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THUDIUM *v.* DICKSON.

4-9324 235 S. W. 2d 53

Opinion delivered December 18, 1950.

Rehearing denied January 22, 1951.

John Baxter and *DuVal L. Purkins,* for appellant.

Jim Merritt and *Gibson & Gibson,* for appellee.

DUNAWAY, J. Appellee Dickson rented a part of a plantation in Chicot County owned by appellant, Mrs. Evelyn Thudium, for the purpose of producing a rice crop in the year 1948. In this action he sought and recovered damages for loss sustained by him because of a partial crop failure which he alleged resulted from not having available the necessary and agreed supply of water when needed to irrigate the rice crop.

Complaint was first filed on February 10, 1949, alleging in substance a breach of contract to furnish an adequate supply of water in time to produce a normal crop. He sued both appellant and the Layne-Arkansas Company, a well-drilling concern of Stuttgart, Arkansas. The rent contract was set out in the complaint, and it was alleged that appellee did not know which of the defendants was primarily liable to him. On June 27, 1949, an amended complaint was filed against both defendants in which the rent contract was again set out; and it was alleged that appellee had been induced to enter into this contract by the fraudulent representations of appellant concerning the water supply. Only the amended and substituted complaint and the pleadings filed in response thereto need be discussed. Appellee dismissed as to Layne-Arkansas prior to the trial.

In view of the contentions here of both parties, it will be necessary to quote somewhat extensively from the complaint. It was alleged that appellee was a rice farmer of many years experience, who prior to April 1, 1949, had lived in Monroe County where he engaged in rice farming; that negotiations during the first three months of 1948 resulted in the execution of the following contract between appellant and appellee:

"This contract made and entered into by and between Mrs. Evelyn W. Thudium, party of the first part, and W. M. Dickson, party of the second part.

"Whereas, the party of the first part is the owner of what is known as Yellow Bayou Plantation in Chicot County, Arkansas, and has rented to W. M. Dickson four to five hundred acres of land to be planted in rice for the year 1948, and it is mutually agreed between the parties as follows:

"1. W. M. Dickson agrees to plant in rice at least 350 acres of land, and not more than 500 acres, on land mutually agreed upon between the parties.

"2. The party of the first part has had test wells made by Layne-Arkansas of Stuttgart, and has contract with them to make sufficient water available for a minimum of 350 acres of rice and have contracted to make this water available before it is needed for the rice.

"3. All surveying and building of levees is to be done by the party of the second part at his own expense. Should a dragline be required as the only alternative in the handling of the water, then the expense of same is to be handled by the party of the first part.

"4. The party of the second part is to plant and harvest the rice in a business-like manner and to convey same to the drier. The rice is to be divided four-fifths to the party of the second part and one-fifth to the party of the first part. The rice is to be placed in the drier under construction at McGehee. Should the McGehee drier not be built in time to receive the crop, then the party of the first part is to pay such additional expense

for hauling as may be required to place the rice in some other drier or mill.

"5. It is agreed that the party of the first part will furnish the actual cost of poisoning weeds in the rice, said cost not to exceed $2.00 per acre. The party of the first part shall have the privilege of selecting the kind of poison and the time same may be used, and it is understood that this will release the party of the second part of any responsibility on account of said poisoning. The poisoning is to be done in the usual manner and before the weeds have produced seed.

"The term of this contract shall be for the year 1948. It is understood by the parties that when the rice grown in the year 1948 has been harvested that the party of the second part will return to the possession of the party of the first part the lands planted in rice.

"Witness our hands this.....day of April, 1948.

"/s/ Evelyn W. Thudium
Party of the First Part.

"/s/ W. M. Dickson
Party of the Second Part."

Plaintiff alleged that beginning April 10, 1948, he planted four tracts of land in rice on the "Yellow Bayou" plantation as follows: "First" crop, "approximately 50 acres"; "Second" crop, "approximately 90 acres"; "Third" crop, "approximately 100 acres"; "Fourth" crop, "approximately 125-130 acres." He alleged that normal production on these lands would have been 70 bushels per acre or 25,900 bushels of rice, whereas the total actual production was only 7,900 bushels. This loss in production was alleged to have been due to failure on the part of appellant to have a supply of water available when required.

To quote from the complaint:

"The loss sustained by the plaintiff as detailed hereinbefore was caused as follows:

"(a) The defendant, Mrs. Evelyn Thudium represented in PART 2 of the contract that she had test wells

made by Layne-Arkansas Company and that she had contracted with them to make sufficient water available for a minimum of 350 acres of rice and had contracted to make this water available before it was needed for the rice. The plaintiff believed and relied upon said representations and done and performed the acts and things and made the investments and expenditures as hereinbefore set out in this pleading. The defendants, failed to furnish water, sufficient water or water in time to make said crop. The plaintiff is advised and therefore states that the defendant, Mrs. Evelyn W. Thudium did not have such a contract with the Layne-Arkansas Company, and that the said representations were false and fraudulent and by reason of said false representations induced this plaintiff to enter into this said contract and do and perform the acts and things, make the investments and expenditures and suffer the loss of a crop as hereinbefore more specifically set out."

This allegation and the allegations as to the cause and extent of the loss are repeated in various forms in the complaint.

On August 15, 1949, appellant filed a "Motion to Strike" various designated paragraphs, sentences and phrases of the complaint "for the reason each and all are redundant, repetitious, and irrelevant". At the same time appellant filed a demurrer on the ground that no cause of action was stated. On September 28, 1949, a pre-trial conference was held at which time appellee moved to dismiss the cause as to Layne-Arkansas. The court granted this motion subject to the right of appellant to file a cross-complaint against Layne-Arkansas if she desired. This was not done.

Appellant, on October 10, 1949, filed an answer, in which she denied all the material allegations of the complaint. She specifically denied any false or fraudulent misrepresentations, and denied that she was in any way at fault for the crop failure. She further pleaded estoppel in that a contract with Layne-Arkansas for drilling the required wells was ultimately made at the instance of Dickson and with his knowledge and consent.

After appellant had been granted a continuance because of illness of one of her attorneys, also a witness, a "Motion to Elect" was filed on December 29, 1949. By this motion appellant sought to have appellee "elect . . . whether the amended and substituted complaint under its allegations is intended to state a cause of action for an alleged breach of the contract of the ..... day of April . . . or is it an attempt to state a cause of action in tort for the alleged fraudulent misrepresentations of Evelyn W. Thudium". The court did not rule on this motion prior to the trial.

At the trial of the cause on January 10, 1950, the issues submitted to the jury were whether appellant was guilty of fraudulent misrepresentations as alleged; and if so, whether the crop loss was due to appellant's not having water available at the proper time or due to appellee's own improper construction of canals and levees for distribution of the water; and whether on the facts appellee was estopped to claim any damages.

The jury returned a verdict for the plaintiff for $17,500. After hearing on the motion for new trial, in which it was urged among other things that the damages were excessive and not supported by the evidence, the court reduced the verdict to $11,325.60. From the latter action, the appellee has cross-appealed.

Appellant's motion for new trial contained thirty-nine assignments of error. The grounds urged by appellant for reversal may be discussed in four groups: (1) Failure of the trial court to sustain the "Motion to Elect", (2) Admission of prejudicial incompetent testimony, (3) Error in instructions given and refused, (4) Sufficiency of the evidence to sustain the verdict.

These facts were clearly established from the evidence: Before the rent contract was entered into, appellant and appellee had several conversations relative thereto. John Baxter, who was acting as attorney and adviser to appellant, exchanged letters with appellee in February, 1949, with regard to the terms and conditions

of the proposed contract. These letters, insofar as pertinent to the issues on this appeal, are quoted:

(Baxter to Dickson—February 10).

"I called Mrs. Thudium this morning and she agreed to your proposition about the rice. The agreement as I understand it is about as follows:

"1. She wants you to plant at least 350 acres of rice, and up to 500 if possible.

"2. She is to make the water available for you either by well or out of the bayou.

"3. You are to do all surveying, building of levees and building of canals at your own expense. Of course, if there are any dragline canals to be dug in making the water available, that will be Mrs. Thudium's expense.

. . . . . .

"Since talking to Mrs. Thudium this morning, I am rather inclined to believe that she ought to put down a big well if possible instead of depending on the bayou. I would like very much for Mr. Powell to look at this situation and see what ought to be done as soon as it dries up so you can get around.

"Mrs. Thudium is leaving town next Sunday and will be gone for about ten days.

"If this agreement is satisfactory with you, you can let me know, and Mrs. Thudium will begin to make arrangement about the water supply."

(Dickson to Baxter—February 12).

"I am in receipt of your letter dated February 10th, in regard to agreement with Mrs. Thudium about the rice.

"To take up this agreement as outlined:

"1. She wishes me to plant up to 500 acres of rice and I will agree to plant up to 400 acres of rice, providing there will be ample water supply to take care of the 400 acres properly.

"2. I would suggest that she furnish the water from a deep well rather to attempt to supply the water from

the bayou, as this would leave the bayou available for additional water supply as I understand that 300 acres in that territory will require about 5,000 gallons of water per minute and the additional 100 acres would raise this requirement to about 6,000 gallons of water per minute. In the event that the deep well would not furnish sufficient water supply for the acreage agreed upon, Mrs. Thudium would agree to furnish additional supply from the bayou.

. . . . . .

"I plan to be down again in the near future and if at all possible I will try to have Mr. Powell along to look over the situation of the well, and that no doubt Mrs. Thudium will have returned to Lake Village and the well agreement can be reached as I will expect the water supply to be available at the time it is needed."

On April 1, 1948, Mr. Baxter wrote Dickson as follows and attached the rent contract set forth above:

"I have drawn a contract and I hand you herewith the original. It has not been approved and signed by Mrs. Thudium. I have talked to her over the telephone and this seems to be about what she wants, and I think this will be agreeable to you.

"If you want any corrections or additions made to this contract we can work these out when you come down here and both of you can sign the contract."

Shortly after April 1, appellee moved to Chicot County, and began his farming operations on appellant's lands, having arranged for the necessary financing and acquired needed equipment. He began preparation of the first land for planting about April 9, and planted the first rice within the next day or two. He then planted the rest of the crop on the entire four tracts, completing the planting by May 11, or thirty-one days from the first planting.

Appellee had already moved to Chicot County and begun planting the crop on "Yellow Bayou" plantation before the rent contract with appellant was signed by

the parties. The testimony is in conflict as to when each of them actually signed the instrument, but it is clear that both parties had done so by April 17. Since appellant knew appellee was proceeding under their agreement, the exact date of execution of the contract is immaterial, and it was conceded in oral argument that whenever signed it was referable to April 1.

Upon appellee's recommendation, appellant had engaged Layne-Arkansas to drill several test wells on her property with a view to putting down permanent wells for irrigation of the rice crop. Four test wells were first drilled, on March 26, 27, 29 and 30. Appellee knew this when he started putting in his crop. Later, according to her testimony, appellant had Layne-Arkansas put down additional test wells, in an effort to locate a satisfactory water supply nearer the rice fields. This second group of test wells was drilled April 28, 29 and 30.

About May 1, or 2, according to appellee, he first learned that appellant might not have a definite contract with the drillers for the necessary wells, as he had understood appellant had represented to him. He then went to Stuttgart and found such to be the case. On May 5, following a conference with appellee and a representative of Layne-Arkansas, appellant signed a contract with this company to drill wells guaranteed to have the required capacity. The wells were located at the site of the first tests, made in March. Drilling began on May 11, one well being completed about May 21 and the last one on May 27.

Appellee's testimony was that crop No. One needed water about April 23, and the other three tracts at various intervals thereafter, depending upon the time of planting and growth on each. After the water became available from the wells, it developed that some of the canals and ditches first constructed were inadequate to raise the water to a level high enough for distribution over all the fields. The court ruled that under the terms of the rent contract this was appellee's responsibility and at the conclusion of the trial sustained appellant's

demurrer to the extent that appellee was claiming any damages on this account.

From all the testimony it is clear that a substantial crop loss resulted from the lack of a water supply when needed and from appellee's improper construction of canals and ditches. The testimony as to the extent of the loss and the relative responsibility of the parties for this loss is in conflict, and will be discussed in connection with the contentions of the parties for reversal on appeal and cross-appeal.

Was appellant prejudiced by the court's refusal to sustain either in advance of, or at, the trial, her "Motion to Strike" or "Motion to Elect"? The "Motion to Strike", as already stated was based upon the redundancy of the complaint, and we can see no error in the trial court's action as to this motion. Before the "Motion to Elect" was filed, appellant had answered denying any fraudulent misrepresentations. The complaint set forth in great detail the facts upon which appellee was basing his claim of fraud, and the damages he was seeking as a result of the alleged fraudulent misrepresentation of appellant.

The issues being tried in the case were made perfectly clear at the commencement of the trial, if they were not already clear from the pleadings. When objection was made to a question asked just after the second witness for plaintiff began to testify, the court made this statement to counsel for appellee:

"As I understand it, you are bringing an action against Mrs. Thudium because she did not furnish the water necessary to make this crop or led your client to believe that she had sufficient water and didn't in fact have it; upon that is your lawsuit and upon that your evidence will be confined."

