447; *Souza* v. *Corti,* 22 Cal. 2d 454, 139 Pac. 2d 645, 147 A. L. R. 861.

Thus, it is clear from a consideration of the California Vehicle Code as construed by the California courts that where the transferor, or vendor, of an automobile has not complied with the statute relating to endorsement of the certificate of ownership and giving notice of transfer, he is deemed the owner and can be sued and held liable for damages resulting from the negligence of the operation of the car by the vendee, or permittee.

It is undisputed that appellee received a copy of the complaint and summons in the California suit by registered mail in due time and prior to rendition of the judgment against him in accordance with the terms of § 404, *supra*. Acts similar to the California substituted service statute, and containing provisions which make it reasonably probable that notice will be communicated to the person to be served, have been held constitutional in many cases. *Hess* v. *Pawloski*, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091; *Wuchter* v. *Pizzutti*, 276 U. S. 13, 48 S. Ct. 259, 72 L. Ed. 446, 57 A. L. R. 1230. See, also, Anno., 35 A. L. R. 951, 82 A. L. R. 768, 88 A. L. R. 170.

Since, under California law, appellee was deemed the owner of the car at the time of the collision out of which the action arose, the California court was not without jurisdiction and there is no charge of fraud in the procurement of the judgment. Under Art. 4, § 1 of the Federal Constitution the courts of this state are required to give full faith and credit to the California judgment, which is conclusive here on collateral attack. *Motsinger* v. *Walker*, 205 Ark. 236, 168 S. W. 2d 385, and cases there cited.

The judgment of the circuit court is accordingly reversed and the cause remanded with directions to enter judgments for appellants.

FRANKLIN *v.* HEMPSTEAD COUNTY HUNTING CLUB.

4-9144 228 S. W. 2d 65

Opinion delivered March 27, 1950.

[redacted]

L. L. Mitchell, for appellant.

W. S. Atkins, for appellee.

HOLT, J. Appellee brought this action for partition of a forty-acre tract of land in Hempstead County. The complaint alleged that appellants, by deed January 7, 1929, conveyed to G. P. Casey and J. O. A. Bush an undivided ½ interest in the land, that appellants retained and owned the remaining ½ interest, and that later Casey conveyed his ¼ interest to appellee.

In an answer and cross-complaint, appellants interposed a general denial, claimed sole ownership of the forty-acre tract, and affirmatively pleaded laches, estoppel and limitations as a complete bar, and further that appellant, Hettie Franklin, was without mental capacity to execute the above deed.

A trial resulted in a decree for appellee. The court found that the tract was not subject to division in kind

and that it should be sold and the proceeds divided in accordance with the prayer of appellee's complaint. From the decree is this appeal.

The record reflects that on January 7, 1929, appellants executed a Quit Claim Deed to G. P. Casey and J. O. A. Bush, by which they conveyed to them for "one dollar ($1.00) and other good and valuable considerations an undivided ½ interest in the land in question." J. O. A. Bush died some time after this deed was executed by appellants. Appellee, Hunting Club, purchased G. P. Casey's ¼ interest.

For reversal, appellants say that there are "but two vital issues:" 1. "Was the instrument called a Quit Claim Deed executed January 7, 1929, a *bona fide* deed in the truest sense, with all of the purported grantors knowing what they were signing, with a full, fair and clear knowledge of its intended consequences," and for a valuable consideration? 2. "If the instrument executed January 7, 1929, was a Quit Claim Deed properly executed . . ., then, were the grantees of J. O. Bush and G. P. Casey guilty of laches," and estopped to assert any rights to the property at this late date?

The Quit Claim Deed in question is regular in form and recites a valuable consideration. It was properly acknowledged and recorded about four days after its execution. No fraud in its procurement was alleged or shown. Appellants are in the attitude of attempting to invalidate or impeach this deed which purports to have been executed, signed and acknowledged by each of them. They could do this only by clear, cogent and convincing evidence, which, after reviewing the testimony, we hold they have failed to do.

In *Stephens* v. *Keener,* 199 Ark. 1051, 137 S. W. 2d 253, we said: "Before we would be warranted in setting aside the solemn recitals in a deed, a written instrument signed and acknowledged, the *quantum* of testimony required must rise above a preponderance of the testimony. To do this the evidence must be clear, cogent and convincing. A mere preponderance is not sufficient. . . . ."

"In *Morris* v. *Cobb,* 147 Ark. 184, 190, 227 S. W. 23, this court said: 'Again, appellant is in the attitude of impeaching the deed purported to have been executed and acknowledged by him. He could only do this by clear, cogent and convincing evidence. *Bell* v. *Castleberry,* 96 Ark. 564, 132 S. W. 649; *Polk* v. *Brown,* 117 Ark. 321, 174 S. W. 562. His evidence does not meet this requirement.'

"And in the recent case of *Burns* v. *Fielder,* 197 Ark. 85, 122 S. W. 2d 160, this court said: 'The evidence necessary to impeach the solemn recitations of the deed must be clear and convincing. As was said in *Bevens* v. *Brown,* 196 Ark. 1177, 120 S. W. 2d 574, such evidence must be so clear that reasonable minds will have no doubt that such an agreement was executed. It must be so convincing that serious argument cannot be urged against it by reasonable people.'' '

We further hold, after reviewing the testimony, that appellants have failed to sustain, by a preponderance thereof, their contention that Hettie Franklin was without mental capacity when she executed the deed, along with the other appellants. See *Wilson* v. *Wilson,* 212 Ark. 85, 204 S. W. 2d 878.

Appellants' contention that appellee has been guilty of laches, and further that they (appellants) have acquired title by adverse possession, can not be sustained.

It is conceded that appellants have held possession and remained on this tract of land since the execution of the deed in 1929, and for many years prior thereto. However, the preponderance of the evidence falls short of showing that appellee, in the circumstances, was guilty of laches or that appellants' holding was adverse or hostile to appellee's interest.

"The doctrine of laches which is a species of estoppel rests upon the principle that, if one maintains silence when in conscience he ought to speak, equity will bar him from speaking when in conscience he ought to remain silent. . . . Mere lapse of time before bringing suit, without change of circumstances or in the relation

of the parties, will not constitute laches. Not only must there have been unnecessary delay, but it must appear that, by reason of the delay, some change has occurred in the condition or relation of the parties to the property which would make it inequitable to enforce the claim. So long as the parties are in the same condition, a claim for land may be asserted within the time allowed by law." *Stewart* v. *Pelt,* 198 Ark. 776, 131 S. W. 2d 644.

The rule is well settled that: "The right of each to occupy the premises is one of the incidents of a tenancy in common. Neither tenant can lawfully exclude the other. The occupation of one so long as he does not exclude the other, is but the exercise of a legal right. If for any reason one does not choose to assert the right of common enjoyment, the other is not obliged to stay out." *Hamby* v. *Wall,* 48 Ark. 135, 2 S. W. 705, 3 Am. St. Rep. 218.

" 'It is . . . from the nature of the estate that a tenant in common of land, in the enjoyment of his rights, must necessarily, *prima facie,* be in possession of the whole.' Angell, Lim. 429. 'The possession, therefore, of one tenant in common is the possession of all.' " *McKneely* v. *Terry,* 61 Ark. 527, 33 S. W. 953.

"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 acts that notice may be presumed." *Hardin* v. *Tucker,* 176 Ark. 225, (Headnote 2), 3 S. W. 2d 11.

There was evidence that appellee claimed an interest in the land and that appellants recognized appellee's interest. Of significance is the fact that appellants paid appellee part of the proceeds from the crops produced on the land.

The rule is well established that "retention of the possession of vendors after the execution and delivery of a deed is presumed to be in subordination of the title conveyed and the statute of limitations will not begin to run until notice of the hostility of their claim is actually given to the grantee. This rule was well stated

in the case of *City of Stuttgart* v. *John,* 85 Ark. 520, 109 S. W. 541. We do not think this presumption was overcome by a preponderance of the evidence." *Daniels* v. *Moore,* 197 Ark. 727, 125 S. W. 2d 456.

As indicated, on the whole case, finding no error, the decree is affirmed.

Justice McFaddin, not participating.

Fagan Electric Company, Inc. *v.* The Housing Authority, City of Blytheville.

