CONNELL *v.* ROBINSON.

4-9183 228 S. W. 2d 475

Opinion delivered April 3, 1950.

Tompkins, McKenzie & McRae, for appellant.

Denman & Denman, for appellee.

DUNAWAY, J. Appellant Connell is the purchaser of a second-hand automobile from one Caruthers, operator of the Kaiser-Frazer agency in Prescott, Arkansas, and appellee Robinson is in the used car and auto loan business in Fort Smith. Robinson brought an action in replevin in the Nevada Circuit Court to recover from Connell possession of the car. From a directed verdict and judgment for the plaintiff below Connell has appealed.

The automobile which is the subject of this litigation was originally sold to one Basham by Caruthers on January 13, 1948, under a contract of conditional sale. This conditional sales contract was immediately assigned by Caruthers to Universal Credit Company. Basham left Prescott with the car, but continued to make the payments due under the contract.

On December 6, 1948, Basham traded in the car in question to Caruthers on a new car. Before making this trade Caruthers checked with Universal Credit Company and ascertained the balance due under the original conditional sales contract, which amounted to $1,008.73. Caruthers also found a purchaser, Connell, for the car to be traded in, before completing the deal with Basham. From the $2,000 purchase price paid by Connell, Caruthers paid Universal Credit Company in full.

Although Basham had represented to Caruthers at the time of the trade that there was no other claim against the car, he had in fact had a transaction with Robinson in Fort Smith on October 26, 1948. It was on the basis of this transaction that Robinson claimed title to the car in the instant suit.

Appellee's version of the Fort Smith transaction was this: On October 26, 1948, Basham, who was unknown to appellee, came to his place of business which had a big sign over it—"Bank Rate Auto Loans Made Here"—and offered to sell the automobile in question for $1,380. Although appellee had some doubt as to Basham's title, he verified Basham's assertion that the only claim against the car was for the sum of $528.75 owed to Pacific Finance Company of Lubbock, Texas. Since the car was

such a "sweet buy" at the offered price of $1,380, Robinson bought it, paying the Pacific Finance Company in full by check and giving the balance of the purchase price in cash to Basham. About six hours later Basham returned and sought to repurchase the car he had just sold, saying that his wife would probably leave him if she found out he had disposed of their automobile. Appellee then resold his recent "sweet buy" to Basham at a profit of $20 under a conditional sales contract upon which this replevin action is based. Basham paid part of the repurchase price in cash with a balance due of $898.08, secured by the conditional sales contract. Basham had no certificate of title to the car and Robinson did not recall whether he had been given any bill of sale by Basham.

Caruthers intervened in the cause alleging that he was entitled to be subrogated to the rights of Universal Credit Company under the initial conditional sales contract by reason of his having paid off that indebtedness at Basham's request and therefore had a lien superior to any held by Robinson; he further prayed that the cause be transferred to equity. By Connell's answer, he claimed to be an innocent purchaser for value; he also claimed the right to be subrogated to the superior lien of Universal Credit Company since he knew of that company's outstanding title-retaining note and had furnished the money for satisfying that indebtedness. Appellant also filed a motion to transfer to equity.

The trial court overruled the motions to transfer to equity, to which action exceptions were duly saved.

Appellee testified as has been set out above, and introduced the conditional sales contract and check to Pacific Finance Company. No other witness testified in his behalf as to anything relevant to the issues in this case.

Caruthers, Connell and a representative of Universal Credit Company testified as to the payment to the latter company, on the issue of subrogation; and as to the circumstances of the sale to Connell.

The trial court directed a verdict for the plaintiff.

Although there were a number of assignments of error made in appellant's motion for new trial, including the refusal of the trial court to transfer the cause to equity, on this appeal we consider only the alleged errors argued in the brief. *Purifoy* v. *Lester Mill Co.,* 99 Ark. 490, 138 S. W. 995. Since we have concluded that the court erred in directing a verdict for the plaintiff, it is unnecessary to discuss the form of the verdict, the only other point argued in appellant's brief.

It was appellant's contention at the trial and in the argument here presented that the alleged sale and resale between Basham and Robinson was not a *bona fide* sale, but was an attempted method of securing a loan made to Basham. If appellee never acquired title to the car, appellant as a purchaser for value would prevail over appellee's claim, even without consideration of his claimed right of subrogation to the prior lien of Universal Credit Company. We have held that an unrecorded chattel mortgage is not a lien upon the mortgaged property as against a purchaser from the mortgagor, even though such purchaser has actual knowledge of its existence. *Primm* v. *Farrell-Cooper Lumber Co.,* 210 Ark. 699, 197 S. W. 2d 557.

A question of fact was thus presented whether appellee ever had title to the automobile. As already stated, appellee was the only witness who testified on this issue. It is well settled in Arkansas that the testimony of a party to an action is never regarded as undisputed in determining the legal sufficiency of the evidence. *Skillern* v. *Baker,* 82 Ark. 86, 100 S. W. 764, 118 Am. St. Rep. 52, 12 Ann. Cas. 243; *McCollum* v. *Graber,* 207 Ark. 1053, 184 S. W. 2d 264.

This rule has been considered in two recent cases in which the question of retention of title in the sale of automobiles was in issue. In *Sykes* v. *Carmack,* 211 Ark. 828, 202 S. W. 2d 761, the question in a replevin suit was whether title had been reserved under an oral contract of conditional sale. Appellant Sykes, plaintiff therein, and his son testified that title was retained when the car was sold. The jury found otherwise. In answer to the con-

tention that the verdict was contrary to the undisputed testimony, this court said at page 830 in affirming the judgment: "Moreover the jury may not have credited the testimony that there was a reservation of the title. The interest of appellant and his son is such that their testimony may not be treated as undisputed, and this interest makes the truth of their testimony, although not disputed by any witness, a question of fact for the jury. In the case of *Skillern* v. *Baker,* 82 Ark. 86, 100 S. W. 764, 118 Am. St. Rep. 52, 12 Ann. Cas. 243, it was held that the general rule that where an unimpeached witness testified distinctly and positively to a fact and is not contradicted, and there is no circumstance shown from which an inference against the fact testified to by the witness can be drawn, the fact may be taken as established and a verdict directed accordingly, is inapplicable where the witness is interested in the result of the suit, or facts are shown which might bias his testimony, or from which an inference might be drawn unfavorable to his testimony or against the fact testified to by him."

In a situation where the plaintiff seller of a car claimed retention of title under an oral contract, in the case of *Pugh* v. *Camp,* 213 Ark. 282, 210 S. W. 2d 120, we said, in reversing the trial court for directing a verdict for the defendant third party purchaser, at page 285: "So, here, while appellant's testimony, as above set out, was not disputed by any witness, his interest in the litigation is such that his testimony may not be regarded as undisputed, and a question of fact was made for the jury."

Appellee argues that the rule of the foregoing cases is not applicable because his testimony is supported by the conditional sales contract—that the introduction of this document made a *prima facie* case entitling him to a directed verdict in the absence of positive testimony contradicting it by appellant. *Johnson* v. *Ankrum,* 131 Ark. 557, 199 S. W. 897, and *Smith* v. *Ryan,* 175 Ark. 23, 298 S. W. 498, cited by appellee in support of this argument do not so hold. In both of those cases the action was against the makers of a note, and we held that the

introduction of the notes made a *prima facie* case for the plaintiffs, with the burden on the defendant makers to show their invalidity, on the respective grounds urged in defense—and that a jury question was made. In the instant case, the action is not against the vendee in the alleged conditional sales contract, but against a third party purchaser who contends there never was a valid contract of sale; that it was a subterfuge. In a determination of this question of fact, the challenged document itself adds nothing to the testimony of appellee which is considered as contradicted under our decisions.

Since the judgment must be reversed for the reason already discussed, we have not deemed it necessary to detail the testimony bearing on appellant's right to be subrogated to the lien of Universal Credit Company. It is sufficient to state that there was substantial testimony to support appellant's claim on this score.

The judgment is reversed and the cause remanded.

PRICE *v.* PRICE.

4-9171 228 S. W. 2d 478

Opinion delivered April 3, 1950.

[redacted]

Reuben Chenowith, for appellant.

Reece Caudle and *Richard Mobley,* for appellee.

Ed. F. McFaddin, Justice. The Chancery Court granted the wife a divorce and also made a division of the real property. The husband challenges the decree.

I. *Sufficiency of the Evidence as to Grounds of Divorce.* Mrs. Price (plaintiff below) said that her husband had frequently slapped and otherwise mistreated her during the twenty-five years of their married life. Of Mr. Price's acts which caused her to leave him and sue for divorce, she testified:

" . . . He had his fist drawn back and he hit me in the face and bruised my eye and knocked me on the floor. I couldn't get up. I just lay there and the first thing I knew he was picking me up, and helped me to the bed. I don't know what happened while I was down on the floor. I didn't know anything. . . . When I started out he told me he didn't mean to hurt my eye; and I told him I was hurt awfully bad, and that my eye was nothing like the spot inside my breast; and I had a bruise over my breast, and on my back and my arm. I had bad bruises all over my body."

The twenty year old daughter of the parties testified: that when she entered the room in which the altercation occurred, her mother and father were alone; that her mother's eye was "swollen almost together"; that her mother was sitting on the bed; and that when the daughter remonstrated with the father, "he said he didn't hit her with his fist, that he just slapped her." The testimony also shows that Mrs. Price went immediately to the home of her mother and sister; and they testified as to the extent of her injuries and bruises.

While Mr. Price denied striking his wife, he did not deny his daughter's testimony; and his offer made in open court—that he would treat his wife as she should be treated if she would return to him—implies an admission of wrongdoing, and a plea for forgiveness. The

Chancellor delayed, for some time, the entry of a decree; but when he found there was no prospect for a reconciliation, and that Mrs. Price entertained fear for her welfare if she returned to Mr. Price, then the decree was granted. We hold it was correctly granted. (See *Lupton* v. *Lupton,* 210 Ark. 140, 194 S. W. 2d 686.)

II. *Division of the Property.* Three parcels of real property are involved:

(a)—The "Dover Cafe" property (part of two lots in the town of Dover) in which the Chancellor awarded the wife one-half interest in fee;

(b)—The "Gravel Hill" property (121 acres) in which the Chancellor awarded the wife one-third interest in fee; and

(c)—The "Home Place"[1] (75 acres) in which the Chancellor decreed the parties to be tenants in common in one portion, and the wife to have one-third estate for life in the other portion.

The husband claims that the wife is usually entitled to only one-third life estate in the realty (see § 34-1214 Ark. Stats. 1947); and the wife, by cross-appeal, claims one-half interest in fee in all the property; and also asks a reasonable attorney's fee.

It is clearly shown that Mrs. Price's wages went into a joint bank account; and that from such account there were paid—directly or indirectly—the considerations for the "Dover Cafe" property and the "Gravel Hill" property. The record is replete with deposit slips, bank statements, and earning reports, showing the source of funds that augmented the joint account. It is unnecessary to detail all of these, but, from a careful study of the record, we reach the following conclusions:

(a)—We affirm the decree of the Chancery Court awarding the wife one-half interest in fee in the "Dover Cafe" property. When Mr. and Mrs. Price purchased the cafe, they did so on an equal basis; and her energy

[1] The parties did not live on the property and no homestead rights are involved. They merely used such designation for convenient reference.

and efforts were responsible for the success of the business and the profits that it made. (See *Williams* v. *Williams,* 186 Ark. 160, 52 S. W. 2d 971.)

(b)—In the "Gravel Hill" property, we award Mrs. Price an undivided one-half interest in fee. It was shown that in 1948 the Prices took a mortgage, in their joint names, on 80 acres of this property. Later the owner transferred the entire 121 acres in satisfaction of the previous mortgage and for an automobile which had been purchased indirectly with funds from the joint account. So as to the "Gravel Hill" property, Mr. and Mrs. Price are tenants in common,[2] each owning one-half undivided interest.

(c)—As to the "Home Place," the Court found that the title to this property was acquired by two different transactions. There was one deed (called "the Brewer deed") made in 1930, to an undivided interest, and another deed made in 1943 to an undivided interest. In his brief appellant does not contend that the Chancery decree was in error as to this property, so we affirm the decree of the Chancery Court regarding the "Home Place."

III. *Attorney's Fee.* On her cross-appeal, Mrs. Price asked for attorney's fee, but we decide against such allowance. The record reflects that in May, 1948, at a time when the parties were separated and before the October events that led to this divorce action, Mrs. Price withdrew from the joint bank account the sum of $325 for her own use. Here is the testimony:

"Q. What is this $325 check shown on the bank statement from the Peoples Exchange Bank?

"A. I put that in the Bank of Russellville in my name.

[2] It will be noticed that Mr. and Mrs. Price acquired the title to the "Gravel Hill" property in 1948, which was after the effective date of Act 340 of 1947, as found in § 34-1215, Ark. Stats. 1947. This statute is not cited in the briefs, but we point out that even if the title had been by entirety to this property, nevertheless the Chancery Court in this case had power to decree the husband and wife to be tenants in common, since the property was acquired *after* the effective date of Act 340 of 1947. We are not called on, at this time, to determine the effect of the 1947 Act on entirety titles created before its enactment. (See 1 Arkansas Law Review 220.)

"Q. And that closed out the account?

"A. Yes."

The appropriation of this money by Mrs. Price constitutes a sufficient sum which she can use to pay the attorney's fee.

CONCLUSION

We affirm the Chancery Court in all respects, except to increase Mrs. Price's interest in the "Gravel Hill" property from one-third fee, as awarded, to one-half fee as now determined; and we adjudge the costs of all Courts against Mr. Price.

FRANKS *v.* WOOD.

4-9158 228 S. W. 2d 480

Opinion delivered April 3, 1950.

Harvey L. Joyce and *Glen Wing,* for appellant.

James R. Hale, for appellee.

DUNAWAY, J. Appellant, Ouida Franks, appeals from a decree of the Washington Chancery Court giving Bennie Wood, appellee, a lien against 8.92 acres of land for the digging of a water well on said property.

The facts are undisputed: The land in question was conveyed on November 7, 1947, to appellant and Hugh Franks, husband and wife, creating in them an estate by the entirety. After a separation in July, 1948, they entered into a property settlement agreement on August 3, 1948, the making of which agreement was recited in a final decree of divorce rendered August 28, 1948. Each party executed a quitclaim deed to the other as to the land in controversy, which deeds were placed in escrow. Under the terms of the property settlement, Hugh Franks was given possession of the land and was to pay appellant $1,000 plus ten per cent. interest on or before August 1, 1949; he was also to keep up the payments due the mortgagee of said property. In the event of his default, the escrow agent was to deliver to appellant the deed executed by Hugh Franks, and Franks was to relinquish possession of the property. Upon full payment by Franks of the agreed sum, the deed executed by appellant was to be delivered to him.

On December 1, 1948, while Franks was in possession he entered into an oral contract with appellee to dig a water well on the premises. The work was started and continued until February 1, 1949. Labor and materials in the amount of $153 were furnished.

Franks defaulted in the mortgage payments in January, 1949. When appellant learned of this in February,

1949, she made the past-due payments and received and had recorded the deed from Hugh Franks to her on February 23, 1949. She thereafter took possession.

On March 15, 1949, appellee filed his lien for the amount due for labor and materials in digging the well, under the provisions of Ark. Stats. (1947), § 51-701. The pertinent parts of that section read as follows: "Any persons, . . . who shall under contract, . . . with the owner or lessee of any land, . . . perform labor or furnish fuel material, machinery or supplies, used in the digging, drilling, . . . any . . . water well, . . . shall have a lien on the whole of such land or leasehold interest therein, . . . the buildings and appurtenances, and upon the materials and supplies so furnished, ..." In Ark. Stats. (1947), § 51-708, it is provided that the foregoing lien shall be enforced in like manner and in the same time as liens of mechanics. See Ark. Stats. (1947), §§ 51-608 and 51-613, providing that the lien shall be filed with the circuit clerk of the county in which the work is done within ninety days after the last work is done or materials furnished.

Appellant had no knowledge of the contract with appellee and no notice that the work was being done until after the well was completed.

The Chancellor decreed that appellee had a lien on all the land to secure the account with interest, which totalled $160.31 and ordered the same foreclosed and the land sold, subject to the prior mortgage. Personal judgment was rendered against Hugh Franks, but not against appellant as had been prayed. On this appeal it is appellant's contention that the contract of Hugh Franks with appellee was in no way binding on her, that he was not the "owner" of the property in question and did not have any interest in the land which would enable him to charge it with a lien.

The mere execution of the quitclaim deeds by Ouida and Hugh Franks did not transfer any interest in the land. Until the deed of Hugh Franks was delivered to appellant in accordance with the terms of their agree-

ment, the estate by the entirety by which they held this property was not affected. The decree of divorce did not attempt to change this estate, as might have been done under authority of Act 340 of the Acts of 1947. A consideration of that Act is therefore unnecessary.

The nature of an estate by the entirety and the extent to which husband and wife may alienate or subject their respective interests therein to their individual obligations are discussed in an article, "Estates by the Entirety in Arkansas," in 6 University of Arkansas Law School Bulletin 13. Either spouse may transfer his interest in the estate by the entirety, including his right of survivorship, but may not thus affect the interest of the other. *Simpson* v. *Biffle,* 63 Ark. 289, 38 S. W. 345. See, also, *Branch* v. *Polk,* 61 Ark. 388, 33 S. W. 424, 30 L. R. A. 324, 54 Am. St. Rep. 266. In *Moore* v. *Denson,* 167 Ark. 134, 268 S. W. 609, it was held that the interest of either spouse is subject to sale on execution to satisfy a judgment against him. There we said at page 139 (quoting from *Branch* v. *Polk, supra*): "They each are entitled to one-half of the rents and profits during coverture, with power to each to dispose of or charge his or her interest, subject to the right of survivorship existing in the other." See, also, *Pope* v. *McBride,* 207 Ark. 940, 184 S. W. 2d 259.

It follows therefore that Hugh Franks at the time the contract was entered into with appellee was the owner of an interest in the property in question which could be subjected to a well-digger's lien. He could not, however, affect the interest of his ex-wife without her knowledge or consent. The statutory lien as to Hugh Franks' interest was not defeated by the delivery and recordation of his quitclaim deed on February 23, 1949, even though the lien was not filed until March 15, 1949. Under our decisions this lien, if filed within the ninety-day period allowed by the statute, relates back to the time the labor and material were furnished and is superior to intervening incumbrances and conveyances. *White* v. *Chaffin,* 32 Ark. 59; *Bell* v. *Koontz,* 172 Ark. 870, 290 S. W. 597. Consequently appellee's lien as to Franks' interest had

already attached before his deed to appellant became effective.

The cause is affirmed in part, reversed in part and remanded with directions that the decree be modified in accordance with this opinion.

ROLFE *v.* JOHNSON.

4-9129 228 S. W. 2d 482

Opinion delivered April 3, 1950.

Jack P. West and *E. J. Butler,* for appellant.

Giles Dearing, for appellee.

MINOR W. MILLWEE, Justice. This is a suit by appellant, F. D. Rolfe, against appellees, Bert Johnson and wife, Lucy Johnson, to require specific performance of an alleged oral contract to convey 160 acres of land in Cross County, Arkansas. This appeal is from a decree denying the relief sought by appellant and dismissing his complaint for want of equity.

Appellees reside in North Little Rock, Arkansas, and the 160-acre farm in Cross County was formerly owned by Lucy Johnson's father. At the time of the transactions here involved, Lucy Johnson owned an undivided one-half interest in the lands, Bert Johnson owned an undivided one-fourth interest, and one-fourth interest was held by them as an estate by the entirety.

Appellant lives at Wynne in Cross County. On February 3, 1948, he drove to Little Rock with George W. Johnson, uncle of Lucy Johnson, and J. H. Parker. They stopped at the home of appellees for a few minutes but Bert Johnson was at the Rock Island Depot where he was employed. According to the testimony on behalf of appellant, he had tried to purchase the farm on a previous visit and Lucy Johnson told him on both occasions that she wished her husband would sell the place and whatever he did about it would be satisfactory with her. This was stoutly denied by witnesses on behalf of appellees who testified that appellant did not mention the sale of the place to Lucy Johnson on either of the visits. Mrs. Johnson stated that she had never discussed the sale of the place with appellant and for sentimental reasons did not want to sell the farm.

After the short visit at the home of appellees, appellant and his companions went to Bert Johnson's office where a sale of the farm was orally agreed upon between appellant and Johnson for $7,000 and appellant delivered a $1,000 check to Bert Johnson with the balance of the purchase price payable when the abstract was completed and the title approved.

There is also a sharp dispute in the evidence as to whether there was a delivery of possession of the land to

appellant. At the time of the alleged sale the farm was in the possession of appellees' tenant, Andrew Wright. Appellant testified, and Bert Johnson denied, that appellant was to have immediate possession of the land before completion of the sale contract. Appellees' contention on this issue is supported by the testimony of George W. Johnson, who testified on behalf of appellant, that possession was to be given when the abstract of title was made.

Upon his return to Wynne, appellant represented to Wright that he had bought the place and on February 5, 1948, demanded $1,200 rent in advance for the year 1948 which Wright paid. Appellant and Wright also entered into a written lease contract on the same day giving Wright the option to purchase the farm for $10,000.

On February 16, 1948, Bert Johnson wrote appellant that he was unable to persuade his wife to agree to the sale and that she had refused to accept the $1,000 check or sign a deed to the place. Bert Johnson had previously written George W. Johnson of Mrs. Johnson's refusal to sell the place and had advised him to hold up the making of the abstract which he had asked George W. Johnson to have made.

We have repeatedly held that before a court of equity may grant specific performance of a parol contract to convey land, the evidence of such agreement must be clear, satisfactory and convincing. *Meigs* v. *Morris,* 63 Ark. 100, 37 S. W. 302; *Walk* v. *Barrett,* 177 Ark. 265, 6 S. W. 2d 310. It is well settled that the payment of the purchase price alone is not sufficient part performance to take the contract out of the statute of frauds. *Starrett* v. *Dickson,* 136 Ark. 326, 206 S. W. 441; *Fryer* v. *Mabin,* 158 Ark. 579, 250 S. W. 877. We have also held that before delivery of possession of the land to the vendee under an oral contract of purchase will take the contract out of the operation of the statute, such possession must be taken under the contract and pursuant to its provisions. *Moore* v. *Gordon,* 44 Ark. 334; *Phillips* v. *Jones,* 79 Ark. 100, 95 S. W. 164, 9 Ann. Cas. 131. See, also, article in 1 Ark. Law Review 269.

Where the alleged purchaser is already in possession as tenant and merely continues in possession after making the contract, it does not amount to part performance sufficient to take the case out of the operation of the statute. *Ashcraft* v. *Tucker,* 136 Ark. 447, 206 S. W. 896. As was said in *Rugen* v. *Vaughn,* 142 Ark. 176, 218 S. W. 205: "This court has held that possession to have the effect to take the case out of the statute must be exclusive, evincing the birth of a new estate, and distinguished from the continuation of an old one; and must not be referable to an antecedent right." As previously indicated, the evidence on the question of change of possession is in hopeless conflict. The lands were already in the possession of appellees' tenant, and it would seem unusual for the parties to have agreed that the purchaser should have possession before the abstract of title was even completed and before he had approved the title and paid, or offered to pay, the balance of the purchase money. It is doubtful from the testimony that such agreement was entered into between appellant and Bert Johnson and Lucy Johnson did not participate in the making of such agreement. In the absence of a delivery of possession to appellant, the payment of a part of the consideration was not sufficient to authorize a decree of specific performance.

It is also clear from the testimony that at the time of the alleged agreement between Bert Johnson and appellant, Lucy Johnson knew nothing about the terms or conditions of the alleged contract. However, appellant insists that she is estopped to rely upon the statute of frauds or to urge the invalidity of the sale under our decision in *Williams* v. *Davis,* 211 Ark. 725, 202 S. W. 2d 205. In that case the wife, who owned the land, wrote letters to the purchaser which set out the price and terms of the proposed sale and also contained the acceptance of the offer made by the purchaser. It was undisputed that she had full knowledge of the negotiations leading up to the agreement which was made with her knowledge and consent and we held that she was estopped to assert that she did not know she owned the land. Here the evidence is in sharp dispute as to whether Lucy Johnson ever acquiesced in the proposed sale made by her husband.

The burden was upon appellant in the case at bar not only to prove the oral contract by clear and convincing testimony but also to show that there had been sufficient part performance of the alleged contract to take it out of the operation of the statute of frauds. We cannot say that the chancellor's holding, that appellant did not meet the burden thus placed upon him, is against the weight of the testimony.

The decree is accordingly affirmed.

HAYES *v.* GORDON.

4-9148 228 S. W. 2d 464

Opinion delivered April 3, 1950.

Surrey E. Gilliam, for appellant.

Walter L. Brown and *Silas W. Rogers,* for appellee.

Ed. F. McFaddin, Justice. This is a dispute between the children of O. C. Hayes, deceased. Appellants are the two children of O. C. Hayes[1] by his first wife, Mrs. Nancy Hayes. Appellees are the three children of O. C. Hayes by his second wife, Mrs. Dasser Hayes.

Appellants, as plaintiffs in seeking partition, alleged that O. C. Hayes died intestate, the owner of a tract of 61½ acres in Union County, Arkansas; and that appellees and appellants each owned one-fifth of said land. Appellees, as defendants, claimed that the tract of 61½ acres was not owned by O. C. Hayes at the time of his death, but was then—and for many years had been—owned by their mother, Mrs. Dasser Hayes, the second wife of O. C. Hayes. In their amended answer, appellees also prayed that the Court correct the description in certain of the deeds under which they claimed title. Each side pleaded limitations, laches, and stale demand.

Upon trial in the Chancery Court the following facts were established:

(1)—That the appellants are the two children of O. C. Hayes by his first wife, Mrs. Nancy Hayes, who died in April, 1896; that O. C. Hayes married his second wife, Mrs. Dasser Hayes, in January, 1898; that appellees are the three children of O. C. Hayes by his second

[1] In some instances, the name is spelled "Hays", but it is impliedly conceded that the identity of the parties is the same, regardless of the spelling of the name.

wife; that O. C. Hayes died, intestate, in October, 1928; that Mrs. Dasser Hayes died, intestate, in June, 1948; and that this suit was filed in July, 1948;

(2)—That O. C. Hayes was one of the children of W. N. Hayes; that since 1920 there has been of record a general warranty deed dated January 14, 1904, wherein W. N. Hayes and wife conveyed 61½ acres to "O. C. Hays and Dasser Hays." We will refer to this as the "1904 deed." The description of the land as therein contained is:

"The Southeast Quarter of the Northwest Quarter, and the North Half of the Southwest Quarter of the Northwest Quarter, and one and one half acres lying in the Northwest corner of the Southeast Quarter of the Northwest Quarter, Sec. 21, Twp. 16, Range *18,* containing sixty-one acres and a half more or less." (Italics our own.)

(3)—That since 1920 there has been of record a general warranty deed dated September 5, 1912, wherein O. C. Hayes attempted to convey to Dasser Hayes the 61½ acres described the same as in the 1904 deed, *supra.* This deed from O. C. Hayes to Dasser Hayes will be hereinafter referred to as the "1912 deed."

(4)—That there are also of record six quitclaim deeds, each dated in 1924, from grantors, who with O. C. Hayes were all the heirs of W. N. Hayes; that the grantee in each of these six deeds is "O. C. Hays." We will refer to these six deeds as the "1924 quitclaim deeds." Each of them definitely describes the 61½ acres involved in this suit as follows:

"The Southeast Quarter of the Northwest Quarter and all that part of the Southwest Quarter of the Northwest Quarter lying North and East of the Missouri Pacific Railroad right of way; all in Section 21, Township 16 South, Range 15 West, and also one and one-half (1½) acres lying in the Northwest corner of the Northeast Quarter of the Southwest Quarter of said section, described as beginning at the Northwest corner of said Northeast Quarter of the Southwest Quarter of Section

21, Township 16 South, Range 15 West, running thence West along the North boundary line of said forty acre tract 383 feet, thence South 14 degrees and 2 minutes West 248.8 feet to the Missouri Pacific Railroad right of way, thence Northwest along said right of way to the West line of said forty acre tract, thence North to point of beginning."

(5)—That after the 1920 discovery of oil near the 61½ acres, O. C. Hayes executed at least six leases or royalty instruments to various third parties at dates between 1921 to 1924; and that Mrs. Dasser Hayes joined in the execution of each of these instruments; and also relinquished dower and homestead in each. These will be referred to as the "1921 to 1924 mineral instruments."

From the foregoing, it will be observed that the lands described in the 1904 deed and 1912 deed, *supra,* are shown in Range *18* West, whereas the lands are in fact situated in Range *15* West,[2] as described in the 1924 quitclaim deeds. Also, it will be observed that the 1½ acre tract is otherwise misdescribed in the 1904 deed and the 1912 deed. But the evidence shows that W. N. Hayes owned the lands in Range *15* West, as correctly described in the 1924 quitclaim deeds; and that the 61½ acres so described were the lands all the time in the possession of the Hayes family.

The Chancellor found that under the 1904 deed O. C. Hayes and Dasser Hayes took possession of the lands described in the 1924 quitclaim deeds; that the 1904 deed was intended to describe such lands; that the 1904 deed created an estate by entirety in O. C. Hayes and Dasser Hayes; and that the 1924 quitclaim deeds were designed to, and did in fact, correct the mistake contained in the description in the 1904 deed. On the basis of such findings, the Chancery Court entered a decree for the defendants. The plaintiffs, as appellants, challenge that decree and present the following points:

I. *Effect of the 1924 Quitclaim Deeds.* Appellants argue that the effect of these deeds was to vest the title

[2] The recent case of *Stephens* v. *Ledgerwood,* 216 Ark. 404, 226 S. W. 2d 587, was one in which there was a mistake as to the township and range.

in O. C. Hayes, as he was the only grantee named in them. It is claimed that O. C. Hayes paid his brothers and sisters approximately $3,000 for these deeds. If he made such payments, it was prompted by either his generosity, the avarice of his relatives, or his desire to accomplish quick clarification rather than the delay of a litigated clarification. But regardless of how much O. C. Hayes paid for the 1924 quitclaim deeds, we agree with the Chancery Court that the deeds were merely curative. Ever since the 1904 deed O. C. Hayes and Dasser Hayes had been in possession of the 61½ acres as tenants by the entirety.[3] The 1904 deed misdescribed the lands, but it is clear that it was the intention of W. N. Hayes to describe, in the 1904 deed, the lands which his heirs described in the 1924 quitclaim deeds.

By naming himself as the sole grantee in the 1924 quitclaim deeds, O. C. Hayes could not divest his wife, Dasser Hayes, of her interest in the lands of which she was then in possession. This statement is true for at least two reasons: (a) O. C. Hayes and Dasser Hayes had taken possession of the lands as tenants by the entirety; and any improvement in the title accomplished by one entirety tenant enured to the benefit of the other entirety tenant (see *Brittin* v. *Handy,* 20 Ark. 381, 73 Am. Dec. 497; *Clements* v. *Cates,* 49 Ark. 242, 4 S. W. 776; Jones' "Arkansas Titles," § 200); and (b) O. C. Hayes, by general warranty deed in 1912, had attempted to convey to Dasser Hayes all the title to the 61½ acres which had been deeded to "O. C. Hays and Dasser Hays" by the 1904 deed. Whether the 1912 deed was the correct way for one entirety tenant to convey his interest in the land to the other entirety tenant is a question that we need not discuss because, even if the entirety relation had not existed, the effect of the general warranty clause in the 1912 deed would be to pass to Dasser Hayes, as grantee, all the title subsequently acquired by O. C. Hayes. Such is the effect of our "after-acquired title" Statute, as contained in § 50-404 Ark. Stats. of 1947.

[3] See *Parrish* v. *Parrish,* 151 Ark. 161, 235 S. W. 792, Jones' "Arkansas Titles," § 1129.

So we conclude that the 1924 quitclaim deeds did not vest sole title in O. C. Hayes; but on his death the title of the 61½ acres passed to Dasser Hayes, his wife, named as entirety tenant in the 1904 deed, even if the 1912 deed had not passed title.

II. *Effect of the 1921 to 1924 Mineral Instruments.* Appellants contend that Dasser Hayes recognized O. C. Hayes as the fee owner of the lands, rather than merely as the entirety owner with her, because in each of the six "1921 to 1924 mineral instruments" Dasser Hayes relinquished her dower and homestead; and appellants claim that by so doing she recognized him as the exclusive owner of the fee simple title. Most, if not all, of these mineral instruments were executed before O. C. Hayes had received the 1924 quitclaim deeds, so appellants' argument, in some respects, lacks factual basis.

Furthermore, the transcript before us shows that in each of the 1921 to 1924 mineral instruments Mrs. Dasser Hayes *joined as grantor* in addition to relinquishing her dower and homestead. Evidently Mr. and Mrs. Hayes thought when they executed these mineral instruments that the signature of the husband was desirable in the conveyance by a wife of her own land. Furthermore, since this land had originally been acquired by entirety in 1904, the attorney passing the title for the mineral grantees might well have desired the signature of O. C. Hayes to accompany that of Mrs. Dasser Hayes, in order to dispose of any question of entirety title.

We refuse to say that Mrs. Dasser Hayes lost to her husband her interest in the land by allowing him to sign with her the 1921 to 1924 mineral instruments; so we reject appellants' argument on this point.

III. *Limitations, Laches, Delays, and Loss of Evidence as a Bar Against Appellees.* The Chancery Court, by its decree in this cause, reformed the 1904 deed from W. N. Hayes to O. C. Hayes and Dasser Hayes so that the deed described the lands actually involved in this suit. Appellants, in insisting that the Court was in error, point out (a) the death of the principal parties to the convey-

ance; and (b) the death of the scrivener of the 1924 quitclaim deeds.

As previously stated, we agree with the Chancellor that the 1924 quitclaim deeds were designed to and did correct the erroneous description in the 1904 deed, and that it was unnecessary for the decree in this cause to reform the description in the 1904 deed. Furthermore, we agree with the Chancellor that if limitations, laches, delay, and loss of evidence were available to either side in the present controversy, these defenses would enure to the appellees rather than to the appellants: because the appellees are in possession and need no reformation; and furthermore, O. C. Hayes died in 1928; and appellants made no claim to any of the lands until 1948, after the death of Mrs. Dasser Hayes.

IV. *Defect of Parties as a Bar to Reformation.* Appellants further insist that there could be no reformation of the 1904 deed until all of the heirs of W. N. Hayes were made parties to this suit, and cite *Gibson* v. *Johnson,* 148 Ark. 569, 230 S. W. 578, and *Cleveland* v. *Biggers,* 163 Ark. 377, 260 S. W. 432.

We agree with the appellants that, generally, before an instrument be reformed, the grantor, or his heirs, should be parties to the litigation. But in the case at bar appellants' present insistence—even if presented to the Chancery Court below so as to be available on appeal—is a contention which must be denied because the facts in the present case distinguish it from the cited cases. These facts are: that all the other heirs of W. N. Hayes executed to O. C. Hayes the six "1924 quitclaim deeds," so whatever interest W. N. Hayes originally owned passed to O. C. Hayes by the 1924 quitclaim deeds. In short, the 1924 quitclaim deeds had already accomplished the necessary reformation.

We have before us, in the present suit, all the heirs of O. C. Hayes; and the effect of the decree is to hold that O. C. Hayes, in acquiring the 1924 quitclaim deeds, did so as trustee for the use and benefit of Dasser Hayes, to whom he was obligated not only as tenant by the entirety,

but also under the general warranty clause of the 1912 deed; and this interpretation disposes of appellants' contention concerning defect in parties.

V. *Title to the "Home Place" Containing* 1½ *Acres.* When appellants filed their original complaint, they claimed that each of them owned only one-fifth interest in the entire 61½ acres. Later, by amendment, appellants claimed that they were the sole owners of the 1½ acre tract called the "home place," and specifically described by metes and bounds in the 1924 quitclaim deeds. Appellants' claim to the "home place" is based on the testimony of witnesses to the effect that W. N. Hayes gave the 1½ acre tract to his daughter-in-law, Mrs. Nancy Hayes (the mother of the two appellants).

There is evidence which indicates that Mrs. Nancy Hayes was ill, and W. N. Hayes built a house for her on the 1½ acre tract, and that she occupied it until her death. But on the evidence in this record, we cannot find and decree a parol conveyance of the fee title from W. N. Hayes to Nancy Hayes. The conclusion is that W. N. Hayes built the house on the 1½ acre tract, and allowed his daughter-in-law, Mrs. Nancy Hayes, and his son, O. C. Hayes, to occupy the house during all the lifetime of Mrs. Nancy Hayes, who died in 1896; that in 1898 O. C. Hayes married Mrs. Dasser Hayes and continued to live in the same house; but that the ownership of the land remained at all times in W. N. Hayes until he made the 1904 deed to "O. C. Hays and Dasser Hays."

Affirmed.

REVIS *v.* HARRIS.

4-9168 228 S. W. 2d 624

Opinion delivered April 3, 1950.

D. B. Bartlett, for appellant.

Brock & Branting, for appellee.

HOLT, J. Appellant, Owen Revis, a resident and taxpayer of Clarksville, a city of the second class, for himself and others similarly situated, brought this action in equity, alleging in his complaint, in effect, that appellee, Sam Harris, while the Mayor of Clarksville and a member of its City Council, was, by an ordinance on July 17, 1947, "constituted, appointed, and elected to serve as Municipal Judge until the next regular election."

He further alleged that Harris served as such Municipal Judge from July 18, 1947, to April 8, 1948, receiving therefor a salary of $200 per month, or a total of $1,733.33. That "J. W. Thompson by appointment by the City Council on January 10, 1949, is assistant treasurer, to treasurer, P. J. Haynes, to handle sewer funds exclusively * * *." That "Sam Harris was illegally and unlawfully paid of the funds of the treasurers of the city of Clarksville and Johnson County, Arkansas, and for reason Act 128 of the Acts of 1947, did not apply to the city of Clarksville, and for the further reason that he being mayor and member of the City Council is and was prohibited by law to be appointed to a Municipal Office which is created during the term for which he is and was elected; that said ordinance was void and of no effect, and the said City Council was without authority of law, and beyond their power to pass said ordinance, or to make such appointment, and for said

reasons the said Sam Harris, was not entitled to hold said office as Municipal Judge as provided by said ordinance and was holding said office without any right and without any authority of law, which ordinance has been so declared to be unconstitutional by our State Supreme Court, and the said Sam Harris was not entitled to be paid any sum or sums out of the taxpayers' money, and were illegal exactions, and this plaintiff in behalf of himself and all others interested are entitled to recover judgment against the defendant, Sam Harris, for said sum as aforesaid, for the use and benefit of the city of Clarksville, and of Johnson County, Arkansas.

"That the defendant, Sam Harris, is and has been since he acted as Municipal Judge, continuing to make illegal exactions against the inhabitants of the said city of Clarksville, by being interested directly or indirectly in the profits of contracts of jobs for work or services performed for the city of Clarksville, Arkansas, by making contracts with and accepting employment by the defendant, J. W. Thompson, manager for the board of commissioners of the Municipality-owned Light, Water and Sewer System plants of the city of Clarksville, Arkansas, and being paid by the said J. W. Thompson for such contracts for work or jobs for his services performed for said Municipality-owned Light, Water and Sewer System plants of the city of Clarksville, Arkansas, and is also accepting appointments for profits and being appointed by the said City Council. * * *

"That on January 10, 1949, said City Council met and appointed this defendant, Sam Harris, as sewer (or plumbing) inspector of the said city of Clarksville. * * * That such appointment * * * was illegally and unlawfully made, and Sam Harris is not qualified as provided by law and he is ineligible to be appointed as such inspector, for the further reason he being mayor at the time said ordinance was established is prohibited by law to be appointed as such inspector and is not entitled to serve as such inspector or to receive any pay for his services as such inspector. * * * That plaintiff has no adequate remedy at law."

He further alleged that Harris while Mayor and a member of the City Council, as indicated, had unlawfully entered into certain contracts with the Municipality-owned Light and Water System of Clarksville; to perform certain work for which he was paid from city funds illegally.

His prayer was that "Sam Harris be enjoined and restrained from further contracting with or accepting employment for jobs for profit, for services performed for said City of Clarksville, and that he be further enjoined and restrained from further performing any services as Plumbing Inspector and as further performing any further services as member of the Clarksville Plumbing Board of Examiners; that the defendant, J. W. Thompson, be enjoined and restrained from further contracting and employing the defendant, Sam Harris, and he be enjoined and restrained from further paying the defendant, Sam Harris, for any services performed for contract, for work and as Plumbing Inspector and as member of the Clarksville Plumbing Board," and that he have judgment against Harris for $1,733.33, the amount paid Harris as salary while acting as Municipal Judge, and that he recover in addition from Harris, for any other sums, illegally paid to Harris as alleged.

Harris filed "Motion to Dismiss Complaint," in effect a Demurrer. The Court treated this Motion as one to strike and decreed as follows: "That all that part of plaintiff's complaint and prayer seeking judgment against the defendant, Sam Harris, for amounts alleged paid to him while acting as Municipal Judge, and sums heretofore alleged to have been paid to him by J. W. Thompson, assistant treasurer, to P. J. Haynes, be and the same are hereby stricken, and to that extent defendant's motion is dismissed for lack of jurisdiction, and improper joinder of causes of action. It is further ordered and decreed that as to that portion of said complaint seeking injunctive relief, as to further payment, defendant's motion is overruled. Plaintiff excepted and declined to plead further, standing on his complaint, and

that the complaint as a whole is dismissed for want of equity."

This appeal followed.

There was error in so much of the decree holding, in effect, that appellant was not a proper party to bring the suit and that the Court lacked jurisdiction.

Our holding in the recent case of *Sitton* v. *Burnett,* 216 Ark. 574, 226 S. W. 2d 544, opinion delivered February 6, 1950, is controlling here.

In that case, Burnett, a citizen and taxpayer, brought suit to recover salary illegally paid Sitton by the second class City of Clinton, while serving as a *de facto* marshal. There it was alleged Burnett was not a proper party to bring the suit and that equity was without jurisdiction. We there held that Burnett, as a resident and taxpayer, was a proper party to bring this suit since taxpayers are the equitable owners of public funds and may sue to prevent any illegal exactions whatever, within the meaning of Art. 16, § 13, of our Constitution.

So here, if appellant's allegations in his complaint to the effect that appellee had been paid sums of money illegally by the City of Clarksville while acting as Municipal Judge, and for other services, without right or authority of law, were true, appellant stated a cause of action and was a proper party to initiate the suit.

Chancery had jurisdiction and the power to grant affirmative as well as injunctive relief in the circumstances. *Grooms* v. *Bartlett,* 123 Ark. 255, 185 S. W. 282.

We said in *Conner* v. *Heaton,* 205 Ark. 269, 168 S. W. 2d 399: "In the case of *Horstmann* v. *LaFargue,* 140 Ark. 558, 215 S. W. 729, this court, quoting with approval from Pomeroy Eq. Jur., § 181, said: 'If the controversy contains any equitable features, or requires any purely equitable relief, which would belong to the exclusive jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the court may go on to a complete adjudication, and may thus establish purely legal rights, and grant legal remedies, which

would otherwise be beyond the scope of its authority,' and in 8 R. C. L. 911, § 37, the author says: 'Inasmuch as a court of equity has jurisdiction of all matters which savor of trusts, it is the proper tribunal in which to seek to enforce or preserve the beneficial interest of the public obtained through a dedication,' and the rule is well settled that 'when equity acquires jurisdiction of a cause for one purpose under *bona fide* allegations, all matters at issue will be adjudicated and complete relief afforded.' " Reaffirmed in *Goodman* v. *Powell,* 210 Ark. 963, 198 S. W. 2d 199.

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

JORDAN *v.* JORDAN.

4-9145 228 S. W. 2d 636

Opinion delivered April 3, 1950.

Osborne W. Garvin, for appellant.

Price Shofner and *June P. Wooten,* for appellee.

GEORGE ROSE SMITH, J. This appeal and cross appeal present separate controversies between the appellee as the widow of B. S. Jordan and the appellants, Jordan's two children by an earlier marriage. On the appeal the

question is whether the widow's homestead in Little Rock includes a commercial building on the rear part of the lot. The proof shows that before 1924 Jordan acquired the homestead now in dispute. The house itself occupies a corner lot and faces Tenth Street. In 1924 Jordan constructed a sheet-iron business building on the back part of the lot. This building fronts on the side street and is numbered 1009 Summit Street. Jordan operated a machine shop in the building for many years. In 1941 he discontinued his business, boarded up the door on the side facing his home, and thereafter rented the building as a garage and warehouse. The chancellor found that the entire lot constituted the homestead and that the appellee has been entitled to the rents from the business building since the younger appellant reached twenty-one. The appellants contend that by his conduct their father segregated the commercial structure from his homestead, so that the appellee is entitled only to a dower interest in the property.

In some of our earlier decisions we have recognized that one may reduce the area of his homestead by cutting off a portion and devoting it permanently to commercial uses. *Klenk* v. *Knoble,* 37 Ark. 298; *Vestal* v. *Vestal,* 137 Ark. 309, 209 S. W. 273. But on its facts the case at bar is controlled by our holding in *Berry* v. *Meir,* 70 Ark. 129, 66 S. W. 439. There Berry first bought the north third of a lot, on which there was a store. He later bought the south two thirds and built a residence upon it. A fence separated the store from the house. In that case, as in this one, the entire lot was less than the constitutional minimum of a quarter of an acre. Ark. Const., Art. 9, § 5. In sustaining Berry's homestead right in the entire lot we said: "Although this storehouse was used by the debtor himself in his own business, there are decisions by the courts of other states to the effect that such a storehouse, entirely separate from the residence of the owner, and not used as an appurtenance or convenience of the dwelling house, is not a part of the homestead. In re Allen, 78 Cal. 293, 120 Pac. 679. But a majority of the judges are of the opinion that this court is committed to a different view of the law. In *Gainus* v. *Cannon,* 42

Ark. 503, Mr. Justice EAKIN, speaking for the court, said: 'It is a strange and irrational idea sometimes advanced that a man ought to lose his homestead as soon as he attempts to make any part of it helpful in family expenses.' "

In the present case the facts favor the homestead claim more strongly than did those in the *Berry* case. There Berry bought the store before he built the house, while here the lot had already been impressed with its homestead character when the warehouse was constructed. In the earlier case a fence divided the homestead into two parts; here such a separation is lacking. We accordingly hold that the entire lot was Jordan's homestead. As the widow's homestead right is a derivative one it also extends to the whole lot. *Stuckey* v. *Horn*, 132 Ark. 357, 200 S. W. 1025.

The cross appeal involves a promissory note for $900, payable to B. S. Jordan and the appellee. The facts are that when Jordan married the appellee he owned a vacant lot in Little Rock. After their marriage the couple contracted to sell the lot to H. W. White and his wife. This contract recites that the Whites have executed an installment note "to the sellers" for the unpaid balance of the purchase price. The note is made a part of the contract and is payable to "B. S. Jordan and Peggy C. Jordan, his wife." It is conceded that Jordan, with his wife's consent, appropriated to himself the down payment on the lot and the only installment that was paid on the note before his death. On these facts the chancellor held that the appellee could have acquired an interest in the note only as a gift from her husband, and the gift was incomplete for want of delivery of the note to the appellee. The decree vested title to the note in the appellants, subject to the widow's dower.

We view the transaction somewhat differently. We need not determine whether a promissory note payable to a husband and wife gives the wife an interest in the note in every case, even without delivery, for here something more than a mere gift is involved. The appellee had an inchoate dower interest in the vacant lot. She

signed the contract as a seller, binding herself to join in a deed when the note was paid in full. In these circumstances she was not a mere donee but rather was a party to the contract, which recited that the note was payable to her and her husband. Her rights in the note arose not from a gift but from her agreement to release her dower in return for being named as a payee in the note. In this respect the case is to be distinguished from *Neal* v. *Neal,* 194 Ark. 226, 106 S. W. 2d 595, relied upon by the appellants. There the intended donees had no contractual interest in the subject matter of the gift, and we held that the gift failed for want of delivery.

Since the note was payable to the appellee and her husband a tenancy by the entirety was created. Ever since *Union & Merc. Tr. Co.* v. *Hudson,* 147 Ark. 7, 227 S. W. 1, tenancies by the entirety in personal property have been upheld in this State. In jurisdictions where that is the law it is held that a chose in action payable to a husband and wife creates a tenancy by the entirety. *American Cent. Ins. Co.* v. *Whitlock,* 122 Fla. 363, 165 So. 380; *Smith* v. *Haire,* 133 Tenn. 343, 181 S. W. 161, Ann. Cas. 1916D, 529; *In re Greenwood's Estate,* 201 Mo. App. 39, 208 S. W. 635. In the absence of any language in this note to indicate that some other estate was intended we conclude that B. C. Jordan and the appellee took it as tenants by the entirety. Upon his death the title vested in her by survivorship.

Affirmed on direct appeal; reversed on cross appeal.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. *v.* REEVES.

4-9131 231 S. W. 2d 103

Opinion delivered March 20, 1950.

Wright, Harrison, Lindsey & Upton, for appellant.

Sid J. Reid, for appellee.

GRIFFIN SMITH, Chief Justice. Two black and tan hounds belonging to Clyde R. Reeves were killed by a Rock Island motor train near a bridge north of Leola, where low marshy country is traversed. The Railroad Company has appealed from a judgment for $200, appellee having sued for $400.

Appellant contends there was no evidence of negligence, and says that the jury arbitrarily disregarded the testimony of Engineer Thomas W. McCuin, the only eye witness. *St. Louis-S. F. Ry. Co.* v. *Harmon,* 179 Ark. 248, 15 S. W. 2d 310.

Reeves testified that from physical evidence the dogs were killed by a train when it struck them on the bridge he described. The train was moving northward and dragged the bodies about thirty feet, and that [said Reeves] "was all they lacked of being off the bridge".

The engineer testified that the dogs came onto the track at the foot of the bridge at a time when the train was 150 or 160 feet away. He was keeping a constant lookout and observed the animals as they came up the "dump", but he did not know whether they came from under the bridge or out of the bushes. He saw them at the north entrance to the structure where the brush, weeds, and grass were from six to eight feet from the ties. Warning was given by four or five blasts of the whistle. The train was making 35 or 40 miles an hour on a straight stretch of track where the schedule calls for 50 miles. A private road crosses the track half a

mile farther north. Three or four seconds lapsed between the time the dogs were seen and the time they were struck. An emergency stop could have been made in six or seven hundred feet, but the effect would be to throw passengers from their seats. Seven seconds are required for emergency brakes to exert their full effect on a train such as McCuin was operating.

. . . .

By Ark. Stat's, § 73-1007, live stock killed on a railroad track is evidence, *prima facie,* that the animal was struck by a train, and "the onus of proving the reverse" is on the railroad company.

The appellee here proved only what the engineer admitted. The physical facts add nothing in contradiction of the evidence relied upon by appellant. In the absence of some fact or circumstance indicating that the engineer was in error, there is nothing to show that ordinary care was not exercised or that a lookout was not being kept. Assuming that the train was traveling 40 miles an hour, that the two dogs suddenly appeared on or near the bridge when the diesel-driven engine was 160 feet away, and that the whistle was promptly sounded,—then what more could McCuin have done? Information of conditions under which the train could be stopped or the speed sufficiently reduced to permit avoidance was peculiarly within the trainman's knowledge, and no effort was made to disprove his testimony. The presumption arising from the fact and place of killing was overcome. In order to prevail some proof of negligence was required. The case is not unlike *St. Louis-S. F. Ry. Co. v. Matlock,* 198 Ark. 1187, 132 S. W. 2d 657. See, also, *St. Louis-S. F. Ry. Co.* v. *Pace,* 193 Ark. 484, 101 S. W. 2d 447.

The judgment is reversed, with dismissal of the cause.

Mr. Justice McFaddin and Mr. Justice Millwee dissent.

Ed. F. McFaddin, Justice (dissenting). The majority of this Court is holding that the Circuit Judge should

have instructed a verdict for the defendant instead of submitting the case to the jury. I respectfully dissent; because, as I see it, a question was made for the jury under our holdings in *Railway Company* v. *Hutchison,* 79 Ark. 247, 96 S. W. 374, and *Railway Company* v. *Chambliss,* 54 Ark. 214, 15 S. W. 469.

In *Railway Company* v. *Hutchison, supra,* Mr. Justice BATTLE clearly stated the applicable rule:

"The plaintiff, W. E. Hutchison, proved that his horse was killed by the operation of the railway of the defendant, the St. Louis Southwestern Railway Company. This was sufficient to show that the killing was the result of the negligence of the defendant, unless evidence adduced proved the contrary. Plaintiff thereby cast upon the defendant the burden of excusing the killing. To do so it introduced two witnesses. But the testimony of each of these witnesses is inconsistent with and contradictory to itself. If the jury disbelieved their testimony on account of these inconsistencies and contradictions, the law warranted them in disregarding it, which they did, as shown by their verdict. *Railway Company* v. *Chambliss,* 54 Ark. 214."

In *Railway Company* v. *Chambliss, supra,* Mr. Justice HEMINGWAY said:

"The plaintiff proved that her horse was killed by the operation of defendant's cars. She thereby cast upon it the burden of excusing the killing.

"If the jury had believed the testimony of the defendant's engineer, its duty would have been plain to find a verdict for the defendant. Was it warranted in disbelieving his testimony?

"As we understand the law, it warrants a jury in disregarding the statements of a witness which it does not believe to be true, whenever such disbelief fairly arises—whether because the statements involve impossibilities, or what, according to common observation and experience in reference to such matters, seems highly improbable, or because they are incoherent and incon-

sistent in themselves, or because they are inconsistent with the accepted testimony in the cause. *Sellar* v. *Clelland,* 2 Col. 539; *French* v. *Millard,* 2 O. St. 52; *Evans* v. *Lipscomb,* 31 Ga. 71."

From the holdings of these two cases I understand the law to be that a jury question is made in a case like the one at bar, if the testimony offered by the Railway Company is "inconsistent and contradictory,"[1] or if "the statements involve impossibilities, or what, according to common observation and experience in reference to such matters, seems highly improbable."[2] Now with the above holdings before us, we turn to the evidence in the case at bar; and here it is:

The "train," a motor coach and baggage car, was traveling North at thirty-five miles per hour (which would be about fifty feet per second) on a straight track and in the daytime. When it was 150 feet South from the South end of a 166 foot trestle, the engineer saw two dogs get on the track at the North end of the trestle. Thus the dogs were 316 feet away from the train at the time the engineer saw them. He testified that the dogs proceeded *South* on the trestle, 30 feet *towards* the approaching train, as the train traveled towards the dogs, and that he blew the whistle four or five times. The trestle was only six feet above the ground.

To put it mildly, it seems to me "highly improbable" that two well trained[3] hound dogs, in the daytime, with a train plainly visible, went 30 feet on a railway trestle *towards* an approaching train that sounded its whistle four or five times after the dogs got on the track, and finally, that in such a situation the dogs refused to jump from the trestle to the ground which was only six feet below.

The Circuit Judge evidently thought the testimony offered by the Railway Company was "highly improbable," because he sent the case to the jury. I agree with

[1] To use Justice BATTLE'S words.

[2] To use Justice HEMINGWAY'S words.

[3] That the dogs were well trained was established by two witnesses.

the Circuit Judge; and I feel that the majority is substituting its judgment for that of the jury and is allowing the Railway Company to escape liability on testimony that is "highly improbable."

REDDICK *v.* SCOTT.

4-9140 228 S. W. 2d 1008

Opinion delivered April 10, 1950.

T. J. Gentry, for appellant.

Luke Arnett, Henry Donham, William J. Smith and *William H. Donham,* for appellee.

GEORGE ROSE SMITH, J. This proceeding for unemployment benefits was brought by the twelve appellants, former employees of the appellee L. W. Scott, who does business as Scott Paper Box Company. Under the Ar-

kansas Employment Security Act (Ark. Stats. 1947, Title 81, Ch. 11) the case was heard by the Appeals Tribunal and reveiwed by the Board of Review. These tribunals awarded benefits to the appellants for a period prior to September 3, 1947, but denied any further benefits for the reason that thereafter the appellants' unemployment was due to their being on strike against the appellee. The circuit court affirmed this decision.

For the most part the facts are not in dispute. In August of 1947 a number of the appellee's employees began negotiating with a labor union representative with a view to joining the union. On August 14 this representative wrote to the appellee, requesting a conference for the purpose of discussing a contract between the union and the employer. On the following morning the appellee caused this letter to be posted by the time clock and in substance informed his employees that if they wanted to organize a labor union they would have to seek employment elsewhere. The Appeals Tribunal, finding that this conduct amounted to a lockout, allowed unemployment benefits for the period immediately following. Ark. Stats., § 81-1106 (d). That ruling is not questioned upon this appeal.

On August 20 the appellee sent a letter to each of the employees who were then away from their jobs. In this letter the employer assured his workmen that their connection with the Box Company had not been terminated by any act of the Company and that they were welcome to return to work. On August 21 the employees replied by letter, requesting assurance that if they returned to work there would be no discrimination on the basis of union activity. The appellee answered by mail the next day, stating that there would be no such discrimination. The employees then returned to their jobs. As we have indicated, unemployment benefits were allowed for this period of idleness.

About a week later, on Saturday, August 30, the employer requested six or seven of the men to work that Saturday afternoon. It is not clear from the record whether these men agreed to work that afternoon or

assigned various personal reasons for not being able to work. At any rate, they did not come back to work after the noon hour. At the beginning of the next work day five of these men were informed that they were no longer employed by the Company. A majority of the other employees then called a strike and established a picket line. The five who had been discharged joined in the strike, all the striking employees taking the position that they would not return to work unless the five were reinstated or unless the appellee also discharged any others who failed to work on Saturday afternoon. In this proceeding the appellants seek unemployment benefits for the period beginning with the date of the strike.

The Appeals Tribunal denied benefits upon the sole ground that the appellants' unemployment was due to a labor dispute. In so holding, the Appeals Tribunal overlooked the fact that the Act does not deny benefits in every case of unemployment that results from a labor dispute. On the contrary, the Act authorizes the payment of benefits if the Commissioner finds that the labor dispute was caused "by the failure or refusal of any employer to conform to the provisions of any agreement or contract between the employer and employee or of any law of the State of Arkansas or of the United States pertaining to collective bargaining, hours, wages," etc. § 81-1106 (d).

On appeal the Board of Review considered to some extent the language just quoted but rested its affirmance on the ground that there was no agreement between the employer and the employees in this case. This conclusion was erroneous as a matter of law. It is undisputed that the letters of August 20-22 were exchanged, and the administrative tribunals so found. These letters unquestionably constituted an agreement that there would be no discrimination on account of union activity.

Thus the Appeals Tribunal was in error in concluding that the mere existence of a labor dispute precludes the allowance of benefits, and the Board of Review was in error in holding that there was no agreement that could have been violated by the employer. The appellee

insists that the judgment should nevertheless be affirmed, for the reason that the discharge of the five employees was not in violation of the agreement or of State or Federal law. With respect to the Federal law the National Labor Relations Board has held, in a decision rendered after that of the Board of Review, that the five men were not discriminated against on the basis of their union activity. *L. W. Scott, d.b.a. Scott Paper Box Co.,* 81 NLRB No. 98, Case No. 15-MC-28, Feb. 10, 1949. The Appeals Tribunal and the Board of Review may or may not agree with that decision.

The issues now remaining hinge upon questions of fact as yet undecided. Under the statute the findings of fact made by the Appeals Tribunal and the Board of Review are conclusive upon judicial review if supported by evidence. § 81-1107 (d) (7). Where an administrative body is empowered to make findings of fact it is not the province of the courts to discharge that function merely because the administrative agency has not acted. For instance, it has been our consistent practice under the Workmen's Compensation Act to remand the cause to the Commission if that body fails to make a finding upon a pertinent issue of fact. *Long-Bell Lbr. Co.* v. *Mitchell,* 206 Ark. 854, 177 S. W. 2d 920; *Paragould Laundry & Dry Cl. Co.* v. *Rogers,* 210 Ark. 764, 197 S. W. 2d 567. Here the administrative tribunals have not yet determined whether the labor dispute was caused by the appellee's failure to conform to his agreement or to law. Similarly, it is argued that the five discharged employees did not owe their original idleness to a labor dispute, but that also is a question of fact. Their right to benefits may depend at least in part upon whether they were available for work, as the Act contemplates. § 81-1105 (b) and (c). It is not the function of this court to decide such fact questions in the first instance.

Reversed, with instructions to remand the cause to the Board of Review for findings of fact upon the issues that are still undecided and for further proceedings consistent with this opinion.

GRIFFIN SMITH, C. J., concurs. DUNAWAY, J., not participating.

GRIFFIN SMITH, Chief Justice, concurring. The opinion says that "The Issues now remaining hinge upon questions of fact as yet undecided. . . . Where an administrative body is empowered to make findings of fact it is not the province of the courts to discharge that function merely because the administrative agency has not acted." The same issue was presented in Case No. 4-9115, *Kimpel, Guardian,* v. *Garland Anthony Lumber Company,* 216 Ark. 788, 227 S. W. 2d 932. There the Workmen's Compensation Commission, as the majority opinion of this Court points out, had erroneously decided against a claim on a point of law. In the dissenting opinion it was said: "I would therefore give the Commission an opportunity to say whether, under the facts, a case was made." The majority opinion in the Kimpel case said, "Here the uncontradicted testimony would have established a case of partial dependency if Jethro had been 21 or more." Now we are saying that where the administrative body is *empowered* to make findings of fact, *"it is not the province of the courts to discharge that function merely because the administrative agency has not acted."*

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

4-9182 228 S. W. 2d 642

Opinion delivered April 10, 1950.

Cecil Grooms and *Howard A. Mayes,* for appellant.

Henry Donham and *Daggett & Daggett,* for appellee.

LEFLAR, J. Plaintiffs Hawkins and Hook suffered personal injuries and Hawkins' car was damaged in a collision with defendant's freight train at a highway-railroad crossing in the city of Paragould at about 2:00 a. m. on November 11, 1948. At the trial of plaintiffs' action brought to recover for these injuries to person and property, the Circuit Judge directed a verdict for the defendant at the close of all the evidence. From the judgment entered upon this directed verdict the plaintiffs appeal.

Since the verdict was directed for the defendant our examination of the evidence must be in its light most favorable to the plaintiffs. Had the case been sent to the jury for a verdict, the jury might have believed the evidence favoring the plaintiffs, and it is our task to determine whether the evidence thus favorably viewed could under the law have sustained a verdict for the plaintiffs.

Plaintiff Hawkins, a southeast Missouri farmer, had made a trip in his car from his home to Coal Hill, Ark., to hire cottonpickers. Plaintiff Hook, a neighbor, accompanied him. Hawkins had hired the needed pickers, who were to go to Missouri on a truck later, and he with Hook had at about 6:00 p. m. on November 10 started back to their home in Missouri. By 2:00 a. m. of the same night,

 [redacted]

when the collision occurred, they had traveled the approximately 245 miles from Coal Hill to Paragould and were driving into that city from the west. Both were watching the road ahead.

The east-west highway in Paragould is crossed at about a 90-degree angle by defendant's railroad tracks. The tracks are raised some two or three feet above the highway, which inclines gradually up to the tracks on both the east and west. At the time plaintiffs approached from the west, at a proper speed for city driving and with their lowered lights in good condition, defendant's freight train was standing still on the track while trainmen were making repairs on the train, apparently at its front end. Neither Hawkins nor Hook saw the standing train till they were almost upon it. When they did see it, Hawkins applied his brakes instantly but was unable to avoid crashing squarely into the train, the front of his car being wedged beneath the boxcar which they struck. Both men were injured, and Hook was knocked unconscious. Hawkins with the aid of bystanders got the unconscious Hook out of the car. Just afterwards the train was pulled a few feet to the south, the trainmen being apparently unaware of the wreck. Plaintiffs' testimony was that the car was torn up both by the original crash and by being dragged afterwards. It was almost a total loss.

Both Hawkins and Hook testified that as they approached the crossing they could see the undimmed lights of a car facing them from the other side of the tracks, and that the undimmed lights blinded them somewhat. Also they saw a red, green and amber traffic light in operation in the middle of the street ahead of them, on the far side of the tracks. They say that they thought they had an unobstructed view down the highway, and that there were no active signals at the crossing to indicate that it was blocked by a train or anything else.

This apparent inconsistency in the plaintiffs' testimony, making it seem that they looked through a standing freight train as though it were a glass window, is explained by their testimony, and by the supporting tes-

timony of several other witnesses. For one thing, the raised track left an open space of two feet and nine inches beneath the freight car bottoms and above the rails, directly in an automobile driver's line of vision as he would look ahead on the highway. For another thing, the part of the train immediately in front of plaintiffs as they approached the crossing was an empty boxcar with the doors on both sides wide open. In the light of this evidence, it is entirely possible that a jury might conclude that plaintiffs were telling the truth when they said that they were carefully watching the highway ahead and saw through or under the standing train without ever seeing the train itself until they were practically beneath it.

To justify a verdict for plaintiffs, the jury would have to find (1) that defendant was negligent in the maintenance or operation of its train at the crossing and (2) that the alleged contributory negligence of the plaintiffs was of less degree than the negligence of the defendant. This is one of the situations in which our comparative negligence law, Ark. Stats., § 73-1004, is applicable, so that the contributory negligence of the plaintiffs will not bar their recovery unless it was equal in degree to or greater than the negligence of the defendant. *Lloyd, Admx.,* v. *St. Louis S. W. Ry. Co.,* 207 Ark. 154, 179 S. W. 2d 651.

This Court has several times held that injured plaintiffs could not recover against railroad companies when automobiles were driven into the side of trains standing still on a highway crossing. *Lowden, Trustee,* v. *Quimby,* 192 Ark. 307, 90 S. W. 2d 984; *Gillenwater* v. *Baldwin, Trustee,* 192 Ark. 447, 93 S. W. 2d 658; *K. C. S. Ry. Co.* v. *Briggs,* 193 Ark. 311, 99 S. W. 2d 579; *Fleming, Admrx.,* v. *Mo. & Ark. Ry. Co.,* 198 Ark. 290, 128 S. W. 2d 986; *Lloyd, Admrx.,* v. *St. Louis S. W. Ry. Co.,* 207 Ark. 154, 179 S. W. 2d 651. Other cases have reached the same result when the automobile was driven into the side of a moving train. *Chicago, R. I. & P. Ry. Co.* v. *Sullivan,* 193 Ark. 491, 101 S. W. 2d 175; *Chipman* v. *Mo. Pac. R. Co.,* 195 Ark. 721, 114 S. W. 2d 14. From these cases it is conceivable that one might leap to the conclusion that

this Court has laid down a rule of law that a plaintiff can never recover when his automobile is driven onto a highway-railroad crossing into the side of a train. A reading of the cases cited makes it very clear that we have not laid down any such broad and all-embracing rule. We have not chosen to disregard the governing abstract principles of negligence and contributory negligence to the extent of saying that there never will be a crossing collision of that sort in which the railroad company or its employees are guilty of negligence, nor have we said that injured plaintiffs figuring in such collisions will always and invariably, in every case that arises, be guilty of negligence equal to or greater than that of the defendant railroad. On the contrary, in *Fleming, Admrx.,* v. *Mo. & Ark. Ry. Co.,* 198 Ark. 290, 294, 128 S. W. 2d 986, 988, one of the cases cited *supra,* we said:

"It is the settled rule that whether failure of a railroad company to station a flagman at a crossing constitutes an omission of such care as an ordinarily prudent person would use under the same or similar circumstances, is a question of fact where there are obstructions which materially hinder the view of approaching trains, provided the crossing is used frequently by the public, and numerous trains are run. Inasmuch as permanent surroundings may create a hazardous condition, the rule of care goes further and requires precautions where special dangers arise at a particular time. It is said that the obligation exists, at an abnormally dangerous crossing, to provide watchmen, gongs, lights, or similar warning devices not only for the purpose of giving notice of approaching trains, but such care is to be equally observed where the circumstances make their use by the railroad reasonably necessary to give warning of cars already on a crossing, whether standing or passing, as where a crossing is more than ordinarily dangerous because of obstructions to the view interfering with the visibility of the responsible train operatives, or those approaching the track."

The quoted language was repeated approvingly in *Lloyd, Admrx.,* v. *St. Louis S. W. Ry. Co.,* 207 Ark. 154,

158, 179 S. W. 2d 651, 652. It represents well established authority in other states as well as in Arkansas. The true rule is that such cases merely present questions as to whether there is substantial evidence of negligence in the defendant railroad and as to the comparative degree of the injured plaintiff's contributory negligence. See *Hendrickson* v. *Union Pac. R. Co.,* 17 Wash. 2d 548, 136 Pac. 2d 438, 161 A. L. R. 96.[1] A directed verdict for the defendant is proper only when there is no substantial evidence from which the jurors as reasonable men could possibly find the issues for the plaintiff. In such circumstances the trial judge must give to the plaintiff's evidence its highest probative value, taking into account all reasonable inferences that may sensibly be deduced from it, and may grant the motion only if the evidence viewed in that light would be so insubstantial as to require him to set aside a verdict for the plaintiff should such a verdict be returned by the jury. *St. Louis S. W. Ry. Co.* v. *Britton,* 107 Ark. 158, 154 S. W. 215; *Mo. Pac. R. Co.* v. *McKamey,* 205 Ark. 907, 171 S. W. 2d 932; *Ozan Lbr. Co.* v. *Tidwell,* 210 Ark. 942, 198 S. W. 2d 182.

In the instant case we believe there was evidence from which the jurors might reasonably have found that the defendant through its employees failed to exercise the care which an ordinary prudent man would have exercised under the same or similar circumstances. The time of night, the lights visible across the track, the open space in the line of an autoist's vision above the raised tracks and beneath the bottoms of the stopped freight cars, the wide open doors of the boxcar through which lights across the track shone while the boxcar stood motionless and silent, the absence of active crossing signals of any kind, the absence of guard or watchman, the fact that this was on a principal street in the business section of a good-sized city, the fact that the train was then moved a distance down the track with neither sign nor signal given—all this was included in the evidence and if believed by the jury would indicate that defendant created, unintention-

[1] The cases are collected in a series of annotations in 15 A. L. R. 901, 56 A. L. R. 1114, 99 A. L. R. 1454, and 161 A. L. R. 111, the latter being the most complete collection of cases.

ally but perhaps carelessly, something like a trap for unwary night drivers. It may or may not be that defendant had time to post watchmen or set signals after stopping the train, but that is not decisive; it is possible that an ordinary prudent man in the position of defendant's employees would not have stopped a train with open boxcar doors on this raised crossing at all in the absence of opportunity to give adequate warning to the traveling public. We hold that there was evidence here from which the jury might have found negligence in the defendant.

Further, the jury might sensibly have found under the evidence that, though the plaintiffs were negligent, their negligence was of less degree than that of the defendant. Ark. Stats., § 73-1004. The testimony was that both plaintiffs were watching the road ahead, that the brakes and lights on their car were in good condition and properly employed, that their failure to see the standing train was due to no fault in the driving or in the lookout that both of them constantly maintained, and that they were to some extent blinded by the undimmed lights of a car facing them. They were strangers in the town and unfamiliar with the particular crossing. We cannot say that their evidence was under the circumstances so improbable, so contrary to the very nature of things, that a jury could not reasonably have accepted it, or part of it, and then have concluded that plaintiffs were less negligent than defendant was.

In reaching this decision we overrule no earlier cases. Each of the cases already cited, relied upon by defendant, is readily distinguishable. In *Chicago, R. I. & P. Ry. Co.* v. *Sullivan,* 193 Ark. 491, 101 S. W. 2d 175, *Chipman* v. *Mo. Pac. R. Co.,* 195 Ark. 721, 114 S. W. 2d 14, and other cases like them, the defendant's train was moving when it was struck, and the very fact of motion on the tracks ahead served as a warning signal to approaching drivers. In *Lowden, Trustee,* v. *Quimby,* 192 Ark. 307, 90 S. W. 2d 984, there was no evidence of surrounding circumstances such as in the principal case pointed to negligence in the defendant, and the plaintiff, keeping no lookout though familiar with the crossing, was guilty of a larger degree

of comparative negligence than is indicated by the plaintiffs' evidence here. *Gillenwater* v. *Baldwin, Trustee,* 192 Ark. 447, 93 S. W. 2d 658, involved a plaintiff who drove into a flatcar at a crossing with which he was familiar at 25 miles an hour without slowing down, stopping, looking or listening, taking it for granted that the street was clear. In *K. C. S. Ry. Co.* v. *Briggs,* 193 Ark. 311, 99 S. W. 2d 579, there was no evidence of negligence in the defendant other than that its train was stopped on a crossing, and the plaintiff who lived in the neighborhood and had observed the train nearby a few minutes previously ran squarely into it at about 6:30 p. m. without any extenuating circumstances.

Fleming, Admrx., v. *Mo. & Ark. Ry. Co.,* 198 Ark. 290, 128 S. W. 2d 986, is the case already quoted from, stating in reference to proof of negligence in a defendant railroad that "inasmuch as permanent surroundings may create a hazardous condition, the rule of care goes further and requires precautions where special dangers arise at a particular time." Besides, the evidence showed that the plaintiff in that case was traveling "at a high rate of speed" when he hit defendant's train, and there were no such extenuating circumstances as were testified to in the present case. It was easy there to conclude that the plaintiff's negligence was at least as great as, and probably much greater than, the defendant's.

Lloyd, Admrx., v. *St. Louis S. W. Ry. Co.,* 207 Ark. 154, 179 S. W. 2d 651, is the only remaining case that deserves special notice.[2] In the *Lloyd* case, as in the instant case, there were open boxcar doors through which lights shone immediately ahead of the driver when he rammed his truck into the defendant's train on a crossing at 2:00 a. m. But there was no elevation of the tracks enabling the driver to see straight ahead beneath the cars, there were no blinding rays of light shining into his eyes from across the tracks, and the distance which the truck skidded after the brakes were applied—130 feet—showed that it was being operated at an excessive and dangerous

[2] Other cases such as *Thomasson* v. *Chicago, R. I. & P. Ry. Co.,* 203 Ark. 159, 157 S. W. 2d 7, add nothing to what has already been said, and need not be separately discussed.

rate of speed. The driver was thoroughly familiar with the road and the crossing. In this case likewise the conclusion was easy that the truck driver's negligence was clearly as great as or greater than the defendant's.

The evidence in the instant case enables us to arrive at no such clear conclusion concerning the negligence of plaintiffs Hawkins and Hook as compared with that of the defendant railroad. We hold that their case should have been left to the jury for determination.

The judgment of the Circuit Court is reversed and the cause is remanded for new trial.

BODCAW OIL COMPANY, INC., *v.* THE ATLANTIC REFINING COMPANY.

4-9114 228 S. W. 2d 626

Opinion delivered April 10, 1950.

Heldt & O'Boyle and *Davis & Allen,* for appellant.

A. B. Tanco, McKay, McKay & Anderson and *Armistead, Rector & Armistead,* for appellee.

MINOR W. MILLWEE, Justice. Appellant, Bodcaw Oil Company, Inc., hereinafter called Bodcaw, is a corporation organized under the laws of Delaware; and appellee, Atlantic Refining Company, hereinafter called Atlantic, is also a foreign corporation organized under the laws of Pennsylvania. Bodcaw instituted this suit in the Lafayette Chancery Court against Atlantic to cancel a 1942 oil and gas lease, and also a 1943 contract covering the SW¼ of Sec. 32, Twp. 17 South, Range 23 West in Lafayette County, Arkansas. After an extensive hearing, the chan-

cellor entered a decree dismissing Bodcaw's complaint for want of equity and quieting Atlantic's title under the 1942 lease, as modified by the 1943 contract.

For many years prior to 1936 the Bodcaw Lumber Company of Louisiana, Inc., engaged extensively in the lumber and sawmill business, and owned large tracts of timbered lands in northern Louisiana and southwest Arkansas. On May 14, 1936, the lumber company sold its Arkansas timbered lands to Union Sawmill Company under a deed reserving the minerals in the grantor. In December, 1941, Bodcaw Lumber Company conveyed said minerals to its stockholders.

When Bodcaw was organized in January, 1942, the stockholders of the lumber company conveyed the minerals reserved in the 1936 deed, including the minerals on the tract in controversy, to Bodcaw in consideration of the issuance to the grantors of 6,000 shares of stock in the new corporation. Thus, the stockholders of the lumber company became the stockholders of Bodcaw. J. A. Buchanan, who was one of the organizers of the lumber company and served as its president from 1922, was elected president of Bodcaw. H. N. Ferguson, who was secretary and a director of the lumber company, also became secretary of Bodcaw. B. S. Cook also continued as a director of the new corporation.

In December, 1939, Bodcaw Lumber Co. executed to Atlantic an oil and gas lease on 1,120 acres in Lafayette County, Arkansas. This lease was executed on behalf of the lumber company by J. A. Buchanan, President, and was atttested by B. S. Cook, who was then Secretary. In making the lease, the lumber company reserved one 40-acre tract out of each quarter-section. Acting under this lease, Atlantic drilled its Bodcaw No. 1 as the discovery well in the McKamie Field, sometimes referred to as McKamie-Patton Field.

The Arkansas Oil & Gas Commission, upon assuming jurisdiction over the new field, required that only one well be drilled on each quarter-section of land. This regulation required Atlantic to pool its three 40-acre tracts in each quarter-section, with the forty reserved by the

lumber company. The pooling arrangement was accomplished by the execution of eight unitization and operating agreements between the lumber company and Atlantic, under which the former was to receive the normal 1/8th royalty. In seven of the unitized areas the lumber company was to also own 1/4 and Atlantic 3/4 of the 7/8ths "working interest." In the unitized area immediately north of the 160-acre tract in controversy the lumber company and Atlantic each own 1/2 of the 7/8ths "working interest." Atlantic was the operator under the several instruments and eight of the nine wells drilled were producers. The eight unitization and operating agreements were executed on behalf of the lumber company by J. A. Buchanan, President, and H. N. Ferguson, Secretary, without prior specific authorization of the Board of Directors of the corporation.

On December 10, 1941, Bodcaw Lumber Co., through Buchanan and Ferguson, President and Secretary respectively, executed an oil and gas lease to Atlantic on the S1/2 of SE1/4 of said Sec. 32. Atlantic was unable to agree upon a unitization with the owner of the minerals underlying the N1/2 of said quarter-section; for that reason Bodcaw, which had become the successor in title to the mineral interests of the lumber company, on June 3, 1942, executed to Atlantic an oil and gas lease covering the 160-acre tract in controversy. This lease was executed on behalf of Bodcaw by J. A. Buchanan, President, and H. N. Ferguson, Secretary, without previous specific authorization by the Board of Directors. It was for a primary term of one year and required payment of 3/8ths royalty to Bodcaw.

On October 19, 1942, Atlantic completed a producing well, known as Bodcaw No. 10, on the 160-acre tract. The well ceased producing on December 10, 1942, having produced less than 2,500 barrels of oil. Atlantic commenced reworking operations on March 25, 1943, in an unsuccessful effort to recomplete the well as a producer in the Smackover Lime formation. Further efforts to make a commercial producer in formations above the Smackover Lime were also unsuccessful.

Atlantic's district superintendent of production, at Magnolia, Arkansas, was ordered by the general superintendent to plug and abandon the well. Before this order was carried out, however, the district superintendent was advised to hold the matter in abeyance, as negotiations were pending with Bodcaw whereby the well might be converted to a salt water disposal well. Thereafter, the district superintendent was advised that such agreement had been reached with Bodcaw; and the well was completed as a salt water disposal well on April 21, 1943, at an expense to Atlantic of $2,388.15. Atlantic also left in the well 4,120 feet of 5½-inch casing which otherwise might have been recovered. No further work has been done on the well since its completion as a salt water disposal well. The total cost to Atlantic of the well was more than $98,000.

Bodcaw, as Lessor, and Atlantic, as Lessee, executed the agreement, dated April 27, 1943, which is the instrument primarily involved in this suit. The instrument was actually executed by Bodcaw on April 29, 1943, which was eight days after the well had already been converted to a salt water disposal well; however, the testimony shows that an agreement had been reached as to its terms prior to conversion of the well.

The agreement recites the sale by Bodcaw Lumber Co. of certain described lands in Lafayette County to Union Sawmill Co. on May 14, 1936, under the deed reserving the minerals in the lumber company; that certain of the lands were being operated by Atlantic for the production of oil and gas; that Bodcaw was the owner of all the interest of the lumber company in said lands, including the 160-acre tract in controversy, "which is now under lease to the Atlantic Refining Co., as evidenced by instrument dated June 3, 1942"; that Atlantic had obtained production from the well known as Bodcaw No. 10 on said tract, which production has ceased. The agreement continues:

"Whereas, the parties hereto now desire that said well above described be used as a salt water injection well in and through which may be injected into certain stra-

tum or strata and horizon or horizons salt water produced from wells located or to be located upon the lands first herein described and the parties hereto desire further that the lease above referred to and recorded in Volume M-7 at Page 523 of the Records of Lafayette County, Arkansas, be reinstated and continue and remain in full force and effect as hereinafter provided.

"Now, therefore, for and in consideration of the premises and the mutual benefits to be derived by the parties hereto, LESSOR has granted, demised, leased and let and by these presents does grant, demise, lease and let unto LESSEE, its successors and assigns, the said southwest quarter (SW¼) of section 32, township 17 south, range 23 west, Lafayette County, Arkansas, for the purpose of injecting, as hereinafter provided, in and through the well situated thereon and such wells hereafter drilled for that purpose, salt water produced from wells located or to be located upon the lands first herein described, together with all rights of whatever kind or nature, incident or necessary to such salt water injection, and also for the purpose and upon the same terms and conditions as set out in the above described oil and gas lease recorded in Volume M-7 at Page 523 of the Records of Lafayette County, Arkansas, as the same is hereby amended. The right is hereby granted unto LESSEE to inject into the above mentioned well the above mentioned salt water in any formation or formations underlying said land as may, in the judgment of LESSEE, most efficiently and economically dispose of the salt water produced from operations upon the lands first above described, with the full right in LESSEE to perform any and all operations in and at said disposal well as may be necessary in connection with the operation thereof for the above mentioned purposes, which operations shall include (but shall not be limited to) the right to deepen such well or drill additional wells if, in the judgment of LESSEE, such deepening operations or additional wells are necessary for the disposal of the above mentioned salt water. This lease shall take effect at once and shall be and remain in full force and effect so long as oil and gas, or either of them, is being produced from the lands

first hereinabove described, or any part of them, by LESSEE, its successors or assigns, under all or any one or more of the oil and gas leases and operating contracts, now existing and which may hereafter be entered into, between LESSEE AND BODCAW LUMBER COMPANY OF LOUISIANA, INC., and BODCAW OIL COMPANY, INC., or either of them and so long as the above mentioned oil and gas leases and operating contracts, or any of them, together with any extensions or renewals thereof, shall remain in force and effect either in whole or in part.

"During the term hereof LESSEE shall not be obligated, either expressly or impliedly, to pay any delay rentals, produce any oil or gas from the southwest quarter (SW¼) of section 32, township 17 south, range 23 west, Lafayette County, Arkansas, or drill any well or wells thereon for that purpose, in order to keep this lease in full force and effect, anything contained in the above mentioned oil and gas lease of June 3, 1942, recorded in Volume M-7 at Page 523 of the Records of Lafayette County, Arkansas, to the contrary notwithstanding . . . "

The above-mentioned agreement was executed on behalf of Bodcaw by J. A. Buchanan, President, and H. N. Ferguson, Secretary, who were also Directors, without previous specific authorization by the Board of Directors. The instrument was notarized by B. S. Cook, a third member of the five-member Board of Directors. At the time the agreement was executed the parties jointly owned the "working interest" in eight producing wells in the McKamie Field, located on lands adjoining the 160-acre tract in controversy on the north. One of these wells directly "offsets" the 160-acre tract. There were fifteen or twenty other producing wells in the field owned and operated by others.

It seems to be undisputed that in 1943 it was the belief of the operators, and their engineers, that the McKamie Field was what is known as a salt water driven field—that is, that the energy which produced the pressure came from a salt water drive. This is evidenced by the fact that Atlantic and Carter Oil Co., principal oper-

ators in the field, had constructed a $2,000,000 desulphurization plant to process and render marketable the "sour" gas produced in the field. It was also shown that if the operators had known that the field was in fact a gas driven field, instead of processing and marketing the gas, they would have reinjected it into the producing formation to maintain the pressure which caused the wells to flow. It was also shown that one of the modern methods of disposing of salt water produced in quantities was to reinject it into a salt water producing stratum by use of a disposal well.

In the latter part of 1945, or early part of 1946, it became obvious to the engineers that the McKamie Field had a gas drive, instead of a salt water drive; that the gas pressure was declining; and that it would be necessary to reinject the gas produced into the producing formation and unitize the whole producing area in order to maintain the gas pressure. A unitization agreement was finally reached by the operators and royalty owners in August, 1948, after this suit was filed on March 1, 1948. The north 100 acres of the tract in controversy was included in the unit, and thus became one of the properties participating in the proceeds from the production of the whole unit. If the lease and contract under attack are invalidated, Bodcaw would thus be entitled to all of the production proceeds allotted to the tract, instead of the ⅜ths royalty provided for in the 1942 lease, as amended by the 1943 contract.

J. A. Buchanan disposed of his Bodcaw stock some time prior to the April 2, 1945, meeting of stockholders and died in October, 1945. Dr. J. S. Seegers, who previously had been a director, was elected President at the 1945 meeting; and his son-in-law, John W. O'Boyle, was also elected a director. H. N. Ferguson suffered a hunting accident in November, 1943, which rendered him mentally incapable of appearing as a witness at the trial. In August, 1946, James D. Heldt was elected Secretary and Treasurer of Bodcaw.

The present officers of Bodcaw testified that some time prior to the time that the necessity of unitization of

the McKamie Field became apparent, they had concluded that the oil and gas lease on the tract in controversy had expired, and the lease and contract had been so marked. Atlantic had no notice of such claim until unitization negotiations were being conducted in 1947. On September 23, 1947, Bodcaw's Secretary wrote Atlantic that the 1942 lease had expired and had been abandoned and forfeited by Atlantic; and that the 1943 agreement was void for lack of consideration.

After the dispute arose, the parties agreed that production proceeds allotted to the tract in controversy should be withheld, pending the outcome of this suit, without prejudice to the rights of either party; and it was so stipulated in the final unitization agreement. Bodcaw has made no effort to lease or further develop the 160 acres in controversy since 1943; and neither party has since that time considered it advisable or prudent to attempt further development of the tract for oil and gas.

We have outlined the facts in considerable detail because we think a consideration of the surrounding circumstances and conditions important in determining the issues on this appeal.

■ Bodcaw first contends that the agreement of April 27, 1943, was invalid for lack of consideration and want of mutuality. It is argued that, although the contract grants Atlantic the right to use the tract of land and the salt water disposal well, the contract imposes no duty or obligation of any kind upon Atlantic; that the agreement does not recite the payment of any consideration and none was paid; and that the contract is, therefore, unilateral, without consideration and void.

Bodcaw relies on such cases as *Grayling Lumber Co.* v. *Hemingway,* 124 Ark. 354, 187 S. W. 327; and *Harrison* v. *Kelly,* 212 Ark. 447, 206 S. W. 2d 184, which state the elementary rule that an agreement entered into between parties to a contract must be mutual in order to be binding, and if it appears that the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality. At the time the contract was executed

the parties jointly owned the eight wells north of the tract in controversy which were then and are still being operated by Atlantic in the production of oil for the mutual benefit of the parties. It is also clear that at that time the parties thought the well which had failed as an oil producer would be useful in the disposal of salt water from the producing lands, and they mutually agreed that it should be used for that purpose and for their mutual benefit and profit. This contemplated use of the well was thus specifically recited in the contract and was recognized by the parties in the contract as mutually beneficial.

The parties further specifically and mutually agreed to continue the oil and gas lease of June 3, 1942, as amended by the 1943 agreement, in full force and effect so long as oil and gas is being produced from the lands already in production. We hold that the mutual benefit thus recognized and contemplated by the parties by conversion and use of the well as a salt water disposal well afforded a sufficient consideration to support the 1943 agreement.

We have also held that where there is a mutual agreement to modify a contract the mutual promises of the parties constitute a sufficient consideration for a valid agreement. *Elkins* v. *Aliceville,* 170 Ark. 195, 279 S. W. 379; *Afflick* v. *Lambert,* 187 Ark. 416, 60 S. W. 2d 176.

If the 1943 agreement be considered as an original contract, and not amendatory to the 1942 lease, we conclude there was also sufficient consideration shown by Atlantic's expenditure of more than $2,300 in converting the well into a salt water disposal well and the leaving by Atlantic of valuable casing in the well which otherwise might have been removed and salvaged. We have frequently held that parol testimony is admissible for the purpose of showing the real consideration in a deed or other writing evidencing a contract where such testimony does not contradict the terms of the written instrument. *Cox* v. *Smith,* 99 Ark. 218, 138 S. W. 978. It is true that the well was converted to a salt water disposal well after an oral agreement had been reached by the parties and

before the written agreement was actually signed, but it was done in contemplation of the written agreement. Evidence of these acts on the part of Atlantic acting under the oral agreement does not in any manner contradict the terms of the written contract, but on the contrary tends to explain and lend substance to said agreement.

It is true that the written contract does not contain an express agreement that Atlantic should forbear the exercise of its legal right to remove the casing from the well, but there are circumstances from which such agreement to forbear is clearly to be implied. *Federal Compress & Warehouse Co.* v. *Hall,* 209 Ark. 274, 189 S. W. 2d 922. Atlantic refrained from exercising its legal right under the 1942 lease to salvage the casing upon abandoning the well as an oil producer and this was additional consideration for the 1943 agreement. We, therefore, conclude that the 1943 contract is supported by sufficient consideration and that it is not lacking in mutuality.

■ It is next insisted that, if the April, 1943, agreement is valid, it revived the 1942 lease only until June 3, 1943. It is argued that the 1942 lease had already expired by its own terms when the agreement was executed on April 27, 1943, in view of a provision of the 1942 lease to the effect that it would not terminate if lessee commenced drilling or reworking operations within 60 days after production should cease. The contention is that since reworking operations were not commenced until March 25, 1943, which was more than 60 days after production ceased on December 10, 1942, the 1942 lease had by its own terms expired prior to execution of the agreement of April 27, 1943.

There are other provisions of the 1942 lease which suggest a conclusion different from the one urged by appellant, but we find it unnecessary to discuss these in view of the plain and unambiguous provisions of the 1943 agreement. This agreement affirmatively recognizes the existence of the 1942 lease and specifically provides that it shall, "be reinstated and continue and remain in full force and effect," as amended by the 1943 agreement, so long as oil and gas, or either of them, is being produced

from the other lands described in the agreement, which include the wells the parties own jointly. The surrounding facts and circumstances, as well as the express and unambiguous provisions of the 1943 agreement, refute the proposition that the parties intended that the 1942 oil and gas lease should terminate only 36 days after the execution of the 1943 agreement.

The lease and 1943 agreement were prepared by attorneys for Atlantic. Bodcaw thus invokes the familiar rules that a contract should be construed most strongly against the party preparing it and that oil and gas leases are to be construed in favor of the lessor and against the lessee. We agree with the trial court's finding that these rules are to be applied where the contract is susceptible to different interpretations, but should not be used to overturn the plain and unambiguous terms of the contract.

It is next contended that Atlantic has abandoned and forfeited its rights to produce oil and gas from the 160-acre tract in controversy. Many cases are cited which deal with the implied duty of the lessee to explore and develop the leased premises. It is insisted that the uncontradicted evidence conclusively shows that Atlantic long ago abandoned its right to produce oil and gas from the tract in controversy. We cannot agree with this contention. An implied covenant to explore and develop the leased premises is read into an oil and gas lease by the courts for the purpose of carrying out the intent of the parties to the contract, when it is necessary to attain the object and purpose of such contract. One of the leading cases in this state on abandonment and forfeiture is that of *Ezzell* v. *Oil Associates, Inc.*, 180 Ark. 802, 22 S. W. 2d 1015. There the court approved the following rules stated by the textwriter in 11 L. R. A., N. S. 417: "Generally all leases of land for the exploration and development of minerals are executed by the lessor in the hope and upon the condition, either express or implied, that the land shall be developed for minerals; and it would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to

continue to hold under it any considerable length of time without making any effort at all to develop it according to the express or implied purpose of the lease; and, in general, while equity abhors a forfeiture, yet, when such a forfeiture works equity, and is essential to public and private interests in the development of minerals in land, the landowner, as well as the public, will be protected from the laches of the lessee and the forfeiture of the lease allowed, where such forfeiture does not contravene plain and unambiguous stipulations in the lease. This principle will be more readily enforced and applied by the court as to gas and oil cases, because of the peculiar nature of those minerals, and the danger of entire loss to the lessor of oil or gas in his lands by reason of well drilling on adjacent lands."

The court further said: "In Ann. Cas. 1917E, p. 1126, it is said: that in oil and gas leases, where the owner of the land leases the same for a nominal sum and the further consideration of a royalty or a percentage of the profits realized by the lessee in working and developing the land, in the absence of an express agreement, there is an implied covenant that the lessee will use reasonable diligence in commencing and continuing operations. Numerous cases are cited which support the rule."

The question here is whether an implied covenant to further explore and develop the tract in controversy will be read into the 1943 agreement in the face of the last paragraph of the agreement hereinbefore quoted. It is true that Atlantic had abandoned the Bodcaw No. 10 well as a producer of oil prior to the execution of the 1943 contract, but this does not mean it had also abandoned the 1942 lease. The fact that the well itself had already been abandoned as a producer of oil and that neither party at that time believed that the drilling of another well was justified tends to explain the reasons for the terms of the 1943 agreement.

The question of abandonment is a mixed one of law and fact and each case must depend upon its own particular facts and circumstances. *Millar* v. *Mauney,* 150

Ark. 161, 234 S. W. 498; *Ezzell* v. *Oil Associates, Inc., supra.* If Bodcaw thought it advisable to further develop and drill the tract it has never so indicated by demanding performance or compliance with any alleged implied covenant to do so. Under the facts and circumstances presented in this record, we cannot say that it was either in the public interest or the interest of the parties to the contract that the tract in controversy should have been further developed and explored for gas and oil. To hold that an implied covenant to do so should be read into the lease, as amended by the 1943 agreement, would be in absolute contradition of the express terms of the agreement.

There are many cases from other jurisdictions which deny the existence of an implied covenant to explore and drill under somewhat similar circumstances. Some of these are *Simms Oil Company* v. *Flewellen,* 138 Tex. 63, 156 S. W. 2d 521; *Shell Petroleum Corp.* v. *Shore,* 72 Fed. 2d 193; *Danciger Oil & Refining Co.* v. *Powell,* 137 Tex. 484, 154 S. W. 2d 632, 137 A. L. R. 408. None of the Arkansas cases cited by Bodcaw involve contracts or leases which contain express stipulations to the effect that the lessee "shall not be obligated either expressly or impliedly to . . . produce any oil or gas . . . or drill any well or wells thereon for that purpose in order to keep this lease in full force and effect." Under the facts and circumstances here, we do not feel warranted in reading into the lease and agreement an intention directly opposite to that expressed by the parties.

Bodcaw next argues that the 1943 agreement is not binding upon it because J. A. Buchanan had neither actual nor apparent authority to execute it. In his findings the chancellor said: "At least one of the witnesses testifying for the plaintiff in this action stated that Mr. J. A. Buchanan, the president of plaintiff company, was indeed a very shrewd business man, and no doubt the members of the corporation, of which he was president, so regarded him; and from the facts and circumstances introduced in evidence in this case they relied on him to protect the interest of the corporation in all contracts executed by him as president; and neither the

Board of Directors or the stockholders ever at any time questioned any contract signed by him as president of the corporation. . . .

"The court finds that the act of the president and secretary, in the execution of the contract, Exhibit 'B', was impliedly ratified by the Board of Directors by acquiescence in many other contracts of similar nature executed by said president and secretary without prior authority to do so; and that said Exhibit 'B' was ratified by implication by plaintiff's long acquiescence in the obligations of said contract."

We concur in this conclusion and hold that J. A. Buchanan acted within the scope of his implied authority in executing the 1943 agreement. As previously stated, the agreement was signed by J. A. Buchanan, president and general manager, and attested by H. N. Ferguson, Secretary. It was acknowledged before B. S. Cook, director, and executed with the knowledge of a fourth member of the five-member board of directors of Bodcaw. We have heretofore mentioned a few of the many contracts which J. A. Buchanan executed over the years as president of both Bodcaw Lumber Co. and appellant without prior authorization of the board of directors. The by-laws of Bodcaw made its president general manager of the corporation. As one director who had served with him over the years stated, Buchanan was the "big boss" of Bodcaw. As president of Bodcaw, he continued to act for the new corporation in the execution of contracts and conveyances without prior authorization by the board of directors in the same manner that was done during the years that he was president of the lumber company. All of such acts were either acquiesced in by the corporation or readily ratified by the board of directors upon request and none of them were ever questioned except the contract in controversy here, and there has been no action by the board refusing to ratify it.

In *Texarkana & Fort Smith Railway Co.* v. *Bemis Lumber Co.*, 67 Ark. 542, 55 S. W. 944, the president of a corporation had been accustomed to executing promis-

sory notes in the name of the corporation without express authority of its board of directors, of which custom the board was cognizant. We held that the corporation was bound by a note so signed by the president and said: "The board of directors must be held, under the circumstances, to have acquiesced, and the corporation was bound for the same, as though the board of directors had, by formal action, conferred upon the president express authority to make the note. *Estes* v. *German National Bank,* 62 Ark. 7, 34 S. W. 85; *City Electric Ry. Co.* v. *First National Bank,* 62 Ark. 33, 34 S. W. 89, 31 L. R. A. 535, 54 Am. St. Rep. 282; *Mining Co.* v. *Anglo-Californian Bank,* 104 U. S. 192, 26 L. Ed. 707." See, also, *Winer* v. *Bank of Blytheville,* 89 Ark. 435, 117 S. W. 232, 131 Am. St. Rep. 102; *International Life Insurance Co.* v. *Vaughn,* 114 Ark. 26, 169 S. W. 330; 2 C. J. S., Agency, § 99. It is clear from the evidence in the case at bar that the board of directors of Bodcaw by its conduct and acquiescence depended and relied upon J. A. Buchanan in the negotiation and execution of all its contracts without previous authorization. Buchanan was thus clothed with the power and authority to execute the agreement in controversy as fully as if the board had formally and expressly granted such authority.

■ Bodcaw next argues that it could not validly grant Atlantic the right to inject salt water into the quarter-section of land in controversy and the 1943 agreement, therefore, fails. The contention is that Bodcaw disposed of the surface rights in the land in 1936; that disposal of salt water by use of a disposal well was unknown at that time and Bodcaw retained no such right of disposal by reservation of the minerals and, therefore, could not assign or transfer such right to Atlantic under our holding in *Missouri Pacific Rd. Co.* v. *Strohacker,* 202 Ark. 645, 152 S. W. 2d 557, and similar cases. We find it unnecessary to determine whether Bodcaw reserved the right to inject salt water into the ground under the deed. The owner of the surface rights is not a party to this suit and, insofar as the record here discloses, has made no claim to the right assigned by Bodcaw. It seems certain that both parties thought and

supposed that Bodcaw had the right to assign the right of salt water disposal by injection into the ground at the time the 1943 agreement was entered into.

In discussing "Assignment of a supposed right as consideration" in Williston on Contracts (Rev. Ed.) Vol. I, § 137, the learned author says: "Somewhat analogous to the surrender of a supposed claim as consideration for a promise is the assignment of a supposed right of another kind. Certainly if the parties confessedly bargain for the assignment of such right as the grantee may have, be it small or great, or none at all, the assignment in fact is sufficient consideration for a promise though it turns out that there is no right transferred. The only possible exception to such a rule is that, if no reasonable person could suppose the assigned chance was of any value, it might then be insufficient consideration. But even in such a case the execution of a quit claim deed or other desired paper would support a promise." See, also, Restatement, Contracts, § 177; *St. Francis Levee Dist.* v. *Cottonwood Lbr. Co.*, 86 Ark. 221, 110 S. W. 805; *Jonesboro Hdwe. Co.* v. *Western Tie & Timber Co.*, 134 Ark. 543, 204 S. W. 418. The facts here do not bring the assumed right of salt water disposal within the "possible exception" to the rule thus stated; and the assignment of such supposed right is sufficient consideration for the 1943 agreement. Moreover, the record shows that the tract in controversy has materially increased in value since the north 100 acres was included in the 1948 unitization agreement and, insofar as Atlantic's rights are concerned, it would be manifestly inequitable for Bodcaw to now be permitted to say that it was without authority to grant a right so clearly intended and for which Atlantic paid a valuable consideration.

Since we conclude that the 1943 agreement is valid and binding and not subject to cancellation by Bodcaw, it is unnecessary to determine whether the cause of action is barred by laches. The decree of the trial court is in all things correct and is, therefore, affirmed.

4-9219 228 S. W. 2d 609

Opinion delivered April 10, 1950.

Warner & Warner, for appellant.

James A. Gutensohn and *Daily & Woods,* for appellee.

DUNAWAY, J. This appeal presents for decision the proper construction of Act 327 of the Acts of 1941, as amended by Act 146 of the Acts of 1949 (Ark. Stats. (1947) § 80-201 *et seq.*), as it applies to Sebastian County. That Act relates to the powers and duties

of the County Board of Education and the County School Supervisor and provides for the payment of expenses of the Board and salary of the Supervisor.

The question is whether Sebastian County is to be treated as a composite unit of government under the provisions of said Act, or whether the two districts of Sebastian County for the purposes of the Act are to be considered as two separate and distinct counties, in view of the unique provision concerning Sabastian County contained in the State Constitution and subsequent acts of the Legislature in regard thereto.

The constitutional provision involved reads as follows: (Art. 13, § 5) "Sebastian County may have two districts and two county seats, at which county, probate and circuit courts shall be held as may be provided by law, each district paying its own expenses."

Pursuant to the constitutional authority thus granted, the General Assembly in 1875 enacted enabling legislation. See Acts 31 and 54 of the Acts of 1875 (January 12 and February 3, 1875, pp. 85 and 135). By virtue of these acts Sebastian County has been divided into two districts, the Fort Smith District and the Greenwood District, each with a county seat and each carrying out the functions of county government as if they were two separate and distinct counties. Sebastian County has, however, one County Judge, Sheriff and Collector, Clerk and Treasurer, which officers serve in their respective capacities in both districts.

Section 10 of Act 31 contains the provision that "the said districts shall respectively defray all expenses of holding courts, opening and repairing highways, building bridges, providing for paupers, erecting public buildings and all other county expenses accruing within and on account of their respective districts, as if separate and distinct counties;". In § 5 of Act 54 it is provided that the Assessor shall make separate assessments of the property in each district, keeping separate records thereof; and that the Collector shall "in every particular proceed in the collection of the taxes for each of said districts as if said districts were separate counties."

It is further provided in § 13 of Act 31 "That as to all matters not within the provisions of this act, the county of Sebastian shall be one entire and undivided county."

The instant case arose as a suit by appellant Roberts, claiming to be the County School Supervisor of all of Sebastian County and the other appellants, claiming to be the County Board of Education of the entire county, against appellee Been, Treasurer of Sebastian County, and others. Plaintiffs alleged that pursuant to Act 327 of 1941 as amended by Act 146 of 1949, Roberts had been employed as County School Supervisor for a term of two years at an annual salary of $4,480; that under the provisions of said Act the Supervisor's salary is payable from funds allotted for this purpose by the state and from funds set aside by the County Board from the County General Education Fund; that the state's contribution amounted to $1,780 for the year 1949-50, and that a balance of $5,983 was required to meet the expenses of the County Board and the salary of the Supervisor; that on the basis of the school enumeration this expense amounted to $0.4442 per capita, which resulted in the apportionment of a cost of $4,250.10 to be borne by the Fort Smith District of Sebastian County and $1,732.90 to be borne by the Greenwood District, as determined by the number of school children in each district.

On September 30, 1949, a voucher executed as required by law was presented to the County Clerk who issued a warrant in the amount of $184.64 to the order of the Supervisor for his salary then due, drawn on the "special fund set aside from the unapportioned County General School Fund." The Treasurer refused payment, on the ground that there was no such fund and that no part of the Supervisor's salary was payable from funds in the Fort Smith District. Plaintiffs prayed a mandatory injunction directing the County Treasurer to set aside from the County General School Fund of the Fort Smith District of Sebastian County the sum of $4,250.10, to be placed with the appropriate amount from the Greenwood District, in the special fund ordered set apart

by the Board to defray the office expenses and salary of the Supervisor.

The proof showed that in April, 1941, pursuant to the requirements of Act 327 of 1941, Sebastian County was divided into four zones for school purposes. Zone Three embraced the entire area of the Fort Smith District of the county, together with territory in the Greenwood District in which several small school districts were located. A special election was held in May, 1941, in each school district in the county for the election of members of the County Board of Education for Sebastian County. The County Judge certified the results of said election, at which one member of the Board from each of the four zones and one member at large were chosen.

The office of the County Board of Education was set up and has been maintained in the courthouse at Greenwood. No office has ever been maintained in the courthouse at Fort Smith. Until this suit was brought no effort was made to require the Fort Smith District of the county to share in meeting the expenses of the office or Supervisor's salary.

The powers and duties of the County Board of Education are set out in Ark. Stats. (1947) § 80-213. They include apportioning all school funds in the county as provided by law and in conformity to regulations of the State Board of Education; formation and dissolution of local school districts and changing the boundaries thereof; and causing "to be set aside from funds in the County General School Fund amounts necessary for the expenses of the Board and of the County School Supervisor's office." By Ark. Stats. (1947) § 80-229 it is further provided that the Board may determine the Supervisor's salary and other expenses of his office. That section reads in part: "Except for the state's contribution to the County Supervisor's salary, all funds provided herein shall be set aside from the unapportioned County General School Fund to a special fund by the County Treasurer."

In Ark. Stats. (1947) § 80-225 the powers and duties of the County Supervisor are enumerated. The pro-

visions of that section are too lengthy to set forth in detail. Generally, he is assigned the duty of supplying to all school districts in the county blanks furnished by the State Board of Education; keeping records concerning the zones into which the county is divided and the location of school houses, boundary lines of school districts and condition of roads therein. He makes all reports required by the State Department of Education concerning such matters as budgets, teacher qualifications and records, Teacher Retirement System and many other things. The Supervisor calls school elections (on September 27, 1949, an election on a bond issue in the Fort Smith School District was held, in connection with which he signed as Supervisor for the county numerous legal documents) and checks transportation reports, on the basis of which the various districts are reimbursed by the state.

Although, under the provisions of Act 327 of 1941 he does not directly supervise the operations of the Fort Smith School District, since it is a district having a superintendent, it is admitted by appellees that the Supervisor performs, among other things, the services above listed for the Fort Smith School District.

The Chancellor held that under the constitutional provision and statutory enactments regarding Sebastian County, as construed by this court, the county must be considered as two distinct units; and that the Fort Smith District cannot be compelled to pay any part of the salary or expenses of the County Supervisor of Education, whose office and primary work are in the Greenwood District of the county. Consequently, the complaint was dismissed for want of equity, from which action comes this appeal.

It is conceded by appellees that there is no constitutional inhibition against treating Sebastian County as one composite unit for school purposes, if in fact the Legislature has done this. It therefore is unnecessary to discuss the constitutional power of the General Assembly to treat as one county for school purposes. a

county which for other purposes has been considered as if it were two separate and distinct counties.

The effect of the above quoted provision of the Constitution and the legislative acts on the subject have been considered by this court in three cases. See *Williams* v. *State,* 160 Ark. 587, 255 S. W. 314; *Jewett* v. *Norris,* 170 Ark. 71, 278 S. W. 652; and *Scaramuzza* v. *McLeod, Commissioner of Revenues,* 207 Ark. 855, 183 S. W. 2d 55.

The historical background of this unique constitutional provision was discussed at length in the *Jewett* case *supra.* There it was held that the two districts of Sebastian County are to be regarded as separate counties within the meaning of Amendment 11 to the Constitution authorizing counties to issue bonds to pay outstanding indebtedness. In the *Jewett* case we said at p. 75: "It may be conceded that these districts are not counties within the ordinary meaning of that word; but we think, in view of the unique provision of the Constitution in regard to Sebastian County, that the two districts thereof are to be treated as if they were in fact separate counties, so far as their fiscal affairs are concerned."

The holding in the *Williams* case *supra,* was discussed in the *Jewett* opinion in this language: (p. 76) "We think there is nothing in the case of *Williams* v. *State,* 160 Ark. 587, 255 S. W. 314, which conflicts with the views here expressed. The point there decided was that an accused person applying for a change of venue might show that the inhabitants of Sebastian County as a political unit were so prejudiced against him that he would be entitled to have the venue changed to another county of the judicial circuit of which Sebastian County was a part. In other words, Sebastian County as a composite unit of government has not been destroyed, although the separate districts thereof have been given separate control of their respective fiscal affairs."

In the *Scaramuzza* case *supra,* the question was whether Sebastian County was to be considered as one unit in a local option election held under authority of Initiated Act No. 1 of 1942, or whether the two districts were to be treated in effect as two different counties.

In holding that they were to be treated as distinct units for this purpose we said at p. 861: "Now of course under this Act an election might be held in any township, municipality, ward or precinct of either district of Sebastian County, but we are also of the opinion that the Act authorized an election by the districts of Sebastian County, for the reason that the districts of that county are in effect separate counties, so far as the 'local concerns' of that county are involved."

As to the effect of the *Jewett* case, we further said at p. 862 of the opinion in the *Scaramuzza* case: "In other words, the separate districts of Sebastian county were as distinct as would be two separate counties, in the exercise of the jurisdiction conferred by § 28 of art. 7 of the Constitution which gives county courts jurisdiction over the fiscal affairs of the respective counties, and also confers jurisdiction in matters of local concern."

It is clear from this review of our holdings that in matters of local concern and fiscal affairs the two districts of Sebastian County have been treated as if they were separate counties. On the other hand, under the terms of the enabling act already quoted, as to all matters not within its provisions, the county of Sebastian is to be considered as one entire and undivided county. It is to be noted that nothing relating to schools was mentioned in said Act.

Article 14, § 4 of the Constitution, dealing with the subject of "Education," provides: "The supervision of public schools and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided for by the General Assembly." We recognize the legislative control thus given over matters of education in *Little River County Board of Education* v. *Ashdown Special School District,* 156 Ark. 549, 247 S. W. 70. In that case we held valid an act of the Legislature creating county boards of education and conferring on them powers formerly vested in county courts, as against a contention that the act violated Article 7, § 28 of the Constitution, giving county courts exclu-

sive original jurisdiction over the local concerns of their respective counties. In view of our holding in that case, we do not think the subject now under consideration is a "local concern" within the meaning of our earlier cases regarding Sebastian County.

An argument advanced by appellees against requiring the Fort Smith District of the county to help pay the Supervisor's salary is that the Fort Smith School District, under the terms of Act 327 of 1941, is not under his direct control, since it has a superintendent. A like contention was made in the *Ashdown* case, *supra*. We decided in that case, however, that the Legislature had the right to provide for part of a county superintendent's salary to be paid out of school funds which would otherwise go to the schools in cities having superintendents and which were, as here, expressly exempted from the supervision of county superintendents; county superintendents having general supervision in such cities by establishing uniform grades and by other ways tending to promote the public school system.

To support their contention that under Act 327 of 1941 the two districts of Sebastian County should be treated as two different counties, appellees cite this provision of the Act: (Ark. Stats. 1947, § 80-225): "The County Court shall supply the County School Supervisor with a suitably equipped office at the County Seat." They argue that in Sebastian County there is no "County Court" of the entire county, but entirely distinct courts in each district; that there is not one "County Seat" for the whole County, but two. Even though the districts of Sebastian County may be treated as wholly separate counties under the Constitution, it is not mandatory that they be. For the purposes of the Act under consideration, the more sensible and practical construction would be to treat Sebastian County the same as the eleven other counties in Arkansas which have two districts for judicial purposes and have two courthouses. The single County Judge of Sebastian County then may provide the necessary office facilities at whichever "county seat" is most practicable. The construction urged by appellees would necessitate the

creation of two Boards of Education and the appointment of two County Supervisors, when admittedly only one is needed.

If Sebastian County is not one composite unit for school purposes, it is difficult to conceive of any purpose for which it would be so treated. To adopt appellees' theory of the case would render meaningless the section of Act 31 of 1875 providing that as to all matters not covered by said act, Sebastian County "shall be one entire and undivided county."

One other contention earnestly made by able counsel for appellees is based upon the statute defining the County General School Fund. Ark. Stats. (1947), § 80-721, reads as follows: "The general school fund of any county shall be composed of all money received from the Common School Fund (Public School Fund) of the State, the per capita tax on the inhabitants of the county, such fines, penalties and other money as shall be accrued to such funds in accordance with the law, and any appropriation from the general revenue of the county for common school purposes." It is argued that since this fund may include appropriations from the general revenue of the county, the effect of holding Sebastian County to be one unit under Act 327 of 1941, might be to require the use of county general revenues of one district for use in the other; and that such use of said funds was foreclosed by our opinion in *Jewett* v. *Norris, supra.* Since the record shows that for many years there has not in fact been any such appropriation to the General School Fund, we do not deem it necessary to construe the statute on this point.

In holding that Sebastian County is one unit for the purposes of Act 327 of 1941 as amended, and that there is a Sebastian County General School Fund from which there should be set aside the special fund for payment of the expenses and salary of the County School Supervisor as directed by the County Board of Education, we do not hold that the County Treasurer may not continue to keep the General School Fund separated as to the two districts of the county as has been his practice. We do hold that

from the school funds arising in Sebastian County as a whole, the Fort Smith District must pay its share of the expenses and salary of the County Supervisor as determined by the County Board of Education.

The decree is reversed and the cause remanded for proceedings in accordance with this opinion.

The Chief Justice dissents.

GRIFFIN SMITH, Chief Justice, dissenting. The opinion might well be captioned, "A Bill for an Act Entitled, . . . ," etc. The result—assuming it is desirable legislation—has nevertheless been arrived at without aid of the General Assembly. What happened is that the law-making body overlooked the two-district complications of Sebastian County. The omission has now been court-supplied on the theory that equity regards that as done which ought to have been done.

Still, there is an old-fashioned concept (though admittedly waning under present-day pressure) that the three coördinate branches of government were intended to be distinct, each functioning in its constitutional sphere. The persisting practice of nibbling a bit here and carving a slice there for the accommodation of expeditionary ends will afford temporary relief to minorities who thus profit through quick surgery, but the method is unsound. I would therefore affirm the decree and suggest that the need be explained to the Fifty-Eighth General Assembly.

HARTSELL *v.* MCDOWELL.

4-9154 228 S. W. 2d 614

Opinion delivered April 10, 1950.

Surrey E. Gilliam, for appellant.

Wade Kitchens and *W. H. Kitchens, Jr.,* for appellee.

George Rose Smith, J. This is a bill in equity filed by the appellant to obtain from the appellees, J. H. McDowell and W. O. Dailey, an accounting for the wrongful sale of partnership timber and damages for profits that would have accrued had the timber not been sold. After hearing the testimony the chancellor dismissed the complaint for want of equity.

In the early part of 1948 McDowell was in business as a timber cutter, employing several crews of laborers. The Haynesville Planing Mill Company liked the quality of his work and engaged him to cut and bank three million feet of timber. As McDowell had no funds with which to buy tracts of timber the Planing Company agreed to advance the purchase money, taking a deposit of the timber deeds as security. The appellant and Dailey joined McDowell in the venture, and the three began buying timber in McDowell's name with money furnished by the Planing Company. On January 29, 1948, the three men executed a written agreement which recited that the Planing Company had advanced $7,750 for timber deeded to McDowell. It was further stated that McDowell and Dailey would cut and bank the timber, for which the Planing Company had agreed to pay them $15

a thousand feet and to credit an additional $15 a thousand feet on the $7,750 debt. "After the Haynesville Planing Mill has received its $7,750 . . . [McDowell and Dailey] will still receive $15.00 per thousand for their cutting and banking the said timber, and out of the other $15.00 per thousand they will pay to [Hartsell] 1/3 of the net profit as to the balance of said timber." By its terms the contract does not impose any duties upon Hartsell, who testified that his contribution consisted in arranging for the purchase of various tracts of timber.

The venture lasted for less than two months. On March 27 the appellees released to the Planing Company all interest in the timber deeds and accepted $2,000 in settlement of their claims against the Company. The appellant contends that this action deprived him of a substantial profit which could have been made by selling the timber to another lumber company and that in any event he is entitled to a third of the $2,000 payment, which the appellees divided between themselves.

There is a direct conflict in the testimony about the events leading to the termination of the venture. It is admitted that the appellant was not on good terms with the Planing Company, and it may fairly be inferred that the Company would not have engaged McDowell had it known that appellant was to participate. Both the appellees testified that the appellant insisted on selling the timber "out from under" the Planing Company in order to make an immediate profit. When the Company learned of this conduct it demanded that McDowell release the title to the timber and that Dailey surrender his teams and logging equipment, for which the Planing Company had advanced the purchase money. Dailey, who is appellant's brother-in-law, states that he and McDowell informed appellant of the Planing Company's demands, but the appellant was intoxicated and the only answer they could get was, "God damn it, I am going to give [the Planing Company] $7,500 and I am going to get $12,000 for the timber." In this predicament, with the Planing Company insisting upon immediate action, the appellees made the best settlement they could. They both

testified that they took a loss on the transaction. They owed labor bills and feed bills and had not yet been paid for their work on two tracts. The sum they received was not enough to pay their actual expenses for the work done. They say that the appellant alone made a profit, as some timber tracts had been bought by the partners at a price lower than the amount charged to the Planing Company, and the difference was divided equally.

We think the chancellor's action is supported by the preponderance of the testimony. We realize that a fiduciary relationship exists among partners or joint adventurers, but the appellant was not himself free from its obligations. It was his duty to coöperate to the fullest extent in promoting the common interest of the partners. The evidence justifies a finding that the appellant was the first to disregard his fiduciary duty and that his repeated efforts to sell out for a quick profit were directly responsible for the collapse of the undertaking.

Furthermore, the contract that we have quoted provides that after the Planing Company had been repaid the appellees will receive $15 a thousand feet for cutting and banking the timber, and out of the other $15 a thousand they will pay the appellant a third of "the net profit." The appellant testified that the parties were to divide the second $15 equally, but the appellees say they understood that the appellant was not to receive anything unless there was a profit. Whether or not we consider this parol evidence as being admissible, it is evident that the contract's reference to a net profit confirms the appellees' belief that if their activities involved expenses of more than $15 a thousand feet those expenses were to be repaid before a distribution of profits was made. We conclude that both the evidence and the equities support the view that, largely as a result of the appellant's conduct, the venture resulted in a loss rather than in a profit to the appellees.

Affirmed.

4-9137 228 S. W. 2d 615

Opinion delivered April 10, 1950.

[redacted]

William Weisman, Cooper Land and *Rose, Dobyns, Meek & House,* for appellant.

Richard M. Ryan, Howard F. Corcoran and *Owens, Ehrman & McHaney,* for appellee.

ED. F. MCFADDIN, Justice. The facts in this case present a sordid story, involving not only the litigants, but also two attorneys, W. R. Berkson of New York City, and Morris Hecht of Hot Springs, Arkansas.

Mr. and Mrs. Oberstein lived in a Fifth Avenue apartment in New York. They had been married for many years, and had a daughter, Patricia, 17 years of age, when, in January, 1947, Mr. Oberstein announced to his wife that he wanted a divorce. He had become infatuated with another woman. When Mrs. Oberstein refused to consider a divorce, Mr. Oberstein moved from the apartment, ceased paying a $150 weekly allowance to his wife, and used the daughter, Patricia, to convey his threats to the effect that if Mrs. Oberstein did not obtain a divorce, he would give her no money.

At first Mrs. Oberstein consulted a New York attorney of her own chosing and was well advised that she could force Mr. Oberstein to contribute to her support. But she discontinued the services of her attorney and went to W. R. Berkson, her husband's attorney,[1] and made a "trade" with that attorney and her husband that she would obtain a divorce, in return for a contract of financial support. On July 22, 1947, Berkson gave Mrs. Oberstein a memorandum:

"Bus leaves 42nd Street Air Terminal Wednesday, July 23, 1947, 7 A. M. our time, for Newark. Plane leaves Newark 6:50 A. M. Eastern Standard Time (7:50 A. M. daylight saving time), flight 207 American Airlines. Arrives Little Rock, Arkansas 12:40 noon.

"Upon arrival in Little Rock, you are to make arrangements at the field for a flight to Hot Springs, and are to telephone Mr. Morris Hecht, the attorney, whose offices are in the Arkansas Trust Building, Hot Springs, Arkansas, and whose telephone number is HOT SPRINGS 2657. He will make all arrangements for you there, and will call for you on your arrival at Hot Springs.

"You are to return on Thursday, July 24th, leaving from Little Rock, Arkansas at 5:30 P. M., flight 210 American Airlines. You are to make arrangements to arrive in Little Rock before 5:00 P. M. Mr. Hecht undoubtedly will assist you in making such arrangements.

W. R. B."

At the same time he gave Mrs. Oberstein this memorandum, Berkson delivered to her the air line tickets and two of his own personal checks payable to Morris Hecht, one for $75 and the other for $90. Also Berkson gave Mrs. Oberstein a letter to Hecht which introduced Mrs. Oberstein, discussed her grounds for divorce, and told Hecht what Berkson desired the decree to contain. There was this significant sentence:

[1] In Mr. Oberstein's response to the motion to vacate, he refers to Berkson as his attorney in this sentence: "He alleges that the plaintiff asked his attorney to assist her in engaging a Hot Springs attorney who would represent her in the contemplated proceeding."

"I feel confident that you will handle this matter to the satisfaction of all parties concerned." [2]

---

[2] The full text of the letter is:

"July 21, 1947

Re: Mary M. Oberstein
v. Eli E. Oberstein
Morris Hecht, Esq.
Arkansas Trust Building
Hot Springs, Arkansas

Dear Mr. Hecht:

"Mrs. Oberstein will leave New York on Wednesday morning, 6:50 o'clock, flight No. 207, and is expected to arrive in Little Rock at 12:40 noon. She will call you from Little Rock and will endeavor to fly from Little Rock to Hot Springs.

"For your information, the facts are as follows:

"The parties were married on April 14, 1930, in Easton, Pennsylvania. There is one child of the marriage, to wit: a daughter, Patricia Louise Oberstein, who was born on January 31, 1931.

"Mrs. Oberstein's action for divorce is based upon indignities to the person which consist of foul and abusive language by the defendant, so repeated and continuous in the presence of friends, strangers and business associates as to constitute a course of conduct rendering plaintiff's condition intolerable. His attitude toward plaintiff indicated conduct connoting settled hate and manifestation of alienation and estrangement. He would boast to plaintiff and to others in their presence of his affairs with other women, would embrace other women in plaintiff's presence, would on innumerable occasions state that he had not occupied the same bed with plaintiff for several years because he derived greater satisfaction from his affairs with other women.

"During the past number of years he would absent himself from home for long periods of time, and for the past three years abstained from having any marital relations with plaintiff, and in fact occupied a bed separate and apart from plaintiff. More recently defendant packed his belongings and took up quarters away from the home, and has not returned, and in addition, has stated that he refuses to return to the plaintiff, and for a long period of time had refused to furnish her with moneys for her subsistence and that of the daughter of the marriage.

"I believe the above sets forth sufficient indignities to the person of the plaintiff, and shows a desertion and abandonment.

"The plaintiff and defendant will agree upon terms of support and maintenance after the action is instituted, and will consent to the inclusion of such terms in the decree to be entered in the case. I believe that I can prepare the waiver here in New York and can obtain the signature of the defendant. Shall I include in such waiver the terms of alimony and support agreed upon between the parties, or do you require that by stipulation in the action to be included in the decree. I prefer that no separation agreement be entered into at this time.

"Mrs. Oberstein will make payment directly of your fees and expenses for her lodgings.

"I feel confident that you will handle this matter to the satisfaction of all parties concerned. If you require coöperation from me, you have but to call upon me.

"Mr. LaCrosse joins me in best wishes and kindest regards.

"Yours very truly,

WRB/sm
Air Mail"

In keeping with the Berkson memorandum, Mrs. Oberstein flew to Little Rock on July 23, 1947, and proceeded to Hot Springs, where she contacted Morris Hecht. He took her to the Arlington Hotel, and she gave him the Berkson letter and the two checks. He returned to her room in an hour and she signed a paper which now appears as a deposition. Hecht advised her that the divorce decree would be granted on October 28, 1947. She had dinner with Mr. and Mrs. Hecht, spent the night at the Arlington Hotel, and returned to New York by plane the next day. That was the sole extent of her stay in Arkansas and her only visit to this State until some time in 1949, subsequently to be mentioned.

When Mrs. Oberstein returned to New York, she reported her Arkansas trip to Mr. Oberstein, remained in New York a short time, and at Oberstein's expense took a cruise to California via the Panama Canal. When she returned to New York, she went to Berkson's office with her sister so that the latter might furnish a deposition to be used in the pending Arkansas divorce case. Oberstein executed a waiver of service and an entry of appearance, in which appears this language:

". . . And the defendant, Eli E. Oberstein, further agrees to pay to the plaintiff, Mary M. Oberstein, as and for her support, and the support and maintenance of the infant issue of the marriage, Patricia Louise Oberstein, as follows: $150 per week until such time as the plaintiff shall remarry or die, whichever shall occur the sooner. . . ."

The instrument was acknowledged in New York City by "William R. Berkson" as notary public.

Morris Hecht, the Hot Springs attorney, signed his name to a complaint, filed September 24, 1947, in the Garland Chancery Court, alleging Mrs. Oberstein to be a resident of Arkansas, seeking a divorce from Mr. Oberstein on the ground of indignities, and praying for support and maintenance of $150 per week. At the time he did this, Hecht, of course, knew that Mrs. Oberstein was not a resident of Arkansas. Also, Hecht obtained and filed in the divorce suit the purported deposition of Anna

Cook, 194 Ramble Street, Hot Springs, Arkansas, to the effect that Mrs. Oberstein had lived in the home of Anna Cook continuously from July 23, 1947, to October 22, 1947. Hecht's wife, Kathryn Hecht, as notary public, certified that Mrs. Oberstein appeared before said notary in Hot Springs, Arkansas, on October 22, 1947, and gave her deposition; whereas in fact Mrs. Oberstein had been in Hot Springs only the one time in July, 1947, when there was no suit pending. Morris Hecht also obtained a decree of divorce, on the ground of indignities, for Mrs. Oberstein against Mr. Oberstein on October 28, 1947, in the Garland Chancery Court on what Morris Hecht knew was false evidence of residence.

On October 25, 1947, Mr. and Mrs. Oberstein signed, in New York City, a property settlement agreement, which provided that *if* the divorce decree should be granted, then Mr. Oberstein, in addition to the $150 weekly support money, would pay Mrs. Oberstein $25,000 in cash, pay rent on the apartment, surrender all the furniture in it, and also give Mrs. Oberstein an automobile.[3]

[3] Material portions of this agreement are:

"In the Garland Chancery Court

Mary M. Oberstein
v.
Eli E. Oberstein

STIPULATION

"It is hereby stipulated by and between the plaintiff and defendant in the above entitled action as follows:

"In the event that plaintiff shall obtain a final decree of divorce in the above pending action ,

"(1) The defendant shall pay to the plaintiff the sum of twenty-five thousand ($25,000) in cash.

"(2) The defendant shall renew the lease on apartment 8C at 1150 Fifth Avenue, Borough of Manhattan, City of New York, in his name and shall pay the rent therefor.

. . . . . .

"(4) The defendant shall execute a bill of sale to a certain DeSoto Coupe automobile 1946 model, Serial No. 5793077, Engine No. 51120502.

"(5) The defendant waives all claim for household furniture now in the premises in apartment 8C at 1150 Fifth Avenue, Borough of Manhattan, City of New York.

. . . . . .

"(7) The defendant shall procure a life insurance policy upon his life in the sum of $15,000, shall cause the plaintiff to be named therein as beneficiary, irrevocable, until such time as she shall remarry or die, whichever shall occur the earlier, and the defendant shall make payment of all premiums which may become due on such policy during such period of time.

. . . . . .

Both parties acknowledged the instrument before William R. Berkson, notary public. On November 5, 1947, Mrs. Oberstein signed a receipt to Berkson reading as follows:

"Received from William R. Berkson the respective sums of $25,000 and $850, the former representing the cash payment of Eli E. Oberstein to me on securing the final decree of divorce; the latter household allowances and arrears owed me by Eli E. Oberstein. This acknowledges receipt of all other papers referred to in the stipulation in the suit for divorce. . . ."

Oberstein married "the other woman" a few days after October 28, 1947. Mrs. Oberstein continued to receive the $150 weekly payments; but in May, 1948, she filed proceedings in New York to have the Arkansas divorce declared void. Then, on December 20, 1948, she filed, in the original divorce suit in the Garland Chancery Court, a petition to have that Court vacate the divorce decree of October 28, 1947. As grounds for vacating the divorce decree, she alleged that it was void for want of jurisdiction of the Court over the parties, and she sought to excuse herself from her part of the fraud and collusion by the claim that she was under "duress" of her husband when she came to Arkansas in July, 1947; and she claimed that this duress was continuous until November 6, 1947. Mr. Oberstein resisted the motion to vacate. Mrs. Oberstein testified when the motion to vacate was heard by the Garland Chancery Court; and on September 6, 1949, a decree was rendered vacating the divorce decree of October 28, 1947. Mr. Oberstein has appealed.

"The foregoing provisions are in addition to the provisions set forth in the waiver and entry of appearance of the defendant, heretofore executed by him on the 3rd day of September, 1947, and filed in the above entitled action. The provisions hereof, it is stipulated and agreed, are not to be incorporated in any decree to be rendered in this action, but in the event of the breach of any of the provisions herein set forth, the plaintiff shall have the right, independently of these proceedings, to institute any action or proceeding in any jurisdiction whatsoever for the enforcement of the provisions hereof.

"In the event that a final decree of divorce shall not issue or be obtained in the within entitled action, then all the provisions set forth in this stipulation shall be deemed null and void and of no effect whatsoever."

It is only fair to say that none of the present attorneys came into this case until shortly before the filing of the motion to vacate on December 20, 1948; and they as well as the Chancellor are in no wise involved or implicated in the collusion and fraud of the parties, or the unethical conduct of William R. Berkson and Morris Hecht.

So much for the recitation of facts. Now for the applicable rules of law and our holdings:

I. *The Divorce Decree is Void.* It is crystal clear that the divorce decree rendered in this case by the Garland Chancery Court on October 28, 1947, lacked the essential requirement of *jurisdiction.* In *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585, in speaking of the absolute requirement of "jurisdiction in divorce cases," we said:

"Before a person can become a resident of this State so as to have his marital status determined by the courts of this State, he must, in truth and in fact, be a *bona fide* resident of the State, . . . A divorce decree in this State, to fulfill all the requirements for full faith and credit under the United States Constitution, can determine status only when there is a *bona fide* residence in this State. We quote from § 111 of the American Law Institute's Restatement of the Law on Conflict of Laws: 'A state cannot exercise through its courts jurisdiction to dissolve a marriage when neither spouse is domiciled within the state.' "

In the case at bar neither spouse was ever domiciled in this State, so it is clear that the divorce decree rendered by the Garland Chancery Court in this cause on October 28, 1947, was a decree rendered without jurisdiction, and was and is void, and is not entitled to full faith and credit under Article IV, § 1 of the United States Constitution. What we should do about vacating the decree is yet to be considered.

II. *Duress.* The next question is Mrs. Oberstein's claim that she was under the duress of her husband in coming to Arkansas and obtaining the divorce. She

offers this to excuse her conduct. The elements of duress, sufficient to invalidate a contract, are: (a) coercion; (b) loss of volition; and (c) the resultant contract (17 C. J. S. 526).[4]

To sustain her claim of duress it was incumbent on Mrs. Oberstein to prove that she was compelled—not merely persuaded—to do what she did. The only threat which she says that she received from Mr. Oberstein was, that if she did not agree to get a divorce, he would leave America and pay her no money. These are her words:

"He had told me all along he wouldn't give me any money at all, unless I did what he told me to do."

But even when he made these threats, Mrs. Oberstein knew that he could not cut her off penniless. She had already been so advised by an attorney of her own choosing:

"Q. Did you receive knowledge from any source, through counsel or otherwise, that, under the law, a woman's husband could be made to support his wife and daughter?

A. I didn't need counsel for that. I knew that myself.

Q. Well, you knew that, didn't you?

A. Yes, I did."

Since she knew that Mr. Oberstein's threats were idle, it necessarily follows that she was not coerced by them. The evidence shows that even though she was at first unwilling to divorce Mr. Oberstein, she did agree to it because she thought she was making a good "trade"; and she even required him to pay her expenses for the cruise through the Panama Canal.

Furthermore, all the duress, claimed to have been exerted on her, ceased when she signed the property receipt to Berkson on November 5, 1947. Yet she continued to receive the weekly support money from Mr. Oberstein

[4] See, also, Univ. of Ark. Law School Bulletin, Vol. 9, p. 80 (May 15, 1941), "Duress—A State of Mind."

until some time in May, 1948, when she refused the checks because of her New York proceedings. In *Page* v. *Woodson,* 211 Ark. 289, 200 S. W. 2d 768, the wife claimed duress to excuse her from her conduct. The facts showed in that case, just as here, (a) that the claimed duress ceased, with the granting of the divorce and the making of property settlement; and (b) that the wife delayed over three months thereafter before initiating the proceedings which contained the claim of duress. In denying any relief to the wife, we quoted from 17 Am. Jur. 902:

"'. . . A contract entered into under duress may be ratified after the duress is removed. Such ratification results if the party entering into the contract under duress accepts the benefits growing out of it or remains silent or acquiesces in the contract for any considerable length of time after opportunity is afforded to avoid it or have it annulled . . .'"

In the case at bar Mrs. Oberstein's receipt of the weekly payments from November 6, 1947, to May, 1948, and her further delay until December 20, 1948, before filing the motion to vacate the Arkansas divorce decree —these facts together with others in the record—convince us that her Arkansas divorce proceedings were not caused by any duress exerted on her; but that she willingly traded her husband an Arkansas divorce decree for a property settlement. We conclude that she was not under duress and that she is now seeking the cancellation of the Arkansas decree to gain additional leverage on Mr. Oberstein for a "new negotiation."

III. *The Problem Confronting This Court.* With the question of duress decided adversely to Mrs. Oberstein, the case before us becomes one in which a man and his wife conspired and colluded to obtain a divorce decree in Arkansas in a Court that had no jurisdiction. Our Statute (§ 34-1209, Ark. Stats. 1947) provides that no divorce decree will be granted when the parties have been guilty of collusion. Such also is the rule in other jurisdictions. See 17 Am. Jur. 243, *et seq.*; 27 C. J. S. 620, *et seq.*; Keezer's "Marriage and Divorce," 3rd Ed., § 515,

et seq.; and see Annotations in 2 A. L. R. 699 and 109 A. L. R. 832. In 17 Am. Jur. 381 these statements appear:

"Collusion between the parties to a divorce proceeding will bar the granting of a decree of divorce, and ordinarily when the fact appears at the trial, the court of its own motion will dismiss the action . . . According to the weight of authority when the spouses through collusion or consent prevail upon the court to take jurisdiction of a divorce suit and render a decree therein, both are precluded from having that decree set aside or attacking its validity because of such collusion or consent, . . ."

From the facts previously detailed, it is clear that both of the parties are culpable in this case. We do not want any Court of any sister State, or of the Federal system, to afford full faith and credit to the void divorce decree rendered in the Oberstein case by the Garland Chancery Court. Neither do we want either of these parties to profit to the slightest extent by reason of their trifling with the Arkansas Courts. Such is the problem confronting this Court.

If Mrs. Oberstein be given the relief she asks—*i. e.*, vacation of the divorce decree—we would, by precedent, make it possible for the Courts of Arkansas to be used by an unscrupulous litigant as a tool for carrying out a peculiarly vicious type of blackmail. Mrs. Oberstein wants the Arkansas divorce decree vacated so she can "re-negotiate" with Mr. Oberstein in her New York suit, in which he would then be unable to claim the Arkansas divorce decree to be entitled to full faith and credit.

On the other hand, if this Court, on its appellate review *de novo* of the case, should reverse the vacating order entered by the Garland Chancery Court in 1949, we would be granting Mr. Oberstein relief to which his own participation in the collusion and fraud disentitles him. He, in effect, is saying that the Arkansas Court was without jurisdiction to grant the divorce in the first instance, but that we should suffer the void decree to remain of record, so he can use it as a shield against Mrs. Oberstein's New York suit. Thus, if we affirm the Chan-

cery Court, we would be allowing Mrs. Oberstein relief to which she is not entitled because of her fraud; and if we reverse the Chancellor's decree, we would be allowing Mr. Oberstein to have relief to which he is not entitled because of his fraud. Each of them is estopped, because of collusion and fraud, from obtaining the sought relief.

In none of our cases have both spouses come from another State, and by joint collusion and fraud, obtained a divorce decree from our Court; and then one of the spouses had the temerity to subsequently ask the Court—in the same case—to relieve the petitioning party against her (or his) own fraud. That is the situation here. So we list the following cases as distinguishable from the case at bar: *Corney* v. *Corney,* 79 Ark. 289, 95 S. W. 135, 116 Am. St. Rep. 80; *Barnett* v. *Miller,* 131 Ark. 110, 198 S. W. 873; *Dawson* v. *Mays,* 159 Ark. 331, 252 S. W. 33, 30 A. L. R. 1463; *Morgan* v. *Morgan,* 171 Ark. 173, 283 S. W. 979; *Rice* v. *Moore,* 194 Ark. 585, 109 S. W. 2d 148; *Murphy* v. *Murphy,* 200 Ark. 458, 140 S. W. 2d 416; *Barth* v. *Barth,* 204 Ark. 151, 161 S. W. 2d 393; and *Feldstein* v. *Feldstein,* 208 Ark. 928, 188 S. W. 2d 295.

Excellent and exhaustive briefs have been submitted by the learned counsel for each side. Mr. Oberstein's counsel cite, *inter alia, Hall* v. *Hall,* 93 Fla. 709, 112 So. 622; *Curry* v. *Curry,* 65 App. D. C. 47, 79 Fed. 2d 172; *McNeir* v. *McNeir,* 178 Va. 285, 16 S. E. 2d 632; *Ferry* v. *Ferry,* 9 Wash. 239, 37 Pac. 431; *Norris* v. *Norris,* 200 Minn. 246, 273 N. W. 708; *Horowitz* v. *Horowitz,* 58 R. I. 396, 192 Atl. 796; *Newcomer* v. *Newcomer,* 199 Ia. 290, 201 N. W. 579; and *Carpenter* v. *Carpenter,* 146 Neb. 140, 18 N. W. 2d 737.

Mrs. Oberstein's counsel cite, *inter alia, Hollingshead* v. *Hollingshead,* 91 N. J. Eq. 261, 110 Atl. 19; *Hopkins* v. *Hopkins,* 174 Miss. 643, 165 So. 414; *Lippincott* v. *Lippincott,* 141 Neb. 186, 3 N. W. 2d 207, 140 A. L. R. 901; *Wampler* v. *Wampler,* 25 Wash. 2d 258, 170 Pac. 2d 316; *Querze* v. *Querze,* 290 N. Y. 13, 47 N. E. 2d 423; and *Roberts* v. *Roberts,* 81 Cal. App. 2d 871, 185 Pac. 2d 381.

In addition to the above cases, we list the following: *Williams* v. *North Carolina,* 325 U. S. 226, 89 L. Ed. 1577,

65 S. Ct. 1092, 157 A. L. R. 1366; *Sherer* v. *Sherer,* 334 U. S. 343, 92 L. Ed. 1429, 68 S. Ct. 1087, 1 A. L. R. 2d 1355; *Coe* v. *Coe,* 334 U. S. 378, 92 L. Ed. 1451, 68 S. Ct. 1094, 1 A. L. R. 2d 1376; *People* v. *Dawell,* 25 Mich. 247, 12 Am. Rep. 260; *In re Ellis Estate,* 55 Minn. 401, 56 N. W. 1056, 23 L. R. A. 287, 43 Am. St. Rep. 514; *Saul* v. *Saul,* 74 App. D. C. 287, 122 Fed. 2d 64; and *Axtell* v. *Axtell,* 183 Ga. 195, 187 S. E. 877.

To review all the cases in which courts have been called on to vacate divorce decrees obtained by fraud or collusion would be a work of supererogation; rather, we give only the general rules from the great weight of authority in such cases[5] and then draw our own conclusions.

In the topic on divorce and separation in 17 Am. Jur. 390, there is a discussion on the vacating and setting aside of void divorce decrees; and we find these three statements of the general rules:

(1)—"Generally speaking, a decree of divorce can be vacated or set aside only at the suit of the spouse claiming to be injured by the decree, where it appears that the granting of the decree was in no way due to his or her fault . . ." 17 Am. Jur. 390.

(2)—"Generally, no relief will be granted in favor of a spouse against whom a divorce decree is granted if he or she consented to the granting of the decree or colluded in its procurement . . ." 17 Am. Jur. 390.

(3)—"According to the weight of authority, when the spouses, through collusion or consent, prevail upon the Court to take jurisdiction of a divorce suit and render a decree, both are precluded from having that decree set

[5] See, also, Leflar on "Conflict of Laws," §§ 133, 137, 138 and 140; the article "The Validity of Void Divorces" by Fowler Vincent Harper in 79 U. of Pa. Law Review 158; the article on "Extraterritorial Divorce" by Lorenzen in Vol. 54, Yale Law Review, 799; and the Annotations in 2 A. L. R. 699, 109 A. L. R. 832, 109 A. L. R. 1018. And in the 1948 Supplement to the Restatement of the Law on "Conflict of Laws," § 112, there is this statement:

"Any person may be precluded from questioning the validity of a divorce decree if, under all the circumstances, his conduct has led to the obtaining of the divorce decree or for any other reason has been such as to make it inequitable to permit him to deny the validity of the divorce decree."

aside or attacking its validity because of such collusion or consent . . ." 17 Am. Jur. 381.

Under the first quoted statement, Mrs. Oberstein is not entitled to have the divorce decree vacated because *she* was at fault in her collusion and fraud in obtaining the decree. Under the second quoted statement, Mr. Oberstein is not entitled to any relief—either in the trial court or here on *de novo* appeal—because *he* was a party to the fraud in obtaining the divorce decree. And under the third quoted statement, both Mr. and Mrs. Oberstein are precluded from any relief of any kind connected with the divorce decree because they were *both* guilty of collusion and fraud on the Court.

But the State of Arkansas is the silent third party to every divorce proceeding in this State; and the other States of the Federal Union are entitled to know whether the divorce decree is valid and entitled to full faith and credit.

Therefore:

(1)—We hold that the divorce decree rendered in this cause by the Garland Chancery Court on October 28, 1947, was and is void; and this adjudication of invalidity prevents the divorce decree from being entitled to full faith and credit in this, or any other State.

(2)—We hold that each of the parties—Mr. and Mrs. Oberstein—is precluded from any relief of any kind involving the said decree: she from having it vacated, and he from having it recognized.

(3)—We refuse to adjudge costs in favor of either party, since both are culpable; and, without reversing or affirming, we direct that a mandate issue remanding this cause to the Garland Chancery Court so that the holding here will be entered as the decree of that Court.

(4)—The proper authorities of Garland County, Arkansas, will investigate and act on the matter of perjury and subornation of perjury as may be developed. We are calling to the attention of the New York Courts the conduct of W. R. Berkson in this case. By *per curiam*

order this day made, the Bar Rules Committee of this Court is directed to institute disbarment proceedings against Morris Hecht.

The Chief Justice concurs and dissents; Mr. Justice George Rose Smith not participating.

Griffin Smith, Chief Justice, concurring and dissenting. I would admit the Chancery Court's right to judicially fumigate its records. Judge Garratt was the innocent agency through which a contemptible fraud was perpetrated, but he is in no sense at fault. The original record upon which action was taken justified the decree. Trouble was that it was a fabrication of misrepresentation, presented to the Court by one whom we had licensed to practice law.

The majority opinion, though replete with directions, neither affirms nor reverses. Why sentence the Chancellor to inaction when his conscientious aim was to cleanse the docket and treat the transaction as though the decree had not been rendered? We say there is no jurisdiction because relief in respect of affirmative action must be denied Mrs. Oberstein; yet we recognize jurisdiction in saying what must be done. Our jurisdiction comes through appeal, yet we say the lower Court was judicially nebulous. The Chancellor might at least be permitted to show what he did, and it is of no great importance whether, after becoming informed, he acted on his own motion or at the request of a litigant.

We have assumed jurisdiction for the purpose of saying that the decree was fraudulently procured, but that the iniquity shocks our consciences to such an extent that we are relegated to long-distance observations and advice.

I am not certain that Mrs. Oberstein's information regarding the requirements for continuous residence in Arkansas during the incubation period was such that she should be denied action on the petition for avoidance. There *was* an element of coercion. This polygamously-inclined husband concocted the entire scheme and

matured it through his lawyer. The threat was that if Mrs. Oberstein did not comply, her material resources would be cut off.

EZELL *v.* STATE.

4597 229 S. W. 2d 32

Opinion delivered April 10, 1950.

Rehearing denied May 8, 1950.

Ralph E. Wilson and *Mitchell D. Moore,* for appellant.

Ike Murry, Attorney General, and *Robert Downie,* Assistant Attorney General, for appellee.

MINOR W. MILLWEE, Justice. Appellant, Matthew Ezell, was convicted by a jury of murder in the first degree and his punishment fixed at death. He has appealed from the judgment rendered in accordance with the jury's verdict.

The testimony tends to establish the following facts: L. J. Wood lives in the Jacksonville Community in Mississippi County. About 7:30 o'clock Sunday morning, April 24, 1949, Jimmie Wood, son of L. J. Wood, went to his father's pasture to round up some horses. As he crossed a levee which runs through the pasture, he heard some dogs barking. Upon investigation he discovered the body of a young Negro girl lying near the bottom of the river side of the levee. He returned home and called Cliff Cannon, deputy sheriff, who examined the body and summoned the coroner and sheriff.

The deceased child's mother, China Flowers, and grandmother, Alice Gray, appeared at the scene and identified the eight-year-old child. A coroner's jury was empanelled and an inquest held that afternoon and completed the next day.

Appellant was at that time living in a three-room house on the Bryant farm with Alice Gray, China Flowers and her five minor children and was employed as a farm laborer. The house was located about 900 feet from the place where the child's body was found. About a year before appellant had lived with Alice Gray for about two or three months at Crawfordsville, Arkansas, and appeared at the Flowers home in Jacksonville about four days prior to the child's death.

The child was sleeping with her six-year-old sister when China Flowers retired about 11 o'clock Saturday

night. Alice Gray slept in another bed in the same room with two of the children. China Flowers slept with her youngest child in an adjoining room in which appellant also slept on a cot. Alice Gray returned from a visit at the home of a sick neighbor late Saturday night and retired in the dark, explaining that there was no burner in the oil lamp. Appellant came in some time later and was asleep on the cot when China Flowers discovered that the child was missing shortly after sunrise Sunday morning.

Appellant was questioned by the deputy sheriff at the house about noon Sunday and taken into custody on suspicion of murder. He was present at the coroner's inquest the next morning and testified in detail how he had taken the sleeping child from her bed, choked her to death and carried her to the place where the body was found. Prior to the inquest appellant had voluntarily made similar statements to the deputy sheriff and coroner. In each of the statements he said that Alice Gray had suggested that he "get rid" of the child, but that she had given no reason therefor; and that she went with him to the levee and directed him where to place the body. He later voluntarily retracted this part of the statement and said he had implicated the child's grandmother because he thought it might make his punishment lighter.

Appellant interposed the defense of insanity. He was committed to the State Hospital for examination and observation on August 26, 1949, and discharged on September 26, 1949. Dr. Oscar Kozberg, assistant superintendent of the hospital testified in detail as to the physical and mental examination and stated that in his opinion appellant was sane at the time of the examination and at the time the alleged crime was committed. He stated that appellant was normal physically; that the tests for syphilis were negative; that appellant was able to work simple problems in arithmetic; and that he found no evidence of hallucinations or other signs of mental incompetency.

Dr. P. W. Turrentine, a general practitioner, testified on behalf of appellant after talking with him about

one and one-half hours two days before the trial. Although he would not say that appellant was insane, nor that he did not know the difference between right and wrong, he disagreed with Dr. Kozberg's conclusion that appellant was without psychosis. It was his opinion, based on the conversation, that appellant had mental aberrations, was highly illogical and unable to place his experiences as to time and place. However, appellant told Dr. Turrentine that he was drinking on the night in question and was taken home by some associates; that after going to bed he got up and took the sleeping child from her bed and carried her to a table where he choked her and attempted to have sexual relations with her and then choked her some more until she died. It was the doctor's impression that appellant's conduct was motivated by an insatiable appetite for alcohol which in turn caused an irresistible sexual urge and compulsion to kill.

The first assignment of error in the motion for a new trial is as follows: "There was no corroborating evidence by the State of Arkansas to prove that a crime had been committed in this cause, except the testimony and confession of the defendant, Matthew Ezell, which was not made in open court." Our statute (Ark. Stats. 1947, § 43-2115) provides that an extrajudicial confession of the defendant must be corroborated by proof of the *corpus delicti.* It was suggested by the state in the oral argument that the confession of appellant at the coroner's inquest was a judicial confession, that is, made in open court, and, therefore, sufficient to sustain a conviction without corroboration. We find it unnecessary to determine this question. Although there is authority that may be said to support the state's contention,[1] we will assume for the purpose of this opinion that the confession at the coroner's inquest was quasi-judicial and as falling under the rule applicable to extrajudicial confessions. See Wharton's Criminal Evidence (11th Ed.) Vol. 2, p. 967.

[1] *Skaggs* v. *State,* 88 Ark. 62, 113 S. W. 346; *Ex parte* Anderson, 55 Ark. 527, 18 S. W. 856.

We have held that the extrajudicial confession of the defendant accompanied by proof that the offense was actually committed by someone will warrant his conviction. *Melton* v. *State,* 43 Ark. 367. In construing the statute in *Burrow* v. *State,* 109 Ark. 365, 159 S. W. 1123, the court said: "Under the above statute, where the offense charged is shown by other evidence to have been committed, then the party charged may be convicted upon proof of his confession, although made out of court; and where the offense is shown by other evidence than that of the accused's confession out of court to have been committed, then his confession will be sufficient to warrant his conviction, whether there is any other testimony tending to connect him with the crime or not."

In *Harshaw* v. *State,* 94 Ark. 343, 127 S. W. 745, Judge Wood, speaking for 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 the celebrated case of *Edmonds* v. *State,* 34 Ark. 720, this court approved the following statement from Burrill on Circumstantial Evidence: "A dead body, or its remains, having been discovered and identified as that of the person charged to have been slain and the basis of a *corpus delicti* being thus fully established, the next step in the process, and the one which serves to complete the proof of that indispensable preliminary fact is, to show that the death has been occasioned by the criminal act or agency of *another person.* This may always be done by circumstantial evidence, including that of the presumptive kind; and for this purpose a much wider range of inquiry is allowed than in regard to the fundamental fact of death, and all the circumstances of the

case, including facts of conduct on the part of the accused, may be taken into consideration.'' See, also, *Hall* v. *State,* 209 Ark. 180, 189 S. W. 2d 917.

The evidence in the case at bar is that the child was in good health prior to her death. When her body was found the feet were crossed and the child's clothing was wrapped tightly about her knees. There was blood in the corners of her mouth and on her tongue and it appeared that she had chewed her tongue. The body was not examined by a physician and there were no other marks found by the deputy sheriff who made the examination.

The deputy sheriff testified that, when appellant did not come with the others to the place where the body was found, he went to the Flowers house about noon and asked appellant if he knew that the girl had been found and he stated that he did. When asked why he didn't come up there, he stated that he was out all night, just sleepy and wanted to rest awhile. Appellant was sober and also told the officers that the little girl was ''bad to walk in her sleep.''

We conclude that the jury was warranted in finding from the facts and circumstances, independent of the confession, that the child did not die a natural death but was choked to death by someone. Hence, there was sufficient evidence to establish the *corpus delicti* and corroborate the confession. It is, of course, to be conceded that a stronger case might have been made if a physician had been summoned and expert testimony used.

The next assignment of error is that the court improperly admitted the confession of appellant made at the coroner's inquest. Before giving his testimony at the inquest appellant was questioned by the deputy prosecuting attorney as follows: ''Q. Matthew, we are investigating here, before a coroner's jury, the death of Ernestine Harris. Now, if you want to testify and give us a statement of what you know about this case you may do so, but it is my duty to warn you before you make any statement, that it can be used against you in the event you are tried for murder in this case. Now, if you

make a statement you will do so voluntarily; of your own free will; without any threats of punishment; with no use of force and with no promise of leniency if and when you are tried. It is also my duty to advise you that if you want to get a lawyer you can get a lawyer to advise you. You understand what I am telling you? A. Yes. Q. Now, with that understanding, do you now want to make a statement? A. Yes, sir, I do. Q. You want to tell us what you know about the case? A. Yes, I want to tell you what I know about the case. Q. Now, one other question I want to ask you before you make this statement: Have you suffered in any way from mistreatment over at the jail, or mistreatment by any of the officers? A. No, sir." The appellant then explained and demonstrated how he choked the child to death by use of his fingers on her throat and his hand over her throat and his hand over her nose and mouth. He also related the route he took in carrying her to the spot where the body was found.

We have held in a number of cases that admissions or voluntary statements of the defendant before a coroner's inquest are admissible in evidence on his trial. *Cole* v. *State,* 59 Ark. 50, 26 S. W. 377; *Tiner* v. *State,* 110 Ark. 251, 161 S. W. 195; *Dunham* v. *State,* 207 Ark. 472, 181 S. W. 2d 242; *Cooper* v. *State,* 215 Ark. 732, 223 S. W. 2d 507. In the Dunham case the defendant's appearance at the inquest was involuntary and we approved the following statement of the rule in 22 C. J. S., Criminal Law, § 733: "Provided they were made voluntarily, admissions by accused at a coroner's inquest may be received against him. The fact that accused was subpoenaed, or the equivalent thereof, to appear at the coroner's inquest does not render his statements thereat inadmissible against him on a subsequent trial, if such statements were, in fact, voluntarily made." Under the undisputed facts in the instant case the confession was properly admitted in evidence.

The next assignment is that the court erred in refusing to give certain instructions requested by appellant. Three of the nine requested instructions would have told the jury that a specific intent to kill is an essential ele-

ment of murder, either in the first or second degree. The court properly instructed the jury that appellant could not be convicted of murder in the first degree unless he had the specific intent to kill. A specific intent to kill is not necessary to constitute the crime of murder in the second degree. *Ballentine* v. *State,* 198 Ark. 1037, 132 S. W. 2d 384. The matters contained in other instructions requested by appellant were fully covered in those given and the court is not required to multiply its instructions on a particular issue. *Wallin* v. *State,* 210 Ark. 616, 197 S. W. 2d 26. The court gave instructions, which we have repeatedly approved, covering the defenses of drunkenness, insanity and all other issues presented by the testimony.

The last three assignments of error question the sufficiency of the evidence to support the verdict. In this connection it is argued that there is no evidence that the killing was malicious or that it was done after deliberation or premeditation; and that, under the testimony, appellant was not mentally responsible for his acts. When considered in the light most favorable to the state, the evidence was sufficient to show implied, if not actual, malice and there was also sufficient evidence of premeditation and deliberation to support the verdict. The state is not bound to prove a motive for the killing and the absence thereof is only a circumstance to be considered with other facts and circumstances in determining guilt or innocence. *Hogue* v. *State,* 93 Ark. 316, 130 S. W. 167.

As previously indicated, the evidence as to appellant's sanity is in dispute. Appellant's mother testified that he had been "half-minded" since he suffered a spell of sickness in 1931, but there is little evidence of specific acts or conduct to substantiate her conclusion. She admitted that appellant was able to hold good jobs and stated that he would do "funny things" and had "strange ways" when drinking. Some lay witnesses described appellant as being of "average mentality" while others indicated that his mental competency was below normal. We have held that mere mental weakness or the fact that one has a mind below normal is insufficient to show insanity, and does not exempt him from re-

sponsibility and punishment for his criminal acts. *Jones* v. *State,* 213 Ark. 863, 213 S. W. 2d 974. The evidence is sufficient to support the jury's conclusion on the question of appellant's sanity.

We are also asked to reduce the penalty from death to life imprisonment, but the evidence does not, in our opinion, warrant the substitution of our judgment for that of the jury in fixing the punishment, if it be conceded that we have such power.

We find no prejudicial error and the judgment of the trial court is, therefore, affirmed.

DUNAWAY, J., dissents.

GERLACH *v.* STATE.

4603 229 S. W. 2d 37

Opinion delivered April 10, 1950.

Rehearing denied May 8, 1950.

Peter A. Deisch and *John C. Sheffield,* for appellant.

Ike Murry, Attorney General, and *Robert Downie,* Assistant Attorney General, for appellee.

HOLT, J. A jury convicted appellant of an assault with intent to rape and fixed his punishment at a term of ten years in the Penitentiary. From the judgment is this appeal.

Appellant has preserved nineteen assignments of alleged errors in his motion for a new trial. His principal defense, if not his only defense, to the commission of the crime, was insanity.

His first three assignments, in effect, question the sufficiency of the evidence to support the verdict. The prosecuting witness, Mabel Reeder, a Negro girl twelve years of age, testified that she had been picking cotton and that at about four o'clock P. M. (October 26, 1948), while she was returning to her home along a highway,

appellant drove up in his automobile, got out and asked her if she knew R. C. Little. She answered that she did and pointed out the field where some of her family were still at work. Appellant then took hold of the witness, put his hand over her mouth, threatened to kill her if she cried out, put her on the floor of his car, drove her into some woods nearby, forced her to submit to him and ravished her against her will. He then took her near her home, put her out of his car, and drove away. The child immediately told her mother and grandmother what had occurred. They examined her and found evidence tending to show that she had been ravished. This evidence was legally sufficient to support the jury's verdict, and in fact, would have supported the greater offense of rape. *Begley* v. *State,* 180 Ark. 267, 21 S. W. 2d 172.

Assignments four and fifteen, in effect, alleged that the court erred in refusing appellant's motion for a continuance made before the trial and again at the close of all the testimony. The court did not err.

This record reflects that the crime was committed October 26, 1948, and appellant indicted May 2, 1949. He was first tried on the charge November 1, 1949, and upon a mistrial being declared, he was again placed on trial November 7, 1949, and found guilty, as above indicated. At the time appellant was indicted (May 2, 1949) he was a patient in the Veteran's Hospital in Memphis. He was released from that institution May 13, 1949, and returned to work for the Pekin Wood Products Company in Helena. He testified (quoting from appellant's abstract) "that since his operation and return from the Hospital in May, 1949, he has been normal."

On November 3rd, four days before the trial, appellant presented to the trial court his motion, praying for an order "directed to the Manager of the Regional Office, Veterans Administration, Little Rock, Arkansas, that he be authorized and directed to procure and bring or send to this court immediately, Certified Records of the diagnosis, hospitalization and medical treatment accorded to the defendant, by the Veterans Administration, since the discharge of the defendant from the Army in 1944" and

"that complete diagnosis and medical history be furnished of treatments given to the said Robert L. Gerlach from June 30, 1943, to the time of the discharge from the Army at Hammond General Hospital, Modesta, California, in April, 1944; * * * that the only defense which the defendant, Gerlach, has against the crime charged against him, which trial is to be held Monday, November 7th, is that on account of a diseased mind, he did not know that he committed an assault, and that at the time of the alleged commission of the crime, he was insane within the meaning of the statutes governing the case.

"In view of the fact that the physician from the State Hospital undoubtedly is being brought into the trial to testify that he made an examination of the defendant, Gerlach, in January, 1949, and further that he was sane at that time, and further that he undoubtedly will testify that the defendant was sane at the time of the alleged commission of the crime, and in view of the defense as above stated, the only means by which the defendant has to defend himself, is to procure from the Veterans Administration the records above prayed, which records contain a complete case history of the defendant as developed in his treatment for a head injury which occurred in the armed forces and subsequently the records of the Veterans Administration will disclose that he was insane at the time of the crime charged.

"It is further moved that this case be deferred or re-set for some subsequent time of trial in the event that it is found that these records cannot be furnished in time for the trial of November 7, 1949."

It thus appears that approximately six months had elapsed from the date the indictment against appellant was returned and the date of trial, November 7, 1949, and the motion for continuance was not filed until four days before the trial. We think it obvious, in these circumstances, that due diligence was not shown on the part of appellant. We have repeatedly held that in order to secure a continuance, as here, proper diligence must be shown, *Bowman* v. *State,* 213 Ark. 407, 210 S. W. 2d 798, and that the granting or refusing of such motion is within

the sound legal discretion of the trial court and this court will not interfere unless abuse of that discretion is shown, *Bailey* v. *State,* 204 Ark. 376, 163 S. W. 2d 141. No abuse of discretion was shown.

Assignments 5, 6, 10, 16, 17 and 18, in effect, charged that the court erred in admitting testimony of witnesses, Fannie Mae McKissick and Dorothy Eady, concerning alleged attempts of appellant to rape them.

The record reflects that at the time of the present trial of appellant (November 7, 1949) two other indictments were outstanding against appellant, one charging rape of Fannie Mae McKissick June 7, 1948, and the other charging the same offense against Dorothy Eady December 10, 1948.

The court overruled appellant's objections to the introduction of this testimony and over appellant's exceptions instructed the jury as follows: "You are instructed that the testimony which has been introduced in this case concerning alleged attacks by this defendant on the State's witnesses, Fannie Mae McKissick and Dorothy Eady, may be considered by you only in determining the intent of the defendant in this case and for no other purpose and you are instructed that this defendant is on trial for the alleged assault upon the State's witness, Mabel Reeder, only on October 26, 1948, as alleged in the indictment."

The court did not err, in the circumstances, in admitting the testimony. We have frequently held that evidence of other crimes of a similar nature to the one on trial and recent in point of time is admissible as bearing upon intent or purpose.

In the recent case of *Hearn* v. *State,* 206 Ark. 206, 174 S. W. 2d 452, wherein the defendant had been convicted of an assault with intent to rape, we said: "This court has repeatedly recognized and declared that evidence of other crimes, recent in point of time, and of a similar nature to the offense then being tried, is admissible as bearing on the question of intent. Some such cases are: *Puckett* v. *State,* 194 Ark. 449, 108 S. W. 2d

468; *Lewis* v. *State,* 202 Ark. 6, 148 S. W. 2d 668; *Monk* v. *State,* 130 Ark. 358, 197 S. W. 580; *Cain* v. *State,* 149 Ark. 616, 233 S. W. 779. These cases involved such offenses as robbery, larceny, homicide, or operating a gambling house. We perceive no good reason why the same rule should not apply to sex crimes; in fact, courts of other states have held that, in sex crimes, evidence of other acts of a similar nature, recent in point of time, is admissible as bearing on the question of intent." (Citing cases.)

Appellant next argues that the trial court erred in admitting the following testimony of witness, John Whitney: "Q. A short time thereafter, did you have occasion to talk to Mabel Reeder, the little girl that was said to have been attacked? A. Yes, sir. Q. Where was she at that time? A. Standing in front of her house. Q. Whose house? A. Mabel Reeder's mother's house. Q. Did she point out to you the woods where this attack is said to have occurred? A. Yes, sir. Mr. Sheffield: We object because we have no idea how long this was after the attack occurred. The Court: The objection is overruled. The testimony will be permitted going to the venue in the case. Mr. Sheffield: Note our exceptions. Q. Did she point out the woods where the attack was supposed to have occurred? A. Yes, sir. Q. Is that in Phillips County? A. Yes, sir. Q. Whose place is it on? A. Vallient Morris'. Q. His place is in Phillips County? A. Yes, sir."

We cannot agree.

The question of venue was also an issue in the case and all of the above testimony could be properly considered on that issue for the purpose of establishing venue.

Appellant says "all of this evidence was an attempt to corroborate the evidence of the prosecuting witness by hearsay testimony." Our rule is well settled that the testimony of the prosecuting witness (Mabel Reeder here), who was not an accomplice, need not be corroborated. *Bradshaw* v. *State,* 211 Ark. 189, 199 S. W. 2d 747.

Whitney's testimony that appellant's attack upon this child had been discussed in his neighborhood was not

prejudicial or hearsay in the absence, as here, of any evidence concerning what was said about the crime.

On the question of venue, the prosecuting witness positively testified that the appellant seized her, threw her in his automobile and threatened to kill her if she made an outcry. He did this between the cotton field and her home, both of which were well within the boundaries of Phillips County.

This testimony was sufficient to show that the assault to commit rape was actually begun in Phillips County, and that appellant intended to commit that crime. The offense was complete and sufficient to establish venue in Phillips County whether the consummation of appellant's purpose was completed in Phillips County or not.

We said in *Boyett* v. *State,* 186 Ark. 815, 56 S. W. 2d 182: "It is well settled that an assault with intent to rape is an effort to obtain sexual intercourse by force and against the will of the person assaulted, and the intent is to be ascertained from the commission of some act or acts at the time or during the progress of the assault. The force actually used need be of no specific degree or character, but comes within the meaning of the law if it is reasonably calculated to subdue and overcome; nor need it be persisted in until the assailant's design is accomplished; if the assault is actually begun and the intent can be inferred from the acts committed, the offense is complete, notwithstanding the fact that the assailant may, for some reason, relent and forbear from the consummation of his purpose."

In the circumstances, the trial court was correct in giving the following instruction relating to venue: "In this case the question of venue has been raised, that is whether this court has jurisdiction of the case. You are instructed that if you find by a preponderance of the evidence that the assault alleged herein occurred in Phillips County then this court would have jurisdiction, or if you should find from a preponderance of the evidence that the alleged assault started or was commenced in Phillips

County and consummated or completed in the adjoining County of Monroe and that same was a continuing sequence of events, this court would have jurisdiction."

We have carefully examined appellant's requested Instruction No. 1 on venue and hold that the court did not err in refusing it for the reason that it was incomplete and did not fully declare the law. The court, in the above instruction which it gave, did, however, fully cover the law applicable to this question of venue.

Appellant next contends that "the court erred in permitting counsel for the State of Arkansas to introduce in evidence the report from the State Hospital for Nervous Diseases which is in the form of a letter addressed to the Hon. Elmo Taylor, Circuit Judge, over the objections and exceptions of the defendant."

We cannot agree.

Ark. Stats. (1947), § 43-1301, provides: "The judge shall order the superintendent or supervising officer of the State Hospital to direct some competent physician or physicians employed by the State Hospital to conduct observations and investigations of the mental condition of the defendant, and to prepare a written report thereof. * * * A written report prepared by the physician or physicians employed by the State Hospital shall indicate separately the defendant's mental condition during the period of the examination, and his probable mental condition at the time of the alleged offense. This report shall be certified by the superintendent or supervising officer of the State Hospital, under his seal, or by an affidavit duly subscribed and sworn to by him before a notary public who shall add his certificate and affix his seal thereto," and § 43-1302 provides: "The physician or physicians who prepared the report shall be summoned as witnesses at the trial at the order of the trial judge or at the request of either party, and if summoned shall be examined by the court and may be examined by either party, and a copy of the written report hereby required shall be given in evidence in every case in which the fact of sanity is an issue at the trial."

The written report in evidence in this case, dated January 10, 1949, about which appellant complains, was prepared and signed by Dr. Kozberg, and certified to by both the examining physician of the State Hospital, Dr. Kozberg, and by the Superintendent of the State Hospital, Dr. Geo. W. Jackson, and filed with the clerk of the court January 12, 1949. We hold not only that there was a substantial compliance with the above statutes, but a literal compliance therewith. Dr. Kozberg, employed by the State Hospital, was a witness and testified in the case, but appellant says "it was improper to corroborate his testimony by the written report of an absent witness," meaning Dr. Geo. W. Jackson, Superintendent of the State Hospital.

The statute provides that the report from the State Hospital "shall be certified by the superintendent or supervising officer of the State Hospital," who was Dr. Jackson, and that a copy of this "written report hereby required shall be given in evidence in every case in which the fact of sanity is an issue at the trial." As indicated, this was exactly what was done in the present case. The statute also provides that "the physician or physicians who prepared the report shall be summoned as witnesses at the trial at the order of the trial judge or at the request of either party." It is not shown, however, that Dr. Jackson was one of "the physicians who prepared the report." If he were not (and in this case it appears that he was not), and if he merely certified the report after Dr. Kozberg actually conducted the examination and prepared it, it was not mandatory on the State to produce Dr. Jackson as a witness. *Smith* v. *State,* 200 Ark. 1152, 143 S. W. 2d 190.

Appellant next contends that "the court erred in sustaining the objection of the State to the questions propounded by the defendant to the witness, Nathaniel Dunnivant," and in this connection, says: "The testimony of Nathaniel Dunnivant was to the effect that he had lived in the same community with the defendant for a number of years, that he knew him well and saw him often; that they had been fellow patients in the Veterans

Hospital. He was asked by an attorney for the State: Q. He was all right? A. I don't think so. Q. You don't think so? A. Not all the time. He was then asked on the part of the defendant: You said you didn't consider him all right, did you regard his mental condition as being poor? The State objected to that question and the objection was sustained by the court. The court then made the observation: This man cannot express an opinion as to the mental condition of a person. He may relate instances and then it is for the jury to decide."

There are many decisions of this court to the effect that the opinion of a nonexpert may be admitted in evidence on the question of the accused's mental condition, provided such nonexpert witness has first shown by his testimony that he possesses information upon which such opinion may reasonably be based. "Whether the information is sufficient for that purpose is a question for the court to decide before it can be admitted," *Griffin* v. *Union Trust Company,* 166 Ark. 347, 266 S. W. 289, and cases there cited.

After reading all of Dunnivant's testimony, we hold that his information, as shown by his own testimony, was insufficient upon which reasonably to base an opinion and the court did not err in refusing to permit him to give his opinion.

We deem it unnecessary to discuss other assignments of appellant. It suffices to say that we have examined all and find them to be untenable.

Accordingly, the judgment is affirmed.

Ed. F. McFaddin, J., concurring. This concurring opinion is for the purpose of emphasizing at length the fact that the appellant's Constitutional Rights have not been invaded.

Article II, § 10 of our State Constitution says: ". . . In all criminal cases the accused shall enjoy the right . . . to be confronted by the witnesses against him . . .". Appellant insists that he was not "con-

fronted'' by Dr. George W. Jackson, Superintendent of the State Hospital, when the letter, bearing Dr. Jackson's signature, was introduced in evidence.

In at least three cases we have considered the above quoted constitutional provision, as related to the report from the State Hospital concerning the mental status of an accused, when the report was furnished under the provisions of Initiated Act III of 1936 (see § 43-1301 *et seq.* Ark. Stats. 1947). These three cases are *Smith* v. *State,* 200 Ark. 1152, 143 S. W. 2d 190; *Jones* v. *State,* 204 Ark. 61, 161 S. W. 2d 173; and *West* v. *State,* 209 Ark. 691, 192 S. W. 2d 135. In each of these cases we recognized that the report could not be admitted in evidence, unless the physician who made the examination and report was personally present in court to identify the report and there confront the accused. Mr. Justice ROBINS' language in *West* v. *State (supra)* is apropos:

''On the trial of the case certain testimony tending to show abnormal mental condition of appellant was introduced. After this testimony had been heard, no official of the State Hospital for Nervous Diseases was offered as a witness, but the lower court, over the objection of appellant's counsel, permitted the prosecuting attorney to read to the jury the report made by the superintendent of the State Hospital for Nervous Diseases as to the mental condition of the appellant. This was error, because, as was stated by us in the case of *Jones* v. *State,* 204 Ark. 61, 161 S. W. 2d 173, such proceeding violated the provision of our constitution (Art. II, § 10) guaranteeing to the accused the right to be confronted by witnesses against him and the privilege to cross-examine them. The same rule was announced in *Smith* v. *State,* 200 Ark. 1152, 143 S. W. 2d 190.''

Nothing in the majority holding in the present case is at variance with our former cases on this point, because in the case at bar the physician who examined the accused and made the report introduced in evidence was personally present in the trial court and confronted the accused. That physician was Dr. Kozberg. The letter

written by Dr. Kozberg was dated January 10, 1949, and addressed to the Circuit Judge. It read:

"We have completed our examinations in the case of Robert Earl Gerlach, who was admitted to the State Hospital under Act No. 3, and I hereby certify that the following is a true and correct report of my findings in this case:

"DIAGNOSIS: Without psychosis, post-traumatic cerebral syndrome caused by old head injury June 1943 and manifested by headaches.

"1. It is my opinion that Robert Earl Gerlach is mentally competent and responsible at the time of this mental examination, and

"2. It is further my opinion that Robert Earl Gerlach was mentally competent and responsible for his acts at the time of their alleged commission.

"Very truly yours,

"Oscar Kozberg, M. D.
"Ass't Superintendent and
Examining Physician

"Approved: George W. Jackson

George W. Jackson, M. D., Superintendent

"Subscribed and sworn to before me this 10th day of January, 1949

"Bertie Griffin
"Notary Public

"My commission expires Jan. 18, 1950"

It will be observed that the letter was signed by Dr. Kozberg and states "it is my opinion." He was the man who made the examination; and he was the man who personally testified and confronted the accused. It is true that the letter bears the notation "Approved: George W. Jackson"; but Dr. Jackson's signature merely indicates that this letter passed through the regular routine of State Hospital correspondence and is the report required

by the Initiated Act. It is clear that the accused was confronted by the witness, Dr. Kozberg, and so no Constitutional Rights of the accused were invaded; and the case at bar is in complete harmony with our previous opinions on this point.

LANE, SMITH AND BARG *v.* STATE.

4600 229 S. W. 2d 43

Opinion delivered April 10, 1950.

Rehearing denied May 8, 1950.

[redacted]

Bruce Ivy and *Claude F. Cooper,* for appellant.

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

GRIFFIN SMITH, Chief Justice. Indictments charged the three defendants with burglary and grand larceny. Each was convicted and sentenced to serve penal terms of seven years for burglary and fifteen years for grand larceny. The motion for a new trial lists sixty-three matters in respect of which error is urged. Eleven are discussed in the briefs.

On the night of June 26th, 1949, a metal safe was taken from the store of R. H. Wilmoth at Etowah. It was found in a ditch near the highway four miles away. Indications were that it had been opened with a sledge hammer. Wilmoth testified that the safe contained $2,285 in money and $446 in checks. Some of the checks were recovered later, but none of the money.

. . . .

Thomas K. Morrow, familiarly known as "Sonny," is known in Mississippi County as a professional gambler and criminal suspect. He met Jack Barg while in Detroit in 1942 or 1943; but in 1949 Barg was in Chicago. Morrow met Martin Lane in January, 1949, and in June of that year he became acquainted with Harry Smith. The circumstances were that Barg, telephoning from Chicago, had tried to get in touch with Morrow. The call was answered by Morrow's mother-in-law, who relayed the message in a manner permitting arrangements for a meeting of the four—Barg, Lane, Smith, and Morrow—at State Line, a point marking the boundaries of Arkansas and Missouri. Morrow testified that after

he was introduced to Smith, either Barg or Lane asked if he knew of a place they could "knock off", explaining that they would like to make some "fast money". Morrow had formerly played poker at London, Kentucky, at a public place operated by George Henderson, who was supposed to be informed regarding safe-cracking opportunities, so they drove to London and talked with Henderson, who had "backed out". Returning, they stopped at Morrow's home at Holland, Mo., then some or all of them went scouting for likely-looking places to rob. Morrow had been joined by his wife. At Manila they stopped at a medical clinic for Barg to make a date with Irene Rice, whose testimony was a feature of the trial.

Half a mile south of Floodway, on the road to Etowah, Morrow and his wife, with Barg and Smith, went into Homer Starnes' store to see if they could spot an available safe, but if Starnes owned a safe the party "didn't locate it". Ten or fifteen minutes later they were in Etowah. Smith went into Wilmoth's store, returning with the explanation that the safe there "looked like a cinch". He had asked that a $20 bill be changed. After "casing" the store they went to Manila and killed time at the Legion Hut, ascertained that Irene Rice could not leave her employment until eight o'clock in the evening, and then went to Morrow's home at Holland. When Irene joined them considerable time was spent drinking beer and whiskey, but at a late hour Barg reminded them that business came before pleasure.

At 2:30 a. m. Barg, Lane, and Smith changed their clothing, preparatory to the business at hand. Morrow drove his car. In the Dodge that followed were Lane, Smith, and Barg. Morrow testified that after driving through Etowah he was overtaken and instructed to go back a short distance and wait. Approximately thirty minutes later the three reappeared with the safe in the "turtlehull of the car". It was unloaded at the point where it was found in the ditch. Morrow, who moved on when the safe was dumped, said that he did not see it opened, but heard sounds like a hammer on metal. All went to Morrow's home. Morrow was told by Lane that

the haul had netted between twelve and fourteen hundred dollars, and he (Morrow) was given $200. He and his wife took Irene part of the way to her place of employment, but when they returned Barg, Lane, and Smith had gone. They were overtaken at Cairo, where "motel" accommodations had been engaged for the night, but Morrow did not see Lane at that time. Barg and Smith called at his cabin, where Barg made the threat that anyone who "snitched" on him would be killed. Morrow and his wife returned to Mississippi County where they remained for two or three days and then left for California. Some time later they were arrested at Salinas and brought back. While in jail Morrow confessed. Charges against Mrs. Morrow were dismissed. At the time of trial Morrow was under bond.