The case was submitted to the jury under proper instructions as to the burden of proof and all the elements plaintiff was required to establish before he could recover in an action based on fraud. As to measure of damages the court instructed the jury as follows:

"If under all of the facts in the case and instructions of the Court you find for the plaintiff, W. M. Dickson, the measure of damages will be four-fifths of the market value of what the land would have produced if the water for irrigation purposes had been furnished, less four-fifths of the market value of what the land actually did produce, deducting from this difference the amount it would have cost to produce, harvest and market the crop that would have been produced if water for irrigation purposes had been furnished, not taking into consideration any damages that Dickson may have sustained by reason of any lack of water on account of defective canals or levees."

This measure of damages is the same as would have been applied had the instant action been one simply based upon breach of contract. *Gibson* v. *Lee Wilson & Company,* 211 Ark. 300, 200 S. W. 2d 497.

Appellant has not shown that she was prejudiced in any way either by the failure of the trial court to earlier rule on the "Motion to Elect" or by the ruling when made. Had she pleaded surprise at any of the proof adduced a different question might be presented. Instead it appears that the case was fully developed on both sides. There is no showing that any witness who might have had information concerning the issues involved was unavailable to testify. In the circumstance of this case, we think appellant's contention in this connection is without merit.

We next consider appellant's argument that certain prejudical testimony was admitted. Objection was made to the Baxter-Dickson letters and other testimony concerning the negotiations preceding the final rent contract of April 1. In permitting the introduction of these letters, the court instructed the jury that the final contract was binding upon the parties and could not be varied in so far as it covered any specific item. As to the supplying of water there is no conflict between the conditions set forth in the letters and in the contract as finally executed. Appellee's cause of action was based upon the alleged misrepresentation as to water supply, and his

reliance thereon. The evidence objected to was admissible to show why he went into possession of the leased lands and began his crop before the contract was actually signed.

Objection was also made to certain testimony concerning customs prevailing in rice-farming operations. It was shown that rice-growing was comparatively new in Chicot County. Such testimony undoubtedly aided the jury in understanding what to them was a new enterprise, and since the testimony in no way conflicted with the obligations of the parties under the contract, there was no prejudice in its admission.

Appellant also complains of testimony that appellee borrowed about $25,000 in connection with his farming operation for 1948. We think this testimony was admissible to show that he was adequately financed and prepared to make the rice crop he claimed he would have made. In addition, when one witness, appellee's wife, was testifying as to this item, the court specifically instructed the jury to disregard such testimony in considering the issue of damages. No request for any further admonition to the jury was made. We see no error in this regard.

We have also concluded that there was no error committed in the giving or refusal of instructions. Appellant's main contention as to instructions is that the above-quoted instruction on measure of damages does not adequately point out to the jury that plaintiff could not recover for any crop loss caused by his own defective construction of canals, ditches and levees. These additional instructions requested by the defendant were given on the point:

"If you find from the evidence the failure, if any, of Dickson's rice crop was due not to an insufficiency of the water supply but his failure to properly survey or construct the canals and levees so as to distribute the water available to the places needed in the rice fields,

then your verdict will be for the defendant, Evelyn W. Thudium."

and

"Even if you find from a preponderance of the evidence in this case it was the duty of Mrs. Evelyn W. Thudium to make the water available for the rice when Dickson needed it and she failed to perform in this respect; if you further find the loss in the crop could have been avoided by Dickson in the exercise of an ordinarily prudent rice grower by properly constructing the levees and canals at the proper grades and levels so as to distribute the water, or in any other way, then Mrs. Thudium is not liable for any loss or damage to the rice crop which could have been reasonably prevented by Dickson."

These instructions adequately covered the point and the court was not required to give all the repetitious instructions requested.

Only one other requested instruction, refused by the court, will be discussed specifically. It reads:

"You are instructed, under no circumstances can Dickson recover any damages for loss of Crop No. 3, or that portion of Crop No. 4, which the evidence has established was due to Dickson's own conduct, and in no event more than sixty per cent of his alleged loss on any particular crop."

This instruction was evidently requested because of testimony that most of Crop No. Three and a part of Crop No. Four could not have been saved even if water had been available at the wells, since canals were never constructed which could have carried adequate water to flood the fields. Appellee testified in great detail as to the damage to each of the four crops. As to all tracts, his testimony was that the crop was at least fifty per cent damaged before water was available from the wells. Then on cross-examination, appellee answered this question:

"Q. I want you to consider carefully before answering this next question. Will you tell the jury to the best

of your ability just how much of this that you said was the loss of this crop was due to the water not being there available before May 26 or 27, and then how much was due to the condition or failure of conditions of the levees or levels or the banks of those canals; tell just how much was due to one and how much was due to the other? A. I would say about sixty/forty."

This estimate of the relative responsibility for loss was given in relation to the entire crop. That necessarily took into account Crops No. Three and Four. It would have been error for the court to instruct the jury to deny recovery entirely as to part of the crop and then limit to sixty per cent the possible recovery as to the balance of the land.

We find no error in the instructions.

On the question of the sufficiency of the evidence to sustain a finding of fraud on the part of appellant, we agree with the earnest argument of counsel that the jury might have disbelieved any fraudulent intent on her part. On the other hand the matter was submitted to the jury under proper instructions on this issue. She did not have the contract with Layne-Arkansas which she represented she did have. The jury apparently found that the representation was fraudulently made.

The final question for decision is on appellee's cross-appeal. In reducing the verdict, the court made this statement:

". . . . under the evidence the Court feels like that the jury should have been bound by the instructions of the Court and held its verdict within the evidence produced and not speculative evidence, but concrete absolute evidence, and following that giving to the plaintiff everything he claimed in his complaint of 25,900 bushels, less the difference in 70 bushels and 57.9 bushels per acre, less the forty per cent, less one-fifth of the crop for rent, which would leave a net of 6,864 bushels loss by the plaintiff at $1.65 per bushel, which is $2.00 a bushel, less the cost of harvesting, transportation and drying, would leave a net loss of $11,323.60, which is the highest possible

sum that the jury could have possibly given the plaintiff under the evidence in this case as the Court sees it, and unless a remittitur to that effect is granted, the judgment will be set aside and a new trial granted."

It is argued that the verdict was supported by the preponderance of the testimony and that the court's finding upon which the reduced judgment was based is against the preponderance. In considering the trial court's action in reducing the verdict the rule is as stated in *McDonnell* v. *St. Louis Southwestern Ry. Co.,* 98 Ark. 334, 135 S. W. 925; ". . . it is the duty of the trial court to set aside a verdict that it believes to be against the clear preponderance of the evidence. But it should not, and the presumption is that it will not, set aside a verdict unless it is against the preponderance of evidence. This court will not reverse the ruling of the lower court in setting aside a verdict where there is substantial conflict in the evidence upon which the verdict was rendered, but will leave the trial court to determine the question of preponderance." See, also, *McIlroy* v. *Arkansas Valley Trust Co.,* 100 Ark. 596, 141 S. W. 196; *Stanley* v. *Calico Rock Ice & Electric Co.,* 212 Ark. 385, 205 S. W. 2d 841.

In the case at bar there was substantial conflict in the testimony. The county agent's testimony was that the 1948 average rice production per acre in Chicot County was 57.9 bushels. Various witnesses estimated that appellee's production under normal conditions would have been from 70 to 80 or 85 bushels. The trial judge saw and heard the witnesses testify, and undoubtedly his estimate of their credibility entered into his determination of where the preponderance of the evidence lay. Under the rule above-quoted, we cannot say that his determination of this question was an abuse of discretion.

It is also argued that the trial court erred not only in holding 60 bushels per acre to be the anticipated yield, but in his determination of the number of acres planted by appellee. It is true that the testimony as to the planted acreage varied all the way from 350 to around 380. But it is obvious from the court's statement that no specific

finding on this point was made. The court took the maximum potential production claimed by appellee in his complaint—25,900 bushels. This had been based upon an estimated production of 70 bushels per acre. From this total the court deducted the difference between 70 bushels and 60 bushels per acre, which was the maximum supported by the trial court's view of the preponderance of the evidence. There was no error in this, for we have held that the amount stated in the complaint measures the maximum recovery. *Turner* v. *Smith,* 218 Ark. *ante,* p. 441, 231 S. W. 2d 110, and cases therein cited.

Affirmed on direct appeal and cross-appeal.

SHEARMAN CONCRETE PIPE COMPANY *v.* WOOLDRIDGE.

4-9261 234 S. W. 2d 382

Opinion delivered November 6, 1950.

Rehearing denied December 18, 1950.

Hardin, Barton & Shaw, Robert L. Jones, Jr., Franklin Wilder and *Lawrence S. Morgan,* for appellant.

Jeptha A. Evans and *Charles I. Evans,* for appellee.

Ed. F. McFaddin, Justice. This case results from a three-vehicle traffic mishap which occurred on U. S. Highway 71, about one mile west of the town of Jenny Lind in Sebastian County. Appellees were plaintiffs and appellants were defendants in the trial court; and this appeal challenges the correctness of the judgments based on the jury verdicts for the plaintiffs. For convenience, we will refer to the parties as they were styled in the lower court.

On June 11, 1949, the Wooldridge family—consisting of Earl Wooldridge, his wife, their two daughters, and his mother-in-law—were in a three-quarter ton truck, traveling west on U. S. Highway 71. The truck was being driven by Merlene Wooldridge,[1] a daughter; and Mrs.

[1] She was eighteen years of age and had a driver's license.

Wooldridge and her mother, Mrs. Bell, were in the seat with the driver. Earl Wooldridge and the other daughter were in the back of the truck, using a tarpaulin to protect them because there had been a rain. As the Wooldridge truck was proceeding west—and therefore traveling on the north half of the concrete slab—and approximately 325 feet east of the Adams Filling Station, a red truck (alleged to be that owned and driven by defendant Paul Bridges) entered U. S. Highway 71 from a south side road, and turned east, thereby facing the Wooldridge truck. This red truck, instead of turning directly on the south side of the highway, made a wide swing in turning, and went on the north half of the concrete slab in front of the approaching Wooldridge truck. The driver of the Wooldridge truck, in order to avoid a possible collision with the red truck, turned off the concrete slab to the gravel shoulder on the north; and then began the chain of events that led up to the resulting collision between the Wooldridge truck and the truck of the Shearman Concrete Pipe Company (hereinafter called "Shearman"), and being driven by its driver, Joseph Daniels.[2] Merlene Wooldridge testified that when she saw the red truck in her traffic lane on the highway, she was driving 35 to 40 miles per hour but reduced the speed to approximately 25 miles per hour.

Witnesses for the Wooldridges testified that the concrete slab (18 feet wide) was a few inches higher than the gravel shoulder, and that when the Wooldridge truck started back on the concrete slab, the truck skidded and went off the slab on the south shoulder, then skidded, and went off the slab on the north shoulder, and then careened back on the slab and south across the center line where the collision occurred between the Wooldridge truck and the Shearman truck. The Shearman truck (headed east) never crossed the center line of the highway, was always on its own right-hand side, and its right wheels went off the slab and to the south shoulder in a futile effort to avoid the collision. The *right* front fender of the Wooldridge truck came in contact with the left front of the

[2] That Daniels was then the servant of Shearman and acting in the scope of his employment is a conceded fact.

Shearman truck. As a result of the collision, all of the Wooldridges were injured; and Mrs. Wooldridge's mother—Mrs. Bell—was killed.

Actions[3] were filed by proper plaintiffs against Paul Bridges (alleged to have been the driver of the red truck that entered the highway from the side road) and against Shearman and its driver, Daniels. The theory of the plaintiffs was that the negligence of Bridges had concurred with that of Shearman and Daniels to cause the stated result, and that each of the parties in the Wooldridge truck had been free of negligence. From verdicts and judgments for the plaintiffs, defendants bring this appeal, presenting the points now to be discussed.

I. *Evidence of Negligence of Shearman and Its Driver, Daniels.* There was no testimony that Daniels[4] was driving too fast, or that he was on the wrong side of the highway, or that he was violating any of the other so-called "rules of the road." Plaintiffs' only claim of negligence against Shearman was that Daniels could and should have discovered the perilous situation of the Wooldridge truck in time to have avoided the collision, and could have avoided it with the exercise of ordinary care, and that he failed to use such care. This claim of the plaintiff was submitted to the jury in Plaintiffs' Instruction No. 3 which is too lengthy to copy in full, but in it the Court instructed the jury that Shearman would be liable:

". . . and if you further find that the said Joseph Daniels saw said Wooldridge truck slipping, sliding and skidding back and forth across and along said highway, . . . in a perilous position;

". . . and if you further find that the said Joseph Daniels appreciated the said perilous position, if any, of the occupants of the Wooldridge truck, at a time when his

[3] Two actions were filed, one by the administratrix of Mrs. Bell's estate, and the other by the four Wooldridges. The actions were consolidated for trial.

[4] As previously stated, Daniels was Shearman's driver and any negligence of Daniels would be chargeable against Shearman. So in speaking of the acts of Daniels, it necessarily means the acts for which Shearman was responsible.

truck was at a sufficient distance away from and west of the Wooldridge truck that by the exercise of ordinary care he could have avoided the collision;

". . . and if you further find that the said Joseph Daniels had the means at his command and within his control to avoid the collision;

". . . and if you find that by the exercise of ordinary care the defendant Joseph Daniels could have avoided the collision;

". . . and if you further find that the said Joseph Daniels failed to exercise ordinary care to avoid said collision; . . ."