4-9150 228 S. W. 2d 39

Opinion delivered March 27, 1950.

Bailey & Warren, for appellant.

Holland & Taylor, for appellee.

[redacted].

George Rose Smith, J. The issue in this case is whether Act 159 of 1949 (Ark. Stats. 1947, § 14-611 *et seq.*) applies to the appellee, Housing Authority of the City of Blytheville. Act 159 provides that whenever "the State, or any agency thereof, or any county, municipality, school district, or other local taxing unit" undertakes to let a construction contract involving an estimated cost of over $10,000, there must be separate bidding and separate contracts for plumbing, for heating, for ventilating and air conditioning, and for electric wiring and illuminating fixtures. In November, 1949, the appellee proposed to award a single contract for the construction of a public housing project that will exceed $10,000 in cost. The appellants, who are dealers in electrical appliances and plumbing supplies, contend that Act 159 requires the appellee to let separate contracts for electric wiring and fixtures and for plumbing. Upon the appellee's refusal to solicit separate bids the appellants brought this action to enjoin the award of a single contract. This appeal is from the chancellor's refusal to grant an injunction.

We pass over the question of whether the appellants' interest is sufficiently direct to enable them to maintain the action (see *Arkansas Democrat Co.* v. *Press Printing Co.*, 57 Ark. 322, 21 S. W. 586), for we think the issue to be of sufficient public importance to make a decision on the merits desirable. Nor need we consider the validity of the Act.

By its terms Act 159 applies to "the State, or any agency thereof, or any county, municipality, school district, or other local taxing unit." In order to hold that the Act applies to the appellee we must find that a housing authority is either (*a*) an agency of the State or (*b*) a local taxing unit. It is apparent from an examination of the statutes governing housing authorities that these public corporations do not fall in either classification. Ark. Stats., Title 19, Ch. 30. The statute creates a housing authority in each city of the first class and in each county, but the corporation cannot begin business until the governing body of the city or county finds by resolution that there is need for the authority

to function. § 19-3004. If a city adopts such a resolution the mayor then appoints commissioners to conduct the affairs of the authority. § 19-3005. The authority's powers can be exercised only within the city and a limited contiguous area. §§ 19-3003 (g) and 19-3011 (b). We find nothing in the statute to indicate that the State has reserved any control over local housing authorities. The appellee is no more an agency of the State than is any other corporation as to which the State has done nothing except bring it into existence.

Nor is the appellee a local taxing unit. A housing authority may derive income from federal grants, from the issuance of bonds, from rentals, etc., but it has not been given the power of taxation. Under the doctrine of *ejusdem generis* the general reference to "other local taxing units" includes only units of the same kind as those already specifically enumerated. *State* v. *Chicago, R. I. & P. Ry. Co.,* 95 Ark. 114, 128 S. W. 555. Here the specific reference is to counties, municipalities, and school districts, which are all governmental bodies having the power of taxation. As a housing authority is markedly dissimilar to the other local taxing units named in the statute, especially with regard to the taxing power, it is evident that the appellee is not within the reach of Act 159.

Affirmed.

COUNTY BOARD OF EDUCATION OF BAXTER COUNTY
v. NORFORK SCHOOL DISTRICT NO. 61.

4-9132 228 S. W. 2d 468

Opinion delivered March 27, 1950.

Rehearing denied April 24, 1950.

Oscar E. Ellis, Ernie E. Wright and *Nell Powell Wright,* for appellant.

Eugene W. Moore and *H. J. Denton,* for appellee.

LEFLAR, J. The Circuit Court, on appeal from the Baxter County Board of Education, reversed an order of the County Board and adjudged that certain rural school districts should be annexed to Norfork School District No. 61. The County Board now appeals to this Court.

Initiated Act No. 1 of 1948 (Ark. Stats., 1949 Supp., § 80-426 *et seq.*; Acts of 1949, p. 1414) consolidated into one county-wide "United District" all "small" school districts in each county of the state. A "small" district was defined as one having fewer than 350 children of school age on March 1, 1949. By fixing this date, the Initiated Act of 1948 gave "small districts" the opportunity to consolidate with other pre-existent districts, under consolidation laws previously in force, and thus get out of the "small district" classification before March 1, 1949.

Flat Rock School District No. 27, Buffalo District No. 12, Lone Pine District No. 17, and Shady Grove District No. 31 were all small rural school districts in Baxter County. On February 10, 1949, certain citizens of Flat Rock District filed with the County Board a petition for annexation to Norfork District No. 61, and on February 14, 1949, similar petitions to the same effect were filed by citizens of Buffalo, Lone Pine and Shady Grove districts. The applicable consolidation law, Ark. Stats., 1947, § 80-408, required notice of these petitions

to be published once a week for two weeks in a county newspaper, the notice to state the date on which the County Board would hold its hearings on the petitions. Publication of these notices was commenced on February 16 or 17 on each petition, the notices setting March 4, 1949, as the date for hearings before the Board on all four petitions.

These hearings were never held. On February 22, 1949, the Attorney General by letter advised the County Supervisor of Schools that the petitions could not be acted upon in time to get ahead of the March 1 deadline for "small district" voluntary consolidations. The theory upon which this advice was given was that the County Board could not hold its hearings until two weeks had passed after the first weekly publication of notice of hearing, which would necessarily put the hearing after the March 1 deadline. It was the opinion of the Attorney General that the "United District" of the county would automatically include all areas for which consolidation with "large districts" had not actually been completed by March 1, regardless of the fact that proper petitions for consolidation had previously been filed. Whether this advice was correct we do not now decide.

The County Board, relying upon the Attorney General's advice, failed altogether to act upon the four petitions. At a meeting held on June 6, 1949, acting under authority conferred upon it by Initiated Act No. 1, the Board determined what parts of the newly formed "United District" should be dismembered therefrom and joined to pre-existing "large districts". This the Board had full power to do. *Stroud* v. *Fryar, ante,* p. 250, 225 S. W. 2d 23. The Board's determination was that the territory formerly comprising all four of the "small districts" in question should be annexed to the Mountain Home District.

Interested parties on June 29, 1949, undertook the appeal to Circuit Court from the County Board order of June 6, 1949. The appeal was filed by citizens who had signed each of the four petitions for annexation to Norfork District, and also by Norfork District itself.

The County Board defended. After a succession of hearings and trials, the Circuit Court held that the County Board's order should be set aside and that the territory of all four small districts should be annexed to the Norfork District in accordance with the original petitions.

We have concluded that the appeal to the Circuit Court was erroneously allowed.

The appeal heard by the Circuit Court was essentially an appeal from the County Board's failure to act on the four petitions in the first place. The evidence presented to the court related to the adequacy of these petitions. The argument urged was to the effect that the County Board should have held hearings upon and approved the petitions. The ground given for the Circuit Court's judgment was that the petitions were valid and the Board should have acted upon them. The Board's failure to act upon petitions found to have been properly filed was the main matter considered, and the main matter upon which the appeal sought consideration.

The statutes provided a specific remedy for this case. Act 361 of 1947 (Ark. Stats., 1947, § 80-421) reads:

"On all petitions filed for a consolidation now pending, or filed hereafter, with the County Board of Education in any County, the hearing on said petition must be held within sixty [60] days after the date of filing. If hearing is denied within this specified time and said Board has refused to act on said petition within the specified time, petitioners shall have the right to appeal the petition for hearing to the Circuit Court of the County in which said original petition was filed."

The sixty-day period allowed by § 80-421 for County Board action ended on April 11 for the petition filed February 10 and on April 15 for the petitions filed February 14.

Act 183 of 1925[1] allows thirty days in which a party aggrieved may take an appeal from orders or actions

[1] Act 183 of 1925 is set out, with explanation, in a note appended to Ark. Stats., 1947, § 80-213.

of a County Board of Education. We have held that Act 183 is in full force and effect. *Gibson* v. *Davis,* 199 Ark. 456, 134 S. W. 2d 15; *McLeod* v. *Richardson,* 204 Ark. 558, 163 S. W. 2d 166. It is applicable to the present appeal. Under it the latest dates on which appeals could be taken from the Board's refusal to act on the petitions within the sixty days allowed by § 80-421 were May 11 and May 15, thirty days after April 11 and April 15, respectively. No appeal from the Board's action was filed until June 29. That was too late.