The defense of each was an alibi.

The State contends that circumstances attending the arrests of appellants are in themselves evidential. Miss Eunice Brogdon is a deputy in the office of Sheriff and Collector William Berryman. She testified that on July 20th the sheriff told her to call Jack Curtis in Chicago, "Sacramento 29498." In response a man answered the telephone and said he was Jack Curtis. Miss Brogdon told him she was "Mrs. Lee—Opal's mother". "Curtis" said he was anxious to get in touch with "Sonny", that it was important; and Miss Brogdon replied, "Well, he talked with me last night and they are in Mississippi, but will be home Saturday night or Sunday". Miss Brogdon then inquired if he (Curtis) could be reached, and how. The reply was that a call placed Saturday night or early Sunday would be appreciated. "Curtis" told Miss Brogdon that he was a very good friend of "Buddy's and Opal's", and that he had stayed at their home "a little while ago". He then gave two telephone numbers, but explained that his name was not Curtis, but that it was Jack Barg. The numbers were "Nevada 20716 and Nevada 20721". Sunday morning Miss Brogdon placed a call as directed. The voice of the man who answered was similar to that of the person who gave her the telephone numbers, and she definitely recognized that the person who then said he was Barg was the same

one who had first said he was Curtis, but had explained that he was Barg.

In this conversation Miss Brogdon said she was "Opal", (Morrow's wife). Barg wanted to know where Sonny was, saying he had to get in touch with him. Miss Brogdon replied, "Sonny didn't come: things are hot around here". Barg insisted that he had to contact Sonny. Miss Brogdon then said, "Well, Sonny is going to meet Irene and me at Sutton's Tourist Court Monday night at ten o'clock, and he wants you to meet us—can you?" Barg replied that he would. Miss Brogdon asked Barg if he knew where the place was. He replied that he was not certain, but when asked whether he knew where the "Spot" was Barg said he did, or in any event he could find it. Finally Miss Brogdon said: "Sonny said bring your tools and the other guys with you—you know what I mean?" The reply was, "Yeah, I know what you mean, [but] what kind of a job is it? Is it the same kind of a job we did before?" The answer was, "Well, I don't know whether it is or not: Sonny doesn't talk very much, you know, but it is something good". He then said, "I get you".

Acting upon the information given by Miss Brogdon, the Sheriff and his deputies, assisted by State Policemen, stationed themselves at Sutton's Tourist Court, cabin No. 3 having been reserved in the name of Opal Morrow and Irene Rice. The appellants were arrested when they drove into the tourist court area in search of the two women and Sonny.

At trial Lane was the only defendant who testified. He is Barg's second cousin. Shortly before June 26th he was told that a night club known as The Winking Pup was for sale. Investigations revealed that it was a corporation and that Harry Smith owned twenty shares of sixty-three that constituted controlling interest. Lane spent two or three days checking the business done by Winking Pup, such as counting customers, analyzing receipts as reflected by the cash register, estimating the cost of operation, etc. On Friday, June 24th, he told Smith that he would buy the twenty shares, but did not

want to close the deal until Saturday morning. Actually he did not take over until Saturday afternoon. In explaining this delay the witness said: "When we got back that evening there were some beer men coming in, and whiskey men making last-minute deliveries, so we let them get through with their business. Smith then took me into the office and showed me around—showed me where the stocks were kept, and a few other things people would be interested in if they were getting into the business. Harry's brother George was there, as was Harry".

The so-called burglary tools found in appellants' car when they were arrested [said Lane] were probably put into the tool compartment by a contractor who had been doing some work for "Winking Pup". The car was bought July 10th or 11th. It was a Chrysler, on which the down payment of $1,000 was made in cash. Lane thought that the three pairs of gloves might have been left on some occasion when mechanics worked on the car, or perhaps one pair was for use in driving.

Barg was the only one of the three who admitted being in this State when the crime was committed. The explanation was that he intended to purchase stock in Winking Pup. He was hopeful that relatives living in Arkansas—his father and an uncle — would advance money for the venture. Testimony corroborating Lane's alibi for himself and Smith placed them in Chicago when the burglary was committed. Its substantial nature could not be questioned here had the jury believed the witnesses. On the other hand, the defendants were definitely identified as having been seen with Morrow and elsewhere at the critical times spoken of by him, hence on the factual issue the evidence is not open to legal criticism.

Initially the appellants complain (a) that they were arrested without warrants, and (b) that they were denied preliminary hearings. The State's answer (a) is that an officer may make an arrest without a warrant where he has reasonable grounds for believing that the person arrested has committed a felony. Ark. Stat's

§ 43-403. It is true (b) that preliminary hearings were not given, but it is equally true that the defendants were released on bond in August, this Court having refused to reduce the amounts fixed by the trial Judge. Condition of the bonds was that the defendants would answer to Circuit Court October 17th on the charges brought against them by *information.* The charges alleged possession of burglary tools—an accusation not brought forward in the indictments, although as to Barg one bench warrant recites that he was being held on a charge of possessing burglary tools, while a second warrant mentions burglary and grand larceny.

Appellants say that their motion to quash the indictments should have been sustained because the Court's minutes or records did not affirmatively show that the indictments were returned in open Court in the presence of the Grand Jury, nor was it shown that twelve of the jurors voted to indict; and, secondly, there was no legal evidence presented to the Grand Jury upon which it could base true bills.

The indictment was indorsed, "Returned into open Court, in the presence of all the Grand Jury, by the foreman thereof, and filed this 17th day of October, 1949". In passing on the motion Judge Harrison dictated a statement to the Court Reporter, the substance of which might well have been taken from the docket. After mentioning organization of the Grand Jury and the directions that it proceed to business, the statement is: "Later on the same day the Grand Jury, with an officer in charge, came into Court and reported two true bills of indictment. Same were presented to the Court and filed, and the Clerk was directed to issue bench warrants thereon at the direction of the Prosecuting Attorney." We think the vices mentioned in *Green* v. *State,* 19 Ark. 178, and in *Shinn* v. *State,* 93 Ark. 290, 124 S. W. 263, were overcome.

Complaint is made that the Court overruled a timely motion to require the Prosecuting Attorney to file a bill of particulars. The gist of the motion was a request for details regarding the brand, manufacturer's number,

and other matters pertaining to the tools alleged to have been used in opening the safe. The Court directed the Sheriff to permit a complete inspection. This was sufficient. We do not discuss the request for copies of petitions that had been filed at a time when the charges were by information. These charges were superseded by the indictments, and no practical purpose can be served by speculating on what rights might have been lost if the trials had been conducted under charges filed by the Prosecuting Attorney.

The Court did not abuse its discretion in overruling motions for severance. Appellants' counsel concedes that the trial Court was within its legal rights in directing that the three be tried together. But, say appellants, the fact that they were non-residents of Arkansas and were friendless in a jurisdiction where public sentiment might with reason be calculated to favor the store owner whose safe was taken justified recognition by the Court that there should be an exception to the rule. Under the State's theory, and under substantial facts acted on by the jury, the transaction was a single undertaking participated in by all, and if guilty they had necessarily conspired to commit a felony. Ark. Stat's, § 43-1802, and Notes on Decisions.

It is next argued that the Court abused its discretion in not granting a continuance. The reasons assigned are cumulative, including, as it is asserted, a denial of preliminary hearings, failure of the trial Court to hear a petition for *habeas corpus,* unexpected rearraignment, and the imposition of new bonds. If, as the appellants say, the Court refused to consider their petitions under *habeas corpus* procedure, their rights were reviewable by this Court through *certiorari. Adams* v. *Pace,* 193 Ark. 1020, 104 S. W. 2d 212. An allegation that the lower Court had arbitrarily or indifferently refused to hear the petition would be considered here as expeditiously as though an abusive exercise of power formed the basis of complaint. Ordinarily, however, where one is admitted to bail and the conditions are not such that his movements are restricted, he will not be heard to say

that he is being illegally restrained. *Stallings* v. *Splain*, 253 U. S. 339, 64 L. Ed. 940, 40 S. Ct. 537.

The petition for a writ of *habeas corpus* was filed October 14th—three days before Circuit Court convened. When the indictments were returned on the 17th the petition of October 14th was amended. While in their brief appellants assert that immediately following the indictments the amended petition was filed, and that they were not able to get it heard, the record shows that the petition was not sworn to until the 18th, and the Clerk's attestation shows that it was filed the 18th—the same day new bonds were executed and the defendants released The inference that the petition was filed on the 17th is not sustained.

Following the preliminary proceedings just mentioned the cases were set for October 25th. On that date the defendants asked for a term continuance, or in the alternative postponement to another day of the same term. There is the contention that the Court refused to hear testimony in support of the motion. In passing on the motion Judge Harrison mentioned that it was verified, then said: "I am holding there is no legal ground for allowance of the motion". This was in response to a defense attorney's statement that "I have got some proof to show the reasons as set out in the motion. I can't get the witnesses in Court, but I can take the deposition". After the motion had been overruled, the attorney said, "What about my missing witness", and the Court's ruling was, "I don't think the record shows due diligence was used to get him here".

The objection in respect of which there was an exception goes to the single point of the absent witness and the general statement that proof in support of the formal motion could be submitted. But the Court treated the statements as true, and held as a matter of law that good cause had not been shown. Crux of the controversy was the inability of the Pulaski County Sheriff to serve a subpoena on Joe Ruff. In making an objection a defense attorney said it was his belief that the subpoena was sent from Osceola October 15th. A Clerk's deputy testified

that the request was not made until October 22d. A letter accompanied the Pulaski County Sheriff's return, stating that Ruff was out of the city and would be for several days. There was testimony that this letter was given to one of the attorneys for the defendants. We agree with the trial Court that the motion should have been denied.

Assignment No. 5 complains of the Court's refusal to suppress evidence thought to have been illegally procured. To this end rules of Federal practice are invoked. It is sufficient to say that our own decisions support the trial Court in the particulars pointed to.

Assignment No. 6 involves transactions treated under other headings.

When the Prosecuting Attorney (Assignment No. 7) asked that Allen Levin be recalled for additional cross-examination, a courtroom colloquy brought the comment from a Deputy Sheriff that "One of these witnesses is back there—this Russian Jew." On objection that the remark, made in the presence of the jury, was prejudicial, the Court told the jury that it was "highly improper and ought not to have been made, and you are told not to consider it for any purpose or under any circumstances." There was no objection that the admonition was insufficient.

Under Assignment No. 9 there is complaint of what the defendants insist was the trial Court's partiality in asking, from time to time, whether certain testimony would be objected to by the State. It is said that on seventeen occasions "objections" were interposed by the Court. Our examination of the records shows that when collateral matters were being discussed, and when the particular subject had been pursued to a point beyond relevancy, the Court asked if there was an objection. It is not contended that the rulings were in all cases erroneous, but that the Court's careful attempt to restrict the examinations to essentials created an impression in the minds of jurors that the Court believed the defendants were guilty.

It is the Court's duty, irrespective of objections or the want of them, to see that a trial is conducted along

orderly lines. Certainly nothing suggestive of a personal opinion regarding the facts should be said or even intimated, and complete freedom from bias must prevail insofar as attitude may be said to be reflected by word, inflection, or intimation. But this does not mean that a Court cannot restrain what are sometimes spoken of as "fishing expeditions," or tedious repetition of questions when the subject has been exhausted, and like conduct. We do not find that the complaints of judicial prejudice are justified.

In Assignment No. 9 appellants ask that prejudice be predicated upon that part of the Sheriff's testimony in which he detailed how the telephone numbers given to Miss Brogdon were procured by him from Mrs. Lee. Admission of this evidence [appellants say] was the foundation upon which Miss Brogdon's testimony (characterized as hearsay) was predicated. In the brief it is said: "Miss Brogdon specifically [testified] *that she does not know to whom it was she was talking.*" The quotation is lifted from its connected position. What the witness said was that she called by telephone after the numbers were given to her, that a man who said he was Jack Curtis talked, and in doing so mentioned things disclosing information regarding people and places in Mississippi County and adjoining Missouri; that he later explained that the real name was Jack Barg, and that she (Miss Brogdon) distinctly identified "Curtis" and "Barg" as the same person because the voice was the same.

By Assignment No. 10 it is contended that reversible error occurred when the Prosecuting Attorney, on cross-examination, was permitted to refer to defense witnesses as "Jews, Russian Jews, and Just Plain Jews." (Transcript pages cited are 513-19-35-46, and 610.)

The expression does not appear in the cross-examinations as a single phrase. This is made clear when the exact language is read, showing questions and answers. It is always improper to gratuitously comment on any personal matter not essential to the controversy and not collaterally important, when in doing so the questioner

or commentator discloses a scornful attitude or assumes a derisive manner. It must be presumed that if this had been done in the case at bar an appropriate admonition would have been given by the Court. Whether such reproval would have been sufficient to erase the harm cannot be determined here because the issue is not properly presented.

There had been testimony that in conversations between themselves and otherwise the defendants spoke a language not understood by the witnesses who testified for the State. Allen Levin, when asked if he spoke any foreign languages, replied that he spoke "his native tongue, Jewish." He also spoke Yiddish very well. The questions were objected to.

George Smith (defendant Harry Smith's brother) was asked if he spoke Yiddish and replied that he did not. Question: "What is your nationality?" A. "Russian." Q. "Russian Jew?" A. "No, Russian." Q. "Not a Russian Jew, Mr. Smith?" A. "No." Following action of the Court in overruling an objection at this point, the Prosecuting Attorney added: "The question I asked you was whether you speak Russian [or] Yiddish: do you understand Russian?" A. "I understand very little Russian. As far as speaking it, I haven't spoken Russian since my mother died. I don't know much about it."

Edward Abbess, a defense witness, testified that he was born in Texas, but went to Chicago in 1926 and knew Martin Lane—"just got acquainted with him there at the Winking Pup." Question: "What is your nationality?" A. "Mexican." Q. "You don't happen to speak a little Russian or Yiddish, do you?" A. "No, sir."

Louis Miller was a bartender on South Crawford street, two or three blocks from Winking Pup. He was asked if he spoke Yiddish and replied that he did not. Question: "What is your nationality?" A. "Jewish." Q. "Russian Jew?" A. "No, I was born here in the United States." Q. "Just plain Jew?" A. "That is right." When an objection was interposed the Prosecuting Attorney said, "I mean by that you are not from Russia."

Lane testified that he spoke some French, a little Italian, and "a sprinkling of Pig Latin." There had been testimony that one or more of the defendants, while using the telephone, spoke in an unfamiliar tongue. It is quite clear that the Prosecuting Attorney had this background in mind while examining the witnesses, and in his summation of the cases.

It is next argued that the jury was improperly instructed regarding conviction on the uncorroborated testimony of an accomplice. Contention was that the Court failed to say that the evidence upon which a conviction rests must be *independent of and unaided by* the testimony of the accomplice.

The Court in express terms told the jury that Morrow and his wife were accomplices and that it would be necessary to find from other testimony facts supporting the accusations; and, [said the Court] . . . "the corroboration is not sufficient if it merely shows that the crime was committed and the circumstances thereof; but you are instructed that the amount of such corroborating evidence and its weight are matters solely for the jury; and if you find that such witnesses have been corroborated by the evidence, either positive or circumstantial, other than their own, tending to show that the crime was committed, and connecting the defendants, or either of them, with the commission, you will be justified in convicting the defendant, or defendants, so connected, provided you believe him guilty from all of the evidence in the case, and beyond a reasonable doubt."

The instruction, given in cases where there was substantial corroborating testimony, was correct. We are not cited to any decision requiring an instruction containing *independent of and unaided by.*

Many other matters are discussed in the 245-page brief and abstract appellants have filed, with citations to the 640-page record. None is of a character involving principles not settled by our decisions, hence a protracted discussion would be academic. All have been examined and prejudicial error is not shown.

Affirmed.

DODSON *v.* ABERCROMBIE.

4-9146 228 S. W. 2d 990

Opinion delivered April 17, 1950.

[redacted]

Kenneth C. Coffelt and *P. E. Dobbs,* for appellant.

McDaniel, Crow & Rolleigh, for appellee.

GRIFFIN SMITH, Chief Justice. The litigation stems from our remand in Case No. 8433—*Dodson* v. *Abercrombie,* 212 Ark. 918, 208 S. W. 2d 433. There Abercrombie as petitioner sought to enjoin Dodson from taking sand and gravel from lands shown by the record to be in Sections 9 and 16. Mike Richards intervened. Dodson answered by admitting and adopting allegations contained in the intervention. After preliminary pleadings had been disposed of Richards and Dodson joined in an amendment that in effect admitted Abercrombie bought the land from W. T. Fagan, sold it to Richards, and in the deed to Richards reserved, *prima facie,* title to the sand and gravel. But, according to the defensive pleadings, this was not intended by any of the parties, hence the deed should be reformed because of a mutual mistake, or for fraud. In reversing the decree sustaining Abercrombie's demurrer to the answer and intervention as amended, it was held that if the deed was accepted by

Richards without misrepresentations by the plaintiff, there would be no ground for reformation, but if Richards' failure to read the document was induced by fraudulent representations by Abercrombie, resulting in its acceptance in circumstances amounting to fraud or inequitable conduct, then a cause of action would lie.

These were the issues that had been joined when the cause went back to Saline Chancery Court. Of the resulting decree appellant says: "The Court rendered a judgment *in that case* restraining Dodson from removing sand and gravel from land owned by Abercrombie, [but] in the judgment certain lands belonging to Dodson were erroneously included".

It is conceded that Dodson had been taking sand and gravel from Abercrombie's property in Section 16, but Dodson's present insistence is that while engaged in similar operations on his own land in Section 9 he was cited for contempt for violating the injunctive order. The complaint recites that "In a cause of action heretofore determined [by the Saline Chancery Court in case No. 3417] wherein H. L. Abercrombie was the plaintiff and Ed Dodson was defendant, a judgment which has become final [through lapse of the term and expiration of the time for appeal] quieted title in Abercrombie to the lands described in Section 9". There is then the statement that "the purpose of this suit is to make the above-described lands the issue in this cause of action". Dodson, according to the complaint, owned 39 acres of a total of 50.2 acres embraced within the described area, "and Abercrombie, by reason of the previous decree, is owner of 11.2". Allegations of mutual mistake and fraud are repeated.

Neither the decree nor the record in Case No. 3417 is brought into the record in this appeal. A great deal of testimony in the case resulting in this appeal goes to the question of intent, mistake, and related matters. Abercrombie did not testify, but his pleadings assert ownership of the disputed right to take the sand and gravel.

Since the record in Case No. 3417 is not before us, we must presume that the Chancellor compared the testimony in this case with his decree and the record in the former suit. The complaint was dismissed for want of equity.

This is not a case where the appellant, through oversight, failed to complete the record. In a pleading entitled "Objections to the Bill of Exceptions" counsel for appellee complained that the "files, records, and decree" pertaining to the former suit were not in the transcript, "although the plaintiff specifically asked in his complaint that the Court take cognizance of them".

Affirmed.

WIMBERLEY *v.* STATE.

4607 228 S. W. 2d 991

Opinion delivered April 17, 1950.

Byron Goodson, for appellant.

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

DUNAWAY, J. Everett (Shine) Wimberley appeals from a conviction of assault with intent to kill. He was charged with this crime by information filed by the prosecuting attorney as a result of the shooting on November 9, 1949, of Dorothy Dugan Wimberley, ex-wife of appellant. Upon trial of the cause, Wimberley was found guilty and sentenced to ten years imprisonment.

For reversal, appellant urges several alleged errors, two of which have to do with the admissibility of certain testimony, while the others relate to the closing argument of the prosecuting attorney.

At the trial the State called Dr. A. H. Rogers, a physician of Mena, to testify concerning the location of the bullet wounds on the victim's body. The defendant objected on the ground that Dr. Rogers' testimony would be a privileged communication, and that Mrs. Wimberley, who had remarried the defendant following the shooting, had not waived the privilege. In fact the doctor stated that she had specifically requested him not to testify. Over this objection, the doctor was permitted to state that he had examined Mrs. Wimberley after she was wounded; to describe the location, nature and extent of her wounds and to state that she was hospitalized and treated by him. Following a recess in the trial, on mo-

tion of the State this testimony was stricken and the court admonished the jury not to consider it. Appellant, however, argues that even though the testimony objected to was later excluded, the effect of the doctor's testimony was not erasable and was prejudicial to him.

We think the doctor's testimony as to the nature, extent and location of the wounds was admissible. At common law, communications between physician and patient were not privileged, and it is only by statute that a physician cannot be compelled to testify as to an examination of a patient. 3 Wharton's Criminal Evidence (1935 Ed.) § 1240; Underhill's Criminal Evidence (1935 Ed.) § 341. The statutory foundation for claiming privilege as to a physician's testimony appears in Ark. Stats. (1947) § 28-607: "Hereafter no person authorized to practice physic or surgery and no trained nurses shall be compelled to disclose any information which he may have acquired from his patient while attending in a professional character and which information was necessary to enable him to prescribe as a physician or do any act for him as a surgeon or trained nurse. . . ."

In *Mutual Life Ins. Co.* v. *Owen,* 111 Ark. 554, 164 S. W. 720 at page 559 we said that the purpose of this statute "is to cover the relation of physician and patient with the cloak of confidence, and thus to allow a greater freedom in their communications to each other in regard to matters touching the disease of the patient. Such statutes are enacted as a matter of public policy to prevent physicians from disclosing to the world the infirmities of their patients."

We considered a similar objection in a case where the defendant was tried on a charge of rape and convicted of carnal abuse. In that case, *Cabe* v. *State,* 182 Ark. 49, 30 S. W. 2d 855, we said at page 52: "Appellant next contends for the reversal of the judgment because Dr. Gray was permitted to testify concerning an examination he made of the prosecutrix a few hours after the alleged crime was committed. The introduction of his testimony was objected to on the ground that it was privileged. The doctrine of privileged communications

only extends to the physician's patients and himself. A defendant in a prosecution for crime has no right to claim the protection. *Davenport* v. *State,* 143 Miss. 121, 108 So. 433, 45 A. L. R. 1348."

The rule is thus stated in 3 Wharton's Criminal Evidence (1935 Ed.) § 1246: "The object of the privilege is to protect the patient; it is conferred on him, and belongs to him or his personal represenative. It extends only to the patient and the physician and cannot be claimed by another who is party to a criminal prosecution. So, the accused in a murder prosecution cannot object to the testimony of a physician as to the nature of the deceased's wound and the cause of his death."

The weight of authority supports our holding in the Cabe case, *supra,* that the doctrine of privilege is for the benefit of the patient, and that the defendant in a criminal prosecution cannot object to the testimony of a physician concerning information gained from the victim by the physician in his professional capacity. See Annotation 2 A. L. R. 2d 647 and cases therein collected.

In *People* v. *Lay,* 254 App. Div. 372, 5 N. Y. Supp. 2d 325, at page 327, the New York court discussed this question:

"The conviction was based upon a confession of defendant and the relevant testimony of a physician who, upon examination and treatment of the woman, found a bullet wound in her body and extracted the bullet. It is claimed that the testimony of the doctor was inadmissible under § 352 of the Civil Practice Act, applied to criminal trials by § 392 of the Code of Criminal Procedure. This court holds that it was admissible.

"It could not have been intended by the Legislature that in such a case the Act should be the means of protecting a criminal from just punishment. *Pierson* v. *People,* 79 N. Y. 424, 35 Am. Rep. 524; *People* v. *Harris,* 136 N. Y. 423, 33 N. E. 65. Those cases involved convictions for murder. But the essence of the decisions applies here. There was no disclosure by the doctor which would subject the woman to prosecution, damage her

reputation, or wound her feelings, as was the case in *People* v. *Murphy,* 101 N. Y. 126, 4 N. E. 326, 54 Am. Rep. 661. Section 1915 of the Penal Law, which requires every physician attending a case of bullet wound to report such case at once to the police authorities, militates against a construction favorable to a defendant in a criminal cause. The statutory prohibition, the birth of which took place in the State of New York, is not accepted in all jurisdictions. 5 Wigmore on Evidence, Second Edition, § 2380. Its scope should be limited to its purpose."

By Act 258 of 1949, the General Assembly of Arkansas enacted "An Act to Require Doctors, Hospitals, and others to Report Treatment of Knife and Gunshot Wounds to Peace Officers." Physicians are required to report immediately to the appropriate peace officers treatment of all knife or gunshot wounds that appear to have been intentionally inflicted. Failure to report is punishable as a misdemeanor.

We agree with the reasoning in the Lay case, *supra,* that a construction which would serve as a cloak for crime should not be placed upon a statute which as we have said, was enacted "to prevent physicians from disclosing to the world the infirmities of their patients." The State has a vital interest in the protection of its citizens from acts of violence. It would be unreasonable to say that a physician must report his treatment of a gunshot wound to a peace officer, but that the State cannot call him to testify as to the nature, location and extent of such wounds in a court of law.

In the case at bar, there was nothing in the doctor's testimony which would subject Mrs. Wimberley to prosecution, damage her reputation, wound her feelings, or disclose to the public any infirmity or condition which she might legitimately wish kept private. Within the limits indicated, the testimony was admissible.

Appellant next argues that the testimony of the operator of the telephone exchange at Wickes concerning a telephone conversation was incompetent, as being a "violation of privacy" and for the further reason that

the defendant was not properly identified as one of the parties engaged in the conversation. The telephone operator testified that in the early morning of November 9, 1949 (the shooting occurred about four or five o'clock a. m. that day) someone who gave his name as Wimberley placed a call from Hill's Cafe in Wickes to "Jimmie" at Mena; that the parties "seemed to be quarreling". The proof showed that Dorothy Dugan Wimberley was known as "Jimmie". A companion of appellant testified that sometime after midnight of November 8-9, he was with appellant at Hill's Cafe in Wickes where he used the telephone.

It is true that the telephone operator could not identify the voices. "But recognition of the voice of the other party on the wire, or other parties, if the witness was 'listening in', is not the only means of identification, as it also may be made by facts or circumstantial evidence. Where a witness called a party's telephone number, and some one responded purporting to be the party called, the conversation was competent, even though witness did not know the voice." Underhill's Criminal Evidence (1935 Ed.) § 129, page 178. There was sufficient circumstantial evidence identifying the parties to the telephone conversation to permit this testimony to go to the jury.

No authority has been cited by appellant to support his contention that the telephone conversation was privileged. In *Hall* v. *State,* 208 Ala. 199, 94 So. 59, it was held that such a conversation was not privileged and that the telephone operator could testify as to a conversation between the accused and his victim.

The objections to the prosecuting attorney's closing argument have given us more concern. In referring to the defendant the prosecuting attorney said that "every time he gets in trouble his poor old mother comes up here and pays his fine." The defendant had not testified in his own behalf and there was nothing in the record to show that he had previously been convicted of other offenses. The defendant objected to this argument as being prejudicial and asked for a mistrial. The court

then admonished the jury that counsel's argument must be based on the record. "The court wants to admonish you not to consider anything unless it is based upon the testimony of the record." The defendant renewed his objection, again asking for a mistrial. He duly saved his exception to the overruling of the objection.

The prosecuting attorney then proceeded to tell the jury "I have been criticized because Shine Wimberley walks the streets of Mena today." When this was objected to, the court admonished the jury: "That is not competent argument and the jury will please consider only the testimony in the trial of this case."

The last remark alone would not have been sufficient to require a reversal of this case, since the court did instruct the jury that it was improper and in effect told them to disregard it. On the other hand, the statement of the prosecuting attorney that the defendant's poor old mother paid his fine every time he had been in trouble before was highly improper and prejudicial. The natural inference was that the defendant was an habitual offender (which was not shown by the record) and such an argument was bound to influence the jury. The court's mild admonition to the jury to consider only argument based on testimony in the record was insufficient to remove the prejudice. *Hughes* v. *State,* 154 Ark. 621, 243 S. W. 70; *Hays* v. *State,* 169 Ark. 1173, 278 S. W. 15; *Sanders* v. *State,* 175 Ark. 61, 296 S. W. 70. A commendable enthusiasm by the prosecuting attorney to bring an accused criminal to justice must stop short of clearly improper and prejudicial argument.

The judgment is reversed and the cause remanded for a new trial.

SCROGGINS *v.* KERR.

4-9196 228 S. W. 2d 995

Opinion delivered April 17, 1950.

J. Fred Jones, Terrell Marshall, Thad Tisdale, and *George W. Shepherd,* for appellant.

T. J. Gentry, for appellee.

LEFLAR, J. The question here is whether Ordinance 8163 of the City of Little Rock may by referendum petition filed under the Arkansas Constitution, Amendment VII, be submitted to vote of the people at a special election. Ordinance 8163 authorizes execution of a "cooperation agreement" between the City and the federal Public Housing Administration (hereinafter called P.H.A.) for the construction of certain low-rent housing projects in Little Rock. After referendum petitions were filed, the City Council concluded on advice of counsel that the Constitution did not authorize a referendum on this ordinance, and declined to call an election. The petitioners then brought mandamus to require the calling of an election, the Chancellor denied the writ of mandamus, and this appeal follows.

The "United States Housing Act of 1937,"[1] with its amendments,[2] authorizes federal cooperation with states and local governments in the development of "decent, safe and sanitary dwellings for families of low income, in rural or urban communities" and in the corresponding elimination of "unsafe and insanitary housing conditions . . . that are injurious to the health, safety and morals of the citizens of the nation." Arkansas by Act 298 of 1937, the "Housing Authorities Act,"[3] created local Housing Authorities in the state and authorized local governmental units to enter into "cooperation agreements" as contemplated by the federal law. Act 298 of 1937 has been sustained and interpreted by this Court in *Hogue* v. *The Housing Authority of North Little Rock,* 201 Ark. 263, 144 S. W. 2d 49, and subsequent cases.

By Resolution No. 1532 adopted on Oct. 5, 1940, the City of Little Rock recognized the need for a Housing Authority to exist and function within the City, and thus

[1] Act Sept. 1, 1937, c. 896, §§ 1-30, 50 Stat. 888-899, 42 U. S. Code Ann., §§ 1401-1430.

[2] The amendments and additions to the original Act, including the Act of July 15, 1949, appear in 42 U. S. Code Ann. (1949 Supp.), §§ 1401-1483.

[3] This act, as amended by Acts 352 of 1941, 77 of 1943, and 280 of 1943, appears in Ark. Stats., §§ 19-3001 to 19-3034. Closely related legislation enacted later appears in §§ 19-3035 to 19-3074 and in Ark. Stats. (1949 Supp.), §§ 19-3041 and 19-3042.

gave to the Housing Authority of the City of Little Rock the standing which thereafter enabled it to do business as a going concern. This resolution was not by itself, however, enough to enable the newly created Authority to proceed at once to build or tear down houses; the later execution of "cooperation agreements" for a particular project or projects was pre-requisite to that affirmative activity.

Such a "cooperation agreement" was authorized by Little Rock Ordinance 6010 adopted on Oct. 14, 1940. This ordinance authorized the Mayor to enter into an agreement or agreements with the local Authority for the erection and operation of an unspecified number of low-rent dwellings and the elimination of a corresponding number of "unsafe or insanitary dwelling units," but with the express limitation that the number of "unsafe or insanitary dwelling units" to be eliminated should in no event exceed three hundred (300). Agreements were apparently executed and housing projects erected and operated under the authority conferred by Ordinance 6010.

Ordinance 8163, now before us, was adopted on Dec. 19, 1949. It recited the fact that there are more than 1,000 unsafe and insanitary dwelling units in Little Rock, inhabited by low income families of a number greatly in excess of 1,000, and that P.H.A. had authorized a 1,000-unit construction program for Little Rock. It then authorized the Mayor to execute for the City a new "cooperation agreement" with the local Authority, the provisions of which may be summarized as follows:

The Authority shall endeavor to secure a contract with P.H.A. for loans and contributions to develop and administer one or more housing projects.

The City shall not levy or impose any real or personal property taxes or assessments upon such projects but the local Authority will make annual payments of either ten per cent of the aggregate rent charged by the Authority or the amount permitted to be paid by State law, whichever amount is lower, provided upon failure of

the local Authority to pay, no lien can attach against any project or assets of the Authority.

The City shall distribute the payments in the proper proportion among the taxing bodies to which real property taxes would otherwise have been paid.

The City agrees within five years after completion of the project to eliminate unsuitable dwelling units in the locality substantially equal to the number of new units, with certain exceptions.

During the period while any contract for loans or contributions is in force between the local Authority and P.H.A. or any bonds remain outstanding, the City without cost or charge to the local Authority shall:

A. Furnish the Authority all public services and facilities now being furnished without cost to other inhabitants of the City including educational, fire, police and health protection and services; maintenance and repair of public streets, roads, alleys, sidewalks, sewers and water systems, street lighting, sewer services and such additional services as may hereafter be furnished without cost to other inhabitants.

B. Vacate such streets, roads and alleys within the area of the Project as may be necessary in the development thereof, and convey without charge to the local Authority such interest as the City may have in such vacated areas; and, insofar as it is lawfully able to do so without cost or expense to the local Authority or to the City, remove from such vacated areas, insofar as it may be necessary, all public or private utility lines and equipment;

C. Insofar as the City may lawfully do so, grant such waivers of the building code of the City as are reasonable and necessary to promote economy and efficiency in the development and administration of the Project; and make such changes in any zoning of the site and surrounding territory as are reasonable and necessary for the development and protection thereof;

D. Accept grants of easements necessary for the development of the Project; and

E. Cooperate with the local Authority by such other lawful action or ways as the City and local Authority may find necessary in connection with the development and administration of the Project.

The City agrees to furnish garbage and trash removal services at a rate to be later determined but no greater than that charged other inhabitants or existing housing projects and to furnish sewerage services at a rate to be fixed at a later date but not greater than that made to other inhabitants or to existing housing projects nor more than charged public charitable organizations.

The City will accept dedication of all interior streets, roads, alleys and sidewalks within the area of the projects after the Authority has completed them, and will accept dedication of land for and will grade, improve, pave and provide sidewalks on all streets bounding the projects or necessary to provide access thereto and to provide water mains and storm and sanitary sewer mains leading to the projects and serving the bounding streets with the local Authority paying the City such amount as would be assessed against the project if it were privately owned.

If the City fails to furnish the services and facilities as agreed, the local Authority may obtain them elsewhere and deduct the cost thereof from any payment in lieu of taxes due the City.

No Cooperation Agreement heretofore entered into between the City and the local Authority shall be construed to apply to any Project covered by this Agreement.

The contract proposed and authorized shall not be changed and shall be binding upon the City so long as any contract between the local Authority and the P.H.A. for loans or contributions is outstanding or any bonds are outstanding and so long as the beneficial title to the project is held by the Authority or some other public agency including the P.H.A.

The final section declares an emergency making the ordinance in force and effective after its passage and approval.

Amendment VII to the Constitution of Arkansas reserves the power of referendum to the local voters of each municipality, as to all "municipal legislation of every character." It further provides:

"Every extension, enlargement, grant, or conveyance of a franchise or any rights, property, easement, lease, or occupation of or in any road, street, alley or any part thereof in real property or interest in real property owned by municipalities, exceeding in value three hundred dollars, whether the same be by statute, ordinance, resolution, or otherwise, shall be subject to referendum and shall not be subject to emergency legislation.

"*Definition*—The word 'measure' as used herein includes any bill, law, resolution, ordinance, charter, constitutional amendment or legislative proposal or enactment of any character."

The Amendment then sets out the procedure to be followed in voting on "measures" which are covered by it.

Not all ordinances enacted by city councils come under the head of "municipal legislation." City governments in Arkansas know no such complete separation of powers as would automatically classify all aldermanic activities as legislative in character.

It is well settled that in some of their functionings city councils in this state act *quasi*-judicially. *Williams* v. *Dent,* 207 Ark. 440, 181 S. W. 2d 29; *Martin* v. *Cogbill, Comr.,* 214 Ark. 818, 218 S. W. 2d 94. Our statute (Ark. Stats., § 22-302) authorizing circuit courts on *certiorari* to review proceedings of city councils has been many times employed, though the courts are deemed to have

appellate power only over such acts of inferior bodies as are judicial in nature.[4] Obviously, Amendment VII reserves to the voters no power of referendum over the judicial or *quasi*-judicial acts of city councils.

Similarly, city councils often enact resolutions and ordinances that are administrative or executive in character. This fact is recognized in *Chastain* v. *City of Little Rock,* 208 Ark. 142, 185 S. W. 2d 95. Counsel for appellants here do not deny that aldermanic action is frequently administrative, nor do they contend that administrative action is subject to referendum. Rather, the contention is that Ordinance 8163 is legislative in nature, and not administrative. Appellees' position, contrariwise, is that the ordinance is administrative in nature, and not legislative.

"Both legislative and executive powers are possessed by municipal corporations. . . . The crucial test for determining what is legislative and what is administrative is whether the ordinance is one making a new law, or one executing a law already in existence. . . . Executive powers are often vested in the council or legislative body and exercised by motion, resolution or ordinance. Executive action evidenced by ordinance or resolution is not subject to the power of the referendum, which is restricted to legislative action as distinguished from mere administrative action. The form or name does not change the essential nature of the real step taken. The referendum . . . is designed to be directed against 'supposed evils of legislation alone'. 'To allow it to be invoked to annul or delay executive conduct would destroy the efficiency necessary to the successful administration of the business affairs of a city.' " 1 McQuillin, Municipal Corporations (2d Ed., Rev., 1940) 1000.

The question of whether particular official acts, including city ordinances, constitute "legislative action" is one that has arisen many times and in many contexts. One of the commonest forms of the question is as to

[4] This problem is examined in a Note on "The Extent to Which the Writ of *Certiorari* Lies to Review the Ordinances of Municipal Councils in Arkansas," in (1940) 8 Univ. of Ark. Law School Bull. 28.

whether the rule or enactment attacked was promulgated in violation of the constitutional prohibition against delegation of legislative power. Legislative bodies may delegate the power to make administrative rules, but under most circumstances may not delegate the right to enact legislation. *Kleiber* v. *San Francisco,* 18 Calif. 2d 718, 117 Pac. 2d 657; 1 Cooley, Constitutional Limitations (8th Ed.) 224; Rottschaefer, Constitutional Law, 72. But the sense in which the word "legislation" is used in this connection is not always the same as that in which it is used in other contexts. Conduct allowed as "legislative" in character for one purpose may be deemed "not legislative" for some other and different purpose. The only safe approach to this problem of interpretation is one which takes the term solely in its specific context, and seeks the sense given it in the particular section or sentence of which it is a part. Interpretations elsewhere of identical or similar clauses in the same context will be useful by analogy; interpretations even of identical clauses in a different context will have little value. The context relevant here is the municipal referendum provision in a state constitution.

That the problem of interpretation is an intensely practical one is indicated by our own decision in *Chastain* v. *City of Little Rock,* 208 Ark. 142, 185 S. W. 2d 95. There it was held that an ordinance calling a municipal election on the question whether certain territory should be annexed to the city was not "municipal legislation" within the meaning of Amendment VII, and that a referendum could not be called on it. A referendum would have involved holding an election to determine whether an election should be held, and we said that one election on the principal issue presented by the ordinance was enough. The framers of Amendment VII had one clear purpose, to insure to citizens the democratic right to rule by majority vote on legislative issues, and that right was assured by the form of the ordinance without any necessity for a referendum. Other states have given their referendum laws the same interpretation. *Langdon* v. *City of Walla Walla,* 112 Wash. 446, 193 Pac. 1; *Campbell* v. *City of Eugene,* 116 Ore. 264, 240 Pac. 418.

Similarly, if there is a law already enacted which authorizes the very action provided for by a later resolution or ordinance, then there is no right to have a referendum on the new measure. It is not a new law, but only a procedural device for administering an old law. The right of referendum should have been exercised when the original measure, the enactment that put the law on the books, was newly adopted. Thus, in *Burdick* v. *City of San Diego,* 29 Cal. App. 2d 565, 84 Pac. 2d 1064, there had been a series of San Diego city ordinances authorizing the construction of a new police station. These successive ordinances designated the site for the new building, accepted the site, authorized the city manager to erect and maintain the building, appropriated money to pay the costs, approved the plans and specifications for the building, created a special fund through which the appropriation was to pass, directed publication of an advertisement for bids, and accepted a federal grant in aid of construction. Finally, a separate ordinance was enacted which in effect gave the "go signal" on the construction job. A referendum was attempted against this last ordinance, but was held not permissible. The California court said that the prior ordinances were legislative in character, and subject to referendum. After they became law without referendum, however, the legislative phase of the project was ended. The final ordinance was nothing more than an administrative enactment, carrying out the previously enacted laws. And in *State ex rel. Hall* v. *Morton,* 128 Kans. 125, 276 Pac. 62, a city ordinance which fixed the route for a new highway through the city was held to be administrative merely, not legislative, therefore not subject to referendum, when it did no more than carry out an already existent law which provided for the construction of the highway. There are many other cases making the same distinction. See *Keigley* v. *Bench,* 97 Utah 69, 89 Pac. 2d 480, 122 A. L. R. 756; *Seaton* v. *Lackey,* 298 Ky. 188, 182 S. W. 2d 336; *Hawkins* v. *City of Birmingham,* 248 Ala. 692, 29 So. 2d 281.

We cannot agree that Ordinance 8163 was administrative, and not legislative, in this sense. There was

no previous law which authorized what 8163 declared should be done. True, no prior law forbade what 8163 authorized, but that is not the point. The point is that without 8163 there would have been no law in Little Rock authorizing the execution of a cooperative agreement covering the particular construction and demolition, and the numerous incidental rights, privileges and exemptions connected therewith, which 8163 provided for.

The Arkansas Housing Authorities Act (Act 298 of 1937) laid the groundwork for local housing authorities in the cities and authorized the cities, after they recognized the existence of the authorities, to make cooperative agreements with them. Little Rock City Council Resolution No. 1532, of October 5, 1940, did no more than breathe the breath of life into the Little Rock Housing Authority, so that the City could thereafter do business with it. The total effect of these enactments was to make it possible for effective public housing legislation to be enacted in Little Rock; these were preliminary steps only, and the real legislation had yet to be enacted.

Ordinance 6010 was real housing legislation in this sense, since it authorized a cooperative agreement under which actual construction and demolition were to be carried out. But 6010 did not authorize the cooperative agreement that 8163 calls for, nor give any authority for the construction and demolition that would be carried out under 8163. On that, it is enough to remember that 6010 included the express limitation that the number of "unsafe or insanitary dwelling units" to be eliminated under its authority should in no event exceed 300, whereas 8163 authorizes approximately 1,000 such eliminations to correspond with the same number of new dwellings. A careful reading of 8163 shows without question that it provides for new and different housing projects, apart from and in addition to those authorized by 6010. What is to be done under 8163 could not be done under 6010. Ordinance 8163 is a new law, and not a mere procedural device for administering some previous enactment. For a similar holding on similar facts, see *Bachman* v. *Goodwin,* 121 W. Va. 303, 3 S. E. 2d 532.

An alternative basis for our decision here is that part of Amendment VII which declares that "Every extension, enlargement, grant or conveyance of a franchise or any rights, property, easement, lease or occupation of or in any road, street, alley or any part thereof in real property or interest in real property owned by municipalities, exceeding in value three hundred dollars, whether the same be by statute, ordinance, resolution or otherwise, shall be subject to referendum and shall not be subject to emergency legislation". Under the cooperative agreement authorized by Ordinance 8163 the City would, among other things, commit itself to "vacate such streets, roads and alleys within the area of such project as may be necessary in the development thereof, and convey without charge to the local authority such interest as the City may have in such vacated areas". It is difficult to imagine that a project of the magnitude contemplated, if it be erected within the city limits, would not under the quoted clause involve municipal realty having more than the stated value. Our cases dealing with this part of the Amendment include *Southern Cities Distributing Co.* v. *Carter,* 184 Ark. 4, 41 S. W. 2d 1085, 44 S. W. 2d 362; *cert.* denied, 285 U. S. 525, 52 S. Ct. 393, 76 L. Ed. 922; *Smith* v. *Lawson,* 184 Ark. 825, 43 S. W. 2d 544; *Carpenter* v. *City of Paragould,* 198 Ark. 454, 128 S. W. 2d 980. (One of the members of the Court places his agreement with the result here reached upon this alternative ground only.)

It is irrelevant here to inquire into the motives of those who seek a referendum. It may or may not be that their interests are opposed to the public interest. It may or may not be that theirs are selfish concerns, and that urgent public needs might be more quickly served without the delay of a referendum. We do not consider such intimations. The framers of Amendment VII presumably had such matters in mind, and by the terms of the Amendment the decision on such matters was left to the electors of the affected area. The framers recognized the validity of Voltaire's words, "I disapprove of what you say, but I will defend to the death your right

to say it,"[5] and preserved the same protection to the right to vote as to the right to speak. The electors of Little Rock have the right to vote on "municipal legislation" such as Ordinance 8163, and it is for them to pass upon the motives, policies and interests that may be involved.

The decree of the Chancery Court is reversed.

KANSAS CITY SOUTHERN RAILWAY CO. *v.* WINTER.

4-9157 228 S. W. 2d 1001

Opinion delivered April 17, 1950.

[5] Letter from Voltaire written in 1764 to Claude Helvetius concerning book written by Helvetius. Tallentyre, Friends of Voltaire (1906), p. 199.

Hardin, Barton & Shaw, for appellant.

Shaver, Stewart & Jones, for appellee.

HOLT, J. Appellee sued appellant to recover damages to his automobile which resulted when his car was struck by one of appellant's Diesel powered passenger trains at a public street crossing in the town of Wilton, Arkansas. He alleged that appellant's negligence consisted in its failure to keep a proper lookout, to give statutory signals (Ark. Stats. 1947, § 73-716), and in obstructing the view by placing a car of creosoted poles "on the side track adjacent to the side crossing."

Appellant answered with a general denial and affirmatively pleaded the contributory negligence of appellee.

A jury trial resulted in a verdict in appellee's favor for $1,000. From the judgment is this appeal.

For reversal, appellant earnestly argues that the evidence was insufficient to support the verdict and that appellee's own negligence was the sole proximate cause of the collision and resulting damage.

Appellant has a line of railroad, running north and south through the town of Wilton, with its depot on the east side of the track. A road or street runs east and west immediately north of the depot, crossing the railroad track at right angles. A spur, or a house track, leads off from the main line track at a point 200 feet south of this street crossing and runs southward.

At about 9 o'clock a. m., December 20, 1948, on the occasion of the collision involved here, there was a car of creosoted poles spotted on the house track at a point approximately 231 feet south of the crossing where the mishap occurred.

Appellee, together with his wife (sitting on the front seat with him), his daughter and another party sitting on the back seat, approached this crossing in his car at a speed of about twelve or fifteen miles per hour. Appellee testified that he listened, and looked both ways, alternately, as he approached the crossing. His wife was

also looking and listening. He did not stop the car as he approached the crossing. The railroad track is on a slight elevation and there is a slight rise up to and over the track as they approached the crossing. They did not hear the train, a whistle or a bell. They were about twelve feet from the crossing when appellee first saw the engine of the train coming into view from behind the car of poles which tended to obstruct his view. The train was moving about forty-five miles per hour. Wilton is a nonstop town. Appellee applied his brakes and in trying to avoid a collision, turned his car to the right. The engine passed and cleared his automobile but the side of the baggage car collided with it. There was also testimony that after the train stopped, it backed up and did some additional damage to appellee's car.

Considering the evidence in its most favorable light in favor of appellee and the jury's verdict, as we must, we cannot say, as a matter of law, that there was no substantial evidence on which the jury could have based its verdict. In the circumstances, whether appellee's view as he approached the crossing was obstructed, whether proper signals were given, and a proper lookout kept, were questions that the jury might properly consider in determining the negligence of appellant. *St. Louis-San Francisco Ry. Company* v. *Call,* 197 Ark. 225, 122 S. W. 2d 178.

The question whether appellee was guilty of contributory negligence, and also if the jury should find him negligent, whether his negligence equalled or exceeded that of appellant, were submitted to the jury.

At appellant's request, the court instructed the jury in accordance with our socalled "Comparative Negligence Statute," (Ark. Stats. 1947, § 73-1004, as amended by Act 140 of 1945 to cover property damage): "* * * Before the plaintiff (appellee) could recover anything in this case, he must prove by a preponderance of the evidence that there was negligence on the part of the operatives of the train, as alleged in the complaint, and even though you might find and believe from the evidence in the case that there was some negligence on the part of

the operatives of the train, as alleged in the complaint, yet unless you find that negligence was equal to or greater than that of the plaintiff, if any, then the plaintiff could not recover, and even though you might find and believe that the negligence on the part of the operatives of the train was equal to or greater than that of the driver of the automobile, then if you should find for the plaintiff, you should reduce his damages in proportion to the measure or degree of his negligence, as compared with that of the operatives of the train in causing and bringing about the damages resulting therefrom, if any."

Appellant cites cases in support of his contention of the insufficiency of the evidence, but it suffices to say that all are distinguishable on the facts in each case.

Appellant next argues that the court erred in permitting appellee to testify, on the question of damages, that prior to the collision, he had his car overhauled at a cost of $512 by putting in a new motor, new radiator, and overhauling the front, and the further testimony, over his objection: "Q. You knew the car before the accident you had? A. Yes, sir. Q. You could see the shape it was in after the accident? A. Yes, sir. Q. Based on that, did it look like it had any value? Q. Has it any value except salvage value? A. That is all — salvage value."

He says: "The measure of the damage, of course, is the difference between the market value before the accident and that immediately afterwards."

We think no error was committed in this connection. There was evidence that the car, after the mishap, had no value other than salvage of about $100, that it was worth about $1,000 before the collision, and if $898 were expended on repairs, it would have a value of $1,012. This testimony was proper in arriving at the measure of damages, which is conceded to be the difference between the fair market value before the collision and immediately thereafter. *Golenternek* v. *Kurth,* 213 Ark. 643, 212 S. W. 2d 14, 3 A. L. R. 593.

Appellant also contends that the court erred in giving certain instructions requested by appellee and in refusing a number requested by appellant. The record reflects that five instructions were given on behalf of appellee and nine for appellant. We do not discuss each of these instructions separately. It suffices to say that we have carefully examined all and find no error in any of them. They appear to have fully and fairly covered every phase of the case.

Finally, appellant says: "The court's so-called emergency instruction, given of his own motion to the jury after reporting that it failed to reach a verdict, contains clear reversible error, in the following language, to-wit: 'I believe it is a case that you men are capable of going in and sitting down and thrashing the thing out, and doing what you think is right and just in this lawsuit.' "

The vice in the instruction, says appellant, is that, in effect, it gave the jury the power to do "what they think is right and just," when the only power accorded them was " to do what the evidence and the law directs." We are unable to find prejudicial error in this admonition of the court. We cannot agree that the jury, presumably composed of "persons of good character, of approved integrity, sound judgment and reasonable information," (Ark. Stats. 1947, § 39-206) could have been misled, to appellant's prejudice, by such an admonition, the effect of which, it seems to us, was to do no more than to admonish the jury to do what was right and just in the light of all the facts, and instructions previously given. No abuse of the trial court's power has been shown.

In *McNew* v. *Wood,* 204 Ark. 530, 163 S. W. 2d 314, we held: (Headnote 6) "The practical administration of the law requires that trial judges shall have the power to admonish the jury as to the desirability of reaching a verdict," citing *Graham* v. *State,* 202 Ark. 981, 154 S. W. 2d 584.

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

4610 228 S. W. 2d 1003

Opinion delivered April 17, 1950.

L. H. Chastain and *R. B. Chastain,* for appellant.

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

MINOR W. MILLWEE, Justice. Appellant was convicted of the crime of sodomy and his punishment fixed at 5 years in the penitentiary. The victim of appellant's alleged perverted lust was a ten-year-old boy.

The first five assignments in the motion for new trial challenge the sufficiency of the evidence to support the verdict and judgment, and allege error in the overruling of appellant's motion for a directed verdict at the conclusion of the State's testimony.

The evidence on behalf of the state is briefly as follows: On the night of October 7, 1949, Jimmy, the 10-year-old lad, a 13-year-old brother and a neighbor boy attended a carnival in the City of Van Buren, Arkansas. Jimmy was fascinated by the "little ponies" and the employee in charge of the animals permitted the lad to assist him. A "little car" attraction and a merry-go-round were nearby. Appellant who was in charge of the cars, asked the employee in charge of the ponies if Jimmy had been paid for his work. The lad stated that he wanted no pay. Later, appellant said to the boy: "Come around later when nobody is around I will give you some free passes." The boy returned later in the evening when the carnival grounds were practically deserted. A circular curtain had been placed about the merry-go-round which was closed for the night. Appellant enticed the boy into the merry-go-round on the pretext of obtaining the promised passes. The unsuspecting lad was there restrained and the unnatural act perpetrated against his will. During the

course of the bestial transaction appellant bit the boy's penis. Jimmy "hollered" and appellant "let go," whereupon the frightened and injured boy ran home and tearfully told his grandmother: "Oh, the carnival man . . . he ruptured me." The boy's bloodstained underwear was removed and germicides were applied to the broken and bleeding foreskin. Officers were summoned who accompanied Jimmy to the carnival grounds where appellant was identified and taken into custody. The next day a physician found the boy's penis discolored and bruised. The bloody underwear was introduced in evidence at the trial.

Appellant argues that the 10-year-old boy is an accomplice whose testimony is not sufficiently corroborated, under Ark. Stats. (1947), § 43-2116, to support the verdict. We have approved the following test generally applied to determine whether one is an accomplice: "Could the person charged (as an accomplice) be convicted as a principal, or an accessory before the fact, or an aider and abetter upon the evidence? If a judgment of conviction could be sustained, then the person may be said to be an accomplice; but, unless a judgment of conviction could be had, he is not an accomplice." *Simon* v. *State,* 149 Ark. 609, 233 S. W. 917; *Henderson* v. *State,* 174 Ark. 835, 297 S. W. 836. Under Ark. Stats. (1947), § 41-112, an infant under 12 years of age cannot be convicted of any crime or misdemeanor. Since a 10-year-old child could not be convicted of sodomy, he cannot be said to be an accomplice. Moreover, the evidence here is that the infant did not voluntarily participate in the unnatural act and did not consent thereto. Hence, his uncorroborated testimony would support a conviction. *Woolford* v. *State,* 202 Ark. 1010, 155 S. W. 2d 339; *Hummel* v. *State,* 210 Ark. 471, 196 S. W. 2d 594.

As judges of the credibility of the witnesses, the jury believed the testimony offered by the state and rejected appellant's denial of the truthfulness of such testimony. The evidence was sufficient to convict and the trial court correctly overruled appellant's motion for a directed verdict of not guilty.

The sixth assignment of error is that the court erred in allowing the introduction in evidence of certain pictures without being properly identified and without a proper foundation being laid. Tommy Wilbanks, one of the investigating officers, testified on cross-examination by counsel for appellant that he found several pictures of young boys in appellant's billfold when the latter was arrested. Appellant testified that he had no pictures in his possession and denied that he placed them in a letter to be mailed to a person in another state. Vergil Goff, the other arresting officer, then testified that he was present when a letter written by appellant to someone in another state was opened by the chief of police and the pictures removed, and that he read the letter. Appellant objected to testimony concerning the letter on the ground that the letter itself would be the best evidence. The court sustained the objection. The witness then testified that the letter, with the pictures removed, was forwarded to the addressee in another state. Appellant then objected to introduction of the pictures in evidence, "unless Mr. Goff was present when the pictures were taken out of the letter, and can testify to this jury that they came out of that letter." The witness again stated that he saw the pictures removed from the letter but was not present when the letter was actually intercepted by the chief of police. Appellant renewed his objection on the ground that there was no proof connecting him with the pictures. After the objection was overruled, the contents of the letter were for the first time fully developed by appellant's cross-examination of the officer, who testified that the letter stated that appellant was in trouble and that he wanted the pictures "taken care of."

We conclude that the pictures were sufficiently identified as being in appellant's possession and that a proper foundation was laid for their introduction in evidence. Evidence of the contents of the letter, other than the pictures, was brought out by appellant and not the state. Since the letter was sent outside the state and beyond the court's jurisdiction, secondary evidence was admissible to prove its contents. *Ritter* v. *State*, 70 Ark. 472, 69 S. W.

262; *Knego* v. *State,* 171 Ark. 58, 283 S. W. 27; Underhill's Criminal Evidence (4th Ed.), § 104. Introduction of the six "snapshots" was not objected to as an attempt to impeach appellant's testimony on a collateral matter, and that the photographs were not inadmissible on the grounds urged. Again, it was appellant who first developed the facts relative to possession of the photographs on the cross-examination of officer Wilbanks. There is nothing inflammatory or of a prejudicial nature in the appearance of the photographs and the fact that the minimum punishment was assessed tends to negative any prejudicial effect on the jury.

The seventh and last assignment of error in the motion for new trial is that the court in an instruction invaded the province of the jury by commenting on the weight and sufficiency of the evidence. Neither the state nor the appellant requested the giving of any instructions. After the court had fully instructed the jury on its own motion, appellant objected to the following sentence in an instruction given: "Gentlemen, whether the child's penis was bruised or bleeding or not, that would be immaterial, except that the prosecuting attorney has offered that as evidence that the defendant did take it into his mouth." We cannot agree with appellant's contention that the court's statement amounted to a demand that the jury bring in a verdict of guilty, or that it constituted prejudicial comment on the weight of the evidence. In the lengthy instruction from which the sentence is taken the trial court read to the jury Ark. Stats. (1947), §§ 41-813 and 814. The latter section requires proof of actual penetration to sustain the charge. Proof of the boy's injured condition was certainly admissible to establish penetration and the court's limitation of the jury's consideration of such proof was favorable, rather than prejudicial, to appellant. If counsel for appellant thought the verbiage used subject to criticism, he should have prepared a request in more appropriate language. *Redd* v. *State*, 65 Ark. 475, 47 S. W. 119,

Other alleged errors are argued but were not brought forward in the motion for new trial and must be regarded as having been waived. *Collier* v. *The State,* 20 Ark. 36.

The judgment is affirmed.

FOLSOM *v.* WATSON.

4-9175 228 S. W. 2d 1006

Opinion delivered April 17, 1950.

Barber, Henry & Thurman, for appellant.

Talley & Owen and *Max Howell,* for appellee.

GEORGE ROSE SMITH, J. This action was brought by the appellees, four women who were injured in a collision between a car driven by the appellant and a car driven by the appellee Francis Watson and occupied by the other appellees as guests. In his answer the appellant denied any negligence on his part and by cross-complaint asserted a claim against Francis Watson for the damage to his own car. At the close of the testimony the trial

judge directed a verdict against the appellant on his cross-complaint. The issues raised by the plaintiffs' complaint were submitted to the jury, which returned verdicts totaling $2,550 for personal injuries and $723.35 for the damage to the Watson car. Judgments were entered accordingly.

Whether the appellant was negligent and whether the appellees were contributorily negligent were sharply disputed questions of fact. The accident happened in the city of Brinkley on March 24, 1948. The appellees testified that Francis Watson stopped her car upon reaching a through street in Brinkley and entered the intersection at a time when the appellant's car was approaching slowly from their right, about 250 feet away. They attributed the collision to the fact that the appellant increased his speed and drove into their car without attempting to avoid a collision. The appellant said that he was driving at a moderate rate of speed and indicated that the accident was caused by Francis Watson's failure to stop before entering the intersection.

The most serious assignment of error concerns rulings made by the trial court while the appellant was being cross-examined. The appellees' attorney was attempting to show that the appellant had offered to pay for the damage to the Watson car. Without detailing all the objections and exceptions we quote the material parts of the testimony:

"Q. Did you talk to the driver of the automobile or her husband after the wreck?

"A. I might have seen him and I might have told him to come on over to the house and see me.

"Q. Didn't you offer to pay Francis Watson's husband the damages to his car?"

(Objection by appellant's attorney.)

"The Court: This is cross-examination, Mr. Thurman.

"Q. Do you remember making the statement to him to come on in and you would pay him for the damages?

"A. No, sir, never. No, sir, I didn't."

(Renewed objection by appellant's attorney.)

"The Court: I think he is entitled to ask the man if he offered to make a settlement. He testified that he might have said to Francis Watson's husband to come on in and he would take care of the damages, or words to that effect."

We agree with the appellant's contention that these rulings were erroneous and prejudicial. It is familiar law that an offer of settlement is not admissible as evidence of liability. *Hinton* v. *Brown,* 174 Ark. 1025, 298 S. W. 198. Since the law favors the making of settlements without litigation it permits a person to suggest a compromise without thereby admitting that he has been at fault. In this case the question put was improper, but the court first ruled that it was permissible cross-examination. Upon a renewal of the objection the court stated that the witness had testified that he might have told Francis Watson's husband to come in and he would take care of the damages. This summation of appellant's testimony was inadvertently erroneous, for the witness had not admitted an offer to pay the damages. All that he had said was that he might have told Francis Watson's husband to come to the house and see him.

It is natural for a jury of laymen to attach great weight to any remark made by the trial judge. See *Western Coal & Mining Co.* v. *Kranc,* 193 Ark. 426, 100 S. W. 2d 676. In the case at bar the jurors were justified in concluding not only that an offer of settlement was a proper matter for their consideration but also that the trial court interpreted the appellant's testimony as an admission that he had made such an offer. In *Hughes* v. *State,* 70 Ark. 420, 68 S. W. 676, we held that it was reversible error for the trial court to remark that a witness had not said that she was unconscious, when in fact she had testified that she had been rendered unconscious. Here the appellant's liability was a closely contested issue, and we cannot say that the error complained of might not have been a decisive factor in the jury's deliberations.

It is also insisted that the proof supporting the cross-complaint presented questions of fact that should have been submitted to the jury. As the evidence may differ materially upon a new trial we think it unnecessary to discuss this contention.

Reversed and remanded.

ARKANSAS VALLEY COMPRESS & WAREHOUSE CO. *v.* MORGAN.

4-9133 229 S. W. 2d 133

Opinion delivered April 17, 1950.

Townsend & Townsend and *House, Moses & Holmes,* for appellant.

Bailey & Warren, for appellees.

Ed. F. McFaddin, Justice. The principal question posed by this litigation is the validity of a lease made by the City of Little Rock to the appellant, and covering property known as Building No. 19 near the Municipal Airport. Intertwined are also other questions relating to actions, parties, municipal powers, estoppel, and laches.

The litigation—of which this appeal is the fruition—was initiated by a complaint filed in the Chancery Court on April 2, 1948, by W. S. Morgan, as a citizen and taxpayer of the City of Little Rock. Defendants were Arkansas Valley Compress & Warehouse Company (hereinafter called "Arkansas Valley") and the City of Little Rock (hereinafter called "City"). The complaint alleged that on December 31, 1931, the City leased to White Brothers (now Arkansas Valley) certain lands and a warehouse thereon (hereinafter referred to as Building No. 19); that the lease was illegal and void;[1]

[1] The complaint alleged that the said 1932 lease was illegal and void because:

"Plaintiff states that said lease was and is illegal and void, of no effect, and was not binding upon the City of Little Rock nor the citizens of said City of Little Rock including this plaintiff for the rea-

because of constructive fraud; that in 1936 the City and Arkansas Valley amended the original lease but the amendment was also void because of constructive fraud; that Building No. 19 was occupied in 1948 by U. S. Time Corporation and the rental should be paid to the City of Little Rock. The prayer of the complaint was for the cancellation of the lease rights of Arkansas Valley and the receipt by the City of the rentals paid by U. S. Time Corporation.

The City, in its answer, denied that there was any actual fraud connected with the leasing of the property to Arkansas Valley, but admitted that the lease "was an attempted improvident agreement on the part of the City . . .". The City prayed that the Court "grant the relief as prayed in the complaint." Obviously, the effect of this pleading was to array the City on the side of the plaintiff; and this is further demonstrated by the fact that the City is one of the appellees. So we bypass the question of the plaintiff's right to bring the suit. The defendant, Arkansas Valley, after various objections as to parties, etc., filed answer in which it denied all allegations as to fraud or improvidence; affirmatively stated that all contracts had been fairly and legally made; and denied that the City held the property as trustee for the public. By way of cross-complaint, Arkansas Valley claimed that when the Federal Government returned possession of the airport property to the City in 1948, the City failed and refused to return to Arkansas Valley a vacant strip of approximately 72 feet. To this cross-complaint the City pleaded the Statute of Frauds.

sons: (1) that the Board of Public Affairs had no power to execute said lease nor did the City of Little Rock have the power to lease properties obtained by it for public purposes for private use; (2) that the consideration therein stated was grossly inadequate to such an extent as to constitute a constructive fraud on the rights of this plaintiff and the citizens of the City of Little Rock; and (3) that the term of said lease was beyond the power of the City to grant and was for such an unreasonable length of time as to constitute an unconscionable and improvident disposition of the property rights of the City and the rights of this plaintiff and other citizens; and (4) that the effect of said attempted lease was that for a half century the City would abdicate its duty as trustee for the public and obligate itself to suspend for the same time all exercise of its legislative and administrative powers of Government as to this property, which was a constructive fraud upon the rights of the citizens of Little Rock."

The cause was tried upon the issues joined. The evidence is voluminous, including 360 pages of testimony and 61 exhibits. The Chancery decree cancelled all rights of Arkansas Valley to Building No. 19, required Arkansas Valley to account to the City for rentals received after September, 1948, and allowed the City to continue receiving future rentals under the sublease to the U. S. Time Corporation.[2] Arkansas Valley has appealed.

Numerous questions are presented in the excellent briefs, but we discuss only those questions essential to a determination of the issues:

I. *The Evidence as to Fraud in the 1932 Lease and 1936 Amendment.* Courts have always been reluctant to define "fraud" (either actual or constructive) lest man's fertile mind invent a new scheme outside the definition but just as nefarious as previously denounced schemes.[3] So most Courts have stated the elements of fraud rather than an all-inclusive definition. In *Mid-Continent Co.* v. *Hill,* 192 Ark. 667, 94 S. W. 2d 364, Mr. Justice MEHAFFY quoted from Black's Law Dictionary as to the elements of fraud:

"Fraud consists of some deceitful practice or willful device resorted to with intent to deprive another of his right or in some manner do him an injury."

---

[2] Among other statements, the decree recites:

"There is no criticism of anybody for obtaining this lease, in the sense that there is no evidence of actual criminal fraud, but the grossly inadequate consideration which defendant, Arkansas Valley Compress & Warehouse Company, pays the City of Little Rock constitutes a constructive fraud upon every citizen of the City; the defendant, Arkansas Valley Compress & Warehouse Company, took an unconscionable advantage of the City officials of Little Rock, who were trustees of municipal properties, in the term of said lease, as well as the grossly inadequate consideration therefor, and this constitutes a constructive fraud upon each and every citizen and taxpayer of the City of Little Rock.

. . .

"The length of the lease from the City of Little Rock . . . is fifty (50) years. This, in effect, alienates highly useful and valuable municipal property for half a century so that the citizens of Little Rock are deprived of their useful enjoyment thereof for an entire generation. City property should not be tied up for such a length of time, because the welfare of a community demands otherwise, and this is another reason why this lease should be set aside and held for naught."

[3] See 23 Am. Jur. 753.

To the same general effect see Bouvier's Law Dictionary:

"Actual or positive fraud includes cases of the intentional and successful employment of any cunning; deception, or artifice, used to circumvent, cheat, or deceive another. 1 Story, Eq. Jur. § 186."

It is not contended that there was any actual fraud in the transactions here involved. The complaint says the dealings were "a constructive fraud on the rights of the citizens of Little Rock." We come then to the matter of constructive fraud, which—while not defined—has been stated to consist of certain elements. In *Levinson* v. *Treadway,* 190 Ark. 201, 78 S. W. 2d 59, Mr. Justice MEHAFFY said:

"Persons, in order to be guilty of legal or constructive fraud, or, as it is sometimes called, fraud at law, do not necessarily have to be guilty of moral wrong, but a constructive fraud is a breach of either legal or equitable duty which, irrespective of moral guilt of the fraud feasor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or injure public interests. Neither actual dishonesty of purpose nor intent to deceive, is an essential element of constructive fraud. 26 C. J. 1016 and cases cited."

Bouvier's Law Dictionary says:

"Legal or constructive fraud includes such contracts or acts as, though not originating in any actual evil design or contrivance to perpetrate a fraud, yet by their tendency to deceive or mislead others, or to violate private or public confidence, are prohibited by law."

In *Hildebrand* v. *Graves,* 169 Ark. 210, 275 S. W. 524, Mr. Justice HART pointed out that in determining the question of fraud, all the surrounding circumstances are to be considered. Therefore, we examine the evidence in this case to see whether there was any constructive fraud in connection with the 1932 lease and the 1936 amendment.

The testimony shows that because of World War I, the United States Government [4] owned property in Little Rock known as the "Airport Site" on the west side of which was located Building No. 19, a concrete building, approximately 800 feet long and 300 feet wide, and served by two railroad tracks. In 1929 the United States Government offered to lease to the City of Little Rock the entire airport property, including Building No. 19; but the City declined the offer chiefly because of the obligation of maintaining the building. The United States Government then advertised for bids. White Brothers made the best bid and in 1930 leased [5] from the United States Government the entire airport property, including Building No. 19, for five years, with option to renew for five additional years. Under this lease, White Brothers agreed to pay the United States Government $2,400 per year, *and also agreed to maintain Building No. 19 in good condition.*

Some time after 1930 White Brothers organized the Arkansas Valley Compress and Warehouse Company (*i. e.*, "Arkansas Valley") which assumed all obligations of the lease; and White Brothers and Arkansas Valley, for the purpose of this statement of facts, are identical. In 1930, 1931, and 1932 Arkansas Valley spent, for improvements on and maintenance of Building No. 19, a sum of approximately $40,000, and the building was used as a cotton compress and warehouse until World War II.

When Arkansas Valley became the owner of the lease in 1930, it had no need for any of the property, except Building No. 19 and some land contiguous, so Arkansas Valley subleased the airport to the City of Little Rock for an annual rental of $3,000 a year. It will be observed that the City had refused to lease all the property from the Federal Government because it did

[4] In some places it is referred to as the War Department; in others the Bureau of Aeronautics; but, in all events, the property was that of the United States Government; and the various departments of the Federal Government are treated as the United States Government in this case.

[5] This lease, as well as all other instruments executed by the United States Government and mentioned in this opinion, gave the Government the right to resume possession of all the property in the event of war, or other national emergency.

not want to be obligated to repair and maintain Building No. 19, but the City was willing to pay $3,000 a year for the airport.

This arrangement between Arkansas Valley and the City continued until 1931 when the City and Arkansas Valley agreed—subject to approval of the United States Government—to a different arrangement which was considered, at that time, to be beneficial to both Arkansas Valley (because it obtained a longer lease than its original ten year lease) and the City (because it would be out less money for the lease of the airport). The United States Government acquiesced in the new agreement; and the result was that the City, on December 31, 1931, made "the 1932 lease" which is under attack in this suit. This lease provided:

(a)—That Arkansas Valley would surrender its lease to the United States Government on all the airport property, including Building No. 19;

(b)—That the United States Government would then lease all the airport property, including Building No. 19, to the City of Little Rock for twenty-five years, with a renewal option for an additional twenty-five years;

(c)—That the City would pay the United States Government rental of $1,200 per year for nine years, and $1.00 per year thereafter;

(d)—That the City would lease Building No. 19 and a 72 foot contiguous strip to Arkansas Valley for twenty-five years, with right of renewal for an additional twenty-five years; and that the rental paid by Arkansas Valley to the City would be $600 per year for nine years and $1.00 per year thereafter; and

(e)—That Arkansas Valley, as lessee, "shall at its expense, repair and maintain in good condition and working order, and in a manner satisfactory to the Chief of the Air Corps, or other competent military authorities, Building No. 19 in its entirety, and the lessee shall at its expense put on Building No. 19 a new roof of the type now existing thereon whenever, in the opinion of the Sec-

retary of War, a new roof is required, all work hereunder to be done under the general supervision and subject to the approval of the competent military authorities. . . ."

Was there any constructive fraud in this lease? The City had been paying $3,000 a year for the airport, and through the beneficence of the Federal Government and the influence of the Arkansas Congressional Delegation, the City was enabled to reduce its annual rent payments on the airport to $600 per year for nine years, and $1.00 per year thereafter. The City certainly improved its position by this 1932 contract. It is now claimed that Building No. 19 had a much greater rental value in 1932 than the $600 per year that Arkansas Valley agreed to pay. That is questionable. Those who represented the City in 1932 and 1933, when all the banks were closed, said *at that time* that the City was materially benefiting itself by the 1932 agreement.

In all that the City did in executing the 1932 contract, there was a full observance of all legal requirements; and, furthermore, there was the spotlight of publicity on all the negotiations and also on the final terms of the 1932 contract. Headline stories in Little Rock newspapers gave the terms of the 1932 agreement, and also its advantages to the City. These newspaper articles were introduced in evidence in this trial. We quote from one newspaper article which appeared under a headline of December 23, 1931:

"Formal approval was given by the City Council to leases between the City and the War Department, and the City and White Brothers,[6] a cotton firm, for part of the municipal airport property, at a meeting yesterday afternoon. . . . The leases, which will supplant the existing leases controlling the section of the airport owned by the Government, will become effective January 1, and it is expected they will save the City more than $30,000 over a period of nine years. The City will lease the property from the Government and will sublease part

[6] As previously stated, White Brothers and Arkansas Valley are considered identical in the statements herein.

of a large warehouse to White Brothers for twenty-five years. The aldermen spent more than an hour studying the leases yesterday, and Mayor Knowlton said he was convinced the leases are as nearly perfect as possible. The Mayor has been working on the leases for several months. . . ."

The 1932 lease agreement was duly recorded, and continued to govern the parties, until some time in 1936, when a Bill was introduced in the United States Congress, by the terms of which the Government proposed to cancel the 1932 lease and transfer to the City of Little Rock *the title to all of the airport property, including Building No. 19;* but in addition to the usual provision (giving the Government the right to resume possession of the property in the event of war or other national emergency), there was a further provision that prohibited the City from subleasing Building No. 19 or any other part of the airport property. The effect of this Bill would have been to impose on the City of Little Rock all the maintenance cost on Building No. 19, including the sprinkler system. Because of the provision against subleasing, the City and Arkansas Valley persuaded the Arkansas Congressional Delegation (which worked untiringly at all times) to have the pending Bill amended; and this was done, with the result that the City of Little Rock received a deed to all of the airport property and in addition, the City was given the right to sublease Building No. 19 to the Arkansas Valley. The deed from the United States Government to the City of Little Rock was dated July 15, 1936; and the new rental agreement between the City and Arkansas Valley provided that, beginning on that date, Arkansas Valley would pay the City as rent for Building No. 19 and the 72 foot contiguous strip the sum of $3,000 per year for 10 years and $2,500 per year thereafter. All other provisions in the 1932 lease continued in full force, including Arkansas Valley's obligation to maintain and repair Building No. 19.

Thus by the 1936 amendment the City materially improved its position over the 1932 lease: instead of receiving only $600 per year for the remaining four years and

$1.00 per year thereafter, the City was to receive as rent from Arkansas Valley $3,000 a year for ten years and $2,500 per year thereafter. But for the amendment sponsored by the Arkansas Delegation, at the request of the City and Arkansas Valley, the City could not have subleased Building No. 19. The full terms of the 1936 agreement were publicly stated in front page articles in local newspapers. Not only was there an absence of concealment: instead there was public acclaim to those who had represented the City.

We have given in considerable detail the facts and circumstances surrounding the 1932 and 1936 leases, because in none of these facts and circumstances do we detect the slightest evidence of any species of fraud. The evidence offered by the taxpayer in this case was to the effect that Building No. 19 had a much greater rental value in 1936 than $3,000 per year. Saying in 1949 that property had a greater rental value in 1936 (than the parties agreed to) is putting "hindsight in front of foresight." The length of time of the lease may now seem improvident; but we cannot say, in the light of 1932 and 1936, that the City acted improvidently. Even so, mere improvidence is vastly different from constructive fraud; and we find an entire absence of any kind of fraud in the negotiations and contracts mentioned herein.

II. *The Right of the City to Cancel the Lease in the Absence of Fraud.* The appellees, Morgan and the City, insist that—because of the length of time for which the property was leased, the cheap rental of only $3,000 a year, and the present rental of $58,000 per year—the City should have the right to cancel the lease of Arkansas Valley, so the City could receive the net rent from the U. S. Time Corporation. But these matters involve a consideration of the function in which the City acted in dealing with Arkansas Valley and the sanctity of contracts made by a City. The situation in the case at bar is strikingly similar to that in the reported case of *Town of Searcy* v. *Yarnell,* 47 Ark. 269, 1 S. W. 319, which we now review:

In 1871 the Town of Searcy desired to have a railroad to run from Searcy and connect with the Cairo & Fulton Railroad (now Missouri Pacific system) at Kensett. So there was organized a corporation styled "The Searcy Branch Railroad Company" and the Town of Searcy paid for and owned all of the $20,000 of stock of that corporation. In 1877 the Town of Searcy sold the Searcy Branch Railroad to Yarnell for $500 cash and the further consideration that Yarnell would extend the railroad five miles, make substantial improvements, and continue operation. Yarnell performed the promised consideration and expended almost $30,000 in so doing. Then, in 1882, the Town of Searcy instituted suit to cancel the sale of the railroad to Yarnell, and claimed, *inter alia,* that Searcy had never consented to the sale and that Yarnell, "by reason of his position and influence, gained an undue advantage over the town, and that the town was powerless to assert her rights" until the filing of the suit in 1882. In denying the attempt of the Town of Searcy to cancel the 1877 sale to Yarnell, this Court said:

". . . A municipal corporation may be the owner of two classes of property. One class includes all property essential to, or even convenient for, the proper exercise of municipal functions and corporate powers. The other class includes all property held for general convenience, pleasure, or profit. It is needless to inquire into the extent of the rights and powers which a municipal corporation has in and over property of the first-named of these classes. It may well be admitted that such an inquiry would involve grave doubts. But the Searcy Branch Railroad, and all its property and franchises, belonged to the second class, and our inquiry is solely as to that . . . 'Powers granted for private advantages, though the public may also derive benefit therefrom, are to be regarded as exercised by the municipality as a private corporation;' and 'municipal corporations in their private character, as owners or occupiers of property, are regarded as individuals.' . . . The contract of sale being otherwise fair and lawful, both parties having performed their respective parts, the plea of

ultra vires cannot and ought not in equity and good conscience, to avail anything. See *Hitchcock* v. *Galveston,* 96 U. S. 341, 24 L. Ed. 659; and *Union National Bank* v. *Matthews,* 98 U. S. 621, 25 L. Ed. 188."

The foregoing case clearly recognizes that a city (*i. e.,* a municipal corporation) acts in two capacities (*i. e.* a governmental capacity and a proprietary capacity); and that when it enters into contracts involving, not the Government of its citizens, but only the convenience, pleasure, and profit of the people and the City, then the municipal corporation acts in its *proprietary capacity.* Other cases to the same effect are *Fussell* v. *Forrest City,* 145 Ark. 375, 224 S. W. 745, and *Lester* v. *Walker,* 177 Ark. 1097, 9 S. W. 2d 323. In *McQuillin* on "Municipal Corporations," 3 Ed. Vol. 2, § 10.05, this statement appears:

"A municipal corporation has a two-fold character and dual powers, recognized by the federal courts the same as by state courts. The one is variously designated as public, governmental, political or legislative, in which the municipal corporation acts as an agency of the state. The other is variously designated as municipal, private, proprietary, or the like. Herein the former will be referred to as governmental and the latter as private. . . . Governmental powers and functions have been defined as those conferred on a municipal corporation as a local agency of prescribed and limited jurisdiction to be employed in administering the affairs of the state and promoting the public welfare generally. . . . Private, often referred to as municipal or proprietary, functions and powers are those relating to the accomplishment of private corporate purposes in which the public is only indirectly concerned, and in which the municipal corporation, in their exercise, is regarded as a legal individual. Private functions are those granted for the specific benefit and advantage of the urban community embraced within the corporate boundaries. All functions of a municipal corporation not governmental are said to be strictly private. When acting as a private corporation a municipal corporation may claim its rights and immunities, and is subject to its liabilities." (See

also Dillon "Municipal Corporations," 5 Ed. § 109, *et seq.*)

In the case at bar the City of Little Rock, in its dealings concerning Building No. 19, was acting in a proprietary rather than a governmental capacity. The United States Congress,[7] in authorizing the transfer of the property to the City of Little Rock in 1936, required that all the property be used "by the municipality for public purposes, except what is known as Building No. 19 thereon covered by existing lease. . . ." This quoted language constituted Congressional recognition of the fact that the City would use Building No. 19 in a proprietary, rather than a governmental capacity; and the clear effect of all of our cases is that when a situation exists, as in the case at bar, the City, in leasing a building and collecting rent, acts in a proprietary and not a governmental capacity.

When a city makes contracts in its proprietary capacity, the city is bound the same as any private corporation or citizen would be. In *Town of Searcy* v. *Yarnell, supra,* we quoted from *Bailey* v. *Mayor of New York,* 3 Hill 531, 38 Am. Dec. 669.

" 'Powers granted for private advantages, though the public may also derive benefit therefrom, are to be regarded as exercised by the municipality as a private corporation;' and 'Municipal corporations in their private character, as owners and occupiers of property, are regarded as individuals.' "

In 62 C. J. S. 246 this is stated as the general rule:

"In respect of its purely business relations as distinguished from those that are governmental, a municipal corporation is governed by the same rules, and is held to the same standard of just dealing, that the law prescribes for private individuals or corporations, and is clothed with the same full measure of authority over its property that private corporations and individuals enjoy, . . ."

See, also, 37 Am. Jur. 729.

[7] See 49 Stat. at L. 1292, 74th Cong. Sess. II, Ch. 404, May 15, 1936.

It is obvious that a private corporation or an individual could not avoid a contract, either on the claim that it was for a long time or that it was for what afterwards proved to be a small consideration. In 9 Am. Jur. 359 the rule is stated:

"Mere inadequacy of price, improvidence, surprise, or hardship, unaccompanied by any element of fraud, mistake, or illegality, or even impossibility of performance, will not, however, furnish basis for interposition of equity by way of cancellation or rescission. Moreover, if parties make contracts upon contingencies uncertain to both, with equal means of information, and there is no fraud, the courts cannot undertake to set such contracts aside. . . ."

And in 12 C. J. S. 970 this appears:

"In the absence of fraud or other inequitable factors a court of equity will not rescind a contract for inadequacy of consideration, improvidence, or hardship."

Some of the cases in which this Court has refused to allow a municipality or a county to rescind a contract on the claim of inadequacy of consideration are: *Little Rock Chamber of Commerce* v. *Pulaski Co.*, 113 Ark. 439, 168 S. W. 848, and *Washington Co.* v. *Lynn Shelton Post*, 201 Ark. 301, 144 S. W. 2d 20.

So in the case at bar, what is said to be an improvident contract in the light of present rental values, must nevertheless stand as a valid contract, else there would never be any sanctity to contracts made by a municipality when acting in a proprietary capacity. The appellees cite and rely on *State* v. *Baxter*, 50 Ark. 447, 8 S. W. 188; but that case is not applicable to the case at bar for several reasons, two of which are: (a) in State v. Baxter actual fraud was shown, whereas no fraud of any kind is shown in the case at bar; and (b) in State v. Baxter the County attempted to dispose of land that it held in trust for a County Court House site. The County, in holding that land, was acting in a governmental capacity, as distinct from a proprietary capacity.

It would unduly extend this opinion to cite and discuss the scores of cases listed in the excellent briefs

in the case at bar. We conclude this section of the opinion by announcing our holding that under the law and evidence in this case, the City is not entitled to cancel the Arkansas Valley lease.

III. *Arkansas Valley's Cross-complaint.* Contiguous to Building No. 19 there is a parcel of ground about 72 feet wide and several hundred feet long. This ground was leased to Arkansas Valley, along with Building No. 19. In 1943 the United States Government proposed to construct a large warehouse on this ground if the City would surrender title and possession of this 72 foot strip. Accordingly, Arkansas Valley released its interest in this strip to the City, conditioned that the City would deed the strip to the United States Government, and the building be constructed. The release of the possession of the strip by Arkansas Valley was thus conditional. The City never deeded the property to the Government, and the proposed building was never constructed; but the City has refused to return the possession of the 72-foot strip to Arkansas Valley. The cross-complaint of Arkansas Valley was to regain possession of the 72-foot strip and against the cross-complaint the City of Little Rock pleaded the Statute of Frauds.

In passing on this cross-complaint the learned Chancellor stated:

"With reference to the cross-complaint filed by the defendant, asking that a strip of about 72 feet and of considerable length be returned to them, this strip was given to the Federal Government by both the City and the defendant with the idea that a large building might be constructed and this ground would be needed. The building did not materialize and in the event the ruling of this court, in regard to the lease, should be reversed, the defendant, Arkansas Valley Compress & Warehouse Company should regain the use of this strip of land."

Since we are reversing the Chancery decree on the main question of the 1932 lease and 1936 amendment, it necessarily follows that Arkansas Valley is entitled to repos-

session of the 72-foot strip; and a decree should be so entered by the Chancery Court.

IV. *Negotiations for Increased Rentals.* During World War II the United States Government took possession of all of the airport property, including Building No. 19, and constructed an additional (*i. e.* second) floor on a portion of Building No. 19. After the United States Government returned the airport property to the City, and the City returned Building No. 19 to Arkansas Valley the City began negotiations with Arkansas Valley for additional rent because of the enlargement of Building No. 19 by the United States Government. While these negotiations were being conducted, the appellee, Morgan, filed this taxpayer's suit which necessarily suspended the correspondence. We presume that the negotiations will be resumed after this litigation is concluded; and we point out that nothing in this opinion is to be considered as an expression concerning the rights of either party in the matter of increased rentals because of enlargement of the building.

CONCLUSION

The decree of the Chancery Court is reversed and the cause remanded, with directions to enter a decree dismissing the complaint of the plaintiff and the prayer of the City, and awarding Arkansas Valley relief on its cross-complaint.

FAUSETT & COMPANY, INC., *v.* BULLARD.

4-9153 229 S. W. 2d 490

Opinion delivered April 24, 1950.

Rehearing denied May 29, 1950.

Moore, Burrow, Chowning & Mitchell, for appellant.

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

George Rose Smith, J. The appellees, W. T. and Allene Bullard, brought this suit to recover damages resulting from misrepresentation made by the appellant's agents in connection with the sale of a dwelling house in Little Rock. This appeal is from a judgment entered upon a verdict for $4,463.

The appellant is a corporation engaged in buying and selling real estate. In April of 1948 it owned the house in question and advertised it for sale. For several months the house had been occupied by E. L. Fausett, president of the company. The appellees saw the advertisement and began negotiations that led to their purchasing the property on April 26, for $16,500. Bullard testified that twice during the negotiations he inquired about conditions underneath the house, as the front of the house was so low that the floor was almost even with the yard. On both occasions Fausett replied that his

crew had been under the house doing some work and it was in excellent condition. Mrs. Bullard corroborated her husband's testimony as to one of these occasions, while Fausett denied having made the statements attributed to him.

After the Bullards took possession they found that the floors vibrated noticeably. In July, Bullard crawled under the house and found a state of serious deterioration and disrepair. These conditions need not be described, as the amount of the verdict is not questioned.

Appellant's principal contention is that it was entitled to a directed verdict. It is insisted that the theory by which the case was allowed to go to the jury is erroneous in two respects.

First, the appellant contends that the proof does not show that Fausett knew his statements about the house to be untrue. It is argued that since the representations were made in apparent good faith there can be no liability in an action at law for deceit.

There was certainly a time in the early development of the common law when the plaintiff in an action of this kind had to prove a conscious and deliberate intention to deceive on the part of the defendant. But since those early decisions it has long been settled that representations are considered to be fraudulent if made by one who "either knows them to be false, or else, not knowing, asserts them to be true." *Hunt* v. *Davis,* 98 Ark. 44, 135 S. W. 458; *Brown* v. *LeMay,* 101 Ark. 95, 141 S. W. 759; *Whaley* v. *Niven,* 175 Ark. 839, 1 S. W. 2d 3. The best statement of the reasons underlying the stricter rule has been made by Williston: "The inherent justice of the severer rule of liability which in some cases at least holds a speaker liable for damages for false representations, though his intentions were innocent and his statements honestly intended, is equally clear. However honest his state of mind, he has induced another to act, and damage has been thereby caused. If it be added that the plaintiff had good reason to attribute to the defendant accurate knowledge of what he was talking about, and the

statement related to a matter of business in regard to which action was to be expected, every moral reason exists for holding the defendant liable." Williston on Contracts (Rev. Ed.), § 1510.

Second, it is earnestly urged that the appellees were not entitled to rely on Fausett's statements, not only because they had an equally good opportunity to make an inspection but also because Bullard made some inquiries of third persons before he bought the property. The appellant relies chiefly on this language in *Yeates* v. *Pryor,* 11 Ark. 58, decided in 1850: "If the means of information are alike accessible to both, so that, with ordinary prudence or vigilance, the parties might respectively rely upon their own judgment, they must be presumed to have done so; or if they have not so informed themselves, must abide the consequences of their own inattention and carelessness."

This quotation pretty well summarizes the doctrine of *caveat emptor,* but it has not been applied inflexibly to every situation. There are many circumstances that justify the buyer in acting upon the seller's statements, even though there is an opportunity to discover their falsity. For instance, in *Brown* v. *LeMay,* 101 Ark. 95, 141 S. W. 759, the seller represented that a tract contained 35 acres when in fact there were only 30.9. Of course the buyer could have ascertained the truth by having the land surveyed, as she did later on. Nevertheless we upheld a judgment for damages, it being shown that the seller knew that his statement was being relied upon. In *Myers* v. *Martin,* 168 Ark. 1028, 272 S. W. 856, it was held that the buyer may credit the statements of a seller who has peculiar knowledge of the subject-matter of the sale.

In this case Fausett was engaged in the business of buying and selling houses. He had been living in this house for a number of months. He said that his crew had been under the house and it was in excellent condition. In view of these circumstances the trial court correctly refused to declare as a matter of law that the Bullards were not entitled to trust Fausett's assurances. "The

recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation. . . . The rule . . . applies not only where an investigation would involve an expenditure of effort and money out of proportion to the magnitude of the transaction but also where it could be made without any considerable trouble or expense.'' Rest., Torts, § 540.

Nor are the appellees precluded from recovery merely because Bullard made some inquiries about the house. The court instructed the jury that the appellees could not recover if they relied upon information obtained from other sources and not upon Fausett's representations. This theory of the case was correct. ''It is not enough to relieve the maker of a fraudulent representation from liability that the person to whom it is made makes an investigation of its truth. It is necessary that the other shall rely upon his investigation and shall not rely upon the false statement.'' Rest., Torts, § 547.

Various errors are assigned in the giving and refusal of instructions, but they all relate to the matters already discussed. The judgment is affirmed.

GOGGIN *v.* RATCHFORD.

4-9181 229 S. W. 2d 130

Opinion delivered April 24, 1950.

N. J. Henley, Henley & Henley and *J. F. Koone,* for appellant.

W. F. Reeves, for appellee.

DUNAWAY, J. The validity of a stock-law election in Big Creek Township in Searcy County is presented for our determination. Suit was filed by appellee Ratchford and others, as citizens and owners of livestock in said township, against appellant Goggin and others, as Election Commissioners, and Lawrence Weaver, as County Clerk, to have quashed the certificates of the Election Commissioners and the County Clerk certifying the approval by the voters of Big Creek Township of the annexation of said township to an adjoining stock-law district previously formed. The Chancellor held the election void and the defendants have appealed.

On July 19, 1948, a petition was filed in the office of the County Clerk of Searcy County signed by seventy-eight persons who represented themselves to be qualified electors of Big Creek Township. The number of signers exceeded seventy-five per cent of the total votes cast for Governor at the General Election in said township in November, 1946. The petition prayed that the County Court order an election on the question of restraining livestock in said township, the proposal to be voted on at the General Election in November, 1948. Petitioners further

asked that Big Creek Township be annexed to the adjoining stock-law district already in existence, if approved by the voters.

From the record it appears that the petition was never presented to the County Court and no order was made by the County Court placing the question on the ballot. However, at the time of making up the ballot for the General Election, the Election Commissioners checked the petition, found that it bore the required number of signatures of qualified electors, and placed the proposal on the ballot. Notice of the General Election was given as required by law; the Sheriff's proclamation for the election included notice that the stock-law question would be on the ballot.

At the election 126 votes were cast on the stock-law issue, of which 86 were in favor of restraining livestock and 40 votes were opposed to the proposal. The County Clerk thereafter entered his certificate in the County Court record declaring the stocklaw proposal adopted.

In appellees' suit, filed February 19, 1949, it was alleged that the election was void because there was no order of the County Court authorizing submission of the question to the electors as required by law. Appellants' answer admitted that there was no order of the County Court calling the election, but set forth the facts already stated in this opinion. Appellees filed a demurrer to the answer, which was sustained by the Chancellor on two grounds: (1) Section 10 of Act 156 of 1915 (Ark. Stats., 1947, § 78-1411) under authority of which the election was held, was repealed by implication by Act 368 of 1947; as a result of which there is now no authority for holding an election for the annexation of a single township to a stock-law district. (2) Failure of the County Court to make an order calling the election was a jurisdictional defect which rendered the election void, even assuming § 10 of Act 156 of 1915 still in effect.

The court accordingly held the election void and ordered that the certificates of the results thereof be quashed.

A brief review of the relevant legislative acts dealing with stocklaw districts will facilitate an understanding of the questions we must decide.

Act 156 of 1915 authorized formation of stock-law districts upon petition to the County Court of twenty-five per cent of the qualified electors of three or more townships in a body. The procedure to be followed and form of ballot were prescribed in the first three sections of the Act. Sections 4, 5, 6 and 7 had to do with the taking up of estrays where stock-law districts had been created, and the assessment of damages done by such estrays, together with allowable costs to be taxed. Sections 8 and 9 related to the fencing of railroad rights-of-way and driving livestock along public highways. Section 10 provided that where three or more townships had been formed into a stock-law district as provided in the Act, any township or group of townships that would be "a contiguous whole to the unit thus formed, may be attached to and become a part of said unit, in the same way and manner as herein provided for in the first instance . . ."

A number of counties were specifically exempted from the provisions of the Act. Searcy County, however, was not one of these. This Act, as amended by Act 257 of 1919, appeared as § 335 *et seq.* of Pope's Digest. Since certain named counties are exempted from the Act, it is a local act under Amendment 14 to the Arkansas Constitution, adopted in 1926. For discussion of "Special and Local Acts in Arkansas" see 3 Ark. Law Review, p. 113.

By Act 368 of 1947, the General Assembly specifically repealed §§ 335, 336, 337, 338 and 346 of Pope's Digest. The provisions of Act 368 of 1947, which was a general law for the formation of stock-law districts in the entire state, appear in Ark. Stats. (1947) § 78-1401 *et seq.* Those sections of Pope's Digest (§§ 5, 6, 7, 8, 9, 10 of Act 156 of 1915) not specifically repealed by the 1947 Act are included in Ark. Stats. (1947) §§ 78-1405 through 78-1411.

The procedure for the initial formation of a stock-law district composed of three or more townships, is practically indentical under the 1947 act with that under the repealed sections of Act 156 of 1915. Unless § 10 of the latter act (Ark. Stats., 1947, § 78-1411) remains unrepealed, there is no provision in our statutes for the addition of a single township to an existing stock-law district.

While it is true that local or special acts may not under Amendment 14 be amended, *Benton* v. *Thompson,* 187 Ark. 208, 58 S. W. 2d 924, repeal of only part of a local or special act is permissible. *Gregory* v. *Cockrell,* 179 Ark. 719, 18 S. W. 2d 362; *Johnson* v. *Simpson,* 185 Ark. 1074, 51 S. W. 2d 233.

Repeal of statutes by implication is not favored, *Faver* v. *Golden, Judge,* 216 Ark. 792, 227 S. W. 2d 453. It is only where a later general act covers the whole subject matter included in a prior special act, so that it is evident that the Legislature intended to make the new act contain all the law on the subject, that the earlier act will be held to have been repealed by implication. *King* v. *McDowell,* 107 Ark. 381, 155 S. W. 501. Here the Legislature specifically enumerated the sections of Act 156 of 1915 which were repealed by Act 368 of 1947. The other sections of the 1915 Act are carried forward by the digesters in Ark. Stats. as still being in effect. Since § 10 of Act 156 of 1915 is the only provision in the law authorizing the annexation of single townships to stock-law districts; and since this subject matter was not covered by the 1947 Act, we have concluded that the Legislature did not intend its repeal.

It is argued that repeal of the first three sections of the 1915 Act, which prescribed the procedure to be followed in creating stock-law districts, left § 10 of that Act without any mechanics for achieving the annexation of a single township. As already pointed out, the procedure under Act 156 of 1915 and that provided for in Act 368 of 1947 is without substantial difference. The Legislature has simply substituted the procedure provided for in the later general act as that to be followed in filing

petitions for the annexation of a single township under § 10 of the earlier act. Since this section is part of a special or local act, such annexations can only be effected in counties covered by Act 156 of 1915; and annexations of single townships can only be made to districts already in existence when Act 368 of 1947 was passed. See *Wright* v. *Raymer,* 165 Ark. 146, 263 S. W. 385.

We also hold that failure of the County Court to enter an order calling the election did not invalidate the election which was in fact held. In upholding a stock-law election where the notice thereof was not given in accordance with the statutory requirements, we said in *Whitaker* v. *Mitchell,* 179 Ark. 993, 18 S. W. 2d 1026, at p. 997:

"In the case of *Wallace* v. *Kansas City Sou. Ry. Co.,* 169 Ark. 905, 279 S. W. 1, we quoted from the case of *Hogins* v. *Bullock,* 92 Ark. 67, 121 S. W. 1064, 19 Ann. Cas. 822, the following quotation from the Supreme Court of Indiana:

" 'All provisions of the election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose, but after election all should be held directory only, in support of the result, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or unless it is expressly declared by the statute that the particular act is essential to the validity of an election, or that its omission shall render it void. *Jones* v. *State,* 153 Ind. 440, 55 N. E. 229.'

"So here the statutory provisions were mandatory in the sense that compliance with them could have been coerced before the election, but, as the notice which was given, while not complying with the statute, appears to have been sufficient to apprise the great body of the electors of the fact that the election would be held, and they have participated therein, we are constrained to affirm the action of the chancellor in upholding the election."

In the case at bar, it is admitted by appellees' demurrer that petitions signed by the required number of elec-

tors were filed with the county clerk; that the county judge knew of the petition but arbitrarily or through negligence failed to act upon it; that notice of the election was given; that a greater total of votes was cast on the stock-law question than was cast for most candidates on the ballot; that the proposed annexation was approved by a vote of more than two to one.

It is urged that an order by the County Court is jurisdictional under our decisions in *Fesler* v. *Eubanks,* 143 Ark. 465, 220 S. W. 457 and *State* v. *Phillips,* 176 Ark. 1141, 5 S. W. 2d 362. See, also, *Wright* v. *Baxter,* 216 Ark. 880, 227 S. W. 2d 967. In those cases it was held that where an order of the County Court calling a stock-law election showed on its face that the required number of electors had not signed the petition, there was such a jurisdictional defect as would void the election. It was the filing of a petition bearing the requisite number of signatures that we held to be jurisdictional. In the case at bar it is admitted that this was done. After the jurisdictional requirement of filing the proper petitions is met, the ordering of the election by the County Court is merely a ministerial act. *Patterson* v. *Adcock,* 157 Ark. 186, 248 S. W. 904.

The reasoning in the *Whitaker* case, *supra* is decisive in the instant case.

The decree is reversed and the cause dismissed.

McGarrah *v.* State.

4605 229 S. W. 2d 665

Opinion delivered April 24, 1950.

Rehearing denied June 5, 1950.

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

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

Ed. F. McFaddin, Justice. Appellant, Edgar McGarrah, was tried on an information charging him with the murder of Franklin Holloway. The uncontradicted facts established that appellant was playing a game of pool with Billy Bridges; that Holloway, Lem McGarrah (appellant's brother) and others were seated nearby and watching the game; that conversation was passing between the participants and the onlookers; that just after appellant had made a good shot and won the game, Hol-

loway arose and took a step; and that appellant struck Holloway on the head with the pool cue, inflicting a skull fracture from which death ensued a few hours later.

It was the State's theory that appellant inflicted the blow because of previous animosity and a declared intention to "get even." It was the appellant's theory that Holloway had a knife, or some weapon, in his pocket and was being aided by Lem McGarrah; that the two were advancing on Edgar McGarrah to inflict injuries, and that appellant struck the blow in necessary self-defense. The jury's verdict evidently adopted a middle ground theory, supported by the evidence, to the effect that Holloway arose to leave the pool hall and that Edgar McGarrah, in a sudden heat of passion, struck Holloway without provocation. From a conviction of voluntary manslaughter there is this appeal.

I. *Continuance for Absent Witness.* The information was filed on May 17, 1949. On October 10th the Court set the case to be tried on October 27th. Appellant had a subpoena issued for the witness Davis, and learned that he was in California. On October 12th appellant's counsel at Fayetteville *wrote* the Prosecuting Attorney at Berryville, suggesting the taking of the deposition of Davis in California; but no interrogatories were enclosed in the letter. On October 20th the Prosecuting Attorney went to Fayetteville and, with appellant's attorney, prepared the interrogatories which were forwarded to California. When the deposition had not been returned on October 27th, appellant moved for a continuance.

The motion was overruled; and we see no abuse of discretion committed by the Trial Court. The burden was on the appellant to exercise due diligence to obtain the testimony of the absent witness. Appellant had from May until October to get the deposition. Instead of writing a letter on October 12th (15 days before the trial), appellant could have had the interrogatories prepared and personally delivered to the Prosecuting Attorney. In short, we fail to find the exercise of due diligence by appellant, and so we refuse to say that the Trial Court

abused its discretion in overruling the motion. See *Jackson* v. *State,* 94 Ark. 169, 126 S. W. 843; *Miller* v. *State,* 94 Ark. 538, 128 S. W. 353; *Joiner* v. *State,* 113 Ark. 112, 167 S. W. 492; and *French* v. *State,* 205 Ark. 386, 168 S. W. 2d 829.

II. *Continuance on Account of Illness of Counsel.* Appellant had retained the law firm of Sullins & Perkins to represent him. Mr. Sullins was ill at the time of the trial and continuance was sought for that reason. But Mr. Perkins ably represented the defendant; and such representation made continuance unnecessary. See *Maloney* v. *State,* 181 Ark. 1035, 27 S. W. 2d 94; *Curtis* v. *State,* 89 Ark. 394, 117 S. W. 521; and *Holmes* v. *State,* 144 Ark. 617, 224 S. W. 394.

III. *Exclusion of Testimony.* The defense offered to prove by Dr. Harrison that on one or two occasions the deceased, Franklin Holloway, had been brought to the Doctor in a delirious condition which the Doctor thought had been occasioned by acute alcoholism; and that at such times the deceased was violent and had to be restrained. The Trial Court excluded the proffered testimony on the theory that the witness had acquired his information as a result of the confidential relationship of physician and patient. See *James* v. *State,* 161 Ark. 389, 256 S. W. 372. We prefer to sustain the exclusion of the proffered evidence, because it was irrelevant. The defendant testified:

"Q. Let me ask you this: did you think he was having a 'spell' that night?

"A. No, I didn't have time to think anything."

Since apprehension of Holloway having a "spell" was not the cause of the defendant striking the deceased, the evidence of "spells" was entirely irrelevant. We need not consider whether the evidence was competent against the objection that it was an effort to show general reputation by specific incidents.

Furthermore, the Court allowed other witnesses to testify as to the "spells" the deceased suffered, so the testimony of Dr. Harrison could only have been cumula-

tive; and the Trial Court has discretion to limit the number of witnesses whose evidence is cumulative. See *Sheppard* v. *State,* 120 Ark. 160, 179 S. W. 168, and *Cole* v. *State,* 156 Ark. 9, 245 S. W. 303.

IV. *State's Instruction No. 11.* The Court gave this instruction:

"The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve upon the accused, unless by the proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide."

The appellant objected to this instruction, claiming that it shifted the burden of proof to the defense; and the appellant asked that these words be added at the end of the instruction:

"But the burden of proof is on the State in the whole case to convince you beyond a reasonable doubt of the guilt of the defendant."

The instruction, as given, is in the exact language of the Statute (§ 41-2246, Ark. Stats. 1947); and such an instruction has been discussed by this Court in numerous cases, some of which are listed in the Annotation immediately following the Statute, and other cases are cited in *Gaines* v. *State,* 208 Ark. 293, 186 S. W. 2d 154. The refusal of the Trial Court to add the additional words requested is justified, because the Court, in other instructions, stated that the burden of proof was on the State. Instruction No. 4 advised the jury as to the presumption of innocence; Instruction No. 5 was on reasonable doubt; and Instruction No. 21 told the jury that the burden was on the State to convince the jury beyond a reasonable doubt that the defendant was guilty. In *Thomas* v. *State,* 85 Ark. 357, 108 S. W. 224, the same contention was made as here; and the Court's opinion in that case, delivered by Mr. Justice Battle, is ruling in the case at bar.

V. *Refusal to Instruct on Involuntary Manslaughter.* The Court ruled that the evidence was insufficient to sustain a charge of first degree murder, and instructed the jury on second degree murder and voluntary manslaughter. The defendant requested an instruction on involuntary manslaughter and claims error because it was refused. Assuming, but not deciding, that the requested instruction was correctly and fully worded, and also conceding that an instruction on involuntary manslaughter should generally be given in a homicide case like the one at bar, nevertheless we hold that there was no error in refusing to give the instruction in this case. When an instruction on involuntary manslaughter should be given in a homicide case, is a question that has been considered in many of our cases, a few of which are:

Ringer v. *State,* 74 Ark. 262, 85 S. W. 410; *Scott* v. *State,* 75 Ark. 142, 86 S. W. 1004; *Edwards* v. *State,* 110 Ark. 590, 163 S. W. 155; *McGough* v. *State,* 119 Ark. 57, 177 S. W. 398; *Black* v. *State,* 171 Ark. 307, 284 S. W. 751; *Deatherage* v. *State,* 194 Ark. 513, 108 S. W. 2d 904; *Cook* v. *State,* 196 Ark. 1133, 121 S. W. 2d 87; *Bailey* v. *State,* 206 Ark. 121, 173 S. W. 2d 1010; and *Hearn* v. *State,* 212 Ark. 360, 205 S. W. 2d 477.

In *Ringer* v. *State (supra),* as well as in *Scott* v. *State (supra),* the accused killed a third party while attempting to defend himself against an assailant, whereas in the case at bar the accused killed the man whom he claimed was his assailant, so there was no mistake as to the victim. In *Edwards* v. *State (supra)* the accused threw at the deceased a small stick of wood (which the Court said was not calculated to produce death), whereas in the case at bar the accused struck the deceased on the head with the heavy end of a pool cue and with such force that the stick broke. In *Deatherage* v. *State (supra)* an officer shot a prisoner, and the question was the limit to which the officer could go in repelling an attack by a prisoner, whereas in the case at bar neither of the parties was an officer. The facts in the case at bar distinguish it from these four cases (*i.e.* Ringer, Edwards, Scott and Deatherage) and bring it within our holding in the McGough, Black and Bailey cases, *supra.*

In *Bailey* v. *State,* 206 Ark. 121, 173 S. W. 2d 1010, we said:

". . . We hold that the trial court was correct in refusing to charge on involuntary manslaughter. The defendant intended to shake the deceased off of the car, and he committed the homicide. Involuntary manslaughter applies where the homicide is unintentional. That cannot apply here. In *McGough* v. *State,* 119 Ark. 57, 177 S. W. 398, the appellant had committed a homicide and claimed that the jury should have been instructed on involuntary manslaughter. This court, speaking through Chief Justice McCulloch, said: 'According to the undisputed testimony, the death of Ferguson resulted from the voluntary act of appellant in firing the gun at him. That being true, the question of involuntary manslaughter is not involved. Where death results from a voluntary act, and the killing was intentional and resulted from means calculated to produce death, the crime is voluntary manslaughter or some higher degree of criminal homicide. It is not involuntary manslaughter. Wharton on Homicide (3 Ed.), § 6.'

"That quotation finds full application here. The defendant, by his own voluntary act, committed the homicide, and, therefore, it could not be involuntary manslaughter. In Warren on Homicide (Permanent Edition), § 86, it is stated: 'The killing is not unintentional where the defendant intentionally did an act, the natural consequence of which would endanger life, on the principle that one is presumed to intend the natural consequences of his act, although he intended only to disable the deceased.' "

In the case at bar the jury was told that if it believed the appellant acted in necessary self-defense, it would acquit him. The fact that the punishment assessed was five years—rather than the minimum of two years for voluntary manslaughter [1]—shows the jury did not believe the theory of self-defense. If appellant did not act in self-defense, then he was guilty of voluntary manslaughter.

[1] See § 41-2299, Ark. Stat. (1947).

CONCLUSION

In addition to those assignments discussed, we have also examined all the other assignments in the motion for new trial, and find none justifying a reversal.

Affirmed.

STORY *v.* CHEATHAM.

4-9172 229 S. W. 2d 121

Opinion delivered April 24, 1950.

Walter L. Brown, L. B. Smead and *Henry B. Whitley,* for appellant.

A. A. Thomason, for appellee.

MINOR W. MILLWEE, Justice. Appellants are the five children and two minor grandchildren of John Story, deceased. As the sole heirs of said deceased, appellants filed this suit in the Columbia Chancery Court against

Emma Story, widow of John Story, deceased, and the other appellees to cancel certain conveyances between said appellees covering a 175-acre tract of land, and for an accounting of rents and other receipts from certain oil and gas leases on said land.

The complaint filed by appellants alleged the death of John Story and his ownership of the 175-acre tract; that in September, 1939, after the death of John Story, the Citizens Bank of Magnolia instituted proceedings to foreclose a deed of trust executed by John Story and Emma Story in his lifetime; that a decree of foreclosure was entered on September 30, 1940, and the lands sold to said Citizens Bank at the foreclosure sale which was confirmed on January 22, 1941; that while said sale was awaiting confirmation, on January 11, 1941, Emma Story, at the direction of appellees, A. R. Cheatham and Henry Stevens, executed and delivered the following instruments: (1) a deed of trust to secure $1,000 in notes to Cheatham and Stevens, (2) a deed conveying 1/7 of the royalty from the lands to the Citizens Bank, and (3) a mineral deed conveying ¼ of the minerals in said lands to Cheatham and Stevens; that on January 22, 1941, the Citizens Bank executed its quitclaim deed to the 175-acre tract to Emma Story; that the bank accepted the 1/7 royalty deed from Emma Story and the sum of $170 cash in complete satisfaction of the mortgage debt; that the obligation evidenced by the $1,000 in notes and deed of trust was paid to Cheatham and Stevens by appellants, or some of them, by the proceeds of a portion of the royalty from said land.

It was further alleged: "That by the above procedure a trust resulted in favor of these plaintiffs as beneficiaries thereof, and the defendants, Henry Stevens and A. R. Cheatham having directed each step, had notice thereof, and the other defendants had knowledge thereof, or by the exercise of reasonable diligence could have had sufficient knowledge thereof to have determined the true ownership of the above lands.

"That Emma Story received no consideration whatever for the execution and delivery of said mineral deed

to A. R. Cheatham and Henry Stevens, and had no title to convey, which was well known to the defendants, or by the exercise of reasonable diligence, the defendants could have known she had no title except dower and homestead; that these plaintiffs received no consideration whatever for the execution and delivery of said mineral deed to Stevens & Cheatham, and derived no benefit whatever therefrom; that said deed is void and is a cloud upon plaintiff's title, and should be cancelled, set aside and held for naught."

The prayer of the complaint was that the legal title to the lands be divested out of Emma Story and vested in appellants, subject to the dower and homestead rights of the widow; that the mineral deed executed by Emma Story to Cheatham and Stevens together with other deeds subsequently executed be set aside as clouds upon appellants' title; for an accounting and judgment for rentals and other sums received from any oil and gas lease covering said lands.

On September 20, 1949, appellees, Henry Stevens and wife, filed an answer and "Separate Motion for Judgment upon the Pleadings." Other appellees, except Ray Kelley and C. M. Lewis, subsequently adopted the pleadings filed by Henry Stevens and wife. The motion for judgment upon the pleadings asked that the cause be dismissed on the following grounds: "(a). The confirmation proceedings in the foreclosure sale became *Res Judicata* as to the plaintiffs alleged cause of action herein; (b) The pleadings disclose that the plaintiffs alleged cause is barred by the statutes of limitations applicable in the premises; (c). The alleged cause of plaintiffs herein constitutes a collateral attack upon the foreclosure proceedings and particularly the confirmation of the sale, as reflected by the pleadings in this alleged cause of action."

On September 28, 1949, the court sustained appellees' motion for judgment on the pleadings, dismissed plaintiffs' complaint for want of equity, but allowed 30 days for additional pleadings. On November 29, 1949, appellants filed a motion to set aside the judgment dismissing

their complaint which was denied on the same date. This appeal is from both the order dismissing appellants' complaint for want of equity and the second order denying their motion to set aside the judgment dismissing their complaint.

The learned chancellor treated the motion for judgment on the pleadings as a demurrer which was sustained and the complaint of appellants dismissed. The only question, therefore, on appeal is whether the complaint stated a cause of action against the appellees. We have frequently held that pleadings under the code are to be liberally construed and every reasonable intendment is to be indulged on behalf of the pleader in determining whether a cause of action is stated. *Geyer* v. *Western Union Telegraph Co.,* 192 Ark. 578, 93 S. W. 2d 660.

The gist of the complaint is that Emma Story, widow of John Story, deceased, under the facts alleged held the bare legal title to the 175-acre tract in controversy as trustee for appellants, and that the transactions alleged amounted to a redemption of the lands from the foreclosure sale for the benefit of appellants as owners of the equitable title. In *Gaines* v. *Saunders,* 50 Ark. 322, 7 S. W. 301, a widow acquired the legal title to her deceased husband's property under facts somewhat similar to those alleged in the instant case and the court held that a trust resulted in favor of the heirs of the husband. The court said: "When Mrs. Saunders acquired the title to the lands in controversy a trust resulted to the heirs of John H. Saunders, deceased, and she held them in trust for the heirs subject to any lien, she may have, on account of money expended in paying off encumbrances, and to any dower and homestead interest she may have in them, and to the payment of the debts against the estate of her intestate; and she continues to hold in that way, so far as the record shows, if the appellants are not entitled to protection as *bona fide* purchasers without notice." See, also, *West et al.* v. *Waddill,* 33 Ark. 575.

In *Krow & Neumann* v. *Bernard,* 152 Ark. 99, 238 S. W. 19, the court held, Headnote (1): "Where land be-

longing to minor heirs was sold under a mortgage executed by their mother, from whom they inherited, a purchase of the land by their father within the period of redemption from the purchaser at the foreclosure sale was tantamount to a redemption by the father for the benefit of such minor heirs."

It is not certain from the allegations in the complaint in the case at bar whether the equity of redemption under the mortgage expired upon confirmation of the sale or prior thereto. In the recent case of *Jermany* v. *Hartsell*, 214 Ark. 407, 216 S. W. 2d 381, we held that the mortgagor's equity of redemption is not extinguished until confirmation where the foreclosure decree provides that title shall be foreclosed and barred "upon the sale of said lands . . . and confirmation thereof."

As to the plea of limitations set up in the motion for judgment on the pleadings, the situation here is similar to that in *Mortensen* v. *Ballard*, 209 Ark. 1, 188 S. W. 2d 749, where we said: "It is possible that, under the facts pertaining to the situation here involved, appellant's cause of action, if any he had, is barred by laches, staleness or limitation. But these facts do not appear from the complaint and are matters of defense which must be raised by answer rather than by demurrer." Moreover, two of the appellants are alleged to be minors and their cause of action could not be held to be barred under the Statute (Ark. Stats. 1947, § 37-226).

We cannot agree with appellee's contention that it appears from the face of the pleadings that the instant suit is a collateral attack upon the foreclosure proceedings insofar as the appellees are concerned. While a development of the facts may sustain this conclusion, appellants assert the validity of the foreclosure proceedings and say that they are relying thereon to sustain their cause of action which did not arise until such proceedings had terminated. Nor do the pleadings on their face show that the foreclosure suit involved the same parties and controversy as involved here, so as to constitute a bar to the instant suit under the doctrine of *res judicata*. *Hatch* v. *Scott, Adm'x*, 210 Ark. 665, 197 S. W. 2d 559.

When the facts stated in the complaint are considered, together with all reasonable inferences to be deduced therefrom, we conclude that a cause of action was stated, and that the trial court erred in sustaining the motion for judgment on the pleadings. The decree is, therefore, reversed and the cause remanded with directions to overrule said motion and for such further proceedings as may be necessary in accordance with the principles of equity.

[redacted]

WERBE *v.* HOLT.

4-9173 229 S. W. 2d 225

Opinion delivered April 24, 1950.

Rehearing denied May 22, 1950.

[redacted]

J. R. Crocker, O. E. Williams and *Thomas F. Butt,* for appellant.

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

George Rose Smith, J. This is a will contest by which the appellants seek to set aside for undue influence an instrument that was probated as the will of F. C. Werbe. By this will the entire estate was devised to the appellee, who was Werbe's housekeeper for several years preceding his death. The appellants are the decedent's heirs at law, though there is some controversy among them as to their respective rights if the will be set aside. That controversy we do not now decide. At the close of the contestants' testimony the appellee filed a motion for judgment before submitting her own proof. The probate judge sustained the motion, and this appeal is from his dismissal of the contest.

We need not detail the evidence, for our decision must rest upon a matter of procedure. It is enough to say that the appellants' proof tended to show that F. C. Werbe was suffering from heart trouble and other maladies when he signed the questioned will, that the appellee had attempted to dominate her employer in the management of his property, had intercepted his mail, had prevented his relatives from visiting in his home, had obstructed his attempt to deed property to his foster son, etc. Several of these assertions were made by implication rather than by direct testimony. When the appellee moved for judgment the trial judge stated that he thought the contestants had failed to establish undue influence by a preponderance of the evidence. For that reason he dismissed the contest without hearing the appellee's witnesses.

Our decision involves two procedural questions of first impression. We must treat the appellee's motion for judgment as having been filed under the authority of Act 470 of 1949 (Ark. Stats., 1947, § 27-1729, as amended). That Act provides that in any chancery case the defendant may, at the close of the plaintiff's case, file a written motion challenging the sufficiency of the evidence to warrant the relief prayed. If the trial court grants the motion and we reverse his action on appeal,

we are required by the Act to remand the cause for the development of the defendant's proof.

The first question is whether Act 470 applies to proceedings in the probate courts. By its terms the Act is applicable only to cases in chancery, but the Probate Code provides: "Procedure and rules of evidence in Probate Courts, except as in this Code otherwise provided, shall be the same as in courts of equity." Ark. Stats., § 62-2004. Act 470 undoubtedly governs procedure in courts of equity, and by the Code the legislature has declared that the probate courts are to follow equity procedure. We think it perfectly clear that Act 470 does apply to probate proceedings.

The second and more difficult question is this: When the defendant in an equity or probate case asks for judgment at the close of the plaintiff's testimony, should the trial judge view the evidence in the light most favorable to the plaintiff to determine whether a *prima facie* case has been made, or should he weigh the testimony to decide whether the plaintiff has proved his case by a preponderance of the evidence? In short, does a motion filed under Act 470 present an issue of law or of fact? In the case at bar this question is of primary importance, for the appellants' proof was undoubtedly sufficient to raise a jury question had the suit been tried in a circuit court. But if the problem is where the preponderance lay, a much closer question is presented.

Forceful arguments are advanced to support each suggested construction of Act 470. For the appellee it is said that the trial judge must eventually weigh the evidence in any event; why should he not do so at the first opportunity? The appellants answer that reason and authority back their contention that the motion raises only an issue of law regarding the sufficiency of the plaintiff's case.

After a painstaking study of this matter we are unanimously of the opinion that the motion presents a question of law and not of fact. The General Assembly evidently chose its language with care, and what the

motion challenges is "the sufficiency of the evidence" to warrant the relief prayed. The quoted phrase has a familiar legal meaning—a meaning that does not involve the weighing of evidence. For instance, it is often said that the defendant's motion for a directed verdict in suits at law challenges "the sufficiency of the evidence" to take the case to the jury. Here the legislature has used a phrase of well known legal signification, and it is presumed to have used the language in that sense. *Fernwood Mining Co.* v. *Pluna,* 138 Ark. 459, 213 S. W. 397.

The history of this statute confirms our interpretation of the legislative intention. For more than a century one difference between the practice at law and that in equity was that in a law case the defendant could test the sufficiency of the plaintiff's evidence by moving for a directed verdict when the plaintiff rested. In equity the defendant did not have this option. He was required to rest his own case before asking judgment, so that such a motion at the close of his adversary's proof involved the relinquishment of his right to call his own witnesses if the motion should be denied.

The first suggestion that the practice in equity had been changed to conform to that at law was made after the passage of Act 257 of 1945 (Ark. Stats., § 27-1729, as it read before the 1949 amendment). That Act provided that in equity, at the close of the plaintiff's case, the defendant might file a written demurrer setting forth any defenses that could previously have been raised by that pleading. In *Kelley* v. *Northern Ohio Co.,* 210 Ark. 355, 196 S. W. 2d 235, we held that the 1945 Act did not enable the defendant to demur to the plaintiff's evidence. We pointed out that a demurrer to the evidence has always been unknown to our practice and that by its language the Act allowed the defendant to raise only such questions as could previously have been presented by a demurrer.

By its express terms the 1949 Act is an amendment of the 1945 legislation. We said in the *Kelley* case that the earlier Act did not introduce into our practice the

demurrer to the evidence, but the General Assembly has now declared in unmistakable language that the defendant in an equity case may by written motion challenge "the sufficiency of the evidence" offered by the plaintiff. It is evident that the legislature meant to change the rule of the *Kelley* opinion and bring the equivalent of a demurrer to the evidence into our equity procedure.

What, then, is the effect of a demurrer to the evidence or a similar pleading in jurisdictions recognizing that practice? The question may arise either in equity cases, where the chancellor is the arbiter of the facts, or in cases tried at law without a jury, where also the trial judge decides all issues of fact. By the overwhelming weight of authority it is the trial court's duty, in passing upon either a demurrer to the evidence or a motion for judgment in law cases tried without a jury, to give the evidence its strongest probative force in favor of the plaintiff and to rule against the plaintiff only if his evidence when so considered fails to make a *prima facie* case. Among dozens of cases that might be cited are *Smith* v. *Russell,* 76 F. 2d 91 (C.C.A. 8); *First Nat. Bk.* v. *Northwestern Nat. Bk.,* 152 Ill. 296, 38 N. E. 739, 26 L. R. A. 229, 43 Am. St. Rep. 247; *Wolf* v. *Washer,* 32 Kan. 533, 4 P. 1036; *Butler County* v. *Boatmen's Bk.,* 143 Mo. 13, 44 S. W. 1047; *Weston Elec. Inst. Co.* v. *Benecke,* 82 N. J. L. 445, 82 A. 878. The minority view, which permits the trial judge to weigh the evidence is well stated in *Porter* v. *Wilson,* 39 Okla. 500, 135 P. 732.

We think the majority rule reaches much the better result. The American courts have always followed the theory of an adversary trial. In such a trial the parties are placed on equal terms and each develops his own proof by his own witnesses, though of course the party having the burden of proof must establish a *prima facie* case before his opponent need go forward with the evidence. The minority conception of a demurrer to the evidence is contrary to the traditional procedure in adversary trials, since the defendant is given an advantage. He has the opportunity of twice submitting the case to the trier of the facts. A comparable rule in jury cases

would permit the case to go to the jury at the close of the plaintiff's case, but if the jury found for the plaintiff the verdict would then be set aside so that the defendant could present his evidence and enjoy a second chance to receive a favorable verdict. Furthermore, in many instances the plaintiff's *prima facie* case must necessarily be somewhat weak, for the reason that only the defendant himself may be able to supply details needed to complete the picture. If the case goes to the trier of the facts on the plaintiff's proof alone, the defendant has the advantage of not exposing weaknesses in his own armor unless called to the witness stand by his adversary. For these reasons we have no hesitancy in adopting the majority rule as to the function of a demurrer to the evidence.

In this case the trial court sustained the defendant's motion on the ground that undue influence had not been shown by a preponderance of the testimony, even though the appellants had made a case that would have to be submitted to the jury in an action at law. The judgment is accordingly reversed and the cause remanded for further proceedings.

MOTORS INSURANCE CORPORATION *v.* LOPEZ.

4-9185 229 S. W. 2d 228

Opinion delivered April 24, 1950.

Rehearing denied May 22, 1950.

Barber, Henry & Thurman, for appellant.

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

LEFLAR, J. Plaintiff Lopez recovered judgment in the Circuit Court on a policy of automobile collision insurance issued to him by defendant insurance company, and defendant appeals.

Plaintiff's car was overturned and wrecked while he was driving it. The loss fell clearly within the coverage of defendant's policy, and defendant's adjuster was sent promptly to check on the amount of the loss. Plaintiff met the adjuster at a garage to which the wrecked car had been towed. They looked over a 4-page list of repair items prepared by the garage operator, the proposed cost of which totaled $873.72, then plaintiff signed a "Loss or Damage Agreement" prepared by the adjuster, the gist of which was that he agreed that the sum of $873.72, minus $56 under the deductible clause and for tire betterment, should constitute the full amount of his claim. A short while after the adjuster departed plaintiff, according to his own testimony, talked with the garage operators and was told by them that even after his car received the repairs contemplated it would not be in as good condition as before the wreck, that anybody would

be able to tell that it was a wrecked car, and that it would never again be as good a car as it had been before the wreck. Plaintiff at once got in touch with the adjuster, telling him that he repudiated the settlement figure on the theory that under the policy the insurer was permitted to repair the automobile or its parts, rather than pay the actual amount by which the car was damaged in money, only if the result would be "of like kind and quality" as the vehicle before the wreck. This was without question in accordance with the actual provisions of the policy.

The insurer refused to reconsider the amount to be paid under the policy. Plaintiff then brought this action claiming that the car was worth $1,850 before the wreck and $400 after the wreck so that, with $50 off under the deductible clause, he was entitled to $1,400 under the policy, plus interest, 12 per cent penalty and an attorneys' fee. (Ark. Stats., § 66-514.) At the trial before a jury the insurer relied upon the "Loss or Damage Agreement," contending that plaintiff was bound by it, and also contended that actual damage to the wrecked car did not exceed the amount of the cost of proposed repairs as originally calculated. The jury's verdict was for the plaintiff in all respects, and judgment was rendered against defendant for the $1,400 claimed, together with the statutory 12 per cent penalty and a $350 attorneys' fee.

The first matter to be considered is appellant insurer's contention that the "Loss or Damage Agreement" was a settlement contract binding upon the plaintiff. That "Agreement," after setting forth the amount of damage settled upon, contained these words:

"The sole purpose of this instrument is to fix and evidence the total amount for which claim is made. This instrument is, and is intended to be binding as to the total amount of loss or damage said to have occurred under the policy. This instrument is not an acceptance of liability by Motors Insurance Corporation, hereinafter referred to as the Corporation, does not commit the Corporation to payment of said claim and does not in any

sense waive any of the conditions or provisions of the policy of said Corporation. Furthermore, upon, in the event, and in consideration of the payment of the above amount by the Corporation, the undersigned hereby agrees to release and discharge the Corporation from any and all liability under its policy for said loss and/or damage, and the undersigned further agrees to hold the Corporation, its successors or assigns, free and harmless from further claim for the loss described."

The terms of this "Agreement" of course show that it is not a contract, and is not by itself intended to be a contract. It is designed "to fix and evidence" the amount of the claim, and purports to bind the insured to the amount thus fixed and evidenced, but it does not purport to bind the insurer at all. It expressly declares that the insurer is bound to nothing by it, is not committed to the making of any payment whatever. No consideration moving from the insurer, in return for the insured's agreement to limit his claim to the amount set, is even recited. No promises are made by the insurer. The only consideration referred to, on the insurer's side, is the payment to be made if and when and in the event that the insurer chooses or is compelled to pay on the policy. This one-sided undertaking is not a contract in any legal sense. It lacks the mutuality which is required by the most elementary principles of our law. *Eustice* v. *Meytrott,* 100 Ark. 510, 140 S. W. 590; Restatement, Contracts, § 80; 1 Williston, Contracts, § 103, *et seq.*

Appellant insurer urges, however, that we have held otherwise, and cites *Cash* v. *Home Life Ins. Co.,* 197 Ark. 670, 125 S. W. 2d 99, as holding that an identical loss and damage agreement was valid. It is true that the agreement in the *Cash* case was substantially identical with that here involved, and that it was held valid, but there is one significant difference in the facts. This difference is that in the *Cash* case the insurance company had already made the payment agreed upon. Once the payment was made by the insurer the one-sided conditional agreement of the insured was turned into an exe-

cuted contract. The payment was the consideration for the insured's undertaking to limit his claim.

In the present case, in contrast, the payment was never made. The insured withdrew his unilateral agreement to accept it in full satisfaction of his claim before payment could be tendered. Thereafter it was not even an offer for a contract; it was merely evidence for the jury to consider, along with the other evidence that was available, on the proper amount of the insured's claim.

Much of appellant insurer's argument on this appeal is based on the assumption that the "Loss or Damage Agreement" was a contract binding on the insured, to be set aside only if insured established fraud or overreaching in its procurement. Since it was not a contract at all, questions as to sufficiency of evidence of fraud to justify setting it aside, and the propriety of instructions directed to that issue, need not be considered.

The other main issue in the trial below was presented on the proper theory that the "Loss or Damage Agreement" was not controlling. This issue was as to the amount of actual damage to the Lopez car—whether it was $873.72 as contended by the Company, or $1,450 as contended by the insured, or some other amount. There is in the record substantial evidence fixing the damage at the higher amount, and it cannot be seriously contended that this evidence is not adequate to support the jury's verdict for the full amount claimed by plaintiff.

One other question remains to be discussed. This is whether the Circuit Judge improperly admitted hearsay evidence when he allowed plaintiff Lopez to testify that the garage operators told him, at once after he signed the "Loss or Damage Agreement" prepared by defendant's adjuster, that after his car received the repairs contemplated it would not be in as good condition as before the wreck, that anybody would be able to tell it was a wrecked car, and that it would never again be as good a car as it had been before the wreck. If this evidence was received or considered by the jury for the

purpose of establishing the truth of what was asserted in it, that is, for the purpose of proving the extent to which the car was damaged, it was inadmissible hearsay, and prejudicial error was committed in allowing it to go to the jury. If on the other hand the mere fact that the statements were made to and heard by Lopez was itself relevant to some issue in the case, and the jury was restricted to consideration of the statements on that issue solely, there would be no violation of the hearsay rule. See 2 Ark. L. Rev. 26. A statement made out of court is not hearsay if it is given in evidence for the purpose merely of proving that the statement was made, provided that purpose be otherwise relevant in the case at trial. 5 Wigmore, Evidence, § 1361; 6 *Ibid.*, § 1770.

At once after plaintiff Lopez gave the testimony in question, and appellant's attorney objected, the Circuit Judge told the jury:

"Now, gentlemen of the jury, that doesn't go to the extent of the damage. That is the matter that must be proven by direct testimony of witnesses. This testimony goes to the attitude of the plaintiff in his dealings with the insurance company. In other words, it has been stated by the insurance company that they offered to settle with him for a certain sum. This testimony is admitted to you for his reason for not accepting that sum. Now, the extent of the damage to this car will still have to be proved by the plaintiff by witnesses who know what that damage is and not by hearsay. This testimony will not be considered by you as going to the actual damage to the car, but goes to the reason for the plaintiff not accepting the eight hundred and whatever dollars it was offered in settlement of his claim for damages."

After a further statement by counsel, the Judge repeated his extemporaneous instruction. He used one ambiguous sentence, "It goes to the matter of repair and not to the extent of the damage." But he followed this sentence with the further explanation: "Now then, this testimony goes to the question of why the car was not

repaired and not the extent of the damage. I don't know whether I have made myself clear to you or not, but the plaintiff must prove his damage and this testimony will not be considered by you as going to the amount of damage."

A similar situation was presented in *Sovereign Camp Woodmen of the World* v. *Cole,* 192 Ark. 268, 90 S. W. 2d 769. There a double defense had been raised by the insurance company: (1) that plaintiff was not totally disabled, and (2) that proof of disability had not been furnished by the plaintiff to the insurer. Plaintiff offered in evidence the affidavits of three physicians, previously filed by them with the insurer, each of which was to the effect that the insured was totally and permanently disabled. The trial judge admitted the affidavits in evidence on the issue of whether proof of disability had been furnished to the insurer, but at the same time admonished the jury that they should not consider the physicians' affidavits as proof of disability. In sustaining the trial judge's action, Judge FRANK G. SMITH said, "They were admitted for the purpose of showing that proof of disability had been made. Restricted to this purpose, the testimony was competent." If the jury had been allowed to consider the affidavits as evidence of the plaintiff's condition of being totally disabled, the statements made out of court would have been used to prove the truth of the very matter asserted in them, and would have been inadmissible hearsay.

The same idea was expressed by HART, J., in *Mason* v. *Bowen,* 122 Ark. 407, 413, 183 S. W. 973, 975, Ann. Cas. 1917D, 713: "It seems to be well settled, both by text-writers and the decisions of courts of the various states, that the statements and declarations of a testator, whether made before or after the execution of a will, are not competent as direct or substantive evidence of undue influence, but are admissible to show the mental condition of the testator at the time of making the will. When the condition of the testator's mind is the point of contention, statements or declarations of the testator are received as external manifestations of his mental condition and not as

evidence of the truth of the things he states. If offered to prove an external act, such as undue influence or fraud, such statements or declarations are merely hearsay and are liable to all the objections to which mere declarations of third parties are subject.'' *Accord: Kennedy* v. *Quinn,* 166 Ark. 509, 266 S. W. 462.

If the jury had been allowed to consider, on the issue of the amount of damage to his car, the testimony of plaintiff Lopez as to what the garage operators told him about the worth of the proposed repairs, the hearsay rule would have been violated. But the Circuit Judge specifically and forcefully told the jury that they should not consider the evidence on that issue. Their consideration of this testimony was limited to the secondary issue of what happened at the time the ''Loss or Damage Agreement'' was signed and then repudiated. In view of the instructions given we hold that there was no reversible error.

The judgment of the Circuit Court is affirmed.

GRIMES *v.* CARROLL.

4-9159 229 S. W. 2d 668

Opinion delivered May 1, 1950.

Rehearing denied June 5, 1950.

James H. Nobles, Jr., and *E. B. Kimpel, Jr.,* for appellant.

Abbott & Abbott, for appellee.

HOLT, J. A brief history of the background of this litigation reveals that in 1927, E. L. and L. A. Grimes executed their note in the amount of $1,666.66,—secured by a deed of trust on 80 acres of the land involved here, —to J. P. Harris. Thereafter, Harris pledged this note and security to appellees,—retail grocers in El Dorado,— to secure a debt of $1,157.69 which he owed appellees. April 9, 1930, upon default, appellees brought foreclosure proceedings against Harris and E. L. and L. A. Grimes. No final decree was taken, but during the pendency of this action, an adjustment was arranged whereby the Grimes on May 6th, 1930 executed a note for $1,514.14 to Dr. W. B. Johnson, due January 1, 1931, and as security a deed of trust on the above 80 acres together with an additional 40-acre tract. The above foreclosure suit against Harris and E. L. and L. A. Grimes was dismissed without prejudice on May 6, 1930, the same day on which the note and deed of trust were executed to Johnson. The Grimes defaulted on their note to Johnson and on February 19, 1931, Johnson assigned said note and security to appellees, who on February 25, 1931, filed suit to foreclose. March 23, 1931, this latter suit was dismissed and on this same day E. L. and L. A. Grimes executed to appellees the two instruments involved here, an unconditional warranty deed to the 120 acres above for a consideration of $1,605.62 and on the same date, an option contract to repurchase for $1,605.62 within two years.

January 26, 1949, the Grimes brought this suit, alleging, in effect, that the warranty deed and "option" of March 23, 1931, above, constituted, when taken together, an equitable mortgage to secure a subsisting debt, that they had an oral agreement with appellees, at the time, that if the Grimes failed to exercise their option within the two year period, then the parties would resume the relationship of mortgagors and mortgagees, and appellees would take possession of the land and credit the

Grimes with rents and profits until the debt was fully paid.

Appellees answered with a general denial and specifically pleaded as a bar, laches and limitations. From a decree in favor of appellees is this appeal.

Since the decree, E. L. Grimes having died, the cause has been properly revived in the name of the Adiministrator of his estate.

Appellants thus state the issues: "Two, and only two, important questions of law are determinative of this case. First; whether or not the transactions herein involved constitute a mortgage; and second: if they did constitute a mortgage, whether or not plaintiffs are barred by laches or limitations from claiming the property."

After a review of the record presented, we have reached the conclusion that, in the circumstances, appellants have delayed too long in bringing suit and are barred by laches. It therefore becomes unnecessary to decide their first contention above.

In addition to the above facts, it appears that at the time of the execution of the deed and option in question, the land involved had a market value of from $10 to $12 per acre, and when the present suit was filed, the value, due to nearby oil activities, had increased to about $150 per acre.

Appellees took, and have held possession from 1933 (following the expiration of the two year option period) to the present time and have paid all taxes since the execution of the deed and option. Appellants have paid nothing on the debt, and moved from the property to Pine Bluff some time in 1933, and appear not to have lived in Union County since. Appellants at no time between 1933 and the date the suit was filed in 1949, asked for any report or accounting from appellees.

It further appears that the attorney, John Carroll, who handled the above transactions between appellees and appellants died in 1936, and Dr. Johnson, to whom the last deed of trust, above, was executed by appellees,

died about the same year, approximately 13 years before this suit was begun, and in the meantime, as pointed out, the property here has increased in value from about $12 per acre to $150. So for about 16 years, appellants have stood by and have shown a complete lack of diligence in asserting any rights that they might have had. Because of appellants' long and unreasonable delay, appellees have been denied the testimony of both attorney Carroll and Dr. Johnson as to all the facts relating to the above transactions.

"Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. More specifically, it is inexcusable delay in asserting a right; an unexcused delay in asserting rights during a period of time in which adverse rights have been acquired under circumstances that make it inequitable to displace such adverse rights for the benefit of those who are bound by the delay; such delay in enforcing one's rights as works disadvantage to another; such neglect to assert a right as, taken in conjunction with lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity; an implied waiver arising from knowledge of existing conditions and an acquiescence in them; acquiescence in the assertion of adverse rights and undue delay on complainant's part in asserting his own, to the prejudice of the adverse party." 30 C. J. S., p. 520, § 112.

"The doctrine of laches is founded on the equitable maxims of 'he who seeks equity must do equity' and 'equity aids the vigilant.' Hence while there is a great variety of cases in which the equitable doctrine is invoked, each case must depend upon its own particular circumstances and courts of equity have always discouraged laches and delay without cause. * * * It is well settled, however, that he, who, without adequate excuse delays asserting his rights until the proofs respecting the transaction out of which he claims his rights arose are so uncertain and obscure that it is difficult for the court to determine the matter, has no right to relief.

So where on account of delay the adverse party has good reason to believe that his alleged rights are worthless or abandoned, where because of the change in condition or relations of the property and parties during the period of delay it would be an injustice to allow the complainant to assert his rights, or in case of intervening equities, it is generally held that laches is a bar to the relief if sought. *Casey* v. *Trout,* 114 Ark. 359, 170 S. W. 75; *Finley* v. *Finley,* 103 Ark. 58, 145 S. W. 885; *Tatum* v. *Arkansas Lumber Co.,* 103 Ark. 251, 146 S. W. 135; *Davis* v. *Harrell,* 101 Ark. 230, 142 S. W. 156; *Rhodes* v. *Cissell,* 82 Ark. 367, 101 S. W. 758; *Williams* v. *Bennett,* 75 Ark. 312, 88 S. W. 600, 112 Am. St. Rep. 57; *Thomas* v. *Sypert,* 61 Ark. 575, 33 S. W. 1059; and *Gibson* v. *Herriot,* 55 Ark. 85, 17 S. W. 589, 29 Am. St. Rep. 17, 444.

"Judge Brewer, who afterwards became an Associate Justice of the Supreme Court of the United States, said while on the circuit, 'No doctrine is so wholesome, when wisely administered, as that of laches. It prevents the resurrection of stale titles, and forbids the spying out from the records of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant, that he make known his claims. It gives to the actual and larger possessor security, and induces and justifies him in all efforts to improve and make valuable the property he holds. It is a doctrine received with favor because its proper application works out justice and equity and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many.' *Naddo* v. *Bardon,* 51 Fed. 493, 2 C. C. A. 335." *Norfleet* v. *Hampson,* 137 Ark. 600, 209 S. W. 651.

We also said in *Daniels* v. *Moore,* 197 Ark. 727, 125 S. W. 2d 456: "Appellants should be denied a recovery on account of their inexcusable delay in bringing their suit. The first deed to the 40-acre tract was executed in 1922 and the second in 1923 and according to appellants' contention the debt was paid in 1926. This suit was not filed until September 25, 1937, more than fifteen years after the execution of the deed and more than

eleven years after the time when appellants claimed that J. B. Moore was paid for his services. J. B. Moore died in 1926 and appellees herein have been deprived of his testimony as to the true nature of the original transactions and because of appellants' delay it has, of course, become difficult for the Moores to prove just what the original transactions were. On account of this unnecessary delay and the loss of the testimony of J. B. Moore who might speak relative to the original transactions the doctrine of laches should be applied."

Accordingly, the decree is affirmed.

THE AETNA LIFE INSURANCE COMPANY *v.* MAY.

4-9143 229 S. W. 2d 238

Opinion delivered May 1, 1950.

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

Bates, Poe & Bates, for appellee.

GRIFFIN SMITH, Chief Justice. Litigants sought answer to the plaintiff's assertion that a life insurance policy had been wrongfully terminated. From a jury's verdict requiring consideration of confusing and inconsistent equations—involving calculations from which one moderately versed in mathematics would retreat, and in respect of which an expert could only state a conditional result—the defending insurer has appealed.

The $2,000 policy on the life of Maurice Marion May was issued November 18, 1926, when he was 18 years of age. He died April 30, 1948. Mrs. Dora E. May, the insured's mother, had on frequent occasions looked after her son's business and claimed to have made some of the premium payments.

On March 18, 1945, the Company mailed Maurice its statement that on the premium anniversary February 18 of that year the unused loan value was $23.44. Applied as a payment on the annual requirement of $41.74, the available loan fund would extend the policy to September 11, 1945. Supplementing this notice, the Company wrote the insured on August 11th, saying the full loan value would be exhausted with use of the small balance previously mentioned, and that $18.30 would be

needed to complete the annual premium payment. It was then stated that this balance, if unpaid after 31 days from the date of notice, would work a forfeiture. The expression was that the policy would "cease". But [said the writer] "We offer any possible assistance to aid you in retaining the benefits of this policy, and will gladly furnish you with any information you may desire".

On September 22d the Company wrote that through failure to pay the premium balance the policy had lapsed. Blanks for use in applying for reinstatement were enclosed. These, said the letter, should be filled out and returned with $18.30. Further word was not received during the insured's lifetime, but on the day of death an interested relative wrote for information. This suit followed the Company's prompt disclaimer of liability.

Witnesses called by the defendant testified that if the 1945 premium had been fully paid when due February 18th the available loan value would have been $744. This does not appear to be contradicted; but appellee insists that the then loan value was $23.44 plus interest overcharges and other items of credit not shown on the statements rendered by the Company and that these were factors not taken into consideration by appellant when the forfeiture was declared. The Company's right to add interest to a borrowed sum is conceded, but it is insisted that with failure to pay this item the interest cannot be added to the capital loan and become a part of the principal for the purpose of charging future interest, for this, says appellee, would be equivalent to paying "interest on interest on interest", contrary to the principle announced in *Vaughan et al.* v. *Kennan,* 38 Ark. 114. For example, appellee concedes that a premium loan of $41.74 was made February 18, 1935, but maintains that the annual interest should have been computed to the policy anniversary (November 18) and set aside as a separate debt of $1.67 for the nine-months period, but that it should not be added to the principal for the purpose of becoming interest-bearing.[1] The Vaughan-Kennan case is discussed *infra.*

[1] When the policy was issued the basis of payment was quarterly premiums of $10.44. The insured later requested that, beginning with February, 1927, the annual basis be established with payments of $41.74.

According to the Company's records its first loan was for a part of the premium due February 18, 1933—$30.30. The difference of $11.44 was paid with cash or by check. During the co-called "depression years" small money installments were accepted. These, in some instances, shifted the payment dates; but they did not affect the anniversary.

By April, 1939, according to Company records, loan indebtedness recognized by and acquiesced in by the insured was $213.36, including interest. At that time a consolidated loan was made. By adding the premium of $41.74 due for carrying the risk to February, 1940, the amount was $255.10. The 1941 premium was paid by check.

On March 23, 1942, the insured asked for a loan of $492.57. The application included a request that the premium due February 18 of that year be included and that "previous loan indebtedness with accrued interest thereon" be deducted. The loan was to bear interest at 6%, payable on policy anniversaries, ". . . and I acknowledge said amount, with any interest that may accrue, to be an indebtedness to said Company on account of said policy. . . . When any interest on this loan becomes due and is not paid [it] may be added to and become a part of the principal indebtedness evidenced by this agreement, and subject to the same rate of interest".

The cause of action alleged in the complaint of August 27, 1948, was twofold: (a) the wrongful declaration that loan values were insufficient to maintain the policy beyond September 11, 1945, and (b) the Company's rejection of the insured's offer to pay a premium. The indebtedness was said to have been substantially less than loan values.

It was not charged that the loan of March, 1942, was for an erroneous sum or that the note was fraudulently procured; neither was it contended that its execution was the result of mutual mistake. At trial there was an attempt to prove by Mrs. Dora May (the decedent's mother) that on March 17, 1933, she sent the Company $10.44 to be applied on her son's policy, and that credit

was not given. When asked whether she had searched for the original check, Mrs. May replied: "I haven't looked for a check of any kind. I have just kept a record of most everything, and I let somebody else more competent than I hunt up all of these checks".

The Court then addressed this question to the witness: "In your bank account, Mrs. May (March 17, 1933) it shows an item—that a check was drawn on your account for $10.44. Do you know whether that check was issued to the Aetna Company in payment of the policy of Maurice May? You may answer yes or no, then you give any explantion you see fit". A. "I will say 'yes', but you are not going to get me twisted up". Q. "Do you have any personal recollection of that check" A. "No, sir, I do not". Question by the Court: "Do you know of your own knowledge that *that* payment was sent to Aetna [to apply] on the policy of Maurice Marion May?" A. "You get me right back where you started with me. I know it wasn't paid on mine because I didn't have anything like that".

If it should be held that examination of the account should start back of the 1942 note, the vice of this evidence is that Mrs. May admitted that she knew nothing about the bank entry except that she did not at the time in question make a payment on her own policy; but she *assumed* that the entry stood for a check to the Company. In short, merely because the bank account was charged with an amount equal to a quarterly premium on the son's policy, she was confident the entry stood for such a check, although quarterly payments had not been the custom. Beginning with February, 1927, premiums were on an annual basis. The Company's records showed that in February, 1933, a premium loan of $30.30 was made and that the difference was paid in cash; yet fifteen years later Mrs. May thought the bank's charge "must have been" for the check she did not remember sending for her son.

Illustrating the difficulty encountered in going back of the settlement made by the insured in 1942, attention is called to Mrs. May's contention that a check for $18.76

sent the Company August 22, 1935, was intended as a payment on the son's account. Here, again, the witness did not remember the transaction. Semiannual payments on her own policy were $18.27 until she attained age 60, when they were reduced to $17.67. Due dates were the 23d of January and July with a grace period of 31 days. The payment in question—claimed by the Company to have been made for herself—was within the grace period. But, said Mrs. May, a penciled notation "Maurice" was found in the lower left-hand corner of the check. The witness thought it very likely that when her statement came from the bank she saw the check and at that time marked "Maurice" on it. A question by the Court was: "Very probably the notation was not written at the time the rest of the check was written?", and Mrs. May replied, "It might not have been—I am not positive about that; but I know I wrote it afterwards when it came back. If I had written the same for mine, I wouldn't have forgotten about it in a month's time".

When a question relating to the $10.44 check was again asked, Mrs. May replied: "I won't answer that! I don't know whether I'm answering right or wrong on that". And finally, while being cross-examined, this question was addressed to the witness: "Tell the jury why—when you knew the premium [on your son's policy] had been paid in February, 1935—tell us why you issued a check for $18.76 in August of that year? . . ." The Court overruled an objection by the plaintiff's attorney, and the question was in part repeated:—"Now, tell us why you issued another check in the same year". The response was, "I won't answer that". After other questions had been asked regarding the two checks, Mrs. May made this final declaration: "You just as well quit asking me all those things. I am just not going to answer—*not going to know another thing!*".

One of the questions she declined to answer was whether she had made an effort "to determine from the Company whether it had received those payments—do you know whether it denied receiving them?" [It should be remembered that Mrs. May had testified that she was her son's agent and guardian, and had handled many

of his business transactions, including the insurance matters].

Our conclusion is that the Company, under the plaintiff's pleadings, had a right to rely upon the 1942 loan and recitals in the note that it was a settlement as of that date.

The distinction between rescission and reformation was very clearly stated by Chief Justice McCulloch in *Frazier* v. *State Bank of Decatur*, 101 Ark. 135, 141 S. W. 941. The reformation of a contract [said Judge McCulloch] involves an effort to enforce it as reformed, whereas rescission involves an effort to abandon and recede from a contract which the parties did not intend to make. One of the parties to a contract cannot have it reformed on account of mutual mistake, for to do so would be to enforce the reformed contract which the other party had not intended to make. But a different question is presented where one of the parties to a contract seeks to have it rescinded because of a mistake on his part, for that makes only a case of there being no contract between the parties on account of the fact that there had not been a meeting of the minds of the contracting parties. Nor does this violate the rule of evidence which forbids varying or contradicting the terms of a written instrument. The instrument did not become the evidence of the contract between the parties until it was accepted, and if it was accepted by a mistake as to its contents, it constituted a mistake as to the identity of the subject-matter, as much [so] as if it had been the delivery of an article sold and purchased.

Generally speaking, no rule of evidence is violated by admitting parol proof of the consideration for a promissory obligation if the purpose is to show the want of any consideration, or that the consideration failed, or that it was illegal. *Tate* v. *Gould*, 175 Ark. 306, 299 S. W. 24.

In the case at bar the note was given approximately six years before the insured died. No one testified that he had ever questioned its correctness; and in going to trial under allegations of the complaint there was noth-

ing to put the defendant on notice that the note would be questioned. The Company asked that the complaint be made more definite and certain, but the response was that a premium was tendered "about the 18th day of February, 1945, and within the 31 days of grace; . . . and, in addition, there was sufficient loan value to keep the policy alive". There was no effort at trial to establish the alleged tender.

At the conclusion of all the testimony the defendant moved for time within which to procure from the home office records pertaining to the alleged payment of $18.76 in 1935. The Court's attention was called to the absence from the pleadings of any reference to the check, hence its introduction and the claim made as to its application came as a surprise. The Court announced that the evidence was closed, but the jury—without being instructed as to the applicable law—was excused until May 24th, a period of eighteen days. The verdict was for payment of $2,000 less $786, with interest at 6%. An attorney's fee of $300 was assessed.

Since the suit was not of a character informing the defendant that the 1942 note would be questioned, we consider only the transactions subsequent to that time.

First, could the Company add interest to principal at annual rests and thereafter compute interest on the consolidated sums?

In *Guardian Life Insurance Co.* v. *Waters,* 205 Ark. 87, 167 S. W. 2d 886, an insurance contract somewhat similar to the one here was considered. In case of default, interest was to be added to the loan, "and in turn *it* bore interest at the principal rate." We said that the promise to pay interest was a condition precedent to the insured's right to have the contract continued in force.

Mr. Justice EAKIN, *Vaughan* v. *Kennan, supra,* said that ". . . in case of notes bearing contractual interest, when there is no agreement as to the interest after maturity, they can bear interest at the ordinary rate of six per cent. after due. It is a matter of intention to be gathered from the direct expressions, or plain import

of the instrument". Kennan had sued Vaughan and another as joint makers of a note "with interest from date at the rate of 10 per cent. per annum". It was added that "If interest is not paid annually, to become principal and bear the same rate of interest". In construing this language the Court said, first, that it was unusual to speak of *annual* interest on a note running less than nineteen months, for "There would only be one payment, and the whole interest would be payable at the end of another year. Besides, there is no obligation to pay anything before maturity, and nothing could be due to be converted into principal". Therefore, said Judge EAKIN, "The most probable view of the intention of the parties, to be gathered from the language, is," . . . etc.

The holding was that each unpaid sum of annual interest should stand alone, as though a new note had been given for it, bearing like interest. While this construction excluded a charge of interest on interest, the Court's decision was tied to the intention of the parties. It was not a declaration that (while contracting in a non-usurious manner) the parties to an instrument can not declare their own terms, saying what would and what would not be principal.

In some of the earlier cases it was held that interest was allowable on the overdue installments of interest, but not after the maturity of the principal. *Wheaton* v. *Pike,* 9 R. I. 432, 11 Am. Rep. 227.[2]

Rector v. *Collins et al.,* 46 Ark. 167, holds that where the maker of a note payable *in futuro,* with 10 percent interest from date, omitting the words "until paid", paid that rate of interest after the note matured, he could not recover the excess over 6% accruing after maturity.

[2] In Doev. Warren 7 Greenl. 48, this interesting statement appears: "Interest is an accessory or incident to principal. The principal is a fixed sum; the accessory is a constantly accruing one. The former is the basis or substratum from which the latter arises, and upon which it rests. It can never by implication of law sustain the double character of principal and accessory. Whatever the plaintiff recovers beyond the face of the notes, the sum originally due, he recovers as interest. No part of it then has yet become principal, nor can it be so regarded. After interest, however, has accrued, the parties may, by settling an account, turn it into principal. It is then in the nature of a new loan; but it does not become principal, by operation of law, merely because it is due."

Judge BATTLE, who wrote the Court's opinion, said: "It was not proved that Collins paid any interest under a mistake of fact, or that he was induced by fraud practiced upon him to do so. He is not entitled to any credit for excessive interest".

In the case at bar the contract was that loans would be made with a pledge of the policy as sole security, with interest at six percent per annum *payable at the end of each policy year,* but if the interest was not paid when due, "it shall be added to the principal and bear interest at the same rate". With payment of the premium for a particular year, *the entire loan value for the end of each policy year* "will be available during the same year". A premium not paid before the end of the grace period would be automatically loaned "and charged as an indebtedness secured by this policy, *subject to interest at the rate of six percent per annum as prescribed* for loans".

We think the effect of the contract—and certainly it is not one prohibited by law or one contrary to public policy under our decisions—was to have unpaid interest added as principal each policy anniversary, with the right to compute interest thereafter as though the added interest were a part of the principal. That is what the parties intended when the contract is given a rational meaning.

With an acknowledged debt of $492.57 and the premium paid to February 18, 1943, the next debit would be six percent on the note, chargeable on the policy anniversary November 18. Since the note was dated March 31, 1942, the interest for 232 days to November 18 of that year would be on the basis of less than 8.1 per day, slightly in excess of the item of $18.72 charged on the policy anniversary. This, added to the note, shows $511.29. Interest chargeable Nov. 18, 1943, would be $30.68; for Nov. 18, 1944, it would be $32.52, and the interest on the debt of $574.49 from Nov. 18, 1944, to Sept. 11, 1945, (297 days) would be slightly in excess of the item of $28.05 actually charged, *reflecting an indebtedness on the note and interest* of $602.54.

Since the premium paid for the 1942-'43 period was included in the March (1942) note, the 1943-'44 premium was credited when an automatic loan of $41.74 was made February 18, 1943. A similar transaction covering the 1944-'45 premium occurred February 18, 1944.

The questions are (a) did the Company correctly compute the policy's cash surrender or loan value, and (b) were these values consumed by the note of March 31, 1942, with interest, plus subsequent premium loans, with interest?

The loan value November 18, 1945, was $730; on November 18, 1944, $678. This testimony is not disputed, and the fact is shown by the policy. A. J. Moody, the Company's Assistant Secretary, testified by deposition that the method for determining the loan value on *February 18* was to ascertain what it was on the preceding anniversary (Nov. 18) "and add thereto one-fourth of the difference between *that* value and the value indicated for the next November 18". The difference between $730 and $678—the increase for a year—is $52. A formulae giving the Company's result (but not disclosed by any tabulation in the record) would be to prorate the increased value to Sept. 11, 1945—the date of cancellation. Dealing with the time from Nov. 18, 1944, to Sept. 11, 1945, there would be this equation: 298 times 52 divided by 365 equals $42.46. Take the loan value on Nov. 18, 1944, and add to it this 298-day prorata, and the value as of Sept. 11, 1945, would be $720.46.

The charges would be as follows: Prorata premium on policy from Feb. 18, 1945, to Sept. 11, 1945,—205 times $41.74 divided by 365 equals $23.44. Automatic premium loans were: Feb. 18, 1943, to Feb. 18, 1944, $41.74; interest from 2/18/43 to 11/18/43, $1.87. Feb. 18, 1944, premium for period ending Feb. 18, 1945, $41.74; interest to 11/18/44, $1.87. Interest on $43.61 ($41.74 plus $1.87) from 11/18/43 to 11/18/44, $2.62. Interest on $46.23 ($41.74 plus $1.87 plus $2.62) from 11/18/44 to 2/18/45, 70c—[1943 loan]. Interest on $43.61 from 11/18/44 to 2/18/45, 66c—[1944 loan]; total of both loans, $91.20. Interest on $89.84 ($91.20 less 70c less 66c) from Feb. 18,

1945, to Sept. 11, 1945, $3.03. Total due Company on automatic loans, both principal and interest, subsequent to March 31, 1942, $94.23.

Recapitulation: Note and interest, $602.54; automatic loans [2/18/43 and 2/18/44] and interest, $94.23; prorata automatic loan, 2/18/45 to 9/11/45, $23.44; interest on $23.44 from 2/18/45 to 9/11/45, 79c. Total charges, $721. Difference between charges and loan value ($721.00 less $720.46), 54c. The Company's computation of charges is shown to have been $720.45, or 55c more favorable to the insured than the results here.

These calculations—based upon testimony not in dispute—do not sustain the appellee's contention that the insurance was wrongfully cancelled. It follows that the judgment must be reversed; and, since the cause has been fully developed in respect of matters in controversy subsequent to the note of March 31, 1942, the cause is dismissed. It is so ordered.

HANKINS *v.* CITY OF PINE BLUFF.

4-9179 229 S. W. 2d 231

Opinion delivered May 1, 1950.

Jack Segars, for appellant.

R. A. Eilbott, Jr., for appellee.

George Rose Smith, J. This action was brought by the city of Pine Bluff to enjoin Alvis Hankins from constructing a concrete curbing that is said to encroach upon the city streets. The city did not obtain a temporary injunction when the suit was filed, and while the case was pending Hankins completed the construction of the curbing. This appeal is from a decree by which the chancellor found that an encroachment exists and ordered its removal.

The curbing in question is situated at the intersection of Twentieth and Main streets. Hankins' lot is on the southeast corner of this intersection. As originally platted Main street had an offset or "jog" at this intersection, so that a person traveling north on Main would have to turn to his right upon reaching Twentieth and go about ninety feet east on Twentieth before turning north to continue on Main. The principal question in this case is whether in 1946 Hankins dedicated a public right-of-way across the corner of his lot as a means of partly straightening the course of Main street.

In 1946 this lot was unimproved and had not yet been taken into the city limits. Prior to that time the county road graders had gradually shifted the roadbed onto Hankins' property as a means of alleviating the sharp

turn at the intersection. Only two witnesses testified about the 1946 dedication relied on by the city. The county judge said that he talked to Hankins about taking some of his property to flatten the curve still more than had already been done. According to this witness Hankins said that the proposal was all right with him, and the county then removed some trees and graded the street to the agreed line. The street has been used by the public ever since.

Hankins' own testimony is not materially at variance with that of the county judge. He concedes that he agreed to let the road cross his property. "At that time it was grown up in weeds and I had no objection to their using it." He was asked if by the agreement the road was to remain only as long as he did not want to improve the property, and he answered, "I don't believe I said anything like that."

On this testimony the chancellor correctly held that there had been a dedication of the road, which inured to the city when it annexed this territory. The two essential elements of a dedication are the owner's appropriation of the property to the intended use and its acceptance by the public. No specific duration of the public user is required to complete the dedication. *Ayers* v. *State,* 59 Ark. 26, 26 S. W. 19. Nor need the dedication be evidenced by a deed. *Conner* v. *Heaton,* 205 Ark. 269, 168 S. W. 2d 399. It is quite possible that Hankins did not realize that the effect of his agreement was to give the public a permanent easement across his property, but there was nothing in his conduct to put the county on notice that his offer was in any way conditional. On the contrary, the county judge testified that the county would not have accepted the right-of-way had such a condition been attached.

Hankins also contends that the city is estopped to question the location of the curbing, for the reason that the city engineer approved it. The city, however, brought suit soon after construction was begun, and in any event the city engineer's erroneous approval could not create an estoppel. It is not suggested that this officer is au-

thorized to give away part of the public thoroughfare, and we have often held that a public officer cannot bind the State or its subdivisions beyond the extent of his actual authority. "All who deal with a public agent must at their peril inquire into his real power to bind his principal." *Woodward* v. *Campbell,* 39 Ark. 580; *McConnell* v. *Ark. Brick & Mfg. Co.,* 70 Ark. 568, 69 S. W. 559.

We think, however, that the decree should be modified in one respect. The chancellor found that the city's easement extends to a specified line as shown on a surveyor's plat that was introduced in evidence. The county judge admitted that through the years there has been a gradual encroachment onto Hankins' property, and the latter testified positively that the line he agreed to in 1946 was three feet farther out than the line now claimed by the city. Hankins' testimony was given with candor and honesty, and we see no reason to doubt his statement that the street has been shifted three feet more since 1946.

The decree is modified to narrow the city's easement by three feet at its point of deepest penetration upon the appellant's lot. With this modification the decree is affirmed, and, as the title to real estate is involved, the cause is remanded for the entry of a decree in accordance with this opinion.

TRICE *v.* MILLER.

4-9187 229 S. W. 2d 233

Opinion delivered May 1, 1950.

Hal B. Mixon, for appellant.

LEFLAR, J. Mrs. Charley Miller died childless, without a will, owning 50 acres of land which had been devised to her by her father's will. She left surviving her a husband, appellee Charley Miller, and blood relatives among whom are the appellants here. Charley Miller is in possession of the 50 acres. Appellants brought suit for a partition of the land. At the trial the Chancellor held that Charley Miller "is vested with a right of possession of the entire tract for his natural life by virtue of his homestead interest." Appellants contend this was error.

The land in question, having come to Mrs. Miller by devise from her father, was ancestral estate. *Oliver* v. *Vance,* 34 Ark. 564; *Hofstatter* v. *Bona,* 205 Ark. 729, 170 S. W. 2d 1016. The relevant law as to a husband's interest in his wife's ancestral lands appears in Ark. Stats., § 61-228: "Upon the death of a married woman, her husband shall be entitled to the following portion of her estate, undisposed of by her will: . . . where she leaves no descendants, as to the lands in which her estate is ancestral the husband shall be entitled to one-third of her real property for life. . . ." Our law gives the husband no additional right of homestead in his wife's lands. See Ark. Const., Art. IX, §§ 6, 10; Ark. Stats., § 62-601, *et seq.* His right in her ancestral lands is a one-third interest for his life.

Reversed and remanded.

ALEXANDER *v.* ALEXANDER.

4-9139 229 S. W. 2d 234

Opinion delivered May 1, 1950.

Walter L. Brown, J. V. Spencer and *J. V. Spencer, Jr.*, for appellant.

Abbott & Abbott, for appellee.

MINOR W. MILLWEE, Justice. The parties to this suit were married in 1938 and lived together in Union County, Arkansas, until October, 1947. On February 13, 1948, appellant, Azzie Lee Alexander, filed a suit for divorce against appellee, Mack Alexander, in which she alleged: "That Plaintiff and Defendant have one child, a boy, Mack Alexander, Jr., age 8 years, adopted by Plaintiff and Defendant; that the child is afflicted with asthma and requires constant attention and care and expensive medical treatment, approximately $40 per month; that Plaintiff has had the sole care of the child and is a proper person to have its care and custody."

The answer and cross-complaint of appellee filed on January 15, 1949, stated: "The defendant admits that the plaintiff and the defendant have one adopted child, a boy, whose name is Mack Alexander, Jr., but the defendant denies that the medical bills of said child are approximately $40 per month."

The original cause was tried and a decree entered on April 13, 1949, awarding a divorce to appellant, Azzie

Lee Alexander, approving a property settlement made by the parties and dismissing appellee's cross-complaint. The decree also awarded appellant custody of the child, Mack Alexander, Jr., and ordered appellee to pay $75 per month for the child's support and maintenance. Appellee prayed and was granted an appeal from that part of the order directing payment of support money for the child, but the appeal was never perfected.

On May 31, 1949, after lapse of the term at which the decree was rendered, appellee filed the instant suit to modify the decree rendered on April 13, 1949, by setting aside the allowance of $75 per month for support of the child. The petition alleges: "Defendant states that until after the entry of said decree this defendant was led to believe by the plaintiff that said minor child had been adopted to the plaintiff and the defendant in the Juvenile Court of Caddo Parish, Shreveport, Louisiana; that the said minor child is a near relative of the plaintiff, being the son of the plaintiff's niece; that at the suggestion of the plaintiff, this defendant consented to the adoption of said child and thereafter left the entire matter in the hands of the plaintiff to complete said adoption; that this defendant understood from the plaintiff that the adoption had been completed and had not learned otherwise until after the decree was entered in this cause; that the defendant thereafter investigated the adoption proceedings and found that said minor child had never been adopted and that since the plaintiff and defendant were divorced, under the law of Louisiana, could not be adopted; this defendant thereupon filed a motion with the Juvenile Court of Caddo Parish, Louisiana, to dismiss said adoption proceedings, which was done by the court, a copy of which order is attached hereto, marked 'Exhibit A' and made a part of this petition.

"This defendant states that said minor child is not his child either by blood or adoption, and that this defendant is not under any legal obligation to support said child, although he will continue to do so voluntarily, according to his ability, in keeping with the station in life of said child."

The response of appellant interposed the plea of *res judicata* and alleged that the validity of the adoption proceedings was an issue in the original cause wherein appellee admitted in his pleadings and testimony that the child had been legally adopted.

At the hearing on the petition to modify the decree of April 13, 1949, appellee introduced the deposition of appellant in the original divorce action in which she testified that the child was legally adopted in Shreveport, Louisiana, in the latter part of 1939 or 1940; that the child was then 12 or 13 months old and was the son of her niece; that Shreveport attorneys were employed and that she, the appellee and the child's mother and grandmother appeared in the Louisiana court with the child.

Appellee testified at the hearing on his petition to modify that in 1942 the parties agreed to adopt the child; that appellant brought the child from Shreveport stating that he had been adopted; that about six months later, when the child's mother and grandmother objected to them having the child, appellee and appellant returned the child to its mother in Shreveport, Louisiana, after they conferred with Shreveport attorneys; that about six months later they were advised that they could have the child and appellant went to Shreveport where she paid the attorneys $25 and returned to El Dorado with the child, again stating that he had been adopted; that after rendition of the divorce decree he learned upon investigation that the adoption proceedings in Louisiana had not been completed and said proceedings were dismissed by the Louisiana court upon his motion on April 26, 1949. The parties stipulated that an investigation of the court records in Caddo Parish, Louisiana, made prior to the date of the original decree would have revealed the facts shown on the petition to modify.

After the hearing on the motion to modify, the chancellor found that the child had not been legally adopted by the parties; that, since the child was neither the natural nor adopted son of appellee, the latter was not liable for the child's support and the monthly allow-

ance of $75 was ordered vacated and set aside. This appeal follows.

In order to sustain the decree vacating the order of allowance for support of the child, appellee contends that his motion is based on the 4th Subdivision of Ark. Stats. (1947), § 29-506, which empowers the court to vacate or modify its judgment or order after expiration of the term "for fraud practiced by the successful party in the obtaining of the judgment or order." The rule which we have adopted and followed in many decisions involving suits to vacate or modify a decree under this subdivision of the statute is stated by Justice BUTLER in *Hendrickson* v. *Farmers' Bank & Trust Co.,* 189 Ark. 423, 73 S. W. 2d 725, as follows: "The fraud for which a decree will be canceled must consist in its procurement and not merely in the original cause of action. It is not sufficient to show that the court reached its conclusion upon false or incompetent evidence, or without any evidence at all, but it must be shown that some fraud or imposition was practiced upon the court in the procurement of the decree, and this must be something more than false or fraudulent acts or testimony the truth of which was, or might have been, in issue in the proceeding before the court which resulted in the decree assailed. *James* v. *Gibson,* 73 Ark. 440, 84 S. W. 485; *Johnson* v. *Johnson,* 169 Ark. 1151, 277 S. W. 535; *Boynton* v. *Ashabranner,* 75 Ark. 415, 88 S. W. 566, 1011, 91 S. W. 20."

The rule is similarly expressed in *Parker* v. *Sims,* 185 Ark. 1111, 51 S. W. 2d 517, where the court said: "The law is settled that the fraud which entitles a party to impeach a judgment must be fraud extrinsic of the matter tried in the cause, and does not consist of any false or fraudulent act or testimony the truth of which was or might have been in issue in the proceeding before the court which resulted in the judgment assailed. It must be a fraud practiced upon the court in the procurement of the judgment itself." See, also, *Turley* v. *Owen,* 188 Ark. 1067, 69 S. W. 2d 882; *Manning* v. *Manning, Executor,* 206 Ark. 425, 175 S. W. 2d 982; *Pattillo* v. *Toler,* 210 Ark. 231, 196 S. W. 2d 224.

In the leading case of *United States* v. *Throckmorton,* 98 U. S. 61, 25 L. Ed. 93, examples of acts which constitute extrinsic or collateral fraud are mentioned as follows: "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. . . . On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed."

In *Dornfield* v. *Dornfield,* 192 N. Y. S. 497, 200 App. Div. 38, custody of the minor children of the marriage was awarded to the plaintiff in a divorce action. By leave of the court, plaintiff was allowed to append a motion for support of said minor children to the end of the divorce decree. At the hearing on the motion for support, the defendant introduced proof that the children of the plaintiff were illegitimate. The court held that the question of legitimacy was *res judicata* between the parties where it was alleged in the original complaint for divorce that the children were the issue of the marriage and the decree awarded care and custody of such issue to the plaintiff.

In the case of *Lowell's Estate* v. *Arnett,* 104 Col. 343, 90 Pac. 2d 957, the court held that a finding in a divorce decree that a minor child had been adopted by the parties was not subject to attack in a subsequent proceeding against the husband's estate to recover money claimed

to have accrued, under the divorce decree, for support and education of the child. The case of *Commonwealth* v. *Bednerak,* 62 Pa. Superior Ct. 118, involved a proceeding to revoke an order for the support of a child on the ground that the child mentioned in the original order was not the child of petitioner. In holding the matter *res judicata,* the court said: "It was a material inquiry in the original hearing whether Elizabeth was in the class 'children' as described in the Act of 1867; and that question having been decided by a court of competent jurisdiction it was not within the capacity of the Municipal Court to retry that issue."

The pleadings and testimony in the original divorce proceeding in the instant case clearly presented the issues as to whether the child in question was the adopted child of the parties and appellee's liability for the child's support. The complaint alleged the adoption of the child and the answer filed eleven months later admitted the truth of the allegation. The petition to modify the decree does not charge that appellant knowingly, corruptly or fraudulently misrepresented to appellee or the court that the child had been adopted and the proof does not warrant such conclusion. Appellant doubtless believed in good faith that the adoption proceedings instituted 7 or 8 years previously had been completed. However, if she knowingly and falsely testified at the original hearing such action would have amounted to intrinsic fraud and does not involve such extrinsic or collateral fraud as is required to modify or vacate the original decree. The burden was upon appellee in the original hearing to meet the issue of his liability for the child's support and he had ample time and opportunity to do so. There would be no end to litigation if he is permitted to retry the same issue in a subsequent proceeding when there is an absence of fraud practiced upon the court in the procurement of the original decree.

Appellee contends that the misrepresentation that the child had been adopted was in regard to a jurisdictional fact and that the court was, therefore, without jurisdiction to order appellee to support and maintain

the child in the original decree. In *Cassady* v. *Norris,* 118 Ark. 449, 177 S. W. 10, the court held that an allegation in a suit to sell land for the non-payment of taxes, that the owner of the land was unknown, made with knowledge of the falsity of the allegation, was not such extrinsic fraud as would authorize relief against the judgment, saying: "But these allegations were not sufficient to constitute a fraud practiced by the successful party in obtaining the judgment. The allegation in the complaint in the suit to condemn, that the owner was unknown, was sufficient to give the court jurisdiction to proceed against the property. It was not a fraud on the court to make this allegation although it was untrue, for the court had the power to inquire into its jurisdiction and to determine whether or not it was true." So here, the allegation in the complaint that the child was adopted was sufficient to give the court jurisdiction to determine appellee's liability for the child's support and the court, having jurisdiction of the parties and the subject-matter, was fully empowered to determine the issues raised in the pleadings.

The case of *Wilder* v. *Wilder,* 207 Ark. 414, 181 S. W. 2d 17, relied on by appellee, involved a suit by a non-resident insane wife to set aside a divorce secured by her non-resident husband. One of the allegations of fraud was that the decree was secured without service of process upon the wife. Upon reversal in this court the trial court set aside the original decree because the wife had not been properly served with summons and we affirmed on the second appeal in *Wilder* v. *Wilder,* 208 Ark. 521, 186 S. W. 2d 933. Here appellant and appellee were before the court and represented by able counsel. Proof was taken on the issues which were fully determined without any fraudulent concealment of material facts.

We conclude that the learned chancellor erred in vacating the order of support made in the original decree. The decree appealed from is, therefore, reversed and the cause remanded with directions to dismiss appellee's petition to modify the decree of April 13, 1949.

EUIN *v.* FAUBUS.

4-9167 229 S. W. 2d 244

Opinion delivered May 1, 1950.

[redacted]

Mark E. Woolsey, for appellant.

Yates & Yates, for appellee.

ED. F. MCFADDIN, Justice. This is a suit seeking to cancel, for failure of consideration, a deed which appellant had executed to appellee.

On February 10, 1944, George W. Euin and wife (hereinafter called appellants) executed and delivered a deed of their 70-acre farm to their son and daughter-in-law, Jesse and Archie Euin, the consideration being:

". . . the care, keep, namely a comfortable home for the remainder of our lives, with food, medical care, clothing and a comfortable place to live furnished, . . ."

On September 10, 1945, the son, Jesse Euin, died; and the daughter-in-law, Archie Euin, continued to attempt to perform the consideration of the said deed.

In the Fall of 1948, Archie Euin began "dating" Mr. Faubus. This was displeasing to her parents-in-law, and two quarrels ensued in December; but the daughter-in-law continued to live with the Euins until January 7,

1949, when she married Mr. Faubus and moved to his home about twenty miles away. Before leaving the Euin homestead, the daughter-in-law, Archie Euin Faubus, arranged to have Mr. and Mrs. Self (the Euins' daughter and son-in-law) move to the Euin home. On February 2, 1949, appellants filed this suit, claiming that Archie Euin Faubus had failed to provide the consideration stated in the deed, that is, the food, medical care and clothing.

Mrs. Archie Euin Faubus (appellee), in defending the suit, claimed that she was faithfully fulfilling the consideration of the deed when she was driven from the home by threats made against her by the Euins. The learned Chancellor, after hearing the evidence, dismissed the complaint for want of equity [1] and appellants seek to reverse that decree.

"Support deeds" are recognized in this State. In *Fisher* v. *Sellers,* 214 Ark. 635, 217 S. W. 2d 331, we discussed such deeds:

". . . Our cases hold that when a deed is executed in consideration of future support and maintenance—as here—then, if the grantee fails to fulfill the provisions of the deed, the grantor may sue at law for damages, or may sue in equity to cancel the deed for failure of consideration. *Salyers* v. *Smith,* 67 Ark. 526, 55 S. W. 936; *Whittaker* v. *Trammel,* 86 Ark. 251, 110 S. W. 1041; *Priest* v. *Murphy,* 103 Ark. 464, 149 S. W. 98; and *Goodwin* v. *Tyson,* 167 Ark. 396, 268 S. W. 15."

[1] In the course of his oral opinion, the learned Chancellor said:

"I sometimes think it would be well if it were illegal to make such a deal as this. . . . The Supreme Court reports of this State are full of these cases and I suspect there is not one in ten that is carried out fully, or can be carried out fully. . . . This is a case in which it is hard to tell what to do, because the woman's husband died. He couldn't carry it out. The deed was made to them as an estate by the entirety, and it looks like she did the best she could. Differences came up and she felt like she had to leave. She is still willing to go back. She means by that—I don't believe it was brought out exactly in the testimony—but I think she is willing to take her husband back there with her and live on the place and do her best. . . . It would be very harsh for me to cancel the deed and say, 'No, you haven't fulfilled your contract'—and the court isn't going to do that. The complaint will be dismissed for want of equity."