Plaintiffs' Instruction No. 3 is the only one on which was predicated a claim for recovery against Shearman and Daniels; and the giving of this instruction is urged as fatal error. The basis of such claim is that there was no evidence to show that Daniels was guilty of any negligence. This necessitates a review of all of the evidence as to when Daniels discovered the perilous condition of the Wooldridge truck and what Daniels did, or failed to do thereafter; and in so reviewing the evidence, we necessarily take that version most favorable to the plaintiffs. (See *Potashnick Local Truck System* v. *Archer,* 207 Ark. 220, 179 S. W. 2d 696, and cases there cited; and see other cases collected in West's Arkansas Digest, "Appeal and Error," Key Number 930.)

The collision between the Wooldridge truck and the Shearman truck occurred in front of the Adams Filling Station. Merlene Wooldridge testified that the Shearman truck was "almost in front of" the Adams Filling Station when she first saw it. Mrs. Wooldridge (also in the driver's seat with Merlene) testified that she did not see the Shearman truck until just before the collision. Joseph Daniels, the driver of the Shearman truck, when called by the plaintiffs as their witness, testified that he was traveling 25 or 30 miles per hour before he applied his brakes; that after applying the brakes he could stop within 40 or 50 feet; and that he stopped as quickly as he could. No other witnesses called by the plaintiffs

claimed to have seen the collision; but through pictures of the highway, measurements of distances, and the testimony of witnesses in rebuttal, the plaintiffs claimed that Daniels *could, and should,* have seen the Wooldridge truck in its difficulties while Daniels was 825 feet west of, and away from, the Wooldridge truck; that Daniels at such distance should have appreciated the peril in which the occupants of the Wooldridge car had been cast (*i e.,* in a car out of control and swerving north and south across the highway); and that Daniels should have stopped his truck several hundred feet west of the Adams Filling Station, and thereby avoided the collision.

Of course the claim of the plaintiffs is based on their attempt to apply to this case some of the phases of the so-called "discovered peril doctrine" or "the last clear chance doctrine," which doctrine, most succinctly stated, is that the contributory negligence of the plaintiff does not preclude a recovery for the negligence of the defendant when it appears that the defendant, by exercising reasonable care and prudence *after discovering* the perilous condition of the plaintiff, could have avoided the injurious consequences to the plaintiff. See *Sylvester* v. *U-Drive-Em System,* 192 Ark. 75, 90 S. W. 2d 232, and *Boone* v. *Massey,* 212 Ark. 280, 205 S. W. 2d 454. See, also, 38 Am. Jur.[5] 900.

Now, in the case at bar, the plaintiffs do not admit that they were cast in the position of peril through their own negligence. Rather, they insist that they were placed in the position of peril through the negligence of Bridges. So all of the phases of the doctrine of discovered peril are not present in this case. But in their said Instruction No. 3 (as previously quoted) the plaintiffs sought recovery from Shearman and Daniels on the theory that Daniels failed to exercise ordinary care *after he discovered* the perilous condition of the Wooldridge truck. Therefore the vital questions are: (1) when did Daniels actually discover the perilous condition of the Wooldridge truck; and

[5] In 1 Ark. Law Review 13 there is a discussion of Arkansas cases on "last clear chance." Likewise, in 4 Ark. Law Review 102 there is a case note on "last clear chance."

(2) did he have sufficient time thereafter to have avoided the collision with the exercise of due care.

To determine these questions, we must turn to Daniels' testimony, since, as previously stated, he is the only eye-witness who testified as to the collision, with the exception of Merlene Wooldridge and her mother (whose testimony we have previously mentioned), and with the exception of Paul Bridges whose testimony is entirely unfavorable to the Wooldridges.

Daniels[6] testified that he was all the time on the south half of the highway; that he was driving about 25 or 30 miles an hour when he first saw the Wooldridge truck; that it was then 250[7] feet away from him and on the north side of the highway with its right wheels on the gravel shoulder[8]; that he thought the Wooldridge truck was going to turn into the Adams Filling Station (located on the north side of the highway), but then he realized that the Wooldridge truck was trying to get on the concrete slab and continue west; that immediately after such realization, and instantly before the collision, the Wooldridge truck got on the concrete slab and darted across the center line towards his truck; that he then put on his brakes, pulled his truck to the south shoulder, and headed towards the ditch in an effort to avoid the collision; and that his truck did come to a stop in the ditch.

[6] In turning to the testimony of Daniels, we are not holding that a case on appeal from a plaintiff's verdict is ever to be tested by the defendant's version of the transaction if in conflict with the plaintiff's. Rather, we are giving Daniels' testimony as the only testimony in the record on the point and thus using it in an effort to support the plaintiffs' version, as best it will.

[7] At the trial in this case Daniels testified that he saw the Wooldridge truck 250 feet away from him. While there was testimony in plaintiffs' direct and rebuttal evidence to the effect that Daniels at other times had stated that he saw the Wooldridge truck at a greater distance than 250 feet and "weaving" and apparently out of control, nevertheless no witness testified contrary to Daniels' statement that until the Wooldridge truck started to dart across the slab to the south (for the last time) Daniels thought the Wooldridge truck was preparing to turn into the Adams Filling Station there on the north side of the highway. Likewise, the pictures, diagrams and maps do not serve to dispute Daniels' statement that he thought the Wooldridge truck was about to turn into the Adams Filling Station.

[8] Evidently the Wooldridge truck had gone from the south shoulder to the north shoulder, and was then on the north shoulder for the last time before the collision.

Thus, the evidence shows that when Daniels realized that the Wooldridge truck was not going into the Adams Filling Station, it was immediately before the Wooldridge truck darted across the slab and struck the Shearman truck. The testimony of Merlene Wooldridge was that she had slowed her truck to 25 miles an hour, so it was traveling about 36 feet per second. The concrete slab was 18 feet wide. Thus the Wooldridge truck could cross the concrete slab from north to south in half a second. When called by the plaintiffs, Daniels testified that he could stop his truck in a distance of 40 to 50 feet after he knew he had to stop. He was also traveling at 25 miles per hour, which is 36 feet per second; so it required him more than a second to stop after he knew he had to stop, and yet the Wooldridge truck hit his truck within half a second after it started across the highway; and it was not until it started across the highway that he discovered its perilous condition.

The recital of these facts demonstrates that the plaintiffs failed to show that Daniels was guilty of any negligence either before or after he discovered the perilous condition of the Wooldridge truck.[9] Therefore, the

[9] Even though the entire doctrine of "discovered peril" or "last clear chance" is inapplicable to this case, as heretofore stated, nevertheless it is interesting to note that even in cases applying the entire doctrine, the Courts have held that there must be some interval of time between the discovery of the perilous condition of the plaintiff and the failure of the defendant to avoid the peril. For instance, in *St. Louis Southwestern Railway Co.* v. *Simpson*, 286 U. S. 346, 76 L. Ed. 1152, 52 Sup. Ct. 520, Mr. Justice CARDOZO, in discussing the necessity of a substantial interval of time, used this language:

". . . The negligence of the conductor in failing to give warning was not separated by any considerable interval from the consequences to be averted, nor is there any satisfactory proof that warning, if given, would have been effective to avert them. The transaction from start to finish must have been a matter of seconds only. In the brief for the respondent nice calculations are submitted in an attempt to prove that if the conductor had applied the brakes at once, his train could have been stopped at a point that would have separated it by a space of approximately half a mile from train No. 18 rushing on from the south, and that if all this had happened, the engineer of No. 18 might have noticed the stationary train in time to stop his own and thus prevent collision. Calculations so nice are unavailing to prove anything except the unity of the whole transaction. The several acts of negligence were too closely welded together in time as well as in quality to be viewed as independent. . . ."

The facts in the case at bar clearly distinguish it from the holding of the Circuit Court of Appeals of the Fourth Circuit in *Swift* v. *Young*, 107 Fed. 2d 170, because in that case the truck driver admitted that he

trial court erred in giving plaintiffs' Instruction No. 3—since there was no evidence on which to base such instruction. Instead, the trial court should have given Instructions 3 and 4 (peremptory instructions) requested by Shearman and Daniels, since no negligence was shown against them. The case as to Shearman and Daniels is therefore reversed and dismissed.

II. *Evidence of Negligence of Bridges.* The plaintiffs' cases as to Bridges were based largely on the testimony of Merlene Wooldridge to the effect that Bridges' truck, in entering Highway 71, made a wide swinging turn, and thereby forced her to drive off the concrete slab and caused the skidding and sliding that resulted in the collision with the Shearman truck. Bridges denied that his truck had so entered the highway, and sought, by testimony of witnesses and by physical facts, to prove that his truck was not the one that Merlene Wooldridge saw. He claims that he was entitled to an instructed verdict because such physical facts disproved the testimony of Merlene Wooldridge.[10] But the fact remains that Merlene Wooldridge positively identified Bridges' truck, and that the so-called "physical facts" at most made a case for the jury as to whether Merlene Wooldridge was correct in identifying Bridges' truck. Therefore, there was sufficient evidence to take the case to the jury as to Bridges' negligence; and he was not entitled to the instructed verdict which he requested.

III. *Damages Against Bridges.* As to the injuries received by Earl Wooldridge and his wife and two daughters, there was offered the testimony of the parties, the testimony of Dr. Eberle, and also the written report of Dr. Krock, who was not called as a witness. It is in regard to this written report of Dr. Krock that an error occurred which necessitates a reversal and a remanding as to the appellant, Bridges.

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saw the perilous condition of the approaching and skidding vehicle but decided he could "get through" and thus drive on. There the truck driver took a chance and failed; and so was held liable. The truck driver in the case at bar took no such chance.

[10] For some of our cases in which "physical facts" were invoked, see: *Alldread* v. *Mills*, 211 Ark. 99, 199 S. W. 2d 571, and *Newsom* v. *Glaze*, 215 Ark. 40, 219 S. W. 2d 232, and cases there listed.

Prior to the trial, the plaintiffs' attorneys had an agreement with the attorneys for Shearman and Daniels that such written report, signed by Dr. Krock, might be admitted in evidence without requiring him to be present. However, no such agreement was made by the attorneys for Bridges; and of course the written report—upon Bridges' objection—was inadmissible as to him, since it was "hearsay."[11]

At the trial, plaintiffs introduced the report of Dr. Krock; and the attorneys for Shearman and Daniels promptly honored their agreement. Bridges' attorney objected to the report, just as he had a right to do. The trial court admitted the report in evidence, and this occurred:

"The Court: . . . the jury is instructed not to consider this report against the defendant Bridges, but only against the Shearman Concrete Pipe Company and Joseph Daniels.

. . . . . .

"Mr. Wilder: Save our exceptions to the action of the court in admitting this report in evidence and to the action of the court in overruling our motion for a mistrial."

Thus the jury had much stronger evidence of injuries on which to base the verdicts against Shearman than it had on which to base the verdicts against Bridges. When the jury attempted to return its first verdict in the Wooldridge case, this was the form:

"We, the jury, find for all the plaintiffs the sum of Twenty Five Thousand Dollars ($25,000), Five Thousand Dollars ($5,000) assessed against Paul Bridges and Twenty Thousand Dollars ($20,000) against Joseph Daniels and Shearman Concrete Pipe Company."

The Court refused to accept the verdict and told the jury:

[11] See *Roberson* v. *Roberson*, 188 Ark. 1018, 69 S. W. 2d 275; *Southern Insurance Company* v. *Floyd*, 174 Ark. 372, 295 S. W. 715; *National Life & Accident Ins. Co.* v. *Threlkeld*, 189 Ark. 165, 70 S. W. 2d 851, and *Southern National Insurance Co.* v. *Heggie*, 206 Ark. 196, 174 S. W. 2d 931.

"You cannot bring in a verdict of this sort. You must separate the amounts and show how much is for each one of the plaintiffs. I am going to send you back and I will give you a new verdict sheet to write your verdict on. It isn't your duty to divide the amounts between the different defendants. If you find against both, you say, 'We, the jury, find for the plaintiff' and state the amount, but you are not to say that any defendant is to pay so much. That is to say you can't divide the amounts among the defendants."

Bridges' attorney duly and seasonably objected and preserved his objections; and fifteen minutes after the first verdict was refused, the jury returned with the following verdict which was accepted by the Court and entered as the judgment over the objections and exception of Bridges, to-wit:

". . . We, the jury, find for the plaintiff Earl Wooldridge in the sum of twenty thousand dollars, and for the plaintiff Susie Wanda Wooldridge in the amount of two thousand dollars, for the plaintiff Merlene Wooldridge in the amount of one thousand dollars, and for the plaintiff Vera Jean Wooldridge in the amount of two thousand dollars."

Now it is instantly apparent that by the Court's action in refusing to allow the jury to return the first verdict, and in requiring that damages for the same amount be returned against Bridges as against Shearman, that the Court impliedly allowed the Krock report to be considered against Bridges. This was of course a violation of Bridges' right to be confronted by the witness whose report was thus received.

We need not decide whether the trial court was correct in allowing the written report in evidence, even with the admonition given, or whether, under the circumstances, the Court should have received the jury's first effort to return a verdict, because, at all events, the result of the entire proceedings was prejudicial to Bridges: such is clearly shown by the fact that the sum, $25,000, which was mentioned in the first verdict, was likewise used in the second verdict, and whereas only $5,000 had

been assessed against Bridges in the first verdict, the entire $25,000 was assessed against him in the second verdict. We cannot affirm as to the $5,000 in the first verdict, because it was never accepted by the Court as a verdict.[12] So the case of Mr. and Mrs. Wooldridge and the two daughters against Bridges must be reversed and remanded.