The petitioners, seeking to avoid the inevitable bar of the statute against appeals too long delayed, now urge that the June 6 order of the County Board of Education, annexing their territory to the Mountain Home District, should be regarded as action taken upon their several petitions. The argument is that any decision made at any subsequent time by the Board concerning this territory constituted by necessary implication action taken upon their petitions even though the Board was at the time not purporting to pass upon them, that annexation to any other district was such a denial of the February 10 and February 14 petitions as to resurrect the lost right of appeal. In this analysis we cannot concur. The Board on June 6, 1949, was not passing upon the consolidation petitions filed many months before. The Board then was acting under the wholly new and different authority, conferred upon it by section 3 of Initiated Act No. 1 of 1948, to annex portions of the newly created "United District" to pre-existing "large districts" which could serve such areas more efficiently and effectively. And from its action under section 3 of the Initiated Act this appeal is unavailing. *Stroud* v. *Fryar, ante,* p. 250, 225 S. W. 2d 23.

The judgment of the Circuit Court is reversed and the cause is dismissed.

4-9134 228 S. W. 2d 638

Opinion delivered March 20, 1950.

Cecil E. Johnson, Jr., for appellant.

R. Coker Thomas, for appellee.

ED. F. MCFADDIN, Justice. This is an appeal from the Little River Chancery Court, Second Division; and the appellant challenges the correctness of the decree rendered by that Court. The learned Chancellor heard the evidence *ore tenus* and filed a written opinion on which the decree was based. We copy the opinion of the Chancellor which contains a statement of the issues, synopsis of the testimony of the witnesses, and application of the governing legal principles.

Opinion of the Chancellor

"This suit was instituted by the plaintiff, Luther Gross, against the defendant, Arthur Stoker, to enjoin the defendant from building a gate across and closing a road running over defendant's lands, and preventing the plaintiff, and the public generally, from using said road.

"The defendant owns a small tract of land, approximating 40 acres, along the western bank of Little River in Little River County. For more than sixty years a road has, or roads have, traversed said lands. The main road originally went from Saratoga, Arkansas, to Little River, and from Little River to the old town of Richmond, and was a military road. In the early days a ferry was operated across Little River to transfer the traffic from one bank to the other.

"In 1938 the CCC authorities, under a contract with the defendant, constructed what is referred to in the testimony as the CCC road, following the most direct path across said land, and being along an old road known as the flat trail or flat road. The testimony is conflicting as to the location of the road leading from the old ferry, or approximately its landing place, across the lands of the defendant. A preponderance of the evidence discloses, however, that there were three roads leading across said lands and their use depended upon weather conditions. There was a road on the South side along the high banks of a slough which was used presumably in wet weather; then, as the wet season moderated, there was a second road across defendant's lands North of this road, leading across said lands, used by the public, and which was a shorter road when weather conditions became better; and then, when the dry season set in, the public generally used the flat trail—or the most direct route across said lands —which was later graded and improved by the CCC authorities. The only road involved in this action is the flat trail or flat road, taken over in 1938 and graded by the CCC authorities; and the issue is: the right of the plaintiff to secure an injunction against defendant enjoining him from closing said road by a locked gate, or otherwise.

"It is evident from the testimony that the lands of the defendant are very low, and along the bank of the river, and of a swampy nature, and that the public, in crossing said lands, had considerable difficulty, depending on weather conditions; but a preponderance of the evidence shows that there were three roads used, as above shown, and that the flat trail or road, built by the CCC authorities, followed a road which had been used by the public for more than fifty years.

"*The plaintiff, Luther Gross,* testified that the CCC road was built in 1938; that when it was first built there was a bridge over Little River where it touches the west bank of Little River, constructed by the CCC authorities, but which bridge was destroyed—shortly after being built —by an overflow of Little River; that he used this CCC

road almost exclusively, after it was built, to conduct his occupation as a licensed commercial fisherman; that the CCC dump was built in height approximately three feet across the defendant's lands; that there were two drains across said lands and that they were bridged by the CCC authorities; that prior to that time timbers were placed in these drains permitting the use of the flat trail in dry weather; that he had traveled that road approximately twenty years altogether; and that recently the defendant had placed a gate across the west side of defendant's lands, blocking said road, and locked same.

"*Lum Starks,* a witness for plaintiff, testified that he had farmed in that community and lived there since approximately 1910, and that the CCC road followed what was known as the old Ward's Ferry road, or the flat trail; that this road after reaching Little River on the east side thereof, went from the east bank of Little River to the town of Saratoga, and was a well-defined road, and was the only method to cross defendant's land in the rescuing of livestock in overflows; that the said CCC road ran across his land; that the CCC road had been graded through the administrations of two county judges; and that the public generally used the CCC road for approximately ten years before this suit was filed. He also testified that there were three roads across the defendant's lands and used as above set forth, depending on weather conditions.

"*Preston Aaron* testified that a road had crossed the defendant's land, being known as the Ward's Ferry road, as far back as he could remember; that he was sixty-four years of age; that he owned lands across the river from the defendant's lands, and had rented from Dierks Lumber Company lands and constructed a cabin thereon and had been intimately acquainted with these lands for the past ten years. He testified that his cabin was immediately West of the defendant's cabins; that to get to his lands it was necessary that he use the CCC road, which he had done since its construction; that he kept a boat on Little River the year around to use in crossing the river; that the traffic generally has been using the CCC road

since its construction; that he rented the Stoker cabin for three years before building his own cabin; and that it would do him an irreparable injury to close the CCC road.

"*M. F. Adkinson* testified that he had worked for Little River County in county highway construction for seven years and was acquainted with the CCC road; that the county had graded it and kept it up under the administration of Judge Lowery and Judge Johnson; and that there was an old road where the CCC road was constructed.

"*J. E. Taylor* testified that he was eighty-three years of age; that a ferry was operated at the connection of the Saratoga road with a road across defendant's lands sixty-five years ago; that it was the principal military road reaching from Saratoga to Richmond; that the road from the river to Saratoga was maintained by the county and had been for sixty years; and that, as far back as he could remember, the road on this side of the river was the Ward's Ferry road.

"*Wes Stephens* testified that there were three roads over the Stoker lands; that he had lived in that neighborhood all his life; that he owned a farm in that neighborhood; that he raises hogs and cattle; that to protect his stock, especially in overflows, it is necessary that he use the CCC road; that, as between the three roads, he used whichever road the weather conditions compelled him to use; that the CCC road had been graded since its construction; that he used the CCC road, and Mr. Stoker's man had helped him to do so in moving his stock out of the bottoms; that the CCC road was the only way he had to move his stock out when the river got up. He also testified that he had a gate where the road crossed his lands, but the public generally used the road and it was open to the world; that there was an old wagon road where the CCC road was built over Stoker's lands; that they never asked Mr. Stoker's permission to use the lands; that about the time Stoker closed the road, he told them that they would have to stop using the road or pay him; that Stoker had made no objections prior thereto; that the public used those roads, and did so without asking permission;

and that there were only three roads he knew of across Stoker's lands, and their use depended upon weather conditions.

"*W. D. Lowery* testified that he was County Judge from January 1, 1939, until January 1, 1945, and, as County Judge of Little River County, he caused the CCC road to be graded to the river; that he never talked with CCC authorities about the road; and that beginning with 1932 there was a road across Stoker's lands over which later the CCC road was built, that is, that the CCC road was the same road as the old road.

"For the defendant's case, *Arthur Stoker* testified that he had owned his land about twenty-five years; that the ferry had not been operated over the river for about forty years; that the roads across his lands to the ferry landing crossed all over his lands; that he made no objections to the people generally using the lands; that there were three roads from the Mulberry Landing; that Judge Lowery repaired the bridges over the CCC road; that he made no objections to anyone going in there; and that he personally put gravel on the road.

"*George Taaffe* testified that there were roads all over the Stoker lands; that during the wet season the roads were all over the place; but during dry weather there was a definitely traveled road; that he was first at Stoker's camp about 1923; that as occasion demanded when a road became impassable another one was cut; that this 33 acres was what was called Little River bottom land; that there were no improvements on the Stoker land; that there was a definite road there during the dry season, late summer and fall, but that he did not know where it ran.