The question before us is whether the appellee, Archie Euin Faubus, has continued to perform the consideration of the said deed by furnishing "food, medical care, clothing" to the appellants. We find that she has not; and so the deed should be cancelled for failure of consideration. The evidence shows that ever since the death of Jesse Euin, appellee has been unable to furnish food, medical care, and clothing for her parents-in-law; and they have all the time had a potential cause of action to cancel the deed for failure of the grantee to furnish the food, medical care, and clothing required by the deed.

The appellee made the decision—which she had a right to make—whether she would seek her happiness by remarriage, or whether she would remain with her parents-in-law and continue to try to save the farm for herself by doing all she could to keep them from declaring the deed forfeited for failure of consideration. She was a comparatively young woman, and chose to remarry; but her second husband is without financial means, and there is no source from which Mr. and Mrs. Faubus can supply the "food, medical care, clothing" for Mr. and Mrs. Euin. Even if the Faubuses lived in the home with the Euins, the problem of "food, medical care, clothing" would be unsolved. So there has been a failure of consideration of the deed; and the Euins are entitled to the relief sought. Nothing would be gained by remanding the cause for further developments, as we did in the case of *Fisher* v. *Sellers, supra.*

The decree is reversed and the cause remanded, with directions to enter a decree granting the appellants' prayed relief.

Justices LEFLAR and DUNAWAY dissent.

4-9147 229 S. W. 2d 492

Opinion delivered May 1, 1950.

Claude F. Cooper and *Oscar Fendler,* for appellant.

HOLT, J. November 19, 1948, appellant, Barnes,—a Negro non-resident of Arkansas,—while being held by officers at Hayti, Missouri, on suspicion of having committed burglary and grand larceny in Blytheville, Arkansas, was delivered by the Missouri officers to the sheriff of Mississippi County, who, without a warrant for his arrest, transported him to Blytheville and placed him in jail there. At the same time that Barnes was brought to Arkansas, another Arkansas officer brought along an automobile, the property of Barnes, and parked, or stored, it near the jail in which appellant was imprisoned.

December 8, 1948, while appellant was still in jail, appellees brought suit against him, alleging in their complaint, in effect, that on or about November 5, 1948, Barnes in company with burglars broke into appellees' store in Blytheville, carried away a safe and stole $2,300 in money, that Barnes was a nonresident, and that he damaged the safe in the amount of $500. They prayed for a writ of attachment on any property of Barnes and for judgment for $2,800. Proper affidavit was attached,

writ of attachment issued, which together with summons on the complaint, were served upon appellant while still in jail. Bond was also executed and the automobile belonging to Barnes taken in charge by the sheriff.

Thereafter, on January 27, 1949, while appellant was still imprisoned, judgment by default in the amount of $2,800 was taken against appellant by appellees. The judgment in part recited: "And it further appearing that a writ of attachment was issued out of this court on the 8th day of December, 1948, and that the sheriff levied on the 8th day of December, 1948, on the following property, to-wit: One 1941 Plymouth Automobile Maroon Colored, two-door sedan, Mo. license No. 862-478 for the year, 1948, of the value of $500 which personal property remains in the hands of such officer.

"It is therefore further ordered that the lien of said attachment be and is hereby foreclosed on said property and that said sheriff shall seize and sell the same, or so much thereof as may be necessary to satisfy this judgment."

May 12, 1949, during the same term of court, appellant filed motion to set aside the above default judgment primarily for the reason that appellant was at all times a nonresident of Arkansas, was brought into this State, and held here against his will, was never legally served with process, and during all of the proceedings herein, was confined in the County jail in Blytheville.

The trial court denied this motion and this appeal followed.

Appellees have not furnished us with a brief. The material facts appear to be undisputed.

For reversal, appellant says: "As a matter of policy the Arkansas Supreme Court has always held that nonresident defendants in criminal prosecutions were immune from service of civil process during the time they were within the forum in attendance at the trial of the criminal action."

The rule in this State seems well established that a non-resident party to either a civil or criminal action

must be and is afforded full protection from all forms of civil process during his attendance at court and for a reasonable time in going to and returning therefrom.

The trial court erred in denying appellant's motion to set aside the default judgment in the circumstances.

This court in the case of *Martin* v. *Bacon,* 76 Ark. 158, 88 S. W. 863, 113 Am. St. Rep. 81, 6 Ann. Cas. 336, said: "It is well settled by the great weight of authority that a party cannot be lawfully served with civil process while he is in attendance on a court in a State other than that of his residence, either as a party or a witness, or while going to and returning therefrom. *Murray* v. *Wilcox,* 122 Ia. 188, 97 N. W. 1087, 64 L. R. A. 534, 101 Am. St. Rep. 263; *Powers* v. *Arkadelphia Lumber Company,* 61 Ark. 504, 33 S. W. 842, 42 Cent. Law J. 397, and note; note to *Mullen* v. *Sanborn,* 79 Md. 364, 29 Atl. 522, 25 L. R. A. 721, 47 Am. St. Rep. 421. In this State a party, in civil actions and criminal prosecutions, can testify as a witness, and may be exempt from service of civil process in both capacities. * * *

"Judge TRENT, in *Small* v. *Montgomery* (C. C.), 23 Fed. 707, said: 'All the United States circuit judges who have passed upon the question of late, as well as dicta by the Supreme Court of the United States in respect thereto, reach this result, viz: that where a party in good faith is brought within the jurisdiction of the State, or detained therein, being a nonresident, either as party to the suit, or as witness in another suit, he is not subject to service,' " and in *Caldwell* v. *Dodge,* 179 Ark. 235, 15 S. W. 2d 318, this court reaffirmed the above holding. We there said:

"It is said that the conflict in the authorities is only as to the right of a nonresident defendant in a criminal case to immunity from service of civil process. As we have already seen, this court has held that a nonresident of the State is exempt from service of civil process while his presence in the State is in compliance with the conditions of a bail bond. *Martin* v. *Bacon,* 76 Ark. 158, 88 S. W. 863, 113 Am. St. Rep. 81, 6 Ann. Cas. 336. Other cases adopting this view may be found in a case-note to

14 A. L. R. at 775. The reason is that the exemption from the service of civil process while under arrest or to avoid the forfeiture of a bail bond is not simply a personal privilege but is a protection granted to the party or witness by the court as a matter of public policy. Under the decisions of our own court above cited the party is afforded full protection from all forms of civil process during his attendance at court and for a reasonable time in going and returning."

The text writer in 42 Am. Jur., page 131, section 152, under the topic, "Nonresident Defendant in Criminal Cases," says: "Many well-reasoned decisions take the position that the rule exempting parties and witnesses in a civil case from the service of civil process is equally applicable to a nonresident who comes into a state and submits himself to the jurisdiction of a state court in answer to an indictment or information instituted in good faith charging him with a criminal offense," and in support of the text, the above case of *Martin* v. *Bacon* is cited.

Accordingly, the judgment is reversed and the cause is remanded with directions to proceed in a manner consistent with this opinion.

BARNES AND YORK *v.* STATE.

4604 229 S. W. 2d 484

Opinion delivered May 1, 1950.

Rehearing denied May 29, 1950.

Claude F. Cooper and *Oscar Fendler*, for appellant.

Ike Murry, Attorney General, and *Robert Downie,* Assistant Attorney General, for appellee.

DUNAWAY, J. Appellants, Barnes and York, were convicted of the crime of grand larceny and their punishment was assessed at five years' imprisonment in the State Penitentiary. This is the second appeal in this case. On the first appeal, *Barnes and York* v. *State,* 215 Ark. 781, 223 S. W. 2d 503, a similar judgment was reversed because of the introduction of prejudicial hearsay testimony, and the cause was remanded for a new trial.

These facts were established by the undisputed testimony: On the night of November 4, 1948, the store building of Moore Brothers, located on the outskirts of Blytheville, Arkansas, was forcibly entered and a metal safe containing in excess of $1,000 in cash and a number of checks was stolen. The safe was found in a Negro cemetery about one mile from town on Sunday, November 7. A large hole had been made in one side of the safe and the money taken. During the course of an investigation by the Blytheville police, an abandoned automobile was found on the highway running from Blytheville to Hayti, Missouri. In that car was a sales slip for merchandise purchased at the Moore Brothers' Store, which

slip of paper had been in the safe the night of the crime. The investigation also disclosed that the night of the offense, several Negroes had hired a taxicab to take them to Hayti, Missouri.

As a result of information furnished to law enforcement officers in Hayti, appellants and another Negro, Wilton Austin, were apprehended as suspects. On November 19, in response to a call from the Hayti officers, the Sheriff of Mississippi County, one of his deputies and the Chief of Police of Blytheville went to Hayti where they talked to appellants and Austin. The suspects denied ever having been in Arkansas.

The Sheriff and others testified that appellants agreed to accompany them to Blytheville, with the understanding that if it developed that they were not the persons wanted for the commission of the offense under investigation, they would be returned to Hayti. Appellants' testimony was to the effect that they did not know they were being taken to Arkansas, but only agreed to go to another town and if not there "identified" as the criminals sought, they would be returned. They were taken by the officers to Blytheville, where they were placed in the county jail.

Upon their arrival there, appellants were questioned briefly and again denied ever having been in Arkansas before. Appellant York and Austin were then locked in the jail, while appellant Barnes was taken in an automobile by the Sheriff and his deputy, who drove past Moore Brothers' Store and the cemetery where the stolen safe had been found. Barnes denied having seen either place before. The officers testified that Barnes was shown a "field," and was not told by them that it was a cemetery; and that because of the darkness and high grass growing there it was impossible to see any tombstones to identify the place as a cemetery.

They then returned to the jail, where according to the officers, Barnes was questioned only a few minutes. The trip and questioning took approximately fifteen minutes, the officers testified. Barnes' testimony was that he was taken to a cemetery, after which he was inter-

rogated for about three hours. Barnes was then locked in the jail for the night, still denying any knowledge of the affair.

The following morning about nine o'clock, the jailer informed the Sheriff, upon his arrival at the jail, that Barnes wanted to talk to him. Barnes was brought downstairs and asked that York be brought down too. Both appellants then made detailed statements in which they admitted their participation in the crime, and said they had each received $300 for acting as watchmen during the burglary and for assisting in removing the safe in an automobile, in company with two other men.

These oral confessions by appellants were not mentioned by the State, and no attempt was made to introduce them in evidence. It appears that before the trial commenced, on motion of the defense, the State was instructed by the trial court not to mention these oral confessions; the ground being that a wire recording of the original oral confessions was so garbled as to be incomplete. Although this evidence was not presented to the jury, it further appeared from the pre-trial proceedings, that the garbled wire recording had been "erased" by the Sheriff after the first trial since it had been ruled inadmissible at that time because of its incompleteness.

On December 6, 1948, similar statements were made by appellants in the presence of the Sheriff, Prosecuting Attorney, Austin and Miss Eunice Brogdon, a deputy sheriff and collector. Appellants told in detail how the crime was committed and that the safe was left in the cemetery where the officers had found it. These statements were reduced to writing by Miss Brogdon. The testimony on the part of the State, by the Sheriff, Austin and Miss Brogdon was that Miss Brogdon took down in shorthand the statements as dictated by the Prosecuting Attorney; that the Prosecuting Attorney dictated the substance of what appellants were then relating as to the occurrence of the crime. The State's witnesses said that prior to the writing down of these statements, the appellants were advised that they were not required to make any statement, and that any statements made could

be used against them. Recital of these facts was made in the statements.

When the confessions were typed by Miss Brogdon, the Circuit Clerk, County Treasurer, and a local real estate dealer were called into the room to witness appellants' signatures. These witnesses all testified that the statements were read to appellants in their presence, that appellants at that time said the statements were true, and affixed their signatures thereto. These three men then signed the statements as witnesses. Miss Brogdon signed the statements as Notary Public, having first sworn the appellants.

The written confessions of both appellants were submitted to the jury under appropriate instructions that they must have been freely and voluntarily made before any consideration could be given them. This was done over appellants' objections, and after a preliminary hearing on the question of the voluntary nature of the confessions in chambers out of hearing of the jury.

The defendants testified that the statements introduced were not true and insisted that the confessions had been made as a result of promises of suspended sentences by the Sheriff and fear of physical mistreatment. They did not testify that there had actually been any mistreatment at any time by anyone while they were in custody. They did not say there were any threats or promises at the time the written confessions were made. Their testimony was that the Sheriff had promised leniency before the initial oral confessions were made, and that they were afraid because at that time a deputy sheriff was present with a black-jack asking the Sheriff to let him see if he could make them talk. The officers flatly denied that any threats or promises had ever been made to induce appellants to make a confession. There was no testimony of constant interrogation over an extended period of time. The defendants did not say they had been questioned in the interim between the making of the oral confessions and the ones later reduced to writing.

It is appellants' contention that the initial oral confessions were illegally obtained as a matter of law, and that the subsequent written confessions were the result of a continuing illegal inducement—fear and promised leniency—and consequently inadmissible.

The proper procedure to be followed when the voluntary nature of an alleged confession is questioned was well stated in the opinion written by Mr. Justice FRANK G. SMITH in *Burton* v. *State,* 204 Ark. 548, 163 S. W. 2d 160, where we said: "We have frequently defined the practice where it is contended that a confession offered in evidence was not freely made. This practice is for the court to hear, as a preliminary matter, in the absence of the jury, testimony as to the circumstances under which the confession was made, and to exclude it from the jury if it were not freely made. If, however, there is an issue of fact as to whether the confession were freely made, that question should be submitted to the jury after having heard the testimony as to the circumstances under which it was made, and the jury should be told to disregard the confession if it were found not to have been voluntarily made."

That is exactly the procedure which was followed in the case at bar. Appellants insist, however, that in this case there are certain undisputed facts which render the admission of the confessions violative of their rights under the 14th Amendment to the United States Constitution, and that the confessions should have been excluded as a matter of law. Two of these are: (1) Appellants were taken in custody without a warrant of arrest. (2) They were not taken forthwith before a committing magistrate as required by Ark. Stats. (1947) § 43-601. Our decision in *State* v. *Browning,* 206 Ark. 791, 178 S. W. 2d 77, settled these questions adversely to appellants' contention. We reaffirmed the holding in the *Browning* case, that even though these facts be true a confession is admissible if voluntarily made, in *Palmer* v. *State,* 213 Ark. 956, 214 S. W. 2d 372. In the *Palmer* case we reviewed the decisions of the U. S. Supreme Court (*Ashcraft* v. *Tennessee,* 322 U. S. 143, 64 S. Ct. 921, 88 L. Ed. 1192; *Malinski* v. *New York,* 324 U. S. 401, 65 S. Ct.

781, 89 L. Ed. 1029; *Haley* v. *Ohio,* 332 U. S. 596, 68 S. Ct. 302, 92 L. Ed. 224) which it was argued necessitated a change in our earlier decisions.

Appellants now urge that later U. S. Supreme Court decisions require us to say that the confessions introduced in this case were obtained under circumstances which rendered their admission a violation of due process of law. See *Watts* v. *Indiana,* 338 U. S. 49, 69 S. Ct. 1347; *Turner* v. *Pennsylvania,* 338 U. S. 62, 69 S. Ct. 1352; *Harris* v. *South Carolina,* 338 U. S. 68, 69 S. Ct. 1354. All of these cases are easily distinguishable from the case at bar. In each instance the undisputed proof was that the accused had been over a period of several days interrogated by relays of officers for hours at a time, day and night, and had not been advised as to his constitutional rights.

In *Watts* v. *Indiana, supra,* the Supreme Court said: "On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple. But 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication. . . .

"In the application of so embracing a constitutional concept as 'due process,' it would be idle to expect at all times unanimity of views. Nevertheless, in all the cases that have come here during the last decade from the courts of the various states in which it was claimed that the admission of coerced confessions vitiated convictions for murder, there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such con-

flict comes here authoritatively resolved by the State's adjudication. Therefore only those elements of the events and circumstances in which a confession was involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here. But if force has been applied, this Court does not leave to local determination whether or not the confession was voluntary. There is torture of mind as well as body; the will is as much affected by fear as by force."

There is no conflict between that decision and the decisions of this court. If the undisputed testimony showed that the confessions had been extorted by threats of harm, promises of favor or benefit, inflictions of pain, a show of violence, or interrogation of the accused "by a continuous inquisition persisted in to the extent of exhausting him physically and mentally and overcoming his will," such confessions would be inadmissible. See *Needham* v. *State,* 215 Ark. 935, 224 S. W. 2d 785, and cases therein cited. Here, however, all the witnesses for the State testified that no such elements were present. Appellants testified that they were. An issue of fact was thus presented, which was submitted to the jury under proper instructions.

Just as a conflict in the testimony regarding the circumstances under which a confession is made, is "authoritatively resolved by the State's adjudication" upon review by the U. S. Supreme Court, so on our review of the issue is the presence or absence of facts claimed to render the making of a confession involuntary concluded by the jury's determination when that question is submitted upon substantial conflicting testimony. The confessions were properly admitted in evidence.

Appellants also argue that the evidence is insufficient to warrant their conviction even if the confessions were admissible. The commission by someone of the crime of grand larceny was definitely proved by the testimony of the owner of the store and the officers who found the chopped-open safe. In addition, Wilton Austin, who was with appellants when they were taken in custody, testified that shortly prior to that time while on a trip

to Kentucky with them, appellants told him they had "pulled a job" in Arkansas. The law is that the extra-judicial confession of a defendant accompanied by proof that the offense was actually committed by someone will warrant a conviction. *Melton* v. *State,* 43 Ark. 367; *Burrow* v. *State,* 109 Ark. 365, 159 S. W. 1123; *Ezell* v. *State, ante,* p. 94, 229 S. W. 2d 32. The evidence was sufficient to sustain the verdict of guilty.

We do not discuss all the points raised by appellants' thirty-seven assignments of error in their motion for new trial. Our conclusion from a study of the record is that no error was committed in the trial of this case. Contrary to appellants' argument, the lengthy record in this case shows that the trial was conducted in an eminently fair and impartial manner by the learned trial judge.

The judgment is affirmed.

PERKINS *v.* STATE.

4608 230 S. W. 2d 1

Opinion delivered May 8, 1950.

Rehearing denied June 5, 1950.

[redacted]

Bland, Kincannon & Bethell, for appellant.

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

MINOR W. MILLWEE, Justice. Jack Perkins and James Eugene Harris were jointly charged by information with the crime of murder in the second degree in the death of a 15-year old girl, Velma Ruth Bohannon. They were jointly tried and convicted of involuntary manslaughter and their punishment fixed at three years in the penitentiary. Jack Perkins has appealed.

There is little dispute in the evidence which, in the light most favorable to the state, tends to show the following facts: In July, 1949, Velma Ruth Bohannon resided with her parents in the Ham Town Community near Mulberry, Arkansas. Appellant and Harris appeared at the Bohannon home in appellant's truck on the afternoon of July 13, 1949, and Harris made an engagement to take Velma Ruth to the picture show. The young men returned about 7:00 p. m., picked up Velma Ruth and drove to the home of another girl who refused to accompany the party. The three then drove to a place in Ozark, where appellant and Harris drank some beer and procured a bottle of wine. They then drove to appellant's home where they parked the truck. Appellant went into his house leaving Harris with the girl. A quarrel resulted when Harris attempted to have sexual intercourse with Velma Ruth. Harris then left the girl and went into the house where he reported the quarrel to appellant and told him to take the girl home. After Harris assured appellant that he did not love the girl, appellant indicated his intention of having sexual relations with her.

Appellant overtook the girl on the road. She refused to ride in the cab with him but got on the running board on the right-hand side. Appellant drove a short distance to Highway 64 and the girl still refused to get in the truck. Appellant then accelerated the speed of the truck in order to frighten or force the child to get into the cab. Instead of taking the dirt road that led to

the girl's home, appellant drove past the point where the road enters Highway 64 toward the town of Mulberry. After driving about a mile past the intersection, he discovered that the girl was not on the truck.

Appellant reported the incident to Harris and they went to the Bohannon home shortly after midnight and asked Mrs. Bohannon if the girl had come in. When the girl's mother replied in the negative, Harris stated that Velma Ruth left them at a cafe. Appellant and Harris then drove back to the highway and after a short search, the motor of the truck would not start. Appellant then went to sleep in the truck and Harris went home.

Velma Ruth's body was found by her mother about five o'clock the next morning on the shoulder of Highway 64 about an eighth of a mile east of the point where the Ham Town road intersects the paved highway. An autopsy revealed that the girl had suffered a broken neck, concussion of the brain and cuts and abrasions about the face apparently caused when she jumped, or was thrown, from the truck. There was other evidence that appellant and Harris were intoxicated on the night in question and that the girl's body had been moved to the place where it was found in some high grass about six feet from the paved highway. At the time of the trial appellant was 27 years of age while Harris gave his age as 18.

The young men were arrested the following day and both made statements to investigating officers which were later reduced to writing and introduced in evidence at the trial. About the only material difference in the statements introduced and the testimony of Harris at the trial is that, in his testimony, he denied having intercourse with the girl.

It is first contended that prejudicial error resulted in the court's refusal to grant appellant's motion for a separate trial. Whether defendants jointly charged with a felony, less than capital, may be tried separately or jointly is a matter that rests in the sound discretion of the trial court under our statute (Ark. Stats., 1947, §

43-1802). We have held that a denial of a separate trial was not an abuse of such discretion where the confession of one defendant, not admissible against a co-defendant, was introduced in evidence but the jury was instructed that it could not be considered as evidence against the co-defendant. *Bennett and Holiman* v. *State,* 201 Ark. 237, 144 S. W. 2d 476, 131 A. L. R. 908; *Nolan and Guthrie* v. *State,* 205 Ark. 103, 167 S. W. 2d 503.

Appellant is critical of the rule announced in the cases cited above and says it should not be applied where acts of immorality are involved. It is insisted that the statements and confession of Harris contain admissions of moral depravity prejudicial to appellant and without which there would be insufficient evidence to sustain a conviction. We cannot agree with this contention but find the statements and admissions of appellant sufficient to sustain his conviction when considered with other facts and circumstances in evidence, exclusive of the admissions of his co-defendant. The trial court strictly complied with the rule followed in the Bennett and Nolan cases, *supra,* in the instructions given in the instant case, and we find no abuse of discretion in denying appellant's motion for severance.

It is next insisted that the court erred in overruling appellant's motion for a continuance based on a report of the State Hospital for Nervous Diseases where appellant remained for 30 days examination and observation as to his sanity. The motion was filed on November 28, 1949, the date of the trial. In the hospital report, dated October 15, 1949, the examining physician gave it as his opinion that appellant was sane at the time of examination and on the date of the alleged offense, but further stated that it was unlikely that he would be capable of adequately testifying in his defense and recommended that the charges against him be dropped, and that he be advised to seek hospitalization for his nervous condition. Appellant offered no evidence in support of the motion except the hospital report.

Appellant relies on the cases of *Taffe* v. *State,* 23 Ark. 34, and *State* v. *Helm,* 69 Ark. 167, 61 S. W. 915,

which hold that a defendant should not be forced to trial while he is of unsound mind. In *Martin* v. *State,* 194 Ark. 711, 109 S. W. 676, we held there was no abuse of discretion in overruling a motion for a continuance where there was a dispute in the medical evidence as to whether the defendant was physically able to stand trial and cooperate in his defense. There was evidence that the defendant was nervous and had been ill for several weeks before the trial. The court said: "We are unable to say from the evidence adduced that the trial court abused his discretion in overruling the motion for continuance. The evidence was conflicting between the physicians, and the appellant was present where the court could observe him. He remained in court during the trial, and there is nothing in the record to indicate that his condition was affected by doing so. This court recently said that the question of a continuance rests in the sound discretion of the trial court, and that its action will not be disturbed, on appeal, except where there is a clear abuse of discretion which amounts to a denial of justice. *Adams* v. *State,* 176 Ark. 916, 5 S. W. 2d 946; *Smith* v. *State,* 192 Ark. 967, 96 S. W. 2d 1." See, also, *Cook* v. *State,* 155 Ark. 106, 244 S. W. 735; *Burford* v. *State,* 184 Ark. 193, 41 S. W. 2d 751.

It is held generally that the mere fact that an accused is nervous, or very excitable, is not sufficient grounds for a continuance. 22 C. J. S., Criminal Law, § 45. See, also, *Nix* v. *State,* 20 Okla. Crim. 37, 202 Pac. 1042, 26 A. L. R. 1053; *Pope* v. *State,* 42 Ga. App. 680, 157 S. E. 211; *State* v. *Lee,* 58 S. C. 335, 36 S. E. 706. It is noted that appellant was placed on trial 43 days after his discharge from the State Hospital. The state of his nervous condition at that time was not shown. He was in court throughout the trial and the court was in position to observe his actions and evaluate his ability to cooperate with counsel in his defense. After the motion for continuance had been denied, and during the course of the trial, a physician testified on behalf of appellant that he had known appellant for 20 years and treated him a few times for nervous indigestion; and that appel-

lant was "quite nervous," as disclosed by his military service hospital record. The doctor would express no opinion as to appellant's mental competency. It is not the duty or responsibility of the State Hospital authorities to say whether charges against one whom they have found to be sane should be dropped. This is a matter for the courts to determine. There is no evidence of insanity and we are unable to say that the court's action in overruling the motion for continuance amounted to an abuse of discretion under the circumstances.

Appellant also argues that the court erred in overruling his motion for a bill of particulars. Ark. Stats., 1947, § 43-804, provides that a bill of particulars shall state the act relied upon by the state "in sufficient details as formerly required by an indictment." Upon the filing of the motion, the prosecuting attorney informed the court that the information filed contained all the facts of which the prosecuting attorney had knowledge. The information alleges the unlawful, felonious, willful and malicious killing of the girl "in some way and manner and by some means, instruments and weapons to the prosecuting attorney unknown. . . ." An indictment in similar language was held sufficient by this court in the early case of *Edmonds* v. *State,* 34 Ark. 720. We conclude that the information was sufficient under the statute.

It is next insisted that the court erred in overruling appellant's motion to strike the allegation from the information that defendants caused the girl's death while contributing to her delinquency. We cannot agree with appellant's contention that there is an absence of proof that he contributed to the girl's delinquency. An indictment containing a similar charge was approved in *Parsons* v. *State,* 212 Ark. 371, 205 S. W. 2d 860.

The trial court overruled appellant's challenge of the prospective juror Pettingill for cause and he was peremptorily challenged by appellant. The record does not disclose whether appellant exhausted his peremptory challenges and the assignment of error in the motion for

new trial does not so allege. We have held that where the record fails to show that the defendant exhausted his peremptory challenges, the objection is unavailing in the appellate court. *Mabry* v. *State,* 50 Ark. 492, 8 S. W. 823; *Smith* v. *State,* 205 Ark. 833, 170 S. W. 2d 1001. Moreover, the *voir dire* examination of Pettingill does not warrant the conclusion that he was disqualified. He apparently waived his exemption from jury service on account of his profession as a minister. He was a friend of the deceased's father and also was acquainted with appellant's father but stated that he would not be embarrassed by these relationships and would try the case solely on the law and evidence. He had talked to a young man who was present when the girl's body was removed to a doctor's office, but the nature of such conversation was not disclosed and the person talked to was not a witness in the case. He had no conviction concerning the guilt or innocence of the appellant but stated that there might be proof that would cause him to recall the previous conversation with the young man.

Error is also urged in the admission in evidence of two photographs of the deceased. The photographs were taken where the body, which was lying face down, was found but after it had been turned over. The pictures reveal the nature of the bruises and abrasions on the girl's forehead, nose and chin. We have repeatedly held such photographs admissible to show the character and nature of the wounds inflicted on the deceased. *Nicholas* v. *State,* 182 Ark. 309, 31 S. W. 2d 527; *Higdon* v. *State,* 213 Ark. 881, 213 S. W. 2d 621. The fact that appellant was convicted of the lowest degree of homicide demonstrates that the photographs were not of such nature as to inflame the passions of the jury. *Garrett* v. *State,* 171 Ark. 297, 284 S. W. 734.

Appellant next contends that prejudicial error resulted in the admission in evidence of his statements and written confession. It is argued that the written statement was taken in violation of the due process clauses of the state and federal constitutions in that it was procured while appellant was in jail under arrest without a war-

rant, before he had been taken before a magistrate and without being advised of his constitutional rights. The sheriff testified that appellant was arrested and taken to jail about 11 o'clock on the morning after the killing and at that time freely and voluntarily detailed what happened the night before. There was no evidence of threats, promises or continuous questioning to obtain the statement which was reduced to writing two or three days later. Appellant was advised by the deputy prosecuting attorney that he did not have to make a written statement and that it might be used against him. The failure to take the accused before a magistrate or to serve a warrant of arrest prior to the making of a confession does not render it inadmissible where the jury finds it to have been made voluntarily. *State* v. *Browning,* 206 Ark. 791, 178 S. W. 2d 77; *Palmer* v. *State,* 213 Ark. 956, 214 S. W. 2d 372. The facts surrounding the confessions involved here are different from those set out in the following cases relied upon by appellant: *Watts* v. *Indiana,* 338 U. S. 49, 69 S. Ct. 1347; *Turner* v. *Pennsylvania,* 338 U. S. 62, 69 S. Ct. 1352; *Harris* v. *South Carolina,* 338 U. S. 68, 69 S. Ct. 1354. The fact that the statements were made to officers while appellant was confined under arrest was a circumstance to be considered on the question of voluntariness which was submitted to the jury under proper instructions. *State* v. *Browning, supra.*

Numerous assignments of error relate to the giving and refusal to give certain instructions. Particular objection is urged against the giving of Instructions Nos. 4, 7 and 8 requested by the state on the grounds that they are repetitious, unduly emphasize certain circumstances and are not based on any evidence. It would unduly prolong this opinion to set out and discuss each of the instructions. While there is some repetition, each instruction presents a theory relied upon by the state not included in the other and we cannot say that the recitals therein so unduly emphasize certain facts as to result in prejudicial error. The jury was warranted in concluding from the facts and circumstances in evidence that the girl met her death when she either jumped, or was thrown,

from the truck operated by appellant while he was contributing to her delinquency and attempting to have improper relations with her. These issues were submitted to the jury in the challenged instructions and the evidence is sufficient to sustain the conviction for involuntary manslaughter.

We have examined other assignments in the motion for new trial and find no prejudicial error in the record. The judgment is, therefore, affirmed.

GANTT *v.* ZINI.

4-9177 229 S. W. 2d 488

Opinion delivered May 8, 1950.

Ben D. Rowland and *Frances D. Holtzendorff,* for appellant.

Irvin M. Brewer, for appellee.

GRIFFIN SMITH, Chief Justice. November 23, 1946, Angelo and Alice Zini contracted with Holloway and Carrie Gantt to sell them Lot Five of Block Two, Calloway Addition to Little Rock, for which the Gantts were to pay $750, plus special improvement district taxes. A cash payment of $200 was acknowledged, the balance to be paid $12 per month including interest at six percent. Twenty payments were made, leaving $351.90 due Sept. 21, 1948, if the contract acceleration clause could have been invoked.

On May 24th, 1949, the purchasers sued for cancellation of note and contract, and for reimbursement of sums they had paid, with interest. The Chancellor sustained a demurrer to the complaint, resulting in this appeal.

The plaintiffs alleged that title to the property—the lot presumptively includes a residence—was "presently" vested in Street Improvement District No. 376 by reason of tax forfeitures, sales, and confirmation after the time for redemption had expired. Ark. Stat's, § 20-1144. Assessments for subsequent years were said to be unpaid.

A further allegation was that the property was subject to liens in favor of District 376 Annex for the years 1933 to 1942; that foreclosure decrees for 1933 to 1938 taxes were on record, and that the District's title as purchaser was confirmed January 27, 1947. A commissioner's deed had been issued to the District, although the period of redemption had not expired. The plaintiffs contended that delinquencies in District 376 were $447.35 and in the Annex $582.50,—a total of $1,029.85. Unforeclosed liens in favor of Sewer District 102 were mentioned.

The Zinis, in procuring the contract, [the complaint asserts] "willfully, intentionally, and fraudulently failed and refused to divulge to the plaintiffs the fact that interests of the sellers, if any, had been divested; but on the contrary [the Zinis] willfully represented that they were capable of conveying title by deed upon payment of the item of $750 representing the purchase price."

While the Purchasers' Agreement recites that the buyers were to pay *to the sellers* $750, "plus special improvement district taxes," payable $200 cash and the balance by note, clearly it was not intended by buyer or seller that the taxes should be included in the note—as, standing alone, the language would indicate. The contract does not expressly say that appellees were placing the Gantts in possession, although there is the statement that upon default in payment the purchasers will surrender possession. After dealing with Zini and his wife the appellants agreed with the improvement districts to discharge the delinquent taxes through payments of $60 per month.

We deal with allegations of the complaint that appellees, when the contract was made, "knew that they had been divested of all interest or equity [including the equity of redemption], and willfully and fraudulently represented to appellants that they were in a position to convey title." As evidence of this there was a contractual paragraph pledging execution of a quitclaim deed when the obligations were discharged.

In *Dunnivan* v. *Hughes,* 86 Ark. 443, 111 S. W. 271, Judge Battle said that where, at the time a vendor of lands executed his bond for title, he was without title to or interest in the property, and the vendee did not acquire possession of it, the vendor would be liable in damages for a breach of such bond.

The rule of law charging a purchaser of real property with knowledge of facts disclosed by the chain of his title where a deed has been executed and delivered, or tendered, is less rigid where contracts or bonds for title are involved; and where fraud has been practiced in the procurement of a contract the buyer may, when convinced that the misconduct will not be rectified, sue for rescission. This is true in particular where there are to be express covenants of title in a deed not yet ready for delivery, or where from the language of a bond for title the implication of ownership in respect of the subject-matter attaches. See *Granison* v. *Moretz,* 211 Ark. 32,

198 S. W. 2d 999; *Sutton* v. *Ford,* 215 Ark. 269, 220 S. W. 2d 125.

It is difficult for members of a Court to lay aside personal knowledge of general practices in improvement districts allowing owners of property preferential consideration to the exclusion of strangers when forfeitures have resulted in foreclosure and confirmation; and yet, in a particular case, we do not know that the Commissioners would withhold the sale of a lot. So here we cannot say that the Zinis would have been preferred. *Wilson* v. *Curb & Gutter Improvement District No. 406,* 213 Ark. 662, 212 S. W. 2d 351. The complaint alleges that the defendants had lost title, both legal and equitable, and the demurrer must be tested by its assertions.

In dismissing the action for want of equity and affirmatively sustaining the demurrer, the trial Court observed that the allegations did not entitle the plaintiffs "to the relief prayed for." This expression includes an inferential finding that appellants' contract was to assume payment of the improvement district taxes, or to take the property subject to these obligations. We agree with this determination. This does not, however, dispose of the contention that the Zinis fraudulently represented that they were title-holders and that they concealed from plaintiffs the true status of the property. For this reason the decree must be reversed, with an order remanding the cause for trial.

Justice McFaddin concurs.

JOHNSON v. UNITED STATES GYPSUM COMPANY.

4-9166 229 S. W. 2d 671

Opinion delivered May 8, 1950.

Rehearing denied June 5, 1950.

K. T. Sutton and *Grover N. McCormick,* for appellant.

Cracraft & Cracraft, for appellee.

George Rose Smith, J. This is a bill in equity brought by the appellee to enjoin the appellants from trespassing and cutting timber on lands to which the appellee holds the record title. The appellants disputed the appellee's ownership and introduced testimony to show that they have acquired title by adverse possession. The chancellor ruled against the appellants on the issue of adverse possession and permanently enjoined them from entering the property.

In its brief in this court the appellee contends that the oral evidence heard below was not properly preserved and cannot be considered by us in the determination of the case. With much reluctance we have concluded that this contention must be sustained, so that we may examine only the face of the record in our review of the chancellor's decree.

At the beginning of the trial the court directed the reporter to take down the testimony, transcribe it, and file it as depositions. The decree contains a recital that when the transcribed testimony has been filed under the certificate of the official court reporter for the Fifth Chancery District it shall become a part of the record in the case. Apparently this method of preserving the testimony was suggested by opinions such as that in *McGraw* v. *Berry,* 152 Ark. 452, 238 S. W. 618, where we stressed the necessity for the court's giving his instructions to the reporter at the beginning of the trial rather than in the decree alone.

In the present case, however, the difficulty lies in the fact that the procedure in the Fifth District has been changed by Act 269 of 1949, which became effective before the trial below. That Act authorizes the appointment of an official court reporter for this District and explicitly states that his transcription of the testimony, "when approved by the court," shall be inserted in the transcript for an appeal to this court. Section 3 of the Act reads in part: "In cases of appeal to the Supreme Court, the transcribed notes of the stenographer *shall be* treated as a bill of exceptions or as depositions in the case *until* the same is approved by the Chancellor trying the case and such approval must be given during the term or within the time fixed for such approval by the court."

We have italicized three words merely to show that there is an obvious omission or typographical error in the wording of the Act. The legislature evidently meant that the transcribed notes shall *not* be (instead of "shall be") treated as a bill of exceptions or as depositions until approved by the chancellor, or perhaps that they shall be so treated *when* (instead of "until") approved by him. When a word in a statute is omitted or misused it is the duty of the courts to disregard the error if the context plainly indicates the legislative intent. *State ex rel Atty. Gen.* v. *Chicago Mill & Lbr. Co.,* 184 Ark. 1011, 45 S. W. 2d 26. Act 269 contains more than one reference to the court's approval of the reported testimony, and the very sentence that contains the error

fixes the time within which the approval must be given. In view of this context we cannot refuse to give effect to what the legislature unquestionably intended.

It is easy to understand how natural it was for the attorneys in this case to follow the pre-existing procedure. It has been pointed out, however, that the practice in each chancery district is governed by a special statute as to the preservation of oral testimony, and litigants must be guided by the act that applies to the particular district. Stevenson, Supreme Court Procedure (1948), pp. 61-65. In some districts the chancellor need not approve the reporter's transcription, but in other districts such approval is essential. By Act 269 of 1949 the Fifth District has been put in the latter category.

In this case at the beginning of the trial the chancellor directed the reporter to transcribe the testimony and file it as depositions. Act 269 permits the chancellor to approve the testimony during the term or within the time fixed by him for such approval. We think his directions to the reporter were sufficient to reserve the power to approve the testimony after the expiration of the term. In this respect the case is very similar to *McCall* v. *McCall,* 204 Ark. 836, 165 S. W. 2d 255, where the bill of exceptions was objected to because the chancellor had not approved it during the term. It appeared, however, that the parties had stipulated that when the stenographer completed the transcription it would be submitted to the chancellor, "and when so approved by the chancellor, filed as depositions and as a part of the record in this case." In holding that this stipulation sufficiently saved the court's power to approve after the lapse of the term we said: "The agreement was unrestricted and should be liberally construed in the interest of justice." In the present case the court's direction to the reporter was unrestricted, and in the interest of justice we construe it as reserving the power to approve the reported testimony after the expiration of the term. But the trouble here is that the report of the testimony heard below has not yet been approved by the chancellor, and

under our Rule 5(d) the time for filing transcribed testimony has expired. We are therefore unable to take this evidence into account in reaching our decision.

On the face of the record there is no error. The only suggestion made by the appellants in this connection is that the cause should have been transferred to law, since the plaintiff below was not in possession of the land when the suit was filed. But the complaint asserted that the defendants were insolvent and were cutting timber upon the plaintiff's land, and that is enough to confer jurisdiction in equity. *Myers* v. *Hawkins,* 67 Ark. 413, 56 S. W. 640.

Affirmed.

LITTLETON *v.* UNION COUNTY BOARD OF EDUCATION.

4-9199 229 S. W. 2d 657

Opinion delivered May 8, 1950.

Rehearing denied June 5, 1950.

Claude E. Love, for appellant.

Surrey E. Gilliam, for appellee.

DUNAWAY, J. This is an appeal from a judgment of the circuit court affirming the action of the Union County Board of Education in annexing territory which formerly composed the Thompson School District No. 1 of Union County, to the Urbana-Lawson School District No. 3 of Union County, under the provisions of Initiated Act No. 1 of 1948, Acts of 1949, p. 1414 (Ark. Stats., 1947, § 80-426, *et seq.*).

The facts are undisputed. There were only 57 school children in the Thompson District on March 1, 1949, which was less than the minimum of 350 enumerates required under the provisions of Initiated Act No. 1 for a school district to maintain its independent existence after June 1, 1949. Prior to June 1, 1949, the directors of the Thompson District filed a letter with the County Board of Education requesting that this district be annexed to the Strong School District. On June 1, one of the directors of the Thompson District was informed that it was not known when the question of annexation would be considered by the County Board. On the same day, without any notice to the directors or patrons of the Thompson District, the County Board ordered the annexation of said district to the Urbana-Lawson District. Within the time provided by law an appeal from this order was taken to the circuit court, which affirmed the County Board's action.

The relevant portions of Initiated Act No. 1 are quoted:

"On June 1, 1949, there is hereby created in each county a new school district which shall be composed of the territory of all school districts administered in the county which had less than 350 'enumerates' on March 1, 1949, as reflected by the 1948 school enumeration." Ark. Stats. (1947), § 80-426.

"It shall be the duty of the newly elected school board and the County Board of Education not only to provide an accredited elementary school for every child as close to his home as possible but also to provide every child access to an accredited high school. To accomplish

this purpose, each County Board of Education shall study the entire school program of its county. If it is found that some or all portions of the new 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 annexation is proposed, is hereby authorized and directed to make such annexation or annexations . . ." Ark. Stats. (1947) § 80-428.

The procedure for electing directors of the new district is set out in Ark. Stats. (1947) § 80-427.

Appellants' argument for reversal is this: At the time of the annexation order complained of, there was no "United" or "County School District" made up of the "small" districts dissolved by Initiated Act No. 1, since no election of directors for such new district had been held. Further, notice of the annexation proposed was a jurisdictional requisite for a valid order, by reason of this language in § 4 of Initiated Act No. 1: "*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 made in accordance with existing laws." Finally, since the Urbana-Lawson District does not have an "accredited" school, the County Board had no authority to order the annexation.

As to the existence of the new county school district on June 1, 1949, this question was decided adversely to appellants' contention in the recent case of *Stroud* v. *Fryar,* 216 Ark. 250, 225 S. W. 2d 23. There we said: "In other words, the Small Districts were given a period of grace in 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."

The *Stroud* decision is also determinative of appellants' second point. After quoting the language set out above from § 80-428 of Ark. Stats. (1947), it is said:

"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. . . ." In regard to the language of § 4 above-quoted, we further said in the *Stroud* case: "The italicized language thus clearly exempted from the provisions of the existing laws such reorganizations and annexations as might be accomplished under § 3 of the Initiated Act before the school directors could have been chosen in the United District. . . ." In the case at bar, directors had not been elected for the United District, and the consent of the Urbana-Lawson District had been obtained, which was the only condition imposed upon the County Board before ordering the annexation.

Appellants' argument that the annexation order is to be invalidated because the Urbana-Lawson District does not have an accredited school is equally untenable. The record shows that the school of Strong District, to which appellants are seeking to have the territory of the old Thompson District annexed, is likewise not accredited. As we said in *Woodlawn School District No. 6* v. *Brown,* 216 Ark. 14, 223 S. W. 2d 818: "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. . . ." An accredited school available to every child in Arkansas is a goal sought to be achieved by Initiated Act No. 1. It is not a condition precedent to annexation. The record shows the challenged annexation order to have been made in exercise of the honest judgment of the County Board of Education on the basis of the facilities available.

The judgment is affirmed.

DERBY *v.* BLANKENSHIP.

4-9160 230 S. W. 2d 481

Opinion delivered May 8, 1950.

Rehearing denied June 26, 1950.

Aubert Martin, C. C. Hollensworth and *Wilson, Kimpel & Nobles,* for appellant.

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

LEFLAR, J. This action was brought by plaintiff Blankenship, a sawmill operator, against defendant Derby, a general insurance agent, on account of the latter's failure to secure for Blankenship a policy of workmen's compensation insurance on his sawmill employees. One of plaintiff's sawmill employees was killed in the course of his employment and plaintiff personally is paying workmen's compensation benefits to the widow and children, under a Workmen's Compensation Commission order. At the time of trial plaintiff had paid $1,112 in compensation benefits, and judgment was rendered for plaintiff on a jury verdict in that amount, with the understanding that further sums later paid out by plaintiff under the order might be recovered subsequently. The defendant insurance agent appeals from that judgment.

Initially, defendant filed a general demurrer to the complaint, which demurrer was overruled by the Circuit Judge. This is the first point on which defendant appeals.

The complaint alleged that defendant Derby represented at Warren, Ark., a number of insurance corporations which were in the business of writing various kinds of insurance policies, including workmen's compensation insurance, and that on July 22, 1948, the plaintiff and defendant agreed at the defendant's office in Warren that defendant would provide such insurance covering employees on plaintiff's sawmill operations, plaintiff then paying defendant $262.50 as a deposit on the premium. One allegation in the complaint was that an oral contract was made whereby the insurance was to be in effect at once, but there was an alternative allegation which may be construed as asserting that there was a contract by defendant to proceed diligently to secure an appropriate insurance contract for plaintiff's benefit. The complaint further set out the injury of a sawmill operative in the course of employment on Aug. 13, 1948, his death on the following day, the fact that the operative left surviving him a widow and nine children, due notice to defendant of the death and related facts, and payments by plaintiff to the survivors in accordance with the workmen's compensation law.

We cannot agree that this complaint failed to set out a cause of action. Either of the types of contract alternatively alleged in the complaint might have existed, and there would certainly be nothing illegal about either of them. Whether either of the alleged contracts did come into existence, and whether there was then a breach of it by defendant, were questions properly left for determination on the evidence submitted by the parties.

Appellant argues impropriety in the granting and refusal of several instructions to the jury. Chief among these was plaintiff's instruction 1-A, given by the court over defendant's objection. This instruction was:

"You are instructed that where an insurance agent undertakes to procure a policy of insurance for another, affording protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the obligation that he has assumed, and within the amount of the proposed policy, the agent may be held liable for any loss suffered by the applicant attributable to his failure to provide such insurance. In this case, if you believe from a preponderance of the evidence that the defendant Derby contracted with the plaintiff to obtain workmen's compensation insurance, covering sawmill and logging operations, and that he, Derby, failed to exercise ordinary care or diligence in his efforts to provide said insurance in accordance with his agreement with plaintiff, or if Derby exercised ordinary care and diligence, but failed to seasonably notify plaintiff of his inability to obtain such insurance, your verdict will be for the plaintiff."

This instruction was admittedly based upon *Feldmeyer* v. *Engelhart,* 54 S. Dak. 81, 222 N. W. 598, in which a similar instruction was sustained. Defendant contends the instruction was necessarily bad because it spoke to the jury in the languages of both contract and tort, a combination which, it is insisted, could not lawfully be urged in a single claim. The answer to this contention lies in the terms of the contract as they were discovered to exist.

"The . . . question, then, is: What duty did the defendant owe to the plaintiff under the contract so made? . . . The relation created . . . constituted the defendant an insurance broker, and as such he undertook to use reasonable diligence to get the property insured; that is, upon the facts of this case, he undertook to have the property rated and to take all other steps necessary to authorize him to write the policy, and in the event of his being unable to protect the plaintiff's property by insurance, then seasonably to notify the plaintiff of his inability so to do, which time, however, did not begin to run until he had had a reasonable time in which to ascertain, by the exercise of ordinary

diligence, whether he could place the insurance." *Russell* v. *O'Connor,* 120 Minn. 66, 139 N. W. 148 (building destroyed by fire seven days after oral contract to procure fire insurance.) A contract requiring, either expressly or by inference, that a party use in a given transaction the same standard of care as is fixed by the law of Torts is altogether valid and permissible.

Once it is concluded that there may be a contract to employ due care and diligence in the procurement of a policy of insurance, and that such a contract comes within the allegations of the complaint in the present case, there can be no serious objection to the wording of the instruction quoted. The instruction would be clearer if the word "seasonably" were changed to "within a reasonable time after failing to secure the insurance," but we cannot say that there was reversible error on the facts of this case in not using the clearer language. The great weight of judicial authority in America permits recoveries against insurance brokers under such circumstances. *Burroughs* v. *Bunch* (Tex. Civ. App.), 210 S. W. 2d 211; *Rezac* v. *Zima,* 96 Kans. 752, 153 Pac. 500, Ann. Cas. 1918B 1035; *Gay* v. *Lavina State Bank,* 61 Mont. 449, 202 Pac. 753, 18 A. L. R. 1204; *Elam* v. *Smithdeal Realty & Ins. Co.,* 182 N. C. 599, 109 S. E. 632, 18 A. L. R. 1210; 2 Couch, Insurance, § 468 (p. 1329); 16 Appleman, Insurance, § 8841 (p. 300). We hold that the giving of plaintiff's instruction 1-A was not reversible error.

The next point urged by appellant, in respect to the instructions, is the trial judge's refusal to direct a verdict for defendant. This presents the question whether there was any substantial evidence given that can sustain the jury's verdict for the plaintiff. Such evidence would have to support the findings (1) that there was a contract between plaintiff and defendant, and (2) that defendant broke this contract. If these two facts be established, plaintiff's damages and consequent right to recover are clear enough.

Defendant himself was asked: "Did you enter into a contract with the applicant to undertake to place this

insurance?" His answer was: "I don't know—yes, it might be a verbal contract that I would endeavor to place it for him. I don't know if you would call it a contract or not, but that was our understanding on it."

Plaintiff testified: "I said, 'What's the deposit?' He (defendant Derby) said, 'It will figure around $262.50,' and I told him to write me out a check and he wrote out the check for $262.50 and I signed it and handed the check to him. (This was on July 22, 1948.) . . . He assured me that he wrote it (this kind of insurance) and it was an assigned risk—in other words, I was taken care of when I signed that check and gave it to him . . . I told him that I wanted to start (sawmill operations) in the next few days, didn't want to take a man until the Workmen's Compensation insurance started . . . I thought the man knew what he was doing and I was influenced by them accepting my check . . . I thought I was taken care of and everything under those conditions."

In the light of this and other corroborating testimony we cannot say that there was no evidence from which a jury could find that there was at least a contract under which defendant bound himself to exercise ordinary care and diligence to effect workmen's compensation insurance for plaintiff and to notify plaintiff if he should be unable to effect it in a reasonable time.

Was there substantial evidence that defendant failed to live up to such a contract?

The plaintiff's own testimony was that he heard no more about the matter after July 22 until he reported the August 13 accident to Derby on the day it happened, and was told by Derby that he had no insurance.

Derby and his secretary both testified that on August 5 they wrote and mailed to plaintiff a letter telling him that they had not yet been able to place his insurance. Plaintiff testified that he never received such a letter. The judge instructed the jury that if they believed Derby had mailed this letter to plaintiff Blankenship as

he and his secretary testified, "then the Court tells you that notice of the fact he had no insurance as of this date will be imputed to Blankenship." The jury found for plaintiff in the face of this instruction, therefore presumably disbelieved the defendant's evidence. This was their privilege.

The defendant's other evidence, which was lengthy, detailed his efforts to secure the insurance for plaintiff. That he made efforts to place insurance on plaintiff's operations is undeniable; that he might reasonably have been more diligent is also undeniable. Whether he exercised the care and diligence that his undertaking with plaintiff called for was a question of fact which, we have concluded, was properly left to the jury. No cases exactly like this have heretofore arisen in Arkansas, but in the case most nearly like it, *Broyles* v. *International Harvester Co.,* 202 Ark. 267, 150 S. W. 2d 733, we held that the evidence required submission to the jury of the similar question there presented.

Appellant also complains of the Circuit Judge's refusal to give numerous other instructions requested by him. We have examined all these proposed instructions carefully, and find that the matter in them was covered by other instructions given by the court, or that they were improper. It would not be profitable for us to set each of them out for detailed discussion.

Finally, defendants urge that the burden imposed upon insurance brokers by the rule we here apply will be an intolerable one, that insurance men will be unbearably hampered by it in their business. Other states have not found this to be so. A clear agreement, preferably in writing, as to when insurance is to be effective, or as to what obligation is to be undertaken by the broker, should be no burden, but should rather be an aid to good business. There should be no vested right to engage in ambiguous undertakings. Insurance brokers may often find it advantageous to enter into the type of contract which we here enforce. If they wish a different type of contract they are free to make it.

No complaint is made as to the measure of damages employed in the trial below, but we point out that defendant will be entitled to deduct the amount plaintiff would have had to pay as a premium on the policy contracted for from whatever total defendant must pay to plaintiff as a consequence of this judgment. The deduction should be the amount which the plaintiff would actually have paid as a premium on the policy applied for, covering his employees for a period of one year, had the policy been issued. Plaintiff is entitled to no more than the net amount in which he is harmed by defendant's breach of contract.

The judgment of the Circuit Court is affirmed subject to this modification, and the case is remanded accordingly.

Chief Justice GRIFFIN SMITH disqualified and not participating.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY *v.* WALLACE.

4-9190 229 S. W. 2d 659

Opinion delivered May 8, 1950.

Shaver, Stewart & Jones, for appellant.

R. T. Boulware and *J. W. Patton, Jr.,* for appellee.

HOLT, J. Appellees, owners of 11 acres of land with a dwelling thereon adjoining appellant's right-of-way, brought this suit to recover damages in the amount of $1,000 for the closing, or obstructing, of a road crossing over appellant's railroad and right-of-way leading to appellees' property in the town of Buckner, Arkansas. Appellant denied any liability. On a jury trial, and at the close of all the testimony, the court, on its own motion, and over appellant's objections and exceptions, instructed the jury, as a matter of law, that from the evidence adduced, appellees had, in effect, by long continued adverse use of the crossing in question, acquired a prescriptive right in said crossing.

The Instruction (No. 1) contained this recital: "Gentlemen of the Jury, this suit is brought by the plaintiffs against the defendant, railroad company, for what the plaintiffs allege was the wrongful act of the railroad company in making unfit for use a certain crossing that had been used by the plaintiff and his tenants and others desiring to use it for a long period of years. There isn't any evidence that it was a public crossing as the term is commonly used or that it was a private crossing as the term is used by the railroad company, but all the evidence is to the effect that this place on the railroad right-of-way was usable by the plaintiff and by his tenants and by others desiring to go across the railroad at that point for a long period of years, and that, beginning in 1922 or thereabouts, the railroad company for more than twenty years has maintained that spot as a crossing. . . . That presents an issue to the court as to whether or not this suit could be maintained by the plaintiffs. The defendant, railroad company, has defended the suit so far as that feature is concerned on the ground that such use was with its permission, and it, therefore, could withdraw that permission at any time

it saw fit. The plaintiffs contend . . . in view of the fact there was no other means of ingress and egress to such premises, the plaintiffs' sole and only method of going to and from that place is across this place, the court is inclined to the view that the plaintiffs are entitled to recover in this case."

Following this instruction, the court proceeded to submit the question of the amount of damages, only, for the jury's determination.

The court erred in giving Instruction No. 1, above. It appears undisputed that the town of Buckner had never dedicated any street over this crossing. Appellees' use was not based upon any consideration. They did not claim any statutory right to its use under Ark. Stats. (1947), § 73-621, or §§ 76-110-11.

We do not detail the testimony. It suffices to say that there was evidence on the part of appellant tending to show that the use of this crossing, by appellees and the public, was permissive only, and on the other hand, evidence on the part of appellees of its adverse use for more than seven years or that they had used it as a matter of legal right and not as a matter of permission. This was a jury question.

The rule is well established that "permissive use cannot ripen into a legal right merely by lapse of time," *McGill* v. *Miller,* 172 Ark. 390, 288 S. W. 932.

We said in *Britt* v. *Berry,* 133 Ark. 589, 202 S. W. 830: "The rule is that where the entry is permissive the statute will not begin to run against the legal owner until an adverse holding is declared, and notice of such change is brought to the knowledge of the owner."

On the other hand, it is also well established that "the statute of limitations operates against railroad corporations whose lands are held adversely as well as against individuals; and this applies to the right-of-way." (*St. Louis & San Francisco Railroad Company* v. *Ruttan,* 90 Ark. 178, 118 S. W. 705.)

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

THOMASON *v.* ABBOTT.

4-9176 229 S. W. 2d 660

Opinion delivered May 8, 1950.

Wilson, Kimpel & Nobles, for appellant.

R. H. Peace, for appellee.

ED. F. MCFADDIN, Justice. A parcel of ground, which the attorneys stated to be worth fifty dollars, is the subject of this litigation, resulting in a transcript of 285 pages and printed briefs of 217 pages. The learned Chancellor, after due consideration, prefaced his opinion with this observation:

"This case has developed into a big lawsuit over a small unimproved plot of ground in the Town of Hamp-

ton, Calhoun County, Arkansas. It is unfortunate that matters of this character cannot be adjusted between the parties without going into courts for settlement. No doubt the expenses of this litigation will far exceed the value of the property involved."

Since the right to a decision of this Court in a case like this one does not depend upon the value of the property in litigation, and since the opinion in this case, though it involves a small parcel, may be a guide in some subsequent case involving extensive holdings, we give in detail the factual situation and legal principles necessary to a decision.

Appellees, as plaintiffs, filed suit in the Chancery Court to recover possession of a strip of land measuring 52 feet east and west and 175 feet north and south, and definitely described as ". . . commencing at the southeast corner of section 31[1] . . . on the township line, and running north along the section line between sections 31 and 32 a distance of 250 feet for the point of beginning; running thence north 175 feet, thence west 52 feet, thence south 175 feet, thence east 52 feet to the point of beginning. . . ." After an extensive hearing the Chancery Court entered a decree for the appellees, and this appeal ensued.

I. *Chancery Jurisdiction.* Plaintiffs (appellees) deraigned title, and claimed to be the owners "and entitled to the full possession" of the parcel of land. The prayer of the complaint was "for possession of the above mentioned land," damages and quieting the plaintiffs' title. The answer of the defendants was not only a denial of the complaint but also prayed, *inter alia,* "that the title of the defendants be quieted and confirmed." Appellants (defendants) now claim that the complaint was an action in ejectment and should not have been tried in the equity court. In *Goodrum* v. *Ayers,* 56 Ark. 93, 19 S. W. 97, we said:

"Conceding that the plaintiff was not in possession of the land, and for that reason could not maintain a

[1] For brevity, we entirely omit the township, range and county, since no question is presented as to these.

suit to quiet title, it cannot avail the appellant; for he filed a cross-bill seeking to quiet his own title, and it gave the court jurisdiction of the entire controversy." To the same effect, see *Weaver* v. *Gilbert,* 214 Ark. 800, 218 S. W. 2d 353. So, whatever of equity jurisdiction might have been lacking in the plaintiffs' complaint was fully supplied by defendants' prayer for relief.

II. *Sufficiency of Plaintiffs' Record Title.* It has long been recognized, in cases like this, that the plaintiff must recover on the strength of his own title, whether the case be in ejectment or one to quiet title. In *Chavis* v. *Henry,* 205 Ark. 163, 168 S. W. 2d 610, we said:

"The plaintiffs (appellees) must recover on the strength of their own title, whether this case be considered as one in ejectment, or one to quiet title. For ejectment cases, see: *Carpenter* v. *Jones,* 76 Ark. 163, 88 S. W. 871; *Wallace* v. *Hill,* 135 Ark. 353, 205 S. W. 699, and cases collected in West's Arkansas Digest, 'Ejectment,' § 9. For quieting title cases, see: *Nix* v. *Pfeifer,* 73 Ark. 199, 83 S. W. 951; *Little* v. *Williams,* 88 Ark. 37, 113 S. W. 340; *Sanders* v. *Boone,* 154 Ark. 237, 242 S. W. 66, 32 A. L. R. 461, and cases collected in West's Arkansas Digest, 'Quieting Title,' § 10."

Each side in this litigation claimed by *mesne* conveyances from Eli Cornish, as the common source of title. The plaintiffs claim both a record title and a title by adverse possession. We proceed, first, to examine plaintiffs' (appellees') record title—*i. e.,* the title reflected by deeds duly recorded and definitely describing or including the parcel of land in question:

(a) In 1906 Eli Cornish conveyed to H. B. Dunn ". . . a part of the east half of the southeast quarter of section 31 . . . 52.50 acres";

(b) In 1906 H. B. Dunn conveyed to C. L. Poole ". . . a part of the east half of the southeast quarter of section 31 . . . 52.50 acres . . .";

(c) In 1906 C. L. Poole conveyed to Hampton Realty Company ". . . a part of the east half of the

southeast quarter . . . section 31 . . ." 49.50 acres;

(d) In 1913 the Hampton Realty Company (an Arkansas corporation) conveyed to C. L. Poole (ancestor of plaintiffs) ". . . the remaining part of the said southeast quarter of the southeast quarter of said section 31, . . . not formerly sold and owned by C. C. Blackstock, T. N. Means, J. B. Tomlinson, D. F. Wilson and the L. B. Pickle Estate and J. L. Hollingsworth, containing 12 acres, more or less . . .";

(e) In December, 1946, the county clerk executed a tax deed to C. I. Abbott on land described as ". . . Part E½ SE¼ section 31 . . . 6 acres" and ". . . part SE¼ SE¼ section 31 . . . 7.50 acres . . ."; and C. I. Abbott conveyed to appellees under this same description;

(f) Appellees have for many years paid taxes on ". . . Part SE¼ SE¼ section 31, 20.13 acres. . . ."

The foregoing is the record title of the appellees from Eli Cornish, the common source of title, it being remembered that the appellees are the heirs of C. L. Poole. As to each of the conveyances (a), (b), and (c), it will be observed that there was no *definite description* of any land. Each of these deeds was void for indefiniteness[2] insofar as a record title is concerned.[3] As to conveyance (d), the same rule—as to indefiniteness—applies, because there is nothing in the record before us to show what land if any was ever sold to or owned by some of the parties named as excluded— *e. g.* C. C. Blackstock and T. N. Means.[4] As to conveyances in (e) and the tax receipts in (f) above, these are also void for in-

[2] As between the grantor and grantee in each such conveyance, evidence *aliunde* the instrument might be introduced in a proper suit to establish what lands were intended to be conveyed; but the case at bar is not such a suit for reformation.

[3] See *Moore* v. *Jackson,* 164 Ark. 602, 262 S. W. 653, and cases there cited; *Adams* v. *Edgerton,* 48 Ark. 419, 3 S. W. 628; *Smith* v. *Smith,* 80 Ark. 458, 97 S. W. 439, 10 Ann. Cas. 522. See, also, Jones' "Arkansas Titles," § 248, *et seq.*, and § 309.

[4] In addition to cases previously cited, see *Cooper* v. *Newton,* 68 Ark. 150, 56 S. W. 867.

definiteness.[5] Therefore, the plaintiffs (appellees) have no record title to the parcel of land in litigation, and cannot prevail on record title, either in an ejectment action or a suit to quiet title.

III. *Sufficiency of Plaintiffs' Claim of Adverse Possession.* Even though the plaintiffs have no record title to the land, and even though their deeds do not constitute color of title, nevertheless if the plaintiffs had actual adverse possession[6] of the premises—that is, actual, adverse, continuous, hostile, notorious, peaceable and exclusive possession of the land—for the statutory period, then they might prevail in the absence of record title; but, as stated in Topic II, *supra,* the burden is on the plaintiffs to show such possession. We therefore examine the evidence to see if they ever had such possession as is required to justify a decree in their favor.

The evidence discloses that when Eli Cornish conveyed to Dunn, and Dunn to Poole, and Poole to the Hampton Realty Company, in 1906, there was a fence along the south line of the southeast quarter of section 31, and also a fence running north and south on the east line of section 31. These fences constituted the east and south enclosures of the tract here involved. There were also fences on the north and west sides of a larger tract of which the parcel here involved was a part. So we may assume that in 1906 the tract here involved was actually enclosed by a fence. But in 1910 the Hampton Realty Company opened a street on the east side of section 31 and took for the street a strip 27 feet wide off the entire east side of the parcel of land here involved. That strip has been used continuously for a street ever since 1910; so all that is left of the parcel of land in this case is a strip, 25 feet east and west and 175 feet north and south, lying west of the said street.[7]

---

[5] See *Woodall* v. *Edwards,* 83 Ark. 334, 104 S. W. 128; *Morris* v. *Eagle,* 94 Ark. 180, 126 S. W. 382; and *Arkansas Portland Co.* v. *Lands,* 179 Ark. 553, 17 S. W. 2d 281.

[6] In Jones' "Arkansas Titles," § 1497, *et seq.,* there is a chapter on adverse possession, which states in detail the substance of most of our numerous cases on adverse possession.

[7] The claim is made by appellees that the use of the street was permissive by C. L. Poole, rather than adverse to him. Even if we

When the street was opened in 1910 the fences were removed from the east and south sides of the parcel, and ever since 1910 the tract remaining (*i. e.*, 25 feet by 175 feet) has been west of the street and has been unenclosed[8] and unimproved. For a short time C. L. Poole used the said tract—across the road and north of his house—as a storage lot for his farm implements, but such use was non-continuous; at infrequent intervals boys played ball on the lot and in the road. The continuous actual adverse possession—as that term is used in the decisions—has not been exercised by appellees since 1906.

Therefore, we have a case in which the plaintiffs have neither a record title nor a title acquired by adverse possession, and are not entitled to prevail either in an ejectment action or in a suit to quiet title; and the Chancery Court was in error in quieting the plaintiffs' (appellee's) title.

IV. *Appellants' Rights.* But because the plaintiffs (appellees) are not entitled to prevail is no reason that the defendants (appellants) are entitled to have their title quieted as prayed. In fact, we conclude that the defendants are entitled to only a small strip of the property here involved. The evidence shows that in 1905 Eli Cornish made a deed to Dr. Wilson, in which certain property was definitely described; that the east side of the property was marked with a rail fence; and that Dr. Wilson had a wire fence placed just east of the rail fence on the entire east side of the property. The title of Dr. Wilson passed by will to Mrs. Iszora Wilson, his wife, and by deed from her to Jack Thomason, one of the defendants.

---

ignore the Hampton Realty dedication and plat, nevertheless the record shows that in 1928 C. L. Poole conveyed to J. D. Whitehead land North of the parcel here in suit, and in the said deed to Whitehead, C. L. Poole described the conveyed premises by reference to the " . . . street running North on Section line between Sections 31 and 32 . . . " That street so referred to in the deed is the street in question here; so the heirs of C. L. Poole are estopped to deny the street as far as Whitehead is concerned; and no permissive use to the public has been shown. Rather there is evidence of a dedication and a public user.

[8] That is, unenclosed except for the Wilson fence discussed in Topic IV, *infra*.

Mrs. Iszora Wilson, the other defendant, testified that the Wilsons never intended to hold any property except what was enclosed by the wire fence. Appellants' counsel conceded in the oral argument, and the testimony of appellants' witnesses showed, that there is a strip 12 feet wide, lying east of the wire fence and west of the road. Under the testimony of Mrs. Iszora Wilson and Miss Sallie Lou Wilson, this 12 foot strip does not belong to the appellants. The deed from Eli Cornish to Dr. Wilson was color of title to what it described; but the testimony of Mrs. Wilson, as to no claim beyond the fence, constituted a declaration against interest and a renunciation of any claim to property east of the fence; and the better view of the evidence is that the fence was 12 feet west of the west side of the road. In short, all the appellants can hold is the property enclosed by the wire fence.

CONCLUSION

We conclude that the decree of the Chancery Court should be reversed and the cause remanded, with directions to dismiss the complaint of the plaintiffs, and to quiet appellants' title to the west 15 feet of the parcel here involved. As to the strip 12 feet wide lying west of, and adjacent to the street, neither party is entitled to prevail in the present state of the record, since the record title appears to be in Eli Cornish. The costs of both Courts are adjudged against the appellees.

[redacted]

ADKINS *v.* WILLIS.

4-9180 230 S. W. 2d 32

Opinion delivered May 15, 1950.

[redacted]

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

J. H. Brock and *Leland R. Branting,* for appellee.

GRIFFIN SMITH, Chief Justice. A jury found that the defendants, now appellees, were entitled to possession of land touching nearly an acre upon which a store building stood. After suit was filed O. R. Willis sold the store property to M. K. Hodges and his wife, who were brought into the litigation. A. B. Adkins and Lillian N. Askins were owners of property north and south of Willis and contiguous to him.[1] Adkins testified that the line to which he claimed was determined by a fence that had been in place for more than half a century. In 1927 appellants acquired the Newton tract, from which the store property was carved. Lands owned by appellants surround the area contended for by appellees, but the controversy relates to north and south boundaries only.

In its verdict the jury determined that appellees were entitled to the disputed strips "on west and south lines between the original fence boundary line and the present fence as constructed by the defendants."

The "present fence" was built by Willis following a survey by J. M. Tate, County Surveyor. It is conceded

[1] Similarity of names would indicate a typographical error, but not so. Adkins owned a life estate in property contiguous to the land contended for here, and Lillian N. *Askins* owns the fee in remainder.

that deeds under which appellees claim described the property if the point of beginning in making the survey was correctly determined by Tate. The start would be "At the Hagarville line in the middle of the public road, thence east with the road 187 feet, south 194 feet, west 187 feet, and north 194 feet," etc. Appellants could not show a record title that included any of this lot, but they insist that the old fence had long been regarded as the boundary. Adkins testified that in cultivating his own land he had gone to the fence, or had used the disputed area for pasturing his stock. One witness testified that "Long ago [the present east-west highway through Hagarville] was only a wagon road, five or six feet wide." This witness thought the description "Hagarville line in the middle of the public road" meant the center of the ancient thoroughfare.

Several diagrams were considered, with testimony by witnesses who used the drawings in illustrating to judge and jury. An example of the jury's better understanding of what witnesses were saying—better as contrasted with conclusions we must draw from the record—is reflected in the cross-examination of Mr. Adkins. In explaining a plat and discussing a stone marker he was accused of having moved, the following questions were asked and answers given: Question: "Is *this* the line?" A. "It is 352 feet from *here.*" Q. "*That* is where the marker stone is?" A. "Yes." Q. "*Here* is the 33/100 acres?" A. "Commence *here* and come up to *here.*" Q. "How wide is *this?*" A. "Road is what the deed says." Q. "How do you know that is it?" A. "There just [isn't] any land for it to be except *that, that* went back to the State and I bought it." Q. "*This* represents a line *here* between you and Mr. Willis, doesn't it?" A. "Yes." Q. "And *this* is a block of land excepted out of this deed?" A. "Yes, sir." Q. "How do you jump across *over here* and get *this* strip of land?" A. "That is just a mistake about lapover and taking my land. *This* is the way it has always been."

Other witnesses testified with equal certainty in so far as distances, directions, area, points of beginning and

ending, and such matters were of importance—facts the witnesses were seemingly familiar with, and as to which with chart aids they were able to effectively clarify transactions and make certain *"this," "that,"* and *"here,"*—references more or less meaningless to us. The problem presented by unfinished reference testimony was emphasized in *Smith* v. *Magnet Cove Barium Corp.,* 212 Ark. 491, 206 S. W. 2d 442.

After the Adkins-Willis controversy arose Willis engaged J. M. Tate to make the survey. Tate testified that he went with Adkins to the corner of Section Fifteen nearest the land in question—a point agreed to by Adkins. Adkins [said Tate] had in advance of the survey consented to abide the result. Tate, from Section Fifteen, established to his own satisfaction where the Willis lot should start, but Adkins then protested. It was Adkins' belief that the surveyor ought to have gone to a rock farther east. This, inferentially, was the stone Adkins was alleged to have moved. Adkins' explanation was that a road grader "undercut" the so-called stone marker, shifting it to such an extent that replacement was necessary. In making this change Adkins undertook to put the rock as near the original position as practicable.

Appellees insist that Adkins is concluded by his consent to respect the result of the survey; but, if they are wrong in this, then testimony by Adkins that he did not intend to hold "more land than was [rightfully] his," or to claim in excess of his deed, contradicted the adverse possession tenure, thus presenting a question for the jury regarding the nature of Adkins' occupancy. It is true that on redirect examination Adkins modified his language by saying he thought the fence was the boundary and that his intent was to claim to it. But even so, the jury had a right to weigh the characteristics of the claim—to determine whether open, notorious, hostile, or friendly. *Martin* v. *Winston,* 209 Ark. 464, 190 S. W. 2d 962.

Appellants correctly say that if title by adverse possession had ripened before Willis and Adkins agreed

(as appellees insist) that the controversy should be referable to Tate's survey, the oral promise by Adkins to abide the result would not be binding. *DeWeese* v. *Logue,* 208 Ark. 79, 185 S. W. 2d 85. But in the case at bar there was something more than the so-called agreement. The nature of Adkins' possession, his intent or lack of intent to take more land than his deed called for, and his oral testimony with chart indications the jury could consider—these were factual matters resolved against the plaintiffs, and we cannot say that substantial testimony in support of the result was lacking. The instructions (not complained of) have not been abstracted.

Affirmed.

McCLUNG *v.* STATE.

4609 230 S. W. 2d 34

Opinion delivered May 15, 1950.

Rehearing denied June 12, 1950.

Ed F. McDonald and *S. J. Reid,* for appellant.

Ike Murry, Attorney General, and *Robert Downie,* Assistant Attorney General, for appellee.

LEFLAR, J. Defendant McClung was indicted for the crime of involuntary manslaughter on account of the death of Mrs. Fannie Vailes in a highway collision between a truck driven by defendant and another truck in which Mrs. Vailes was a passenger, driven by Jim Vailes, her husband. The trial in Circuit Court resulted in a jury verdict of conviction, with a one-year penitentiary sentence. Defendant's appeal is based upon alleged errors in the instructions given and refused by the trial judge.

The evidence given by the prosecution indicated that defendant may have been drunk at the time of the collision, that his vehicle had been weaving from one side to the other of a busy highway for some miles before the collision occurred, and that Vailes, driver of the other truck, had pulled toward the left side of the highway in an effort to avoid defendant's truck but was struck by defendant who pulled back toward the right side of the road just as he came up to Vailes' vehicle. This set of facts of course suggested the possibility that negligence in both Vailes and the defendant constituted concurrent proximate causes of the collision and ensuing death.

(1) One point urged by defendant is that he should not be convicted unless Mrs. Vailes' death was caused *solely* by his wrongful conduct. This view appears in defendant's objection to the State's instruction number 1, given by the Court, also in defendant's instruction number 3, refused by the Court. The law is otherwise. It has long been well settled that one whose wrongdoing is a concurrent proximate cause of an injury is criminally liable therefor (other elements of liability being present) the same as if his wrongdoing were the sole proximate cause of the harm done. This is true both as against a plea of contributory negligence in the person harmed, *Bowen* v. *State,* 100 Ark. 232, 140 S. W. 28; *Benson* v. *State,* 212 Ark. 905, 208 S. W. 2d 767; and a plea of concurring negligence in another, *Bishop* v. *State,* 73 Ark. 568, 84 S. W. 707; *Taylor* v. *State,* 193 Ark. 691, 101 S. W. 2d 956. Also see 1 Wharton, Criminal Law (12th Ed.), § 204.

(2) Another point urged by defendant is that there was error in instruction number 6, offered by the State. This instruction dealt with concurrent negligence and would have permitted the jury to find defendant guilty, despite the concurring negligence of another, if it found that defendant's acts "were a necessary part of the chain of acts and that the death would not have been caused except for the unlawful act or acts, if any, of the defendant." The unsoundness of this instruction is obvious. It is a statement of mere "but for" causation in its crudest form. Under it, a defendant who had a week previously stolen the truck he was driving would be made criminally liable for a death occurring in a collision in which he was not at fault, since "the death would not have been caused except for the unlawful act . . . of the defendant" in stealing the truck which otherwise he would not have been driving. For proximate causation we must find more than that a given result would not have happened but for the prior occurrence of fact "A"; we must find that fact "A" was a substantial and currently operative factor in bringing about the result in question. See Restatement, Torts, § 431.

In the instant case, however, there was no evidence of far-fetched and remote causation, as distinguished from evidence indicating acts of the defendant which were substantially and currently operative in producing the collision and death, by which the jury could have been distracted. So long as there was no evidence to which the erroneous instruction could be applied, it is improbable that the defendant would be harmed by it. Other instructions given by the Court made the matter of causation reasonably clear to the jury.

Apart from that, defendant's objection to instruction 6 was not on the ground that it was an erroneous statement as to what constitutes proximate causation. The objection was "specifically for the reason that the acts of others might preponderate the acts of the defendant that would be the direct result of the injury and the defendant could not be liable for these acts and for the further reason it is not a correct definition of the law in this case." This objection did not raise nor call the Court's attention to the specific error just discussed.

Finally, the transcript in the case does not show that the State's instruction number 6 was ever given to the jury. Defendant's brief on appeal assumes that it was given, and argues the point accordingly, but the transcript merely recites the defendant's objection (quoted above) to the instruction, then moves on to the next instruction. In every other instance in which an instruction requested by either party was given, the fact that it was given is specifically recited in the transcript. Under this state of the record it is permissible to assume that the trial judge quite properly omitted number 6 from the instructions which he gave to the jury.

(3) Defendant argues that there was further error in the State's instruction number 1, given by the Court, in that it told the jury that defendant might be found guilty if he operated his truck "in a careless and reckless manner," thus causing the death of Mrs. Vailes. The governing statute, Ark. Stats., § 41-2209, defines the crime of involuntary manslaughter in terms of death ensuing "as a proximate result of injury received by

the driving of any vehicle in reckless, willful *or* wanton disregard of the safety of others." Since the alternative "or" is used in the statute, rather than "and," there was no error in instructing that the defendant would be guilty if he drove in a "reckless manner," without mentioning the alternative possibilities of willfulness and wantonness. Omission from the instruction of these additional bases for finding guilt was favorable rather than harmful to the defendant's cause. Apart from that, the Court in its instruction number 8 read the whole statute (§ 41-2209) to the jury, and also gave to the jury the defendant's requested instruction number 6, which was: "You are further instructed that criminal negligence, under the involuntary manslaughter statute, is something more than ordinary negligence, which would authorize a recovery in a civil action, but is the reckless disregard of consequences or a needless indifference to the rights and safety of others with a reasonable foresight that injury would probably result."

In the light of all the instructions given, it is clear that the jury was not misled as to the type of misconduct a defendant must be guilty of to bring him within the involuntary manslaughter statute.

(4) Finally, defendant argues that the Court below erred in modifying defendant's requested instruction number 4 by including therein a reference to defendant's "driving under the influence of intoxicants" as a basis for criminal liability for involuntary manslaughter. The State's instructions 3 and 4, already properly given by the Court, covered the same ground, and defendant's argument is that the Court's additional reference to drunken driving in this instruction "unduly stressed" this phase of the case. We cannot agree. Rather, it appears that the modification was necessary in order to bring the requested instruction into line with the other instructions already properly given.

(5) Several other allegations of error are set out in the defendant's motion for new trial but are not argued in the brief on appeal. We have carefully examined all of them, and have re-read the record in reference to them.

Our conclusion is that none of them sets forth a valid ground for reversal of defendant's conviction.

The judgment of the Circuit Court is affirmed.

HARDY *v.* HARDY.

4-9028 230 S. W. 2d 6

Opinion delivered May 15, 1950.

Rose, Dobyns, Meek & House, for appellant.

Jacoway & Jacoway and *Edward E. Stocker,* for appellee.

J. W. PATTON, JR., Special Justice. This suit was filed by William McCombs Hardy, one of three beneficiaries of a testamentary trust, to require the trustee, Corinne McCombs Hardy, to restore to the trust estate the sum of $12,911.34, being one-third of the proceeds of certain timber sales made by the trustee during the years 1945 and 1946. This is one of several matters in controversy between these parties and a companion case, No. 9031, is being this day decided by this Court.*

M. W. Hardy died testate on November 13, 1929, and his will was duly probated in Pulaski County. Under the provisions of the will the widow, Corinne McCombs Hardy, received as her absolute property the family home in the City of Little Rock and certain designated personal property. The testator also devised to his widow a one-third interest for life in the remaining real estate and bequeathed to her a one-third interest absolutely in the remaining personal property. The residue of the estate was devised and bequeathed to Corinne McCombs Hardy and the First National Bank of El Dorado, Arkansas, in trust for William McCombs Hardy, Robert Lamar Hardy and Frances Hope Hardy, the three minor children of M. W. Hardy and Corinne McCombs Hardy.

* See *infra,* p. 305.

The trustees were given broad powers of control over the trust property and it was provided that the trust was to terminate when the youngest child reached the age of thirty years. William McCombs Hardy was born January 3, 1915, and Robert Lamar Hardy and Frances Hope Hardy, twins, were born February 6, 1927, and all three are now living. It was in connection with the last settlement of the trustee with William McCombs Hardy that the present suit arose.

The Bank and Mrs. Hardy were also designated as executors of the will and qualified and acted as such after the will was probated. On May 12, 1931, the widow, Corinne McCombs Hardy, attempted to show her election to take dower instead of under the will by executing a deed, in the form provided by law, in favor of the three minor children and shortly thereafter this suit was filed by R. B. McCombs, as the next friend of the children, praying that the deed be cancelled and that the widow be required to take under the will. On October 30, 1931, the Pulaski County Chancery Court rendered a decree finding that Corinne McCombs Hardy had exercised powers conferred by the will and had accepted benefits under the will that were inconsistent with the right of dower and the Chancellor therefore cancelled the deed and decreed that the widow must take under the will. She accepted said decree and has been taking under the will.

On March 30, 1932, in the same cause, the Pulaski Chancery Court accepted the resignation of the First National Bank as trustee and vested all assets, powers and responsibilities in Corinne McCombs Hardy as the surviving trustee. The Court further directed that the surviving trustee, before February 1st of each year, file a statement of account for the previous calendar year, and the Court expressly retained control of the cause for any further orders or decrees that might be necessary. Thereafter, the trustee filed annual reports describing the income and disbursements of the trust and in each instance the report was approved by the Chancery Court

the same day filed. The effect of such orders of approval is a major question on this appeal.

From time to time the trustee sold timber from certain lands that had been the property of M. W. Hardy. Prior to the year 1945 the trustee set aside one-third of the proceeds of such timber sales, invested the same and paid the income from the investment to herself individually, but held the principal as an asset of the trust. This was because Mrs. Hardy had only a life estate in said one-third interest. In 1945 the Arkansas General Assembly enacted Act 143 which provided that a widow's dower interest in timber shall be an absolute one-third of the proceeds of any sale. Acting upon the advice of her accountant, who is also an attorney, the trustee, in 1945 and 1946, took for herself absolutely the full one-third of the proceeds of such timber sales. This amounted to the sum of $6,242.82 in the year 1945 and the sum of $6,668.52 in the year 1946 making a total of $12,911.34. The trustee's annual report for the year 1945 was filed and approved on May 8, 1946, and the annual report for the year 1946 was filed and approved February 12, 1947.

On October 27, 1948, the appellant, William McCombs Hardy, filed in the same original cause the petition upon which this appeal is based. He alleged the timber transactions as above detailed and prayed that the trustee be required to restore to the trust estate that portion of the 1945 and 1946 timber sales which she had taken for herself under the authority of Act 143 of 1945 and that she continue to handle timber matters just as she had done before the 1945 Act. Appellant, plaintiff below, contended that since appellee had no dower interest that Act 143 of 1945 did not apply; that the orders approving the 1945 and 1946 reports were not final and that the trustee could not shield herself behind them without perpetrating a constructive fraud upon the beneficiaries. The appellee answered that the terms at which the reports were approved had lapsed and the orders were final and denied that constructive fraud was practiced by the trustee. The Chancellor decreed that the orders approving the reports were final; that the trustee

acted in good faith and that there was no ground for vacating and modifying the orders. From that decree there is this appeal.

In view of the high standard of behavior required of a trustee in his fiduciary capacity and in the absence of any statutory provision which might bar the action brought by appellant in this case, we are unable to agree with the decision of the Chancellor.

M. W. Hardy, during his lifetime, accumulated considerable property and it was obviously his intention in making his will to adequately provide for both his widow and his three minor children. After providing for his widow in excess of what she would have received had he died intestate, he established a trust for his children and designated his widow as one of the trustees, thereby expressing his confidence that she would faithfully apply the trust property according to his wishes. Corinne McCombs Hardy, the widow, by her acceptance of this confidence, expressed her agreement to administer the trust for the use and benefit of the children and certainly not to neglect the interest of the beneficiaries to her own personal advantage.[1] In *Hindman* v. *O'Connor,* 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490, it was said: "As a general rule, a party occupying a relation of trust or confidence to another is, in equity, bound to abstain from doing everything which can place him in a position inconsistent with the duty or trust such relation imposes on him, or which has a tendency to interfere with the discharge of such duty."[2]

It is true that a trustee is not an insurer of the trust property and that as long as he is faithful and diligent in the execution of his duties the courts will not hold a trustee responsible for mere mistakes or errors of judg-

[1] "The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary." *American Law Institute Restatement, Trusts,* Vol. 1, § 270. See also 54 *American Jurisprudence,* § 312, p. 247.

[2] Also *Sorrels* v. *Childers,* 129 Ark. 149, 195 S. W. 1, 1 L. R. A. 1917F 430, and *Burel* v. *Baker,* 89 Ark. 168, 116 S. W. 181.

ment which result in a loss.[3] But in the performance of duties imposed upon a trustee it is the general rule that the trustee must exercise skill, prudence and caution and that he represents and must protect the interest of all the beneficiaries and that he must act honestly and in utmost good faith.[4] In administering the trust, the trustee must act for the beneficiaries and not for himself in antagonism to the interest of the beneficiaries; he is prohibited from using the advantage of his position to gain any benefit for himself at the expense of the beneficiaries and from placing himself in any position where his self-interest will, or may, conflict with his duties.[5] We have several times held that if a trustee violates the rights of a beneficiary by neglect or misconduct, the beneficiary may hold the trustee liable for the damage caused.[6]

As previously stated, Mrs. Hardy accepted the chancery decree and abandoned any claim she had to dower rights. Act 143 of 1945 applies to dower and homestead interests of a widow and not to any life interest that vests in a widow under the provisions of a will and, therefore, is in no way applicable to the interest of the appellee in the estate of her deceased husband. The taking for her own personal use of one-third of the timber sales in 1945 and 1946 was a breach of trust on the part of the trustee. Her acts in taking a part of the proceeds of the timber sales to which she was not entitled was a breach of trust even though she acted in good faith and in the belief that she was legally entitled to same under the authority of

[3] "If, therefore, a trustee has exercised the proper care and diligence, he is not responsible for mere error or mistake of judgment." *Graham Brothers Co.* v. *Galloway Woman's College,* 190 Ark. 692, 81 S. W. (2d) 837. See, also, 54 *American Jurisprudence,* § 321, p. 255, and Annotation in 3 L. R. A. (N. S.) 415.

[4] 65 *Corpus Juris,* § 519, p. 648.

[5] "Nothing in the law of fiduciary trusts is better settled than that the trustee shall not be allowed to advantage himself in dealing with the trust estate. Lack of any fraud on the part of the trustee will not validate a transaction having the effect of making for himself a profit out of the trust estate." 54 *American Jurisprudence,* § 314, p. 249. See, also, 151 A. L. R. 905 and 65 *Corpus Juris,* § 520, p. 652.

[6] *Clark* v. *Spanley,* 122 Ark. 366, 183 S. W. 964, and *Casteel* v. *White River Grocery Co.,* 159 Ark. 93, 251 S. W. 31.

Act 143 of 1945. A trustee is under duty to refrain from personal traffic in, or private use, application, or appropriation of trust property or funds, at least without the express consent of the *cestui que trust.*[7] There is no evidence in this case that appellant had full knowledge of the facts and certainly no concurrence upon his part in the acts of the trustee. Appellee should, therefore, be required to restore to the trust estate the funds appropriated by her unless the orders of the Chancery Court approving the accounts of the trustee for the years 1945 and 1946 are final.

The rule in Arkansas is that a judgment or final order may not be vacated or modified after the expiration of the term in which it is rendered or made except for the reasons set out in Arkansas Statutes (1947), § 29-506. However, the rule against vacating or modifying a judgment or order after expiration of the term at which it was rendered has no application to interlocutory judgments or orders and such judgments or orders may be vacated or modified at any time before the final judgment.[8] Therefore, we must determine whether the orders of the Chancery Court approving the 1945 and 1946 reports were final or merely interlocutory. In determining whether a judgment or order is final or interlocutory, there is no hard and fast definition or test applicable to all situations. The statements of account which the orders in question approved were not filed in compliance with any provision of the trust instrument or pursuant to any statutory requirement, but at the direction of the Chancery Court. The orders cannot be considered as a final determination of the rights of the parties since the trust does not terminate until the youngest of the beneficiaries reaches the age of thirty years and a judgment or order is not generally considered final where further judicial action is necessary to fully and finally determine and settle the rights of the parties.[9]

---

[7] 54 *American Jurisprudence,* § 313, p. 248.

[8] See 10 A. L. R. 559.

[9] "Any judgment or decree, which finally disposes of the issues between the parties to an action, and finally settles and adjudicates all the rights in controversy, is a final judgment." *McConnell* v. *Bourland,* 175 Ark. 253, 299 S. W. 44.

The annual accounts, which the Chancery Court directed Corinne McCombs Hardy to file, are in many ways comparable to the annual accounts which executors, administrators and guardians of minors are required to file by statute. The Arkansas Legislature has made the order of a Probate Court approving and confirming the account of an executor or administrator binding and conclusive in the absence of fraud or other recognized ground for equitable relief.[10] It is also the rule in Arkansas that the order of confirmation of a guardian's settlement by the Probate Court is a judgment which can be appealed from, but which cannot be otherwise disturbed, except in a Court of Chancery upon an allegation of fraud or other recognized ground for equitable relief.[11] However, the powers and duties of executors, administrators and guardians have long been the subject of statutory regulation and safeguards for the protection of interested parties have been provided by the Legislature.[12] While the Legislature has provided for annual settlements by personal representatives and guardians and a procedure for confirmation thereof by the Probate Court, it has not seen fit to make similar provisions in the case of trustees and therein lies the distinction.

In Arkansas there is no statute which regulates the creation of trusts and in the absence of such a statute M. W. Hardy had the right to create any trust he deemed wise and expedient as long as it was for a lawful purpose and to establish the powers and duties of the trustee he named. By the terms of his will, M. W. Hardy did create an active express trust for a lawful purpose and the powers and duties of the trustee, Mrs. Hardy, must be determined by the provisions of the instrument which created the trust. Mr. Hardy, as the creator of this trust, made provision for partial settlements between the trustee and each of the beneficiaries as they reached the ages of 21, 26 and 30 and also for a final settlement when

[10] See *Arkansas Statutes* (1947), § 62-1508.

[11] *France* v. *Shockey*, 92 Ark. 41, 121 S. W. 1056.

[12] As to guardians of minors see *Arkansas Statutes* (1947), § 57-301 to § 57-353, inclusive. As to accounting and settlement of executors and administrators see *Arkansas Statutes* (1947), § 62-1501 to § 62-1523, inclusive.

the youngest beneficiary reached the age of 30 years, but there was no provision for the filing of annual settlements by the trustee and nothing in the will to evidence any intention to relieve the trustee of liability to the beneficiaries prior to a final settlement. If the Chancery Court had the power to relieve the trustee from liability to the beneficiaries by its orders approving the 1945 and 1946 accounts, it must be found in the inherent power of courts of equity over trusts and not in the instrument which created the trust. In *Morris* v. *Boyd et al.,* 110 Ark. 468, 162 S. W. 60, this Court held that the jurisdiction of equity exists to control and supervise the carrying out of a trust already created and this involves a general superintending control for the purpose of enforcing the trust and preventing a failure thereof. The learned Court further said: "Chancery Courts also assume jurisdiction for the purpose of construing the terms of an instrument whereby a trust is created and to determine its scope. And in case of doubtful construction, the trustee may invoke the jurisdiction of the Court for direction in executing a trust. But the courts do not possess the prerogative power of creating trusts or of altering the terms of instruments creating them." If the Chancery Court has the power through its orders approving the reports to relieve the trustee of liability to the beneficiaries for a wrongful appropriation of trust funds then it would have the power to alter the terms of the instrument which created the trust. The Chancery Court does not possess that power. In the absence of statutory authority for the filing and confirmation of settlements of trustees, we reach the conclusion that the orders of a Chancery Court approving the accounts of a trustee, other than a final account upon termination of the trust, are interlocutory and not final unless otherwise provided in the instrument which creates the trust. The orders of the Chancellor approving the 1945 and 1946 reports of the trustee should have been modified and the trustee required to restore to the trust that portion of the proceeds of the timber sales which she had appropriated to her own use.

In view of the facts that we hold the orders approving the 1945 and 1946 accounts of the trustee to be interlocutory and not final, it is unnecessary to pass on the question of constructive fraud.

The decree of the Chancery Court is accordingly reversed and this cause is remanded for the entry of a decree in accordance with this opinion. All costs in this court and the court below are taxed against the appellee.

Justices MILLWEE, GEORGE ROSE SMITH and DUNAWAY disqualified and not participating.

HARDY *v.* HARDY.

4-9031 230 S. W. 2d 11

Opinion delivered May 15, 1950.

Barber, Henry & Thurman, Jacoway & Jacoway and *Edward E. Stocker,* for appellant.

Rose, Dobyns, Meek & House, for appellee.

J. S. Brooks, Special Justice. This is an action originated by the appellee (who is also the cross-appellant) against the appellant (who is also the cross-appellee) to compel appellant, as the Trustee under the Last Will and Testament of M. W. Hardy, deceased, to account to the appellee, William McCombs Hardy, a son of M. W. Hardy, and beneficiary of the Hardy Will, for certain dividends on Trust stocks, for restoration to the Trust of certain funds involved in sale of timber from lands of the Hardy estate, for permission to inspect the books and records of the Hardy Trust and finally to charge personally against the appellant, Corinne McCombs Hardy, the attorneys' fees incurred by the appellee. On hearing in the Pulaski Chancery Court in Case 82668, and hearing of another case in the same Court between the same parties, consolidated for trial, the dividends question was decided in favor of the appellee, William McCombs Hardy, but the Court refused to assess attorneys' fees against the appellant individually. Costs were assessed by the Court one-fifth to appellee and four-fifths to appellant. The other issues mentioned were disposed of by the Court below and are not before us now. The Trustee, Mrs. Hardy, has appealed the dividends question, and

William McCombs Hardy has cross appealed the attorneys' fee decision.

This is a companion case to No. 9028, decided this same day.[1] The basic facts appear in both cases and we will not elaborate on such facts. M. W. Hardy died in 1929 in Pulaski County, and left surviving him his widow, Corinne McCombs Hardy, and three minor children, the appellee, William McCombs Hardy, then age 14, and twins age 3, a son, Robert Lamar Hardy, and a daughter, Frances Hope Hardy. M. W. Hardy was testate, and his Last Will and Testament was duly probated in Pulaski County. After making provision for the widow, the bulk of the estate was left to the three children, share and share alike. A trust was set up by the Will, the general provisions of the Trust being that each child was to receive one-fourth of his inheritance at age 21, another one-fourth at age 26, and the remaining one-half at age 30.

The Hardy estate consisted of both real and personal assets—stocks, bonds, timber lands, etc. The widow, Mrs. Hardy, to whom we sometimes refer hereafter as the Trustee, was left the home in Little Rock in fee and one-third interest for life in all other real estate, together with certain personalty rights. Mrs. Hardy and the First National Bank of El Dorado were named Co-Trustees, but the Bank resigned in 1932. In that year, the Chancery Court of Pulaski County authorized Mrs. Hardy to continue as sole Trustee, and directed that she make annual reports of the Trust functions to that Court. Mrs. Hardy as such Trustee administered the affairs of the Trust from 1932 until 1947 or 1948.

William McCombs Hardy, sometimes referred to hereafter as McCombs Hardy, became 21 in 1936, 26 in 1941 and 30 in 1945, but for reasons apparently agreeable to all involved, the distributions called for by the Hardy Will at those ages were not made. Sometime in 1946, the question of a complete settlement by the Trustee with her son did come up, and this particular litigation involves one phase of the settlement. Discord between the Trus-

[1] See *ante*, p. 296.

tee and McCombs Hardy arose about this time, as to several matters. The phase of the Hardy Trust estate here involved arose out of the settlement of the Trustee with McCombs Hardy as to his interest in certain stocks and bonds belonging to the Trust.

After a request for the Trustee to turn over to McCombs Hardy in 1946, his share of such stocks and bonds, both parties agreed to have these items appraised by the accountant of the estate, or some person selected by the accountant, as of September 30, 1946. The procedure was to agree on an appraised value on said date, and then have the Trustee, using estate funds of the other two Hardy children, purchase the interest of McCombs Hardy in such items. The valuation basis was used, and some time after September 30, 1946, McCombs Hardy was furnished with such appraisal, as a result of which the sum of $24,049.60 would be paid to him for his interest in the stocks and bonds involved.

For different reasons, the parties did not meet to complete the transaction until January, 1947, when the contents of the appraisal were first mutually discussed. The Trustee approved the listing and the values there shown except as to the $5.00 per share figure placed on the Barton-Mansfield stock. This stock was eliminated from the list, and the amount due McCombs Hardy then reduced accordingly to $20,834.60, and check for this amount was written by the Trustee and delivered to McCombs Hardy, and cashed by him. The check, dated January 24, 1947, contained an endorsement, "On account of settlement of his share in certain personal property and cash as of September 30, 1946." One of the stocks on the list was that of the Acme Brick Company. This Company had paid a large dividend on stocks belonging to the Hardy estate in December of 1946. Such dividend and other dividends from stocks involved in the transaction between the Trustee and William McCombs Hardy paid between September 30, 1946, and January 24, 1947, amounted to $9,869.94.

Shortly after the January 24, 1947, transaction, McCombs Hardy made a demand on the Trustee for his

share, one-third, of all the dividends and he alleged that at the time of the settlement on January 24th the dividend payment question was discussed and that the Trustee agreed to pay him his share of the dividends. Mrs. Hardy denied any such agreement and claimed that the settlement made with her son as to the purchase of these stocks and bonds was effective September 30, 1946, and also asserted that the acceptance by McCombs Hardy of the above mentioned check, containing the endorsement shown, estopped her son from claiming any right to the dividends. The present litigation arose out of such controversy, together with other phases of discord between these two parties. McCombs Hardy further asserted in the Court below that because the Trustee denied him his rights and privileges due to him from the Hardy trust the Trustee should be compelled individually to pay reasonable attorneys' fees incurred by him in compelling the enforcement of his rights.

We concur with the findings of the lower Court in all phases of this case, presently before us, except as to the question of costs. As to the stock dividends point, our decision is based upon two lines of thought.

(1) The Chancellor's Findings.

This case could be effectively disposed of now upon the consideration of the question of fact presented to the Chancellor below as to the direct testimony of William McCombs Hardy that his acceptance of the January 24, 1947, check from the Trustee was conditioned upon the agreement of the Trustee to pay to him his share of the dividends. The Trustee denied any such agreement and the disputed fact was thus presented to the Chancellor whose decision resolved the question in favor of McCombs Hardy. This being an equity suit, it is the duty of this Court to weigh the evidence and reach its own conclusion. However, the Chancellor's finding is persuasive unless the Court is satisfied that the preponderance of the evidence is to the contrary. We cannot say, in view of the record, that McCombs Hardy did not sustain the burden of proving his allegations by a preponderance of

the testimony as to the dividends question. It particularly occurs to us that as a related fact in the January 24th settlement the Trustee could not fairly assert the September 30th date binding on McCombs Hardy and yet herself partially accept and partially reject the valuation figures of the September 30th statement, as was the case when she refused to settle on the figures fixed for the value of the Barton-Mansfield stock.

(2) Purchase by Trustee.

However, in addition to the fact question above discussed, resolved against the Trustee, even if it be assumed that there was a definite valuation agreement on the September 30, 1946, date for the sale of McCombs Hardy's interest in the stock involved, still the settlement transaction of January 24, 1947, and the acceptance of the check of that date by McCombs Hardy should not be enforced by the Trustee as to the dividends point. The record in no way shows a specific agreement of the parties to have the interest of McCombs Hardy in these stocks concluded on September 30th, but only that this was a valuation basis date and that the transaction was continued over a period of almost four months before its conclusion. In the meantime, large dividends had accumulated on the stocks and the amount and extent of these dividends was known only to the Trustee who had managed completely the Hardy trust for many years. The trustee-beneficiary relationship between the parties made it incumbent on the Trustee to use the highest degree of care and fairness in her dealings with her son as to the purchase of his stock interest in the trust, no matter if the purchase was made for herself or for the other beneficiaries. This Court has previously in a number of cases defined the extent and nature of a trustee's obligations and duties in dealings with the beneficiary. In *Patterson* v. *Woodward,* 175 Ark. 300 (1925), 299 S. W. 619, we said:

"At the outset it may be said that it is a rule of universal application in equity that a trustee shall not deal with trust property to his own advantage against the consent of the *cestui que trust.* The rule is not confined

to any particular class of trustees but applies to all who come within its principles."

Also in *Lybarger* v. *Lieblong,* 186 Ark. 913, 56 S. W. 2d 760 (1933), we further said:

"Everyone whether designated agent, trustee, servant or what not, under contract or other legal obligation to represent and act for another in any particular business or line of business or for any valuable purpose, must be loyal and faithful to the interest of such other person in respect to such business or purpose. He cannot lawfully serve or acquire any private interest of his own in opposition to that of his principal. 'This is a rule of common sense and honesty as well as of law.' In R. C. L. 825, it is also said: 'He may not use any information that he may have acquired by reason of his employment either for the purpose of acquiring property *or doing any other act which is in opposition to his principal's interest.*' " (The emphasis is ours.)

Then in 159 Fed. 321, in a case arising in Arkansas and decided by the Circuit Court of Appeals, Eighth Circuit, styled *Byrne* v. *Jones, et al.* (1908), involving a transaction between an Arkansas attorney and a Massachusetts client, it was said:

"A trustee or an agent may purchase the trust property directly from his *cestui que trust, sui juris,* or principal, on condition that the latter intends that the former shall buy, that the former discloses to the latter, before the contract is made, every fact he has learned in his fiduciary relation which is material to the sale, that he exercises the utmost good faith, that no advantage is taken by misrepresentation, concealment of, or omission to disclose, important information gained as trustee or agent, and that the entire transaction is fair and open."

Further in the same case it was said:

"Any omission by the trustee or agent to disclose any fact material to the sale learned by him as trustee or agent, any material misrepresentation, concealment, or other disregard of this condition, renders the sale and

the contract for it voidable at the election of the *cestui que trust* or principal."

Among cases cited in support of this rule in the case quoted from are *Cornish* v. *Johns,* 74 Ark. 231, 240, 85 S. W. 764, and *Thweatt* v. *Freeman,* 73 Ark. 575, 580, 84 S. W. 720.

The well known text writer, Bogert, in his work, Trusts and Trustees, says in § 493 thereof (Breach of Fiduciary's Duty to Use Utmost Good Faith in Direct Dealing With Principal) that:

"Fiduciaries are not prohibited from having direct dealings by way of conveyance or contract with their principals, but such transactions are guarded very jealously by equity. By reason of the intimate knowledge which the fiduciary has with respect to the financial affairs of the principal, the superiority of his position, his usual influence with the principal and the latter's trust and confidence in the fiduciary, there is great opportunity for the exercise of fraud and undue influence."

The same authority in § 543 (Trustee's Duty of Loyalty to the *Cestui*) states:

"One of the most fundamental duties of the trustee is that he must display throughout the administration of the trust complete loyalty to the interest of the *cestui que trust.* He must exclude all selfish interest and also all consideration of the welfare of third persons."

Tested by the principles of the above authorities and cases, we do not find that the Trustee in her dealings with McCombs Hardy fulfilled all of her duty and obligations to the beneficiary, particularly as to a full disclosure of all facts. We think it obvious that McCombs Hardy would not have accepted the January 24, 1947, check from the Trustee if he had been given exact knowledge of the dividends accruing on the stocks, except upon a specific understanding and agreement of the Trustee for payment of his share of the dividends. The record shows that he conditioned the settlement on receipt of his share of the dividends, even though he knew nothing of the

details as to the dividends, and, no doubt, his conditional acceptance of the check would have been very definite and emphatic beyond any possible misunderstanding if the Trustee had disclosed all pertinent facts and figures about these dividends.

Our conclusion is not altered by the fact that the Trustee's dealings with her son were not on the basis of her purchase of his interest in these stocks, but that the purchase was being made for the other two Hardy children. The errors in her conduct as Trustee in dealings with her son were detrimental to McCombs Hardy, no matter who benefitted from the transaction. The cases and text writers are agreed on this point, it being said in the Re-Statement of the Law of Trusts, § 183:

"Where there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them."

The text writer in 54 Am. Juris., page 254, which is § 320, Loyalty to Plural Beneficiaries and Plural Trusts, affirms this principle. Several cases are cited by the text writer, among them, *Gaver* v. *Gaver,* 176 Md. 171, 4 A. 2d 132, in which case a mother, Mrs. Gaver, held as life tenant with the remainder interest to pass to her children equally. Mrs. Gaver was not permitted to favor one of the children in a property transfer and in that case the Court said:

"As a trustee Mrs. Gaver was under a duty to exercise her power to sell fairly and impartially for the equal benefit of all of the remaindermen and any grant of a gift, benefit or advantage to one remainderman at the expense of the others would constitute a breach of that duty, 65 C. J. 648, 26 R. C. L. 1280, 1281; *Calvert* v. *Calvert,* 18 Md. 73."

(3) Attorney's Fee.

Both parties concede that the law of Arkansas generally on this subject raised by the cross appeal of William McCombs Hardy is that each litigant must pay his own attorneys' fees. *Jacobson* v. *Poindexter,* 42 Ark. 97;

White River L. & W. Ry. Co. v. *Starr, R. & L. Co.*, 77 Ark. 128, 91 S. W. 14. It is true that a Trustee is responsible to the beneficiary for any damage sustained by reason of the trustee's misconduct or neglect. *Clark* v. *Spanley,* 122 Ark. 366, 183 S. W. 964. However, the record does not show in this case misconduct or neglect by Corinne McCombs Hardy to such an extent as to justify the position and claim of the cross appellant, McCombs Hardy, on this point.

Affirmed on both the direct and cross appeals with all costs assessed against the appellant, Corinne McCombs Hardy.

Justices MILLWEE, GEORGE ROSE SMITH and DUNAWAY disqualified and not participating.

WYNN MOTEL HOTEL, INC., *v.* CITY OF TEXARKANA.

4-9207 230 S. W. 2d 649

Opinion delivered May 15, 1950.

Rehearing denied July 3, 1950.

George F. Edwardes, for appellant.

Dennis K. Williams and *Shaver, Stewart & Jones,* for appellee.

MINOR W. MILLWEE, Justice. This is a suit by appellee, City of Texarkana, Arkansas, to remove an encroachment on the south side of East Seventh Street in said city allegedly resulting when appellant, Oney Earl Wynn, in 1946, erected a building known as the "Wynn Motel" five and one-half feet over the north boundary of his Lot 12, Block 26, of the original town of Texarkana, Arkansas.

The complaint alleged that in December, 1880, the St. Louis Iron Mountain & Southern Railway Company, hereinafter called Southern, made and recorded a plat of the blocks, lots, streets and alleys of the original town of Texarkana, Arkansas, on part of a certain section of land in Miller County, Arkansas, showing said Lot 12 to be 49 feet wide and 140 feet long abutting on East Seventh Street, which was shown by said plat as being 78 feet wide at all places; that appellant Wynn and his predecessors in title claimed title to said lot through Southern and their conveyances are based on said plat; that state and federal highway authorities were in the process of widening and resurfacing East Seventh Street and required the

full width thereof for such purposes. Appellee prayed that a mandatory injunction be issued requiring appellants to remove the alleged encroachment. The suit originated in chancery, but was transferred to circuit court on motion of appellants.

In the answer appellant Wynn asserted ownership of said Lot 12 together with a strip nine feet and 10 inches wide and 140 feet long adjacent to the north boundary of said lot by adverse possession of Wynn and his predecessors in title since 1877. It was also alleged that Southern parted with its title to the property in 1877 and, therefore, had no right to dedicate a street 78 feet wide in 1880. After the circuit court denied appellee's motion to remand to chancery, the case proceeded to trial before a jury resulting in a verdict and judgment for appellee.

The first three assignments of error in the motion for new trial challenge the sufficiency of the evidence to support the verdict. The fourth assignment alleges that the uncontradicted evidence reflects that appellant Wynn has title to the strip of land in controversy by adverse possession. The fifth assignment is that the trial court erred in refusing to grant a motion for a peremptory instruction for appellants at the conclusion of the testimony on behalf of appellee.

The evidence reflects that about the time Texarkana was incorporated as a town, Seventh Street, at the point in controversy, traversed a knoll which was cut down by the town in opening and grading the street, leaving a terrace or embankment about three feet high on or adjacent to the south side of the street and increasing in height to the back of said Lot 12 now owned by appellant Wynn. The evidence is in sharp dispute as to whether the front or north edge of this terrace formed the north boundary of said Lot 12, or whether said terrace extended several feet into the south part of East Seventh Street for the 140-foot length of the lot abutting on said street.

It is undisputed that four small houses were erected and stood on top of this terrace facing Seventh Street for many years prior to 1935 when appellant Wynn went

into possession of Lots 11 and 12 of Block 26 under a gift from his mother, Mary E. Pugh. Wynn removed the houses in 1935 and graded Lot 12 down to the street level. The oldest of the houses, known as the Dosty house, was on the west end of the lot at the corner of Seventh and Hazel Streets. In 1936 Wynn erected a filling station on or near the site of the Dosty house. The filling station does not fall within the encroachment area and the evidence is in dispute as to whether the Dosty house and the other three houses removed by appellant actually extended into the 78-foot street.

In 1946 appellant Wynn obtained a permit from the city and erected the Wynn Motel east of the filling station. Two of the engineers and surveyors testified that the front of the building extended into Seventh Street five feet and six inches. Another surveyor stated that the encroachment was five feet and seven inches, while a fourth fixed the encroachment at five feet and three inches. Some of the witnesses for appellant thought the old houses extended as far, or farther, into Seventh Street than the Motel building, while there was evidence on behalf of the city that said buildings did not encroach on said street.

There was also considerable variance in the testimony as to when the four houses were erected on the terrace. There was some evidence on behalf of appellants that the houses were erected prior to 1890. However, one of appellant's witnesses stated that J. H. McClain erected the three houses east of the Dosty house, on the site of the present Motel, during his ownership of the lot, and the record discloses that the property was deeded to McClain in 1899.

The parties stipulated that Texarkana was incorporated as a town in 1880, advanced to a city of the second class in 1887, and became a city of the first class in 1903. The first statute exempting municipalities from the statute of limitations as to streets and other public places was enacted in 1885 and applied only to cities of the first class. This statute now appears in the third subdivision

of Ark. Stats. (1947), § 19-2304. Since Texarkana did not become a city of the first class until 1903, the case was submitted to the jury on the question whether Wynn's predecessors in title actually held adverse possession of the strip in controversy for seven years prior to 1903.[1] This question was resolved in favor of the city on evidence which is disputed but substantial and sufficient to support the verdict. It follows that the trial court did not commit error in refusing to direct a verdict in favor of appellants.

The sixth assignment in the motion for a new trial alleges error in the court's refusal to give appellants' requested instructions Nos. 2, 3, and 5. The requested instructions are set out in appellants' brief, but none of the other instructions are abstracted. We have repeatedly held that the refusal to give certain instructions cannot be relied upon as error unless all of the instructions are set out in the abstract. *Keller* v. *Sawyer,* 104 Ark. 375, 149 S. W. 334. In *DeQueen & Eastern Ry. Co.* v. *Thornton,* 98 Ark. 61, 135 S. W. 822, the court said: "Counsel for appellant assign as error the action of the court in refusing a certain instruction, which they set out in their abstract. They contend that the refused instruction is not covered by any other instruction given. But they have not set out the other instructions, and the court might differ with them as to their construction of the omitted instructions. Under rule 9 counsel must abstract them, or we will assume that the theory embraced in the refused instruction was fully covered by the other instructions given which are not abstracted. *St. Louis, I. M. & S. Ry. Co.* v. *Boyles,* 78 Ark. 374, 95 S. W. 783."

Where instructions given in a case are not set out in appellants' brief, it is conclusively presumed that the

[1] Ark. Stats. (1947), § 19-2305 provides that no statute of limitation shall bar removal of street encroachments by cities of the second class. This statute was enacted in 1897. While its provisions were not invoked in the instant case, the testimony as to seven years adverse possession prior to 1897 is, of course, weaker than that relating to such possession prior to 1903. The statute seems to have also been overlooked in the case of *Fordyce* v. *Hampton,* 179 Ark. 705, 17 S. W. 2d 869. Ark. Stats. (1947), § 19-3831 was enacted in 1907 and applies to all municipalities.

case was submitted to the jury under instructions correctly declaring the law. *Wilson-Ward Co.* v. *Fleeman,* 169 Ark. 88, 272 S. W. 853; *Sloan* v. *Ayres,* 209 Ark. 119, 189 S. W. 2d 653. The court gave four instructions requested by appellee and two requested by appellants. Since these instructions are not abstracted, it must be presumed that the court correctly declared the law governing the issues. Moreover, the refused instructions relate to questions of abandonment and estoppel by the city and establishment of an alleged agreed boundary between the city and Wynn, or his predecessors in title; and this court has held contrary to appellants' contention on said issues in the following cases: *Little Rock* v. *Wright,* 58 Ark. 142, 23 S. W. 876; *Paragould* v. *Lawson,* 88 Ark. 478, 115 S. W. 379; *Mebane* v. *City of Wynne,* 127 Ark. 364, 192 S. W. 221; *Butler* v. *Emerson,* 211 Ark. 707, 202 S. W. 2d 599.

The seventh and last assignment of error in the motion for new trial reads: "That the Court erred in giving each and all of the instructions requested by the Defendants [Plaintiff] and particularly Instruction No. ..... which charged the jury that no title by adverse possession could be acquired after May 27, 1903, for the reason that said instruction was contradictory to Defendants Instruction No. 1 and was confusing to the jury." In connection with this assignment appellants earnestly insist that the trial court committed error by arbitrarily instructing the jury in appellee's requested instruction No. 5 that the strip of land in controversy was 5 feet and 6 inches wide when there was a variance in the testimony as to the width of the alleged encroachment. Even if it be conceded that appellants properly preserved an exception to the challenged instruction in said assignment seven, the abstract is fatally defective in that none of the instructions given are set out in appellants' brief.

It is also argued that a verdict should have been directed for appellants because appellee failed to show or deraign title to a street 78 feet wide. The record shows that Cairo & Fulton Railroad Company procured a patent from the United States covering the site of the original

town of Texarkana in 1857 and published a map of the town. The patentee railway consolidated with St. Louis, Iron Mountain Railway Company in 1874 to form Southern which conveyed Lot 12 in Block 26 to W. M. Fuller in 1877. On March 1, 1880, Fuller conveyed to B. F. Kelly "Lot 12 in Block Number 26 in the town of Texarkana, Arkansas, as laid down on the map of said town published by the Cairo & Fulton Railroad Company now the St. Louis Iron Mountain & Southern Railway, being forty-nine feet front by one hundred and forty feet deep." Kelly conveyed the lot to Nannie Mooring in 1886 and the latter conveyed to J. H. McClain in 1899. In 1923 McClain conveyed the lot to W. K. Pugh, who devised the property to his widow, Mary E. Pugh.

It is true that the dedication deed and plat were made and recorded by Southern in 1880 after the deed to Fuller in 1877 and the record here does not show whether Cairo & Fulton Railroad Company sold lots with reference to the map it published prior to consolidation with St. Louis, Iron Mountain Railway Company. But it is clear from the record that the parties here claim under a common source of title and that Lot 12 of Block 26, which is described throughout the chain of title as being 49 feet wide and 140 feet long has been conveyed and reconveyed with reference to the map recorded by Southern in 1880 and the earlier map published by Cairo & Fulton Railroad Company. It is well settled that "when the owner of land makes a plat thereof, or adopts one made by someone else, and sells lots by reference to the map, this amounts to a dedication of the streets and public ways shown on the map." *Hope* v. *Shiver,* 77 Ark. 177, 90 S. W. 1003. The evidence is sufficient to show that Southern adopted the map published by Cairo & Fulton Railroad Company and there was a dedication of the abutting Seventh Street by sale with reference to the published plat.

When Kelly sold and conveyed Lot 12 to Nannie Mooring in 1886, he adopted the plat recorded by Southern showing a street 78 feet wide abutting said lot. Appellant Wynn claims title under this deed and all intervening sales and conveyances from Nannie Mooring to

appellant Wynn were made with reference to the recorded dedication deed and plat showing the width of Seventh Street as 78 feet. Since these sales and conveyances were made according to the recorded plat adopted by the several grantors, it is immaterial that Southern had parted with title to Lot 12 when the dedication deed and map were recorded. The evidence is, therefore, substantial and sufficient to show a valid dedication of a 78-foot street by the several conveyances which stem from the common source of title of the parties.

The judgment of the circuit court is affirmed.

[redacted]

O'QUIN *v.* O'QUIN.

4-9169 230 S. W. 2d 16

Opinion delivered May 15, 1950.

[redacted]

L. M. Alexander and *Gerland P. Patten,* for appellant.

Sam Robinson and *A. F. House,* for appellee.

HOLT, J. The parties to this litigation were married November 14, 1941. They were both employed at the Veterans Hospital where appellant (Mrs. O'Quin) had worked for approximately twenty years and is now so employed. Immediately following their marriage, they established a joint bank account in a North Little Rock Bank in which both deposited all earnings. Appellee (Mr. O'Quin) had a son by previous marriage, but has no child by appellant. Both were middle-aged.

At the time of their marriage, Mrs. O'Quin owned four lots in North Little Rock on one of which was her dwelling. She also possessed cash and household furniture, all totaling approximately $2,200. Mr. O'Quin owned property of the approximate value of $1,500.

By thrift and regular employment, from their joint efforts, they improved the home property of Mrs. O'Quin and acquired and improved a number of other pieces of real estate, also Government bonds, a profitable plumbing shop built on one of the above lots which Mrs. O'Quin brought to the marriage, an automobile and other property. All of the above property, real and personal, immediately following the marriage and as later acquired, was put in the names of Mr. and Mrs. O'Quin as tenants by the entirety.

This marriage progressed harmoniously until August 11, 1948, when differences arose which resulted in Mr. O'Quin's filing suit for divorce and a decree in his favor on September 1, 1948. On August 28, 1948 (about three days before this decree), an alleged property settlement had been made by these parties and deeds executed.

Thereafter, on September 14, 1948, the parties having become reconciled, at their joint request, the court set aside and annulled the above decree of divorce of September 1, 1948, but made no order relative to the previous property settlement.

The present suit was filed by Mrs. O'Quin December 23, 1948, in which she asked for divorce and that the deeds which she made to Mr. O'Quin wherein she conveyed certain real property, presently referred to, be set aside for fraud, undue influence in its procurement and lack of consideration, and that she was entitled to one-half of all their property, real and personal.

The trial court, after an extensive and patient hearing, denied appellant's prayer for divorce, but confirmed in Mrs. O'Quin title to the real property received by her in the alleged property settlement August 28, 1948, $1,600 in cash, a Plymouth automobile valued at $2,300 and her right to $2,500 in Postal Savings Certificates. By the decree, Mr. O'Quin was given real property worth more than $30,000, the plumbing shop, trucks and equipment, of the approximate value of $5,000, $2,500 in Postal Savings Certificates, and $12,299.85, which constituted their joint bank account.

Much testimony was presented. Charges, countercharges, and accusations, not sustained by the proof, were made. We shall not extend this opinion by detailing the testimony. It suffices to say that, on the divorce issue, we hold that both parties appear to be about equally at fault; that, in the circumstances, all accusations, differences and any misconduct were condoned and forgiven by each following the resumption of their marital relations, as indicated, and that the preponderance of the testimony is not against the Chancellor's finding that appellant was not entitled to a divorce.

On the issue of the property settlement, we hold that the court erred in denying Mrs. O'Quin's contention that all of the property involved here was acquired and owned by the parties as tenants by the entirety and that she was therefore entitled to a one-half interest in said property.

We think the preponderance of the evidence shows that following the first rift in their marriage August 11, above, the parties endeavored to adjust their differences and that appellee by what, in effect, amounted to fraud, overreaching, and deception, induced his wife, on the promise to save the marriage, to deed to him on August 28, 1948, lots 1, 2, 11 and 12 Holead's Addition to Levy, now in the City of North Little Rock, Pulaski County, Arkansas, and Lot 5, Block 60, North Argenta, now in the City of North Little Rock. The four lots above described in Holead's Addition were owned by Mrs. O'Quin at the time of their marriage.

At the same time a deed was executed to Mrs. O'Quin to Lots 11 and 12, Block 2, Machin's Addition to North Little Rock and Lot 2, Block 4, Vestal's Addition to North Little Rock.

These deeds appear to have been executed on a Saturday and on the following Monday, August 30, Mr. O'Quin sued for divorce and secured an uncontested decree which was later set aside, as above indicated.

It is a well settled rule applicable here that: "Equity will scrutinize more closely a conveyance from the wife to the husband than an ordinary conveyance. On account of the confidential relation and the supposedly greater influence of the husband, the wife's conveyance may be attended with a presumption against its validity. 21 Cyc. 1293.

" 'In any transaction by which the husband acquires title to his wife's separate property, the burden is on him to show it to be fair and without any exercise of undue influence, and such as in good conscience ought to bind her.' " (*Mathy* v. *Mathy,* 88 Ark. 56, 113 S. W. 1012.)

We think it clear that following the setting aside of the divorce decree, September 14, 1948, there was an

honest effort and intention by both parties to resume their former status in every respect, including their joint property interests which, in effect, cancelled their property settlement of August 28, 1948.

It is significant that Mrs. O'Quin on the resumption of their marital relations, delivered to Mr. O'Quin the Postal Savings Certificates along with deeds and other properties, the $1,600 assigned to her by her husband was deposited in a new joint bank account and all rents from their properties went into this account, along with Mrs. O'Quin's salary checks. There appears to have been no effort by them during this period to separate their property interests.

The rule is well settled that: "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 determined accordingly." (*Carter* v. *Younger,* 112 Ark. 483, 166 S. W. 547), and in *Sherman* v. *Sherman,* 159 Ark. 364, 252 S. W. 27, where a separate agreement involving property was involved, after reaffirming the above language in the *Carter* v. *Younger* case, we said: "Tested by this rule, we think that the facts and circumstances of this case warranted the chancery court in finding that the marital relations between J. W. Sherman and his wife never ceased, and that there was mutual forgiveness of the past misconduct on the part of each. . . .

"The preponderance of the evidence indicates that it was not only their intention to end the contract, in so far as it required them to live apart, but also to annul it as to the settlement of their property rights. . . ."

We have not overlooked appellee's "Motion to Dismiss," which we hold to be without merit.

Accordingly, the decree denying the divorce is affirmed, but, as to the property rights, is reversed and the

cause is remanded with directions to set aside any and all instruments by which the parties have destroyed the tenancy by the entirety existing between them, and to enter a decree that the parties are tenants by the entirety as to all real and personal property owned by them before the instruments of August 28, 1948. If, since August 28, 1948, either party has made unfair or prejudicial disposition of any of the personal property to the disadvantage of the other, then the Chancery Court will, on proper petition of the aggrieved party, require restoration of such personal property to the entirety estate. The cost of all proceedings is adjudged against the appellee.

Judge GEORGE ROSE SMITH not participating.

WILSON *v.* SANDERS.

4-9224 230 S. W. 2d 19

Opinion delivered May 15, 1950.

M. A. Matlock, for appellant.

E. R. Parham, for appellee.

George Rose Smith, J. This suit to quiet title to eight lots in Little Rock was brought by the appellee Sanders against the appellants, W. P. and Eunice M. Wilson, and others. At the trial the appellants offered no defense on the merits, their only contention being that the case should be dismissed because another action involving the same cause was pending in the same court. The chancellor rejected this plea and entered a decree quieting title in Sanders.

It appears that in 1946 Wilson paid $75 for a quitclaim deed to these lots. At that time the property had been sold to the State and to three improvement districts for nonpayment of taxes and assessments totaling about $5,000. The owner's time for redemption from one of the districts had expired. In May of 1946 Wilson brought the suit that is now urged as a bar to the present proceeding. The complaint, which was signed by Wilson *pro se,* asserted that the titles acquired by the districts were actually mere liens against the property. The plaintiff did not seek to redeem the property nor offer to pay the delinquencies. The complaint asked the court to determine the interests of all concerned and to order a sale of the lots and a distribution of the proceeds.

Sanders was not a party to that suit, as he had not then acquired any interest in the lots. One defendant, an improvement district, filed an answer disclaiming any title to the lots. A second defendant, the grantee of another district, filed a motion to make the complaint more definite. With no issues having been joined the suit lay dormant for more than three years.

In June of 1949 Sanders brought this action to quiet title. He shows that in March of that year he bought the lots from two of the districts for $2,375. While the suit was pending he acquired the title held by the grantee of the third district and of the State. The chancellor adjudged Sanders' title to be superior to Wilson's and therefore granted the relief prayed.

Sanders advances several grounds for affirmance of the decree. He says first that a plea based upon the

pendency of another action can be sustained only if the plaintiffs and the defendants occupy the same positions in both cases. Since Wilson is the plaintiff in the first case and is the defendant in this one, it is argued that this transposition of the parties is fatal to Wilson's plea in abatement. That, however, is not the law in this State. Our statute refers simply to "another action pending between the same parties for the same cause," without mentioning their respective roles in each case. Ark. Stats., 1947, § 27-1115. We have upheld a plea of this kind when the parties' relative positions in the two cases were reversed. *Board of Directors of St. Francis Levee Dist.* v. *Redditt,* 79 Ark. 154, 95 S. W. 482.

It is also urged by the appellee that the issues in the two cases are not the same. This contention is well taken. What the statute requires is that the two suits be "for the same cause," and our decisions have enforced this requirement. In *Garabaldi* v. *Wright,* 52 Ark. 416, 12 S. W. 875, one partner sued the other for a dissolution of the partnership and a settlement of their affairs. The defendant later sued the plaintiff in a different court for conversion of part of the property involved in the first case. In stressing the need for an identity of issues we said: "If the objects of two suits are different, they may progress at the same time, although the thing about, or in reference to which, they are brought, is the same in each case."

That opinion is controlling here. Wilson's 1946 complaint was designed to obtain a sale upon the theory that liens only were involved. The present complaint sought to quiet Sanders' title upon the theory that the improvement districts had acquired title rather than mere liens. The objects of the two suits are entirely different. Furthermore, this dilatory plea was not the most appropriate remedy available to Wilson. If he really wanted his own case to be tried and was not merely seeking to delay an adjudication on the merits, he was authorized by § 27-1305 to ask that the cases be consolidated on the ground that they were "of like nature or relative to the same question." He did not request such a consolidation;

instead he insisted that Sanders' suit be dismissed because his own distantly related case had been pending for over three years with no apparent effort on his part to bring it to trial. We affirm the chancellor's action in overruling this plea.

LEDBETTER *v.* ADAMS.

4-9193 230 S. W. 2d 21

Opinion delivered May 15, 1950.

T. J. Gentry and *Thad Tisdale,* for appellant.

John H. Wright, for appellee.

ED. F. MCFADDIN, Justice. Appellants are the widow and minor children of J. D. Ledbetter who was killed on October 22, 1948, while employed as a driver for the City Cab Company of Arkadelphia, Arkansas. Claim was duly filed by appellants with the Arkansas Workmen's Compensation Commission, and resulted in a finding by the Commission that appellee, Tommie Adams, was the owner of the City Cab Company, the employer of Ledbetter, and therefore liable for compensation payments. From such award appellee, Adams, appealed to the Circuit Court which reversed the Commission's finding and nullified the award. Appellants now seek reversal of the Circuit Court judgment and reinstatement of the Commission's award.

I. *Absence of Motion for New Trial.* Appellee urges that the appeal be dismissed, since no motion for new trial was filed in the Circuit Court; but we hold that no such motion was necessary, because the Circuit Court tried the case entirely on the record certified by the Workmen's Compensation Commission. The recent case of *Springdale Monument Company* v. *Allen,* 215 Ark. 788, 223 S. W. 2d 802, settles the point. In that case we said:

"As indicated, where, as in the present case, there was no new evidence or other proceedings in the Circuit Court, and the trial court reviewed the complete record certified to it by the Workmen's Compensation Commission, we hold a motion for a new trial was not necessary."

II. *Liability of Appellee.* This was the strongly contested issue before the Commission and Circuit Court: it being argued (a) that appellee was not the employer of five persons; and (b) that appellee was not the employer of Ledbetter. As to appellee not being the employer of five or more persons,[1] little need be said. The witnesses listed the names of at least five employees if Ledbetter be considered one; so the employment of Ledbetter by appellee is the determinative question. The Workmen's Compensation Commission found that appellee was the

[1] See Sec. 81-1302, Ark. Stats. 1947; also 1949 Cumulative Pocket Supplement to that section, and containing Initiated Act No. 4 of 1948.

employer of Ledbetter and liable for the award. The Circuit Court—on the same evidence—found that Ledbetter was not employed by appellee, but was employed by the witness, Earl Pike.

The undisputed evidence shows that five taxicabs were registered, licensed, and insured in the name of appellee, Adams; that these were driven by various persons; and that Ledbetter was driving one of these taxicabs at the time he was killed in a traffic collision. But Adams claimed that he had sold this particular cab and two others to Earl Pike (his kinsman) in January, 1948, (before Ledbetter was killed in October) and that Ledbetter was an employee of Pike. Adams was substantiated by Pike who claimed Ledbetter as his employee. Of course, if there were only five taxi drivers, and if three were employed by Pike and two by Adams, then neither Adams nor Pike would come within the purview of the Workmen's Compensation Law which is limited to employers of five or more persons.[2]

The evidence disclosed that Pike and Adams registered, in Adams' name, the cabs which Pike now claims to own; that neither the City, the State, nor the public liability insurance carrier was ever notified that Adams had sold any of the cabs to Pike; and that Pike filed, in Adams' name, claims with the public liability carrier. On the strength of the evidence herein detailed, and other of like nature, the Commission made these findings:

"We are convinced from the evidence that the contention of Tommie D. Adams, that he only operates two cabs under the name of City Cab Company, and the contention of Earl Pike that three of the cabs operating under the name of City Cab Company belong to him and that there is no common ownership of all five cabs, or partnership ownership of all five cabs, is simply a subterfuge engaged in to defeat the purpose of the Arkansas Workmen's Compensation Act.

"We are convinced from the evidence that Tommie D. Adams, doing business as the City Cab Company, owns

[2] See Footnote 1 (*supra*).

all the cabs and that at the time of the death of Jeff D. Ledbetter on October 22, 1948, he had five or more employees, one of which was Jeff D. Ledbetter.

"The registration of all the cabs for licenses in the name of Adams and the insurance coverage on all the cabs in the name of Adams is such a strong circumstance, that when taken with all the other evidence, convinces us that Tommie D. Adams is the actual owner of all the cabs operating under the name of City Cab Company, and that he had a sufficient number of employees to bring him within the provisions of the Arkansas Workmen's Compensation Act."

We hold that there was sufficient competent evidence from which the Commission could have found—as it did—that Adams was (a) the employer of five or more persons; (b) the real owner of the entire taxicab business of the City Cab Company; and (c) the employer of Ledbetter. In *Wren* v. *D. F. Jones Construction Co.,* 210 Ark. 40, 194 S. W. 2d 896, we reviewed cases showing the right of the Workmen's Compensation Commission to draw conclusions and inferences from the evidence, and said:

"Under our Workmen's Compensation Law the Commission acts as a trier of the facts—*i. e.,* a jury—in drawing the inferences and reaching the conclusions from the facts. We have repeatedly held that the finding of the Commission is entitled to the same force and effect as a jury verdict."

Since there was substantial evidence to support the inferences drawn and the conclusions reached by the Workmen's Compensation Commission, it follows that the Circuit Court was in error in reversing the factual findings of the Commission. See *Lundell* v. *Walker,* 204 Ark. 871, 165 S. W. 2d 600; *J. L. Williams & Sons* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82; and *Simmons National Bank* v. *Brown,* 210 Ark. 311, 195 S. W. 2d 539.

If the transfer from Adams to Pike had been in good faith, nevertheless the authorities hold (1) that the original employer remains liable under the Workmen's Com-

pensation Act, until there has been a reasonable time, or course of events, for knowledge of change of employer to be brought home to the employee; and (2) that the relationship of employer and employee is presumed to continue for a reasonable time after a sale of the business made without the knowledge of the employee. See *Palmer* v. *Main,* 209 Ky. 226, 272 S. W. 736; *Buchanan Min. Co.* v. *Henson,* 228 Ky. 367, 15 S. W. 2d 291; Schneider's Workmen's Compensation Text, Perm. Ed., § 788; Horowitz on "Workmen's Compensation," p. 228, *et seq.;* and also 71 C. J. 397. So even in the absence of a finding as to subterfuge, appellee, Adams, could have been held liable within the purview of the authorities just cited.

The judgment of the Circuit Court is reversed and the cause remanded, with directions to the Circuit Court to certify to the Workmen's Compensation Commission that its award is reinstated and affirmed.

CAPITAL TRANSPORTATION COMPANY *v.* HOWARD.

4-9164 229 S. W. 2d 998

Opinion delivered May 22, 1950.

House, Moses & Holmes and *William M. Clark,* for appellant.

Harry C. Robinson and *William J. Kirby,* for appellee.

HOLT, J. March 23, 1949, appellee, Mattie Howard, brought this suit to recover damages for personal injuries alleged to have been received when she fell in the aisle of appellant's electric trolley bus, because of appellant's negligence in operating the bus.

Appellant answered with a general denial and affirmatively pleaded contributory negligence of appellee. A jury awarded appellee $600, and from the judgment on the verdict is this appeal.

Appellant makes no complaint as to the amount of the verdict but earnestly contends that there was no substantial evidence to warrant it.

After a review of all the testimony, we hold that this contention must be sustained.

Only three witnesses, who were on the bus at the time of the mishap, testified in the case. September 8, 1948, appellee, a Negro woman, weighing about 250 pounds, boarded appellant's bus, carrying a sack of

groceries. After paying her fare, she proceeded to the rear, but just before she reached her seat the bus gave a "sudden jerk" or "snatched" and she fell to the floor receiving injuries. Appellee testified: "A. I got on the bus at 9th and Chester. When I started back to my seat, I made it almost to the seat, when I turned to wheel the bus gave a sudden jerk and flattened me out on the floor. Q. Did the bus start immediately when you got on it? A. It started immediately, when I got on the bus it started up immediately. When I got back nearly to where I thought I would have a seat it gave a jerk and jerked me down. . . . Q. Do you know what caused that sudden jerk? A. I don't know what would make the bus, the driving of the bus would be the only thing that would make a sudden jerk. Q. It did jerk? A. It jerked me flat of my back, laid me out on the floor, stretched me out just like (making motion with hands). Q. Did it tear your grocery bag? A. Tore the grocery bag and broke the handle off my purse. Q. Did it daze or addle you? A. Yes, sir, it dazed me pretty bad, I didn't know how bad I was until that night."

Willie Jiles, on behalf of appellee, testified that she was a passenger at the time, sitting in the rear. She saw appellee, along with several other people, get on the bus, and further: "A. Just to tell the truth, I didn't pay any attention, they were all getting on the bus, I didn't pay any attention until she hit the floor, that is when I looked, I was looking out through the window when the bus stopped, I was sitting where I could see out the window, when the bus started off she fell. I didn't know who it was at the time because there were some, some more standing up there and I kinder looked around I said 'Oh, who was that hit the floor' a man picked her up, I don't know who he was but I did see her fall. Q. Had the bus proceeded some ways past the corner where she got on before she fell? A. I just don't know, to tell you the truth I wasn't paying so much attention because when I am on a bus I don't pay any attention to who gets on and off, I was looking through the window when the bus started off and she fell, I saw that. Q. Did anything at-

tract your attention other than her falling? A. When the bus started off it was a snatch. Q. You felt the snatch when she fell? A. Yes, I heard her falling and I peeped around some other passenger and saw her laying on the floor, I spoke to someone, I said 'a mighty big woman to fall.' "

On behalf of appellant, the bus driver, L. O. Gary, testified: "A. Well, she boarded my bus at 9th and Chester. She had a sack of groceries, she deposited her fare in the box, . . . I started the bus immediately after she deposited her fare and she walked back to the rear of the bus, naturally as anyone would, and I just drove on down the street as naturally as I always do. I had driven about half a block when I heard a sack hit the floor. . . . I immediately glanced up in the rear view mirror and saw a Negro man pick up the sack of groceries and hand it to a colored lady, just set them in her lap and he sat back down," that appellee later came up and asked for a transfer but made no complaint.

There appears no disagreement as to the law governing cases of this nature. The same standard of care is required in the operation of trains, buses, street cars and trolley buses. Our rule is well settled that we must affirm where there appears any substantial evidence to support the jury's verdict. It is also our duty to view the evidence in the light most favorable to the appellee, giving to it, its strongest probative value, in her favor, with every reasonable inference deducible from it, whether from all the evidence presented or from appellee's testimony only, (*Harmon* v. *Ward,* 202 Ark. 54, 149 S. W. 2d 575, and *St. Louis Southwestern Railway Company* v. *Holwerk,* 204 Ark. 587, 163 S. W. 2d 175).

As we read the testimony of appellee and her witness, Jiles, in the light of the above rules, it amounts to this: After appellee had boarded the bus with a sack of groceries in her arms, she paid her fare, walked toward a seat in the rear and when "almost to the seat, when I turned to wheel, the bus gave a sudden jerk and flattened me out on the floor."

Jiles testified that the bus "snatched" just before appellee fell. Neither of these witnesses, nor any other, testified that there was a violent or unusual jerk.

Before appellee would be entitled to recover, the burden was on her to show, by some substantial testimony, that her fall and consequent injuries resulted from a violent or an unusual jerk, amounting to negligence on the part of appellant in operating its bus. We so held, in effect, in such cases as *St. Louis-San Francisco Railway Co.* v. *Porter,* 199 Ark. 133, 134 S. W. 2d 546; *Missouri Pacific Railroad Company* v. *Baum,* 196 Ark. 237, 117 S. W. 2d 31, and *Missouri Pacific Transportation Co.* v. *Bell,* 197 Ark. 250, 122 S. W. 2d 958.

In the Baum case, Judge DONHAM, speaking for the court, quoted with approval, the following rule from 10 C. J., § 1387, page 973, as follows: " 'The jerk or jolt must be unnecessarily or unusually sudden or violent; such jerks and jars as are necessarily incident to the use of the conveyance, and are not the result of negligence, will not render the carrier liable for resulting injuries.'

"In American Jurisprudence, Vol. 10, p. 213, § 1343, it is said: 'Sudden jerks and jolts in the movement of railroad trains or street cars are generally accepted as among the usual incidents of travel, which every passenger by experience has learned to expect to some extent. At precisely what point such violent movements lose their character as incidents reasonably to be expected during the course of travel and assume the status of actionable negligence is a question of fact, to be determined in the light of the surrounding circumstances. However, unusually sharp jerks of a vehicle or violent jolting due to a defect in the track or the negligent operation of the car has been frequently viewed as imposing liability upon the carrier for the resulting injuries to a passenger.' . . .

"The carrier is not an absolute insurer of the safety of its passengers. It is only required to exercise towards its passengers the highest degree of care which a prudent

and cautious man would exercise, and that which is reasonably consistent with the mode of conveyance and practical operation of its trains. . . .

" 'It is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion.'

"The law is that negligence is never presumed, but, like fraud, must be proven. . . . As hereinabove stated, a jolt or jerk of the train, resulting in injury to a passenger, will not render the railroad company liable, unless the jolt or jerk is unnecessarily or unusually sudden or violent. In other words, a jerk or jar which is necessarily incident to the mode of the conveyance and the practical operation of the train is not the result of negligence, and, even though injury results therefrom, the carrier cannot be held liable."

In the present case, it is highly significant that appellee was the only passenger on the bus, wherein other passengers were standing, to receive a fall or injury, and made no complaint to the bus driver.

Juries are not permitted to speculate as to the proximate cause of what made appellee fall. In *Turner* v. *Hot Springs Street Railway Company,* 189 Ark. 894, 75 S. W. 2d 675, this court said: "The trial court was correct in directing a verdict for appellee, because the testimony adduced by appellant was not sufficient to show that the injuries received were proximately due to any negligence of appellee. No witness testified that appellant's fall was proximately due to the small pieces of snow and ice afterwards seen in the vestibule of the street car. It is true, the jury might have guessed or speculated that her

fall was caused by stepping upon the small pieces of ice and packed snow in the vestibule of the street car, but, on the other hand, it was equally as probable that her fall was caused by packed snow or ice which had accumulated on her own shoes. The point is, juries are not permitted to guess or speculate as to the proximate cause of an alleged injury, the burden resting upon appellant to show by a preponderance of the evidence that her injuries were caused by some negligent act or omission of appellee. (Citing cases.)''

In the Porter case, above, we said: ''It is conceded by appellee that the mere starting of the train before she had reached her seat, but after she had safely boarded it, does not constitute actionable negligence. The gist of the negligence alleged is that the train started with a sudden lurch or jerk. But if it be conceded, contrary to all the evidence except that of appellee herself, that the train was started with a jerk or lurch, the fact would not justify a recovery, unless there was a negligent jerking or lurching of the train. . . . 'There is no escape from the conclusion that unless appellant was injured through the negligent jerking or lurching of the train, then her injury must have resulted from some carelessness on her own part. . . . It is hardly probable that she would have been the only one to receive an unusual jar. It is out of the ordinary that she would be the only one to receive a fall or injury.' ''

As indicated, we agree with appellant that the rule followed in the Porter, Baum and Bell cases applies here and that appellee has failed to show, by any substantial testimony, such an unusual, violent or unnecessary jerk or lurch of the bus, not assumed by the passenger, which would amount to negligence on the part of the Transportation Company.

Speaking of the rule applied in the above three cases, this court in the recent case of *Jones* v. *Missouri Pacific Railroad Company, Thompson, Trustee,* 202 Ark. 333, 150 S. W. 2d 742, made this comment: ''In the Baum and the Porter cases the injured passenger had safely boarded

the train and it was held that before a recovery could be had, it was necessary to show some unusual, violent and unnecessary lurch or jerk of the moving train not assumed by the passenger which would amount to negligence on the part of the railroad company, and that no such negligent conduct had been established.

"In the Bell case the plaintiff was attempting to alight from a bus and in so doing fell in the aisle and was injured when the bus stopped, which Bell contended was occasioned by an 'unusual, unnecessary or a violent jerk,' and it was there said: 'It is undoubtedly true that appellee fell in the bus, and it may be true that she was injured in the fall, but the proof fails to show that it was the result of the second stopping, or that the second stopping, if any, was sudden, unnecessary or violent, and these were the grounds of negligence relied on in the complaint and without proof of which no recovery can be sustained.' "

Accordingly, the judgment is reversed, and since the cause seems to have been fully developed, it is dismissed.

GRIFFIN SMITH, C. J., not participating.

Justices MILLWEE and GEORGE ROSE SMITH dissent.

BATCHELOR *v.* STATE.

4606 230 S. W. 2d 23

Opinion delivered May 22, 1950.

Ike Murry, Attorney General, and *Robert Downie,* Assistant Attorney General, for appellee.

DUNAWAY, J. Appellant Batchelor was convicted of the crime of rape upon his eight-year-old daughter and the penalty was fixed by the jury as life imprisonment.

The evidence on the part of the State disclosed these facts: About May 30, 1947, appellant was living in a house with his former wife and their four children, including his eight-year-old daughter, the prosecuting witness. The family was working in the cotton fields. On the day in question appellant sent the child's mother from the house to the mail box which was about one-half mile distant. During Mrs. Batchelor's absence, appellant

laid his daughter on the bed, removed her underclothes and had sexual intercourse with her. Appellant continued the act until he observed Mrs. Batchelor returning toward the house. The child was bleeding from her private parts and appellant wiped up the blood with some rags which he then put under the bed. When Mrs. Batchelor reentered the house and asked what had happened to their daughter, appellant told her the child had fallen over a bed post and injured herself.

About one month later, at which time the child's mother was no longer living with the family, appellant repeated the act of intercourse with his daughter.

In March, 1949, when a child welfare worker from the State Welfare Department was investigating the Batchelor home, these facts first came to light. It was then that the little girl told of the attacks upon her by her father, she having been afraid to say anything before because of appellant's threats to "beat her up." Appellant was arrested March 17, 1949, charged by information with the crime of rape, and tried November 21, 1949.

No abstract or brief has been filed by appellant, but we have carefully considered all assignments of error made in the motion for new trial.

Appellant complains of the testimony of the prosecuting witness on several scores. It is contended first that she was not a competent witness because of her youth. The rule in regard to the competency of a child's testimony was stated in *Hudson* v. *State,* 207 Ark. 18, 179 S. W. 2d 165, where we said at page 22: ". . . if the child-witness, when offered, has capacity to understand the solemnity of an oath and to comprehend the obligation it imposes, and if in the exercise of a sound discretion the trial court determines that at the time the transaction under investigation occurred the proposed witness was able to receive accurate impressions and to retain them to such an extent that when testifying the capacity existed to transmit to fact-finders a reasonable statement of what was seen, felt, or heard,—then, on appeal, the Court's action in holding the witness to

be qualified will not be reversed." There a child of seven years was allowed to testify. See, also, *Ramick* v. *State,* 212 Ark. 700, 208 S. W. 2d 3 (a child eight years old testified); *Needham* v. *State,* 215 Ark. 935, 224 S. W. 2d 785 (a child eight years of age testified as to rape committed upon her person).

It is also urged that error was committed by the trial court in having the child repeat a part of her testimony. While the little girl was testifying counsel for the defendant objected that the witness had not been sworn. It developed that this was true, and after having her duly sworn the trial court had the witness give her entire testimony under oath. There was no error in the court's action in remedying the very defect in the proceedings which had been called to the court's attention by appellant's objection.

In connection with his daughter's testimony appellant also argues that error was committed when the welfare worker whom she had first told of the crime was asked by the prosecuting attorney if the little girl had not told substantially the same story on several occasions. The court sustained an objection by defense counsel to this line of questioning. No request was made that the jury be admonished to disregard the witness' answer after the court sustained counsel's objection. No error was committed.

Another alleged error was the admission in evidence of a certain letter to his "wife," which appellant had written while in jail. The letter was intercepted by the jailer, who testified that he was familiar with appellant's handwriting and that appellant had written the letter. At the trial introduction of the letter was objected to on the ground that it was privileged. Although there is a division of authority on this question, this court has decided the issue contrary to appellant's contention. An incriminatory letter written by an accused to his wife, which has come into the hands of a third party was held admissible in *Hammons* v. *State,* 73 Ark. 495, 84 S. W. 718, 68 L. R. A. 234, 108 Am. St. Rep. 66, 3

Ann. Cas. 912, and *Hendrix* v. *State,* 200 Ark. 973, 141 S. W. 2d 852.

Appellant also complains of the testimony of one witness as to statements made by appellant at a *habeas corpus* hearing which preceded the trial. These statements were to the effect that the child had hurt herself when she fell on a bed post and that he had wiped blood from her with clean rags and put the rags under the bed. These were self-serving declarations; the testimony complained of was not prejudicial.

A number of assignments of error have to do with instructions refused by the trial court. It is sufficient to say that the instructions as given by the court fully covered all matters contained in the defendant's requested instructions. There was no error in refusing to give repetitious instructions.

Finally, the contention is made that the prosecuting attorney in his closing argument improperly referred to newspaper accounts of the great number of sex crimes being committed in this country. The argument complained of does not appear in the bill of exceptions, nor is it shown that any objection was made to the prosecuting attorney's remarks. Since the language used by the prosecuting attorney is not set forth in the record we are unable to determine whether the argument was proper. We cannot presume it was prejudicial to appellant. *Mitchell* v. *State,* 73 Ark. 291, 83 S. W. 1050.

The evidence was sufficient to sustain the verdict; no error appearing in the trial of the cause, the judgment is affirmed.

GRIFFIN SMITH, C. J., not participating.

HIGGINBOTTOM *v.* WILLIFORD.

4-9194 230 S. W. 2d 26

Opinion delivered May 22, 1950.

T. J. Carter and *W. M. Thompson,* for appellant.

Harry Ponder, for appellee.

ED. F. MCFADDIN, Justice. This is a suit between parents involving the custody of their daughter born April 8, 1947. The mother, appellee, seeks to obtain the custody of the child.

The parents were divorced on January 15, 1949, and the mother consented to a decree which awarded the custody to the father. The decree recites:

". . . there has been one child, a girl, born to this union, whose custody is now with the plaintiff, . . . a fit and proper person to have the care and custody of said child; it appearing to the Court that said defendant is not asking its custody, and it further appearing to the Court that said plaintiff has kept and cared for it all the time, and that he has arrangements made with his parents for its home, where he will support and care for it. . . .

"It is further considered, ordered and decreed that said plaintiff, H. B. Higginbottom, shall have, and he is

hereby awarded, the full care, custody and control of the said Betty Jo Higginbottom, but the defendant shall have the right to visit and see the said Betty Jo Higginbottom at stated and reasonable times. The Court retains jurisdiction only for the purpose of adjusting the matter of the custody and support of the minor child, Betty Jo Higginbottom."[1]

The divorce decree was granted on January 15, 1949; and ten days later the mother married another man and is now Mrs. Williford, the appellee. On June 3, 1949, she filed petition to obtain the custody of the child; and in the petition she claimed that she has remarried, and now has a suitable home for the child who would be properly cared for, if the custody be awarded the mother.

Appellee was the only witness testifying in support of her petition. A most glaring omission is the failure of her present husband—George Williford—to testify that he wanted the child in his home, and would be good to the little girl and assist in supporting her. The appellee has no source of income, and if she had the child, then George Williford would have to provide the home, food, and clothing; yet he did not testify in corroboration of his wife's statement, even though the evidence strongly assailed the environment in which the mother would raise

[1] The foregoing decree was based on the husband's *corroborated* and then *undisputed* testimony:

"In about three weeks after our marriage she commenced leaving home, going away and staying for several days at a time. Sometimes she would stay for weeks before returning home. There would be no trouble—she would just leave out. Sometimes I would be there when she left, and sometimes I was not at home. When I would find her, she would be out with questionable parties, making parties of all kinds, drinking and carousing around, here and there. I would try to get her to come home, settle down and help me take care of the home and make a home what it ought to be; and she would not come in until she took a notion. That kept up until about three or four weeks before our baby was born, which was on the 8th day of April, 1947. Then in about four weeks after its birth she commenced leaving the home and going places, just as she had before, and kept it up until I quit, on the 11th day of November, 1948. When she would come in home she would stay at home maybe for a week, but never stay at home for more than two weeks at a time, until she would take off again.

"Q. Where would the baby stay when she would leave out or go away?

"A. She always left the baby with me. We are raising it on a bottle and my mother has helped me out a good deal in taking care of it. She always left it at home when she took off."

the child. On this latter point, George Williford's mother testified to the effect that he and the appellee were not suitable persons to have the child.

On the other hand, the child's father and the paternal grandparents (who now have the child) were supported by witnesses to the effect that the child is now in a good Christian home and being properly cared for in every way. On this point the learned Chancellor said:

"There is no question in the Court's mind about Cleo Higginbottom and his wife having a good Christian home, and the Court knows that it would be a fine place for the child to stay; and the Court rather feels that the child might get better treatment and be raised more properly if she is left there than if she is left with her mother; but the child is only two years and two months old, and, of course, the presumption is great that the mother ought to have the child."

It is unnecessary to detail all the evidence in this case, and also to discuss and delineate our child custody cases, a few of which are: *Myers* v. *Myers,* 207 Ark. 169, 179 S. W. 2d 865; *Gregory* v. *Jackson,* 212 Ark. 363, 205 S. W. 2d 471; *Marr* v. *Marr,* 213 Ark. 117, 209 S. W. 2d 456, and *Thompson* v. *Thompson,* 213 Ark. 595, 212 S. W. 2d 8. In the case last cited Mr. Justice ROBINS stated our holding in this language:

"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."

Even though the child is of tender years, still we hold that the custody should not be awarded the mother under the record now before us. There has been no such change in circumstances as make it for the best interests

of the child to change the custody from that contained in the decree of January 15, 1949.

Therefore, the decree of the Chancery Court (of July 26, 1949) is reversed, and the cause is remanded, with directions to deny the appellee's petition for change of custody and to leave in full force the decree of January 15, 1949.

HOLT, J., dissenting. This action concerns the custody of a little girl approximately three years of age. The divorce is not now an issue. At the time the divorce decree was rendered, this child was less than two years of age.

We have frequently announced the rule, involving child care and custody, that the primary consideration must be, and is, the welfare of the child. In the present case, there is no evidence or contention that the young mother is morally unfit to have the care and custody of this little girl of such tender years, and as I construe our rule, in all such cases, it is that the child's welfare would be best served in its mother's care and custody.

In one of our most recent cases, *Aucoin* v. *Aucoin,* 211 Ark. 205, 200 S. W. 2d 316, where there was evidence tending to show immorality on the part of the mother, yet we there held that the custody of a three-year-old girl should be given to the mother on account of the tender age of the child.

In *Andrews* v. *Andrews,* 117 Ark. 90, 173 S. W. 850, where the evidence showed the mother to have been guilty of immorality and the husband "a man of good character and able to suitably provide for his child, and to have been without fault in his domestic troubles," however, this court affirmed the action of the lower court in awarding the care and custody of a little girl, 4 years of age, to the mother. We there said: "A sufficient reason here for not taking the child from the mother and delivering it to the father is tender age of the child, who is shown to be only four years old." It will also be noted that at the time the decision was rendered, February 15,

1915, the law, in effect, was that "the father is the natural guardian of his child, and is *prima facie* entitled to its custody."

At the present time, however, the law provides that "there shall be no preference between the husband and wife as to child custody," Ark. Stats. 1947, § 51-106.

We held in the Andrews case above: (Headnote 2) "The custody of a child of tender years will not be taken from the mother and awarded to the father, although the father secured a divorce for cause on the wife's part, where the wife and mother was living with her father, who was able to provide for her and the child, and where she was, under the evidence, a suitable guardian for the infant," and in *Wimberly* v. *Wimberly,* 202 Ark. 461, 151 S. W. 2d 87, we held: (Headnote 2) "Where appellant and appellee having a nine-year-old son separated and the evidence showed both were intelligent, earners and of good moral character, and both were capable and able to rear and educate the child, held that during the period of tender years it was to the best interest of the child that its mother should have the custody of it," and in the body of the opinion, said: "There is nothing in this case from which it can definitely be said that it is to the best interest of the child for the mother to have custody of it, save and except the humanitarian rule which has most generally been adopted by the courts that during the period of tender years the child should be left in the care of the mother."

It is my opinion, therefore, that the findings and decree of the Chancellor should not be disturbed and should be affirmed.

4-9205 230 S. W. 2d 28

Opinion delivered May 22, 1950.

[redacted]

Dinning & Dinning, for appellant.

Cracraft & Cracraft, for appellee.

MINOR W. MILLWEE, Justice. Appellant, Leon Heskett, brought this action against appellee, Fisher Laundry & Cleaners Co., a corporation, and J. B. Fisher to recover damages, actual and exemplary, for injuries alleged to

have been suffered by reason of a vicious, intentional, unprovoked and premeditated assault committed upon appellant by the said J. B. Fisher while acting as an officer and general manager of the corporation.

Appellant alleged that at the time of the assault he was engaged in his regular work as an employee of the defendant company and that J. B. Fisher was engaged in the discharge of his duties as general manager of the corporation; that appellant was prevented by reason of the assault from performing the duties of a laborer for a period of three weeks; and that he had suffered excruciating mental and physical pain and great humiliation on account of the assault which was committed in the presence of fellow employees and other persons. The complaint contained a prayer for actual damages in the sum of $5,000 and for exemplary damages in a like sum.

Appellee and J. B. Fisher answered with a general denial and stated that appellant's injuries, if any, resulted from his unjustified attack upon J. B. Fisher who acted in self-defense and to protect his employer's property. In an amendment to the answer appellee alleged that it carried Workmen's Compensation Insurance and that appellant was subject to the provisions of the Workmen's Compensation Act which was pleaded as a defense to the action. The trial court treated the amendment to the answer as a demurrer to the jurisdiction of the court which was sustained as to appellee and overruled as to the defendant, J. B. Fisher. Appellant elected to stand on the complaint as to the action against the corporation and this appeal is prosecuted from the judgment dismissing the cause of action against appellee.

The questions for determination are: whether a willful and malicious injury inflicted by the officer and general manager of the employer upon the employee is comprehended within the provisions of the Workmen's Compensation Act; and, if so, whether the Act affords an exclusive remedy to the injured employee.

The compensation acts of many states contain provisions specifically preserving the ordinary remedies at

law for injuries resulting to employees from the employer's willful act or misconduct. 58 Am. Jur. Workmen's Compensation, § 54. In some states the Act provides for an increase in compensation in case of the willful misconduct of the employer. 4 Mass. Ann. Laws, Ch. 152, § 28; Deering's Calif. Labor Code, § 4553. Our compensation act, like those in many other states, contains no specific provision as to right of recovery for injuries sustained by willful and intentional acts of the employer. Section 2(d) of the Ark. Workmen's Compensation Act, Initiated Act No. 4 (1949 Cumulative Pocket Supp. Ark. Stats. 1947, §§ 81-1301 to 81-1349) defines "injury" as meaning only accidental injury arising out of and in the course of employment, including occupational diseases and infections. Section 81-1303 provides that the act shall apply only to claims for injuries and death based upon accidents which occur from and after the effective date of the act.

Section 81-1304 provides: "The rights and remedies herein granted to an employee subject to the provisions of this Act, on account of injury or death, shall be exclusive of all other rights and remedies of such employee, his legal representative, dependents, or next kin, or anyone otherwise entitled to recover damages from such employer on account of such injury or death, except that if an employer fails to secure the payment of compensation, as required by the Act, an injured employee, or his legal representative, in case death results from the injury, may, at his option, elect to claim compensation under this Act or to maintain a legal action in court for damages on account of such injury or death . . ."

Section 81-1305 provides: "Every employer shall secure compensation to his employees and pay or provide compensation for their disability or death from injury arising out of and in the course of employment, without regard to fault as a cause for such injury; provided, that there shall be no liability for compensation under this Act where the injury or death from injury was solely occasioned by intoxication of the injured employee or by willful intention of the injured employee to

bring about the injury or death of himself or another . . ."

In order to sustain the judgment appellee contends that the fact that the injury is the result of a willful assault on the employee does not prevent it from being "accidental" within the meaning of the act. This contention is in accord with the general rule which we approved in the case of *Hagger, Admx.,* v. *Wortz Biscuit Co.,* 210 Ark. 318, 196 S. W. 2d 1. Appellee says the question involved here is determined by our holding there. That case involved a suit against a company and a fellow employee of the deceased for gross negligence in the storing of gasoline in glass containers and underground tanks which allegedly caused an explosion and fire resulting in the employee's death. While the complaint in that case alleged that the fellow employee willfully and recklessly stored the gasoline, the case did not involve willful and malicious injury by assault such as is alleged in the instant case.

The effect of our holding in the Hagger case, *supra,* is that the remedy afforded the employee under the compensation act is exclusive where injury or death results from gross negligence of the employer or a fellow employee. We adhere to that rule and also to the *dictum* in that case to the effect that an injury may be the result of "accidental" means under the statute so as to be compensable notwithstanding the act producing the injury was intentional. In *Lundell* v. *Walker,* 204 Ark. 871, 165 S. W. 2d 600, we upheld an award by the compensation commission where a plantation foreman shot and killed an employee in an argument over the employee's discharge. The question here is whether the compensation act affords the exclusive remedy where the injury or death is the result of a willful and malicious assault by the employer.

In Horovitz on Workmen's Compensation p. 336 it is said: "Where the *employer* is guilty of a felonious or *willful assault* on an employee he cannot relegate him to the compensation act for recovery. It would be against

sound reason to allow the employer deliberately to batter his helper, and then compel the worker to accept moderate workmen's compensation benefits, either from his insurance carrier or from himself as self-insurer. The weight of authority gives the employee the choice of suing the employer at common law or accepting compensation."

In *Lavin* v. *Goldberg Building Material Corp.,* 274 App. Div. 690, 87 N. Y. S. 2d 90, the administratrix brought a common law action against the corporate defendant and its foreman for personal injuries resulting in death from the willful and intentional assault on plaintiff's intestate by said foreman while acting within the scope of the employment. The New York court held that, where there is a willful and intentional assault, the employee has his election to take under the compensation act and thus regard the assault as an accident, or instead to sue both the foreman and the corporate defendant at common law. The court said: "The Workmen's Compensation Law deals not with intentional wrongs but only with accidental injuries. We entertain not the slightest doubt that where an employer, either directly or through an agent or servant, is guilty of a felonious assault upon an employee he cannot relegate the latter to the compensation statute as the sole remedy for his tortious act. It would be abhorrent to our sense of justice to hold that an employer may assault his employee and then compel the injured workman to accept the meager allowance provided by the Workmen's Compensation Law. Under such circumstances the one assaulted may avail himself of a common law action against his assailant where full monetary satisfaction may be obtained." See, also, *LePochat* v. *Pendleton,* 187 Misc. 296, 63 N. Y. S. 2d 313, affirmed without opinion, 271 App. Div. 964, 68 N. Y. S. 2d 594; *Stewart* v. *McLellan's Stores Co.,* 194 S. C. 50, 9 S. E. 2d 35; *Castleberry* v. *Frost-Johnson Lumber Co.,* (Tex. Comm. App.) 283 S. W. 141; *Richardson* v. *The Fair, Inc.,* (Tex. Civ. App.) 124 S. W. 2d 885. An interesting article on the question appears in 2 Ark. Law Review p. 130.

Perhaps the leading case on the question is that of *Boek* v. *Wong Hing,* 180 Minn. 470, 231 N. W. 233, 72 A. L. R. 108, where the employer struck and injured the employee during the regular hours of work. In an action at law for damages by the employee, the defense was that the Workmen's Compensation Act afforded the employee his exclusive remedy. In holding that the employee could either seek recovery under the compensation act or sue for full damages at common law, the court said: "An employer who intentionally and maliciously inflicts bodily injuries on his servant should occupy no better position than would a third party not under a Compensation Act, and should not be heard to say, when sued at law for damages, either that the injury was accidental or that it arose out of the employment. By committing a felonious assault upon a servant the master willfully severs the relation of master and servant and should be held to have left it to the election of the servant either to consider the relation still existing and seek redress through the Compensation Act, or else to consider the relation terminated and seek redress under the common law. Instead of himself beating up plaintiff, had defendant hired a third party, who was not under any Workmen's Compensation Act, to do so, it would not for a moment be doubted that the third party, when sued for damages at law, could not move for a directed verdict, as was done here, on the ground that plaintiff's sole remedy was under the Compensation Act. If the mere tool or agent is liable in an action for damages, the principal should be likewise . . ." A majority of the decisions from other jurisdictions appear to support the conclusion reached by the Minnesota court although there is authority to the contrary. *McLaughlin* v. *Thompson, Boland & Lee, Inc.,* 72 Ga. App. 564, 34 S. E. 2d 562.

Under § 40(a) of the Ark. Workmen's Compensation Act (1949 Cumulative Pocket Supp. to Ark. Stats. § 81-1340) the recovery of a claim for compensation does not affect the employee's right to maintain a tort action against any third person responsible for his injury whether the act of such third person be willful or merely

negligent. This section of the Act was doubtless included in order to safeguard the employee's right to recover full damage against the wrongdoer. It would seem, by analogy, that the intention of the lawmakers was not to destroy such employee's right to full damage when the injury results from the willful and intentional act of the employer. Under § 81-1305, *supra,* the employer does not waive the defense of the injury being occasioned by the willful intention of the employee to bring it about. As suggested by appellant, it would appear anomalous to hold that the employer does not waive such defense while the employee waives the right to recover full damage for an injury caused by the willful and malicious act of the employer.

The complaint in the instant case alleges that an officer and general manager of appellee committed a vicious, unprovoked, intentional and violent assault and battery upon appellant during the course of the employment under circumstances which, if substantiated, would entitle appellant to both actual and exemplary damages at common law. We conclude that the rule laid down in *Boek* v. *Wong Hing, supra,* is supported by sound reasoning and that appellant is entitled to elect to either claim compensation under the compensation act or treat the willful assault as a severance of the employer-employee relationship and seek full damages in a common law action. Appellant having elected to pursue the latter remedy, it follows that the trial court erred in sustaining the demurrer to the complaint against appellee.

The judgment is, therefore, reversed and the cause remanded with directions to overrule the demurrer to the complaint against appellee.

MONTGOMERY, EXECUTOR *v.* BLANKENSHIP.

4-9191 230 S. W. 2d 51

Opinion delivered May 29, 1950.

A. L. Burford and *Shaver, Stewart & Jones,* for appellant.

T. B. Vance and *James F. Vance,* for appellee.

DUNAWAY, J. Disposition of some $800,000 worth of corporate stocks and $17,426.33 in cash, the property of Mrs. Ida M. Bottoms who died in Miller County, Arkansas, on December 21, 1944, at the age of 83, is involved in this appeal.

This action arose as a suit by the heirs at law of Mrs. Bottoms against Winston Montgomery, as Executor of the estate of Mrs. Bottoms and the Texarkana National Bank of Texarkana, Texas, which claimed to hold the stocks and cash in question as trustee under a trust created by the decedent. Involved are certificates of stock in Crowell Long Leaf Lumber Co., Inc., Meridian Land & Mineral Corporation, and Crowell Land & Mineral Corporation, which will hereafter be referred to as the "Crowell Stocks." The cash item had reverted to the decedent from a trust created by her in 1928.

Some time after the death of Mrs. Bottoms her executors filed an inventory in the Miller Probate Court, listing, among other assets, the Crowell Stocks and the cash item of $17,426.33. Later, on advice of counsel, who had not been consulted when the inventory was originally filed, Montgomery, now sole surviving executor under the will of Mrs. Bottoms, filed in the Probate Court a petition to delete this property from said inventory. The heirs at law of Mrs. Bottoms intervened in opposition to said deletion. The probate judge then suggested that since the question of title to the disputed property was involved, a suit to determine this matter be brought. The heirs at law, appellees here, then commenced the instant action in the Miller Chancery Court.

On January 27, 1944, Mrs. Bottoms went to the Texarkana National Bank. There she executed contemporaneously a "Living Trust Agreement" and her Last Will and Testament. Both instruments had been prepared at her request by J. K. Wadley, an old friend of Mrs. Bottoms and a stockholder and director in the bank.

At the time these instruments were executed, the Crowell Stocks were in possession of the bank, pledged as security for a loan in excess of $50,000. Under the provisions of the trust agreement these stocks, and other securities not here involved, were to be held by the bank as trustee. Mrs. Bottoms was to receive the net income of the trust for life, and at her death the income and principal of the trust estate were to be distributed to designated beneficiaries, which for the most part were various Baptist institutions. The trust agreement contained a provision that it could be "amended, modified or revoked in whole or in part by the Trustor at any time during her lifetime."

The residuary clause of Mrs. Bottoms' will reads as follows: "I give, bequeath and devise to Texarkana National Bank of Texarkana, Texas, to be added to and become a part of, and subject to all the terms and conditions of living trust created by me under date of January 27th, 1944, all of my estate remaining after paying all debts legally chargeable to same, including fees to my executors."

The Crowell Stocks were kept in possession of the Bank under its pledge at all times from the execution of the trust instrument and will until the loan was paid in full by the Executor under order of the probate court in January, 1946.

It is admitted that since no attack was made on the will within six months after it was duly probated and notice thereof published, the plaintiffs are now barred by limitations from contesting it, under the provisions of Act 401 of the Acts of 1941 (Ark. Stats. 1947 § 60-210).

It is the theory of the appellees' case that the *inter vivos* trust attempted to be created by Mrs. Bottoms was invalid for several reasons: (1) She did not have mental capacity to execute the instrument; (2) There was no delivery of the stocks and acceptance of the trust by the Bank, since it continued to hold said stocks in its capacity as creditor and not as trustee; (3) The terms of the trust are violative of the rule against perpetuities. Appellees

further contend that although the validity of the will is not now open to attack, the residuary clause therein, above quoted, was not sufficiently definite to create a testamentary trust; and that even if this was attempted by the testatrix, the trust instrument could not be incorporated by reference in the will, since it was amendable and revocable during her lifetime. Appellees therefore contend that as to the property now in litigation there was a partial intestacy and that they take as the heirs at law of the decedent.

Appellants contend that there was a valid trust created by Mrs. Bottoms on January 27, 1944; but that even if this is not so, the property in question passed to the Bank as trustee under a testamentary trust created by the residuary clause in the will. It is appellants' theory that the trust instrument was incorporated in the will by reference.

Much of the proof adduced at the trial of this cause was on the issue of the mental capacity of Mrs. Bottoms. It is unquestioned that she had been ill for many years, and admittedly on some occasions was not mentally competent. There was, however, a sharp conflict in the testimony as to her capacity at the time the challenged instruments were prepared at her request and executed by her.

The Chancellor made no special findings, either as to the competency of Mrs. Bottoms or as to any of the other issues raised by the pleadings and proof. The decree, to quote the pertinent parts reads: "The Court, being well and sufficiently advised and having jurisdiction of this cause, finds and decrees in favor of the plaintiffs and against the defendants, Winston Montgomery, as Executor of the Estate of Ida M. Bottoms, Deceased, and Texarkana National Bank of Texarkana, Texas.

. . . . .

"To all of which findings, holdings, decrees and orders of the Court, save the finding and decree with respect to the item of $17,426.33 aforesaid, the defendants Winston Montgomery, Executor of the Estate of Ida M. Bottoms, deceased, and Texarkana National Bank of Tex-

arkana, Texas, except and request that their exceptions be noted of record, which is accordingly done, and they and each of them pray and are granted an appeal to the Supreme Court of Arkansas."

While there is a difference of opinion among the members of the court as to the validity of the *inter vivos* trust, we are unanimously of the opinion that in any event the Crowell Stocks passed to the Texarkana National Bank as trustee under the residuary clause of the will. In view of this conclusion, only those points relevant to our decision on this question need be discussed.

In accordance with the weight of authority, the rule in Arkansas is that instruments definitely identified and in existence when a will is executed may be incorporated therein by reference. *Rogers* v. *Agricola,* 176 Ark. 287, 3 S. W. 2d 26; *Kinnear* v. *Langley, Executor,* 209 Ark. 878, 192 S. W. 2d 978, discussed in 1 Arkansas Law Review 180. The general rule in regard to incorporation of a document by reference as approved by this court in the Kinnear case is as follows:

"If a will, duly executed and witnessed according to statutory requirements, incorporates into itself by reference any document or paper not so executed and witnessed, whether such paper referred to is in the form of a will, codicil, deed, or a mere list or schedule, or other written paper or document, such paper if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to, takes effect as a part of the will, and is entitled to probate as such."

By the residuary clause in her will Mrs. Bottoms clearly devised to the Texarkana National Bank all the residue of her estate "to be added to and become a part of, and subject to all the terms and conditions of living trust created by me under date of January 27th, 1944." The extrinsic document referred to is clearly identified. Indeed there is no dispute as to the identification of the instrument sought to be incorporated by reference.

Was the trust instrument in existence when the will was executed? The undisputed testimony of the witnesses was that the trust agreement was in existence when the testatrix signed her will. J. K. Wadley, who had prepared both instruments, testified that he had done so some days prior to the date of their execution; that on January 27, he and the other two witnesses to the will came to the office of Winston Montgomery in the Bank, where both instruments were signed by Mrs. Bottoms in their presence. It is true, as appellees point out, that these witnesses were unable to say which document Mrs. Bottoms signed first, but that is immaterial. The requirement for incorporation by reference is only that the extrinsic document be in existence, not signed, and this fact is established by the undisputed proof.

The failure of the trust agreement to create a valid *inter vivos* trust when executed by Mrs. Bottoms, which we have assumed for the purpose of this decision, does not prevent the incorporation of that "living trust agreement" into the will by reference. In *Rogers* v. *Agricola, supra,* a prior invalid will was held to have been incorporated by reference into what the testator thought was only a codicil to an earlier will, and the two documents together constituted his "whole will." As stated in 1 Page on Wills (Lifetime Ed.) § 266, p. 522: "If incorporated by reference it makes no difference whether the original document of itself was valid at law or not. A deed invalid because it never was delivered, may be incorporated in a will. A prior defectively executed will, or the will of another person, or a part of the will of another person, may thus be incorporated. Such incorporation may prevent lapse of a legacy given by a prior will. The account books of testator may be incorporated by proper reference. The incorporated document may be treated as part of the will for the purpose of ascertaining the beneficiaries and the share to be given to each."

An invalid deed was held incorporated in a will by reference, even though the testator in his will had referred to the property as having been already disposed

of by deed, where the court found from all the circumstances an intent on the part of the testator that the property should go to the one mentioned in the will as grantee in the deed. See *In re Dimmitt's Estate,* 141 Neb. 413, 3 N. W. 2d 752, 144 A. L. R. 704, discussed in 41 Michigan Law Review 751.

Appellees' final argument that the "living trust agreement" could not have been incorporated by reference is based upon the fact that the trust instrument was amendable and revocable. To support this contention appellees cite the case of *Atwood et al* v. *Rhode Island Hospital Trust Co. et al.,* 275 Fed. 513 (C. C. A. 1st). The case supports appellees' position, but represents the minority view. In *Koeninger* v. *Toledo Trust Co.,* 49 Ohio App. 490, 197 N. E. 419, the court allowed incorporation by reference of the unchanged portions of an amendable trust instrument. For discussion of this case see 49 Harvard Law Review 498. An amendable and revocable trust instrument was held incorporated by reference, and effect was given to three amendments made prior to the execution of the will, but not to a fourth made after execution of the will, in *President and Directors of Manhattan Co.* v. *Janowitz et al.,* 14 N. Y. Supp. 2d 375, discussed in 39 Columbia Law Review 1256. Incorporation by reference of amendable or revocable trust instruments was also permitted in *Old Colony Trust Co.* v. *Cleveland,* 291 Mass. 380, 196 N. E. 920; *Swetland* v. *Swetland,* 100 N. J. Eq. 196, 134 Atl. 822; *In the Matter of Willeys Estate,* 128 Cal. 1, 60 Pac. 471.

The general rule in this regard is stated in 1 Page on Wills (Lifetime Ed.) § 260, p. 513 as follows: "If the testator has created a trust, reserving power to amend the trust, the trust instrument may be incorporated in the will by reference, but the operative effect of the will cannot be changed by a subsequent modification of the trust instrument, if the modification is not executed in accordance with the wills act. Effect is to be given to the will and to the provisions of the trust instrument as they existed when the will was executed. No effect can be given to the subsequent modification of the trust instru-

ment if it is not executed in accordance with the act which regulates the execution of a will."

In the case at bar no problem arises as to whether amendments to the instrument can be given effect, for no changes were ever in fact made in the instrument as it existed at the time the will was executed.

Having decided that the trust instrument was incorporated by reference in the will of Mrs. Bottoms, there is no occasion to pass upon the mental capacity of the decedent. "If the document is of such nature and is so referred to in the will, as to comply with the requirements already given, it is treated as part of the will, and as if it were set forth therein in full." 1 Page on Wills (Lifetime Ed.) § 266, p. 522. Since no attack was made upon the probate of the entire will within the time provided by law, appellees cannot now single out for attack a portion of the will which was incorporated by reference and became as much a part of the will as any of its other provisions. They cannot do indirectly what they are barred by statute from doing directly.

Two other contentions of appellees bearing on the validity of the testamentary trust must be considered, however. It is urged that the terms of the trust violate the rule against perpetuities. The pertinent provision of the trust instrument reads as follows: "The Trustee is hereby directed to pay, out of the Trust Estate, commencing upon the Trustor's death, all of the cash received from both income and principal and remaining after the payment of the Trustee's fees and expenses as hereinbefore provided, in the following manner, to-wit:

"(1) There shall be paid in semi-annual installments all of the net income and principal available in cash, to the following, in proportionate amounts, until they all shall have received the amount set up for them as follows: (Then follows a list of beneficiaries with the amount of money each is to receive.)

"(2) After the payments provided for in Article (1) of this paragraph have been made in full, then in semi-annual installments all of the balance of the avail-

able cash net income and principal of the Trust Estate shall be paid in the proportions shown, to the following:" (Seven Baptist institutions are named to receive designated shares of the balance of the trust estate.).

Under the terms of the trust instrument as incorporated in the will, legal title to the Crowell Stocks vested immediately upon Mrs. Bottoms' death in the Bank as trustee. Equitable title likewise vested immediately in the named beneficiaries. Since there was a present vesting of both legal and equitable title, and only a postponement of full enjoyment of the estate by the charities named, the rule against perpetuities has no application in this case. See *Ward* v. *McMath,* 153 Ark. 506, 241 S. W. 3; *Garrett* v. *Mendenhall, Executor,* 209 Ark. 898, 192 S. W. 2d 972.