As to the judgment for the death of Mrs. Bell, that case is in all things affirmed insofar as Bridges is concerned.

Neither the Chief Justice nor Mr. Justice HOLT participated in this case.

BRIMSON *v.* PEARROW.

4-9277 234 S. W. 2d 214

Opinion delivered November 13, 1950.

Rehearing denied December 18, 1950.

[12] See *Clift* v. *Jordan*, 207 Ark. 66, 178 S. W. 2d 1009. Since a verdict is the "final decision" of a jury (53 Am. Jur. 695), it necessarily follows that any effort of a jury to report—short of a "final decision"—cannot really be called a verdict, although the expressions "first verdict" and "second verdict" are used to differentiate the efforts of the jury to reach a final decision.

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

Gerland P. Patten, for appellee.

MINOR W. MILLWEE, Justice. This suit was instituted by Ocie Dona Pearrow to set aside a deed executed by her to appellants, Dr. James E. Brimson and wife, on May 1, 1942, conveying lots 5 and 6, block 1, Reubel and Leymer's Addition to the City of Little Rock, Arkansas. In the same suit Mrs. Pearrow also sought to cancel a deed between the same parties dated November 2, 1938, conveying lot 4 in the same block and addition, or, in the alternative, to recover the alleged unpaid purchase price of said lot.

The trial court found that the deed to lots 5 and 6 was void and same was ordered cancelled "because inequitable, without consideration, induced by fraud, and/or failure of consideration." The court further found: "That after giving credit for any and all amounts properly owing by the plaintiff to the defendants for merchandise furnished and money advanced, taxes paid on the property involved herein, and betterments to said property, and to plaintiff for payments made, the defendants are entitled to a judgment against the plaintiff in the amount of $720." A lien was declared on said

lots to secure the payment of said judgment. Each side has appealed.[1]

Under the will of her husband who died in 1932, Ocie Dona Pearrow acquired a life estate with power of disposition of the fee to lots 3 to 6, inclusive, in the above-mentioned addition. Mrs. Pearrow conveyed lot 3 to appellants on July 2, 1937, and lot 4 on November 2, 1938. The record reflects that in a former suit title to lots 3 and 4 was confirmed in appellants free from all claims except a lien for any unpaid balance of the purchase price. See, also, *Pearrow* v. *Vaden,* 201 Ark. 1146, 148 S. W. 2d 320, where we held that Mrs. Pearrow had the right to convey a fee title to lots 5 and 6.

All of the lots were mortgaged in 1936 when the mortgage indebtedness was reduced to $1,600 and refinanced through the efforts of Mrs. Pearrow's stepchildren. The 1937 deed to lot 3 recites a consideration of $450 in cash and the assumption by appellants of a series of unpaid notes due under the mortgage covering all the lots. The deed to lot 4 dated November 2, 1938, recited a consideration of $1,650 payable $150 in cash and the balance at $12.50 a month.

Dr. Brimson is a licensed physician and for several years has operated a retail drug and liquor store on the property first purchased from appellants. The lots in controversy are located in a growing suburban commercial district of Little Rock at the juncture of Asher Ave. and Fair Park Boulevard. After the sale of lots 3 and 4 to appellants, Mrs. Pearrow rented out two dwelling houses located on lots 5 and 6 except a part of one of the houses in which she resided. The evidence discloses that she began drinking heavily about 1938 and by 1942 had become a confirmed alcoholic. She was an elderly woman and in poor health, physically and mentally. Although the testimony is somewhat conflicting as to her mental capacity on May 1, 1942, it is certain that her inordinate appetite for intoxicants had made

[1] Ocie Dona Pearrow died after trial in chancery court and the appeal was revived in the name of her heirs and attorney as proper parties in interest on June 5, 1950.

her easily susceptible to undue influence at that time. She developed a strong dislike for her stepchildren and a close friendship for appellants.

The testimony shows that appellants regularly sold and furnished Mrs. Pearrow with intoxicants for a period of several years before and after execution of the 1942 deed and that such sales were made at times without regard to her condition as to sobriety. She was in and out of the County Hospital on account of her excessive drinking and at the time of the trial had been confined there for a year. A record of Mrs. Pearrow's account at appellants' store showed numerous and regular sales of gin and other intoxicants before and after May 1, 1942, during which time she was in an almost continuous state of intoxication. There is considerable variance in the testimony as to the value of the lots in 1942. An expert for appellee stated that the lots were worth $10,000 while appellants' expert witness placed the value at $600 in 1942, but stated that they were worth ten times that amount at the time of the trial.

The deed to lots 5 and 6, dated May 1, 1942, recited a consideration of "One Dollar and other valuable considerations Dollars, cash in hand paid to me by Doctor James E. & Elsie C. Brimson Grantees, and receipt of which sum is hereby acknowledged. . . ." On the same date the parties executed a "Lease Agreement" in which it was agreed that Mrs. Pearrow should retain possession of the property for life and appellants agreed to pay her $35 per month so long as she lived. On the date of the conveyance Mrs. Pearrow also signed a receipt to appellants for $350 as "down payment" on the property.

At the trial Dr. Brimson was called as a witness by appellee and testified that the actual consideration for the deed to lots 5 and 6 was $2,500. He denied any agreement to pay Mrs. Pearrow $35 per month and could not recall having signed the lease agreement, but readily admitted the genuineness of his signature thereto when confronted with the instrument. In an attempt to establish payment of the consideration of $2,500, Dr. Brimson stated that Mrs. Pearrow owed him a doctor bill of

"somewhere between $750 and $1,000" for the care of her husband who died ten years previously, and that this old debt was a part of the consideration. In this connection he testified: "The Court: When did you first think of this doctor bill? A. To be real honest and truthful I never did expect to get it. It didn't worry me a great deal. I wouldn't have ever brought it up if this thing hadn't come up. Q. (Mr. Patten continuing) By 'this thing' you mean this law suit? A. Yes."

Dr. Brimson also produced a receipt dated September 9, 1943, signed by Mrs. Pearrow reciting a payment to her of $1,080 and stating that it constituted full payment for lots 5 and 6. He testified that he advanced this amount in cash in order to enable Mrs. Pearrow to consummate a marriage she was contemplating at that time to a Mr. Taylor. Other close neighbors of Mrs. Pearrow knew nothing about the alleged marriage to Taylor. Mrs. Mary Bauer appeared to be a disinterested witness. She testified that she moved in one of Mrs. Pearrow's houses in October, 1942, and that Mrs. Pearrow at that time mentioned a previous marriage to Taylor. There was no record evidence of such marriage introduced and the greater weight of the testimony shows that if such incident occurred, it was long prior to the date of the 1943 receipt. The receipt also stated that Mrs. Pearrow would "evacuate the property," but she remained there for several years thereafter collecting rents as she had previously done without objection from appellants.

In *West* v. *Whittle,* 84 Ark. 490, 106 S. W. 955, this court set aside the deed of a confirmed drunkard to a friend and business confidant under circumstances somewhat similar to those in the instant case. In that case the court approved the following statement from the earlier case of *Hightower* v. *Nuber,* 26 Ark. 604: "And in a court of equity, where bad faith and unconscionable acts can have no allowance or favor, the strength of mental capacity of the parties, the circumstances surrounding them, their relationship, etc., make up the grounds upon which the court can find the real influences that produced the conveyance. And when it is discovered

that the party in whose favor the conveyance was made possessed an undue advantage over the grantor, and in person, or by agent, exercised an improper influence over such one, and to the advantage of the grantee, it is an act against conscience and within the cognizance of a court of equity."

In the recent case of *Green* v. *Whitney,* 215 Ark. 257, 220 S. W. 2d 119, we reaffirmed the following rule stated in the leading case of *Edwards* v. *Locke,* 134 Ark. 80, 203 S. W. 286: "This court is committed to the doctrine, which is supported by the great weight of authority, as announced in 4 R. C. L., p. 509, § 22, that: 'Where a grantor conveys land, and the consideration is an agreement by the grantee to support, maintain, and care for the grantor during the remainder of her or his natural life, and the grantee neglects or refuses to comply with the contract, that the grantor may, in equity, have a decree rescinding the contract and setting aside the deed and reinvesting the grantor with the title to the real estate.' *Salyers* v. *Smith,* 67 Ark. 526-531, 55 S. W. 936; *Priest* v. *Murphy,* 103 Ark. 464, 149 S. W. 98; *Whittaker* v. *Trammell,* 86 Ark. 251, 110 S. W. 1041.

"The rationale of the doctrine is that an intentional failure upon the part of the grantee to perform the contract to support, where that is the consideration for a deed, raises the presumption of such fraudulent intention from the inception of the contract and, therefore, vitiates the deed based upon such consideration. Such contracts are in a class peculiar to themselves, and where the grantee intentionally fails to perform the contract, the remedy by cancellation, as for fraud, may be resorted to regardless of any remedy that the grantor may have had also at law."

Applying these principles to the pattern of events surrounding the execution of the deed of May 1, 1942, we conclude that the chancellor correctly stamped it as a void transaction. If the consideration of the deed was $2,500 as testified by Dr. Brimson, then the court was warranted in concluding that the alleged payment of

$1,080 represented by the September, 1943, receipt was never in fact made, and that the alleged agreement to treat the old doctor bill as a part of the consideration was purely an afterthought. It would seem that the true consideration should be determined from the three written instruments executed on May 1, 1942, and consisted of the cash payment of $350 and the promise to pay Mrs. Pearrow $35 per month so long as she lived. It is undisputed that appellants intentionally failed and neglected to make the monthly payments provided in the lease agreement and equity will presume the conveyance to have been fraudulently induced and obtained in the first place. Mrs. Pearrow's age and her affliction by reason of long and excessive use of intoxicants furnished by appellants make this equitable rule peculiarly applicable to the facts in the instant case. It follows that the decree must be affirmed on direct appeal.

On the cross-appeal it is insisted the chancellor erred in rendering judgment against Mrs. Pearrow for $720 and that the evidence in fact warrants a judgment in her favor in approximately this amount. There was considerable evidence directed to whether the consideration for the conveyance of lot 3 in 1937 had been fully paid, but there was no allegation in the complaint with reference to lot 3 and no request that the pleadings be amended to conform to proof on this transaction which occurred nearly 12 years before the date of trial. It would unduly prolong this opinion to attempt to detail the testimony relating to discharge of the consideration set out in the conveyance of lot 4 in 1938. As to this lot, the principal contention is that the court erred in holding that a receipt for $512.50 dated April 15, 1940, and signed by Mrs. Pearrow, represented a valid payment. It is argued that this receipt was either falsified or altered by appellants to make it show $512.50 instead of $12.50, the amount of the monthly payments. There is nothing on the face of the receipt indicating an alteration. It is true that receipts of $12.50 were issued for months immediately subsequent to the April receipt, but the instrument does provide that it shall cover particular

payments and could have been given for past as well as future payments. We cannot say that the court's finding on the validity of the receipt was erroneous.

It is clear from the evidence that appellants paid $350 on the date of the execution of the deed to lots 5 and 6, $150 for roofing a house on lot 6, and $107.54 in taxes accruing since 1943. It is evident from the recitals of the decree that the chancellor also included in the judgment against Mrs. Pearrow certain items of merchandise, other than intoxicants, which she purchased from appellants. We hold that such items do not represent recoverable betterments for which appellants would be entitled to a lien on the property under the equitable doctrine of restitution. On the cross-appeal the judgment in favor of appellants will, therefore, be reduced to $607.54. As thus modified, the decree is affirmed.

GRIFFIN SMITH, C. J., not participating.

CITY OF STUTTGART *v.* MCCUING.

4-9278 234 S. W. 2d 209

Opinion delivered November 13, 1950.

Rehearing denied December 18, 1950.

Arthur R. Macom, for appellant.

W. A. Leach, for appellee.

HOLT, J. The City of Stuttgart, in order to supplement a Federal grant awarded to improve its streets, alleys and boulevards, by proper procedure, on October 17, 1935, submitted to its electorate the proposition to issue and sell bonds in the amount of $75,000, for this purpose. The proposed bond issue was approved by a majority vote, and, by proper ordinance, a special tax levy of 3¼ mills on all real and personal property was duly levied by the City Council for the calendar years of 1937 to 1939 inclusive, and 4½ mills for the calendar years of 1940 to 1949 inclusive, to retire the bonds and interest, the ordinance also providing for the levy of the tax until the bonds with interest had been paid.

Thereafter, the bonds were sold, the improvements made, and all annual assessments collected up to and including the year 1946, due and payable in 1947. The bonds with interest were retired November 1, 1949, leaving a surplus of $9,435.52 out of the tax collected for the year 1946.

May 9, 1949, by resolution, the City Council directed that this surplus fund be paid into the Street Fund to be used exclusively for constructing, widening and straightening the streets, alleys and boulevards in the city.

Later, October 24, 1949, this resolution was amended to require said surplus to be used for repairs and maintenance of existing streets, as well as for constructing, widening and straightening streets.

On October 29, 1949, appellee, Mike McCuing, a property owner and taxpayer, for himself and all others

similarly situated, brought the present suit to enjoin appellants from disposing of this tax money as directed by the above resolutions and prayed that said surplus be returned to those taxpayers who had paid it.

November 21, 1949, appellants filed a general demurrer on the ground that appellees' complaint failed to state a cause of action. This demurrer was overruled and on appellants' refusal to plead further, final judgment was entered giving to appellees the relief prayed.