"*Robert Sessions* testified that he was County Judge from 1931 to 1938; that as County Judge he worked the road to Lum Starks' place; that he did not know of any court order establishing a road over the Stoker lands; that he had made one trip over the road across Stoker's land from Starks' place to the river; that he was never familiar with this land; that he believed the CCC made arrangements with the county to use their machinery in working the roads they constructed; that finances were

short about that time and he believed that they worked with the WPA and CCC; and that he did not know whether this was a public road or not.

"*E. S. Pickett* testified that he lives near Foreman in Little River County; that he was reared around the 33 acres in controversy; that they went down different roads across these lands to the river; that he left there in 1919 and had visited there three times since; that the last time was after the CCC road had been built; that there was a road known as the flat road; and that there was approximately fifty years' use of the flat road over which the CCC road was built before the construction of the CCC road.

"*George McDowell* testified that the road across the defendant's land ran to the river and was a dead end road at the river; that the ferry ceased to operate about forty years ago; that there were three roads over the defendant's lands, one being what is known as the flat road; that when it got 'boggy' they drove where they could; that he was there once a month prior to the construction of the CCC road, and that the CCC road was built over what is known as the flat road; and the flat road had been in use for approximately fifty years.

"The defendant introduced his contract of lease with the CCC and the relinquishment of the contract.

"It is my opinion that a preponderance of the testimony shows that, depending on weather conditions, there were three well-defined roads across the defendant's lands: one being on a high bluff on the south side, used in wet weather; one being north of this road and between this road and the CCC road and used when weather conditions improved, being shorter than the first mentioned road; and the last being what is known and referred to by witnesses as the 'flat road', and being the nearest route across the defendant's lands to the river; that the public generally is interested in the use of the 'flat' or 'CCC' road; that the flat road had been in use for more than fifty years before the CCC road was graded and raised over the flat road; that in dry weather, before the CCC road was built, even cars could travel the flat road, as

there were depressions, but by putting timbers over the low places this could be done; then, when the CCC road was built, it lifted the flat road about three feet and bridged these places, and perhaps County road machinery was used in building this road; that the public generally used the flat road for fifty years or more, and used the CCC road for ten years, before any question was raised as to the right of the public to use this road.

"In my opinion this testimony clearly established that the public, by prescription, acquired the right to use this road, being first the flat road and later the CCC road. No one during all those years ever questioned the right of the public to use this road as a public road, not even the defendant after he acquired title to the land.

"It is my opinion that the contract entered into between the defendant and the CCC authorities was a private contract between them, and evidently it was the intention to build and use this road as a public road after it was built and graded and raised with public funds, and that it would be used to a greater extent today had the bridge not washed out. This road is a public road reaching back to Civil War days; the right of the public to use this road—because of a use for more than sixty years—is now beyond question. A decision of this case, in my opinion, is governed by the case recently decided by the Supreme Court: *Martin* v. *Bond, Trustee,* 215 Ark. 146, 219 S. W. 2d 618."

We conclude from a careful study of the transcript and the briefs, that the learned Chancellor was correct; and we therefore adopt his opinion as our own.

Affirmed.

ED. F. MCFADDIN, Justice, on rehearing. In his petition for rehearing, appellant earnestly insists that both the Chancellor and this Court have ignored evidence to the effect that at a point a mile distant from appellant's land, another land owner had erected a gate over the road in question; and appellant argues that such other gate gave the appellant the right to erect the gate in question in this suit. In support of such contention,

appellant cites *Porter* v. *Huff,* 162 Ark. 52, 257 S. W. 393; *Mount* v. *Dillon,* 200 Ark. 153, 138 S. W. 2d 59; and *Kennedy* v. *Crouse,* 214 Ark. 830, 218 S. W. 2d 375. In each of the cited cases the Court was discussing the gate over the road there in question, and not another gate erected by another land owner some distance down the road from the gate in the suit.

We cannot weigh appellant's action in erecting the gate over the public road, as here involved, by what some other person did at another place on the road. Possibly the other gate should have been challenged, but we are not deciding that point. We merely hold that the appellant had no right to erect the gate in this suit; so the petition for rehearing is denied.

PORTIS *v.* THRASH.

4-9117 229 S. W. 2d 127

Opinion delivered March 27, 1950.

Rehearing denied May 15, 1950.

E. L. Carter, George F. Carter, Malcolm W. Gannaway and *James B. Gannaway,* for appellant.

Wood & Chesnutt, for appellee.

ED. F. MCFADDIN, Justice. This case involves the effort of a real estate broker to recover his commission. Thrash, appellee, filed action in the Circuit Court, claiming:

(1)—That on February 20, 1948, appellant, Mrs. C. E. Portis, signed a written contract with appellee, by the terms of which Mrs. Porits agreed to pay appellee a commission of five per cent, if within ninety days he produced a purchaser ready, able, and willing to buy Mrs. Portis' home for the price of $23,000;

(2)—That Thrash, within said time limit, produced such a purchaser who offered to pay the entire $23,000 either in cash, or on any terms desired by Mrs. Portis;

(3)—That Mrs. Portis refused to complete the sale; and

(4)—That Thrash was entitled to his commission of $1,150.

In her answer, Mrs. Portis did not specifically deny the signing of the contract but claimed:

(1)—That the contract was signed on condition that it would not be valid until approved by her husband, which approval was never accomplished;

(2)—That she cancelled the contract the day after it was signed; and

(3)—That the property covered by the contract was joint property as well as homestead, and appellant knew this fact; and this constituted a defect in the title so as to prevent plaintiff from recovering.

On appellant's motion the case was transferred to Chancery; and a trial resulted in a decree for plaintiff for the commission of $1,150. On this appeal appellant presents the contentions contained in her answer, as above listed.

I. *Contract Signed on Condition.* Mrs. Portis testified before the Court that the contract was signed by her on condition that it would not be valid until approved by her husband; that Mr. Portis refused to approve the contract: and, that the contract never came into existence. In *American Sales Book Company* v. *Whitaker,* 100 Ark. 360, 140 S. W. 132, 37 L. R. A., N. S. 91, we recognized the rule of our earlier cases, to the effect that if a signed instrument was not actually delivered as a binding contract but was delivered with the understanding that it should be held without becoming effective until after the happening of an event, then the signed instrument would not be a binding contract unless the stipulated event occurred.

Mrs. Portis' testimony would have supported a holding in her favor in the light of the above mentioned case. But Mr. Rose, the salesman who represented appellee in the contract negotiated with Mrs. Portis, testified that the contract was signed and delivered as an unconditional instrument. He said:

"Q. Did you or not tell her that you understood that it would not be binding until Mr. Portis signed it?

"A. Well, when I was down getting a listing I asked for Mr. Portis' signature. That is when she told me, that whatever she did would be all right with Mr. Portis . . ." The salesman is inferentially supported by letters subsequently written by Mrs. Portis to appellee. The original contract was exhibited to Mrs. Portis while she was testifying:

"Q. That is your signature?

"A. That is my signature."

Mrs. Portis also claimed that the sales price was to be $23,000 net to her, although she admitted that the contract did not so state.

A question of fact was made as to whether the contract was fairly obtained or signed on condition. We cannot say that the finding of the Chancery Court on the

fact question is against the preponderance of the evidence. See *Murphy* v. *Osborne,* 211 Ark. 319, 200 S. W. 2d 517.

II. *The Issue as to Cancellation.* Mrs. Portis testified that the day after the contract was signed, she notified appellee that the contract was cancelled. In the light of *Nance* v. *McDougald,* 211 Ark. 800, 202 S. W. 2d 583, Mrs. Portis' testimony would have supported a decree in her favor to the extent that Thrash could recover only his damages but not his commission. But again the answer is that the testimony of appellee and his salesman contradicts Mrs. Portis, and her letters, previously mentioned, inferentially support appellee; so we cannot say that the Chancellor's finding on the fact question—as to whether the contract was cancelled—is against the preponderance of the evidence.