Appellees also contend that by seeking to sustain the validity of the *inter vivos* trust, appellants made an election of remedies and could not as an alternative defense to appellees' action, claim that the bank took the Crowell Stocks under a testamentary trust if the *inter vivos* trust failed. In appellees' complaint it was alleged that the *inter vivos* trust was invalid, that the stocks in question did not pass under the residuary clause of the will, and that the appellees took as the heirs at law when Mrs. Bottoms died intestate as to this property. The doctrine of election of remedies is not in the case. As the court said in *State Life Ins. Co. of Indianapolis* v. *Mitchell,* 126 F. 2d 867 (C. C. A. 8th) at p. 870: "The doctrine stated in its simplest form means that, if a party has two inconsistent existing remedies on his cause of action and makes choice of one, he is precluded from thereafter pursuing the other." In order for the appellees in the instant case to recover, it was necessary for them to show not only that there was no valid *inter vivos* trust, but that the Crowell Stocks were not disposed of under the residuary clause in the will. In defending the issues raised by the plaintiffs, there was no "election of remedies" by the appellants, defendants below.

We hold that the Crowell Stocks passed to the Texarkana National Bank as trustee under a valid testa-

mentary trust created by the residuary clause of the will of Mrs. Bottoms. As to the cash item of $17,426.33 an additional question is presented.

It is appellees' position that appellants did not pray an appeal from the chancellor's holding in favor of appellees as to the cash item, and therefore that this question is not before us. As already pointed out, the trial court made no special findings, but found "in favor of the plaintiffs and against the defendants" and ordered the stock certificates and cash turned over to the executor. Appellants excepted to all the findings and holdings of the chancellor "save the finding and decree with respect to the item of $17,426.33 aforesaid." Appellants argue that the decree of the trial court simply meant that the cash item was ordered delivered to the executor, and if the trust instrument was held incorporated in the residuary clause of the will by the court, then the executor would return the money to the bank as trustee and hence there was no necessity for an appeal from the court's finding as to this item.

The decree finding "in favor of the plaintiffs and against the defendants" was a finding against appellants as to all issues in the case. The effect of this was to hold that the appellees, as heirs at law of Mrs. Bottoms, would take title to the cash as against any claim thereto by the bank as trustee. Since no appeal was taken from the ruling of the chancellor as to the cash item, we cannot consider the correctness of that part of the decree. *Baker* v. *State, Use of Independence County,* 210 Ark. 690, 197 S. W. 2d 759; *Rural Realty Co.* v. *Buckner,* 203 Ark. 474, 158 S. W. 2d 17.

The decree is affirmed in part, reversed in part, and the cause remanded for proceedings in accordance with this opinion.

McCLENDON *v.* CITY OF HOPE.

4-9200 230 S. W. 2d 57

Opinion delivered May 29, 1950.

James H. Pilkinton and *Royce Weisenberger,* for appellant.

John P. Vesey and *W. S. Atkins,* for appellee.

MINOR W. MILLWEE, Justice. The Legislature of 1939 enacted Act 131 (Ark. Stats., 1947, §§ 19-3401 and 19-3402) authorizing municipalities to regulate the production and sale of milk and milk products sold for ultimate consumption therein in accordance with the 1939 edition of the United States Public Health Service Milk Ordinance. Section 19-3402 prescribes the form of the ordinance under which municipalities are authorized to adopt by reference the standard U. S. Public Health Service ordinance.

The City of Hope, Arkansas, passed Ordinance 537 on July 10, 1939, adopting the standard ordinance. Section 12 of Ordinance No. 537 reads: "MILK AND MILK PRODUCTS FROM POINTS BEYOND THE LIMITS OF INSPECTION OF THE CITY OF HOPE, ARKANSAS. Milk and milk products from points beyond the limits of inspection of the City of Hope, Arkansas, may not be sold in the City of Hope, Arkansas, or its police jurisdiction, unless produced and/or pasteurized under grading provisions identical with those of this ordinance; provided that the City Milk Inspector shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions."[1]

[1] The 1939 standard ordinance as amended to Dec. 3, 1942, appears in the digester's notes to § 19-3402, *supra.* Sec. 11 of the amended ordinance corresponds to § 12 of the 1939 ordinance and reads: "Milk and milk products from points beyond the limits of routine inspection.—Milk and milk products from points beyond the limits of routine inspection of the city of_____ may not be sold in the city of _____, or its police jurisdiction, unless produced and/or pasteurized under provisions equivalent to the requirements of this ordinance: Provided, That the health officer shall satisfy himself that the health officer having jurisdiction over the production and processing is properly enforcing such provisions."

In 1940 the Hope City Council passed Ordinance No. 563 which provided that no milk or cream should be sold in the city that had been pasteurized outside of Hempstead County, Arkansas, except as authorized by the City Milk Inspector.

On June 30, 1949, appellant, William McClendon, filed an application with the proper officials for a permit to sell grade A milk within the City of Hope. He proposed to transport the milk from the Borden Milk Plant in Texarkana, Texas, and to comply with Ordinance 537 and all city and state health laws and regulations. Upon being denied a permit, appellant instituted suit in the Hempstead Chancery Court on July 25, 1949, questioning the validity of Ordinance No. 563 and the action of the city authorities in refusing to grant his application for a permit. Acting on advice of counsel that Ordinance No. 563 was void, appellant on September 1, 1949, began distributing milk products at wholesale to cafes and stores in the city.

On September 6, 1949, the Hope City Council repealed Ordinance No. 563 and enacted Ordinance No. 644. Sections 2 and 5 of this ordinance are as follows: "SECTION 2. That § 12 of Ordinance 537 (§ 525 of the Digest) be and the same is hereby amended to read as follows: 'No milk or milk products, regardless of origin, may be sold in the City of Hope unless produced and/or pasteurized under grading provisions identical with those of §§ 457 to 529 inclusive of the Digest; and it shall be the duty of the City Milk Inspector to satisfy himself that such production and/or processing provisions are complied with.

" 'And no milk or milk products, regardless of origin, may be sold in the City of Hope unless the person, firm or corporation producing and/or processing said milk or milk products has paid the applicable inspection fees provided in this ordinance and holds a permit issued by the City Milk Inspector of the City of Hope. Any distributor, whether independent contractor or agent of a producer or processor, or wholesale or retail dealer,

distributing milk in the City of Hope from a producer and/or processing plant which does not hold a permit from the City Milk Inspector of the City of Hope, shall be subjected to the same penalties as set forth in § 10 of this ordinance.'

"SECTION 5. Every person or firm or corporation selling milk to or producing milk for pasteurizing, homogenizing, bottling, or other plants where milk is prepared for sale to the consumer within the City of Hope shall pay an inspection fee to the City of Hope in the sum of two-thirds (2/3c) cent per each 100 pounds of milk sold or produced by such person, firm or corporation to or for such pasteurizing, homogenizing, bottling or other plants. Such plants purchasing or receiving milk shall collect from the seller or the producer of the milk the above stated inspection fee of two-thirds cent for each 100 pounds of milk from the person, firm or corporation selling or producing the milk to or for such pasteurizing, homogenizing, bottling or other plants. The purchaser shall keep an accurate record of same and remit such money or moneys to the City Collector of the City of Hope not later than the 10th day of each month after the effective date of this Ordinance. The permit heretofore issued by the City of Hope to any pasteurizing, homogenizing, bottling or other plants within the inspection jurisdiction of the City of Hope which fails or neglects to make such collections and remit same to the City Collector of the City of Hope as herein provided, shall be revoked by operation of law, and such person, firm or corporation shall be prohibited from carrying on or doing business in the City of Hope. In no event shall the amount paid by the producer be less than five ($5.00) dollars per year."

Section 6 of Ordinance No. 644 provides: "Every person, firm or corporation operating a milk plant or place where milk or milk products are pasteurized, homogenized, mixed, condensed, or bottled, or otherwise prepared for sale to the consumer within the City of Hope shall pay to the City Collector each month on or before the 10th day of each month for the preceding

calendar month an inspection fee of one and one-third cents on each one hundred pounds of milk and/or milk products received and/or distributed, or sold or otherwise disposed of, except in the case of sweet cream. . . ."

On September 7, 1949, appellant again applied for a permit which was refused and the instant suit was filed challenging the validity of certain provisions of Ordinance 644 and praying a mandatory injunction requiring the proper authorities to issue a permit to appellant.

The answer of the city admitted most of the facts alleged in the complaint, but denied the invalidity of the ordinance as applied to appellant or anyone else. In response to the prayer of the complaint the chancellor ordered the issuance of a temporary permit to appellant pending a final hearing.

After the hearing the chancellor filed a written opinion directing the entry of a decree holding Ordinance No. 644 valid and dismissing appellant's complaint for want of equity. The decree contains the following recitals: "The Court further finds that, under the terms of the said Ordinance No. 644 the milk inspector of the City of Hope, Arkansas, is authorized to inspect the production of any milk offered for sale in the City of Hope, Arkansas; that is, to inspect the dairy herds, dairy barns and equipment and make the bacteria count, and that for such inspection the said ordinance provides a tax of two-thirds cent per hundred weight; that said milk inspector of the City of Hope, Arkansas, is, also, authorized to inspect the entire output of the pasteurizing plant where any milk is pasteurized and any part thereof offered for sale in the City of Hope, and that for said services the City of Hope is entitled to collect a tax of one and one-third cents per hundred weight on the entire production of said pasteurizing plant.

"That any fees collected from the plaintiff which prove to be in excess of the necessary expenditures by the city for the actual inspection of plaintiff's milk,

and/or the source of his supply, must be refunded to the plaintiff by the City at the end of the year.

"That the evidence in this case shows that plaintiff's products presently meet all the requirements of the ordinances of the City of Hope, Arkansas, and, under such *prima facie* showing, the plaintiff is entitled to a continuation of his permit to sell milk in the City of Hope, Arkansas, as long as his product meets the requirements of Ordinance No. 537 of the ordinances of the City of Hope, Arkansas, and as long as he pays the fees called for by Ordinance No. 644, in accordance with this decree."

The evidence offered by appellant at the final hearing discloses the following undisputed facts: The Borden Milk Company, which is the sole source of the milk supply sold and distributed by appellant, is located at Texarkana, Texas. Appellant procures milk at wholesale prices from the Borden plant and transports it about 30 miles to Hope, Arkansas, in a refrigerated truck. The milkshed of the Borden plant includes 63 dairies and farms located in Miller County, Arkansas, and Bowie County, Texas. The Borden milk plant and the producing dairies from which it processes its raw milk for pasteurization and bottling are equipped, and the milk handled and processed, under supervision of the City Milk Inspector of Texarkana, Texas, and the state health departments of both Texas and Arkansas. Both the City of Texarkana, Texas, and Texarkana, Arkansas, have adopted the U. S. Public Health Service Milk Ordinance under which the City of Hope operates. The Borden plant and its milkshed are duly inspected in accordance with the provision of the standard milk ordinance. Milk products pasteurized at the Borden plant are sold and distributed in many other cities in both Texas and Arkansas.

The rating of raw milk sold to plants in Texarkana, Texas, under the standard ordinance has for a long time been in excess of 90% and the city was recently awarded a Standard Milk Ordinance Honor Roll Certificate which

is only made to cities having a superior rating on both raw and pasteurized milk and milk products.

The Borden plant pays fees of approximately $300 annually to support the inspection work carried out by the Texarkana authorities in compliance with the terms of the standard ordinance. Appellant sells the products in the original sealed bottles and cartons in which they are placed by the Borden plant. The Borden plant processes more than 12 million pounds of milk annually. Under §§ 5 and 6 of Ordinance No. 644, appellant would be required to pay to the City of Hope approximately $2,500 annually in inspection fees in duplication of inspection services already performed by Texarkana authorities under the uniform ordinance. Such schedule of fees would be prohibitive as applied to appellant and the payment thereof would force him out of business.

Dr. Hubert Shull has been City Milk Inspector for both Texarkana, Arkansas, and Texarkana, Texas, for the past 24 years. He testified in detail as to the manner of inspecting, grading and rating of the respective dairies and plants in the Texarkana inspection area which is carried on in accordance with the forms and practices set up by the standard ordinance. The inspection process employed has been checked and approved by both the U. S. Public Health Department and the Arkansas State Health Department. It would require an outside inspector several months to make the inspections and do the work of Dr. Shull and his assistants, while it would only require several hours to determine from the records kept by the inspector and a limited examination of the plants and dairies to determine whether the requirements of the standard ordinance are being met.

The learned chancellor held Ordinance No. 644 and the inspection fees provided therein valid as applied to appellant on the authority of *Terry Dairy Products Co.* v. *Beard, City Collector,* 214 Ark. 440, 216 S. W. 2d 860. In seeking a reversal, appellant does not contend that the ordinance is void *in toto* and readily concedes its validity under our holding in that case, as applied to producers and processing plants located within the primary inspec-

tion limits of the City of Hope. However, it is earnestly insisted that under the undisputed facts in the instant case the ordinance is invalid as applied to appellant because it requires him to bear the expense of a duplicate inspection before he is allowed to sell milk in the City of Hope; that as applied to appellant, the fees provided are excessive and unauthorized under § 19-3401, *supra,* and the standard ordinance enacted pursuant thereto; and that the Hope Milk Inspector's demand of payment of said fees as a prerequisite to the issuance of a permit to appellant is arbitrary, unreasonable and unauthorized under the circumstances presented here. We conclude that appellant's contentions should be sustained.

A municipal corporation has no powers except those expressly conferred by the legislature or those necessarily implied as incident to or essential for the attainment of the purposes expressly declared. *Bennett* v. *City of Hope,* 204 Ark. 147, 161 S. W. 2d 186. It is also well settled that city councils may not exceed the power given to them by the legislature and must stay within the delegated authority which must be exercised reasonably and without arbitrary restrictions. *Helena* v. *Dwyer,* 64 Ark. 424, 42 S. W. 1071, 39 L. R. A. 266, 62 Am. St. Rep. 206; *Phillips* v. *City of Siloam Springs,* 182 Ark. 139, 30 S. W. 2d 220.

The following rule is stated in 62 C. J. S. Municipal Corporations, § 429, p. 826: "The fact that a portion of an ordinance or regulation is void because it is unreasonable does not invalidate the whole ordinance, where such portion is distinctly separable from the remainder which in itself contains the essentials of a complete ordinance. The ordinance should not be set aside *in toto,* but should be permitted to stand, to the end that it may be enforced except in particular cases, where it may be made to appear that the circumstances rendered the operation of its provisions unreasonable."

In *Meridian* v. *Sippy,* 54 Cal. App. 2d 214, 128 Pac. 2d 884, it was held that a city ordinance providing that no permit should be issued to sell milk in a city unless the dairy is inspected by the city health officer was in conflict

with the state statute giving the director of agriculture the right to designate the county or city which should conduct the inspection. In holding that it was unreasonable to require double inspection of the distributors by the city and state, the court said: "Any ordinance or statute which prevents any person from engaging in a lawful business cannot be upheld unless protection of life, health or property makes it reasonably necessary. Such is not the case here. The contention of respondent if approved might result in the erection of trade barriers that would affect the economic prosperity of the whole state." See, also, *La Franchi* v. *City of Santa Rosa,* 8 Cal. 2d 331, 65 Pac. 2d 1301, 110 A. L. R. 639.

In *Terry Dairy Products Co.* v. *Beard, supra,* milk distributors in the City of Little Rock contested the amount and method of collection of inspection fees from them under an ordinance fixing a schedule of fees in the same amount as those involved in Ordinance 644. We held that such fees were not excessive as applied to said distributors. While that case also involved inspections made outside of the state, it did not involve duplicate inspections by out of state authorities or the validity of inspection fees as applied to out of state plants such as are involved here. There the Little Rock authorities had the primary responsibility of out of state inspections and there was no duplication of this service.

The police power which the legislature may delegate to municipalities is very broad and can be exercised to promote the public health, safety and welfare. In the case at bar we are dealing with a specific delegation of municipal authority in the regulation of the production and sale of milk and milk products. By §§ 19-3401 and 19-3402, *supra,* the legislature authorized municipalities to enact a specific ordinance which contains comprehensive regulations covering all phases of production, processing and distribution of milk which the lawmakers deemed adequate to properly protect the public health and safety. Section 12 of the 1939 standard ordinance provides that the City Milk Inspector shall satisfy himself that the health officer having jurisdiction over the

production and processing of milk products from points beyond the regular inspection limits of the city is enforcing the provisions of the standard ordinance before such products may be sold in the city. Thus the inspector may bar the sale of milk products from points outside the Hope inspection area that are not handled under the same or equivalent inspection provisions as provided in the standard ordinance. Under the undisputed facts here the milk sold by appellant is produced and processed under grading provisions identical with those required by the ordinance which Hope was authorized to, and did, enact. It is also undisputed that the City Milk Inspector of Hope can reasonably satisfy himself that the health officer of Texarkana, Texas, is enforcing the provisions of the standard ordinance without duplicating the inspection work of the Texarkana officer and his assistants. Under these circumstances, we hold it is unreasonable, arbitrary and beyond the power specifically delegated to the City for the Hope Milk Inspector to insist on such duplicate inspection and require appellant to pay the fees provided therefor in Ordinance 644 before he is entitled to a permit to sell milk in the city. As thus applied to appellant, Ordinance No. 644 is invalid.

In authorizing municipalities to enact the standard milk ordinance the Legislature sought to insure the purity of the milk supplied to a city's inhabitants. As evidenced by § 12 of the 1939 ordinance, it was also the legislative purpose to provide for the free flow of wholesome milk products from one community to another unburdened by unnecessary duplication of adequate inspection and the erection of prohibitive trade barriers. As applied to appellant, the fees provided in Ordinance 644 bear no reasonable relation to enforcement of the requirement that the city inspector of Hope satisfy himself that the health officer of Texarkana is enforcing the inspection provisions of the standard ordinance. If the City of Hope can impose the fees set out in Ordinance 644 and require a duplicate inspection of the Borden plant and milkshed, then every other city where products of the

Borden plant are sold could repeat the process. One of the purposes of the standard milk ordinance is to restrict the erection of prohibitive trade barriers that would result from such pyramiding of inspection fees and services.

A state cannot grant greater powers than it possesses to a municipal corporation. *Helena* v. *Dwyer, supra.* One of the objections urged against Ordinance 644 as applied to appellant is that it places a burden on interstate commerce which is unnecessary to the public health and welfare of the people of the City of Hope. State inspection laws similar in effect to the ordinance in question have been held unconstitutional by the U. S. Supreme Court. The case of *Brimmer* v. *Rebman,* 138 U. S. 78, 11 S. Ct. 213, 34 L. Ed. 862, involved a Virginia statute which made it unlawful to sell any meat slaughtered more than 100 miles from the place where it was to be sold unless inspected by local inspectors at a fee of 1 cent per pound. In holding the act void the court said: "Undoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and, therefore, void. *Welton* v. *Missouri,* 91 U. S. 275, 281, 23 L. Ed. 347;

Railroad Co. v. *Husen,* 95 U. S. 465, 24 L. Ed. 527; *Minnesota* v. *Barber,* 136 U. S. 313, 10 S. Ct. 862, 34 L. Ed. 455, above cited."

A headnote to the case of *Standard Oil Co.* v. *Graves,* 249 U. S. 389, 39 S. Ct. 320, 63 L. Ed. 662, reads: "A law of the State of Washington requires that products of petroleum, intended for use or consumption in the State, shall be inspected before being sold or offered for sale, and imposes fees for inspection by which in 10 years over $335,000 was collected, of which only about $80,000 was disbursed for expenses, leaving a revenue of over $255,000. *Held,* in respect of such products imported from another State for sale in Washington, that the charge is excessive and an unconstitutional burden on interstate commerce."

It is undisputed that if appellant is required to pay the fees for duplication of the work of the Texarkana authorities he would be driven out of business. While § 8 of Ordinance 644 provides that excess fees shall be returned at the end of the year "upon approval by the Council," we hold that the City of Hope is unauthorized under our statute and the standard ordinance to require the payment of such fees where it is undisputed that the Texarkana authorities are enforcing the provisions of the standard ordinance. We do not hold that the City of Hope is precluded from assessing such fees as may be necessary and reasonable for the Hope Milk Inspector to satisfy himself that the Texarkana health officer is properly enforcing the provisions of the standard ordinance as provided by § 12 of Ordinance 537. Nor do we hold that the city may not impose reasonable fees for inspection of milk brought into the city to determine whether it is wholesome and being transported under refrigeration requirements of the standard ordinance. What we do hold is that the fees fixed in Ordinance 644 based on a duplication of inspection of the Borden milkshed and plant are excessive, unreasonable, an unnecessary burden on interstate commerce and unauthorized by Act 131 of 1939 as applied to appellant.

The decree is accordingly reversed and the cause remanded with directions that a mandatory injunction issue requiring the issuance of a proper permit to appellant so long as he complies with Ordinance No. 537 of the City of Hope, the regulations of the State Health Department, and the payment of such reasonable inspection fees as may be fixed by the City of Hope in the proper enforcement of the standard ordinance.

GRIFFIN SMITH, C. J. and MCFADDIN, J., not participating.

BELL *v.* BATESVILLE WHITE LIME COMPANY.

4-9210 230 S. W. 2d 643

Opinion delivered May 29, 1950.

Rehearing denied July 3, 1950.

Chas. F. Cole, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

George Rose Smith, J. This is a workmen's compensation case in which Clint Bell's widow and children seek benefits upon the theory that Bell's death resulted from an accidental injury suffered in the course of his employment by the appellee. The Commission denied the claim upon the ground that the claimants had not met the burden of proof. The circuit court affirmed the Commission's order.

Bell had worked for the appellee for many years prior to April of 1945. In that month he became totally disabled as a result of heart trouble and filed a claim for compensation. The Commission rejected the claim, but on appeal we held that the injury was compensable because the dusty atmosphere in which Bell worked was a factor contributing to the onset of his disability. *Batesville White Lime Co.* v. *Bell,* 212 Ark. 23, 205 S. W. 2d 31. Pursuant to that decision Bell received compensation payments until his death in August of 1948. The appellants then filed the present claim for death benefits.

It will be observed that Bell's death occurred a few months more than three years after the inception of his disability. The statute governing this case (which arose before the 1948 amendments to the Act) provides that if death does not occur within the first three years of the period for compensation payments "it shall be presumed that such death did not result from the injury and no death benefits shall attach." Ark. Stats. 1947, § 81-1315 (b). The Commission ruled that the statutory presumption is rebuttable, and we agree with that ruling. Had the legislature intended for the presumption to be a conclusive one it could easily have said so, or it could have said that in no case would death benefits attach unless the employee died within three years after the injury. Most presumptions are rebuttable, and we find

nothing in the Compensation Act to indicate that this one is not.

The Commission held, however, that the claimants' evidence was not sufficiently strong to overcome the statutory presumption. As far as the cause of Bell's death is concerned, the evidence is undisputed. When Clint Bell was about fourteen years old he had rheumatic fever. This disease usually creates a weakened heart condition. A person having a rheumatic heart may lead a normal existence for years, but in most cases the heart condition eventually flares up and ultimately proves to be fatal. Bell's case history was typical except that he lived longer than most patients do after the onset of disability. It is not even suggested that his death was due to anything except heart trouble; in fact, the appellee and its insurer did not offer any evidence to contradict the appellants' proof.

The transcript in the first case was introduced at the hearing below. What the Commission did was to reexamine that testimony and conclude that the claimants had not shown that Bell's original injury was accidental. The Commission reasoned that the statutory presumption imposed upon these claimants a heavier burden of proof than that which ordinarily obtains. Implicit in the Commission's written opinion is the thought that even though the proof in Bell's own case was strong enough to establish an accidental injury, the same evidence was insufficient to overcome the statutory presumption in a death case.

We think the Commission erred in retrying the issue of accidental injury. Whether the Commission's finding upon an employee's claim is *res judicata* as to his widow and children is a question of first impression in Arkansas. Several states have held that the rule of *res judicata* does not apply, but in most of them the peculiar wording of the compensation act permits the commission to modify its awards at any time. Our own provision for modification is not so broad. See § 81-1326.

We believe the better reasoned cases to be those holding that a decision rendered during the employee's

lifetime upon his assertion of compensable disability is binding when his dependents raise the same issue after his death. On this point an excellent opinion was handed down in *Lanning* v. *Erie R. Co.,* 265 App. Div. 576, 40 N. Y. S. 2d 404, aff'd without opinion, 291 N. Y. 688, 52 N. E. 2d 587. There the employer contested the employee's claim upon the ground that he was engaged in interstate commerce when the injury took place. The Board rejected that defense and allowed compensation. The injury led to the employee's death, and in a proceeding brought by his widow the employer offered the same defense. In holding that this issue was concluded by the first adjudication the court said: "The railroad was not entitled to litigate a second time the issue of interstate commerce. It had its day in court on that question. While there is not an exact identity of parties, the decedent's claim for disability compensation and his widow's claim for death benefits both spring from the same accident and injury and they must stand or fall upon the determination of the issue of interstate commerce. This issue was proffered by the railroad and determined against it on the original claim by Lanning. . . . Close analogy to the present situation is found in the statutory action for wrongful death. A judgment for or against a decedent in his lifetime is a bar to a later action for his wrongful death. *Collins* v. *Hall,* 117 Fla. 282, 157 So. 646, 99 A. L. R. 1086. The foundation in each instance is the same wrongful act and once the underlying issues as to such act have been determined against a party he has no right to a second hearing on those same identical questions." To the same effect, except that the first decision had been adverse to the employee, is *Ek* v. *Dep't of Labor and Industries,* 181 Wash. 91, 41 P. 2d 1097.

In the case at bar the evidence upon the issues still left open by the rule of *res judicata* is not in conflict. It was determined in the first proceeding that Bell suffered an accidental injury which activated his dormant heart condition. That issue is not subject to reconsideration. All that remains to be decided is whether Bell's rheu-

matic heart was the cause of his death, and, if so, whether death occurred sooner than it would have had his ailment not been activated by his employment. *Frank Lyon Co.* v. *Scott,* 215 Ark. 274, 220 S. W. 2d 128. The uncontradicted evidence requires an affirmative answer to both questions.

Reversed, with instructions to remand the cause to the Commission for the entry of an award in favor of the claimants.

GRIFFIN SMITH, C. J., not participating.

MCFERRIN *v.* CLARKSVILLE WOOD INDUSTRIES, INC.

4-9212 230 S. W. 2d 49

Opinion delivered May 29, 1950.

Rehearing denied July 3, 1950.

D. B. Bartlett and *Jno. S. Gatewood,* for appellant.

Brock & Branting, for appellee.

LEFLAR, J. This case arises from a motion for summary judgment against the sureties on a forthcoming bond filed by the defendant after an attachment levied by the plaintiff McFerrin. The Circuit Court found the attachment to be void because title to the attached prop-

erty was in a third person, then denied the motion for summary judgment. The attaching plaintiff appeals only from the order denying his motion for summary judgment on the bond.

The principal question presented by the appeal is whether a statutory forthcoming bond remains effectual after the attachment, in connection with which the bond was given, is held to have been invalid. Our decisions say that the bond in such a case does not remain effectual. We have two separate sets of statutes under which such bonds may be filed, and the results reached under both have been the same.

One of the sets of statutes appears in Ark. Stats. §§ 31-124 and 31-126. *Rogers* v. *Reliable Feed Co.,* 169 Ark. 391, 275 S. W. 705, held that sureties on a forthcoming bond executed under these sections could not be held after it was determined that title to the attached property was in a third person and the attachment was therefore invalid.[1] Also see *Applewhite* v. *Harrell Mill Co.,* 49 Ark. 279, 5 S. W. 292.

The other set of statutes consists of §§ 31-136 and 31-162. These are the statutes under which the forthcoming bond in the present case was apparently filed. Originally these statutes were interpreted to leave the bondsmen liable even though the attachment be held void. *Ferguson* v. *Glidewell,* 48 Ark. 195, 2 S. W. 711. But in 1891 they were amended (§ 31-136) to provide that upon invalidation of an attachment the sureties on the forthcoming bond should be discharged. *Burgener* v. *Spooner,* 167 Ark. 316, 268 S. W. 6; *Ford* v. *Wilson,* 172 Ark. 335, 288 S. W. 712. This 1891 amendment is controlling in the present case.[2]

[1] This was despite the express language of § 31-126: "In any proceeding on this bond, it shall not be a defense that the property was not subject to the attachment." We do not now find it necessary to pass upon the suggestion that this holding was incorrect and should be overruled.

[2] It might be argued that the two sets of statutes were actually one unit, to be read together, so that the 1891 amendment to § 31-136 operated to repeal § 31-126 altogether. We do not now determine that possibility.

The third party intervener whose title in the present case was held to be superior to that of the plaintiff attaching creditor was a prior mortgagee named Umphrey, who intervened in the lawsuit for the purpose of claiming the attached chattels under his prior mortgage. The Circuit Court found that Umphrey's title under the mortgage was valid and superior, and accordingly dissolved the attachment. From this action of the Court the plaintiff did not appeal. But plaintiff now contends, as against the sureties on the bond, that the attachment was improperly dissolved because the mortgage did not describe the attached chattels with sufficient definiteness to include them within its coverage.

It is true that the mortgage did not specifically describe "200 bundles each containing 30 pieces, size 12″ x 12″, of hardwood flooring," which was the property attached. But the mortgage did include "two (2) carloads of oak lumber, random widths and lengths . . . and all other unfinished lumber hereafter acquired by mortgagor." This was broad enough to support the finding of the Circuit Judge, sitting without a jury, that the mortgage covered the attached property.

Our own examination of the record raises some doubt as to whether Umphrey's mortgage was ever filed with the recorder. If the mortgage was not filed it of course would not be binding on third persons such as the plaintiff here. Ark. Stats. § 16-201. Similarly, our examination raises a query whether the mortgage might not have been bad as to third persons like plaintiff on the ground that it covered part of a stock of goods exposed for sale while left in the mortgagor's possession. *Lund* v. *Fletcher*, 39 Ark. 325, 43 Am. Rep. 270; *Coffman* v. *Citizens' Loan & Inv. Co.*, 172 Ark. 889, 290 S. W. 961. The plaintiff (appellant) did not attack the mortgage on these grounds, and offered no affirmative evidence in support of either of them. In the absence of either argument or affirmative evidence that the intervener's mortgage failed on these grounds, we must accept the Circuit Judge's finding that the mortgage was valid.

On this basis, it follows that the Circuit Court was correct in its order holding that the sureties on the bond filed under § 31-136 were discharged. The judgment is affirmed.

GRIFFIN SMITH, C. J., not participating.

GIBSON *v.* BOARD OF EDUCATION OF DREW COUNTY, ARKANSAS.

4-9195 230 S. W. 2d 44

Opinion delivered May 29, 1950.

Gibson & Gibson, for appellant.

John Baxter, Adrian Williamson and *DuVal L. Purkins,* for appellee.

MINOR W. MILLWEE, Justice. Jerome School District No. 22 was created by Special Act 583 of 1921 out of territory lying in Drew and Chicot Counties and since its organization has been administered by the Drew County Board of Education. Initiated Act No. 1 of 1948 (1949 Cumulative Pocket Supp. to Ark. Stats., 1947, §§ 80-426 to 80-429) authorized the creation of a county-wide school district composed of all districts with less than 350 pupils enumerated on March 1, 1949, but reserved the right of annexation and reorganization in accordance with existing law prior to that date. The Jerome district had less than 350 pupils enumerated.

Prior to January 24, 1949, a petition was filed with the county boards of education of Drew and Chicot counties signed by more than 10 per cent of the qualified electors of the Jerome District requesting that a special election be held in said district for the purpose of its dissolution and annexation to Dermott School District in Chicot county or to Portland School District in Ashley county.

The Board of Directors of the Dermott District passed a resolution consenting to the annexation. Pursuant to notices published in Drew and Chicot county newspapers an election was held in the Jerome District on February 26, 1949, in which a majority voted for dissolution and annexation to the Dermott District. On February 28, 1949, the Drew County Board of Education met, declared the results of the election and made an order of annexation transferring the property and assets of the Jerome District to the Dermott District. The Chicot County Board of Education declined to take any specific action since no election was held in the Dermott District, but resolved that it had no opposition to the annexation.

Appellant, C. C. Gibson, Jr., is a resident of Drew County, a patron and board member of the Jerome District and one of the signers of the petition for the election. On March 3, 1949, appellant filed a petition before the Drew County Board of Education alleging the invalidity of the election of February 26, 1949, for the reason that the Dermott District did not petition for, nor conduct, an election for the purpose of annexing the Jerome District. The petition was denied by the Drew County Board and an appeal was granted to circuit court on the date of the filing of the petition.

At a hearing in circuit court on May 10, 1949, attorneys representing the Dermott District for the purpose of defending the action of the Drew County Board of Education filed a petition to dismiss the appeal on the following grounds: "(1) The appeal was not taken in the manner and within the time allowed by law; (2) The petition of C. C. Gibson, Jr., before the Drew County Board

of Education fails to state sufficient grounds to constitute a cause of action."

Following a hearing on the motion, the trial court indicated that the petition to dismiss should be sustained on the second ground urged, but appellant was given 30 days to present further testimony. At a second hearing on July 27, 1949, the trial court entered judgment dismissing the appeal and affirming the annexation order of the Drew County Board of Education made on February 28, 1949.

Appellant urges several grounds for reversal, but we are confronted at the outset with appellee's contention that the dismissal of the appeal by the circuit court should be sustained because no bond for appeal from the order of the Drew County Board of Education was filed as required by Act 183 of 1925 (Compiler's Note to Ark. Stats., 1947, § 80-213). While the circuit court dismissed on another ground, the appeal from the county board's order was subject to dismissal on the first ground set out in the motion to dismiss. In *Gibson* v. *Davis*, 199 Ark. 456, 134 S. W. 2d 15, we held that Act 183, *supra,* was controlling as to appeals from county boards of education. The Act provides that an aggrieved party may appeal from a final order of the board within 30 days by filing the affidavit and bond prescribed in the Act. Appellant filed an affidavit for appeal, but did not file the bond required under the Act. In *Cypress Ridge School Dist. No. 3* v. *Morris,* 213 Ark. 192, 209 S. W. 2d 689, we said: "The express provision requiring appeal bonds in school election contests (except as limited by the Act of 1943) is controlling, and is jurisdictional." See, also, *Lynn School Dist. No. 76* v. *Smithville Dist. No. 31,* 213 Ark. 268, 211 S. W. 2d 641.

Although not abstracted, the record reflects that a bond for costs was filed by appellant with the circuit clerk on September 26, 1949. This was done several months after the time specified in Act 183, *supra,* and after rendition of final judgment in circuit court.

It follows that the circuit court did not err in dismissing the appeal from the order of the Drew County

Board of Education and the judgment is, therefore, affirmed.

GRIFFIN SMITH, C. J., not participating.

[redacted]

MORRIS *v.* MAUNEY.

4-9213 230 S. W. 2d 37

Opinion delivered May 29, 1950.

[redacted]

Howard Stone, for appellant.

Tom Kidd, for appellee.

PER CURIAM. On May 1, 1950, we granted appellant until May 8, 1950, to perfect his abstract in response to appellee's motion to affirm for failure to comply with Rule 9 of this court. Neither the original abstract and brief nor the amendment filed by appellant on May 8, 1950, makes any reference to a motion for a new trial. Under Rule 9 a judgment will be affirmed unless appellant's brief shows that a motion for new trial was filed and overruled. *Van Hoozer* v. *Hendricks,* 143 Ark. 463, 221 S. W. 178.

It is also well settled that only errors apparent on the face of the record will be considered where there is no motion for a new trial. *Miller* v. *Kansas City Southern Ry. Co.,* 129 Ark. 217, 195 S. W. 354.

No error appears on the face of the record in the instant case and the judgment is accordingly affirmed for failure to comply with Rule 9.

GILTON *v.* CHAPMAN.

4-9214 230 S. W. 2d 37

Opinion delivered May 29, 1950.

[redacted]

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

J. G. Moore, for appellee.

LEFLAR, J. Appellee Chapman brought this action to recover a $1,000 down payment which he had made to appellants on an oral contract for the purchase of a farm and equipment for a total price of $16,500.[1] Appellants gave testimony tending to show that they were at all times willing to convey the land to appellee had he produced "cash on the barrel-head" for payment of the balance agreed upon, which they say appellee never offered them. Appellee claimed that he did offer to pay cash, in the form of a check that would have been honored, but that appellants refused to go on with the deal and he finally took back his check on the theory that appellants had refused to perform the oral contract. Contradictory evidence was presented to the jury on the issue thus formed, and a verdict for plaintiff for $1,000 resulted. Judgment was duly entered according to the verdict, and defendant appeals.

The contract for sale of land being oral, it was unenforceable under the Statute of Frauds. Ark. Stats.,

[1] Plaintiff Chapman also sought $500 damages for inconvenience and expense allegedly incident to the loss of the deal, but the jury made no award on this part of the complaint, and the claim may be deemed to have passed out of the case on appeal.

§ 38-101. It is well established, however, that a defendant who refuses to perform a contract unenforceable because of the Statute of Frauds, the plaintiff being willing to perform, must repay to the plaintiff any amounts in good faith paid to the withdrawing defendant. *Benton* v. *Marshall,* 47 Ark. 241, 1 S. W. 201; *Littell* v. *Jones,* 56 Ark. 139, 19 S. W. 497; Keener, Quasi-Contracts, 277; Woodward, Quasi-Contracts, 147. ". . . when one who has given his performance in return for a promise of a specific exchange does not receive that exchange, there is failure of consideration on the one side and unjust enrichment on the other; and his knowledge beforehand that he may not receive that exchange does not alter the case. It would be as unfortunate in law as in morals if one who had paid a thousand dollars for an absolute promise of a piece of land believing that the vendor's word was as good as his bond, though knowing the oral agreement was legally unenforceable, should be without remedy if the vendor or his representatives failed to perform. In fact, without regard to the plaintiff's knowledge, or lack of knowledge, of the invalidity of the oral contract, he is allowed to recover the fair value of what he has given when the defendant fails or refuses to perform on his part. It is immaterial whether the plaintiff has parted with money, property, or services." 2 Williston, Contracts (Rev. Ed., 1936) § 534.

Appellant asserted that a second oral contract was made for sale of the same property to appellee for $15,000, but evidence to support this allegation is wholly lacking. The $15,000 figure was arrived at merely by deducting from the agreed $16,500 figure (a) the $1,000 which appellee had already paid, and (b) $500 which appellee had originally agreed to pay to the real estate man, Smith, who brought appellant and appellee together, Smith having in the meantime decided that he would not collect the $500 because he had no realtor's license at the time of the transaction. See Ark. Stats., § 71-1311.

Appellant Gilton himself testified: "I told him he could have the place for $15,000. Q. Why did you deduct $1500 from the purchase price of the place? A. I con-

sidered he had paid $1000.00 on it; after Smith gave him his commission, and he said that he gave it to him, that cut it down to $16,000. I gave him credit for the $1000." Gilton's testimony makes it very clear that the $15,000 represented nothing more than a recalculation of the amount then payable under the earlier oral contract. The talk between the parties about a $15,000 payment was merely a part of the conversation about their oral contract, conversation which preceded the final break when one party or the other backed out of the contract.

The testimony at the trial was in sharp conflict as to whether appellee had or could immediately procure enough cash to complete the payment called for by the oral contract, whether he made to appellant a tender of payment conditioned only on delivery of a good deed to the land, and whether appellant refused to perform the contract after such tender. The trial court submitted these issues to the jury under instructions which correctly stated the law, and the jury found for the plaintiff appellee. We have concluded that there was sufficient evidence before the jury to sustain its verdict. There was testimony by the plaintiff, supported by corroborating testimony of other witnesses, that he had secured the money so that the check he posted with a third party would have been honored, and that appellants nevertheless refused to proceed with delivery of the deed unless other conditions clearly not included in the original contract were also complied with by plaintiff. In view of this evidence we are not free to supersede the jury's verdict.

The judgment of the Circuit Court is affirmed.

GRIFFIN SMITH, C. J., not participating.

4-9184 230 S. W. 2d 39

Opinion delivered May 29, 1950.

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

Barrett, Wheatley & Smith, for appellee.

ED F. MCFADDIN, Justice. Appellant filed action seeking to recover $600 alleged to have been paid to appellee on November 25, 1945, when the latter was Sheriff of Craighead County. Appellant also sued the American Surety Company, the surety on Brown's bond as Sheriff

of Craighead County [1]; but for clarity we refer to Brown as the defendant and appellee. The defense was a general denial and a plea of limitations. At the close of the plaintiff's case, the Court directed a verdict for the defendant; and this appeal ensued.

Giving the evidence in favor of the appellant its strongest probative force,[2] it appears that on November 24, 1945, appellant and his wife were arrested on the charge of illegal possession of liquor for sale.[3] Each was fined $100 and costs in the Mayor's Court of Caraway, Craighead County, Arkansas; and appellant promptly paid the said fines and all costs. Thereafter appellant claims that he went to Jonesboro at the instruction of the appellee, Sheriff of Craighead County; and on that trip appellant claims that appellee required him to pay $600 additional, on penalty of being sent to jail. The $600 was paid on November 25th,[4] and thereafter appellant learned that the $600, which he had paid to Brown, was never paid to the County Treasurer or any other legal depository.

This action was filed on May 5, 1949. The question, whether the payment was voluntary, is not presented in this case. We are required to determine only (a) the applicable Statute of Limitations; and (b) when such Statute began to run.

I. *The Applicable Statute of Limitations.* By one side or the other we are cited to the following: the two-year Statute (§ 37-203 Ark. Stats.); the three-year Statute (§ 37-206); the four-year Statute (§ 37-207); and the five-year Statute (§ 37-213).

We hold that the plaintiff's cause of action comes within the three-year Statute of Limitations (*i. e.*,

[1] This was the Statutory Bond required by § 12-1101, *et seq.*, Ark. Stats., 1947.

[2] This is the rule in testing the correctness of an order directing a verdict against an appellant. See *Garner* v. *Missouri Pacific Rd. Co.*, 210 Ark. 214, 195 S. W. 2d 39.

[3] Sec. 48-918, *et seq.*, Ark. Stats., 1947, forbids such possession in dry territory.

[4] Plaintiff testified he had the money in a bank and Brown sent a man with him to get the money from the bank.

§ 37-206), because it is an action to recover money wrongfully taken by Brown from Wrinkles. According to appellant, Brown used his office as a color or cloak to wrongfully obtain the money; so this is an action to recover money wrongfully obtained. See *State* v. *Jones,* 198 Ark. 756, 131 S. W. 2d 612; *Baker* v. *Allen,* 204 Ark. 818, 164 S. W. 2d 1004; *F. & C. Company* v. *State,* 197 Ark. 1027, 126 S. W. 2d 293, and cases there cited.

II. *When the Statute of Limitations Began to Run.* The date of the payment was November 25, 1945, and this action was filed on May 5, 1949, which was three years, five months, and ten days after the payment. The statutory bar of three years began when the plaintiff's cause of action accrued. Three rules suggest themselves:

(a)—The cases hold that in an action to recover money paid by mistake—in the absence of any claim of fraud—the cause of action accrued on the date of such payment. See *Richardson* v. *Bales,* 66 Ark. 452, 51 S. W. 321; *State* v. *Jones,* 198 Ark. 756, 131 S. W. 2d 612; and *Brookfield* v. *Rock Island Improvement Co.,* 205 Ark. 573, 169 S. W. 2d 662, 147 A. L. R. 451. If Wrinkles paid Brown the $600 by a simple mistake as to whether it was due, then Wrinkles' cause of action to recover the money accrued on the date of payment, and was barred when this action was filed.

(b)—The cases hold that in an action to recover money paid to a public officer under duress, the cause of action accrued as soon as the duress was removed. While we have found no cases in this State on the point, the texts—based on cases from other jurisdictions—recognize this statement as the uniform rule. See 40 Am. Jur. 835 containing the discussion "Duress By Public Officers"; and 34 Am. Jur. 193 containing the discussion "Duress and Undue Influence." If Wrinkles paid Brown the $600 because of duress (that is, because Brown was a public officer threatening imprisonment), then the cause of action to recover the money accrued as soon as the duress was removed. There is nothing in the evidence to show that the duress was not removed as soon

as the payment was made; so the cause of action was barred.

(c)—The cases hold that in actions to recover money paid because of fraud, the cause of action accrued when the fraud was discovered, or should have been discovered, with the exercise of reasonable diligence. See *Dilley* v. *Simmons National Bank,* 108 Ark. 342, 158 S. W. 144; *Wright* v. *Lake,* 178 Ark. 1184, 13 S. W. 2d 826; and see, also, 34 Am. Jur. 132. If Brown obtained the $600 from Wrinkles by fraud, then the cause of action accrued when Wrinkles discovered the fraud, or should have discovered it, with the exercise of reasonable diligence; and the evidence shows that Wrinkles discovered the fraud either at the time of payment, or within a very short time thereafter, and at all events, more than three years before the filing of this action.

Wrinkles testified that Brown insisted that the $600 was to settle the case with the Deputy Prosecuting Attorney, but Wrinkles admitted that within four weeks after the payment he became suspicious and went to the bank to see about the check which he had cashed to pay Brown the $600. With his suspicions thus aroused, an inquiry pursued with reasonable diligence would have established Brown's fraud if it was not already known. The Deputy Prosecuting Attorney testified that within "several months" after the date of the alleged payment, Wrinkles discussed the matter with him. So with Wrinkles' suspicions aroused within four weeks of the date of payment, and with the Deputy Prosecuting Attorney available to inform him that the money had not been paid to any legal depository, certainly Wrinkles had that knowledge of the fraud which the law requires to constitute accrual of the cause of action. With all these facts, Wrinkles waited three years, five months, and ten days from the date of payment before filing this action.

All the evidence shows that the cause of action was barred by the three-year Statute of Limitations; and we, therefore, affirm the judgment of the Circuit Court.

LEFEAVRE *v.* PENNINGTON.

4-9222 230 S. W. 2d 46

Opinion delivered June 5, 1950.

Harry T. Wooldridge, for appellant.

Harwell & Boston and *Jay W. Dickey,* for appellee.

GEORGE ROSE SMITH, J. This is a proceeding instituted by the executor of the will of Dr. J. W. Pennington, to obtain a construction of the residuary clause. This clause reads: "The Bal. to be divided equally between all of our nephews and nieces on my wife's side and my niece, Nathalee Pennington, of Lawrenceburg, Tennessee." The trial court construed the will as giving half the residuary estate to the appellee, Nathalee Pennington. The twenty-two appellants, who are the testator's nephews and nieces on his wife's side, contend that the property should be distributed equally among all the beneficiaries, so that the appellee would receive a twenty-third instead of a half.

We agree with the trial court's conclusion. To begin with, the testator used the word "between," which in its literal sense applies to only two objects, as "between Scylla and Charybdis." If the reference is to more than two the preposition should be "among." Webster's New International Dictionary. In several cases the courts have stressed this distinction in holding that language such as that now before us contemplates a division of the

legatees into two classes. *In re Moore's Estate,* 157 Pa. Super. 296, 43 A. 2d 359; *Roelf's Cousins* v. *White,* 75 Ore. 549, 147 P. 753.

It is probably true, however, that most people do not habitually observe the distinction between the two words. For that reason we do not rest our decision on this point alone but prefer to treat this as a case of ambiguity. We may therefore look to the state of the testator's feelings toward the various beneficiaries as an aid in arriving at his intention. *Rufty* v. *Brantly,* 204 Ark. 32, 161 S. W. 2d 11. There was testimony showing that Dr. Pennington had a warm affection for Nathalee. The two wrote to each other often, and he had visited in her home in Tennessee. Dr. Pennington had sent Nathalee various gifts, including a fountain pen, a $500 United States bond, and $10 a month when she was ill for five months. At the trial Nathalee described herself as her uncle's favorite niece.

This evidence confirms our belief that Dr. Pennington meant for half of his residuary estate to go to Nathalee and for the other half to be divided among the appellants. It is not without significance that Dr. Pennington described the appellants merely as a class, apparently not caring whether the class increased or decreased in number before his own death. Nathalee, on the other hand, was singled out for individual mention. This different treatment may well have been due to the fact that Dr. Pennington did not entertain for each of the twenty-two appellants the same close affection that he had for Nathalee.

Finally, a per capita distribution among all twenty-three litigants would be a somewhat unnatural division of the estate. Many men feel that property acquired during marriage belongs jointly to the husband and wife, no matter which one holds the legal title. Consequently it is not at all unusual for a childless widower to divide his estate equally between his own family and that of his wife. We think it much more likely that Dr. Pennington intended such a division than that he meant to give twenty-two twenty-thirds to his wife's relatives and only

one twenty-third to his own kin. Thus the literal meaning of the language, the state of the testator's affections, and a natural distribution of the estate all point to the construction adopted by the trial court.

Affirmed.

HOLT and DUNAWAY, JJ., dissent.

EDWIN E. DUNAWAY, J., dissenting. I dissent because I think the majority by insisting upon the strict etymological meaning of the word "between" is defeating the intent of the testator as to the disposition of his property.

It is true that that eminent legal authority, Webster's New International Dictionary, says that in its literal sense "between" applies only to two objects, and the example quoted in the majority opinion is given as illustrative. In the same authority, however, the word "among" is given as a synonym for "between," and we find this statement: "When used of more than two objects, it brings them severally and individually into the relation expressed; as, a treaty *between* three powers; the three survivors had but one pair of shoes *between* them."

The great weight of authority recognizes that in common parlance "among" and "between" are used interchangeably. "In popular usage no distinction is made between the words 'between' and 'among'; both being used without regard to the number involved. This confusion of meaning frequently appears in wills, and effect is given to testator's actual intention." 3 Page on Wills (3rd Ed.) § 1084, p. 295. Again in an annotation in 75 A. L. R. 831, where the cases are collected, it is said:

"Where the gift is to a named individual and a number of persons by general description, as in the case of a gift to A and the children of B, and the question arises whether A is a member of the class, or where the gift is to the children of A, B, and C, and the question arises whether the legatees constitute a single or a composite class, some doubt may arise from the testator's use of the word 'between' in a direction to divide. The courts,

however, have settled that such use is of little significance, as the word 'between' may be, and frequently is, used in the same sense as 'among'."

See, also, *Thompson, Construction of Wills,* § 229, p. 372.

In *Graves* v. *Graves,* 55 Hun 58, 8 N. Y. S. 284, the court said in discussing this problem: "Criticism is made upon the use of the word 'between,' and not 'among', in the direction for division in the case at bar. It is true that in very strict use of language the preposition 'between' is more properly employed where the reference is to two persons or things only; and 'among', where the reference is to more than two. But the distinction is too nice to furnish a rule of construction, and it is known to all that 'between' is very commonly used as synonymous with 'among' in such connection."

The will in question was a holographic will, prepared by a layman and not a lawyer versed in legal niceties. The testator said of his estate, "The Bal. to be divided equally between all of our nephews and nieces on my wife's side and my niece Nathalee Pennington . . ."

The problem of construction presented by thus designating a class of legatees and then naming an individual is discussed in 3 *Page on Wills,* (3rd Ed.) § 1083, p. 292:

"If the gift is to one or more named or designated persons who are to take together with a class, the question arises whether or not such named persons take each a share, and the class takes a share, on the one hand; or whether such named persons are intended to be members of the class, so that such persons and the members of such class will each take the same amount, on the other. If testator intends to make them members of the class, the gift is one to a class.

"It is said that it will be assumed, in the absence of anything in the will to show a contrary intention, that testator intended to make such named person a member of the class, and to divide the gift between the members of the class as thus constituted, per capita."

It must be recognized that the courts encounter interminable difficulties in trying to construe wills in the light of authority. As said in *Roelf's Cousins* v. *White,* cited *supra* in the majority opinion, "These troubles are nowhere more cogently illustrated than in Mr. Jarman's Standard Treatise on the Law of Wills, where one may find authority for almost any proposition which the exigencies of a given case may suggest or demand." That seems to be true in the instant case.

What then does the record reflect as to the testator's feelings toward the various beneficiaries as an aid in arriving at his intention? It is from the testimony of Nathalee Pennington herself that the majority finds a "warm affection" toward her on the part of the testator and hers is the only testimony that she was her uncle's favorite niece. Dr. Pennington left Tennessee, where Nathalee lives, in 1900 and has lived in Arkansas since. After her early childhood Dr. Pennington saw her only twice—once during his wife's lifetime and once during a visit to Tennessee, after Mrs. Pennington's death. From his wife's death until he died, the testator lived with a sister of his wife, Mrs. Anderson. Some of the legatees are children of this sister, and some the children of other brothers or sisters. (How many branches of Mrs. Pennington's family there were is not shown by the record.) A son of Mrs. Anderson was named executor without bond, and the will provided that as to sale of decedent's property this nephew's "judgment be final in all matters."

The fair inference from all of this is that the testator was much closer to his wife's family here in Arkansas than to his own which he left in Tennessee many years ago. Certainly the testimony of Nathalee, who stood to take one-half the estate instead of one twenty-third, about her favored position might have been somewhat colored by interest. Nor does the argument impress that since Nathalee's four brothers were left nothing, the testator must have meant for her to share in half the property. A more reasonable view, it seems to me, is that the testator wanted certain of "our" nephews and nieces as a

class to have his property. Which ones?—all of his wife's and only one of his. In his brief holographic will, instead of listing the twenty-two names of all his wife's nieces and nephews, he designated them as a class, and to that class added the one of his own relatives he desired to include; and provided that between them his property should be "divided equally."

The judgment should be reversed.

Mr. Justice HOLT joins in this dissent.

McGEE *v.* HATCHER.

4-9215 230 S. W. 2d 41

Opinion delivered June 5, 1950.

A. A. Robinson, for appellant.

George H. Steimel and *W. J. Schoonover,* for appellee.

DUNAWAY, J. Elsie Dalton McGee has appealed from a decree partitioning in kind certain lands in Randolph County, Arkansas.

In 1935 Dr. J. W. Dalton and his wife conveyed to their four daughters by warranty deed the lands involved in this appeal. The pertinent language of this deed reads as follows: ". . . we . . . do hereby grant, bargain, sell and convey unto the said Mrs. Nellie E. Hatcher, Mrs. Blanche Celeste Henderson, Mrs. Sarah Elsie McGee, and Mrs. Willie May Wilson all the following described real estate, lying and being situated in Randolph County, Arkansas, the respective interests taken by each of the said grantees being hereinafter set out, to-wit: (giving description of lands) it being the intention of this deed to convey all lands in Randolph County now owned by us or either of us.

"It is intended by this conveyance to deed to each of the said Nellie E. Hatcher, Mrs. Blanche Celeste Henderson, and Mrs. Willie May Wilson, absolute title to one-fourth interest in all the said lands and to Mrs. Sarah Elsie McGee an estate of one-fourth interest therein, during her natural life, with remainder to her bodily heirs, or in event she leaves no bodily heirs surviving her, such remainder to go in equal parts to the said Mrs. Nellie E. Hatcher, Mrs. Blanche Celeste Henderson, and Mrs. Willie May Wilson.

"To have and to hold the said described lands unto the said Nellie E. Hatcher, Mrs. Blanche Celeste Henderson, Mrs. Willie May Wilson and Mrs. Sarah Elsie McGee, and unto their heirs and assigns, subject to the provision in last paragraph above as to the estate granted to said Mrs. Sarah Elsie McGee."

This partition suit was filed by Nellie E. Hatcher, as owner under the above-quoted deed of an undivided one-fourth interest in the lands in question, and Lewis D. Hatcher, who had acquired the undivided one-fourth interest of Mrs. Celeste Dalton Henderson. The heirs of Mrs. Willie May Wilson, owners of her undivided one-fourth interest, and Elsie Dalton McGee, owner of the remaining undivided one-fourth interest, were made parties defendant. It was alleged in the complaint that Mrs. McGee was the owner of a life estate.

Two issues were raised in the answer filed by Mrs. McGee. She asked the court to decree that she was owner

of an undivided one-fourth interest in fee, rather than of a life estate. She further contended that if her estate was only one for life, there could be no partition.

The Chancellor held that Mrs. McGee's interest in the lands in suit is an estate for life, and decreed partition in kind with Mrs. McGee's share set apart to her for life, remainder to her bodily heirs. On this appeal Mrs. McGee argues the same two issues presented in the court below.

That Mrs. McGee holds only a life estate under the deed from her father and mother is clear from the quoted language of the instrument. Although it is argued that there is a repugnancy between the granting and *habendum* clauses, this is plainly not so, and it is not even necessary to resort to the rule in *Beasley* v. *Shinn,* 201 Ark. 31, 144 S. W. 2d 710, 131 A. L. R. 1234, in construing the instrument. In the granting clause, it is specifically said that the "respective interests taken by each of the said grantees being hereinafter set out"; then follows the language limiting Mrs. McGee's one-fourth interest to an estate "during her natural life, with remainder to her bodily heirs," and if none survive her, remainder to her named sisters.

The other question presented by this appeal does not appear to have ever been decided by this court. The statute under which this suit was filed reads in part as follows: "Any persons having any interest in and desiring a division of land held in joint tenancy, in common or in coparceny, absolutely or subject to the life estate of another, or otherwise, or under an estate by the entirety where said owners shall have been divorced either prior or subsequent to the passage of this Act, except where the property involved shall be a homestead and occupied by either of said divorced persons, shall file in the circuit or chancery court a written petition in which a description of the property, the names of those having an interest in it, and the amount of such interest shall be briefly stated in ordinary language, with a prayer for the division, and for a sale thereof if it shall appear that partition cannot be made without great prejudice to the owners, . . ." Ark. Stats. (1947), § 34-1801.

In *Krickerberg* v. *Hoff,* 201 Ark. 63, 143 S. W. 2d 560, we held that one owning both an undivided one-half interest for life and the entire fee in certain property was entitled to partition against the owner of the other undivided life interest. There, in discussing whether the parties were co-tenants, or tenants in common, within the meaning of the partition statute, we said at page 67: "In determining whether there is a co-tenancy or tenancy in common, the test seems to be whether the right of possession is present. In the instant case the right of possession is present, both appellee and appellant being entitled to possession of an undivided one-half interest of the entire property."

An earlier case in which we impliedly approved a partition between the owners of undivided interests in fee and the owner of an undivided interest for life, which was followed by contingent remainder interests, is *Liberty Central Trust Co.* v. *Vaughan,* 167 Ark. 219, 267 S. W. 361. The right of partition was not actually considered by the court, a prior consent decree of partition not having been appealed from; the question in the case being whether the partition decree had enlarged the interest of one of the remaindermen from a contingent to a vested remainder. The court did, however, discuss the earlier partition proceedings with apparent approval. It should be noted, though, that in that case the contingent remaindermen were made parties defendant in the partition suit.

The exact question now before us is whether the owner of an undivided interest in fee is entitled to partition in kind where one of the present possessory interests is a life estate with contingent remainders thereafter limited, and the remaindermen are not in being; and further, if there may be partition, whether it is effective only for the duration of the life estate or is binding as to the remainder interests as well.

There have been a great many variations in the decisions in different jurisdictions on the right to partition among the owners of possessory interests, where some own the fee and others have life interests only; distinctions being made as to whether it is the owner of an inter-

est in fee or the life tenant who is seeking the partition, whether the remaindermen may or must be made parties to the suit, and the extent to which they are bound by the decree. Differences in the language of the various statutes account for much of the diversity in the cases. The authorities are collected in an annotation in 12 A. L. R. 662, supporting the statement that "under statutes authorizing partition in kind or sale for partition among co-tenants, it is recognized quite generally that an owner in fee of an undivided share in real estate is entitled to a judicial separation of his share from that of an undivided share held by another in life tenancy at least for the duration of the life estate."

We hold that in the case at bar the court properly decreed a partition in kind, and that the separation of the undivided shares as ordered is binding upon the owners of the future interests in the share of Mrs. McGee. This is in accordance with the view expressed in 3 Simes Law of Future Interests, § 661, p. 74:

"It would seem that, in order to effectually partition the entire estate of a possessory co-owner, it is sometimes necessary to subject a future interest to partition. Thus, under statutes limiting the power to partition to those who have possessory interests, there is frequently a liability to be subjected to partition on the part of persons having future interests. . . .

". . . Indeed, if a plaintiff in a partition action owns an undivided share in fee simple absolute as a possessory co-owner, it would seem that he is entitled to partition of the entire fee simple and thus has the power to bind owners of contingent or defeasible remainders or executory interests or indeed any other owners of future interests in the other undivided shares."

The rule is stated as follows in Restatement, Property, § 126:

"(1) When a possessory estate for life is owned by a joint tenant or by a tenant in common, and at least one undivided share in such land is

"(a) owned in fee simple by another joint tenant or tenant in common:

. . . . .

then such joint tenant, or tenant in common, has a power to compel the partition of the ownership of the land in which such estate for life exists, so as to bind the future interests limited after such estate for life, unless the creator of the estate for life, by the terms of the creation of such estate, has manifested an intent that there be no such power, . . ."

See, also, Restatement, Property, § 177; *Waldon* v. *Baker,* 184 Okla. 492, 88 P. 2d 352; *Trumbo* v. *Sanford,* 305 Ky. 231, 203 S. W. 2d 22; *Whittaker* v. *Porter,* 321 Ill. 368, 151 N. E. 905.

The decree is affirmed.

[redacted]

HOLCOMB *v.* STATE.

4623 230 S. W. 2d 487

Opinion delivered June 5, 1950.

[redacted]

Hebert & Dobbs, for appellant.

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

HOLT, J. A jury found appellant guilty of larceny of a cow (Ark. Stats. 1947, § 41-3917,—Pope's Digest, § 3140) and fixed his punishment at one year in the Penitentiary. From the judgment is this appeal.

For reversal, appellant contends that (1) the evidence was not sufficient to support the verdict and (2) that the court erred in giving the State's requested instruction No. 2.

(1)

The evidence as to appellant's guilt was in the sharpest conflict. That on the part of appellant was to the effect that he, in good faith, purchased the cow in question from the owner, Mancel Robbins, the complaining witness, paid cash for her, and later sold the cow. The testimony on the part of the State was to the effect that Robbins owned the cow and never at any time sold the cow to appellant. Whether appellant had bought the cow from Robbins, as he claimed, or was guilty of larceny of the cow, as the testimony on the part of the State tended to show, presented a fact question for the jury.

We have reached the conclusion, however, that appellant's second contention, that the court erred in giving the State's instruction No. 2, must be sustained.

Instruction No. 2 provides: "You are instructed if you find from the evidence in this case beyond a reasonable doubt that the defendant, Oscar Holcomb, was in possession of a cow recently stolen from Mancel A. Robbins, and that possession is not explained to the satisfaction of the jury, such possession is sufficient to sustain a conviction of larceny."

Appellant's objection was as follows: "The defendant objects and excepts to the giving to the jury of State's requested Instruction Number 2 generally and specifically; generally, on the grounds that the instruction is not the law, and specifically, on the grounds that the instruction is vague, indefinite, general and uncertain; and, second, that it tells the jury that the defendant was in possession of a cow recently stolen from Mancel A. Robbins, when the evidence shows that possession of the cow was in possession of a man named Gregory at Mor-

rilton, Arkansas; and the defense further objects to said instruction on the grounds that it inferentially tells the jury that the cow was stolen, when that is one of the points in issue in the case."

We hold that the instruction was inherently wrong since, in effect, it was on the weight of the evidence and an invasion of the province of the jury.

In *Sons* v. *State,* 116 Ark. 357, 172 S. W. 1029, we said: "We have held in repeated decisions that unexplained possession of property recently stolen constitutes evidence legally sufficient to warrant a conviction of larceny or of the crime of knowingly receiving stolen property; but that an instruction that such evidence is sufficient to sustain a conviction amounts to an instruction on the weight of the evidence and is, for that reason, an invasion of the province of the jury.

"In *Duckworth* v. *State,* 83 Ark. 192, 103 S. W. 601, the instruction told the jury that 'the possession of property, recently stolen, unexplained, is evidence of the defendant's guilt,' and that if such unexplained possession is corroborated by other evidence tending to connect the accused with the larceny, 'then you will find them guilty.'

"In *Thomas* v. *State,* 85 Ark. 138, 107 S. W. 390, the court charged the jury that 'the possession of property recently stolen, unexplained, * * * would be sufficient under this indictment to sustain a conviction.'

"In each of these cases, we held that the instructions given were erroneous for the reason that they were on the weight of the evidence."

In *Mays* v. *State,* 163 Ark. 232, 259 S. W. 398, we said: "The court gave, over appellant's objection, an instruction numbered 3, which advised the jury that the finding of stolen property in the possession of another, shortly after the said property had been stolen, raises a presumption of guilt as against the person in whose possession the same is found, but that this presumption is a rebuttable one, and that, if this possession is explained to the satisfaction of the jury, the presumption is over-

come, and should not be considered as any evidence against the accused. After so announcing the law, the court proceeded in the same instruction to say that the finding of the property in the possession of the defendant was not itself sufficient to warrant a conviction, but was merely a circumstance to be considered by the jury in passing on defendant's guilt or innocence, and that he should not be convicted unless they were convinced, beyond a reasonable doubt, that defendant knew the dresses were stolen when he received them.

We have here an instruction which contains the error which has been frequently condemned by this court as prejudicial. A recent case is that of *Pearrow* v. *State,* 146 Ark. 182, 225 S. W. 311, where it was said: "The court erred in telling the jury 'that the possession of property recently stolen and unexplained by the defendant affords presumptive evidence of his guilt.' This language was an instruction on the weight of the evidence, which was condemned by this court as erroneous and prejudicial in the quite recent case of *Long* v. *State,* 140 Ark. 413, when we said: 'The rule is that the unexplained possession of recently stolen property is a fact from which an inference of guilt may be drawn.' It is wholly within the province of the jury to draw or not to draw such inference, and it is an invasion of the province of the jury to tell them, as a matter of law, that the unexplained possession of recently stolen property raises a presumption of guilt. Other cases holding to this effect are cited in *Long* v. *State, supra.* The latter part of the instruction is a correct statement of the law, but it did not cure the vice of the language of the first part, just quoted."

Appellee relies strongly on the case of *Shoop* v. *State,* 209 Ark. 498, 190 S. W. 2d 988. That case, however, is clearly distinguishable. It reaffirms the general rule announced in *Sons* v. *State,* above, in this language: "This court has long followed the rule that the possession of recently stolen property, if unexplained to the satisfaction of the jury, is (evidence legally) sufficient to sustain a conviction either of larceny or receiving stolen property," but as pointed out in the Sons case

above, "an instruction that such evidence is sufficient to sustain a conviction amounts to an instruction on the weight of the evidence and is, for that reason, an invasion of the province of the jury."

Such we hold to be the effect, as indicated, of instruction No. 2, above.

There was no instruction such as we have here involved in the Shoop case.

For the error in giving instruction No. 2, the judgment is reversed and the cause remanded for a new trial.

GLADISH *v.* DRAINAGE DISTRICT No. 17, MISSISSIPPI COUNTY.

4-9180 230 S. W. 2d 490

Opinion delivered June 5, 1950.

G. E. Keck and *Frank Sloan,* for appellant.

Graham Sudbury, for appellee.

Marcus Evrard, for interveners.

ED. F. MCFADDIN, Justice. This litigation was instituted by the appellant, Gladish, filing an action against Drainage District No. 17 of Mississippi County, Arkansas (hereinafter called "District"), and seeking (a) to recover damages for the taking of certain lands in the building of a new levee; and (b) to recover damages because other lands were left outside the new levee. Gladish's tenants also joined as plaintiffs, in order to recover damages for crops destroyed by the new levee. Even though the case was filed in 1940, various unavoidable circumstances necessitated delay; and the cause was not decided by the Chancery Court until October 26, 1949, when a decree was entered denying relief to the plaintiffs and resulting in this appeal by them.

FACTS

We detail the events in chronological order:

(1)—Through foreclosures and otherwise, the District owned several hundred acres of land protected by the then existing levee; and on November 30, 1936, the District made two contracts of sale, agreeing to sell to Woodard and to Cockerham lands in excess of 700 acres. These contracts provided for annual payments over a period of years and prohibited the purchasers from assigning the contracts without the consent of the District. We will refer to these as "the Woodard and Cockerham contracts."

(2)—For several years prior to 1936 the District had realized that its existing levee was inadequate, and had negotiated with the United States Government for the construction of a new levee to be located farther away from the river than the existing levee. In late 1936 or early 1937 the United States Government offered to construct the new levee if the District would furnish the lands and easements therefor. The District on April 1, 1937, obtained certain instruments—designated and referred to herein as "option contracts"—from Woodard and Cockerham, by the terms of which Woodard and Cockerham, each as second party, agreed with the District, as first party, that:

". . . in consideration of the further sum of $25.00 per acre, to be paid upon the execution and delivery of a General Warranty Deed by the Second Party to the First Party, the Second Party agrees, upon request, at any time within one year from this date, to convey by General Warranty Deed, to the First Party all lands needed by First Party in the construction of its levees and spoil banks; said strip of land commencing on the land side of said levee, 5 feet from the toe thereof and extending to the edge of the borrow pit, including, when finally constructed, the actual levee, berme, borrow pit and a strip of land 5 feet wide on the land side of the levee, over and across the following described land, lying in Mississippi County, Arkansas, to wit:" (Then follow descriptions of lands totaling 376 acres.)

The option contracts also recited that the exact location of the levee and the lands needed by first party would be ascertained and determined by surveys made by United States Government Engineers.

(3)—On August 2, 1937, Woodard and Cockerham, for a valuable consideration, agreed to assign to the appellant, Gladish, their said contracts of purchase of the lands totaling in excess of 700 acres. This agreement recited:

"It is specifically understood and agreed that the Sellers hold their title to said lands under Contracts of Purchase with Drainage District No. 17 and that their

conveyance to the Purchaser will be by the way of an assignment of each of said Contracts, and that said Sellers will in no wise warrant the title to said lands, . . ." The agreement made no mention of the option contracts referred to in (2), *supra*. Because the purchase contracts executed by the District to Woodard and Cockerham prohibited assignment without consent of the District, it became necessary for such consent to be obtained.

(4)—On November 3, 1937, the District, having learned that Gladish was about to purchase the "Woodard and Cockerham contracts," addressed a letter to Gladish (which he received the next day), containing copies of the Woodard and Cockerham options mentioned in paragraph (3) above. Then on November 23, 1937, the District consented to the assignments to Gladish of the Woodard and Cockerham contracts, but without any reference to the option contracts.

(5)—There is no dispute as to any of the foregoing facts; but we come now to a controversial matter. Sometime prior to April 1, 1938, (and within the year provided for in the option contracts) Mr. Holland (president of the Board of Commissioners of the District) and Mr. Meyer (engineer of the District) went to see Mr. Gladish concerning the option contracts which were to expire on April 1, 1938. That a conversation took place is agreed; but the language and result of the conversation are sharply disputed. The District contends that its said representatives at that time exercised the option contracts for the District. Mr. Gladish insists to the contrary. The Chancellor found that the District in effect exercised its option contracts in the said conversation; and this finding will be discussed in Topic I, *infra*.

(6)—Sometime in 1939 the District actually entered on some of the lands that Mr. Gladish had purchased from Woodard and Cockerham and constructed the new levee on and across said lands, thereby taking 24.46 acres of Gladish's land. On April 4, 1940, Mr. Gladish and his tenants filed this suit, seeking the relief heretofore mentioned. The District, by its answer and cross complaint, asked specific performance of the said option contracts. The learned Chancellor awarded the District specific per-

formance of the option contracts and refused Mr. Gladish and his tenants the damages claimed. From that decree comes this appeal with a transcript of 730 pages and printed abstracts and briefs of 278 pages.

OPINION

I. *Did the District Legally Exercise Its Options?* For the purposes of this opinion we may assume, without deciding, that the options were valid in every respect[1] and binding on Gladish as a purchaser with notice. Nevertheless, we hold that the District did not exercise the options in the manner required by law.

The evidence shows that when the option contracts were signed on April 1, 1937, the District had not then obligated itself to the United States Government to furnish the right-of-way; so naturally the definite location of the levee could not have been known at that time, although stakes had been driven for a tentative location. It was not until November 12, 1937, that the District executed the resolution for coöperation with the Federal Government. When Messrs. Holland and Meyer went to see Mr. Gladish (as stated in fact paragraph (5), *supra*), they were trying to get him to extend the time of the options which he refused to do.[2]

---

[1] Appellants cite and strongly rely on *Hogan* v. *Richardson,* 166 Ark. 381, 266 S. W. 299, as holding that an option instrument was a unilateral offer when the consideration for the option was only one dollar. In *Hogan* v. *Richardson,* the instrument stated no time limit during which the option would be kept open: the decision could well have been put on that point and would not have been contrary to the weight of authority; which is to the effect that an option contract for one dollar is valid. In 55 Am. Jur. 504, the rule is stated: "The inadequacy of the consideration does not affect the binding effect of the option. This is the rule generally applied in case of options given in consideration of one dollar." See, also, 66 C. J. 494 and 1 Williston, "Contracts" (Rev. Ed.), §§ 61 and 115.

[2] We give the testimony of Messrs. Holland, Meyer and Gladish as to the conversation:

(a)—Mr. Holland's testimony was:

"Q. Just what was your conversation at that time?

"A. The substance of what he said was that he was not going to extend the option, and then we told him that we wanted to exercise the option that bound him, that we had with the other parties, and I asked him if it would be necessary for us to do whatever was necessary under the option, and he said, no, he wouldn't recognize it. We wanted him to extend it like the rest of them were, and when he

wouldn't do that, we informed him it was our contention that it did bind him with the other parties.

"Q. Was that all that was said? Did you tell him what land you wanted to take? Did you tell him what lands would be in the floodway? Had the District made its survey at the time this conversation took place?

"A. I don't remember whether it had or not. I know this, that Mr. Gladish knew about what the Government was going to do the same as I did, before he bought the land.

"Q. Did you know definitely what lands would be in the Government right-of-way? There would be no way of knowing that until the Government ran the line, and the Government hadn't done that on April 1, 1938, had it?

"A. I don't remember.

"Q. What I am getting at is this, that the reason why you said you asked other parties to extend their options, or renew their options, was because the time was about to elapse without the Drainage District knowing what lands would be needed?

"A. I guess it is, I don't remember when those surveys were made.

. . . . .

"Q. The last time you talked to Judge Gladish, or on any one of the occasions you talked to him about these options, did you know the exact number of acres you needed and the amount of money that would be required to pay for it under these options?

"A. Johnny (*i. e.*, Mr. Meyer) might have.

"Q. As far as you were concerned, you didn't?

"A. No, sir."

* * * * *

(b)—Mr. Meyer's testimony was:

"Q. At the time you and Judge Holland interviewed Judge Gladish the last time, what did he say he was going to do with reference to this option?

"A. As I remember it, he said he wasn't going to do anything about it.

"Q. You say you can't give the exact conversation?

"A. No, I can't give the exact conversation.

"Q. For the purpose of refreshing your memory, I will ask you whether or not Judge Holland proposed to him that if he would comply with the option that you would tender the money or do whatever was necessary to carry it out?

"A. Yes, sir.

"Q. What did he say to that?

"A. In so many words he said: 'Nothing doing.'"

* * * * *

(c)—Mr. Gladish's testimony was:

"Q. It has been testified on direct examination of Johnny Meyer and Judge Holland that they did—some two or three weeks before the options expired by their terms on April 1, 1938—have a conversation with you relative to the option.

"A. They did.

"Q. At that time—will you state the substance of that conversation?

"A. Well, the substance of all the conversations was to get me to renew the contract.

"Q. Did they offer you either orally or in writing a specific description of any rights-of-way or flowage rights over your land?

"A. No, sir.

. . . . .

"Q. It was testified by Johnny Meyer that he and you had discussed at some time where the new levee was to be and what acreage was involved and in general that you knew the descriptions of the lands to be sought by the District for that purpose. Is that true or not?

"A. He never discussed anything with me about that right-of-way until the engineers went down and went across my land around the first of the year 1939."

Mr. Gladish testified that when the District, on November 23, 1937, executed the consent to the assignment to him of the Woodard and Cockerham contracts and made no reservation as to the option contracts, he considered the option contracts as thereby terminated. But regardless of his understanding of the legal effect of the assignment, Mr. Gladish refused to extend the time in which the District could exercise the option contracts; and the District never informed Mr. Gladish—prior to April 1, 1938—what specific lands were to be described in the deed required by the option contracts.

When we consider the quoted clause in factual paragraph (2) (that the deed was to be made within one year) with the subsequent clause in factual paragraph (2) (that the description of the lands for the levee was to be ascertained by survey of the United States Engineers), it is clear that the option contract contemplated that the said deed was to actually describe the surveyed lands. The description of such lands was not furnished Mr. Gladish; and this omission probably accounts for the testimony of Mr. Holland relating to an "extension" of the option, which Mr. Gladish refused to give. Mr. Gladish is supported to some extent by the fact that the auditor of the District wrote Mr. Gladish a letter in January, 1939,[3] which, after describing the lands, said *inter alia*:

"Official notice is hereby given that this District is now ready to exercise its option on the above described contract of purchase, . . ."

This letter, written by the District in 1939, is rather clear evidence that the District, at the time of writing that letter, did not consider that it had theretofore exercised its rights under the option contract. Those rights, unless extended, had expired on April 1, 1938; and we find no evidence of any extension.

So we conclude that in the conversations prior to April 1, 1938, the District was unable to get Mr. Gladish

[3] This letter related primarily to a provision in the option contract regarding lands in front of the new levee, which will be discussed in Topic III, *infra*. But the significant point is that it referred to the fact that the District was then preparing to exercise option contracts; and that carries with it the idea that the option had not been exercised theretofore.

to extend the option; and that the District failed to advise him what lands he was to deed to the District or the amount he was to receive therefor. This description of the right-of-way was information that the District should have furnished Gladish; and this it failed to do. In short, the District failed to pursue the course which the law requires of one who is seeking to exercise an option. See *Indiana & Arkansas Lumber & Mfg. Co.* v. *Pharr,* 82 Ark. 573, 102 S. W. 686; *Zearing* v. *Crawford,* 102 Ark. 575, 145 S. W. 226; *Lane* v. *Jackson,* 135 Ark. 384, 205 S. W. 650; *Newman* v. *Kellogg,* 195 Ark. 12, 110 S. W. 2d 693; and *Pope* v. *Shannon,* 199 Ark. 1148, 138 S. W. 2d 382. So we hold that the District failed to exercise its option in the manner required by law, and was not entitled to a decree of specific performance of the option contracts.

II. *Damages Arising Because of the Taking of the Lands.* The District contended—and the Chancery Court found—that the option contracts provided the measure of compensation for the lands taken by the District. When we deny—as we do—specific performance of the option contracts, then Mr. Gladish is entitled to recover the damages allowed by law for the taking of his lands.

Section 4941, Pope's Digest, was the applicable Statute at the time Gladish's lands were actually taken in 1939.[4] Under such Statute, Mr. Gladish is entitled to recover (a) the market value of the land at the time it was actually occupied, (b) damages for the inconvenience of crossing from one portion of the tract taken to the other portion of the tract, and (c) damages sustained on account of the obstruction of natural drainage.[5] We discuss these:

(a)—It is admitted that 24.46 acres of Mr. Gladish's land were actually taken by the District. Mr. Gladish claimed that this land was worth $125 per acre, or a total of $3,057.50; and Mr. Gladish and his tenants claim crop and incidental damages totaling $506.20. We find that

[4] Sec. 8 of Act 177 of 1945 (now found in § 35-1108, Ark. Stats. 1947) is similar in all material matters here involved to § 4941, Pope's Digest; but this cause of action arose prior to the adoption of the 1945 Act.

[5] See the recent case of *Staub* v. *Mud Slough District,* 216 Ark. 706, 227 S. W. 2d 140, on this third element of damages.

the preponderance of the evidence supports these figures which total $3,563.70.

(b)—As to the inconvenience of crossing from one portion of the tract to the other portion, a study of the evidence convinces us that $1,000 is an adequate amount for this element of damage.

(c)—As to the obstruction of natural drainage, the evidence is too indefinite to justify any award. Mr. Gladish testified only as to the construction of ditches to take care of seep water. We find no substantial evidence that any natural drainage was obstructed by the actual construction of the levee.

So we conclude that the total damages arising from the taking of the land amount to $4,563.70.

III. *Damages Claimed Because the New Levee Left Certain Lands Unprotected.* Mr. Gladish claims that he is entitled to approximately $15,000 additional damages, because the new levee was set back some distance from the old levee; and some of his lands that had been protected by the old levee are left unprotected because of the location of the new levee. In making this claim for damages he relies on either of two points: (a) that the case at bar comes within the rule of law announced in *Garland Levee District* v. *Hutt,* 207 Ark. 784, 183 S. W. 2d 296; and (b) that the case at bar comes within the language of Act 14 of the Second Extra Session of the Legislature of 1932. We find that Mr. Gladish is not entitled to recover on either of these points.

(a)—The evidence does not bring this case within the rule of law announced in *Garland Levee District* v. *Hutt, supra.* In *City Oil Works* v. *Helena,* 149 Ark. 285, 232 S. W. 28, a setback levee was constructed, leaving lands unprotected by the new levee that had been formerly protected by the old levee; and we held that such fact in itself gave the owner of the unprotected land no cause of action for damages against the District that constructed the new levee. To the same effect is *Rauls* v. *Costner,* 201 Ark. 155, 143 S. W. 2d 1090, in which we quoted from a headnote to *McCoy* v. *Board,* 95 Ark. 345, 129 S. W. 1097, 29 L. R. A., N. S., 396:

"A levee district, which builds a levee so as to protect lands from overflow of the waters of a stream at floodtime, will not, under Const. 1874, Art. 2, § 22, providing that private property shall not be 'damaged for public use without just compensation therefor,' become liable for injuries to land lying between the levee and the river resulting from the flood water being raised higher between the levee and the river than before the levee was constructed."

Such was our recognized holding when *Garland Levee District* v. *Hutt, supra,* was decided. That case recognized the holdings in the cases previously mentioned but said:

". . . There was some evidence in this case that the lands of appellees lying between the new levee and the river were, under the plans of the new levee project as actually executed, to be used as a basin to receive flood waters in time of overflow from Red River, which flood waters would act as a cushion against the current of the overflow and thereby protect the new levee.

"On a retrial of this case the jury should be instructed that, if they found from a preponderance of the evidence that under the plans for the new project as actually carried out the said lands of appellees were to be used as a means of affording protection in the manner above set forth to the new levee, then the landowners would be entitled to recover as damages for the imposition of this servitude or easement on their land the difference between the fair market value of their land before the new levee was built and the fair market value thereof after the construction of the new levee."

In the case at bar the evidence fails to show that Mr. Gladish's lands in front of the new levee are used in any such way as to justify an award of compensation. At the downstream, or lower end of the old levee, and on lands located below those of Mr. Gladish, a section of the old levee has been removed so that any water accumulating on the lands between the old and the new levee can flow off naturally. There was no complete removal of the old levee in front of Mr. Gladish's lands, nor was the old

levee removed upstream so as to allow the water to "bottleneck" between the old and the new levee in front of his land, as was unsuccessfully claimed to be the situation in *Rauls* v. *Costner, supra.* Rather, in the case at bar, the break in the old levee was downstream from Mr. Gladish's lands, so that whatever water accumulated between the old and the new levee would the more rapidly drain from the land when the river subsided. We conclude, therefore, that the case of *Garland Levee District* v. *Hutt, supra,* is not factually applicable to the claim of Mr. Gladish in the case at bar.

(b)—Neither does Act 14 of the Second Extra Session of 1932 afford any relief to Mr. Gladish. In *Garland Levee District* v. *Hutt, supra,* the landowner sought to claim relief under the said Act, and our language in that case is applicable here:

"Nor can it be said that Act 14 of the second extra session of 1932 is applicable to the case at bar because, by the plain provisions of that act, it is limited in its application to cases where a written agreement had been made by the board of commissioners to compensate landowners for damages resulting from the abandonment of the existing levee and the building of a set-back levee. No such agreement is alleged or proved in this case."

It is true that the option contract of April 1, 1937, (as heretofore referred to in paragraph (2) of the Facts) gave the District an option to take lands for flowage rights upon the payment of an amount stated in the said option contract; but Mr. Gladish has—successfully in this Court—established the fact that the option contract expired. He cannot defeat one portion of the option contract and then successfully rely on another portion: it was an indivisible instrument. Since the option contract expired, there remained no valid contract between Mr. Gladish and the District, whereby the Act 14 of the Second Extra Session of 1932 may be invoked by the landowner. Therefore—under the facts presented in this case—Mr. Gladish is not entitled to recover any damages, on the claim that some of his lands were left unprotected by the new levee.

CONCLUSION

The decree of the Chancery Court is reversed, and the cause is remanded, with directions to enter a decree for appellants for $4,563.70, with interest at six per cent. from August 31, 1939.[6] As to costs, Woodard and Cockerham are entitled to recover from Mr. Gladish all their costs. The appellants are entitled to recover from the District all their other costs.

CARR *v.* CITY OF EL DORADO.

4-9151 230 S. W. 2d 485

Opinion delivered June 5, 1950.

[6] Interest runs from the taking. See *Newgass* v. *Railway,* 54 Ark. 140, 15 S. W. 188. The testimony merely discloses that the entry was "August, 1939," so we have fixed it as the last day of the month.

Surrey E. Gilliam, Stein & Stein, Crumpler & Eckert, and *Herschel Friday,* for appellant.

Jabe Hoggard, John M. Shackleford, Jr., and *S. Hubert Mayes,* for appellee.

LEFLAR, J. This is a bill in equity brought by appellant R. A. Carr, doing business in El Dorado, Ark., as the Yellow Cab Co., to restrain one Otis Hughes from operating taxicabs in El Dorado and to cancel a taxicab permit issued to Hughes by the city of El Dorado. Appellant's contention is that the Hughes permit was not properly approved by the City Council.

There is no real dispute concerning the facts. In applying for a permit Hughes was represented by his attorney, John M. Shackleford, Jr., son of Mayor John M. Shackleford of El Dorado. The application was in all respects in accordance with the governing statute, Ark. Stats., §§ 19-3512 to 19-3518. A hearing was held before the City Council, as prescribed by § 19-3517, on Jan. 24, 1949, and considerable testimony, both favorable and unfavorable, was presented. Mayor Shackleford and seven members of the Council—all of the councilmen except A. L. Cone—were present at the hearing. A shorthand record of the testimony was taken, and in addition the City Clerk, George Jackson, included in the minutes of the Council meeting a short summary of the testimony of each witness. The Council voted to defer action on the application until Feb. 24, 1949. At the Feb. 24 meeting, the Mayor and all eight members of the Council were present. When the vote was taken, four members of the Council voted against granting the permit, and four members, including Cone, voted to grant it. Appellant Carr, opposing the permit, protested against Cone's vote on the ground that Cone had not been present at the hearing. Mayor Shackleford overruled the protest and held that Cone's vote was proper, then the Mayor himself broke the tie by voting in favor of the permit. In due course the permit was issued and Hughes has since been operating under it.

Appellant Carr promptly brought his suit to invalidate the permit, contending (1) that Councilman Cone

was not qualified to vote because he had not heard the evidence at the Jan. 24 hearing, and that the true vote of the Council was therefore 4 to 3 against granting the permit, and (2) that Mayor Shackleford was disqualified from voting because he and his son, attorney for Hughes, were closely connected both by blood and professionally in the practice of law (as associates in the same law office).

As to (1), the evidence indicated that Cone had not read the transcript of testimony taken at the Jan. 24 hearing, but had read the summary thereof in the City Clerk's minutes, had talked to various citizens about whether the permit to Hughes ought to be granted, and had discussed the matter with another councilman before voting on it. As to (2), it appeared that Mayor Shackleford and his son were not partners in the practice of law, but only maintained a joint office, and that the Mayor had nothing to do with his son's employment by Hughes and would not receive, either directly or indirectly, any part of the $100 fee paid by Hughes to John M. Shackleford, Jr.

The Chancellor held for the defendant Hughes, that the permit was properly approved by the Council, and dismissed the complaint. Carr appeals.

(1) The legal character of official action by city councils is diverse. The concept of complete separation of powers, however it may exist in other areas of government, does not abide in the city council chamber. Primarily legislative in their functionings, city councils yet perform many acts, pass many ordinances and resolutions, that are administrative or judicial in their nature. *Scroggins* v. *Kerr, ante,* p. 137, 228 S. W. 2d 995 (Ark., Apr. 17, 1950). It is not impossible that a single aldermanic action may possess characteristics of all three of the classic departments of government — legislative, executive, and judicial.

When a city council's acts partake of the judicial character, they are commonly classified as *quasi*-judicial rather than judicial. They will seldom be subject to all

of the identical rules and limitations that apply to the conduct of courts, but will often be subject to some of these rules and limitations. *Williams* v. *Dent,* 207 Ark. 440, 181 S. W. 2d 29. What judicial procedures are to be required in a particular type of *quasi*-judicial proceeding before a city council, or in a proceeding both *quasi*-judicial and *quasi*-administrative (which might be a better classification for taxicab permit hearings held under Ark. Stats., § 19-3517) is a question not to be answered by broad statements about the requisites of judicial hearings generally, but rather by analysis of the practical function of the proceeding and the possibilities of reasonable fairness inherent in it.

That is the way the problem was dealt with in *Herring* v. *Stannus,* 169 Ark. 244, 275 S. W. 321. That case involved the validity of a permit issued by the Little Rock City Council for erection of a filling station in an area zoned for residential purposes. The governing ordinance (comparable to the governing statute in the present case) required that the Council hold a hearing at which testimony should be heard for and against the proposal, after which the Council should grant or refuse the permit. Instead of the hearing being held before the entire Council, it was held before the 7-member "civic affairs" committee of the Council which made its report back to the Council as a whole, after which the entire Council voted to grant the permit. Opponents brought a bill in equity contending, among other things, that this invalidated the permit. This Court held that it did not.

The practical exigencies of attending to aldermanic business in a modern city make it impossible for a city council always to conduct hearings as a court does. So long as the hearing is conducted in a manner designed reasonably to apprise Council members of the relevant facts, in a case involving issuance of a permit like that now before us, we hold there is no violation of due process of law or other constitutional requirements in the fact that some Council members who voted on issuance of the permit were not present at the hearing. Since the nature and effects of hearings before city councils and similar

bodies vary so widely, we point out that our decision in this case does not necessarily apply to all types of hearings. See *Morgan* v. *United States,* 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288, and 304 U. S. 1, 58 S. Ct. 773, 82 L. Ed. 1129.

(2) As to Mayor Shackleford's participation in the approval of the permit, the Chancellor's decision for the defendant Hughes included a finding that the Mayor had no such personal interest in the case as would invalidate his vote. The state of the evidence, already summarized in this opinion, is such that we cannot say the Chancellor's finding on this point is contrary to the preponderance of the evidence.

Apart from that, it does not appear from the record that appellant raised the question of the Mayor's disqualification in proper time to take advantage of it. There is no doubt that the relationship between the Mayor and his son, John M. Shackleford, Jr., was well known to all participants in the hearing from the first. It was a patent fact. Yet the transcript shows no objection raised, no disqualification suggested, until the present case was filed in Chancery Court. As to Councilman Cone, both the Council minutes and the stipulation of facts agreed to by the parties recite that Cone's right to vote was challenged when he voted. In neither the minutes nor the stipulation, nor elsewhere in the evidence, is there any affirmative showing that the Mayor's right to vote was questioned at the time the vote was taken.

"The disqualification of the Judge may be waived by failure to seasonably object. *Washington Fire Ins. Co.* v. *Hogan,* 139 Ark. 130, 213 S. W. 7, 5 A.L.R. 1585. We hold that the appellants in the case at bar should have presented *in the County Court* (where Judge KING presided) their motion to disqualify Judge KING, and that such failure constituted a waiver of the claimed disqualification. That Judge KING had signed the petition was a patent fact—*i. e.,* apparent on the face of the petition—and not a latent fact that might not have been discovered with the exercise of due diligence." *Nowlin* v.

Kreis, 213 Ark. 1027, 214 S. W. 2d 221. Also see *Morrow* v. *Watts,* 80 Ark. 57, 95 S. W. 988; *Byler* v. *State,* 210 Ark. 790, 197 S. W. 2d 748; *Bates* v. *State,* 210 Ark. 1014, 198 S. W. 2d 850.

If appellant Carr wished to disqualify Mayor Shackleford (and we do not now decide whether the Mayor was subject to disqualification) he should have challenged his right to vote, as Alderman Cone's right was challenged, at the time of the vote, and he should have presented to the Chancery Court affirmative evidence of the timely challenge.

The decree of the Chancery Court is affirmed.

LANE, SMITH AND BARG *v.* STATE.

4600 230 S. W. 2d 480

Opinion delivered June 5, 1950.

Per Curiam. This Court after having on April 10, 1950, affirmed judgments of conviction against the petitioners herein, issued an order withholding its mandate

until June 1, 1950, in order to permit a petition for review by *certiorari* to be filed in the Supreme Court of the United States. Petitioners now state that the United States Supreme Court, due to lack of time, has not acted upon their request for review by *certiorari* and, due to the fact that the United States Supreme Court will shortly recess, no action can be taken on the petition for *certiorari* until the end of the recess, wherefore petitioners ask that this Court grant a further stay of its mandate and permit petitioners to remain free on bail pending final action by the United States Supreme Court on the petition for *certiorari.*

The right to bail pending appeal after conviction is at common law a matter of judicial discretion in the individual case. That rule is unchanged by the Arkansas Constitution (Art. II, §§ 8, 9), and is changed by our statute, Ark. Stats., § 43-2714, only as to certain appeals in criminal cases pending before the Supreme Court of Arkansas. The present case, involving petition for *certiorari* from this Court to the Supreme Court of the United States, does not come within § 43-2714. The common law rule of judicial discretion is here applicable.

The situation in the present case is the same as if Rule 46 (a) (2) of the Federal Rules of Criminal Procedure were applicable. This reads:

"Bail may be allowed pending appeal or *certiorari* only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice."

This rule is of course not applicable in *certiorari* from this Court to the Supreme Court of the United States, but we quote it as illustrative of the reason for our conclusion in this case.

The majority of this Court are of the opinion that the record in the present case presents no substantial federal question which would justify the exercise of our discretion in favor of granting bail after conviction and

affirmance of conviction. We therefore refuse to stay the mandate further, and defendants are required to surrender themselves in accordance with the prior orders of this Court.

HOWELL *v.* MCMILLAN.

4-9221 230 S. W. 2d 654

Opinion delivered June 5, 1950.

Rehearing denied July 3, 1950.

Culbert L. Pearce, for appellant.

Gordon Armitage, for appellee.

ED. F. MCFADDIN, Justice. The litigants are rival claimants to a tract of land in White County which became delinquent for the 1944 State and County taxes, and was purchased by appellant, Howell, at the Collector's sale on November 12, 1945. After the expiration of the two-year period allowed for redemption[1] appellant received a deed from the County Clerk on November 19, 1947.

On December 17, 1947, appellant filed suit in the White Chancery Court, praying that his title be quieted and confirmed and alleging possession under his tax deed, and also that "Plaintiff has paid the State and

[1] See § 84-1201 Ark. Stats. (1947).

County taxes due on said lands for the three years next before publication of notice of the filing of this complaint." This suit to quiet title was Case No. 2959 in the White Chancery Court; and we refer to it as "the confirmation suit." The appellees—L. O. McMillan and O. W. Killan, both residents of Texas—were named as the only defendants in the confirmation suit; and service of process on them was attempted by publication of a warning order and report of attorney *ad litem*.[2] Proof of such publication of the warning order became a part of the file in the case, and a decree of confirmation was rendered on February 9, 1948, based on the said publication of warning order and report of attorney *ad litem* as the only service of process in the case.

On March 23, 1949, the present appellees—McMillan and Killan—filed Case No. 3264 in the White Chancery Court, naming the present appellant, Howell, as the defendant, and attacking the confirmation decree in Case No. 2959. The complaint alleged, *inter alia:*

(a) That appellees were the owners of the land;

(b) That the 1944 tax sale was void for several itemized reasons;

(c) That appellees tendered appellant a return of all amounts, etc., paid by him; and

(d) That the confirmation decree in Case No. 2959 was void because, *inter alia,* the warning order published in the said confirmation suit was insufficient publication to give the Court jurisdiction to render the confirmation decree in Case No. 2959.

In his pleadings against the said complaint, appellant admitted that the 1944 tax sale was voidable for several reasons; but claimed (a) that the confirmation decree was valid and rendered beyond attack all the defects in the tax sale, and (b) that the appellees had delayed too long to attack the confirmation decree. The Chancery Court consolidated Case No. 2959 and Case

[2] The form of warning order in this case was that as contained in Form No. 5 of the Appendix to Ark. Stats. 1947, Annotated Vol. 3, p. 1100.

No. 3264, and upon a trial, reflecting the facts as above recited, found for appellees, set aside the confirmation decree, and quieted appellees' title subject to payment to appellant of all amounts paid out by him for taxes on the lands involved. From that decree is this appeal.

Learned counsel for appellant says that the confirmation proceedings were under the authority of § 34-1918, *et seq.*, Ark. Stats. (1947), and claims that all jurisdictional requirements were strictly followed by appellant in the confirmation suit. We conclude, however, (a) that at least one essential jurisdictional requirement —i. e., legal publication of notice—was lacking in the confirmation suit; (b) that such defect appears in the confirmation proceedings; and (c) that the confirmation decree was void as rendered without proper publication.

As previously stated, appellant admits that the confirmation suit (i. e., Case No. 2959) was brought under § 34-1918, Ark. Stats. (1947). We agree with that statement; but we find that § 34-1919, Ark. Stats. (1947), prescribes the form, contents, and time required for valid publication of notice in proceedings under § 34-1918,[3]

[3] In order to be able to definitely state that § 34-1919 governs the notice required in proceedings brought under § 34-1918, we have made a step by step survey of the legislation leading to these Sections, as contained in the various compilations of our Statutes, as follows:

(a)—Sections 1 and 2 of Chapter 149 of the Revised Statutes of 1838 were carried verbatim into §§ 1 and 2 of Chapter 160 of English's Digest of 1848, except the words "at the City of Little Rock" were changed to read "in this State," since the Digester in 1848 understood that § 6 of Chapter 6 of the Revised Statutes of 1838 authorized such a change.

(b)—Sections 1 and 2 of Chapter 160 of English's Digest of 1848 were carried verbatim into §§ 1 and 2 of Chapter 170 of Gould's Digest of 1858 and then into §§ 786 and 787 of Gantt's Digest of 1874.

(c)—Section 786 of Gantt's Digest was amended by Act 69 of 1881 to substitute the words "the County Clerks or by the State Land Commissioner" in lieu of the words "the Auditor"; and as so amended became § 576 of Mansfield's Digest of 1884. Section 787 of Gantt's Digest was carried verbatim into § 577 of Mansfield's Digest of 1884.

(d)—Section 576 of Mansfield's Digest has remained unchanged and has been carried verbatim into § 661 of Kirby's Digest of 1904, and § 8379 of Crawford & Moses' Digest of 1921 and § 10975 of Pope's Digest of 1937; and is now § 34-1918, Ark. Stats. 1947.

(e)—Section 577 of Mansfield's Digest was amended by § 1 of Act 95 of 1893 and, as so amended, became §§ 662 to 664, inclusive, of Kirby's Digest of 1904. These §§ 662 to 664 of Kirby's Digest were carried verbatim into §§ 8380 to 8382, inclusive, of Crawford & Moses' Digest of 1921 and into §§ 10976 to 10978, inclusive, of Pope's Digest of 1937, and now constitute § 34-1919, Ark. Stats. 1947.

which is *six weeks'* publication of a notice that "shall state the authority under which the sale took place and give a description of the land purchased and the nature of the title by which it is held." The publication on which appellant based the confirmation decree was a *four weeks'* publication of a warning order which recited:

"The defendants, L. O. McMillan and O. W. Killan, are hereby warned to appear in this court within thirty days and answer the complaint of the plaintiff."

It is clear that the publication of the said warning order for four weeks was not the type of publication required by § 34-1919. The decree in the confirmation suit recites that it was based on the publication of the warning order, and the warning order and proof of publication were made a part of the papers in the confirmation proceedings; so, under the authority of *Winn* v. *Campbell,* 94 Ark. 338, 126 S. W. 1059, we conclude that the confirmation decree itself shows the insufficiency of publication required to give the Court jurisdiction to render the confirmation decree under § 34-1918. When a litigant pursues a special statutory proceeding (as the confirmation proceeding pursued by appellant in the case at bar), then the method of service provided in such special statutory proceeding is exclusive. In *Abbott* v. *Butler,* 211 Ark. 681, 201 S. W. 2d 1001, in discussing confirmation proceedings we cited *Lawyer* v. *Carpenter,* 80 Ark. 411, 97 S. W. 662, and said:

"It was held in the case just cited that a general law does not apply where there is a specific statute covering a particular subject matter, irrespective of the date of their passage, and the effect of the confirmation decree must be construed with reference to the act under which it was rendered."

We therefore conclude that there was no legally sufficient publication of the notice as required by § 34-1919 so as to give the Court jurisdiction to render the confirmation decree in Case No. 2959; that the Chancery Court was correct in consolidating that case with Case No. 3264, and in allowing appellees to make defense

to the confirmation proceeding; and that the defense, as made, supports the decree rendered and from which there is this appeal. Other questions presented by the appellant are found to be without merit.

Affirmed.

HARRIS *v.* HOLDER.

4-9155 230 S. W. 2d 645

Opinion delivered June 5, 1950.

Rehearing denied July 3, 1950.

Surrey E. Gilliam, for appellant.

Arwin & Stein and *Mahony & Yocum,* for appellee.

MINOR W. MILLWEE, Justice. Appellee, W. M. Holder, is a building contractor and appellants, John W. Harris, W. Bradley Trimble, and W. B. Justiss, are partners doing business as Justiss Motor Company. On

May 12, 1948, appellee contracted to construct a Quonset steel garage building for appellants in El Dorado, Arkansas. El Dorado Lumber Co. sold appellants the steel to be used in construction of the building. Appellee was to furnish the labor, certain materials and construct the building for $4,446.

The Justiss Motor Co. moved into the building the latter part of July, 1948. On September 17, 1948, appellee filed this suit alleging due performance of the contract, the payment by appellants of only $1,500 of the contract price, and prayed judgment for the balance together with damages to his reputation and credit.

Appellants' answer and cross-complaint denied that the building was completed according to the contract and particularly alleged breach of the contract in construction of the concrete floor which was alleged to be defective and unusable for the purposes intended. Appellants prayed damages on the cross-complaint against appellee and the surety on the performance and labor and material payment bonds executed by appellee.

A suit previously filed against appellee by certain materialmen was consolidated with the instant suit and judgments sustaining liens in favor of said materialmen were entered under a stipulation of all the parties.

After an extensive hearing the trial court found that the concrete floor was defective, but that such condition resulted from appellants' interference with appellee in the manner and method of doing the work. A decree was entered in favor of appellee for the balance found due under the contract after discharge of the judgments entered in favor of the materialmen. Appellants' cross-complaint was dismissed for want of equity and they have appealed.

In reference to the construction of the 6,000-foot floor the contract provides that appellee shall furnish: "All materials and labor for 6″ floor of 2,000 lbs. concrete, reinforced with 6″ x 6″ x 10-gauge steel in slabs 20 ft. x 20 ft., reinforcing mesh to be broken at all expansion joints and joints cleaned and filled with either mastic

or formed expansion strips; all slabs to be floated and finished in a workmanlike manner and all details to be strictly adhered to.'' While a great deal of testimony was directed to the condition of the concrete floor, it is undisputed that it was defective and not finished in a workmanlike manner as required by the contract. Expert and lay witnesses on both sides testified that the floor was rough, uneven, or out of level in many places, and that the topping was soft, pitted, flaky and crumbly.

In his testimony appellee first denied but later admitted that the floor was defective and offered a variety of reasons therefor. He stated that the building site was moved back 50 feet from the original level location called for in the contract to a place where there was a three-foot fill which he was required to ''cat-pack.'' The written contract recites that the building was to be located at 1200 West Hillsboro Street, but does not otherwise designate the building site. Appellee apparently acquiesced in the change of building sites, if made, and the preponderance of the evidence fails to disclose that the defective condition of the floor resulted from such change.

The contract also provided for erection of the building ''according to blueprints furnished by El Dorado Lumber Co. subject to changes as directed by engineer approved by El Dorado Lumber Company.'' Edward Bader was sent to El Dorado by the manufacturer of the steel furnished by El Dorado Lumber Co. and was employed by the latter as the engineer designated in the contract. The evidence on behalf of appellants is that they knew nothing about concrete construction and made no attempt to supervise appellee or his employees in the construction of the concrete floor. Appellee stated that both Bader and Justiss supervised the laying of the floor and that Harris and Bader directed appellee to pour concrete on ground that was too soft and wet.

The preponderance of the evidence was to the effect that it is not an improper practice to pour concrete on wet ground in hot weather, but that the use of too much water might cause the concrete slab to crack or sink.

According to the greater weight of the evidence the slab base of the floor in controversy did not crack or sink and the defects in the floor resulted from the manner in which the topping or surface was laid and finished.

There was evidence that the soft and flaky condition of the topping was caused by allowing it to dry while unprotected and uncovered from the hot sun. Appellee stated that such condition might have been caused by leaving the floor uncovered, but asserted that appellants failed to furnish material for that purpose. Appellants were not required to furnish such covering either under the contract or local custom. Several contractors testified that dirt, which was available to appellee, furnished the best covering and was used generally by them for that purpose.

Another reason assigned by appellee for the defective condition of the floor was that appellants and Bader ordered delivery of the mixed concrete too rapidly and before appellee was ready for it to be poured. The mixed concrete was purchased by appellee from Gilliam Bros. Appellants' denial that they ordered the concrete is corroborated by the representative who handled the orders for Gilliam Bros. He testified that appellee ordered the concrete sent out and all the delivery tickets were shown to have been signed by appellee. While appellee stated that he told the truck drivers to slow down the delivery, there is no showing that he made any complaint to the representative who handled the orders.

Appellee also claimed that appellant Justiss interfered by allowing water to run all night on the fresh concrete floor. His testimony on this point is somewhat contradictory. Although he testified that he directed Justiss to sprinkle the concrete at night, he stated that it constituted a bad practice when the floor was unprotected from the sun. He also testified that Justiss continued to run too much water on the floor after being warned not to do so, but this was stoutly denied by appellants' witnesses.

Appellee and his employees stated generally that Bader supervised and directed the construction of the

floor but they were unable to name specific orders which contributed to the defective conditions found. Bader directed the use of extra steel in the curb walls and larger expansion joints in the floor, but neither of these changes had anything to do with the defects in the floor and appellee apparently concurred in the changes which were authorized under the contract.

The contract stipulated that the 20′ x 20′ slabs should be "floated and finished in a workmanlike manner." According to the evidence there are two types of finish—a "wood float" finish and a "steel trowel" finish. Either finish will produce a smooth surface, but a steel trowel finish produces a harder surface and requires more time. Ed Moore, the only finisher on the job, testified that he was putting a wood float finish on one of the first slabs when Justiss told him he didn't like it and wanted it steel finished; that appellee refused to agree to a steel finish, but witness disregarded the wishes of his employer and followed the instructions of Justiss; and that a bad finish resulted because they were laying too much concrete per day. Bader corroborated Moore as to the direction by Justiss that a steel trowel be used, but stated that appellee ordered Moore to use the steel trowel in compliance with the suggestion of Justiss. Although appellee stated that he told Justiss he would not pay Moore for a "slick finish," he admitted that he told Moore to do what Justiss requested in connection with the finishing of the floor. It thus appears that appellee acquiesced in the method of finishing suggested by Justiss.

It is undisputed that Moore was a good finisher, but the greater weight of the evidence discloses that he was trying to finish more concrete (1,200 feet) per day than could be done in a workmanlike manner regardless of the type of finish used. Pat Riley, an experienced contractor and witness for appellee, examined the floor and, after listening to the testimony of Moore, testified: "Q. What was the trouble out there? A. I think it was too much work for one finisher."

W. M. Bearden, another contractor, testified on behalf of appellee as follows: "Q. How many feet can a

man trowel in a day? A. 500 feet, and that is all he can. Q. How many feet can a man float finish with wood? A. A thousand feet. Q. Did you hear some witness testify that they were trying to float 1,200 feet? A. Then they got what they have out there. It is pretty expensive to try to do it that way. It can't be done. . . ." Other contractors stated that one finisher could only finish from 300 to 750 feet per day, particularly in hot weather. Bader testified that appellee repeatedly stated that he was going to employ more finishers.

It is elementary that there is no breach of a contract where performance is prevented, or rendered impossible, by the conduct of the other party. *Townes* v. *Oklahoma Mill Co.*, 85 Ark. 596, 109 S. W. 548. It is also generally recognized that a defective performance of a building contract is excused where it is due to the acts of the owner or his representative, unless the contractor has not offered a substantial compliance with the contract. 17 C. J. S., Contracts, § 46 (a). See, also, 9 Am. Jur., Building and Construction Contracts, § 45.

We conclude that the preponderance of the evidence does not show that the defective condition of the floor was occasioned by interference on the part of the appellants, but was primarily due to the failure of appellee to furnish a sufficient number of finishers and to properly cover and protect the freshly laid floor from the sun. The greater weight of the testimony also warrants the conclusion that appellee acquiesced in any changes and suggestions made by appellants and Bader in the construction of the floor.

There was considerable conflict in the testimony as to whether appellants accepted the work of appellee when they moved into the building, but a determination of this question is immaterial under the rule which this court has adopted. In *Fitzgerald* v. *La Porte,* 64 Ark. 34, 40 S. W. 261, it was held: "Where work has been done substantially in compliance with the terms of a contract, or there has been an acceptance of the work by the contractee, the contractor may, notwithstanding defects therein, recover

the contract price, less the cost of correcting such defects."

In *Roseburr* v. *McDaniel,* 147 Ark. 203, 227 S. W. 397, the court said: "The rule established by decisions of this court is that where a building contract is substantially performed, even though there are omissions and deviations therefrom, if such defects do not impair the structure as a whole and are remediable 'without doing material damage to other parts of the building in tearing down and reconstructing, and may without injustice be compensated by deductions from the contract price,' there may be a recovery for the amount found due after making such deductions."

In *Hollingsworth* v. *Leachville Special School District,* 157 Ark. 430, 249 S. W. 24, we held that where defects are remediable without taking down and reconstructing any substantial portion of the building, the amount of deduction from the contract price to which the owner is entitled is the expense of making the work conform to contract requirements. This is in accord with the general rule stated in 9 Am. Jur., Building and Construction Contracts, §§ 43 and 152.

There is considerable variance in the testimony as to the expense necessary to correct the defects in the floor. The evidence is also conflicting as to the number of slabs that were defective. Two contractors submitted bids to appellants in the amounts of $2,580 and $2,500, respectively, for placing a four-inch concrete floor on top of the present floor. They considered this the appropriate way to correct the defects. These bids were based on the use of "3,000 lbs." concrete and a steel trowel finish. Another contractor who testified on behalf of appellants gave an estimate of $2,750 for a four-inch floor. He stated that a three-inch layer of concrete could be used with a patented "ceiling," but he did not figure the cost of the three-inch floor. One witness experienced in concrete work stated that a four-inch top floor would cost $1,300 excluding overhead and profit. He thought a two-inch top might suffice after use of an air hammer

on the old floor. Another contractor stated that it would take $1,800 or $1,900 to remedy the floor while appellee stated that it could be done at a cost of $500. There was other evidence that a 3-inch top floor would be sufficient.

We hold that appellants are entitled to damages for appellee's failure to properly construct the concrete floor in the sum of $1,500 which amount, together with the amount of judgments in favor of the materialmen, appellants are entitled to offset against the balance due on the contract price. Appellants are also entitled to judgment against appellee and the surety on his performance and material and labor payment bonds for any excess due after proper credit is allowed for the balance due on the contract price. The decree is, therefore, reversed and the cause remanded with directions to enter a decree in accordance with this opinion.

TURNER *v.* SMITH.

4-9211 231 S. W. 2d 110

Opinion delivered June 12, 1950.

Rehearing denied July 3, 1950.

Hendrix Rowell, for appellant.

A. F. Triplett, Sam M. Levine and *Reinberger & Eilbott,* for appellee.

George Rose Smith, J. This suit was brought by fourteen landowners and two tenants to enjoin the appellant, Y. B. Turner, from maintaining a reservoir which is alleged to obstruct the natural drainage of the plaintiffs' lands. The plaintiffs also asked damages for crop destruction that occurred in 1948 as a result of inundation caused by the Turner reservoir. Other landowners intervened to assert similar causes of action. The chancellor, after hearing testimony for eight days and after viewing the area in question, entered judgments totaling $6,773 and issued a mandatory injunction requiring Turner to cut 500-foot openings in the banks of his reservoir at four specified points. Turner appeals, and the appellees cross appeal.

In 1948 Turner constructed, apparently for duck-hunting purposes, a rectangular reservoir that is one and three-quarters miles long from north to south and a mile wide. The levee enclosing this reservoir is about three feet high. The principal issue is whether Turner, by putting in this levee, has wrongfully obstructed nat-

ural watercourses or has merely fended off surface waters—as he is entitled to do if he does not unnecessarily damage his neighbors. *Little Rock & F. S. Ry. Co.* v. *Chapman,* 39 Ark. 463, 43 Am. Rep. 280; *Baker* v. *Allen,* 66 Ark. 271, 50 S. W. 511, 74 Am. St. Rep. 93.

This part of Jefferson County slopes gently to the southeast and normally drains in that direction. The slope is so gradual that the fall is only a foot between the west bank of the reservoir and the east bank. In 1948 the appellees owned or occupied lands that lie generally northwest of the reservoir. It is practically undisputed that in November of that year many of the appellees were compelled to abandon their homes because of high water. Several of them testified that for from ten to twenty years they had made crops annually on these farms, but 1948 was the first year in which high water forced them to vacate their homes. Their theory of the case is that the southeastward slope is so nearly horizontal that even a three-foot levee impounds water that extends for miles to the northwest.

After studying the testimony we are convinced that Turner has obstructed at least two natural watercourses. On several occasions we have defined a watercourse. Frequently cited is *Boone* v. *Wilson,* 125 Ark. 364, 188 S. W. 1160, where we said: "A watercourse is defined to be a running stream of water; a natural stream, including rivers, creeks, runs and rivulets. There must be a stream, usually flowing in a particular direction, though it need not flow continuously. It may sometimes be dry. It must flow in a definite channel, having a bed and banks, and usually discharges itself into some other stream or body of water. It must be something more than mere surface drainage over the entire face of the tract of land occasioned by unusual freshets or other extraordinary causes." In *Richardson* v. *State,* 77 Ark. 321, 91 S. W. 758, we defined a bayou as a sluggish watercourse, a small river or creek, an offshoot of a river.

In the light of these definitions it is pretty clearly proved that Turner has obstructed natural streams

rather than mere surface waters. The north levee of his reservoir crosses what was formerly Short Bayou. At its point of entry this bayou had a clearly visible channel that is not only described by witnesses but is also discernible upon aerial photographs of the area. After entering the Turner property this bayou flattened out and became a broad sheet of water in the nearly level timberland, but the evidence indicates that the water continued to flow sluggishly toward the southeast until the stream reappeared with well defined banks at a point east of the reservoir. In much the same way Fish Lake Bayou used to flow across the southern part of the appellant's reservoir. At the west line this bayou had a visible channel, but several hundred feet after entering the Turner property Fish Lake Bayou temporarily "fingered out" and became a marsh or "scatters" before reappearing as a bayou at a point inside the east boundary of the reservoir. The fact that these streams temporarily flattened out and flowed without well defined banks did not destroy their character as watercourses, nor did this fact deprive the appellees of their right to insist that the water's flow be unimpeded. The leading cases on this point recognize that at intervals a stream may spread out and become sluggish without thereby being reduced to surface water. *Gillett* v. *Johnson,* 30 Conn. 180; *Macomber* v. *Godfrey,* 108 Mass. 219, 11 Am. Rep. 349; *Mitchell* v. *Bain,* 142 Ind. 604, 42 N. E. 230.

The appellant insists, however, that unless he can obstruct these bayous his lands are condemned to be forever a broad right-of-way for water draining from the north and west. This fear is not well grounded. All that the upland proprietors may legally demand is that the natural streams be permitted to continue their eastward flow without hindrance. Turner is charged with notice that the land he bought is crossed by living watercourses. He may reclaim his swampland by confining these streams between levees or within ditches, but in doing so he must provide channels that will take care of the bayous' waters in ordinary conditions and in times of any recurrent floods that may be reasonably expected.

Undoubtedly he may maintain a reservoir on his property, but in doing so he cannot flood his upland neighbors by blocking the flow of natural watercourses.

We do not think, however, that the record supports the chancellor's finding that 500-foot openings must be cut at four points in the banks of the reservoir. The evidence indicates that somewhat narrower openings may be sufficient to permit the passage of the water. Without attempting to define the width of the cuts we modify the decree to provide that the appellant must remove his levees for sufficient distances to allow the waters to flow without obstruction in normal conditions and in times of recurrent floods.

Reversible error is assigned in several rulings upon the admission or exclusion of evidence. This is a chancery case, however, which we try *de novo*. It is enough for us to say that, even conceding all the appellant's contentions, the preponderance of the testimony nevertheless supports the decree.

Finally, it is contended that the money judgments are excessive. In several instances this is true, owing to two errors in the chancellor's computation of damages. Most of the judgments are for the value of cotton crops that were inundated before the appellees were able to finish gathering them. A number of the appellees testified that they would have picked the cotton themselves, and in these cases the chancellor charged nothing for the expense of gathering the crop. This was error. The appellees were entitled only to the value of the cotton at the time of its destruction, and not to charge them with the cost of picking it would be to reimburse them for labor that was never performed. We have held that when a matured crop is destroyed the cost of harvesting it should be deducted in arriving at its value. *Moore* v. *Lawson,* 210 Ark. 553, 196 S. W. 2d 908. Second, several of the plaintiffs received judgments for more than the amounts they sued for. In a very similar case of crop damage, where the jury returned a verdict for $1,347.50 even though the complaint alleged only $390 as damages, we held that the amount

stated in the complaint measured the maximum recovery. *Western Union Tel. Co.* v. *Byrd,* 197 Ark. 152, 171, 122 S. W. 2d 569; see also *Cohn* v. *Hoffman,* 45 Ark. 376. These two errors in computation require us to recalculate nearly all the judgments, but we see no reason to burden the reports with figures that are of no conceivable value as a precedent. These matters are set forth in an appendix that will not be published in the official or unofficial reports.

On cross appeal it is urged that the appellees are entitled to double damages under Ark. Stats. 1947, § 35-523. These plaintiffs elected to sue in equity, however, and in the absence of any showing of willful wrongdoing on Turner's part we are not willing to say that he should be subjected to a penalty. See *Cooley* v. *Lovewell,* 95 Ark. 567, 130 S. W. 574; *Hendrix* v. *Black,* 132 Ark. 473, 201 S. W. 283, L. R. A. 1918D, 217.

With the indicated modifications the decree is affirmed.

OLIPHANT *v.* OLIPHANT.

4-9206 230 S. W. 2d 653

Opinion delivered June 12, 1950.

[redacted]

Linus A. Williams, for appellant.

W. J. Morrow, for appellee.

ED. F. MCFADDIN, Justice. Appellants (brother and sister) instituted this suit to set aside two deeds executed by their father, F. M. Oliphant, to their brother, E. E. Oliphant, the appellee. It was alleged that F. M. Oliphant lacked sufficient mental capacity to execute the deeds, and that they were obtained by undue influence. In defense to the suit, the appellee claimed that F. M. Oliphant possessed sufficient mental capacity, and that the deeds were executed in consideration of care, support, and payment of indebtedness. One deed, conveying 60 acres, was dated and acknowledged on March 11, 1935, and recorded on September 30, 1936. The second deed, conveying 40 acres, was dated and acknowledged on December 17, 1938, and recorded on January 19, 1939.[1]

The evidence at the trial[2] disclosed that except for a few short intervals, F. M. Oliphant lived with his son, E. E. Oliphant, from 1934 until January 21, 1939, the date of F. M. Oliphant's death. The appellants visited their father at extremely infrequent intervals during these years; and E. E. Oliphant and his wife had the entire care of F. M. Oliphant who was 78 years of age at the time of his death. There is no direct evidence of undue influence; but appellants claim that the undue influence was shown by the mental weakness of F. M. Oliphant, together with the fact that he deeded all his property to E. E. Oliphant to the exclusion of the appellants.

The real issue in the case, therefore, is the mental condition of F. M. Oliphant at the time he executed the deeds in 1935 and 1938. In *Bilyeu* v. *Wood,* 169 Ark.

[1] This deed was signed by mark; but such is allowed by § 27-109, Ark. Stats. 1947; and the unwitnessed mark may be proven even by the grantee. See *Dawkins* v. *Pettys,* 121 Ark. 498, 181 S. W. 901, and cases there cited.

[2] Although this case was filed October 5, 1939, it was not tried in the Chancery Court until September 13, 1949. Explanation for the delay is immaterial to the controversy.

1181, 278 S. W. 48, Mr. Justice HART stated the applicable rule:

"To invalidate a deed on the ground of the grantor's mental incapacity, the proof must show that the grantor was incapacitated from intelligently comprehending and acting upon the affair out of which the transaction grew, and that he did not intelligently understand and comprehend the nature and consequences of his act. . . . *Kelly's Heirs* v. *McGuire,* 15 Ark. 555; *Pulaski County* v. *Hill,* 97 Ark. 450, 134 S. W. 973; *McEvoy* v. *Tucker,* 115 Ark. 430, 171 S. W. 888; and *Reaves* v. *Davidson,* 129 Ark. 88, 195 S. W. 15." See, also, *Culling* v. *Webb,* 208 Ark. 631, 187 S. W. 2d 173, and *Braswell* v. *Brandon;* 208 Ark. 174, 185 S. W. 2d 271.

The burden was on the appellants, as plaintiffs, to establish F. M. Oliphant's mental incapacity; and to sustain that burden, they offered the testimony of themselves and three others. Some of these witnesses had not seen F. M. Oliphant for several years prior to his death, but testified that with advance in age his mental condition could not have improved over what it was the last time such witnesses observed him. On the other hand, appellee offered the testimony of six witnesses, in addition to that of himself and his wife. We are impressed by the testimony of Dr. Pillstrom, who treated F. M. Oliphant for several years immediately prior to his demise:

"Q. Just state, Doctor, what his mental condition was at the time you treated him during his last illness?

"A. Well, I would say he was sane, he had a heart condition and a kidney condition that was giving him trouble but it didn't seem to affect his mental condition.

"Q. Doctor, was his condition such, at that time, that he was mentally capable of disposing of his property and making a contract?

"A. Yes, I would say it was."

Furthermore, Otis Gould, son of one of the appellants, testified as to F. M. Oliphant's mental condition:

"Q. Just state from your observation of Mr. Oliphant during the time you lived there and during the times you visited in the home up until the time of his death, whether or not his mind was sufficient that he knew the consequences of his acts?

"A. I think so.

"Q. Do you think his mind was sound at that time?

"A. I think it was.

"Q. And during the times you visited there?

"A. Yes."

It would unduly lengthen this opinion to detail all of the testimony. The learned Chancellor held that the evidence offered by the plaintiffs failed to establish the mental incapacity of F. M. Oliphant; and with that holding we agree. Certainly we cannot say that the finding of the Chancery Court is against the clear preponderance of the evidence.

Affirmed.

HOUCK *v.* BIRMINGHAM.

4-9223 230 S. W. 2d 952

Opinion delivered June 12, 1950.

Holland & Taylor, for appellant.

Claude F. Cooper and *Frank C. Douglas,* for appellee.

MINOR W. MILLWEE, Justice. Appellant, R. L. Houck, owns and operates a large farm near Luxora in Mississippi County, Arkansas. He is a stockholder and director in Planters Cooperative, Inc., a cooperative organized under Act 153 of 1939 (Ark. Stats. §§ 77-1001—77-1025). The cooperative operates a cotton gin about 4½ miles from the farm owned by appellant.

Appellees are six croppers who made cotton crops on the shares for appellant in 1946 and 1947. All of the appellees made crops in 1946 and three of them also made crops in 1947.

Under the several oral crop agreements appellant was to furnish the land, equipment, tools and seed and each of the appellees was to do the work of planting, cultivating and gathering the cotton crop for which he was to receive one-half of the proceeds of the crop. As the cotton was gathered each year it was hauled to the cooperative gin by appellant, and appellees were charged $1.50 per bale in 1946 and $2.00 per bale in 1947 for their share of the hauling expense. There were other gins closer to the lands farmed by appellees, but the original charge for ginning and price paid for cottonseed by Planters Cooperative compared favorably with that charged and paid by other gins in the community.

The articles of incorporation of Planters Cooperative provide that its net income or profits, after payment of a certain dividend on preferred stock, shall be paid or credited to "patrons, members and non-members alike on a patronage basis, including such amounts as may be set aside in reserves by the vote of the directors," as prescribed in the by-laws or ordered by the board of directors. The by-laws provide that non-member patrons shall be treated the same as members and shall participate in the distribution of the earnings on the same basis. The amount, or percentage, of said patronage payments is determined by the proportion that each patron's business bears to the total business of the cooperative. In other words, if the cooperative ginned 1,000 bales of cotton in a season at a net profit of $1,000, then each patron, whether a member of the association or an outsider, would be entitled to a patronage payment of $1.00 for each bale of cotton which he delivered for ginning.

Although no formal resolution to that effect was introduced, appellant testified that at the stockholders' and directors' meeting held at the end of each ginning season in 1946 and 1947, it was decided that "patrons" would include "landlords who rented their land for part of the crop as rent, renters who rented from their landlords for cash, and renters who rented from their landlords for part of the crop," but would not include share croppers. Planters Cooperative made patronage payments to appellant for the full amount of all cotton harvested by appellees in 1946 and 1947. Appellees brought this suit against appellant and Planters Cooperative seeking recovery of one-half of said patronage payments.

Trial resulted in a decree awarding judgment in favor of each of the appellees against appellant for one-half of the several amounts of the patronage payments made to appellant for cotton produced by appellees, the total of said judgments amounting to $737.65. Since the cooperative had paid over to appellant the respective amounts found due, the complaint against it was dismissed.

The question for decision is whether the chancellor correctly held that appellees were entitled to share in the patronage payments made to appellant.

Appellant points out the legal distinction between a tenant and a share cropper under our decisions and insists that appellees had no interest in the crop which they could control; and that their 50% share of the proceeds of the crop does not include any part of the patronage payments. We do not agree with appellant in this contention. It is true, we have held that a tenant is one who pays the landlord cash or a share of the crop, or both, for the use of the land, while a cropper is one who receives a share of the crop from his employer as payment for his labor, and is merely an employee. *Barnhardt* v. *State*, 169 Ark. 567, 275 S. W. 909. In *Hardeman* v. *Arthurs,* 144 Ark. 289, 222 S. W. 20, the court quoted with approval from *Tinsley* v. *Craige,* 54 Ark. 346, 15 S. W. 897, 16 S. W. 570, where it was said: "Ordinarily when the parties occupy the relation of landlord and tenant, the title to the crop is in the tenant, and he pays the landlord rent in kind or otherwise; and in general where they occupy the relation of landlord and cropper on shares, the title to the crop is in the landlord, and he delivers a part of it to the cropper in payment of his services."

Appellees had no title to the crops until their respective one-half shares were set apart to them. *Hammock* v. *Creekmore,* 48 Ark. 264, 3 S. W. 180. Nevertheless, appellant was under a duty to divide the crops, or the proceeds thereof, with appellees. *Fenton* v. *Price,* 145 Ark. 116, 223 S. W. 364. Where a share cropper gathers the crop and turns it over to the employer-landlord to be sold, he has a cause of action against the latter for his share of the proceeds of the crop. *Hemphill* v. *Lewis,* 174 Ark. 224, 294 S. W. 1010.

A share cropper also has a contingent interest in the crop which he may mortgage. *Beard* v. *State,* 43 Ark. 284. The Laborers Lien Statute (Ark. Stats. § 51-301) has been construed to give croppers a lien on the crop grown for their labor which is superior to a mortgage

on the crop given by the employer even where the mortgage is prior in point of time. *Carraway* v. *Phipps,* 191 Ark. 326, 86 S. W. 2d 12.

The nature of the cropper's right in the crops, or the proceeds thereof, depends upon the intent of the parties as ascertained from their contract. It is undisputed that under the contractual relationship existing between appellant and appellees, the latter were entitled to receive for their services 50% of the proceeds of the crops which they produced. The question here is not one of title to crops but is whether the net proceeds of said crops include the patronage payments. If appellees had contracted for one-half the crops for their services and a division of the cotton had been made when it was gathered, and prior to ginning, appellees certainly would have been entitled to the patronage payments which are made to patrons of the gin regardless of whether they are stockholders or members of the cooperative. The mere fact that appellant hauled the cotton to the gin and made a division of the proceeds of the sale of the cotton should not work a forfeiture of appellees' right to receive their share of the patronage payments. Such payments are in reality refunds or rebates which reduce the cost of ginning to both the appellant and the appellees and thereby increase the net proceeds of the sale of the cotton.

In *Uniform Printing & Supply Co.* v. *Commissioner of Internal Revenue* (C. C. A. 7th), 88 Fed. 2d 75, 109 A. L. R. 966, a corporation was organized by a group of insurance companies to do their printing. A by-law of the corporation directed that its surplus earnings should be returned to its customers in the proportion that the gross amount of business furnished by any customer bore to the gross amount of business done by the corporation. The court held such patronage payment to be a refund, or rebate, to customers rather than a dividend and, therefore, not a part of its taxable income, saying: "Had the taxpayer given a customer (whether stockholder or outsider) a discount promptly after filling the order, no one would call it a dividend. If a rebate were given promptly upon the customer's business reach-

ing a certain volume, the same conclusion as to its character would follow. To make cost estimates and adjust them at or near the end of each year returning the excess payment to the customer should not change the reasoning which leads to this conclusion. Nor should the fact that the customer is a stockholder materially affect the result." The court pointed out that the amount returned to each stockholding customer was based on the business transacted and not on stock ownership.

The same conclusion was reached by the Montana court in the case of *Gallatin Farmers Co.* v. *Shannon,* 109 Mont. 155, 93 Pac. 2d 953. In that case a cooperative association distributed its net profits in the form of "patronage dividends" in a manner similar to the payments made in the case at bar. The court held that the patronage dividend payments constituted a rebate, or refund, to patrons which was a necessary expense of the cooperative within the meaning of a state income tax statute and, therefore, deductible from gross receipts in determining net income. In regard to such payments the court said: "They are in no sense profits of the corporation that redound to the benefit of its stockholders. Patronage dividends are not distributed on the basis of stock ownership, but to patrons on the basis of patronage. Though the patrons be also stockholders, the allocation or distribution is not made on the basis of stock ownership but on the amount of patronage given to the corporation." See, also, *Anamosa Farmers Creamery Co.* v. *Commissioner of Internal Revenue,* 13 B. T. A. 907; *Midland Cooperative Wholesale* v. *Commissioner of Internal Revenue,* 44 B. T. A. 824; *U. S. Cooperatives, Inc.* v. *Commissioner of Internal Revenue,* 4 T. C. 93.

The Planters Cooperative pays no income tax because of the manner of distribution of its net earnings to customers in the form of patronage payments. These payments are not dividends similar to income from ordinary stock investments, but are refunds, or rebates, due all customers of the cooperative regardless of stock ownership. The making of such payments results in a refixing and reduction of the original charge for gin-

ning and a corresponding increase in the net proceeds derived from the sale of the cotton. The fact that the legal title to the cotton was in appellant does not lessen his obligation to pay over to appellees one-half of such net proceeds under the terms of their contract. In the absence of a stipulation in the contract to the contrary, appellees were, therefore, entitled to share equally with appellant in the patronage payments, and the chancellor correctly so held.

Affirmed.

McFaddin, J., dissents.

Ed. F. McFaddin, Justice (dissenting). In this case the appellees are being awarded money that they never contracted to receive and from a source of payment that undertook to specifically exclude them. I respectfully dissent, because I cannot see that the appellees have any right to ask a court of equity to aid them in being thus enriched.

Appellees, Birmingham, *et al.*, were sharecroppers for Houck and were to receive one-half of the net proceeds from each bale of cotton and seed, just as sold. The cotton was ginned at the Planters Co-op Gin, which had a lower ginning rate and a higher price for seed than other gins. Houck settled with Birmingham, *et al.*, and thus completely and fairly fulfilled and discharged his contract with the appellees.

Then later, the Planters Co-op Gin Company delivered a patronage payment to Houck for the cotton ginned from his farm. It was given to Houck individually and not to the appellees, because the Planters Co-op Gin Company specifically excluded the appellees from being the beneficiary of the patronage payment. This is shown in the testimony that the payments would be made "to patrons of the Co-op and that patrons would be landlords who were renting their land for a part of the crop . . . and would not include . . . any sharecropper."

The witness Chester Caldwell was secretary of the Planters Co-op Gin Company; and here is his testimony:

"Q. I believe you said you were one of the original incorporators of this Co-op; has it been your impression and the general belief of all of the stockholders and directors in the forming of this Co-op and ever since that time that the sharecroppers were not classed as patrons and were not entitled to patron refunds or dividends?

"A. That is right and that information came down directly from the Bank of St. Louis. It gives us certain rules and regulations to operate under.

"Q. Does the Bank of Cooperatives in St. Louis prescribe certain rules and regulations for the conduct of their business as long as you borrow money from them?

"A. That is right.

"Q. And neither that bank, nor your board of directors, nor your stockholders' meetings have ever classed sharecroppers as producers, and have never classed them as entitled to any of these patron refunds or dividends?

"A. No, that is left up to the discretion of the man they are working for and he can do whatever he wants to as far as we are concerned.

"Q. Of course, if a man to whom you paid patron's refunds or dividends wants to give it away, endow a college, or get drunk, that is no business of yours.

"A. Entirely his business, no concern of the gin.

"Q. And the Co-op is under no obligation, legally or otherwise, to pay any of the dividends or profits to any sharecroppers?

"A. That is right."

Thus, the Court is taking money personally given to Houck by the Planters Co-op Gin Company and forcing him to give part of it to Birmingham, *et al.*, long after there had been a complete settlement of the proceeds of the crop. Anyone who wants to see the forced "redistribution of wealth" need go no further than this case.

FORT SMITH REFRIGERATION & EQUIPMENT CO., INC., *v.* FERGUSON.

4-9218 230 S. W. 2d 943

Opinion delivered June 12, 1950.

Lawrence S. Morgan and *Franklin Wilder,* for appellant.

James R. Hale, for appellee.

DUNAWAY, J. Appellee Ferguson brought this action to recover $750 alleged to be due him under an oral contract with appellant as compensation for procuring a purchaser who bought 300 frozen food locker units from the appellant corporation. From a verdict and judgment in favor of Ferguson, the company has appealed.

In his complaint filed in August, 1946, Ferguson alleged that on or about October 10, 1945, one Leo Bourland, acting as agent of the defendant corporation, engaged the plaintiff to find a buyer for frozen food locker units, the plaintiff to be paid $2.50 per locker unit sold; that 300 units were sold to Gibney Brothers of Prairie Grove as a result of negotiations carried out by plaintiff, and that the defendant had refused to pay the sum of $750 which was due plaintiff under said contract. Bourland was made a co-defendant.

On October 28, 1946, a default judgment was entered against appellant, but was later set aside when it developed that there had been no service of summons on the company. A default judgment against Bourland, entered December 28, 1946, remains unsatisfied. Appellant's answer, filed April 26, 1947, denied the making or ratification of the alleged contract, and denied that Bourland had ever acted as agent for the corporation.

The appellant company was incorporated January 5, 1946. Sam Poulos and William Watkins each were the owners of 249 shares of stock, and Franklin Wilder held two shares. Before the incorporation, Poulos and Watkins had conducted the Fort Smith Refrigeration & Equipment Company as a partnership.

It is not disputed that through Ferguson the purchasers of the 300 locker units were first put in contact with the partnership concern some time in late 1945. It is also conceded that subsequently a written contract between the purchasers and the newly formed corporation was entered into, and that the first payment on the purchase price was made in June, 1946.

There is, however, sharp conflict in the testimony as to the oral contract alleged. At the trial Ferguson testified that Watkins was the one who had promised to pay him the sum of $2.50 per locker unit, although the complaint had alleged that the oral contract was made by Bourland. Bourland testified by deposition for the plaintiff that it was his understanding from someone connected with the appellant concern that Ferguson was to be paid as he claimed. Bourland denied having made the agreement himself and was not present when Watkins was supposed to have done so. Bourland's connection with the business was that he supervised the installation of various locker plants, for which he received twenty per cent of the net profit of each transaction as compensation.

At the time of trial of the cause, the whereabouts of Watkins was unknown, he having severed his connection with the company a year or two earlier. Poulos denied any knowledge of the alleged contract and denied that Ferguson had ever been employed on a commission basis in any capacity by the defendant corporation.

Appellant's main contention is that it was entitled to a directed verdict because the corporation was not in existence at the time the contract with Ferguson was alleged to have been made, and that even if such a contract had been made on behalf of the partnership, the appellant corporation would not be liable therefor.

Appellant concedes that the rule as to liability of corporations on contracts or obligations of a predecessor partnership is as stated in *Fletcher on Corporations*, § 4012:

"A corporation succeeding a partnership or association is liable on the contracts or obligations of the latter where it either assumes them under express agreement or where the facts and circumstances are such as to show an assumption.

". . . unless the corporation has expressly assumed the debts and obligations of its predecessor, its liability, if it exists at all, must arise by implication or

presumption, out of the facts and circumstances attending the incorporation, and the acquisition by the corporation of the assets and property of the firm or association, . . . The corporation, of course, would not be liable on the partnership obligations where no showing is made that it either expressly or impliedly assumed them."

It is further said in § 4014 of the same work. "It is quite generally recognized that a corporation may be held to have impliedly assumed the obligations of its predecessor, for an assumption of liability by the corporation, like any other fact, may be established by circumstantial evidence. Of course, the facts upon which the implication or presumption of liability is predicated must affirmatively appear from the pleadings and proof. The situation is analogous to that in which a new corporation, created to succeed to the assets and business of an old corporation, and which is simply a continuation of the old, becomes liable for its debts, and although more difficulty is encountered with the question of the assumption of liabilities when a corporation has succeeded to the business and assets of a partnership, it seems safe to say that the same rule prevails."

Where the question was as to the liability of one corporation for the debts of another, in *Good* v. *Ferguson & Wheeler Land, Lumber & Handle Company,* 107 Ark. 118, 153 S. W. 1107, Ann. Cas. 1915A, 544, we held, to quote the headnote: "One corporation may become liable for the debts of another when it has by reasonable implication assumed the payment of the liabilities of the debtor corporation, and it is a question for the jury to determine from the facts and circumstances whether they lead to the implication that when a new corporation takes over the property of an old one, it undertakes to discharge the latter's obligations." See, also, *Warmack* v. *Major Stave Company,* 132 Ark. 173, 200 S. W. 799; *Meeks* v. *Ark. Light & Power Company,* 147 Ark. 232, 227 S. W. 405.

Under the general rule as above-quoted and our holding in the *Good* case, *supra,* there was a question

made for the jury's determination whether the corporation had impliedly assumed the obligation to pay a commission to Ferguson. The two partners became the owners of 498 of the 500 shares of stock in the new corporation. They both were officers, and continued to conduct the same business. The corporation completed the sale of the locker units for which the negotiations had been begun by Ferguson, and received the profits from said sale.

Appellant was not entitled to a directed verdict, and since the instructions given by the court are not abstracted, we presume that this issue was submitted to the jury under proper instructions. *Sloan* v. *Ayres,* 209 Ark. 119, 189 S. W. 2d 653.

Appellant next urges that the trial court erred in not giving an instruction, the substance of which was that Ferguson could not recover if the jury found that he was acting as agent for both parties. The court below properly concluded that there was no evidence to warrant giving the requested instruction.

It is also urged that there was a fatal variance between the pleadings and the proof as to whether Bourland or Watkins made the contract to pay the commission alleged. The defendant did not plead surprise and ask for a continuance when this testimony was developed at the trial, and having chosen to speculate on the outcome of the jury's verdict without making such request, cannot now complain. See *National Cash Register Company* v. *Holt,* 193 Ark. 617, 101 S. W. 2d 441; *Stroud* v. *Henderson,* 171 Ark. 338, 284 S. W. 45.

The final point argued by appellant concerns the court's refusal to permit the defendant to introduce testimony as to whether the contract alleged was a reasonable or customary one in the business. To sustain its contention that such evidence was admissible, appellant relies on the recent case of *Shaver* v. *McKamey,* 216 Ark. 211, 224 S. W. 2d 819, in which we cited with approval the earlier case of *Greer* v. *Laws,* 56 Ark. 37, 18 S. W. 1038. Both cases involved a dispute as to the

amount of commission due for the sale of real estate. We held it competent to prove the customary charge by real estate men in similar transactions, as bearing upon the probable truth of what was alleged on either side as having been the agreement between the parties.

In the case at bar the dispute is over whether there was any agreement for a commission. The situation is not the same as in the cases cited, where both parties were agreed that some commission was due, but differed as to the amount they had agreed upon. While proof of customary commissions in a particular type of business transaction might bear upon the probable truth of the amount of commission alleged by either party as having been agreed upon, such testimony would have no bearing on the truth of the existence or non-existence of any contract at all.

The judgment is affirmed.

JONES *v.* GACHOT.

4-9202 230 S. W. 2d 937

Opinion delivered June 12, 1950.

Fred A. Snodgress and *A. F. House,* for appellant.

Talley & Owen and *Max Howell,* for appellee.

ED. F. MCFADDIN, Justice. This is a suit seeking to impress a trust on real property.

In 1932 Mrs. Felice Field executed a regular warranty deed to L. C. Gachot and J. F. Gachot (her nephews), conveying certain lands in Pulaski County. There was nothing in the deed to indicate, or even suggest, that the grantees received the title in any way except as the owners thereof. Under an agreement with J. F. Gachot, L. C. Gachot went into possession of the property here involved and so remained until his death in 1948. Then, in 1949, this suit was filed alleging (and evidence was offered to that effect) that when Mrs. Felice Field made the deed to L. C. Gachot and J. F. Gachot in 1932, the said grantees agreed with the grantor to hold the property as trustees for themselves and their brothers and sisters. Such agreement is the trust that is sought to be impressed on the property against the widow and heirs of L. C. Gachot. The Chancery Court rejected the evidence as to the alleged trust agreement and dismissed the compliant for want of equity; and this appeal ensued.

At the outset, appellants concede that an *express trust* cannot be established by oral evidence. See § 38-106, Ark. Stats. 1947; also *Patton* v. *Randolph,* 197 Ark. 653, 124 S. W. 2d 823; and *Hawkins* v. *Scanlon,* 212 Ark. 180, 206 S. W. 2d 179. But appellants contend that the trust here sought to be imposed is not an express trust, but a *constructive trust* and they cite, *inter alia,* § 45 of the Restatement of the Law of Trusts:

"Where the owner of an interest in land transfers it *inter vivos* to another in trust for a third person, but no memorandum properly evidencing the intention to create a trust is signed, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the third person, if, but only if,

"(a)—the transferee by fraud, duress or undue influence prevented the transferror from creating an enforceable interest in the third person, or

"(b)—the transferee at the time of the transfer was in a confidential relation to the transferror, or

"(c)—the transfer was made by the transferror in contemplation of death."

It is conceded that sub-paragraph (a) does not apply to this case; but it is earnestly insisted that a trust should be decreed in the case at bar under either sub-paragraph (b) or sub-paragraph (c).

In the briefs no Arkansas case is cited as going to show that such sub-paragraphs (b) and (c) are recognized by holdings in this state.[1] But even if the rules stated in sub-paragraphs (b) and (c) prevail in Arkansas (which it is unnecessary to decide), nevertheless the proof in the case at bar is entirely insufficient to justify the application of either of these sub-paragraphs. As to sub-paragraph (b), there was no more of a "confidential relation" existing between the grantor, Mrs. Field, and the grantee, L. C. Gachot than exists between any other aunt and nephew; there was a kinship, but not a confidential relationship; he did not importune her to make the deed; they were not living in the same home; she consulted an attorney who prepared the deed for her. As to sub-paragraph (c), there was no more "contemplation of death" on the part of Mrs. Field, the grantor, when she made the deed in question than there is such contemplation by any person of advanced years: she was both physically and mentally active at the time she had the attorney prepare the deed; she was not in extremis; she lived fourteen months after its delivery.

A study of the evidence in the case at bar reflects that this suit—filed after the death of L. C. Gachot—is an effort to establish an express trust by oral evidence, and is within the interdiction of § 38-106, Ark. Stats. 1947, and our cases, of which *Patton* v. *Randolph, supra,* and *Hawkins* v. *Scanlon, supra,* are only a few.

Affirmed.

[1] There is an article in 3 Ark. Law Review 3, entitled "A Decade in the Law of Trusts," in which some cases are reviewed on these two sub-paragraphs.

The Chief Justice and Mr. Justice GEORGE ROSE SMITH not participating.

LEFLAR, J., concurring. I concur in the conclusion that the evidence in this case was insufficient to establish a constructive trust in appellants' favor. But I wish to make it clear that our statute prohibiting express oral trusts in lands (Ark. Stats., § 38-106) does not in any wise inhibit the establishment of constructive trusts. The next following section in the statute of frauds (§ 38-107) provides: "Where any conveyance shall be made of any lands or tenements, by which a trust or confidence may arise or result by implication of law, such trust or confidence shall not be affected by anything contained in this act."

The great weight of American authority recognizes the validity of constructive trusts under the circumstances set out in the Restatement of Trusts, § 45, as quoted in the majority opinion. Unless constructive trusts are enforced in those circumstances the statute of frauds will be made an instrument for achieving fraud, by vesting in nominal grantees the title to lands for which they have paid nothing and to which in equity and good conscience they are not entitled. Under § 38-107 it is clear that this was never the intent of the statute of frauds.

Whether the constructive trust in such circumstances should run in favor of the ones for whom the oral trust was declared, as the Restatement suggests, thus effectuating it as though it were an express trust, or should run in favor of the grantor or his successors, on the theory that the parties should be restored as nearly as possible to the position they were in prior to the making of the deed, is another matter. Certainly, the latter disposition of the property would be more nearly in keeping with the law of constructive trusts generally. See 3 Bogert, The Law of Trusts, p. 215; 1 Scott, The Law of Trusts, p. 269. This form of relief, however, was not sought in the present case.

STATE HIGHWAY COMMISSION *v.* HOLDEN.

4-9225 231 S. W. 2d 113

Opinion delivered June 19, 1950.

[redacted]

Daggett & Daggett, for appellant.

Cracraft & Cracraft, for appellee.

ED. F. MCFADDIN, Justice. The question presented is the landowner's right to recover damages for his crops destroyed by the construction of a highway; and the answer to the question depends on whether the landowner's damages are to be fixed as of the date of (a) the making of the County Court order (under § 76-917, Ark. Stats.), or (b) the taking of the lands by actual entry.

On October 27, 1947, the County Court of Lee County, on petition of the State Highway Commission [1] and without notice to the landowner, made an order (under said § 76-917, Ark. Stats.) designating the location of a State highway across appellee's lands.[2] On August 13, 1948,

[1] See § 76-510, Ark. Stats. 1947.

[2] Various other proceedings occurred: Holden unsuccessfully attempted to remove the case to Federal court (see *Lee County* v. *Holden,* 82 Fed. Supp. 353). Holden also filed petition in the Pulaski Chancery Court to require the Highway Commission to post a bond prior to actual entry, which bond was made on August 13, 1948. Holden had filed claim against Lee County in the County Court; and after Federal court remand his claim was disallowed by the County Court and he appealed to the Circuit Court. There he recovered the judgment from which the Highway Commission and Lee County prosecute the present appeal to this Court. Dates as to bond and actual entry are found in the Federal case mentioned.

the Highway Commission filed a bond to assure the landowner of the payment of his damages, and immediately thereafter the lands were actually entered and the construction of the highway commenced. The landowner (appellee, Holden) had planted and cultivated a cotton crop on the land in 1948, just as in previous years; and this 1948 crop was destroyed by the construction of the highway. The Circuit Court allowed the jury to award damages for the destruction of the cotton crop; and that is the only item challenged by appellants (State Highway Commission and Lee County) on this appeal. For convenience, we will refer to the appellants as "Highway Commission" and the appellee as "Holden".

The Highway Commission claims that the damages are to be determined as of the date of the County Court order (i. e. October 27, 1947) and cites, *inter alia, Newgass* v. *Railway Co.,* 54 Ark. 140, 15 S. W. 188; *Kansas City So. Ry. Co.* v. *Boles,* 88 Ark. 533, 115 S. W. 375; *School District of Ogden* v. *Smith,* 113 Ark. 530, 168 S. W. 1089; and *Keith* v. *Drainage District,* 183 Ark. 384, 36 S. W. 2d 59.

Holden claims that the damages are to be determined as of the actual entry on his land, that is, August 13, 1948; and cites, *inter alia, Greene County* v. *Hayden,* 175 Ark. 1067, 1 S. W. 2d 803; *Arkansas State Highway Comm.* v. *Partain,* 192 Ark. 127, 90 S. W. 2d 968; and *Miller County* v. *Beasley,* 203 Ark. 370, 156 S. W. 2d 791.

After a careful study, we reach the conclusion that the appellee is correct, and that the judgment should be affirmed under the authority of the cases cited by the appellee, as above listed. It is true that in *Newgass* v. *Railway Company, supra,* we said:

". . . As the filing of the petition is the attempt to assert the right of condemnation, and subsequent delay is without fault of either party, it seems fair to each alike that the assessment should be made with reference to value as of that date."

And it is also true that in *Mo. & No. Ark. Railroad Co.* v. *Chapman,* 150 Ark. 334, 234 S. W. 171, we said:

"It follows that the court did not err in holding that the value of the property should be proved as of the time of the filing of the suit, instead of the date the property was actually appropriated by the railroad company."

But in the two quoted cases, as well as in the other cases relied on by the appellants, the Statute, being considered in each case, authorized proceedings for condemnation in an adversary suit with notice given the landowner at the institution of the proceedings: whereas, in the case at bar, the County Court of Lee County, in making its order of October 27, 1947, was acting under § 76-917 [3] of Ark. Stats., which section entirely omits any requirement as to notice to the landowner prior to the making of the order opening the road. Such absence of notice has been discussed in some of our cases, of which *Sloan* v. *Lawrence Co.,* 134 Ark. 121, 203 S. W. 260, and *Greene County* v. *Hayden,* 175 Ark. 1067, 1 S. W. 2d 803, are two.

In *Greene County* v. *Hayden, supra,* we held that the language in § 76-917 Ark. Stats.—"twelve months from the date of the order laying out or changing any road"—meant *twelve months from the actual entry on the land,* because to hold otherwise would have allowed an order of taking without notice and a subsequent taking without compensation. We said:

"Here the undisputed evidence shows that the order of condemnation was entered in June, 1924, and that the county remained quiescent until January, 1926, at which time the route of the road as described in the order of condemnation was surveyed, but more than a year had then expired since the making and entry of the order of condemnation.

"The law does not permit a proceeding of this character to deprive the property owner of his day in court. If it did, the property owner would be deprived of his

[3] Sec. 76-917 is from Act 611 of 1923, which was prior to the Amendment No. 14 to the Constitution prohibiting local legislation. Lee County is one of the Counties to which the said Act 611 of 1923 is applicable.

right to be heard upon the question of compensation, and there is no question, under the Sloan case, *supra,* about the existence of this right. No legislation can deprive the landowner of this right. Yet, in practical effect, these landowners have been deprived of that right. Their causes of action were barred under the contention of the county before they were advised that it had accrued.

. . . . . .

"It follows therefore that the causes of action were not barred, as the statute did not begin to run against the landowners until they had notice of the order of condemnation by the taking of their land by the entry thereon by the surveyor, and the claims were all properly filed within a year of that time."

With these holdings established, there came *Miller County* v. *Beasley,*[4] 203 Ark. 370, 156 S. W. 2d 791, in which was presented the question, whether the claim for taking of lands under § 76-917 Ark. Stats. was to be paid out of the funds for (a) the year in which the order was made, or (b) the year in which the lands were actually taken; and we said:

"It is our view that the act of taking is not complete when the judgment of condemnation is rendered. Since such judgment may be without notice, the lawmaking body must have had in mind an order of condemnation followed by entry upon the land. Such entry, being physical and visible, affords the proprietor an opportunity to exact payment or to require a guaranteeing deposit."

Since the "act of taking is not complete when the judgment of condemnation is rendered," it necessarily follows that the landowner is entitled to damages as of the date when the act of taking is complete—that is, when his lands are actually entered and taken under the order. After the judgment is rendered by the County Court, under § 76-917, the landowner may require security, such

[4] There were other cases, such as *Arkansas State Highway Comm.* v. *Partain,* 192 Ark. 127, 90 S. W. 2d 968, and *Arkansas State Highway Comm.* v. *Partain,* 193 Ark. 803, 103 S. W. 2d 53; but *Miller County* v. *Beasley, supra,* is the case most nearly in point.

as bond, by Chancery Court proceedings before his lands be entered.[5] Failure of the condemnor to make such security would prevent the entry, so that the lands might never be taken. Certainly, therefore, the date of actual entry fixes the date for the determining of the damages under § 76-917 Ark. Stats. The fact that the Highway Commission had put stakes through Holden's land before he planted the crop is not determinative. There were several sets of stakes; and the highway was not constructed along one line of stakes, but went according to another line. Merely because the Highway Department has driven a stake in a field is not an act sufficient to constitute a taking of the land or to require the owner to cease using his land for its normal and natural purposes.[6]

CONCLUSION

We hold that in a proceeding under § 76-917 Ark. Stats. the damages of the landowner for the normal and natural use of his land are to be calculated as of the date of actual entry, rather than as of the date of the County Court order.

Affirmed.

LEFLAR, J., concurs.

HOLT and GEORGE ROSE SMITH, JJ., dissent.

LEFLAR, J., concurring. I concur in the result stated in the opinion prepared by MCFADDIN, J., that the judgment of the Circuit Court should be affirmed, but at the same time I believe that the rule of law set out in the opinion of GEORGE ROSE SMITH, J., is correct. Since the rule is set out clearly and succinctly in Judge SMITH's opinion, it is not necessary to repeat it here.

My agreement with the decision to affirm the judgment is based upon the view that, under the record in this case, there was no substantial evidence that the appellee landowner failed to act with reasonable prudence in

[5] See *Independence Co.* v. *Lester*, 173 Ark. 796, 293 S. W. 743, and *Arkansas Highway Comm.* v. *Hammock*, 201 Ark. 927, 148 S. W. 2d 324.

[6] See 18 Am. Jur. 896, and see, also, *Lafferty* v. *Schuylkill River Railroad Co.*, 124 Pa. 297, 16 At. 689.

planting his crops under the actual circumstances here present. The Circuit Judge, under this state of the evidence, was justified in not leaving to the jury the question whether appellee acted with reasonable prudence. The evidence has already been discussed in the two other opinions filed in this case, and there would be no advantage in analyzing it again in this opinion, particularly since the same facts are unlikely to be present in another case.

GEORGE ROSE SMITH, J., dissenting. In this case the Highway Commission obtained a county court order in October, 1947, by which a change in the location of the highway was authorized. The appellee had no notice of the county court proceedings, but by the following spring, when the appellee planted the crops now in question, the Highway Commission had marked the proposed right-of-way with flags. The appellee admitted at the trial that when he planted his crop he knew where the highway was going to be. In a similar situation we have held that the entry of the surveyor for the purpose of laying out the right-of-way supplies the notice that is lacking in the county court proceedings, and therefore the one-year period allowed for filing a claim for compensation begins to run against the landowner from the date of the surveyor's visible entry. *Greene County* v. *Hayden,* 175 Ark. 1067, 1 S. W. 2d 803.

As I see it, the real problem in this case is that of determining the landowner's proper course of action when the staking of the right-of-way puts him on notice that his land is to be taken. If he fails to plant a crop he may lose the use of the land for a year if the Highway Commission relocates the right-of-way or abandons the project altogether, as it has the privilege of doing. *Selle* v. *City of Fayetteville,* 207 Ark. 966, 184 S. W. 2d 58. On the other hand, if the landowner goes ahead with his planting the Highway Commission is compelled to pay unnecessary damages merely because it proceeds expeditiously and completes the taking before the crop can be harvested, as was true in this case. The majority solve this problem simply by saying that the landowner is

entitled to ignore the impending taking as far as the use of his land is concerned, even though he cannot ignore it as far as the filing of his claim for compensation is concerned. This does not seem to me to be the best available answer, since it gives the landowner all the advantage and penalizes the State for acting with praiseworthy diligence.

In the Selle case, *supra,* we said that if the public begins a condemnation proceeding that is later abandoned, "the condemnor is liable for any damages occasioned by a deprivation of any use of the land to which it would prudently have been put." I think the word "prudently" furnishes the answer to the question posed by this case. When the landowner is put on notice that his land is to be taken he must act with prudence rather than with complete disregard of the condemnor's intentions. He should at least make some inquiry as to when the actual taking is to occur. If he is assured by the condemnor that he has time to plant and harvest a crop, then he is free to plant and should receive compensation if his land is actually taken before the crop can be gathered. But if the landowner's inquiry discloses that he will not be able to harvest his crop then he should not be permitted to enhance his damages by planting and cultivating a crop that will never reach maturity.

It might be answered that even after the landowner has prudently decided not to plant his land the Highway Commission might still abandon the project and thereby cause the property to lie fallow for a year. This suggestion presents no difficulty whatever. As the majority point out, as soon as the right-of-way is staked out the landowner is entitled to enjoin any further proceedings until the condemnor makes a bond to secure the ultimate payment of compensation. But deprivation of the use of the land is equally a taking, and I can think of no reason why the bond in question might not be made broad enough to cover the rental value of the property if the condemnor failed to complete the condemnation and thereby caused the landowner an unnecessary loss.

At the trial the jury were instructed that they might consider the value of the crop in arriving at their award of compensation. I think the instruction should have been that this value might be considered only if the landowner acted with reasonable prudence in planting the crop after having notice that his land was to be taken. I would therefore reverse the judgment and remand the cause for a new trial.

HOLT, J., joins in this dissent.

ADAMS *v.* HIGHWAY 10 WATER PIPE LINE IMPROVEMENT DISTRICT NO. 4.

4-9298 230 S. W. 2d 956

Opinion delivered June 19, 1950.

Rehearing denied July 3, 1950.

Fitzhugh & Cockrill, for appellant.

Rose, Dobyns, Meek & House, for appellee.

HOLT, J. Appellants, property owners within Highway 10 Water Pipe Line Improvement District No. 4, brought this suit to restrain further proceedings and for dissolution of the district.

Essential stipulated facts were: "The petitions asking the formation of Highway 10 Water Pipe Line Improvement District No. 4 were filed on October 21, 1946, and, in part, read as follows: 'We respectfully petition the Pulaski County Court to lay off an improvement district pursuant to the provisions of Act 41 of 1941 enacted by the General Assembly of the State of Arkansas and approved February 13, 1941, and all amendments thereto, for the purpose of constructing a water pipe line and connecting the same with the waterworks system supplying the City of Little Rock.'

"An order creating the district was entered on October 25, 1946. Neither in the Petitions nor in the Order was there any reference to the length of the water pipe line to be constructed.

"On June 5, 1947, the Commissioners filed Plans of Improvement reciting that the district would construct or cause to be constructed a six-inch water pipe line along Highway 10 commencing at the east corner of Block B, Woodland Heights Addition to the City of Little Rock, being the end of the existing water main owned by Little Rock Municipal Water Works, and running westerly along Highway 10 to the northwest corner of the Joe T. Robinson School property. To the Plans of Improvement there was attached a plat indicating the starting point and the course of Highway 10 from such starting point to the terminal point.

"The assessment of benefits as made by the Assessor of the district was filed in the office of the County Clerk on June 15, 1948. Notice was duly published, and on July 21, 1948, an order was entered confirming said assessment of benefits.

"On the 22nd day of September, 1948, an order was entered levying a tax in the sum of $207,650 against the lands in the district, being the amount of the principal of

the bonds to be issued, the anticipated interest thereon, and 10 per cent for unforeseen contingencies, but said order was subsequently set aside.

"On February 8, 1949, the Commissioners filed revised Plans of Improvement reciting that the water line would be extended along Highway 10 from the east corner of Block B, Woodland Heights Addition to the City of Little Rock, being the end of the existing water main owned by Little Rock Municipal Water Works, and running thence westerly along Highway 10 to the southwest corner of the SE ¼ of SW¼ of SW¼ of NE¼, section 15, township 2 north, range 14 west. A plat was attached indicating the starting point and the course of the highway from such starting point to the terminal point.

"On the same day the Commissioners filed a petition reciting that they had revised the Plans of Improvement shortening the length of the water pipe line to be laid, and that this would diminish or remove benefits to the lands within the district which are west of the new terminal point. They prayed that they be permitted to withdraw the assessment of benefits theretofore filed and to substitute a revised assessment of benefits.

"On the same day an order was entered reading as follows: 'On this day is presented to the court the petition of the commissioners of Highway 10 Water Pipe Line Improvement District No. 4 asking that they be authorized to withdraw the assessment of benefits heretofore filed.

" 'The Court being well and sufficiently advised doth find that the Plans of Improvement have been revised and that it would be proper for the commissioners to withdraw the original assessment of benefits and make another assessment of benefits based upon the plans as revised.

" 'THEREFORE, it is ordered and adjudged that said commissioners be, and they are hereby, permitted to withdraw the book containing the assessments heretofore approved by order of this court and file herein a book containing the revised assessments.'

"On March 15, 1949, the Assessor of the District filed the revised assessment of benefits based upon the Revised Plans of Improvement. Notice of the filing of such revised assessment was duly published, and on April 22, 1949, an order was entered confirming the same.

"Notice of the revision in the Plans of Improvement was duly published by the Commissioners in July of 1949.

"On December 3, 1949, an order was entered levying a tax in the amount of $178,360 being the amount of the principal of the bonds issued, the anticipated interest thereon, and 10 per cent for unforeseen contingencies. It provides that the tax shall be paid in annual installments, the installments for the years 1950 and 1951 to be 4 per cent, and commencing in 1952 each annual installment to 6 per cent of the assessed benefits.

"The parties, in offering testimony, are not to be restricted by anything contained in this Stipulation, as it is executed merely for the purpose of dispensing with admitted facts and with the introduction of original papers on file in the office of the Clerk of the Pulaski County Court.

"The lands described in the Petition signed by property owners and in the Order of October 25, 1946, creating the District, comprise land on either side of Highway 10 approximately a quarter of a mile back on either side of the highway from the present terminus of the existing water line running westward about six miles to the Joe T. Robinson School. Of these lands described in said Petition and Order and appearing on the original assessment roll, lands of Roy Sturgis in area 223.10 acres were assessed with benefits and under the revised plans and substituted assessment roll, lands of Roy Sturgis in area only 32.2 acres were assessed. The effect of the changed plans is to eliminate the Roy Sturgis lands stopping the proposed pipe line about 7/8 of a mile east of the Joe T. Robinson School and eliminating about 1/6 of the length of the pipe as originally proposed. The defendants take the position that the lands of the Joe T. Robinson School were never legally assessable with benefits.

"With the exception of Dr. Glenn H. Johnson, all parties whose names appear on a certain Petition circulated recently among landowners in opposition to the District are represented by the Plaintiffs in this action and are parties to the class action.

"Although a contract was prior to the institution of this suit entered into between the District and W. R. Stephens Company for the sale of $92,000 worth of bonds at 4% with conversion privileges, said bonds have not been delivered and the District has not let a contract for the construction of the improvement or delivered any money to the Little Rock Municipal Water Works for the laying of the pipe."

The trial court found "that the orginization of the defendant district was legal and valid in all respects; that the Commissioners had a right to make a change in the Plans of Improvement; that the assessment of benefits was confirmed and is now incontestable," and entered a decree accordingly.

For reversal, appellants earnestly contend that the change of plans and specifications, eliminating approximately one mile of the area on the west end of the District (amounting to about 1/6 of the District which included the Joe T. Robinson School) in the construction of the District, amounted to such a material change and alteration from the original plans and character of the District as would void all orders of the County Court made subsequent to October 25, 1946.

We have concluded that appellants' contention must be sustained.

As above indicated, the procedure followed here in the formation of the District was under Act 41 of the Acts of 1941, (now §§ 20-701—20-729, Ark. Stats. 1947).

It is undisputed that no bonds have been executed, issued or delivered, that no work has been done and that under the changed plans approximately one mile of the west end of the District, including the school, was eliminated.

In sustaining appellants' contention, we must necessarily, and do hold, that the failure to take the water line to the school constituted a material change of plans and specifications in the District and that § 20-723, Ark. Stats. (1947), which allowed the change, does not allow a material change to be made.

Section 20-723 is § 23 of the "Suburban Improvement District Law" and provides: "The commissioners may at any time alter the plans and specifications. The changed plans, with the accompanying specifications, etc."

Unless the words "changed plans" have a limited meaning by judicial construction, then they would mean any change, either material or immaterial. A study, however, of our previous decisions convinces us that these words "changed plans," as well as the purpose and intent of § 23 above, permit only immaterial changes and does not permit of material changes.

The Alexander Road Law is Act 338 of 1915 and § 16 of Act 338 gave to the Commissioners of the District the power to make changes. The procedure for such changes is (1) a report to the County Court, showing the change; (2) published notice by the County Court for two weekly insertions; (3) order of the County Court making the change; and (4) appeal by any dissatisfied land owner to the Circuit Court within ten days from the County Court order. Section 16, together with § 14 of the Alexander Law, provided that if there be no appeal from the County Court, then the judgment of the County Court making the change becomes conclusive on all property holders. The Alexander Law says "any alteration or change." The Suburban Law says "the changed plans." So it will be observed that § 23 of the Suburban Law is quite similar to § 16 of the Alexander Law.

We have several cases construing § 16 of the Alexander Law. In *Rayder* v. *Warrick,* 133 Ark. 491, 202 S. W. 831, we considered the "change" section of the Alexander Law and said: "We think § 16 intended to give the Commissioners the power to alter the plans and to

change the route in order to better carry out the improvement as originally contemplated, but it does not authorize them to change the plan of the improvement to a wholly different one or construct it over a wholly different route."

Then in *Hout* v. *Harvey,* 135 Ark. 102, 204 S. W. 600, we further considered § 16 of the Alexander Law and held that it allowed only minor changes.

Then came *Pritchett* v. *Road Improvement District,* 142 Ark. 509, 219 S. W. 21, which was also a case under the Alexander Law. There, the Commissioners changed the road by moving one mile of it a quarter of a mile away from the previous course. The right to make the change was challenged. This Court said: "This necessarily constituted the adoption of a different route and not merely a slight change . . ." And we also held that the alteration of the plan was void. In the course of the opinion, this Court reviewed the earlier cases on § 16 of the Alexander Law and summarized: ". . . changes with respect to the character of the improvement and the route of the road must be confined to such changes as are consistent with the original plans and not changes to a different route . . ." (Headnote 3).

We may therefore summarize these cases involving § 16 of the Alexander Law by saying that the changes allowed are minor, or immaterial changes; and that major, or material changes, are not allowed under § 16 of the Alexander Law. These holdings were all before the adoption of the 1941 Act here involved, so that the words "changed plans" and the permission for change of plans had a definite meaning by judicial construction when the Suburban Law was adopted; and we therefore conclude that the "change" section in the Suburban Act necessarily is limited to immaterial changes, and that material changes are not allowed by § 23 of the Suburban Law.

In *Phillips* v. *Tyronza and St. Francis Road Improvement District,* 145 Ark. 487, 224 S. W. 981, the Parkin Road Improvement District was organized under a special act (Act 181 of 1920). The "change" section

of that Act is § 26 and appears to have been patterned after the "change" section of the Alexander Law and of § 23 of the Suburban Law here under consideration. Under said § 26, the Commissioners of the Parkin Road Improvement District entirely eliminated one of the lateral roads and dissatisfied property holders brought suit in equity to enjoin the issuance of bonds. This Court held that the elimination of the lateral was a *material change* and rendered the assessments void. In that case, as in the case at bar, it was urged that the remedy of a dissatisfied land owner was by appeal, as provided in the "change" section of that Act, and not by an independent suit in equity, as was there undertaken but we denied this contention, saying: "It is contended by the road commissioners that the present suit was not commenced within the time allowed by the statute, and for that reason should be dismissed. In making this contention they rely upon the provision of the statute limiting the time of landowners in making objections to the assessment of benefits on their lands. The present suit, however, was not instituted for that purpose. It goes to the integrity of the district and attacks its validity. Hence it does not come within the provision of the statute limiting the time for reviewing assessments of benefits. *Mo. Pac. Rd. Co.* v. *Conway Co. Bridge Dist.*, 134 Ark. 292, and *Mo. Pac. Rd. Co.* v. *Conway County Bridge Dist.*, 142 Ark. 1, 218 S. W. 189."

So in the case at bar, when we hold, as we have, that the change attempted was a material change, then it necessarily follows that such change does not come within the purview of § 23 of the Suburban Law, and that the present suit in equity goes to the integrity of the orders making the changes in the district.

Reaching this conclusion, it necessarily follows that the decree of the Chancery Court must be and is reversed.

GEORGE ROSE SMITH and DUNAWAY, JJ., not participating.

MANIER *v.* HODGES.

4-9204 230 S. W. 2d 960

Opinion delivered June 19, 1950.

Rehearing denied July 3, 1950.

S. L. Gladish and *Wils Davis,* for appellant.

James E. Hyatt, Jr., and *A. F. Barham,* for appellee.

DUNAWAY, J. This is an appeal by Mary Hale Manier from a decree quieting title to certain property in Osceola, Arkansas, in appellee, Samuel Major Hodges, Jr.

In 1909, James P. Hale acquired this property by purchase and occupied it until his death on December 1, 1930. Mr. Hale died intestate leaving as survivors his widow, Mary E. Hale, and his daughter, Mary Hale Manier, his sole surviving heir-at-law.

On October 23, 1911, Hale and his wife executed a deed of trust to said property to one C. C. Ermen, to secure an indebtedness in the principal sum of $800, with interest at five per cent. per annum, due "thirty days after the death of both of us." The deed of trust and note were subsequently assigned to J. T. Coston, who in turn assigned them on May 4, 1925, to the Times Publishing Company of Osceola.

Mary E. Hale on March 16, 1935, executed a deed to this property to the Times Publishing Company. That deed contained this recital:

"The consideration for this conveyance is the satisfaction of a mortgage held by Times Publishing Co. on said lot, and the assumption of payment of all taxes and assessments thereon, and the agreement on the part of Times Publishing Co. to pay me $5.00 per month, monthly as long as I live. An express lien is hereby retained on said lot for the payment of said sums."

After the execution of this deed, which was duly acknowledged and also signed by appellant as a "witness," the Times Publishing Company went into possession of the property, which was vacant at the time. One agreed monthly payment of five dollars was made to Mary E. Hale, who died April 13, 1935, about one month after she had executed the deed above mentioned.

On April 1, 1946, the Times Publishing Company by warranty deed conveyed the property to S. M. Hodges, Sr., who died intestate on December 14, 1946. His widow Ethel, and son, the appellee, survived him. Ethel Hodges died December 31, 1946.

Appellee brought this suit to quiet title on October 29, 1947. Appellant answered contending that appellee and his predecessors in title had held the property as mortgagees in possession, and prayed an accounting of the rents and profits, and a determination of the amount of the indebtedness then due. Appellee in reply pleaded the statute of limitations under more than seven years adverse possession, laches and estoppel.

The Chancellor found all issues in favor of the plaintiff and entered a decree quieting title in Samuel Major Hodges, Jr.

As opposed to appellant's contention that appellee and those through whom he claimed title were mortgagees in possession, appellee maintains that the Times Publishing Company went into possession of the property under the deed of March 16, 1935, from Mary E. Hale. It is his contention that appellant had actual knowledge that the Times Publishing Company was in possession claiming to own the property in fee; and that seven years after the death of the life tenant, Mary E.

Hale, its adverse possession ripened into title against the appellant.

The evidence clearly supports the Chancellor's finding in favor of appellee. Appellant testified that Mr. Coston mailed the deed which her mother executed on March 16, 1935, to Mary E. Hale at Hot Springs where she resided with appellant. Appellant refused to sign the deed and objected to her mother doing so. However, when her mother insisted on executing the deed, appellant took her to a notary public and appellant signed the deed on its face as a "witness." Mrs. Manier admitted that she knew the contents of the instrument.

Appellant testified that " . . . I wrote Mr. Coston and told him that I was in a position to take that note up and he said there was nothing I could do about it, so then I sent word to Mr. Hodges and told him that I thought that he was doing a terrible injustice to me and that I wasn't satisfied with it and sooner or later he would hear from me." Although the exact date of the letters here referred to is not shown by the record, it is evident that appellant knew from the time the deed was executed, that the Times Publishing Company was claiming ownership of the Hale property.

It is undisputed that appellant made no effort to recover possession of the property, or even discuss the matter with Mr. Hodges, from the time of her mother's death in 1935 until this action was brought in 1947. The possession of the Times Publishing Company, claiming under the deed from Mary E. Hale, became adverse to appellant at the death of the life tenant. See *Bradley Lumber Co. of Arkansas* v. *Burbridge,* 213 Ark. 165, 210 S. W. 2d 284, and cases therein cited at p. 171. Appellant therefore is barred by the seven-year statute of limitations from asserting any claim to the property in suit.

The decree is affirmed.

Opinion delivered June 19, 1950.

[redacted]

Guy H. Jones, for appellant.

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

GEORGE ROSE SMITH, J. This appeal is from a judgment by which the appellant was fined $600 for the offense of selling intoxicating liquor in a dry county.

The appellant contends that the State failed to prove that what he sold was intoxicating liquor. Lee Mode testified that on the night of the offense he refused to allow his son Gerald, a confirmed alcoholic, to order whiskey by telephone. Gerald then went off in a taxi, and Lee followed in his car. He testified that Gerald stopped at the appellant's house and entered the kitchen. Lee

watched through the window and saw the appellant hand Gerald a half pint of whiskey in exchange for two dollars. The witness said that the bottle was labeled whiskey, but he did not smell or taste the contents.

This testimony is sufficient to support the jury's conclusion that intoxicating liquor was sold. We have held that a jury question is presented when a witness testifies that liquor was sold, even though he does not say that it was alcoholic or intoxicating. *Fuller* v. *State,* 179 Ark. 913, 18 S. W. 2d 913. The appellant is mistaken in thinking that a witness should not be permitted to identify whiskey by sight alone. If it were required that the witness must have smelled or tasted the liquor it would be possible for bootleggers to sell their wares on the streets with impunity, merely by having the buyer hasten away with his purchase before anyone could smell it or taste it.

Several witnesses testified that the appellant's reputation for violating the liquor laws is bad. Ark. Stats. 1947, § 48-940. On the authority of *Richardson* v. *State,* 211 Ark. 1019, 204 S. W. 2d 477, it is insisted that the court should have restricted this testimony to recent reputation only. The record shows that the testimony was in fact so restricted. All questions about reputation were framed in the present tense, and when the objection was made below the court stated that he assumed the witness was referring to the appellant's present reputation. Later on, the jury were instructed that they might consider proof of recent reputation if corroborated by other substantial evidence of guilt. This procedure conforms to even the most strict interpretation of our earlier holding.

Complaint is made of the court's refusal to give an instruction requested by the appellant. Lee Mode, the State's principal witness, admitted on cross-examination that he had been convicted of a felony. The appellant submitted an instruction to the effect that the jury might take previous felony convictions into consideration in weighing the testimony of any witness. This instruction was properly refused. The court had given a comprehen-

sive instruction upon the matter of credibility, telling the jury that they might consider the witnesses' demeanor on the stand, their means of knowledge, the reasonableness of their statements, their interest in the case, their bias or prejudice, and all the facts and circumstances testified to. The court's instruction, however, did not mention previous convictions as bearing upon the issue of credibility.

Had the requested instruction been given it would have unduly singled out this particular test of credibility and would have placed unnecessary emphasis upon Mode's criminal record. In a similar situation we have upheld the trial court's refusal to give a separate instruction telling the jury that they might consider the accused's evidence of good character in weighing the testimony. "This court is thoroughly committed to the rule that in the trial of cases a court should not single out specific features of the case and emphasize them in separate instructions, but should submit all the facts and circumstances together for the consideration of the jury." *Price* v. *State,* 114 Ark. 398, 170 S. W. 235. In a later case we disapproved an instruction that would have unnecessarily stressed the testimony of certain witnesses. *Shank* v. *State,* 189 Ark. 243, 72 S. W. 2d 519. At most the appellant was entitled to have the matter of previous convictions mentioned along with the other tests of credibility that were set forth in the court's instruction. No such modification was requested.

It is also asserted that certain testimony given by a State police officer was prejudicial to the accused. The court, however, immediately instructed the jury to disregard these statements, and the appellant did not press the point by asking for a mistrial, nor was the court's ruling assigned as error in the motion for a new trial.

Affirmed.

4-9201 230 S. W. 2d 946

Opinion delivered June 19, 1950.

Peyton D. Moncrief and *Virgil R. Moncrief,* for appellant.

George E. Pike, for appellee.

HOLT, J. March 20, 1940, appellee, Porter John, filed suit (*Ex parte*) to confirm his title, based on a State tax deed April 17, 1939, to the SE¼ of the SE¼ of section 28, township 4 south, range 4 west, 40 acres, in Arkansas County, which was forfeited and sold to the State for the delinquent taxes in 1931.

Appellant, James Bass, intervened, alleging that he was the owner of the land in question, that the tax sale and forfeiture to the State were void for numerous reasons, that appellee is the son of Dr. John, and that: "Several years ago, Dr. John entered into a lease agreement with intervener's co-owner of above land, under which agreement Dr. John agreed to maintain repairs on the land for the use of same as pasturage and at the time of the pretended tax sale (was) and is still occupying said

land as tenant under the said arrangement. At the time of the pretended tax sale in June, 1931, at the time said land was forfeited, at the time the state land commissioner executed his deed to petitioner, Porter John, this intervener, James Bass, was a minor."