This appeal followed.

Two questions are presented: (1) The City Council's authority over the surplus funds in question, (2) The right of appellees to institute suit to recover this surplus.

In effect, appellants contend that since a part, at least, of the 1946 tax levy was required to retire the bonded indebtedness in full and was a lawful tax, this gave the City authority to use the surplus to repair and maintain existing streets, to construct, widen or straighten streets, that this was the purpose for which the tax had been authorized, and therefore, did not contravene Amendment 13 of our Constitution, which forbids the use of tax money, raised for a specific purpose, for any other or different purpose.

Appellees, on the other hand, earnestly contend that the sole purpose for which this special tax was, or could have been levied, was to retire the said bonds and interest when due and any amount collected in excess of the amount so required for this specific purpose, is an unlawful exaction and may be recovered by any taxpayer who paid the tax.

—(1)—

Is authority found in Amendment 13 for the passage of the above resolutions by the City by which it seeks to confiscate and use the surplus funds in the manner indicated? We hold that no such authority is conferred by this Amendment. The exact question presented appears to be one of first impression.

Those provisions of Amendment 13 (which for our convenience we have numbered) material here, are: "(1) Neither the State nor any city, county, town or other municipality in this State, shall ever lend its credit for any purpose whatever; nor shall any county, city, town or municipality ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the indebtedness existing at the time of the adoption of the Constitution of 1874, and the State shall never issue any interest bearing treasury warrants or scrip.

"(2) Provided that cities of the first and second class may issue by and with the consent of a majority of the qualified electors of said municipality voting on the question at an election held for the *purpose,* bonds in sums and for the *purposes* approved by such majority at such election. * * *

"(3) For the construction of, widening or straightening of streets, alleys and boulevards within the corporate limits of such municipality. * * *

"(4) In order to provide for the payment of the bonds issued under the provisions of this amendment, and interest thereon, a special tax, not to exceed five mills on the dollar in addition to the legal rate permitted, may be levied by municipalities on the real and personal taxable property therein. And any municipality issuing any bonds shall, before or at the time of doing so, levy a direct tax payable annually not exceeding the amount limited as above, sufficient to pay the interest on such bonds as the same matures, and also sufficient to pay and discharge the principal of all such bonds at their respective maturities. * * *

"(5) And no money raised under the provisions of this amendment by taxation or by sale of bonds for a *specific purpose* shall ever *be used for any other or different purpose.*

"(6) It shall be the duty of the mayor and city council or other governing body established by law, to exercise supervision over the sale of any bonds, which may

be voted by the people at an election *held for that purpose* and they shall expend economically the funds so provided *for the specified purposes* for which they were voted.

"(7) Said election shall be held at such times as the city council may designate by ordinance, which ordinance shall *specifically state the purpose* for which the bonds are to be issued, and if for *more than one purpose,* provision shall be made in said ordinance for balloting *on each separate purpose.*"

The facts are not in dispute. Simply stated, the taxpayers of Stuttgart voted a tax well within the five mills limitation for a specific purpose: "For the purpose of constructing, widening, straightening and paving the streets, alleys and boulevards within its corporate limits," and to issue and sell bonds in the amount of $75,000 for this purpose. This authority was granted to the electorate by paragraphs (2), (3), and (4), of Amendment 13, above. This power was given to the qualified voters within the municipality and not to the City Council. In short, the consent of the people, who were called upon to pay the tax, was first required. Without their consent the City was powerless to act.

Under the plain terms of paragraph (5) above, "no money raised under the provisions of this amendment by taxation or by sale of bonds for a specific purpose shall ever be used for any other or different purpose," the money raised for the specific purpose here, as indicated, could never be used for any other or different purpose. This language is so plain that no judicial construction seems necessary.

As an added safeguard and guarantee against using such surplus tax money for any other purpose, paragraph (7) emphasizes "the purpose" limitation in this language: "Which ordinance shall specifically state the purpose for which the bonds are to be issued and if for more than one purpose, provision shall be made in said ordinance for balloting on each separate purpose."

Here, the surplus fund in excess of the money necessary to retire the bonds with interest and to complete the work for which collected is substantial. It belongs to the taxpayers who paid it and not to the City. We hold that the duty rested on the City to make refund of this surplus as prayed.

From a practical viewpoint, since in all cases of refunds there must be necessary costs attached, such refunds would be subject to the burden of distribution. Obviously, in some instances where excess funds are to be dealt with, the overall cost of refunding might exceed the surplus, or it might be found that in respect of each taxpayer the rule *de minimis non curat lex* (the law cares not for small things) should apply. In such cases, where no taxpayer's claim could be regarded as substantial, no refunds would be required. In all other cases, however, as indicated, refunds should be made upon appropriate demand.

We have not overlooked the case of *Oak Grove Consolidated School District No. 9* v. *Fitzgerald, Treasurer,* 198 Ark. 507, 129 S. W. 2d 223. That case, we think, is clearly distinguishable and in fact supports our views above expressed. There, the following provision of Amendment No. 11 (the 18 mill school tax amendment): "provided further that no such tax shall be appropriated for any other purpose, nor to any other district than that for which it was levied," was considered, and we held that any surplus remaining to the school district, after making all payments due the Revolving Loan Fund loan prior to January 1, 1940, could be used for general school purposes, for the reason that such authority was specifically granted by § 11555, Pope's Digest (now § 80-907 Ark. Stats. 1947), which provides: "The proceeds of such levy and collection shall be set aside from year to year in a separate fund to be known as the 'Loan Fund,' and used for no other purpose than to pay the principal and interest on the bonds herein authorized until all such maturities for such bonds in any year have been paid in full, or a fund sufficient to pay them has been set aside in cash, when the district may use for other school purposes

the excess of funds remaining after making annual payments."

We also pointed out that the use of such annual surplus would not have been allowed in the absence of such specific authorization.

Here, we are considering Amendment No. 13 (Municipal Improvement Bonds) under which Stuttgart proceeded, which provides that "no money raised under the provisions of this amendment by taxation or sale of bonds for a specific purpose, shall ever be used for any other or different purpose."

The result reached in the Oak Grove School District case was based upon the legislative direction and the presumption that the money—that is, the surplus—would be used for the same general purpose.

Language of Amendment No. 13 is somewhat stronger than that used in Amendment No. 11; but, whatever the differences may be, we do not feel justified in extending construction of Amendment No. 13 to permit diversion of the fund in question.

—(2)—

Appellants' contention that appellee, McCuing, was without authority to bring the suit is, we think, without merit.

In the circumstances, this surplus is a trust fund being held by the City, as trustee, subject to be distributed to the taxpayers entitled to it. Appellee, as one of the taxpayers, on his own behalf and for others similarly situated, had the right to bring the present suit. What was said in *City of Bentonville* v. *Browne,* 108 Ark. 306, 158 S. W. 161, applies with equal force here: "As an owner of property within the improvement district, appellee had the right to sue to prevent the city from wasting, or mismanaging, or improperly diverting, the funds of the improvement district."

Accordingly, the decree is affirmed.

George Rose Smith, J., dissenting, with whom Leflar and Dunaway, JJ., concur, dissenting. On the sur-

face the majority decision seems to be favorable to the taxpayers, since it orders a refund of money that would otherwise be spent for municipal purposes. But the practical effect of today's decision is to order the useless and wasteful expenditure of public funds that may well amount to hundreds of thousands of dollars. I am not convinced that in adopting Amendment 13 the people intended such extravagance.

This amendment, adopted in 1926, authorized bond issues for at least twenty municipal purposes. Almost every city in the State has bonds outstanding under this amendment. The majority decision may apply also to county issues under Amendment 17, as that amendment contains about the same language as that now relied on by the majority. Nearly all our counties have issued bonds under Amendment 17. Both amendments contemplate long-term issues, which are only now beginning to mature. Within the next ten or fifteen years hundreds of these issues will at last be retired. This means that practically every city, and perhaps the counties as well, will suffer from today's decision.

For in every instance there will be a surplus in the bond fund when the last bond is paid. It is manifestly impossible to levy an ad valorem tax that will produce to the penny the sum needed to pay principal and interest. If the bonds are to be sold at par a margin of safety must be allowed for changes in assessed values and for delinquencies in tax payments. That margin of safety makes a surplus unavoidable. The only real question in this case is what should be done with these surpluses.

Four members of the court conclude that these funds must be returned to the taxpayers whenever any taxpayer's claim can "be regarded as substantial." Of course in every city or county there will be at least one public utility company or other large taxpayer whose claim may fairly be said to be substantial. Hence the practical effect of the opinion is to order a refund whenever the cost of the refunding process cannot be expected to consume the entire surplus.

In many cases the expense involved in this refunding procedure will be staggering. Pulaski County, for example, has over 90,000 separate real property assessments and over 60,000 personal property taxpayers. An audit must first be made to determine the exact amount of more than 150,000 separate refunds. Next, the names and addresses of the taxpayers must somehow be ascertained. Many of them will have died; their heirs must be identified. Others will have moved away; their whereabouts must be traced. But this is not all. After an investigation that must invariably extend over a period of years there is still the matter of writing 150,000 checks, addressing that many envelopes, and affixing stamps that will themselves cost over $4,500. And even then, what has been accomplished? An insignificant number of taxpayers will receive refunds of a few dollars apiece, if that much is left after the costs have been charged against the fund. But the overwhelming majority of the taxpayers will receive a few cents each—often not enough to pay for the stamps and stationery that bring them their checks. It is easy to see that dollars must be spent to refund pennies. Naturally the problem is not equally serious in the less populous communities, but likewise the surplus to be wasted will then be relatively smaller.

It is perfectly clear that the majority decision is inconsistent with its own major premise. That premise is that the surplus funds can be used only for the specific purpose for which the tax was levied. But as a result of this opinion far more than half of these funds will be diverted from the original purpose, to be dissipated in the wasteful refunding operations. These taxes certainly were not levied for the purpose of being thrown away with hardly any benefit to the city or its citizens.

If the language of Amendment 13 were so mandatory that the conclusion reached by the majority could not be escaped, then I should be compelled to agree that this court would be powerless to remedy an unfortunate situation. But it seems to me that the plain intent of the amendment is contrary to the decision now announced. The fundamental aim of Amendment 13 is to enable cities

to issue bonds for a wide variety of municipal activities. The clause forbidding the use of tax money for purposes other than that for which the tax was levied was obviously inserted to insure the marketability of the bonds, by providing the bondholder with a certain recourse in the event of default. When the bonds have been retired the whole objective of this clause has been satisfied.

Finally, the case of *Oak Grove Consol. Sch. Dist. No. 9* v. *Fitzgerald,* 198 Ark. 507, 129 S. W. 2d 223, cannot be distinguished from the case at bar, even though the majority say that it supports their conclusion. There we construed language in Amendment 11 that is in substance identical with that in Amendment 13. The school district had levied an annual tax of seven mills for the specific purpose of paying bonds that had been issued to borrow money for a building program. That case is even stronger than this one, for the bonds had not yet been paid in full, as is the case here. There was, however, a surplus in each year that was not needed for current maturities. In holding that the constitution did not prevent the use of these annual surpluses for other school purposes we said: "The 7-mill tax was devoted to the purpose for which it was levied, and has accomplished that purpose. An excess of revenue remains after that purpose has been accomplished, and we perceive no reason why this excess may not be used for either of the other two purposes for which school taxes may be levied." So here, the purpose of this tax levy was accomplished when the bonds were paid. The city proposes to use the surplus for additional work on the streets, which is the exact end for which these taxes were levied. It is clear that the language of Amendment 11 has been construed to mean one thing and that of Amendment 13 to mean exactly the opposite. Apparently a test case will yet be needed to determine which of these conflicting interpretations shall be applied to Amendment 17, dealing with county issues.

4-9282 234 S. W. 2d 41

Opinion delivered November 20, 1950.

[redacted]

Ivie C. Spencer, for appellant.

Westbrooke & Westbrooke, for appellee.

HOLT, J. This is a suit in replevin filed May 18, 1949. Appellee, General Contract Purchase Corporation, alleged in its complaint that it was the owner and entitled to possession of a certain Ford truck of the value of $600.91, exclusive of interest and costs, that appellant, Walter Johnson, was in possession of said property and unlawfully detaining it under the claim of alleged ownership. Prayer was for judgment for recovery of said truck, damages and costs.

Appellant answered with a general denial.

By agreement, the cause was tried before the Court, sitting as a jury. The Court found that appellee was entitled to possession of the truck and that its value was $600.91, and entered judgment for possession. It was further ordered that "if delivery thereof cannot be had, plaintiff shall recover of and from said defendant the sum of $600.91, with interest from March 18, 1949, the value of said property; * * * and if defendant does not pay the sum of $600.91 with interest, then same may be recovered of and from Darrell Stone and D. J. Steinsiek, bondsmen on cross bond filed herein, together with costs laid out and expended for all of which execution may issue."

This appeal followed.

Appellee maintained a place of business in Pocahontas, with Roland Morris its agent in charge. August 28, 1948, appellee, through its representative, Morris, loaned Connie Ehrhardt $1,201.75 on the Ford truck in question. Ehrhardt, at the time, executed his note for the amount of the loan and as security properly executed a chattel mortgage on the truck. This mortgage was filed with the Circuit Clerk of Randolph County September 7, 1948. Thereafter, October 6, 1948, Ehrhardt sold the truck to Darrell Stone in Jonesboro and in November, 1948, Stone sold and delivered this truck to appellant, Johnson.