III. *Known Defect in the Title.* Finally, appellant insists that Thrash knew the property was the homestead, as well as the joint property of Mr. and Mrs. Portis, and that no valid conveyance of it could be made unless the instrument be signed and acknowledged by both husband and wife (see § 50-415 Ark. Stats. 1947). Because of the foregoing, appellant contends that appellee's knowledge of the status of the title was the same as the knowledge of a title defect; and quotes from *Southern Trust Company* v. *Bunch,* 159 Ark. 47, 251 S. W. 674:

"If at the time a broker makes sale of property he has knowledge of, or information of defects in the title, and by reason of these defects the sale cannot be made effective, he is not entitled to his commission."

Appellant also cites and quotes from *Burnham* v. *Upton,* 174 Mass. 408, 54 N. E. 73, and *Hurst* v. *Sands Co.,* 236 Ky. 729, 33 S. W. 2d 653. To these may well be added 9 C. J. 627; 12 C. J. S. 225; 8 Am. Jur. 1098; and Annotation in 156 A. L. R. 1398 and 169 A. L. R. 605. The law, as above quoted from *Southern Trust Company* v. *Bunch, supra,* has been frequently reaffirmed, and is in no way impaired by our holding the present case.

The appellant's contention is contrary to the effect of our holdings in *Branch* v. *Moore,* 84 Ark. 462, 105 S. W.

1178, 120 Am. St. Rep. 78; *Chandler* v. *Gaines-Ferguson Realty Co.*, 145 Ark. 262, 224 S. W. 484; and *Reynolds* v. *Ashabranner*, 212 Ark. 718, 207 S. W. 2d 304. The non-joinder of a spouse in the anticipated conveyance is not a "defect in title" within the rule of *Southern Trust Company* v. *Bunch, supra.* A "defect in title" (as that expression is used in cases like this one) means something existing at the time of the contract and not the future possibilities of the refusal of a spouse to join in the conveyance. In *Reynolds* v. *Ashabranner, supra,* the property was owned by entirety; and the real estate broker recovered judgment against the spouse who signed the contract, notwithstanding the refusal of the other spouse to agree to the conveyance. The holding in that case is ruling in the case at bar.

Affirmed.

OWENS *v.* SOUTHEAST ARKANSAS TRANSPORTATION COMPANY.

4-9142 228 S. W. 2d 646

Opinion delivered March 27, 1950.

Rehearing denied May 1, 1950.

John P. Vesey, for appellant.

Jay W. Dickey, for appellee.

GRIFFIN SMITH, Chief Justice. For more than thirty years W. C. Owens had been employed by Southeast Arkansas Transportation Company and its predecessors. He was struck by an automobile December 26, 1948, and died from the injuries three days later. The instrumentality causing death was not an agency of the employer. The question is whether facts not substantially disputed were sufficient, as a matter of law, to carry the Company's Compensation coverage under Act 319 of 1939 to the time and place of misfortune.[1] The decedent's widow has appealed from a Circuit Court judgment sustaining the Commission's finding that the injury did not arise out of or occur in the course of the servant's employment.

[1] Ark. Stat's, § 81-1301; Init. Meas. No. 4, 1948.

As a bus driver for the Transportation Company Owens went from his home to the carbarn and started his daily runs at 6:22. He was relieved for an hour at 10:56, then worked until 6:12—an active employment period of ten hours and eighteen minutes. In lieu of a weekly or monthly salary, he was paid by the hour, and his current earning was $57.50 per week. Ordinarily the drivers would go by the office at day's end to settle for collection of fares and adjust their "tokens" account. The superintendent's desk is on the second floor of a building on Main street reached by steps leading from an entrance about thirty feet north of the northeast corner of Second and Main streets. Northbound buses on Main turn west on Second and stop near the northwest corner of the intersection.

Owens left his bus the evening of December 26, crossed the street, settled with the Company's assistant superintendent, and promptly left. He hurriedly remarked that the 6:24 bus was in sight and that he intended to catch it—presumptively to go home, as was his custom. In attempting to cross Main street, Owens walked diagonally southwest and was struck by a motorist who testified that he did not see the pedestrian until after the accident.

We have no difficulty in concluding that if Owens' injuries had been caused by the act of a third party after the bus had been boarded, or after he had reached a place that made him an actual or constructive passenger, liability under the Compensation Law would attach. To meet a situation where facts were analogous to those with which we are dealing, Minnesota amended its compensation law after the Supreme Court had held that an employe was not protected while being transported on a company truck between two of its plants. This result was necessary because the original Act, by express terms, limited liability to accidents that occurred "on the premises". The amendment extended coverage to employes to whom transportation was regularly furnished. Under this broader policy compensation was allowed an employe who was injured in a streetcar safety zone while awaiting transportation. The decision is based upon

legislative intent. *Radermacher* v. *St. Paul St. Ry. Co.*, 214 Minn. 427, 8 N. W. 2d 466, 145 A. L. R. 1027. The opinion of Mr. Justice Olson is summed up in the headnote he prepared, as follows: "Where as an incident to the employment it is contemplated and understood by both employer and employe that the former will transport the latter to or from the place where the work is done, an accidental injury to the employe while thus being transported arises out of and in the course of the employment".

An opinion by Chief Justice Brogan, *Micieli* v. *Erie Railroad Co.*, 131 N. J. L. 427, 37 A. 2d 123, (1944) expressed the view of the New Jersey Court of Errors and Appeals that an employe who is carried to and from his place of employment as part of his contract of service, or as a privilege incidental thereto with no deduction from his regular wages for such transportation, is considered by the weight of authority to be a servant and not a passenger. See 62 A. L. R. 1445; 145 A. L. R. 1035; *City and County of San Francisco* v. *Industrial Accident Comm.*, 61 Cal. App. 2d 248, 142 P. 2d 760. In the California case the Court said that where there was evidence that for a long period the municipal street railway had furnished transportation to its employes as an accepted condition of employment, the State Industrial Commission was not bound to accept printed statements on a pass issued to an employe to the effect that the pass was issued as a courtesy and not as part of the consideration for employment.

A different result was reached in another California case, *Dellepiani* v. *Industrial Accident Comm.*, 211 Calif. 430, 295 P. 827. The employe was injured while crossing a public street. The employer, Street Railway Company, had not engaged to deliver the employe to the place of his employment, or to his home after the day's work was done. The Company's undertaking was to furnish free transportation "on its street cars as same are operated" on and along the streets between the employe's home and the Company's premises upon which the worker was employed. The employe was run over

by a passing automobile and killed after he had left the street car and started to walk across the street to the carbarn—his place of employment. It was held that the employe was not under the direction, control, or protection of the employer; and, since he was free to choose any route of travel and any means of conveyance that might appear to him to be feasible and desirable to reach the premises of the employer, and the latter is without any right or authority to govern his movements during such period, it would not be accurate to say that the employe had either reached his employer's premises or that he was being conveyed thereto by his employer.

In circumstances where the principle involved was not at material variance with the *Dellepiani* case, recovery was denied in *De Voe* v. *N. Y. State Railways,* 218 N. Y. 318, 113 N. E. 256, L. R. A. 1917A, 250; *Ogden Transit Co.* v. *Industrial Comm.,* 95 Utah 66, 79 P. 2d 17, and in *Ex Parte Taylor,* 213 Ala. 282, 104 So. 527.

A tendency of Courts in most of the States is to deal with the particular case, from a factual standpoint, in the light of what employer and employe probably intended. And this is to be done without splitting behavior infinitives to a point where none of the subdivided parts bears the slightest relation to the original undertaking. But in Arkansas the Commission is the fact-finding agency, and we affirm its decisions when they are based upon substantial evidence, and when error of law does not appear.

An example of analytical progress by Courts is the so-called landmark decision in Massachusetts, *"Caswell's Case",* 305 Mass. 500, 26 N. E. 2d 328. The opinion was written by Judge Lammus, and has been spoken of as having avoided the paralyzing effect of an earlier Massachusetts decision, *In re McNicol's Case,* 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A 306. In Caswell's Case the employe was injured in an unprecedented manner. The City of Worcester was in the path of a hurricane, the severity of which caused windows to be broken in the fourth story of a building in which Caswell was working. When the wind entered the fourth

floor area through the demolished windows, its force disengaged bolts that anchored the roof to portions of the brick walls, causing disintegration of support on the southeast side, with the result that the roof fell into the fourth story area and injured Caswell. In approving compensation the Court said: "Unquestionably the injury was received in the course of his employment. The only other requirement is that the injury be one 'arising out of' his employment. An injury arises out of the employment if it arises out of the nature, conditions, obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects".