He prayed that he be allowed to redeem and that appellee should be denied any rights in the property. Appellee and his father, Dr. John, answered (separately) appellant's intervention with general denials. Appellee also alleged that he had made valuable improvements on the 40-acre tract which materially increased its value.

The trial court found that appellant, Bass, had the right to redeem and that appellee's tax deed should be cancelled and set aside, but that appellee should recover for improvements in the amount of $3,275 and declared a lien against the land for this amount.

The cause is here on appellant's direct appeal and appellee's cross appeal.

The record reflects that the tract of land involved was on the 2nd Monday in June, 1931, forfeited and sold to the State of Arkansas for nonpayment of taxes due thereon. Thereafter, on April 17, 1936, the State issued its deed to appellee, Porter John, to this property for a consideration of $41. Appellee immediately fenced the tract and made substantial improvements within the period of about sixteen months after his purchase.

Appellant, James Bass, was born May 8, 1916, and reached the age of 21 May 8, 1937. The present suit, as indicated, was filed March 20, 1940, and appellant, Bass, filed his intervention May 7, 1940, which was one day short of three years after he, Bass, had reached his majority. We hold that appellant's right to redeem was limited to two years from and after the expiration of his disability. Ark. Stats. 1947, § 84-1201 (Pope's Digest, § 13860) so provides: "Period for redemption, * * * All lands, towns or city lots or parts thereof, which may hereafter be sold for taxes at delinquent sale, under the laws of this State, may be redeemed at any time within two (2) years from and after the sale thereof; and all

lands, city or town lots, belonging to insane persons, minors or persons in confinement, and which have been or may hereafter be sold for taxes, may be redeemed within two (2) years from and after the expiration of such disability," etc.

We have many times construed this section, and in *George* v. *Hefley,* 182 Ark. 678, 32 S. W. 2d 445, we said: "The court has frequently construed this statute (§ 84-1201) to give minors the right to redeem from and after the sale until the expiration of two years after they have reached their majority. The court has said that the minor's right to redeem commences from and after the sale, and that the right to redeem continues until two years after he should come of age. *Bender* v. *Bean,* 52 Ark. 132, 12 S. W. 180; *Seger* v. *Spurlock,* 59 Ark. 147, 26 S. W. 819; *Moore* v. *Irby,* 69 Ark. 102, 61 S. W. 371; and *Crowley* v. *Spradlin,* 77 Ark. 190, 91 S. W. 550.

"Later decisions of the court have recognized that the statute does not suspend the right of redemption during the minority of the owner, but it may be exercised as well before as after the removal of the disability of minority. *Hisey* v. *Sloan,* 180 Ark. 797, 22 S. W. 2d 1005, and cases cited."

Our holding in the *George* v. *Hefley* case was recently reaffirmed in *Schuman* v. *Westbrook,* 207 Ark. 495, 181 S. W. 2d 470.

Any rights, therefore, to redeem that appellant might have had in the land here in question were lost and precluded by his failure to intervene or assert such rights within the two years allowed to him after he reached his majority, and the trial court erred in cancelling and voiding appellee's tax deed and in holding that appellant had the right to redeem in the circumstances.

Appellant's contention that at the time of the tax sale to appellee, appellee and Dr. John, his father, as partners and acting in unison, held and occupied the land in question as tenants under an alleged lease agreement with appellant's "co-owner" and that "appellee's purchase was in equity and effect a redemption" is without merit, for the reason that even though appellee were a

tenant in possession (which the preponderance of the evidence fails to support) there being no evidence that appellee agreed to keep the taxes paid, he was within his rights in purchasing at the tax sale.

In the recent case of *Billingsley* v. *Lipscomb,* 211 Ark. 45, 200 S. W. 2d 510, we held: (Headnotes 3 and 4) "A tenant who is under no obligation to pay the taxes on the land he occupies may purchase at a tax sale the lands of which he is in possession and may set up such title, and the sale, if otherwise valid, extinguishes the landlord's title and terminates the lease. 4. Quieting Title.—Appellant, tenant of appellee, and who was under no obligation to pay the taxes on the land leased and who purchased the land from the state after a sale for delinquent taxes was entitled to have his title quieted as against appellee the original owner."

Finally, appellant questions appellee's right to cross-appeal, contending that appellee is estopped by his election to purchase at the Commissioner's sale for the exact amount awarded him (appellee) in the decree for improvements. It appears that pursuant to the decree, the Commissioner sold the property and appellee was the purchaser. We cannot agree that by so doing appellee has lost his right to cross-appeal.

The trial court, after erroneously declaring appellee's deed from the State void, allowed him $3,275 for improvements, and a lien on the property for this amount. When appellant failed to reimburse appellee for said improvements, appellee, as was his right, bid the amount of his lien at the sale to protect his interest. This action of appellee did not irrevocably bind him to the one course of action which he pursued and was in no sense inconsistent with appellee's claim throughout that he was the owner of the land by virtue of his State deed, a claim which we are now holding must be upheld. Had appellant paid appellee the amount awarded for betterments, then a different situation similar, in effect, to that in *Bolen* v. *Cumby and Another,* 53 Ark. 514, 14 S. W. 926 (relied upon by appellant) would be presented.

In the Bolen case, Bolen claimed the land under a tax sale. The trial court held the sale void but allowed for improvements and a lien on the property. Bolen appealed. Subsequently, Cumby paid to Bolen the amount allowed for improvements and Cumby then moved to dismiss Bolen's appeal. This court there held that, in the circumstances, Bolen's appeal should be dismissed because he had accepted a benefit under the judgment inconsistent with his appeal. It was there said: "A party may prosecute his appeal from a judgment, partly in his favor and partly against him, even after accepting the benefit awarded him by the judgment, provided the record discloses that what he recovers is his in any event—that is, whether the judgment be reversed or affirmed. But he waives his right to an appeal by accepting a benefit which is inconsistent with the claim of right he seeks to establish by the appeal," and in *Kelley* v. *Laconia Levee District,* 74 Ark. 202, 85 S. W. 249, 87 S. W. 638, this court held: (Headnote 1) "One who accepts the benefit of so much of a decree as is favorable to him is not estopped thereby to appeal from the remainder of the decree, if the part accepted and that appealed from are independent." See, also, *McIlroy* v. *McIlroy,* 191 Ark. 45, 83 S. W. 2d 550, and *Hutton* v. *Pease,* 190 Ark. 815, 81 S. W. 2d 21.

Here, appellee has not voluntarily received any money from appellant but merely purchased at the sale to protect his interests.

We regard any statements in *Brookfield* v. *Martin,* 201 Ark. 475, 145 S. W. 2d 727 (cited by appellant) that might appear to be in conflict herewith as dictum merely.

Accordingly, the decree must be, and is reversed, on appellee's cross-appeal and the cause remanded with directions to dismiss appellant's intervention for want of equity and for further proceedings consistent with this opinion.

Since appellant, on direct appeal, questions only the amount allowed appellee for improvements or betterments, it becomes unnecessary to consider this issue.

4-9217 230 S. W. 2d 939

Opinion delivered June 19, 1950.

[redacted]

Barber, Henry & Thurman and *R. C. Limerick, Jr.*, for appellant.

Charles I. Evans, for appellee.

ED. F. MCFADDIN, Justice. Appellee, Mikles, recovered judgment against Kern-Limerick, Inc. for $6,000, being $2,000 damages for defective repair of a WK[1] tractor, and $4,000 damages for fraudulent misrepresentation regarding an HD[1] tractor. To reverse that judgment there is this appeal.

FACTS

Mikles—a resident of Booneville, Arkansas—purchased a secondhand WK tractor for $700 in July, 1947; and at his order Kern-Limerick, Inc.—a large road implement firm, maintaining repair departments, etc. in Little Rock, Arkansas—undertook to repair and re-

[1] These were the initials used by the witnesses in describing the tractors; and we use the same initials for convenient identification. To describe the tractors in detail as to make, etc., would be of no benefit to this opinion.

condition the tractor and add a "dozer attachment" thereto. Kern-Limerick's bill was $4,403.13, of which Mikles[2] paid $2,000 in cash, and the balance was charged to him on open account.

While in the course of having the WK tractor repaired, Mikles saw that Kern-Limerick had for sale a secondhand HD tractor; and Mikles agreed to purchase this for $5,300, being $1,000 in cash and $4,300 on deferred payments. The contract of sale, signed by Mikles, described the tractor as being secondhand, and stated the deferred payments to be due: $500 on November 10, 1947, $500 on December 10, 1947, $660 on January 10, 1948, and a like sum each month thereafter until the full indebtedness and interest be paid. The contract also contained these provisions:

"The undersigned hereby acknowledges receipt of a full and true copy of this order and that no statements or representations have been made either verbally or written which are not expressed herein.

. . . . . .

"It is expressly understood and agreed that the title to the above described goods shall be retained in Kern-Limerick, Inc., until the entire purchase price as above set out has been fully paid in cash."

Mikles used the two tractors in constructing water ponds for farmers who were cooperating with the Government "Triple A" program; and also he used the tractors for pulling trees, building roads and other purposes. Both tractors gave Mikles considerable trouble by breakdowns, which began the first week of use and continued at frequent intervals. Mikles regularly notified Kern-Limerick of the breakdown of each tractor, and that company regularly sent a mechanic with parts to make the necessary repairs. The breakdowns and repairs continued; and in January or February, 1948, Mikles, after returning the WK tractor for further repairs, had a telephone conversation with Kern-Limerick, in which he asked for an adjustment on the amount

[2] For clarity we will refer to the parties by name, rather than by status in the litigation.

charged him for repairs. On February 4, 1948, Kern-Limerick wrote Mikles a letter containing, *inter alia,* the following paragraph:

"Your open account on our books as of January 31, 1948, totals $4,029.75 which includes the balance of $2,403.13 on the WK Tractor and Dozer, and repair and supply invoices of $1,626.62. In addition, you owe on the HD-7 Tractor notes totaling $4,300.00."

In the letter, Kern-Limerick offered to cancel $1,146.40 of the repair account of $1,626.62 and then stated:

"Since you sent your WK into us, we have taken the engine down and it is very apparent that you either have not used the right oil or have neglected keeping it properly oiled. We are having a new crank shaft installed and believe the best sale that can be made will be about $3,000.

"If you want us to do so, we will try to sell it for $3,000 and apply it to your account which stands as follows with the adjustments made above:

"Balance on WK Tractor	$2,403.13
"Repairs and supply account	480.22
	$2,883.35
"Allowance for Tractor	$3,000.00
"Your balance	$ 116.65
"Balance due on your HD-7	$4,300.00"

Mikles wrote Kern-Limerick on February 6, 1948, and had a telephone conversation; and then on February 18, 1948, Mikles again wrote Kern-Limerick:

"The WK tractor should be worth as much as it cost to have it repaired as the tractor is not figured in at all, so try to get $4,000 for it and that will let me get along a little better on the HD-7 and will say to you just as soon as my tractor can go to work I will mail you a payment and will clean up as soon as I can. Thanking you for past favors and service."

Kern-Limerick repaired the WK tractor at a cost of $200 and sold it for $3,100; and allowed Mikles a credit of $3,000 for the sale. Mikles never complained in writing of the sale price; and in his pleadings stated that the sale price was $3,000. At the trial he sought to claim that he should have received $4,000; but it was stipulated (as hereinafter quoted) that the entire balance of $4,300 was due and unpaid on the HD tractor.

Mikles continued to use the HD tractor, but made no payments. Kern-Limerick insisted on payment; and on July 8, 1948, Mikles wrote Kern-Limerick a letter which we copy in full:

"As per your request, this letter will explain the tractor condition and the way I can finish paying for the tractor as outlined over the telephone.

"I bought the tractor last summer and promised to pay for it by the month as I had all the work I could do. I have had too much trouble with this tractor and have been down so much with it, I could not make the payments. I have got the tractor in good condition now. Your man thinks it should go on and work which I think it will. I have all the work I can do this summer if this tractor will just stay running. The last few days I have been out about one thousand dollars on this tractor. I had an agreement with Mr. Limerick by telephone to pay cash for the work I would have done on the tractor, and as soon as I could make a payday with it I would start my payments and get it paid out. I have had the service man here twice before this time and am just now getting started. I am on a job which consists of three parts, and as I complete each part I can draw my money. I lack about three working days having the first part done. As soon as this is done I will mail you some money, and as fast as I can I will pay this tractor out. I have hit it pretty hard with this tractor not working any better than it has. This was the way I was going to pay for it and every time your man came to work on the tractor I had my operator help him, so you can see I have had a costly thing and haven't had anything coming in to speak of.

"Mr. Kern, I want to pay for this tractor and will do so just as fast as I can.

"Thanking you for your past services and being lenient with me."

After receiving that letter, Kern-Limerick delayed until July 22nd; and receiving no payment, filed replevin suit and repossessed the HD tractor under the title retaining contract. Mikles then filed counterclaim,[8] alleging (a) that the repair job on the WK tractor was defective, and (b) that Kern-Limerick had defrauded him in his purchase of the HD tractor by falsely representing it to be in good condition, etc. Mikles claimed damages of the (a) amount paid workmen when tractors were broken, (b) cost of repairs, and (c) profits he would have made from the use of the tractors if they had not broken. Kern-Limerick denied the allegations of the counterclaim and pleaded, *inter alia*:

". . . That the defendant has waived any claim, action or cause of action which he had or might have had against the plaintiff."

At the trial it was stipulated (1) that the entire series of notes—totaling $4,300—for the HD tractor was past due and unpaid and also (2)

"It is further stipulated that under the above statement of facts the plaintiff at this time is entitled to a judgment against the defendant for possession of the tractor and equipment and that the only matter in issue is the question of damages set up by Mikles in his cross complaint."

As previously stated, the judgment—based on the jury verdict—was for Mikles for $6,000 on his counterclaim; and this appeal ensued.

OPINION

Many questions are presented in the excellent briefs; but we find it unnecessary to consider any of them except

[8] *Brunswick* v. *Culberson*, 178 Ark. 957, 12 S. W. 2d 903, and *Galloway* v. *Puryear*, 179 Ark. 524, 16 S. W. 2d 1000, are cases holding that a counterclaim may be filed in a replevin action.

Kern-Limerick's request for an instructed verdict, because an answer to that question is determinative of the case and requires a reversal and dismissal. We have stated the facts in detail and copied from the correspondence at length, because Mikles' letter of July 8th—copied above in full—and the three-day extension which Kern-Limerick granted, constituted a waiver of the damages attempted to be claimed by Mikles.

The cross complaint of Mikles was on two counts: (a) failure to properly repair the WK tractor, and (b) fraudulent misrepresentations as to condition of the HD tractor. But Mikles waived any cause of action he might have had for damages on either of these counts: by his letter of February 18, he consented to the sale of the WK tractor and the crediting of the proceeds to his account; and by his letter of July 8, he agreed to pay for the HD tractor if given three days (which was granted). The case at bar is ruled by our cases of *Schichtl* v. *Bowser,* 175 Ark. 1141, 1 S. W. 2d 816, and *Pate* v. *McWilliams,* 193 Ark. 620, 101 S. W. 2d 794.

In *Schichtl* v. *Bowser, supra,* the buyer claimed damages for breach of warranty of pumping equipment. The evidence showed that the buyer used the equipment for a year, discovered all of the claimed defects, and when pressed for payment, requested additional time and promised payment. In that case the trial court instructed a verdict for the seller for the balance due on the pumping equipment and we affirmed, saying:

"The court instructed a verdict for appellee, and properly so, because appellant waived his right, to rely upon the defects in the outfit under his guaranty, by writing the letter to appellee's attorney of date April 26, 1926, in which he made an absolute promise to pay the balance of the purchase money, irrespective of any defects he had complained of prior to that time."

In *Pate* v. *McWilliams, supra,* the seller brought suit on a title retaining contract involving automobiles; and the buyers cross complained for damages, because of alleged

fraudulent misrepresentations inducing the sale.[4] The evidence showed that the buyers used the cars from May until December; and after having received full knowledge that the alleged representations were not true, the buyers continued to make payments on the automobiles. On such evidence the trial court instructed a verdict for the seller in his action for the balance of the contract price; and this Court affirmed, saying:

"... appellants waived the right to defend on the ground of a fraudulent procurement of the contract, by making no complaint and by using the trucks and making monthly payments thereon long after they claimed to have discovered that the Dodge truck consumed more gas and oil than the Chevrolet trucks had consumed."

See, also, *McDonough* v. *Williams,* 77 Ark. 261, 92 S. W. 783, 8 L. R. A., N. S. 452, 7 Ann. Cas. 276, as a case involving waiver; and also 24 Am. Jur. 34, *et seq.;* 56 Am. Jur. 122, *et seq.;* and 67 C. J. 289, *et seq.* Other cases on waiver involving sales are collected in West's Arkansas Digest, "Sales," key number 50.

Even if we assume (a) that the repair job on the WK tractor was defective, so as to give Mikles a cause of action; (b) that the condition of the HD tractor was fraudulently misrepresented to Mikles, so as to give him a cause of action for fraud; and (c) that he had not received the amount of credit he wanted for the WK tractor,[5] nevertheless, Mikles knew all these matters when he wrote Kern-Limerick the letter of July 8th, in which he asked for a three-day extension[6] for payment, which request was granted. When he wrote that letter with full knowledge of all the things now alleged, and asked for further indulgence for payment, such conduct constituted a waiver of what he sought to assert in his cross

[4] The said representations were claimed to be that the Dodge trucks would consume less gasoline and oil than the Chevrolet trucks.

[5] The fact that it was stipulated by Mikles at the trial that the notes totaling $4,300 were past due and unpaid on the HD tractor shows that he was then making no claim for credit on the notes for any overplus from the sale of the WK tractor.

[6] The letter, as previously copied in full, says: "... I lack about three working days having the first part done, and as soon as this is done I will mail you some money."

complaint. He testified at the trial that he wrote that letter and "meant it too." The evidence as to waiver—being based on Mikles own letters—is undisputed; and therefore an instruction should have been given in favor of Kern-Limerick on Mikles' cross complaint.

The judgment of the Circuit Court in favor of Mikles is reversed and his alleged cause of action is dismissed.

BRUNK *v.* MERCHANTS NATIONAL BANK, EXECUTOR.

4-9230 230 S. W. 2d 932

Opinion delivered June 19, 1950.

Gutensohn & Ragon, Wilder & Morgan, Floyd E. Barham, Warner & Warner and *Lem C. Bryan,* for appellant.

Daily & Woods and *Wm. K. Harris,* for appellee.

DUNAWAY, J. This suit was filed by the Merchants National Bank of Fort Smith, as Executor of the estate of George C. Brinkmann, deceased, for a construction of the decedent's last will and testament.

These are the issues which we must decide on this appeal:

(1) Did the decedent die intestate as to his real property, as is contended by appellant Ruth Brinkmann Brunk?

(2) Was Ruth Brinkmann Brunk the legally adopted daughter of the decedent?

(3) Should the will be reformed to correct an alleged mistake in the bequest to Lola Brinkmann Strojost, a niece of the decedent and one of the appellants here?

(4) Was there a delivery of a deed to certain real property executed by the decedent to his foster daughter, Lillian Trapp, one of the appellees here; and if not, was there an enforceable contract made by the decedent to devise or convey to her said real estate?

The Chancellor held that the decedent's real estate was disposed of by the residuary clause of his will; that Ruth B. Brunk was the decedent's legally adopted daughter; that there should be no reformation of the bequest to Lola B. Strojost; and that there was both a contract to devise or convey certain real property to Lillian Trapp, and a constructive delivery to her of a deed to said property.

The questions presented will be discussed in the order above-stated.

The pertinent parts of the will on the issue of intestacy as to real estate are as follows:

". . . I, George C. Brinkmann, of Fort Smith, Arkansas, of legal age and of sound and disposing mind

and memory, and knowing the uncertainty of life, and the certainty of death, and desiring to make disposition of my property while I am able so to do . . .

"I give, devise and bequeath to the following named churches and benevolent organizations, as follows: (then follows a list of charitable institutions with bequests to each in designated amounts). If there should be left, after paying amounts donated to the above named Churches and Benevolent Organizations I direct that said amounts be paid to said named churches and benevolent organizations in accordance to the amounts that I have given to each of said Churches and Benevolent Associations."

Appellant Ruth B. Brunk contends that the language in the residuary clause—"If there should be left, after paying amounts donated to the above named churches and benevolent organizations I direct that said *amount* . . . "be paid proportionately to these charities—referred only to money or personal property, and was not sufficient to dispose of the testator's real estate, which was nowhere specifically mentioned in the will. In urging this construction, she relies on the rule as stated in *Williams* v. *Norton,* 126 Ark. 503, 191 S. W. 34, that "an heir can be disinherited only by express devise or necessary implication, so strong that a contrary intention cannot be supposed; that the heir cannot be disinherited unless the estate is given to somebody else."

The will in question must, however, be construed in accordance with other established rules as well. In *Lockhart* v. *Lyons,* 174 Ark. 703, 297 S. W. 1018, we said at p. 706: "The true rule in the construction of wills, which can be said to be paramount, is to ascertain or arrive at the intention of the testator from the language used, giving consideration, force and meaning to each clause in the entire instrument.

. . . . . .

"A testator is presumed to intend to dispose of his entire estate, and it must be borne in mind, in the construction of wills, that they are to be so interpreted as

to avoid partial intestacy, unless the language compels a different construction. . . ."

See, also, *Badgett* v. *Badgett,* 115 Ark. 9, 170 S. W. 484; *Morris* v. *Lynn,* 201 Ark. 310, 144 S. W. 2d 472.

Also applicable to the case at bar are these rules stated in *Galloway* v. *Darby,* 105 Ark. 558, 151 S. W. 1014 at pp. 572-573, 44 L. R. A., N. S. 782, Ann. Cas. 1914D, 712.

"The presumption against intended intestacy leads to a liberal, rather than to a restrictive, construction of the residuary clause, in the will, in order to prevent partial intestacy.

. . . . . .

"The rule is that the testator's intention is to be ascertained from the whole will. . . . Hence it follows that language which in a general or residuary clause may not alone be sufficiently conclusive to dispose of all the property of the testator may have its meaning enlarged to correspond with an intention shown in the introductory clause."

Although the testator in the introductory clause of his will did not say he intended to dispose of "all" his property, he did state his intention of disposing of his "property" without limitation. He then made substantial specific bequests to a number of his relatives, including $2,500 to Ruth B. Brunk. In addition, the proof shows that the same day the will was executed, he executed and had delivered to her a deed to his home in Fort Smith. The testator certainly did not disinherit this appellant.

We have concluded, from a consideration of the whole will, that the Chancellor correctly held that the testator intended to dispose of his entire estate. The decedent's real estate passed under the residuary clause to the charities named therein.

The next question concerns the legality of the adoption of Ruth B. Brunk. On October 8, 1934, George C. Brinkmann and his wife, Lena, filed petition in the Probate Court for the Fort Smith District of Sebastian

County to adopt Ruth Bute. In the petition it was stated that the child was fourteen years of age and had been in petitioners' custody since July 4, 1932, and that Ruth was a resident of Sebastian County. The Probate Court endorsed on the back of the petition: "Petition approved this 8th October, 1934. (signed) R. P. Strozier, Probate Judge." The formal order of adoption failed to state that the child was a resident of Sebastian County, a jurisdictional defect which would render the adoption void under our holdings in *Morris* v. *Dooley,* 59 Ark. 483, 28 S. W. 30 and 430 and *Minetree* v. *Minetree,* 181 Ark. 111, 26 S. W. 2d 101.

On August 13, 1949, while this suit was pending, an order *nunc pro tunc* in the adoption proceedings was entered on petition of Ruth B. Brunk without notice to anyone, correcting the original adoption order to state the required residence. The validity of the original order and of the *nunc pro tunc* order entered without notice is challenged. We do not deem it necessary to discuss the order *nunc pro tunc;* for an attack on the original order of adoption is barred by limitations under the provisions of § 3 of Act 408 of the Acts of 1947. We held § 3 of that Act to be a valid statute of limitations in the recent case of *Dean* v. *Brown,* 216 Ark. 761, 227 S. W. 2d 623. There we said: "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."

The record sufficiently shows that Ruth B. Brunk was kept for two years under a court order by the parties attempting to adopt her, without any proceeding to challenge the order, so under our holding in the *Dean* case the adoption became perfected.

The third question for our consideration involves the bequest to Lola Brinkmann Strojost. It is her contention that through a scrivener's error an intended bequest to her of $2,500 was mistakenly listed in the will as

only $500. Following three bequests of $2,500 each, this item appears in the will:

"To Lola Brinkmann Strotjost. of xxxxxxxxxxxxxx

Furgason Missouri xxxxxxxx $500.00

(The words x'd out are "Farmington, Missouri, $2,500.00" and the amount "$2,500.00" is again x'd out following the words "Furgason, Missouri".)

T. W. M. Boone, the attorney who drafted the will, testified that after he prepared the will it was taken to Mr. Brinkmann, who read it as written and made no correction in this item before signing. It appears that two changes in other items in the typewritten copy of the will were made in pen and ink. Appellant Strojost attempted to show that the bequest as written was a scrivener's error by showing that in earlier wills she had been bequeathed the sum of $2,500.

We think the Chancellor correctly held against this appellant's claim under our ruling in *Jackson* v. *Wolfe,* 127 Ark. 54, 191 S. W. 938. That case involved a suit to reform a will, it being contended that the testator intended to describe a tract of land other than the tract actually described in the questioned devise. We said at pages 56-57 of the opinion in the *Jackson* case: (first quoting from *Eagle* v. *Oldham,* 116 Ark. 565, 174 S. W. 1176)

" 'But while we may feel sure of the testator's intention, we must gather that intention from the will itself. This idea has been expressed in a variety of ways by all the courts. But extrinsic evidence is generally held admissible in the interpretation of wills, not to show what the testator meant, as distinguished from what his words express, but for the purpose of showing the meaning of the words used.'

" . . . In the present case we find no circumstances whatever which would justify this court in declaring that the testator meant by the description used, to convey a tract other than the one which was specifically described. . . . To hold with the plaintiff in this case

would be purely a reformation of the instrument, which in all the cases on that point this court has held could not be done."

The final issue to be decided is whether Lillian M. Trapp is the owner of a house and lot in Fort Smith, which adjoined the decedent's homeplace. The executor and others have appealed from the Chancellor's finding that the property belongs to her by virtue of a deed executed to her by the decedent; and that Brinkmann had made an enforceable contract to convey or devise said property to her.

Lillian Trapp was taken into the home of George C. Brinkmann and his wife, Lena, when the girl was seven years of age. She was not adopted by them because her father was living and would not give his consent. She lived with them as if she were their daughter until she married at nineteen years of age. There is testimony that from the time Lillian was fourteen years of age until her marriage, she worked for wages which she turned over to the Brinkmanns with the understanding that she would share in their estate as if she were their natural child. Many disinterested witnesses testified that the Brinkmanns had said repeatedly over a period of twenty-five years that Lillian was to receive the real estate in question.

Prior to the death of Lena Brinkmann, she and her husband executed mutual or reciprocal wills. Mr. Boone, who prepared said wills, testified that they were the same in leaving the property of each to the other; both wills with a provision that if the other spouse should predecease the maker, the property in issue should go to Lillian Trapp. Lena Brinkmann's will, unchanged, was admitted to probate on November 26, 1947.

On March 30, 1948, George C. Brinkmann prepared in his own handwriting, executed and acknowledged, a warranty deed conveying said lot to Lillian Trapp. This deed was placed in an envelope which was sealed and upon the face of this envelope Brinkmann wrote: "Mrs. Lillian Trapp, Farmington, Michigan. See Mrs. Ruth

Brinkmann Brunk, 1009 South 11th Street at Fort Smith, Arkansas, for correct address."

During decedent's last illness he sent for his half-brother, Herman Erke, to come and stay with him in Fort Smith. Sometime prior to his going to the hospital, where he died on January 18, 1949, Brinkmann told Herman of the deed he had executed; pointed out a tin box in his safe where he said the deed was; and directed that it be delivered to Lillian Trapp. Herman's testimony was unsatisfactory as to whether the delivery was to be made immediately or at Brinkmann's death.

After Brinkmann's death, the executor found said deed unrecorded in the lock box of the decedent at the Merchants National Bank of Fort Smith. When Herman had looked for the deed in the tin box at decedent's home he had discovered it was not there; that Brinkmann had been mistaken about where he had placed it. No one had access to the bank lock box after the execution of the deed but decedent himself.

We hold that under the facts as outlined, there was no delivery of the deed. Since we agree with the Chancellor's finding that there was an enforceable contract by Brinkmann to devise this property, and his holding will be affirmed on that ground, we shall not discuss our cases on the requirements for actual or constructive delivery of deeds.

As stated in *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." A number of earlier cases are reviewed in the opinion in the *Crowell* case. We further said in *Offord* v. *Agnew,* 214 Ark. 822, 218 S. W. 2d 370: "As in other contracts, a promise to make a will cannot be enforced without consideration. The usual type of consideration in contracts of this class is a promise by one party to support and care for another during life in consideration of the other party's agreement to devise the land."

While a promise of care or support is the usual type there may be such contracts based on other consideration. In the case of *Crews* v. *Crews,* 212 Ark. 734, 207 S. W. 2d 606, an oral contract to devise property was involved in an action by the widow of the decedent. During his lifetime she had joined in the conveyance of property held by the entirety, which was subsequently reconveyed to him. In consideration of the conveyance of the wife's interest, he had agreed to devise the property to her, which oral contract was enforced.

In 4 Page on Wills (3rd Ed), § 1707, p. 828, it is said: "If the contract to bequeath or to devise property is a contract for making joint, mutual, or reciprocal wills, in which the consideration for the promise by A to make a will which contains certain provisions, is a corresponding promise by B to make a will containing similar provisions, the contract is enforceable, and if broken, the promisee may enforce it either at law or in equity." And to quote from § 1712 at p. 850: "A promise to make a will is consideration for a promise to make a will in return; even if a third person is to be the beneficiary."

In some jurisdictions it has been held that the execution of mutual or reciprocal wills by husband and wife at the same time and with similar provisions is of itself sufficient to prove a contract to dispose of property in the manner indicated in the wills. *Chambers* v. *Porter,* Supreme Court of Iowa, June 25, 1921, 183 N. W. 431; *Frazier* v. *Patterson,* 243 Ill. 80, 90 N. E. 216, 27 L. R. A., N. S. 508, 17 Ann. Cas. 1003. However, according to the general rule, the execution of such wills is not of itself evidence of a contract to devise property, but such a contract may appear from the terms of the will. See cases collected in Annotation 43 A. L. R. 1028.

In the case at bar, in addition to the testimony outlined, there was additional evidence of a contract to convey or devise the property in question to Lillian Trapp. Herman Erke testified that both George C. and Lena Brinkmann had told him many times they had put their property together and that Ruth would get the home place and Lillian the property next door. The tenant who

occupied the house in question testified that when he tried to buy the place, Brinkmann said he could not sell it because it belonged to Lillian. Many other witnesses testified that Brinkmann always referred to the property as "Lillian's."

No testimony was introduced to contradict that introduced on behalf of Lillian Trapp. Indeed it is conceded that the decedent wanted her to have the property, but it is argued that since the deed executed by him was not delivered his intention must fail. The Chancellor found "from the evidence that George C. Brinkmann executed said deed pursuant to a contract made with Lillian Trapp, and with his wife, Lena Brinkmann, for the benefit of Lillian Trapp . . ."

Although the decedent erroneously thought he had effectively conveyed the property during his lifetime, we hold that the evidence supports the finding of a contract to convey or devise, and the action of the Chancellor in vesting title in Lillian Trapp will be sustained.

The decree is affirmed.

HOLT, J., not participating.

POWERS *v.* CHISMAN.

4-9243 231 S. W. 2d 598

Opinion delivered June 26, 1950.

W. J. Cotton and *F. O. Butt,* for appellant.

Henley & Henley, for appellee.

DUNAWAY, J. Correctness of the judgment of the Boone Probate Court in denying appointment of a guardian of the person and estate of Elfie Leam Chisman as an incompetent person is the main issue on this appeal. The court's order as to costs and certain fees is also questioned on appeal and cross-appeal.

Appellee, Elfie Leam Chisman, is an elderly widow who returned to live in Harrison, Arkansas, with her sister, Allie M. Powers, from her home in Denver, Colorado, following the death of appellee's husband in December, 1949. Before leaving Denver, appellee sold her home, and later deposited part of the proceeds of the sale in the Commercial Bank in Harrison and invested

the balance in U. S. government bonds. The bonds were payable to appellee and her sister, and the bank account was in their joint names. Appellee lived with Mrs. Powers during the month of March, 1949, until she went to Windsor, Missouri, to visit a Mrs. Means, an aunt by marriage. Upon her return to Harrison she stayed with Mrs. Powers for several days, and then boarded with a Mrs. Cochran until she was injured in a fall about eight weeks later. She then remained in the Harrison Clinic for fifteen days, when she again went to the home of Mrs. Powers where she stayed until July 17, 1949. Mrs. Powers suffered a heart attack on July 14, 1949; following this Dr. Powers, husband of Allie M. Powers, took appellee to Windsor, Missouri.

In March, 1949, Mrs. Powers had taken appellee to the office of R. E. Rush, an attorney in Harrison, where she executed a will naming Mrs. Powers as the principal beneficiary.

On August 10, 1949, James B. Wilson, an attorney of Windsor, Missouri, came to Harrison with a power of attorney from appellee, and sought to gain possession of all appellee's property to remove it to Missouri. Thereupon, Mrs. Powers filed petition in the probate court seeking appointment of a guardian of the person and estate of appellee, alleging her incompetency "by reason of ill health and feeble mind". Value of appellee's estate was listed as approximately $13,000 in cash and bonds.

On August 11, 1949, the referee in probate made an order appointing T. N. Flinn guardian of the person and estate of Elfie Leam Chisman. Proper bond was filed, letters of guardianship were issued, and Flinn took charge of the estate of Mrs. Chisman.

Appellee then on September 20, 1949, filed a motion to quash the order appointing a guardian on the ground that no service of process on her was had as required by Ark. Stats. (1949 Suppl.) § 57-611. On September 23, 1949, the probate court found that the notice required by law had not been given and sustained the motion as to appointment of a guardian of the person of Elfie Leam

Chisman, but continued the matter as to the guardianship of her estate within the court's jurisdiction until a hearing on the merits. Exceptions to this action were duly saved by appellee, but in view of the court's final action in the matter we do not pass upon this phase of the proceedings.

At the hearing on the merits, both Mrs. Powers, the petitioner, and Mrs. Chisman, the alleged incompetent, testified. Each side presented lay witnesses whose testimony was in direct conflict as to appellee's competency. The medical testimony likewise was conflicting, with two doctors testifying for each side. In view of this conflict, the court appointed a disinterested physician to make an examination and report his findings as authorized by Ark. Stats. (1949 Suppl.) § 57-615. This doctor testified that in his opinion appellee is competent.

The definition of an incompetent as set out in the Probate Code of 1949 (Ark. Stats. (1949 Suppl.) § 57-601) does not change the test of competency approved by this court in many decisions. As we said in the recent case of *Kelley* v. *Davis,* 216 Ark. 828, 227 S. W. 2d 638: "The legal test of competency for the purpose here under consideration was fully discussed in *Schuman* v. *Westbrook,* 207 Ark. 495 at page 499, 181 S. W. 2d 470, 472, where we said, 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 itself is 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 comprehend and understand the nature and effect of the business he is doing . . .' ".

The probate judge held the evidence insufficient to establish the incompetency of appellee. Although there is testimony which would have supported a contrary

holding, we cannot say the trial court's finding is against the preponderance of the testimony; so under our established practice we will not substitute our judgment for that of the court below. *Boyland* v. *Boyland,* 211 Ark. 925, 203 S. W. 2d 192.

Appellants earnestly insist that the trial court erred in not allowing Flinn any fee for services as guardian during the time he held possession of appellee's estate under the original appointment by the referee. Likewise it is urged that the attorney for the guardian is entitled to compensation for his services to be paid by appellee. The court held that since the original order was without notice to appellee as required by law and hence invalid; and the guardianship dismissed on a hearing on the merits, that the court was without power to order these payments made from appellee's estate.

Appellants argue that the guardianship of the estate should be treated as a temporary guardianship as authorized by Ark. Stats. (1949 Suppl.) § 57-620. That section reads as follows: "If the court finds that the welfare of an incompetent requires the immediate appointment of a guardian of his person or of his estate or of both, it may, with or without notice, appoint a temporary guardian for the incompetent for a specified period not to exceed ninety days, and remove or discharge him or terminate the trust. The appointment may be to perform duties respecting specific property or to perform particular acts, as stated in the order of appointment. The temporary guardian shall make such reports as the court shall direct, and shall account to the court upon termination of his authority. In other respects the provisions of this Code concerning guardians shall apply to temporary guardians and an appeal may be taken from the order of appointment of a temporary guardian. The letters issued to a temporary guardian shall state the date of expiration of the authority of the temporary guardian."

It will be noted that this provision authorizes appointment of a guardian without notice where the court finds that it is immediately necessary for the welfare of

the incompetent. The statute limits the time for which such appointments may be made and directs that such time be specified in the order of appointment. In the case at bar, the original order was made simply on the basis of the verified petition of Allie M. Powers. The proceeding was not instituted as one for the appointment of a temporary guardian, and the order made was not in conformity with the statutory requirements.

The provision of the Probate Code of 1949 authorizing the appointment of a temporary guardian without notice should certainly not be given so liberal a construction that an invalid guardianship order can be made the basis of charging the estate of one subsequently held to be competent, for services rendered at the instance of the adverse petitioner. The court correctly denied the allowance of guardian's and attorney's fees against appellee. Both Flinn and the attorney undoubtedly performed valuable services in good faith and should be recompensed by Mrs. Powers.

The final question, raised on cross-appeal, concerns the court's allowance of a fee to the examining physician appointed by the court. This fee was ordered paid from appellee's estate. The section of the statute which authorizes such appointment contains this language: "The court shall fix the fees to be paid such examiners, which shall be charged as part of the costs of the proceeding. The costs of the proceeding shall be paid by the petitioner, who shall be reimbursed therefor out of the estate of the incompetent, if a guardian be appointed."(Ark. Stats. (1949 Suppl.) § 57-615).

The statute plainly provides that the petitioner shall pay the costs of the proceedings, including the fee of the examining physician appointed by the court, subject to reimbursement if a guardian is appointed. Here no guardian was appointed. It follows that the petitioner is not entitled to reimbursement from the estate of appellee and that the probate court improperly ordered appellee to pay this item.

The judgment is accordingly affirmed on appeal and reversed on cross-appeal.

4-9197 231 S. W. 2d 117

Opinion delivered June 26, 1950.

[redacted]

G. P. Houston, Sam Rorex and *Gordon Armitage,* for appellant.

Leon Reed, Golden Blount and *A. F. House,* for appellee.

HOLT, J. The parties here were married October 17, 1948. May 26, 1949, appellee, J. H. Bridwell, sued for divorce alleging indignities. Appellant answered with a general denial and, in a cross complaint, asked for a divorce on the same ground (indignities) as alleged by her husband, and in addition asked for property settlement.

The trial court awarded appellee a divorce and allowed appellant a property settlement in the amount of $7,500. The cause comes to us on direct and cross appeal.

For reversal, appellant first questions the sufficiency of the evidence to support the decree of divorce to appellee.

At the time of the marriage, appellant had been twice married, and was 42 years of age. Appellee, also, had had two previous marriages and was 56 years old. A short time before the marriage here (June 23, 1948) the parties entered into a premarital contract whereby it was "mutually agreed by the parties hereto that when they enter into the Holy bonds of wedlock that the party of the second part shall have as her share and interest in full, including homestead and dower, in his estate should he predecease her, the sum of Ten Thousand ($10,000.) Dollars."

The evidence is voluminous and much of it is in conflict. We do not attempt to set it out in detail. Neither party was without blame. Almost from the beginning of the marriage there were frequent quarrels, discord and acts on the part of each that made their marriage venture almost certain to end in failure. The Chancellor found especially that appellant was given to cursing, and to the use of the most vile and obscene language toward appellee, such as to show extreme contempt for him. While, as indicated, the husband was not blameless, we are unable to say that the findings of the trial court on the divorce branch of the case is against the preponderance of the evidence. But appellant argues that all acts of indignities of the wife were condoned by appellee by continuing to cohabit with her after their occurrence. We

cannot sustain this contention on the facts before us. Here it appears undisputed that appellant left appellee on May 19th or 20th, went to her daughter's home in DeWitt and while there, without her husband's knowledge, employed an attorney to file suit for divorce. She returned home, unannounced, from this trip on May 25th, and immediately packed, and attempted to conceal, certain belongings, while her husband was engaged at his store. On coming to the house late in the afternoon and discovering his wife's return and her plans, a violent quarrel and encounter followed which resulted in their immeidate and final separation. The evidence does not show any cohabitation after May 20th and the outbreak of May 25th above, for which appellant appears to have been largely responsible, appears but a continuation of previous indignities, and condonation does not apply, in the circumstances.

The general rule is stated in 17 Am. Jur., p. 249, § 197. The text recites: "Condonation is a conditional, rather than an absolute, remission of the offense, the implied condition being that the offense will not be repeated and that the guilty party shall not in the future commit any other matrimonial offense or, as if it is frequently expressed, that the offender will treat the injured party with conjugal kindness."

Our own decisions are in accord with the general rule. In *Denison* v. *Denison,* 189 Ark. 239, 71 S. W. 2d 1055, we said: "Upon the merits of the case, it may be said that the testimony is voluminous and conflicting, but, after carefully considering it, we are unable to say that the allegations of appellee's complaint are not supported by a preponderance of the testimony. No attempt was made to show that appellant was guilty of conduct involving moral turpitude. The testimony relates to the infirmity of her temper, which, according to appellee's testimony, was irascible and ungovernable.

"It is argued that the more violent outbreaks were condoned, because the parties continued to cohabit as man and wife after their occurrence. But not so. One indignity might not — and usually would not — afford

ground for divorce. It is the persistence of one spouse in a course of conduct which becomes intolerable to the other of which the law takes cognizance and grants relief by way of divorce, and the doctrine of condonation has no application under the facts of this case. *Longinotti* v. *Longinotti,* 169 Ark. 1001, 277 S. W. 41," and in *Franks* v. *Franks,* 211 Ark. 919, 204 S. W. 2d 90, we reaffirmed our holding in the Denison case and said:

"Assuming, without deciding that her acts in returning and resuming the marital relation, based on his promises not to repeat the offense, constituted condonation for past mistreatment, still it was only conditional condonation. If the condition is broken by future misconduct, condoned past conduct may then be relied on in support of an action for divorce on the subsequent misconduct or both. In *Longinotti* v. *Longinotti,* 169 Ark. 1001, 277 S. W. 41, we said: 'The law is well settled that either spouse may condone conduct of the other which, but for the condonation, would entitle the innocent spouse to a divorce. But it is equally as well settled that condonation does not deprive the aggrieved spouse of the right to a divorce on account of the subsequent misconduct of the offending spouse. On the contrary, subsequent misconduct will generally operate to revive the right to a divorce for the condoned offense.' See, also, *Denison* v. *Denison,* 189 Ark. 239, 71 S. W. 2d 1055."

We also hold that the decree of the trial court awarding appellant $7,500. should be affirmed.

The parties were able to live together for less than eight months. Appellant brought to the marriage venture no property, while appellee was possessed of very substantial means. Although appellant is held to be at fault and therefore not entitled to any part of appellee's property, as a matter of law, it was entirely within the discretion of the trial court whether any award should be made to her in the circumstances.

We said in *Ray* v. *Ray,* 192 Ark. 660, 93 S. W. 2d 665: "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; section 3511, Crawford & Moses' Digest, 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."

It appears that appellee, during the pendency of this litigation, has paid to appellant approximately $329.50 as fees for her attorneys, alimony of $100 per month from January, 1949, costs of printing her brief in the amount of $166, or approximately $1,095. He asked that he be credited with this amount and that it be deducted from the $7,500. awarded appellant. We think, in the circumstances, that appellee is not entitled to this deduction and his request, therefore, is denied.

Accordingly, the decree is affirmed on both direct and cross appeal, appellee to pay all costs in both courts and no additional attorneys' fee to appellant's attorneys is allowed.

George Rose Smith, J., not participating.

Citty *v.* Sharpe.

4-9231 231 S. W. 2d 120

Opinion delivered June 26, 1950.

Ted Goldman, for appellant.

Shaver, Stewart & Jones, for appellee.

DUNAWAY, J. Appellant Citty sought to recover from appellee Sharpe for damages sustained as a result of loss by fire of a truck owned by appellant. Purchase of the truck had been financed through appellee's company, and as basis for recovery against appellee, appellant alleged breach of an oral contract to provide insurance coverage on the truck. The trial court directed a verdict for the defendant at the conclusion of plaintiff's testimony. From that action comes this appeal.

In August, 1947, M. L. Citty, appellant's brother, bought a panel truck for $1,500, financing payment of the purchase price and insurance through appellee, doing business as Texarkana Finance Company. From the record it appears that a renewal policy of insurance for $1,500 was issued August 22, 1948, to expire April 22, 1949. This policy was made payable to M. L. Citty and C. E. Sharpe, as their interest might appear. The Certificate of Insurance recites an encumbrance on the truck of $608, payable in eight installments of $76 each, with the final installment due April 16, 1949. The insurance premium was $38.92.

On June 10, 1948, appellant bought the truck from his brother, paying him $400 and assuming the balance of the indebtedness due appellee. Appellant continued to make the monthly payments of $76 under the contract of his brother with appellee until January, 1949.

At that time he desired to have the monthly payments reduced, and entered into a new contract with

appellee. There remained unpaid on the original note the sum of $304. On January 11, 1949, appellant paid four dollars in cash, and executed a new note in the amount of $330, representing the unpaid balance on the old note plus the agreed interest at ten per cent. That note and mortgage contained this provision concerning insurance on the truck: "The Mortgagor Agrees as Follows: . . .

"That the Payee hereof or assigns may keep said motor vehicle insured to the full amount due on this note or such part thereof as they may be able to obtain with loss payable to Payee as his interest may appear."

The truck was destroyed by fire in June, 1949. When this was reported to appellee with a request that the insurance company be notified, appellant was informed that the insurance on the truck had expired April 22, 1949. Thereafter, this action was begun to recover from appellee the sum of $1,250, alleged to be the market value of said truck when it was destroyed.

Appellant testified that appellee in June, 1948, had agreed to have the policy of insurance then in force changed from his brother's name to that of appellant; that this was not done, with the result that he did not receive the notice from the insurance company that the policy would expire on April 22, 1949. He further testified that when the new note and mortgage were executed in January, 1949, appellee told him that the insurance remained unchanged and that he would have coverage until the truck was paid out.

It is undisputed that appellee did not charge or collect any premium for insurance when the new note was executed. The rights of the parties must be determined by the written contract of January 11, 1949, which could not be varied by parol. *Graves* v. *Bodcaw Lumber Co.*, 129 Ark. 354, 196 S. W. 800.

At most appellant could introduce testimony of a verbal contemporaneous agreement only in explanation of the ambiguous language of the contract already quoted, that appellee might insure the truck for the amount due

on the note. At the trial appellant admitted that he had made no payments since the fire and that there remains unpaid on the note the sum of $180. Even assuming an agreement on the part of appellee to procure insurance to the amount of the unpaid balance of the note, the amount remaining unpaid would be the limit of his liability to appellant for his failure to do so. Since it is admitted that appellant has not paid the balance due at the time of the fire, he has not shown that he has been damaged.

We hold, therefore, that the trial court correctly directed a verdict for appellee. Appellant can still raise this issue in defense if appellee seeks to recover the balance due under the note of January 11, 1949.

The judgment is affirmed.

SANDERS *v.* BAKER.

4-9233 231 S. W. 2d 106

Opinion delivered June 26, 1950.

[redacted]

Chas. F. Cole, for appellant.

R. W. Tucker, for appellee.

MINOR W. MILLWEE, Justice. This is a suit by Ernest Sanders, Jr. to quiet title to a strip of land 50 feet wide and 350 feet long on the west side of Frl. Block 22 of Maxfield's Second Eastern Addition to the City of Batesville, Arkansas, and to cancel a deed of said lands from Alph Shirley and wife to appellee, Leona Baker. Appellant asserted ownership of the disputed strip by adverse possession since November 3, 1938, when he purchased four lots in Frl. Block 22 adjoining the land in controversy on the east from Claude Hill and wife. All of Frl. Block 22 was formerly owned by Theodore Maxfield, who conveyed the four lots now owned by appellant to the latter's predecessor in title about 1905. On December 12, 1947, the executors of the Maxfield estate conveyed lots 1 and 6 in Frl. Block 22 to Alph Shirley and wife who conveyed to appellee on April 2, 1948.

After a hearing the chancellor made the following findings: "The Court in this case is of the opinion that Mrs. Baker's title to Lots One and Six of Fractional Block 22, Maxfield's Second Eastern Addition, or the strip of ground 50 feet by 350 feet lying on the east side of 23rd Street is good as against the claimant Ernest Sanders, under the facts and circumstances and for reasons as follows:

"The Court is of the opinion that Mr. Sanders under the evidence has almost a perfect case of adverse possession except for one element which is the element of intent, and the facts and evidence touching on the acts of intent, as the Court sees it, are about as follows.

"First, in favor of Mr. Sanders, the evidence shows that he built a house on his own land adjacent to the

strip and during the period of occupancy had some truck patches on the strip in question, and at one time rented a portion of the strip to another party. That on another occasion when a couple of neighbors were out talking to him he told them that he owned all the land. The evidence also shows that at the time Mr. Sanders bought it and moved on the land and during the whole period of occupancy the entire piece of land was under fence and inclosed.

"On the other hand, the following, in the opinion of the Court, indicate that perhaps Mr. Sanders did not have the intent to hold the land as his own and adversely. In the first place, the Court notes that the fence was not erected by Mr. Sanders but was already there when he moved on the ground. In the second place, the block of ground in question which is Block 22 of Maxfield's Second Eastern Addition as shown on the recorded plat is not lotted, but the plat shows that other blocks adjacent to this block were lotted and in such a manner that Lots One and Six would have comprised the strip of ground in question had Block 22 been lotted. In the third place, the deed that Mr. Sanders received from Mr. Hill to the land described his land as Lots Two, Three, Four and Five of said Block 22, which may have been some indication to Mr. Sanders and others that it was not the intention of the grantors to convey him the entire block of ground since Lots One and Six were not mentioned. All of the above facts and circumstances are to be considered with the following: In the fourth place, after the period of occupancy, one Shirley who had obtained a deed from Maxfields to Lots One and Six entered upon the land and erected a fence around the ground in question or rather on the east side of the disputed strip; that he did this apparently in the presence of and close to the home of Mr. Sanders, and it appears that Mr. Sanders at the time and at no immediate time thereafter made objection, but, on the other hand, Mr. Sanders went to Mr. Shirley, the grantor, later on to Mrs. Baker, and made an effort to purchase from him Lots One and Six, and at no time made any claim that he owned Lots One and Six. And in the next place, and to the Court's mind the strong-

est circumstance was that later Mr. Sanders went to the defendant, Mrs. Baker, who had purchased from Mr. Shirley, and attempted to buy the lots from her; that according to the undisputed testimony of Mrs. Baker and without Mrs. Baker requesting it, Mr. Sanders went to her seven or eight times in an effort to buy the two lots, and during these conversations trades were discussed back and forth, and prices were discussed indicating trading on the face value of the lots, and at no time did Mr. Sanders indicate to her that he was claiming any interest or had ever claimed any interest in the lots in question. And the Court is of the opinion that during the period of occupancy that it was not the intent of Mr. Sanders to claim title to this strip of land." A decree was accordingly entered dismissing appellant's complaint and quieting title to the land in controversy in appellee.

For reversal it is earnestly insisted that the chancellor's conclusion that appellant did not intend to hold the lands adversely is against the preponderance of the evidence. It is well settled that the intention to hold adversely is an indispensable element of adverse possession. *Moir* v. *Bailey,* 146 Ark. 347, 225 S. W. 618. Appellant argues that no weight can be attached to his conversations and negotiations with appellee and others in which he sought to purchase the disputed tract and made no contention at the time that he was claiming title thereto. It is insisted that when these negotiations took place appellant's title by adverse possession had already vested and could not be divested by parol abandonment under the rule recognized in *Stroud* v. *Snow,* 186 Ark. 550, 54 S. W. 2d 693, and *Hart* v. *Sternberg,* 205 Ark. 929, 171 S. W. 2d 475. In *Deweese* v. *Logue,* 208 Ark. 79, 185 S. W. 2d 85, we said: "It is true, admissions and declarations made by claimant after a title has been acquired by adverse possession cannot operate to defeat it, but they are nevertheless admissible to show the character of possession prior to the lapse of time necessary to give title and bear on the question whether claimant's possession was in fact hostile. See 2 C. J. 272; *Hutt* v. *Smith,* 118 Ark. 10, 175 S. W. 399. In the case of *Russell*

v. *Webb,* 96 Ark. 190, 131 S. W. 456, this court upon rehearing said: 'Any act or conversation recognizing the claim of the original owner after the seven years' occupancy would tend to show that the possession held during the statutory period was not adverse. Though such testimony is not admissible for the purpose of divesting title out of the adverse occupant and revesting it in the original owner, it is perfectly admissible for the purpose of showing that the possession of the occupant was not adverse, and that the occupant did not acquire title by the possession, which was only permissive. *Shirey* v. *Whitlow,* 80 Ark. 444, 97 S. W. 444; *Hudson* v. *Stilwell,* 80 Ark. 575, 98 S. W. 356.' " See, also, *Sloan* v. *Ayers,* 209 Ark. 119, 189 S. W. 2d 653; *Lowe* v. *Cox,* 210 Ark. 169, 194 S. W. 2d 892.

Appellant did not specifically deny the conversations and negotiations with appellee and others relative to his offer to purchase the property nor did he assert that such offers were made for the purpose of buying his peace and avoiding litigation. As reflected by the chancellor's findings, the question whether appellant occupied the property in dispute with the intent to claim adversely is sharply disputed. In view of the chancellor's favored position in passing on the credibility of the various witnesses, we cannot say that his determination of this factual issue is against the preponderance of the evidence.

Appellant also contends that the deed to appellee from Alph Shirley and wife is defective in that it describes lands which cannot be located by reference to the official plat of Block 22. The recorded plat shows Frl. Block 22 to be 350 feet long running north and south along the east line of 23rd St. between Boswell and Porter Streets. The deed to appellee contains the following description: "Lots One (1) and Six (6) in Frl. Block Twenty-two (22) of Maxfield's Second Eastern Addition to the City of Batesville, Arkansas. Said Lots are 50 feet on Boswell and 50 feet on Porter Street, and 350 feet on line of 23rd Street, and are on intersection of Boswell and 23rd Streets and Porter and 23rd Streets." We have said that the office of the description

in a deed is not to identify the land, but to furnish the means of identification. *American Investigation Co.* v. *Gleason,* 181 Ark. 739, 28 S. W. 2d 70. It is true that Frl. Block 22 is not subdivided into lots on the official plat but, as pointed out by the chancellor, other blocks in the addition are subdivided in such manner that Lots 1 and 6 would have comprised the property in controversy had Frl. Block 22 been subdivided. The property in controversy may readily be identified by reference to the official plat from the description used in the deed to appellee.

Moreover, we have repeatedly held that in suits to quiet title the plaintiff must succeed, if at all, as in actions of ejectment, upon the strength of his own title, and cannot rely upon the weakness of his adversary's title. *Bullock* v. *Duerson,* 95 Ark. 445, 129 S. W. 1083; *Chavis* v. *Henry,* 205 Ark. 163, 168 S. W. 2d 610. Appellant had no record title to the land in controversy. Since we have concluded that the chancellor's finding on the issue of adverse possession is not against the preponderance of the testimony, it follows that the decree must be affirmed.

McGarity *v.* State.

4625 231 S. W. 2d 109

Opinion delivered June 26, 1950.

[redacted]

Reimberger & Eilbott and *Lawrence E. Dawson,* for appellant.

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

ED. F. MCFADDIN, Justice. Appellant was convicted and fined for permitting his livestock to run at large in violation of the 1948 Initiated Act No. 1 of Jefferson County; and this appeal ensued.

The case was tried on facts stipulated as follows:

". . . that on May 1, 1949, Lonzo McGarity, a resident of Jefferson County, permitted his hogs, 14 in number, to run at large in Jefferson County, Arkansas, after having first been notified by Douglas Riley to put up and confine said hogs, and after such notice defendant refused to do so.

"It is further understood and agreed that there is no county-wide stock law in Pulaski County."

The said Initiated Act No. 1—adopted by the voters of Jefferson County at the 1948 General Election[1]—reads in part:

"That, from the effective date of this act, it shall be unlawful for any livestock to run at large in Jefferson County, and whenever any livestock are (is) running at large, it shall be the duty of the owner thereof, within twenty-four hours after verbal or written notice of such fact, to take up such livestock and confine them; and in case of such owner's failure or refusal to do so, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined a sum of not less than $10 nor more than $50 for each offense, and each day the said livestock shall run at large after such notice shall constitute a separate offense."

[1] Authority for such a County law as this is found in Initiative and Referendum Amendment No. 7 to our Constitution. See, also, *Dozier* v. *Ragsdale,* 186 Ark. 654, 55 S. W. 2d 779, and *Tindall* v. *Searan,* 192 Ark. 173, 90 S. W. 2d 476.

Appellant relies on the Florida case of *Thomas* v. *Mills,* 107 Fla. 385, 144 So. 882, as authority for reversal. The Florida law required a County to fence its boundaries before putting a County stock law into effect. We have no such requirement in Arkansas; so the Florida case is not ruling. The stipulated fact—that Pulaski County (adjoining Jefferson County), has no law prohibiting cattle from running at large—is of no benefit to the appellant, because he is a resident of Jefferson County. See *Linehart* v. *Bruton,* 207 Ark. 536, 181 S. W. 2d 468. Furthermore, one residing outside the affected territory is guilty of law violation if he knowingly allows his cattle to cross the boundary into a prohibited territory in violation of a stock restraint law. See *DeQueen* v. *Fenton,* 100 Ark. 504, 140 S. W. 716.

In view of the stipulated facts in this case, and our holdings in the case of *Smith* v. *Plant,* 179 Ark. 1024, 19 S. W. 2d 1022, and *Turnage v. Gibson,* 211 Ark. 268, 200 S. W. 2d 92, this case must be affirmed, since we are unable to perceive any reason why these cases are not ruling in the case at bar.

Affirmed.

CITY OF HARRISON *v.* SNYDER.

4-9249 231 S. W. 2d 95

Opinion delivered June 26, 1950.

W. J. Cotton, for appellant.

Willis & Walker, for appellee.

MINOR W. MILLWEE, Justice. Appellee, Garland Snyder, operates a grocery store in a residential section of the City of Harrison, Arkansas. By this suit against the City of Harrison and its mayor, appellee challenges the validity of Ordinance 393 of said city which amended Ordinance 385, an ordinance regulating the manner of collection and disposal of garbage and waste by the Sanitation Department of the city and fixing a schedule of fees to be charged for said services.

After levying a fee of $1.50 per quarter for each single family dwelling house and each unit of a multiple dwelling house, actually occupied as a residence, Section One of the amended ordinance provides: "All business, commercial and industrial houses, and other non-residential houses of any nature, shall be assessed for the collection of garbage, waste, trash and refuse, a reasonable sum per quarter to be determined by the Mayor, City Health Officer and Sanitation Committee of the City Council in keeping with the above schedule, except that no house nor place of business, having any waste, shall be assessed less than $1.50 per quarter. The fees due under this Sub-section are levied upon and shall be collectable from the owner, manager or occupants of said non-residential house."

Acting under the above section, the Mayor, City Health Officer and Sanitation Committee fixed a garbage fee of $3.00 per quarter for all commercial or non-residential houses without further approval or ratification by the city council either by resolution or ordinance. Appellee was arrested and fined for failure to pay the quarterly assessment of $3.00 against his grocery store. Although appellee alleged that the entire ordinance was unconstitutional and void for various reasons, in the course of the trial he abandoned all grounds of attack except the charge of invalidity against that part of section 1 which delegates to the committee named the power and authority to fix the garbage fee applicable to commercial property.

Hence, the only question for decision is whether a city council can delegate its legislative power to a committee to fix a garbage fee. The chancellor held that it could not and his findings are incorporated in the decree as follows: "That Ordinance 385, approved by the City Council of the City of Harrison on the 1st day of April, 1947, and Ordinance 393 amending said Ordinance 385, is void only in so far as it attempts to delegate to the Mayor, City Health Officer, and Sanitation Committee of the City Council the power and authority to fix garbage fees as provided in section 1 of said Amendment 393; and the Mayor and City of Harrison are attempting to exact from the plaintiff the sum of $3.00 per quarter garbage assessment as fixed by the Mayor, City Health Officer, and Sanitation Committee of the City Council; and that said actions on the part of the defendants Guy Raulston, Mayor of the City of Harrison, and the City of Harrison, in attempting to exact $1.50 per quarter in excess of the minimum amount fixed by section 1 of said Ordinance No. 393, is an illegal exaction of plaintiff because said amount in excess of the $1.50 minimum was fixed by the Mayor, City Health Officer, and Sanitation Committee of the City Council as a ministerial act and not passed on, adopted or approved by the City Council of the City of Harrison, Arkansas.

"And the Court further finds that the $1.50 in excess of the minimum fixed by said ordinance is an illegal exaction attempted on the part of the defendants Guy Raulston, Mayor of the City of Harrison, and the City of Harrison, and that said defendants should be permanently enjoined from collecting or attempting to collect in excess of $1.50 per quarter since the effective date of said ordinance." The court refused to enjoin the city from collecting fines assessed against appellee on charges still pending in the circuit court.

We have held that it is within the police power of a municipal corporation to control and regulate the manner of collection, removal and disposal of garbage and that a city may properly provide a penalty for violation of such regulations. *Guerin* v. *City of Little Rock,* 203 Ark. 103, 155 S. W. 2d 719. In 62 C. J. S., Municipal Corporations, § 154 (b), it is said: "The right to delegate power by municipal authorities rests on the same principle and is controlled in the same way as the delegation of the legislative power by the state, and the prohibitions against delegation of municipal legislative authority are substantially the same as those against prohibition of delegation of state legislative authority." It is also well settled that functions exclusively legislative must be exercised by the legislature and cannot be delegated. Thus, the legislature cannot delegate its power to tax or fix the tax rate. 16 C. J. S. Constitutional Law, § 133 (a).

The applicable rule is stated in McQuillin, Municipal Corporations, (2d Ed.), § 395, as follows: "The rule is well settled that legislative power cannot be delegated. So far as the powers of a municipal corporation are legislative they rest in the discretion and judgment of the municipal body intrusted with them, and the general rule is that that body cannot delegate or refer the exercise of such powers to the judgment of a committee of the council, or an administrative officer of the city." In the same section it is pointed out that this rule does not preclude the appointment of administrative agents for the performance of administrative or ministerial duties in making effective the legislative will. The author fur-

ther says: "There is a clear distinction between legislative and ministerial powers. The former cannot be delegated; the latter may. Legislative power implies judgment and discretion on the part of those who confer it." This doctrine has frequently been approved by this court. *State* v. *Davis,* 178 Ark. 153, 10 S. W. 2d 513; *Satterfield, Mayor* v. *Fewell,* 202 Ark. 67, 149 S. W. 2d 949.

While the council may not delegate its powers to a committee, when it ratifies the act of the committee in due form it becomes the act of the council. McQuillin, Municipal Corporations (2d Ed.) § 645; *Herring* v. *Stanmus,* 169 Ark. 244, 275 S. W. 321. Thus, it was proper for the council to refer the matter of a reasonable fee to be charged to the committee named in the ordinance provided the fee recommended is duly ratified by the council. In this connection, we recently held that a city ordinance cannot be repealed, amended or suspended by resolution, but may be repealed, amended or suspended by ordinance only. *Meyer* v. *Seifert,* 216 Ark. 293, 225 S. W. 2d 4. The vice in § 1 of Ordinance 393 is that it delegates the power to finally fix garbage fees to a committee without ratification by the municipal body clothed with legislative authority under our constitution and statutes.

Counsel for the city cites *American Baseball Club* v. *Philadelphia,* 312 Pa. 311, 167 Atl. 891, 92 A. L. R. 386, in support of his contention that authority to fix reasonable garbage fees was properly delegated to the committee named in the ordinance. The ordinance involved in that case requried those giving athletic contests to pay a license fee based upon the number of policemen or firemen necessary to protect the public safety at such contests. The court held that the delegation of legislative authority was not involved in making the amount of the required license fee dependent upon a reasonable estimate of the number of policemen and firemen which, in the opinion of the director of public safety, may be necessary to protect the public safety. The court emphasized the fact that the ordinance dealt with special

services rendered by the city to a seasonal business conducted for private profit and involved the extraordinary use of municipal facilities. Obviously it would be unreasonable, if not impossible, to require the city council to meet every time a baseball game was played to determine the number of policemen necessary to maintain order during the particular contest. The court also pointed out that the rate of the exaction for the license was fixed by the ordinance, "but the application of the rate is dependent upon extraneous facts to be found by an administrative official."

In the case at bar we are not dealing with the validity of a license for special services rendered by a municipality to a particular business. The garbage assessment is a permanent exaction in the nature of tax which is applicable to all occupants or owners of dwelling and business houses in the city. The ordinance here delegates authority to the committee to fix the permanent rate of the assessment and not merely the application of the rate to a particular transaction. This is a legislative matter properly resting in the judgment and discretion of the city council and may not be delegated to a committee. The chancellor correctly so held, and the decree is affirmed.

BAKER *v.* ALLEN.

4-9246 231 S. W. 2d 98

Opinion delivered June 26, 1950.

W. F. Reeves, V. D. Willis and *W. S. Walker,* for appellant.

Henley & Henley, N. J. Henley and *J. F. Koone,* for appellee.

ED. F. MCFADDIN, Justice. This is a contest for the office of School Director. At the annual school election in 1949, appellant and appellee were rival candidates; and on the face of the returns, appellee was the victor. On October 7th appellant filed contest before the County Board of Education and made a bond conditioned in the exact language of § 3-1210 Ark. Stats. The appellant was unsuccessful in the contest before the County Board and filed his affidavit for appeal to the Circuit Court, but did not tender or file any bond for appeal.

In the Circuit Court appellee moved to dismiss the appeal on the ground that the appellant had not filed an appeal bond under Act 183 of 1925.[1] The Circuit Court sustained the said motion in this language:

". . . It is therefore considered, ordered, adjudged and decreed that Contestant's appeal should be and the same is hereby dismissed for failure to file the appeal bond as required by law, . . ."

The correctness of the Circuit Court's judgment is the only question presented on this appeal. Appellant thus states the issue:

"The sole question presented to the court in this appeal is whether or not the bond given by appellant when he filed his contest against the appellee . . . meets the requirements of Act 183 of 1925, requiring the applicant in all cases appealed from the County Board of Education where the money judgment is involved, to give bond for the payment of costs."

Appellant claims that the bond which he filed at the beginning of his contest before the County Board was

[1] See Compiler's Note following § 80-213 Ark. Stats.

amply sufficient for all purposes, since it was conditioned ". . . that the contestant and his securities will pay to the contestee or defendant in the action, and the officers of the court, such sum of money as shall be adjudged against him in the court in which the suit shall be brought or in any court to which it shall be carried by appeal or otherwise."

But Act 183 of 1925 says ". . . any person or persons being a party to the record or proceeding in a manner brought before any county board of education, who feels aggrieved by any final order or decision of any such Board of Education, may prosecute an appeal from any such final order or decision, provided, any such person or persons shall within thirty (30) days from the date of the final order or decision complained of, . . . enter into a bond with good and sufficient surety thereon in such sum as shall be ordered by such Board of Education . . ."

That Act 183 of 1925 is the Statute governing appeals from the County Board of Education to the Circuit Court has been held in a series of cases, two of the most recent of which are *Board* v. *Norfork District,* 216 Ark. 934, 228 S. W. 2d 468, and *Gibson* v. *Board, ante,* p. 386, 230 S. W. 2d 44 (decided May 29, 1950). In the last mentioned case the failure to file the bond was held to be fatal to the appeal. *Gibson* v. *Davis,* 199 Ark. 456, 134 S. W. 2d 15, held that Act 183 of 1925 was not repealed by Act 169 of 1931.

The Legislature has plenary power to prescribe the time and manner of appealing from the County Board of Education to the Circuit Court;[2] and by the quoted language above, the Legislature has prescribed that a bond shall be executed "within thirty days from the date of the final order . . ." This provision might have been so worded by the Legislature in order that the County Board would have full notice that an appeal was actually to be prosecuted, or it might have been so worded for some other reason; but, at all events, the Statute clearly says that an appeal bond shall be filed *after* the

[2] See *Jones* v. *Floyd,* 129 Ark. 185, 195 S. W. 360, and also *Horn* v. *School District,* 213 Ark. 490, 211 S. W. 2d 107.

County Board's ruling. The bond filed by the appellant at the beginning of his contest does not meet the requirements of the Statute; so the Circuit Court was correct in dismissing the appeal.

Affirmed.

MOSELY *v.* MOSELY.

4-9250 231 S. W. 2d 99

Opinion delivered June 26, 1950.

Louis Mishell and *Caviness & George,* for appellant.

Parker Parker and *F. D. Majors,* for appellee.

GEORGE ROSE SMITH, J. This will contest presents a single question of law. In 1933 the testator, B. B. Mosely, and the appellant, Alva Mosely, were married. In 1940 B. B. Mosely executed a will by which all his property was left to Alva. In 1945 the couple were divorced, and it may be assumed that Alva received a property settlement. Mosely married the appellee Verlon Mosely in January of 1949 and died the following June without having revoked the 1940 will. The other appellees, Mosely's two brothers and heirs at law, are

the real contestants of the will, as of course Verlon Mosely is entitled to her dower whether or not the will is valid. The probate judge refused to probate the will, holding that it was revoked by the divorce and property settlement.

The Probate Code provides that if a testator is divorced after making his will, all provisions in favor of the divorced spouse are revoked. Ark. Stats. 1947, § 60-407. But here the testator died on June 28, 1949, which was three days before the effective date of the Code. § 62-2002. We must therefore follow the law as it existed before the Code took effect.

Our earlier statute provided that no will should be revoked otherwise than by another written instrument executed with the same formalities, or by burning, tearing, cancellation, obliteration, or destruction, either by the testator himself or by some other person in his presence and by his direction and consent. § 60-113. In construing this statute we have uniformly held that the only methods of revoking a will are those enumerated in the statute. For instance, a testator's direction that his son destroy a will was held ineffective where the testator did not specify, as the statute requires, that the destruction be in his presence. *Reiter* v. *Carroll,* 210 Ark. 841, 198 S. W. 2d 163.

The appellees insist, however, that Mosely's divorce and property settlement revoked the will by operation of law. This doctrine of implied revocation was developed in the English ecclesiastical courts and later adopted at common law. It was originally confined to cases in which the testator had married or had a child after the execution of the will, and to that extent the doctrine has been widely adopted by statute in this country. But whether the doctrine extends also to revocation by divorce and property settlement depends upon the statute in the particular jurisdiction. These statutes are of two types, which lead to opposite results.

In some states the statute enumerates the methods of revocation just as our earlier act did and then contains this proviso: "excepting only that nothing contained in

this section shall prevent the revocation implied by law from subsequent changes in the conditions or circumstances of the testator." This is the wording of the Michigan law, and in the leading case of *Lansing* v. *Haynes,* 95 Mich. 16, 54 N. W. 699, 35 Am. St. Rep. 545, the court held that in view of this proviso the testator's later divorce and property settlement operated as a revocation. In other states having similar statutes the same result has been reached. *In re Hall's Estate,* 106 Minn. 502, 119 N. W. 219, 20 L. R. A. (N. S.) 1073, 130 Am. St. Rep. 621, 16 Ann. Cas. 541; *Pardee* v. *Grubiss,* 34 Ohio App. 474, 171 N. E. 375; *In re Bartlett's Estate,* 108 Neb. 681, 189 N. W. 390, 190 N. W. 869, 25 A. L. R. 39.

But where the statute does not contain such a proviso the courts have consistently held that the principle of implied revocation extends only to those changed circumstances that are expressly set forth, such as marriage or birth of issue. Consequently it is the rule in those jurisdictions that a will is not revoked by a later divorce and property settlement. *Robertson* v. *Jones,* 345 Mo. 828, 136 S. W. 2d 278; *Pacetti* v. *Rowlinski,* 169 Ga. 602, 150 S. E. 910; *In re Nenaber's Estate,* 55 S. D. 257, 225 N. W. 719. The statute we are now considering is of the latter type, and these decisions follow our own rule that the statutory methods of revocation are exclusive. We accordingly hold that Mosely's will was not impliedly revoked by the divorce proceedings.

Reversed.

AUSTIN *v.* MANNING, MAYOR.

4-9316 231 S. W. 2d 101

Opinion delivered June 26, 1950.

Abe Collins, for appellant.

Winfred Lake, for appellee.

LEFLAR, J. The City of DeQueen, under authority of Act No. 71 of 1949 (Ark. Stats., 1949 Supp., §§ 19-4801 to 19-4812),[1] adopted a city ordinance authorizing construction of a municipal gas transmission and distribution system, held a special election approving the ordinance by a vote of 956 to one, and is proceeding to sell bonds called for by the ordinance to finance the gas system. Plaintiff as a citizen and taxpayer asserted that Act 71 and the ordinance enacted under it are invalid and asked the Chancery Court to enjoin defendants Mayor, Recorder and aldermen of DeQueen (hereinafter identified as "the City") from proceeding thereunder. The Chancellor sustained the City's demurrer to the complaint, and plaintiff appeals.

Act 71 empowers municipalities not already served by any existing natural gas company to issue bonds for

[1] Another statute, Ark. Stats. § 19-2318, first enacted in a somewhat different form in 1875, authorizes cities to own and operate gas distribution systems, as well as other types of utility services, at least for some purposes. Also, see, Ark. Stats., § 20-316.

and to construct gas transmission and distribution systems, after approval by the electors at a special election, the bonds to be payable solely from revenues derived from the gas system and not to constitute an indebtedness of the municipality as such. The Act provides that "the notice, calling, publication and conduct of (the) election shall be governed by the provisions of Amendment No. 13 to the Constitution of 1874," and the DeQueen election approving the gas system was so governed and conducted.

Plaintiff's principal arguments for unconstitutionality are based upon Amendment 13, and are twofold: (a) that the Amendment includes no specific authorization to municipalities to construct gas transmission and distribution systems, and (b) that the proposed bonded indebtedness is not authorized by the Amendment. Our previous decisions have resolved these arguments against the plaintiff and in favor of defendant City.

Amendment 13 does not prohibit or relate to the incurring of indebtedness by cities when by its terms the indebtedness is not payable out of taxes but rather is payable altogether out of income or assets of the special and separable activity for which the debt is incurred. *McCutchen* v. *Siloam Springs,* 185 Ark. 846, 49 S. W. 2d 1037; *Jernigan* v. *Harris,* 187 Ark. 705, 62 S. W. 2d 5. "Self-supporting municipal activities may in a sense borrow on their own credit, independently of the city's credit." *Williams* v. *Harris, Mayor,* 215 Ark. 928, 934, 224 S. W. 2d 9, 12. In *Robinson* v. *DeValls Bluff,* 197 Ark. 391, 122 S. W. 2d 552, we sustained a municipal issue of bonds for construction of a barge terminal, the bonds being secured by and payable from the assets and income of the barge terminal alone. The fact that barge terminals are not mentioned in Amendment 13, just as gas systems are not mentioned, does not mean that indebtedness on their account is prohibtied. It is not prohibited when the indebtedness is of a self-liquidating type not controlled by Amendment 13. The proposed DeQueen bond issue is that type of indebtedness.

Plaintiff also argues that Act 71 is invalid under Article V, § 23 of the Constitution insofar as it provides

that "the notice, calling, publication and conduct of said election (at which the bond issue must be approved) shall be governed by the provisions of Amendment No. 13 to the Constitution of 1874."

The words of Article V, § 23, are:

"Sec. 23. *Revival, amendment or extension of laws.* No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length."

Section 23 does not prohibit the legislative drafting technique of cross-reference to other statutes governing related matters not actually "revived, amended, extended or conferred" by the particular enactment. "Such legislation, known as a reference statute, is quite common, and is uniformly upheld. It refers to another statute to regulate the procedure to make its provisions effective, and legislation would be very cumbersome and difficult if such acts were not held valid." *Jernigan* v. *Harris,* 187 Ark. 705, 710, 62 S. W. 2d 5, 7. See *Watkins* v. *Eureka Springs,* 49 Ark. 131, 4 S. W. 384; *State* v. *McKinley,* 120 Ark. 165, 179 S. W. 181; *Potashnick Local Truck System, Inc.,* v. *Fikes,* 204 Ark. 924, 165 S. W. 2d 615. The quoted reference in Act 71 to the election provisions of Amendment 13 was both permissible and effective.

Plaintiff next points out that the Mayor of DeQueen at once after the election issued a proclamation declaring the results and announcing that the election would be final unless contested within thirty days. It is urged that there was no justification in law for this limitation upon the time within which a contest might be initiated. Whether that interpretation of the law as to the time limit for a contest is correct or not, the fact remains that the contest was initiated within the thirty days, and plaintiff cannot now complain. He has contested the election, and there is nothing to indicate that his contest would have been any more effective had it been delayed.

By filing the contest when he did, he waived any right he may have had to wait until later to file it.

Plaintiff also asserts that the City has petitioned the Public Service Commission for authority to extend the services rendered by the proposed gas system to contiguous rural areas, including persons living along the route of the main gas transmission line between Okay and DeQueen, and that the Commission has taken this petition under advisement. The contention is that it would be unlawful for the City to render such service to these rural areas.

Our statute (Ark. Stats., § 73-264) permits any city which operates "facilities for supplying a public service or commodity to its citizens" to "extend its service into the rural territory contiguous to such municipality", subject to Public Service Commission approval. In *Arkansas Utilities Co.* v. *City of Paragould,* 200 Ark. 1051, 143 S. W. 2d 11, we pointed out that compliance with this statute, by securing Public Service Commission approval, is in the ordinary case an absolute prerequisite to the extension of municipally operated utility services into contiguous rural areas. Also see *Yancey* v. *City of Searcy,* 213 Ark. 673, 212 S. W. 2d 546. In the present case the City has quite properly filed its petition for authority thus to extend its services with the Public Service Commission. That is the forum in which the petition must be passed upon. The complaint asserts no facts that would give the Chancery Court any jurisdiction to pass upon that petition which was properly filed and pending elsewhere.

The City's demurrer to the plaintiff's complaint was properly sustained in the Chancery Court, and the decree of that Court is affirmed.

4-9208 230 S. W. 2d 949

Original opinion delivered May 22, 1950.

Substituted opinion delivered July 3, 1950.

Rehearing denied July 3, 1950.

Phil Herget, Wm. F. Kirsch, Jr., and *Kirsch & Cathey,* for appellant.

Fietz & McAdams and *Lee Ward,* for appellee.

GEORGE ROSE SMITH, J. This suit grows out of a collision between a gravel truck owned by the appellee Martin and a truck and trailer owned by the appellants, a partnership doing business as Dr. Pepper Bottling Company. Loyce Nutt, who was driving Martin's truck, was killed in the collision, and this suit was brought by his widow against the Bottling Company. The latter brought Martin into the case, and the owners of the two vehicles asserted claims against each other for their property damage. Carl Wagner, who was riding with Nutt when the accident occurred, intervened to assert a claim against the Bottling Company for personal injuries. The jury returned verdicts for Mrs. Nutt for $15,000 and for Martin for $800. The Bottling Company appeals, and Wagner, having failed to receive a verdict, cross appeals.

Upon the direct appeal the Bottling Company's principal contention is that it was entitled to a directed verdict. The testimony as to the cause of the collision, which occurred at night, is in direct conflict. Wagner testified that he observed the Bottling Company's truck and trailer approaching at about fifty miles an hour. Nutt dimmed his headlights, but the driver of the other vehicle failed to dim his, which were of blinding intensity. According to Wagner the oncoming vehicle was weaving back and forth across the center of the highway, and just before the collision the Bottling Company's truck crossed the black center line and struck the gravel truck. Nutt had applied his brakes and brought his vehicle almost to a stop when the collision took place.

This testimony was sufficient to make a case for the jury. It is true that other witnesses testified positively that it was the gravel truck that was on the wrong side of the highway, but this dispute merely raised an

issue of credibility for the jury. Nor can we accept the appellants' insistence that the uncontroverted physical facts are so contrary to Wagner's testimony as to destroy its force. The appellants rely strongly on several photographs taken soon after the accident, all indicating that the gravel truck was then slightly across the center line, whereas the appellants' truck came to rest in the ditch on its own side of the highway. We have pointed out, however, that unlooked for results often attend a collision as violent as this one must have been. *Alldread* v. *Mills,* 211 Ark. 99, 199 S. W. 2d 571. The appellants' deductions from the photographs and from the condition of the damaged vehicles are very persuasive, but they do not reconstruct the train of events so indisputably that reasonable men could not have accepted Wagner's version.

It is also contended by the Bottling Company that there was a fatal defect of parties plaintiff. Our statute provides that actions for wrongful death shall be brought by the decedent's personal representative, but if there be none the suit may be brought by the widow and heirs. Ark. Stats. 1947, § 27-904; *St. L., I. M. & S. Ry. Co. v. Watson,* 97 Ark. 560, 134 S. W. 949. In this case there was neither allegation nor proof as to whether a personal representative had been appointed for Nutt's estate. The complaint was filed in the widow's name alone and alleged that Nutt was survived by the plaintiff and by a two-year-old son. It was further averred that "this plaintiff and her infant son" had been damaged in various sums for loss of support, companionship, etc. It was clearly the pleader's intention to assert both causes of action, and by its terms the jury's verdict compensates both the widow and the child.

The objection now urged, that the child was not a plaintiff, comes too late. Mrs. Nutt, as her child's next friend and natural guardian, was entitled to act for him, even though the strict rules of pleading required the child to be named in the style of the complaint. The Bottling Company could have raised its present point by demurrer, plea in abatement, or answer, but instead it

pleaded to the merits. The case was tried and submitted to the jury upon the tacit assumption that the child would be bound by a favorable or adverse verdict. Had the objection been made at any time during the trial it would have been a simple matter for Mrs. Nutt's attorney to interline the infant's name in the complaint, especially as the mother had the power to act for her son. Not even in its motion for new trial did the Bottling Company complain that the child, though tacitly recognized as a party, was not named in the style of the pleadings. In these circumstances the point was waived. Of course even now the Company has the right to demand that a guardian be appointed to receive the amount awarded by the jury for the child's benefit.

It is also insisted that abstract instructions were given and that incompetent evidence was admitted. As to the former, inferences could have been drawn from the testimony to support the giving of the instructions, and in any event we do not see how the jury could have been misled or confused. *Equity Mutual Ins. Co.* v. *Merrill,* 215 Ark. 483, 221 S. W. 2d 2.

As to the evidence, the main complaint is directed against the appellees' Exhibit C—a photograph, taken in daylight, that shows the highway in question for a considerable distance. This picture was offered in evidence while Wagner was on the witness stand. A little earlier in the trial there had been received in evidence another photograph, designated Exhibit B, which showed the position of the gravel truck immediately after the collision. When Exhibit C was offered the appellants objected on the ground that the witness had not compared the two pictures, the theory being that without such a comparison Exhibit C had not been shown to depict the conditions that existed immediately after the accident. Of course the picture would not be admissible unless it correctly represented the scene of the collision. *LaGrand* v. *Ark. Oak Flooring Co.,* 155 Ark. 585, 245 S. W. 38. Upon the appellants' objection the court at first excluded the picture.

Wagner was then asked to compare certain stains of oil and blood that appeared in both pictures, and he identified the same stains as appearing in both exhibits, explaining them to the jury. He also testified that except for the fact that the trucks had been removed Exhibit C was the same picture as Exhibit B, which had been admitted at the appellants' request. This testimony fully met the appellants' objection, and the trial court correctly admitted Exhibit C.

In the daylight picture there appear certain tire marks on Nutt's side of the highway, extending for a much greater distance than could have been shown on Exhibit B, which had been taken at close range. Wagner was asked to state which vehicle made these marks, and after a general objection by the appellants the witness answered that Martin's truck had made them. It is now argued that Wagner should not have been permitted to answer the question, "for Wagner himself did not contend that he ever examined the tire marks at the scene of the accident." Apart from the fact that this basis for objection was not brought to the trial court's attention while Wagner was available for further interrogation, the appellants are in error in contending that Wagner had not examined the scene. Wagner had already testified that immediately after taking Nutt to the hospital he had gone back and examined the scene of the collision.

Also bearing upon the admissibility of Exhibit C is the testimony of Martin, who owned the gravel truck. Martin stated that he went to the scene soon after the collision and examined the tire marks. He described the marks on Nutt's side of the center line as grip marks rather than skid marks, being the marks made when the brakes are applied. Martin examined these grip marks with a light and found that the tread corresponded exactly with those on his truck, which had almost new tires with a clearly discernible tread. He described these marks, which he pointed out on Exhibit C, as being perfectly straight and as not crossing the center line at any point in that vicinity. In view of this testimony and

that given by Wagner we cannot agree with the appellants' insistence that Exhibit C was inadmissible.

Upon Wagner's cross appeal the only complaint is that the jury failed to return a verdict either way upon his claim. What happened was that among the forms of verdict handed to the jury were three separate forms for a finding in favor of Mrs. Nutt, Martin, and Wagner, but there was no form enabling the jury to find in favor of the first two and against Wagner, whose injuries required first aid only. There was also a single form for an inclusive finding against all three. The jurors solved their problem by completing and signing the forms for Mrs. Nutt and for Martin and by returning the others incomplete and unsigned. For two reasons we think the trial court was right in refusing a new trial. First, the jury evidently intended to find for the Bottling Company in Wagner's case but had not been given an appropriate form to use. It is the court's duty to carry out the jury's intention when the meaning of the verdict can be fairly interpreted. *Sledge & Norfleet Co.* v. *Mann,* 166 Ark. 358, 266 S. W. 264. Second, as stated in the case just cited, an objection that goes merely to the form of the verdict must be made before the jury has been discharged. If Wagner thought that the jury meant to find in his favor but somehow overlooked both the signing of the verdict and the insertion of the amount of his damages, it was his duty to demand a clarification while the jurors were still present and in a position to explain their intention. We cannot permit him to let the jury separate without complaint on his part and then insist that a highly doubtful speculation should be resolved in his favor.

Affirmed on direct and cross appeal.

JACKSON *v.* SUTTON.

4-9252 231 S. W. 2d 93

Opinion delivered July 3, 1950.

W. J. Cotton, for appellant.

M. A. Hathcoat, for appellee.

MINOR W. MILLWEE, Justice. Appellees, Carl G. Sutton and wife, were the owners of a 63-acre farm in Boone County, Arkansas, on February 3, 1947, when they entered into an "Escrow Contract" for the sale and conveyance thereof to appellants, J. F. Jackson and wife, Effie Jackson. The contract required a cash payment of $1,200 on the purchase price of $3,800 with the balance payable $300 a year beginning January 20, 1948, until the last payment of $200. The deferred payments bore

interest at the rate of six per cent and were evidenced by nine notes payable as provided in the contract.

The contract further provided that a copy thereof, together with a warranty deed and abstract of title, should be placed in escrow and delivered to appellants upon full payment of the purchase price; that appellants were to pay future taxes and keep the property insured; and that, upon default in the payments stipulated in the contract, the escrow agent should return the deed and abstract to appellees and appellants should surrender possession of the property, all moneys collected under the contract to be retained as rent and liquidated damages.

Appellees filed this suit on May 25, 1949, alleging that appellants had defaulted in performance of the contract by failing to make payments of the annual installments, taxes and insurance. A copy of the contract was attached as an exhibit to the complaint which asked for a cancellation of the contract and deed placed in escrow and for possession of the property.

In their answer and cross-complaint appellants admitted the execution of a contract in which they agreed to make the payments as alleged by appellees, but denied that the contract sued upon was the one signed by them. Appellants asserted that the contract as actually executed had been altered or substituted to eliminate certain provisions; that the agent of appellees had made false representations as to acreage and fences; that appellees had failed to finish a house under construction on the property as required by the contract actually executed; and that appellants had breached the contract by refusing to comply with such provisions.

After thorough consideration and analysis of the testimony which was taken in the form of depositions, the chancellor held that appellants had failed to discharge the burden of showing a fraudulent substitution or alteration of the contract; that the agent of appellees made no false or fraudulent representations in the sale of the land, and that appellants had defaulted in the contract payments. However, the court gave appellants the

right to elect whether they should pay delinquent installments, taxes and insurance and thereby continue the contract in force or whether they would forfeit the contract. Appellants' request for a week within which to make an election was granted. At the expiration of such period, appellants announced in open court that they declined to make the delinquent payments and continue the contract. A decree was accordingly entered dismissing appellant's cross-complaint, ordering cancellation and forfeiture of the contract, and directing return of title papers held by the escrow agent and delivery of possession of the lands to appellees within 60 days.

Appellants contend that the chancellor's findings, that the contract sued upon had not been fraudulently substituted, or altered, and that no false representations had been made by appellees' agent, are against the greater weight of the testimony. We cannot agree with this contention.

Appellees, who reside in Amarillo, Texas, listed the lands for sale with D. C. Overturff, a real estate agent at Green Forest, Arkansas. Appellants, who came to Boone County from Texas, approached Overturff, inspected the property and made an offer to purchase which appellees accepted by wire. Overturff had an attorney prepare the two-page typewritten contract in triplicate. After appellants signed the contract, it was mailed to appellee, Carl G. Sutton. Appellees then signed the contract, retained the original, deposited one copy with the escrow agent, along with a warranty deed and abstract of title, and returned the other copy to Overturff who delivered it to appellants. The original and a photostatic copy of the carbon copy left with the bank were introduced in evidence by appellees.

As originally drafted the contract designated the First National Bank of Green Forest, Arkansas, as escrow agent. Appellee, Carl G. Sutton, changed the contract by substituting the Amarillo National Bank of Amarillo, Texas, as escrow agent. The testimony is conflicting as to whether this change was made prior to consummation of the sale agreement, but the preponderance

of the evidence shows that appellants acquiesced in the change and made payments in the amount of $356 on the contract without objection thereto.

In September, 1947, appellants entered into a contract with Sam Thomas to exchange the 63-acre farm and certain personal property for 400 acres of land in Colorado. Pursuant to this agreement, appellants transferred their copy of the contract involved in this suit to Thomas. It developed that Thomas did not own the lands which he agreed to convey to appellants. He absconded with appellants' personal property and attempted to convey the lands here involved to Merritt Finley of Malvern, Arkansas, while appellant, J. F. Jackson, was in Colorado investigating title to the 400 acre tract. Appellants did not introduce their copy of the contract with appellees and Mrs. Jackson testified that it was in Finley's possession the last time she saw it.

Appellants testified that the contract signed by them provided that a house under construction on the premises was to be finished at the expense of appellees, and that the land was to be enclosed on the north and west sides by a wire fence. Appellants' son, Mrs. Jackson's mother, and two neighbors who lived on adjoining premises testified that they read the contract soon after its execution and corroborated the testimony of appellants as to its contents. Some of these witnesses stated that the contract consisted of three typewritten pages. J. F. Jackson stated that the provisions relative to finishing the house and fencing the lands started near the bottom of the first page of the contract. Most of this testimony was in response to questions that were very leading. The chancellor thought it unlikely that most of these witnesses would remember the exact terms of a written contract casually read by them many months before they gave their testimony. In short, the court did not consider such testimony very convincing, and neither do we.

Although appellants denied that the contract introduced by appellees was the contract actually entered into, neither of them denied their signatures thereto. The witnesses for appellees denied that there was any alteration

of the contract except the change as to the escrow agent, which they assert was made with the express consent of appellants, and the contract itself supports this conclusion. They also testified that appellants made no complaint about the matter of completion of the house, the acreage and the building of fences until after this suit was brought.

Appellants also argue that D. C. Overturff, who also handled the trade between appellants and Sam Thomas, fraudulently colluded with the latter in order to cause appellants to surrender their copy of the contract to Thomas. This contention is not supported by the evidence.

The issues are purely factual and the chancellor's findings are fully supported by the greater weight of the evidence.

Affirmed.

BEENE *v.* COUNTY BOARD OF EDUCATION, COLUMBIA COUNTY.

4-9266 231 S. W. 2d 594

Opinion delivered July 3, 1950.

S. E. Gilliam, Melvin T. Chambers, Wade Kitchens and *W. H. Kitchens, Jr.,* for appellant.

McKay, McKay & Anderson, for appellee.

ED. F. MCFADDIN, Justice. This appeal stems from the efforts of two School Districts to consolidate and thereby avoid the effects of Initiated Act No. 1 of 1948,[1] since, united, the two Districts would have had more than 350 pupils. The Districts, both in Columbia County, were Atlanta School District No. 9 (hereinafter called "Atlanta"), and Calhoun District No. 3 (hereinafter called "Calhoun").

On November 30, 1948, a petition was filed with the Columbia County Board of Education, purporting to contain the signatures of a majority of the qualified electors of the Atlanta District, and praying that Atlanta be dissolved and its territory annexed to Calhoun, whose School Board had duly certified consent to such annexa-

[1] The text of this Act may be found on Page 1414, *et seq.*, Acts of Arkansas 1949. The Act was considered in *Stroud* v. *Fryar*, 216 Ark. 250, 225 S. W. 2d 23, and *County Board of Education* v. *Norfork School District*, 216 Ark. 934, 228 S. W. 2d 468.

tion. This proceeding was under Ark. Stats. § 80-408, as modified by § 80-418.[2] The County Board duly advertised that the date of the hearing on the petition would be January 20, 1949; and at the meeting on that date, a number of the petition signers, by written demand, had their names removed from the petition, as provided by said § 80-408. With such names removed, the County Board found that the names remaining were less than a majority of the qualified electors of the Atlanta District; and, accordingly, the County Board dismissed the petition.

Appellants then appealed to the Circuit Court where there was a lengthy trial on the question of whether the names remaining on the petition constituted a majority of the qualified electors of the Atlanta District. The Circuit Court found that there were 138 qualified electors in the Atlanta District; and that the petition contained the names of only 68 qualified electors. Accordingly, the Circuit Court dismissed the petition. Appellants bring the case to this Court and claim that the Circuit Court was in error: (I) in holding certain persons to be qualified electors; (II) in refusing to allow certain names to be restored to the original petition; and (III) in holding other names properly stricken from the original petition. We consider these contentions:

I. *Holding Certain Persons to Be Qualified Electors.* Section 80-408 Ark. Stats. says that the number of qualified electors " . . . shall be determined as of the date said petition is considered by said county board of education, . . . " The County Tax Collector produced the list of all persons who had paid poll tax in the Atlanta District from October 2, 1947, to October 1, 1948. The Court then proceeded to add the names of others shown to be qualified electors, and to strike from the poll tax list the names of some shown to have abandoned residence.

[2] Sec. 80-408 says: ". . . majority of qualified electors of each district . . .," wheres Act 235 of 1947 (now found in Sec. 80-418 Ark. Stats.) merely requires the majority of the dissolving District, and the consent of the Board of Directors of the annexing District. The latter was the procedure here. See *Austin School District* v. *Young*, 212 Ark. 75, 204 S. W. 2d 902, and *Wallace School District* v. *County Board of Education*, 214 Ark. 436, 216 S. W. 2d 790.

A. *"Maiden Voters."* To the list of qualified electors, the Court added three "maiden voters"—*i. e.,* those who recently became of age. They were: T. C. Ware, who became twenty-one years of age on December 8, 1948; Thurston Ware, who became twenty-one years of age on May 21, 1948; and Curtis Lee Wyrick, who became twenty-one years of age on December 22, 1948. We hold that the Circuit Court was correct in holding each to be a qualified elector. Amendment No. 8 to our Constitution says: " . . . persons who make satisfactory proof that they have attained the age of twenty-one years *since the time of assessing taxes next preceding said election,*[3] and who possess the other necessary qualifications, shall be permitted to vote." Under § 84-414, *et seq.,* Ark. Stats., the " . . . time for assessing taxes next preceding . . . " January 20, 1949, expired on April 10, 1948. Each of these three young men became twenty-one years of age after April 10, 1948, so under the constitutional provision they were qualified to vote upon making proof of such fact and possessing the other necessary qualifications. Such proof was made. The fact that Act 220 of 1947[4] abolished the requirement of assessing poll tax does not change the plain constitutional language, as above quoted. In short, any person being otherwise qualified and becoming twenty-one years of age after April 10, 1948, would be entitled to vote without poll tax until October 2, 1949.

B. *School Patrons Who Had Transferred Out of the District.* Wade Jermany and six other residents of the Atlanta District had transferred their children to other School Districts; and appellants claim that because of such transfers these seven persons were not qualified electors in the Atlanta School District. *Jones* v. *Floyd,* 129 Ark. 185, 195 S. W. 360, is against the appellants' contention. In that case we held that Howard County residents who had transferred their children to a Pike County School District could *not* vote in the Pike County School District election; and we said:

[3] Italics our own.

[4] See *Blackard* v. *Kolb,* 212 Ark. 332, 205 S. W. 2d 857.

"Residence is, therefore, an essential prerequisite without which one cannot become qualified to vote, and this residence must be in the county in which he proposes to vote, and in the precinct, town or ward in which he proposes to vote. He can vote where he resides and not elsewhere."

In the case at bar, Wade Jermany and each of the other six "transfers" resided in the Atlanta District and had duly paid poll tax; and each was a qualified elector in the Atlanta District: and the Circuit Court was correct in so holding.

C. *Actual Residence of Certain Poll Tax Payers.* Appellants claim that each of six named persons—being Dr. Horace Beene, Mrs. Horace Beene, Bruce Hendricks, Mrs. Bruce Hendricks, A. C. Shepherd and Felton Robinson—was not a qualified elector in the Atlanta District, even though each had a poll tax. Appellants sought to show that each such person was not an actual resident of the Atlanta District on January 20, 1949, the date of the hearing before the County Board of Education.

We have carefully checked the transcript as to each of these six named persons; and we find that no exception was preserved by appellants to the ruling of the Court at the time the Court held each of the six to be a qualified elector. The procedure in the case was as follows: (a) the Court heard the evidence as to each challenged person; and (b) immediately and finally ruled as to each such person. At such time appellants saved no exception to the Court's ruling; and in the absence of a seasonable exception, there is nothing for us to review. See *St. Louis, I. M. & So. Railway Co.* v. *Brown,* 100 Ark. 107, 140 S. W. 279; *Jenkins* v. *Quick,* 105 Ark. 467, 151 S. W. 1021; *Cotner* v. *Bangs,* 137 Ark. 394, 209 S. W. 80; and *Alldread* v. *Mills,* 211 Ark. 99, 199 S. W. 2d 571. In 3 Am. Jur. 51, the rule is stated: "As a general rule an exception to a ruling should be taken at the time the ruling is made"; and in 4 C. J. S. 760, the text says: "In order to be effective in saving error for consideration on appeal, exceptions taken to proceedings during trial must be timely."

It was not until after the tabulation and announcement of the Court's final decision, on the following day, that appellants sought—and then in a general or "blanket" remark—to except to the Court's ruling regarding any of these six persons. Such attempt came too late. Appellants had apparently acquiesced in each ruling made by the Court; and it was not until the final count disclosed a result adverse to them that appellants sought to "back up" and except to the rulings which had previously been unquestioned. Because of the failure to register timely exceptions, we hold that the question of the residence of each of these six challenged voters is not properly before us.

II. *Refusing to Allow Certain Names to Be Restored to the Original Petition.* S. J. Chisholm and three other persons signed the original petition for the annexation of Atlanta to Calhoun, but at the hearing before the County Board of Education they asked to have their names removed from the petition, as allowed under § 80-408, Ark. Stats.; and the names were so removed. When the case was tried in Circuit Court, S. J. Chisholm and the other three persons sought to have their names restored to the original petition, and offered proof that they had been defrauded in having their names removed. A consideration of the evidence indicates that it was more a case of persuasion than fraud by the last group who "contacted" each of the four parties. The Statute and the cases hold that no name can be restored to the petition after the hearing before the County Board of Education. See *Dansby School District* v. *Haynes School District,* 210 Ark. 500, 197 S. W. 2d 30. So under the facts here presented, the cited case is full authority for the Circuit Court's ruling which refused to restore the names of S. J. Chisholm and the other three parties to the annexation petition in the trial in the Circuit Court, since the names had been duly stricken prior to the hearing before the County Board.

III. *Holding Other Names Properly Stricken From Original Petition.* Finally, appellants claim that eleven names were stricken from the original petition without any proof that the signatures were genuine on the with-

drawal instrument. The situation was as follows: Lillian Carter and ten others had signed the original petition for annexation of Atlanta to Calhoun, but at the hearing before the County Board these eleven had their names removed from the petition by written instrument of withdrawal, in accordance with said § 80-408 Ark. Stats. When the case was tried in Circuit Court, it was stipulated that each and every signature on the original annexation petition was genuine; but appellants say that there was no such stipulation as to the genuineness of signatures on the withdrawal instrument: and so appellants further claim that these eleven names should not have been considered as withdrawn from the original annexation petition. To support their argument, appellants quote from *Scott* v. *County Board of Education,* 182 Ark. 472, 31 S. W. 2d 736, which in turn quoted from an earlier case:

" 'The court properly eliminated from its consideration a petition . . . because there was no competent testimony that the names thereon were genuine signatures of electors residing within the district.' " *Hughes* v. *Special School District,* 135 Ark. 454, 205 S. W. 824.

In making their said contention, appellants appear to lose sight of the fact that the signatures on the original annexation petition were stipulated to be genuine. With those admittedly genuine signatures before it, the County Board in the first instance—and the Circuit Court on appeal—had only to compare a signature on the withdrawal instrument against the admittedly genuine signature of the same person on the original annexation petition. Thereby it was possible to determine the genuineness of the signature on the withdrawal instrument. Appellants have not called our attention to any place in the transcript where any question was raised in the Circuit Court as to any signature being other than genuine; but even if such issue had been presented, the stipulation as to the genuineness of signatures on the original annexation petition supplied the proof from which the Circuit Court could have verified—and evidently did verify—the signatures on the withdrawal instrument.

CONCLUSION

Appellee has also urged: (a) that there was no appealable order made by the County Board of Education; and (b) that the Statute (§ 80-408 Ark. Stats.) does not contemplate an appeal from the County Board's finding that the annexation petition contained an insufficient number of signatures. We have not considered these contentions, because we are convinced that, at all events, the appellee should prevail on the fact that the petition for annexation contained an insufficient number of signatures. Therefore, the judgment of the Circuit Court is affirmed; and for good cause shown an immediate mandate is ordered to issue.

GIPSON *v.* MORLEY, COMMISSIONER OF REVENUES.

4-9209 233 S. W. 2d 79

Opinion delivered May 22, 1950.

Kenneth C. Coffelt, for appellant.

O. T. Ward and *Bailey & Warren,* for appellee.

LEFLAR, J. Appellant James A. Gipson, as a citizen and taxpayer, brought this bill in equity for an injunction to restrain the Commissioner of Revenues and the State Treasurer from enforcing or paying out funds for the enforcement of the provisions of Act 282 of the Acts of the General Assembly of Arkansas for 1949. Act 282 contains three principal groups of provisions: (1) It fixes prices at which sales of liquor and related items (not including beer) may be made at wholesale or retail—for wholesale sales the price is fixed at the wholesaler's cost plus 15 percent, and for retail sales at the retailer's cost plus 33 1/3 percent on liquor, plus 45 percent on cordials, liqueurs and specialties, and plus 50 percent on sparkling and still wines (the various items enumerated are defined in the statute); (2) a tax of 25 cents per case on liquor and other stated items and 10 cents per case on wine is levied, the proceeds to go into a special fund in the State Treasury; and (3) there is appropriated from the special fund certain amounts to pay the salaries and expenses of 20 employees in the office of the Commissioner of Revenues whose duty it is to enforce this and all other liquor control laws of the State. Plaintiff Gipson's contention is that Act 282 is unconstitutional under Article II, §§ 3, 18, 19 and 21 of the Constitution of Arkansas. The contention of unconstitutionality is seriously urged however, only as to the group of provisions numbered (1) in the summary just given—those relating to price-fixing. It is virtually conceded that the taxing provisions, and the appropriation for additional employees to police the liquor business in the State, are valid. The Chancellor held the Act to be constitutional, and plaintiff appeals.

The sections of the Constitution upon which appellant relies are as follows:

"§ 3. The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity, nor exempted from any burden or duty, on account of race, color or previous condition.

"§ 18. The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens.

"§ 19. Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed; nor shall any hereditary emoluments, privileges or honors ever be granted or conferred in this State.

"§ 21. No person shall be taken or imprisoned, or disseized of his estate, freehold, liberties or privileges; or outlawed, or in any manner destroyed or deprived of his life, liberty or property, except by the judgment of his peers or the law of the land; nor shall any person, under any circumstances, be exiled from the State."

It is apparent that none of these sections contains a specific prohibition against the type of legislation here enacted. If there is a prohibition it will have to be discovered from the general spirit of the sections, or from some inner essence deemed implicit though not explicit in the words. Furthermore, discovery of such a prohibition would negative the State's regulatory authority under the police power, a constitutional concept which in the past has been held to justify numerous governmental controls exercised over the liquor business.

A practically unlimited right to regulate the liquor traffic has from early times been conceded to the State. "The State has this right, because the authority to sell liquor is a mere privilege, which the State may grant or withhold, as it pleases, or, if it grants this permission at all, it may do so under any conditions which it cares to impose; and this is true . . . even though these

conditions are so onerous as to amount to virtual prohibition of that traffic." *Wade* v. *Horner,* 115 Ark. 250, 258, 170 S. W. 1005, 1008, Ann. Cas. 1916E, 167. "The sale of intoxicating liquors is not a matter of right protected by constitutional guarantees. It is only a privilege, to be exercised under the police power. The General Assembly, in legalizing the traffic, may impose such restrictions as it deems appropriate." *Cook, Commr.* v. *Glazer's Wholesale Drug Co.,* 209 Ark. 189, 195, 189 S. W. 2d 897, 900. *Accord, Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 128.

The only case in which this Court has previously had occasion to pass on the validity of a price-fixing statute is *Noble* v. *Davis,* 204 Ark. 156, 161 S. W. 2d 189, holding unconstitutional an enactment which authorized minimum price schedules for barbers. The decision was that the business of the barber "is one of common right," and that prices charged for barber services have no such effect upon the public peace, health, safety and welfare as to justify a statute fixing minimum prices in a field of business which is one of common right.[1] *Noble* v. *Davis* affords us but little aid in passing upon the validity of a statute designed to regulate a type of business which is admittedly not one of common right.

There are several cases from other jurisdictions in which liquor price-fixing plans have been denied enforcement, but they likewise do not give us much aid. They come from the states of Illinois, New York, Louisiana, and Florida.

The case of *Illinois Liquor Control Commission* v. *Chicago's Last Liquor Store,* 403 Ill. 578, 88 N. E. 2d 15, held the Illinois liquor price control act to be invalid because it violated an Illinois constitutional prohibition against revival or amendment of an earlier act by reference merely. That is a legislative drafting technicality which the Arkansas act completely avoids.

Levine v. *O'Connell,* 275 App. Div. 217, 88 N. Y. Supp. (2d) 672, invalidated the New York statute on the ground

[1] The concept of common right, or of "natural and fundamental rights," is analyzed in a Comment in (1948) 2 Ark. L. Rev. 203.

that it improperly delegated the price-fixing power to a state board. The New York Court said: "We assume, without deciding, that it would be within the competence of the legislature to determine that mandatory price fixing in the sale of alcoholic beverages would be a proper exercise of the police power. The important point for this case is that the legislature has not done so; on the contrary (it) purports to authorize the State Liquor Authority 'in its discretion'" to establish a price fixing plan. Under the Arkansas act there is no such improper delegation of legislative power to an administrative board; the enactment itself lays down the price fixing rule.

The Louisiana holding appears in *Schwegmann Bros.* v. *Louisiana Board of Alcoholic Beverage Control,* 216 La. 148, 43 So. 2d 248. The statute there was similar to that enacted in Arkansas, and its stated purpose was the regulation and control of the liquor traffic so that it "may not cause injury to the economic, social and moral well-being of the people of the state." The Louisiana Court held that the fixing of wholesale and retail package liquor prices was insufficient by itself to achieve the end sought, that there were too many liquor sales transactions in which prices were left unregulated, that the act was not comprehensive enough to accomplish what it purported to accomplish. Particular emphasis was laid on the fact that there was no regulation of prices on sales of liquor over the bar by the drink, a type of sale which we do not allow in Arkansas, and therefore have no occasion to regulate. No objection is made that the Arkansas statute is not sufficiently comprehensive; no argument is made that it does not regulate enough, rather it is urged that it regulates too much. The Louisiana Court concluded: "It is to be clearly understood that we are not holding that the legislature cannot under any circumstances adopt legislation, pursuant to the state's police power, relating to the establishing of prices on intoxicants with the view and purpose of regulating the liquor traffic and protecting the general welfare of the people. That broad question is not presented by this

case . . ." Contrariwise, that broad question is specifically the one that now is before the Arkansas Court.

The other state in which a liquor price-fixing plan has been invalidated is Florida, where in *Liquor Store* v. *Continental Distilling Corp.,* (Fla.) 40 So. 2d 371, the Florida Court refused to enforce an act which authorized manufacturers to fix binding retail prices on "brand name" goods sold for resale in the state. The Court pointed out: "It is well to remember also that this act applies to every kind of article including such necessities as food and drugs." Then it was stated: ". . . a law which provides for the fixing of minimum prices should contain a yardstick as a guide for the establishment of such ground level prices. The power to determine those prices should not be left to the unleashed discretion of the trade-name owner but should be confined within impregnable specified boundaries. A definite measuring stick should be set forth in the body of the act. This statute contains no such rule." The Arkansas statute does contain such a rule, a very specific one, and besides it sets up a price fixing structure only for the liquor business, as distinguished from all retail businesses.

In contrast with these cases is *Reeves* v. *Simon,* 289 Ky. 793, 160 S. W. 2d 149, which sustained Kentucky's Distilled Spirits and Wine Fair Trade Act, a price fixing measure similar to Arkansas' Act 282 of 1949. The decision was squarely on the constitutionality of the enactment. In the course of its opinion the Kentucky Court said:

"The proof shows that due to price-cutting and to cut-throat competition by producers, wholesalers and retailers, chaos existed in the trade which resulted in law violations, excessive use of intoxicants and other conditions detrimental to the commonweal. The evidence is to the effect that the fixing of minimum prices has had a stabilizing effect upon the industry, done away with ruinous competition, resulted in less consumption of intoxicants by the public and has caused liquor to be sold in more wholesome surroundings . . .

"(It was urged that) the mark-up in the resale price was for the sole benefit of the dealer and that the Act ran afoul of section 3 of our Constitution which forbids the granting of exclusive emoluments or privileges except for public service. The natural status that anybody might sell whiskey has long since ceased to exist and its sale under police power for years has been limited to select persons and only at selected places . . .

"The answer to the argument that this statute is more inclined to enrich the dealer than it is to regulate the sale of whiskey for the public benefit, is that courts are not concerned with the wisdom or appropriateness of legislation, but the public benefit to be derived therefrom and the adequacy thereof is primarily for the Legislature. Unless it is clear the statute has no reasonable relation to a proper legislative purpose and is arbitrary and discriminatory and without substantial basis, the courts will not interfere.

"Innumerable methods have been devised by the legislatures of the several states, and some by the national congress, in an attempt to properly regulate the liquor traffic—none of which have met with great success—and we cannot say that the instant law calling for strict price control and the elimination of ruinous competition has no relation to the subject or that it is arbitrary and discriminatory and not based upon substantial grounds."

Many other states have enforced price-fixing laws of one kind or another, but most of these are irrelevant here, nor do we now approve them either by inference or otherwise. It is established that such enactments do not violate the due process, equal protection, privileges and immunities, or other possibly relevant clauses in the Federal Constitution. *Nebbia* v. *New York,* 291 U. S. 502, 54 S. Ct. 505, 79 L. Ed. 940, 89 A. L. R. 1469; *Olsen* v. *Nebraska,* 313 U. S. 236, 61 S. Ct. 862, 85 L. Ed. 1305, 133 A. L. R. 1500, therefore it is clear that the Arkansas liquor price control act is not violative of the Federal Constitution. Decisions enforcing price controls over

liquor and beer sales in still other states do not deal with the constitutional questions which we have before us here —see *Grant Lunch Corp.* v. *Driscoll,* 129 N. J. L. 408, 29 Atl. 2d 888; *Fowler* v. *Harris,* 174 Md. 398, 200 Atl. 825—though they do, of course, imply an absence of the constitutional doubts which invoked the present litigation.

The principal argument in Arkansas, as in Kentucky, against the constitutionality of the liquor price control act is that it confers a "special privilege" of profit making upon liquor dealers, a privilege not conferred upon the rest of the population. This is of course true in one sense only—the statute does assure a gross profit per item sold, but it does not assure a net profit in the operation of any particular store. That however is beside the point; there can be no doubt that the statute substantially increases the likelihood of net profit to the dealer.

The fact remains that from the earliest days of liquor regulation our laws, now admittedly valid, have granted a special privilege to liquor dealers much more farreaching, more monopolistic, than anything contained in Act 282. This is the license to engage in the liquor business to the exclusion of unlicensed sellers. This is a "special privilege" of which bootleggers have traditionally complained, and one which gives to liquor dealers a substantial assurance of the profit that is not given to other law-abiding citizens. Yet the courts of Arkansas, like those of all American states, have sustained these monopolistic grants of special privilege on the ground that it is within the competency of the legislature to determine under the police power what regulatory rules are needful in controlling a type of business fraught with perils to public peace, health and safety as is the liquor business.

The recital of legislative policy in section 1 of Act 282 asserts the purpose "of avoiding price wars which would materially affect the revenues of the State, attempts at monopolies, and the demoralization of the legally controlled sale of liquors in this State which grows out of unfair price manipulation." The effect upon State revenues is one of the least of the harms which

would flow from an unregulated liquor traffic. Unlawful sales to minors and drunkards, the offering of free samples, the effort to increase sales by cut-rate prices and other competitive practices freely allowed and commonly encouraged in other and more harmless fields of commerce, are among the evils against which our legislation seeks to guard.

For a century or more we have sought to deal with such dangers by the grant of special privileges to liquor sellers as a class, on the assumption that the limited number of grantees of the special privilege could be more easily regulated than could unlicensed sellers generally. In the course of the century our legislatures have devised many regulations for the liquor trade. Some of them have been abandoned, others are retained today. Some of our regulations have been opposed by a majority of liquor dealers because the rules were onerous and burdensome, other regulations have pleased the dealers because they served to do away with costly competitive practices, to eliminate untaxed bootleg sales, to forbid business methods which aroused public antagonism, or to impose other limitations or procedures which proved financially profitable to law-abiding dealers. The validity of these legislative regulations is not to be tested by whether they produce more or less profit to the liquor dealers, or by whether the regulations are pleasing or displeasing to the regulated dealers. Rather, the legislative judgment is the test.

There is much room for difference of opinion as to whether the fixing of minimum prices is a sound or wise method for achieving the legitimate police power ends of liquor traffic regulation. The writer of this opinion and a majority of his colleagues on this Court feel personally that such minimum price fixing is unsound and unwise, but our views on that point are irrelevant here. Others believe that price regulation does tend to remove some of the dangers that inhere in the liquor traffic, and that it gives to the state a firmer control than could otherwise be maintained over the traffic and its incidental evils. That is an understandable point of view,

and one that apparently appealed to the intelligent judgment of members of the legislature. The legislature was seeking a remedy for ills that it is authorized to remedy, or seek to remedy, and its choice of remedy was not one that is prohibited to it by our Constitution.

The decree of the Chancery Court is affirmed.

The CHIEF JUSTICE and McFADDIN, J., dissent in part. DUNAWAY, J., not participating.

ED. F. McFADDIN, Justice (dissenting). This suit attacks the constitutionality of Act 282 of 1949, which Act has three objectives:

(1)—To fix the price of liquor and provide a penalty for sale at a different price (§§ 1 to 12, inclusive, and § 15 attempts to accomplish this objective);

(2)—To levy an additional tax on liquor (§ 13 of Act 282 attempts to accomplish this objective); and

(3)—To authorize the employment of twenty additional enforcement officers at salaries to be paid from the tax levied by § 13 (§§ 14 and 14-A of the Act attempt to accomplish this objective).

There is no real challenge as to the constitutionality of Objective No. 2 (that is, the tax levy), or Objective No. 3 (that is, the employment); and I regard these objectives as clearly constitutional and severable from Objective No. 1. In other words, the tax and employment provisions are constitutional.

This dissent is directed only to so much of Objective No. 1 of the Act as fixes a *minimum* price on liquor and forbids sale at less than such minimum price. I regard such legislation as granting the liquor dealers a privilege in violation of two sections of our Constitution. These are Article II, § 18 of our State Constitution, which says: "The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens[1]"; and

[1] In *Edelmann* v. *The City of Fort Smith*, 194 Ark. 100, 105 S. W. 2d 528, we held that a statute granting tax immunity to World War Veterans was unconstitutional, yet the Act 282 of 1949 guarantees liquor dealers a profit which is not guaranteed to other citizens.

also Article II, § 19 of our State Constitution, which says: ". . . nor shall . . . privileges . . . ever be granted or conferred in this State . . ."

In the early case of *Ex Parte Levy,* 43 Ark. 42, 51 Am. Rep. 550, (also a liquor case), Mr. Justice EAKIN, in considering this constitutional language, said of a privilege:

"It is, according to Burrell, some peculiar right or favor granted by law contrary to the general rule—an exemption or immunity from some general duty or burden—a right peculiar to some individual or body—a personal benefit or favor (see Bur. Law Dic. in verb.)."

To the same effect, see 50 C. J. 400, wherein cases are cited which say that the word "privilege" means:

". . . a peculiar advantage; a peculiar benefit or advantage; a peculiar benefit, favor, or advantage; a personal benefit or favor; a private or personal favor enjoyed; . . . a particular and peculiar benefit or privilege, enjoyed by a person, company, or class beyond the common advantages of other citizens; some peculiar right or favor granted by law contrary to the general rule; . . ."

Bouvier's Law Dictionary says a privilege is: "Exemption from such burdens as others are subjected to."

I make the point that our Constitution prohibits granting one group an advantage not enjoyed by all groups; and I make the point that this Act 282 of 1949—*insofar as it fixes a minimum price for which liquor may be sold*—grants a "peculiar advantage" to liquor dealers, because by such legislation the State is guaranteeing them a gross profit in their business, whereas the State is not guaranteeing such a gross profit to farmers, merchants, barbers, doctors, or any other group in our economic system.

That the Act does guarantee such a gross profit to liquor dealers is definitely stated in §§ 3, 4, 10 and *15 of*

said Act 282.[2] *Wholesale liquor dealers are guaranteed* 15 per cent. gross profit and retail liquor dealers are guaranteed from 33⅓ to 50 per cent. gross profit, depending on the type of liquor sold; and anyone attempting to sell at less than the fixed price is subject to prosecution. In short, liquor dealers are guaranteed a gross profit, because the State has the right to issue them permits and the State proposes to keep the liquor industry in a "healthy condition" by prohibiting one dealer from underselling another. What other group is thus favored in our State?

Several years ago the barbers of this State attempted to have their prices fixed; and Act 432 of 1941 was adopted, under which the State Board of Barber Examiners fixed the price of a haircut at forty cents and the price of a shave at twenty cents. Litigation ensued to test this price-fixing law, and it was held unconstitutional in the case of *Noble* v. *Davis,* 204 Ark. 156, 161 S. W. 2d 189. Mr. Justice McHaney delivered the opinion of this Court in that case and spoke out in clear language against the entire evil of price fixing:

" 'This class of legislation, that is, fixing prices, is new and likely resulted from the decision of the Supreme Court of the United States in *Nebbia* v. *New York,* 291 U. S. 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A. L. R. 1469,

[2] These sections read:

"Section 3. The wholesaler's selling price to the retailer shall be his cost (as defined in this Act) and determined by the Commissioner of Revenues, plus a mark-up of fifteen (15) per cent of cost on liquor, fifteen (15) per cent on cordials, liqueurs, and specialties, and fifteen (15) per cent on sparkling and still wines, and he shall deliver such liquors to the retailers at such price without additional charge for delivery.

"Section 4. The retailer's selling price shall be his cost (as defined in this Act) and determined by the Commissioner of Revenues, plus a mark-up of thirty-three and one-third (33⅓) per cent of cost on liquor, forty-five (45) per cent on cordials, liqueurs, and specialties, and fifty (50) per cent on sparkling and still wines.

"Section 10. Any rebates, loans, gifts, or other special inducements offered, given or accepted by either wholesaler or retailer shall be considered evasions of the requirements of this Act, . . ."

"Section 15. Any person who violates any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than One Hundred ($100.00) Dollars nor more than Five Hundred ($500.00) Dollars and any permit which has been issued to such person so convicted shall be revoked and may not again be issued to such person for a period of two (2) years."

decided March 5, 1934, in which the court sustained a statute fixing the price of milk in New York. A dissenting opinion was filed in that case, concurred in by four members of the court. The various acts fixing prices to be charged by barbers, to which our attention has been directed, were passed since the decision in the Nebbia case.' The following are some of the cases where the courts have held similar legislation invalid, in addition to the Tennessee case: *Duncan* v. *City of Des Moines,* 222 Ia. 218, 268 N. W. 547; *State, ex rel. Fulton* v. *Ives,* 123 Fla. 401, 167 So. 394; *Mobile* v. *Rouse,* 233 Ala. 622, 173 So. 266, 111 A. L. R. 349; *Hollingsworth* v. *State Board of Barber Examiners,* 217 Ind. 373, 28 N. E. 2d 64. The decisions in all these cases are based on the fact that the statutes of those states are not regulatory, but are mere price-fixing statutes, or a delegation of the power to fix prices to a board, which have no real or substantial relation to the public safety, health, welfare or prosperity, and are thus distinguishable from the Nebbia case. In the Tennessee case the further observation is made: 'If the act in question is valid, then the Legislature can directly, or through a board, fix the fees that physicians and dentists may charge for their services; the prices that hotels, restaurants and lunch counters may charge for food; the prices of meats, packing house and canning factory products; and so on *ad finitum* until the liberty of the individual and the right to contract is destroyed.' We agree with the principles announced in this case and the other cases above cited as also others that might be cited.''

Thus, regardless of ''price fixing'' in other States, the fact remains that we declared it unconstitutional in *Noble* v. *Davis, supra.* Although we held that barbers could not fix prices, yet the majority is now allowing liquor dealers to be protected by having their prices fixed. The trade of a barber is an old and respected trade, whereas the liquor dealer business has always been one of a dangerous nature; yet we are guaranteeing a gross profit to liquor dealers, after refusing such a gross profit to barbers. This Act 282 of 1949 singles out one group—the liquor dealers—and guarantees them a privilege that

we have denied to other groups in our economic system. Therefore I submit that it is unconstitutional insofar as it puts a floor on the price of liquor.

It is said that if the State does not put a minimum price on liquor there will be a price war, and the State will lose revenue. This is a fallacious argument. The State will get just as much tax on liquor, whether liquor be sold at a profit or at a loss to the dealer. Have conditions reached the place where the State must prohibit merchants from having sales, for fear some will lose money? The free enterprise system is certainly in great danger if we are afraid to trust a merchant to run his business for fear he may lose money by selling his goods too cheaply. No, this Act, under the guise of protecting the State revenue, is granting a privilege to the liquor dealers which has been rightly refused the barbers in the case cited. The whole idea of guaranteeing a profit—gross or net—to an industry is contrary to our Constitution. The majority seeks to distinguish the price fixing for liquor dealers from price fixing refused the barbers by saying that the liquor business is in a distinct sphere. My answer to such argument is, that the Constitution does not grant the liquor group any privileges refused other groups, and that the Constitution should be the guide.

It is true that in some of our cases we have said that the liquor business existed at the "privilege" of the State. In *Cook, Commissioner* v. *Glazer's Wholesale Drug Co.,* 209 Ark. 189, 189 S. W. 2d 897, in speaking of the liquor permit, this sentence was used: "The privileges conditionally extended with the permit cannot be terminated nor abridged at the whim of an administrator . . ." The word "privileges," as quoted in the sentence, was used as synonymous with *sufferance* or *permission.* In other words, the cases in which we have spoken of the liquor business as operating at the privilege of the State, the word "*privilege*" was meant as engaging in a business that was not a matter of right but a matter of being permitted by the State. This is clearly reflected by the language of Mr. Justice EAKIN in *Ex Parte Levy,* 43 Ark. 42:

"There are some trades and occupations confessedly dangerous to the public, either as to health, or safety, or morals. Government has the inherent power to regulate or prohibit them. It is not presumed that constitutions meant to prohibit this salutary exercise of power. The retail of liquors is one of them. As lawful as any other, when permitted, and as fully entitled to protection, it is nevertheless in questions of giving or withholding permission, considered as dangerous."

The majority is allowing a business, which operates only by permission, to now acquire a special privilege in violation of our Constitution. The Kentucky case of *Reeves* v. *Simon,* 289 Ky. 793, 160 S. W. 2d 149, does not seem to me to be sufficient justification for the evasion of our Constitutional inhibitions, as contained in Article II, §§ 18 and 19 and previously quoted. I respectfully submit that neither the Kentucky case nor the majority opinion in the case at bar has answered the argument which points out that the Constitution of our State prohibits the granting of a privilege. That Act 282 of 1949 does grant such a privilege is clear, because it puts a minimum price on the sale of liquor.

That the State has a right to put a maximum price on liquor is clear, because the liquor business is of such a nature that it must be regulated; and those who engage in it must get their permits from the State on such terms as the State desires to impose, and one of these conditions is that those engaged in the business must not sell above a certain price. So the maximum price on liquor is constitutional. But the putting of a floor on the price of the article and prohibiting anyone from selling liquor at less than a fixed price is unconstitutional, because the effect of such legislation is to guarantee a profit to liquor dealers and to give them a privilege in violation of our Constitution.

Therefore, for the reasons herein stated, I respectfully dissent from that portion of the majority opinion which holds to be constitutional the section of Act 282 of 1949 which fixed a minimum price on the sale of liquor. I am authorized to say that the Chief Justice has read

this dissenting opinion and concurs with the views herein stated and may later issue an additional dissenting opinion of his own.

FLAT BAYOU DRAINAGE DISTRICT OF JEFFERSON COUNTY *v.* ATKINSON.

4-9220 232 S. W. 2d 76

Opinion delivered April 24, 1950.

A. F. Triplett, for appellant.

R. A. Zebold, for appellee.

GRIFFIN SMITH, Chief Justice. S. L. Atkinson as a property-owner of Flat Bayou Drainage District sought to enjoin the Commissioners from petitioning County Court to levy additional taxes against predetermined betterments of $208,490.15 that were ascertained when the District was created under general laws in 1917. It was alleged that a new bond issue of $91,000 for use in reconditioning, reconstructing, and repairing proposed by the District (a) could not be sustained from residual tax sources because levies made from time to time had, in the aggregate, exceeded the benefits by 25.8%, and (b) there was no intent to comply with the provisions of

Act 203 of 1927 by procuring landowner petitions. The District demurred to the complaint, resulting in a ruling by the Court that insofar as the suggested bond issue was concerned betterments had been exhausted, but that the nature of the improvement did not require petitions.

The Act of March 28, 1919, as amended by Act 285 of 1941, is relied on by the petitioning taxpayer. Ark. Stat's, § 21-541. The enactment of 1919 permitted property-owners to pay assessments in full within sixty days after passage of the Act. If this were not done the betterments would bear interest at six per cent, payable in installments as levied. The Act of 1941 substituted "the formation of the District" for "the passage of this Act", and added a proviso that it should not apply "to Districts heretofore organized in which interest on bonds or other borrowed money was calculated as a part of the cost of construction and included in the assessment of benefits".

It is quite clear that the Amending Act was intended to extend the sixty-day period from the time the District was formed by allowing payment without interest if the privilege should be exercised within sixty days from the [effective] date of the later Act; but as to Districts wherein interest on borrowed money "had been calculated as part of the construction and included in the assessment of benefits", Act 285 has no application. This exception was essential because as to Districts wherein interest on benefits had been included, such interest became a part of the assets pledged, hence a statute authorizing a remission would impair the obligation of contract.

It is necessary to examine successive transactions of the appealing District to determine whether interest on benefits was calculated or included when money was borrowed. It is not contended that property-owners took advantage of either Act by voluntarily paying the full assessment in advance without interest.

A County Court order of March 23, 1918, deals with a bond issue of $98,000. The judgment recites aggregate assessments of $208,490.15, "which bears interest at six percent per annum". Bonds drawing interest at 5½%

were payable $2,500 February 1, 1919, and then in varying amounts to and including 1939—a period of 21 years; but interest of $2,695 was payable in 1918. It was found that $187,266.75 would be required to discharge the principal and interest. The benefits were assessed at 4.3% to produce an annual yield of $8,965.07. The assessing order [subdivision B] mentions "a tax sufficient to produce the sum of $187,266.75, being the estimated cost of the improvement, including the interest on the bonds plus 10% for contingencies, and also a small additional sum annually for current expenses".

On May 7, 1921, there was an additional judgment authorizing a $30,000 bond issue "to hasten the work for which the District was organized". The order assessed [subdivision B] "a tax amounting to the sum of $140,800, with interest thereon at the rate of six percent per annum". This "tax" was divided into installments, payable 5.3% during 1922, 1923, and 1924, producing $11,049.97 annually; and for 1925 and succeeding years to and including 1939, 6% of the face of the assessed benefits, producing $12,509.40.

Slight percentage changes in tax levies were subsequently made, but these do not affect the issue because it is conceded that the total shows 125.8% of the benefits when interest is not considered. This would be $53,790.46 more than the primary sum of $208,480.15.

Atkinson argues that interest on the borrowed money was included in the first tax order because of the mention of improvement costs, including interest on the bonds. But the order must be read in the light of what it did, and what it was intended to do. The bonds drew interest at 5½%, or $5,390 for the first year. The first annual payment on principal was $2,500 in 1919. A half year's interest payment was made in 1918—$2,695. The total payment during 1919 was $7,890, so there was a treasury balance of $1,075.07 if we assume that the levy of 4.3% yielded the full return of $8,965.07. Interest at six percent on the assessed benefits would have amounted to $12,509.41. It will thus be seen that if interest at 6% on the assessments and a tax of 4.3 had been collected.

the return on a 100% collection basis would have been $21,474.48. No one contends that this was done.

Our conclusion is that interest on the benefits has not been collected, but that the various levies were paid without landowner protests that the $208,490.15 had been exceeded. Result is that the interest may still be computed and used for maintenance purposes. The formula for determining the present unused benefits is as set out in *Richey* v. *Long, Prairie Levee District,* 203 Ark. 1, 155 S. W. 2d 582. Whether the assessment of interest will produce sufficient revenue to finance the proposed bond issue after landowners have been credited with sums previously paid is a matter not addressed to us in this appeal.

The complaint alleges, and the demurrer admits, that the additional levy will be used to "reconstruct, recondition, and repair" the levee under authority of Ark. Stat's, § 21-533, etc. We agree that if the Commissioners were proposing to proceed under Act 203 of 1927, Ark. Stat's, § 21-518, petitions would be essential. But, while wording of the complaint is not taken *verbatim* from Act 279 of 1909, the plan appears to be more in keeping with its authority to keep the ditches "clear from obstructions, widening and deepening them". A very clear comparison of the two Acts with a discussion of their purposes is to be found in the opinion of Mr. Justice Robins, *Cox* v. *Drainage District No. 27 of Craighead County,* 208 Ark. 755, 187 S. W. 2d 887. See, also, *Owens et al.* v. *Central Clay Drainage District,* 216 Ark. 159, 224 S. W. 2d 529.

Reversed on the Drainage District's appeal; affirmed on Atkinson's appeal.

George Rose Smith, J., dissenting. Act 285 of 1941 provides that the assessment of benefits shall not bear interest in any case where interest on the bonds was calculated as part of the cost of construction "and included in the assessment of benefits." If taken literally this language would never apply to any district, since interest on the bonds is never "included" in the assessment of

benefits. That assessment is merely the estimated benefit that will be conferred upon the land as a result of the construction of the improvement, and in the computation of that benefit it is immaterial whether the improvement is to be constructed with borrowed money or with cash already on hand.

It is our duty, however, not to construe the statute in such a way that it wil be wholly ineffectual. I think the legislature must have meant that the assessment of benefits is not to bear interest in any district having total assessed benefits sufficiently large to equal or exceed the face amount of the bonds, interest thereon, and the usual margin for contingencies. That is the situation here, and therefore I think this district's assessed benefits should not bear interest, at least after the effective date of the 1941 Act. On the other hand, in districts where the original assessment of benefits was not large enough to "include" both the bonds and their interest, then interest on the assessed benefits would be available to pay the interest on the bonds. See *Oliver* v. *Whittaker*, 122 Ark. 291, 183 S. W. 201, for an instance of the latter situation.

REYNOLDS METAL COMPANY *v.* BALL.

4-9108 232 S. W. 2d 441

Opinion delivered June 12, 1950.

Rehearing denied October 2, 1950.

Wright, Harrison, Lindsey & Upton, Leon B. Catlett and *Walter L. Rice,* for appellant.

Ed F. McDonald, for appellee.

LEFLAR, J. This is an action for damages to plaintiff's farm and pasture land, located on Hurricane Creek some six or seven miles below the alumina extraction plant[1] of defendant Reynolds Metal Co. (hereinafter called Reynolds). The damage to the land was caused by sediment deposited on it during overflows of Hurricane Creek following heavy rains. Plaintiff alleged that this sediment either came from the Reynolds plant or contained poisonous substances which came from the plant. At the close of the plaintiff's evidence and again at the close of all the evidence the defendant moved for a directed verdict, the Court each time denying the motion. The jury's verdict was for the plaintiff for $1500, and defendant appeals, asserting insufficiency of the evidence to sustain the verdict.

No doubtful question of law is involved. It is virtually conceded that if Reynolds has discharged deleterious or poisonous substances from its plant and these have, during periods of normal overflow, lodged as sediment upon plaintiff's land, destroying vegetation and depreciating the value of the land, plaintiff may recover. *Nebo Consolidated Coal & Coking Co.* v. *Lynch,* 141 Ky. 711, 133 S. W. 763; *Good* v. *West Mining Co.,* 154 Mo. App. 591, 136 S. W. 241; *Arminius Chemical Co.* v. *Landrum,* 113 Va. 7, 73 S. E. 459, 38 L. R. A. (N. S.) 272, Ann. Cas. 1913D, 1075; Annot., 39 A. L. R. 899. The question is whether the evidence introduced was sufficient to justify the jury in finding that this has happened.

The evidence was ample to show that sediment was deposited on plaintiff's land when Hurricane Creek overflowed, as it frequently did. Plaintiff and several

[1] A plant in which alumina is extracted by means of chemical processes from the raw bauxite ore that is mined in the area.

of his neighbors testified, ". . . there comes an overflow and this old muddy substance covers my lespedeza up." "I had my cattle in there; they couldn't eat it until a rain came and washed that stuff off." "It is slick slimy stuff." "The sediment that comes out of the creek settles all over the land." "I walked out and picked up some of that, it was cracked open, it was in little cakes about half an inch thick and then I walked over to another place and stepped off in that and stepped over my shoetops almost." "The creek overflows and sediment and stuff overflows and gets on it and kills the vegetation."

It was not seriously suggested by plaintiff that all the sediment, or even any large portion of it, came directly from the Reynolds plant. The plant is several miles upstream from plaintiff's farm, and several bauxite mines (not alumina factories like the Reynolds plant), drain into Hurricane Creek between his farm and the plant, and others drain into the creek above the plant. It is clear that a large part of the sediment comes from sources for which defendant is not responsible.

Defendant Reynolds denied that any substantial amount of the sediment came from its plant, and also denied that any poisonous or harmful substances whatever were allowed to flow from its plant into the creek at any time. Reynolds introduced the testimony of expert witnesses, chemists who stated that they had analyzed the chemical content of the sediment and found nothing in it that would be poisonous or otherwise harmful to vegetation, apart from the obvious effect of choking the vegetation out by covering it up. Plaintiff introduced no expert evidence as to the chemical content of the sediment. The plaintiff and some of his witnesses gave their opinions that the sediment was poisonous, but these were unscientific statements of lay opinion, based on observations from which it might also have been concluded that the vegetation was merely choked out. Substantial proof that the sediment included chemical constituents that were poisonous to vegetation was lacking.

Similarly, the testimony was very vague as to the Reynolds plant being the source of the allegedly poisonous elements in the sediment. Plaintiff testified, "It (the muddy substance) came from Reynolds Metal Company because we never did have any of that there until that plant went in." Other witnesses testified: "Q. Where does that come from? A. Well, I would say it comes from the plant." "Q. You have seen this red water escaping from the plant? A. Yes, from the dump over there where it comes out from the plant into Hurricane creek over there on the north side of the Hurricane Creek plant . . . Q. You don't know what chemicals it is? A. No, sir, I wouldn't know." "Q. Do you know where this sediment comes from? A. Yes, it comes from the bauxite mines . . . .Q. Do you mean at the mining plant . . . ? A. I mean all of them. Q. Including Reynolds Metal Company? A. If they drain that ore in there. Q. Do you know whether they do or not? A. No, I don't, I don't know where it comes from. Q. You do know it comes out of the mines? A. Yes." Other witnesses testified to the same general effect. Their testimony was no more definite than that just quoted.

We are forced to conclude that the record does not contain substantial evidence that Reynolds discharged from its plant into the creek deleterious or poisonous substances which caused the damage of which plaintiff complains. The judgment based upon the jury's verdict in the Circuit Court must therefore be reversed.

The evidence might well have been much more completely developed than it was. This Court has held that, even where a judgment based on a jury verdict is reversed for insufficiency of the evidence to support it, there may be circumstances which justify remanding the case for new trial, rather than outright dismissal. *Douglas* v. *Franks,* 212 Ark. 426, 206 S. W. 2d 11. A majority of the Court feel that this is such a case.

The judgment is reversed and the cause remanded for a new trial.

MILLWEE and GEORGE ROSE SMITH, JJ., dissent, their view being that the judgment should be affirmed.

MORLEY, COMMISSIONER OF REVENUES *v.* CAPITAL TRANSPORTATION COMPANY.

4-9198 232 S. W. 2d 641

Opinion delivered June 12, 1950.

Rehearing denied October 2, 1950.

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

House, Moses & Holmes, for appellee.

LEFLAR, J. The issue in this case is whether the Capital Transportation Company's "trackless trolleys," large passenger busses operated by 150-horse-

power electric motors receiving their energy from overhead wires, are within the taxing provisions of Act 115 of 1939 (Ark. Stats., § 75-206). That Act levies a tax upon all "motor busses (which) are operated on certain designated streets, according to regular schedules, in lieu of street cars, and the operators of such motor busses pay a valuable consideration for that privilege not charged against other motor vehicles."

The Company sought an injunction restraining the Commissioner of Revenues from collecting the statutory tax upon its electrically powered busses, and the Commissioner cross-complained asking for a judgment in the amount of the taxes allegedly due. The Chancellor granted the injunction as prayed by the Company, and the Commissioner appeals. The Company does not deny that the General Assembly may properly levy a tax upon these electrically powered busses; the problem is whether it has done so. This presents to the Court the single question of what is the correct interpretation of Act 115.

Act 115 reads as follows:

"An Act to Levy a Tax on Motor Busses Operating Over Definite Routes and in Lieu of Street Cars.

"Whereas, it has become necessary for persons and companies operating street cars in some of the cities and towns to replace the street cars with motor busses in order to provide an adequate and necessary service, and in the future it will be required of such persons and companies to convert other street car lines into motor bus lines, in order to continue the operation of such transportation systems under their franchise; and

"Whereas, such persons and companies should pay a reasonable fee for the operation of such busses in lieu of street cars which did not pay a license fee to the state, and

"Whereas, other motor vehicles pay a license fee to the state. Therefore,

"Be it enacted by the General Assembly of the State of Arkansas:

"Section 1. Hereafter, where motor busses are operated on certain designated streets, according to regular schedules, in lieu of street cars, and the operators of such motor busses pay a valuable consideration for that privilege not charged against other motor vehicles, the owners and/or operators of such motor busses shall pay to the state an annual motor vehicle and license fee of 45 cents per horsepower of the rated horsepower of the motor propelling such motor bus, and in addition thereto shall pay $2.50 for each passenger seating capacity of such motor bus or busses." (Repealing and emergency clauses omitted.) The Act was approved on Feb. 22, 1939.

It is established that the Capital Transportation Company has for many years operated a public transportation system on the streets of Little Rock and North Little Rock. For a time the Company operated only electric street cars which ran on fixed metal rails, but during the 1930's it began using gasoline motor busses on some of its routes. In each instance city ordinances were enacted authorizing the change-over. Since 1939 the tax fixed by Act 115 has been paid on these busses. In 1947, again under authorization of city ordinance, the Company began using and now has in operation 35 of the "trackless trolleys" which it claims are not taxable under Act 115. The old street cars have been eliminated entirely and the metal tracks paved over. The two types of busses, those powered by gasoline motors and those powered by electric motors, now operate in lieu of the old street cars on all the Company's lines and routes.

Each of the 35 new busses has an individual 150-horsepower electric motor which receives its energy from overhead trolley wires. The busses have pneumatic rubber tires which roll directly on the pavement surface of the street, and they may be driven a maximum of twelve feet on either side of the overhead wires, thus giving them maneuverability over a 24-foot width on the side of the street where they are driven. Separate sets of overhead wires are maintained on each side of a street.

The purpose of Act 115 appears clearly from its language. It was to levy a tax on busses which ran directly on the pavements and which were substituted for the untaxed street cars that operated on metal rails and not on the pavement. The tax was set at a lower figure than that levied on other busses of the same size and general characteristics,[1] because other busses made a more general use of the State's highways and because municipal transportation companies pay other taxes that appeared to justify an equalizingly lower levy on busses whose use was limited to fixed schedules and routes within a given city. The tax was designed to put such specialized busses upon a tax-paying parity with other pneumatic tired vehicles which similarly ran upon the pavements and not upon metal rails. Its purpose is evident both from the title and the preamble of Act 115, and also from the body of the act following the enacting clause.[2]

Accepting this purpose in Act 115, the Act still would not achieve its purpose as to busses operated by electric motors if they were by its terms omitted from its coverage. The Company contends that its "trackless trolleys" are not "motor busses" at all, that the statutory term "motor bus" applies only to self-propelled vehicles, and does not include busses whose motors are powered by energy furnished through outside electric wires.

What did the General Assembly of 1939 mean when it used the words "motor busses" in Act 115? The answer cannot be arrived at merely by looking in the dictionary, but must be discovered by examination of the statute as a whole. *Holt* v. *Howard,* 206 Ark. 337, 175 S. W. 2d 384; *Elizabeth Arden Sales Corp.* v. *Gus Blass*

[1] Under Pope's Dig., § 6615 (a) and (d), in effect when Act 115 was enacted, ordinary gasoline powered motor busses were charged an annual tax of 45 cents per horsepower on the motor plus $2.50 for each passenger-carrying capacity plus $1.50 for each 100 pounds of gross weight of the vehicle. Act 115 imposed the first two items of tax only, and not the last one named, upon the busses to which it applied.

[2] It is permissible to examine both the title and the preamble of an act to discover its meaning when ambiguity in its text is urged. See cases cited in Anderson, Drafting a Legislative Act in Arkansas, 2 Ark. L. Rev. 382, at 386 and 388.

Co., 150 F. 2d 988, 161 A. L. R. 370 (C. C. A., 8), *cert.* denied, 326 U. S. 773, 66 S. Ct. 231, 90 L. Ed. 467.

For one thing, this type of bus was already well known in the municipal transportation industry in 1939. See *City of Dayton* v. *De Brosse,* 62 Ohio App. 232, 23 N. E. 2d 647, decided Feb. 2, 1939, and *Memphis Street Ry.* v. *Crenshaw,* 165 Tenn. 536, 55 S. W. 2d 758, decided in 1933, involving the operation of "trackless trolleys" in Dayton, Ohio, and Memphis, Tenn., respectively. If it was the purpose of the legislature to tax busses which ran on the pavement rather than on rails, deliberate omission of a known type of such busses from the new enactment was highly improbable.

For another thing, this type of bus satisfies all the incidental descriptive provisions contained in the statute. These 35 busses "are operated on certain designated streets." They are operated "according to regular schedules." They are operated "in lieu of street cars." Furthermore, the operators "pay a valuable consideration for that privilege not charged against other motor vehicles." All these facts are assured by the terms of the ordinance under which the Company operates the busses, and are freely admitted by the Company.

Everything about the statute makes it appear that when the legislature used the term "motor busses" it meant "busses moved by individual motors." The legislature was making a distinction between street cars operating on rails and motor busses operated "in lieu of street cars." It was not distinguishing between busses moved by internal combustion motors and busses moved by electric motors. It was not distinguishing between busses whose motors are powered by gasoline poured in through a tube and others whose motors are powered by electric energy run in on a wire. There is nothing in the statute limiting the tax to busses which carry a fuel tank.

The word "motor" is discussed in 19 Encyclopedia Americana, p. 514: "A machine for utilizing some

power, as gas expansion or electric current, to do useful work . . . The word motor came into common use with the commercial development of electricity. The makers of the first electric machine that was marketed for delivering power chose to call it an electric motor, and since then a reversed dynamo has always been a motor. Then came Daimler's perfecting of the 'petrol' engine, for use on bicycles, which is now technically called an internal combustion engine, but popularly called a motor." Webster's New International Dictionary (2nd ed.) under the noun "motor" gives successive illustrations: "(4). A rotating machine which transforms electrical energy into mechanical energy," and "(5). Any internal combustion engine."

"Trackless trolleys" are busses which are moved, controlled and directed from within their own bodies by means of individual electric motors. We believe that, in the light of the whole phrasing and purposes of Act 115, they are "motor busses" within the sense in which that term was used in this particular act.

Appellee Company argues that if the term "motor bus" is broad enough to include "trackless trolleys" it is broad enough to include street cars also. The quick answer to that is that a street car is not a bus. A street car is a vehicle that operates on fixed metal rails, whereas a bus has pneumatic tires and operates on the regular street surface. That difference represents the reason why the General Assembly of 1939 saw fit to levy a tax on busses operated "in lieu of street cars."

The Company also argues that because "trackless trolleys" can not be driven over the State highway systems generally, but only over fixed city routes, they should not be taxed under Act 115. But the gasoline motor busses taxed by Act 115 are similarly limited in their operation to fixed city routes; the moment they enter upon broader operations over the State's highways generally they lose the special status given them by Act 115 and become subject to the higher fees collected on busses not "operated on certain designated streets, according to regular schedules, in lieu of street

cars." The applicability of Act 115 is limited to busses which in fact do not operate over the State highway system generally, and it makes no difference whether they stay within their fixed city routes merely because their drivers keep them there in obedience to orders or because the bus is so constructed that a driver could not disobey orders by driving across the state with it even if he wanted to.

Finally, the Company relies upon two decisions, from Tennessee and Georgia, which held that "trackless trolleys" were not within the coverage of particular taxing statutes of those states. We agree that both these decisions are sound, but neither of them involves a statute like our own.

In *Memphis Street Ry.* v. *Crenshaw,* 165 Tenn. 536, 55 S. W. 2d 758, the question was whether "trackless trolleys" were within the general registration and licensing law that applied to all automobiles and motor vehicles in the state. The Court pointed out that "the primary purpose of the law is to secure registration, largely to insure identification, recorded opportunity for the tracing of a rapidly moving class of vehicles of an itinerant, peripatetic, even migratory nature. . . . If this is the primary object of this registration law, then it is difficult to conceive how vehicles thus absolutely confined to fixed routes . . . could be contemplated as within the objective of the lawmakers." Similarly, it can not be contended that the comparable general automobile registration law of Arkansas is applicable to "trackless trolleys," nor is that contention now being made.

Thompson, Comr. of Revenue v. *Georgia Power Co.,* 73 Ga. App. 587, 37 S. E. 2d 622, is the other case. It presented the question whether a "trackless trolley" was a "motor bus" within the meaning of the general automobile registration law of Georgia. The Court held that it was not. As in the Tennessee case, the Court looked to the function and purpose of automobile registration, found that its function and purpose were applicable only to the types of vehicles commonly known as

automobiles, and concluded that a "trackless trolley" was not an automobile in the sense employed by the general registration act.

As to these cases, we can only hold that Act 115 of 1939 is a different kind of statute. It is not a part of the general automobile registration law of Arkansas. Act 115 is designed merely to fix an amount of state tax payable by motor busses "operated on certain designated streets, according to regular schedules, in lieu of street cars."

There is nothing in the nature of "trackless trolleys" that makes inappropriate the application of the statute to them. Everything in their physical characteristics and mode of operation makes it as fair and as appropriate for the statute to be applied to them as to other motor busses falling within the statutory description. It would be unfair to the owners of gasoline motor busses and contrary to the spirit and purpose of the statute if "trackless trolleys" were not taxed under it. The statute purports to cover these busses, and we hold that there is no justification for an interpretation that would take them out of the coverage which appears on the face of the statute.

The decree of the Chancery Court is reversed and remanded with directions that a decree be entered in favor of the cross-complainant for the amount of the tax found to be due from the appellee Company under Act 115.

McFaddin, J., dissents; Griffin Smith, C. J., not participating.

Ed. F. McFaddin, Justice (dissenting). I respectfully dissent because the majority opinion, as I see it, contains two errors, either of which is fatal to the conclusion which the majority has labored to reach. These are: (1) refusal to accept the definition of words; and (2) violation of a cardinal rule of statutory construction.

I. *Refusal to Accept the Definition of Words.* The Act 115 of 1939 does not mention electric trolleys: instead, it levies a tax only on "motor busses." I submit

that an electric trolley is not a motor bus; and that no amount of judicial legerdemain can change the plain meaning of the words "motor bus." Webster's Dictionary, long before the passage of Act 115 of 1939 and continuously up to the present time, defines motor bus to be "an automotive omnibus." An "omnibus" is "a heavy public vehicle . . . designed to carry a comparatively large number of passengers." But a motor bus is an "*automotive* omnibus"; and Webster's Dictionary defines "automotive" as follows: "self propelling; . . . hence, of, pertaining to, or concerned with vehicles . . . that contain within themselves means of motion, control and direction."

The last words quoted prove the point: a motor bus is an automotive vehicle—*i. e.*, one which contains in itself the "*means of motion,* control and direction." An electric trolley does *not* contain in itself the means of *motion*; because the electric trolley receives its motive power from overhead wires and cannot operate when contact is broken with the overhead wire. According to the dictionary definition, an electric trolley—such as is involved in this case—is not a motor bus. The old adage is applicable here, to-wit: a cow has four legs; and calling its tail a leg does not give a cow five legs, because calling the tail a leg does not make it one.

So, in this case, calling an electric trolley a motor bus can never make it one; because an electric trolley does not have within itself the means of *motion.* As I see it, the majority opinion is a resort to judicial legislation to change a dictionary definition, in order to make Act 115 read differently from the way the Legislature worded it. I submit that we should accept the defined meaning of words rather than to legislate other meanings to the words chosen by the Legislature.

II. *Violation of a Cardinal Rule of Statutory Construction.* The majority opinion contains this paragraph:

"There is nothing in the nature of 'trackless trolleys' that makes inappropriate the application of the statute to them. Everything in their physical characteristics and mode of operation makes it as fair and as appropriate

for the statute to be applied to them as to other motor busses falling within the statutory description. It would be unfair to the owners of gasoline motor busses and contrary to the spirit and purpose of the statute if 'trackless trolleys' were not taxed under it. The statute purports to cover these busses, and we hold that there is no justification for an interpretation that would take them out of the coverage which appears on the face of the statute.''

Now I submit that this paragraph shows in itself the fundamental error; because it impliedly admits that the Court is extending a taxing statute beyond its strict language. In *Cook* v. *Arkansas-Missouri Power Corporation,* 209 Ark. 750, 192 S. W. 2d 210, the late and beloved Mr. Justice Robins recognized and declared the applicable cardinal rule of statutory construction in this succinct language:

''A statute imposing a tax must be strictly construed against the taxing authority. 'A tax cannot be imposed except by express words indicating that purpose.' (Headnote 3.) *Wiseman* v. *Arkansas Utilities Company,* 191 Ark. 854, 88 S. W. 2d 81.

'' 'Where the intent or meaning of tax statutes, or statutes levying taxes, is doubtful, they are, unless a contrary legislative intention appears, to be construed most strongly against the government and in favor of the taxpayer or citizen. Any doubts as to their meaning are to be resolved against the taxing authority and in favor of the taxpayer . . .' 51 Am. Jur. 366.

'' 'The general rule is that statutes providing for taxation are to be construed strictly as against the state and in favor of the taxpayers . . .' 61 C. J. 168.''

Some of the many other cases to the same effect decided by this Court are: *City of Little Rock* v. *Arkansas Corporation Commission,* 209 Ark. 18, 189 S. W. 2d 382; *Moses* v. *McLeod,* 207 Ark. 252, 180 S. W. 2d 110; *McLeod* v. *Commercial National Bank,* 206 Ark. 1086, 178 S. W. 2d 496; and *McCain* v. *Crossett Lumber Company,* 206 Ark. 51, 174 S. W. 2d 114.

In the case at bar the majority opinion is violating this cardinal rule of statutory construction; because Act 115 does not mention trackless trolleys but only motor busses, and the majority is extending a taxing statute in order to include vehicles not mentioned in the taxing statute.

The language quoted from the majority opinion says that it would be unfair to the owners of gasoline motor busses to tax them and leave untaxed the owners of electric trolleys. I maintain that it is not for this Court to determine whether the Legislature acted wisely in selecting a specific vehicle to be taxed. It is a legislative function to determine the articles to be taxed; and it is not for this Court, under our cardinal rules of statutory construction, to extend a taxing statute beyond the specified articles so taxed. The quoted paragraph from the majority opinion shows most clearly the violation of this rule of statutory construction. I submit that it would be much wiser for the Court to allow the Legislature to do its own legislating, rather than for the Court to invade that field.

NATIONAL GARAGES, INC., *v.* BARRY.

4-9228 232 S. W. 2d 655

Opinion delivered June 12, 1950.

Rehearing denied October 9, 1950.

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

Wright, Harrison, Lindsey & Upton, for appellee.

HOLT, J. This appeal comes from a judgment, October 5, 1949, for appellee against appellant in the amount of $505.66, as damages for the unlawful and unauthorized removal of appellee's automobile from appellant's parking lot in Little Rock on August 16, 1948, at about 11:00 a. m., without appellee's knowledge or consent.

Appellee was the only witness in the case. At the close of his testimony, appellant, without offering any testimony, asked for an instructed verdict in its favor. Appellee also asked for a verdict in his favor for the amount claimed, whereupon, the court took the case from the jury and entered a judgment for appellee, as indicated.

Appellee owned a 1941 Buick automobile and paid appellant $8.00 per month in advance for use of its storage lot. He testified, in effect, (quoting from appellant's abstract): "That they put a sticker on the windshield, and he would drive in and leave his car in the driveway, with the key in the car and the attendant would park it then, or when he could get to it; that he had no particularly assigned space, he just left his keys in the car and they parked it; that on August 16, 1948, he parked there about nine o'clock in the morning and went to his office, then later on in the morning he went out on a trip and got back about eleven and drove in and left the car again in the driveway for the attendant to take care of. He then went to his office. After lunch, about

three o'clock, he went out to look at another piece of property and he went to get his car and it wasn't on the lot."

Appellant says: "It is undisputed that appellee parked his automobile on the day in question on appellant's parking lot; that appellee paid a consideration therefor; and that the appellant thereby became a bailee for hire; that the automobile was missing when appellee called for it; that the automobile was stolen from the parking lot; that the thief was convicted and is now serving a sentence in the Arkansas Penitentiary; that the automobile was recovered by the Sheriff at Morrilton, Arkansas, and returned to the appellee in a damaged condition."

For reversal, appellant states his contention as follows: "It is the contention of the appellant that although it was a bailee for hire it was not an insurer and was only liable in the event it was proven to have failed to use ordinary care to protect appellee's automobile."

The rule is well settled that when each litigant, as here, asks for an instructed verdict and no other instructions are requested by either side, they, in effect, agree that the issue may be decided by the court, and its ruling, having the same effect as the verdict of a jury, will be permitted to stand if there is substantial evidence to support it. (*General Contract Purchase Corporation* v. *Row,* 208 Ark. 951, 188 S. W. 2d 507, Headnote 1.)

In the present case, it is conceded that appellant and appellee occupy the positions of bailee and bailor, respectively, and that appellee's car was stolen and damaged while in the care and custody of appellant, the keeper of the parking lot. It was further shown that the parking lot attendant knew the appellee and knew which car was his, so the trial court could have inferred that the theft was the result of appellant's negligence. When these facts were established, a *prima facie* case was made against appellant and it then became its duty to go forward with evidence to rebut this *prima facie* case. This, appellant has failed to do. In fact, it offered no testimony at all.

In these circumstances, the well settled rule is stated by the text writer in 24 Am. Jur., p. 508, under the subject "Garages, Parking Stations and Liveries," § 59, "Evidence—Burden of Proof," as follows: "The general rule seems to be that a *prima facie* case is ordinarily made out for the bailor when he proves the bailment and a failure on the part of the bailee to return the property on demand. The duty then usually devolves on the bailee to 'go forward' with evidence to rebut the *prima facie* case. Thus, one who brings an action against a garage or livery stable keeper based upon the latter's negligence ordinarily has the burden of proving such negligence or want of due care on the defendant's part; and when a car owner makes out a *prima facie* case of damage to his car while in the garage keeper's custody, it becomes the duty of the garage keeper to rebut the *prima facie* case by showing that he used due care as bailee." See, also, an extended annotation entitled "Liability for loss or damage to automobile left in parking lot," 131 A. L. R., pp. 1175-1205.

The principles of law announced in *Hornor Transfer Company* v. *Abrams,* 150 Ark. 8, 233 S. W. 825, a bailment case, apply with equal force here. There it was held: (Headnote 1) "A bailee of goods for hire is not absolutely liable for their loss, but only for their negligent loss," but that the burden is on the bailee for hire who has been placed in exclusive possession of the property, as here, to explain the loss thereof before the bailor could be put upon proof as to negligence.

No error appearing, the judgment is affirmed.

GERLACH *v.* COOPER.

4-9229 232 S. W. 2d 458

Opinion delivered June 19, 1950.

Rehearing denied October 2, 1950.

[redacted]

Arthur Sneed, for appellant.

E. L. Hollaway, for appellee.

LEFLAR, J. This is a bill in equity to cancel a deed the execution of which was allegedly procured by fraud and overreaching. The defendants by cross-complaint sought possession of the land conveyed by the deed, the plaintiff having continued to occupy it up to the time of trial. The Chancellor rendered a decree for the defendants (a) declining to cancel the deed and (b) directing issuance of a writ of possession in defendants' favor. Plaintiff appeals.

The plaintiff, Miss Adelhied Gerlach, is an elderly spinster who received conveyance of the land in question from a nephew on June 12, 1940. Her deed was duly recorded on that same day. She has had her home on the premises thus conveyed to her most of the time since then. On February 16, 1946, in the office of Bryan McCallen, an attorney at Corning, she executed a deed of the premises to defendants (appellees), this being the deed which she now attacks. The deed recited a consideration of $1.00 only, but defendants testified that they had agreed to pay her, and did pay her, $550 in cash at her home later on the same day. This she denies. Defendants gave in evidence a receipt signed by Miss Gerlach acknowledging payment of $550 to her by defendant Gladys Cooper on February 16, 1946. Plaintiff does not deny her signature on the receipt, but infers that defendants may have filled in the receipt after somehow inducing her to sign her name at the bottom of a blank piece of paper. No affirmative evidence was given that this in fact did occur; she merely denied execution of the receipt without further explanation of it.

As to execution of the deed itself, plaintiff admitted her signature and acknowledgment, but testified that she thought she was signing something "for safekeeping" of her 1940 deed, and that she had no intention of selling her home. McCallen, the attorney and scrivener, testified that he no longer remembered the details of the transaction clearly (the trial was held more than three years after the deed was executed) but his "impression" was that he had read and explained the deed to her before she signed and acknowledged it before him. Both the defendants testified specifically that Miss Gerlach executed the deed with full knowledge of what she was doing.

The defendants testified that Miss Gerlach wanted the $550 payment kept secret because she hoped to get "on the welfare" and feared she would be rejected if the Welfare Board learned that she had this much cash on hand. There was other testimony, largely contradictory, about the rent which she was to pay to the defendants after the conveyance and about the collection of interest-bearing loans which she had made to third persons, but it shed little light on the principal problem of whether the deed was induced by fraud.

Taxes on the property were paid by the Coopers (defendants) after they received the deed. Miss Gerlach testified that she reimbursed them for the taxes paid. This they denied.

A neighbor testified that he tried to buy part of the land from Miss Gerlach in the latter part of February, 1946, and that she then told him she could not sell it because "Mr. Cooper had the deeds."

"The requisite of evidence to avoid a deed . . . must transcend a preponderance. It must be 'clear and convincing . . . .'" *Alderson* v. *Steinberg,* 199 Ark. 1165, 1167, 137 S. W. 2d 925, 927. The test in an effort to set aside a deed for fraud in its execution is whether there is "a preponderance of the evidence which is clear and convincing." *Hiatt* v. *Hiatt,* 212 Ark. 558, 569, 206 S. W. 2d 458, 463. The plaintiff (appellant) in seeking to set aside the deed in the present case had this burden of proof to sustain. The evidence which we have just

summarized was insufficient to sustain the burden of proof that the law imposed upon her. We agree with the Chancellor that the decision, on the evidence as presented. must be for the appellees.

Appellant also, apparently for the first time on appeal, raises the point that her deed to defendants does not carry the $1.10 in federal revenue stamps required by the statute. 26 U. S. Code, §§ 3480, 3482. She argues that the deed is therefore ineffectual. Assuming that the point was properly raised in the trial below, it nevertheless does not aid her. Referring to this statute, the United States Supreme Court has said: "As to the absence of revenue stamps . . . this neither invalidated the deeds nor made them inadmissible in evidence. The relevant provisions of that act, while otherwise following the language of earlier acts, do not contain the words of those acts which made such instrument invalid and inadmissible as evidence while not properly stamped. . . . From this and a comparison of the acts in other particulars it is apparent that Congress in the later act departed from its prior practice of making such instruments invalid or inadmissible as evidence while remaining unstamped and elected to rely upon other means of enforcing this stamp provision, such as the imposition of money penalties . . . ." *Cole* v. *Ralph,* 252 U. S. 286, 293, 40 S. Ct. 321, 60 L. Ed. 567.

The decree of the Chancery Court is affirmed.

ATHA *v.* STATE.

4628 232 S. W. 2d 452

Opinion delivered June 19, 1950.

Rehearing denied October 2, 1950.

Tom Kidd, for appellant.

Ike Murry, Attorney General and *Robert Downie,* Assistant Attorney General, for appellee.

LEFLAR, J. Defendant Atha was convicted of the crime of operating an automobile "upon the public highway while under the influence of intoxicating liquors" in violation of Ark. Stats. (1949 Supp.), § 75-1023 (Act 255 of 1949).

As one ground for appeal, defendant questions the sufficiency of the evidence to support the jury's verdict. The evidence on which defendant was convicted included the testimony of the sheriff and a deputy sheriff who were driving late at night in a car a little behind the car which defendant was driving. Both these witnesses stated that defendant was zig-zagging from side to side as he drove down Washington street near the courthouse in Murfreesboro, and that he staggered and smelled of whiskey when they stopped his car and ordered him out of it a few moments later. Several witnesses for defendant testified that they had been with him during various parts of the evening, that they had not seen him take a drink, and that he did not appear to be intoxicated. Defendant himself testified that he had not had a drink of liquor for several weeks. Under this state of the evidence the jury was free to decide the case either way. We cannot say that its verdict of "Guilty" was without substantial evidence to support it.

Defendant also complains that there was a variance between the indictment and the proof, in that the indictment alleged drunken driving on a "public highway" whereas the evidence showed that defendant was driving on Washington street in Murfreesboro. We do not regard this as a variance at all. Assuming that Washington street is not on a state-numbered highway, it is still itself a "public highway" according to the "usual acceptation in common language" which by Ark. Stats., § 43-1023, we are required to employ in construing the words of an indictment. Defendant was in no wise misled by the words used. He knew that Ark. Stats. (1949 Supp.), § 75-1023, under which he was indicted, made it a crime to drive while intoxicated "upon any of the highways, streets or roadways within the State of Arkansas," and the evidence made it clear that he knew at all times that he was being charged specifically with drunken driving on Washington street in Murfreesboro. There could not possibly have been any "prejudice of the substantial rights of the defendant on the merits" within the meaning of Ark. Stats., § 43-1012.

Complaint is made of the fact that the Circuit Clerk was allowed to testify that the defendant had previously been convicted of drunken driving. The statute under which he was tried, in a later section, specifically authorizes such evidence for the purpose of imposing a heavier penalty in event of second or subsequent convictions for driving while drunk. Ark. Stats. (1949 Supp.), § 75-1024. The Circuit Judge expressly told the jury that the evidence was admitted for this and no other purpose. There was no error in this.

Finally defendant argues there was error in allowing him to be cross-examined, when he voluntarily took the stand as a witness for himself, about prior convictions for drunkenness and bootlegging. Such questioning on cross-examination is proper, for the purpose of testing credibility of the witness. *Benson* v. *State,* 103 Ark. 87, 145 S. W. 883; *Bockman* v. *Rorex,* 212 Ark. 948, 208 S. W. 2d 991. The Court properly instructed the jury that cred-

ibility was the only issue upon which this testimony should be considered.

No error appearing, the judgment of the Circuit Court is affirmed.

WALTERS-SOUTHLAND INSTITUTE *v.* WALKER, TRUSTEE.

4-9227 232 S. W. 2d 448

Opinion delivered June 19, 1950.

Rehearing denied October 2, 1950.

C. Ewbank Tucker and *Cracraft & Cracraft,* for appellant.

Burke, Moore & Burke, for appellee.

MINOR W. MILLWEE, Justice. Appellant, The Walters-Southland Institute, is a school which has been operated at Lexa, Arkansas, since 1936 by the African Methodist Episcopal Zion Church. Appellee, W. W. Matthews, served as bishop of the Arkansas conference of the church and president of the school from 1936 until May, 1948. The exact nature of the organization of the school prior to 1946 is not clear from the record although it had a board of trustees and operated under auspices of the church.

In 1936 the institute purchased its 160-acre school site from the Masonic Lodge and executed a mortgage on said property to secure the payment of the purchase price. In 1940 the president and secretary of the school, acting under authority of the board of trustees, entered into an agreement with the lodge which provided for an extension of the time of payment of a balance of $5,500 remaining due on the purchase price at the rate of $500 annually beginning December 31, 1941. The agreement further provided for the execution of a $500 interest note payable October 1, 1941, which covered all interest due and payable for the 11-year extension period.

In March, 1946, appellee and five other members of the board of trustees consulted G. D. Walker, an attorney at Helena, Arkansas, with reference to the execution of a mortgage to Bishop Matthews to secure certain advances he had made to the school including payment of a $4,200 balance on the Masonic Lodge indebtedness. Upon investigation Mr. Walker ascertained that appellant had no corporate entity. Acting upon his advice, a petition was filed by appellee and 14 others in circuit court and an order entered incorporating appellant as a benevolent association pursuant to the provisions of Ark. Stats., §§ 64-1301—64-1312.

The articles of incorporation provide that the bishop of the conference shall be an ex-officio member and president of a board of trustees consisting of not less than nine nor more than fifteen members. The articles further provide that the board of trustees shall operate the institute in accordance with the doctrine and discipline

of the African Methodist Episcopal Zion Church and its Department of Christian Education. The church discipline provides that no debts shall be contracted by the board of trustees without concurrence of the Board of Christian Education which is authorized to exercise general supervision and control over all educational institutions of the church.

After a correction deed was obtained from the Masonic Lodge, a resolution was adopted at a meeting of the board of trustees on April 2, 1946, authorizing the execution of a deed of trust of the school property by appellant in favor of G. D. Walker, as trustee for the use and benefit of Bishop Matthews, to secure an indebtedness of $7,847.60 evidenced by four notes payable one, two, three and four years from date bearing interest at the rate of 6 per cent. per annum. The resolution recites its adoption by a vote of six to 0 with Bishop Matthews excusing himself from presiding and participating in the proceedings. The notes and deed of trust were executed by the vice-president and secretary on April 2, 1946, and the deed of trust was filed for record on the same date.

On April 28, 1948, the vice-president and secretary of appellant executed an unsecured note to Bishop Matthews for $6,001.40, payable in 60 days. The minutes of the meeting of the board of trustees held April 27, 1948, authorizing the execution of this note reflect that the meeting was presided over by Bishop Matthews and attended by three other members of the board including Etoriah Dryver who served as registrar and bookkeeper of appellant for a seven-year period beginning in 1941. Nine members of the board were noted as absent and two as "present by proxy." The minutes further recite that this note was given for further advances by appellee which were used in the construction of a new building for the school at a total cost of $49,029.11.

At a meeting of the General Conference of the church at Louisville, Kentucky, in May, 1948, appellee was deposed as bishop on charges of forgery and immoral conduct. The charge of forgery grew out of an alleged alteration by the bishop of a passport by changing his

date of birth shown thereon for the purpose of deceiving the conference and continuing himself in office as an active bishop. The second charge was based on his alleged association "openly" with Etoriah Dryver to whom he was secretly married in January, 1947. Although the conference determined that Bishop Matthews should not be deemed a retired bishop in the "usual, official use" of the term, it voted to allow him the usual retirement pay of one-half his former salary as bishop "as an act of mercy and out of consideration for his many years of service to the church."

On April 4, 1949, appellee and G. D. Walker, Trustee, brought this suit against appellant to foreclose the deed of trust of April 2, 1946, alleging failure of payment of three of the four notes secured by the deed of trust. By amendment to the complaint appellee also sought judgment for $6,001.40 and interest on the unsecured note executed on April 28, 1948.

While appellant in its answer and cross-complaint did not specifically deny the indebtedness to appellee, it alleged that the latter had sole active charge of the receipt and disbursement of all funds of the school from 1936 to 1948 and occupied the status of a trustee toward said institution; that during said years he controlled funds belonging to the school in excess of $120,000 without adequate records and a proper accounting thereof; that he caused the deed of trust and notes sued upon to be authorized at meetings of the board of trustees held without a quorum present and without approval of the Department of Christian Education as requried by the discipline of the church; and that there were certain discrepancies in appellee's financial reports to the general conference and a failure to account for funds which the church records disclosed were delivered to him for the use and benefit of appellant. Appellant prayed for an accounting and that it be given credit upon any indebtedness found due appellee for all funds received by him belonging to appellant and not properly accounted for. By amendment to the cross-complaint it was also alleged that on account of the fiduciary relationship existing between the parties and the complicated accounting in-

volved, a master should be appointed to take proof and state an account between the parties.

At the conclusion of the trial, the chancellor made separate findings of fact in which he stated: "The testimony is very confusing about the manner in which those books were kept and about whether Bishop Matthews owed the church and fraudulently kept back the church school's money that he had. There is nothing here in the record for the Court to make a finding as to any indebtedness due the church for anything whatever." A decree was entered awarding judgment for $7,108.92 in favor of appellee for the balance due on the three notes secured by the deed of trust and also for the amount of $6,504.56 on the unsecured note. The decree further ordered foreclosure of said deed of trust and sale of the school property unless the amount first found due was paid within 90 days. Appellant's prayer for an accounting and the appointment of a master to hear and state an account was denied and the cross-complaint dismissed for want of equity.

Appellant offered evidence to show that during the 12-year period appellee served as bishop and president of the board of trustees, he exercised almost exclusive control over the affairs of the institute. While his conference covered considerable territory, he maintained his residence at the school and devoted a large portion of his time to administering its affairs. He received and made deposits of all moneys sent to the school and signed all checks disbursing school funds. Two of the trustees in attendance at board meetings authorizing execution of the notes and deed of trust were ministers residing in Little Rock and Pine Bluff. Their testimony is to the effect that appellee dominated board meetings and that they followed his recommendations in all financial matters without question and without being advised as to the correctness of the amounts which he claimed to have advanced from time to time in operation of the school. While the financial reports given at board meetings were submitted by the registrar, other board members stated that they relied wholly upon appellee's recommendations in passing thereon and knew nothing about the actual

financial status of the institution. A majority of the board members, who are nominated by the bishop, were inactive insofar as this record discloses. The board meeting authorizing execution of the note for $6,001.40 was held about 10 days prior to the filing of charges against appellee at the General Conference.

There was evidence that when appellee assumed the mortgage indebtedness to the Masonic Lodge, he represented to other trustees that interest payments to the lodge were too high and that he was willing to refinance the loan at a lower interest rate. Under the extension agreement with the lodge the interest rate was in fact much lower than the 6 per cent. rate charged by appellee in taking over the loan. After addition of other advances to the indebtedness due the Masonic Lodge the increased principal was made payable in four annual installments of more than $1,900 each under the refinancing agreement between appellant and appellee, while the extension agreement with the lodge provided for principal payments of only $500 annually over a period of 11 years.

After appellee was succeeded in office by Bishop R. L. Jones, appellant employed a certified public accountant to make an audit of the institute's books and records. This audit did not purport to be an exact reflection of the transactions of the school because of the incompleteness of the records presented and the short time (five days) spent in making it. However, the audit reflects certain discrepancies between the receipts and disbursements as shown on the records of the school and as reported to the general conference and the Department of Christian Education of the church, particularly during the four-year period prior to 1948. As shown by the audit, the books of the school show receipts of $13,250.80 and disbursements of $7,237.21 for the year beginning June 1, 1944, and ending May 31, 1945, while reports forwarded to the Board of Christian Education of the church for that year show receipts of $19,959.42 and disbursements of $12,176.93. Similar discrepancies appear for subsequent years and will not be detailed here. Appellee was unable to explain these discrepancies stating that he at no time was bookkeeper or treasurer of appel-

lant and was not responsible for the reports drawn up by the registrar and approved by the board of trustees.

The record before us includes several hundred pages of exhibits of accounts, reports and cancelled checks involving hundreds of transactions and more than $100,000. In view of this complicated record and the fiduciary relation existing between appellee and appellant, the question here is whether the court erred in refusing to appoint a master to hear and state an account. A chancellor is clothed with considerable discretion in determining whether an accounting matter should be referred to a master. *Norden* v. *McCallister,* 207 Ark. 1101, 184 S. W. 2d 459. In the early case of *Bryan* v. *Morgan,* 35 Ark. 113, the court said: "It was not erroneous in the Chancellor to refuse a reference to the Master to take and state the account, but it was not good practice. The Chancellor may, himself, take an account, announce the result, and decree accordingly. But this practice should be confined to simple and obvious cases, in order to save expense to litigants. In complicated transactions, justice cannot be well done without a reference."

The issue here is similar to that involved in the case of *Excelsior White Lime Co.* v. *Rieff,* 107 Ark. 554, 155 S. W. 921. There the general manager and secretary-treasurer of a corporation sued the corporation for back salary alleging insolvency of the defendant. The corporation filed a cross-bill asserting that the plaintiff had full control of the corporation, that he had not accounted for certain assets, and prayed for an accounting. There, as here, the court was confronted with a voluminous and complicated record and it was impossible to determine whether the plaintiff-manager of the corporation had properly accounted for funds he had received in managing and directing the affairs of the corporation. After citing the rule stated in *Bryan* v. *Morgan, supra,* the court said: "After spending much time on this record, the court has concluded that an injustice might be done one or the other of these litigants in attempting to state an account and strike a balance between them under the conditions of this record and it has accordingly determined and therefore orders that the cause be reversed

and remanded with directions to the chancellor to refer this record to a master to state this account; and that in stating this account, he charge the appellee with any excess of salary paid him and also with any funds not affirmatively shown to have been properly accounted for."

Appellee points out that the plaintiff in the Rieff case was not only general manager and treasurer of the corporation, but actually kept the books and records and ran the affairs of the company while in the instant case the affairs of appellant were controlled by the board of trustees and the books were kept by the registrar-treasurer. It is true that appellee, as president of the board of trustees, was not required to perform many of the duties which the evidence discloses that he actually did perform in connection with the administration of the affairs of appellant. He collected, deposited and disbursed the school funds and apparently dominated and controlled the actions of the board of trustees. The fiduciary relation existing between the parties imposed upon appellee the duty to render a proper accounting of the funds handled by him particularly in matters in which he was personally interested. The existence of such fiduciary relation is one of the well recognized grounds for equity jurisdiction of a suit for an accounting. 4 Pomeroy's Equity Jurisprudence (5th Ed.), § 1421.