Appellant earnestly contends that the evidence shows Ehrhardt was not a resident of Randolph County at the time the chattel mortgage in question was filed with the Circuit Clerk, and therefore said mortgage was not notice to appellant, a third party. We cannot agree.

Ark. Stats. 1947, § 51-1001 (§ 9434, Pope's Digest) provides (in part): "All mortgages whether for real or personal estate, shall be proven or acknowledged in the same manner that deeds for the conveyance of real estate are now required by law to be proven or acknowledged; and when so proven or acknowledged shall be recorded, if for lands in the county or counties, in which the lands lie, and if for personal property, in the county in which the mortgagor resides."

There was substantial evidence, which we presently point out, from which the trial court would have been warranted in finding that Ehrhardt was, in fact, a resident of Randolph County both at the time the mortgage was executed and at the time (September 7, 1948) the mortgage in question was filed with the Circuit Clerk of that county. Ehrhardt stated in his verified mortgage, in the original bill of sale of the truck to him (March 20, 1948) and also in his certificate of registration (August 13, 1948) with the Arkansas Revenue Department that he was, on each of these dates, a resident of Randolph County.

Roland Morris testified positively that Ehrhardt was a resident of Randolph County at the time he, Morris, as appellee's representative, financed the loan to Ehrhardt, as evidenced by the note and mortgage here involved. Ehrhardt did not testify.

We hold, therefore, that on substantial evidence Ehrhardt was a resident of Randolph County, that the mortgage here in question was properly filed in said county and was notice to appellant from the date of its filing.

Accordingly, the judgment is affirmed.

SCHUMAN *v.* OUACHITA COUNTY.

4-9290 234 S. W. 2d 42

Opinion delivered November 20, 1950.

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

GEORGE ROSE SMITH, J. This suit, which was decided below on demurrer to the appellant's complaint, is a sequel to our decision in *Sorkin* v. *Myers,* 216 Ark. 908, 227 S. W. 2d 958. The earlier case involved the validity of tax titles to mineral interests that had been severed from the fee. It was there shown that in Ouachita County the taxes upon such mineral interests were not extended upon the same taxbooks that included real property in general. Instead, a separate book of "Leases and Royalties" was kept, in which mineral interests were listed according to the alphabetical order of the owners' names. We held that the statutes require mineral interests to be subjoined to the assessment of the corresponding surface ownerships, which are to be arranged in order of section, township, and range, rather than alphabetically by ownership. We concluded that since a mineral owner could not readily determine whether his property was being taxed—there being errors in the alphabetical listing—the defect went to the power to sell and was not cured by confirmation of the tax sale.

Less than a month after that opinion was delivered the appellant filed the present suit. He alleges that he and others own mineral interests in Ouachita County lands. It is asserted that the county clerk, in making up the assessment books for the 1949 taxes, failed to subjoin the description of severed mineral interests to the corresponding description of the surface; instead, such mineral interests were listed alphabetically in a different book. The assessor valued the minerals for taxation and turned the book back to the county clerk, who extended the taxes upon a similar alphabetical listing, as in the *Sorkin* case. It is averred that the assessments are void, that the collector will unless restrained enforce these invalid taxes by a sale of the property, and that the owners' titles will thereby be subjected to a cloud. There are also assertions that injunctive relief is necessary to prevent a multiplicity of suits, irreparable injury, etc. The prayer is that the county and its collector be enjoined from collecting the tax or selling the property.

To this complaint the chancellor sustained a demurrer, on the ground that no cause of action is stated. The plaintiff refused to plead further, and a dismissal of the suit followed.

The appellant's reasoning is easily deducible from the foregoing statement. The *Sorkin* case held that the method of assessing mineral interests in Ouachita County so far deviates from the statutory plan as to render tax sales void for want of power to sell. The same system is being followed in the assessment of the 1949 taxes. Therefore these levies constitute illegal exactions which may be restrained in a class suit brought by any affected taxpayer. Ark. Const., Art. 16, § 13.

We do not agree that we are dealing with an illegal exaction within this constitutional provision. It is true that we have many cases in which the collection of taxes has been enjoined under this section, but they all involve a tax that was itself illegal. Such situations include the attempt to collect a road tax not properly voted by the people, *Merwin* v. *Fussell,* 93 Ark. 336, 124 S. W. 1021; a county levy in excess of the five mills allowed by the constitution, *Greedup* v. *Franklin County,* 30 Ark. 101; a tax levied by a county having no jurisdiction over the property, *McDaniel* v. *Texarkana Cooperage & Mfg. Co.,* 94 Ark. 235, 126 S. W. 727; a tax based on an assessment not made by the assessor, *Lyman* v. *Howe,* 64 Ark. 436, 42 S. W. 830; a tax not authorized by the city's delegated power of taxation, *Waters Pierce Oil Co.* v. *Little Rock,* 39 Ark. 412; and other instances of like character.

In the present case the taxes complained of are not themselves illegal. The complaint concedes that these mineral interests were duly valued by the assessor and that the taxes were lawfully levied by the quorum court. A valid tax lien in favor of the taxing authority arose on the first Monday in January, 1949. Ark. Stats. 1947, § 84-107. The sole defect is that these taxes were so extended on the taxbooks that the property owners would encounter undue difficulty in attempting in good faith to discharge their debt to the State and county. But the

debt nevertheless exists, and our decisions do not support the theory that a flaw in the assessment or collection procedure, no matter how serious from the taxpayer's point of view, makes the exaction itself illegal. See *Mo. Pac. R. Co.* v. *Fish,* 181 Ark. 863, 28 S. W. 2d 333; *Beard* v. *Wilcockson,* 184 Ark. 349, 42 S. W. 2d 557.

We think it clear that these taxes are not illegal exactions that may be enjoined under the constitution. This does not mean, however, that the plaintiff and others in his circumstances are powerless to prevent a void tax sale that will cast a cloud on their titles. They undoubtedly have a remedy. But in seeking equity they must in turn do equity. On this phase of the case we regard as controlling our decision in *Buschow Lbr. Co.* v. *Witt,* 212 Ark. 995, 209 S. W. 2d 464. There a tax sale was void because the assessment was made under a "part" description—a defect equally as fatal to the power to sell as that now complained of. But in requiring the landowner to discharge his obligation to the taxing authority we said: "The State has a continuing lien for taxes, including those due its subdivisions. Appellees have invoked the aid of equity in an effort to clear their title to lands they say did not become State property, yet they do not offer to do equity by saving to the State an amount equal to taxes that would have accumulated if no sale had been attempted. . . . Suit to enjoin certification to the State could have been maintained, if coupled with tender of sums actually due."

The present complaint is fatally defective in not making a tender of the taxes legally due. We may assume, even though the complaint does not so allege, that the appellant could not easily determine from the taxbooks the amount of taxes extended against his property. But in equity he is entitled to no more than relief from the burden of making that determination. To state a cause of action he should have alleged that he had been unable to determine from the taxbooks the amount of the tax on his lands, that the county and its officials should be required to make that determination before proceeding to sell his property for nonpayment of the taxes, and

that he is ready and willing to pay the tax when informed of its amount. A complaint lacking the necessary tender of the debt does not state a case for equitable relief.

Affirmed.

DODSON *v.* ABERCROMBIE.

4-9274 234 S. W. 2d 30

Opinion delivered November 20, 1950.

Kenneth C. Coffelt, for appellant.

McDaniel, Crow & Rolleigh, for appellee.

ED. F. MCFADDIN, Justice. The Chancery Court sustained a demurrer to the complaint and dismissed the suit when plaintiff refused to plead further; the correctness of the ruling on the demurrer is the only question here presented.

Plaintiff, Minnie Dodson, filed suit against defendant, H. L. Abercrombie; and the complaint stated in part:

"She and defendant are resident citizens of Saline County, Arkansas. She is the owner of the following described lands, situated in Saline County, Arkansas, to-wit:" (Then follows detailed description of certain lands.)

"She acquired said property by reason of a quit-claim deed from H. L. Dickinson,[1] said deed being recorded in deed Record Book 53, at page 566, of the deed records of Saline County, Ark. The said H. L. Dickinson acquired said lands from the Salco Sand & Gravel Company when said Company dissolved and liquidated in 1918. Said Dickinson never did record his deed; he lost it. The plaintiff herein represents to the court that said lands were transferred to him (Dickinson) by said company by proper warranty deed and that he lost the deed before it was ever recorded. Plaintiff further alleges that the said Dickinson held said lands continuously for more than seven (7) years and at the time of the conveyance of said lands by Dickinson to her, the said Dickinson was the only lawful owner of the property. The said Salco Sand & Gravel Company was an Arkansas Corporation, organized in 1915 and dissolved in 1918, or thereabouts. The Salco Sand & Gravel Company acquired said lands from Joe Berger, Trustee, and the said Joe Berger had acquired said lands from B. F. Henry and Addie B. Henry, his wife, as shown by deed of conveyance recorded at page 516 of deed Record Book 3, of the deed records of Saline County, Arkansas.

"The defendant, H. L. Abercrombie, is claiming title to said property and the rights to all of the gravel thereon and under by reason of a judgment of the Saline Chancery Court in Case No. ..... wherein Abercrombie was plaintiff and Ed Dodson was defendant. In said case the said H. L. Abercrombie's title to said lands and the gravel thereon and under was confirmed in him as against the said Ed Dodson, but not as against any other person, or

[1] In some instances the name is spelled "Dickinson" and in others it is spelled "Dickerson". There is nothing to show a lack of identity.

not as against this plaintiff. The plaintiff alleges that the judgment of this court in favor of H. L. Abercrombie, as alleged, is a cloud upon the title of this plaintiff in and to said property and the gravel thereon and under and that the cloud should be, by decree of this court in this case, removed."

The complaint further alleged that Abercrombie was about to remove the gravel from the land; and the prayer was, *inter alia,* that the plaintiff's title be quieted and that the defendant be restrained from removing gravel from the land. The defendant's "demurrer" reads:

"That the complaint of the Plaintiff does not state facts sufficient to constitute a cause of action, and further states:

"1. That the plaintiff is barred by laches, that the suit was filed by H. L. Abercrombie against Ed Dodson, in August of 1947, and that she testified at said hearing and knew it was a controversy over this particular land.

"2. That she is the wife of Ed Dodson and knew that the court rendered a decree in this case confirming title to this land in H. L. Abercrombie.

"3. She alleges in her complaint that H. L. Dickerson never did record his deed and knew that H. L. Abercrombie had a deed from W. T. Fagan.

"4. She is bound to know that Ed Dodson filed suit against H. L. Abercrombie to set aside the decree claiming said lands by reason of a State Deed."

As to the paragraphs above, numbered 1 to 4, we point out that each of these was in effect a "speaking demurrer," and, as such, was not permissible under our practice. See *Rider* v. *McElroy,* 194 Ark. 1106, 110 S. W. 2d 492, and *Lawhon* v. *American C. & C. Co.,* 216 Ark. 23, 223 S. W. 2d 806.[2] In the said numbered paragraphs defendant sought to present such matters as laches, estoppel, and *res judicata;* but the rule is well settled

[2] Regarding "speaking demurrer," see, also, 49 C. J. 423 and 21 C. J. 433.

that these matters must appear on the face of the complaint in order to be presented by demurrer. The defendant cannot plead facts and at the same time demur to the complaint. Such is a speaking demurrer. In *Rider* v. *McElroy* (*supra*) the late and beloved Justice FRANK G. SMITH quoted from Ruling Case Law:

"'. . . A demurrer which sets up a ground *dehors* the record, or a ground which, to be sustained, requires reference to facts not appearing on the face of the pleading thus attacked, is said to be "a speaking demurrer," and is bad.'"

We presume that the appellee, in arguing these "speaking" matters in the trial court, stated—just as is done in the brief here—that Minnie Dodson was the wife of Ed Dodson, the appellant in two cases in this Court (*Dodson* v. *Abercrombie,* 212 Ark. 918, 208 S. W. 2d 433; and *Dodson* v. *Abercrombie, ante,* p. 128, 228 S. W. 2d 990); that the present litigation was instituted three days after our opinion was rendered in the second of these cases; that in the prior cases Ed Dodson claimed the title; and that now, in the present case, Minnie Dodson is claiming the title. All these matters may be true, but they go to the merits of the controversy and necessitate the presentation of evidence, since they do not appear on the face of the complaint. It is to meet just such a situation that we have long had our rule preventing a speaking demurrer.

So with paragraphs numbered 1 to 4 of the so-called "demurrer" overruled, for the reasons stated, we come to the one question propounded, that is: did the complaint state a cause of action? Obviously, the answer is yes: Minnie Dodson alleged that she owned and was entitled to the possession of certain definitely described lands; she deraigned her title; she affirmatively pleaded that she had never been a party to any previous litigation with the defendant. In short, she alleged facts sufficient to constitute a cause of action. See Ark. Stats. §§ 34-1401, 34-1411, and 34-1901. See, also, *Brasher* v. *Taylor,* 109 Ark. 281, 159 S. W. 1120. If the defendant thought he

was entitled to any additional information, he could have filed a motion to make more definite and certain. If he thought that equity was without jurisdiction, he could have filed a motion to transfer to law. But on the face of the complaint a cause of action was stated; and that is the test on a demurrer. See *State* v. *Stevenson,* 2 Ark. 260; *Brown* v. *Ark. Central Power Co.,* 174 Ark. 177, 294 S. W. 709; *Watson* v. *Poindexter,* 176 Ark. 1065, 5 S. W. 2d 299; and *Cullins* v. *Webb,* 207 Ark. 407, 180 S. W. 2d 835.