The trend toward liberality of thought where parity of interests must be considered was emphasized by Mr. Justice Sutherland when he said: "The modern development and growth of industry, with the consequent changes in the relations of employer and employe, have been so profound in character and degree as to take away, in large measure, the applicability of the doctrines upon which rest the common-law liability of the master for personal injuries to a servant, leaving of necessity a field of debatable ground where a good deal must be conceded in favor of forms of legislation, calculated to establish new bases of liability more in harmony with these changed conditions". *Cudahy Packing Co.* v. *Parramore,* 263 U. S. 418, 44 S. Ct. 153, 68 L. Ed. 366, 30 A. L. R. 532.[2]

The term "arising out of and in the course of" is not included in the definitions found in our Compensation Law, § 2. The omission was probably due to a feeling on the part of lawmakers that a tied-in construction would prove too vexatious for practical purposes because circumstances slight in themselves are often helpful in measuring conduct and intent. Hundreds of cases are cited in Words and Phrases, (4, pp. 18-147) showing how Courts have treated the words in the light of facts pertaining to a particular case. In some of the

[2] This case first went to the Supreme Court of Utah by writ of review through which the Cudahy Company sought to annul an Industrial Commission award in favor of Parramore's dependents.

jurisdictions it is said that there must be *causal* connection between employment and injury,[3] while others have said that *reasonable* connection must be established.[4]

In discussing "out of" and "in the course of" as used in compensation statutes, Mr. Justice Porter, *Haas* v. *Kansas City Light & Power Co.,* 109 Kan. 197, 198, P. 174, (1921) made the comment that American and British Courts had uniformly held that the terms were to be treated conjunctively. The Judge went back to the early case of *Fitzgerald* v. *W. G. Clark & Son,* (1908) 2 K. B. 796, quoting Buckley, L. J.: "The words 'out of and in the course of the employment' are used conjunctively and not disjunctively. Upon ordinary principles of construction they are not to be read as meaning 'out of'—that is to say, 'in the course of'. The former words must mean something different to the latter words. The workman must satisfy both the one and the other. The words 'out of' point, I think, to the origin or cause of the accident. The words 'in the course of' to the time, place and circumstances under which the accident took place. The former words are descriptive of the character and quality of the accident, the latter words relate to the circumstances under which an accident of that character or quality takes place. The character or quality of the accident as conveyed by the words 'out of' involves, I think, the idea that the accident is in some sense due to the employment. It must be an accident resulting from the risk reasonably incident to the employment".

. . . . . .

In Bradbury on Workmen's Compensation, 3d Ed., 468, and in 1 Honnold on Workmen's Compensation, par. 122, the rule is said to be that a man's employment does not begin until he has reached the place where he is to work or the scene of his duty, and that it does not continue after he has left the premises of his employer; and it is ordinarily held that if an employe is injured *on the premises of the employer* in going to or from work,

[3] *Industrial Commission of Ohio* v. *Weaver,* 45 Ohio App. 371, 187 N. E. 186.

[4] *Patterson* v. *S. S. Thompson, Inc.,* 12 N. J. Misc. 4, 169 A. 338.

he is entitled to compensation. But [Boyd on Workmen's Compensation, par. 486] the employment is not limited to the exact moment when the workman reaches the place where he begins his work or to the moment when he ceases that work. It necessarily includes a reasonable amount of time and space before starting and after ceasing actual employment, "having in mind all the circumstances connected with the accident". And [Schneider, Workmen's Compensation, v. 1, p. 776, 2d Ed.] "Whether an employe in going to or from the place of his employment is in the line of his employment will depend largely upon the particular facts and circumstances of each case. There must necessarily be a line beyond which the liability of the employer cannot continue, and the question where that line is to be drawn has been held to be usually one of fact". See Elliott on Workmen's Compensation Acts, 7th Ed., 41.

The Cudahy-Parramore case to which attention has been called, and the remarks of Mr. Justice Sutherland when that controversy reached the Supreme Court of the United States, were cited by Mr. Justice Robins in *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579. An award in favor of George Summerville was sustained, the injury having occurred while the claimant was being transported in a sub-contractor's truck. The Commission had found that the course of conduct upon which liability was predicated placed the employer in the attitude of one who had tacitly acquiesced in the custom of his workmen who under their contract of employment were to be given transportation. The "tacit acquiescence" had reference to a departure from the general plan of riding in Hunter's trucks, as distinguished from one operated by a subordinate. Judge Robins' views on transportation liability were carried into his dissenting opinion in *Stroud* v. *Gurdon Lumber Co.,* 206 Ark. 490, p. 496, 177 S. W. 2d 181. He stressed the thought expressed by Mr. Justice Rutledge that if, in compensation claims (seamen in that case) leeway is to be given in either direction, "all the considerations which brought the liability into being dictate it should be in the sailor's behalf".

. . . . . .

Our review of the record in the appeal here decided discloses two essential facts: (a) After completing his settlement at the Company office Owens left immediately and was proceeding by the most direct route to catch the bus he customarily used in going home; and, like a large number of pedestrians were in the habit of doing, he "angled" across Main street, or was in the act of doing so when hit. (b) Free transportation was a part of the contract of employment, and it was mutually beneficial. Any doubt regarding its place in the Company's plan is dissipated with the testimony of J. O. Poss, superintendent.

Question on cross-examination: "When you employ a man do you [in connection with that employment] tell him that you will furnish transportation to and from work?" Answer: "No, I don't tell them that: I tell them we will furnish free transportation any time the bus is on the street" . . . Question: "Could you withdraw that right at any time you desired—your giving them free transportation?" Answer: "Well, I suppose we could, [but] I don't think we would want to".

A little later, on redirect examination, the witness said: "I don't believe I tell [prospective employes] anything at the time I employ them, about transportation. I instruct them after they are employed that they have a right themselves to ride the bus any time they desire, but that doesn't apply to anyone other than the employes, and policemen and firemen. Their families have to pay".

Another witness testified that Owens rode the bus home from work ninety percent of the time.

. . . . . .

Counsel for appellee correctly says that none of our cases is precedent for a holding that recovery can be had here. The problem is reduced in point of time to whether this trusted employe, with a service record of more than thirty years, had severed his day's connection with the Company when he left the office and hurriedly stated that the 6:24 bus was in sight. The

rule appears to be fairly well settled that if Owens, with transportation rights, had reached the bus, or had been within the sidewalk area where boarding was merely a formality, recovery would lie.

It is the intervening transaction, the attempt to cross the street, that presents our problem.

Of course, had there been a turning aside—any substantial deviation from a direct course adopted for personal reasons—the situation would be different. But see *Tinsman Manufacturing Company, Inc.* v. *Sparks*, 211 Ark. 554, 201 S. W. 2d 573, and the cases there cited, beginning at p. 563. Sparks left the master's bus when it stopped at Hampton, and in crossing the highway to purchase tobacco for himself he was struck by an automobile. It was held that the accident occurred "in the course of" the servant's employment.

We are not willing to say, in the circumstances of the case at bar, that the law must be so narrowed as to deny recovery while a customary act was being performed. It was too closely related to the employe's proven course of conduct—conduct known to the Company and impliedly if not actually acquiesced in by it. In effect the Company said to Owens, "Take your pass and go across the street to our bus; your day's work has been finished, and we are interested in seeing that you get home as expeditiously as possible".

The judgment is reversed. The cause is remanded to Circuit Court with directions that its mandate to the Commission be responsive to this opinion.

McCOURTNEY *v.* MORROW.

4-9156 229 S. W. 2d 124

Opinion delivered April 3, 1950.

Rehearing denied April 24, 1950.

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

Wm. F. Kirsch, Jr., and *Kirsch & Cathey,* for appellee.

LEFLAR, J. This appeal is from an order of the Circuit Court disposing of a dual motion by petitioner McCourtney for (1) retaxing costs and (2) allowance of statutory penalty (Ark. Stats., § 12-1738) against the Circuit Clerk for demanding extortionate fees. The Circuit Court's order eliminated from the Clerk's fee bill, in accordance with the prayer of petitioner's motion, certain items of costs originally charged by the Clerk, but sustained the Clerk's charge of the statutory fee (Ark. Stats., § 12-1710) of 75 cents "for each page in making and preparing" the transcript in question,[1] and assessed no penalty against the Clerk. Petitioner appeals from the two holdings last mentioned.