Appellee also argues that appellant failed to discharge the burden of proving there was something due it as a setoff against the indebtedness before it was entitled to an accounting. The applicable rule is stated in 1 C. J. S., Accounting, § 27, as follows: "Where there is no balance due plaintiff from defendant, an accounting will not as a general rule, be ordered, since it would avail plaintiff nothing. On the other hand it has been held that the showing of a balance due plaintiff is not essential, since the party to whom the balance is due is the very matter to be determined; and an accounting has been held proper when it is necessary to show how money advanced by plaintiff in a business venture has been disposed of." It has also been held that an accounting may be had against a fiduciary to determine whether there is, in fact,

anything due the plaintiff. *French* v. *C. F. & T. Co.*, 124 Or. 686, 265 Pac. 443.

In view of the complicated record here involved, the fiduciary relation existing and the circumstances surrounding the transactions between appellee and appellant, we hold that it was error to refuse the appointment of a master. The decree is, therefore, reversed and the cause remanded with directions that this record be referred to a master to hear further testimony and state an account between the parties.

CARTY *v.* CARTY.

4-9237 232 S. W. 2d 447

Opinion delivered June 26, 1950.

Alonzo D. Camp and *Melbourne M. Martin,* for appellant.

Jack Holt, for appellee.

George Rose Smith, J. This was at first a suit for separate maintenance brought by the appellant against her husband, the appellee. By cross complaint the defendant sought a divorce on the ground of indignities, and the plaintiff then amended her complaint to ask for a divorce on the same ground. After the trial the chancellor held that because both parties were equally at fault neither was entitled to a divorce. The appellant was ordered to vacate the family home and was awarded separate maintenance in the amount of $50 a month for one year.

About seven weeks after the trial the appellant filed a pleading that the chancellor rightly treated as a motion to set aside the decree for newly discovered evidence. In this motion the appellant asserted that a few days before the first trial her husband had been guilty of an act of adultery, of which the appellant had no knowledge until after the first hearing. The appellant prayed that she be granted a divorce upon the ground of adultery. By stipulation the first decree was vacated, but after a second hearing the chancellor found that the charge of adultery had not been proved. The final decree, now under attack, reinstated the original findings.

In the main we affirm the chancellor's conclusions. The correctness of his action in denying a divorce to either spouse on the basis of indignities is not questioned. The issue upon the accusation of adultery is wholly one of credibility. The husband's alleged paramour testified that on November 17, 1949, she spent the night with him in a tourist court near Little Rock. This is denied by the appellee, who states that he merely rented a cabin for the woman because her daughter and son-in-law would not allow her to enter their home when she had been drinking. According to the appellee he does not like to drive a car at night, and after obtaining a room for this woman he telephoned his son to come and take

him home. Both the son and a friend who accompanied him corroborated the appellee's testimony about his having gone home instead of staying at the tourist court. The attendant in charge of the tourist court verified the fact that the appellee had registered for a cabin, signing his own name, but this attendant did not testify that the appellee entered the cabin itself.

It is evident that either the woman or the appellee and his corroborating witnesses testified falsely. The two versions of the night's happenings are about equally probable. In this situation we are guided by the findings of the chancellor, whose opportunity to determine the veracity of the witnesses is far better than ours. The supposed paramour gave her evidence with such evasiveness that the chancellor commented upon it during the trial. We cannot say that it was error for him to credit the testimony offered by the appellee.

We think, however, that the appellant is entitled to a somewhat more liberal allowance for her separate maintenance. The appellee admits that his monthly income is about $250. It is well settled that when a wife obtains an award for her separate maintenance the marital relation still continues, and it is therefore the husband's duty to provide support for his wife. *Pledger* v. *Pledger,* 199 Ark. 604, 135 S. W. 2d 851; *Bonner* v. *Bonner,* 204 Ark. 1006, 166 S. W. 2d 254. We have concluded that the maintenance payments should be fixed at $75 a month without limitation as to time, subject to future modification if required by changed conditions. With this modification we affirm the decree, the appellee to pay all costs in both courts and an attorney's fee of $100 for the services of the appellant's attorneys in this court.

BURBRIDGE *v.* GOODWIN.

4-9241 232 S. W. 2d 455

Opinion delivered July 3, 1950.

Rehearing denied October 2, 1950.

Frank J. Wills, for appellant.

J. R. Wilson and *Martin K. Fulk,* for appellee.

GEORGE ROSE SMITH, J. The appellees are three attorneys, Shields Goodwin, DuVal Purkins, and U. A. Gentry, who brought this suit to obtain compensation for having successfully represented the appellant, L. J. Burbridge, in litigation that was concluded by our decision in *Bradley Lbr. Co.* v. *Burbridge,* 213 Ark. 165, 210 S. W. 2d 284. That opinion disposed of three cases that had been consolidated in this court. In one case, a suit in ejectment, we held that Burbridge had title to the 320 acres involved in all the cases. In another, a suit to enjoin the removal of piling from the tract, we upheld Burbridge's contentions and awarded him a judgment for $330.26, with interest that brought the total amount to about $630. The third suit was for the value of pine timber cut in the first decade of this century, and we held that the action was barred by laches.

While the record in the case at bar is of great length the issues are relatively simple. The appellees contend, and the chancellor held, that by their contract with Burbridge they are entitled to a one-fourth interest in the 320-acre tract, which is estimated to be worth about $80,000. The appellant contends that the appellees are entitled only to a fourth of the $630 recovery, his theory being either that the appellees had no contract of employment in the ejectment suit or that the ejectment suit was needlessly tried, since the issues would have been settled by the other cases.

The facts that led to the earlier litigation go back almost a century. In 1869 the land in question was conveyed to appellant's mother, Isabella Burbridge, "and the issue of her body." In 1891 Isabella Burbridge purported to convey the fee simple to J. F. Ritchie, who took possession. By subsequent conveyances Ritchie's title passed to the Bradley Lumber Company. Among many questions in the earlier litigation were those of adverse possession and of the construction of the 1869 deed. We held that Isabella Burbridge was merely a life tenant and that possession under her 1891 deed did not become adverse to the remainderman until the life tenant's death in 1932.

The first of the three earlier cases was the piling suit, filed by Purkins in 1931. Next came the pine suit, filed by Goodwin in 1933. It was Goodwin's opinion, which our decision confirmed, that the lumber company would acquire title by adverse possession unless an ejectment suit was instituted within seven years after Isabella Burbridge's death. He accordingly filed the ejectment suit in 1939, pursuant to the written contract of employment upon which the present case centers. By that contract Burbridge agreed that Goodwin should receive for his services 20% of any recovery by judgment, compromise, or otherwise, or 25% if the case should be appealed to this court.

At first Goodwin and Burbridge agreed to let the ejectment suit pend until the other cases, which were in chancery, were tried. For reasons originally satisfactory

to Burbridge none of the cases were brought to trial for many years after their filing. Goodwin entered the army in 1942 and later withdrew from the pine case. Burbridge, with Goodwin's approval, then employed Gentry to handle the pine case. The chancery cases were finally brought to trial on December 10, 1946, after Goodwin had returned to civilian life. There is testimony that on the evening before this trial the three attorneys and Burbridge all agreed that the ejectment suit should also be tried as quickly as possible so that all the cases could be consolidated in the Supreme Court. Burbridge was undoubtedly reluctant to have the ejectment suit tried, but the evidence shows pretty conclusively that he acceded to what he considered to be the more informed judgment of his attorneys.

On January 20, 1947, the three lawyers met with Burbridge and his son in Little Rock. At that time Goodwin was the attorney of record in the ejectment suit, Gentry in the pine suit, and Purkins in the piling suit. It was agreed that the attorneys would pool their efforts in all the cases and divide their fees equally with one another. It was also agreed that the suit at law would be tried as quickly as possible, although Burbridge was still opposed to this strategy and yielded to the others against his own inclinations. Thereafter the litigation was prosecuted to its conclusion, with the results that we have stated.

We find it unnecessary to decide whether Goodwin abandoned his employment in the ejectment suit when he was ordered overseas, for the testimony shows that the contract was later reinstated. Anderson Burbridge, the appellant's son, testified that at the conference of January 20, when the appellant agreed to the trial of the action at law, Goodwin asked, "Do you mean under my old contract?" and Burbridge, Sr., replied, "Yes." The appellant's version is to the same effect, though he says that he was acting under duress. Eight days later Goodwin sent a copy of his contract to his co-counsel, as a confirmation of their understanding as to the division of fees. A copy was also sent to Burbridge, but

he waited about thirteen weeks before first suggesting that Goodwin had abandoned his employment in the ejectment suit. In the meantime a hearing had been held in the circuit court, in which all the attorneys participated. We think it to be clearly shown that the three appellees did have a contract of employment in the ejectment suit.

The appellant's remaining contention is that he was overreached by his attorneys when he consented to the trial of the ejectment suit. The record does not sustain the charge that the appellees acted in bad faith in bringing the case to trial. Goodwin's contract fixed a 20% fee in the event of any recovery by judgment "or otherwise." Even if the ejectment suit had been allowed to abide the outcome of the chancery appeal and even if that appeal had settled the issue of title, there would still have been a recovery in the ejectment suit upon a plea of *res judicata*. This recovery would necessarily have been by judgment or otherwise; so the appellees would have earned a 20% fee even without a trial on the merits. In this respect the case may be compared to one in which an attorney is employed in several similar suits and prosecutes a single test case to a successful conclusion. It certainly would not be seriously argued that if the adversary then concedes defeat in the untried cases the attorney is thereby deprived of his right to compensation.

Thus on this issue the real question is whether the appellees violated their fiduciary duty toward their client as a means of obtaining a fourth of the recovery instead of a fifth. We are unable to say that they even exercised bad judgment, much less bad faith. The sole issue in the ejectment suit was that of title to the land. The attorneys rightly feared that the pine suit might go off on the issue of laches, leaving the title still in controversy. The ground for decision adopted by the Supreme Court has occasionally come as a surprise to the attorneys in the case; so the appellees could hardly have given their client positive assurance that this court would adjudicate the title in the remaining chancery case—the

piling suit. The simpler and more certain strategy was to consolidate the ejectment suit with the others, so that the issue of title would be squarely presented on appeal. Both the appellant and his son agreed to this course of action, and both are business men of mature judgment. Finally, when the ejectment suit was called for trial Gentry stated to the court that his client desired a continuance, but both the judge and the opposing counsel insisted that the case be tried. We are acutely conscious of the fiduciary obligation that an attorney owes to his client, but we are convinced that these appellees were motivated throughout the litigation by the interests of their client rather than by any ends of their own.

Affirmed.

WOOD *v.* HUMMEL.

4-9242 232 S. W. 2d 454

Opinion delivered July 3, 1950.

Rehearing denied October 2, 1950.

David L. Ford, for appellant.

Floyd E. Barham, for appellee.

LEFLAR, J. The plaintiff Hummel Plumbing Company (hereinafter called Hummel) was awarded judgment in the Chancery Court against defendant Wood for $581.79, the amount of a bill owed Hummel for installing a 3-inch water line and a 2-inch gas line into Wood's commercial laundry. At the same time Hummel was

allowed a statutory lien (Ark. Stats., §§ 51-601, 51-604) on Wood's leasehold interest in the laundry premises to secure payment of the judgment. Wood appeals, asserting that Hummel's work was not done for Wood, but rather for Wood's landlord, one O'Shea, or possibly for a general contracting firm, Schriver and Son (hereinafter called Schriver) which had previously built the laundry for O'Shea. It is agreed that the only question presented by the appeal is whether the fact findings are contrary to a preponderance of the evidence.

When O'Shea contracted with Schriver for the latter to construct the laundry building, O'Shea already had an agreement with Wood that Wood was to lease and operate the laundry after it was built, and it was understood that the building should be constructed specially for that purpose. Wood visited the site frequently during the construction period and had opportunity to observe the work as it progressed. The O'Shea-Schriver contract was a written one, with fairly detailed specifications attached to it. Hummel was sub-contractor for the plumbing work, and there is no suggestion of non-compliance on Hummel's part with the terms of this subcontract. It was completed and Hummel was paid for the work done under it before the present controversy arose.

When the construction job was nearly finished, Wood discovered that the water and gas lines installed were apparently insufficient for commercial laundry purposes, and he requested Hummel to install an additional 3-inch water line and 2-inch gas line. Hummel installed them, but no one paid for the extra work, and Hummel brought the present suit against both Wood and O'Shea for the amount of his bill. Wood and O'Shea answered denying liability, and also brought in Schriver as a party defendant on the theory that Schriver was liable for Hummel's extra work as a part of what was to have been done under the original O'Shea-Schriver contract.

Most of the testimony at the trial was to the effect that negotiations for the extra work were altogether between Hummel and Wood. No testimony indicated af-

firmatively that either O'Shea or Schriver gave Hummel any orders in regard to it. O'Shea denied having authorized the extra work, and testimony was given on Schriver's behalf that the construction job had been previously completed in full compliance with the original contract and specifications. There was testimony that Schriver, after Hummel commenced the extra work, told Hummel explicitly that he (Schriver) would not pay for it, and that Hummel then stopped work temporarily, but resumed it after getting in touch with Wood. One witness testified that Wood discussed with Hummel the time to be allowed Wood for paying the bill if he could not get anyone else to pay it.

As already stated, the Chancellor found for Hummel against Wood. He further found that O'Shea was not liable to Hummel, from which finding Hummel does not appeal; also that Wood was not entitled to recover over from Shriver. Wood's appeal presents to us only the question whether the evidence supports the decree. In view of the testimony summarized above, we are unable to say that the Chancellor's findings were contrary to the preponderance of the evidence. The decree of the Chancery Court is affirmed.

ROGERS *v.* HILL.

4-9239 232 S. W. 2d 443

Opinion delivered July 3, 1950.

Rehearing denied October 2, 1950.

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

Barrett, Wheatley & Smith, for appellee.

DUNAWAY, J. Appellant Rogers, defendant below, appeals from a verdict and judgment in favor of appellees, plaintiffs below, in an unlawful detainer action involving certain farm lands in Craighead County.

Rogers was in possession of the premises during the crop year 1949 as a tenant of the owner, Neal Green. Appellees, who are brothers, entered into negotiations with Green in November, 1949, for the purchase of this farm. Appellees are farmers who had been renting other lands as tenants, and who desired to buy the farm now in litigation for their home. During the negotiations the question arose whether Green could deliver possession on January 1, 1950, so he and the appellees went to the farm to discuss the matter with appellant. This much is undisputed, but the testimony is conflicting as to the conversation that ensued.

Green admitted that prior to the negotiations for sale, he had discussed with appellant his renting the land for 1950. The testimony of Green and the Hill brothers was to the effect that appellant was advised of the proposed sale to appellees, and that it was contingent upon their getting possession on January 1, 1950. These witnesses testified further that appellant stated unconditionally that he would move, and that they should go

ahead with the sale. Acting in reliance upon appellant's assurance that he would cause no trouble, appellees purchased the land from Green on November 29, 1949. They immediately notified their landlord that they were giving up the lands they were then farming.

On being informed that appellant would not vacate the premises, appellees on December 20, 1949, caused a notice to be served on him, demanding possession by January 1, 1950. On January 3, 1950, a three day notice to vacate was served on appellant, and on January 7, 1950, this action was begun.

Appellant answered, asserting right to possession under an oral lease with Green for the year 1950. In their reply, appellees pleaded estoppel against appellant on the basis of his statements made to them before their purchase and upon which they relied in going ahead with the purchase and giving up possession of the lands they had been renting.

It is conceded that appellees can prevail in this lawsuit only if appellant is estopped to assert his rights under his lease with Green, it being admitted that the required notice to terminate a lease from year to year had not been given. The cause was submitted to the jury on the issue of estoppel alone.

The doctrine of estoppel *in pais* was early recognized in decisions of this court and is available as a defense to a claimed right either at law or in equity. See *Gambill* v. *Wilson,* 211 Ark. 733, 202 S. W. 2d 185. In the recent case of *Williams* v. *Davis,* 211 Ark. 725, 202 S. W. 2d 205, we quoted with approval, at p. 731, this statement in *Jowers* v. *Phelps,* 33 Ark. 465: "Estoppels *in pais,* depend upon facts, which are rarely in any two cases precisely the same. The principle upon which they are applied is clear and well defined. A party who by his acts, declarations, or admissions, or by failure to act or speak under circumstances where he should do so, either designedly, or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for

this misleading influence, will not be allowed, afterwards, to come in and assert his right, to the detriment of the person so misled.''

Although the appellant and other witnesses in his behalf testified that his promise to move from the Green farm was conditional upon a satisfactory settlement with Green, this was contradicted by the testimony of appellees and Green. This disputed question of fact was for the jury to determine.

Harry B. Hill, one of the appellees, testified as follows: ''Mr. Green said: 'Mr. Rogers, I have got a chance to sell this land to these boys. They want to buy it, but they won't buy it unless I give them possession of it. I came out to see you folks and see if you will agree to move and give these boys possession of the place the first of the year.' Mr. Rogers dropped his head down and looked at the ground a few moments and said: 'Mr. Green, you've really been good to us. I don't want to stand in the way of you selling this place. You go right ahead and sell it. I will find me a place and move to it and give possession. I won't give you one minute's trouble.' Mr. Green said again 'I didn't know how you folks would feel. I told them I wouldn't sell it until we knew.' Mr. Rogers said 'That's all right, Mr. Green. Go right ahead and sell the place. I will find a place somewhere. I won't give you one minute's trouble.' Mrs. Rogers spoke up and said 'No; you've been good to us, Mr. Green. We don't want to stand in the way of you selling the place.' She said 'If the place is going to sell I would rather have these boys have it than any other.' I spoke up and said, 'Cecil, you understand we are buying the place for a home to move to the first of the year?' He said 'Yes, sir. I'm glad to see you boys get this place. I just wish I had the money to buy it myself, you wouldn't have had a chance at it. I can find me a place and give you possession. I won't give you no trouble.' ''

The situation in the case at bar is similar to the one considered by this court in *Trapnall* v. *Burton,* 24 Ark. 371, where we said at p. 399: ''If a person who has the claim to, or is the owner of, property real or personal,

stands by and permits it to be sold, without giving notice of or asserting his right, he is estopped from setting up his claim or title, against the purchaser.'' In that case Trapnall had bought certain real property at a sheriff's sale under execution against one Hawkins and there was pending a suit between the two. The land was desired as the site on which to erect a school.

To quote further from our opinion in that case at page 400: ''When the trustees were about purchasing the west half of the northeast quarter, . . . they knew of Trapnall's claim, and of his then pending suit. They informed him of the intended purchase, he himself being warmly interested in the enterprise of establishing the college. They told him that they should not purchase, if he intended enforcing his claim. He told them that he neither wanted or expected to recover the land itself, but to compel the payment of a sum of money due by Hawkins, ... He declared that he would place no obstacle in the way of the purchase. The trustees believed him, and relying on these assurances made the purchase.''

On the basis of Trapnall's assurances that he did not intend to enforce his claim against the land, we held that there was an estoppel against a subsequent effort by his heirs to enforce it after the trustees had bought the property.

In the instant case the appellees went to appellant for the specific purpose of finding out whether he was claiming a lease for 1950 on the farm they wished to purchase. They informed him that they would not buy the property unless they could get possession and move onto the place on January 1, 1950. Although he did not say in so many words that he did not have a lease, appellant did, according to appellees' testimony, in effect say that he was not claiming right to possession under any lease. His statements, as above set out in detail, certainly amounted to a present representation that he was not asserting any right to possession for the year 1950. Acting in reliance on appellant's declarations, appellees to their

detriment were left without a place to farm for the year 1950.

The facts in this case bring it within the rule approved by this court in *Shields* v. *Smith,* 37 Ark. 47 (at p. 53): "The doctrine of estoppel is applied with respect to representations of a party to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect if a party, who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statement, or enforce his rights against his declared intention of abandonment."

Appellant also argues that even if the testimony was sufficient to warrant submission of the question of estoppel to the jury, the court's instructions as to this issue were erroneous. The following instructions, among others, were given:

"2. It is admitted that the defendant Rogers had a contract with Green by which he was to occupy the land during 1950, but plaintiffs contend that Rogers agreed prior to the purchase of the land by the plaintiffs to surrender the possession on or before January 1st, and that he is now estopped by reason of his agreement to claim any right to possession for the year 1950.

"3. If you find from the evidence in this case that the defendant Rogers, prior to the purchase of the land by the plaintiffs, agreed unconditionally to surrender the possession thereof on or before January 1st, 1950, then your verdict in this case should be for the plaintiffs."

A general objection was made to instruction No. 2 but no objection was made to instruction No. 3. The instruction objected to was a proper instruction, and in the absence of any objection to instruction No. 3, appellant cannot now complain that it did not fully cover all the elements necessary for the creation of an estoppel.

We have considered appellant's requested instructions and agreed that they were properly refused by the trial court.

Appellant's final contention is that the trial court improperly permitted the witness Neal Green to testify concerning certain litigation between him and appellant involving cotton grown in 1949. It appears that the court allowed this testimony in explanation of references made to the litigation in the opening statement of counsel for appellant. Since appellant injected this matter into the lawsuit, he cannot complain that the court permitted Green to explain the nature of his legal controversy with his former tenant.

The judgment is affirmed and an immediate mandate ordered.

Mr. Justice LEFLAR concurs.

DONALDSON *v.* CALVERT-MCBRIDE PRINTING COMPANY.

4-9244 232 S. W. 2d 651

Opinion delivered July 3, 1950.

Rehearing denied October 9, 1950.

Harper, Harper & Young, for appellant.

Warner & Warner, for appellee.

HOLT, J. This appeal is from a judgment of the Sebastian Circuit Court affirming the action of the Workmen's Compensation Commission, which denied appellant's claim for an alleged compensable injury.

The facts were undisputed: "It was stipulated that the claimant received an accidental injury arising out of and in the course of his employment as a result of said injury the claimant was off work from March 10, 1947, to March 17, 1947, at which time he returned to work for this respondent employer. The claimant was paid no compensation during this period for the reason that he was not off work long enough to entitle him to compensation under the provisions of the Act, but medical expense in the amount of $25 was paid by the respondents; that the employer filed his Form A-8, being the Employer's First Notice of Injury, with the Commission on March 13, 1947.

"The case was first set for hearing before Commissioner Caperton on June 22, 1949, at which time the respondents specifically pleaded the Statute of Limitations in bar of any claim for compensation. The claimant being without counsel, the Commissioner continued the case until he could secure the services of an attorney.

"The claimant testified that on Friday, March 7, 1947, he struck his coccyx, or lower end of his spine, on a part of the press where he was working; that although it hurt pretty badly he continued to work until Saturday noon, which was the end of the regular work week, and that he also worked the following Monday, but on Tues-

day, he went to Dr. Hugh Johnson, who in turn sent him to Dr. Brooksher for an X-ray; that Dr. Johnson sent him home, where he remained about one week, and then returned to his regular work as a pressman; that at that time he was being paid $52.20 per week, and that after returning to work in March, 1947, he worked most of the time for the next two years; that he first knew that he had fractured his coccyx two or three weeks after March 7, 1947; that from March, 1947, to December 31, 1948, he was off from work on ten or twelve different occasions, a week or so at a time, because his back was hurting him; that he was paid straight time by his employer for any time he lost from work from March, 1947, to October, 1948; that in October, 1948, he went to the Veterans' Administration Hospital, at Fayetteville; and about that time Dr. Johnson told him he could not do any heavy lifting, which he had to do in his job as a pressman; that he talked to his employer in October, 1948, and they gave him a job as outside salesman at $48 per week. At this time it appears that the claimant's wages, which were $52.20 per week at the time of his injury, had been increased to where he was earning $63.60 per week. However, he took the position as an outside salesman at $48 per week, and since that time his salary as such has been raised to $56.40 per week; that on March 21, 1949, he was operated on at the Veterans' Administration Hospital, in Fayetteville, and three joints of his coccyx were removed; that his condition is worse since his operation and the end of his spine pains him constantly; that there was no doubt in his mind about his injury as he was informed by Dr. Hugh Johnson that he had a fracture of his coccyx, and he had had trouble all along for a period of two years or so; that the reason he did not file a claim for compensation was that he did not know there was any time limitation for the filing of a claim; that he had had some trouble with his kidneys and he thought that they might have something to do with his condition also. It appears that the first claim for compensation filed by this claimant was a letter to the Commission dated May 23, 1949, which was received by the Commission on May 24, 1949, in which the claimant set out the injury of March 7, 1947, and his operation on March 21, 1949."

The Commission denied appellant's claim on the ground that it was barred since it was not "filed within one year after the time of the injury" as provided by § 18 (a) of the Workmen's Compensation Law of 1939, § 81-1318, Ark. Stats. 1947.

The Commission held that "the time of injury" was March 7, 1947, and since appellant did not file his claim until in May, 1949, he was too late.

As indicated, the Circuit Court, on appeal, affirmed.

Was the claim barred? The question presented appears not to have been determined by this court.

Section 18 (a) of the Workmen's Compensation Law, in effect March 7, 1947, provided: "The right of compensation for disability under this act shall be barred unless a claim therefor is filed within one (1) year after the time of the injury."

Appellant earnestly contends that "no injury within the meaning of the Law and no disability occurred until October, 1948, and that the first time appellant suffered a loss in earnings because of his injury is the time of his 'injury' within the meaning of the Law then in effect," and that an "injury" did not occur until it became a compensable injury in October, 1948.

Appellees insist that under the plain terms of the act, appellant was barred because he failed to file his claim within one year limitation "after the time of the injury" and that this requirement was mandatory and jurisdictional.

Our rule is well settled that we must give a liberal construction to the provisions of the Workmen's Compensation Law, to effectuate its humane purposes, and resolve any doubt in favor of the claimant. To this end, we should not, in administering the act, defeat its purpose by over emphasis on technicalities, by putting form above substance. The act itself provides that in a proceeding to enforce a claim "there shall be a *prima facie* presumption * * * that the claim comes within the provisions of this act." *Batesville White Lime Company* v. *Bell,* 212 Ark. 23, 205 S. W. 2d 31.

The general rule, applicable here, is stated in *71 C. J.*, p. 966, § 734, as follows: "Unless otherwise provided by the statute, the date of the injury and the date of the accident for the purpose of bringing suit are not necessarily the same. By injury is meant the state of facts which first entitles claimant to compensation, so that if the injury does not develop until after the accident, the cause of action arises when the injury develops or becomes apparent and not at the time of the accident, the latter having been held to be the rule in regard to latent injuries even where the statute requires the proceedings to be instituted within a specified time after the accident," and the text writer in *58 Am. Jur.*, p. 846, § 409, announces the rule:

"The rule in most jurisdictions is that the period within which a proceeding for the recovery of compensation may be instituted, or within which an application or claim may be filed, commences to run when the injury accrues, or when the disabling consequences of the accident or injury become apparent or discoverable, rather than at or from the time of the happening of the accident from which the injury results; but in some jurisdictions the period of limitations is computed from the time of the occurrence of the accident."

Appellant filed claim for compensation May 24, 1949, within less than a year from October, 1948, setting out the injury of March 7, 1947, and the operation of March 21, 1949.

As indicated, appellant argues that an injury does not occur until it becomes a compensable injury and that "time of the injury," as used in the act, means a compensable injury and the one year limitation, therefore, must be reckoned from October, 1948, when appellant's injury became compensable.

Appellees contend that "the one year limitation began to run from the date of the accident, March 7, 1947," and that "he (appellant) then had a compensable injury" on that date. In other words, appellees, in effect, argue that "time of the injury" as provided in the act is synonymous with "time of accident." We think there is a

clear distinction between an accident and an injury. The injury is the result of the accident. An accident often, at the time of its happening, produces a compensable injury, but this is not always true.

For example, one of the distinguishing features between the present case and that of *Sanderson & Porter* v. *Crow,* 214 Ark. 416, 216 S. W. 2d 796, (strongly relied upon by appellees) is that in the Crow case, on the facts, a compensable injury resulted on the date of the accident. Here, appellant's injury was not compensable until he suffered a loss in earnings in October, 1948. Such was the effect of our holding in *Sallee Bros.* v. *Thompson,* 208 Ark. 727, 187 S. W. 2d 956.

" 'Disability,' as defined in the statute, 'means incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury.' Section 2 (e) of Act 319 of 1939." *Conatser* v. *D. W. Hoskins Truck Service,* 210 Ark. 141, 194 S. W. 2d 680.

In a well reasoned case by the Wyoming Supreme Court, *Baldwin* v. *Scullion,* 50 Wyo. 508, 62 Pac. 2d 533, 108 A. L. R. 304, in which many authorities are reviewed, that court construed the limitation section of their Workmen's Compensation Law, which provided "no * * * award for compensation shall be made unless, * * * claim * * * is filed by the injured workman * * * within five months after the date on which the injury occurred." It will be observed that this act is similar, in effect, to our own § 81-1318 above. The court there said: "The term 'injury' from the date of whose occurrence the mandatory time limitation imposed upon the employee to file his claim for compensation commences to run, means a compensable injury under the law. It is not used in the sense of 'accident.' "

It would have been an easy matter for our lawmakers, had they intended that a claim must be filed within one year from the date of the accident, to have said so by using the word "accident" rather than the word "injury." Of significance is the fact that in 1948 (1949 Cumulative Pocket Supplement, Ark. Stats.) the above

§ 81-1318 was amended so that the time for filing claims was changed to two years from the date of the accident, not the date of the injury. Section 81-1318 (a) now reads: "Time for Filing. (1) A claim for compensation for disability on account of an injury (other than an occupational disease and occupational infection) shall be barred unless filed with the Commission within two (2) years from the date of the accident."

There would appear to be no need for this change had the Legislature considered the two words "accident" and "injury" to be synonymous. We hold, therefore, that "time of injury" used in the act before amendment, as indicated, means a compensable injury, and since appellant filed his claim within one year from October, 1948, when his injury became compensable, it was filed in time.

Finally, appellees say: "Medical expense of $25 was paid by respondents. This constituted 'compensation' as defined in § 2 (i), 81-1302 (i). The employer was required to furnish it promptly (§ 81-1311). Claimant accepted it, so he was paid 'compensation' in this manner. But he still failed to file claim for 2 years, 3 months and 17 days and is barred."

We think this contention without merit for the reason that § 81-1318 (a) above, refers to "time of injury," which we hold to mean time of compensable injury (October, 1948). This section also provides "except that if payment of compensation has been made in any case on account of such injury (that is compensable injury) * * * a claim may be filed within one year after the date of the last payment."

It is undisputed that appellant received his injury on March 7, 1947, "was off work from March 10, 1947, to March 17, 1947," that he was paid no compensation during this period for the reason that he was not off work long enough to entitle him to compensation under the provisions of the act (§ 81-1310), but medical expenses in the amount of $25 were paid by the appellees for this period.

Obviously, this medical payment was not, and could not have been, a "payment of compensation * * * on ac-

count of such injury (compensable injury)'' of October, 1948.

Accordingly, the judgment is reversed and the cause remanded with directions to the Circuit Court to remand the cause to the Workmen's Compensation Commission with directions to allow appellant's claim for compensation and determine the amount thereof.

BROTHERS *v.* DIERKS LUMBER & COAL COMPANY.

4-9245 232 S. W. 2d 646

Opinion delivered July 3, 1950.

Rehearing denied October 9, 1950.

Bates, Poe & Bates, for appellant.

Watson, Ess, Whittaker, Marshall & Enggas, Abe Collins and *Elbert Cook,* for appellee.

LEFLAR, J. Appellants filed a Workmen's Compensation claim against appellee Direks Lumber & Coal

Co. (hereinafter called Dierks) and one Dan Durham on account of the death of their husband and father, Chester O. Brothers, who was killed when a log rolled off a truck onto him while he was helping unload logs being hauled from the Ouachita National Forest to a Dierks lumber mill. The Workmen's Compensation Commission denied the claim against Dierks, on the ground that decedent Brothers was not an employee of Dierks but was employed only by Durham, who was held to be an independent contractor. The claim was allowed against Durham only. It is shown that Durham is financially worthless, and without insurance, so that he cannot pay the claim allowed. He did not appeal. The dependents of the decedent appealed against Dierks, and the Circuit Court affirmed the order of the Workmen's Compensation Commission. This appeal is from the Circuit Court judgment.

Appellant relies upon two separate grounds for reversal, one ground involving primarily the facts and the other primarily a question of law. Under the fact heading, the contention is that Durham was not an independent contractor at all, but merely a supervisory employee of Dierks, hired to handle the job of hauling logs from the forest to the mill and to superintend the labors of other employees, like the decedent Brothers, who were hired to work on the same job. Considerable evidence was offered, though most of it was excluded, to the effect that Dierks' regular system was one of employing foremen under the guise of independent contractors so as to achieve certain advantages which were deemed to inhere in the absence of an employer-employee relationship between Dierks and the loggers. This evidence if admitted would apparently have been supported by evidence that a similarly disguised relationship was present in the instant case.

We find it unnecessary to pass upon this fact question, or upon the admissibility of the proffered evidence, because it appears that the other ground of appeal, primarily one of law, requires reversal in any event. This ground assumes that Durham was an independent contractor, as contended by Dierks. It has to do with the

interpretation of § 6 of the 1939 Workmen's Compensation Act (Ark. Stats., § 81-1306).

Section 6 provides that "a contractor in the performance of whose contract one or more persons are employed, . . . by a subcontractor, who subcontracts all or any part of such contract shall be liable for and shall pay compensation to any employee injured whose injury arises out of and in the course of such employment, unless the subcontractor primarily liable therefor has secured compensation for such employee as provided in this act." Under this section, if a subcontractor does not carry compensation insurance (or self-insurance) on his employees, they are deemed "statutory employees" of the main contractor for purposes of the Workmen's Compensation Act.

Dan Durham did not have insurance of any kind on Brothers or the other men who were helping him haul logs for Dierks. The evidence disclosed that Dierks had maintained Compensation insurance for Durham and his crew, and apparently for other similar crews, until about a month before Chester Brothers was killed, but the carrier insurance company had then canceled the policy, apparently because the risk was so great. Durham testified that he thought he and the crew were still covered by insurance when Brothers was killed, but it is now clear that they were not.

The question is presented whether Dierks was a "contractor" and Durham a "subcontractor" within the meaning of § 6. Appellee Dierks' position is that it was merely a purchaser of timber, and not a "contractor" in the statutory sense.

Dierks was removing merchantable timber from the Ouachita National Forest under a contract with the Forest Service of the Department of Agriculture of the United States. The contract was quite lengthy, covering some fifteen typed, printed and mimeographed pages. The central feature of the contract was that Dierks became the purchaser of certain timber, of which the Forest Service was the seller. But the contract was much more than a mere bill of sale. It set out in great detail

the manner in which Dierks was to cut and remove the timber. An obvious objective of the contract, along with the sale of merchantable timber, was the doing of work by Dierks which would help to preserve and maintain the National Forest in accordance with good forestry practices.

The contract by its terms was unassignable by Dierks. The manner of cutting individual trees was specified, both as to height of stumps, the diameter at which tops were to be cut off, and what trees were to be cut. Refuse and debris were to be disposed of by Dierks so as not to pollute streams or develop unsanitary conditions in the forest, and "slash" was to be distributed in a designated and detailed manner. The maintenance of fires and activities likely to cause fire were regulated in minute detail, and Dierks was required to keep all its employees available to the Forest Service for fire-fighting duty at all times. The contract required that fifty percent of the laborers used in cutting and removing the timber be residents of Scott, Montgomery and Yell counties. The manner in which Dierks' work was to be done in reference to young timber left standing was set out. Telephone lines, ditches and fences were to be protected by Dierks, or repaired if they should be damaged. Dierks was required to clean up all loading spaces by piling and burning debris, as directed by the Forest Officer, whether the debris was produced by Dierks or by others. Roads built by Dierks in the Forest area, for hauling out timber, were to be constructed according to defined standards and specifications. Designated roads were to be repaired by Dierks. The manner of road maintenance and repair was specified, and the road maintenance obligation was imposed on Dierks regardless of whether the hauling be done "by the purchaser (Dierks) or by other persons or concerns as sub-contractors or customers of the purchaser." Numerous other clauses in the contract imposed still other duties on Dierks. The various conditions in the contract were inter-dependent, and the Forest Officer was authorized to suspend all operations under the contract, including the removal of scaled timber, in

event of non-compliance by Dierks with any of the terms of the contract.

This Court has had occasion once before to deal with a Forest Service timber sale contract like this, in *Cook, Commr. of Revenues,* v. *Wilson,* 208 Ark. 459, 187 S. W. 2d 7. The issue there was as to the collectibility of state severance taxes, a matter not relevant in the present case, but it is worthy of note that we then emphasized the detailed performances due under the contract, as distinguished from the purchase and sale feature merely. And on appeal to the United States Supreme Court (*Wilson* v. *Cook,* 327 U. S. 474, 66 S. Ct. 663, 90 L. Ed. 793) the problem was stated in terms of "a contractor who had contracted with the United States for the purchase and severance of timber on national forest reserves," and Chief Justice STONE proceeded to discuss the transaction in terms of "the contracts of severance and purchase" and not merely in terms of a sale.

The only American case substantially similar to the instant case, that we have been able to discover, is *Nylund* v. *Thornberg,* 209 Minn. 79, 295 N. W. 411. The Minnesota court there held a purchaser of timber from the State to be liable for workmen's compensation to an employee of a subcontractor, under a statute like our § 6. The employee was injured while cutting and removing timber from State lands under direction of his subcontractor employer. The defendant purchaser's contract with the State for severance, removal and purchase of timber was quite similar to Dierks' contract with the Forest Service, the terms of a relevant Minnesota statute having been incorporated into the contract. The Minnesota court, speaking of the statutory contract, said:

". . . the status of the holder of a permit issued thereunder is much that of a general contractor in cutting and removing the merchantable timber from the state's land. True, it speaks of the sale of the timber, but such sale results from a compliance with the numerous terms and conditions prescribed by the statutes mentioned. (The Court then reviewed some of these terms and conditions, several of which were almost identical

with those in the Dierks contract.) It is apparent that the state has a vital interest in having the timber properly cut and removed without harm to growing trees on the land not included in the permit and to have the tops, branches or slashings properly burned, thus protecting its lands and its inhabitants against forest fires. Taking the whole situation in view, we think the holder of a valid timber permit . . . is a general contractor of the state in cutting and removing the timber, and the one to whom he lets the actual work becomes his subcontractor, within the meaning of Mason's Minn. St. 1940 Supp. § 4290, subd. 4 (equivalent to § 6 of the Arkansas Workmen's Compensation Act.) Hence relator becomes liable for compensation to respondent accidentally injured, because (the subcontractor) failed to carry compensation insurance."

Arkansas has in earlier cases held that § 6 of the Workmen's Compensation Act applied to employees of a subcontractor where the main contractor's obligations under a contract for purchase and sale of timber products were considerably fewer than under the Dierks-Forest Service contract. *Hobbs-Western Co.* v. *Craig,* 209 Ark. 630, 192 S. W. 2d 116; *Hobbs-Western Co.* v. *Morris,* 212 Ark. 105, 204 S. W. 2d 889. Though both these cases involved the point, the first was the one that actually interpreted § 6.

In *Hobbs-Western Co.* v. *Craig,* the decedent Craig was employed by one Lea, held to be a subcontractor under Hobbs-Western Co. within the meaning of § 6. The principal contract, comparable to the Dierks-Forest Service contract in the present case, was between Hobbs-Western Co. and the Rock Island Railroad. This principal contract provided that Hobbs-Western Co. should sell and the Rock Island Railroad should buy from Hobbs-Western Co. all the railroad ties the Railroad should require for a given five-year period. The contract set the price for the ties, and specified their dimensions, but it did not call for them to be cut from any particular lands, nor by any particular persons, nor in any particular detailed manner. This Court held that the contract be-

tween Hobbs-Western Co. and the Rock Island Railroad made Hobbs-Western Co. a "contractor" within the meaning of § 6, and that Lea was a "subcontractor" under the section since he was cutting ties under contract with Hobbs-Western Co. to enable it to supply the requirements of the principal contract with the Rock Island Railroad. Because the "subcontractor" Lea was uninsured, recovery was allowed on Craig's behalf against the "contractor" Hobbs-Western Co.

Both the Dierks-Forest Service contract and the Hobbs-Western-Rock Island contract were primarily purchase and sale contracts. The only factual difference between them, in terms of § 6, is that Dierks was the buyer under its contract whereas Hobbs-Western Co. was the seller. This is an irrelevant difference as far as § 6 is concerned. As a difference, it does not bear upon the question whether the parties to the contracts were "contractors."

If Hobbs-Western Co. was a "contractor" within the meaning of § 6 (and we have so held)[1] there is no escape from the conclusion that Dierks was likewise a "contractor" under the same section. The contractual duties imposed upon Dierks under its contract, by way of work to be done and services to be performed as distinguished from the mere sale of goods, were far more substantial than those imposed upon Hobbs-Western Co. under its contract. We do not hold that a mere contract for the sale of goods makes either the buyer or seller, or both, a "contractor" within the meaning of § 6, but we are committed to the view that when the contract to sell is accompanied by an undertaking by either party to render substantial services in connection with the goods sold, that party is a "contractor" within the meaning of the section.

[1] In order to make certain that this issue was clearly presented to the Court, we have re-examined the briefs and the transcript, including the principal contract between the Rock Island Railroad and Hobbs-Western Co., filed in the case of *Hobbs-Western Co.* v. *Craig*, 209 Ark. 630, 192 S. W. 2d 116, and we find that the question whether Hobbs-Western Co. was a "contractor" within the meaning of § 6 was argued as a principal issue in the case. Re-examination of the briefs and transcripts filed in *Hobbs-Western Co.* v. *Morris*, 212 Ark. 105, 204 S. W. 2d 889, shows that the issue was again presented there.

Once it is determined that Dierks was a "contractor" under its Forest Service contract, it follows automatically that Dan Durham was a "subcontractor," since he was performing under contract with Dierks a part of the work—removal of the merchantable timber—called for by the Dierks-Forest Service contract. The fact that Durham was not cutting timber, but only removing it, is unimportant; a single subcontractor is not expected to do all the work which the principal contractor has agreed to do. What Durham was doing was an essential part of the interdependent whole called for by the Dierks-Forest Service contract. And Durham was uninsured.

One further argument is urged by appellee Dierks. This is that § 6 of the Arkansas Workmen's Compensation Act is unconstitutional, regardless of what interpretation we give it.

This argument is based upon the wording of Amendment 26, the Workmen's Compensation Amendment to the Arkansas Constitution. Prior to the adoption of Amendment 26 in 1938, the old Art. V, § 32 of our Constitution provided that "No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property." This prevented the enactment of a general workmen's compensation law because such a law would put a limit on the pre-existent common law liabilities of employers to their employees for personal injuries. To cure this, amendment 26 was worded as follows:

"The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payment shall be made. It shall have power to provide the means, methods, and forum for adjudicating claims arising under said laws, and for securing payment of same. Provided, that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property; and in case of death from such injuries the right of action shall survive, and the General

Assembly shall prescribe for whose benefit such action shall be prosecuted."

Appellee's argument is that the exception to the old law, achieved by Amendment 26, is limited to "the amount of compensation to be paid by employers for injuries to or death of (their own) employees," and that all other cases fall within the retained proviso, "that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property."

For one thing, we deem it safe to say that the framers of Amendment 26 had in mind the workmen's compensation laws of a majority of the other states, already in force in 1938. Most of these laws included the concept of the statutory employee, as it now appears in Arkansas in our § 6, as a part of their provisions for "compensation to be paid by employers for injuries to or death of employees." See 2 Schneider, Workmen's Compensation (perm. Ed., 1942) 175; Annots., 58 A. L. R. 872, 105 A. L. R. 580. The framers of Amendment 26 intended to make it possible for Arkansas to enact workmen's compensation laws similar to those which had appealed to the good legislative judgment of other states. It cannot be assumed that they did not intend to adopt here the same concepts of the words "employer" and "employee" as were already in force in the same field in other states.

Our decisions in *Hobbs-Western Co.* v. *Craig,* 209 Ark. 630, 192 S. W. 2d 116, and *Hobbs-Western Co.* v. *Morris,* 212 Ark. 105, 204 S. W. 2d 889, already discussed herein, did not it is true pass expressly upon the constitutionality of § 6, but they did take its constitutionality for granted, and enforced the section on the assumption that it was constitutional.

The only relevant limitation which Amendment 26 imposes upon free legislative action is that "no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property." It does not deny the legislature's right to create

new causes of action for injury or death where none before existed. Before there can be a law *limiting* recoveries for injury or death, there would have to be some existent right to recover for such wrongs. Prior to the enactment of § 6, the employees of independent contractors save in extraordinary situations had no rights against the main contractor. The claimants in the present case would apart from § 6 have had no rights against Dierks, and § 6 in giving them a right against Dierks therefore did not limit any amount otherwise recoverable by them. § 6 merely gave them a right; it did not take any right away from them. Our conclusion is that § 6 is a constitutional enactment under the authority conferred by Amendment 26.

The judgment of the Circuit Court is reversed, with instructions to remand the cause to the Commission for the entry of an award in accordance herewith.

LONGINO *v.* MACHEN.

4-9259 232 S. W. 2d 826

Opinion delivered October 2, 1950.

Keith & Clegg, for appellant.

A. R. Cheatham, for appellee.

George Rose Smith, J. In 1919 S. V. Rogers and others executed to E. I. Newblock an oil and gas lease upon an eighty-acre tract. This lease was in the customary form, reserving to the lessors a one-eighth royalty in all oil and gas produced under the lease. In the following year the lessors executed and delivered to L. A. Longino a deed, the construction of which is the only question presented by this case. The appellants, Longino's heirs, contend that the effect of the 1920 deed was to convey an undivided one-fourth interest in all oil and gas underlying the tract in question. The appellees, who have acquired the title of the original lessors, interpret the deed as having conveyed merely a one-fourth interest in any royalties payable under the 1919 lease. The chancellor sustained the latter contention and accordingly canceled the deed as a cloud on the appellees' title, the lease having expired in 1924.

The deed in controversy is entitled "Sale of Royalty in Oil and Gas Lease." The granting clause recites that the grantors convey to Longino "a one-fourth undivided interest in all right, title and interest retained by us, or in any manner whatsoever owned by us, in a certain oil, gas and mineral lease dated Dec. 19, 1919, wherein the aforesaid grantors conveyed to E. I. Newblock and to their heirs, assigns and successors the oil, gas and mineral rights" underlying the eighty acres. The *habendum* clause reads in part: "To have and to hold said interest in the aforesaid royalty retained in the hereinbefore mentioned land," etc. In the acknowledgment the grantors are referred to as "grantors in the foregoing sale of royalty retained in lease of oil, gas and minerals."

The deed under consideration is unquestionably ambiguous, but we have concluded that the chancellor's construction is a more reasonable one than that suggested by the appellants. When the instrument is examined in its entirety it is seen to make three separate

references to "royalty" as being the subject of the conveyance. We are aware that this term is sometimes loosely used to mean an interest in minerals in place, but it is well settled that the ordinary and legal meaning of the term is a share of the product or profit, to be paid to the grantor or lessor by those who are allowed to develop the property. It has often been pointed out that the ordinary meaning of royalty does not include a perpetual interest in oil or gas in the ground. *Leydig* v. *Commissioner of Internal Revenues,* 10th Cir., 43 Fed. 2d 494; *Bellport* v. *Harrison,* 123 Kan. 310, 255 P. 52; *Rist* v. *Toole County,* 117 Mont. 426, 159 P. 2d 340, 162 A. L. R. 406. On two occasions we have interpreted language not wholly dissimilar to that now before us as meaning royalty payments to the lessor rather than an interest in the minerals themselves. *Keaton* v. *Murphy,* 198 Ark. 799, 131 S. W. 2d 625; *McWilliams* v. *Standard Oil Co.,* 205 Ark. 625, 170 S. W. 2d 367.

The principal argument advanced by the appellants is based on the reference in the granting clause to "all right, title and interest retained by us, or in any manner whatsoever owned by us, in a certain oil, gas and mineral lease." Counsel point out that the interest held by an oil and gas lessor is actually threefold: the surface ownership, the right to receive royalties, and a reversionary interest in the minerals in place. Summers, Oil and Gas, § 601. It is insisted that this granting clause must refer to the third of these legal interests as well as to the second. If the language were susceptible of this interpretation only then of course the granting clause would be entitled to greater weight than the title, *habendum,* or acknowledgment. But the trouble is that the granting clause is itself ambiguous. If the reversionary interest in the minerals is retained by the lessor, then is not the surface ownership also retained? As against the appellants' argument it might equally well be said that the royalty interest is alone created by the lease and retained therein by the lessor; the other two interests have belonged to the lessor all along and simply do not pass to the lessee.

Since the granting clause is not so clear as to be controlling we look to other provisions of the deed to aid us in determining the intention of the parties. The three references to royalty, as well as the explicit designation of the particular lease from which the royalty is to be derived, leave no doubt that the appellees' interpretation is to be preferred. When we realize how easily the parties might have conveyed an interest in the minerals by the execution of an ordinary mineral deed we do not feel justified in saying that instead they sought to accomplish the same result by the cumbersome and roundabout method now urged by the appellants.

Affirmed.

WITHEE *v.* HALL, SECRETARY OF STATE.

4-9357 232 S. W. 2d 827

CLEMENTS *v.* HALL, SECRETARY OF STATE.

4-9378

Opinion delivered October 2, 1950.

Neill Bohlinger and *Leffel Gentry,* for petitioners.

HOLT, J. We have consolidated these two cases. Each is an original proceeding here under the provisions of Constitutional Amendment No. 7 commonly known as the Initiative and Referendum Amendment.

In case No. 9357 petition was filed with the Secretary of State by various sponsors, seeking to submit a proposed constitutional amendment to repeal Amendment No. 34, commonly known as the "Freedom to Work" amendment, and in case No. 9378 the Arkansas Municipal League filed a petition with the Secretary of State for the submission of a proposed "Home Rule Amendment" to the Constitution.

In both cases plaintiffs asked that this court declare the petitions insufficient, and that the Secretary of State and the State Board of Election Commissioners be enjoined from certifying and distributing election ballots containing the proposed constitutional amendments for submission at the election November 7, 1950.

The undisputed facts in both of the above cases show that the petitions filed with the Secretary of State lacked the required number of valid signatures.

In No. 9357 it is established that the petition contained 25,929 signers, and that 24,930 were required, and that 1,020 of these signatures did not appear in the published, official list of poll tax payers, and in addition 2,616 names had been placed on the petition by someone other than the person whose name appeared, and were in fact forgeries.

In case No. 9378 it is established that the petition contained 25,534 signatures, that 24,930 valid signatures were required, and that the names of 1,423 persons, who were purported to have signed the petition, did not appear on the official poll tax list.

It thus appears from the undisputed evidence that in case No. 9357 only 24,909 names were left unchallenged and that 24,930 valid signatures were required, and in case No. 9378 only 24,111 names were left unchal-

lenged on the petition and that 24,930 valid signatures were required.

In these circumstances the rule heretofore announced by this court in the case of *Hargis* v. *Hall,* 196 Ark. 878, 120 S. W. 2d 335, is controlling here. We held in that case that upon proof being made, as here, that where persons signed the petitions whose names did not appear on the official poll tax list, there is a presumption that they were not qualified electors and in order to overcome this presumption proof to the contrary is required. No contrary proof was offered here. We said in *Hargis* v. *Hall, supra*:

"We hold, further, that the official poll tax lists, as certified by the collector and county clerk, contain, *prima facie,* the names of all persons who are eligible to vote.

* * *

"No testimony has been offered even tending to show that the more than four thousand persons whose names appear on the petition, but did not appear on the official poll tax lists, were qualified electors, and the presumption attaches that they were not."

As indicated no proof has been offered in either of the cases here to rebut the *prima facie* evidence showing that the names on each of the petitions, which did not appear on the official poll tax list, were invalid.

Accordingly we hold that both petitions were insufficient and the injunctive relief prayed against respondents is granted.

HALLER *v.* STATE.

4-4638 232 S. W. 2d 829

Opinion delivered October 2, 1950.

Lee Ward, for appellant.

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

MINOR W. MILLWEE, Justice. John Haller prosecutes this appeal to reverse a judgment of conviction against him for the crime of incest. There is no bill of exceptions. The first ground relied upon for reversal is that the court erred in overruling a demurrer to the information.

The information reads: "I, H. G. Partlow, PROSECUTING ATTORNEY WITHIN AND FOR THE SECOND JUDICIAL CIRCUIT OF THE STATE OF ARKANSAS, of which Greene County is a part, in the name and by the authority of the State of Arkansas, on oath, accuse the defendant, John Haller of the crime of incest committed as follows, to-wit: The said defendant on

numerous and divers occasions between August 24, 1946, and August 24, 1949, in Greene County, Arkansas, did unlawfully, feloniously and incestuously commit fornication with one Retha Haller, by then and there feloniously and incestuously having carnal knowledge of her, the said Retha Haller, the said John Haller and she, the said Retha Haller, then and there being father and daughter, and the said John Haller and Retha Haller both being unmarried persons; against the peace and dignity of the State of Arkansas."

It is earnestly insisted that the information is fatally defective because of the failure to allege a specific date upon which the crime was committed and that it amounted to a charge of many separate and distinct offenses in violation of Ark. Stats., § 43-1009. This section provides that an indictment must charge but one offense except in cases mentioned in § 43-1010.

The common law rule is that an indictment or information must charge the offense as having been committed on a day certain. Under the statutes of many states, including our own, the precise time of the offense is immaterial and need not be stated except where time is an ingredient of the offense. Ark. Stats., § 43-1015, provides: "The statement, in the indictment, as to the time at which the offense was committed, is not material, further than as a statement that it was committed before the time of finding the indictment, except where the time is a material ingredient in the offense." This court has held that an error in an indictment in setting forth a future or impossible date as the time of the commission of the offense is not fatal. *Conrand* v. *State*. 65 Ark. 559, 47 S. W. 628; *Taylor* v. *State,* 169 Ark. 589, 276 S. W. 577. We have also held that the indictment is not demurrable where it fails to state the date of the alleged offense and contains an allegation that it was committed on a blank date. *Grayson* v. *State,* 92 Ark. 413, 123 S. W. 388, 19 Ann. Cas. 929; *Threadgill* v. *State,* 99 Ark. 126, 137 S. W. 814; *Oakes* v. *State,* 135 Ark. 221, 205 S. W. 305; *Cook* v. *State,* 155 Ark. 106, 244 S. W. 735.

In *Venable* v. *State,* 177 Ark. 91, 5 S. W. 2d 716, we held that time was not a material ingredient of the of-

fense of carnal abuse except to show that, at the time of the commission of the offense, the prosecutrix was under 16 years of age. The age of a prosecutrix is not involved in the case at bar and time is not a material ingredient of the offense.

Incest is a statutory offense which has been defined generally by the authorities as consisting of sexual intercourse, either habitual or in a single instance, and either under a form of marriage or without it, between persons too closely related to intermarry. Bishop's Statutory Crimes, § 727; 27 Am. Jur., Incest, § 1; 42 C. J. S., Incest, § 1; Underhill's Criminal Evidence (4th Ed.), § 650. The rule that one offense only can be charged in one count of an indictment or information does not preclude the charge in the same count of several acts relating to the same transaction and together constituting only one connected charge or offense. 27 Am. Jur., Indictments and Informations, § 124. While it is true that each act of sexual intercourse may be made a separate offense, the effect of the information in the instant case is to charge appellant with but one offense of incest committed by a series of acts amounting to habitual sexual intercourse with his daughter over the three-year period stated in the information. We conclude that the trial court did not err in overruling the demurrer to the information.

It is next contended that the court erred in denying defendant's motion for a bill of particulars. This motion sought to require the state to specify the dates, places and the names and addresses of all persons present when appellant was accused of committing the crime. The information alleges that the crime was committed within the jurisdiction of the court and was, therefore, sufficient as to place.

The question whether the state should have been required to specify a certain day upon which the crime is alleged to have been committed presents a more serious matter. It would have been the better practice for the court to have required the state to specify, or approximate, a particular date. As previously indicated,

the information in effect charged incest by habitual intercourse over the three-year period.

Appellant argues: "It might very well be true that an accused was hundreds of miles from the scene of a crime when it was supposedly committed. If the accused has no idea as to when the alleged crime was committed, how on earth could he be prepared to show his own whereabouts? It is not reasonable to suppose that a defendant can be prepared at the drop of a hat to prove where he was on just any given day of a period of three years." If appellant suffered such prejudice in the instant case, it could have been readily shown by a bill of exceptions. The evidence is not before us and the record furnished discloses no motion for continuance or plea of surprise on account of the proof offered by the state.

Ark. Stats., § 43-1012, provides: "No indictment is insufficient, nor can the trial, judgment, or other proceeding thereon, be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits." § 43-804 provides that the bill of particulars shall state the act relied upon by the state in sufficient detail as formerly required by an indictment. In *Brockelhurst* v. *State,* 195 Ark. 67, 111 S. W. 2d 527, a denial for a request for a bill of particulars was upheld and the court said: "It will be seen from the information filed, above quoted, that it set out in detail 'the act or acts' upon which the state relied for a conviction, and contained all the requirements of the former statute to make a good indictment had it been returned by a grand jury. So, appellant had a bill of particulars in the information on which he was tried, and it would have been a useless thing to require another. The court, therefore, properly denied this request." See, also, *Bryant* v. *State,* 208 Ark. 192, 185 S. W. 2d 280.

The information in the case at bar charges the crime of incest in the language of the statute and in sufficient detail as required by an indictment prior to the enactment of Ark. Stats., § 43-1006. The face of the record

fails to disclose any defect which tends "to the prejudice of the substantial rights of the defendant on the merits."

Affirmed.

DUNAWAY, J. I respectfully dissent. The information upon which the defendant was tried, as set out in full in the majority opinion, charges him with the crime of incest committed upon his daughter by having carnal knowledge of her "on numerous and divers occasions between August 24, 1946, and August 24, 1949 . . ."

The defendant filed a motion for a bill of particulars, asking that the dates upon which he was accused of committing incest be set forth, and that the particular occasion for which he was being prosecuted be specified.

I believe that under our statute the defendant was entitled to a bill of particulars and that the trial court committed error in overruling his motion. In Ark. Stats. (1947), § 43-1006, it is plainly provided: "The State, upon request of the defendant, shall file a bill of particulars, setting out the act or acts upon which it relies for conviction."

This court has apparently never before decided that the crime of incest may be charged on the basis of a general allegation of habitual intercourse. In the reported cases the indictment or information has been based upon a single act, and proof of other acts of incest has been held admissible for the purpose of showing the probability of the commission of the offense charged. See *Adams* v. *State,* 78 Ark. 16, 92 S. W. 1123; *Carmen* v. *State,* 120 Ark. 172, 179 S. W. 183.

However, even assuming that an indictment or information may validly charge an offense in such terms, this is no answer to the question whether the defendant is entitled to a bill of particulars. The statute above-quoted says the State *shall,* upon request, furnish the defendant with a bill of particulars "setting out the act or acts upon which it relies for conviction." The information in the instant case charges the defendant with incestuous intercourse "on numerous and divers occasions" over a three-

year period. Can this be said to set out the act or acts upon which the State relies for conviction?

The *Brockelhurst* case, cited *supra* in the opinion of the majority, is no authority for upholding the action of the trial court. The language quoted from that opinion undoubtedly is a sound statement of the law as applied to the information there challenged on the facts in that particular case. There the information charged the defendant with first degree murder, and set out the time, place and victim of the homicide. The court very properly said that such an information complied with the statute.

Here, however, the defendant is not charged with any given act at some given time, but is charged with having incestuous relations on "various and divers occasions." Although time is not an essential ingredient of this crime, so long as it is proved that the offense was committed within the period of limitation, the defendant was entitled to be more definitely informed of the acts for which he was to be tried, and their approximate dates. Suppose, for example, that he was not in the jurisdiction for various intervals of time during the three years period; and that the witnesses to establish this were in Oshkosh, Kalamazoo, and San Francisco? Must he have available witnesses to establish his whereabouts and help him account for his activities on every one of 1,095 days?

The defendant's right to a bill of particulars is to be determined as of the time the trial court passes on this question. True, we do not have the bill of exceptions before us, and cannot say whether he was in fact prejudiced by the court's refusal to grant his motion. I do not believe, however, that the burden is on him to show actual prejudice when he was denied the very thing the statute says he should have, and for which he made timely application.

Even under our liberalized criminal procedure, the statutes do not, in my opinion, authorize the State to put a man on trial for his liberty upon such a broadside information as is before us.

The judgment should be reversed and the cause remanded for a new trial.

Justice GEORGE ROSE SMITH joins in this dissent.

GORDON *v.* WOODRUFF COUNTY.

4-9327 232 S. W. 2d 832

Opinion delivered October 2, 1950.

John D. Eldridge, Jr., for appellant.

W. J. Dungan, for intervener.

J. Ford Smith, for appellee.

GRIFFIN SMITH, Chief Justice. In 1928 E. E. Jeffries and his wife deeded to Woodruff County—"for county purposes only"—slightly more than 32 acres lying approximately a mile west of McCrory. If abandoned for county purposes the property would revert to the grantors. This is the third controversy involving use of the

land. See *Jeffries* v. *State, Use of Woodruff County,* 212 Ark. 213, 205 S. W. 2d 194; same, 216 Ark. 657, 226 S. W. 2d 810.

The Quorum Court, in appropriating funds for 1950, allotted $2,500 for use in constructing buildings for a county fair, and $300 for expenses pertaining to the fair.

Woodruff County Fair Association was incorporated by order of the Circuit Court as a non-profit organization to promote the live stock, agricultural, horticultural and related interests of the people generally. It has $1,200 for use in supplementing construction costs. The Association and the County, acting together, expect to receive public subscriptions as an aid to the project.

C. S. Gordon, a taxpaying citizen, brought an injunctive action against George P. Eldridge as County Judge, and against the Fair Association. He cited the condition in the Jeffries deed, contending that use to which the property would be put would place the grantor[1] in a position to invoke the reverter clause of his deed, and the County would lose its investment. Jeffries intervened. The Special Chancellor found that the appropriation was proper for county purposes, hence not contrary to the terms of the grant. The intervention was dismissed as premature. The appeal questions these determinations.

While the language of the Quorum Court appropriation must be looked to primarily in arriving at the contemplated purpose in authorizing the expenditure, it must not be presumed that there was an intent to violate Art. 12, Sec. 5, of the Constitution. It prohibits a county from becoming a stockholder in any company, association, or corporation. Neither may a county obtain or appropriate money for, or loan its credit to, any corporation, association, institution, or individual.

This provision of the Constitution was considered by the Court in an opinion written by Mr. Justice Wood in 1923, *Bourland* v. *Pollock,* 157 Ark. 538, 249 S. W. 21. Cities, towns, and other municipal corporations are in-

[1] Mrs. Jeffries died before the suit was begun.

cluded in the constitutional restriction. In the Bourland-Pollock case a federated welfare association was involved. Pollock was treasurer of the association and received monthly from the Ft. Smith board of commissioners the sum of $125 to be expended for activities the City itself had authority to engage in. While holding that the "welfare association" did not come within the "inhibitory words of the Constitution," and hence there was no express application of Art. 12, Sec. 5, the opinion stated that in contributing to the welfare association or committee to carry on governmental work which the city should have performed through some agency, the municipality in effect adopted the association as its own agency "to do the character of governmental work which manifestly the city authorities conceived could be better . . . done as through some instrumentality which was exclusively of its own creation and over which it had supreme control." A strong dissenting opinion by Mr. Justice HART was concurred in by Chief Justice McCULLOCH. They took the position that the money appropriated by the city was a gift for purposes the city had a right to engage in, but that in adopting the association as its agent (as expressed by the majority) the city lost control to such an extent that its duty of supervision was abdicated. It was also the view of the dissenting justices that the so-called "association" came within the terms of Art. 12, Sec. 5.

But should we agree with Judges HART and McCULLOCH to the extent of impairing the majority holding that the Association was within the constitution's prohibitory language, that alone would not sustain the position of appellant and intervener. It would be necessary to go further and say that the appropriation by Woodruff County was *to* the Fair Association, a contribution or gift over which the County lost its property rights and surrendered all control. Proof does not support this conclusion.

Gordon's complaint alleged that the Quorum Court's purpose in making the $2,500 appropriation was "to assist the County Fair Association in erecting permanent fair buildings on the lands" and that the work was

about to be undertaken. The intervener adopted all of Gordon's allegations, but also contended that use to which the property would be put was not a county purpose.

The County Judge testified that if not restrained the County Court would approve an allowance and direct issuance of warrants covering the appropriation; but, said he, the condition would be that the Fair Association should have possession of only a part of the ground for a limited period each year—that is, for the time necessary to prepare for the annual event and its incidents. The buildings would be owned by the County, and the Association would have access to them "for the week or ten days while the fair is in progress." During the remainder of the year these buildings would be used for storing [county] machinery and supplies.

Describing the fair as "the show window of farmer activities," John Miller, testifying as manager of the incorporated Association, said that $1,200 had been saved from former activities, and that his group intended to permit use of this fund as a part of the building program, but title to the realty would remain in the County, and subject to its control. There was no purpose on the part of those promoting the fair to make money. All profits would be reinvested in facilities or activities and rededicated to the general plan to aid agriculture and related undertakings.

Appellants cannot prevail if what is proposed to be done comes within the scope of *county purposes*. Courts have not hesitated to construe the Constitution as permitting activities not expressly recognized at the time the Constitution was adopted. Control and management of all County property are placed in the County Court. Ark. Stat's, Sec. 22-601, *Little Rock Chamber of Commerce* v. *Pulaski County,* 113 Ark. 439, 168 S. W. 848. In the Chamber of Commerce-Pulaski County case property owned by the County and not then used for county purposes, was sold to the Chamber of Commerce for $1 and "benefits to accrue to said county from the expenditure by said Chamber of Commerce of the funds raised for

the industrial and development purposes for the above described lands." In holding that the County Court had a right to make the sale and that the transaction was free from fraud, and not in contravention of Art. 12, § 5, of the Constitution, (pp. 444-5 of the Arkansas Reports) the Court in its opinion by Chief Justice McCulloch necessarily found that industrial development was a general county purpose in the sense that the County Court had power to evaluate prospects and to regard them as the equivalent of money; otherwise the admitted cash payment of $1 would have been so palpably inadequate as to amount to fraud. While fraud was not alleged, the opinion quite clearly reflects the Court's view that anticipatory values were the main consideration.

Births and deaths, and their registration, were not expressly mentioned in the Constitution (Art. 7, § 28), or in the Act of February 5, 1875 (Ark. Stat's, § 22-601), but expenditures for services by a local registrar were approved "for county purposes" in *Burgess* v. *Johnson County,* 158 Ark. 218, 250 S. W. 10. Agricultural and home demonstration agents and their work come within the broad scope of county purposes. *Smith and Buechley* v. *Hempstead County,* 180 Ark. 272, 21 S. W. 2d 178; *Watson and Smith* v. *Union County,* 193 Ark. 559, 101 S. W. 2d 791. See Ark. Stat's, Sec. 17-515 and 17-517. *Contra, Johnson* v. *Donham,* 191 Ark. 192, 84 S. W. 2d 374.

The General Assembly has expressly recognized county fairs (Act 44 of 1927) as agencies through which the agricultural, manufacturing, and educational interests of the community may be promoted when provision is made "for the exhibition and display of the products of the farms, orchards, vineyards, gardens, manufacturing industries, and the display of the work of the pupils in the public schools of the County, and [the display of] domestic fowls and animals, for the benefit of the public, *and not for individual or personal profit.*"

In view of the limitation and restrictions attending expenditure of the $2,500—a sum available only when the County Court directs issuance of warrants—the transaction falls within the scope of county purposes, as de-

fined by this Court. Special Chancellor Norton properly declined to enjoin.

Having decided that the expenditure was for an authorized activity or county purpose, it follows that construction of the buildings and their part-time use by the Fair Association do not conflict with the Jeffries grant, hence it is unnecessary to say whether the intervention was premature.

Affirmed.

CARSON *v.* STATE.

4631 232 S. W. 2d 835

Opinion delivered October 2, 1950.

Claude F. Cooper, for appellant.

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

DUNAWAY, J. Appellant, Wheeler Carson, questions the sufficiency of the evidence to sustain a jury verdict finding him guilty of second degree murder and fixing his punishment at twenty-one years in the penitentiary.

According to the witnesses on behalf of the State, these are the events that transpired prior to the fatal stabbing of the deceased, Chester Jones, by the appellant on the night of December 12, 1949:

About six o'clock in the evening, appellant and his brother, Finley Carson, joined the deceased, his cousin, Alberta Allen and one J. T. Baker at a cafe in Blytheville, Arkansas. The five of them drove to the Missouri state line, where they purchased a half pint of whiskey. After about thirty minutes they drove to a roadside establishment, Roy's Place, on Highway 61, the group having consumed the liquor enroute. Here they drank two or three rounds of beer. The Carson brothers had been drinking all afternoon.

From Roy's Place the party started for the Silver Slipper. Enroute Finley Carson announced that his brother, the appellant, could "whip any two sons-of-bitches" in the car. After first ignoring this assertion, which was repeated several times, the deceased said he was getting tired of being called a son-of-a-bitch; he and the appellant got out of the car and had some words, but then shook hands and proceeded to town. Later Finley renewed his provocative remarks, and an argument ensued.

Following this argument, the car was stopped again and this time the deceased and appellant exchanged some blows, the deceased being the victor in the bout. They then shook hands, got back in the car and started to take the Carsons home. On the way, at appellant's insistence that he wanted another beer, they stopped at the Silver Slipper, where the deceased went in and bought appellant a beer. While deceased was inside the Silver Slipper, appellant made the threat: "He whipped my tail once, I will get even with the son-of-a-bitch."

Upon arrival of the party at the Carson home, the appellant remained at the car after his brother went to the house, and invited the others to come in for a drink. The deceased accepted this invitation, although he had been informed of appellant's threat. After about five minutes, the deceased, who had been stabbed with a knife, came running out of the house in a bent-over position. He died on the way to the hospital. None of those in the car had heard any disturbance in the house.

At the trial it was shown that the deceased had suffered a breast wound about two inches long, that the breast bone had been cut through and the subclavicle artery severed.

The accused admitted having cut the deceased with a knife, but claimed he had acted in self-defense. His testimony was that the deceased started another fight, after coming in the house uninvited; that at the time of the stabbing the deceased was "raising up" from behind a stove with a metal poker. The defendant testified that he only intended to hit the deceased in the arm to disable him. The defendant's brother and father testified that they rushed into the front room, from a back room where the elder Carson had been asleep "till the racket started." Neither saw the start of the fracas, and both testified that they did not see a poker or any other weapon in the hands of the deceased. Neither witnessed the fatal stabbing.

Appellant's argument is that there is no proof of malice, and that the judgment must be reversed or reduced from second degree murder to voluntary manslaughter. To support this contention he relies upon 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. In the McClendon case the defendant had been convicted of first degree murder and in the Bone case of murder in the second degree; in both cases this court reduced the sentences to voluntary manslaughter.

It is, of course, true that the State must have proved that the killing was done with malice for a conviction of second degree murder in the case at bar to be sustained. But express malice may be proved or malice may be implied when no considerable provocation for the killing appears or where all the circumstances of the killing manifest an abandoned or wicked disposition. Ark. Stats. (1947) § 41-2204; *Ballentine* v. *State,* 198 Ark. 1037, 132 S. W. 2d 384.

In the instant case, the State's witnesses testified as to circumstances and events from which the jury might well have found that the killing was done with malice.

There was evidence of ill-feeling between the deceased and the accused prior to the fatal encounter; and there was testimony that the appellant had made threats against the deceased. The knife wound must have been inflicted with considerable force to have cut through the breast bone. Since neither the defendant's father nor brother saw the deceased with a poker in his hand when they ran into the room where, according to the father, the deceased "was backed up, right in the corner," the jury was justified in believing that there was no provocation for the killing.

The facts in the McClendon and Bone cases, *supra,* are easily distinguishable from those in the case at bar. In both of those cases there was no proof of previous ill-feeling, threats, or difficulties between the parties. On the contrary, there was positive proof of amicable relationships prior to the time of the altercation, which in each instance began in a sudden heat of passion and continued without interruption until one of those involved was killed.

Although appellant denied making any threat toward the deceased, and he and his brother gave a different version of the happenings of the evening, the jury evidently chose to believe the witnesses presented by the State. With the testimony in conflict, that was the jury's prerogative.

The judgment is affirmed.

BLACKARD, ET AL. *v.* STATE.

4611* 232 S. W. 2d 977

Opinion delivered October 2, 1950.

* Cases numbered 4612 to 4621 inclusive by other petitioners were disposed of in this opinion.

Yates & Yates and *Grant & Rose,* for petitioners.

Ike Murry, Attorney General, for the State.

Thomas Harper, for intervener.

Ed. F. McFaddin, Justice. Each of the eleven petitioners seeks, by *writ of certiorari,* to have this Court quash the Chancery Court order which found each petitioner guilty of contempt and assessed punishment. The contempt proceedings were tried in a consolidated hearing in the Chancery Court; so the eleven petitions for *certiorari* have been consolidated in this Court.

The contempt proceedings spring from a labor dispute. When the Utah Construction Company (hereinafter called "Utah") undertook to remove coal from its Ozark-Philpott Mine, a labor dispute arose as to whether the mine would be operated by members of the United Mine Workers of America. On petition of Utah, the Chancery Court issued a temporary order, and later a permanent order (on January 19, 1950), restraining the Union, its members, and all other persons, not only (a) from picketing any and all persons or places so as to

interfere in any way with Utah's operation, but also (b) from "attempting to prevent in any manner by the use of force or otherwise the plaintiff (Utah) from operating its property."[1]

Sometime after the issuance of the permanent restraining order, the eleven petitioners herein, and also several other parties, were cited for conduct alleged to be in contempt of the Court, and as being in violation of the said restraining order. After a careful, patient and thorough hearing, the Chancery Court found that certain of those cited had not been in contempt, but that each of the eleven petitioners herein was guilty of contempt for violation of the said permanent restraining order. Punishments were assessed as hereinafter stated. From the orders of punishment each of the eleven petitioners invokes *certiorari*; and the major contention is that the evidence fails to support the Court's finding that a contempt had been committed by any individual petitioner.

[1] The wording of the permanent injunction is:

"That the defendants . . . and all other persons acting in concert with them be, and they are hereby permanently restrained and enjoined from committing, encouraging, permitting or causing to be committed any of the following acts:

"Picketing in any manner, either singly or in larger numbers, plaintiff's property or plaintiff's employees, or any roads, railroads or other means of access thereto; in Johnson or Franklin Counties, State of Arkansas, or any other places within the State of Arkansas; congregating in any manner at or near plaintiff's property or anywhere else for the purpose of picketing plaintiff's property and its employees or any other persons desiring to enter upon and leave plaintiff's property or to do business with plaintiff upon its property or at any other place; in any manner from threatening, intimidating, accosting or detaining any of plaintiff's employees, or from threatening or intimidating by any means whatever any of plaintiff's employees or members of their families, and from interfering in any manner with any of plaintiff's employees to prevent them from working peaceably upon plaintiff's property and from preventing or *attempting to prevent in any manner by the use of force or otherwise the plaintiff from operating its property, known as the Ozark-Philpott Mine*, or in any manner from interfering with or preventing by any means whatever any of the plaintiff's employees in going to and from plaintiff's property or anywhere else for the purpose of carrying on their employment with plaintiff, or from going on plaintiff's property, or damaging or interfering in any manner with any of plaintiff's property for the above purposes:" (Italics are our own.) This injunction must, of course, be now considered as a completely valid one. Since no appeal was taken from the decree in which it was issued, we have no occasion to pass on it. *Carnes* v. *Butt*, 215 Ark. 549, 221 S. W. 2d 416.

At the outset it is appropriate to state some of the rules applicable to such a situation as is here presented:

I. "Criminal contempt proceedings are those brought to preserve the power and vindicate the dignity of the court and to punish for disobedience of its orders. Civil contempt proceedings are those instituted to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties." Definitions of, and distinctions between, civil contempt and criminal contempt may be found discussed in a number of cases. See *Gompers* v. *Buck's Stove & Range Company,* 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797, 34 L. R. A., N. S. 874; *Bessett* v. *W. B. Conkey Company,* 194 U. S. 324, 24 S. Ct. 665, 48 L. Ed. 997; *In re Nevitt,* 117 Fed. 448; *Wakefield* v. *Housel,* 288 Fed. 712; *Parker* v. *United States,* 153 Fed. 2d 66, 163 A. L. R. 379; see 12 Am. Jur. 392, from which the above quoted words have been taken; and see, also, 17 C. J. S. 7.

One of the reasons for the distinction between criminal contempt and civil contempt is because it is generally held that in criminal contempt proceedings the proof must be beyond a reasonable doubt. In the case at bar the proceedings involve criminal contempt; and the trial court held that the proof had to be beyond a reasonable doubt, just as in a criminal case.[2] This ruling was correct. See *Gompers* v. *Buck's Stove & Range Company, supra*; *Michaelson* v. *United States,* 266 U. S. 42, 69 L. Ed. 162, 45 Sup. Ct. 18, 35 A. L. R. 451; *Davidson* v. *Wilson,* 286 Fed. 108; and see 12 Am. Jur. 441 and cases there cited. See, also, Annotation in 49 A. L. R. 975, "Degree of Proof Necessary in Contempt Proceedings." This ruling gave the petitioners the benefit of every reasonable doubt. We will subsequently discuss whether the evidence was sufficient to establish, beyond a reasonable doubt, the commission of contempt by each petitioner.

II. The correct procedure to obtain a review by this Court of the judgment of the trial court in a contempt case is by *certiorari,* just as is here invoked. See *Whorton* v. *Hawkins,* 135 Ark. 507, 205 S. W. 901. In *McCain*

[2] The decree of the Chancery Court specifically states that the contemnors were guilty "beyond a reasonable doubt."

v. *Collins,* 204 Ark. 521, 164 S. W. 2d 448, we said: "The office of the writ (of *certiorari*) is merely to review the errors of law, one of which may be the legal sufficiency of the evidence." See, also, *Bertig Bros.* v. *Independent Gin Co.,* 147 Ark. 581, 228 S. W. 392.

III. On review by this Court in such proceedings by *certiorari,* we do not try the criminal contempt case *de novo,* despite any such language so intimating as contained in *Jones* v. *State,* 170 Ark. 863, 281 S. W. 663. Rather, we review the evidence just as we would in an appeal in any criminal case. The trial court in the first instance, in a criminal contempt proceeding, must find the cited person guilty beyond a reasonable doubt. Then, on *certiorari* proceedings this Court reviews the record to determine whether the evidence, when given its full probative force, is sufficient to sustain the finding of the trial court. See *Stewart* v. *United States,* 236 Fed. 838; *Binkley* v. *United States,* 282 Fed. 244; *Davidson* v. *Wilson,* 286 Fed. 108; and *In re Oriel,* 23 Fed. 2d 409.

So much for the general rules. With these rules in mind we have examined the record herein concerning each of the eleven petitioners. The main insistence of the petitioners is that the evidence is insufficient to support the finding of the Chancery Court; and this insistence makes necessary a review of the salient evidence regarding each contemnor. Evidence was presented concerning three or more separate incidents. We will discuss the case as it relates to each petitioner.

(a)—The contempt by the petitioner, Woodrow Thompson, consisted of threatening an employee, William Almond, who at all times was employed by Utah at its Ozark-Philpott Mine. Almond testified that after the permanent injunction had been granted, Woodrow Thompson approached him and said: "I hope every damn one of you have to work for 50 cents a day . . . We're after you . . . If you go back out there and go to work, I'm going to get your——." Certainly these statements, if made by Thompson, were in contempt of the injunction because they constituted threatening an employee of Utah; but it is insisted by Thompson that he made no such statements, and several witnesses who

professed to have heard the entire conversation said that Thompson did not make the said remarks. With the evidence in conflict, it became a matter for the trial court—with the same prerogative in this case as a jury has in a criminal case—to determine which testimony to believe. We will subsequently discuss this matter of credibility.

(b)—The contempt by the petitioner, Matt Snider, consisted of attempting to intimidate Jack Morton, an employee of Utah. Morton testified that Snider approached him when the two were alone. Morton testified of Snider:

"Q.—He came on out to the car and he said, 'You think you've got a good job, do you?'—and used a few cuss words; he said, 'You think you've got a pretty God-damned good job, do you?', and I said, 'Yes, fair,' and he said, 'Well, you're just putting guys like me out of work,' and I said, 'Well, I can't help that. I've got to make a living,' and he went ahead to say, 'You won't work out there long,' and I said, 'Why?', and he said, 'Well,'—he said, 'guys like me are going to stop you,' and I said, 'You are?', and I said, 'Well, as long as they let me work, I'm going to work out there,' and he just went ahead cussing and left a cussing. He said I wasn't going to work out there very long, or nobody else work out there very long."

Snider denied that he had such a conversation with Morton; and Snider was supported by several witnesses who testified that if any such conversation had taken place, they would have heard it. What we have previously said about the case against Woodrow Thompson applies with equal force to the case against Matt Snider; and we will later discuss the matter of credibility.

(c)—The contempts by each of the remaining nine petitioners arose from their efforts to prevent Ed Willey and his truck drivers from hauling shale to the Utah mine from a pit located twelve or fourteen miles away. That this shale was necessary for Utah's continued operation was definitely established. Petitioner Ogalvie at one time had a contract for his trucks to haul the shale, and he either surrendered the contract or lost it. At all

events, Ed Willey was under contract for his trucks to haul the shale. One disinterested witness (Chester Emil) testified that Ogalvie told him that Ogalvie would not deliver the shale because it was not a Union job, and that if Willey could not haul the shale, then Utah "would have to go Union."

Another disinterested witness (Sid Skaggs) testified that Ogalvie and Cecil Ross (one of the petitioners) were together when Ross told Skaggs that Ross "was going to have a bunch out there to stop Ed Willey from hauling shale." On Friday, January 20, a group of men arrived at Skaggs' store which was located about a mile from the shale pit and at a place where the road to the shale pit left the main highway. Skaggs suggested to the men that an injunction had been granted against picketing and interfering with Utah's operation; but the spokesman for the group advised Skaggs that the injunction was not effective in the County in which Skaggs' store and the shale pit were located.[3]

Petitioners Ogalvie, Bud Ross, and Cecil Ross seemed to have been the "mainsprings" of the plan to stop Willey's trucks from hauling the shale. Ogalvie and Cecil Ross, with petitioner Bud Wise, actually assaulted, or assisted in an assault on Willey on Saturday, January 21, after the assemblage of the others at the shale pit on Friday, January 20, had failed to serve as a sufficient deterrent from the hauling. The other five petitioners (Blackard, Killough, McCleary, Marvel, and Webb) either congregated at the shale pit for the purpose of intimidation or otherwise assisted in attempts to deter Willey and his truck drivers from hauling shale for Utah. Their principal defenses were (a) that the differences with Willey arose out of matters other than the Utah injunction, and (b) that the petitioners happened by mere coincidence to be at the shale pit and at Skaggs' store.

It is argued that all that some of the petitioners did was to assemble at the shale pit on Friday, January 20,

[3] In this conclusion the spokesman was in error, as is shown by the injunction copied in a preceding footnote.

and that such an assemblage was not a picket line. We are not considering any question relating to picketing, because the contemnors violated that part of the injunction which was a restraint "from preventing or attempting to prevent in any manner . . . the plaintiff from operating its property known as the Ozark-Philpott Mine . . ." We agree with the Chancellor that the assemblage at the shale pit was an attempt to prevent the hauling of the shale to Utah's mine. J. W. Lee testified that an assemblage of twenty or twenty-five men at the shale pit had never occurred previously or subsequently. Lee operated the loading machine for Willey at the shale pit and testified that Willey's truck drivers were accosted and engaged in conversation by some of those in the assemblage. C. C. Patton, one of the truck drivers for Willey, detailed the conversation Cecil Ross had with him to the effect that if the shale wasn't hauled, Utah would have "to go Union." Dexter Curtis, another of Willey's truck drivers, testified to like effect.

The record is voluminous: the transcript consists of 490 typewritten pages; and the abstracts and briefs consist of 281 printed pages. To review all of the evidence would serve no useful purpose. The evidence regarding these nine petitioners is in the same hopeless conflict as is that concerning the two petitioners previously mentioned; and we therefore now discuss the matter of credibility.

If the evidence should be weighed by the mere number of witnesses, then probably the petitioners should prevail; but the evidence in a case like this, just as the evidence in any case, is to be tested by the truth and not by the number of witnesses. In *Romines* v. *Brumfield,* 199 Ark. 1066, 136 S. W. 2d 1023, we quoted Ballentine's Law Dictionary:

"The weight of evidence is not a question of mathematics, but depends upon its effect in inducing belief. One witness may be contradicted by several and yet his testimony may outweigh all of theirs. The question is not on which side are the witnesses more numerous, but what is to be believed."

Immediately after the conclusion of the evidence, the Chancellor delivered an opinion from the bench which when transcribed consumes ten typewritten pages. The opinion shows a masterful grasp of the evidence, and contains a review of the testimony on each of the alleged acts of contempt. In one portion of the opinion the Chancellor, in referring to some evidence offered by the petitioners, said: "I don't believe a word of it."

The Chancellor heard the witnesses testify and observed the demeanor of each while on the witness stand and has positively stated in the record that the basis of his finding was the truthfulness of the testimony offered to show the contempt by each of the eleven petitioners and the falsity of the testimony of their defense. As previously stated, we review the evidence in this case just as we would an appeal in an ordinary criminal case, that is, to determine whether the evidence, when given its full probative force, is sufficient to sustain the finding of the trial court. We find that it is.

Twenty-two individuals were cited for contempt. The Chancery Court, after a painstaking hearing, found that the evidence was insufficient against eleven of the petitioners, but found that the evidence of contempt was sufficient against the eleven petitioners herein; and assessed fines of $25 each against the petitioners Thompson, Snider, Blackard, Killough, McCleary, Marvel, and Webb. Bud Wise was fined $50. Ogalvie and Cecil Ross were each punished by a fine of $200 and thirty days in jail; and Bud Ross received a fine of $100 and a ten day jail sentence.

A careful review of the entire case convinces us that each of the eleven petitions for *certiorari* should be denied and that the order of the Chancery Court, finding each of the petitioners to be in contempt and adjudging punishment, therefore should be allowed to remain in full force in all respects.

4-9235 233 S. W. 2d 233

Opinion delivered October 9, 1950.

Rehearing denied November 13, 1950.

[redacted]

Abbott & Abbott, for appellant.

Mahony & Yocum, for appellee.

ED. F. MCFADDIN, Justice. Appellant, as plaintiff, filed this suit in Chancery Court to cancel a deed which she alleged was obtained from her by the fraud of her stepson, Ross Harrell, who is one of the appellees. The trial court refused the relief sought; and this appeal seeks a reversal of the Chancery decree.

Jesse Harrell, the father of the appellee, Ross Harrell, married the appellant, Mrs. Inez Harrell (now Trout), in 1931; and they lived together until Jesse Harrell's death in 1940. Ross Harrell (now 39 years old) lived in the home of his father and stepmother during their married life, and continued to live in the home of his stepmother for some time after the death of his father. Jesse Harrell, as one of the children of Ben Harrell (who died in 1926), owned an undivided interest

in 140 acres in Union County known as the Ben Harrell Estate. Appellant, Mrs. Inez Harrell (now Trout), was entitled to dower in the Jesse Harrell interest; and also she purchased in her own right the interest of some of the heirs in the Ben Harrell land. Also, Jesse Harrell, and his brother, Lige Harrell, owned 90 acres, as tenants in common; and appellant had a dower interest in this land. No part of the 230 acres was in cultivation. At one time after the death of Jesse Harrell the timber was sold from some of the lands; and Lige Harrell and Ross Harrell gave the appellant what they said was her part of the proceeds of the timber money. In 1944 the appellant remarried and is now Mrs. Inez Harrell Trout, and lives in El Dorado, Arkansas, in which City occurred the negotiations and transactions hereinafter to be mentioned.

In October, 1948, Mr. Weadock (an oil scout) approached Lige Harrell, uncle of Ross Harrell, about an oil and gas lease on the 230 acres; and Lige Harrell informed Weadock that he would not take less than $25 an acre for a lease on his part of the lands. This price did not deter Weadock; and he obtained a list of the other parties interested in the Harrell lands, and on subsequent occasions revisited Lige Harrell, who was the "moving spirit" in the leasing of the Harrell lands. Ross Harrell lived in Bixby, Oklahoma, and Lige Harrell contacted him by phone and letter.

Ross Harrell had been trying for several years to purchase all of the interest of Mrs. Trout in the 230 acres; and, motivated by the prospects of leasing the lands for oil and gas, as told him by his uncle, Lige Harrell, Ross Harrell left his home in Bixby, Oklahoma, and arrived in El Dorado, Arkansas, on November 10, 1948. He visited with his relatives, and with Mrs. Trout; and on November 12, 1948, he persuaded Mrs. Trout to sign a warranty deed to him for all of her interest in all of the 230 acres. He paid her $820 in cash and agreed that he and his wife would execute to Mrs. Trout a non-participating royalty deed, conveying to her 28/69ths of the royalty under 18 2/3 acres of the Harrell lands. Mrs. Trout's deed to

Ross Harrell was placed in escrow until Ross Harrell and wife should execute the royalty deed.

A few hours after Mrs. Trout had signed the warranty deed to Ross Harrell, he sold to Weadock an oil and gas lease on the purchased property for as much as he had paid Mrs. Trout for the deed for her entire interest in the lands. Before the royalty deed was actually signed and before Mrs. Trout's deed was taken from escrow, she filed this suit to cancel and rescind her deed to Ross Harrell on the ground that it had been obtained from her by fraud. The evidence as to the fraud consists, *inter alia,* in the fact that Mrs. Trout inquired of Ross Harrell, before she executed the deed, as to whether there had been any offers to lease the land for oil and gas; and he told her there had been no such offers, when in fact he knew that there had been such offers and that he had come to El Dorado for such purpose.

The law is well settled that when parties are *sui juris* and deal at "arm's length" and in no confidential relationship, the prospective purchaser is under no obligation to volunteer information to the vendor; but if in such a situation, the vendor makes inquiry of material matters and the purchaser undertakes to make answers, then such answers must be truthful, unequivocal and non-evasive. The rationale of the holdings is summarized in 23 Am. Jur. 860:

"Response to Inquiries.—A party of whom inquiry is made concerning the facts involved in a transaction must not, according to well-settled principles, conceal or fail to disclose any pertinent or material information in replying thereto, else he will be chargeable with fraud. The reason for the rule is simple and precise. Where one responds to an inquiry, it is his duty to impart correct information. Thus, one who responds to an inquiry is guilty of fraud if he denies all knowledge of a fact which he knows to exist, if he gives equivocal, evasive, or misleading answers calculated to convey a false impression, even though literally true as far as they go, or if he fails to disclose the whole truth. . . ."

In 56 A. L. R. 429 there is an Annotation entitled: "Duty of purchaser of real property to disclose to the vendor facts or prospects affecting the value of the property"; and on page 434 thereof the effect of the cases is stated in this language:

"So, while recognizing that the prospective purchaser would not ordinarily owe the vendor the positive duty to inform the latter as to facts or conditions affecting the value of the land, in the absence of exceptional circumstances, the courts have widely held that there are other circumstances not involving a fiduciary relationship, under which the vendor may have the right to rely upon the prospective purchaser telling the entire truth with respect to facts and conditions bearing upon such value; . . . Under such circumstances it becomes the purchaser's duty to speak the truth, if he undertakes to speak at all, and a concealment or suppression of the truth, where coupled with any actual misrepresentation or over-reaching, however slight, may be sufficient to entitle the vendor to have the deed set aside, the circumstances amounting to fraud or deceit."

Among the scores of cases cited to sustain the summarized statements, there is our own case of *Warren* v. *Martin,* 168 Ark. 682, 272 S. W. 367. In that case the purchaser undertook to inform the vendor of the conditions regarding oil development and misrepresented such conditions. This Court, after reviewing all of the evidence, directed that the deed so received by the purchaser should be cancelled; and we said: "We are convinced by a preponderance of the evidence that appellant (vendor) was induced to execute the deed through misrepresentation on which she had a right to, and did, rely." Likewise, in *Danielson* v. *Skidmore,* 125 Ark. 572, 189 S. W. 57, the vendor made inquiry of the vendee concerning the condition of property about to be received as part purchase price; and the vendee made answers which were material and which he knew to be false. In awarding relief to the vendor, we said: "He had a right to rely upon the representations of Danielson as to the quality of

the soil, and according to his testimony he did rely upon them."

The preponderance of the evidence clearly establishes that Ross Harrell, in obtaining Mrs. Trout's signature to the deed, violated the salutary rules just stated. Here is his testimony:

". . . My Uncle Lige told me over the phone that they were leasing land around Lisbon, and if I would come down I would have a chance to lease. That was two or three weeks prior to the time I came. I told him I would come down on the 10th or 12th (November) . . .". Regarding his answers to Mrs. Trout's inquiries on November 11th, he testified:

"Q. Was anything said about you having had an offer for the lease on the land? A. She wanted to know if I had had an offer for the lease on the land, and I said I had not, and then she asked if any member of the family had had an offer on the land, and I said not so far as I knew. Q. Had you had any? A. No. Q. Had any of the family, so far as you knew, had an offer? A. I didn't know if they had."

Thus Ross Harrell admitted that he told Mrs. Trout absolutely nothing about the Weadock negotiations, although he knew of them. He claims that she asked him about "offers to lease"; and that all of which he had *actual knowledge* were mere "chances to lease". We hold that when he elected to answer her inquiries, then he should have told her of the Weadock negotiations of which he had knowledge and which had caused his trip to El Dorado at that time.

To say the least of it, his testimony and that of his witnesses shows that Ross Harrell was evasive, equivocal, and misleading, in the answers he gave to Mrs. Trout in response to her said inquiry. Both Ross Harrell and Lige Harrell, his uncle, testified that Lige Harrell was looking after all lease matters for Ross Harrell and the other Harrell heirs. Lige Harrell denied that Weadock ever made him a real "offer" until about an hour *after* Mrs. Trout had signed the deed. But at one place in

the testimony Lige Harrell said of his letter to Ross Harrell:

"A. I wrote him and told him that some leases were being sold in that community. Q. You didn't write him that Weadock was trying to buy his lease? A. *I told him that we had had offers.*" (Italics our own.)

Furthermore, on November *10th,* Weadock had his attorneys in Magnolia prepare the proposed deed from Mrs. Trout to Ross Harrell, and also the oil and gas leases for the Harrell heirs to execute. Weadock stayed in El Dorado and never contacted Mrs. Trout. About noon of November 11th, Lige Harrell told Weadock that Mrs. Trout had just agreed to sign the deed to Ross Harrell; and Weadock then handed the previously prepared deed to Lige Harrell who took it to the office at which Ross Harrell had advised Mrs. Trout to meet him. The deed was actually signed by Mrs. Trout at about 3:00 P. M. and at about 4:00 P. M. Ross Harrell, Lige Harrell, and some of the other Harrell heirs signed the lease to Weadock.

We would certainly be over credulous were we to believe that Ross Harrell came from Oklahoma to El Dorado and visited with his uncle and aunt during the night and day of November 10th and did not learn from them all about the Weadock-Harrell negotiations, and that Weadock had continued to seek the lease after Lige Harrell had quoted the price of $25 per acre. The preponderance of the evidence establishes that Ross Harrell did know of the Weadock offers when he gave his answers to Mrs. Trout. What happened, as shown by the entire record—of which we have mentioned only a small part—"speaks so loud" that we cannot believe the feeble explanations offered by Ross Harrell and his witnesses in their attempt to establish that the answers given to Mrs. Trout's inquiries were truthful, unequivocal and non-evasive.

Appellees claim that Mrs. Trout did not in fact rely on the answers that Ross Harrell gave her. We are convinced, however, by the preponderance of the evidence

that Mrs. Trout did rely on Ross Harrell's answer. The mere relationship of stepmother and stepson does not, *ipso facto,* create a confidential relationship between the parties. See *Smith* v. *Lamb,* 87 Ark. 344, 112 S. W. 884. Likewise, the mere relationship of co-tenancy does not, *ipso facto,* create a confidential relationship in all the dealings between the parties, even though such a relationship may exist in some matters. See *Clements* v. *Cates,* 49 Ark. 242, 4 S. W. 776. We are not deciding the present case on any theory of confidential relationship. We are mentioning these matters to show that in the timber dealings between the parties Mrs. Trout did in fact rely on Ross Harrell; and that, likewise, in this deed matter she did rely on the answers made by Ross Harrell to her inquiry; and she is entitled to rescind the transaction because such answers lacked that truth, candor and non-evasiveness which are essential.

The decree is reversed and the cause is remanded, with directions to enter a decree in accordance with this opinion upon Mrs. Trout's return of the $820 she received from Ross Harrell.

GRIFFIN SMITH, C. J., dissents.

GRIFFIN SMITH, C. J. My conclusion is that Mrs. Trout did not rely upon representations made by Harrell; that she had personal knowledge of values, and that her contracts were not predicated upon information obtained from her stepson. Effect would be to affirm the Chancellor's findings. The case was heard by one of the State's most capable judges of equitable matters who invariably gives attention to every material issue. I do not think the testimony is sufficient to overturn his findings.

4639 233 S. W. 2d 392

Opinion delivered October 9, 1950.

Rehearing denied November 20, 1950.

Tom Kidd, for appellant.

GEORGE ROSE SMITH, J. Last year the City of Dierks adopted an ordinance requiring property owners to pay an annual sanitation tax of $4 for each business house and dwelling in the city, this revenue to be used for fogging the city with an insecticide three times a year. L. C.

Holman appeals from a $25 fine that was imposed by the circuit court upon Holman's refusal to pay the tax.

It is contended that the ordinance was not regularly passed and that it is unconstitutional even if validly enacted. As to the first contention it is shown that the ordinance was introduced at a city council meeting on January 21 and was unanimously adopted by all members of the council. Appellant argues that the minutes of the meeting are defective in failing to recite that two-thirds of the aldermen voted to suspend the rules and to read the proposed measure a third time, as the statute permits. Ark. Stats. 1947, § 19-2402. We have held, however, that the legal effect of unanimous action by the council is to dispense with the need for formally suspending the rules. *Young* v. *City of Gurdon,* 169 Ark. 399, 275 S. W. 890. Nor is there merit in the contention that the failure to record the names of those voting for and against the ordinance is fatal to its validity. In the case of municipalities this requirement applies only to ordinances authorizing the execution of contracts. Ark. Stats., § 19-2403; *White* v. *Town of Clarksville,* 75 Ark. 340, 87 S. W. 630.

Upon the constitutional issue Holman takes the position that the city, having already levied its entire ad valorem tax of five mills, is without power to levy an additional tax of $4 upon each building in the city. Ark. Const., Art. 12, § 4. While the ordinance refers to this levy as a tax, it is actually not a tax but a charge for services to be rendered. The city proposes to spray the property of its citizens and to charge the cost of this operation against those who receive its benefits. Such a fee for the performance of a service is not taxation. Cooley on Taxation (3d Ed.), p. 5.

The most serious question in the case is whether the city has been given the power to perform the proposed services and to charge a fee therefor. On this issue we think our decision in *Geurin* v. *City of Little Rock,* 203 Ark. 103, 155 S. W. 2d 719, to be controlling. There the city council created an agency to collect rubbish and garbage throughout the city and provided a schedule

of fees to be paid by those receiving this collection service. We held that the city's delegated power to "prevent injury or annoyance . . . from anything dangerous, offensive or unhealthy" (Ark. Stats., § 19-2303) authorized the procedure chosen. If the sanitary disposal of rubbish and garbage is necessary to prevent injury from things dangerous, offensive or unhealthful, the same principle certainly applies to the extermination of flies, mosquitoes, roaches, and other pests that may cause or transmit disease.

There is some suggestion that an exaction levied in the same amount against the owner of every building may discriminate unreasonably as between the owners of large and of small buildings or as between the owners of improved and of unimproved property. There is, however, no proof concerning the relative sizes of buildings in Dierks, the relative amounts of improved and unimproved property, or the relative benefits that will accrue to those who own buildings and to those whose property is unimproved. It may be that the classification selected by the council is a reasonable one, and in the absence of evidence to the contrary we are unwilling to say that the presumption of constitutionality has been overcome.

Affirmed.

FULLER *v.* STATE.

4630 232 S. W. 2d 988

Opinion delivered October 9, 1950.

Batchelor & Batchelor, for appellant.

Ike Murry, Attorney General, and *Robert Downie,* Assistant Attorney General, for appellee.

LEFLAR, J. Grover Fuller appeals from conviction under an information charging him with stealing two cows from one Richmond. Fuller admitted that he took the cows from Richmond's pasture near Van Buren on the night of March 7, 1950, and hauled them to Springdale, where he sold them. His defense was that he believed the pasture had been rented by and was in possession of another person, not Richmond, and that the cows were two that had been stolen from him some time previously by this other person. It is clear that this belief was a mistaken one, but if he honestly held the belief it was a good defense to the criminal charge of grand larceny, *Wilson* v. *State,* 96 Ark. 148, 131 S. W. 336, 41 L. R. A. (N. S.) 549, Ann. Cas. 1912B, 339, and he was entitled to present his evidence on the point fully and fairly.

The first witness to testify on defendant's behalf was Ben Mayo, high school athletic director who had coached Fuller when the latter had been a football player at the Fort Smith High School in the 1930s, and had kept up with Fuller and his family since then. Mayo was offered to testify to Fuller's good reputation in the community and also to the fact that though sane, he was inclined to be neurotic, particularly after he suffered a severe head wound while in military service during the war, and was therefore more likely to hold the belief

relied upon as a defense than an ordinary man would be. As a preliminary, defendant's attorney had Mayo identify himself, then asked him eight questions, all answered briefly, which traced the acquaintanceship between Fuller and Mayo from Fuller's high school days to a time shortly before the alleged theft. The last of the series of questions was "What business was he (Fuller) engaged in here?" Mayo's answer was "He was in the dairy business."

At this point, the Circuit Judge said "Just a minute, Mr. Batchelor, we will take too much time here if you expect to prove the reputation of Fuller by this teacher. There is no need to go into all of this. Now you can spend a lot of time on a man's acquaintances and visits and all that. But that wouldn't help the jury and it isn't admissible here."

Defendant's attorney recorded his exceptions to the Judge's remarks.

The Judge then continued "Well, it is just taking up the time of the jury for nothing. He could talk about his football players from now until tomorrow night but that would not help the jury in deciding this matter."

Defendant's attorney again recorded exceptions, and asked "Your honor, do you stop me at this time?"

The Judge resumed "Yes, sir, from pursuing that line of questioning. At this time these men here on the jury have something else to do besides listen to that. They want to try this case, and it is my duty to confine the testimony to points that are material."

Defendant's attorney once more recorded exceptions, and suggested that the matter might be discussed further in another room out of the jury's hearing.

The Judge then said "The only thing, gentlemen, we just have this to do and these men want to be about their business when they finish this, and if we permit this teacher and other teachers to talk about all these things and their acquaintances, it will take three times as long as should be necessary."

The colloquy continued a little longer, then the Judge agreed that they should go to another room away from the jury. After further discussion in the separate room, Mayo was allowed to resume his interrupted testimony. There were some further interruptions by the Judge, of the same general tenor as those just quoted, but not going as far in casting aspersions on the defendant's attorney and witness.

A Circuit Judge presiding at a jury trial should not be a mere automaton on the bench, exerting no control over what goes on before him. He should be more than a moderator who keeps order while counsel do and say what they please before the jury. It is his duty to see not only that the trial proceeds in accordance with law, but that it proceeds efficiently and effectively, and in keeping with the ends of justice. He should, among other things, be free to shut off long-winded and irrelevant testimony or questioning, and to confine counsel to the actual issues in the case being tried. The firm and fair administration of the trial is a part of his job.

We feel, however, that the record in this case shows that the Circuit Judge went too far. We do not find error in his rulings as to the propriety of testimony, nor in the fact that he sought to control irrelevant questioning, but rather in the manner and the language of his rulings concerning what was at the most a minor transgression on the Court's time. Their phrasing and tenor were such as to cast serious reflections on the witness as well as the attorney and to create an impression among the jurors that the testimony could have little value, whereas actually it may have been highly important to the establishment of the defendant's rather unusual defense. The Judge's language tended to minimize the effect of significant testimony, not of irrelevant or unimportant evidence.

". . . a judge presiding at a trial should manifest the most impartial fairness in the conduct of the case. Because of his great influence with the jury, he should refrain from impatient remarks or unnecessary comments

which may tend to result prejudicially to a litigant or which might tend to influence the minds of the jury. By his words or conduct he may, on the one hand, support the character and weight of the testimony or may destroy it in the estimation of the jury. Because of his personal and official influence, uncalled for or impatient remarks, although not so intended by him, may give one of the parties an unfair advantage over the other.'' *Western Coal & Mining Co.* v. *Kranc,* 193 Ark. 426, 428, 100 S. W. 2d 676, 677. Also, see, *McAlister* v. *State,* 206 Ark. 998, 178 S. W. 2d 67.

The requirement of Art. 7, § 23, of our Constitution, that ''judges shall not charge juries with regard to matters of fact'', applies as well to the credibility of witnesses and the weight to be given their testimony as to the outright truth or falsity of what they say. *St. L. S. W. Ry. Co.* v. *Britton,* 107 Ark. 158, 154 S. W. 215. And it applies not only to what judges tell juries in the course of formal instructions but also to what they say in colloquys with lawyers in the jury's hearing.

The judgment of conviction is reversed and the case is remanded for new trial.

GRIFFIN SMITH, C. J., and MCFADDIN, J., dissent.

GRIFFIN SMITH, C. J. I would affirm the case. While Judge Kincannon no doubt disclosed impatience with defense attorney tactics, I think the record as a whole shows that the conduct criticized by the majority was the result of planned aggravation by counsel designed to achieve the very purpose it accomplished; hence the defendant is not entitled to claim prejudice in circumstances where he was inviting reprimand. On the whole I do not think the Court did anything more than to sternly admonish obedience to well-known rules—rules that were being persistently violated.

LOY *v.* BEAN.

4-9314 232 S. W. 2d 986

Opinion delivered October 9, 1950.

[redacted]

D. B. Bartlett, for appellant.

Wiley W. Bean, for appellee.

MINOR W. MILLWEE, Justice. Appellant, E. P. Loy, brought this action under the Usurpation Statute (Ark. Stats., §§ 34-2201—2209) seeking to oust appellee, Johnny Bean, from the office of school director. This appeal challenges the correctness of the trial court's action in dismissing appellant's complaint under the undisputed facts disclosed by the pleadings.

The facts are: School District No. 19 of Johnson County was created under Initiated Act No. 1 of 1948. Pursuant to the provisions of Act 324 of 1949, the district was divided into five zones and a special election was held on July 5, 1949, for the election of directors of the new district. Loy and Bean were candidates from Zone 2 and Bean was elected and qualified as director. The five newly elected board members met and determined the length of their respective terms by lot as provided in § 2 of Act 324, *supra,* Bean drawing the short term

of one year. At a regular school election held on September 27, 1949, Loy was elected and qualified as a director from Zone 2. Subsequently the County Board of Education held and ordered that Bean's term of office would continue for a period of one year from his election on July 5, 1949, and thereafter until his successor was legally elected. Loy prayed an appeal from this order to the circuit court and on April 21, 1950, the appeal was dismissed for want of jurisdiction. Loy filed the instant action on May 11, 1950.

The trial court held that Bean, being elected director July 5, 1949, for a one-year term, would hold office until July 5, 1950, and until legally succeeded, or until the regular school election in September, 1950; and that, as a matter of law, there was no vacancy when Loy was elected in September, 1949. Appellant's contention for reversal is that the court erred in refusing to hold that appellee's term of office had expired on September 27, 1949, when appellant sought to succeed him at the regular school election.

Under the provisions of § 1 of Initiated Act No. 1 of 1948, Acts 1949 (p. 1414) School District No. 19 was automatically formed on June 1, 1949, comprising all districts in the county, with less than 350 pupils of school age, which had not been merged with some other district between the date of the adoption of the initiated act and March 1, 1949. Upon formation of the new County, or United, District the smaller districts lost their previous status as separate districts. *Stroud* v. *Fryar,* 216 Ark. 250, 225 S. W. 2d 23.

Section 2 of Initiated Act No. 1 provides for the election of board members of the County District and states that the length of their terms "shall be determined in accordance with provisions of existing law". Act 324, *supra,* was duly adopted with an emergency clause and became effective upon its approval March 19, 1949. Hence, the act was a part of "existing law" at the time of the formation of District 19. After stipulating that the five directors of the new district shall determine the length of their respective terms of from one to five years

by lot, § 2 provides: "Thereafter, one member shall be elected at each annual school election for a term of five (5) years; provided, that any member of the board of education shall hold office until his successor has been elected and qualified. . . ."

We hold that the trial court correctly interpreted the statutes and that it was not the intention of the Legislature to provide that a director who was first elected to the one-year term should hold office for only two months and 22 days, or until the next annual school election. It is more reasonable to assume from the language used that it was intended that the director first elected should hold office for the term of one year specified in the act, after which time one director should be elected at each annual election for a five-year term. Under this interpretation of the statutes, it follows that Bean's term of office had not expired and there was no vacancy in the office when Loy was elected at the election held September 27, 1949.

Affirmed.

PUTERBAUGH *v.* STATE.

4633 232 S. W. 2d 984

Opinion delivered October 9, 1950.

George W. Shepherd and *H. B. Thorn,* for appellant.

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

HOLT, J. An information (based on Ark. Stats. 1947, § 41-3210) charged that Puterbaugh did "unlawfully and feloniously and knowingly accept, receive, levy and appropriate gold, silver and paper money, lawful money of the United States of America, without consideration, from the proceeds of the earnings of Jewel Zornes, a female, then and there engaged in prostitution, against the peace and dignity of the State of Arkansas." A number of witnesses, some of whom were admittedly prostitutes, testified in behalf of the State. Appellant operated a hotel in North Little Rock. The testimony of these women, most of whom had rooms in the hotel, was to the effect that they had an understanding or agreement with appellant that when they picked up a man and took him to the hotel for immoral purposes, appellant would charge $2.50 for the use of the room; on the other hand, if appellant obtained a man and then assigned one of the girls to the room, appellant's fee was one-half of her earnings. A jury found appellant guilty of pandering and fixed his punishment at two years in the State penitentiary. From the judgment is this appeal. For reversal, appellant first questions the sufficiency of the evidence.

Jewel Zornes testified that she first met appellant in May, 1949, at the hotel in question, where she was staying at the time; that she entered into an agreement with Puterbaugh, who was managing the hotel, to stay there and share her earnings as a prostitute with appellant. She

testified: "Q. Did you have dates with men up there? A. If we rented the room, we was to give him $2.00. Q. $2.00 out of every $5.00 you made? A. That's right. Q. Tell the jury the procedure in which men were taken up there? A. Well, if we would go down stairs and talk to men and bring them up there— Q. Downstairs? A. Yes, in the cafe, we would give the manager, Mr. Puterbaugh, $2.50 for the room and my room was No. 3 and Violet Baker's was No. 23 and Betty's was No. 1—that was understood—we walked our men by and I did the paying—I paid Puterbaugh $2.00 or $2.50 for the room. Q. That was for rent? A. Yes, sir, and if he rented the room and called us on a date, we gave him half of what we made. Our walk-up dates didn't register." She further testified that she worked under the above arrangements with appellant from May until July, 1949, and that she had dates with men on July 8 and shared her earnings with appellant, and that there were four other prostitutes in the house, that she did not remember how much money she paid appellant. "Q. Jewel, have you any idea how much money you paid the defendant for having dates with men? A. I would like to get one thing clear—those deposits I made that I had slips for, they were not on dates. We saved money from time to time and put it up every two or three weeks. Those others was just $2.00 or $3.00 to $4.00 and $4.50 or maybe $5.00, according to how much we gave him and there wasn't no receipt on that."

Betty Joe Clark, who had a similar arrangement with appellant, testified in effect corroborating Jewel Zornes. There was also testimony given by the other women of a corroborating nature.

This evidence was ample to support the jury's verdict. "It is too well settled for dispute that, if there is any substantial evidence to support the verdict, we must permit it to stand, and in determining this question, we must view the evidence in the light most favorable to the State * * *." *Padgett* v. *State,* 212 Ark. 716, 207 S. W. 2d 719. True it is that appellant produced testimony tending to contradict the State's evidence; however the jury elected to believe the testimony offered by the

State, which, as indicated, was ample to support the verdict.

Appellant next contends that the Court erred in permitting the following question and answer propounded to State's witness Gillespie: "Q. Was there anybody up there guarding the front and back doors against the law? A. Yes, sir."

There was no error in the admission of this testimony for the reason that testimony (in effect the same) on this very point had been previously introduced without any objection whatever on the part of the defendant. Witness Jewel Zornes testified: "Q. Were there any men around there guarding the front and back entrances to the place? A. After they turned the heat on, when they came up there every night for a week, he put Paul Allen on the back and Pat Baker in front and he stayed in the hall in order to get us out if the law did come up there." *Gordon* v. *Town of DeWitt,* 106 Ark. 283, 153 S. W. 807.

Appellant next argues that the trial court erred in admitting over his objection the following question propounded to officer Gilbert and his answer: "Q. What is the reputation of that place (Pulaski Hotel)? A. I would say it was bad. It has a reputation as a hang-out for prostitutes and also whiskey on Sunday." This very question appears to have been decided adversely to appellant's contention in *Cole* v. *State,* 156 Ark. 9, 245 S. W. 303. We there held (Headnote 3): "In a prosecution of a hotel keeper for receiving earnings of a prostitute rooming at the hotel, testimony showing the reputation of the hotel was admissible."

Finally, appellant contends that the trial court erred in refusing to grant a new trial on the ground of newly discovered evidence under Ark. Stats., 1947, § 43-2203, Sub-section (6)—"Where the defendant has discovered important evidence in his favor since the verdict." The record discloses that after the trial some of the prostitutes who testified on behalf of the State, with the exception of Betty Joe Clark and Jewel Zornes, made affidavits and testified in person when appellant's motion for

a new trial was being considered by the trial court, that their testimony given at the trial was false and was given under duress, coercion and threats. The record further reflects, however, that witnesses Jewel Zornes and Betty Joe Clark refused to recant or change the testimony which they gave at the trial. Their testimony alone, which the jury evidently believed, was sufficient to support the verdict. In *Little* v. *State,* 161 Ark. 245, 255 S. W. 892, we held (headnote): "Criminal Law—New Trial —Recantation of Testimony.—In a prosecution for aggravated assault committed on a baby, in which there was testimony, aside from that of the child's mother, sufficient to sustain conviction, and, in which it appeared, on defendant's motion for new trial, based on the mother's affidavit recanting her testimony that defendant had beaten the child, that the mother, since the trial, had come under the defendant's influence, a denial of the motion for new trial was not error."

There is another reason that no error was committed in this regard. In the circumstances here, in considering appellant's motion for a new trial, it was within the trial court's discretion to determine what witnesses told the truth while testifying, and no abuse of this discretion accorded the trial court has been shown. This court, in *Tucker* v. *State,* 176 Ark. 1206, 2 S. W. 2d 61 (not reported in Arkansas reports) held: (Headnote)—Refusal of new trial for retraction of corroborated testimony of accomplice who was state's witness held not abuse of discretion.

"In prosecution for setting up a still, refusal of new trial for newly discovered evidence on account of accomplice's subsequent retraction of testimony as state's witness *held* not abuse of discretion, where testimony of accomplice was in part corroborated and accomplice had been confined in jail and had access to and conversations with defendant since trial; question whether or not witness told truth when on witness stand being within discretion of trial court."

And in the body of the opinion it was said: "So it should be stated here the trial court had all sufficient

reasons for overruling the motion on the ground of newly discovered evidence and was fully justified, it occurs to us, in his opinion that the witness Brannon told the truth when he was on the witness stand. At least, whether witness Brannon did swear the truth or not while on the witness stand was in the discretion of the trial court to determine under the facts of this record. We cannot say that the trial court abused its discretion in overruling appellant's motion for a new trial."

Finding no error, the judgment is affirmed.

DUNAWAY, J., not participating.

MAXWELL *v.* STATE.

4636 232 S. W. 2d 982

Opinion delivered October 9, 1950.

W. Harold Flowers and *L. Clifford Davis*, for appellant.

Ike Murry, Attorney General, and *Robert Downie*, Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. This is the second appeal from a death sentence for rape. We formerly reversed because insufficient time was given the accused to prepare his defense, but held that the evidence was sufficient to sustain the judgment. *Maxwell* v. *State*, 216 Ark. 393, 225 S. W. 2d 687.

On retrial the defendant moved for a change of venue, alleging local prejudice. Witnesses in support of the motion were not informed respecting all sections of the county, nor did they testify unequivocally that public hostility was such that a fair trial could not be procured; hence the Court properly denied the request.

It was conceded that for more than a quarter of a century no Negroes had been summoned for trial jury service, hence the exclusion had been systematic for racial reasons, and in derogation of the Fourteenth Amendment to the Federal Constitution.

When the jury panel was interrogated by the Judge at a time preceding the term at which Maxwell was tried, it was ascertained that some were disqualified, and the Court discharged all but thirteen. Direction had been given that a special list of not less than fifty be summoned, and a day before the trial began this list, containing 69 names, but including the thirteen brought forward from the old panel, was opened and by consent of counsel for the defendant and the Prosecuting Attorney it was given to the Sheriff, who promptly executed summonses. However, the defendant at all times protested that under the conceded facts that no Negro had been called to serve on a Hempstead County jury for more than twenty years it had been shown that discrimination on account of race had been habitually practiced, hence the old panel rem-

nant of thirteen should be discharged. Had this been done the jury would have been selected from the new names, with eight Negroes on the list.

The State contends, and not without attention-compelling force, that commingling of the original thirteen jurors with the panel containing Negroes gave to the defendant in principle the identical opportunity he was contending for: that is, the right to select twelve names from a list partially composed of members of his race. The answer is that we are dealing primarily with the Constitution as distinguished from a particular defendant. Perhaps in the instant case Maxwell's counsel could have shown sufficient individual disqualifications to procure the services of one or more of the Negroes on the trial jury. It is also possible that the result would have been the same—conviction and the death sentence. But there is no doubt that the local system of jury selection resulted in systematic exclusion of Negroes in violation of the Fourteenth Amendment, and that for the first time in many years colored electors were summoned when the special list was given the Sheriff. *Bone* v. *State,* 198 Ark. 519, 129 S. W. 2d 240. See *Washington* v. *State,* 213 Ark. 218, 210 S. W. 2d 307, for a discussion of disproportionate numbers in dealing with white and Negro persons called for jury service.

Our own cases, and decisions by the Supreme Court of the United States, are too clear for misunderstanding.

Appellant's counsel urge that because of a diversity of views expressed by members of the Supreme Court of the United States, we should hold that a prosecution by information is unconstitutional. See the dissenting opinions of Mr. Justice Black and Mr. Justice Murphy in *Adamson* v. *California,* 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903, 171 A. L. R. 1223, where it is suggested that the Bill of Rights should be extended by judicial construction to bind the States. This would include the Fifth Amendment, excusing an accused from trial on charges involving a capital or otherwise infamous crime unless on presentment or indictment by a Grand Jury. Maxwell was proceeded against by information — a

process heretofore held sufficient by the U. S. Supreme Court. Our holdings have been consonant with these views, and must be adhered to.

Appellant further contends that he was discriminated against within the meaning of the Fourteenth Amendment because there were no Negroes on the Jury Commission. We know of no rule making this requirement and the suggestion must be rejected.

As in the former appeal, proof was sufficient to sustain the verdict. The defendant did not testify, nor did his counsel cross-examine any of the State's witnesses; neither were the jurors questioned in any manner by the defendant, or challenged except as heretofore stated. Ordinarily the principle emphasized by Chief Justice HART in *Rose* v. *State,* 178 Ark. 980, 13 S. W. 2d 25, would apply; but here the vice goes deeper and involves a fundamental right the defendant was denied. He was entitled to favorable action on the motion to quash the old panel, hence a new trial will be necessary. Reversed, with directions to proceed in a manner not inconsistent with this opinion.

McFADDIN, J., not participating.

BRADY *v.* POWELL.

4-9234 233 S. W. 2d 61

Opinion delivered October 16, 1950.

John D. Eldridge, Jr., for appellant.

Dennis W. Horton, for appellee.

HOLT, J. Appellee, Signa Powell, began this suit in August, 1949. She alleged that she acquired title in September, 1937, to a 40-acre tract of land in Woodruff County, as follows: "The southwest quarter of the southwest quarter (SW¼ of SW¼) of section thirty-six (36), township five (5) north, range three (3) west."

"That she immediately thereafter went into possession of said above described land up to an old fence row on the east boundary line thereof which was the division line between the property herein described" and an 80-acre tract owned by the McGowan Estate hereinafter described; "that she has been in actual, open, adverse and continuous possession of said above described land that was conveyed to her, up to the said old fence row, since 1937 or more than ten years;" that her husband George W. Powell, purchased the 80-acre tract, above, from the McGowan estate in March, 1945, under the following description: "The east (½) of the southwest quarter (SW¼) of section thirty-six (36), township five (5) north, range three (3) west of the fifth principal meridian, containing eighty (80) acres, less Missouri and

North Arkansas Railroad right-of-way and Arkansas Highway right-of-way."

That her husband "George W. Powell on the 20th day of April, 1945, sold to the defendant herein, J. B. Brady, said lands and conveyed title thereto by executing and delivering a warranty deed with relinquishment of dower. This plaintiff states that she executed said deed and signed her name thereto acknowledging her relinquishment of dower and homestead and that she otherwise had no interest in said property nor received any of the benefits therefrom; that the scrivener inadvertently drew the deed and placed 'we' where it should have been 'I,' relative to warranty, which was a mutual mistake, and the defendant herein, knew that said land was owned by Geo. W. Powell."

In this deed from George Powell to appellant, Brady, the same description was used as in the above deed from the McGowan Estate to George Powell.

She asked that appellant be enjoined from proceeding with the building of said fence; "that the deed from George W. Powell to J. B. Brady be reformed so that this plaintiff be in no wise obligated as guarantor of title or otherwise, except as releasing dower and homestead, therein; that title to said land up to the old fence be quieted and confirmed in this plaintiff."

Appellant answered with a general denial and alleged that he was entitled, under his deed from George Powell, to the full 80-acre tract, that his title be quieted in the 3.3 acres in dispute, and claimed by Signa Powell; or in the alternative that the purchase price of $3,750, which he paid for the 80-acre tract, be abated to the extent of the 3.3-acre deficiency.

The trial court found "that plaintiff is the owner of, and she and those under whom she claims have adversely and continuously held for more than seven years, the southwest quarter of the southwest quarter (SW¼ SW¼) of section thirty-six (36), township five (5) north, range three (3) west, and up to the old fence row on the

east boundary thereof which is the division line between her land hereinabove described and the east half (E½) of the southwest quarter (SW¼) of section thirty-six (36), township five (5) north, range three (3) west, all lying in Woodruff County, Arkansas, and title to said first above described tract of land should be quieted and confirmed in said plaintiff, Signa Powell, and the temporary restraining order heretofore made on September 7, 1949, should become perpetual.

"It is further found by the court, that a mutual mistake was made in the Warranty Deed with Relinquishment of Dower, executed by Geo. W. Powell and Signa Powell to J. B. Brady, and appearing of record in the office of the clerk and recorder of deeds for Woodruff County, Arkansas, in Deed Record Book QQ at page 67 thereof, and same should have conveyed only that part of the east half (E½) of the southwest quarter (SW¼) of section thirty-six (36), township five (5) north, range three (3) west lying east of the old fence row hereinabove described and set out," and should be reformed accordingly.

It further found that appellee, George Powell, had breached no covenant of warranty in his deed to Brady, that appellant was entitled to no relief, and entered a decree accordingly.

This appeal followed.

The preponderance of the evidence was to the effect that appellee, Signa Powell, acquired the 40-acre tract in question in 1937, as above indicated, and had claimed and occupied adversely up to the fence line dividing her land from the 80-acre tract claimed by appellant and that this established fence up to which she claimed had been in existence, and the division line, many years prior to 1937.

Without detailing the testimony, we hold that the preponderance thereof supports the Chancellor's finding and decree awarding Signa Powell the 40-acre tract and additional land up to the old fence row and division line,

which represents the 3.3 acres (in question) by adverse possession for more than 7 years, and quieted her title thereto.

The evidence shows that Signa Powell owned in her own right the land awarded her in the above decree and that her husband owned in his own right the tract described as 80 acres, conveyed to him by the McGowan Estate, and which he later conveyed to appellant, Brady. Signa Powell had no interest in this 80-acre tract except dower. That appellant knew this is clearly demonstrated by his own testimony: "Did you know Mrs. Powell owned that land immediately adjoining that on the highway? A. West of it, yes. Q. Did you consider you were buying any land from Mrs. Powell? A. Only her right of dower and homestead to the same eighty acres that he acquired from the McGowan Estate. That is all I am contending for. Q. You were buying and understood you were buying the same land from Powell that he bought from McGowan? A. Yes. Q. At that time a survey had not been made? A. That is right; the deed called for eighty acres and her signature on it for the right of dower and homestead which Mrs. Brady always does sign. Q. When you hailed Mr. Powell in the street and mentioned buying the land, was any amount of land mentioned? A. No, it was to be the same land he had bought from the McGowans."

In the circumstances, we hold that the court correctly held that there was a mutual mistake in the execution of this deed from Powell to appellant and decreed that it be reformed in accordance with Signa Powell's allegation in her complaint above.

We have reached the conclusion that appellant's alternative prayer, that he be allowed an abatement in the purchase price of the 80-acre tract, must be sustained.

Appellant's deed from George Powell called for 80 acres without any qualifications such as "more or less," or any qualification whatever. We have here a sale by the acre and appellant was entitled to the full acreage called for in his deed which was of the essence of the con-

tract. It is undisputed that the tract was short the 3.3 acres which we have indicated were acquired by Signa Powell by adverse possession.

In *Glover* v. *Bullard,* 170 Ark. 58, 278 S. W. 645, this court thus announced the rule: "The general rule on this question is clearly stated in *Weart* v. *Rose,* 16 N. J. Eq. 290. It is there said that the general rule as laid down by Chancellor Kent is that where it appears by definite boundaries, or by words of qualification, as 'more or less,' or as 'containing by estimation,' or the like, that the statement of the quantity of acres in the deed is a mere matter of description, and not of the essence of the contract, the buyer takes the risk of the quantity, if there be no intermixture of fraud in the case.

"On the other hand, where the sale is by the acre, and the statement of the quantity of acres is of the essence of the contract, the purchaser, in case of a deficiency, is entitled in equity to a corresponding deduction from the price," and in *Harrell* v. *Hill,* 19 Ark. 102, it was held: (Fifth Headnote):

"The general rule is, that when a misrepresentation is made as to quantity, though innocently, the right of the purchaser is to have what the vendor can give with an abatement out of the purchase money for so much as the quantity falls short of the representation; and such abatement ought to be in proportion to the price given for the whole tract as represented, without regard to any other evidence of the value of the land."

Accordingly, the decree in so far as it relates to appellee, Signa Powell, is affirmed. As to the abatement of the purchase price, the decree is reversed and the cause remanded with instructions to the Chancery Court to enter a decree in accordance with this opinion.

4-9240 233 S. W. 2d 64

Opinion delivered October 16, 1950.

[redacted]

Bland, Kincannon & Bethell, for appellant.

Floyd E. Barham, for appellee.

MINOR W. MILLWEE, Justice. This is an appeal by plaintiff Aetna Ins. Co., representing by assignment the interest of plaintiff E. F. Brown, from a judgment for defendants in an action filed by Brown and Aetna against defendants Carl Parker and Mrs. Charles Brown.

The case arose out of a three-way street crossing collision which occurred at the intersection of Dodson Ave. and South 21st St. in Fort Smith. Mrs. Charles Brown was driving westward on Dodson Ave., a through street, in a Pontiac car owned by her son Dale. This car was insured by the Southwest Casualty Co. E. F. Brown, Jr., not related to Mrs. Brown or her son Dale, was driv-

ing eastward on Dodson Ave. in his Chevrolet. His car was insured by Aetna. Carl Parker was driving northward in a 1936 Ford truck on South 21st St. There were stop signs on South 21st St. on both sides of Dodson Ave. The evidence conflicts as to whether Parker stopped at his stop sign, but at any rate, after he had either stopped or had almost stopped, he drove slowly into the intersection. There was conflicting evidence as to how fast Mrs. Brown was driving as she entered the intersection. She testified that she was going about 20 or 25 miles an hour while other witnesses estimated the speed at 30 to 45 miles an hour in a district where the speed limit is 25 miles per hour. All the evidence was to the effect that Parker was driving slowly, about five miles an hour. The front of Parker's truck struck the left rear of Mrs. Brown's Pontiac after they both came upon the intersection. Mrs. Brown then lost control of her car, which careened catercorner in a southwesterly direction across the intersection, striking E. F. Brown's car and doing considerable damage to both cars. The evidence does not indicate any negligence in E. F. Brown.

Two actions and one cross action were filed, and the cases were consolidated for purposes of trial.

In the action numbered 9860 below, the Southwest Casualty Co., insurer for Dale Brown, after paying for damage to the Pontiac and taking an assignment of Dale Brown's claim, sued Carl Parker on the theory that negligence on Parker's part caused the collision and resultant injuries. Parker denied any negligence in himself, and cross-complained against Mrs. Brown for damages allegedly suffered by him. In this action the jury found for the defendant Parker on both the complaint and cross-complaint. On the cross-complaint, the verdict was for Parker for $113.75. Judgment was entered accordingly, and there is no appeal in case 9860.

In the other action, numbered 9905 below, Aetna sued Carl Parker *and* Mrs. Brown, alleging negligence in both as the cause of damage to E. F. Brown's car for which Aetna, being liable under its insurance policy, had paid off and taken an assignment from E. F. Brown. In

this action the same jury returned a verdict for the defendants generally, and judgment was entered accordingly. Plaintiffs Aetna and E. F. Brown appeal.

The first argument for reversal is presented in the following language of the motion for new trial: "The verdict of the jury is inconsistent in that they rendered a verdict in favor of Carl Parker against Mrs. Charles Brown, which verdict could not be rendered unless they found that the said Mrs. Brown was guilty of some negligence, and since there was no evidence to the effect that E. F. Brown, Jr., was guilty of any negligence at all, then said verdict should not be permitted to stand as against the Aetna Insurance Company."

The answer to this argument must be that the law imposes no requirement of consistency upon jurors hearing separate cases which are consolidated for purposes of trial. If such separate cases were being tried separately, by different juries, there would be no assurance of consistency in the verdicts, and no greater assurance of consistency is insisted upon when one jury tries both cases together. As this Court said in *Leech* v. *Mo. Pac. RR. Co.,* 189 Ark. 161, 164, 71 S. W. 2d 467: "It does not follow, however, that because two separate and distinct causes of action are tried by the same jury the finding of facts in one cause is binding on the jury in the other cause of action if there is a dispute in the testimony. Although there was evidence tending to show concurrent negligence on the part of Graham and appellee and no negligence on the part of the deceased, yet there was evidence tending to show no negligence on the part of the appellee, and the jury was at liberty to so find in the cause of action on behalf of appellant for the benefit of herself and son, as much so as if the two causes of action had been tried separately instead of together. Notwithstanding the causes of action may be tried together under the provisions of the statute, they are wholly independent of each other, and the finding of the jury in one is not binding upon the jury in the other if the facts are in dispute, as they were in this case." To the same effect, see *Green* v. *West Memphis Lbr. Co.,* 192 Ark. 1177, 91 S. W. 2d 261.

The other argument for reversal has to do with defendant Parker's requested Instruction No. 12, given over plaintiff Aetna's objection. This instruction reads: "You are instructed that if you find and believe from the evidence in this case that Carl Parker entered the intersection of South 21st and Dodson before the car operated by Mrs. Charles Brown entered the intersection, then you are instructed that Parker was entitled to proceed through the intersection unmolested and this would be true, even though you might find that Parker failed to stop before entering Dodson Avenue. Notwithstanding the fact that Dodson Avenue is a through street, if Parker was in the intersection, then it was her duty to yield the right-of-way to Parker. If you find that she failed to yield the right-of-way to Parker when she was under a duty to do so, and that such failure on her part was negligence and that such negligence was the sole and proximate cause of the accident or accidents, then in that event you cannot return a verdict against Parker in this case."

The asserted vice in this instruction is that, as to Aetna's action against Parker, it tends to establish an absence of negligence on Parker's part, in proximately causing the collision, even though he entered the intersection without exercising proper care.

In a number of cases we have sustained the rule laid down in the quoted instruction. *Murray* v. *Jackson,* 180 Ark. 1144, 24 S. W. 2d 960; *Jacks* v. *Culpepper,* 183 Ark. 505, 37 S. W. 2d 94; *Halbrook* v. *Williams,* 185 Ark. 885, 50 S. W. 2d 243; *Livingston* v. *Baker,* 202 Ark. 1097, 155 S. W. 2d 340. In *Murray* v. *Jackson, supra,* this Court said, "In the absence of a statute or ordinance regulating the matter, it is the general rule that the vehicle entering an intersection of streets first is entitled to the right-of-way, and it is the duty of the driver of the other car to proceed with sufficient care to permit the exercise of such right without danger of collision." We then held in that case that the superior right of the driver first entering the intersection prevailed even when there was a city ordinance giving the right-of-way to the vehicle

entering the intersection from the right, the ordinance being deemed not applicable when the driver on the right was last to enter the intersection.

In *East* v. *Woodruff,* 209 Ark. 1046, 193 S. W. 2d 664, relied on by appellants, the collision occurred after the two vehicles left the intersection, and we held that an instruction like the one involved here, given at appellant's request, was more favorable to appellant than the particular facts in that case warranted. Though we have approved the controverted instruction in the cases cited, there clearly may be cases in which it would be improper. Thus there might be a case in which the car that first enters the intersection does so by dashing out rapidly in front of a car that is proceeding slowly and properly toward the intersection, so that the driver of the second car has no opportunity to guard against the dangers created by the first car which suddenly and unexpectedly looms up on the intersection before him. In that situation an instruction like defendant Parker's No. 12 would definitely be incorrect. See 2 Blashfield, Automobile Law and Practice, §§ 991, 994. No such facts appeared in any of the cases in which we have approved the statement of the law set forth in the instruction.

Nor do such facts appear in the present case. All the evidence introduced tended to show that Parker, who for purposes of this instruction is deemed to have entered the intersection first, drove onto it slowly, so that Mrs. Brown, driver of the other car, would have had opportunity to see him (regardless of whether she in fact did see him or not) in time to have brought her car, if driven with due care, under control without a collision. Under this state of the evidence, we cannot say that the instruction was erroneously given.

The judgment is affirmed.

George Rose Smith, J., dissents.

AMERICAN FARMERS INSURANCE COMPANY OF PHOENIX, ARIZONA *v.* THOMASON, GDN.

4-9251 234 S. W. 2d 37

Substituted opinion.

Original opinion delivered October 16, 1950.

Rehearing denied December 4, 1950.

R. D. Rouse, for appellant.

Tompkins, McKenzie & McRae and *P. L. Smith,* for appellee.

LEFLAR, J. This is an action against a foreign insurance corporation, on a contract of accident insurance entered into in another state, with substituted service on the defendant corporation by summons served on the State Insurance Commissioner under the provisions of Ark. Stats. § 66-244. Defendant appeared specially to the jurisdiction, by a motion to be discussed hereinafter.

The motion to dismiss for lack of jurisdiction was overruled. Defendant then pleaded to the merits, still saving the jurisdictional issue. On trial by the Court sitting without a jury, judgment was for plaintiff, and defendant appeals.

Defendant is an Arizona insurance corporation. There was evidence that in 1949, about the time the present action was brought, defendant had been doing business in Arkansas without authorization, and this may be assumed to be a fact. It was established by stipulation of the parties that the insurance policy sued upon was entered into in California in 1944 while the insured, a resident of Arkansas, was temporarily employed in California, and that the insured while still in California suffered an injury which was within the coverage of the policy. There was no evidence whatever that defendant was doing business in Arkansas at the time the policy was executed and delivered in California.

(1) The service on defendant, purporting to be under § 66-244 of the Statutes, was not authorized by that statute. That enactment provides: "The transacting of business in this state by a foreign or alien insurer without a certificate of authority and the issuance or delivery by such foreign or alien insurer of a policy or contract of insurance to a citizen of this state or to a resident thereof . . . is equivalent to an appointment by such insurer of the Insurance Commissioner . . . to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit or proceeding arising out of such policy or contract of insurance . . " The statute provides for substituted service on the Commissioner only in suits "arising out of such policy or contract of insurance", that is, a policy or contract issued to a citizen or resident of Arkansas by an insurance company which is doing business in Arkansas without authorization. Not only was plaintiff's policy not issued in Arkansas, but there is no evidence in the record that defendant was doing any business in Arkansas when

the policy was issued.[1] The statutory mode of service is not authorized in such circumstances.

Apart from that, the due process clause of the Federal Constitution would be violated if substituted service such as plaintiff contends for were permitted. A similar problem was presented in *Old Wayne Mutual Life Ass'n* v. *McDonough,* 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345. It was there held that, a foreign insurance corporation doing business in Pennsylvania without authority having been sued there by a local resident on an insurance policy executed outside the state, substituted service was wholly invalid even though a Pennsylvania statute providing for it had been complied with. In the absence of actual or implied consent to substituted service, such service on the foreign corporation was held to be limited to causes of action arising out of the business carried on or other acts done by the corporation in the state where suit was brought. See, also, *Simon* v. *Southern Ry. Co.,* 236 U. S. 115, 35 S. Ct. 255, 59 L. Ed. 492; *Nat'l Liberty Ins. Co.* v. *Trattner,* 173 Ark. 480, 292 S. W. 677; *Portas v. Modern Investment Corp.,* 198 Ark. 300, 128 S. W. 2d 360.[2]

It is suggested that the requirements of due process of law for substituted service, as interpreted by the United States Supreme Court, have been modified since the decision in *Old Wayne Mutual Life Ass'n* v. *McDonough, supra.* There is no doubt that they have at

[1] Plaintiff argues that a provision in the policy making premiums payable by deposit at any bank or trust company in the United States constituted doing business through its agents (banks and trust companies) in Arkansas. But no instance of premiums actually being paid to an Arkansas bank or trust company was shown, therefore this possibility of "doing business" in Arkansas was not an issue in the case.

[2] These cases are to be distinguished from others in which, by actually appointing an agent to receive service, the defendant foreign corporation is deemed to have *consented* to service on the designated agent in causes of action in favor of residents of this state arising in other states while business was being done in this state. See *American Ry. Expr. Co.* v. *H. Rouw Co.,* 173 Ark. 810, 294 S. W. 401; *Yockey* v. *St. L.-S. F. Ry. Co.,* 183 Ark. 601, 37 S. W. 2d 694; *Equitable Life Assur. Soc.* v. *Mann,* 189 Ark. 751, 75 S. W. 2d 232. The case of *Scottish Union & Nat'l Ins. Co.* v. *Hutchins,* 188 Ark. 533, 66 S. W. 2d 616, which might appear to be contradictory, must be read in the light of *Protas* v. *Modern Investment Corp.,* 198 Ark. 300, 128 S. W. 2d 360, cited above.

least been clarified. In *International Shoe Co.* v. *Washington,* 326 U. S. 310, it was held that a course of activity consisting merely of the solicitation of business by salesmen, which was admittedly less than the "doing of business", in Washington enabled that state to subject the foreign corporation to personal jurisdiction based on constructive service.[3] In *Travelers Health Ass'n* v. *Virginia,* 339 U. S. 643, 70 S. Ct. 927, decided June 5, 1950, the theory of the *International Shoe Co.* case was extended to permit the State of Virginia to exercise jurisdiction over a Nebraska insurance company which was engaged in extensive mail order solicitation of insurance business in Virginia. The major difference between the Virginia case and the case now before us is that in the Virginia case it was shown by evidence that the Nebraska company had for many years been soliciting "memberships" in Virginia by mail, that it had about 800 Virginia policyholders, and had been investigating claims in Virginia and otherwise servicing policies there. The cause of action sued upon arose out of the Nebraska company's activities conducted in Virginia. The case now before us, in contrast, involves action on a policy issued in California by a company which, as far as we can discover from the evidence, had never solicited business, by mail or otherwise, nor done any other acts in Arkansas at the time this cause of action arose. The effort thus to impose local jurisdiction upon a non-appearing, non-consenting foreign corporation which has engaged in no activity in Arkansas, in a suit on a cause of action which arose outside the state, cannot be successful.

(2) A separate ground upon which plaintiff seeks to uphold the judgment below is that the defendant

[3] A statute providing for service in Arkansas on this theory was thereafter enacted, in Act 347 of 1947, Ark. Stats., § 27-340. See 3 Ark. L. Rev. 22-24. There are many cases, both in Arkansas and elsewhere, holding that a state may base jurisdiction upon the doing of the act (less than "doing business") out of which arises the cause of action sued upon. See *Highway Steel & Mfg. Co.* v. *Kincannon, J.,* 198 Ark. 134, 127 S. W. 2d 816; *Chapman Chemical Co.* v. *Taylor,* 215 Ark. 630, 222 S. W. 2d 820; *Johns* v. *Bay State Abrasive Products Co.,* 89 Fed. Supp. (D. Ct., Md.) 654.

entered a general appearance which subjected him to the Arkansas court's jurisdiction without limitation.

The pleading from which this general appearance is sought to be discovered is headed "Motion to Quash Service of Summons and to Require Plaintiff to Specifically Allege Matters Thereto Related." It begins with a statement that the defendant "without entering its appearance . . . appears specially and for the sole and only purpose of quashing service of summons." But it then proceeds to ask that plaintiff be required to allege whether defendant is a foreign or domestic corporation, in what state defendant is domiciled, what unauthorized business defendant has done in Arkansas, and where the insurance contract sued upon was entered into. Then follows a further prayer that, after plaintiff furnishes this information, the service be quashed for lack of jurisdiction under the Fourteenth Amendment in accordance with the information thus to be furnished. Three days later, before any further action was taken in the case, defendant filed a "Supplemental Amendment to Motion to Quash Service of Summons" in which, asking no new questions, he answered for himself the four questions asked of the plaintiff in the first motion, and renewed the motion to quash.

Later pleadings filed by defendants included an answer, a substituted answer, and a motion to make more definite and certain. In each of these, and in the stipulation of facts, defendant carefully preserved his objections to the jurisdiction. We have held that a defendant may, after duly making a special appearance objecting to the jurisdiction, appear on the merits with the jurisdictional question expressly reserved, and retain the right to present the issue of jurisdiction on appeal. *Sinclair Refining Co.* v. *Bounds,* 198 Ark. 149, 127 S. W. 2d 629.

Plaintiff's position, however, is that the original motion to quash, as filed by defendant, was so broad that it amounted to a motion to make more definite and

certain which, as held in *Searcy Wholesale Grocery Co.* v. *Baltz,* 209 Ark. 620, 192 S. W. 2d 111, itself was a general appearance.

We do not think that the motion filed by defendant here had the same effect as that filed in the *Baltz* case. The *Baltz* motion was headed "Motion to Make More Definite and Certain", and in holding that it constituted a general appearance McHaney, J., pointed out that the "motion did not question in any way the jurisdiction of the court." In contrast, the whole purpose of the motion filed by the defendant here was to question the jurisdiction of the court, and the requests for additional information were specifically directed to the jurisdictional issue and that issue alone. We hold that these requests for information relevant to the motion to quash for lack of jurisdiction did not themselves confer jurisdiction.

The judgment is reversed and the cause is dismissed.

Holt, J. (dissenting). On the record before us, I think the case should be affirmed for the reason that appellant entered its appearance and thereby recognized the jurisdiction of the court over it for all purposes.

Appellant filed "MOTION TO QUASH SERVICE OF SUMMONS AND TO REQUIRE PLAINTIFF TO SPECIFICALLY ALLEGE MATTERS THERETO RELATED."

In this motion, appellant, after alleging that it was entering its appearance for the sole purpose of quashing service of summons, then asked the court to require appellee to allege specifically "Whether the defendant (appellant) is a foreign or a domestic corporation, etc."

In thus seeking the aid of the trial court to require the appellee to amend his complaint and state whether it was a foreign or a domestic corporation, it was asking for affirmative relief, and implied the jurisdiction of the court for all purposes.

As I construe our decisions, our rule is that when one seeks to take advantage of want of jurisdiction, he must

first object on that ground alone and must keep out of the court for every other purpose.

Had appellant confined his motion to quashing the service of summons alone, asked for and secured a ruling of the court against him, then in another motion preserved his right to quash service of summons, answered or asked for any affirmative relief, his appearance would not have been considered as a waiver of such objection to the service upon it.

In *Robinson* v. *Bossinger,* 195 Ark. 445, 112 S. W. 2d 637, this court in an opinion by Judge Frank G. SMITH, announced the rule in this language: "After the objection to the jurisdiction had been made and overruled, and exceptions saved and properly carried into the answer, asking for or agreeing to a continuance under these circumstances is not an attempt to secure affirmative relief, and is not inconsistent with the special appearance. * * * 'If the defendant, being sued in a court that has not jurisdiction *ratione personae,* excepts to the jurisdiction when he first appears in the suit, and urges the exception before making any other defense, and if the exception is overruled, he is not compelled to allow judgment to go against him by default, but may thereafter resort to any other appropriate means of defense, without reiterating his protest against the jurisdiction of the court, and without thereby creating a presumption that he has abandoned his exception to the jurisdiction of the court. When a judge has erroneously overruled an exception to his jurisdiction, there is no good reason why the exceptor should continue to remind the judge of his error at every stage of the proceedings, in order to avoid a presumption that he (the exceptor) acquiesces in the erroneous ruling.' "

In *Searcy Wholesale Grocer Co.* v. *Baltz,* 209 Ark. 620, 192 S. W. 2d 111, we held that where, as here, a party filed a motion reciting that it was appearing solely for the purpose of the motion but "sought the aid of the court to require appellee to amend the complaint as to whether it was a corporation or a partnership," impliedly conceded the jurisdiction of the court for all purposes,

and in *Federal Land Bank of St. Louis* v. *Gladish,* 176 Ark. 267, 2 S. W. 2d 696, we said: "Broadly stated, any action on the part of the defendant, except to object to the jurisdiction over his person, which recognized the case as in court, will constitute a general appearance.' 4 C. J. 1333. * * *

" '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.' 2 R. C. L. 340."

Accordingly, I think the case should be affirmed.

LONG *v.* STATE.

4632 233 S. W. 2d 237

Opinion delivered October 16, 1950.

Rehearing denied November 13, 1950.

Fred M. Pickens, Jr., Andrew G. Ponder and *Harry L. Ponder, Jr.,* for appellant.

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

GRIFFIN SMITH, Chief Justice. Jess J. Long, while serving as a police officer at Batesville, shot and killed Tom Williamson. His plea of self-defense was rejected by a jury that found him guilty of voluntary manslaughter. A penitentiary term of three years was assessed and the defendant has appealed.

The motion for a new trial, in addition to formal assignments and a contention that there should have been an instructed verdict of not guilty, urges error by the Court in not declaring a mistrial when the Prosecuting Attorney asked Long on cross-examination if the county officers took him from Batesville to Newport "for protective reasons." Other matters are urged as error, but they were not brought forward in the motion for a new trial.[1]

A little after six o'clock the evening of June 21st, 1949, Alvis P. Ball and his wife, Neva Cook Ball, drove

[1] An objection—not mentioned in the motion for a new trial—was to the Court's refusal to declare a mistrial when the Prosecuting Attorney, in cross-examining Long on a point as to which the witness indicated that his memory was vague, said, "That part (referring to one of Long's statements) was a lie to the Court?" Judge Bone's admonition was: "That remark will be withdrawn from the jury as being improper. The jury is instructed not to consider it."

five miles into the country to attend a barbecue given at Glenn Edgar's farm. They were accompanied by George (Budge) Evans and his wife, and by Tom Williamson and his wife, Grace. Drinks and food in abundance were served, including four kinds of meat. Williamson ate ravenously and became nauseated. There is testimony that intoxicants were generously consumed by the men, but friendly witnesses said that Williamson drank nothing but beer, and that in consequence of overeating illness occurred. When Williamson's condition became apparent the Ball party left for Batesville. They stopped on Main Street and left Mr. and Mrs. Evans, then went to the Ball residence where Williamson's car had been parked, and where Alvis Ball temporarily left them. Mrs. Williamson did not drive, so Mrs. Ball took the wheel, with Williamson on her right. Mrs. Williamson was between them. The arrangement placed Tom Williamson next to the door, spoken of by the witnesses as the "outside." Mrs. Ball testified that the car speed was 20 miles and that she crossed Main Street when the traffic light was green. Two blocks beyond the bridge at Chestnut Street they turned right. At that time Mrs. Ball observed the light from behind them. It proved to be a police car driven by Ernest Brookerson, who was accompanied by Long. Brookerson was Long's senior in point of time served on the police force.

The Brookerson-Long car sounded its siren and Mrs. Ball drew up to the curb. Long got out of the police car when it stopped in front of Mrs. Ball and her companions; whereupon, according to Mrs. Ball's testimony, Long came to the left side of the detained car. After using his flashlight, Long said, "I believe we have the wrong car," and Mrs. Ball replied, "I believe you [do have the wrong car]." Mrs. Ball then told Long who she was and identified other members of the party. She explained that they had been to the Edgar Farm barbecue, that they were on their way to Williamson's home—"about a block and a half around the next corner,"[2]—and

[2] Testimony relating to the distance was given by Mrs. Williamson.

that Williamson was sick. Williamson had not said anything. Long remarked, "Wait a minute and we will see." Just then Brookerson got out of the police car and went to the right side of the car Mrs. Ball had been driving; then, said Mrs. Ball (and before either of the officers had said anything more) Mrs. Williamson told them who she was, who the sick man was, mentioned Mrs. Ball's name, and told where they had been and where they were going. Tom Williamson, who had been reclining with his head against the car seat, or partially through the right front window, "raised up" and said, "You know me: I am Tom Williamson." He told where they had been and said that he was going home.[3]

While the explanation Mrs. Ball testified that Williamson made was taking place, Alvis Ball drove up and parked his car behind Williamson's, then got out and asked what the trouble was. The door of the Ball car at that instant was opened "from the outside—presumably by one of the policemen"—and Ball shut it. The act seemingly provoked Long, who struck a vicious blow with his blackjack. Ball was knocked down. The next thing this witness remembered was Mrs. Williamson's pleadings with Long:—"Don't knock me down, I am pregnant." Brookerson and Williamson were "scuffling" not far from the car. Mrs. Ball—who was "trying to get Alvis up"—heard two shots—"saw them." Brookerson was standing behind Williamson:—"they were all in a huddle"—when Long fired. He then aimed the pistol [in Williamson's face] and snapped it, but there was no shot.

On cross-examination Mrs. Ball testified that while she was attempting to aid her husband after Long had struck him with the blackjack, [Long in the meantime had gone to aid Brookerson] Williamson pleaded with Long, "Don't shoot me with that old pistol, Jess." The three men were then in a chicken yard adjoining the side-

[3] On cross-examination Mrs. Ball admitted that at the preliminary hearing she had testified that Williamson said, "you know me: I am Tom Williamson. We have been out there. I drank some and ate some and got sick." She also conceded that this was a correct quotation.

walk, and were about twelve feet from the Williamson car.[4]

Mrs. Tom Williamson testified to substantially the same proceedings as those mentioned by Mrs. Ball as to how the car was stopped and what was initially said, adding that her husband "roused up," when one of the officers used his flashlight, and said, "You know who I am! I am Tom Williamson and they are taking me home. I have been to a barbecue and got sick." Responding, one of the policemen commented that he "didn't know whether they were [going home] or not." Long turned and hit Ball with the blackjack, knocking him into a ditch near the paving. Williamson got out of the car and began scuffling with Brookerson, who weighed 260 pounds. The conflict carried them through a wire fence and into a chicken yard. Brookerson was wielding a flashlight. Mrs. Williamson says she attempted to hold Long, but that he broke loose.

While Brookerson held Williamson from behind, Long got in front of him:—"Tom had asked Long not to shoot, and all the time I was screaming for somebody to help. I begged [Long] to let Tom alone—not to shoot, to let him alone." Brookerson and Williamson were "coming out of a crouch" when Long fired the first shot. Williamson had just asked Long not to shoot him.

Mrs. Williamson, on cross-examination, admitted that her husband had taken "a little beer." The witness "believed" that Brookerson struck the first lick when Tom got out of the car. The shots fired by Long were at intervals of "just a second or two" and at the time Long fired he was standing within two or two and a half feet of Williamson. When Brookerson came over to where Williamson fell and Mrs. Williamson asked what should be done, he replied, "I don't know, lady—he shot me too."

Alvis Ball testified that when he drove up to the two cars he left his own lights burning. After getting out of

[4] Mrs. Ball's exact statement was: "When I heard Tom [Williamson] ask [Long] not to shoot him, I looked up. At that time Tom was standing up and Jesse Long just pulled the gun and shot twice. Brookerson was standing right behind them."

the car he asked what the trouble was, "but they didn't give me any answer." He didn't know who hit him.[5] A final statement, given in response to a question asked on cross-examination, was that Brookerson held Williamson "and Jesse Long shot him in cold blood."

Abbott Shoemaker, who lived "right around the corner in the middle of the block," approximately two-thirds of a block from where the killing occurred, was in bed the night of June 21st when his attention was attracted by the noise of cars, but he couldn't tell how many:—"A short time after that I heard screaming—some woman screaming. Then I heard a man pleading, 'Don't shoot me, don't shoot me.' I had gotten up and was standing in the front door after the woman screamed the first time. . . . Then I heard two shots that sounded like shooting in a rain barrel of water." On cross-examination Shoemaker repeated that while standing in the door he distinctly heard a man's voice "begging someone not to shoot." The man's exact words were, "Don't shoot me with that gun, don't shoot me with that gun. Then two shots were fired right together, 'bang! bang!' like that."

[5] Ball testified in part: "When I asked what the trouble was they didn't give me any answer. I was between them and the car, and leaned down in the car and asked what was wrong. . . . About that time I looked into the car—leaned down—they started to open the door. I was standing against the car and pushed [the door] back. About that time somebody hit me from behind, and, more or less, I went down in the gutter. It was the hardest lick I ever had. When I came to *they* were in the chicken yard. Long got loose from Mrs. Williamson [who was trying to hold him] and got over into the fight. The best I could tell they scuffled up and down. From all appearances Tom was on the ground [with] Brookerson more or less on his back. I heard Brookerson say 'turn me loose' and Tom answered, 'let me up and I will turn you loose.' The next thing I heard was a shot. When I heard the shot [Tom] stood straighter. They [then] shifted positions and there was another shot. After the second shot they all changed positions. . . . [Long] then aimed the gun, but it failed to fire the third time. He aimed it the third time at [Tom's] face and it just snapped. Before that I heard Tom say, 'Don't shoot me with that damned old pistol,' and Grace [Williamson] had screamed (I don't know how many times) 'don't shoot'. . . . [Williamson] was never loose from [Long] to the extent that he could gain his balance. . . . Tom was [nearly] up when the first shot was fired—half up and half down. After the second shot he straightened up altogether, because he was free of both of them. . . . [Long] then said, 'don't bother me,' and covered them with his pistol in one hand and a blackjack in the other. . . . No statement was [ever] made to the effect that we [or any of us] were under arrest."

Other witnesses testified that they lived in the immediate neighborhood, and heard pleadings. Sidney Wilson awoke when a woman screamed; then a woman cried, "Don't shoot him." Then followed two shots. He heard somone say, "Don't shoot him any more—you've already shot him." It was a woman's voice. Then someone in the group suggested that an ambulance and the coroner should be called. When Wilson reached the scene Mrs. Williamson had her husband's head in her lap, with Brookerson standing nearby. The distance from Wilson's bedroom to the chicken yard was half a block.

Medical testimony was that the two bullets struck Williamson in the chest: one an inch and a half from the left nipple, the other four inches from the nipple, below the median line. Each passed entirely through the body. The exit of one bullet was nine inches below the shoulder blade, while the other emerged about twelve inches from the tip of the left shoulder. The course of each was slightly downward. Other post-mortem examinations showed a slight injury below the right knee—an eighth of an inch wide and directly across the shin bone. Another abrasion was under the left kneecap. The skin was broken and blood had oozed from it. A "pump knot" protruded near the right eye, and near the right ear something like briar scratches were to be seen.

The accused claimed self-defense, coupled with the assertion that Williamson was resisting arrest and that no more force than necessary was used. Long, whose statements in the main were substantiated by Brookerson, testified that he and Brookerson were sitting in a police car the night of June 21, across the street from Chief Henry Varnell. Brookerson was in the driver's seat. The chief motioned to them to pull over to his side of the street, then pointed to an automobile that had just passed and said, "There's a drunk in that car yonder." The patrolling officers had not seen the vehicle until then. Believing that the chief's comment was a direction to investigate, they trailed the car until near enough to sound the siren, then stopped at the point described by Mrs. Ball and others.

Long says that when Brookerson stopped he (Long) walked to the driver's side and saw a woman whom he did not then know. A woman asked why the car was being stopped and Long replied that he was looking for a drunk. Then one of the women said there was no drunk person in the car. Long's reply was, "If you've not got any drunk, maybe I got the wrong car." The officer testified that he then looked across the seat and saw a man lying in a suspicious attitude. One of the women told him the man was Tom Williamson:—"She said, 'you know Tom—let us take him home: you know what Tom will do.' "

Long insisted that he didn't say anything more, but walked around the car, preceded by Brookerson. Both of Williamson's arms were up and his head was resting on them. Long stopped near Brookerson, who, addressing the person they thought was drunk, said, "Where are you going, fellow?" With that Williamson is alleged to have replied, "You g. d. fellows go ahead and let me alone"; whereupon Brookerson informed Williamson he was under arrest. Brookerson grabbed the door, but as he did so Williamson "shoved it open and came out onto him." Long said that in a quick glance he saw that "Brookerson was on top of Tom." Then, according to the defendant's version, Alvis Ball came up behind them and "made toward [Williamson and Brookerson] and when he did that I hit him with a blackjack and knocked him down." Mrs. Ball went over to where her husband was, and Mrs. Williamson grabbed Long "and began yelling, 'Don't hit him any more.' She also said, 'I am pregnant: don't knock me down, don't hurt me.' She was just holding my arms."

Long further testified that at this juncture he went across the sidewalk "to help Brookerson with Tom." The two were on the ground fighting, but got up together. Then, said Long, "Tom turned right around to me, and [with an oath] said, 'I'll get you, too, . . . beg.' I threw up my right arm to knock the lick off and Tom grabbed me by the tie and jerked me right up against his side. When he grabbed me and shoved me he cut off my

wind, [so] I grabbed my gun and hit him. I was putting out all the force I had, but was gradually going back, and my wind was getting short. I saw I was going to have to do something, and do it quick, for I was nearly chocked *out*. I shot the first shot and Tom grabbed me tighter, [then] I pulled the trigger again and Tom let me loose."

Near the close of his direct examination the defendant, talking to the jury, said: "After I got my breath I raised up and was standing, gasping for breath. You gentlemen excuse me, it's not funny,—excuse me for laughing—that's just a nervous habit of mine."

On cross-examination Long was asked if Williamson was on his way home when Chief Varnell identified the car, the purpose of the question being to determine whether the arrest was made for public drunkenness. Long replied: "He was on the street when we were ordered to take after him." Q. "On his way home?" A. "I don't know whether he was on his way home or not." Q. "They told you so, didn't they?" A. "They did afterwards." When asked what Mrs. Williamson meant when she said, "Don't hit him again," Long replied: "I don't suppose she wanted me beating [Alvis Ball] up."

A day after the killing Long went to Newport for a physical examination. In testifying as to the reason, Long explained that he thought he ought to have "those scratches" seen about. Dr. T. E. Williams testified that they were not scratches, but lacerations.

Brookerson was admitted to a hospital June 24th and discharged on the 27th. He had lost a thumb nail, and had received other injuries and was suffering from muscular spasms, indicating a severe strain. Dr. Williams did not think that certain parallel wounds found on Brookerson had been inflicted by finger nails.

In telling of happenings immediately preceding the shooting by Long, Brookerson testified that Williamson's emphatic assertion was, "I am not going anywhere with you G. d. s. o. b.'s." Brookerson repeatedly spoke

of his encounter with Williamson as a "scuffle"; or, "we were clutched together wrestling."

Carl Thomason, a deputy sheriff, testified that he saw Brookerson in a Batesville hospital June 22nd. When asked whether Brookerson held up his left hand and said, "That is all I got," the witness replied (after an objection had been overruled): "He raised up in bed and smiled when I asked how bad he was hurt, and said, 'This is all that happened to me: I don't know whether I was cut or shot.' "

The information charged murder in the first degree, involving malice, premeditation, and deliberation. When asked on cross-examination what offense Williamson had committed and why the so-called "arrest" was being made, Long replied: "From the language he used to us officers, I suppose; and probably for drunkenness—I don't know." Q. "You mean he had offended you?" A. "If a man called you a G. d. s. o. b. . . . wouldn't that make you mad?" And again (question): "With all you did, you were at no time trying to make an arrest?" A. "No." Explaining further, Long said that he was only "trying to protect Brookerson—we always try to help each other."

Other than the insistence that a verdict should have been directed for the defendant, the instructions are not complained of. We do not think prejudice resulted from the Prosecuting Attorney's comment that Long was taken from Batesville for safekeeping, and there was substantial testimony to show inexcusable homicide, hence the Court properly rendered judgment on the verdict of voluntary manslaughter.

Affirmed.

CRINER *v.* CRINER.

4-9192 233 S. W. 2d 393

MARTIN *v.* DAVIS.

4-9276

Opinion delivered October 16, 1950.

Rehearing denied November 20, 1950.

[redacted]

Harkness & Friedman, Quinn & Williams, Surrey E. Gilliam, J. Bruce Streett, J. V. Spencer and *J. V. Spencer, Jr.,* for appellant.

C. M. Martin, Wilson, Kimpel & Nobles, Keith & Clegg and *McKay, McKay & Anderson,* for appellee, in case No. 4-9192.

[redacted]

Wilson, Kimpel & Nobles, for appellant.

Surrey E. Gilliam, for appellee, in case No. 4-9276.

PER CURIAM. The question is whether this Court has power to direct retrial of a cause on petition of those

who would have appealed had they been able to file the record within the time prescribed by law.

On January 17, 1950, Alice Criner and others filed with the Clerk of this Court a certified copy of a Ouachita Chancery Court decree in an action they had brought against John H. Criner and a list of named defendants. The subject-matter was involved in a decision of this Court rendered January 26, 1948, *Criner* v. *Ritchie,* 212 Ark. 815, 208 S. W. 2d 447. In the present action there were 93 plaintiffs, all claiming to be heirs of Reason and Susan Criner, who were mentioned in the cited case.

When the decree was filed there was a petition for *certiorari,* asking that the complete record be brought up. The decree was dated July 28, 1949, but not filed here until five months and twenty days later. In the meantime (January 8, 1950) the official Court Reporter died. He had taken in shorthand all of the testimony. This testimony filled seventeen notebooks with the pages written on each side. A few of the books had been transcribed.

This incomplete bill of exceptions—perhaps less than a third of the entire testimony—was available to the trial Court, and to this Court. Efforts were made to ascertain if some other reporter, or an expert in shorthand writing could decipher the notes, using the transcribed portion as a guide to characters and arbitrary designations the official Reporter—a man of long experience—had adopted. The result of these inquiries was unsatisfactory, hence there was no practicable method of receiving the appeal through extension of time within our rules relating to *certiorari.*

The only alternative would be to direct a retrial of the cause. This, of course, would result in some advantage and some disadvantage to each side on the single issue of retrial because the testimony of particular witnesses could be anticipated and preparation made for rebuttal. This, however, would not control our disposition of the motion if all other conditions suggested the justice of a different course, and if precedent and prac-

tice were not involved, and power to make the order were not highly questionable.

A majority of the Court thinks that the right to have the bill of exceptions approved was lost before the Reporter died.

The trial was in First Division of Ouachita Chancery Court. Terms begin the second Monday in March, July, and November. The decree was rendered during the July term. Time for appeal would have expired January 28, 1950, but for the filing of the decree and the petition for *certiorari* heretofore mentioned. Act 345 of 1941 (patterned after Act 202 of 1927 for the Sixth District) regulates Chancery practice in the First Division of the Seventh District. In the 1927 (Sixth District) measure, it is provided that "The original copy of said transcribed notes when filed with the clerk of the court, as herein directed, shall be treated as depositions in said cause as fully and completely as if filed within the term of the court."

This provision is omitted from the 1941 enactment, and its non-inclusion has the effect, generally, of depriving the trial court of power to approve a bill of exceptions at a subsequent term. The situation would be different if the decree by its terms authorized the additional time, or if the Court had a standing order tolling the time. See *Johnson* v. *U. S. Gypsum Co., ante,* p. 264, 229 S. W. 2d 671; *Elvins* v. *Morrow,* 204 Ark. 456, 162 S. W. 2d 892.

In the instant case there was no standing order, and, as has been pointed out, the decree does not give time. For the reasons expressed a majority of the Court are of opinion that time for filing the bill of exceptions expired before the Reporter died. The motion is overruled.

Since there is no record before us, aside from the decree, and there being no apparent error therein, the appeal is dismissed.

The same order applies in Case No. 9276—*Chas. M. Martin* v. *H. A. Davis et al.*

PORTLAND SCHOOL DISTRICT NO. 4 *v.* DREW COUNTY BOARD OF EDUCATION.

4-9308 233 S. W. 2d 66

Opinion delivered October 16, 1950.

Gibson & Gibson and *Paul Johnson,* for appellant.

John Baxter, DuVal L. Purkins and *Williamson & Williamson,* for appellee.

ED. F. MCFADDIN, Justice. The present case is a phase of the same litigation that was before us in the case of *Gibson* v. *Board of Education of Drew County* (No. 9195, decided May 29, 1950, *ante,* p. 386, 230 S. W. 2d 44). To aid in an understanding of the present case, it is proper to consider background information, and then the two cases prior to this one.

When Initiated Act No. 1 of 1948 [1] was adopted many small Districts undertook to accomplish annexation to larger Districts prior to March 1, 1949. One such small District was Jerome District No. 22 (hereinafter called "Jerome") which embraced territory in both Drew and Chicot Counties and was administered by the County Board of Education of Drew County by virtue of § 80-414, Ark. Stats. 1947, which says, *inter alia:* ". . . For all school purposes such district, situated in two or more counties, shall be a part of the county in which is situated the largest number of inhabitants of the territory affected."

[1] For the terminology in a discussion of this Act, see *Stroud* v. *Fryar,* 216 Ark. 250, 225 S. W. 2d 23.

On one side of Jerome was the Dermott School District (hereinafter called "Dermott") in Chicot County; and on another side was the Portland School District (hereinafter called "Portland") in Ashley County. Dermott was a "large" District, as also was Portland; and each was anxious to secure the annexation of Jerome. The record reflects that representatives of each large District met with the patrons of Jerome at a public meeting; and each representative extolled his District and the benefits Jerome would receive from annexation to his District. Accordingly, there was filed with the Drew County Board of Education (hereinafter called "Drew County Board") a petition, signed by ten per cent of the qualified electors in Jerome, praying that an election be held in Jerome to determine whether it would be annexed to Dermott or Portland. The procedure invoked was under § 80-414, Ark. Stats. 1947.[2]

The election, sought by the petition, was held on February 26, 1949; and the result was: 49 for annexation to Dermott; 34 for annexation to Portland. The Dermott School Board certified to the Drew County Board Dermott's desire to have Jerome annexed.[3] The Chicot County Board of Education likewise passed a resolution, expressing understanding of, and agreement to, the annexation to Dermott. The County School Supervisor of Chicot County expressed it: ". . . On the entire matter, it is, and was, the intent and feeling of the Chicot County Board of Education to concur and acquiesce in the action of the Drew County Board of Education in ordering the annexation of Jerome . . . to Dermott. . . . ." This resolution was sufficient under our holding in *Acklin* v. *Jackson County Board of Education,* 212 Ark. 422, 206 S. W. 2d 745. Accordingly, on

[2] The case of *Arnold* v. *Snellgrove,* 198 Ark. 14, 127 S. W. 2d 125, held that this section (then § 11486 Pope's Digest) applied to dissolution of multi-county Districts, as well as to formation of such Districts.

[3] Of course it was unnecessary under § 80-414, Ark. Stats. 1947, to have an election on this matter in the Dermott District or the Portland District. The school boards of these Districts could act without an election. See *Acklin* v. *Jackson County Board of Education,* 212 Ark. 422, 206 S. W. 2d 745; and see also *Fomby School District No. 26* v. *Williams,* 203 Ark. 235, 156 S. W. 2d 220.

February 28, 1949, the Drew County Board canvassed the result of the February 26th election and adopted a resolution annexing Jerome to Dermott; and all of this was accomplished before March 1, 1949.

FIRST CASE

So much for the background information. C. C. Gibson, a resident and patron of Jerome, undertook to appeal to the Drew Circuit Court from the said order annexing Jerome to Dermott. Such attempt to appeal was Case No. 1627 in the Drew Circuit Court. We refer to this as the "first case."

While the said Case No. 1627 was pending in the Drew Circuit Court, it occurred to some well-meaning person that possibly because of Initiated Act No. 1 of 1948 the State Board of Education might have jurisdiction to decide to which large District—as between Dermott and Portland—Jerome should be annexed, since Jerome embraced territory in two counties.[4] Thereupon, Hon. John M. Golden, the Judge of the Tenth Judicial Circuit, which includes Drew County, on July 5, 1949, wrote the State Board of Education a letter to the effect that he had no objections to any efforts by the State Board to settle the controversy if acceptable to all parties concerned. Accordingly, the State Board of Education, by resolution of July 11, 1949, undertook to annex Jerome to Portland, rather than to Dermott.

But the Case No. 1627 was still pending in the Drew Circuit Court; and when the resolution of the State Board was presented to the Drew Circuit Court in the said case, then being heard before Judge Golden, some of the parties refused to concede that the State Board of Education had power to adopt its said resolution. Ac-

[4] The language in said Initiated Act No. 1 of 1948 (Acts 1949, p. 1414), evidently thought to be germane to such idea is that in § 3 thereof, reading: ". . . Provided that if any territory shall be annexed to a district administered in another county the question of annexation shall be submitted to the State Board of Education. If in the judgment of the State Board of Education the proposed annexation should be made, it shall adopt a resolution making the annexation. The resolution shall describe by metes and bounds each district affected by the annexation, and a copy of said resolution shall be sent to the County Clerk of each county affected who shall record same."

cordingly, the Drew Circuit Court on July 25, 1949, refused to enter an order in accordance with the State Board's resolution and entered judgment dismissing Gibson's appeal; and we affirmed in *Gibson* v. *Board of Education of Drew County, ante,* p. 386, 230 S. W. 2d 44. So the "first case" became final.

SECOND CASE

On September 8, 1949, the Portland School District and its directors filed Case No. 1643 in the Drew Circuit Court, naming the Drew County Board as defendant. We refer to this as the second case. It was in effect a petition for *writ of certiorari,* seeking to have the order of the Drew County Board of February 28, 1949 (annexing Jerome to Dermott) quashed as null and void; and was filed after the resolution of the State Board, as previously mentioned, and after the final judgment of the Drew Circuit Court in the first case, and while the first case was pending appeal to the Supreme Court. Dermott intervened in the second case and, together with the Drew County Board, resisted the claim of Portland.

On September 29, 1949, the Drew Circuit Court heard the cause both on documents and the testimony of seven witnesses (whose testimony has not been preserved), and the Court found, *inter alia:*

"1. That the Order of the Drew County Board of Education made February 28, 1949, annexing Jerome School District No. 22 of Drew and Chicot Counties, Arkansas, to Dermott Special School District of Chicot County, Arkansas, is not void on its face and that the Drew County Board of Education in rendering said Order acted within the jurisdiction and authority vested in it by law;

. . . . .

"3. That plaintiffs, had they proceeded in apt time, could have appealed from the Order of the Drew County Board of Education made February 28, 1949, annexing Jerome School District No. 22 of Drew and Chicot Counties, Arkansas, to Dermott Special School District of

Chicot County, Arkansas, and not having done so, are now barred from maintaining this action, which is in the nature of a proceeding for *certiorari* to serve in lieu of an appeal."

Thereupon, on September 29, 1949, the Drew Circuit Court dismissed Portland's complaint, and there has been no appeal from that order: so the "second case" has become final.

THIRD CASE

After the decision of the Circuit Court in the first case, and evidently in order to show its adherence to the Court ruling rather than the State Board's ruling, the Drew County Board on September 9, 1949, adopted a resolution in effect reaffirming its action of February 28, 1949, which action had annexed Jerome to Dermott. From that resolution of September 9, 1949, C. C. Gibson (the same party who was in the first case) attempted to appeal to the Drew Circuit Court on the theory that the resolution of September 9th was a new decision by the Drew County Board and gave him a new right of appeal; and such attempted appeal to the Circuit Court becomes the "third case" in this involved litigation. It was numbered Case 1647 in the Drew Circuit Court. Portland intervened to support Gibson, and Dermott intervened to support the Drew County Board in opposition to Gibson and Portland.

In the trial of this third case in the Circuit Court, there was introduced in evidence all of the record in the first case and all of the judgment and exhibits (but without the oral testimony) in the second case. Portland and Gibson contended that the resolution of the State Board of July 11, 1949, was legal and valid and was a complete settlement in favor of Portland. Dermott and the Drew County Board contended that the State Board had no jurisdiction to make its resolution and that the proceedings in the first and second cases precluded Portland and Gibson from any relief in the third case. The Drew Circuit Court (Judge Gus W. Jones of the Thirteenth Circuit presiding on exchange of Circuits) decided the third

case in favor of the Drew County Board and Dermott; and from that judgment there is this appeal.

After a careful study of the excellent briefs filed by both sides, we conclude that the Circuit Court was correct in the judgment in this third case. The State Board of Education in its resolution of July 11, 1949, though motivated by the best of intentions, was, nevertheless, acting on subject matter that did not exist, because such subject matter—*i. e.*, the Jerome District—had ceased on February 28, 1949.[5] Prior to March 1, 1949, the Drew County Board of Education had entered an order which was legal and valid on its face, and which annexed Jerome to Dermott. Therefore, unless the annexation order of February 28, 1949, was held illegal—and it was not so held—there was, on and after March 1, 1949, no "small District" of Jerome in reference to which the State Board could take any action; because the Jerome District, by an order of the Drew County Board of Education, legal and valid on its face, had ceased to exist, and had become a part of Dermott. The correspondence between Judge Golden and the State Board was not for the purpose of divesting the Circuit Court of its jurisdiction, but rather to see if a settlement could be reached that would result in the end of litigation. When the resolution of the State Board was presented to the Court in the first case, it was apparent that some of the litigants would not agree to the resolution; so Judge Golden proceeded to hear the first case and rendered the judgment which dismissed the appeal of Gibson.

Gibson had his day in court in the first case. He failed to properly appeal from the February 28, 1949, resolution of the Drew County Board and is bound by the result of the first case. Portland also could have ap-

[5] The Initiated Act No. 1 of 1948 says in the second paragraph of section 1: . . . "It is the intent of this section to authorize, between the date of adoption of this Act and March 1, 1949, the reorganization or annexation of Districts which would be dissolved by this Act in accordance with existing laws governing reorganization or annexations." In *Stroud* v. *Fryar*, 216 Ark. 250, 225 S. W. 2d 23, we said: "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."

pealed from the February 28, 1949, resolution if it had so desired, but it did not. Portland is also bound by the result of the second case. In the case of *Barber* v. *Barker,* 209 Ark. 704, 192 S. W. 2d 353, Mr. Justice McHaney, in speaking of the necessity of invoking appeal rather than some other remedy, used this very clear language in a case involving school consolidation, to-wit:

"If appellants are making an attack on the regularity or the legality of the proceedings taken to effectuate the consolidated district, they have adopted the wrong procedure. No appeal was taken from the action of the County Board of Education to the circuit court which is the correct procedure in such a case. This was the procedure followed in *Sugar Grove School Dist. No. 19* v. *Booneville Special School Dist. No. 65,* 208 Ark. 722, 187 S. W. 2d 339."

Also in our opinion in *Gibson* v. *Board of Education of Drew County, ante,* p. 386, 230 S. W. 2d 44, we pointed out the Statute governing appeals from the County Board.

So we hold that the third case, *i. e.,* the one now before us, is merely an attempt by Gibson and Portland to re-try issues that were, or should have been, settled in the first and second cases.

Affirmed.

Prescott Arkansas Telephone Corp. v. McFarland.

4-9257 233 S. W. 2d 70

Opinion delivered October 16, 1950.

Bailey & Warren and *Walls Trimble,* for appellant.

W. J. Dungan and *Dennis W. Horton,* for appellee.

DUNAWAY, J. Appellee, Gladys McFarland, recovered judgment against appellant, Prescott Arkansas Telephone Corporation, in the amount of $2,398.40, together with interest, costs and attorney's fees. Suit was brought under provisions of the "Fair Labor Standards Act," 29 U. S. C. A., § 206-207, seeking recovery of amounts allegedly due on account of unpaid minimum wages and overtime pay to which plaintiff claimed she was entitled.