Therefore, we must necessarily reverse the Chancery Court decree and remand the cause with directions to overrule the demurrer.

MAGEE *v.* ROBINSON.

4-9293 234 S. W. 2d 27

Opinion delivered November 20, 1950.

Cracraft & Cracraft, for appellant.

John C. Sheffield, for appellee.

MINOR W. MILLWEE, Justice. Appellees, O. J. Robinson and wife, owned a farm in Phillips County which they sold to appellant, R. P. Magee, on April 4, 1946. Appellees conveyed by warranty deed with lien retained to secure payment of $5,000 balance of the purchase price evidenced by ten notes of $500 each payable annually beginning January 1, 1947, and bearing interest at six per cent. from that date. Upon appellant's refusal to pay the first note when due, appellees instituted this suit to recover judgment for $500 and to foreclose the lien reserved in the deed.

Appellant defended on the ground that, at the time of the conveyance, the property was encumbered by an outstanding lease which constituted a breach of the general covenant of warranty in the deed; and that he paid $400 in order to remove the encumbrance and obtain possession of the property. Judgment was prayed against appellees for $400 with interest, costs and attorney's fee as an offset against the note due January 1, 1947.

No objections were interposed in the chancery court to any of the testimony which was taken on depositions. The chancellor entered a decree of foreclosure in favor of appellees finding that appellant was not entitled to credit on the note for the payment made to discharge the alleged encumbrance.

There is little dispute in the evidence, which tends to establish the following facts: In the latter part of March, 1946, appellant inspected the 116-acre farm and entered into purchase negotiations with O. J. Robinson. Robinson informed appellant that he had already arranged to farm the cultivated lands in 1946. He also told appellant that the residence, a store building, barn and two-acre

pasture on the lands had been leased to J. W. Davis for five years at $15 per month, but that the lease was worthless; and that possession of the entire premises would be delivered to appellant on January 1, 1947. Appellant was employed in Central America at that time and did not expect to personally occupy the premises for at least three or four years. On the date of the execution of the deed it was agreed that possession of the lands would be surrendered to David Inebnit, appellant's brother-in-law, on January 1, 1947, and that Robinson would continue to receive the rents from Davis until that date. It was also agreed that no interest would be payable on the deferred balance of the purchase price until after January 1, 1947, and this stipulation was incorporated in the deed.

At the time of the execution of the deed, or shortly thereafter, appellant executed a power of attorney to Inebnit authorizing the latter to take charge of and rent out the lands on January 1, 1947, and a copy of this instrument was furnished appellees.

Appellant's employment in Central America was for some undisclosed reason terminated in the fall of 1946, when he returned to Phillips County and began negotiations with Robinson and Davis to obtain immediate possession of the property. On November 25, 1946, counsel for appellant directed a letter to O. J. Robinson by registered mail advising him that Davis refused to surrender possession under his lease unless he was paid $400 and notifying Robinson that, "unless you cause Mr. Davis to vacate from this property by December 15th, so that Mr. Magee can enter into peaceful possession of the property, that Mr. Magee will pay to Mr. Davis this sum of money as a necessary expense to possession and will immediately thereafter proceed to hold you legally liable for the reimbursement of this amount of money, together with all costs and expenses, including a reasonable attorney's fee paid to his attorney for services in the matter."

On December 12, 1946, appellant entered into a written agreement with Davis to pay him $400 to vacate the premises on or before December 17, 1946. Davis vacated the premises on December 15, 1946, and was paid $400

by appellant. Appellant also paid Robinson $7.50 rent for the last half of December, 1946, and Davis paid Robinson the same amount as rent for the first half of said month.

For reversal of the decree appellant earnestly insists that the chancellor erred in refusing to either dismiss the complaint or allow him credit on the note sued upon for the $400 paid Davis. Although appellant assisted in fully developing the testimony concerning the prior and contemporaneous oral agreements as to the effective date of possession, and made no objection to appellees' development thereof, it is now argued that all this evidence was incompetent and inadmissible and in violation of the rule that parol evidence cannot be admitted to vary the express terms of a deed. Appellant relies on several cases where we have held that, in the absence of fraud or mistake, parol evidence is not admissible to show that a covenant against encumbrances was not intended by the parties to apply to a particular encumbrance, where no exception to that effect is contained in the deed itself. Some of these cases are *Hardage* v. *Durrett,* 110 Ark. 63, 160 S. W. 883, L. R. A. 1916E, 211, Ann. Cas. 1915D, 862; *Ark. Trust Co.* v. *Bates,* 187 Ark. 331, 59 S. W. 2d 1025; *Thackston* v. *Farm Bureau Lumber Corporation,* 212 Ark. 47, 204 S. W. 2d 897.

Conceding, without deciding, that appellant may on appeal question for the first time the admissibility of the contemporaneous oral agreement, we hold that such evidence was admissible under the authority of *Bass* v. *Starnes,* 108 Ark. 357, 158 S. W. 136, where the court held (headnote 2): "In a suit against a vendor of land for breach of covenants of warranty, evidence on the part of the vendor is admissible to show that the vendor told the vendee that there was an unexpired lease on the land conveyed, and that there was no rent to be paid on it, and that the vendee agreed to it, such facts being a part of the consideration in fixing the price of the land sold, and the evidence is admissible on the question of reduction of damages for breach of covenant of warranty." See, also, *Barnett* v. *Hughey,* 54 Ark. 195, 15 S. W. 464; *Davis* v.

Jernigan, 71 Ark. 494, 76 S. W. 554; *Sheffield* v. *Maxwell,* 163 Ark. 448, 260 S. W. 399.

The case of *Hardage* v. *Durrett, supra,* involved a suit to recover for an alleged breach of covenant by the grantor in failing to pay accrued taxes on the land conveyed and this court held that it was not competent to show by parol evidence that the grantee had agreed, as part of the consideration, to pay the taxes. In that case the court fully discussed the conflicting authorities on the precise issue there involved and held that it did not come within the principle announced in *Bass* v. *Starnes, supra,* which was distinguished on the facts. After a complete reëxamination of the facts in the last mentioned case, the court stated that a correct conclusion had been reached therein.

In Restatement of the Law of Contracts, § 240, the following general rule is stated: "(1) An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration, nor a written agreement by a subsequent integration relating to the same subject-matter, if the agreement is not inconsistent with the integrated contract, and (a) is made for separate consideration, or (b) is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract. . . ." In the comment on Sub-section (1b) the authors also state: "The justification of the Parol Evidence Rule is that when parties incorporate an agreement in a writing it is a reasonable assumption that everything included in the bargain is set down in the writing. Though this assumption in most cases conforms to the facts, and the certainty attained by making the rule a general one affords grounds for its existence, there are cases where it is so natural to make a separate agreement, frequently oral, in regard to the same subject-matter, that the Parol Evidence Rule does not deny effect to the collateral agreement. This situation is especially likely to arise when the writing is of a formal character and does not so readily lend itself to the inclusion of the whole agreement as a writing which is not limited by law or custom to a particular

form. . . . So in connection with leases and other conveyances, collateral agreements relating to the same subject-matter have been held enforceable."

Applying this salutary rule to the facts in the case at bar, the separate agreement as to possession of the lands is neither odd nor exceptional, but is one that might naturally be made by parties situated as were appellees and appellant at the time the deed was executed. Moreover, that part of the contemporaneous oral agreement which provided that Robinson should retain possession and continue to receive the rents from Davis until January 1, 1947, in lieu of interest on the deferred balance of the purchase price during that period, tends to explain the stipulation in the deed that the notes bear interest from January 1, 1947.

Aside, however, from prior and contemporaneous oral agreements, the action of appellant in executing the power of attorney to Inebnit to take charge of the premises on January 1, 1947, and his payment to Robinson of half the December, 1946, rent of the premises occupied by Davis, amount to a clear recognition of appellees' right to possession of the lands until January 1, 1947. Appellant's demand that Robinson cause the property to be vacated by December 15, 1946, was, therefore, premature and wholly inconsistent with his other actions relative to possession. In *Texas Company* v. *Snow,* 172 Ark. 1128, 291 S. W. 826, a grantee was held to be estopped by its conduct from recovering for breach of a covenant of warranty, the court saying: "The chancellor may have found that the conduct of the appellant estopped it from claiming any right because of the Reaves claim. It is true, as contended by appellant, that knowledge, or notice, however full, of an incumbrance, or of a paramount title, does not impair the right of recovery upon covenants of warranty. The covenants are taken for the protection and indemnity against known and unknown incumbrances or defects of title. The appellees, however, go further in this case, and not only contend that the appellant knew of the defect or incumbrance, but show such conduct on the part of the appellant as appears in-

consistent with their claim for damages for breach of warranty because of the Reaves claim."

Appellant says he cannot be charged with acting prematurely or unreasonably because he definitely knew in November, 1946, that Davis would not vacate the premises by January 1, 1947. There is a conflict in the evidence on this point. Robinson maintained that arrangements had been made for Davis to vacate by January 1, 1947, while appellant testified that he had refused to do so. An inspection of the five-year lease contract between Robinson and Davis shows that Robinson's insistence as to the invalidity of the instrument was not unwarranted. Regardless of the intentions of Davis, his removal from the premises by January 1, 1947, might have been accomplished by Robinson at much less expense than the $400 prematurely paid by appellant. Under all the circumstances, Robinson was at least entitled to the experiment.

The decree is affirmed.

BURDINE *v.* PARTEE FLOORING MILL.

4-9294 234 S. W. 2d 193

Opinion delivered November 27, 1950.

Crumpler & Eckert, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

HOLT, J. This appeal is from a judgment of the Columbia Circuit Court, affirming an award of the Arkansas Workmen's Compensation Commission, under the provisions of Act 319 of 1939 and amendments thereto.

The opinion of the Commission, November 19, 1949, recites (in part): "Finding of Fact—1. That the claimant suffered a compensable injury on February 18, 1949, from which he was temporarily totally disabled to June 7, 1949, without any residual permanent disability.

"Upon the foregoing finding of fact, the Commission bases the following 'Conclusions of Law.' It appears from the evidence before the Commission that this claimant did suffer an accidental injury arising out of and in the course of his employment by a series of traumas, the last being on February 18, 1949, which culminated in disability on that date; that the accidental injury sustained was in the nature of a traumatic bursitis and tomosynovitis of the right little finger caused from long use of a carpenter's hammer. Such a condition is set out in § 14 (a) (5) (4) of the Act and is listed as an occupational disease, which, under our Act, is an accidental injury.

"It appears from the medical evidence that the claimant's period of disability extended from February 18, 1949, to June 7, 1949, and that he was released by the attending physician as able to return to work, and from the medical evidence it is found that the claimant had no residual permanent disability resulting from the accidental injury.

"Upon consideration, therefore, the Commission directs that there issue the following award.

"The respondents will pay to the claimant compensation at the rate of $25 per week from February 19, 1949, to June 7, 1949, covering the period of temporary total

disability resulting from the accidental injury, together with all medical and hospital expenses in connection with the accidental injury, etc."

Appellant argues there is but one question in issue, "that is whether . . . where the sole medical expert testifying stated that there was permanent partial disability to the claimant, and where there was no other evidence presented on the question of claimant's disability, whether under those circumstances, the Arkansas Workmen's Compensation Commission can properly find that there was no permanent partial disability to the claimant."

Appellees, on the other hand, contend that "weighing the probabilities of a permanent injury was within the exclusive province of the Workmen's Compensation Commission. The question for decision is whether the refusal of the Commission to award compensation for permanent disability was supported by substantial evidence."

From the record presented, the question for our determination is one of fact and "the rule is firmly established that the findings of the Commission, which is the trier of the facts, will not be disturbed on appeal to the Circuit Court if supported by substantial testimony." *Meyer* v. *Seismograph Service Corporation,* 209 Ark. 168, 189 S. W. 2d 794.

The only expert testimony presented is that of Dr. E. G. Burt, who testified: "Q. Have you examined him recently? A. A week or ten days ago. Q. What did you find then? A. He still has some thickening of the tissues there and I still feel like I can feel that bone there but I got to convince myself I can't but it seems to me like that bone is a little enlarged there but I guess I will have to accept the X-ray evidence that it is not enlarged. Q. Upon the basis of your examination and findings, what are the indications for the hand? Will there be or may there be some permanent injury to the muscle or structure of that part of the hand? A. Well, now, that is putting it in the fortune telling class. I am afraid from that same type of work, it would be more likely to recur. I am honest about that. If he resumed the same type of

occupation it would be more likely to recur. This might be called 'carpenter's hand,' I guess. It is new to me really but I do think he would have a reoccurrence of this if he went back to the same type of work. . . . Q. Doctor, what leads you to believe that an injury of this type would be permanent? Now, in ordinary language this man has what you have probably had and I have probably had, a stone bruise; isn't that right? A. Well, a stone bruise is usually severe enough that you will have necrossing of tissue and a relatively acute condition. Any condition is, if you get something acute, it is easier to get over than something chronic. This is more of a chronic condition as I see it where you have a thickening of tissue, muscle fibers. This part of his hand was larger than this part. Now, that has gone down considerably. In fact, it is just about like the other one. There is still a little enlarging or thickening and it has been six months and I don't know if six months more will put it down any, rather doubt it and like I say, the fact that he has had this change in the tissues would make me believe that he would be more susceptible to a reoccurrence if he subjected it to the same trauma he had before. . . . Q. As I understand it, it is your opinion that this man has twenty-five per cent. loss of use of his hand? A. For that type work. . . . Q. But it wouldn't be for the overall operation of carpentering, doing all types of carpentering? A. No."