As to the charge of 75 cents per page for "making and preparing" the transcript, it is shown that the transcript was actually typewritten in McCourtney's law office, and not by the Clerk. But after it was typed it was handed by McCourtney to the Circuit Clerk for checking and certification, and the Clerk compared it with his notes, made certain corrections, and then certified it. We hold that this constituted a "making and preparing" of the transcript within the meaning of § 12-1710. The responsibility for the transcript was the Clerk's, regardless of who did the typing, and he cannot

[1] This transcript was in the case of *McCourtney* v. *Ellington,* 215 Ark. 539, 221 S. W. 2d 410. Preliminary relief to petitioner in reference to the same fee bill was denied in a *per curiam* order issued by this Court on February 21, 1949.

escape the responsibility (nor in this case did he seek to do so) by allowing some other interested party to type it for him.

Petitioner McCourtney also contends that the Clerk waived the right to make a full charge for the transcript by some remarks he made at the time he received the typed copy from McCourtney. In a memorandum opinion delivered by this Court on February 21, 1949, we said in reference to this contention in this case by this petitioner that the Clerk was without power to waive the statutory fees. The law of the case on this point has therefore already been determined against the petitioner.

The other ground of appeal is the Circuit Court's failure to allow petitioner the penalty of $5.00 for each item eliminated by the Court from the Clerk's fee bill. The relevant statute (§ 12-1738, enacted in 1842) allows a $5.00 penalty against "any officer" for each illegal charge made by him, payable to the person against whom the charge was made. But "it is apparent that this legislation is highly penal, and it must, therefore, be strictly construed." *Sebastian Bridge District* v. *Lynch, Chancery Clerk,* 200 Ark. 134, 144, 138 S. W. 2d 81, 86. Also see *Johnson County* v. *Bost,* 139 Ark. 35, 213 S. W. 388.

We have held in criminal cases[2] arising under § 12-1738 that the statute requires, as a prerequisite to liability, a finding of fact that the public officer acted corruptly, with bad motive or evil intent. *Leeman* v. *State,* 35 Ark. 438, 37 Am. Rep. 44; *Hood* v. *State,* 156 Ark. 92, 245 S. W. 176. It would be improper to give one meaning to the statute in its criminal aspect and a different meaning to the same words in the same section in its civil penal aspect. Our conclusion is that, in order to collect the private penalty permitted by the statute, a claimant must prove that the officer not only made an unlawful charge, but did so corruptly, with bad motive or evil intent. A thorough examination of the entire record in the present case shows that petitioner has not by his evidence sustained this burden of proof.

[2] A similar provision for criminal liability appears in § 12-1739, enacted in 1923. Compare Ark. Stats., § 27-2320.

Since the order of the Circuit Court against the appellant petitioner must in any event be affirmed, we do not pass on the procedural propriety or timeliness of his motion for retaxing costs. See *Buchanan* v. *Parham,* 95 Ark. 81, 128 S. W. 563; *Cain* v. *Carl-Lee,* 170 Ark. 859, 281 S. W. 661; *Lewis* v. *Jones Constr. Co.,* 194 Ark. 602, 108 S. W. 2d 1093. Nor do we decide whether it was permissible, after our *per curiam* order of February 21, 1949, for the petitioner to file his motion to retax costs in the Circuit Court.

Affirmed.

Chief Justice GRIFFIN SMITH dissents in part and concurs in part.

GRIFFIN SMITH, Chief Justice, dissenting. If the court had jurisdiction, the power to act must have been acquired in a timely manner, attended by procedural propriety. Then why say that we do not pass on these questions? The point is emphasized because in affirming the judgment the trial Court's jurisdiction is necessarily recognized. The record discloses that some of the cost items in controversy were approved, while others were disallowed. Since jurisdiction cannot be conferred by consent, the judgment comes from a Court, or it doesn't. Furthermore, we had previously told the litigants that McCourtney's right to question the cost bill was in the Supreme Court.

At a time when jurisdiction of parties and subject-matter was in Circuit Court appellant sought to avoid payment of cost items he regarded as excessive. By petition for a writ of mandamus here he asked that the Greene Circuit Clerk be required to make the record available and tendered a bond for $150. In a *per curiam* order of February 21, 1949, the relief was denied, a statement being that "any allegation of overcharge may be considered by this Court upon appropriate motion to retax the cost." The motion was not made, but the appeal, *McCourtney* v. *Ellington,* 215 Ark. 539, 221 S. W. 2d 410, was disposed of June 20th when the judgment was affirmed. Following issuance of our mandate, McCourtney filed his motion in Circuit Court, notwithstand-

ing our specific holding that the controversy was referable to this jurisdiction. The appeal had not been filed at the time this motion was made, so of course the trial Court had not lost jurisdiction if the judgment term had not expired.

It is not necessary to cite authority in support of the proposition that, with the exception of power to enter an order *nunc pro tunc,* jurisdiction is lost by the trial Court when an appeal is taken. If the judgment or decree is reversed, or if some modification requires remand, the trial Court again acquires jurisdiction. Hence, when McCourtney perfected the appeal following our order of February 21, his procedure had been made certain.

The cases cited in the majority opinion deal with jurisdiction. In *Buchanan* v. *Parham* Judge McCulloch said that a Circuit Court judgment awarding costs in an election contest was void for want of statutory authority. On the question of appeal costs, it was said that Circuit Court had no power to assess them. The remedy available to Circuit Clerk Parham " . . . for the collection of his fee for making the transcript, which constituted a part of the costs of the appeal adjudged against [the appellant] Buchanan, is by enforcement of the judgment of this Court."

In *Cain* v. *CarlLee* the principal matter was this Court's right to adjudicate a controversy involving alleged overcharges by the trial court stenographer. It was held that the stenographer was the agent of the trial Court. The Clerk of the lower Court, says the CarlLee opinion, in making the transcript of the record for certification on appeal, "acts as the officer of this Court, and is under our control; therefore this Court has authority to tax or retax such costs."

Bearing in mind that the case at bar involves a motion in the trial Court to retax the cost after an appeal had failed, and in circumstances where there had been no remand, the rule laid down by Mr. Justice BUTLER in the *Jones Construction Company* case is enlightening. In explaining the CarlLee case it was said that this Court had "impliedly recognized the right of the appellee to

have the costs reduced even after remand of the case to the Circuit Court" if that right should be asserted within a reasonable time. But the difference between the Carl-Lee controversy and the case at bar is that McCourtney lost his appeal and there was no remand, while in the cited case the trial Court's jurisdiction was reacquired when the cause was sent back with directions.

Effect of the Jones Construction opinion is to say that a motion to retax costs that require judicial action should be made promptly, and where not made until after appeal has been taken, it is too late; but where the costs are fixed by statute and judicial action is not required to determine whether the Clerk's demands are excessive, the procedure is treated as ministerial and the remedy may be invoked at any reasonable time.

Here the costs were not definite and certain. The appellant contended that by reason of his own work in preparing the transcript, the appellee was without legal authority to say that fees were applicable to a Clerk-prepared transcript. The Court had to decide this question. Furthermore, the matter in controversy related to the appeal record, and the Clerk then acted "as the officer of this Court"—or so we said in the CarlLee case.

Let us see what the practice has been. *Childress* v. *Tyson,* 200 Ark. 1129, 143 S. W. 2d 45, was decided July 8, 1940. October 28th of that year the appellant's motion to retax the cost was considered by this Court. The bill was reduced from $766.30 to $443.81.

The judgment in *McCoy-Couch Furniture Mfg. Co.* v. *Zahringer* (208 Ark. 581, 186 S. W. 2d 922) was affirmed April 23, 1945. A partial transcript had been filed by the appellant with a prayer for *certiorari.* The Clerk's return was his admission that the transcript was ready, but that the appellant had refused to pay the fee bill. We directed that the transcript be filed when the appellant tendered into the registry of this Court the sum of $31.35—the amount demanded by the Clerk. The parties later stipulated that the transcript cost should be $5.71. The difference of $25.64 was returned to the appellant.