Appellant denied that appellee was entitled to minimum wages and overtime pay as provided by the "Fair Labor Standards Act," for the reason that plaintiff was a switchboard operator in a telephone exchange of less than 500 stations and her employment was thus exempted from application of the Act by 29 U. S. C. A., § 213 (a) (11). The defendant company further denied that twenty per cent or a substantial part of plaintiff's working time was spent in performing administrative and clerical duties other than those of a telephone operator, as alleged by the plaintiff and which, if proved, would entitle her

to the benefits of the Act, even if the telephone exchange in question was one of less than 500 stations.

After hearing oral testimony, the Chancellor found that the court had jurisdiction of the parties and the subject matter in the cause; and further found that the plaintiff worked a substantial part of her time in a clerical capacity in addition to performing the duties of a telephone operator. The court found that the defendant was indebted to the plaintiff for unpaid minimum wages and unpaid overtime compensation in the amount of $1,199.20, and for a like amount as liquidated damages.

On this appeal appellee has raised the question that the oral evidence heard by the Chancellor was not properly preserved, in that it was not approved and filed as a bill of exceptions within the time fixed by the court, and consequently cannot be considered as a part of the record.

The cause was heard on November 15, 1949, and judgment was rendered on that date. No formal decree was entered until January 9, 1950, when a decree *nunc pro tunc* was entered as of November 15, 1949. By the terms of that decree appellant was given 120 days in which to file a bill of exceptions. A new term of the Woodruff Chancery Court began on January 9, 1950.

As pointed out in the recent case of *Johnson* v. *United States Gypsum Company, ante,* p. 264, 229 S. W. 2d 671, the practice in each Chancery district as to the preservation of oral testimony is governed by special statute. Act 269 of the Acts of 1949 is controlling as to the Fifth Chancery District, from which this appeal originates.

In the *Johnson* case, *supra,* we construed Act 269 of 1949 and held that approval of the stenographer's transcribed notes by the Chancellor is a prerequisite to treating such transcription as a bill of exceptions or as depositions. In § 3 of Act 269 it is provided that ". . . such approval must be given during the term or within the time fixed for such approval by the court." In the *Johnson* case the court, at the beginning of the trial,

directed the reporter to take down the testimony, transcribe it, and file it as depositions; and the decree contained a recital that when the transcribed testimony had been filed under the certificate of the official court reporter, it should become a part of the record in the case. We held this a sufficient reservation of power for the Chancellor to approve the testimony after expiration of the term.

In the case at bar, however, there was no such reservation of power. In fact the record reflects an affirmative statement by the Chancellor that no such order as was present in the *Johnson* case was made in the instant case. The decree appealed from fixed 120 days as the time within which the bill of exceptions must be filed. This time ran from the date of the final decree, November 15, 1949, and not from the date of the *nunc pro tunc* order. *Engles* v. *Oklahoma Oil & Gas Co.*, 163 Ark. 270, 259 S. W. 749. The time for obtaining the Chancellor's approval was fixed by the terms of the decree, and there was no reservation of power to approve the testimony after expiration of the term of court. The time allowed had expired before the transcript was presented to the Chancellor. Under the provisions of Act 269 we have no alternative but to sustain the appellee's motion to strike the transcribed oral testimony filed herein.

This evidence therefore cannot be considered and we may examine only the face of the record in reviewing the decree of the court below. No error appearing, the decree is affirmed.

PAFFORD *v.* HALL, SECRETARY OF STATE.

4-9399 233 S. W. 2d 72

Opinion delivered October 16, 1950.

Harry C. Robinson, for petitioner.

Ike Murry, Attorney General and *Cleveland Holland,* Assistant Attorney General, for respondent.

J. S. Abercrombie and *McMillan & McMillan,* for intervener.

GEORGE ROSE SMITH, J. This is an original action in which the plaintiffs question the sufficiency of a petition for an initiated act to be popularly known as "A Statewide Prohibition Act." When the petition was filed with the defendant Hall, Secretary of State, he caused it to be examined and found that it contains 53,224 valid signatures. He accordingly declared the petition to be sufficient, as only 19,945 signatures are necessary to equal the required eight per cent of the total vote for governor in the most recent general election. Ark. Const., Amendment 7. The plaintiffs then brought this action to enjoin Hall from certifying the ballot title to the various county election officials. The Temperance League of Arkansas had sponsored the proposed act and intervened to defend the validity of its petition.

The petition is composed of about 1,700 separate sheets, each verified by the affidavit of the canvasser who circulated it. The plaintiffs assert in their complaint that 1,290 of these sheets must be rejected in their entirety, because on each one there is at least one instance of a husband's having signed his wife's name in addition to his own, or vice versa. It is admitted by all the parties that if these 1,290 sheets are entirely void the rest of the petition does not contain the necessary 19,945 names. After filing the suit the plaintiffs began taking testimony to prove their assertions, but it soon became apparent that in hundreds of instances a person had in fact signed the name of his spouse as well as his own. The defendant and the intervener thereupon ended the taking of this testimony by stipulating that each of the 1,290 sheets does contain a signature not written by the petitioner himself, as alleged in the complaint. It is hardly necessary to say that we scrutinize a stipulation of this kind with great care. All those who signed the petition have a direct interest in the case, and the handful of parties to the action cannot be permitted to nullify the petition

by an imprudent stipulation. Nevertheless an examination of this petition discloses that both names of a great many married couples are in the same handwriting, and we see no reason not to approve a stipulation that was evidently made in good faith to eliminate extensive and laborious proof.

The plaintiffs, relying mainly on some language in *Sturdy* v. *Hall,* 201 Ark. 38, 143 S. W. 2d 547, contend that all the names on these 1,290 sheets must be disregarded, since the canvassers necessarily made false statements in their affidavits verifying the genuineness of the signatures. On the other hand the defendant and the intervener rely upon a later case, also styled *Sturdy* v. *Hall,* 204 Ark. 785, 164 S. W. 2d 884, to support their contention that it is not enough for the plaintiffs to show that a single signature on a sheet is not genuine; the plaintiffs must go farther and prove that the canvasser has been guilty of conscious and deliberate fraud.

It is perhaps possible to reconcile the holdings in the two *Sturdy* cases on the basis of their particular facts, but in a matter of undoubted public interest we think it desirable to eliminate any uncertainty that these opinions may have created. We are unanimously of the opinion that the later *Sturdy* case states the law correctly; that is, one who attacks a petition cannot destroy the verity of the circulator's affidavit merely by proving that at least one signature is not genuine. The plaintiff must also adduce proof to show that the falsity of the canvasser's affidavit was conscious rather than inadvertent.

Here the plaintiffs have been content merely to show that in 1,290 instances one person signed the name of his spouse. We need not decide whether such a showing is alone sufficient to make a *prima facie* case of fraud, for the intervener has gone forward with the evidence by taking the depositions of 962 of the canvassers whose sheets are questioned. Their testimony completely negatives the suggestion that they were motivated by improper purposes in making affidavits that are not strictly true. In many instances both the husband and wife were

present and one asked the other to sign for the two. In other cases the challenged signature had already been written before the canvasser realized what was being done. There is hardly an indication of actual fraud in the great volume of testimony that has been submitted. Under our earlier decisions we must of course reject the 1,290 illegal signatures, as well as the entire sheet in those rare instances when a finding of intentional wrongdoing is justified, but even then the number of valid signatures is still far more than twice what is needed.

Another objection to the petition is based on the intervener's failure to comply with the statutory requirement that there be filed with the Secretary of State a certified poll tax list for each county in which signatures have been obtained. Ark. Stats. 1947, § 2-206. This requirement is not contained in Amendment 7, but the Amendment does state that laws may be passed to facilitate its operation, even though the Amendment is declared to be self-executing. We think the requirement in question is valid, since the filing of the poll books is not a burdensome condition and manifestly aids the Secretary of State and this court in determining whether enough qualified electors have signed the petition. Hence the Secretary of State should have required the poll books to be filed. Instead, he accepted the petition and without the books certified that the petition was sufficient. If the plaintiffs were now attacking the petition on the ground that an examination of the poll books discloses that not enough qualified electors have signed the petition, then the absence of the books might be a reason for rejecting the petition. But that is not the basis for attack in this case. The case was not tried on the theory that anyone who signed this petition is not a qualified elector. The purpose of the statute is to facilitate the exercise of the power of initiative, and for that reason alone the act is constitutional. It would altogether distort the intention of the Legislature to hold that the people should not be allowed to vote on a measure merely because the books were not filed in an instance where their presence or absence is wholly immaterial.

The plaintiffs make other attacks on the petition, but they may be answered in a few words. The Constitution directs that the petition be filed "not less than four months" before the election. This election is to be held on November 7, and it is argued that the filing of the petition on July 7 was one day too late. That result can be reached only by excluding both the first and the last day, and would involve saying that January 1 is less than a month before February 1. The law does not care about fractions of a day, however, and we have consistently held that only one of the two days need be excluded. *State* v. *Hunter,* 134 Ark. 443, 204 S. W. 308, and see Ark. Stats., § 27-130. It is also urged that each canvasser's affidavit should have set out the names of those who signed the sheet, but in *Terral* v. *Ark. Power & Light Co.,* 137 Ark. 523, 210 S. W. 139, we held this to be unnecessary.

The act's popular name, A Statewide Prohibition Act, is said to be misleading because the measure would permit every person to possess not more than one quart of intoxicating liquor. The Constitution makes no reference to a popular name; this is merely a legislative device (Ark. Stats., § 2-208) that is evidently useful in making it easy for voters to discuss a measure before the election. It seems too clear for argument that the popular name need not have the same detailed information as is required for the formal ballot title, else there would be no difference between the two. This act does prohibit the manufacture or sale of intoxicating liquor, and that is prohibition as the term is generally understood. There are of course exceptions to complete prohibition, as the use of alcoholic beverages for medicinal or religious purposes, but the popular name certainly cannot include them all.

Finally, it is argued that the ballot title was not filed with the State Board of Election Commissioners. The title appears on each of the 1,700 sheets, and they were filed with the Secretary of State, who is a member of the board in question. Under our holding in *Westbrook* v.

McDonald, 184 Ark. 740, 43 S. W. 2d 356, 44 S. W. 2d 331, this is a substantial compliance with the Constitution.

The petition for an injunction is denied.

JAMES *v.* JAMES.

4-9247 233 S. W. 2d 75

Opinion delivered October 16, 1950.

A. D. Chavis, for appellant.

Brockman & Brockman, for appellee.

DUNAWAY, J. This cause arose as a suit by Robert James, against his wife, Carrie James, to have a resulting trust declared as to certain real property in Pine Bluff, Arkansas, legal title to which was held by Carrie James. She answered, denying all allegations in the complaint, and filed a cross-complaint seeking a divorce. Robert James has appealed and Carrie James has cross-appealed from the action of the Jefferson Chancery Court in regard to the property. The court's action in granting a divorce is not questioned.

The decree appealed from reads in part as follows:

"The court, being well and sufficiently advised as to all matters of fact and law arising herein and the premises being fully seen, finds that the plaintiff Robert James and the defendant Carrie James were married

March 1, 1944, and lived and cohabited together as husband and wife until October 10, 1947; that prior to the date of the separation the following described real property, situated in Jefferson County, Arkansas, was purchased, the deeds thereto placed the legal title to said property in Carrie James, to-wit:

"The East half (E½) of Lot Four (4) in Block Twelve (12) of Geisreiter's Sub-division of a part of the Northeast fractional quarter of Section 31, Township 5 South, Range 9 West of the 5th P. M.

"The court finds that the plaintiff Robert James contributed one-third of the purchase price paid for said land and that a lien should be impressed upon said land to the amount of one-third of the value of said land as his interest therein.

"That the defendant Carrie James should be awarded as dower in the interest awarded to Robert James a sum equal to one-third of the value of said interest. Said dower interest to equal one-ninth of the value of said property. That said land is not susceptible of a division in kind.

"That the defendant Carrie James is entitled to a decree of divorce on her cross-complaint."

The only real issue to be decided is whether the evidence supports the findings of the Chancellor.

From the testimony these facts were established: Appellant and appellee met in June, 1942, when appellee came from her home in Hot Springs, Arkansas, to visit her son in Pine Bluff. The son boarded at a combination cafe and rooming house operated by appellant. After a brief return to Hot Springs, appellee came back to Pine Bluff in August, 1942, and took up residence at appellant's establishment. She assumed the management of the cafe and rooming house, and he went to work at the Pine Bluff Arsenal.

Some time after appellee's return to Pine Bluff, negotiations were started for the purchase of the property now in controversy. It was owned by the widow and

heirs of one Joe Alexander, deceased, subject to a mortgage held by the estate of E. P. Ladd and a tax title held by Shaffer Haley. On April 7, 1943, appellee (then Carrie Doss) purchased the tax title of Haley for the sum of $123.19, and received a quitclaim deed from him in which she was named as grantee.

On the same date the initial payment was made to R. A. Zebold, administrator of the Ladd estate, on the unpaid balance of the mortgage debt which then totalled $366.99. Thereafter partial payments on the mortgage indebtedness were made at various times to Mr. Zebold, who gave receipts in each instance in the name of Carrie Doss.

Upon final payment to the Ladd estate on September 3, 1943, Mr. Zebold had prepared a deed for the Alexanders, conveying the property to Robert James, and a note to be paid by Carrie Doss for $433.01, the balance due the Alexanders on the purchase price. Neither this deed nor note was ever executed. Some time later, a deed to Carrie Doss was executed by the Alexanders, but was not delivered until October 16, 1945, when Carrie Doss paid in full the amount then due. Prior to this payment and delivery of the deed, the Alexanders had obtained judgment against Carrie Doss and Robert James in a suit instituted against both to collect the balance of the purchase price.

Appellant and appellee were married on February 3, 1944, and lived together as husband and wife until shortly before the filing of the complaint in this action on October 28, 1947. There was some dispute as to the exact nature of their relationship prior to their marriage.

Except as already stated, the testimony on behalf of the parties to this action was in irreconcilable conflict. Appellant's testimony was to the effect that he initiated the purchase of the property in question and furnished all of the money with which it was bought; that appellee was at all times acting as his agent in making the payments in connection with the purchase; and that he did not discover until their estrangement in October, 1947,

that title had been taken in appellee's name rather than his own.

Appellee in turn sought to prove that she was acting only for herself in buying the property; and that the purchase price was paid entirely out of her own funds, partly from her earnings and partly through a loan from her son. Receipts, bank statements, and tax receipts were introduced by appellee in support of her claim.

In order to prevail in this action to establish a resulting trust for his benefit it was incumbent upon appellant to show that he had furnished the purchase money. *Lasker-Morris Bank & Trust Co.* v. *Gans,* 132 Ark. 402, 200 S. W. 1029; *Lisko* v. *Hicks,* 195 Ark. 705, 114 S. W. 2d 9.

It would serve no useful purpose to detail the voluminous testimony presented by each litigant in support of the conflicting contentions made as to the source of the purchase money. The Chancellor, who saw and heard the witnesses, has made a finding that the funds were provided, one-third by appellant, and two-thirds by appellee. We cannot say this finding is against the preponderance of the evidence.

The decree is affirmed on direct appeal and on cross-appeal.

REED *v.* PHILLIPS.

4-9254 233 S. W. 2d 77

Opinion delivered October 16, 1950.

Jack Holt, for appellant.

Henley & Henley, for appellee.

LEFLAR, J. Appellee R. T. Phillips was for some time a real estate broker doing business at Jasper in Newton county, Arkansas. On November 3, 1948, his license to engage in that business was revoked by the Real Estate Commission under authority of Ark. Stats., §§ 71-1301 to 71-1311, inclusive, an enactment held valid by this Court in *State* v. *Hurlock,* 185 Ark. 807, 49 S. W. 2d 611. The validity of this revocation is not challenged. The Secretary of the Real Estate Commission brought the present suit under § 71-1311 of the cited statute, alleging that Phillips had continued to act as a real estate broker after hise license was revoked, and praying that he be enjoined from doing so further. Phillips denied engaging in the business after his license was revoked, though admitting that he had bought and sold his own real estate and maintained a small office for that purpose. After a hearing the Chancellor concluded that the preponderance of the evidence failed to sustain the allegations, and denied the injunction. The plaintiff appeals.

The evidence given by the plaintiff was largely that of an undercover agent, James K. Daugherty, who was sent to Jasper by the Secretary of the Commission to secure evidence against Phillips. This Daugherty endeavored to do by misrepresenting himself to Phillips as a prospective farm buyer from St. Louis. He testified that Phillips showed him three or four different places, one of which was apparently owned by Phillips himself. Daugherty stated that he made contracts, through Phillips, to buy two of the places, from owners named J. T. Smith and Allen Lamden, and made a $25.00 down payment to Smith on his place and a $25.00 down payment to Phillips on the Lamden place. Both payments were admittedly made by Daugherty. But Phillips testified that, after showing Daugherty his own place, he took Daugherty to see Smith and Lamden, whose farms were nearby, merely because Daugherty asked him to, and not with any idea of acting as a real estate broker to sell the farms.

As to the transaction with Smith, Daugherty himself testified that "I started to hand it (the $25.00) to Mr. Phillips. He said no, hand it to Mr. Smith; he had nothing to do with that." Daugherty's receipt for the payment was signed by Smith. Other testimony indicated that negotiations were directly between Daugherty and Smith.

Daugherty further testified that, when they returned to town after closing the Smith deal, "I didn't know whether it would hold up in court," so he went back to see Phillips again and gave him $25.00 earnest money on the Lamden place. Phillips gave Daugherty a receipt for this. He did not turn the money over to Lamden. His explanation was that he took the money primarily as a convenience to Daugherty, who said he did not want to make another trip out to Lamden's place, and that the money was not turned over to Lamden because he (Phillips) on second thought feared he might be acting as a real estate agent if he did pay it over. Daugherty of course did not complete either purchase.

The only other testimony as to real estate transactions engaged in by Phillips after his license was revoked related to land apparently owned either by himself or his wife. It was proved that his old real estate sign remained beside his office for some time after the license was revoked, but he explained that he didn't own the sign, that it belonged to the Strout Real Estate Agency, for whom he formerly worked and whose name was on the sign, and that he didn't take it away because it didn't belong to him. The plaintiff also sought to show that Phillips used his real estate business stationery for correspondence after his license was revoked, but the only evidence offered was a letter that had nothing to do with real estate. Phillips' explanation was that he was merely using up old paper in writing personal letters.

The Chancellor made an oral statement from the bench before issuing his formal decree in the case, and in the course of it said "The Court is really inclined to think that perhaps this defendant has held himself out as willing to sell property to others, but the only proof

of that is the special agent that was sent in here and that was flatly denied." He then concluded that the evidence actually introduced did not sustain the allegations. Appellant contends now that the two parts of the Chancellor's statement are inconsistent, and that the first words amounted to a finding that defendant was guilty of the acts charged. We do not so interpret the Chancellor's language. He was merely saying that he suspected the defendant might in fact have done the acts, but that the evidence did not show he had, and the decree would have to be based on the evidence. There is no inconsistency in that.

A moment later, at the close of the Court's oral statement, Mr. Holt, attorney for the plaintiff Secretary of the Commission, asked "If the court please, what harm can be done by granting an injunction if he is not going to violate the law?" and the Chancellor replied "Under the law, before I would be warranted in issuing an injunction I must find positively he has violated the law in the past." Appellant asserts error in this statement also, on the theory that the Chancellor's use of the word "positively" indicated that he was requiring clear and conclusive evidence, rather than merely a preponderance of the evidence, as a condition to granting the civil injunction sought against Phillips.

Here again we do not believe that the record sustains appellant's position. In the decree, formally rendered on the same day as the trial, it was declared that "the Court doth find that plaintiff has failed to establish by preponderance of the testimony the material allegations of his complaint herein." That was the Court's formal action in the case, and the evidential standard employed in it was the proper one. The adverb "positively" as it appeared in the earlier statement appears to have been nothing more than a word thrown in for emphasis in the course of the judge's explanatory conversation with Mr. Holt. At any rate it does not rebut the effect of the express language contained in the decree.

On review of the entire record we cannot conclude that the Chancellor's determination of the case is con-

trary to the preponderance of the evidence. The decree is affirmed.

DUNAWAY, J., dissents.

HOLT, J., not participating.

DODSON *v.* THOMASON.

4-9256 233 S. W. 2d 395

Opinion delivered October 23, 1950.

Rehearing denied November 20, 1950.

Alonzo D. Camp, for appellant.

Sharp & Sharp and *Fred MacDonald,* for appellee.

LEFLAR, J. Appellant brought ejectment for two town lots in appellees' possession in Brinkley, Ark. Appellees answered, filed a cross-complaint setting out title in themselves and praying that same be quieted by decree, and moved that the case be transferred to equity. The motion to transfer was granted, appellant's motion to re-transfer to Circuit Court was denied and, after hearing before the Chancellor, a decree was rendered dismissing appellant's complaint and quieting title in appellees in accordance with the cross-complaint. This appeal followed.

Both appellant and appellees have tax deeds from the State, and each of them thought his deed conveyed

the land in question, though the descriptions in each deed were inaccurate. A correct description of the land is "Lots 7 and 8 in the West half of the East half (W½ of E½) of Block B, Brinkley Car Works & Mfg. Co.'s Subdivision of the Town of Brinkley, Ark."

Appellees received deeds from the State to the two lots in 1936 and 1942 respectively, under descriptions which may without discussion be assumed to have been inadequate. They have been in possession and active occupancy under claim of title since those dates.

Appellant received his deed from the State in 1948. This deed was based on a 1940 tax sale to the State under the description "Lots Seven (7) and Eight (8) in the West Half (W½) of the East Half (E½) of Block 'B,' City of Brinkley," and the 1948 deed to appellant employed the same description. It is agreed that there are several Block B's within the City of Brinkley, the stipulation of the parties enumerating a Block B in Pat Howard's Addition which includes lots numbered 7 and 8 and a Block B in Emmons' Addition which includes lots numbered 7 and 8, as well as the Block B in the Brinkley Car Works & Mfg. Co. Subdivision which contains the lots numbered 7 and 8 which are now before us.

Extrinsic circumstances are suggested which might make possible an identification of the lots in question, apart from the incomplete description used in the tax sale and in appellant's deed. These circumstances do not suffice to validate the tax sale through which appellant derives his claim to title. The description was too indefinite to enable the owner or the public to identify the land being sold with that certainty which is requisite in tax sale proceedings. *Brinkley* v. *Halliburton,* 129 Ark. 334, 196 S. W. 118, 1 A. L. R. 1225; *Schuman* v. *Laser,* 212 Ark. 727, 207 S. W. 2d 308; Jones, Arkansas Titles, §§ 248, 250. And see *Stout* v. *Healey,* 216 Ark. 821, 228 S. W. 2d 45. Appellant has not shown good title in himself.

Appellant contends, however, that he should win because appellees' title is not good. Appellees are in possession, and apparently have been in possession for the

statutory period for acquisition of title by adverse possession. Ark. Stats. § 37-101. But appellant points out that there can be no adverse possession against the State, and concludes from this that appellees in this case can urge no claims based on adverse possession. That does not follow. Appellant acquired no title from the State through the tax sale and State deed described above. Even if the State does have a tax title in this land, which does not appear, appellant does not stand in the place of the State. Appellees are not pleading adverse possession against the State, but against appellant. Furthermore, appellant claiming in ejectment must succeed on the strength of his own title and not on the weakness of the title of his adversary. *Knight* v. *Rogers,* 202 Ark. 590, 151 S. W. 2d 669; *Jackson* v. *Gregory,* 208 Ark. 768, 187 S. W. 2d 547. In the complete absence of a showing of title in plaintiff (appellant), he could not win even though appellees' only showing was one of prior possession.

Appellant also urges error in the Chancellor's refusal to retransfer the cause to the Circuit Court. Appellees' answer and cross-complaint not only denied the allegations of appellant's complaint but also prayed that appellees' own title be quieted on the basis of facts alleged in the cross-complaint. This prayer for equitable relief was ample basis for retention of jurisdiction by the Chancery Court over the whole case. *Thomason* v. *Abbott, ante,* p. 281, 229 S. W. 2d 660. Appellant's motion to retransfer to the law docket was properly denied.

The decree is affirmed.

BANKERS NATIONAL INSURANCE COMPANY *v.* HEMBY.

4-9267 233 S. W. 2d 637

Opinion delivered October 23, 1950.

Rehearing denied December 4, 1950.

Tackett & Epperson, for appellant.

P. L. Smith, for appellee.

MINOR W. MILLWEE, Justice. This is a suit to recover disability benefits on two policies of health and accident insurance issued to appellee by appellant, Bankers National Insurance Company, a foreign insurance corporation unauthorized to do business in this state. Service of summons was obtained under the provisions of Ark. Stats., § 66-244.

The complaint alleged, and appellant admitted at the trial, that appellee was accidentally injured on July 7, 1948, while riding as a fare paying passenger on a bus of the Baum Bus Line at Okolona, Arkansas. As a result of the accident, appellee sustained a bilateral hernia and other injuries rendering him totally disabled for a considerable length of time.

Following a trial the court found that appellee was totally disabled within the meaning of the policies for more than twenty-six weeks as a result of the accident and judgment was rendered against appellant for $993.70 plus the statutory penalty of 12% and attorney's fee.

Appellant first filed a "special demurrer" to the jurisdiction of the court alleging that it had not transacted business in this state. The record proper fails to disclose any action on the demurrer. There is a page of docket entries attached to, but not made a part of, the transcript. One of these entries shows that the special demurrer was overruled without exceptions being saved to such ruling. Docket notations cannot be used to supply a deficiency in the record. *City of Monticello* v. *Kimbro,* 206 Ark. 503, 171 S. W. 2d 152. Appellant then filed an answer denying generally the allegations of the complaint.

The insuring clause of both policies insures appellee, "against (1) death, dismemberment, loss of sight or time, dislocations and fractures resulting within thirty days from the date of accident, directly and independently of all other causes, through external, violent and accidental causes, herein referred to as 'such injury,' . . . subject, however, to all the terms, provisions and limitations herein contained."

Other provisions of the first policy No. HA-20860 material to the issues read: "Part A. The Company will pay the respective following amounts, providing such specific loss occurs as described hereunder in Part A and also as described in the 'Insuring Clause':

Loss of Life	$1,000.00
Loss of Both Feet	1,000.00
Loss of Both Hands	1,000.00
Loss of Both Eyes	1,000.00
Loss of One Arm and One Leg	1,000.00
Loss of One Arm and the Sight of One Eye	1,000.00
Loss of One Leg and the Sight of One Eye	1,000.00

Loss of One Arm	500.00
Loss of One Leg	500.00
Loss of One Foot	500.00
Loss of One Hand	500.00
Loss of One Eye	500.00

1. If such injury is sustained while the Insured is a passenger on any railroad passenger train on which the Insured is traveling as a fare-paying passenger in a place provided exclusively for the use of passengers.

2. If such injury is sustained while the Insured is a passenger on any steamship in or on which the Insured is traveling as a fare-paying passenger in or on a place provided exclusively for the use of passengers.

3. If such injury is sustained while the Insured is a passenger on any street railway passenger car, elevated or subway passenger car, then in passenger service in which the Insured is traveling as a fare-paying passenger in a place provided exclusively for the use of passengers. . . .

"Part D *ALL OTHER ACCIDENTS*. . . . 2. If the Insured shall in consequence of such injury caused by any accident not otherwise covered by this policy, and not otherwise excluded under any provision, be immediately, wholly and continuously disabled by such injury from attending to any and every kind of work or business, the Company will pay indemnity at the rate of Five ($5.00) Dollars per week the first two weeks and at the rate of Seven ($7.00) Dollars per week beginning with the fifteenth day of such disability but not to exceed a combined total of ten consecutive weeks. . . .

"Part E If the Insured shall be immediately, wholly and continuously disabled due to such injury under the conditions as set forth in Part A, not incurring any of the specific losses or any of the dislocations or fractures set forth in Part C and be prevented by such injury from performing any and every duty pertaining to any occupation, the Company will pay in lieu of all other indemnity under this policy at the rate of Twenty ($20.00) Dollars per week, not exceeding twenty-six con-

secutive weeks." Another provision of the policy contained an exception excluding liability for death or disability resulting from hernia.

The second policy, No. HA-30714, contains the same provisions as above recited with two exceptions: (1) Payments under Part D 2 are at the rate of $10.00 per week for the first two weeks and $15.00 per week for the next thirteen weeks; and (2) Benefits under Part E are at the rate of $30.00 per week.

There is no merit in appellant's contention that recovery should be denied because appellee was the holder of policies with three other companies at the time of the accident. Appellant was informed of such insurance in appellee's application for the two policies here involved, which provide that the insurance therein shall not be affected by any other insurance held with any other company.

Appellant also relies on the fact that appellee became disabled as a result of hernia produced by the accident. A subordinate provision of the policy excludes liability for death or disability resulting from hernia and numerous other enumerated diseases, ailments and conditions. Appellant's answer to the complaint contained a general denial and the exception clause as to hernia was not pleaded as an affirmative defense. Justice KNOX, speaking for the court on this point in *Southern National Ins. Co.* v. *Pillow,* 206 Ark. 769, 177 S. W. 2d 763, said: "As a general rule limitation of liability and loss from an excepted cause are matters which must be specifically pleaded by the insurer as an affirmative defense, if he would limit or defeat recovery because of such provision of the policy. 29 Am. Jur. 1069; *Mechanics' Ins. Co.* v. *C. A. Hoover Distilling Co.,* (C.C.A. 8th) 182 F. 590, 31 L. R. A., N. S., 873. This court in the case of *Missouri State Life Ins. Co.* v. *Barron,* 186 Ark. 46, 52 S. W. 2d 733, applied this rule and held that failure of the insurer to plead that a contributing cause of death fell within the provisions of the policy exempting insurer from liability therefor, constituted a waiver of such exception as a defense. So here failure of appellant to plead that its

liability was limited to a return of the premium paid because insured's death resulted directly or indirectly from pneumonia, amounted to a waiver of such defense." See, also, 46 C. J. S., Insurance, § 1295. Appellant's failure to plead the exception as to hernia as an affirmative defense amounted to a waiver of such defense. It is, therefore, unnecessary to determine whether appellant would be relieved of liability even if the clause had been properly pleaded. See Appleman, Insurance Law and Practice, § 443.

The trial court held appellant liable under Part E which provides benefits for disability due to injury under the conditions set forth in Part A, that is, if the accidental injury is sustained while insured is a passenger on one of the modes of conveyance specified. It is undisputed that appellee's injury occurred while traveling on a motor bus and not on one of the types of conveyance designated in Part A. A policy which provides indemnity for accidents occurring while insured is traveling as a passenger in a certain type conveyance includes only accidents received while traveling in the kind of conveyance designated. *Rhodes* v. *U. S. Casualty Co.*, 172 Ark. 344, 288 S. W. 883; 45 C. J. S., Insurance, § 762.

It is true that prior to institution of this suit appellant rejected appellee's claim of disability on the exclusive ground that hernia was an excepted risk, and this exception clause was not specifically pleaded. If Part A, when considered in connection with Part E, merely dealt with a ground of forfeiture, appellant might be held to have waived such forfeiture under the rule that where an insurer denies liability for a loss on one ground, at the time having knowledge of another ground of forfeiture, it cannot thereafter insist on such other ground if the insured has acted on its asserted position and incurred prejudice or expense by bringing suit, or otherwise. 29 Am. Jur., Insurance, § 871. But Part A, as related to Part E, sets forth the scope or coverage of the policy and not merely a condition, the breach of which may be a ground of forfeiture. The rule is that, while a forfeiture of benefits contracted for may be waived, the doctrine of waiver or estoppel cannot be invoked to ex-

tend the coverage and thereby bring into existence a contract not made by the parties. *Miller* v. *Ill. Bankers Life Ass'n,* 138 Ark. 442, 212 S. W. 310; *Hartford Fire Ins. Co.* v. *Smith,* 200 Ark. 508, 39 S. W. 2d 411; 45 C. J. S. Insurance, § 674 a. Cases pointing out this well recognized distinction are collected in an annotation in 113 A. L. R. 857. We, therefore, conclude that appellee was not entitled to disability benefits under Part E of the policies.

However, we do hold that appellee is entitled to indemnity under Part D 2, *supra.* This clause is boldly headed: "*ALL OTHER ACCIDENTS.*" The language of the clause is somewhat ambiguous and is, therefore, to be given a liberal construction in favor of the insured. Since appellant is precluded from relying on the exception as to hernia, appellee's injury and disability were caused by an "accident not otherwise covered" by the policies. While there is some dispute as to the length of time of appellee's disability, the greater weight of the evidence supports the conclusion that he was totally disabled within the meaning of the policies for at least 15 weeks. Under this clause appellee is entitled to judgment for $281 less a 25% reduction on account of his age as provided in another clause which appellee conceded at the trial to be applicable.

The decree is accordingly modified by reducing the judgment in appellee's favor to $210.75. As so modified, the decree is affirmed. The costs in this court will be divided equally between the parties.

MORLEY, COMMISSIONER OF REVENUES *v.* PITTS.

4-9263 233 S. W. 2d 539

Opinion delivered October 23, 1950.

Rehearing denied November 13, 1950.

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

Barrett, Wheatley & Smith, for appellee.

ED. F. MCFADDIN, Justice. This appeal necessitates a consideration of a portion of the Arkansas income tax law (§ 84-2001 *et seq.,* Ark. Stats.).

Appellee, at all times a citizen and resident of Craighead County, Arkansas, in 1943, 1944 and 1945 engaged in the business of drilling some wells for oil in the State of Illinois. The wells were "dry holes"; and appellee claimed, as deductible from his Arkansas State income, the amount expended for such drilling. Appellant, as Commissioner of Revenue of Arkansas, denied that the items were deductible; and this appeal challenges the correctness of the Chancery Court decree which allowed the deductions.

We affirm the Chancery decree. Section 84-2016, Ark. Stats. 1947, contains ten paragraphs, each listing items that may be deducted in computing the net income of a taxpayer. These are contained in lettered paragraphs (a) to (j) inclusive. Paragraph (a) allows as deductions "All the ordinary and necessary expenses paid during the income year in carrying on any trade or business, . . . " Paragraph (d) lists, as items for deduction, "Losses sustained during the income year and not compensated for by insurance or otherwise, if in-

curred in trade or business and such losses incurred in any transaction entered into for profit, though not connected with the trade or business, ..." The appellee incurred such expenses in drilling for oil, and is entitled to claim them as deductible items under one or the other of the foregoing sections. Our State Statute allowing these deductions is so clear that cases decided under the Federal Statute are inapplicable.

Appellant urges that Act 162 of 1943,[1] in relieving an Arkansas resident from paying taxes on income received from outside the State, necessarily implies that deductions are not to be allowed on losses incurred in business ventures engaged in outside the State. One sufficient answer to the appellee's contention—as applied to the facts in the case at bar, rather than to some supposititious case—is that Act 162 does not mention or attempt to change the Statute regarding deductible items. It is concerned with income and not with deductions. The purpose of the Act, as stated in the caption,[2] was to protect an Arkansas resident from double payment of income tax.

The appellant in the case at bar is seeking by implication to use Act 162 to prevent the taxpayer from claiming items deductible under § 84-2016, Ark. Stats. 1947. Tax acts are to be construed in favor of the taxpayer; and matters not appearing in a taxing Statute are not to be read into it when such result is adverse to the taxpayer through implication. Our cases recognizing and declaring this salutary interpretation of the law are legion.

[1] This Act is captioned "AN ACT to Prevent Double State Income Taxation of Individual Residents of Arkansas." Section 1 of the Act provides that when the gross income of an Arkansas resident includes income derived from property outside the State or business transacted outside the State, the Arkansas tax shall be first computed as if all the income were derived from inside the State; and then a credit shall be given for the amount of income tax owed by the Arkansas resident to the State or Territory from which such income has been received by the taxpayer.

Section 2 provides that no income arising from use, production, or sale of real estate situated in another State shall be included in the gross or net income of a resident of Arkansas.

[2] While a Caption, or Title, is not a part of an Act, yet, when it expresses the Legislative intent implicit in the text, it may be referred to in connection with the overall purpose of the Act. *Pruitt* v. *Sebastian County Coal & Mining Co.*, 215 Ark. 673, 222 S. W. 2d 50.

A few of them are: *Fort Smith Gas Co.* v. *Wiseman,* 189 Ark. 675, 74 S. W. 2d 789; *Wiseman* v. *Arkansas Utilities Company,* 191 Ark. 854, 88 S. W. 2d 81; *Hardin* v. *Fort Smith Couch & Bedding Co.,* 202 Ark. 814, 152 S. W. 2d 1015; *U-Drive-'Em Service Company, Inc.* v. *Hardin,* 205 Ark. 501, 169 S. W. 2d 584; *McCain* v. *Crossett Lumber Company,* 206 Ark. 51, 174 S. W. 2d 114; *McLeod* v. *Kansas City Southern Railway Co.,* 206 Ark. 281, 175 S. W. 2d 391; *McLeod* v. *Commercial National Bank,* 206 Ark. 1086, 178 S. W. 2d 496; *Moses* v. *McLeod,* 207 Ark. 252, 180 S. W. 2d 110; *City of Little Rock* v. *Ark. Corporation Commission,* 209 Ark. 18, 189 S. W. 2d 382; and *Cook* v. *Ark.-Mo. Power Corp.,* 209 Ark. 750, 192 S. W. 2d 210.

The decree of the Chancery Court is in all things affirmed.

Justices George Rose Smith and Dunaway dissent.

George Rose Smith, J. (dissenting). It seems to me that the majority have misconceived the implications of Act 162 of 1943, which provides that no income which arises from the use, production or sale of real estate situated in any other State shall be included in the gross or net income of a resident of Arkansas. Of course the purpose of this provision is to avoid double taxation, since such income is ordinarily taxed by the State in which the land is situated.

If the appellee's oil wells in Illinois had been productive the resulting income would have been exempt from Arkansas taxation by reason of the 1943 statute. In that case it seems clear that whatever expenses the taxpayer incurred in obtaining the production of oil would not be deductible on his Arkansas return, since it would be patently absurd to exempt the income and yet allow the expenses to be deducted from non-exempt income. This is the uniform holding elsewhere even when the statute, like ours, does not contain an express provision prohibiting the deduction of expenses incurred in earning tax-exempt income. *Lewis* v. *Com'r of Internal Revenue,* 3d Cir., 47 Fed. 2d 32; *W. H. Williams Co., Inc.* v. *Cocreham,* 214 La. 520, 38 So. 2d 157. The exception is necessarily read into the law to carry out the legislative intention.

In the present case the only difference is that the taxpayer's efforts to obtain exempt income were unsuccessful. Of course, as the majority point out, there is no express provision in our law prohibiting the deduction of these expenses, but the same argument could be made if the Illinois venture had succeeded. Or what if one well had been productive and a second had not been? Would the expense of drilling the second be offset against taxable income earned in Arkansas, even though the net result of the Illinois operations showed a profit? These and like questions are certain to arise, and I hardly think that the majority opinion will aid our revenue department in arriving at an answer. The only way to avoid such illogical situations is to adopt a uniform rule that expenses incurred in an effort to earn exempt income are not deductible from other income, whether the effort succeeds or fails. Such a rule necessarily follows from the fact that operations intended to result in exempt income are simply not within the purview of our income tax laws.

DUNAWAY, J., joins in this dissent.

ARKANSAS TAX COMMISSION *v.* ASHBY.

4-9232 233 S. W. 2d 361

Opinion delivered October 23, 1950.

Lloyd A. Henry and *Pat H. Mullis,* for appellant.

Ernest Briner, for appellee.

Ike Murry, Attorney General; *Jeff Duty,* Assistant Attorney General, and *Hendrix Rowell,* AMICUS CURIAE.

HOLT, J. January 23, 1950, appellees, citizens and taxpayers in Benton, Arkansas, on their own behalf and all others similarly situated, brought this action alleging: "That defendant, Ross McDonald, is the county clerk of Saline County, Arkansas, and as such it is his duty to prepare the tax books for the City of Benton and Saline County, for the taxes to be collected by the tax collector for the year 1949, which will be due and collectible this year.

"That defendants, W. R. Waters, V. E. Morden and N. A. Martin, compose the Tax Equalization Board of Saline County, Arkansas, for the tax assessments to be equalized and assessed for the year 1950 to be due and collectible in the year 1951.

"That defendants, Saline County Equalization Board has been directed (by the Arkansas Tax Commission) to reconvene and be in session at the Courthouse, Benton, Arkansas, from January 23 to January 31, (1950) inclusive, for the purpose of hearing protests and making adjustments in the assessed valuations as reassessed by the Board of Re-assessment for Saline County.

"That the re-assessment of real property made by said re-assessment board for Saline County, is made without any authority of law and without legal right to make such re-assessment, and that the time for making such assessment has expired, having heretofore been assessed and equalized by the County Equalization Board when in proper session for the year 1949 for the taxes which will be due and payable this year on such property in the City of Benton, Arkansas.

"That the said county equalization board is now without any legal authority to change any of said assessments as made by the former equalization board for the taxes for the year 1949 which will be due in the year 1950, and defendant county clerk has no legal right to enter any re-assessment made by such board, and any re-assessment now made by such board or any other board is unlawful and without authority of law.

"That any such re-assessment would be taking property without due process of law and without proper notice."

They prayed for injunctive relief against all defendants.

Appellant, Arkansas Tax Commission, in a petition to be made a necessary party (which the court granted) alleged: "That the Arkansas Tax Commission is an agency of the Arkansas State Government, and as such has certain statutory duties and powers.

"That said Arkansas Tax Commission, acting within its authorized power, ordered a re-assessment of all real property in Saline County, said order being issued on October 31, 1949.

"That the Arkansas Tax Commission, acting under authority of § 84-464 and Sub-Section (s) of § 84-103, Arkansas Statutes, 1947, issued an order on January 20, 1950, to the Saline County Clerk and to the members of the Saline County Equalization Board to convene at the Saline County Courthouse at its regular place of meeting in Saline County, Arkansas, on Monday, January 23,

1950, and continue in session from day to day to and including January 31, 1950, for the purpose of hearing appeals from the action of the Re-assessing Board, and to make only such adjustments as are necessary to bring about an equalization of urban real property assessments on a basis of twenty (20%) per centum of the true and actual value." In a separate answer, the Tax Commission denied every material allegation in appellees' complaint.

Upon a hearing, based upon the pleadings and exhibits, the trial court granted the injunctive relief prayed without giving any specific reason.

This appeal followed.

Under Art. 7, § 28 of the Arkansas Constitution, County Courts were given exclusive, original jurisdiction in all matters relating to county taxes.

Art. 16, § 5, provides that "all property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State," and Art. 7, § 46 of the Constitution provides that the qualified electors of each county in the State shall elect one assessor "with such duties as are now or may be prescribed by law."

The Legislature, in order to bring about equitable assessments, constituted and provided Boards of Equalization to operate in the various counties (§ 84-701, Ark. Stats. 1947), and as a further aid in accomplishing equal assessments, our lawmakers enacted Act 129 of 1927, which created for a period of 32 years, a Commission to be known as the Arkansas Tax Commission. This act clothed the Tax Commission with certain powers. Section 12, sub-section (a) provides: "To have and exercise general and complete supervision and control over the valuation, assessment and equalization of all property, privileges and franchises; the collection of taxes and enforcement of the tax laws of the State, and over the several county assessors, county boards of review and equalization, tax collectors and other officers charged with

the assessment or equalization of property or the collection of taxes throughout the State, to the end that all assessments on property, privileges and franchises in this State shall be made in relative proportion to the just and true value thereof, in substantial compliance with law.

"(p) To order in any year a re-assessment of all real and personal property or real or personal property, or any class of personal property in any county, or in any district or subdivision thereof, when in its judgment such re-assessment is advisable or necessary, and for that purpose to cause such re-assessment to be made by the local assessment officers, or, if in the judgment of the Commission the interest of the public will be advanced thereby, to cause such re-assessment to be made by a person or persons to be recommended by the County Judge and appointed by the Commission for that purpose, and in either case to cause such re-assessment to be substituted for the original assessment. Any change in assessed value for State and County purposes shall not affect the assessment of benefits, made for any public improvement.

"(s) To require any county board of equalization, at any time after its adjournment, to reconvene and to make such orders as the Commission shall determine are just and necessary, and to direct and order such county boards of equalization to raise or lower the valuation of the property, real or personal, in any township, district or city, and to raise or lower the valuation of the property of any person, company, or corporation; and to order and direct any county board of equalization to raise or lower the valuation of any class or classes of property; and generally to do and perform any act or to make any order or direction to any county board of equalization or any local assessor as to the valuation of any property or any class of property in any township, district, city or county which, in the judgment of the Commission, may seem just and necessary, to the end that all property shall be valued and assessed in the same manner and upon the same basis as any and all other

taxable property, real or personal, wherever situated throughout the State."

Section 29: "* * * Any such re-assessment shall, when completed, be treated exactly as an original assessment and be subject to equalization by the county board and to such appeals from the action of any officer having to do with said assessment as are now provided by law in the case of original assessments."

Section 8 of Act 191 of 1949 provides for the right of appeal from the Commission's actions to the Circuit Court.

Section 31 of Act 129 of 1927 constituted the State Tax Commission a State Equalization Board and provided the yardstick to be used by the Board in the equalization of the assessment. We observe, therefore, that Act 129 gave to the State Tax Commission certain duties and powers as (1) a tax assessing body and (2) as a State Equalization Board.

As a tax commission, the Arkansas Tax Commission was given general and complete supervision and control over the valuation assessment and equalization of all property, privileges and franchises, the collection of taxes and enforcement of the tax laws of the State and supervision over the County Assessors. It was given original and exclusive power over the assessment of both real and personal property, all pipe lines, railroads and other utilities.

Act 12 of 1933 abolished the office of Arkansas Tax Commission and transferred all duties and powers to the Arkansas Corporation Commission. Thereafter, by Act 40 of 1945, all duties of the Arkansas Corporation Commission were transferred to the Public Service Commission and in 1949, by Act 191, the Legislature recreated the Arkansas Tax Commission, vesting in it all taxing powers imposed upon the Arkansas Public Service Commission. In effect, therefore, the Arkansas Tax Commission of 1949 is the Arkansas Tax Commission as created by Act 129 of 1927.

On October 10, 1949, the present Arkansas Tax Commission, appellant here, ordered a hearing for all property owners in Saline County to be held October 28th, and on October 31st thereafter, ordered a re-assessment of all real property in Saline County and appointed Assessors. December 20, 1949, the Tax Commission cancelled so much of its order which included rural property. January 20, 1950, after re-assessments were completed, the Commission ordered the Saline County Equalization Board to reconvene on January 21, 1950, to hear appeals and make adjustments on a basis of not less than twenty per cent of the true value of the assessed property. January 23, 1950, the present action was begun resulting, as indicated, in the granting of injunctive relief.

There are two primary questions presented: (1) Whether Acts 129 and 191 are valid, constitutional legislation. (2) Whether the mechanics pursued and acts performed by the Arkansas Tax Commission, in the instant case, were in accordance with the provisions of Act 129 as re-enacted by Act 191 (by reference) and within the time limit within which the Tax Commission was required to act.

—(1)—

As to the first question. We hold that Acts 129 and 191 are constitutional and valid legislative enactments.

This court in *State* v. *Little,* 94 Ark. 217, 126 S. W. 713, said: "Our Constitution, art. 16, § 5, provides that 'all property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State.' Hence, it will be seen that the taxing power is a legislative function, and that, subject to constitutional restrictions, the action of the Legislature is supreme," and in *Clay County* v. *Brown Lumber Company,* 90 Ark. 413, 119 S. W. 251, in an opinion by Judge FRAUENTHAL, it was said:

"The Legislature has plenary power to prescribe the manner in which property shall be assessed and its valua-

tion fixed for the purposes of taxation. Article 16, § 5, of the Constitution of 1874 provides: 'All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State.'

"It is common knowledge that one of the most difficult and perplexing undertakings of government is to fix an equal and uniform valuation on property throughout the State. Intelligent men differ as to the value of the most common objects before them; and the most that can be expected from legislation is an approximation to this end of equality, uniformity and fairness of valuation. The jurisdiction to fix this valuation is by legislation ordinarily placed with some officer or board; and boards or courts of revision are sometimes established. But the entire proceedings are statutory, and the statutory remedies provided to a party aggrieved by an overvaluation made within the jurisdiction of the particular officer or board must be pursued. * * *

"When legislation, in accomplishing the necessities of government, makes provision that certain officers or boards shall fix the assessment of property, it does not violate the right of due process of law."

This court in *Hutton, Collector,* v. *King,* 134 Ark. 463, 205 S. W. 296, wherein it was contended that under our scheme for assessment of taxes under Art. 7, § 46, and Art. 16, § 5, of the Constitution, the Tax Assessor was the sole, primary valuer, this court denied this contention and said: "Those two provisions must, of course, be read in harmony so as to give effect to each, and when so read they mean that there shall be a tax assessor elected with duties which the name of his office implies, but that the Legislature may prescribe those duties and direct the manner in which value of taxable property shall be ascertained. They mean, in other words, that the office of tax assessor must form a fixed part of any valuation scheme erected by the Legislature, and that the office cannot be abolished nor made a sinecure and an entirely different scheme adopted, but that the lawmakers

may, from time to time, prescribe the duties of the office and adopt such other methods as may be deemed expedient to ascertain the values of taxable property. * * *

" 'The framers of the Constitution of 1874 were therefore familiar with the practice of correcting and revising the assessment of county assessors, whether the office was created by the Legislature or the Constitution; but they have nowhere made their returns conclusive or prohibited the creation of boards to revise and equalize them.' Further along in the opinion this statement is found: 'As one of the necessary steps toward ascertaining values for taxation, local assessors elected for the purpose must make, or be afforded the opportunity to make, the primary assessment. But this valuation need not be final. On the contrary, it becomes the duty of the Legislature to afford the means of making this approximate estimate of values conform as nearly as practicable to the constitutional design of equality and uniformity.' "

It appears certain that the Arkansas Tax Commission which was created by Act 191 of 1949 must look to said Act 129 of 1927 for the method or mechanics of its procedure. The contention is made, however, that Act 191 is invalid for the reason that it attempts to incorporate portions of other acts by reference to title only and therefore offends Art. 5, § 23 of the Constitution, which, in effect, provides that no law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only. The answer to this contention is that, as we construe Act 191, it is a reference statute which is original, complete and intelligible in itself and therefore does not offend against the Constitution.

In *Arkansas State Highway Commission* v. *Otis & Company,* 182 Ark. 242, 31 S. W. 2d 427, this court, in construing Art. 5, § 23, of the Constitution, said: "In addition, it may be said that textwriters and courts generally say that the constitutional requirement does not apply to supplemental acts not in any way modifying or

altering the original act, nor to those merely adding new sections to an existing act. * * *

" 'It is not necessary, in order to avoid a conflict with this article of the Constitution, to reënact general laws whenever it is necessary to resort to them to carry into effect a special statute. Such cases are not within the letter or spirit of the Constitution or the mischief intended to be remedied. By such a reference the general statute is not incorporated into or made a part of the special statute. The right is given, the duty declared, or burden imposed by the special statute, but the enforcement of the right or duty and the final imposition of the burden are directed to be in the form and by the procedure given by the other and general laws of the State. Reference is made to such laws, not to affect or qualify the substance of the legislation or vary the terms of the act, but merely for the formal execution of the law. The evil in view in adopting this provision of the Constitution was the incorporating into acts of the Legislature by reference to other statutes of clauses and provisions of which the legislators might be ignorant, and by which, affecting public or private interests in a manner and to an extent not disclosed upon the face of the act, a bill might become a law which would not receive the sanction of the Legislature if fully understood.'

" 'There is no evil of this or of any nature to be apprehended by the mere reference to other acts and statutes for the forms of process and procedure, for giving effect to a statute otherwise perfect and complete. It would be a serious evil to compel the engrafting upon and embodying in every act of the Legislature all the forms and the details of practice which may be necessarily resorted to to carry any one statute into effect, when the same proceedings are provided for by the general statutes of the State, and are applicable to hundreds of other cases, and with which the legislators may be supposed to be reasonably familiar.' "

—(2)—

As to the second question whether the Tax Commission exercised its powers within the time contemplated by Acts 129 and 191, above, we hold, on the record presented, that it did not, and therefore, the present case must be affirmed for this reason alone.

The constitutional officer in the beginning of the taxing process is the County Assessor. It is his duty to assess real property annually between the first Monday of January and the 3rd Monday in August, each year (Ark. Stats. 1947, §§ 84-414—84-416). Thereafter, he is required (§ 84-447) to file report of his assessment with the County Clerk on or before the third Monday of August, and in addition, he is required to make report to the Arkansas Tax Commission of the total assessment of the county, and the County Clerk shall immediately lay this report of assessment before the County Equalization Board (§ 84-707). All property shall be assessed according to its value on January 1st of each year. (§ 84-426).

The State Tax Commission may at any time between January 1st and the third Monday in August, in conjunction with the County Assessor, or on its own motion, re-assess all property or correct assessments.

The Tax Commission is required to assess all utilities, etc., in addition to re-assessment. List of utility property shall be delivered to the Tax Commission on or before March 1st (§ 84-601).

The Legislature of 1929 created a County Equalization Board (§ 84-701), which is required to meet annually on the third Monday of August of each year (§ 84-705) and equalize the individual assessments. For this purpose, the Board meets on the third Monday in August and "if necessary up to the third Monday in September and not thereafter, exercise its functions as a Board to equalize the assessed values of such property as has been assessed by the assessor for the then current year, etc." (§ 84-706). By this section it is provided that the County Equalization Board may not meet after

the third Monday in September for the purpose of equalizing the assessed values of property assessed by the assessor.

Anyone appealing from the orders of the County Equalization Board shall file his appeal with the County Court on or before the second Monday of October "and shall have preference over all matters in said court and shall be heard and order made on or before the first Monday of November." (§ 84-708).

The County Clerk then enters upon the assessment record the adjusted or equalized assessment value of the property as found and fixed by the County Equalization Board unless further adjustments are ordered by the County Court on appeal or by the State Equalization Board (§ 84-712). On or before the second Monday of November, the County Clerk must file, unless otherwise ordered by the Equalization Board (§ 84-713), with the State Equalization Board, a final abstract of the tax books showing "by total of items and value the total assessment of his county after all adjustments."

The Arkansas Tax Commission, as such, convenes the first Monday of March in each year, § 16, Act 129, and is in continuous session thereafter except when meeting as a State Board of Equalization, § 7, Act 129. Under its powers, the Commission has authority to act as an assessing body in conjunction with the County Assessor and the County Equalization Board and may act in assessing or re-assessing from the opening of the Assessor's books in January of each year until the books are delivered to the County Equalization Board in August of each year. The assessment made by the Commission is treated as an original assessment and subject to equalization by the County Equalization Board and to appeal as in original assessments.

The Commission, acting as a State Equalization Board, is required, under §§ 84-714 and 84-716, to complete its work and certify its records to the County Clerk in each year on or before the third Monday of November of each year.

As we construe Act 129, the entire scheme of taxation for the current year is completed by the time the County Equalization Board adjourns and within time for appeal to the County Court. The intent was that the appeal would be disposed of in time for the Quorum Court for the current year to levy taxes.

As above noted, § 33 of Act 129 requires copy of the complete record of the Arkansas Tax Commission, acting as an Equalization Board, to be filed with the County Clerk on or before the third Monday of November, in each county in which the assessed valuation of property has been, by the Board, ordered increased or decreased, the date on which the various Quorum Courts meet (§ 17-401) thus affording the Quorum Court a yardstick upon which to levy taxes for the current year.

Obviously, in the present case, the Arkansas Tax Commission, acting as such and as a Board of Equalization, in 1949, did not complete its work by the third Monday in November, 1949, as we hold it was required to do under Act 129.

In conclusion, we hold that Acts 129 and 191 are constitutional and valid enactments, but since, as indicated, the Arkansas Tax Commission failed to complete its work by the third Monday in November of 1949, for this reason only, the case must be, and is affirmed.

The Chief Justice and LEFLAR, J., concur in part and dissent in part.

Justices MCFADDIN and GEORGE ROSE SMITH concur.

GRIFFIN SMITH, Chief Justice (with whom Mr. Justice LEFLAR agrees), concurring in part and dissenting in part. The majority's holding that statutes creating the Tax Commission are not constitutionally objectionable or functionally defective in their entirety finds support in numerous opinions of this Court; but Mr. Justice LEFLAR and I veer away from the present construction dealing with the *time* within which the Commission was compelled to function.

The majority's analysis of applicable legislation imputes a meaning imperatively requiring the Commis-

sion to attain an expressed purpose under an exclusive procedural pattern that in practical application defeats the design to reassess; but it is now said that the procedure is so intricately intertwined with the statutory purpose that we should say the *means* are mandatory, yet the law—valid though it be—must for all practical purposes fall with the means.

From the standpoint of Courts there is always the presumption that legislative bodies were concerned with the general purpose of a statute and that methods of achieving expressed purposes are incidental. Therefore, where particular administrative steps were not of the essence, nor harmful within themselves, then the fact that a pattern phrased by the General Assembly has not been minutely followed will not be permitted to defeat the law.

The prevailing opinion makes the statute valid but without meaning—a result not contemplated by its framers and those who enacted it. A better construction would be that when the legislature directed the Commission to reassess local properties, a reasonable time was contemplated within which the work might be done. The requirement that as an *Equalization Board* it must complete the work by November 15th does not mean that reassessments would likewise be finished by that time; nor is there any language of a mandatory nature directing completion of reassessments by November 15th.

Ed. F. McFaddin, Justice (concurring). I concur in the result reached by the majority in this case, because I think the decree of the Chancery Court was correct in granting the appellees the relief that they sought. But I reach this conclusion because (a) the powers sought to be exercised by the Arkansas Tax Commission in this case arise only from Section 2 of Act 191 of 1949; and (b) I think Section 2 of Act 191 of 1949 is void as violating Art. V, § 23 of the Constitution of Arkansas, which reads:

"No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, ex-

tended or conferred shall be reënacted and published at length."[1]

Said § 2 of Act 191 of 1949, here involved, reads:

"All powers and duties with respect to the assessment, equalization, extension, and collection of taxes Ad Valorem, and the administration of the corporation franchise or privilege tax, now vested in and imposed upon the Arkansas Public Service Commission under authority of Act 12 of the 1933 General Assembly, as amended or supplemented by Act 247 of the 1937 General Assembly, as amended by Acts Nos. 155 and 206 of the 1939 General Assembly; Acts Nos. 38 and 119 of the 1939 General Assembly; and Acts Nos. 40 and 289 of the 1945 General Assembly be, and the same are hereby, transferred to, vested in, and imposed upon the Arkansas Tax Commission, as herein created."

This Section is the only authority for the powers sought to be exercised in this case by the recreated Arkansas Tax Commission. No specific duties are conferred upon the Commission by this Section. It did not even attempt to transfer to the newly created Commission *all* of the powers possessed by the Arkansas Public Service Commission. It only attempted to confer on the new Commission such duties and powers as the Arkansas Public Service Commission had with respect to "the assessment, equalization, extension, and collection of taxes *Ad Valorem,* and the administration of the corporation, franchise or privilege tax." It will be noted that such duties, so referred to, are scattered through various and sundry Acts of different sessions of the Legislature, beginning with Act 129 of 1927 which is an Act not even mentioned in § 2 of Act 191 of 1949. I submit that there is no way in which any member of the Legislature could

[1] The foregoing provision of our Constitution was probably taken from Article V, Section 23 of the Constitution of 1868, except that that provision in that Constitution was worded:

"No law shall be *revised,* altered or amended by reference to its title only, but the act revised and the section or sections of the act as altered or amended shall be enacted and published at length."

It is well to note that in the Constitution of 1868 the inhibition was against the law being *"revised"*, whereas in the present Constitution it is against a law being *revived,* as well as against the provisions thereof being *"extended"* or *"conferred."*

have realized the full purport of § 2 of said Act 191 without making an extensive study and analysis of the various and sundry Acts not before him in any single digest.[2] It is clear to me that § 2 of Act 191 of 1949 was an attempt to *revive* the Arkansas Tax Commission and to *confer* powers on that body and to *extend* previous laws, and all by reference only to the title of certain Acts.

The majority opinion in the case at bar cites and quotes from *Arkansas State Highway Commission* v. *Otis & Company,* 182 Ark. 242, 31 S. W. 2d 427, as authority for the majority holding that § 2 of Act 191 of 1949 does not violate Art. V, § 23 of the Constitution. But the legislative enactment involved in the cited case is vastly different from the legislative enactment involved in the case at bar. In *Arkansas Highway Commission* v. *Otis & Company,* the challenged Act read:

"Section 1. That the Highway Commission shall as soon as possible ascertain the amount of any valid outstanding indebtedness incurred prior to January 1st, 1927, against any road district in the State of Arkansas organized prior to the passage of Act No. 11 of the Acts of the General Assembly of the State of Arkansas for the year 1927 which was approved February 4, 1927, and shall draw vouchers to be paid out of the appropriation already provided for in Act No. 18 of the Forty-Seventh General Assembly for the payment of road district bonds and interest obligations; . . ."

Of course that enactment was complete in itself because it directed the Highway Commission (already pos-

[2] Section 2 of Act 191 of 1949 is an attempt to revive the Arkansas Tax Commission and to confer on it—by reference to title only—the powers formerly held by the original Arkansas Tax Commission, created by Act 129 of 1927, which Tax Commission was superceded by the Arkansas Corporation Commission in 1933, which in turn was superceded by the Arkansas Public Service Commission in 1945. There is thus an effort to *revive* and *confer* that *extends* over to the third degree—that is, from the original Arkansas Tax Commission through the Arkansas Corporation Commission, and through the Arkansas Public Service Commission. In these acts of transmission, the duties of the Commission were at no time specifically re-enacted; and then comes Section 2 of Act 191 of 1949, which attempts to confer powers on the re-created Arkansas Tax Commission. The opinion of the majority in the case at bar demonstrates that in order to find out what powers the present Tax Commission has, it is necessary to go back to Act 129 of 1927, which is not even one of the Acts mentioned in Section 2 of Act 191 of 1949 now under attack.

sessed of powers under other Acts) to determine the amount of indebtedness incurred by any road district prior to a certain date, and to pay such indebtedness out of a particular fund. So, all the language in the present opinion quoted from the cited case is language that merely bears on the *"referring"* to some previous enactment *for procedure* and not for *power* or *authority*. In the case at bar, however, the situation is vastly different. Here the newly recreated Arkansas Tax Commission has no *powers* except those *revived, extended* and *conferred* by § 2 of the Act 191 of 1949; and all such powers are *revived, extended* and *conferred* by reference merely to the *title of the Acts*. Such is clearly contrary to the Constitution. In every one of the so-called "reference statutes," to which my attention has been called, the same thing is true as existed in the cited case of *Arkansas State Highway Commission* v. *Otis & Company, supra;* and none of these cases is like the case at bar.

In *State* v. *McKinley,* 120 Ark. 165, 179 S. W. 181, Mr. Justice HART stated the line of demarcation between the so-called "reference statutes" and an Act attempting to *revive, extend* and *confer* powers. Here is his language:

"Where the new act is not complete but refers to a prior statute which is changed so that the legislative intent on the subject can only be ascertained by reading both statutes, uncertainty and confusion will exist; and this constitutes the vice sought to be prohibited by this clause of the Constitution."

I insist that § 2 of said Act 191 shows on its face that it contains the vice sought to be prohibited by this clause of the Constitution.

Likewise, in *Harrington* v. *White,* 131 Ark. 291, 199 S. W. 92, Chief Justice MCCULLOCH said:

"We have steadily adhered to the rule that where a statute 'by its own language grants some power, confers some right or creates some burden or obligation, it is not in conflict with the Constitution, although it may refer to some existing statute for the purpose of pointing out

the *procedure* in executing the power, enforcing the right, or discharging the burden.' '' (Italics are our own.)

It will be observed that Chief Justice McCulloch said that the statute could refer to an existing statute *for procedure*. He did not say that the new enactment could refer to another statute for the creation of the *power* itself. Yet that is exactly what § 2 of Act 191 of 1949 attempts to accomplish—*i. e.*, refer to another statute for the *extending* and *conferring* of power.

We have some cases in Arkansas in which Art. V, § 23 has been applied. In *Watkins* v. *Eureka Springs*, 49 Ark. 131, 4 S. W. 384, a legislative enactment of 1875 attempted to allow municipalities to call in and cancel outstanding warrants. Section 4 of that Act read: . . . ''that the law now in force governing in cases where counties are authorized to call in their floating indebtedness shall apply and govern in proceedings had by counties, cities or incorporated towns.'' The said § 4 was attacked as violating Art. V, § 23 of the Constitution. This Court, speaking through Chief Justice Cockrill, held that § 4 violated the Constitution. Here is the language:

''But can the operation of the provision be *extended* or the power given by it *conferred* upon cities, by a general reference to the former law? We apprehend that it was just this sort of blind legislation the Constitution intends to prohibit when it says the provisions of a law shall not be 'extended or conferred' without 'reënacting' the part 'extended or conferred.' It may be that no legislator was misled by this act or failed to perceive all that it was desired it should accomplish. Of that we have no means of judging. It is sufficient that the Constitution renders such an effort at legislation unavailing. It does not permit the intelligent duty of legislation to be performed like the devotions of the Christian who was content to point to the lids of a sealed book as containing his prayers and expressing his sentiments.''

I submit that § 2 of Act 191 of 1949 attempts to give to the newly recreated Arkansas Tax Commission the *powers* formerly held by another body, and is thereby attempbting to *extend* and *confer* powers just as was held unconstitutional in *Watkins* v. *Eureka Springs, supra,* which is a landmark case and has been cited by this Court in a score of subsequent cases.

Another case to the same effect is *Beard* v. *Wilson,* 52 Ark. 290, 12 S. W. 567. The Legislature of 1875 passed an Act, declaring that certain sections of Gantt's Digest providing for the redemption of land sold under execution should apply likewise to all sales made under decrees in Chancery. This Court held that such Act violated Art. V, § 23 of the Constitution of Arkansas, saying:

"It would be difficult to imagine a plainer violation of the Constitutional provision."

Likewise, in *Farris* v. *Wright,* 158 Ark. 519, 250 S. W. 889, the Legislature of 1923 attempted to abolish tenancy by the curtesy and give the surviving husband the same interest in his wife's estate that the law gave the surviving wife in the husband's estate. This Court held that the 1923 Act was void, as violating Art. V, § 23 of the Constitution.

Again, in *Texarkana-Forest Park District* v. *State,* 189 Ark. 617, 74 S. W. 2d 784, the Legislature had passed Act 183 of 1927, attempting to extend Acts 126 and 645 of 1923, by reference to title only. The Court held:

". . . It definitely and certainly appears from a mere reading of Act 183 of 1927 that no valid improvement district could be organized under its authority and mandate. Without the aid of Acts 126 and 645 of 1923 the provisions of Act 183 of 1927 are absolutely meaningless and void of purpose. . . ."

The Court held the Act 183 of 1927 to be void, in violation of Art. V, § 23 of the Constitution, saying:

"In *Watkins* v. *Eureka Springs,* 49 Ark. 131, 4 S. W. 384, this court decided that an act of the General Assembly which had the purpose and effect of extending to

cities and towns rights and remedies which existed by law in favor of counties could not be so extended by reference to title only. We have uniformly held, following the case just cited, that when a new right is conferred or cause of action given, § 23 of Art. 5 of the Constitution of 1874 requires the whole law governing the right and remedy to be reënacted in order to enable the court to effect its enforcement. *Farris* v. *Wright,* 158 Ark. 519, 250 S. W. 889; *Beard* v. *Wilson,* 52 Ark. 290, 12 S. W. 567; *Common School Dist.* v. *Oak Grove Special School Dist.,* 102 Ark. 411, 144 S. W. 224; *State* v. *McKinley,* 120 Ark. 165, 179 S. W. 181; *Harrington* v. *White,* 131 Ark. 291, 199 S. W. 92; *Palmer* v. *Palmer,* 132 Ark. 609, 202 S. W. 19; *Hermitage Special School Dist.* v. *Ingalls Special School Dist.,* 133 Ark. 157, 202 S. W. 26; *Fenolio* v. *Sebastian Bridge Dist.,* 133 Ark. 380, 200 S. W. 501; *St. L.-S. Ry. Co.* v. *Southwestern Telegraph & Telephone Co.,* 121 Federal 276."

Thus, in a long line of cases we have held that laws cannot be *revived,* or the provisions thereof *extended,* or *conferred* by reference to title only. Certainly § 2 of Act 191 of 1949 attempts to do the very things that the Constitutional provision prohibits; and certainly we have upheld this Constitutional provision in the cases just cited. Accordingly, I submit that § 2 of Act 191 of 1949 is null and void; and the decree of the lower court should be affirmed for that reason. It seems to me that now is a good time to return to the foundation cases on Constitutional Law and see that Constitutional rights are protected, rather than frittered away by some system of judicial refinement.

George Rose Smith, J., concurring. I agree that the decision of the trial court should be affirmed, but it does not seem to me that the language of the statutes supports the theory adopted in the opinion written by Justice Holt, which for convenience will be referred to as the majority opinion.

When the Tax Commission concludes that the assessment of property throughout the State is not properly equalized the Commission has a choice of two remedies.

First, it may direct a blanket percentage increase in all assessments in counties or districts where assessed values are uniformly below the State average, or it may direct a similar percentage decrease in areas having assessments that are too high. Ark. Stats. 1947, §§ 84-714—84-716. When the Commission chooses this remedy it is acting as a State Equalization Board, and by § 84-715 its authority is specifically limited to making percentage increases or decreases. Provision is made in the same section for notice to the citizens in the areas affected, and they are given an opportunity to be heard before the increase or decrease is certified to the county clerk not later than the third Monday in November. I agree with the majority that this procedure is valid and enforceable.

There may also be instances where some tracts in a particular county or district are properly assessed according to the state-wide average, but the valuation of other tracts is too high or too low. Here a blanket increase or decrease would not be appropriate. To correct such a situation the Commission is authorized to pursue its second remedy; that is, to order a complete reassessment of all property (or of designated classes of property) within the particular county or district. That is what was attempted in this case. The majority conclude that the attempt fails because the work was not completed by the third Monday in November. I agree that the attempt must fail, but in my view the reason is that the controlling statutes do not create a workable system by which the Commission can complete a reassessment by the second method of procedure.

The majority interpret § 84-464 to mean that the Commission must file its reassessment by the third Monday in August, so that a dissatisfied property owner may appeal to the county equalization board at its regular session, which begins the third Monday in August and may continue until the third Monday in September. Section 84-706. The majority accordingly hold that the Commission's action in this case came too late.

It does not seem to me that the statute is susceptible of this construction. To begin with, there is nothing in

the statute that expressly requires the Commission to file its reassessment by the third Monday in August. On the contrary, § 84-464 empowers the Commission to order a reassessment "whenever . . . it shall be made to appear . . . that the assessment of the property in any county, or district or subdivision thereof, is not in substantial compliance with law." Thus by its terms the statute permits the reassessment to be made at any time during the year.

Furthermore, if the Commission must make its reassessment by the third Monday in August, then as a practical matter this method of equalizing assessments is useless. The assessor is not required to file his original assessment until the third Monday in August. Section 84-415. That is the very day on which the majority require the Commission to complete its action. But obviously the Commission cannot even determine whether a reassessment is necessary until it has examined the assessor's work, much less perform the immense task of reassessing every tract in the county or district. It is evident that by merely withholding their assessments books until the last day the assessors throughout the State can completely prevent the exercise of the Commission's power as construed by the majority opinion.

It is for this reason that the legislature undoubtedly intended for the Commission to be able to order a reassessment at any time during the year. But in my opinion the provisions of the existing statutes are so incomplete that the legislative intention cannot be carried into effect. I shall mention only two of the defects that are fatal to the workability of the law.

First, it is a basic requirement of due process of law that one whose property is to be taxed according to its value must be afforded an opportunity to be heard on the question of valuation. *Londoner* v. *Denver,* 210 U. S. 373; *McGregor* v. *Hogan,* 263 U. S. 234. Here § 84-464 attempts to comply with the constitution by providing that the reassessment shall be treated as an original assessment and be subject to equalization by the county board and to such appeals as are allowed in the case of original

assessments. On its face this provision seems to afford due process, but in actuality it is too indefinite to be workable. What is the period allowed for an appeal to the county board of equalization from an original assessment? The statute merely states that the property owner may apply to the board not later than the third Monday in August. Section 84-708. Suppose the reassessment is filed in October; is the property owner free to appeal at any time before the following August? If so, his appeal is of no value, for in the meantime the taxes will already have been extended on the taxbooks; and the law makes no provision for protecting the landowner in this situation.

Second, a reassessment filed during most of the months in the year will be of no practical value. In the case at bar the Commission filed its reassessment in January and ordered the county equalization board to reconvene on January 23 to hear objections to the new assessed valuations. The quorum court had already met in the preceding November, however, and its tax levies were based on assessed values that then appeared. To permit valuations to be changed on a wholesale scale after the meeting of the quorum court might easily disrupt county finances completely. Further, the county clerk must extend the taxes and deliver the taxbooks to the collector by the third Monday in February (§ 84-807), but how can he do so if the valuations are subject to change at the very time that he is working on the books? It does not seem to require extended argument to demonstrate that our present legislation overlooks so many contingencies that it cannot be said to outline a workable method of equalizing assessments under what I have referred to as the second method of procedure.

I think that the General Assembly, if it chooses to, may establish a system by which the Tax Commission might complete a reassessment within a limited time after the filing of the original assessment and by which the property owned might have a limited time to apply for a hearing before the equalization board or some other body. Of course the due process clause does not require a

judicial review, as long as an opportunity is given to be heard by some impartial tribunal. *Kelly* v. *Allen,* 9th Cir., 49 F. 2d 876, cert. den., 284 U. S. 642. Or the legislature might permit the Commission to act at any time during the year, if the landowner were given a clearly defined opportunity for a hearing and if the revised assessment should not be effective until the next meeting of the quorum court. I think, however, that it is readily apparent that the law now under consideration is not sufficiently complete to create an enforceable system of reassessing individual properties within a county or district. For that reason I concur in the affirmance of the decree.

MONROE *v.* CULPEPPER.

4-9404 233 S. W. 2d 245

Opinion delivered October 23, 1950.

Wendell Utley, for appellant.

Henry B. Whitley, for appellee.

DUNAWAY, J. Appellant Monroe filed this suit in the Columbia Chancery Court against appellees, as commissioners of Street Improvement District No. 9 of the City of Magnolia, Arkansas. Validity of the ordinance creating the District was challenged on two grounds: (1) The description of the boundaries of the district was fatally defective. (2) The directions to the commissioners as to the improvements to be made were so indefinite as to "clothe the commissioners with a roving commission which would be controlled only by their own discretion," in violation of the rule laid down in *Cox* v. *Road Imp. Dist. No. 8 of Lonoke County,* 118 Ark. 119, 176 S. W. 676.

The cause was submitted upon the pleadings and an agreed statement of facts; and the complaint was dismissed for want of equity. Monroe has appealed.

The first question presented has to do with the adequacy of certain descriptions used in de-limiting the boundaries of the district. In a series of more than fifty calls, referring to various streets and lots in the City of Magnolia, there were references to lots in "Blewster-Bennett Addition", "Clayton Addition" and "Smith and Buffington Addition", when in fact there are no such additions in the City of Magnolia. The correct descriptions of the properties in question are respectively, "Bennett-Blewster Addition", "Clayton Subdivision", and "Buffington and Smith Addition".

A map showing the boundary lines of District No. 9, prepared by Max A. Mehlburger, Consulting Engineer, was attached as an exhibit to the complaint in this action, and is admitted to be an accurate representation of said boundaries. Since it is admitted that there are no other additions or subdivisions in Magnolia with names similar to the ones here in question, and it was stipulated that the engineer's map, prepared from the descriptions con-

tained in the ordinance, accurately represents the boundary lines on the ground, no property owner could have been misled as to the property included in the district by the descriptions used in the ordinance.

One additional call in the description is attacked on the ground that it is indefinite. The ordinance provides that the boundary line shall go from a given corner of a definitely described lot, "thence in a westerly direction parallel with, and on the same degree, as East Smith Street to the East Line of North Jackson Street", and thence along the East Line of North Jackson Street to another designated point. The quoted description is challenged as being indefinite. The map shows this line is laid out by the engineer; and the engineer, Mehlburger, testified (as stipulated) that the line was determined by establishing the distance from the north line of East Smith Street to the corner of the lot which was the beginning point, and measuring like distances at various points along East Smith Street to the intersection of East Smith Street and the east line of North Jackson Street. We think the challenged description called for a clearly ascertainable boundary line.

Appellant's second contention is that the ordinance delegated to the commissioners a "roving commission" to make whatever improvements they chose. This argument is based on the following language in the ordinance:

"Section 1. There is hereby established an improvement district embracing the following porperty . . . (description given), for the purpose of paving the following streets within the district, to-wit: (a number of streets are named and the points on each are designated where the paving is to begin and end) . . . *with such turnouts, side and connecting streets within the district* as the Commissioners may deem for the best interest of the district to protect the proposed improvement . . .".

It is argued that the italicized language authorizes the paving of turnouts as well as side and connecting streets anywhere in the district that the commissioners may deem necessary. If this be the proper construction

of the ordinance, it would certainly be void under our decisions in *Cox* v. *Road Improvement Dist. No. 8 of Lonoke County, supra;* and *Nelson* v. *Nelson,* 154 Ark. 36, 241 S. W. 370.

Appellees contend, however, as set out in their answer, that the quoted language of the ordinance reads as it does through clerical error; and that it should be construed as it was intended to read: "with such turnouts *to* side and connecting streets within the district as the Commissioners may deem for the best interest of the district to protect the proposed improvement . . .". Appellees argue that the exact extent and type of construction of the turnouts into side streets which might be necessary to protect the named streets which were to be paved, could not be determined in advance; and that such construction would be a mere detail in furtherance of the main paving project which was set out in detail in the ordinance.

Appellees rely upon the case of *Kempner* v. *Sanders,* 155 Ark. 321, 244 S. W. 356, to sustain the validity of the ordinance, if construed in accordance with their contention. That case involved an ordinance which provided "that Street Improvement District No. 303 of the City of Little Rock be and the same is hereby created and established for the purpose of repaving with an asphaltic surface and otherwise improving Main Street . . .; to provide for drainage where necessary, and for the purpose of doing any and all work necessary and incidental to the said paving and draining, . . .". In answer to a contention there made, similar to that urged in the case at bar, we said:

"But appellant contends that the clause 'and otherwise improving' makes the antecedent language uncertain and makes it doubtful as to the kind of improvement contemplated. But, taking the sentence as a whole, we are convinced that it is not susceptible of such interpretation. The meaning and effect of the conjunction 'and' was to indicate that the board of improvement could add to and join with the repaving of Main Street such other and further work as was necessary and incident thereto

and included in the repaving of Main Street with an asphaltic surface. In other words, the main purpose of the petition was the repaving of Main Street. The words 'and otherwise improving' were manifestly added in order to give the board of improvement the power to do whatever was necessary to effectuate the main purpose. Certainly these words cannot be interpreted to clothe the board 'with a roving commission controlled only by their own discretion to make any kind of improvement they desired.' The only improvement they could make, as we view the petition, was the repaving of Main Street with an asphaltic surface and the doing of such other work in connection therewith as was incident thereto and essential to making the repavement of Main street a successful and complete improvement, such as was contemplated by the petition.

"While, to give the council jurisdiction, it is necessary that the preliminary petition describe with certainty the improvement proposed, yet this may be done in general terms, leaving the details and plans of the improvement to be worked out by the board after the district is established."

We think the reasoning in the *Kempner* case is applicable in the instant case, and hold that the construction of the ordinance urged by appellees is correct. From a consideration of the entire ordinance it is clear that the omission of the word "to" was a clerical misprision and should be read into the ordinance. See, *Roscoe* v. *Water & Sewer Imp. Dist.*, 216 Ark. 109, 224 S. W. 2d, 356. The District may contract for the construction of such turnouts into side or connecting streets, which enter the streets designated for paving as may be necessary to effectuate the main paving project. The District has no authority under the ordinance here questioned for paving streets other than those specifically designated in said ordinance.

The decree is affirmed.

McFaddin, J., dissents.

THOMAS *v.* HAWKINS.

4-9403 233 S. W. 2d 247

Opinion delivered October 23, 1950.

Charles L. Farish and *John M. Lofton, Jr.,* for appellant.

Clark & Clark and *John G. Moore,* for appellee.

GRIFFIN SMITH, Chief Justice. D. E. Thomas, Sheriff, now serving the remainder of an elective term, was a candidate in the July 25th democratic primary for the nomination, to succeed himself. Opposing were Marlin Hawkins and William E. Bearden. The certified returns showed that 2,382 votes were cost for Hawkins, 2,164 for Thomas, and seven for Bearden. Within apt time (Ark. Stat's, § 3-245) Thomas contested, attaching to his complaint a detailed list of votes alleged to have been irregular or invalid, amounting to more than 700. The votes listed as invalid would, if taken from Hawkins' total, change the results and make Thomas the nominee.

The Court held that the affidavit attesting verification was legally insufficient, and for that reason alone dismissed the action.

Facts found by the Court were inconclusive because in summarizing effect of testimony there was the judicial statement that it was not necessary to determine which side prevailed as to weight of evidence and the credibility of witnesses. According to the Court's findings, Thomas and his witnesses testified in effect that the plaintiff came into the Circuit Clerk's office where the affidavit was signed in the Clerk's presence, then immediately returned to his own office just across the hallway. Some of the witnesses called by the plaintiff testified that Charles L. Farish, counsel for Thomas, asked his client, in the Clerk's presence, if allegations of the complaint were true, "or words to that effect," and that Thomas replied that they were. There was no testimony that words passed directly between Thomas and the Clerk.

On behalf of Hawkins the Clerk testified that when the complaint was filed Thomas was not personally present, but [said he] "I filled out the jurat because [I] was certain that the affidavit bore the actual signature of the plaintiff, [so] I assumed to verify and acknowledge the signature." In a measure this testimony was supported by Mrs. Dorothy Brents, an employee of the Clerk's office.

The Court found that the applicable law "is clear and unambiguous, without reference to the verity or truthfulness of any particular witness," basing these conclusions upon Ark. Stat's, §§ 28-105, 28-206, 27-125, 40-101 and 102; statements in American Jurisprudence, Vol. 1, §§ 2, 13, and 14; *Kirk* v. *Hartlieb,* 193 Ark. 37, 97 S. W. 2d 434; *Thompson* v. *Self,* 197 Ark. 70, 122 S. W. 2d 182; *Murphy* v. *Trimble, Judge,* 200 Ark. 1173, 143 S. W. 2d 534; *Cox* v. *State,* 164 Ark. 126, 261 S. W. 303, and 1 R. C. L. 765.

Act 386, approved March 28, 1947, amends §§ 3 and 12 of Initiated Act No. 1 of 1917, and repeals § 6 of Act 123 of 1935.

Under § 3772 of Crawford & Moses' Digest, § 4738 of Pope's Digest, it was necessary that the contestant support his complaint by the affidavits of at least ten

reputable citizens. Section 3-245, Ark. Statutes, embraces the provisions of Act 386 of 1947, and requires verification by the affadivit of the contestant [only] "to the effect that he believes the statements [in the complaint] are true."

The verification filed by appellant reads: "State of Arkansas, County of Conway. I, D. E. Thomas, state on oath that I am the plaintiff in the above-styled cause, and that I believe the statements set forth in this complaint are true and correct. D. E. THOMAS. Subscribed and sworn to before me this 12th day of August, 1950. R. W. MORGAN, JR., Circuit Clerk."

A majority of the Court thinks that as a prerequisite to the issues raised—that is, before legal effect of the testimony regarding the manner of signing and acknowledging the verification can be adjudicated—the factual status should be decided by the trial Court: whether Thomas, after signing the affidavit, failed—in the presence of the Clerk—to assert his belief in the truthfulness of what the paper contained. Should this fact be decided against Thomas the contest should be dismissed.

The Chief Justice and Mr. Justice LEFLAR entertain the view that under the testimony most favorable to Hawkins there was sufficient formality to satisfy the legislative intent.

Reversed and remanded.

BRANSCUMB *v.* WHITAKER.

4-9248 233 S. W. 2d 249

Opinion delivered October 23, 1950.

Ted McCastlain, for appellant.

Sharp & Sharp, for appellee.

George Rose Smith, J. This action for personal injuries was brought by the appellant against his employer, the appellee. The defendant did not have workmen's compensation insurance at the time of the injury, and the plaintiff elected to sue at common law rather than to file a claim under the compensation law. Ark. Stats. 1947, § 81-1304. This appeal is from a judgment entered upon a verdict for the defendant.

A pivotal issue at the trial was whether the plaintiff at the time of the accident had so far deviated from the scope of his employment as to have become a mere licensee instead of an employee. Since we have concluded that the trial court gave an erroneous instruction upon this issue it is necessary for us to detail the facts only as they bear upon this question.

The appellee operates a stave mill, at which the plaintiff had been employed for about two months before he was hurt. The evidence is in conflict as to the work for which the plaintiff was employed. According to Branscumb's own testimony he was hired to haul and peel stave bolts outside the mill, but when that work was done he was required to go into the mill and work at the culling machine. This machine, which uses a large knife

blade to cut the bolts into staves, is admittedly dangerous to anyone not skilled in its operation. The plaintiff testified that while he was working at this machine a fellow employee bumped his arm and knocked his hand into the machine, causing the loss of two fingers. It is conceded that the fellow servant doctrine is not available as a defense to an employer who fails to obtain compensation coverage. Ark. Stats., § 81-1304. The fellow servant in question testified that the injury was his fault. Other employees having the same duties as Branscumb testified that they too were required to work at the culling machine, either at the foreman's direction or with his knowledge.

At the trial the theory of the defense was that the plaintiff was employed to work outside the mill only. The foreman testified that only one employee was allowed to operate the culling machine, and when that man was absent the mill closed down. According to the foreman the plaintiff was neither directed nor permitted to enter the mill in the course of his work. Upon this theory the defendant requested, and the court gave, this instruction: "You are instructed that if you find from the evidence that the plaintiff was employed at the time of the injury to sort staves outside the mill proper and none of his duties required him to work at the operation of the machine at which he was injured, and you further find that he left the job that he was employed to do and without the knowledge or consent of the defendant or his foreman, but acting on his own volition and for his own purpose, undertook to operate the machine, and while doing so was injured, he would not be entitled to recover, and your verdict should be for the defendant."

The plaintiff objected to this charge on the ground that it required the employer to have known of or consented to the plaintiff's work at the culling machine on the particular day of the injury, in spite of the testimony offered by the plaintiff to the effect that it was customary for the plaintiff and other like employees to work at this machine when they were abreast of their other duties. This objection was well taken, for the jury would have been entirely justified in concluding from the lan-

guage of the instruction that the defendant would be liable only if he or his foreman was actually aware that the plaintiff was working at the culling machine at the time of the accident.

At common law it is certainly true that an employee cannot, except in an emergency, turn aside from his assigned tasks and undertake a different and unauthorized line of work without losing his status as an employee. A typical case of such a deviation from the scope of employment is *Taylor* v. *Grant Lbr. Co.,* 94 Ark. 566, 127 S. W. 962, where we held that by his actions the servant had become a licensee. But the rule is different when the unauthorized conduct has been so habitual that the jury may conclude that the employer is aware of the practice. *American Ry. Express Co.* v. *Davis,* 152 Ark. 258, 238 S. W. 50, and 1063. In a case much like this one on its facts, *Ward Furn. Mfg. Co.* v. *Pickle,* 174 Ark. 463, 295 S. W. 727, we held that the test is whether the employer should have anticipated that the employee might attempt the act that is later said to have been beyond the scope of his duties. In the case at bar if the jury had believed that the plaintiff and other similar employees habitually worked at the culling machine, their verdict might well have been for the plaintiff. Since the questioned instruction can fairly be said to have ruled out that line of thought it must be considered erroneous.

Reversed.

Griffin Smith, Chief Justice, dissenting. M. S. Whitaker owns Brinkley Stave Company, an unincorporated business, and directs its operations. The work program calls for three to twenty men, depending upon availability of raw material and the demand for staves.

Junius Branscumb, a 24-year-old Negro, lost two fingers August 18, 1948, when his right hand came into contact with the blade of a culling machine. Earl McFaul, colored, a fellow servant, admitted that he bumped a bolt against Branscumb while the latter was at the machine. Branscumb sought $4,500 to compensate the injury and has appealed from a judgment in favor of the defendant.

The action was brought under authority of Act 319 of 1939, with an allegation that injury resulted from the negligence of a fellow servant at a time when the plaintiff and all other workers were acting within the scope of their employment. Branscumb's pay was 55c per hour, amounting to an average of $26 per week.

The Compensation Act, Ark. Stat's, § 81-1304, permits one having a cause of action against an employer who has not *secured* the payment of compensation [insurance, ordinarily] to elect whether to proceed under the Act, or to sue in Circuit Court, but ". . . in such action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant employer plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employe assume the risk of his employment, nor that the injury was due to the contributory negligence of the employe."

Appellee's answer to the complaint was a general denial, coupled with the affirmative assertion that appellant was injured through his own negligence, "and at a time when he was not in the performance of a service for the defendant."

The effect of Branscumb's testimony was that his employment as a common laborer involved pulling stave bolts "out of a tunnel" and peeling bark from them. The bolts would then go to the culler for processing; but, said appellant, if he got caught up with this work, he would go to the culling machine. The regular operator was a man named Wallace.

Question: "After you got caught up [with the work you ordinarily did] where did you go?" A. "I went to culling." Q. "Who was culling before you began?" A. "Bill Wallace, the regular culler." Q. "Who else was at the machine before you got there?" A. "This old man McFaul." Q. "Did any of these men tell you to cull?" A. "No, sir, [but] they didn't try to keep me from it. I told them that Mr. Jack Crow sent me over there to cull. He had told me to cull on three or four occasions."

Crow testified that he was the mill foreman and had been since 1941. His general experience at mill work covered a period of 29 years. Culling, said Crow, required skill. Branscumb's duties were those of a common laborer, stacking and spreading staves outside of the building where machines were housed. An inexperienced man was never directed to operate the culler. If Wallace needed relief he (Crow) would take over, or the work would be temporarily suspended. Appellee Whitaker testified to the same facts. Other witnesses—some of whom were no longer employed at the mill—gave testimony tending to support the defense.

I think the controlling issue for submission to the jury was whether, when the injury occurred, Branscumb had, without authority, stepped aside to such an extent that a factual question relating to the misfortune at the particular time he claims to have been sent to do the work he was undertaking to perform was made for the jury: that is, Did the accident arise out of and in the course of the employment? It is conceded by appellee that if the plaintiff had a claim under Act 319 he was entitled to plead § 81-1304, Arkansas Statutes.

Although in his motion for a new trial appellant complains of the Court's refusal to give his requested instructions two and three, the record shows they were given. In fact, all instructions asked by appellant were given. General objections only were made to instructions given at appellee's request, with the exception of No. 2, where the objection was specific. The jury was told by this instruction that the plaintiff would not be entitled to recover if the evidence showed that at the time of injury he was employed to sort staves outside of the mill proper, "and that none of his duties required him to work at the operation of the machine, . . . [and that he] left the job he was employed to do, and without the knowledge or consent of the foreman, but acting on his own volition and for his own purposes, undertook to operate the machine."

This was a binding instruction, and if prejudicially erroneous in any essential the vice would not be cured

by a correct instruction. Appellant complains, and the Court's majority sustains this assignment, that he and others had testified to a custom that permitted unskilled men to operate the machine.

But appellant's case is founded upon his assertion that at the particular time in question the foreman, Jack Crow, "sent me over there to cull." If the plaintiff's purpose had been to show that he responded to custom or a permissive practice—in respect of which there was substantial testimony—he could have easily asked the Court to instruct on that phase, as distinguished from the very positive contention that on the day and hour of the injury he was expressly instructed to go to the culling machine. Since he elected to stand or fall upon this record, it should bind him. Branscumb concedes that he had not talked with Whitaker about culling. The plaintiff claimed that he was paid more for culling than for peeling the bolts, thus inferentially admitting that attendance at the machine was in a higher wage-scale bracket.

Appellant first contends that the judgment should be reversed because of prejudicial error on the face of the record, hence it was not necessary that objection to appellee's plea of contributory negligence be mentioned in the motion for a new trial. *Anthony* v. *Sills,* 111 Ark. 468, 164 S. W. 117. The answer is that appellant asserted that the injury occurred while he was "acting with due care of his own safety, and without negligence or fault on his part." It would be an anomalous situation if when the plaintiff had asserted he did not contribute to his own hurt, the defendant should be penalized for replying to the affirmative declaration, even though the reply may be treated as mere surplusage. Essential of the answer was appellee's assertion that Branscumb was not engaged in the performance of a service for the defendant.

It is next contended that we should reverse because of prejudicial error in permitting appellee to *prove* contributory negligence after objections had been interposed. Whitaker was asked, on direct examination, *where* a culler should stand with reference to the machine blades

—"Where should he stand to catch the staves?" A later question was, "If the culler doesn't deliberately stick his fingers in the machine [can he] get hurt?" Before an objection could be made the witness had answered no. There was no request that question and answer be stricken and that the jury be told the question was not proper. Section 5 of Act 319, Ark. Stat's, § 81-1305, denies recovery where the willful inattention of the employe causes injury. Under this section of the Act the defendant could undertake to show that the injury was self-inflicted.

By instruction No. 1, given at the plaintiff's request, all of the provisions of § 81-1304, (§ 4 of Act 319) were read to the jury, and in addition, the Court said, "Therefore it is not necessary that plaintiff plead or prove freedom from contributory negligence; nor may the defendant, Whitaker, plead as defense that the injury was caused by the negligence of a fellow servant, nor that the employe, Branscumb, assumed the risk of his employment, nor that the injury was due to the contributory negligence of the plaintiff."

The same instruction told the jury that if it should find from a preponderance of the evidence that the plaintiff was injured "in the course of his employment, . . . and if you should further find that he was injured as a proximate result of the carelessness and negligence of the fellow servant, Earl McFaul, as alleged in the complaint, while acting in the course of his employment, . . . then the defendant would be liable in this action for the reason that the negligence of the fellow servant, Earl McFaul, would be imputed to the defendant, and said defendant would be liable the same for the fellow servant's negligence as if the defendant had been guilty."

The defendant's theory of the case was expressed in his requested Instruction No. 1, given and generally excepted to:

"You are instructed that if you find from the testimony that the plaintiff was employed to push and pull tunnel cars and peel bark from bolts, and had nothing

to do with the operation of the machine at which he was injured, and you further find that his injuries were not the result of any risk to which he was exposed in the performance of his duties, then he would not be entitled to recover, and your verdict should be for the defendant."

It will be observed that the plaintiff, after objecting to evidence relating to the attending circumstances of injury, asked the Court to instruct in respect of McFaul's activities—consonant with that part of his complaint alleging that the fault was not his.

In his brief appellant complains of the Court's action in not instructing the jury to disregard testimony relating to his contributory negligence. The subject was dealt with in appellant's requested Instruction No. 1 where he selected his own language to tell the fact-finders that Whitaker could not plead "that the injury was due to the contributory negligence of the employe."

The conclusion is inescapable that a disputed question of fact was presented: that is, Did the accident arise out of and in the course of Branscumb's employment? The jury, with the aid of all instructions requested by the plaintiff, and with those asked by the defendant that were given, (some were refused) concluded that Branscumb was not employed to operate the culler and that he was not asked by Whitaker or Crow, or anyone in authority, to make the attempt in circumstances shown by the testimony.

The phrase "arising out of and in the course of" is discussed in *Owens* v. *Southeast Arkansas Transportation Co.,* 216 Ark. 950, 228 S. W. 2d 646. We there approved the statement of Buckley, L. J., in *Fitzgerald* v. *W. G. Clark & Son,* (1928) 2 K. B. 796. "In the course of," said Judge BUCKLEY, means the place and circumstances in respect of which the accident took place, while "out of" points to the origin or cause of the misfortune.

In *Barrentine* v. *Dierks Lumber & Coal Co.,* 207 Ark. 527, 181 S. W. 2d 485, it was held that a compensable injury "must not only arise in the course of employ-

ment, but also *out* of the employment—both elements must be present.'' The same principle was stated in *Lundell* v. *Walker*, 204 Ark. 871, 165 S. W. 2d 600: ''The injury . . . must occur while the employe is engaged in the master's business''; that is, liability attaches ''when the servant acts with reference to the services for which he is employed and for the purpose of performing the work of his employer, and not for an independent purpose of his own.''

The policy promulgated by Act 319, said Mr. Justice CARTER in *Birchett* v. *Tuf-Nut Garment Mfg. Co.*, 205 Ark. 483, 169 S. W. 2d 574, ''. . . is to compensate only for losses resulting from the risk to which the fact of engaging in the industry exposes the employe.''

Many cases from other jurisdictions might be cited in support of the proposition that if the employe is engaged to do a particular class of work as to which the risk is conclusively presumed to be known to the master, and neither the master nor any of those authorized to speak for him enlarges upon the scope of such employment, and the employe is not, in circumstances known to the management, or that ought to have been known by him, allowed to vary from the assigned task to an extent materially increasing the risk, — then, if the servant through curiosity, a misconception of his duty, or for any other cause in conflict with the master's intent, where the restriction is one of reason, undertakes to do something on his own account and is injured, liability will not attach.

A case in point is *Bullard* v. *Cullman Heading Co.*, 220 Ala. 143, 124 So. 200. In the Court's opinion Chief Justice ANDERSON said that the plaintiff was employed to offbear heading from a machine in the defendant's plant. Activities placed him at a point to which the heading was taken by a chain conveyor. It was the plaintiff's duty to hand the material to a fellow employe, to be stacked. The plaintiff, in order to rest, asked his foreman for permission to exchange work with a floor-cleaner. After cleaning for a short period the plaintiff

left his job and began operating a bolting saw. This was without the knowledge of the foreman. The injury occurred within a few minutes of the time the unauthorized activity began. In discussing the issues on rehearing the Court said: "Here we have a case where the plaintiff was assigned a duty totally different from the one in which he was engaged when injured—one harmless, and the other to some extent dangerous, each independent of and disconnected from the other, and the master could not be liable in the absence of an express or implied consent to the discharge of the new duties. That there was such a departure, so as to remove the plaintiff from the protection of the Compensation Act, there can be no doubt."

In a case decided last year, *Georgejakakis* v. *Wheeling Steel Corp.*, 151 Ohio St. 458, 86 N. E. 2d 594, a Court-prepared syllabus says: "A person employed in and about an industrial plant, who departs from the sphere of his employment and is injured while deliberately and without authority or necessity engaging in a pursuit wholly foreign to the duties he was hired to perform, does not sustain an injury in the course of and arising out of his employment which is compensable under the Ohio Workmen's Compensation Act." Judge ZIMMERMAN, who wrote the opinion, said that a number of recent cases, factually similar to the Georgejakakis appeal, "hold that where an employe voluntarily and of his own motion exposes himself to risks patently outside of and beyond the course of his regular employment, and without the knowledge or acquiescence of his employer, such injury is not compensable."

Although Whitaker was an interested party (as was Branscumb) and his testimony will not be regarded as undisputed, and Cole was Whitaker's foreman, the jury had a right to find from the contradictory statements of the several witnesses that Branscumb was employed to work outside of the building and substantially away from it; that on August 18, 1948, he was not (as he so positively asserted) directed to engage in the transaction resulting in injury, and that his action in voluntarily substituting

for Hughes was not authorized by Cole. I think, too, that under the facts in this case, that part of Instruction No. 2 which told the jury that the plaintiff could not recover if, at the time, he was *"acting on his own volition and for his own purposes"* would have been sufficient—in the absence of an offered instruction by the plaintiff covering this point—to go to the jury on the issue of custom, even if it should be conceded that the plaintiff was entitled to try the case on two distinct theories—one involving express directions, and the other mill practices.

For these reasons I would affirm the judgment.

GUNTER *v.* FLETCHER.

4-9402 233 S. W. 2d 242

Opinion delivered October 23, 1950.

Wood & Smith, for appellant.

J. B. Reed and *John D. Thweatt,* for appellee.

LEFLAR, J. This is an election contest case. Appellant Gunter filed a complaint alleging that he and appellee Fletcher were the two candidates for nomination for the office of Senator from the 22nd Senatorial District in the Democratic primary on August 8, 1950, that Fletcher was certified as the winner, but that specified irregularities in the voting and counting of votes had occurred, so that Gunter was actually the winner. The concluding paragraph in the complaint's allegations of fact is as follows:

"12. Plaintiff alleges that proper recomputation of the votes cast will show the following totals, making plaintiff the nominee:

"For Fletcher 3160
"For Gunter ..... 3371"

The complaint does not set out the number of votes certified for each candidate in the official canvass of returns by the County Democratic Central Committee. Defendant Fletcher filed a general demurrer to the complaint, which demurrer was sustained by the Circuit Judge, and plaintiff's complaint dismissed. Plaintiff appeals.

Appellee Fletcher's position is that the demurrer was properly sustained because the complaint fails to state facts sufficient to constitute a cause of action, in that it does not set out what number of votes was certified for each candidate in the official returns, nor assert that Gunter is a qualified elector of the Senatorial District, 25 years of age, and a member of the Democratic party.

As to the failure of the complaint to recite the number of votes certified for each candidate in the official returns, appellee bases his argument on the cases of *Hill* v. *Williams,* 165 Ark. 421, 264 S. W. 964; *Moore* v. *Childers,* 186 Ark. 563, 54 S. W. 2d 409; and *Wilson* v. *Anderson,* 193 Ark. 799, 103 S. W. 2d 63. In each of these cases there was an attempted election contest, and in each of them a general demurrer, or a motion to dismiss, was held to have been properly sustained. In *Hill* v. *Williams,* the Court used, and thereafter the two later cases re-

peated, the following language upon which appellee relies:

"It was incumbent upon appellant to allege facts, and not conclusions, which would disclose, if true, that he received a plurality of all the votes cast for sheriff and collector in said county. . . . There should have been an allegation in the complaint showing the number of votes received by each candidate, so that it would appear, after deducting the alleged fraudulent votes from the number accredited to appellee, that appellant would then have more votes than either one of his opponents."

The effect of the argument is that these decisions require, in every election contest complaint, a formal recitation of the totals shown by the Central Committee's canvass, and that the omission of these figures always and inevitably will defeat the complaint regardless of what other allegations of fact be set out in it. To this we cannot agree.

The purpose of our statutes governing election contests is to aid the democratic processes upon which our system of government is based, by providing a ready remedy whereby compliance with the election laws can be assured. The purpose is to facilitate, not to hinder by technical requirements, the quick initiation of such contests.

"This court has several times held that the statute providing for contesting elections should be liberally construed. The purpose of the contest is to determine what candidate received the greatest number of votes; and if there are sufficient facts stated to give the other party reasonable information as to the grounds of the contest, then the case should be tried on its merits." *LaFargue* v. *Waggoner,* 189 Ark. 757, 768, 75 S. W. 2d 235, 240. "Since such contest is generally held not to be a civil action subject to the rules of pleading in actions at law, but to be a special statutory proceeding, . . . the same strict technical accuracy in pleading is not usually required as in civil actions *inter partes.* . . . it is not essential that the contestant set forth the grounds

of his contest with the precision required of a pleading in a civil action, certainty to a common intent being all that is required, and technical objections will be disregarded." *Robinson* v. *Knowlton,* 183 Ark. 1127, 1133, 40 S. W. 2d 450, 452. And see *Winton* v. *Irby,* 189 Ark. 906, 75 S. W. 2d 656; *Hailey* v. *Barker,* 193 Ark. 101, 97 S. W. 2d 923.

Plaintiff in his complaint here alleges certain specific irregularities in the voting and counting of votes, then asserts that a proper recomputation of the votes will show Gunter with 3371 votes and Fletcher 3160, making Gunter the nominee. That is a clear and sufficient allegation of facts entitling Gunter to win the contest, if the evidence sustains his allegations. A recital of the official returns in addition would under these circumstances serve no genuinely useful purpose in the lawsuit, would add nothing to appellee's information as to the facts upon which Gunter relies as grounds for his contest. To require the recital would be to insist upon a technicality, otherwise useless, for its own sake.

Such a requirement would not be in keeping with the law of Arkansas as to pleadings generally, which since the adoption of our Civil Code has provided simply that "The complaint must contain . . . a statement in ordinary and concise language, without repetition, of the facts constituting the plaintiff's cause of action," Ark. Stats., § 27-1113, nor is there anything in the statute governing complaints in election contests, Ark. Stats., § 3-245, from which the requirement can be discovered. If the technicality is insisted upon, it will be because this Court imposes it in this special situation; it is one imposed nowhere else in our law governing pleadings, and one not even hinted at by the controlling statute.

Nor does it seem to us that the technicality is required in this case by the three earlier decisions upon which appellee relies. *Hill* v. *Williams, supra,* the first of them, involved a contest of an election in which there were four candidates, not two, and the conclusion was that the peculiar wording of the complaint there filed,

not quoted in the opinion, "failed to show that appellant received a plurality of all the legal votes cast for sheriff and collector at said election." The case did not hold that a recital of the official returns was the only phraseology whereby the requisite facts could be alleged, but rather held that the complaint had no allegation in it, in any form, setting out the facts necessary to constitute a case for the plaintiff. Essentially the same explanation applies to the language used in *Moore* v. *Childers, supra,* where there were five candidates and the complaint did not identify them nor indicate what vote the others had received, and in *Wilson* v. *Anderson, supra,* where there were three candidates and the vote for the third candidate was not alleged. In each of these cases it was apparently impossible for one reading the complaint to find any clear allegation in it that the contestant had received a plurality of the votes cast. No comparable difficulty appears from a reading of the complaint in the present case; its allegation is clear that, with only two candidates in the election, Gunter received 3371 valid votes and Fletcher 3160 valid votes.

Finally, if the plaintiff's allegations were in any respect so indefinite that, though a cause of action was stated, the defendant still would have difficulty in preparing his defense, the remedy would be by motion to make more definite and certain, Ark. Stats., § 27-1160, and it would be proper for the Court to treat the demurrer as a motion to make more definite and certain by requiring recitation of such additional facts as would enable the defendant adequately to prepare his defense. *Reynolds* v. *Roth,* 61 Ark. 317, 33 S. W. 105; *Forrest* v. *Forrest,* 208 Ark. 48, 184 S. W. 2d 902.

As to the alleged defect of the complaint in not setting forth Gunter's electoral status, age, and Democratic party membership, we hold that these are matters of affirmative defense. A candidate already admitted by the proper authorities to participation in the party primary, whose right to participate therein has not been attacked in advance of the primary, presumptively possesses the general qualifications essential to that par-

ticipation. One who wishes thereafter to attack the candidate on the ground that he lacks these qualifications must affirmatively plead the lack of them. The right of contest is by statute, § 3-245, specifically "conferred on any candidate," with the result that anyone who has been allowed to participate in a primary election as a candidate need not establish anew his qualifications to be a candidate unless they are affirmatively questioned.

The judgment of the Circuit Court is reversed and the cause is remanded.

MILLWEE, J., dissents.

GRIFFIN SMITH, C. J., not participating.

PENNY, ADMINISTRATRIX *v.* GULF REFINING COMPANY.

4-9258 233 S. W. 2d 373

Opinion delivered October 30, 1950.

Lee Ward, for appellant.

Charles Frierson and *Kirsch & Cathey,* for appellee.

LEFLAR, J. Plaintiff administratrix brought action for the alleged wrongful death of her husband, Alfonzo Penny, who was killed in a highway collision between a milk truck which he was driving and a Gulf Oil Products truck driven by defendant Cooper assertedly acting as the employee of the other defendants. Plaintiff's complaint alleged negligence in defendant Cooper's driving as the cause of the collision. This the defendants denied. At the trial plaintiff introduced all her evidence, and rested, whereupon defendants moved for directed verdicts, which were granted by the Circuit Judge. Plaintiff appeals.

"A directed verdict for the defendant is proper only when there is no substantial evidence from which the jurors as reasonable men could possibly find the issues for the plaintiff. In such circumstances the trial judge must give to the plaintiff's evidence its highest probative value, taking into account all reasonable inferences that may sensibly be deduced from it, and may grant the motion only if the evidence viewed in that light would be so insubstantial as to require him to set aside a verdict for the plaintiff should such a verdict be returned by the jury." *Hawkins* v. *Mo. Pac. R. Co., ante,* p. 42, 228 S. W. 2d 642, 644.

The evidence introduced by the plaintiff showed that decedent was driving his milk truck in a westerly direction on State Highway 34, a gravel road near Paragould. The oil truck was being driven by defendant Cooper in an easterly direction on the same road. Shortly before the collision a state highway truck, also being driven toward the east, had overtaken and passed the oil truck. The highway was dry and dusty, and there was apparently a great deal of dust in the air, perhaps enough to obscure vision. At the time of the collision, decedent Penny's truck and the state highway truck, going in opposite directions, had just passed each other. Penny's truck then collided with the oil truck, which was close

behind the state highway truck. The collision apparently occurred in the midst of a cloud of dust.

Alfonzo Penny, the only occupant of his truck, was instantly killed. Defendant Cooper, driver of the oil truck, was not called as a witness by the plaintiff and, since the motion for directed verdict was granted at the close of plaintiff's evidence, he did not testify at all. There were no other eye witnesses of the collision. Both trucks came to rest on the north side of the highway, which was the right side for the Penny truck and the left side for Cooper's oil truck. The Penny truck had been struck on its left side, and it came to rest close to the point of collision. The oil truck had its front wheels knocked off. These rolled to the north side of the road a hundred feet or more to the east of the Penny truck. The oil truck itself, without its front wheels, skidded on the front of its chassis to a point on the north side of the road variously estimated to be 150 to 250 feet east of the Penny truck.

The theory upon which plaintiff attempted to establish negligence in defendant Cooper was that Cooper was driving on the wrong side of the road, which fact was the proximate cause of the collision, and that Cooper was generally a negligent driver. Defendants' theory was that Alfonzo Penny was driving on the wrong side of the road, and that this fact was the cause of the collision. The burden of proof was of course on the plaintiff.

The only tangible evidence given as to whether the point of collision was on the south (Cooper's) side of the road or on the north (Penny's) side came from two witnesses who testified as to the nature and location of marks left on the road surface by the two trucks.

Witness Marvin Penny testified in detail as to these marks, supporting his testimony by reference to two photographs, also introduced in evidence, both taken at the scene of the collision shortly after it occurred. His testimony was that the skid mark of the oil truck chassis, "scooting" on the road surface after the wheels were lost, commenced well over on the south (Cooper's) side

of the roadway, and veered to the north side only as it came near to the point where the truck finally stopped, a considerable distance to the east of the point of collision. Both photographs also showed this skid mark commencing and continuing for some distance on the south (Cooper's) side of the road. In addition, Marvin Penny testified that the marks of the right hand dual tires of the oil truck were clearly visible on the south (Cooper's) side of the roadway, very near to the sodded line on the south edge of the graveled road. The testimony of this witness tends altogether to support the defendants' rather than the plaintiff's theory as to how the collision occurred.

The other witness who testified about the marks on the highway was Press Williams. He came to the scene about an hour after the accident, whereas Marvin Penny came up at once. The whole of Williams' testimony concerning marks on the highway was elicited on direct examination by plaintiff's counsel, and is quoted herewith:

"Q. You have said there was some kind of marks in the highway leading up to the Penny truck? A. It was the oil truck wheels where it looked like it was going to pull out and go around. Q. What I asked you about was physical marks on the road leading to the Penny truck. Did you observe any? A. Yes. Q. What kind were they? A. Looked like dual wheels. Q. Leading up to the Penny truck? A. Right past the wreck. Looked like it dug out two little holes. Q. I am afraid you don't understand what I am talking about. Was Mr. Penny's body still there? A. Yes, sir." (Tr. 75-76).

Plaintiff on appeal argues that this constitutes evidence that Cooper may have attempted to pass the state highway truck ahead of him just before he collided with Alfonzo Penny's truck, and that he had pulled over onto the left (Penny's) side of the highway in order to do so.

Press Williams' testimony, as quoted, was the only evidence from which this conclusion might have been inferred. We do not believe that his testimony would be

sufficient to sustain a jury verdict to the effect that this was what happened. The words "It was the oil truck wheels where it looked like it was going to pull out and go around," in the context in which they appear, are ambiguous, and we cannot say that they constitute any evidence to support plaintiff's theory as to how the collision occurred. This conclusion is buttressed by the fact that plaintiff's counsel apparently attached no special significance to the words at the time the witness testified, since he then said to the witness "I am afraid you don't understand what I am talking about." The true meaning of ambiguous words is usually much better understood by those who hear them when they are spoken than by others who read them later in the cold type of a formal record.

Another alleged error asserted by appellant is that the Court refused to allow witness Marron Mason to testify that the deceased Alfonzo Penny was habitually a careful driver and that the witness knew the defendant Cooper to be a careless and reckless driver. Without deciding whether this testimony should or should not have been admitted, it is enough now to point out that even had it been admitted it would not, in the absence of evidence sufficient to establish negligence in Cooper in the particular instance, have sustained a verdict for plaintiff. Since we hold that there was no evidence showing that Cooper was negligent in this instance, it follows that no prejudice resulted from exclusion of this part of Marron Mason's proffered testimony.

Finally, appellant contends that his case should have been given to the jury under the doctrine of *res ipsa loquitur*. This Court has held otherwise. *Arkmo Lumber Co.* v. *Luckett,* 201 Ark. 140, 143 S. W. 2d 1107. And see 8 U. of Ark. Law School Bull. 43. *Res ipsa loquitur* has no application unless the evidence in the particular case has a substantial tendency to show negligence in the defendant and in nobody else. That was not the state of the evidence here.

The judgment of the Circuit Court is affirmed.

4-9262 233 S. W. 2d 375

Opinion delivered October 30, 1950.

[redacted]

Golden Blount and *Harry Neelly,* for appellants.

C. E. Yingling, C. E. Yingling, Jr., and *Wm. H. Roth,* for appellee.

George Rose Smith, J. This is a proceeding brought by the appellee Malcolm McFadden to obtain the dissolution of an insolvent partnership in which he and the appellant A. O. Sims were partners. The questions presented by this appeal are whether the chancellor sufficiently protected Sims' homestead and whether the decree correctly adjudicated the priorities of the firm's various creditors.

On April 1, 1948, McFadden and Sims formed a partnership to operate an automobile agency in Searcy. At that time Sims and his wife jointly owned a parcel of urban property on which were situated their dwelling and also a business building in which Sims had been conducting a garage business. About a year earlier the couple had mortgaged this property to Mrs. Sims' brother, M. M. Garrison, to secure a debt of $5,500. In the court below Garrison asked that his mortgage be foreclosed, and the court granted that relief. No one now disputes the priority of Garrison's mortgage over the claims of other creditors.

McFadden testified that when the partnership was formed Sims agreed to contribute this real estate to the venture. Sims denies this, saying that the firm was merely to occupy the premises rent free. Every one agrees that the partnership did occupy the business building on the parcel of land and that the Sims family continued to make their home in the dwelling house. We think the clear preponderance of the testimony supports the chancellor's finding that Sims agreed to contribute to the business all the real estate except his dwelling house. On two occasions the firm gave financial statements listing the parcel of land as a partnership asset. In November of 1948 the partners signed a memorandum assuming the Garrison mortgage and reciting that title would vest

in the partnership when the mortgage was paid. Thereafter a payment of $250 upon the mortgage was made with partnership funds. These facts leave us with no doubt that the commercial part of the real estate was contributed by Sims to the firm when it began business.

In spite of this evidence Sims insists that he could not validly turn his homestead over to the firm, since our statute provides that any conveyance of a homestead is void if the wife does not join in the deed. Ark. Stats. 1947, § 50-415. Sims' theory is that since the area of this entire parcel is less than the constitutional minimum of a quarter of an acre for a homestead, he could not devote a part of it to commercial purposes without his wife's joinder. But the answer is that we are not dealing with a conveyance of a homestead. Instead, Sims' conduct amounted to an abandonment of his homestead right in the area devoted to commercial use, and we have often held that a husband may abandon his homestead without his wife's consent. *Sidway* v. *Lawson,* 58 Ark.. 117, 23 S. W. 648; *Stewart* v. *Pritchard,* 101 Ark. 101, 141 S. W. 505, 37 L. R. A. (N. S.) 807.

Thus Sims could and did contribute to the partnership all the tract of land except his dwelling and its curtilage. The entire tract was mortgaged to Garrison, who asks that his mortgage be foreclosed. It seems likely that the proceeds of sale will materially exceed the amount of the mortgage debt. The most serious question in the case concerns the proper disposition of the surplus after the mortgage debt has been paid.

It is shown by uncontradicted testimony that the dwelling house and its surrounding yard comprise 26.5% of the total value of the tract. The chancellor, taking the view that Garrison should be required to proceed first against the security which he alone could reach, directed that the first 26.5% of the proceeds of sale should be applied upon the mortgage debt. The decree provides that the remaining 73.5% of the proceeds shall be applied first to satisfy the rest of the mortgage debt, and any remaining balance shall be divided equally between Mrs. Sims (whose interest as a tenant by the entirety is not

subject to her husband's debts) and the common creditors of the partnership.

This decree would ordinarily be a proper marshaling of the assets, since the general rule is to require a secured creditor to proceed first against that part of his security that the common creditors cannot reach. But when a homestead is involved there is a well recognized exception to this rule. One whose homestead is mortgaged along with other property is entitled to demand that the mortgagee proceed first against the other property. *Bank of Hoxie* v. *Graham,* 184 Ark. 1065, 44 S. W. 2d 1099. In this situation a common creditor cannot invoke the ordinary rule that requires the secured creditor to look first to that part of his security that the other creditors cannot reach. *Bank of Luverne* v. *Turk,* 222 Ala. 549, 133 So. 52; *Mounce* v. *Wightman,* 29 Ariz., 567, 243 P. 415. The law is so solicitous of the homestead right that the secured creditor will be required to exhaust his non-exempt security first, even though this procedure entails a loss to the common creditors. *Nolan* v. *Nolan,* 155 Calif. 476, 101 P. 520; *Kerens Nat. Bk.* v. *Stockton,* 120 Tex. 546, 40 S. W. 2d 7.

In view of these principles we must reverse that part of the decree that makes the homestead itself primarily liable for the mortgage debt. The proceeds of sale will be applied first to the satisfaction of the mortgage. Next, 26.5% of the original proceeds of sale (or whatever lesser amount is all that remains) will be paid to the Simses as their homestead interest. This 26.5% is in its entirety exempt from the claims of common creditors. Mrs. Sims' share is of course not subject to the claims of her husband's creditors. Sims' own share is also exempt, for we have held that when a homestead is sold at a forced sale, as distinguished from a voluntary sale, the debtor's share of the proceeds is exempt if he intends to use it to acquire another homestead. *Simpson* v. *Biffle,* 63 Ark. 289, 38 S. W. 345; see also, *Franklin Fire Ins. Co.* v. *Butts,* 184 Ark. 263, 42 S. W. 2d 559. Sims has insisted upon his homestead rights from the inception of this suit, and we think he should be allowed a reasonable time in which

to invest his share of the proceeds in another homestead.

After the payment of the 26.5% to the Simses any remaining balance will be divided equally between Mrs. Sims as co-owner of the property and the creditors of the partnership. We think it necessary to add that since the tenancy by the entirety attaches to the proceeds of sale it is perhaps true that either Mrs. Sims or the creditors might have demanded that this remaining part of the purchase price be held by the court until the tenancy by the entirety is terminated by the death of either the husband or the wife. But neither the creditors nor Mrs. Sims has made this suggestion, and we treat their silence as an acquiescence in the chancellor's decision to divide the sum equally.

The other provisions of the decree are correct. Here the controversies arise from an unrecorded chattel mortgage given by Sims to his father-in-law, O. M. Garrison, in 1946—long before the partnership was organized. This mortgage covered certain garage equipment that Sims later contributed to the original capital of the firm. In August of 1949 the firm gave a chattel mortgage to the Security Bank, conveying "all garage equipment contained in an automobile garage, show room and paint shop located at 1512 East Race Street, Searcy, Arkansas . . ." Under our decisions this is a valid description. Hughes, Arkansas Mortgages, § 63. The bank recorded its mortgage promptly, while Garrison's was not recorded until after this suit was filed. The chancellor correctly gave priority to the instrument first placed of record. Ark. Stats., § 51-1002.

The remaining issue is that of priority between Garrison's chattel mortgage and McFadden's claim for capital advanced in addition to his original contribution. The partners at first made capital contributions of equal value, but when the firm began to encounter financial problems McFadden from time to time advanced an additional $5,300, Sims agreeing that the firm would repay these advances. The decree gives McFadden judgment for $5,300 and makes it subordinate to all other claims

except Garrison's judgment under his chattel mortgage, over which McFadden is awarded priority.

An unrecorded mortgage is good in Arkansas against the mortgagor, his heirs, general creditors having no specific lien, and others who merely stand in the mortgagor's shoes. But it is not good against strangers. Hughes, *supra,* § 136. The question is therefore whether a stranger acquired rights in the property before the mortgage was recorded. The answer must be in the affirmative. Sims contributed the mortgaged property to the partnership, and McFadden contributed a like amount of capital upon the assumption that the property was unencumbered. Under the Uniform Partnership Act the partners became tenants in partnership as to this property. Ark. Stats., § 65-125. As such a tenant Sims no longer had any individual property in any specific asset of the partnership, his interest being limited to his share of the profits and surplus. § 65-126. The firm itself acquired title to the property, and by the terms of the Act a partnership can receive and convey property in its partnership name. § 65-108. In view of this provision it is generally held that at least as to conveyances the Act treats a partnership as an entity rather than as an aggregate of its members. 7 U. L. A. § 6, note 8. Hence the partnership took the property free of the unrecorded mortgage, and a partnership creditor stands in the same position. McFadden's claim for capital contributions is a partnership debt, § 65-140 (b, III), and as to partnership assets it is entitled to priority over Garrison's claim against Sims as an individual. § 65-140 (h).

As to the distribution of the real estate proceeds the decree is reversed and the cause remanded. In other respects the decree is affirmed.

4-9260 233 S. W. 2d 378

Opinion delivered October 30, 1950.

[redacted]

Hebert & Dobbs, for appellant.

Charles X. Williams, John Freeman, Witt & Witt and *Donald Poe,* for appellee.

ED F. MCFADDIN, Justice. This litigation stems from a timber contract between the parties.

In 1947 appellees agreed to purchase, and appellants agreed to sell, the pine and oak timber of specified size from eight tracts of land totaling 1,960 acres. The agreed price was to be $30 per thousand for pine timber, and $12 per thousand for oak timber; and the appellees were to cut and remove the timber from the tracts within a specified time. Appellees paid appellants $10,000 as part payment and were to render regular reports and calculations. Included in the contract was the timber on a tract of 1,160 acres, known as the "Standridge Tract," concerning which appellants were in litigation; and the con-

tract provided that if appellants lost such litigation, then the Standridge Tract would be deleted from the contract. The appellants lost such litigation[1] and, as a result, the appellees claimed the timber on the remaining tracts was not sufficient to equal the $10,000 initial payment and the other payments made; and appellees brought this action to recover $1,734.82 claimed to be due them. Appellants conceded that appellees would have been entitled to a refund if the timber on the remaining tracts had not equalled $10,000 and other payments; but appellants claimed that the timber exceeded the total payments by $2,339.29 for which amount appellants prayed judgment on their cross-complaint.[2] The cause was tried to a jury and resulted in a verdict and judgment in favor of appellees for $1,734.82; and appellants, in seeking a reversal, present the contentions now to be discussed.

I. *Admission of Evidence.* The trial court, over appellants' objections, allowed appellees' witness, Alexander, to introduce in evidence a statement of several pages which was an audit or recapitulation of appellees' records concerning the timber cut and removed. Appellants claim that this statement was inadmissible under the rule against hearsay evidence;[3] and they cite *Central Coal & Coke Company* v. *John Henry Shoe Company,* 69 Ark. 302, 63 S. W. 49; *Johnson* v. *Berg,* 147 Ark. 323, 227 S. W. 413; *Rouw* v. *Arts,* 174 Ark. 79, 294 S. W. 993.

We conclude, however, that the evidence introduced in the case at bar made the Alexander statement admissible on every point except as to which tract of timber furnished each load of logs. Here is such evidence: Oscar Graham testified that he made duplicate tickets just as he scaled each load of logs; that all of the tickets were written by him except one, and he furnished the

[1] See *Standridge* v. *Rice,* 212 Ark. 703, 207 S. W. 2d 598; and *Rice* v. *Standridge,* 214 Ark. 806, 218 S. W. 2d 88.

[2] There were one or two small items, involving a saw and a claimed shortage on some lumber, that were included in the figure named in the cross-complaint.

[3] "Evidence is hearsay when its probative force depends on the competency and credibility of some person other than the witness. Subject to certain exceptions, the courts will not receive testimony of a witness as to what some other person told him, as evidence of the existence of the fact asserted." 31 C. J. S. 919.

information for that one; and he gave one copy to the timber hauler, and filed the other copy with Herbert Watson, bookkeeper of appellee. These original tickets were introduced in evidence. So Alexander's testimony about the tickets was a recapitulation of what the tickets showed and was substantiated by the man who made them. Herbert Watson testified that he posted appellees' ledgers from the said original tickets; and the ledgers were exhibited at the trial. So Alexander's statements of what the ledger showed were not only supported by the man who had made the tickets but also by the man who had made the entries in the ledger.

Graham and Alexander each testified that Alexander was the auditor, or head bookkeeper; that when Alexander prepared the questioned statement, Graham assisted him; that the statement was prepared for appellants; and that one of the appellants personally checked the appellees' books and haul tickets. Testifying in the case were a timber cutter, timber hauler, the log scaler who made the tickets, and the bookkeeper, as well as Alexander, who prepared the statement introduced. In short, the person performing each stage of the procedure testified; and such testimony removes the statement from the inhibition of hearsay testimony, because the statement prepared by Alexander and introduced in evidence was a recapitulation of the combined testimony of the witnesses who testified from personal knowledge. This is true as to every part of the Alexander statement, except that part which attempted to show the particular tract from which each log came, and that point is further discussed in Part II, *infra.*

Furthermore, since the timber contract required the appellees to submit to appellants a statement of the timber received under the contract, this statement made by Alexander, under all of the circumstances heretofore mentioned, might have been a record made in the regular course of business, and admissible under the rules stated in *Alexander* v. *Williams-Echols Dry Goods Company,* 161 Ark. 363, 256 S. W. 55. And see, also, Act 293 of 1949 which is an Act to provide for the introduction

in evidence of records made in the regular course of business.

II. *Motion for an Instructed Verdict.* At the close of the plaintiffs' case in chief, the defendants' (appellants here) motion for an instructed verdict was refused and such ruling is assigned as error. In testing the correctness of the Court's ruling, we must consider all the evidence in the case. See *Grooms* v. *Neff Harness Company,* 79 Ark. 401, 96 S. W. 135; *Fort Smith Cotton Oil Company* v. *Swift & Company,* 197 Ark. 594, 124 S. W. 2d 1.

Appellants' main insistence on this point is that the contract required the logs to be scaled "at the mill site" of appellees, whereas, in fact, some of the logs were scaled at a railroad point. Appellants also insist that the contract required appellees to keep a record of the timber cut from each tract, and that appellees failed to comply with such provisions.

As to these matters, there was evidence (a) that Carpenter—one of the appellants—checked appellees' books and haul tickets each two weeks and raised no objection to the place at which the logs were scaled, or as to the failure, if any, to show from which tract the timber came; and (b) that statements of the logs so scaled were delivered to the appellants and received by them without objection. Such evidence was sufficient to take the case to the jury on the principal issue of whether, in fact, there was sufficient timber on appellants' lands to equal the advance deposit of $10,000 plus the other payments made. That was the bitterly contested feature of the case.[4] The jury might well have found that after the elimination of the Standridge Tract, the parties considered the point of delivery and the designation of tracts from which the timber came to be

[4] That such is true is indicated by a statement made by appellants' attorney, when—in objecting to appellees' interrogation of a witness as to each of the haul tickets—he said: "If the court please I don't want to interrupt this line of examination if the court thinks it is necessary, but there is no controversy between us as to the method they kept books. The controversy is whether they cut all the timber they should cut and whether they cut some they shouldn't cut. We don't dispute their method of keeping books."

so inconsequential as to ignore them in their dealings. On this basis the Alexander statement as to the designation of the tracts from which the logs came was immaterial. The motion for an instructed verdict was properly denied.

III. *Appellants' Instruction No. 3.* Appellants complain of the refusal of the Court to give this instruction which reads:

"You are instructed that it was the duty of the plaintiffs to have all tracts of lands included in the timber purchasing contract surveyed by metes and bounds and the boundaries plainly established in order to learn or ascertain the amount of merchantable timber they were obligated to cut and, if you believe from the evidence, that plaintiffs failed or neglected to so fix said boundaries then you will take that into consideration in determining whether plaintiffs properly accounted for all timber they were obligated to cut and in arriving at your verdict on their claim under their complaint and amendment thereto."

This instruction was intended to make applicable to this case the provisions of § 54-201, Ark. Stats.[5] (1947). But that section is clearly for the protection of owners of property adjacent to timber about to be cut, and certainly can be waived by parties as to their timber, even if applicable to such a situation. That such provision was waived by all parties in this case is shown by the evidence. Appellee, Leo Moudy, testified that appellant, Rice, told him that appellees would be relieved of having the land surveyed because appellant, Carpenter, was familiar with the tracts of timber and would show the

[5] This Section reads: "Before any person or persons, who shall desire to cut and remove for purpose of rafting, making railroad ties, piling, telegraph poles, staves, or sawing into lumber, any timber from any land in this State, he, or they, shall, unless the same has been surveyed and the boundaries thereof ascertained and known, before cutting and removing the same, procure the county surveyor of the county in which such land may be situated and cause such land to be surveyed by said surveyor, and the metes and bounds of such land shall be marked and plainly established. And this act shall apply as well to persons purchasing timber rights from lands of this state, as to land owners. (Act Mar. 6, 1885, No. 45, § 1, P. 50; C. &. M. Dig., § 7018; Pope's Dig., § 8998)."

cutters where to cut. Appellant, Carpenter, testified that he knew the lines of the different tracts and showed the cutters such lines. So certainly the conduct of the parties constituted a waiver of the Statute, even if applicable, which we do not decide. The trial court was, therefore, correct in refusing appellants' Instruction No. 3.

Finding no error, the judgment is affirmed.

ARKANSAS WORKMEN'S COMPENSATION COMMISSION *v.* SANDY.

4-9188 233 S. W. 2d 382

Opinion delivered October 30, 1950.

John T. Jernigan and *John P. Streepey,* for appellant.

Wm. H. Roth, for appellee.

DUNAWAY, J. The Arkansas Workmen's Compensation Commission appeals from an order of the White

Circuit Court. The court set aside a finding of the Commission that appellee, David R. Sandy, was not entitled to payment from the Workmen's Compensation "Second Injury Fund" as claimed by him, and allowed said claim for total and permanent disability.

In 1925, before the enactment of a Workmen's Compensation Act in Arkansas, Sandy received an injury to his left hand, whereby he lost all the fingers on the hand except the thumb. On July 21, 1943, while employed as a millwright by the Hansen & Haggott Lumber Company of Searcy, Arkansas, Sandy suffered an injury to his right arm, necessitating its amputation above the elbow. Compensation at the rate of $20 per week was paid him for 20 weeks, covering his period of temporary total disability. Claimant was then paid a lump sum settlement in the amount of $3,754.76, representing the sum he was entitled to at $20 per week for 200 weeks for loss of his right arm, as provided for by the Workmen's Compensation Act. This order of the Commission was dated April 6, 1944.

On July 19, 1944, Sandy filed a claim with the Commission alleging that as a result of the 1925 injury to his left hand and the subsequent loss of his right arm in 1943, he was totally and permanently disabled. By this claim appellee sought additional compensation from the "Second Injury Fund" provided for by the Workmen's Compensation Act.

The section of the Workmen's Compensation Act under which Sandy was paid compensation for the loss of his right arm now appears as § 81-1313 (c) Ark. Stats. (1949 Suppl.). That section provides the compensation which shall be paid for the specific loss of various members of the body.

The part of the Act under which the present claim for additional compensation was filed reads as follows: (Ark. Stats. (1949 Suppl.) § 81-1313)

"(f) Second injury. In cases of permanent disability arising from a subsequent accident, where a permanent disability existed prior thereto:

. . . . . .

"(2) If an employee has a prior permanent disability not occasioned by an injury resulting while in the employ of the same employer in whose employ he received a subsequent permanent injury, the amount of compensation for the subsequent injury shall be fixed as follows:

. . . . . .

"iii. If an employee who had previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one leg, or an eye, incurs permanent total disability through the total loss of another member, enumerated in this sentence, he shall be paid, in addition to the compensation for permanent partial disability provided in section 13 (c) (subsection (c) of this section), additional compensation during the continuance of such total disability not to exceed sixty-five per centum (65%) of the average weekly wage earned by him at the time of the accident which produced the total permanent disability. In case an employee who has been awarded additional compensation under this subsection subsequently establishes an earning capacity by employment, he shall be paid during the period of such employment, instead of the compensation above provided sixty-five per centum (65%) of the difference between his average weekly wages at the time of the accident which produced total disability and his wage earning capacity as determined by his actual earnings in such employment. The sum total of compensation payable for all disabilities shall not exceed 450 weeks or eight thousand ($8,000) dollars. Compensation provided in this subsection shall be paid out of a special fund created for such purpose in the following manner: The employer, or, if insured, his carrier, shall pay the sum of five hundred ($500) dollars into such special fund for every case of injury causing death in which there are no persons entitled to compensation. The State Treasurer shall be custodian of this special fund, to be known as Second Injury Fund, and the Commission shall direct the distribution thereof."

After appellee's additional claim was filed, he was examined by Dr. D. T. Cheairs, medical examiner for the Commission. Dr. Cheairs' report reads as follows:

"I have today, September 29, 1947, made examination of David R. Sandy, white male, age, 64 years. Injured his left hand in May of 1925, and lost his right arm July 21, 1943. *Present Complaint*: 'I have lost my left index, middle, ring and little fingers where they join the left hand. My left thumb is o. k.' *Findings*: Claimant's right arm was amputated just above the elbow. His left index, middle, ring and little fingers were amputated in metacarpel-phalangeal joints. Left thumb functions normally. *Opinion*: Claimant has 70 per cent permanent partial disability to his left hand in addition to the loss of his right arm about the elbow."

This report and testimony of the claimant were considered upon hearing of the claim by Chairman Peel of the Commission in September, 1947. Commissioner Peel's opinion denying the claim was filed December 16, 1947. At the hearing by the full commission upon review of Commissioner Peel's findings, a medical report of Dr. Porter R. Rogers, claimant's family physician, was filed. Dr. Rogers' report, dated February 21, 1948, is as follows:

"This is to certify that I have been the family physician of David R. Sandy since 1942. In 1943, Mr. Sandy received an injury in which he lost his right arm. He has only the thumb of his left hand, having lost all of his fingers in an accident in 1925. *Physical Findings*: The loss of all the fingers on his left hand and the loss of his right arm above the elbow, leave Mr. Sandy totally and permanently disabled from following any gainful occupation. It is my opinion that Mr. Sandy is totally and permanently disabled in his left hand."

The claimant's own testimony may be briefly summarized: Prior to the 1925 injury to his left hand, he was a millright and continued in this occupation until he lost his right arm as a result of the accident in 1943. After the loss of his right arm he bought and sold timber

tracts and timber until some time in 1947. His son had a small sawmill, and part of the timber was processed through this mill. He also bought some tie siding from his son and had it manufactured. He was only able to make a living through the aid of his son and because of the lump sum compensation settlement he had received. His plan (set forth as the reason for the lump sum settlement in 1944) to go into the beer business had not materialized. He could operate a rice farm in his physical condition, and thinks he could make a living doing this if he had the necessary capital.

The Commission also considered a letter dated November 1, 1944, from the District Supervisor of Vocational Rehabilitation, State Board of Vocational Rehabilitation, to the effect that because of Sandy's physical disability and his advanced age, there was nothing that department could do to assist him.

Upon the evidence above outlined, the Commission denied appellee's claim. The Commission found that Sandy was not totally and permanently disabled and that he had not suffered the total loss or loss of use of his left hand prior to the 1943 injury. The Commission found as a fact that the loss of use of claimant's left hand was only partial, both before and after the subsequent injury to his right arm.

In denying the additional compensation claimed from the "Second Injury Fund", on the basis of its finding of fact, the Commission stated this in its opinion:

"This fund, called the 'Second Injury Fund', is a limited and restricted fund and is created specifically for the benefit of those employees who are found to be totally and permanently disabled and who strictly comply with the provisions and requirements of § 13 (f) (2) (iii). While Workmen's Compensation Acts are generally to be liberally construed the solvency of this special 'Second Injury Fund' requires that the provisions and requirements thereof be fully and strictly complied with. In our opinion, the 'loss of a member or organ', or the 'loss of use of a member or organ', as is provided for in § 13

(f) (2) (iii) means the total loss or total loss of use. To hold otherwise would open this special fund to the point of insolvency and provide no benefit to those who do comply with its provisions and who are entitled to benefits thereunder."

This court has held that the degree of disability suffered by an injured employee is a factual question to be determined from the evidence in the case. *Caddo Quicksilver Corporation* v. *Barber,* 204 Ark. 985, 166 S. W. 2d 1; *Bookout* v. *Reynolds Mining Company,* 213 Ark. 198, 209 S. W. 2d 881.

In the instant case, the medical testimony as to the extent of claimant's disability was conflicting, and the Commission evidently chose to accept the report of Dr. Cheairs. The courts are without authority to reverse the conclusion of the Commission in this regard. *Mechanics Lumber Company* v. *Roark,* 216 Ark. 242, 224 S. W. 2d 806. On the whole case, there is substantial evidence to support the Commission's finding of fact, and the Circuit Court erred in setting aside the order of the Commission.

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

WEBB *v.* HERPIN.

4-9255 233 S. W. 2d 385

Opinion delivered October 30, 1950.

M. C. Lewis, Jr., for appellant.

GEORGE ROSE SMITH, J. This action in unlawful detainer was brought by the appellants to obtain possession of a house and lot in the city of Hot Springs. The complaint alleged that the principal defendant, Willie Mae Herpin, was occupying the property as a tenant and was wrongfully detaining it after notice to vacate. In her answer the defendant denied these allegations and pleaded that in 1936 she had agreed to buy the property from the plaintiffs' predecessor in title, that the monthly payments under her written contract of purchase had been duly made, etc., with a prayer that the complaint be dismissed. At the trial, the plaintiffs offered testimony to show that the contract of sale had been terminated in 1943 and that thereafter the defendant had been merely a tenant. The defendant met this evidence with proof that the contract was still in force and that her monthly payments had been installments on the purchase price and not rent. The verdict and judgment were for the defendant.

The main arguments for reversal center upon the trial court's action in permitting the defendant to prove her own title in a suit in unlawful detainer. The appellants' theory is that since this is merely a possessory

action the appellee should not have been allowed to show that she had been making payments under an agreement to purchase. It is true that in this form of action the title is not in issue and cannot be given in evidence "except to show the right to possession, and the extent thereof." Ark. Stats. 1947, § 34-1519. Hence if the defendant admits his status as a tenant he cannot defend his possession by asserting title to the land. But this is far from saying that the defendant in unlawful detainer can never prove that he owns the land. The plaintiff, to make a *prima facie* case, must offer evidence that he rented the property to the defendant. If the defendant has denied the landlord-tenant relationship he is entitled to bolster his denial by an attack on his adversary's title. *James* v. *McDuffy,* 133 Ark. 599 (mem.), 202 S. W. 821. In fairness to the defendant the rule could not be otherwise. Suppose that the plaintiff's testimony that he rented the land to the defendant is utterly false. Certainly the defendant ought not to be limited to taking the witness stand and making a bare denial of his opponent's testimony. The strongest possible corroboration of the defendant's contentions would be proof that he had owned the property for years, and that the plaintiff had no semblance of title. Hence we are of the view that the statute permits proof of ownership when the defendant, as here, denies the existence of the asserted tenancy.

The fallacy in the appellants' argument lies in the failure to distinguish what the defendant may *plead* and what he may *prove.* This distinction really goes back to the doctrine of *res judicata.* Ordinarily the binding effect of a judgment is determined by an examination of the pleadings as well as the judgment itself. *Fawcett* v. *Rhyne,* 187 Ark. 940, 63 S. W. 2d 349. Our statute explicitly provides that title is not to be adjudicated in unlawful detainer; the issue is merely the right to possession. But if the defendant were permitted to plead his title, and not merely to prove it, he would be in a position to contend later on that a judgment in his favor amounted to an adjudication of his asserted title. That is what the statute is intended to prevent. Consequently it is the rule that the defendant in this action may deny

the allegation that he rented the land, but if he attempts to amplify his pleading by asserting title in himself the latter allegation should be stricken. *Washington* v. *Moore,* 84 Ark. 220, 105 S. W. 253; *Dunlap* v. *Moose,* 98 Ark. 235, 135 S. W. 824.

In this way alone can the remedy be restricted to its proper scope as a possessory action. This form of action is meant to provide the landlord with a summary means of ousting a tenant who refuses to pay his rent. By making the lease the tenant recognizes his landlord's title, and the latter ought not to be required to jeopardize his ownership whenever he seeks to repossess the land. If the alleged tenant really has a valid claim of ownership he may either defend the possessory action by proving his title, as we have seen, or he may bring a concurrent action to put the title in issue. *Cortiania* v. *Franco,* 212 Ark. 930, 208 S. W. 2d 436.

In the case at bar the appellants moved to strike that part of the defendant's answer by which she pleaded title under her contract of purchase. As a technical matter the trial court should have sustained this motion, lest the defendant convert a judgment in unlawful detainer into an adjudication of title. But the error is rendered harmless when we point out that this judgment is not *res judicata* of the issue of title. *Williams* v. *Prioleau,* 123 Ark. 156, 184 S. W. 847. The appellants may still test that question by a suit in ejectment.

Other arguments for reversal are made, principally with reference to the admissibility of evidence, but we find them to be without merit. Affirmed.

DERMOTT DRAINAGE DISTRICT *v.* CHERRY.

4-9226 233 S. W. 2d 387

Opinion delivered October 30, 1950.

Will J. Irvin and *Edwin E. Hopson, Jr.*, for appellant.

Gibson & Gibson, for appellee.

GRIFFIN SMITH, Chief Justice. Trustees of the W. R. Cherry estate joined with Roy Morrison in an action against Dermott Drainage District, and Drainage District No. 4.[1]

In November, 1947, each District approved by resolutions certain work the United States proposed to do under authority of § 2 of the Flood Control Act of August 28, 1937, as amended. It was stated that Big Bayou Slough should be opened and cleared "to take care of the flood waters flowing or emptied thereinto." The Districts agreed to provide without cost to the Federal Government the necessary lands, with a guarantee against damages, and to maintain the system in accordance with regulations prescribed by the Secretary of War under terms of the Flood Control Act of June 22, 1936, or similar legislation.

[1] In appellants' brief it is stated that Drainage District No. 4 is erroneously referred to in the complaint as Black Pond District No. 4; that this District is wholly within Desha County, and that no part of Dermott Drainage District is in Desha, but is principally in Chicot County. An engineer's blue print, filed as an exhibit, shows Black Pond Slough. Throughout the testimony there are references to "Black Pond," and "Black Pond Slough," and what the complaint mentions as Black Pond District No. 4 may have been used as interchangeable expressions.

The complaint alleged that clearing and excavation work incident to reconditioning of Big Bayou Slough would not be a completed drainage undertaking when finished according to plans supplied the Government's contracting firm;[2] that unconfirmed promises for additional work had been made by Government agents who had authority to make them, but even so, the promises were vague and indefinite. It was finally alleged that the Districts were without sufficient funds to adequately compensate landowners for increased damages they would sustain, hence the Commissioners were misinformed when they adopted the resolutions.

About twelve years before the trial of this case in September, 1949, considerable drainage work was done in a part of the area here involved when the Federal Government undertook to reclaim approximately 10,000 acres of overflow land partially drained by Big Bayou, or Big Bayou Slough. The bayou's course is generally north and south, and it lies mostly in Desha County, but partly in Chicot. There is testimony that in connection with this work ditches spoken of as laterals were cut. W. H. Bynum, who personally owned 700 acres just east and north of Dermott, and who held stock in a corporation that owned 2,500 acres in Chicot County, and an equal amount in Ashley County immediately west, testified that before the laterals were cut, Big Bayou served as a reservoir or receiving place for all of these lands and its general utility for this purpose was reasonably satisfactory except when extreme floods came. With completion of the Government's reclamation project, adjacent lands began to get "a considerable amount of water."

When the appellant drainage districts passed their resolutions in 1947 authorizing Government work, the contractor started dredging and snagging at a point where Black Pond Slough empties into Big Bayou, not far from Bellaire, and proceeded north. The northern extremity of Ditch No. 4 is a mile or more north of Highway No. 4, on or near Sec. 30, Township 12 South,

[2] Delta Drainage Company contracted with the Government to do the work mentioned in the specifications upon which the bid was predicated.

Range 4 West, in Desha County, and slightly more than two miles west of McGehee. Dermott Drainage District is approximately 22 miles long.

The landowners as appellees, in whose favor the Chancellor granted a restraining order, say that the construction complained of consists of eleven miles on the upper reaches of Big Bayou. A question asked by one of the attorneys for appellees and the answer indicate that assessed benefits against the Dermott District "were based upon a ditch extending from just east of the Missouri Pacific's tracks north of Dermott and extending south" beyond the lands owned by those who are complainants here. In the course of trial where testimony was heard *ore tenus* by the Chancellor, many references were to a map filed as plaintiffs' Exhibit No. 2, but the method of identification was not such as to bring into the record the places pointed to. For this reason we must assume that in this respect the trial Court was better informed as to landmarks, relative distances, and related matters not susceptible of determination here through answer of witnesses who were looking at places indicated, but not named for the record.

But generally it appears that Big Bayou Slough was originally utilized by the Dermott District in Chicot County. An inset map shows the slough as beginning west of McGehee, extending south past Masonville, but west of that town, veering east in Sec. 29 in Chicot County, then southeast and south to its confluence with Black Pond Slough. An engineer's drawing shows a line beginning more than a mile west and a little north of where the two sloughs join. It passes through Dermott and extending northward parallels "Ditch No. 4," *terminating* more than two miles west of McGehee. It is marked, "Channel Clearing and Snagging," and the distance is indicated as 11.6 miles.

Appellees contend that much of the Government work is new construction in that the bayous and original ditches are being widened and deepened. The defense answers that fresh soil near the old embankments was used as a foundation or base for machinery operating

within the original confines and that it has been mistaken for new structure. It is also contended that because of imperative economy when the original work was done, stumps and an occasional tree were left. Dermott District was created in 1915 and its bonds have been paid. The dredge boat used in building the ditch was constructed slightly east of the Missouri Pacific Railroad in Section 29, township thirteen south, range three west, Chicot County. But a witness for the protesting landowners testified that the point so described "was the most northern point of Big Bayou Slough *that was dug at that time.*" This testimony adds confirmation to the general trend of discussions by witnesses who thought the bayou was a part of the drainage ditch system. R. W. Parrish, Chancery Clerk, testified that the organization papers affecting the Dermott District were not on file with other records relating to the undertaking, and that a diligent search for them was unavailing.

Appellees confine their complaint to that part of the Government work on the upper limits of Big Bayou. Six miles of the work is in the Dermott District. It follows that if appellees are correct in stating that the Dermott District "lies within Chicot County, with no part of it in Desha," the litigating parties are not in disagreement on this point. But in designating the injury occasioned by District No. 4, (or, as the brief says, "Black Pond District No. 4") appellees describe it as being immediately north of the Dermott District within Desha County. They also say that "five miles of said work has been and will be done in this District." They further complained that the 11.6 in mileage "of continuous work" would connect with District No. 4.

Testimony varied regarding the actual work that was being done, and witnesses for the plaintiffs did not all agree. D. W. Nall, a Chicot County Road Supervisor, thought that near the Crenshaw dump on the Bellaire road paralleling Big Bayou the ditch would be 40 feet wide at the top, 20 feet at the bottom, and four feet deep,

with a 15-ft. berm.[3] Another witness testified that there had never been a "dug ditch" up Big Bayou beyond where the Missouri Pacific crosses [Big Bayou] north of Dermott; but this same witness said that he had, to some extent, privately drained his own land, and for that purpose had caused a ditch to be dug measuring 24 feet at the top and 16 feet across the bottom, "emptying into this new ditch." Indicative of the uncertain character of testimony affecting terrain in its relation to the original projects, one witness for plaintiffs was asked: "How far [are] Big Bayou Lake and Big Bayou Slough from the southern end of Ditch No. 4?". A. "It is approximately a mile, I think." Q. "What type of drain did you have from the southern end of Ditch No. 4 over that mile to Big Lake Bayou?" A. "That *was* Big Lake itself—from the end of it down to the bayou. I have always called it slough." But, said this same witness, the northern end of Big Bayou Slough where it connects with Ditch No. 4 "from bank to bank is tolerably wide. That's been a long time ago, but I would judge it was 60 or 70 feet—that is, where the ditch empties into the slough. The banks were natural, and not man-made."

G. M. Jones, a commissioner for the Dermott District, interpreted the resolution he participated in procuring as a request that the Government "snag and clean out" Big Bayou *ditch* up to the county line. The purpose was to facilitate drainage and save the taxpayers. In doing the work the contracting firm used a large tractor with bulldozer for leveling purposes—"taking off the spoil—that is, the old ditch bank." The result was a usable roadway. This work, incidentally, could create an honest though erroneous belief that the ditch was being widened. The course of the ditch, the main channel, had not been changed, and no laterals were dug. The contract called for dredging "the lower part on down as far

[3] "Berm," or berme, is defined as a narrow ledge; specifically, a *fort.*, a space of ground or a terrace [varying in width] left [in olden times] between the rampart and the moat or foss, designed to receive the ruins of the rampart in the event of a bombardment and to prevent the earth from filling the foss. The term is now generally used to designate the bank or side of a canal, and in practice has been somewhat broadened to include other forms of construction.

as the District goes." The same dredging firm had a contract "for clearing trees and brush and everything out of Big Bayou Slough." The witness knew, from personal observations, that "since that clearing—when the contract was first let at that time—there were big trees in the bayou: overcup [4] or other species that grew like that. After these were cleaned out smaller [timber] grew [where the clearing had occurred] and the flowage was retarded. The present contract contemplated clearing these impediments to flowage."

There had been testimony (J. B. Griswood for the plaintiffs) that the old ditch (that part not dredged, etc.) "after it came to the fork up there—naturally the old ditch is smaller than that cleaned up." He thought that originally the southern end of the drainage system was larger than the northern reaches, but since the "reworking" there was not much difference. But, said he, in the "new ditch all the undergrowth is cleaned out and the old ditch has grown up. The saplings are as big as my leg, and I couldn't say how many drifts there are in it, but there is one [in particular] right at the bridge." Mr. Griswood was also of the opinion that "the ditches" were not large enough to take care of water that might normally be anticipated, but "this new ditch will put the water anywhere from 12 to 14 inches deeper than before the construction. This is my observation, or sense."

On the question whether the work complained of was new construction or maintenance, plaintiffs' witness Nall testified that "with that new ditch in there—with a clean channel and as large as it is—you are bound to get more water and get it quicker on the Crenshaw dump. This will keep [the public road] under water longer, and [the water will reach it quicker] than it would if that ditch had never been dug, because it had grown up. Possibly some of the water up there did come from above the county line, but [the ditch or bayou] grew up to such an extent that, you might say, the water had to seep down —it came gradually. But now, with that open channel,

[4] A timber tree of the southern United States, with acorns deeply immersed in the cups; also, any of several other species of this character, as the bur oak.

there is nothing to [retard] the flowage in full force. When you get down to the end where the old ditch has grown up, it hasn't been cleaned out and the [increased] water can't get away. It is going to cover up the road deeper than before."

Aside from the decree, the Chancellor gave a lengthy opinion that is very helpful to this Court, and is a practice to be commended. It was found that irrespective of any drainage laws allowing districts to clean and recondition ditches, the evidence disclosed that effect of the work done—whether new or maintenance (the point was not decided)—would be to accelerate flowage, and since the lower uncleaned drains were not large enough to care for increased waters from flash-floods or from prolonged rains, consequence of what was being done was the taking of private property for public use, without just compensation. District No. 4 had between $5,000 and $6,000 in its treasury, while the Dermott District's balance was around $11,000. Property damages as estimated would be substantially in excess of these combined figures, although on this question the court did not make a specific finding.

We agree with the Chancellor that testimony preponderated in favor of the conclusion that more water would reach the area near Bellaire faster because of the work done, and that landowners below the juncture and perhaps for some distance above it within backwater areas would sustain damages. However, the decree points out that the work had been "practically completed" when the trial was had, and the Court properly declined to discuss "damages that might have happened and that might have been stopped" while the work was in its early stages. The injunction against the two districts merely restrained the Commissioners from doing anything else in carrying the project forward. The Federal Government and Delta Drainage Company were left untouched, hence the work continued to its completion insofar as the restraining order affected it.

We do not pass upon matters not decided by the lower court except where judicial notice supplies the

omission, therefore we do not say whether the work could have been done under Pope's Digest, § 4481—Ark. Stat's, § 21-533. It does not appear that Drainage District money was spent in any manner, but on the contrary the two commissions merely undertook to comply with Federal requests for protection under the Flood Control Act. The suit was not for damages against the commissioners for acts so obviously distinct from their powers as agents for the districts as to render them personally liable, nor were the districts asked to make restitution. The Chancellor appropriately declined to "freeze" the treasury funds held by each district, and only issued a restraining order that operated against something that in effect had been virtually finished.

Our conclusion is that the injunction came too late. At the time issued it could not serve a practical end, because the commissioners, respecting "further activity in connection with the project," were little more than onlookers who had satisfied the Government's primary requirement nearly two years before.

It is in evidence that plans were afoot—depending upon Congressional appropriation of funds for work already authorized—to extend, either by enlargement or dredging and snagging, the lower reaches of the Dermott District.

A gentleman's agreement between Congressmen and Senators from Arkansas and Louisiana was delaying the upper work until Louisiana had taken steps to care for additional water. It is our view that the drainage commissioners should not be restricted by an injunction affecting their conduct in 1947 when the primary interest of those complaining involves an enlarged outlet below Bellaire, and to the lower extremities of the Dermott District. If in undertaking to accomplish the improvements hinted at the commissioners should exceed their legal authority, then by expeditious application entire relief could be obtained.

In the present state of transactions, as reflected by the record here, jurisdiction for redress from damages

already occasioned, if such resulted from illegal acts, would be in Circuit Court.

The restraining order will be dissolved, and the cause remanded with directions that the actions be dismissed if, upon a finding by the Chancellor, the work has been completed from a practical standpoint.

MARSH *v.* CITY OF EL DORADO.

4-9320 233 S. W. 2d 536

Opinion delivered October 30, 1950.

Rehearing denied November 27, 1950.

Neill C. Marsh, Jr., and *Henry B. Whitley,* for appellant.

Jabe Hoggard and *Crumpler & O'Connor,* for appellee.

HOLT, J. April 5, 1949, the electorate of the City of El Dorado, by proper procedure (Ark. Stats. 1947, § 19-307) voted to annex certain contiguous territory. 1,014 voted for annexation and 277 against. Thereafter, August 17th, the City petitioned the County Court to make the order of annexation. September 21st, appellants, as Remonstrants, appeared in the County Court, and after a hearing, the Court denied the City's petition for annexation. On appeal by the City to the Circuit Court, there was a finding in favor of annexation in accordance with the City's petition, and judgment accordingly.

This appeal followed.

For reversal, appellants first contend that the burden of proof was on the City of El Dorado and that the evidence was not sufficient to support the judgment.

The rule is well settled since the early case of *Dodson et al.* v. *Mayor and Town Council, Fort Smith,* 33 Ark. 508, that the vote of the municipality makes a *prima facie* case as to the propriety of annexations. There, this court said: "By force of the statute the annexation follows the vote of the city, and the proper formal steps prescribed to be taken in the County Court, unless there be a complaint filed against it and sustained. The vote of the town makes a *prima facie* case as to the propriety of the annexation. The *onus* of showing cause against it sufficient to satisfy the judgment of the County Judge, was upon the remonstrants."

This holding has been consistently followed by this Court. *Walker* v. *City of Pine Bluff,* 214 Ark. 127, 214 S. W. 2d 510; *Burton* v. *City of Fort Smith,* 214 Ark. 516, 216 S. W. 2d 884; *City of Newport* v. *Owens,* 213 Ark. 513, 211 S. W. 2d 438.

We have also consistently held that the findings of the Circuit Court, on appeal, in annexation cases, have the same weight as the verdict of a jury and therefore we must affirm the Court's judgment if we find any substantial evidence in support thereof, *Walker* v. *City of Pine Bluff,* and other cases above.

The correct rule in determining whether contiguous territory should be annexed was clearly set forth in *Vestal* v. *Little Rock,* 54 Ark. 321, 15 S. W. 891, 16 S. W. 291, in this language: "That city limits may reasonably and properly be extended so as to take in contiguous lands, (1) when they are platted and held for sale or use as town lots, (2) whether platted or not, if they are held to be brought on the market and sold as town property when they reach a value corresponding with the views of the owner, (3) when they furnish the abode for a densely-settled community, or represent the actual growth of the town beyond its legal boundary, (4) when they are needed for any proper town purpose, as for the extension of its streets, or sewer, gas or water systems, or to supply places for the abode or business of its residents, or for the extension of needed police regulation, and (5) when they are valuable by reason of their adaptability for prospective town uses; but the mere fact that their value is enhanced by reason of their nearness to the corporation, would not give ground for their annexation, if it did not appear that such value was enhanced on account of their adaptability to town use.

"2. We conclude further that city limits should not be so extended as to take in contiguous lands, (1) when they are used only for purposes of agriculture or horticulture, and are valuable on account of such use, (2) when they are vacant and do not derive special value from their adaptability for city uses."

We have never deviated from this rule in subsequent opinions. See *City of Newport* v. *Owens* and *Walker* v. *City of Pine Bluff, supra.*

The Circuit Court, after hearing a large number of witnesses, found: "The first witness testifying for the

city was Frank Burnside. He is an engineer, thoroughly capable and thoroughly respected in this county. He has been the County Surveyor for a long time at public request. Mr. Burnside went over every area and every tract of ground entirely around the city that is involved in this hearing. He has spent twenty-five years of his life in work of that kind. He testified that there is no piece of ground involved in this area that is not adaptable for city purposes.

"He was followed by the City Engineer, who testified that he is a man of ten years' experience in such work. That all of this property can be furnished with sewer system.

"He was followed by Ex-Mayor Bodenhamer * * *, a man thoroughly capable and thoroughly experienced in real estate matters, and he testified with the exception of two small tracts in the Southeast corner, he is familiar with all the property involved in this lawsuit, and it is all adaptable to city uses. He also testified that El Dorado is a growing city and that there is need for expansion for El Dorado's normal growth. * * *

"I believe from the evidence that all of the property involved is adaptable to city uses, that there is need for expansion and that the prayer for annexation should be granted, and it is so ordered."

This testimony is substantial and sufficient to support the judgment.

We do not detail the testimony since to do so would serve no useful purpose. It suffices to say, as indicated, that the testimony of the three witnesses, Mr. Burnside, the City Engineer, and Ex-Mayor Bodenhamer, was substantial and warranted the findings and judgment of the Circuit Court.

Appellants next argue that § 19-307, above, is unconstitutional and say: "Appellants do not contend, and do not want to be understood as contending, that the Legislature could not enact a law under which territory could be brought into a municipality without the consent of a

majority of the electors therein, but simply contend that the Legislature has not done so. Appellants do contend, however, that the Legislature cannot enact a law placing the burden of proof on the inhabitants of a territory sought to be annexed, to show that the territory should not be annexed."

The answer to this argument is found in *Dodson et al.* v. *Mayor and Town Council, Fort Smith,* above, wherein § 19-307 above (Act Mar. 9, 1875, No. 1, § 84, p. 1; C. & M. Dig., § 7468; Pope's Dig., § 9501), was construed. It was there held that by force of the statute, annexation must be determined by the vote of the electorate within the town or city.

Appellants argue that we should overrule the Dodson case, but this we decline to do. We hold, therefore, that under the provisions of § 19-307, above, contiguous territory may be brought into a municipality on the vote of a majority of the electors within the municipality only and that said section is constitutional.

Next appellants question the sufficiency of the plat which the City filed with its petition and say: "The plat filed fails to show areas that are platted, and shows other areas as platted that actually are not platted; it fails to show roads, and shows other roads or streets that actually do not exist."

We think this contention without merit. Engineer, Frank Burnside, testified positively that the "map is specifically and generally correct." The Circuit Court, therefore, had before it substantial evidence upon which to base its findings, that the plat or map in evidence was sufficient.

Appellants next contend that "the Circuit Court could not properly enter a judgment incorporating the territory in the city, but could only reverse the County Court and remand to that Court for compliance with the provisions of the above statutes."

The effect of our holding in the case of *Batesville* v. *Ball,* 100 Ark. 496, 140 S. W. 712, is against this conten-

tion. We there said: "When a cause is appealed from the county court to the circuit court, the latter court obtains jurisdiction over the matter to the same extent as if it had been originally brought in that court, and it must proceed to fully try and determine the cause. It does not pass upon the question as to whether or not the county court has committed error in any of its rulings, either of law or of fact, but it must try the cause upon its merits, both of law and of fact, just as if it had been originally brought in the circuit court. It does not either affirm or reverse the findings or judgment of the county court, but tries the cause alone upon its merits, and determines the same by the exercise of its own discretion and judgment. It must come to a final determination of the matter, and enter a final judgment thereon. After such final judgment has been made by it, it can then order the same back to the county court with directions to enter such judgment as it has made; but it has no authority to remand the cause with power to the county court to proceed further therein as it may determine."

Here, the Circuit Court made a final determination of the question of annexation and entered a final judgment thereon as it was required to do. If it has not already done so, the trial court should order its final judgment "back to the County Court with directions to enter such judgment, etc."

As pointed out in the above case, the Circuit Court has no authority to remand the cause to the County Court for any further proceedings that that court might determine.

Finally, appellants contend that the petition for annexation was not filed by the City in the County Court within a reasonable time after the election. We cannot agree. It appears that the City waited approximately four months and twelve days before filing its petition in the County Court.

Appellants point to no statute in this State on annexation specifying the time within which a municipality must file its annexation petition after the question has

received a favorable vote from the electorate. In such circumstances, the general rule that where no statute of limitation is provided, the law contemplates that the petition (in question here) must be filed within a reasonable time, applies. Appellants have failed to show any such changed conditions since the election as would materially affect their rights as Remonstrants. We hold that the delay pointed out here, in the circumstances, was not unreasonable, that the petition was filed by the City and the County Court within a reasonable time and that appellants have failed to show any abuse of the trial court's discretion in so holding.

Finding no error, the judgment is affirmed.

A. *v.* B.

4-9268 233 S. W. 2d 629

Opinion delivered November 6, 1950.

Rehearing denied November 27, 1950.

Kenneth C. Coffelt, for appellant.

Clayton Freeman and *Robert E. Diles,* for appellee.

LEFLAR, J. This appeal involves two cases which were consolidated for trial below. In one case, Mr. and Mrs. A were petitioners in Probate Court seeking to adopt a child. After entry of an interlocutory order of adoption, but before entry of any final order, Mr. and Mrs. B intervened asking that the adoption be denied and that the child be turned over to them as its natural parents. The other case arose out of a petition filed by Mr. and Mrs. B in Chancery Court against Mr. and Mrs. A seeking custody of the same child. Since the same judge presides in both courts, the cases were tried together. The decision was for Mr. and Mrs. A in each case, and Mr. and Mrs. B appeal.

The child was born to C, now Mrs. B, but then an unmarried girl, on June 2, 1947. The mother cared for the child herself until February 7, 1948, when she placed it with Mr. and Mrs. A, agreeing to pay them $8 per week for its room and board. This she paid until April 10, 1948. On that date she left for California. The baby remained with Mr. and Mrs. A, but they received no further payments for its board and room.

On November 20, 1948, Mr. and Mrs. A filed their petition for adoption of the child, and on June 17, 1949, the Probate Court's interlocutory order of adoption was rendered. Consent of the mother to the adoption was filed in accordance with Ark. Stats., § 56-106, after the consent form was mailed to her in California and there on February 12, 1949, filled out and returned by her. Evidence at the hearing on the interlocutory order included a report of the Child Welfare Division of the State Department of Public Welfare to the effect that Mr. and Mrs. A were "conscientious, hardworking people, regular in their habits and financially able to assume the responsibility of rearing this child in a modest but wholesome manner." It was brought out that they owned their own suburban home, which was modern and comfortably furnished, that Mr. A. was a carpenter by trade, that he also owned a farm, that they had given the child good care and were attached to it, that the child was in poor physical condition due to malnutrition when

it was turned over to them but that they, by medical care and personal attention, had restored it to good health.[1] It was on the basis of this evidence that the interlocutory adoption order was issued.

Appellant Mr. B is the putative father of the child. At the time of its birth, and until September 2, 1949, Mr. B, a sergeant in the U. S. Army, was married to another woman. On the date named his wife secured a divorce from him, and custody of their children. Then on October 15, 1949, he and C were married. Early in January, 1950, they filed their custody suit and their intervention in the As' adoption proceeding. At the trial thereof, as already stated, Mr. and Mrs. A prevailed.

The principal argument presented for reversal, on behalf of Mr. and Mrs. B, is that the adoption order is ineffectual without the consent thereto filed by the mother, and that this consent was withdrawn before any final order of adoption was issued.

We have had occasion once before to discuss the question whether a consent to adoption filed under § 56-106 by the mother of an illegitimate child is final and conclusive on the mother, or can be withdrawn by her. In *Combs* v. *Edmiston,* 216 Ark. 270, 225 S. W. 2d 26, our holding was that such consent could be withdrawn, under the circumstances of that case, prior to the entry of the interlocutory decree of adoption. We also mentioned, but had no occasion to pass upon, the question whether a consent given in statutory form by the mother could be withdrawn after entry of an interlocutory order of adoption and before final order, so as to defeat the adoption.

As pointed out in *Combs* v. *Edmiston,* there are three lines of authority on the latter question. The weight of authority among the older decisions was that the natural parent's consent to adoption might be effec-

[1] The report of the Child Welfare Division also pointed out that the families of the child's natural parents lived in the same community as Mr. and Mrs. A, and knew where the child was, which fact might cause trouble in the future, and for this reason only the Division's recommendation was against the adoption. The soundness of this recommendation as an original matter, is evidenced by the present litigation.

tively withdrawn or revoked at any time before the adoption was finally approved and decreed by the court. *Re White's Adoption,* 300 Mich. 378, 1 N. W. 2d 579, 138 A. L. R. 1034. But it was pointed out 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." See *Re Adoption of a Minor,* 79 U. S. App. D. C. 191, 144 Fed. 2d 644, 156 A. L. R. 1001. Finally, we stated the third view in the following language:

"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 parents 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. Annot., 156 A. L. R. 1011."

Of these three views, we now conclude that the one last stated is preferable. It is the one under which maximum consideration can be given to the welfare of the child itself while at the same time the interests of the competing adults can be given fair weight. It has less of arbitrariness about it than has either of the more extreme views.

Applying then the rule which permits consideration of all the surrounding circumstances in the case, we hold that the mother's consent in the instant case could not be withdrawn, as was attempted. The baby has lived with Mr. and Mrs. A for most of the three years of its life; they are the only parents it has really known. The mother left it in their hands and made no effort to support it or secure its custody from April 10, 1948, until the custody suit was filed in January, 1950. She gave her consent to the adoption freely and without any suggestion of coercion—there were no questionable incidents to the consent such as were present in *Combs* v. *Edmiston, supra.* The putative father, now the mother's husband, never at any time supported or offered to support the child to any extent whatever, and even appeared somewhat reluctant, in the course of his testimony, to say that he would pay Mr. and Mrs. A for caring for the child in case it should be awarded to him and his wife. Mr. and Mrs. A have a good home in which to keep the child, whereas Mr. and Mrs. B have no home. Mr. B testified that he intended to make service in the Army his life career, that he expected to be ordered overseas shortly, and that he hoped to make arrangements for his new wife and the baby to follow him overseas later. He suggested no plan as to how they would live in the meantime.

Next, it is urged on behalf of Mr. and Mrs. B that the baby became the legitimate child of both of them, by reason of the father's subsequent marriage to the mother and recognition by him of the child as his own, under Ark. Stats., § 61-103. From this it is argued that consent by the mother alone, to the adoption, does not satisfy the requirements of the adoption statute, § 56-106,

since consent by the mother alone suffices only in the case of an illegitimate child. The answer to this is that the adoption is effective as of the date of the interlocutory order, unless later set aside at the final hearing for good reason (§ 56-108), and the consent is required as of the date of the interlocutory order. At the relevant date in this case the child was illegitimate; and the adoption had already become effective, subject to the final hearing, when his natural parents married each other.[2]

We find in the record no reason for refusing final approval to the interlocutory order of adoption, despite the intervention. Since the right to custody of the child depended upon the outcome of the adoption suit, the petition by Mr. and Mrs. B for custody must also fail. The order and decree appealed from are affirmed.

[redacted]

MADDOX *v.* STATE.

4640 233 S. W. 2d 542

Opinion delivered November 6, 1950.

[redacted]

[2] A separate ground that might possibly have been relied upon by the adoptive parents is the provision in § 56-106 that "the consent of a parent or parents may be dispensed with if . . . the parent has abandoned the child for more than six months next preceding the filing of the petition."

Bert B. Larey, for appellant.

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

GRIFFIN SMITH, Chief Justice. November 19, 1949, Carl Maddox shot and mortally wounded Collins Sheppard, 26 years of age. The circumstances were such that when tried the defendant was found guilty of murder in the second degree and sentenced to a term of 18 years in the penitentiary.

Witnesses introduced by the State testified that C. L. O'Donnell and Collins Sheppard had been together until nine o'clock in the evening, when they met Wren Sheppard and Julius Wynn at Cool Point. Collins and Wren Sheppard were brothers. Using Wynn's car they drove to the café and night club owned and operated by Maddox on Highway 71 near the Louisiana line, reaching the place shortly after two a. m. In the meantime they had been joined by Kathryn Schoolfield.

Wren Sheppard, Wynn, and O'Donnell testified in substance that while at Cool Point they concluded to drive to Maddox' place for coffee. There they parked about forty feet from the club. Other automobiles were to be seen, and the premises were lighted inside and out. Ten or twelve people, presumed to be customers, were in the building. When Collins Sheppard, walking in front of his companions, reached a small front porch at the main entrance it was found that the door was locked. In response to Collins' knock, Maddox came to the door and said the place was closed, then returned to his friends within. Collins knocked a second time and according to at least two of the witnesses he had turned to walk away

when Maddox reappeared and opened the door. Under testimony from which the jury could have believed that Collins thought that the club owner, in opening the door, had reconsidered the original rejection, he (Collins) turned and took a step toward Maddox. The latter fired one shot from a pistol, then withdrew to a position near the wall, where he brandished the weapon and warned incomers not to molest him.

At the time the shot was fired Collins was not less than four nor more than eight feet from his adversary.[1] It was not contended that Collins was armed, and those who testified for the State agreed that the would-be patron did not use unusual force in knocking on the door, and that there were no threats. The wounded man was taken to a doctor, but was dead before attention could be given. He was shot "in the stomach about an inch from the navel," said one of the witnesses.

The defense contended, and at least inferentially suggested, that the four men were under the influence of intoxicants. It was claimed that the newcomers were politely told—first by Betty Carroll (an employee) and then by "Patsy" (one of Maddox' daughters)—that the place was closed. Finally, when Sheppard and his friends persisted in entering, and when Collins kicked and threatened to kill all who were within, Maddox went to the door, partially opened by Patsy. Collins had taken advantage of Patsy's courteous attitude and actions to shove his foot through the partly opened door in an effort to force an entrance. After Collins and his companions had kicked for some time, the door "flew open" and Collins was in the act of forcing his way in. Maddox insists that he had put a pistol in his pocket as a precautionary measure, not intending to use it. But, thinking he could "bluff" Collins, Maddox drew the weapon and they scuffled for possession of it. Then, said the defendant, "because I was afraid he would hurt me I jerked the gun down to get loose from him, and it [was accidentally] discharged."

At another point in his testimony Maddox said: "When [Collins] kicked the door open and put one foot

[1] State witnesses differed in their estimates of the distance separating the two men.

in, *then* is when I put the gun on him. He jumped at me and grabbed it, and I stooped over. He was stronger than I am, and I was afraid of him; so I jerked the gun down like this (indicating) to get loose from him, and that is when it fired."

Appellant complains that he was entitled to an instruction dealing specifically with self-defense. In trying to clarify the issues Judge Bush said: "Mr. Maddox, there is one thing I would like for you to clear up for me: Is it your testimony that you didn't intend to fire the shot?" A. "No, I didn't." Q. "[You contend] that the gun went off accidentally?" A. "Yes, sir, in the scuffle." Q. "You stand or fall on that statement, do you?" A. "Yes, sir."

Certain suggested instructions dealing specifically with self-defense are thought by appellant to have been erroneously refused, particularly No. 9, No. 10, and No. 11. But if it be conceded that the effect of testimony given by Maddox was that he attempted to use the gun as a "bluff" because he feared bodily injury, the Court's Instruction "A" correctly told the jury that if it should find from the evidence " . . . that the deceased, in a violent, riotous and turbulent manner undertook to force his way into the restaurant of the defendant, then the defendant would have a right to use a show of force to prevent such forcible entry by the deceased, and if the deceased did so undertake to force his way into the restaurant and the defendant presented a pistol in order to prevent his act of forcibly entering, and a scuffle ensued over the pistol and the pistol was accidentally fired and [Sheppard] was killed, you will acquit the defendant." This instruction was responsive to the defendant's own theory of the tragedy.

Another objection was to the Court's refusal to halt the Prosecuting Attorney on cross-examination of Maddox, and not to require an answer to the inquiry: "About a month before this happened didn't you kill another man down there in your place of business [by using a baseball bat?"]. Responding to the defendant's request for a mistrial, the Court ruled that the question could be an-

swered only to test the defendant's credibility, and the jury was instructed not to consider the interrogation or reply for any other purpose. Maddox admitted that he had killed a man named Phillips in the manner mentioned and at the time referred to.

Other objections are made, but we are in accord that none of the assignments is prejudicial, hence the judgment must be affirmed.

WATSON *v.* WHITE.

4-9284 233 S. W. 2d 544

Opinion delivered November 6, 1950.

Bernard Whetstone, for appellant.

T. P. Oliver and *J. S. Thomas,* for appellee.

MINOR W. MILLWEE, Justice. On July 26, 1949, a collision occurred on the streets of El Dorado, Arkansas, between automobiles owned by plaintiff, James F. Watson, and defendant, E. V. White, respectively. Plaintiff brought this action in the Municipal Court of El Dorado against defendant for damages to his car in the sum of $100 allegedly arising out of the collision. Defendant filed an answer and cross-complaint seeking damages in the sum of $100 to his car as a result of the collision.

The judgment of the municipal court, after stating the appearance of the parties and their counsel, recites: "Whereupon it was suggested by counsel for the Defendant that since testimony had been heard by the Court in a criminal proceeding, prior to this date, that the Court enter a judgment based upon the facts as submitted in the criminal hearing, which was done." Then follows judgment in favor of plaintiff for $100 with exceptions and an appeal prayed by defendant and granted by the court. Affidavit and bond for appeal to circuit court were duly filed by defendant.

Prior to trial in circuit court, plaintiff filed a motion to dismiss the appeal on the ground that the municipal judgment was by confession and defendant could not, therefore, appeal from it. At a hearing on said motion counsel for plaintiff testified that after the witnesses were sworn to try the case in municipal court, counsel for defendant inquired whether the court could enter judgment for the plaintiff and show an appeal therefrom by defendant; that the court replied in the affirmative and

directed plaintiff's counsel to "write up a judgment" accordingly; and that the judgment was entered without ascertaining whether counsel for plaintiff was willing to submit the case on the testimony adduced at the previous trial.

In a colloquy ensuing between counsel and the court counsel for plaintiff stated: "When a judge writes up a judgment reciting the facts upon which it is rendered, I don't see how this Court can do anything about it, except to accept that judgment on its face, and my Motion to Dismiss is directed to that judgment." The trial court refused to construe the municipal court judgment as one by confession, or consent, and overruled the motion to dismiss. Plaintiff assigns this as reversible error and relies on the case of *Cave* v. *Smith,* 101 Ark. 348, 142 S. W. 508. In that case a justice of the peace judgment recited: "And the defendant acknowledged service of the summons, and without further proceedings the defendant asked the court to enter judgment against him for said sum sued on $13.50, and then filed affidavit and bond for an appeal to the circuit court," etc. The court there held that defendant confessed judgment when he asked the court to enter judgment against him after entering his appearance without interposing any defense whatever. The facts were distinguished from those in the earlier case of *Walker* v. *Willis,* 5 Ark. 166, which held that there was not a confession of judgment where the defendant agreed that judgment might be rendered against him in justice court after a demurrer to his plea of want of consideration was sustained and his amended plea stricken by the justice of the peace.