The procedure was similar in *Coley* v. *Westbrook*, 208 Ark. 914, 188 S. W. 2d 141. The judgment was reversed June 11, 1945. The appellant tendered $40 to the Supreme Court registry—slightly more than the Clerk demanded—and asked for *certiorari* to bring up the record. This Court found that the cost bill should be $11.45.

On March 3, 1947, issues presented in *Sumlin* v. *Woodson*, 211 Ark. 214, 199 S. W. 2d 936, were decided. The appellee's motion to retax costs was denied April 4, 1947, with the statement that the opinion contained an order affecting costs, hence the motion was in the nature of a petition for rehearing, and filed out of time.

The effect of the majority opinion is to entertain the appeal and adjudicate rights in circumstances where we have formerly ruled to the contrary.

MOUSER *v.* STATE.

4602 228 S. W. 2d 472

Opinion delivered April 3, 1950.

Claude F. Cooper and *W. Leon Smith,* for appellant.

Ike Murry, Attorney General, and *Jeff Duty,* Assistant Attorney General, for appellee.

HOLT, J. This is the second appeal of this case, *Mouser* v. *State,* 215 Ark. 131, 219 S. W. 2d 611, opinion delivered April 18, 1949.

A jury convicted appellant of the crime of burglary, under Ark. Stats. (1947), § 41-1004, and assessed his punishment at a term of three years in the Penitentiary. From the judgment is this appeal.

For reversal, appellant has properly preserved in his motion for a new trial twenty-three assignments of alleged errors, nine of which he contends alleged, in effect, that the trial court erred in admitting in evidence a confession made by appellant at Jackson, Mo.

On behalf of the State, three witnesses, Percy Little and Otto Sperling, Missouri officers, and William Berryman, the sheriff of Mississippi County, Arkansas, testified that appellant, while in custody and in the Court House in Jackson, in their presence, freely and voluntarily confessed to the commission of the crime charged; and that he was not threatened, coerced or forced, or promised any reward or leniency.

Witness, Little, testified that appellant stated, in effect, he had attempted to break into the building in question in Blytheville, Arkansas, by prying open a window, and during the process of breaking in, some men came around the corner of the building and started shooting. He and an associate by the name of Fithen ran and as they ran, threw away certain tools,—a hammer, punch and a pinch bar or "jimmy," which they had in their possession. He further admitted that he and his accomplice were later picked up by appellant's wife and driven to a tourist camp along the highway. The other two witnesses corroborated Little's testimony and witness, Sperling, in addition, testified that appellant in his confession stated that "he made an attempt to get in (the building) but was frightened away from the place and

threw the tools out in the weeds right along there." Appellant did not testify in the trial of the case.

Upon appellant's objection to the admissibility of this confession, the trial court, following the usual and approved procedure, out of the presence and hearing of the jury, heard testimony on the question whether the confession had been made freely and voluntarily. At this hearing, the above officers testified that the confession was freely and voluntarily made by appellant. There was no evidence by appellant to the contrary. This issue, whether the confession was free and voluntary, was submitted to the jury under proper instructions.

The record reflects that the prosecuting attorney, in his opening statement, was permitted, over appellant's objection, to state the substance of this confession to the jury. Having properly admitted the confession in evidence under appropriate instructions, the court did not err in permitting the State's attorney to detail this confession to the jury in his opening statement. Such was the effect of our holding in the recent case of *Smith* v. *State,* 205 Ark. 1075, 172 S. W. 2d 249.

It also appears that the prosecuting attorney, as a part of his opening statement, used the following language: "He (appellant) told Mr. Berryman that he, in company with a man by the name of Jess Fithen, had come into the State of Arkansas, about the ..... possibly the day before, or the day that this crime was alleged to have been committed. That they had driven down to the town of Keiser and had "cased" a bank job there, and looked it over, and they had decided it was a little too big for them, and they could not make that bank, and had come back in to Blytheville and had looked over the lumber company."

Following this statement, the following occurred: "Mr. Smith: Now, if the court please, the defendant moves that the jury now be told that the statement with reference to any bank in Keiser is not proper, and should not be made, and should not be considered for any purpose, even in the opening statement. The Court: Well,

the objection is overruled. Mr. Smith: Exceptions, if the court please. During the course of the examination of the witness, Little, the prosecuting attorney asked that witness as follows: Q. Was there anything said by the defendant about the casing of a job at any other place? Mr. Smith: Now, that is objected to, if the court please. The Court: The objection is sustained."

Appellant argues that "the court should have instructed the jury that they could not consider that statement (meaning the reference to Keiser Bank in opening statement by the prosecuting attorney) for any purpose whatsoever, and in failing to do so reversible error was committed."

The trial court did not err. It should have admitted into evidence that part of the confession relating to "casing the Bank" at Keiser. The testimony was competent as tending to show a criminal intent, scheme or design on the part of the appellant. (*Ross* v. *State,* 92 Ark. 481, 123 S. W. 756.) The prosecuting attorney committed no error in detailing to the jury that part of the confession about "casing the Bank" at Keiser, even though the court on motion of defendant erred in excluding the evidence.

Appellant next contends that the evidence was not sufficient to support the verdict. He says: "The appellant respectfully concludes that the trial court should have directed a verdict in his favor. The only evidence produced by the state in any way connecting the defendant with the commission of the crime was his own extrajudicial statements," and that there was no proof of the *corpus delicti.* We cannot agree.

In this connection, what we said in our former opinion controls here: "Ark. Stats. (1947), § 43-2115, * * * provides: 'A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed.' We have frequently held that the extrajudicial confession of the defendant, accompanied with proof that the offense was actually committed by some one, will warrant his conviction. *Smith* v. *State,* 168 Ark. 253,

269 S. W. 995; *Haraway* v. *State,* 203 Ark. 912, 159 S. W. 2d 733.

"In *Harshaw* v. *State,* 94 Ark. 343, 127 S. W. 745, the court said: 'It is not essential that the *corpus delicti* be established by evidence entirely independent of the confession, before the confession can be admitted and given probative force. The confession may be considered in connection with other evidence tending to establish the guilt of the defendant. But, if there is no other evidence of the *corpus delicti* than the confession of the accused, then he shall not be convicted alone upon his confession. *Hubbard* v. *State,* 72 Ark. 126, 91 S. W. 11; *Meisenheimer* v. *State,* 73 Ark. 407, 84 S. W. 494.' See, also, *Russell* v. *State,* 112 Ark. 282, 166 S. W. 540."

In addition to the confession, witness, Elliott, testified that a short time after the burglary, he found in a weed patch back of the store a sledge hammer and punch. These tools were connected with appellant by witness, Little, who testified that appellant, in his confession, stated that he and Fithen had run from the building and thrown away the tools. It appears that no mention of tools had been previously made to appellant when he, appellant, referred to the tools. As indicated, witness, Sperling, testified that appellant in his confession stated that they threw the tools in the weeds "right along there." The tools were discovered just where appellant had indicated he and his accomplice had thrown them. All this evidence in connection with appellant's confession was sufficient to warrant the jury's verdict of guilty.

We deem it unnecessary to discuss separately the other assignments of alleged errors. It suffices to say that we have carefully examined each assignment and find them all to be without merit.

Accordingly, the judgment is affirmed.

STONE *v.* GATHRIGHT.

4-9165 228 S. W. 2d 474

Opinion delivered April 3, 1950.

[redacted]

John P. Vesey, for appellant.

Howard Stone and *Bobby Steel,* for appellee.

GRIFFIN SMITH, Chief Justice. W. C. Gathright and others sued Edd Stone and his son, Guy Edd, alleging personal injuries and property damage because of young Stone's negligent conduct in driving his father's truck. It was alleged that the son, 18 years of age, was incompetent and inexperienced, and that this was known to the father, who had neglected to equip the truck with clearance lights. Aggregate demands were $1,100; the verdict was for $375.

Appellants' brief contains a statement of what they conceived the facts to be, but the testimony is not abstracted. There is also failure to abstract the motion for a new trial and the instructions.

There is no error on the face of the record. Appellants do not insist that the partial abstract of testimony made by appellees sufficiently presents the matters in controversy; but, irrespective of these deficiencies, a majority of the Judges think that the judgment, on the merits of the case, should be affirmed as to both appellants. It is so ordered.

[redacted]