In the later case of *The McCall Co.* v. *Smith,* 117 Ark. 118, 173 S. W. 845, a justice of the peace judgment showed that the jury returned a verdict for defendant "at the suggestion of plaintiff's attorney" after evidence offered by plaintiff (appellant) was held inadmissible by the justice of the peace. The court said: "Taking the recitals of the record altogether it cannot be said that they show that the judgment entered by the justice of the peace was on confession, or by the consent, of the appel-

lant. The word *suggestion* is neither synonymous with *confession* nor *consent,* and before a judgment should be treated as one rendered on confession or consent the recitals showing such confession or consent should be clear and unequivocal. Such is not the case here."

In the case at bar defendant had filed an answer and cross-complaint in the municipal court. The record reflects that the court had previously tried a criminal charge against the defendant arising out of the same collision. The suggestion by counsel for defendant that the court enter judgment based upon the facts developed in the previous trial, in order to expedite the proceedings, did not amount to a clear and unequivocal confession on his part that plaintiff was entitled to a judgment against him. Plaintiff says he did not agree to the action of the court in rendering judgment on the proof previously taken, but he was present with his counsel and made no objection to the procedure which resulted in a judgment in his favor. The trial court correctly overruled the motion to dismiss.

After the motion to dismiss was overruled, the case proceeded to trial. Plaintiff introduced the testimony of his wife, who was driving plaintiff's automobile at the time of the collision, and the manager of a store and garage where plaintiff's car was repaired. When plaintiff then announced that he rested his case the trial court stated: "Mr. Whetstone, before closing your case I would like to call your attention to the fact that in making proof of damage to cars—I don't know whether it is proper for me to put it in here—but I think in fairness to everybody concerned, at most you are inclined to rely on an estimate of the garage mechanic on what it cost to make repairs to the car. I have called this to the attention of the attorneys in cases of this kind, that that is not the rule in arriving at the measure of damages. The rule, strictly stated, is the difference in the value of the vehicle immediately before the accident, and the value immediately afterward. You have approached it in this case on the proof of what it cost to repair it. That is a circumstance that may be considered,

but I don't think that is sufficient, standing alone. I call your attention to this because I don't want anybody to get slipped up on it."

Plaintiff insists that the trial court erred in refusing to declare a mistrial on account of the court's remarks. In view of the nature of the testimony offered by plaintiff on the measure of damages, which will be discussed later, we cannot agree with plaintiff's contention that the trial court's statement amounted to a comment on the weight of the evidence or "a belittlement of appellant's case and the ability of his counsel." On the contrary, we hold that the remarks of the court and the colloquy which followed show that the trial judge was endeavoring to be helpful to both parties in presenting proper testimony on the measure of damages, and that he was trying to prevent the happening of the very thing that did happen when plaintiff refused to offer further testimony. After denial of plaintiff's motion for a mistrial, the trial court offered to permit plaintiff to submit further testimony on the measure of damages. This offer was refused by plaintiff and a request for a directed verdict in defendant's favor on plaintiff's complaint was granted, after defendant moved to dismiss his cross-complaint.

It is next contended that the trial court erred in directing a verdict for defendant on account of the insufficiency of the proof as to the measure of damages. In this connection plaintiff's wife testified to the damaged condition of the 1941 model car involved in the collision. She then testified: "Q. Do you know how much it cost to have it repaired? A. No, sir. It was over—it was $100.40; I saw all of the bills; I didn't look at all of the bills; the grocery bill and that were paid at the same time."

The manager of the store and garage where the repairs were made testified that he appraised the damage to the car and made an estimate of the cost of repair, but no estimate was introduced in evidence. He stated that the front fender was replaced and the radiator was either repaired or replaced; that they straightened or attempted

to straighten the frame and lined up the "running gear." He then testified: "Q. Do you know how much your bill ran for work and parts on the car? A. It was a little over $100; I don't know exactly. The Watsons were good customers and we made them a good price; it ran over $100, though." On cross-examination he testified: "Q. And you run the store and garage at Junction City for Mr. Mayfield? A. Yes, sir; more or less the manager. Q. And you personally inspected the car? A. Yes, sir; I did, on this particular job. Q. You don't know where, or when, or how that damage occurred to the car, do you? A. No, sir; I don't. Q. You don't know anything about that? A. No, sir; nothing pertaining to the way it happened. I have not heard it discussed one way or the other. Q. And you don't know when it happened? A. I remember it was in July. Q. You don't know whether all of the repairs you did on the car was caused by the collision up here on Hawthorne and Raymond streets or not, do you? A. No, sir; I wouldn't have any way of knowing how it was done. They are regular customers of ours; but I didn't notice any of these damaged parts that we repaired previous to that time. Q. You didn't look for them? A. No, sir; I didn't look for it."

Plaintiff asserts that this testimony was sufficient to take the case to the jury under the cases of *Kane* v. *Carper-Dover Mercantile Co.,* 206 Ark. 674, 177 S. W. 2d 41, and *Golenternek* v. *Kurth,* 213 Ark. 643, 212 S. W. 2d 14. In these cases we reaffirmed the oft repeated rule that the measure of property damages arising out of an automobile collision is the difference between the market value of the property immediately before the injury and its market value immediately after the injury. The effect of our holdings in the cited cases is that proof of repairs is sufficient if, when considered with the other evidence adduced, it is shown to fairly represent the difference in market value before and after the injury. No repair bills or estimates of the cost of repairs were introduced in the instant case. It is not shown whether certain parts were replaced or merely repaired and the amount of the charges is indefinite. The installation of

new parts in a 1941 model automobile may enhance the value a great deal and thereby materially affect the difference in market value before and after the injury. Under the testimony adduced here, we cannot say that the trial court erred in directing a verdict for defendant.

Plaintiff also contends that in any event he was entitled to nominal damages and the court, therefore, erred in instructing a verdict for defendant. The issue of nominal damages was not raised at the trial and there is no assignment of error in the motion for new trial on this ground. In *Cathey* v. *Arkansas Power & Light Co.*, 193 Ark. 92, 97 S. W. 2d 624, upon which plaintiff relies, this court held that a suit for condemnation of land for highway purposes came within that class of cases in which the damages cannot be adequately and definitely estimated and applied the rule of nominal damages. The instant case does not deal with damages of the type involved in the Cathey case and cases there cited.

Plaintiff made timely objection to the action of the trial court in dismissing the cross-complaint without prejudice when defendant moved for a non-suit thereon. Under the principles announced in *Fowlkes* v. *Central Supply Co.*, 187 Ark. 201, 58 S. W. 2d 922, the taking of a non-suit in the circumstances here presented is tantamount to a dismissal of the cross-complaint with prejudice. The judgment of the circuit court will be modified to show a dismissal of defendant's cross-complaint with prejudice. In all other respects the judgment is affirmed.

MOODY *v.* LOGAN.

4-9416 233 S. W. 2d 548

Opinion delivered November 6, 1950.

Hout & Thaxton, Jack Holt and *Ben B. Williamson,* for appellant.

D. Leonard Lingo, Harry Ponder and *Cunningham & Cunningham,* for appellee.

ED. F. MCFADDIN, Justice. This is an election contest involving the Democratic nomination for County Judge of Lawrence County. Appellant and appellee were the only two candidates for said nomination in the August 8, 1950, Primary Election; and, on the face of the returns, appellee received 2,270 votes and appellant received 2,265 votes.

The Democratic County Central Committee, refusing a recount, certified appellee as the nominee; and this action was filed by appellant on August 15, 1950, claiming 224 illegal votes had been counted for appellee.[1] On August 19 appellee filed a pleading which was a motion to dismiss and also an answer and cross-complaint. Among other matters, the motion sought to dismiss the complaint on the claim that the printed list of poll tax payers had not been legally printed in exact compliance with § 3-118, Ark. Stats. The Circuit Court judgment was based on that point, and resulted in the dismissal of the appellant's complaint. We therefore discuss the evidence on this one point and the holding thereon.

[1] The complaint gave the number of each such claimed illegal ballot, the name of the person voting, and the box and precinct in which such vote was cast and counted. Two hundred and twenty-four votes were claimed illegal for reasons as follows: 121 voters had no poll tax receipt; 28 absentee ballots were so irregular as to be void; 21 voters were "moved in"; 40 persons voted in the wrong precinct; 2 illiterates had been mis-voted; 7 ballots of maiden voters were so irregular as to be void; and 5 persons had "voted" without going to the polls.

The applicable Statute (§ 3-118, Ark. Stats.) requires that these five things be done:

(1)—Not later than October 15 each year the Collector shall deliver to the County Clerk a list—duly arranged—of all persons who had paid poll tax on or before October 1 of that year, with said list duly authenticated by affidavit of the Collector.

(2)—The County Clerk shall at once record this list of poll tax payers in a well bound book.

(3)—The County Clerk, not later than October 22, shall deliver to the County Election Commissioners a certified copy of the list furnished him by the Collector.

(4)—The County Clerk shall, at all times, keep in his office, for public inspection, the original list of poll tax payers, as furnished him by the Collector.

(5)—The County Election Commissioners shall have the list of poll tax payers (furnished by the Clerk under (3) above) printed so that sufficient copies will be available to furnish one to each Judge at each General or Special Election.

In the case at bar, requirements (1) and (2) were strictly complied with[2]; but requirements (3), (4), and (5) were complied with only as follows:

(a) instead of making a certified copy of the list furnished by the Collector and delivering such copy to the Election Commissioners, the County Clerk—as had been the custom in that County for many years—delivered to the Election Commissioners the *original list* furnished by the Collector to the County Clerk; and thus the *original list* was not kept at all times by the County Clerk for public inspection; and

(b) when the Election Commissioners received the *original list* of poll tax payers from the Clerk, the list was in a ledger, with pages securely fastened; in order to facilitate the work of the printer, the pages were carefully cut from the ledger; and after the printed list (re-

[2] The list, as delivered to the Election Commissioners, actually contained the Clerk's certificate that the list had been recorded.

quirement (5) of § 3-118, Ark. Stats.) had been prepared, the unfastened pages were returned to the Clerk but still contained in the same ledger cover.

The Circuit Court held that these aforementioned items (a) and (b) were not in substantial compliance with the requirements of the Statute and that the printed list of poll tax payers, offered in evidence, had no verity.[3] Thus, the only question for decision on this appeal is whether, under the facts here presented, the printed list of voters was in substantial compliance with § 3-118, Ark. Stats., so as to be entitled to use in a contest after an election had been conducted.

We have held that prior to the election the provisions of § 3-118 are mandatory but after the election the requirements are directory, and that substantial compliance with the Statute will allow the printed list to be used in an election contest. In *Trussell* v. *Fish,* 202 Ark. 956, 154 S. W. 2d 587, we were considering a printed list from which the Collector's affidavit was entirely omitted. After reviewing our earlier cases, we said:

"In most of the cases where effect of the collector's failure to make the affidavit is discussed (see third footnote) it is said that there must be *substantial* compliance with the statute, and to this rule we adhere. The question is, What *is* substantial compliance? and it follows that proof in a particular case regarding intent and effect must first be considered before an answer can be formulated.

"There would be a subversion of purpose and a sacrifice of popular will if we should say that in a primary election the unintentional failure of a ministerial officer to perform strictly all functions which are made mandatory with respect to verification of poll tax lists, continues to be imperative after the lists, unaffected by

[3] In order to make a *prima facie* case as a basis for appeal, it was incumbent on the contestant (appellant here) to show that at least six votes (a number in this case sufficient to overcome appellee's majority) had been illegally cast. To make such *prima facie* case, the appellant offered to prove that 110 persons who voted for appellee in the election did not have poll tax receipts, as shown by the printed list. The Circuit Court held such proof insufficient, since the proof was based on the *printed* list which the Court held to be without verity.

fraud, and substantially correct in all other essentials, have performed the service intended by the legislative authority."

In the case at bar the Election Commissioners returned to the County Clerk the ledger which contained the original list of poll tax payers prepared by the Collector; and with that original list before him, the County Clerk answered questions as follows:

"Q. You have referred to the original list that was given to you by the collector?

"A. Yes, sir, and this is it. (indicating)

"Q. Am I right; I find here a binding to a book, all the pages in the binding are loose; is that right?

"A. Yes, sir, the printers did that so they could print it.

"Q. These loose pages and this binding we have here, you have referred to, you say that amounts to the original list given you by the collector?

"A. That is right.

"Q. The original list was taken by you and turned over to the printer in Walnut Ridge?

"A. To Mr. Bland, he is a printer and an election commissioner.

"Q. Were these pages, that are cut out, cut out by the printer?

"A. He said he did.

"Q. Do you know yourself who cut them out, did you see him?

"A. No.

"Q. They were cut out when you got the book back?

"A. Yes, sir.

"Q. How long was the original list out of your hands, and out of the county clerk's office?

"A. I don't know, long enough for him to print it, I guess."

Of course the County Clerk should have literally followed § 3-118, Ark. Stats., and the previous custom in that County is no justification for such failure; but we cannot hold that—after an election—the integrity of the printed list had been destroyed because the County Clerk delivered the original list to the Election Commissioners, and the printed list was prepared from the original list, and the original list was returned to the County Clerk. It is argued that when the 250 pages were separated, one from the other, in order for the printer to set the type for the printed list, that such act constituted a fatal mutilation of the original list of poll tax payers. This original list is before us, just as it was introduced in evidence; each page is numbered; the handwriting is clear and legible; voters are arranged by Townships—all as required by Statute. As a matter of fact, a better prepared and more legible list of poll tax payers is seldom to be found. Mrs. Morgan, the Collector, testified that she prepared and delivered the list to the County Clerk, as required by law; and that it contained her certificate. She admitted that possibly one or two persons had paid poll tax whose names she did not find on her list; and stated that until she had time to check the list line by line, she could not definitely swear that there had been no change in it; but she said that the list returned by the printer to the Clerk, and offered in evidence, looked like the original list that she had turned over to the Clerk; and that she did not see anything in the list different from what it contained when she delivered it to the County Clerk.

We have detailed all the evidence concerning the mutilation of the original list in order to show that there is no conflict in the evidence, and no suggestion of fraud. It is merely a question of drawing the legal conclusion from admitted facts; and we conclude that there was a substantial compliance with § 3-118 of Ark. Stats. so that the integrity of the printed list, in this case, had not been destroyed; and that the printed list could be used in a

contest after an election had been held. Such being true, it necessarily follows that the judgment of the Circuit Court is reversed and the cause is remanded.

HOLT, J., not participating.

PHILLIPS *v.* MICHEL.

4-9269 233 S. W. 2d 551

Opinion delivered November 6, 1950.

Johnson & Johnson, for appellant.

E. K. Edwards, for appellee.

DUNAWAY, J. This cause arose as a suit to enjoin a continuing trespass, brought by appellee Michel as sole heir-at-law of Edward Michel, who died intestate on September 26, 1948. Appellants, defendants below, are the widow and heirs-at-law of Floyd Phillips, who died intestate on October 26, 1942.

The complaint alleged that Edward Michel had acquired title to the property in litigation, consisting of approximately nine acres of land, by purchase in 1917; and that he had been in actual, open, continuous, exclu-

sive possession of all said property from 1917 until the time of his death in 1948. It was further alleged that defendants had within the past year been guilty of trespass in that they had cut and removed timber from the lands; removed some of the roofing from a certain outbuilding; and had turned cattle and other livestock in upon said lands. Defendants were doing this under some claim of right or interest in the lands, it was alleged, though they had no right or interest in same.

Defendants answered, claiming ownership by adverse possession under a tax deed from the State of Arkansas, alleging that they had held possession of said lands since acquisition of the tax title by Floyd Phillips in 1932 and had paid the taxes on the property for more than ten years. Defendants prayed that their title be quieted in said property.

This appeal is from a decree quieting title in appellee Michel and granting the injunction prayed for against further trespass by appellants.

The tax deed relied upon by appellants was issued to Floyd Phillips on August 1, 1932, by the State Land Commissioner. The lands were described in the deed as "Part NE¼ NW¼ NW¼ Sec. 26, Twp. 9 S., Range 30 W., 9.00 acres", and it was shown that the forfeiture to the State was for non-payment of taxes for the year 1924. It is conceded that the tax forfeiture and deed were void not only because of the insufficiency of the description, *Cotton* v. *White,* 131 Ark. 273, 199 S. W. 116, but also because the 1924 taxes on the property had in fact been paid.

Appellants argue, however, that they acquired title by more than seven years adverse possession. This they sought to prove by the testimony of Loel Phillips, one of the appellants, and Bob Bizzel. Their testimony was that in February, 1933, they went with Floyd Phillips to see Edward Michel. Floyd Phillips told Michel of his purchase of the tax deed to the property where Michel was then living, and where it is admitted he continued to live until his death in 1948.

Loel Phillips testified that his father told Michel that he did not want to "run him out of his home", but would give him a deed to the property if Michel would repay the elder Phillips the money he had paid to the State. When Michel told Phillips he was not in a financial position to do this, Phillips told him he could continue to live there the rest of his life, but that he, Phillips, was going to continue paying taxes on the property. The balance of Loel Phillips' testimony was to the effect that Edward Michel did continue to live on the property until he died under this "agreement" with the elder Phillips. At the time of the visit to Michel in 1933 Loel Phillips was eleven years of age.

Bizzell testified that Michel said "I ain't going to be out a dime" or something to that effect when Phillips' offer was made. Bizzell further testified as follows: "Edward just made the remark that a home was what he wanted and if he got a home, that was all he wanted. And Floyd said, 'Yes, you have got a home. You can stay here the rest of your life', and that is about all the discussion."

It was further shown at the trial that from 1933 on the house in which Michel lived, the outbuildings, and fences fell into an increasing state of dilapidation. No taxes were paid thereafter by Michel; taxes from 1933 through 1949 on "Pt. NE NW NW, Section 26, Township 9 South, Range 30 West, containing 9 acres" were paid by Floyd Phillips or Loel Phillips and the Floyd Phillips Estate.

Appellants contend that the testimony above-outlined established an attornment by Edward Michel to Floyd Phillips in 1933, and that thereafter Phillips held possession of the nine-acre tract through Michel as his tenant. In arguing that seven years adverse possession after attornment ripened into title in Phillips, appellants rely on the cases of *Wheeler* v. *Foote,* 80 Ark. 435, 97 S. W. 447 and *Johnson* v. *Elder,* 92 Ark. 30, 121 S. W. 1066, as authority for their position. The cases are distinguishable on the facts.

Wheeler v. *Foote, supra,* involved a suit between two parties, both of whom claimed title to a tract of land by limitations. The prevailing party, a Mrs. Foote, claimed title by actual adverse possession of part of the tract under color of title to the whole. In that case, a third party who owned land adjoining the disputed tract had occupied a part of the land in controversy under a mistake as to the boundary. When informed of his mistake, the occupant agreed to continue his possession as tenant of Mrs. Foote. This court held that in these circumstances Mrs. Foote established her title by adverse possession through actual possession by her tenant.

Likewise, in *Johnson* v. *Elder, supra,* there was a third party occupying a part of the lands there in controversy who agreed to continue his possession as the tenant of one of the claimants to the land, whose alleged ownership was based upon a void tax deed. There is language in the original opinion in the Johnson case to the effect that one in possession of land under a claim of ownership may attorn to another claiming superior title and thereafter occupy the lands merely as tenant of the latter. On rehearing however, the actual decision in the case considerably modified the force of this language. Upon it being shown that prior to the attornment the alleged tenant had himself acquired title by adverse possession to the part of the land he occupied, the court held the agreement to attorn void for want of consideration. The holder of the void tax deed therefore failed to prove his title by adverse possession since he was claiming possession through the third party as tenant and this court held that there was no tenancy.

Under the holding in the Johnson case, the alleged attornment in the case at bar would have been void for want of consideration even if a definite agreement to attorn had been made. We do not think, however, that the proof was sufficient to establish such an agreement by Edward Michel.

It is conceded that the lands in controversy were improved and enclosed, and actually occupied by Edward

Michel. The statutes providing that payment of taxes on unimproved lands creates a presumption of possession (Ark. Stats. 1947, § 37-102—seven years consecutive payment of taxes under color of title) or of color of title (Ark. Stats. 1947, § 37-103—fifteen years consecutive payment of taxes) have no application. *Wheeler* v. *Foote, supra; Schmeltzer* v. *Scheid,* 203 Ark. 274, 157 S. W. 2d 193. In addition the tax payments by the appellants were made under the same insufficient description which rendered their tax deed void.

The decree is affirmed.

STANDARD ACCIDENT INSURANCE COMPANY *v.* THEO MONEY CHEVROLET COMPANY.

4-9273 233 S. W. 2d 553

Opinion delivered November 6, 1950.

Moore, Burrow, Chowning & Mitchell, for appellant.

Bates, Poe & Bates, for appellee.

GEORGE ROSE SMITH, J. This is an action by the appellee corporation, which was later succeeded by the appellee partnership, to recover $301.32 under what is captioned an "Automobile Garage Liability Policy," issued by the appellant. In 1947 the insured was engaged in the garage business in the city of Waldron. A customer, Virgil Nichols, left a truck at the shop for repairs to the differential. One of the company's mechanics, Bert Hawkins, worked on the vehicle and then took it out for a test drive. In the course of this test the rear axle assembly broke down, either because defective parts had been installed or because Hawkins had done his work improperly. The work had to be done over again, and the company filed a claim with the insurer upon the theory that an accident within the coverage of the policy had occurred. This suit was brought after the insurer denied liability. At the conclusion of the plaintiff's testimony both sides requested an instructed verdict, and the court entered judgment for the plaintiff.

The insuring clause of the policy provides that the insurer will pay all sums which the insured shall become obligated to pay "by reason of the liability imposed upon him by law for damages because of injury to or destruction of property . . . caused by accident" and arising out of the insured's garage business.

Even when construed most strongly against the insurer this language is not broad enough to cover the present claim. To establish a cause of action the insured must prove that it is liable for damages caused by an accident arising from the operation of its garage. If we assume that an accident has been shown, which we do not determine, it still cannot be said that as a result the insured became liable to Nichols for any damages. On the contrary, all that happened was that the insured had to do its work a second time to be in a position to make a charge for its services.

The appellee relies mainly upon the decision in *O'Toole* v. *Empire Motors, Inc.*, 181 Wash. 130, 42 P. 2d 10, where a similar policy was involved. But that case

involved the vital element of liability on the part of the garage owner to his customer. A car had been defectively repaired, and as a result it turned over and caused injury to the customer and his wife. They recovered judgments in tort against the garage owner, and the insurer was required to pay the amount of the judgments. In the case at bar the essential factor of the insured's liability to Nichols is lacking. Immediately after the asserted accident Nichols could not have maintained a suit against the insured merely because the truck had not yet been repaired. The most that can be said is that the insured had to do its work twice before Nichols could be expected to pay the bill, but even then the liability was on the part of Nichols to the insured and not the other way around.

Reversed and dismissed.

STITH *v.* PINKERT.

4-9297 234 S. W. 2d 45

Opinion delivered November 13, 1950.

Rehearing denied December 11, 1950.

J. R. Booker and *Tilghman E. Dixon,* for appellant.

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

DUNAWAY, J. For the second time the question of appellee Pinkert's title to the west ½ of lots 1 to 6 inclusive, block 8, Adams Addition to the City of Little Rock, Arkansas, is before this court. The first case was *Pinkert* v. *Lamb,* 215 Ark. 879, 224 S. W. 2d 15.

In the *Lamb* case, the litigation was between Ed Pinkert and Ella Stith, widow of James H. Stith. Pinkert claimed title through mesne conveyances from Sewer Improvement District No. 94 of Little Rock. The District had purchased the property at a commissioner's sale held pursuant to a decree of the Pulaski Chancery Court rendered November 23, 1937, condemning said lots to be sold for delinquent assessments for the year 1934. Ella Stith claimed in a collateral attack on the foreclosure decree and sale thereunder that they were void for various reasons.

We upheld the validity of the foreclosure sale of the property to the district in the former case and reversed the Chancellor's decree to the contrary. One day before the mandate was issued by this court in that case, the instant suit was begun by appellants herein, Herbert Stith, James H. Stith, Jr., and Melanie Stith Tabor, the

surviving children and heirs of James H. Stith, deceased, who died in 1942. All three appellants are nonresidents of the State of Arkansas and have been for many years.

The first action, later transferred to equity, had been begun as one in ejectment by Pinkert against John Lamb, alleged to be in possession of the property as tenant of James H. Stith. At the first trial it was stipulated that Ella Stith was the record title owner prior to the sale of the lots to the District and that she held possession through Lamb as tenant.

It now develops that Ella Stith had only a dower interest in the property and that appellants herein, owners of the fee as heirs-at-law of James H. Stith, had not been made parties to the first action. The stipulation had evidently been made by counsel under a misapprehension of the facts, in an effort to expedite trial of the cause when it was shown that James H. Stith was deceased.

In the instant case, the Stith heirs sought cancellation of Pinkert's deed and an accounting of the rents and profits from the property. They joined as defendants Pinkert and one Schuman, alleged to be tax-title speculators, the receiver of District No. 94 and the Board of Commissioners of said District, certain parties who had collected rents from the property and Ella Stith, mother of one appellant and step-mother of the other two. Only Pinkert and Schuman answered or appeared.

The complaint alleged all the same grounds of invalidity of the foreclosure and sale as were presented in *Pinkert* v. *Lamb, supra,* together with certain new matters. It was alleged that the foreclosure decree was void because James H. *Smith,* rather than James H. *Stith,* had been named as owner in the complaint filed against the property by the District; and because this same mistake was made in naming *Smith* as the owner in the warning order or published notice of pendency of the suit. In addition to these two defects, which were alleged and proved in the *Lamb* case, it was alleged and proved

that in the notice of sale the property was described, but the name of the owner was omitted entirely. It was further alleged that the description in said notice of sale was so indefinite as to void the sale.

At the outset appellees contend that the judgment in *Pinkert* v. *Lamb, supra,* is *res judicata* of the present suit. Appellants, on the other hand, contend that since they were not parties nor privy to the prior suit, the doctrine of *res judicata* is inapplicable and they are not bound by the former judgment. We agree that *res judicata* is not in the case, but the law as declared in the opinion in the *Lamb* case is controlling in the case at bar under the rule of *stare decisis.*

In the *Lamb* case we held that Act 207 of 1937 (Ark. Stats. 1947, §§ 20-441 *et seq.*) governed the procedure to be followed in the foreclosure suit brought by the District. Then it was urged and now appellants argue that Act 207 is violative of the due process clause of the U. S. Constitution, in making the foreclosure proceeding an action *in rem* against the lands, in providing for constructive service and in providing that an incorrect allegation of ownership should be immaterial. In sustaining the constitutionality of the statute we fully discussed these questions in the *Lamb* case. We adhere to the views there expressed.

Appellants further argue that we erred in holding Act 207 applicable since the foreclosure suit was already pending at the time said act became effective March 8, 1937. Appellants argue that the statute should be construed to be applicable only to suits commenced after its enactment. The statute pertained only to the mode of procedure and did not create any new rights or take away any vested rights. "Practice and procedure include the mode of proceeding and the formal steps by which a legal right is enforced. Those words comprehend writs, summonses, and other methods of notice to parties as well as pleadings, rules of evidence and costs. Practice and procedure indicate the forms for enforcing rights as distinguished from the law which creates, defines and

protects rights." *Duggan* v. *Ogden,* 278 Mass. 432, 180 N. E. 301, 82 A. L. R. 765. As stated by this court in *Foster* v. *Graves,* 168 Ark. 1033, 275 S. W. 653 (at p. 1039): "The rule established by this court is that statutes in regard to remedies in procedure may be construed to apply to all pending proceedings, and will be so applied unless the language of the statute indicates a contrary intention." There is no such language in Act 207. We adhere to our decision in the *Lamb* case in holding Act 207 of 1937 applicable to this foreclosure proceeding.[1]

As discussed fully in the *Lamb* case, the misspelling of *Stith* as *Smith* in the complaint and warning order did not render void the foreclosure decree of the Chancery Court of November 23, 1937. Section 2 of Act 207 (Ark. Stats. 1947, § 20-441) which prescribed the procedure for enforcing collection of delinquent assessments by sale of the delinquent lands contains this provision: "Said proceedings and judgment shall be in the nature of proceedings *in rem,* and it shall be immaterial that the ownership of the said lands . . . be incorrectly alleged in said proceedings, and such judgment shall be enforced wholly against such property, and not against any other property or estate of said defendant." Validity of a similar statutory provision was sustained by this court in *Ballard* v. *Hunter,* 74 Ark. 174, 85 S. W. 252, affirmed by the Supreme Court of the United States in *Ballard* v. *Hunter,* 204 U. S. 241, 27 S. Ct. 261, 51 L. Ed. 461.

To hold that the obvious clerical error in misstating the name Stith rendered the decree void, would render the quoted statute meaningless. There is no contention made nor anything in the record in the instant case to indicate that there was such a person as James H. Smith, or that Stith and his heirs were in any way misled by this mistake in the complaint and warning order.

We turn now to a consideration of appellants' contention that failure to name the owner in the published

[1] As pointed out in the *Lamb* case, Act 207 of 1937 was subsequently amended by Act 130 of 1939 and Act 195 of 1949, which are inapplicable to the case at bar.

notice of sale rendered the sale void. As already pointed out, the challenged proceeding was one *in rem* against the property. Section 4 of Act 207 (Ark. Stats. 1947, § 20-444) providing for publication of notice of sale contained no requirement that the owner or supposed owner be named. Certainly, if an erroneous allegation of ownership is immaterial in the complaint and warning order omission of the owner's name in the notice of sale would not be a fatal defect.

As to the notice of sale, appellants also argue that the following description used therein was indefinite and confusing: "The following described real estate to-wit: Lots 21, 22, Block 1, Lots 1 to 6, inclusive, 12, 13, 16, 17, Block 4, West 33 feet of East 66 feet of 1, 2, 3, 4, 5, 6, West one-half of 1, 2, 3, 4, 5, 6; 7 to 11 inclusive, Block 8, all in Adams Addition".

It should be noted that the challenged description appeared in the notice of sale and not in the complaint, warning order, or decree of foreclosure. The description used in the earlier steps of the proceeding was as follows: "West ½ of Lots 1-6, incl., Block 8, Adams Addition". Sufficiency of that description was upheld in the *Lamb* case. While a majority of the court is of the opinion that the description in the notice of sale was sufficient, appellants cannot prevail even assuming its insufficiency. Such a defect was cured by the decree of the Chancery Court confirming the sale.

This Court held in *Stout* v. *Brown,* 64 Ark. 96, 40 S. W. 701, that a sale of attached property under a writ of *venditioni exponas,* after it had been reported to and confirmed by the court, could not be collaterally attacked upon the ground that such writ did not specify the property to be sold, or that the officer sold without authority, or that he sold without giving the notice required by law. The *Stout* case was cited with approval in *Lambie* v. *W. T. Rawleigh Co.,* 178 Ark. 1019, 14 S. W. 2d 245. In the later case of *Cassady* v. *Norris,* 118 Ark. 449, 177 S. W. 10, was also discussed in this language (at p. 1029): "The court further held that, after a confirmation of a sale has

been made by order of the court, all defects and irregularities in the conduct of the sale are cured, and every presumption will be indulged in favor of its fairness and regularity.'' In *Glasscock* v. *Glasscock,* 98 Ark. 151, 135 S. W. 835, it was held that confirmation of a judicial sale of lands cures such irregularities as a failure to advertise the lands. See, also, *Files* v. *Harbison,* 29 Ark. 307, upholding a judicial sale of lands against a collateral attack, where part of the lands had been omitted from the notice of sale.

Appellants have also sought to bring themselves within the rule announced by this court in such cases as *Word, Receiver,* v. *Grigsby,* 206 Ark. 164, 174 S. W. 2d 439, and *Schuman* v. *Person,* 216 Ark. 732, 227 S. W. 2d 160. It is argued that James H. Stith sought to redeem the lots in question, but was prevented from doing so by the mistake or neglect of the official to whom he tried to pay the delinquent assessment. To establish this allegation in their complaint, appellants introduced in evidence two redemption certificates issued to the Homeowners Loan Corporation, which held a mortgage on the property. One certificate was issued in 1934 covering delinquencies for several previous years; the other was issued in 1938 for the delinquent 1937 assessment. No other proof was offered on this issue. Mere proof of two redemptions on other occasions certainly did not prove that as to the 1934 delinquency, James Stith attempted in good faith to pay his taxes and was only prevented from doing so by official misprision.

Even though the foreclosure sale was valid, James H. Stith and his heirs had five years from the date of the sale on March 16, 1938, in which to redeem the property. Ark. Stats., 1947, §§ 20-446, 20-1144. The record does not disclose that they made any effort to do so.

We will not discuss at length appellants' allegations that Pinkert's title was acquired through fraud and collusion. Suffice it to say there is no proof whatever to sustain such allegations.

All other arguments of appellants have been considered and are deemed to be without merit.

The decree is affirmed.

WALLACE *v.* JOHNSON.

4-9281 234 S. W. 2d 49

Opinion delivered November 13, 1950.

Rehearing denied December 11, 1950.

Cecil Grooms, for appellant.

H. M. Cooley, Harry Ponder, Jr., and *Harry C. Blanton,* for appellee.

GRIFFIN SMITH, Chief Justice. Land carved from 960 acres near Monette, in the Eastern District of Craighead County, was described in an executory contract, and some of it forms the subject-matter of this controversy.

Activities resulting in the Chancery suit had their inception in efforts of Dr. W. E. Yount, equitable owner of the parent tract, to clear his indebtedness and salvage something from this valuable holding. He employed C. M. Boydstun, of Jonesboro, as agent, and H. M. Cooley, of the same city, as lawyer-agent, to deal with the lands. Dr. Yount, a dentist, residing at Cape Girardeau, Mo., found personal supervision of the property to be impracticable.

In December, 1929, Dr. Yount agreed to sell W. B. Wallace and Everett Wallace two tracts, one containing 80 acres and the other 20. There is evidence that the described area actually contained 101 acres, 43 of which were cleared and contained a house and barn. Dr. Yount, realizing the difficulty he would have in removing legal encumbrances from the land, accepted a down payment of $100 and consented that the next payment ($1,775, representing a fourth of the balance on the basis of $75 per acre) should be made when he could show a merchantable title. The method provided for payment of the remaining three-fourths (less the $100 that went with the contract) is not important here; nor are we concerned with sales contracts made in 1929 by Dr. Yount with other parties, and with his later contracts.

There is testimony that the land is quite valuable now —worth, perhaps, $150 per acre. Some witnesses thought that $30 per acre would represent actual values in 1929, and that the contract price of $75 was extremely high.

Due to depressed conditions following 1929, W. B. and Everett Wallace were willing to negotiate with Dr. Yount on a basis differing from the written contract, although it is possible that they could have stood on the strict letter of their agreement that the second payment was not due until an abstract had been supplied and that title to the property be merchantable.

They elected, however, to accept Dr. Yount's suggestion, made through the agent Boydstun, that for 1930 and 1931 a fourth of the cotton and a third of other crops would be delivered to Dr. Yount, proceeds to be applied to the payment of taxes and insurance. If, after making these payments, a balance remained, it would be applied on the purchase price.

The Sturdivant Bank of Cape Girardeau held an eleven thousand dollar second mortgage on Dr. Yount's lands, and the Doctor owed considerable interest on this mortgage. C. A. Vandivort was the bank's president. In September, 1931, Yount deeded the entire property to Vandivort, who acted as trustee for the bank. In 1933 Dr. Yount filed voluntary bankruptcy proceedings, and there was an adjudication in 1934. If sums paid by contract purchasers of the Craighead County lands were thought by the buyers to be due them from Dr. Yount, they failed to file claims.

As president of the bank Vandivort designated Boydstun to collect rents.

Appellant claims that Vandivort, while inspecting the properties late in 1931, agreed with W. B. Wallace to accept payments on the basis of a third and fourth, as Dr. Yount had, until it was possible to procure a deed. On the first of January, 1932, Boydstun and W. B. Wallace executed a supplemental contract relating to "about 83 acres of cleared land" wherein Vandivort was mentioned as owner and Wallace as lessee. The arrange-

ment called for payments based on a third and fourth. The contract, signed "C. A. Vandivort, by C. M. Boydstun, agent," bound Wallace to deliver possession of the property at termination of the contract—the crop year of 1932. There was, however, this paragraph: "[W. B. Wallace] has a contract of purchase with W. E. Yount, which has been purchased by C. A. Vandivort, (giving the date) and it is agreed . . . that if said contract . . . remains in . . . force, then all rentals on the lands described in said contract paid under [this supplemental agreement] shall be credited on the indebtedness or amount due thereunder, leaving the balance due as called for in said contract."

Boydstun testified that W. B. Wallace told him in 1930 that he had a contract with Dr. Yount, and if "they" were able to pay for the land, *that* 40-acre tract was to go to Everett Wallace and the remaining 60 acres to A. J. and B. A. Wallace. The only agreement Boydstun had with Vandivort covered renting, farm supervision, and related matters, but in January of 1932 he had no right to bind Vandivort on a contract of sale or to conduct such negotiations. Inferences to be drawn from this testimony are that personal knowledge regarding Dr. Yount's contract of 1929 and Boydstun's information that Vandivort had succeeded Yount as proprietor prompted Boydstun's reference to the old contract when the supplement was executed. Boydstun did not inform Vandivort of the content or send his principal a copy, although on cross-examination such assurance of failure was somewhat weakened. Vandivort testified that he did not know of this provision, hence could not ratify it. Furthermore, Boydstun insisted that he exhibited to all of the tenants his letter of limited authority, and told [Wallace] that the contract [relating, presumptively, to the sale] was absolutely worthless without Vandivort's approval, "and that the burden of getting that was on him."

Through various methods of payment and compromise with creditors Vandivort acquired all outstanding claims to the 960 acres, completing payments in 1935 or 1936. The Sturdivant Bank failed in 1932 and its affairs

were administered by the Missouri Commissioner of Finance who in turn executed a deed to Vandivort personally. In December, 1942, Vandivort and his wife conveyed to their seven children for a recited consideration of $1 and love and affection.

W. B. Wallace died in 1945, survived by his widow, and by the appellant Everett, and five other children. The widow died in 1949 after this litigation was begun.

The original action by Vandivort's grantees was forcible entry and detainer, but with other pleadings it became apparent that the justiciable question would be whether the Wallace group could prevail upon their assertions of equitable rights, hence the cause was properly transferred to Chancery, and of course it was not tried on the initial allegation.

Though not conceded by express words, undisputed proof shows that the only cash payment made by any of the Wallaces was the initial $100, although they contend that crop values in excess of the agreed third and fourth, less taxes, insurance, etc., would on a master's accounting sheet disclose complete liquidation of the purchase price. Abandonment, with citations to specific acts indicating that the Wallaces did not intend to carry out their contract after the depression began late in 1929, and *laches,* were pleaded.

Touching upon the extent of Boydstun's authority, counsel for appellant asked his client: "Did you ever have a conversation with Mr. Vandivort about the land: about Mr. Boydstun's authority?" A. "Yes, sir. [Mr. Vandivort] said he might not get down [to Craighead County] very often, and for us to talk with 'Uncle Charlie'—that's what he called Mr. Boydstun." Q. "And Mr. Boydstun collected all payments made by you and the other tenants in the neighborhood, looked after the land, and discussed the planting of crops with you?" A. "Yes, sir."

Two additional houses and barns were constructed in the 1930's, but Vandivort furnished materials and the Wallaces did the work. Most of the land was cleared

by appellant and his relatives before Vandivort bought for the bank. According to Everett Wallace, he did not ask Vandivort for a deed until 1937, but did repeat the request in 1943. Before the suits were filed appellant had on one occasion used fertilizer on his acreage and Vandivort reimbursed him for a fourth of the cost. On cross-examination appellant admitted that in November, 1932, he accepted a receipt from Boydstun as agent acknowledging on behalf of himself and his father that $132.94 had been paid. The total was evidenced by an adding machine slip penciled, "$36.72 rent." It was then stipulated that all of the receipts were marked "rent." At least one check, issued in 1942, was given appellant by Vandivort to reimburse Wallace for money he had spent in repairing the house in which he lived on the 43-acre tract.

In cross-examining appellant he was asked whether, in September, 1943, he "sold out, 'lock, stock, and barrel', to his brother Pete, [including] tools, team, ungathered crops, etc., and remained away until January, 1946?" In partially affirming the transactions, appellant admitted the sales, but denied that he was off the place all of the time embraced within the dates. An exhibit offered by appellees was the contract of B. A. (Pete) Wallace dated Nov. 1, 1943, covering 101 acres. Wallace signed as tenant and Vandivort for his children. It was renewed for 1945.

Particularly during the depression years it was necessary for appellant and his father to borrow money for crop-making purposes. Funds were advanced by the Bertig Gin Company and others. In July, 1934, Everett, A. J., and B. A. Wallace certified to the U. S. Department of Agriculture, AAA division, that they had rented lands from Boydstun as agent for Vandivort "for a share of the crop," and that each was to furnish his own work stock and equipment "and manage the tract of land which [I] have rented, . . . the landlord to pay for major repairs on the place."

In an undated letter to Henry Wallace, Secretary of Agriculture, the three Wallaces in Craighead County

said: "[We] are cotton producers and rent land from an owner and furnish seed, teams, tools, and labor, and manage the operation of the farm. [We] are *interpreted* (interested?) in the contract as managing share-tenants, and [were] refused rights to execute a cotton-reduction contract with [our] landowner, Mr. C. A. Vandivort. He has executed a reduction contract without allowing me to sign in § 12. [We] hereby ask that payment be held until we can come to some agreement."

There was some testimony directed to the relationship between Boydstun and Vandivort, having for its purpose a showing that the agent's authority was more than that of making rental contracts, collecting crop apportionments, and other acts of superintendency. Boydstun no doubt assisted those who were cultivating the lands in procuring advances on prospective crops, and to this extent prepared waivers in favor of those making the loans. But the waivers were not signed by Boydstun. On the contrary they were sent directly to Vandivort.

In January, 1934, Vandivort, the Wallaces, and others met at Black Oak to discuss appropriate division of government benefits that were being paid to farmers. The understanding was evidenced by a writing dated the 31st of that month, the introductory sentence being, *We, the undersigned landowner and tenant.* A. J. and Everett Wallace signed as tenants, and Vandivort as landlord.

W. I. Doyle, who as tenant participated in the Black Oak discussions, testified that in July, following, Vandivort was present at the AAA meeting heretofore referred to and signed a waiver "for all of us" to get money for crop production. Vandivort had stated at the meeting that he wanted to collect these benefits "to apply on those deeds for crop production loans." On one occasion when the witness Doyle was with Wallace (presumptively Everett) and Boydstun, Wallace mentioned his desire to buy from Vandivort. This was before Everett left the land—probably in the spring or summer of 1942. Wallace asked Boydstun if the land could be bought and Boydstun said he didn't know. Wallace then said he

was in a position to pay $4,000 cash for the forty [or 43] acres, having arranged to borrow that sum.

Doyle denied an assertion by Wallace to the effect that he (the witness) was present at a meeting between Vandivort and Wallace in 1937 or 1943 when Wallace demanded of Vandivort that a deed to the land be executed. Wallace later told Boydstun that he had written Vandivort, and that Vandivort replied that he did not want to sell. A copy of Vandivort's letter to Wallace, dated August 15, 1942, was identified by the writer. In it he said: "I have considered your proposal to buy the forty acres on which you live, [but] think it best that I not sell it."

A. J. (Nate) Wallace, Everett's brother, testified that in 1940 he leased 30 acres of the 100-acre tract, that another brother had 30 acres, "and Everett was living on the other 40." In August, 1947, H. A. Wallace stated in writing that he had not at any time made a claim of ownership to an interest in the 80-acre tract, either on his own behalf or as an heir of W. B. Wallace. There was testimony that Nate Wallace made similar statements.

On December 20, 1944, W. B. Wallace made an independent landlord-and-tenant contract with Vandivort. By indorsement it was extended to cover 1945.

The record shows a letter of July 12, 1945, marked "Plaintiff's Exhibit O." It is written with ink on a penned letterhead, and is addressed to Everett Wallace, and is signed, "C. A. Vandivort." Appellant's contention is that it was in response to an inquiry whether the land was for sale. Vandivort testified that he did not write the letter, that it was not written by any of his children, and that he had never had stationery of that kind. Everett Wallace had testified that he wrote Vandivort in 1945, asking if the place could be bought. He had seen the property advertised in a real estate office, and wondered why "his" property was being sold.

After the case had been fully developed Chancellor Cherry rendered a decree in favor of the Vandivort inter-

ests. Before lapse of the term the Chancellor acted favorably upon a motion by counsel for Wallace that the decree be vacated and retrial allowed because, as it was contended, new evidence had been discovered.

This evidence was a contract of June 19, 1934, between Vandivort, Boydstun, and H. M. Cooley. It recited Vandivort's purchase of the Yount property and disclosed Vandivort's assent to the statement that Boydstun and Cooley had contracted with Dr. Yount to sell the 960 acres under the arrangement referred to, and contracts were accordingly made. It was Vandivort's desire that Boydstun and Cooley should "continue their efforts to a final conclusion of sale of all said lands and assist in refinancing the same," therefore an agency was created. Cooley, as attorney, was to receive a stipulated compensation for the services he had rendered Dr. Yount as attorney, [and for services rendered Yount and Vandivort] "in connection with said lands." The sums so stipulated were to compensate for any services Cooley might render "in connection with handling all matters that may be litigated in the future pertaining to said lands for C. A. Vandivort."

The amounts so stipulated were to be paid from net proceeds "derived from the sale of lands that have been sold and that may be hereafter sold, and it is contemplated that C. M. Boydstun shall serve as real estate agent in making sale of the remainder of said lands yet unsold, . . . and for said additional services of [Cooley and Boydstun] in connection with the remainder of said lands and the handling of all matters pertaining to the sale and the legal work," pay would be as fixed in the contract; and "the amount hereinbefore mentioned shall cover all services by [Boydstun and Cooley] that have been rendered and that may hereafter be rendered until the final completion of the same. It is agreed that all contracts heretofore entered into with the men now on said lands shall be carried out as near as possible between said parties and in the manner as [Vandivort, Boydstun, and Cooley] may deem proper and equitable in connection with said contracts."

Counsel for the appellant thinks wording of this contract, though admittedly unknown to any of the Wallaces at the time of its execution, discloses affirmative acknowledgment by Vandivort of his obligations to appellant and his relatives, therefore rental arrangements with Dr. Yount, and the practice continued by Vandivort when he succeeded to the title, should be regarded as expediencies treated at the time as temporary. But, says appellant, whether Vandivort did or did not intend to perform under the Yount contracts, W. B. and Everett Wallace were on the property when Vandivort took over, and he was charged with constructive knowledge of any claim their possession would support.

Appellees reply that C. A. Vandivort's understanding of these contracts (and there were contracts with third parties signed by Dr. Yount about the time he dealt with the Wallaces and later) was influenced by the rental agreements; that he assumed from the conduct of W. B. and Everett Wallace that when the "bottom fell out of real estate values" they were anxious to remain as tenants, but were wholly incapable of completing purchase payments, and that they were being accommodated by the novation—to which would attach an implication of finality insofar as the obligation to purchase was an element.

In a cross-complaint appellant sought specific performance of the 1929 contract and asked that a master be appointed to state an account. The pleading, in the prayer for affirmative relief, included all of the property mentioned in Dr. Yount's contract, and alleged that in defending and prosecuting the plaintiff was acting for himself and "for the use and benefit of other heirs of W. B. Wallace."

In June, 1947, the defendants moved to dismiss for misjoinder of parties. The motion was overruled by Judge Cherry, but sustained by Chancellor C. M. Buck when the final decree was rendered. It was Judge Buck's view that the joint contract was not divisible, that W. B. Wallace had no intention of carrying out the contract, nor was such intention evidenced by Wallace's other

named sons after his death. But the Chancellor thought that Everett Wallace, in good faith, had undertaken to comply with his obligations. However, his failure to designate other Wallace heirs as plaintiffs or defendants justified the holding of misjoinder or nonjoinder. Rents for 1946, 1947, 1948, and 1949 for which Everett Wallace should account were found to be $2,567.68, but $2,060.24 of this sum had been paid, bonds and cross-bonds having been executed.

Our conclusion is that the Chancellor's finding that W. B. Wallace had abandoned his contract is sustained by a preponderance of the evidence; but we think a like finding should be made as to Everett. This makes it unnecessary to determine whether other Wallace heirs were necessary parties.

Even when the Wallace-Yount contract was made, the equitable grantees had notice that a lien-free title might not be obtainable, so there was inserted in the document a paragraph reading: "In the event [Dr. Yount] is unable to secure a release of said lands from mortgages, then [W. B. and Everett Wallace] agree to pay customary rentals. . . ."

Of course if Vandivort had information from which a reasonable man would have concluded that the original parties were not treating the contract as rescinded, liability would attach to successive owners on the ground that possession puts a purchaser on inquiry. Whatever the facts may have been for the years through 1931, there was conduct thereafter to show that the Wallaces were satisfied with tenancy arrangements. Although the mere act of designating landlord and tenant relationships in dealing with the AAA would not be determinative of the issue, doubtless something more than mere curiosity prompted appellant to claim that he wrote Vandivort in 1945 asking if the land could be bought.

Certainly the joint protest of Everett, A. J., and B. A. Wallace to the Secretary of Agriculture at Washington was their studied complaint. On cross-examination Everett admitted that *he* wrote the letter. Presumptively it was mailed in 1934, for its use as an exhibit is

followed by transcript references to a photostatic copy of a "Landlord Agreement" of July 23, 1934. Everett, A. J., and B. A. Wallace were among those who subscribed as tenants, with Vandivort as landlord.

Although facts in the case at bar are not like those controlling the decision in *Harris* v. *Lemley,* 131 Ark. 471, 199 S. W. 373, there is in that case a distinct recognition that one may, as a matter of law, be held to have abandoned a contract.

Abandonment and rescission are words quite often used indiscriminately. The general rule seems to be that the fee owner of realty will not be held to have abandoned his rights unless by some recognized process the title has been divested. In this respect the law is not the same as that applicable to homestead or estates on condition, and it is held that the equitable doctrine of *laches* or abandonment applies only to easements or licenses and such special rights and abandonment has no application to vested estates; but the title, though not lost by abandonment, might be barred by estoppel or the statute of limitation. Thompson on Real Property, v. 5, pp. 314-15. While failure of vendor and vendee to perform or offer to perform the contract does not alone operate as a mutual rescission, conduct inconsistent with the original intent may—particularly if it is engaged in for a protracted period—disclose the purpose of one or both of the parties as clearly as though there had been express declarations.

Well-reasoned cases hold that as to lands mere temporary absence or nonuser is not sufficient evidence of abandonment, the term "abandonment" having been discussed by the textwriter as a mode of divestiture of title to property in general. *American Jurisprudence,* v. 1, §§ 1 and 14. In his work on the Law of Real Property, Tiffany says, v. 4, § 962, that surrender by act and operation of law, which is expressly excepted from the Statute of Frauds, is a surrender which the law infers from certain acts by the parties as being inconsistent with the continued existence of [the former status]. In his comments on surrender of estates and interests not neces-

sarily identical with the one here involved, Tiffany says that the right is yielded by operation of law "when the tenant accepts from the reversioner a new lease, to begin immediately, or at any time during the existence of the previous lease, this result being based on the theory that, by such acceptance, the tenant is estopped to deny the validity of such lease, which nevertheless cannot be valid unless the first lease is terminated."

The *Restatement of Contracts,* [v. 2, § 406 (b) (c)] construes the law to be that an agreement to rescind need not be expressed in words. "Mutual assent to abandon a contract, like mutual assent to form one, may be manifested in other ways than by words. Therefore, if either party wrongfully expresses a wish or intention to abandon performance of the contract, and the other party fails to object, there may be sometimes circumstances justifying the inference of assent to a rescission. Sometimes even circumstances of a negative character, such as failure by both parties to take any steps looking toward the enforcement or performance of a contract, may amount to a manifestation of mutual assent to rescind it. . . . The question is not one of words, but of substance. Whether the parties talked of 'rescission', 'release', 'discharge', 'waiver', or 'forgiveness' of the right is immaterial." We are not here concerned with the Restatement's illustration No. 2, p. 771 of vol. 2, where the Statute of Frauds is discussed. In the case at bar there is written evidence of appellant's intentions in dealing with the property.

In circumstances strikingly similar to the case at bar, except that notice of forfeiture had been served, it was held that the purchaser of land under an executory contract who after making the initial payment defaulted had abandoned. Several years after the contract was made the parties entered into an agreement whereby Harms, the purchaser, leased the property from Boynton, the seller. The Supreme Court affirmed a holding by the circuit judge that the lease was obtained without fraud, and that Harms' execution of it and occupancy of the land thereunder constituted a surrender of what-

ever rights he formerly had. *Miner* v. *Boynton,* 89 N. W. 336, 129 Mich. 584. The same appellate court, in affirming *Dundas* v. *Foster,* 274 N. W. 731, 281 Mich. 117, reached a like result in 1937, but there, again, notice of forfeiture had been given.

Cases are cited by the textwriter, *Vendor and Purchaser—Abandonment,* Corpus Juris, v. 66, pp. 730-31, sustaining the summary that conduct from which intent may be clearly inferred is the controlling consideration, and this is a question of fact.

Where the parties made a new contract, containing no reference to the former agreement, the original was held to have been abandoned. *Weaver* v. *Propst,* 28 S. W. 2d 872. The decision was by the Texas Court of Civil Appeals. Likewise, a second sale of property without objection from the equitable grantee was treated in Iowa as a mutual abandonment of the first contract. *Miller* v. *McConnell,* 179 Ia. 377, 157 N. W. 943, [rehearing denied, but opinion modified, 161 N. W. 461].

Applying these principles to the case at bar, appellant must lose. While there is some argument that the contract between Vandivort upon the one hand and Boydstun and Cooley on the other recognized the Yount commitments of 1929 as late as 1934, the explanations by these three parties that other contracts were contemplated and that Vandivort's seeming purpose at all times was to treat the rental or lease contracts as responsive to the wishes of all the Wallaces—these and many other facts and circumstances point clearly to acquiescence in the substituted status, continuing from 1932 to 1945.[1]

Affirmed.

[1] Appellant filed a supersedeas bond, but paid $2,060.24, leaving an apparent balance of $507.44, plus the value of 1949 crops ungathered or undisposed of when the cause was submitted. Because uncertain computations must be made, the cause is remanded for the single purpose of determining what amount is still chargeable against appellant and his bondsmen.

BOWLES *v.* DIERKS LUMBER & COAL COMPANY.

4-9236 233 S. W. 2d 632

Opinion delivered November 13, 1950.

Shaver, Stewart & Jones and *Quinn & Williams,* for appellant.

Watson, Ess, Whittaker, Marshall & Enggas and *Abe Collins,* for appellee.

ED. F. MCFADDIN, Justice. This appeal involves the validity of several State tax deeds and also the effect of confirmation proceedings conducted under Act 119 of 1935.[1]

Appellant filed suit in the Chancery Court, claiming to be the owner of six tracts of land in Little River

[1] This Act, as presently amended, is now § 84-1315, *et seq.*, Ark. Stats.

County, Arkansas, totaling 200 acres. The appellee held under deeds, issued to it in 1945 by the State Land Commissioner, based on forfeiture for taxes of previous years; appellant claimed that the tax forfeitures were void for various reasons; appellee not only asserted the validity of the tax forfeitures but also pleaded confirmation decrees under Act 119 of 1935 as curing all possible defects. There was no allegation in the complaint, or testimony in the record, as to any claim of actual possession by appellant. It was stated in the oral argument before this Court that the lands were timber lands.

Trial in the Chancery Court resulted in a decree for appellee for five of the tracts and a decree for appellant for one tract. By appeal and cross-appeal the entire controversy is before this Court. Because, in some instances, the questions presented on one tract are different from those on other tracts, we will discuss the tracts grouped according to the questions presented.

Tract No. 1—E½ SE¼ SE¼ Sec. 25

and

Tract No. 5—SW¼ NW¼ Sec. 36

As to Tract No. 1, the trial court dismissed appellant's claim, because appellant failed to show any title in himself or any possession of the land, and therefore could not be heard to attack appellee's tax title since one without title or possession cannot attack the title of another. See *Jackson* v. *Gregory,* 208 Ark. 768, 187 S. W. 2d 547, and cases there cited. Such holding of the trial court was in all things correct.

As to Tract No. 5, L. E. Spence was the common source of title. He conveyed to J. A. Denton in 1922, and J. A. Denton conveyed to Lillie P. Denton in 1932. There is no record title out of Lillie P. Denton. In July, 1947, J. A. Denton, Mrs. Mae Kennedy, and others, executed a quitclaim deed to appellant Bowles; but there is nothing in the deed or elsewhere in the evidence to show that these grantors had any title through or from Lillie P. Denton. Appellant was asked if he knew anything about the relationship of the parties; and he gave nega-

tive answers. There is no presumption that appellant's grantors had any title from Lillie P. Denton (see *Ambs* v. *Chicago, Etc., Railway Company,* 44 Minn. 266, 46 N. W. 321, and *Turner* v. *Liebel,* 185 Ky. 313, 215 S. W. 70; 19 C. J. 1156, and 28 C. J. S. 958). Thus appellant has failed to show either a record title, or possession, and therefore has no standing to attack appellee's tax deed issued by the State in 1945. As previously stated, one without title or possession cannot attack the title or another.

Tract No. 2—W½ SE¼ SE¼ Sec. 25

L. E. Spence, the common source of title, conveyed to Gunn in 1923, and Gunn conveyed to appellant in 1947. But the tract forfeited to the State in 1931 for the taxes of 1930; the State obtained a confirmation decree in 1937 under Act 119 of 1935; and the State conveyed to appellee in 1945.

Appellant claimed that the 1930 tax forfeiture was void and that the 1937 confirmation decree could not, and did not, cure the defect. The Chancery Court held for the appellant; and appellee has appealed. The Chancery decree recites:

". . . The testimony discloses that the clerk failed to certify the delinquent sale; failed to certify that the lands were advertised as required by law, and the court is of the opinion that the title claimed by the defendant, Dierks Lumber & Coal Company, based on said tax sale, is void; . . ."

We hold that these two defects—*i. e.,* failure of the Clerk to certify the list, and failure of the Clerk to certify that the lands were advertised,[2] both as required by

[2] There is a statement in *Cecil* v. *Tisher,* 206 Ark. 962, 178 S. W. 2d 655, that reads: "We think the failure of the clerk to perform this duty, as required by § 13848 of Pope's Digest, did avoid these sales, and was a *jurisdictional defect.*" In that case there had been no confirmation proceeding under Act 119 of 1935; and the words, "jurisdictional defect," were used in that opinion as relating to a defect which could be urged prior to confirmation, and did not mean a defect relating to the power to sell which, of course, could not be cured by a confirmation proceeding. Likewise, *Browning* v. *King,* 214 Ark. 480, 216 S. W. 2d 803, was a case in which the defect was urged *prior* to a confirmation; and in *Devore* v. *Beard,* 208 Ark. 476, 187 S. W. 2d 173, the defect was urged before the confirmation decree became final.

§ 84-1103, Ark. Stats. — were irregularities that were cured by the confirmation decree,[3] as neither defect went to the power to sell.[4] Such is the effect of our holdings in *Berry* v. *Davidson,* 199 Ark. 276, 133 S. W. 2d 442; *Faulkner* v. *Binns,* 202 Ark. 457, 151 S. W. 2d 101; *Stringer* v. *Fulton,* 208 Ark. 894, 188 S. W. 2d 129; *Billingsley* v. *Lipscomb,* 211 Ark. 45, 200 S. W. 2d 510; and *Hensley* v. *Phillips,* 215 Ark. 543, 221 S. W. 2d 412. So we conclude that the Chancery Court was in error in awarding this tract to the appellant; and to that extent the decree is reversed on appellee's cross-appeal.

Tract No. 3—SW¼ SE¼ Sec. 25

and

Tract No. 6—NW¼ NW¼ Sec. 36

L. E. Spence was the common source of title. In 1925 he conveyed one tract to Gunn and the other to Widdersheim; and each of these parties, by separate deed, conveyed to appellant Bowles in 1947. But in 1941 each of the tracts forfeited to the State for the nonpayment of 1940 taxes; and the State obtained a confirmation decree, under Act 119 of 1935, at the November 1944 term of the Little River Chancery Court. Thereafter (in March 1945) the State conveyed the tracts to the appellee. Appellant claimed that the tax forfeitures were void and that the confirmation decree could not cure the three defects on which appellant relied to defeat the tax sale. We mention these as (a), (b), and (c):

(a)—Appellant claimed that the levying of school taxes by the Quorum Court was void because the record failed to show the levy to have been in *mills.* The Quorum Court proceedings showed in this regard that the school taxes were levied "as voted by the voters of the several

[3] In using the expression "cured by the confirmation decree," we necessarily mean: (a) the rendition of the decree, and (b) the lapse of one year without challenge of the decree. See § 84-1325, Ark. Stats.

[4] As to defects that go to the power to sell, see *Lumsden* v. *Erstine,* 205 Ark. 1004, 172 S. W. 2d 409.

school districts at the regular school elections . . . in words and figures as follows:

"School District	Total Mills Voted	General Fund	Building Fund
Dist. 12, Winthrop	18	13	5

"

It will be observed that the word, "*mills*", appears in the second column as "Total Mills Voted." The case of *Seligson* v. *Seegar,* 211 Ark. 871, 202 S. W. 2d 970, involved a record in all respects similar to the one here; and under the authority of that case the appellant's attack is without merit, and the Chancery Court was correct in so holding.

(b)—Appellant claims that the proceedings of the Quorum Court were not signed by the Clerk, and therefore the entire tax sale was void. This contention is also similar to one made in *Seligson* v. *Seegar, supra,* and for reasons there stated is likewise held to be without merit. Furthermore, we point out that the Quorum Court proceedings were duly entered of record, and such record—in the custody of the proper official—was presented to the trial court. The Chancery Court was correct in holding this claim of appellant to be without merit.

(c)—The appellant contends that the Quorum Court levied the taxes *before* making the appropriations, whereas § 17-409, Ark. Stats., requires the reverse order of procedure. Sub-section 6, Division 8, of said section reads: "After the appropriations shall have been made, the court shall then levy the county (municipal) and school taxes for the current year . . ." In the case at bar the appropriations were made at the same session of the Quorum Court at which taxes were levied, but appear in the record to have been *after* the taxes had been levied. No contention is made that the taxes were not levied, but it is contended that the taxes were levied *before,* instead of *after* the appropriations were made. At most, such would be a mere irregularity in the order of business; and even if it could be urged to defeat a tax sale prior to a confirmation decree under Act 119 of 1935 (a

point we do not decide), certainly such irregularity would be cured by a confirmation decree [5] under said act.

We are therefore brought to the validity and sufficiency of the confirmation decree which the State of Arkansas obtained at the November, 1944, term of the Little River Chancery Court confirming the title of the State to the lands here involved. That was Case No. 50 in the Little River Chancery Court. A portion of the decree is in the transcript, and when the attorneys were discussing the decree in the trial of the present case, this occurred:

"Mr. Collins: The decree is at page 313 of the same volume.

"Court: All right. That was the November Term, 1944, Confirmation Suit of 1944. Confirming the taxes for what year?

"Mr. Collins: 1940. It was the 1940 tax suit. We desire to introduce this decree in evidence.

"Court: If there is no objection, let it be introduced.

"Mr. Quinn: No objection."

While the Chancery Clerk was on the witness stand, he testified from the record: ". . . that 1940 suit is number 50."

So it is clear that even though the portion of the decree copied into the transcript fails to state—through apparent oversight—that the decree confirmed the State's title, because of the failure to pay the *1940* taxes, nevertheless, such fact is made clear from the above copied excerpts.[6] The lands forfeited to the State for

[5] In using the expression "cured by the confirmation decree," we necessarily mean: (a) the rendition of the decree, and (b) the lapse of one year without challenge of the decree. See § 84-1325, Ark. Stats.

[6] There was an effort by appellee to bring to this Court by *certiorari* certain papers that were not in fact before the trial court. Under our rules we have necessarily rejected all such papers. Also a typographical error, in some of the exhibits, was mentioned by this Court in the oral argument; and appellee initiated correspondence with appellant in an effort to clear up this error. We have rejected all such correspondence. The error was mentioned in the trial court and impliedly conceded on Pages 39, and following, of the transcript.

the non-payment of the 1940 taxes; and we hold—as did the Chancery Court—that the confirmation decree heretofore referred to cured the irregularity of the challenged Quorum Court proceedings. Such is the effect of our holdings in the cases of *Fuller* v. *Wilkinson,* 198 Ark. 102, 128 S. W. 2d 251; *Faulkner* v. *Binns,* 202 Ark. 457, 151 S. W. 2d 101; and *Stringer* v. *Fulton,* 208 Ark. 894, 188 S. W. 2d 129, and cases there cited.

Tract No. 4—NE¼ NW¼ Sec. 36

L. E. Spence, the common source of title, conveyed to Iverson in 1922, and Iverson conveyed to appellant Bowles in 1947. But the tract forfeited to the State in 1941 for the taxes of 1940; the State obtained a confirmation decree at the November, 1944, term of the Chancery Court, under Act 119 of 1935, and the State sold the tract to appellee in 1945. The same three defects urged against Tracts Nos. 3 and 6 (*supra*) were urged regarding this tract; and our holdings on those questions apply here.

In addition, appellant also claimed this tract under a Road Improvement District deed: that is to say, this tract was in Road Improvement District No. 7 of Little River County,[7] and the Road Improvement District obtained a decree of foreclosure in 1926 for the delinquent assessment of 1924. Then in 1933 the Road Improvement District obtained a deed when the land owner had not effected a redemption; and in 1947 the Commissioners of the Road Improvement District executed a deed to appellant Bowles. He now contends that during the time the title was in the Road Improvement District the land was not subject to forfeiture for State and County taxes. Therefore, he urges that the 1940 tax forfeiture was null and void, and seeks to rely on such cases as *Hubble* v. *Grimes,* 211 Ark. 49, 199 S. W. 2d 313; *Little Red River Levee Dist. No. 2* v. *Moore,* 197 Ark. 945, 126 S. W. 2d 605; and *Baiers* v. *Cammack,* 207 Ark. 827, 182 S. W. 2d 938.

But the vice in the appellant's argument is that in the said adjudicated cases the Districts involved were

[7] This District was created by Act 292 of 1919.

Levee Districts or Municipal Districts that had not been taken over by the State; whereas, in the case at bar, Road Improvement District No. 7 of Little River County was a beneficiary of Act 11 of 1927 and Act 153 of 1929, and was therefore taken over by the State. Because of the last mentioned fact the Road Improvement District deed, to Bowles in 1947, is a nullity. The reasons for this statement are fully given in the cases of *Todd* v. *Denton,* 188 Ark. 29, 64 S. W. 2d 331, and *Tri-County Highway Dist.* v. *Taylor,* 184 Ark. 675, 43 S. W. 2d 231. In *Luebke* v. *Holtzendorff,* 204 Ark. 502, 162 S. W. 2d 899, we said of these last two mentioned cases: "Those opinions were to the effect that since the passage of the Martineau Road Law of 1927 and Act 153 of the Acts of 1929 road improvement districts were without authority to sell lands for the non-payment of delinquent road taxes." So we hold—as did the Chancery Court—that the appellant's deed from the Road Improvement District is a nullity and does not give him any right to challenge appellee's tax title.

To summarize: the decree of the Chancery Court is affirmed on direct appeal and is reversed on cross-appeal only as to Tract No. 2, and remanded with directions that such tract be awarded to appellee. This being an equity case, we are free to adjudge the costs as seem equitable: and we decree that the costs of this Court shall be equally paid by appellant and appellee, and that the division of costs made by the trial court be in all things approved.

WHETSTONE *v.* DANIEL.

4-9285 233 S. W. 2d 625

Opinion delivered November 13, 1950.

[redacted]

Bernard Whetstone, for appellant.

George Rose Smith, J. This case went off below on demurrer to the complaint. The plaintiff, a lawyer, alleged in his complaint that he had been employed by a Texas finance company to collect a balance of $226.12 from the defendant or to repossess the car on which this debt was owed. Upon being so employed the plaintiff called on the defendant and obtained a promise that the defendant would on the following day either pay the debt or surrender the car. In disregard of his promise the defendant made a direct settlement with the finance company, after which the latter offered to pay the plaintiff a nominal fee for his services. The complaint asserts that the defendant, by settling with the finance company, deprived the plaintiff of the lien he would otherwise have had on the car or on the proceeds of collection. Judgment is prayed for a reasonable fee, which is said to be half the debt that the plaintiff was employed to collect. The trial court sustained a demurrer to this complaint, and the appeal is from the ensuing order of dismissal.

We agree that no cause of action is stated. Our present statute provides that an attorney shall have a lien on his client's cause of action from and after service upon the adverse party of written notice by registered mail, or, in the absence of such written notice, from and after the filing of suit. If the adverse party then compromises the claim without the attorney's consent he is liable

to the attorney for a reasonable fee. Ark. Stats. 1947, § 25-301.

Here the plaintiff admits that he neither gave written notice nor filed suit. Since, however, the statute is to be liberally construed, *Slayton* v. *Russ*, 205 Ark. 474, 169 S. W. 2d 571, 146 A. L. R. 64, the appellant insists that his action in visiting the appellee and demanding payment of the claim should be considered substantial compliance with the requirement of written notice by registered mail. But even a liberal interpretation must be consistent with the basic intent of the statute. To construe the law as the appellant suggests would simply dispense with the necessity of giving notice by registered mail. That notice is a necessary element in the legislative scheme. It gives the recipient unmistakable warning that the attorney is insisting upon his lien and that any subsequent compromise will involve liability for the attorney's compensation. Not having given the appellee the warning required by the statute, the appellant must look to his own client for his fee.

Affirmed.

RILEY *v.* WARNER.

4-9279 233 S. W. 2d 626

Opinion delivered November 13, 1950.

[redacted]

J. F. Koone and *N. J. Henley,* for appellant.

Opie Rogers and *Carroll W. Johnston,* for appellee.

LEFLAR, J. In the Chancery Court, appellees Mr. and Mrs. H. L. Warner were, as assignees, awarded specific performance against Mrs. Ida B. Riley of a contract under which Mrs. Riley had agreed to sell a house and lot in Clinton, Ark., to Mr. and Mrs. C. W. Cross. Mrs. Riley appeals.

By written contract Mrs. Riley agreed to sell the premises to the Crosses for $1,750, of which the Crosses paid $500 in cash and were to pay $25 on the first of each month, commencing January 1, 1949, until the balance, with accrued interest, was paid off. The deed, abstract and other papers were deposited in escrow with the Clinton State Bank, to be delivered to the Crosses when payments should be completed, subject to the following provision in the contract:

"It is further agreed by all parties hereto that should any of the payments herein specified remain in default for a period of sixty days this sale shall become null and void, and (the seller) is hereby authorized to withdraw her deed and abstract, and any and all sums paid prior to default shall be retained by said (seller) and held as rental for said property, and no part of the payments made as hereinbefore provided shall be returned or refunded to the (purchasers)."

In addition to the $500 down payment, the Crosses made the first two $25 payments, on January 1 and February 1, but the payments due on March 1, April 1, and May 1 were not made. On May 3, 4, and 5 Mrs. Riley demanded that her deed and other papers be returned to her, in strict accordance with the terms of the contract; on May 5 Mr. and Mrs. Warner offered to Mrs. Riley the full amount remaining due on the entire purchase price, with accrued interest (a total of $1,220.74), but she refused to accept it and, on her continuing demand, the

Bank as escrow agent returned to her the deed and accompanying papers.

The assignment from the Crosses to the Warners had occurred some time after March 1, 1949, through the agency of a realtor named Conner. Conner had in some undetermined manner secured the deed and abstract from the escrow bank, and had allowed the Warners to believe that title had passed unconditionally to the Crosses, who lived in another state. The Warners paid the entire amount of their agreed purchase price ($2,300) to Conner, and he held it pending legal approval of the title after the abstract was brought up to date. The Warners in the meantime went into possession of the premises, under directions from Conner, and had by May 1, 1949, expended some $1,800 in making improvements, including a new room added to the house, a well, and a butane gas system. Mrs. Riley admitted that she knew the premises had been sold by the Crosses and that the new owners had added another room to the house prior to May 1.

The principal question in the case is whether, under the circumstances stated, the forfeiture provision in the contract, quoted above, should be literally enforced. The Chancellor held that it should not, and we agree.

It has been many times stated that equity abhors a forfeiture. This does not mean that equity will never enforce a forfeiture. Performance by the defaulting party within the exact time specified may be of the essence of a particular contract. But a forfeiture for delay in performance will not be enforced unless the contract inescapably calls for its enforcement and the party in default "shows no sufficient excuse for nonperformance at the time specified," *Atkins* v. *Rison,* 25 Ark. 138, or the total of the contract's provisions shows that performance within the time specified, or substantially within it, is essential to the effective carrying out of the contract as a whole, *White* v. *Page,* 216 Ark. 632, 226 S. W. 2d 973. When the contract does not declare that time shall be of the essence, and there is

nothing in the transaction making it imperative that payments be made by the designated day else not at all, and there is within a reasonable time an offer made in good faith to pay what is due, the claim to a forfeiture will be denied. *Butler* v. *Colson,* 99 Ark. 340, 138 S. W. 467; *Smith* v. *Berkau,* 123 Ark. 90, 184 S. W. 429.

In the present case, though forfeiture on delay in payment was called for, there was nothing in the contract either expressly or by inference making time of the essence in payment of the installments owed by the purchasers. Nothing in the transaction as a whole indicated any urgency in payments being made on particular days, other than the fact that the amount of interest payable by the purchasers would be increased in case of delay. A cash payment of the entire balance due under the contract, plus interest, was tendered only five days late, and the tender was renewed when the case came to trial. These facts do not justify enforcement of the forfeiture.

There were several interveners in the suit who sought to enforce materialmen's and laborers' liens in connection with the cost of improvements placed upon the premises prior to commencement of the litigation. The Warners admit that these claims are valid as against their interest in the realty, and do not dispute them. The Chancellor's order adjudging the validity of these liens is proper.

The decree is affirmed.

BOWMAN *v.* HALL.

4-9355 233 S. W. 2d 628

Opinion delivered November 13, 1950.

Dinning & Dinning, for appellant.

Cracraft & Cracraft, for appellee.

George Rose Smith, J. This action was brought by the appellees to enjoin the appellants from repeatedly trespassing upon a 12-foot strip of land to which the appellees asserted title. By answer and cross-complaint the appellants alleged title in themselves and asked for a similar injunction against the appellees. After hearing oral testimony the chancellor found for the plaintiffs and entered the decree from which the appeal is taken.

Before the case was reached for submission to this court the appellees filed a motion to strike the bill of exceptions and to affirm the decree for want of error on the face of the record. The facts relied on to support this motion are almost identical with those presented in *Johnson* v. *United States Gypsum Co., ante,* p. 264, 229 S. W. 2d 671. There we construed Act 269 of 1949, which establishes the procedure for the preservation of oral testimony in the chancery district in which both these cases arose. There, as here, the chancellor directed at the beginning of the trial that the testimony be transcribed and filed as depositions. We held in the

earlier case that under Act 269 this direction was a sufficient reservation of power to approve the reported testimony after the lapse of the term. But there, as here, the chancellor had not actually approved the transcribed testimony within the six months allowed for the taking of an appeal, nor within the additional thirty days allowed by our Rule 5(d) for the filing of transcribed testimony. In reluctantly holding that the proffered testimony had to be stricken we said: "But the trouble here is that the report of the testimony heard below has not yet been approved by the chancellor, and under our Rule 5(d) the time for filing transcribed testimony has expired. We are therefore unable to take this evidence into account in reaching our decision."

In the case at bar the same situation exists, except for one additional fact. In the *Johnson* case the chancellor's approval was never obtained. In the present case the decree was entered on March 7, 1950, and the appeal was lodged here in August. After the appellees filed their motion to strike, the appellants submitted the testimony to the chancellor and obtained his approval on October 18—more than six months and thirty days after the entry of the decree. The appellants argue that the two cases are distinguishable, their theory being that the mere filing of the reported testimony is a compliance with Rule 5(d), the chancellor's approval being a formality that may be attended to later.

Our decisions are at variance with this suggestion. The chancellor's examination and approval are not mere formalities; they transform what only purports to be transcribed testimony into an authenticated record on which we may rely. As we said in *Elvins* v. *Morrow,* 204 Ark. 456, 162 S. W. 2d 892: "The trial court . . . is the final authority, and approval by the judge of what purports to be transcribed testimony is imperative . . ." There must evidently be a time limit within which appeals to this court must be perfected. Rule 5(d) is explicit in stating that in no event will transcribed testimony filed more than thirty days after the time for appeal be permitted to become a part of the record. The purpose of

this rule is to fix a definite date by which the testimony must be filed in this court. We think the rule manifestly refers to testimony so authenticated as to become a part of the record, and not to purported testimony that must still be taken from our files and submitted to the trial court. The motion to strike must be sustained, and as no error appears on the face of the record the decree is affirmed.

SWINKEY *v.* CROW.

4-9287 234 S. W. 2d 36

Opinion delivered November 20, 1950.

O. D. Longstreth, Sr., for appellant.

George W. Shepherd, for appellee.

DUNAWAY, J. Appellant Swinkey brought this action to recover the sum of $100 from appellee Crow as damages for the loss of a cow, which it was alleged was killed through the negligence of Crow.

About dusk on July 29, 1949, appellee was driving his automobile in a westerly direction on a gravel road near College Station in Pulaski County when he hit and killed the cow in question. This was one of two cows belonging to appellant which were crossing the highway from north to south at the point where the accident occurred. Appellant alleged that appellee was negligent in driving his automobile at an excessive rate of speed and in a reckless manner while under the influence of intoxicating liquor.

Appellee answered with a general denial and pleaded contributory negligence in that appellant knowingly per-

mitted his stock to run at large in a Stock Law District in violation of the law.

The case was submitted to the Court sitting as a jury, which resulted in a judgment for the defendant.

Several witnesses for appellant testified that appellee was driving at the rate of approximately sixty miles per hour a short distance behind another car which had thrown up a cloud of dust. Their testimony was that the lights on appellee's car were not burning, though it was growing dark.

Appellee and other witnesses in his behalf testified that he was driving at about thirty miles per hour and that he did have his lights on. Appellee's version of the accident was that he was driving along the highway when appellant's two cows suddenly jumped or ran from a ditch on the north side of the road and in front of his car. He dodged the first one, and cut his car to the left in an effort to avoid hitting the second one, which he was unable to do.

The Court made written findings of fact, the first of which was as follows: "From the evidence submitted the Court found the facts to be that the defendant was guilty of no negligence." On appeal this finding of the Court is treated the same as a jury verdict. Since there is no question of proper instructions in regard to contributory negligence, and there is substantial evidence to support the finding that the defendant was not guilty of negligence, this disposes of the case.

The judgment is affirmed.

WEATHERLY *v.* PURCELL.

4-9286 234 S. W. 2d 32

Opinion delivered November 20, 1950.

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

Lee Ward, for appellee.

LEFLAR, J. William H. and John J. Purcell brought ejectment against W. R. Weatherly, claiming title to certain land by reason of a deed executed by their grandfather to their father. Defendant Weatherly by answer denied that the Purcells had title; and also by cross-complaint asserted that, if title should be found to be in the Purcells, he was entitled to reimbursement under Ark. Stats., § 34-1423, for the value of improvements made upon the land during his prior occupancy. At the trial the Circuit Judge held that as a matter of law the Purcells had the title, and submitted to the jury only the question as to whether and in what amount Weatherly had made improvements upon the land within the meaning of § 34-1423. On this issue the jury returned a verdict in Weatherly's favor for $7,760.00. Now, Weatherly appeals from that part of the judgment which held title to be in the Purcells, and the Purcells cross-appeal from the award to Weatherly for improvements made.

(1) The deed in question, from the Purcells' grandfather to their father, was executed in 1889. In the granting clause it conveys the land to "John E. Purcell and his bodily heirs." The recitation in the *habendum*

is "to have and to hold the aforegranted premises to the said John E. Purcell and his heirs aforesaid in fee simple forever." Then the covenanting clause runs in favor of "the said John E. Purcell his heirs and assigns forever." And finally the release of dower clause, signed by the grantor grandfather's wife, is "unto the said John E. Purcell his heirs and assigns."

The grantee John E. Purcell occupied the land from 1889 to 1930, when he conveyed to defendant Weatherly, purporting to transfer a fee simple estate. John E. Purcell died in 1949, leaving plaintiffs William H. and John J. Purcell as the heirs of his body.

Weatherly's claim to title is based on the theory that the deed, read as a whole, conveyed to John E. Purcell a fee simple estate, which was in turn conveyed to Weatherly by the 1930 deed. The theory of the plaintiffs, the Purcells, is that the deed conveyed only a common law fee tail estate which, by Ark. Stats., § 50-405, is made into a life estate in the first grantee followed by a remainder in fee simple to the heirs of the life tenant's body. Under this theory John E. Purcell could convey to Weatherly no greater interest than his own life estate which ended in 1949, at which time the plaintiffs as remaindermen became entitled to possession.

We are definitely committed to the rule that the effect of a deed is not to be determined by the words of the granting clause alone, but is to be discovered from the language of the instrument as a whole. Where there is inconsistency between the granting clause and the *habendum,* the words of the *habendum* will prevail if, looking at "the four corners of the deed," it is determined that they represent the true intent of the grantor as expressed by the whole deed. *Luther* v. *Patman,* 200 Ark. 853, 141 S. W. 2d 42; *Beasley* v. *Shinn,* 201 Ark. 31, 144 S. W. 2d 710, 131 A. L. R. 1234; *Stewart* v. *Warren,* 202 Ark. 873, 153 S. W. 2d 545; *Carter Oil Co.* v. *Weil,* 209 Ark. 653, 192 S. W. 2d 215; *Coffelt* v. *Decatur School Dist.,* 212 Ark. 743, 208 S. W. 2d 1; *McBride* v. *Conyers,* 212 Ark. 1034, 208 S. W. 2d 1006. And see Restatement, Property, § 242(c).

A majority of the Court have concluded that no inconsistency appears in the present deed, that Weatherly had only an estate *pur autre vie* which is now ended, and that the Purcells are entitled to possession as remaindermen. The granting clause of the deed runs to "John E. Purcell and his bodily heirs." These words by themselves would create a fee tail at common law. The *habendum* is "to the said John E. Purcell and his heirs aforesaid in fee simple forever." The "heirs aforesaid" to which the *habendum* refers are "his bodily heirs" as set out in the granting clause. By our statute (§ 50-405) the legal effect of a gift to P and his bodily heirs is a life estate to P and a fee simple to the "heirs aforesaid," to-wit, P's bodily heirs. That is exactly what the *habendum* called for. Under this view, there is in the deed no conflict of language calling for interpretation of the instrument as a whole. The language in the covenant and release of dower clauses is deemed to refer only to the particular heirs whose relevance to the conveyance is fixed by the granting clause and *habendum,* inasmuch as the later clauses in the deed serve incidental purposes only, and do not purport to define the estate conveyed.

This view is supported by *Corbin* v. *Healy,* 20 Pick. (Mass.) 514, quoted and followed in our own case of *Dempsey* v. *Davis,* 98 Ark. 570, 136 S. W. 975. In *Corbin* v. *Healy* the conveyance was to "Rhoda and to her heirs born of her body" . . . "to have and to hold the same" to her "and her heirs forever," followed by covenants to her "and her heirs as aforesaid." The Massachusetts court, by SHAW, C. J., "conceded that the *habendum* may sometimes enlarge or diminish the grant, when it is so worded as to show a clear intention to do so. But here the *habendum* is not in terms, to hold the land, but to hold 'the same'; that is, the limited estate in the land before granted, which was an estate tail; and then the generality of the word 'heirs' in the *habendum* may be well construed to be limited to those heirs, who by law could take that estate, namely heirs of her body." Then the court said that the term "heirs as aforesaid"

as it appeared in the covenant "must be understood heirs in tail, entitled to take."[1]

(2) The so-called "Betterments Act," Ark. Stats., §§ 34-1423 *et seq.*, permits recovery of the value of improvements made and taxes paid by any person who, "believing himself to be the owner, either in law or equity, under color of title, has peaceably improved . . . any land which upon judicial investigation shall be decided to belong to another."

The evidence in the present case indicates without question that up until 1946 everyone who had anything to do with the land assumed that the 1889 deed conveyed a fee simple title to John E. Purcell. John E. Purcell executed a deed in 1930 purporting to convey a fee simple to Weatherly. That gave Weatherly "color of title" within the meaning of the Betterments Act. The fact that John E. Purcell's own deed, which did not give him a fee simple (as we today determine), was on record did not keep Weatherly from "believing himself to be the owner," as prescribed by the statute. *Beard* v. *Dansby,* 48 Ark. 183, 2 S. W. 701; *Shepherd* v. *Jernigan,* 51 Ark. 275, 10 S. W. 765. It is not necessary now to review all the evidence introduced; it suffices to say that when Weatherly made the improvements upon the land for which he now seeks reimbursement he had no idea that he owned only an estate *pur autre vie* while John E. Purcell lived.[2] He peaceably improved the land while in possession under color of title believing himself to be the owner in fee simple. That entitled him to recover under § 34-1423.

Finally, the Purcells object to the manner in which the betterments issue was presented to the jury, in that (1) the Circuit Judge refused to give an instruction that

[1] *Fender* v. *Rogers,* 185 Ark. 191, 46 S. W. 2d 804, may be distinguished by the fact that no words defining the estate granted were placed in the granting clause, and the apparently contradictory language all appeared in the *habendum.* The Court thus undertook to discover only the meaning of the two sets of words used in the *habendum.*

[2] Compare *Douglas* v. *Hunt,* 98 Ark. 320, 136 S. W. 170, and *Graves* v. *Bean,* 200 Ark. 863, 141 S. W. 2d 50, in both of which the occupant had been informed, *before* making improvements, of the outstanding claim to a remainder following his own life estate.

"a life tenant has a right to cut only such timber from the lands in his possession as constitute good husbandry and farming practices," and (2) that the jury in calculating the value of the improvements was not prevented from including increased values attributable to changed economic conditions rather than to the improvements themselves. As to the first of these objections it is enough to point out that the only issue upon which the proffered instruction might have been relevant was as to whether the clearing of the land constituted a reimbursable improvement, and on that issue the instruction was abstract and incomplete, therefore properly denied. And as to the second objection, the record shows that the Court specifically instructed the jury on the point, telling them to find the difference between what would be the value of the land *at the present time* if the improvements had not been made and its present value with the improvements.

We find no error in the proceedings below. The judgment is affirmed both on the appeal and the cross-appeal.

OGLE *v.* HODGE.

4-9280 234 S. W. 2d 24

Opinion delivered November 20, 1950.

Gene Bradley, for appellant.

DUNAWAY, J. Appellant, Thelma Ogle, brought an action in ejectment against appellees, Hodge and wife, and Overton and wife. Appellant sought to recover a strip of land about eight feet wide on the north side of lots owned by the appellees, ownership of which she claimed by adverse possession. The Hodges and Overtons answered with a general denial and motion to transfer to equity, alleging that appellant was attempting to interfere with the use of a public road, that she was insolvent, and that they would be irreparably damaged unless appellant was restrained from interfering with their use of said road.

The cause was transferred to equity. This appeal is from a decree dismissing Thelma Ogle's complaint and permanently enjoining her from interfering with the use of the public thoroughfare in question.

All of the property involved in this litigation is located in what was originally platted in 1924 as the J. P. Pride Subdivision to the City of Blytheville, Arkansas. The lots now owned by the Hodges and the Overtons were situated in Block "J" of said subdivision, and were bounded on the north by Carolyn Avenue. This and other property had been mortgaged by Joe P. Pride to the American Central Life Insurance Company, which in May, 1936, bought in the property at a foreclosure sale. Thereafter the various owners of the property in the J. P. Pride Subdivision petitioned the County Court of Mississippi County, Chickasawba District, to reduce the lots in said subdivision to acreage and to close the streets therein. On September 26, 1936, the County Court granted the prayer of the petition and ordered a new plat to be filed.

This new plat, known as the Replat of the J. P. Pride and Gateway Addition, was subsequently duly filed, showing the "Irregular Lots" into which the old subdivision had been re-divided by order of the County Court. Old Block "J" was re-platted as "Irregular Lots" 44, 45, and 46; and Carolyn Avenue as "Irregular Lot" 43. Lot 43 is shown to be 702 feet in length east

and west and 60 feet in width north and south, immediately adjacent to the north lines of Lots 44, 45 and 46.

Appellant Ogle is the owner of part of Lot 45, not involved in this suit; the N½ of the West 252 feet of Lot 43; and "225 ft. out of Lot 43 located between the East 225 ft. and the West 252 ft. of said Lot 43." It is the last-described property that adjoins the property of the Hodges (west 50 ft. of Lot 46) and of the Overtons (the balance of Lot 46).

North of Lot 43, formerly Carolyn Avenue, is Lot 50 owned by Moore Brothers. Ever since appellant acquired the described interests in Lot 43 on September 3, 1940, and apparently for some years before there has been a fence between Lots 43 and 50, referred to by the witnesses as "Moore Brothers' fence."

We shall first discuss appellant's claim by adverse possession to the north eight feet of the Hodge and Overton lots, and then consider the question of whether there is a public thoroughfare over Lot 43.

It is appellant's theory that under her deed to the above-described middle section of Lot 43 she is entitled to a lot 60 feet wide; and that she went into possession of a strip of land 60 feet in width, measured from the "Moore Brothers' fence." Apparently everyone had assumed that this fence was on the true line between Lots 43 and 50 until the dispute arose between appellant and appellees as to the correct boundary between their property, when the appellees built fences and driveways and otherwise exercised affirmative acts of ownership, on the strip of land now in litigation. A survey then made disclosed that the true line between Lots 43 and 50 was approximately eight feet north of the fence.

Appellant, and other witnesses in her behalf, testified that she had used Lot 43 as farm property, planting it to various crops, beginning in April, 1941, and continuing until October 3, 1947, when appellees began occupying the disputed strip to the south of Lot 43. According to this testimony the first visible and notorious acts of ownership upon which appellant based her claim of title

by adverse possession occurred less than seven years before appellees exercised their right of possession of land to which they admittedly had record title. This proof was insufficient to establish title by adverse possession. *Culver* v. *Gillian,* 160 Ark. 397, 254 S. W. 681.

In addition, appellant's own testimony on cross-examination showed that any possession she may have had of any part of Lot 46 was not under a claim adverse to the true owners.

"Q. Now, Miss Ogle, when you bought the 225 feet out of Lot 43 you naturally supposed that Moore's fence was on his line, didn't you?

"A. Yes, sir; he said it was.

"Q. He said it was on his line?

"A. Yes.

"Q. And you really and truly believed at that time that that was a fact?

"A. Yes.

"Q. Then it was your intention to measure 60 feet south of the true line, wasn't it?

"A. The fence, I thought that was the true line.

"Q. You thought the fence was the true line?

"A. Yes.

"Q. And it was your intention to measure 60 feet south from the true line?

"A. Yes, sir.

"Q. And it was your intention to take the 225 by 60 feet strip out of Lot 43 from one true line to the other true line, wasn't it?

"A. Yes, sir.

. . . . . .

"Q. You knew Lot 43 was 60 feet wide?

"A. Yes, sir.

"Q. And it was your intention to take from the true line on the north to the true line on the south?

"A. Yes, sir.

"Q. But you were going on the assumption and belief that Moore's fence was on the true line?

"A. Yes, sir. He said it was on the line, and that is what the company that sold it to Houston measured it from. Then Houston sold it to me.

"Q. But it was your intention all the time to take the 60 feet as shown by the plat?

"A. Yes."

We think this case comes within the rule that where one, through mistake, takes possession of adjacent lands intending to claim only to the true boundary, the act is not adverse. See *Martin* v. *Winston,* 209 Ark. 464, 190 S. W. 2d 962, and cases therein cited at page 467.

The Chancellor correctly held that appellant failed to prove title by adverse possession to the eight foot strip across appellees' property.

We now turn to a consideration of the conflicting claims concerning the presence of a public road across Lot 43, or what had been Carolyn Avenue. Appellant contends that Carolyn Avenue was closed as a public thoroughfare by virtue of the county court order of 1936. She further contends that any use of a road across this property since 1936 had been merely as a private driveway in which the public acquired no rights.

On the other hand, appellees contend, as set out in their answer (they have not favored us with a brief), that the county court order closing the street was void on its face; that irrespective of the validity of the order, Carolyn Avenue had been continuously used as a public thoroughfare from 1924 until the time of this suit, and that the public had thereby gained a prescriptive right in said roadway.

The testimony was in conflict as to the length of time Carolyn Avenue had been used as a road, and as to the nature and extent of such use. Although the basis upon which the Chancellor enjoined appellant's interference with use of this roadway does not appear, we

think the evidence justifies a finding that the public had acquired a way across this property by prescription, even assuming a valid order by the county court in 1936 vacating Carolyn Avenue as a road or street. Since the decree will be affirmed on this ground, we do not deem it necessary to discuss the validity of the county court order.

Oliver Coppedge, a son-in-law of Joe P. Pride, who originally owned all the property in question, testified that to his knowledge since 1935 Carolyn Avenue, or Lot 43, had been used continuously as a street.

Appellant herself testified that in 1944 she had built a store at the extreme west end of Lot 43 (the part described as N½ of the West 252 feet of Lot 43, not the middle section which adjoined the appellees). She testified that the customers of her store came in from the east on a road across Lot 43, partly on her property and partly on an adjoining strip owned by Mitchell Houston. (He owned the S½ of the West 252 feet.) She further testified that in 1942 "we did open up room for one car to drive through" and that cars did drive through. Appellant also testified that her neighbors came in and out over Lot 43, and that it was graded into a street in 1945.

Mitchell Houston, owner of the adjoining part of Lot 43, testified on cross-examination that a road does exist through this property, which was graded in 1945 or 1946 by the county. Other witnesses for appellant admitted that there was a graded street in to the store and that it was used by the public.

From the testimony of appellant's own witnesses it is clear that from 1942 there was a road used by the public. Coppedge's testimony, as already stated, was that this use by the public went back as far as 1935. We have concluded that the preponderance of the evidence shows the establishment of a public road by prescription, by its open, continuous and adverse use by the public for

a period of more than seven years. *Harrison* v. *Harvey,* 202 Ark. 486, 150 S. W. 2d 758.

The decree is affirmed.

Justice LEFLAR dissents.

BOYD *v.* DODGE, CHANCELLOR.

4-9445 234 S. W. 2d 204

Opinion delivered November 27, 1950.

T. J. Gentry and *Wm. P. Alexander,* for petitioner.

Blake Downie, for respondent.

DUNAWAY, J. Petitioners as members of Communications Workers of America, CIO, Division No. 6, an unincorporated labor organization, have filed a petition in the Supreme Court of Arkansas for a Writ of Prohibition to the Pulaski Chancery Court, First Division. Petitioners pray that the court be prohibited and restrained from proceeding further in the case therein pending, *Southwestern Bell Telephone Company* v. *Jack N. Brashears and Others* (Chancery Case No. 90241), and that the temporary restraining order issued by said court on November 9, 1950, be dissolved.

The complete record of the proceedings in the Chancery Court has been filed with the Supreme Court. From the record it appears that no testimony was taken and that the temporary restraining order was issued without notice on the basis of the petition for injunction filed by the Southwestern Bell Telephone Company.

Since the Supreme Court is not in session, petitioners presented their petition to me asking for a temporary Writ of Prohibition under the provisions of Art. VII, § 4, of the State Constitution, which authorizes the issuance of such writs by the several judges of the Supreme Court. In view of the fact that any decision on my part in this matter would be effective only until the next regular sitting of the Court, on Monday, November 20, 1950, I asked all the other Justices to hear the argument of both sides in regard to the petition.

Petitioners are members of the Communications Workers of America, CIO, Division No. 6 and at present are on strike against their employer, the Western Electric Company. It was conceded in the oral argument that petitioners and others are regularly employed by the Western Electric Company to install and maintain telephone equipment in the various offices of the Southwestern Bell Telephone Company. It was further conceded that both the Western Electric Company and the Southwestern Bell Telephone Company are controlled by a common parent corporation, the American Telephone & Telegraph Company.

In the petition for an injunction to restrain these striking employees of Western Electric Company from engaging in picketing around the Telephone Company offices in Little Rock and in the Rosedale community, it was alleged that as a result of said picketing employees of the Telephone Company, not involved in the strike, were refusing to cross the picket lines and that thereby telephone service would be disrupted. The basis for granting injunctive relief as set out in the petition filed in the Chancery Court, and as presented in the oral argument here, is contained in this allegation: "The above described picketing of plaintiff's offices and garages is contrary to the public policy of the State of Arkansas and has endangered and, if allowed to continue, will further endanger the health, welfare and convenience of the public."

Petitioners in seeking a Writ of Prohibition challenge the jurisdiction of the Chancery Court. This attack is made on two grounds: First, that the court had no jurisdiction of the petition for the reason that the Communications Workers of America, CIO, Division No. 6, is an unincorporated labor organization which cannot be sued in its association name as it is not a legal entity. Second, that the court has no jurisdiction of the subject matter covered by the complaint for the reason that the field of picketing for higher wages in business engaged in interstate commerce has been pre-empted by the Federal Labor-Management Relations Act of 1947 (Public Law 101, 80th Congress, 29 U. S. C. A. Supp. § 141, *et seq.*). It is petitioners' contention that, in the absence of an allegation of some acts in connection with picketing over which the State has police power (either because of acts in violation of state statutes or common law), the remedy for an alleged unfair labor practice under the Federal Labor-Management Relations Act is before the National Labor Relations Board or in the Federal courts as prescribed in that Act.

There is no allegation in the petition filed by the Telephone Company in the Chancery Court of any violence, mass picketing, threats, or intimidation. It is con-

ceded that the picketing complained of was peaceful and, as already stated, the only basis for the injunction was that the picketing was resulting, or would result, in disruption of telephone service, and that this is contrary to the public policy of the State of Arkansas. It was conceded in the oral argument that the striking employees, when on the job, work in certain buildings of the Telephone Company, and that their supervisors operate from these buildings. There are no disputed questions of fact involved.

As already stated the complete record of the proceedings in the Chancery Court has been filed with the Clerk of the Supreme Court. After consultation of all the Justices of the Court, a majority of the Justices are of the opinion that the petition filed herein should be treated as an appeal from the interlocutory order of the Chancellor granting a temporary restraining order against all picketing. Ark. Stats. § 27-2102 provides that an appeal may be taken to the Supreme Court from an interlocutory order granting or refusing an injunction. That section further provides: "The proceedings in other respects in the circuit or chancery court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or by the Supreme Court, or a judge thereof." In view of the opinion of a majority of the Justices that this proceeding should be treated as brought under that section of the statutes, the question is whether a stay should be granted as therein provided pending final determination of the appeal by the court.

The only ground stated in the petition below for the relief prayed and for the restraining order prayed thereon is that the picketing violates the public policy of this state. No statute nor decision of this court is cited as declaring this public policy. There is no allegation nor finding of violence, law violation or breaches of the peace. Another allegation in the petition in the court below was "The defendant union does not represent any of the employees of the plaintiff and no labor dispute exists or could exist between the plaintiff and the said defendant union or the members thereof . . . Ac-

cordingly, there is no offer, concession or other act which the plaintiff could make or do which would solve or in any other way affect any labor dispute to which the defendant union is a party."

That members of labor unions may engage in peaceful picketing is elementary. In the recent case of *Local No. 802* v. *Asimos,* 216 Ark. 694, 227 S. W. 2d 154, the authorities both of the Supreme Court of Arkansas and of the Supreme Court of the United States in regard to the right to picket were fully collected and reviewed. The public policy of this State, as found in the Constitution and decisions of the Supreme Court, may be summarized in the words of a headnote to that case. "In the absence of proof showing that mass picketing is conducted and that acts of violence in connection with the picketing have occurred, labor unions may, on the grounds of free speech guaranteed by the 14th Amendment to the U. S. Constitution, engage in picketing."

That case, it seems to me, is also determinative of the Telephone Company's argument with regard to the non-existence of a labor dispute with its own employees. There, in seeking to uphold an injunction it was argued "Because no labor dispute existed between appellees and their employees, . . . there was in progress no strike which might have justified peaceful picketing." In answer to that contention Justice McFaddin, speaking for the court, said: (at page 702 *et seq.*) "Appellees are correct in stating the fact that no labor dispute existed between the Jefferson Coffee Shop and its employees.

. . . . . .

"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.

". . . 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 dis-

pute. (Citing and discussing *Bakery and Pastry Drivers* v. *Wohl,* 315 U. S. 769, 86 L. Ed. 1178, 62 S. Ct. 816, and *Cafeteria Employees* v. *Angelos,* 320 U. S. 293, 88 L. Ed. 58, 64 S. Ct. 126.)

. . . . . .

"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 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."

Lest this memorandum be misunderstood, I should add that this case does not involve the question of whether a secondary boycott is legal under Arkansas law. A secondary boycott occurs when striking employees, in addition to picketing the premises of their own employer, also establish picket lines around the premises of others not so directly interested in the labor dispute, such as customers to whom the primary employer sells or manufacturers from whom he buys. This question is not now presented, for in the oral argument it was admitted by counsel for the Telephone Company that no contention of the existence of a secondary boycott is being made.

It may be that the right to picket as presently interpreted should be circumscribed in cases where widespread public inconvenience might result, as in the case of public utilities, but that is a matter for the legislative branch of government and not the courts to determine.

Constitutionality of Ark. Stats. § 27-2102 was upheld in the case of *Sager* v. *Hibbard,* 203 Ark. 672, 158 S. W. 2d 922. There in discussing the reasons for the enactment of this statute, Chief Justice GRIFFIN SMITH,

speaking for the court, said: (at page 676) "Modern business, commerce, and even professions, are such that serious consequences may attend delay in determining whether an order mentioned in Act 355 has been improvidently granted or denied. It was the legislative intent to relieve against possible error."

The effects of an improperly granted injunction against a labor union can be just as important to that economic group as to those mentioned in the *Sager* case. The Telephone Company argues that since it has filed a thousand dollar bond petitioners are adequately protected against damage in the event the court ultimately determines that an injunction should not have been granted. Aside from the economic consequences to these petitioners of being wrongfully restrained from engaging in peaceful picketing, which would hardly be susceptible of proof, deprivation of their constitutional right of free speech cannot be compensated for in dollars and cents.

The Clerk of this court is therefore directed to issue an order staying any further proceedings under the temporary restraining order of the Pulaski Chancery Court in so far as it applies to picketing around any buildings of the Telephone Company where the petitioners regularly engage in work, until further orders of the Supreme Court. This of course is without prejudice to the right of the Southwestern Bell Telephone Company to petition the Chancery Court for appropriate injunctive relief if the picketing engaged in violates the law of this State as set forth in *Local No. 802* v. *Asimos, supra.*

The question of whether federal or state jurisdiction is involved in the circumstances of this case can be decided when the case is submitted to the court on appeal. I therefore express no opinion on this matter and will not discuss the authorities cited by counsel.

Since the Chief Justice and Justice McFaddin are filing separate memoranda, noting their disagreement with this order, I might add that Justices Holt, Millwee, George Rose Smith and Leflar agree with the views herein expressed.

GRIFFIN SMITH, C. J., expressing his own views. The controversy was presented to a Justice of this Court on petition for a temporary writ of prohibition. The Justice addressed requested other members to sit with him in an advisory capacity during presentation of the case by oral argument. The general rule is that something the trial court has already done cannot be tested by prohibition. But the Justice who was asked to consider the petition concluded it should be treated as an appeal and that the Chancellor's injunction should be stayed under authority of Sec. 27-2102 Ark. Stats. On the face of the transaction there would follow the conclusion that the relief given is good until the Court convenes November 20.

But in deciding how the petition should be treated and in discussions relating to the stay, four other Justices agreed with the procedure; so we have the anomaly of an appeal wherein the merits of highly controversial issues will relate back to the action of a single Judge acting when the Court was not in session, but relying upon assurances of associates who have advised that the petition be transmuted to a classification under which the injunction can be stayed.

The so-called labor dispute (as a consequence of which Western Electric employees picketed Southwestern Bell) does not involve a disagreement between the telephone company and its own employees. The petition filed with Judge Dodge contains the sworn statement that "there is no offer, concession, or act which (Southwestern) could make or do which would solve or in any way affect any labor dispute to which the defendant union is a party." This paragraph was called to the attention of attorneys for the prohibition petitioners during oral argument, and the question was asked whether it was true. No answer has yet been given.

The effect of what we are doing is to decide the litigation on its merits, and—in the absence of any evidence—to hold that Western Electric strikers have the right to picket Southwestern. In the present state of the record

not a member of this Court knows, or can know, what the facts are upon which Western workers predicate their claim to the right of interference with Southwestern property and personnel. It is not disputed that Western Electric and Southwestern Bell are distinct corporations. Whether the control of Western by Southwestern, or whether Southwestern's business influence precipitated the strike—these are matters not yet developed. It is admitted that Southwestern buys mechanical equipment from Western, and that Western workers make the installations. It is also conceded that no Western employee is now working in or on Southwestern property.

My disagreement with the majority goes to procedural rules alone. Primarily it is grounded upon the belief that the judicial process should not be accelerated at the cost of deliberation when facts essential to a fair determination may be procured. In treating the petition for prohibition as an appeal we have deprived the losing party of its right to show (when the Chancellor would if not interfered with hear the cause on motion to make the injunction permanent) what the actual facts relating to the dispute are. This is not a service to capital, labor, the judicial process, or the public.

I would deny the writ, but direct an expeditious hearing on the motion to make permanent, then reach a conclusion in the light of record information.

PER CURIAM. On November 17, 1950, by order of one of the justices of this court, an appeal was granted in this cause and a temporary stay issued against further proceedings in the Pulaski Chancery Court under a temporary restraining order theretofore issued by that court.

This court at its next regular sitting, on November 20, 1950, continued this temporary stay in effect until further orders of the court. By this action, the memorandum opinion of Justice DUNAWAY was adopted as the opinion of the court, the Chief Justice and Justice McFADDIN dissenting.

It is now made to appear to the court that the temporary restraining order of the Pulaski Chancery Court

appealed from herein was dissolved and the petition for injunction dismissed on motion of the petitioner below, Southwestern Bell Telephone Company. Appellee, Southwestern Bell Telephone Company, now prays that the memorandum opinion of November 17, 1950, be withdrawn and the appeal be dismissed since the questions raised by the appeal are now moot.

It is the opinion of the court that the appeal is now moot, and the same is hereby dismissed. The memorandum opinion rendered in granting the temporary relief sought in this court, however, will not be withdrawn, and stands as the opinion of the court with respect to the relief heretofore granted.

The dismissal of the appeal is without prejudice to any proceedings which may be had under the bond made in the Pulaski Chancery Court in connection with the granting of the temporary restraining order of November 9, 1950.

GRIFFIN SMITH, dissenting. The Per Curiam order adopting Judge DUNAWAY's opinion was made November 27th. The Court's treatment of the controversy was announced November 20th and was a continuation of the action of an individual Judge, then concurred in by four others, but no opinion was adopted. (See Supreme Court Judgment Record C-47, p. 249.) On the contrary, the *status quo* was affirmed and parties to the record were accorded the right to be heard at a later date.

Expressions of the Chief Justice at the time the individual order was made are self-explanatory, but because no opinion was adopted these views could not be termed a dissent; nor could they assume that status on the 20th when the only Court action was to continue the individual order.

The practical wisdom of not precipitately acting was justified when, before the temporary order could reach the Court sitting in its constitutional capacity, the strike was terminated. Result of our hasty intervention was to adjudicate the rights of each side on pleadings and orders alone, without having before us the factual background

disclosing relationship of the parties. Had the matter been at once remanded to the Chancellor with directions for a prompt hearing, the value of this Court's determination of a dispute abounding in complications would have been of some permanent value.

ED. F. MCFADDIN, Justice (dissenting). I vote against the issuance of the Writ of Prohibition in this case at this time. I feel that the remedy by Appeal (under § 27-2102, Ark. Stats.) is adequate; and that the case should be reviewed on appeal in the regular manner, rather than by the extraordinary writ, as is here attempted.

Furthermore, even if the application for writ of prohibition be treated as an appeal—concerning the propriety of which I am in doubt—nevertheless I feel that the order of the Chancery Court should remain in force until the case is briefed and heard on its merits.

CASE *v.* HUNT.

4-9296 234 S. W. 2d 197

Opinion delivered November 27, 1950.

Ben B. Williamson, for appellant.

J. L. Bittle, for appellee.

LEFLAR, J. Appellant Case brought this action for treble damages under Ark. Stats., § 50-105, on account of the cutting by defendants of 856 pine trees from Case's land. Defendants admitted that they cut the trees, but denied that the circumstances of the cutting justified an award against them of thrice the value of the timber cut. The jury returned a verdict against defendants for single damages only, and plaintiff Case appeals.

The testimony differed as to the actual amount of lumber cut from the 856 trees, but the maximum testified to was 20,000 board feet. The value of the lumber as cut also was the subject of divergent testimony, but the highest rate testified to was $10 per 1,000 board feet. The jury's verdict of $200 for the plaintiff was obviously an award of single damages based on these maximum figures.

The evidence was that defendants had bought from a third party the timber on a tract adjoining Case's land, and that the seller had pointed out the boundary incorrectly, so that defendants thought the 856 trees were included in the timber they had bought from the third person. Defendants did not, before cutting the trees, have the boundary surveyed in the manner set out in Ark. Stats., § 54-201, though their testimony indicated an honest belief that the 856 trees were on their own side of the boundary. They now admit that this belief was erroneous.

The first ground relied upon by appellant Case is the Circuit Judge's refusal to give appellant's proffered Instruction No. 1, which would have told the jury that defendants' failure to procure the survey by the County Surveyor, as prescribed by § 54-201, before cutting the 856 pine trees "would be *prima facie* willful and unlawful and the plaintiff would be entitled to recover three times the value of the said 856 pine trees so cut and removed, and your verdict should be for the plaintiff for such amount."

This was in the nature of a binding instruction. Defendants had given evidence that the cutting on plain-

tiff's land was not willful, that they had gone on plaintiff's land unintentionally. Yet the instruction stated that if the statutory survey had not been made, as admittedly it had not, the plaintiff should receive treble damages in any event.

Failure to procure the statutory survey is some evidence that the timber was cut willfully and intentionally from plaintiff's land, but it does not in the face of contrary evidence have the practically conclusive effect which plaintiff's Instruction No. 1 would have ascribed to it. See *Parker* v. *Fenter,* 216 Ark. 398, 225 S. W. 2d 940. The proffered instruction was correctly refused.

Appellant also complains of two instructions which were at defendants' request given by the Circuit Judge.

One of these, No. 6, told the jury that if they found that defendants "had probable cause to believe that the land on which the trespass is alleged to have been committed, or the timber cut and carried away, was (their) own, then the plaintiff shall recover only single damages, or in other words the actual value of the timber so cut and removed." The instruction is in exact accordance with the provisions of Ark. Stats., § 50-107, which we have deemed to be a part of the same statutes as § 50-105. *Sturgess* v. *Nunn,* 203 Ark. 693, 158 S. W. 2d 673. The later section explicitly limits the right of treble recovery which plaintiff seeks under § 50-105, and the instruction based upon it was properly given.

The other instruction complained of, No. 8, told the jury that if they believed "that the defendants cut this timber under the honest belief that it was on the tract of timber which they had bought, . . . that they were not taking it purposely, intentionally and knowingly from Mr. Case's land," they should award single damages only. This instruction likewise is in accordance with the law of this state. *Upton* v. *Wimbrow,* 148 Ark. 408, 230 S. W. 277; *Sturgess* v. *Nunn, supra; Parker* v. *Fenter, supra.* Our statutes do not impose double or treble damages upon one who cuts timber from the land of another

unless he does so willfully and intentionally. Otherwise, single damages suffice.

The judgment is affirmed.

[redacted]

NORVELL *v.* JAMES.

4-9328 234 S. W. 2d 378

Opinion delivered December 4, 1950.

[redacted]

John Sherrill and *Thomas J. Bonner,* for appellant.

Wright, Harrison, Lindsey & Upton and *Edward Lester,* for appellee.

DUNAWAY, J. The Commissioners of the Little Rock Municipal Water Works appeal from a judgment in favor of appellee James, rendered by the Pulaski Circuit Court. The cause was submitted to the court sitting as a jury.

James brought this action against appellants to recover a balance alleged to be due under a written contract entered into on April 24, 1946. James had contracted with appellants to do certain work in laying water mains from the filter plant of the Water Works down to and within the business district of Little Rock. Beginning at Second and Pulaski Streets and continuing east into and through parts of the downtown business district of Little Rock, the work necessitated cutting the pavement and digging trenches in forty-one blocks of the city streets.

Upon completion of the work the Commissioners withheld a part of the contract sum of $122,074.37 claimed by James to be due him. Several disputed items were involved in the amount initially withheld, but we are concerned with only one. The judgment now appealed from arises out of a difference between the parties over the manner in which appellee refilled the trenches and maintained this temporary refill.

In his complaint James alleged that he had "fully complied with the contract and completed the work contemplated thereunder" and that the sum of $1,726.11 due him was being wrongfully withheld. This represented the cost of work done by the City of Little Rock in applying cut-back or hot asphalt to the surfaces of the trenches which appellee had caused to be filled with clay gravel.

Appellants' defense to the suit was that James had not complied with the terms of his contract, in that he had not filled the trenches with macadam in accordance with required specifications; and that, as authorized by

the contract, they had procured the temporary resurfacing work by the City as the cheapest means of remedying James' default in performance. The cost of this work they claimed to be entitled to deduct from the total contract price of the project.

The trial court made this finding of fact in rendering judgment for the plaintiff: "The Court finds that the trenches dug by the plaintiff were not paved with broken stone macadam as required by the contract but that they were paved with gravel, which the Court finds to be a substantial compliance with the terms of the contract, and therefore plaintiff is entitled to recover $1,726.11 which defendant incurred in applying cut-back to the trenches."

In their motion for new trial, and in their argument here, appellants urge that the trial court erred (1) in finding that appellee had substantially complied with the contract and (2) in rendering judgment for appellee when the court found that the trenches "were not paved with broken stone macadam as required by the contract."

The relevant provisions of the contract concerning the temporary refilling of trenches by the contractor are quoted: "Paragraph 28.4. The attention of bidders is called to the specifications covering the maintenance of trenches and temporary repaving of broken stone macadam to be replaced and maintained by the Contractor; however, the bidder shall have the option of maintaining trenches by the use of suitable wooden platforms, provided that such platforms are properly and adequately maintained so as to be in nowise an obstruction to traffic at all times. In the event that the timber platforms are not properly and adequately maintained this option will be withdrawn and the CONTRACTOR will be required to place the broken stone macadam and maintain same in all trenches as provided by the specifications."

"Paragraph 59.3. Where it is important that the surface of the backfill be made safe for vehicular traffic as soon as possible, or where a permanent pavement is to be placed within a short time, the upper twelve (12″)

inches of backfill shall be of approved moist material, thoroughly compacted in four (4″) inch layers by tamping and shall be brought to the required surface grade.''

''Paragraph 59.10. Temporary paving of all ditches in traveled streets shall be done by the CONTRACTOR as a part of this contract and without additional compensation therefor. Temporary paving shall consist of a broken stone macadam wearing surface or of suitable wooden platforms.''

The provision of the contract under which the Commissioners proceeded to have the resurfacing work done themselves and claim the right to deduct the cost is as follows: ''Paragraph 32.1. If the CONTRACTOR shall neglect to prosecute the work properly or fail to perform any provisions of the contract, the OWNER, after three days' written notice to the CONTRACTOR may, without prejudice to any other right or remedy he may have, make good such deficiencies and may deduct the cost thereof from any payments then or thereafter due the CONTRACTOR.''

The proof shows that along approximately three blocks the surface of the trenches was covered with loose crushed stone. This proved unsatisfactory, as the loose stone scattered over the street when cars drove over it, and the rest of the trenches were refilled with clay gravel which had been removed in digging the trenches. It was admitted that no tamping had been done; compaction in the back-filling had been obtained by jetting water into the ditches and letting the clay gravel settle.

It was conceded that on no part of the refilling job was macadam used. In *Webster's New International Dictionary* macadam is defined as ''the broken stone used in macadamizing'' and macadamizing as ''to construct or finish (a road) according to the system invented by John Loudon McAdam, which consisted in compacting into a solid mass a layer of small broken stone on a convex well-drained earth roadbed; hence, to construct any road of broken stones, as on a bed of large stones . . .''. From the testimony of appellee himself, as well

as that of engineers for appellants, it is clear that the term "macadam" is a technical one applied to broken stone, of various sizes, so laid that it gains a certain compaction.

Appellants insist that appellee's use of clay gravel was not a substantial compliance with the contract, but that even if it was, appellee cannot recover the full contract price where only substantial compliance is established.

This court has held that one may recover on a contract upon a substantial performance of it, but from the contract price there must be deducted either the additional cost of literal compliance or the cost of correcting the defects in the work, *Mitchell* v. *Caplinger,* 97 Ark. 278, 133 S. W. 1032; *Thomas* v. *Jackson,* 105 Ark. 353, 151 S. W. 521; *Hollingsworth* v. *Leachville Special School District,* 157 Ark. 430, 249 S. W. 24.

Counsel for appellee concede that this is a correct statement of the law, but urge that it has no application to the instant appeal. Appellee argues that there was testimony before the trial court that one Ryan, the on-the-job work inspector for the Water Works, daily saw the method of temporary filling which was being used. Appellee testified in effect that Ryan authorized this admitted departure from the terms of the contract. From this, counsel argue that as the work progressed, there was a modification of the contract requirements, permitting the use of clay gravel instead of macadam.

The argument then is, that whether the contract was modified was a fact question for the determination of the court sitting as a jury. According to appellee's theory of the case, our review on this appeal is limited to an examination of whether there is any substantial evidence to support the judgment of the court.

It is well settled that fact findings by the trial court in a case such as this are treated with the same finality as are jury verdicts on appeal, and will be affirmed if supported by any substantial evidence. See *Luster* v.

Robinson, 76 Ark. 255, 88 S. W. 896; *Dunaway* v. *Ragsdale,* 177 Ark. 718, 9 S. W. 2d 6; *Schulze* v. *Price,* 213 Ark. 732, 213 S. W. 2d 365. Where the court makes no special findings of fact or declarations of law, and none are requested, we look only to see whether there is any substantial evidence to support the judgment.

Appellee contends that since no special findings were requested, by either side our review is so limited in our consideration of the case at bar. This argument, however, overlooks the fact that the court on its own motion did make a special finding of fact. We have held that a special finding by the court cannot be treated as surplusage and disregarded, even though a judgment might have been sustained but for the special finding. *Henderson* v. *Gladish,* 198 Ark. 217, 128 S. W. 2d 257.

In the instant case, without detailing all the testimony, it is enough to say that there was substantial evidence to sustain a finding either way on the issue of substantial performance. The trial court's determination is therefore conclusive of this issue. But this still leaves for decision the question of law: did the special finding warrant the judgment entered thereof? As this court said in *Worthington's Admr.* v. *DeBardlekin, Ad.,* 33 Ark. 651 (at p. 654): "In the case now before us, there was a motion for a new trial, and though the court made no declarations of law, none being asked by either party, we certainly can look into the bill of exceptions to see if there was any evidence to sustain the findings of the court, sitting as a jury, and whether, as matter of law, the plaintiff below was entitled to judgment upon the facts found." See, also, *Supreme Royal Circle of Friends of the World* v. *Morrison,* 105 Ark. 140, 146, 150 S. W. 561.

Here the court found "the trenches dug by the plaintiff were not paved with broken stone macadam *as required by the contract*". The necessary implication of this finding is that there had been no modification of the original contract of April 24, 1946, upon which appellee predicated his action. Again, since there is substantial evidence to support this finding, we see no occasion to

detail the conflicting testimony on the point. This finding is as conclusive against appellee on the issue of modification of the contract as is the finding of substantial compliance against appellants.

It follows that under the rules of law above-stated as to substantial performance, the judgment for the full amount of the contract price is not supported by the special findings of fact. The court should have allowed a deduction of the necessary cost of correcting the defect in appellee's performance of his contract.

The judgment will be reversed and the cause remanded for a new trial.

STOUT *v.* OATES.

4-9302 234 S. W. 2d 506

Opinion delivered December 11, 1950.

Thad Tisdale and *U. A. Gentry,* for appellant.

Quinn Glover and *E. R. Parham,* for appellee.

LEFLAR, J. This is an action brought by W. I. Stout, minority stockholder in the Southern Mattress Co., an Arkansas corporation, to compel J. Carl Oates, Elsie P. Oates, and Sam C. Oates, officers and majority stockholders, to repay to the corporation certain sums received by them as "salaries" during the years 1941-48. The Chancellor found for the defendants and dismissed Stout's complaint. He appeals.

The Southern Mattress Co. was dominated by J. D. Oates, its president, until his death in 1941. Of the 1,000 shares of its stock, J. D. Oates owned 608 shares; his son J. Carl Oates owned 25 (of which 9 were later transferred to J. Carl's wife, Elsie P. Oates); Sam C. Oates (not a relative of J. D. Oates) owned 167 shares; and the remaining 200 shares were owned by H. S. Nixon (100), J. F. Walker (50), and W. I. Stout (50). Shortly before the present suit was filed W. I. Stout purchased the stock held by Nixon and Walker, thus becoming the owner of 200 shares. After the death of J. D. Oates his 608 shares were technically owned by his estate, of which J. Carl Oates was administrator and principal beneficiary.

After his father's death J. Carl Oates was elected president of the corporation and actively administered its affairs until he became ill with tuberculosis in 1947 and went to the Sanitarium at Booneville, at which time his wife Elsie P. Oates was elected vice-president and thereafter shared the work with him. This work involved not only the management of the mattress factory operated by the corporation but also the handling of all purchases of materials and the making of all sales. In

their capacities as officers of the corporation Mr. and Mrs. Oates made many trips to "call on the trade." No other salesmen were employed. Sam C. Oates was secretary of the corporation, and from 1919 on through the period of this litigation he was bookkeeper, payroll clerk and general office manager at the factory. During the later years he was also consulted frequently on matters involving administration of the business, particularly after J. Carl Oates became ill in 1947.

The system used in paying salaries to the corporate officers was one whereby they each received $150 a month throughout the fiscal year, which was the same as the calendar year, then at the end of the year when corporate profits were known they (the officers) themselves determined what additional salary payments for the past year were justified by the business done and profits made. Prior to his death in 1941, J. D. Oates made these determinations by himself for all the officers. After 1941, J. Carl Oates had the principal voice in making the determinations, though he was assisted by Sam C. Oates and, from 1947 on, by Elsie P. Oates. The corporation made a profit on its operations, after salaries were paid, each year during the entire period in question, and substantial dividends were paid for each year up to but not including 1948.

For many years annual meetings of the corporate directors and of the stockholders were held soon after the first of January. It seems that these were regularly attended by all or almost all of the stockholders as well as the directors. At these meetings Sam C. Oates, the secretary, regularly handed out to each director and stockholder copies of a "financial statement" listing the assets and liabilities of the corporation and summarizing by items the income and outgo from the year's operations. The minutes of the meetings do not show that there were formal approvals of these financial statements or of the transactions summarized by them, but it is undisputed that there was never any question raised concerning them.

The last of these annual meetings was held on Feb. 22, 1947, at which the 1946 financial statement was circulated, a board of directors consisting of all the stockholders was elected, and officers were named as already indicated. No meetings were held in 1948 and 1949, but financial statements were sent to all stockholders in the same form as for previous years.

The total amounts paid by the corporation to the various officers for the years in question are as follows:

Year	President J. Carl Oates	Vice-president Elsie P. Oates	Secretary Sam C. Oates	Total
1941	$3,000.00		$3,000.00	
1942	6,382.50		4,017.50	$10,400.00
1943	6,778.12		4,121.88	10,900.00
1944	6,778.12		4,121.88	10,900.00
1945	6,778.12		4,121.88	10,900.00
1946	12,000.00		4,800.00	16,800.00
1947	6,600.00	$4,800.00	5,400.00	16,800.00
1948	4,250.00	4,250.00	5,100.00	13,600.00

The annual financial statements, under the head of "Salaries", gave total figures only, and not the amounts paid each officer. Actually, the amounts shown under the head of "Salaries" each year were larger than the total sums paid to the officers, the figure given for 1948, for example, being $14,216.50, instead of the $13,600.00 shown above, and for 1947 $17,234.00 instead of the $16,800.00 shown above, the difference being apparently attributable to salaries paid to temporary employees. Amounts paid to hired workmen, however, were shown under the separate heading of "Payrolls". There is no showing in the evidence that any of the directors or stockholders ever doubted that the "Salary" figures set out therein represented payments made primarily to the officers of the corporation, J. Carl, Elsie P., and Sam C. Oates. In fact, it cannot be denied that they knew this.

The records of the corporation, however, show that not all of the payments made to the corporation's offi-

cers were in fact paid as salaries. The corporation's books, kept by Sam C. Oates, designate a part of the payments made during the four years 1942-45 as "stock bonuses", and it appears to us that these so-called "stock bonuses" were not salary payments but were preferential dividends paid to the officers as majority stockholders, and not paid to the minority stockholders. Here are the figures:

	J. Carl Oates			Sam C. Oates		
Year	Salary	Bonus	Total	Salary	Bonus	Total
1942	$4,800.00	1,582.50	6,382.50	3,600.00	417.50	4,017.50
1943	4,800.00	1,978.12	6,778.12	3,600.00	521.88	4,121.88
1944	4,800.00	1,978.12	6,778.12	3,600.00	521.88	4,121.88
1945	4,800.00	1,978.12	6,778.12	3,600.00	521.88	4,121.88

It will be seen at a glance that in each year the basic salaries are fixed in round numbers, just as they were in every other year in question, but the inclusion of the bonuses makes the total payments end in odd cents. The amount of these bonuses can be arrived at to the penny by giving these men a 10% dividend on their respective stock holdings in 1942 and a 12½% dividend in the other three years.

These amounts were included in the salary totals tabulated above, and in the salary reports on the annual financial statements handed to all stockholders and directors. The secretary testified that the recording of this part of the salaries in this form was for bookkeeping purposes only, and did not represent any effort to pay a special dividend to a preferred group of stockholders. In explaining the "stock bonus" form of entry in the corporate books, he said, "I did that of my own accord. No one else but myself knew that I made that entry."

Despite this testimony, it is impossible to believe that these were just bookkeeping entries that nobody else knew about, or that the total "Salary" figures were independently arrived at in advance and the book entries were nothing more than the secretary's special method of making a record. It is of course admitted that both J. Carl and Sam C. Oates participated in fixing the

amount of these "Salaries", and certainly they both knew that the total amounts were determined by adding to the basic salary a percentage of stock ownership.

It is argued that these two men, with no thought of stock ownership, in good faith concluded that in 1943 the fair value of J. Carl Oates' services was exactly $6,778.12, the value of Sam C. Oates' services was exactly $4,121.88, and so on for the other years. Then, by what is now attributed to coincidence, it was discovered that in every one of these four years the odd salary figures corresponded precisely with a given basic salary, plus a percentage of stock holdings and a "stock bonus" entry was made on the books accordingly, for the secretary's private reasons. That contention falls of its own weight; it is contrary to the obvious facts.

There was also some suggestion in the testimony that these stock bonuses were merely a device adopted for income tax purposes. This notion is equally untenable. As to the officers, the sums they received would be subject to the same taxation whether called salaries or dividends. And as to the corporation this device actually increased the corporate tax, since salaries are deductible from the company's gross income but dividends are not. Thus there is no reasonable basis for treating these bonuses as anything except what they were—preferential dividends.

In the annual financial statements these bonuses were concealed under a general heading, "Salaries"; so the minority stockholders were not told what was being done and could not have ratified the payments. The total figures given in the annual statements under the head of "Salaries" admittedly included amounts paid to others than the officers. There was no breakdown of figures whereby the stockholders could tell what amount was being paid to any particular officer. The only ratification which these figures could support would be to the effect that a salary payment in the totals indicated was not out of line for the business. But this would not include a ratification of preferential dividends

paid to the majority stockholders without the knowledge of the minority.

It is of course unlawful for one group of stockholders to pay themselves a dividend that is not shared by all stockholders. In the absence of specific approval by all stockholders, preferential dividends are invalid, and it makes no difference that those receiving the dividends, and therefore presumably approving them, constitute a majority of the stockholders. Fletcher, Corporations, § 5352; Thompson, Corporations, § 5277.[1] And see *Railway Company* v. *Martin,* 57 Ark. 355, 21 S. W. 465; *Jones Lbr. Co.* v. *Wisarkana Lbr. Co.,* 125 Ark. 65, 187 S. W. 1068. Minority stockholders may always attack such preferential dividends, and this is true whether they are formally labeled dividends or not. They are inherently bad.

Nor is the right of minority stockholders to attack these preferential dividends barred by the statute of limitations. Defendants were officers and directors of the corporation, and therefore held these preferential payments as trustees for the corporation and all its stockholders. *Red Bud Realty Co.* v. *South,* 96 Ark. 281, 131 S. W. 340; *Jones Lbr. Co.* v. *Wisarkana Lbr. Co.,* 125 Ark. 65, 187 S. W. 1068. Though the trust was not express, it was the kind of constructive trust as to which the statute of limitations does not begin to run until the concealed right is or should be discovered. *Hardy* v. *Hardy,* 198 Ark. 1021, 132 S. W. 2d 365; *Bovay* v. *Byllesby,* 27 Del. Ch. 381, 38 Atl. 2d 808, 174 A. L. R. 1201; *Ventress* v. *Wallace,* 111 Miss. 357, 71 So. 636, L. R. A. 1917A, 971; Fletcher Corporations, § 5886. Compare *Board of Education* v. *Morgan,* 182 Ark. 1110; 34 S. W. 2d 1063. There is no showing in the evidence that any of the minority stockholders knew or had any ready opportunity to know, before the bringing of the present action, about these preferential dividends the existence of which was concealed by the form of the annual financial statements furnished to them by the officers. We

[1] Numerous cases to this effect are cited in 18 C. J. S. 1113, 13 Am. Jur. 681, and 55 A. L. R. 65.

therefore conclude that the plaintiff, as a minority stockholder suing on behalf of the corporation, is entitled to judgment against J. Carl Oates and Sam C. Oates for the amounts received by them under the so-called "stock bonuses" which were in fact preferential dividends.

As to the other amounts received by defendants, however, the situation is different. The Chancellor found that the total amounts received by the respective defendants were no more than reasonable compensation for the services rendered by them, for which they were without question entitled to be paid. The whole history of the corporation's operations shows that the stockholders did not expect the officers to work for nothing, to give their whole time to the corporate business without compensation. They were to be paid, and the only question now is whether they were paid too much. In the absence of agreement or contract as to the amount of salary payable, the test seems to be the reasonable value of the services rendered. Fletcher, Corporations, § 2133; Thompson, Corporations, § 1849.

The highest salaries were paid in 1946 and 1947. In 1946 the salary paid to President J. Carl Oates was $12,000, and that paid to Sam C. Oates as secretary, bookkeeper and office manager was $4,800. The total was $16,800. The total profit for the year, before salaries were paid, was $24,501.52, and the net profit, after salaries, was $7,700.52, or 30.80208 per cent of the $25,000 capital stock of the corporation. This was earned from gross sales of the company's product totaling $158,026.12 for the year, for most of which the officers of the corporation were personally responsible.

In 1947 President J. Carl Oates received a salary totaling $6,600, Elsie P. Oates as vice-president received $4,800, and Sam C. Oates as secretary, bookkeeper and office manager received $5,400, for a total salary roll of $16,800. For that year, before salaries were paid, the business showed a gross profit of $21,646.75. After salaries were paid, the net profit was $4,846.75, or 19.387 per cent of the $25,000 capital stock. This was earned from gross sales of $143,362.36 for the year.

For 1948 both profits and salaries went down. The president was paid $4,250, the vice-president $4,250, and the secretary, bookkeeper and office manager $5,100, a total of $13,600. The gross profit for the year was $15,511.50, leaving a net profit after salaries of $1,911.50, or 7.646 per cent on the capital stock, based on total sales of $123,001.80.

Salaries paid for the preceding years, as already set out, were much lower, particularly after the amounts paid as "stock bonuses" are deducted, but sales and profits were correspondingly high. All the evidence indicates that both J. Carl Oates and Sam C. Oates worked hard, performed many of the tasks for which in other corporations additional employees might have been hired, and managed the business wisely and well.

There is much other evidence in the record indicating the amount and type of work done by defendants as managers of the corporate business, as well as the testimony of several officials of similar small manufacturing and sales companies to the effect that comparable or higher salaries are being paid in their organizations. In view of this testimony, we cannot say that the preponderance of the evidence is contrary to the Chancellor's finding as to the propriety of the amounts paid to defendants for their services.

Except as to the amounts paid as "stock bonuses"—the illegal preferential dividends—the decree of the Chancery Court is affirmed. As to the "stock bonuses", the case is remanded with directions to enter a decree in accordance with this opinion.

ALEXANDER *v.* MASON.

4-9323 234 S. W. 2d 511

Opinion delivered December 11, 1950.

L. B. Smead, J. Bruce Streett and *C. Stanford Harrell,* for appellant.

O. E. Westfall and *R. K. Mason,* for appellee.

LEFLAR, J. This is a second appeal, the case having been previously before us in *Alexander* v. *Mason,* 216 Ark. 367, 225 S. W. 2d 680. In that decision we reversed the decree originally entered, concluding that there was error in so much of it as cancelled appellees' contract to sell the land to appellants and quieted title in appellees. We held that appellants had the rights of purchasers under a bond for title, and our mandate directed the Chancery Court to determine the amount of appellants' indebtedness, same to be a lien on the lands to be foreclosed if the debt be not paid within a reasonable time to be fixed by that Court.

At the new trial the Chancellor found, on the appellants' own evidence, that the contract price of $1,775.48, owed under the 1932 contract for purchase of the land, remained altogether unpaid, and that the 10% contract rate of interest likewise remained altogether unpaid. The amount due was calculated at straight interest, not compounded, and after deducting certain costs payable by appellees was made a lien on the land to be foreclosed if not paid within 90 days. This appeal is on the grounds that the debt was barred by (1) the statute of limitations and (2) laches.

At the first trial the statute of limitations was expressly pleaded and was an issue in the case. The Chancellor found against appellants on the limitations plea, and on appeal we affirmed his decree except as to the

specific points of reversal. These did not include the statute of limitations issue. On it, we said: "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." Our reexamination of the record and briefs filed in the first appeal shows that the quoted conclusion of this Court was entirely justified and correct.

It is not now possible for appellants to rely anew on their old plea of limitations. It is barred by our decision on the first appeal.

As to the plea of laches, the only evidence to sustain it is that appellants for seventeen years, from 1932 until this suit was initiated in 1949, occupied the land without paying rent or any portion of the purchase price or the interest thereon. "It is well settled that laches is not mere delay, but is delay that works disadvantage to another. So long as parties are in the same condition, the party claiming the right to the land may press his right at any time within the limits of the law. It is only when he takes no steps to enforce his right until the condition of the other party has in good faith become so changed that he cannot be restored to his former state, if the right be then enforced, that delay becomes inequitable and operates as estoppel against the assertion of the right." *Jones* v. *Temple*, 126 Ark. 86, 93, 189 S. W. 847, 850. The only disadvantage asserted by appellants, by reason of the delay, is that they will be required to pay the interest which they contracted to pay, on the unpaid purchase price. That is not the kind of disadvantage that will sustain a finding of laches. There is no improper hardship in requiring appellants to pay the agreed price for the land, with the rate of interest which they contracted to pay, even though they have grown accustomed to an easier system by reason of paying nothing while they lived on the land for seventeen years.

The decree is affirmed.

GRIFFIN GROCERY COMPANY *v.* MCBRIDE, RECEIVER.

4-9341 235 S. W. 2d 38

Opinion delivered December 11, 1950.

Rehearing denied January 15, 1951.

O. E. Williams, for appellant.

Price Dickson, for appellee.

DUNAWAY, J. Appellant, Griffin Grocery Company, filed a claim with appellee, McBride, receiver for Vita-O-Ray *Milling* Company, for damages claimed to be due on account of an alleged breach of a covenant to surrender possession of a building in good condition in Fayetteville, Arkansas, in accordance with the terms of a lease agreement between appellant and the Milling

Company. The claim was disallowed by the receiver, and the disallowance approved by the Chancellor. Hence this appeal.

A chronological statement of the events preceding the filing of the claim for damages will simplify consideration of the legal questions involved.

On July 1, 1939, appellant, owner of the business building in question, entered into a lease agreement with Vita-O-Ray *Products* Company. It appears that this lease was for a five-year term, with option to renew. Although the record does not reflect the exact date, about 1941 the Products Company went into bankruptcy. Sometime thereafter the Milling Company was incorporated to carry on the same type of business, with I. G. Fullington and other members of his family as principal officers and stockholders, as they had been in the bankrupt concern. The new company continued to occupy the building and paid rent as stipulated in the lease of July 1, 1939.

Beginning in February, 1943, Fullington wrote several letters to appellant asking for a renewal of the lease which was to expire July 1, 1944. Appellant claims to have had no knowledge of the bankruptcy and dissolution of its original tenant.

On November 1, 1943, a new lease was executed between appellant and the Milling Company. Although appellant contends that this lease was identical with the old one and simply a renewal thereof, this does not appear from the record. Nor is there any evidence that there was ever any assignment of the Products Company lease to the Milling Company, prior to the execution of the lease of November 1, 1943.

The Milling Company remained in possession of the premises until January 6, 1949, when it was adjudicated insolvent and appellee was appointed receiver. Prior to this, appellant had sold the building to J. K. Gregory on November 9, 1948.

The damage complained of resulted chiefly from the cutting of holes in the floors of the building for the instal-

lation of various pieces of machinery. In addition there was proof of broken windows and water damage caused by the stoppage of drains as a result of improper removal of debris.

The Chancellor found that most of the damage was done by the Bankrupt Products Company and held that the Milling Company was not liable therefor. The court further held that appellant, having sold the building to Gregory without reserving any claim for damages to real estate, had no allowable claim against the Milling Company.

Appellant's claim was predicated upon the provision in the lease agreement in which the Milling Company covenanted that ". . . at the expiration of the time mentioned in this lease, peaceable possession of the said premises shall be given . . . in as good condition as they now are, the usual wear, inevitable accidents and loss by fire excepted . . .".

Appellant's argument for reversal is that the Milling Company assumed the benefits of the lease and is therefore liable for the obligations thereunder of the bankrupt company. It is true, of course, that one corporation may become liable to discharge the obligations of another, either by express agreement or by reasonable implication from all the facts and circumstances when a new corporation takes over the property of an old one. *Good* v. *Ferguson & Wheeler Land, Lumber & Handle Company,* 107 Ark. 118, 153 S. W. 1107; *Meeks* v. *Ark. Light & Power Company,* 147 Ark. 232, 227 S. W. 405.

In the case at bar there was no express agreement shown, and as already pointed out there was no assignment of the original lease. While it is contended that the new corporation was no more than the old one with a new name, the proof in the case does not establish this. No more is shown than that the two corporations occupied the same building and had some officers and stockholders in common. This does not meet the test of the cited cases for establishing assumption of liability by implication.

Therefore, the Milling Company's covenant to surrender the premises "in as good condition as they now are" was referable to the condition of the building at the time of letting under its lease of November 1, 1943. There is no proof of damage after this time.

The Chancellor was also correct in disallowing the claim of appellant on the other ground stated in the order appealed from. A covenant to surrender premises in a specified condition, as distinguished from a covenant to make repairs, is not breached until failure to deliver possession in the required condition upon termination of the lease. *City Hotel Co.* v. *Aumont Hotel Company,* Texas Civ. App., 107 S. W. 2d 1094; *Tiffany, Landlord and Tenant,* § 118d. Such a covenant runs with the land and the benefit thereof passes upon a transfer of the reversion. *Tiffany, Landlord and Tenant,* § 118f.

At the time the Milling Company surrendered possession of the building appellant had no interest in the property.

Affirmed.

On Motion for Rehearing.

Per Curiam. In a petition for rehearing the appellant insists that it is the proper party plaintiff for the reason that it did not execute its deed to Gregory until January 3, 1949, after the lease had been terminated by notice to the lessee in the preceding November. But the pivotal date is that on which the lessee surrendered possession, because the lessee could have complied with its covenant by restoring the building to its original condition at any time before giving up possession. Even though the appellant attempted to regain possession in November it is undisputed that the tenant did not in fact relinquish possession until February 1, 1949. Hence any cause of action that might then have arisen could not have been vested in the appellant, since it had already sold the property to Gregory.

Rehearing denied.

SELF *v.* TAYLOR.

4-9315 235 S. W. 2d 45

Opinion delivered December 11, 1950.

Rehearing denied January 22, 1951.

Jack Rose and *G. L. Grant,* for appellant.

Bland, Kincannon & Bethell, for appellee.

DUNAWAY, J. This appeal questions the validity of an injunction against picketing in a labor dispute in Fort Smith, Arkansas. It is urged by appellants that members of the International Brotherhood of Electrical Workers, Local No. 700, have been denied their right of peaceful picketing as guaranteed by the federal constitution. The Chancellor granted the injunction on the

ground that the union was picketing for an unlawful objective—to obtain a closed shop in violation of Amendment 34, the Freedom to Work Amendment of the State Constitution and Act 101 of the Acts of 1947, the enabling act for enforcement of Amendment 34.

Suit for injunction was brought by appellee, Leon E. Taylor, d/b/a Leon E. Taylor Electrical Company against T. F. Self, individually and as business agent and representative of the International Brotherhood of Electrical Workers, Local No. 700.

On July 1, 1946, Taylor and Local No. 700 entered into a collective bargaining contract covering terms and conditions of employment of appellee's employees. This contract was in effect until July 1, 1949, when it was terminated upon notice given, in accordance with its provisions, by the union. The 1946 contract had contained a closed shop agreement which was not subject to Act 101, since § 5 of the Act specifically provided that the Act should not be applicable to contracts in existence at the time of its passage in 1947.

After the notice of termination was given by the union in May, 1949, the parties began negotiations for a new contract. During the course of the negotiations appellee agreed to all the demands of Local No. 700 except those providing for a closed shop and union hiring hall procedure. Appellee refused to sign a contract containing these provisions because such a contract would be in violation of the law of Arkansas and he would thereby subject himself to criminal prosecution.

Section 3 of Act 101 provides: "No person, group of persons, firm, corporation, association, or labor organization shall enter into any contract to exclude from employment, (1) persons who are members of, or affiliated with, a labor union; (2) persons who are not members of, or who fail or refuse to join, or affiliate with, a labor union; and (3) persons who, having joined a labor union, have resigned their membership therein or have been discharged, expelled, or excluded therefrom."

The closed shop provision of the 1946 contract reads as follows: "The employer shall employ only members in good standing of the Union on all electric work." This identical clause was demanded in the proposed 1949 contract. It is now conceded that inclusion of such a provision would have been illegal.

Upon termination of the contract on July 1, 1949, appellee's employees quit their work and none of them worked for him again until about thirty days later, when two men returned to their jobs. Fines were assessed by Local No. 700 against those who returned to work, and they subsequently resigned from the union.

It appears that another electrical contractor in Ft. Smith, D. C. Barnett, was engaged along with appellee in joint negotiations with Local No. 700, and that the same difficulties were being encountered by him in agreeing upon a contract. Although the record is very sketchy on the exact sequence of events after July 1, 1949, it appears that Barnett instituted a suit similar to the one at bar in the Sebastian Chancery Court sometime in early August, 1949; that as a result of a conference between the Special Chancellor (acting in the absence of Judge Wofford) and the parties to that suit, negotiations between the union representatives and Barnett and Taylor were resumed.

During these negotiations, the union offered a contract substantially the same as the earlier one sought, except that all reference to closed shop, union shop, and union hiring hall had been eliminated. Also the proposed contract contained a provision for cancellation *at any time* by either party upon sixty days notice. The contract previously in force had been for a period of one year, renewable automatically from year to year, unless notice of termination was given thirty days prior to its annual expiration date.

Appellee testified that he agreed to accept all the terms of the contract offered if the union would make a contract "on a year's basis". He testified as follows:

"I agreed to it until they told us that they would have to get rid of the men that were working for us. We asked about this sixty day cancellation clause and they said that I'd either have to get rid of my men or they would cancel the contract.

. . . . . .

"Q. Did you inquire of the representative of the unions why there was a sixty day cancellation clause in this contract? A. I asked why they wanted it in there and they told me that they would cancel it out if I didn't dispose of these men. Q. What men did they have reference to? A. Two men that went back to work for me after they refused to let them work for me."

Barnett, who was present at the same negotiating sessions testified concerning inclusion of the sixty-day cancellation clause and his refusal to sign a contract containing it:

"Q. Why did you decline to sign it as presented? A. Because during the discussion, they would always refer to it that they would cancel it, depending on our good behavior, and finally Mr. Petty (a union representative) did say that he would cancel it unless we got rid of some of the men that was in bad with the Local.

. . . . . .

"Q. How long have you been doing business with Local No. 700 in Fort Smith? A. Oh, about 9 years. Q. During that time, have you ever been offered, or asked to enter into a contract for a period of less than one year? A. No sir."

This testimony was not contradicted by appellants.

When the union insisted upon the sixty-day cancellation clause, and the union representatives told appellee that they would exercise their right to cancel if he did not fire non-union men working for him, he refused to sign the contract and broke off negotiations, according to his testimony.

On August 25, 1949, two members of the union began peacefully picketing appellee's place of business. They

carried a placard bearing these words: "This place is unfair to Electrical Workers Local AFL 700".

The instant suit was filed the same day and a temporary injunction was issued against picketing appellee's place of business or any place where he was doing work. The initial petition was filed only against Self, but by amendment all the officers of Local No. 700 were made parties so there is no issue on appeal as to the parties to this suit.

After hearing the testimony, the Chancellor made permanent the temporary injunction. A written opinion was filed by the Chancellor as a part of the record, and since it clearly states the basis of his action and details testimony pertinent to a decision of this case, we quote rather extensively from this opinion:

"The first question for consideration is whether or not the inclusion of the 60 day cancellation clause had for its objective the imposition of closed shop conditions.

. . . . . .

"During the course of the hearing, this question was asked Mr. Self, business agent and witness for the defendants, by the Court:

" 'Q. If I understand that provision, and you will correct me if I'm wrong, it may be terminated by either party, by giving sixty days notice? A. Yes sir, that's right. Q. If the plaintiff in this case were to sign that contract with you, and then employed non-union men on the job with your union employees, would you give them notice? A. May I answer this question in full, Your Honor? It will take a little qualification. You know the law at the present time, does not provide that a union man has to work with a non-union man, and if we had such a contract with either one of these employers, and they employed non-union men, and our men left their employ, I don't think there would be any further point in maintaining a contract. Do you? Q. Would you ask your men to leave their employ? A. I wouldn't have to. They are under obligation. Q. You know that would

take place? A. Yes sir. Our people don't work with that kind of people.'

"Mr. Petty, International Vice President of the union testified as follows:

" 'Q. I will ask you—You stated on direct examination that you were still willing to sign a contract with Mr. Barnett and Mr. Taylor? A. That is right. Q. I will ask you if you are willing to sign a contract for one years duration with them. A. I am willing to sign the same contract that we presented to them, dated August 18th. Q. That would be with the 60 day cancellation clause in it? A. That's right. Q. Now, what is the policy of your union and requirements of your constitution and by-laws governing your members with reference to work with non-union men? A. I believe the constitution speaks for itself. Q. Well, you are familiar with it, aren't you? A. Yes. Q. Well, what is the requirement? A. Well, the policy of the I. B. E. W., in the construction branch of our trade, is to work only with union people of our own craft. Q. Do you agree with the statement that Mr. Self made on direct examination with regard to the procedure in the event that a person having a contract with a union employed non-union people? A. I don't know just exactly what you refer to. Q. Mr. Self testified that it would be expected that union members would not work on the same job with non-union members. A. That is right. Q. And if they withdrew from their employment, there would be no reason for further contractual relations with that employer and notice would be given to cancel the contract? A. That's right. Q. And that, as I understand, is the correct policy of the union? A. That is right.'

"The constitution of the International Brotherhood of Electrical Workers was introduced in evidence, and, under its provisions, its members are not permitted to work with non-union employees. Mr. Webb, Interna-

tional Representative of the I. B. E. W., testified to the same effect as that of Mr. Self and Mr. Petty.[1]

"As stated above, the contract offered August 18, 1949, with the mutual 60 day cancellation clause included, was prepared during the recess in the trial of the Barnett case. The evidence shows that no other contract of its kind in this community has been negotiated. The proposed contract, itself, is not illegal. The way in which defendants say they will operate under it is illegal. If plaintiff were to sign that contract, and did not dismiss from his employ the non-union men working for him the first day the members of the union appeared for work, they would quit and either give notice of the termination of the contract at once, or begin picketing plaintiff's place of business because he employed non-union workers, and this litigation would start all over again. It was the object of the defendants, in submitting this contract, to compel plaintiff to operate a closed shop business. He could not afford to sign such a contract, under the laws of the State of Arkansas, because if he permitted union men to work for him, he would have to violate the law and dismiss employees because they were not members of the union. It is an ingenious scheme, but it did not work."

That peaceful picketing for a lawful purpose is protected both by the federal constitution and the law of Arkansas is too well settled to require discussion. See *Local No. 802* v. *Asimos,* 216 Ark. 694, 227 S. W. 2d 154, for a collection and analysis of our own and U. S. Supreme Court decisions on this subject. It is equally well settled that even peaceful picketing for an unlawful objective is not protected by the constitutional guar-

[1] On questioning by the Court, Webb gave these answers:

Q. . . . but I am going to ask you the question again, and I think you have already answered it, according to your constitution and by-laws, if Taylor signed this agreement offered on—in August last year and he then continued to have non-union men in his employment—that your union men would not work?

"A. In accordance with their oath of obligation they have taken to become a member of the brotherhood, they couldn't under the constitution of our organization, work with non-union men.

"Q. And you would give the sixty-day notice?

"A. That is absolutely right."

antee of the right of free speech. We recognized this in the *Asimos* case, *supra,* where we said at p. 702: "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." See, also, *Giboney* v. *Empire Storage & Ice Company,* 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834; *Union Local 262* v. *Gazzam,* 339 U. S. 532, 70 S. Ct. 784; *Union Local 309* v. *Hanke,* 339 U. S. 470, 70 S. Ct. 773; *Amalgamated Meat Cutters* v. *Green,* 119 Colo. 92, 200 Pac. 2d 924; *Construction and General Labor Union* v. *Stephenson,* (Tex.) 225 S. W. 2d 958; *Local Union No. 519* v. *Robertson,* (Fla.) 44 So. 2d 899.

Appellants argue that since there is no mention of a closed shop in the proposed contract of August 18, 1949, and appellee refused to sign this contract, they have a constitutional right to picket his business in an effort to force him to accept this contract. They further argue that no man can be forced to work with non-union men, and if for any reason they want to cease their employment they have a right to do so. This latter contention is patently true, but it still begs the question whether they have a right to picket to obtain a contract legal on its face, but which in the circumstances of this case is obviously designed to achieve indirectly a result which the law says is illegal.

We do not find that this question has been presented to any court before. The National Labor Relations Board, however, has considered a closely analogous situation where the International Typographical Union was attempting to avoid the anti-closed shop provisions of the National Labor-Management Relations Act of 1947. *In the Matter of Chicago Typographical Union No. 16,* 86 Decisions and Orders of the N. L. R. B. 1041. There the NLRB held that union insistence upon a sixty-day cancellation clause in any collective bargaining contract with the publishers amounted to bad faith bargaining and was an unfair labor practice under the federal act. In so holding the NLRB said: ". . . the primary

objective of collective bargaining is to stabilize labor relations for periods of reasonable duration. To this end the parties had, before 1947, traditionally bargained for and executed contracts for a fixed duration of 1 year. The Respondents' unwillingness to consider the traditional term, evidenced by their refusal to bind themselves contractually for more than 60 days, raises in and of itself a presumption that the Respondents were not bargaining in good faith. The record shows no lawful or reasonable economic justification for such a refusal. Indeed, as we have already noted, it establishes that the 60-day cancellation clause was deliberately designed, and was adamantly insisted upon, to effect the exclusion of nonunion men, squarely in conflict with the provisions of the amended Act. . . . under this arrangement the Respondents intended to place themselves in a position whereby they could with contractual impunity call a strike, ostensibly with regard to economic matters otherwise settled in the cancellable agreement, in order to force the Employer noncontractually to maintain closed-shop conditions."

We think the same analysis fits exactly the situation presented in the instant case. The undisputed proof amply supports the Chancellor's finding that the only purpose of the picketing was to force appellee to continue a closed shop either contractually or non-contractually as a matter of economic self-preservation.

In *Giboney* v. *Empire Storage & Ice Co., supra,* the U. S. Supreme Court sustained an injunction against peaceful picketing where the Missouri courts had found that the sole purpose of the picketing was to induce Empire to agree not to sell ice to non-union peddlers—an illegal objective under Missouri law. While in that case, the illegal purpose was admitted, and here it is denied, it is not necessary that one concede in so many words that he is violating the law before he is accountable for his actions, if the illegal nature of his acts clearly appears from all the facts and circumstances. We think the principles announced in the *Giboney* case are applicable here:

"It is contended that the injunction against picketing adjacent to Empire's place of business is an unconstitutional abridgment of free speech because the picketers were attempting peacefully to publicize truthful facts about a labor dispute. See *Thornhill* v. *Alabama,* 310 U. S. 88, 102, 60 S. Ct. 736, 84 L. Ed. 1093, and *Allen Bradley Co.* v. *Union,* 325 U. S. 797, 807, note 12, 65 S. Ct. 1533, 89 L. Ed. 1939. But the record here does not permit this publicizing to be treated in isolation. For according to the pleadings, the evidence, the findings, and the argument of the appellants, the sole immediate object of the publicizing adjacent to the permises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to nonunion peddlers. Thus all of appellants' activities—their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony." (p. 497-98).

"While the State of Missouri is not a party in this case, it is plain that the basic issue is whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Kansas City, Missouri. Missouri has by statute regulated trade one way. The appellant union members have adopted a program to regulate it another way. The state has provided for enforcement of its statutory rule by imposing civil and criminal sanctions. The union has provided for enforcement of its rule by sanctions against union members who cross picket lines. . . . We hold that the state's power to govern in this field is paramount . . .". (p. 504).

To use a phrase of Mr. Justice FRANKFURTER in the *Hanke* case, *supra,* we do not consider the proposed union contract "as an independent collocation of words" and determine the objective of the picketing from that alone.

The contract itself; the circumstances of its proposal; the constitution of the international union (which forbids union members from working on the job with non-union men) as made in effect a part of the contract; the testimony of union representatives that their members would not work under the contract if non-union members were employed—all of these things must be considered in deciding whether the finding of the Chancellor as to the purpose of the picketing is supported by the evidence. Unless we blind ourselves to reality it is apparent that a closed shop is the union's objective in picketing.

We hold that the injunction was properly granted. To hold otherwise would subject appellee to endless picketing which could only be terminated by granting a closed shop by practice, if not by contract. Suppose, for example, appellee signed the demanded contract, and did not discharge his non-union employees. The union would, as the testimony shows, immediately give the sixty-day notice and terminate the contract. They would then begin picketing appellee's business as unfair. Why? Because he insisted upon obeying the laws of Arkansas instead of abiding by the policy of the international union. Of course, some pretext might be given as a claimed legitimate grievance, but the real union purpose would be to force a closed shop. The record could be no clearer after a trial period under the sixty-day contract than it is in the instant case.

Certainly our decision is not to be taken as holding that a collective bargaining contract must be effective for any particular length of time. As stated in the trial Examiner's Intermediate Report in the *Chicago Typographical Union* case, *supra* (at p. 1062): "The question of the length of a contract term is ordinarily one for negotiation between the parties. A refusal to agree to a term of 1 year, or of any other particular duration, does not *per se* constitute a refusal to bargain. . . . In the instant case no special circumstances were advanced by the Union for departing from the traditional practice of signing contracts for a fixed duration term of a year, other than a desire to protect the 'rights' of its members

not to work with nonunion men, or on nonunion goods, or where its jurisdiction was interfered with." Insistence upon the sixty-day cancellation clause in the circumstances of this case is simply one element in the proof of Local No. 700's illegal purpose.

One final point must be mentioned. Appellants argue that the court went too far in making the injunction "permanent". In answer to a similar contention in *Milk Wagon Drivers Union* v. *Meadowmoor Co.,* 312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836, the U. S. Supreme Court said: (at p. 298) "The injunction which we sustain is 'permanent' only for the temporary period for which it may last. . . . Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted." The injunction does not prevent appellants from bargaining in good faith for a legal contract. If legitimate differences arise not connected with the closed shop demand, which would warrant peaceful picketing, they may apply to the Chancery Court for appropriate modification of the injunction. If such modification is erroneously denied, an appeal always lies to this court.

Affirmed.

LEFLAR, J. (dissenting). The facts of this case have been fully set out in the majority opinion, as have also the relevant rules of law. They will be restated here only to the extent necessary to present my views.

Peaceful picketing is lawful in Arkansas, at least when used as a means for publicizing efforts to achieve lawful ends against the party picketed. *Local No. 802* v. *Asimos,* 216 Ark. 694, 227 S. W. 2d 154. The communication of information by such picketing is a part of the freedom of speech which is guaranteed by the Constitution. *Thornhill* v. *Alabama,* 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 460. But picketing may be forbidden when it is used to achieve unlawful ends. *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834; *Building Service Union* v. *Gazzam,* 339 U. S. 532, 70 S. Ct. 784. A collective bargaining contract call-

ing for a closed shop is unlawful in Arkansas. Constitution of Arkansas, Amendment 34; Ark. Stats., §§ 81-201 to 81-205. There is no law in Arkansas, however, that requires contracts of employment to be entered into for any specific period of time, such as one year, and it is altogether lawful for employers and employees to contract voluntarily for a period of employment covering sixty days only, or more, or less. We have no law that requires a workman to promise by contract that he will work for more than sixty days if he does not choose to do so.

Furthermore, the National Labor Relations Act does not apply to intrastate employment. There is no contention that it applies in the present case. That federal enactment creates the concept of "unfair labor practices" which, according to the opinion of the National Labor Relations Board quoted in the majority opinion herein, (86 N. L. R. B. Reports 1041) includes conduct similar to that involved in the present case. As to that it suffices to say that no similar law has been enacted in Arkansas to create the statutory concept of "unfair labor practices," and there is no common law rule in Arkansas making it unlawful for laborers to seek a sixty-day contract rather than a one year contract of employment, regardless of their reasons.

The contract sought by defendants here would obligate them to work for at least sixty days in an open shop. The contract would not automatically terminate at the end of sixty days, of course, but the reserved right in either party to terminate it by sixty days written notice would produce at least a theoretical possibility that the contract might not last longer than sixty days (though experience shows that many contracts made by skittish and suspicious parties with sixty-day or thirty-day termination clauses actually last for years.) I therefore refer to it as a sixty-day contract merely. Our Amendment 34, and its enabling act, do not say that employees must contract to work in an open shop for at least a year at a time. A contract for sixty days of open

shop employment is a completely valid contract under our law.

The evidence quoted in the majority opinion indicates that if this sixty-day contract is signed the defendants will not work *more* than sixty days under it. That would be their privilege under the contract. It is also their privilege under the law of Arkansas.

If the contract and the defendants' employment under it are terminated at the end of sixty days a new problem will obviously have arisen. It may be assumed that the employer will offer a new contract containing the same open shop provisions and the same sixty-day notice clause. If the defendants accept it, work will continue without interruption. If they reject it on the ground that the wage scale provided by it is too low they will be within their rights and no law will be violated. If they reject it because of the open shop provisions, and insist upon closed shop provisions, they will be asking for an illegal contract, and picketing to achieve it may be lawfully enjoined. *Giboney* v. *Empire Storage Co., supra; Building Service Union* v. *Gazzam, supra; Local No. 802* v. *Asimos, supra.* At that stage, but not until that stage, the picketing will be used to achieve unlawful ends.

It may be said that this merely postpones an inevitable outcome, that by the evidence the unlawful end will surely be sought sixty days hence in any event, and that we might as well assume its inevitability and enjoin it now. The difficulty with this is that the assumedly inevitable outcome is not what we are enjoining now. What we are enjoining now is something else, something that is lawful.

Apart from that, we do not really know that an effort to secure an unlawful closed shop contract will surely be the inevitable outcome of a sixty-day contract executed now. There is testimony from which it is inferred that this effort will ensue. But minds and motives change as time passes. New bargaining techniques may be developed, new incentives may arise. It is at least

conceivable that the problem may not exist at all after the men have been back at work for sixty days.

The action now being taken by the majority of this Court appears to me to be a serious and a dangerous one. It is not limited in its impact or effect to labor union cases. It may apply in any case where any group, or any individual, seeks to engage in lawful conduct which, in the minds of some or all, may create a later opportunity for unlawful conduct. It is the motive, the hope, the uncertain expectation that is feared, and because of the fear a lawful act is enjoined. This is too tenuous. It goes a step beyond our past decisions in seeking to control the minds of men by law, in seeking to prevent the peaceful communication of ideas upon a subject of legitimate public interest. I do not want to take that step.

GRAY *v.* BUTRUM.

4-9313 234 S. W. 2d 774

Opinion delivered December 18, 1950.

J. B. Brazil and *Hays, Williams & Gardner,* for appellant.

Charles L. Farish and *Clark & Clark,* for appellee.

LEFLAR, J. This in effect is a bill in equity brought by plaintiff Butrum to have a deed declared to be a mortgage only, and to have the deed cancelled upon payment of the mortgage debt. The Chancellor found for

Butrum, and decreed the relief prayed. Defendant Gray, grantee under the deed, appeals.

Butrum and one Lipscomb were brothers-in-law, and lived together on the land in question (20 acres with poor improvements) from about 1941 until Lipscomb died early in 1949. Previously the land had been conveyed and reconveyed several times, but by a deed executed in 1935 the title had been put in Lipscomb for life, with remainder in fee in Butrum. At the same time there was a mortgage on the land to secure a debt owed by Lipscomb to one Rose. Later, defendant Gray paid the amount of the debt to Rose and took an assignment of the debt and mortgage. Then on Nov. 12, 1938, Lipscomb and Gray executed a written contract whereby Lipscomb agreed that the land should be conveyed by absolute deed to Gray, but that Lipscomb should remain in possession and receive reconveyance on payment to Gray of the amount of the debt and interest, then $131. No deed was executed under this contract until Dec. 29, 1941, at which time the deed now in question, absolute in form, was signed by both Lipscomb and Butrum and delivered to Gray. Admittedly the outstanding debt was Lipscomb's, not Butrum's, and Butrum testifies that he thought the instrument he signed was a mortgage merely.

Gray testifies that he paid Lipscomb $200 in cash, in addition to cancellation of the debt, in return for the 1941 deed, but he offers no corroborative evidence as to this additional payment, and the deed itself recites a consideration of $158.50, which was then the amount of the debt with accumulated interest. After 1941 Lipscomb or Butrum sometimes paid the taxes and Gray sometimes paid them. Butrum continued to live on the land after Lipscomb died in 1949, but Gray made claim to possession, and this litigation ensued. The Chancellor's decree found the amount of the debt with accumulated interest, plus the taxes paid by Gray, to be $276.04, and ordered the 1941 deed cancelled on payment of that amount by Butrum.

Appellant Gray contends that the evidence was insufficient to sustain the Chancellor's conclusion that the

deed was in reality a mortgage only. We have carefully reviewed the evidence, as summarized above, and find that it was sufficient. The evidence clearly justified the Chancellor's finding that the 1941 deed was executed in compliance with the 1938 contract which clearly and definitely called for a deed to serve the functions of a mortgage. We have always held that it is permissible by extrinsic evidence of a clear, cogent and convincing character to show that a deed absolute on its face was actually intended to be a mortgage. *Scott* v. *Henry,* 13 Ark. 112; *Clark-McWlliams Coal Co.* v. *Ward,* 185 Ark. 237, 47 S. W. 2d 18; *Newport* v. *Chandler,* 206 Ark. 974, 178 S. W. 2d 240, 155 A. L. R. 1096. This appears to be such a case.

Appellant also asserts error in the Chancellor's refusal to admit as evidence the record and testimony in an earlier case between the same parties, involving the same subject matter, in which a voluntary nonsuit had been taken by the plaintiff Butrum. The testimony given in the previous trial was allowed for the purpose of showing prior contradictory statements of witnesses at the trial of the present case but was not admitted in bulk, as appellant contends that it should have been.

In the earlier proceeding, appellant had filed a cross-complaint asking that title to the land be quieted in him. This cross-complaint was of course not dismissed when Butrum took his voluntary nonsuit. Ark. Stats., § 27-1407. Appellant contends that, as to his cross-complaint, it was consolidated for trial with Butrum's new complaint, so that the present trial was as to it merely a continuation of the former trial and that evidence introduced at the former trial should have been admitted in the later one.

For one thing, the Chancellor declared that the two cases were not consolidated for trial, and this would seem to be decisive, despite an earlier remark, which he later said had been inadvertent, that they would be consolidated. Apart from that, the only evidence given at the first hearing was that offered by appellee on his complaint, none having been given on the cross-complaint

at the time the nonsuit was taken. Furthermore, the transcript of previous testimony was offered in evidence without proper authentication. Finally, having examined the transcript in question, we find nothing in it that would in any event justify a different result from that reached.

The decree is affirmed.

MASSEY *v.* TYRA.

4-9339 234 S. W. 2d 759

Opinion delivered December 18, 1950.

N. J. Henley, for appellant.

W. F. Reeves, for appellee.

LEFLAR, J. This is a bill in equity brought by Mr. and Mrs. Joseph W. Tyra (hereinafter called Tyra) for rescission of a contract for purchase of land, recovery of the $1,500 down payment, and reimbursement for certain expenses incurred on the land before rescission. The ground alleged for rescission was misrepresentation by defendants[1] of adequacy of the water supply on the land. The Chancellor found that there was misrepresentation justifying a decree of rescission, and ordered repayment of the amount received by defendants on the purchase price, but denied recovery for any expenses incurred by Tyra. An intervener, Al Davis, asked for and was allowed a materialmen's lien "upon the lands aforesaid" for $509.68 to be recovered "of and from the plaintiffs and defendants", though payable primarily out of the $1,500 which Tyra was held entitled to get back from defendants. Defendants appealed, and Tyra cross-appealed.

Tyra is a pensioned city fireman from Long Beach, Calif., who wished to retire in the Ozarks. He told de-

[1] One defendant, Mary Massey, disclaimed interest in the suit, since she holds title to the land merely as a trustee for the Citizens Bank of Marshall, Ark., and the Reconstruction Finance Corporation, true owners of the land, also defendants, who acted through defendant Albert Wheeler, a real estate agent, in making the sale to plaintiff Tyra.

fendants' real estate agent, Wheeler, that he was looking for a place where he could live, operate a small business, and raise some dairy cattle and hogs. In this connection he emphasized the importance of a good water supply. Wheeler showed Tyra the place in question, which included about 100 acres of hill land with a house fronting on U. S. Highway 65, about three miles northwest of St. Joe, Ark. A part of the house constituted living quarters for a family, and the rest was equipped and used as a public restaurant. This was what Tyra was looking for, but before closing the deal he asked specifically about the water and made it clear that he would not purchase unless the water supply was sufficient for stock raising as well as for the home and restaurant. Wheeler told him there were two good springs on the land, suitable for watering stock, and that the 358-foot well near the house produced an ample water supply. On the basis of these representations Tyra on March 14, 1949, contracted to pay $9,000 for the place, and made the $1,500 cash payment which he now seeks to recover.

When Tyra took possession of the premises about two months later he found that the well pumped only around 50 gallons of water each 24 hours, this amount being far less than enough to supply the house and restaurant. His first thought was that the pump was not operating properly and, on recommendation of Al Davis, plumber from Harrison, he first replaced part of the pipes, then replaced the whole pump, at a cost of $509.68. When these changes were completed, about a month after they moved on the place, the plumber finally told Tyra that he had a dry well. It was producing no more water than before. Tyra also made a search for the springs that were said to be on the place, but was unable to locate them. He complained to defendants, but they did nothing, merely telling him the water supply was adequate.

In the meantime he had made certain other improvements on the premises—repairs to the kitchen and living room at an asserted cost of $255, and fence repairs costing $89.75. The testimony indicates these repairs were

made before Tyra learned that the well was practically a dry hole.

In the complaint seeking rescission, Tyra asserted that "plaintiffs are ready and willing to comply with their contract and make all payments contracted if defendants will furnish the amount of water necessary to supply the home, the cafe and the livestock which plaintiffs informed the defendants they would need, and since they refuse to do anything, they are left without remedy except to have the contract rescinded." At some time during the controversy, however, Tyra moved off the land in question, to another place.

The first part of the trial was held on Nov. 1 and 4, 1949, at which time most of the evidence was taken. Defendants' position at this hearing was that the springs and well were adequate as represented, and that there was no real shortage in the water supply. Defendants introduced numerous witnesses who so testified. Tyra and his witnesses of course testified to the contrary. The Chancellor then declared an extended recess in the trial.

During the recess, he designated the attorney for the plaintiff and the attorney for the defendant as viewers to go on the land and see if the springs were there. They went over the land in December, 1949, accompanied by Tyra and the realtor Wheeler, and filed a report saying "there are no springs of any kind on the tract."

In February, 1950, defendants sent a driller to the place and deepened the well about 50 feet. At this depth it showed a regular and substantial supply of water. At the resumed trial in March, 1950, defendants admitted that the water supply from the well had been inadequate previously, but took the position that it was now adequate, and that Tyra was bound by the statement in the complaint, quoted above, to the effect that plaintiffs were willing to abide by the contract if defendants would furnish an adequate water supply. Tyra contended that this change in the theory of the defense came too late.

On this the Chancery Court sustained Tyra's view. The holdings were that Tyra had lost the right to rely on misrepresentations concerning the springs by his own failure to check on them at the beginning, when he had ample opportunity to do so, but that the misrepresentation concerning the well did give him a right to rescind which was not lost by the defendants' later renovation of the well. As to expenses incurred by Tyra on the well, the house and the fence, however, the Court held Tyra could not recover because he "should have found the falsity of the representations as to the supply of water that the well would furnish within three or four days after he took possession of the land and premises", and should not be allowed to recover for expenditures made thereafter.

We hold that the Chancellor was correct in his conclusion that defendants' misstatements concerning the character and amount of the water supply constituted material misrepresentations. They went to the very nature and quality of the premises purchased, and their fitness for the purposes for which Tyra made clear to defendants that he was making the purchase. This in the circumstances justified rescission of the contract. *Yeates* v. *Pryor,* 11 Ark. 58; *Kincaid* v. *Price,* 82 Ark. 20, 100 S. W. 76. And, see, *Fausett & Co.* v. *Bullard, ante,* p. 176, 229 S. W. 2d 490.

Defendants' effort to remove the defect in the water supply, long after Tyra's suit was filed and the case went to trial, did not destroy the right to rescind. "The law is expressly written, that the right of a plaintiff must be adjudicated upon as it existed at the time of the filing of his bill. . . . And it would seem to be against the policy of a court of chancery to allow a defendant to cut off, or to modify the relief to which the whole case may show the plaintiff to have been entitled upon the condition of the case when the suit was begun, by the use of legal process or remedies after the defendant is brought into a court of equity, there to make his defense." *Hornor* v. *Hanks,* 22 Ark. 572, 580. And, see,

Vandergriff v. *Vandergriff,* 211 Ark. 848, 202 S. W. 2d 967.

Nor did the quoted statement in Tyra's complaint, even if interpreted as an offer to abide by the contract should water be later furnished, remain open as a continuing offer which could be accepted by defendants at any indefinite future time. The complaint containing the alleged offer, filed on July 29, 1949, was answered by pleadings which declared that the water supply was sufficient, and that was the defense relied upon at the trial in November. It was only during the long recess in the trial, after it had become fairly apparent that the true facts would not sustain the original defense, that defendants attempted by redrilling the well in February, 1950, to shift their defense and accept the so-called offer contained in the complaint. By that time the offer, if it was one, was terminated. Defendants had rejected it both by their pleadings and by their defense at the trial, and on its rejection it ceased to exist as an offer. Restatement, Contracts, §§ 35, 36; Williston, Contracts, § 51.

The next question is on the cross-appeal, as to what relief Tyra should receive as an incident to the rescission. His right to have back the $1,500 down payment is of course clear. The Chancellor held that Tyra's delay in inspecting the premises fully and in discovering the true facts about the water supply promptly, after he had fair opportunity to do so within the first three or four days of his occupancy of the land, barred any recovery for expenditures thereafter made. In this we believe that the Court's conclusion went further than was justified by the preponderance of the evidence.

It is true that a purchaser may not on rescission recover for expenditures made by him on the land after he knew or in good conscience should have known that the contract of purchase would be rescinded, at least when his expenditures add nothing to the value of land, as was the case with the $509.68 expended by Tyra on the well. *Neely* v. *Rembert,* 71 Ark. 91, 71 S. W. 259.

But the evidence indicates that when Tyra made the expenditures on the well he was in good faith assuming that the contract was valid, that he had no grounds for rescission, and that the well would produce a plentiful supply of water, as represented, if he could only get the pumping machinery to work properly. Perhaps some other person more suspicious than Tyra, or better acquainted with the nature of hill country wells and pumps, would have given up sooner than he did and have recognized at once that the well was practically a dry hole. Under the circumstances, however, there certainly was nothing reprehensible or improper in Tyra's continuing, as long as he did, with the effort to make a success of his deal with defendants. That Tyra acted in good faith is evidenced by the fact that he thought, and had every reason to think, that he was spending his own money on the well. His outlay on the well was a direct consequence of defendants' misrepresentation to him that there was plenty of water in the well, the outlay was made before he learned from the plumber Al Davis that the well was dry, and it was made in a proper effort to correct the very fact which, unknown to him, defendants had misrepresented.

We hold that the amount thus expended on the well may be recovered by Tyra even though it added nothing to the present value of the premises. This is on the same theory followed in *Holland* v. *Western Bank & Trust Co.*, 56 Tex. Civ. App. 324, 118 S. W. 218, where a plaintiff entitled to rescission of a contract for purchase of Mexican land, was held also entitled to damages for money expended by him in attempting to utilize the property; in *Vanderbilt* v. *Bishop*, 188 Fed. 971, where rescission was accompanied by an award as damages of the amount expended by plaintiff in the care and cultivation of a misrepresented orchard on the premises; in *McRae* v. *Lonsby*, 130 Fed. 17, where rescission of a contract for purchase (for salvage purposes) of a sunken ship was accompanied by an award of damages in the amount of expenses reasonably incurred in trying to raise the hull before its true condition, falsely misrepresented, was

discovered; and in *Klim* v. *Sachs,* 92 N. Y. S. 107, 102 App. Div. 44, where a plaintiff entitled to rescission was also allowed damages covering expenses incurred in making a search of the title and a survey of the premises. This $509.68 expenditure was a direct and reasonably foreseeable result of defendants' misrepresentation, and recovery on account of it should be allowed.

As to Tyra's asserted expenditures of $255 in improving the kitchen and living room and $89.75 in repairing the fence, a somewhat different measure of recovery is proper. Since these expenditures, according to the evidence, were made during the time when Tyra still in good faith believed that there was no such defect in the water supply as to require rescission, he is entitled to some reimbursement for them. But the measure of damages for such improvements is the amount by which the value of the premises was enhanced by them. *Halcomb* v. *Ison,* 140 Ky. 189, 130 S. W. 1070; Black, Rescission and Cancellation, § 636; Annot., 48 A. L. R. 12,64. The recovery should not exceed Tyra's actual outlay for the improvements in any event, but it may be less if defendants show that the cost was greater than the enhancement in value.

This issue of enhanced value was not passed on in the Chancery Court, since it was there mistakenly held that the improvements were made too late to permit any recovery on account of them, and the record does not include any evidence on the specific point of enhancement of value. In such a situation it is proper for us to remand the case for additional proof on the point not fully developed. *Brizzolara* v. *Powell,* 214 Ark. 870, 218 S. W. 2d 728. We do so, with directions that the Chancery Court allow plaintiff Tyra to recover, in addition to his $1,500 down payment and the $509.68 expended on the well, the amount by which the value of the premises was enhanced, as of the date of the complaint, by Tyra's work on the house and the fence. Tyra should have a lien on the land to secure the payment of the total due him.

There is one other point on which the decree below was in error. This is as to the scope of the materialmen's lien given to the plumber Al Davis, apparently under Ark. Stats. § 51-701, for his $509.68 bill against Tyra for work on the well. This work was done by Davis for Tyra. Tyra was not defendants' agent in contracting for the work; he was contracting for himself only. The decree provided that Davis should recover this sum "of and from the plaintiffs and defendants" and gave him a lien "upon the lands aforesaid." Actually, this debt was owed by Tyra only, and under the statute the lien could exist only on his interest in the land, and not on defendants' interest. *Roberts* v. *Tice,* 198 Ark. 397, 129 S. W. 2d 258, 122 A. L. R. 1177; *Judd* v. *Rieff,* 174 Ark. 362, 295 S. W. 370; *Snodgress* v. *Huff,* 234 S. W. 2d 505. Tyra's interest in the land now exists only in the form of his rights against defendants under the decree to be entered in this case, but it is proper that the materialmen's lien be good against his interest in this changed form, and we so hold.

The case is remanded for further proceedings and entry of a decree in accordance with this opinion.

[redacted]