As we view Dr. Burt's testimony, the Commission would have been warranted in finding that its effect, in Dr. Burt's opinion, was that appellant would be more susceptible to a recurrence of his injury should he engage in the same type of work. He was somewhat uncertain as to the permanent nature of the injury when asked (as above noted), "Will there be, or may there be, some permanent injury to the muscle or structure of that part of the hand?" His answer is: "Well, now, that is putting it in the fortune telling class. . . . It is new to me really, etc."

We cannot say that the Commission (and the Circuit Court on appeal) was compelled to draw but one infer-

ence from the testimony and bound to find that appellant's injury was of a permanent nature and his wage earning capacity permanently impaired. It appears to us that the most that can be said of it is that there might be a recurrence causing disability as defined by the Statute, Ark. Stats., § 81-1302 (e): "The term 'Disability' 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."

We do not have here a case wherein the expert testimony can be held to be uncontradicted: " 'Moreover, were it conceded that all the expert witnesses introduced in the case agreed upon conclusions as argued by appellant, the jury would not necessarily have to so find the facts to be, because such testimony may be controverted by any other competent evidence.' *St. Paul Fire & Marine Ins. Co.* v. *Green,* 181 Ark. 1096, 29 S. W. 2d 304. Not only this, but, were it conceded that all the expert testimony offered by both parties was in full accord and agreement and not contradicted by any other expert evidence, yet the jury would not be bound by such testimony. 11 R. C. L., 586, states the rule as follows: 'Even if several competent experts concur in their opinion, and no opposing expert evidence is offered, the jury are still bound to decide the issue upon their own fair judgment.' " *Arkansas Power & Light Company* v. *Bollen,* 199 Ark. 566, 134 S. W. 2d 585.

Appellant testified before the Commission. It had the opportunity to observe his hand for evidence as to its use. There appears to be no evidence whether appellant's earning power had been or would be reduced.

It appearing that the Commission's findings are supported by substantial evidence, the judgment of the trial court affirming those findings must be and is affirmed.

COVINGTON *v.* PRAIRIE COUNTY BOARD OF EDUCATION.

4-9321 234 S. W. 2d 203

Opinion delivered November 27, 1950.

A. R. Macom and *W. A. Leach,* for appellant.

John D. Thweatt and *Cooper Thweatt,* for appellee.

MINOR W. MILLWEE, Justice. On March 1, 1949, there were three school districts in Prairie County having more than 350 pupils as reflected by the 1948 school enumeration and eleven districts having less than that number. By Initiated Act No. 1 of 1948 (Ark. Stats., §§ 80-426—80-429) a new school district was created on June 1, 1949, composed of the territory included in the eleven small districts. Acting under provisions of the initiated act, the Prairie County Board of Education on June 1, 1949, determined that all portions of the new district could be served more effectively by annexation of its several parts to the three large districts and orders of annexation in compliance with such determination were entered with the consent of the boards of directors of the large districts.

Appellants are qualified electors residing in territory formerly comprising one of the small districts. Appellees are the Prairie County Board of Education and the three large districts to which annexations of the new district were made. Appellants instituted this action against appellees in the circuit court seeking, by *certiorari,* to have the annexation orders of June 1, 1949, declared void.

The allegations of the petition are summarized in the following statement from appellants' brief: "The appellants contend that the County Board of Education had no power or authority to make any orders of reorganization or annexation affecting the newly created district until after the election of a board of directors for said district as required by § 2 of the Act (Initiated Act No. 1 of 1948), and then not without the consent of the qualified electors residing within said district obtained in the manner provided by law."

Appellees' general demurrer to the petition for writ of *certiorari* was sustained by the trial court. Upon appellants' refusal to plead further, the petition was dismissed.

The proceedings herein were instituted prior to the decision in *Stroud* v. *Fryar,* 216 Ark. 250, 225 S. W. 2d 23. Appellants candidly state: "The facts in the case of *Stroud* v. *Fryar* are identical with the facts in this case and unless that case be overruled it is decisive of the issues presented on this appeal and calls for an affirmance of the instant case." In the Stroud case we adopted an interpretation of Initiated Act No. 1 contrary to present contentions of appellants. This interpretation of the initiated act was reaffirmed and followed in the recent case of *Littleton* v. *Union County Board of Education,* 217 Ark. 278, 229 S. W. 2d 657. See, also, *County Board of Education of Baxter County* v. *Norfork School District No. 61,* 216 Ark. 934, 228 S. W. 2d 469. It would serve no useful purpose to repeat what we said in these cases. We decline to overrule them, and the judgment is accordingly affirmed.

REID *v.* REID.

4-9289 234 S. W. 2d 195

Opinion delivered November 27, 1950.

Eugene Coffelt, for appellant.

J. T. McGill, for appellee.

Griffin Smith, Chief Justice. The parties were divorced in Illinois during 1942. The only child mentioned is a girl, born in 1932. When the divorce was granted the court directed appellant to pay $70 per month for alimony and child support. He was then earning between $3,500 and $4,500 a year. Appellant moved to Arkansas and bought a small farm in Benton County. He has again married and now asserts inability to appropriately maintain himself and wife and meet the Illinois judgment. We are not concerned with the binding effect of the award then made by agreement—whether that court or any other could grant relief on the insistence of the party charged. Seemingly appellant and appellee agreed that the Illinois judgment should be disregarded, for on July 5, 1949, appellant petitioned for relief, stating that $70 per month had been awarded for the child's support. The prayer went to the single question of child support. When the Benton Chancery Court order is read, it is apparent that the parties were in accord regarding a reduction. The judgment is dated July 5, 1949, recites a waiver of summons by the defendant, and settlement of delinquencies through payment of $330, with consent by the defendant that future monthly payments would be $30.

On January 26, 1950, appellee filed a pleading alleging appellant's failure to pay the modified sum "for the support of their child," the arrearages then being $210. The respondent was cited to show cause why he should not be held in contempt. A hearing was had February 9 of this year. When counsel for appellant asked his client concerning the daughter's health, the Chancellor remarked that "this development has made it necessary for me to know about the proceedings in Illinois." The reporter's notation is, "Court reads Illinois decree."[1] [A female person is of legal age in that state at eighteen.][2]

Although counsel for appellant objected to testimony in regard to "any divorce suit," there was no objection when the Chancellor later suggested that he ought to read the judgment or decree. Appellant had just been asked by his attorney, "Has the information come to you that the daughter is not in good health?"

It should be borne in mind that the proceeding did not have for its purpose the enforcement of a foreign judgment under the full faith and credit clause of the U. S. Constitution, Art. 4, § 1. If that had been the object the authenticated copy referred to by Judge Seamster would have been the basis for an independent suit.

Since the question prompting the Chancellor's interest in the divorce decree was asked by appellant's counsel, and there was no objection when the instrument was read or when it was included in the bill of exceptions, no prejudice resulted from the use made of it. The record, including the judgment, appears to have been indorsed "o. k" by counsel for each litigant.

The court found that the defendant had contemptuously disregarded the direction to pay $30 per month and ordered him into the Sheriff's custody. It was also decreed that the defendant execute a bond for $500, conditioned that he would make future payments.

[1] Chapter 37, § 72.25, Revised Statutes of Illinois, 1949, confers jurisdiction upon circuit courts in matters of divorce and alimony, and permits them to render "judgments and decrees."

[2] Revised Statutes of Illinois, Ch. 3, § 283.

Appellant's contention is that the Arkansas decree of July 5, 1949, applies only to child support, and that the former wife's interest in the original $70 judgment was destroyed through consent when the decree, by its terms, mentioned child support only; hence, after the daughter became 18 years of age, there was no further obligation. The arrearages of $210 under the Arkansas decree were paid, and the appeal was taken from the order requiring execution of bond for future payments.

In buying the farm appellant borrowed on his life insurance and [as he said] "I cashed all the bonds I had, $6,500, to be paid on this farm." The father thought that his 18-year-old daughter was "all right," but he had not seen her for more than four years, nor had the girl written him. He "presumed" she was in good health because "it was perfect four years ago."

There are circumstances in which bond for the performance of a judgment for alimony or child support may be required. An instance would be where the defendant was fraudulently disposing of his assets. Since the court had power to require a bond, its action in a particular case would be subject to review on appeal. Of course, if power in the court were lacking, a petition for review through *certiorari* would reach the vice.

We cannot agree with appellant that in reducing the Illinois award it was the Arkansas court's intention to do more than relieve appellant of a part of his burden. For confirmation one need only examine the July 5th complaint wherein it is asked that "the child support" be reduced. The expressed purpose then was *not* to procure relief from alimony. Appellant, while objecting to consideration of the Illinois judgment, says it is not denied that he was to pay his wife $70 per month. The Illinois judgment which mentions both the wife and daughter does not differentiate between the two, so the award was not by its terms apportionable. Nor is there any language in the Arkansas decree relieving appellant of his obligations to appellee.

Literally construed in the light of counsel's admission in his brief that the *wife* was due $70 per month, the

reduction in which $30 is mentioned applies only to the daughter, leaving the remaining $40 as the wife's alimony. The fallacy of this reasoning is that no actual reduction would result, when of course the controlling purpose was to ease appellant's payments. Therefore, giving effect to what the court and all of the parties obviously intended, it should be held that appellant is to pay his wife $30 per month from the date of the decree, and it is immaterial whether she uses it for herself or assists the daughter. In either event appellant has been helped to the extent of $40 per month, and that was his primary purpose.

Affirmed.

WALLACE *v.* RIALES.

4-9291 234 S. W. 2d 199

Opinion delivered November 27, 1950.

Ed B. Cook, for appellant.

Claude F. Cooper, for appellee.

Ed. F. McFaddin, Justice. This appeal challenges a judgment recovered by a real estate broker for his commission. Appellee, Riales, filed the action against appellant, Wallace, and a trial to a jury resulted in verdict and judgment for $3,000, the full amount sought.

There was sufficient competent evidence offered by Riales to establish: that Wallace, the owner of lands known as "Musgrave's Bar," agreed to pay Riales five per cent. commission for his services if he disposed of the real estate for $110,000; that Riales interested Dr. Husband as a prospective purchaser who would not pay all cash, but would trade certain Rio Grande Valley property for Musgrave's Bar; that Wallace agreed to such trade brought about by Riales; that the trade was consummated with Wallace receiving $5,000 in cash and a deed to the Rio Grande Valley property, in exchange for his deed conveying the Musgrave Bar property; that Wallace paid Riales $2,500 at the time the deeds were delivered, and agreed to pay the balance shortly thereafter but defaulted; that the price of Musgrave's Bar was $110,000; and that Wallace owed Riales the balance of $3,000.

Appellant, Wallace, on the other hand, contended: that when Riales could not sell Musgrave's Bar for cash, Wallace thereafter was not obligated to pay the five per cent. commission;[1] that when Riales induced Dr. Husband

[1] But on this point Wallace testified:

"Q. Now, I believe you stated you did list this land with Mr. Riales for sale?

"A. Yes, sir.

"Q. After it was listed with him did you ever revoke his authority to sell it, or withdraw the listing, or revoke his authority?

and Wallace to trade the properties, Riales was representing both parties, so that Wallace only owed Riales a commission of two-and-a-half per cent.; that the actual value of Musgrave's Bar was $80,000 instead of $110,000; that two-and-a-half per cent. of $80,000 is $2,000, so that Wallace had really paid $500 more than was due by him.[2]

The trial court—with no objections or exceptions thereto shown in the record—instructed the jury in part:

"The defendant admits that he listed the land with the plaintiff for sale, and that plaintiff's authority was not revoked. He admits that plaintiff brought about negotiations resulting in the disposal of said lands. The question for your determination in this case under the evidence is this: Was the value of the property fixed at $110,000 as contended by the plaintiff, or was the value of the property fixed at $80,000, as contended by the defendant?

"A. No.

"Q. You never did that?

"A. No, sir. The only thing, when he would come up to trade I would tell him I wanted cash for it; I didn't want to trade it, when he mentioned the farm Dr. Husband had.

"Q. Yes. But you finally did, you said, get to thinking about it and decided you might trade for the property down in the Valley, and I believe you stated you went back to Mr. Riales and talked to him about trading it?

"A. Yes, sir.

"Q. And you say now his authority as a real estate broker was never revoked, and your listing never withdrawn from him?

"A. That's right; yes, sir. . . ."

[2] On this last mentioned point Wallace testified:

"Q. How do you account for—you paid him $2,500?

"A. I did.

"Q. What did that represent?

"A. It represented part of the two-and-a-half per cent commission.

"Q. Well, why did you pay him part of the two-and-a-half per cent?

"A. I figured he did a pretty good (job) of trading and I would give him $500 extra on it.

"Q. What did you figure you owed him?

"A. $2,000.

"Q. And you paid him an extra five hundred?

"A. That's right.

"Q. Did you ever consider you owed him any more?

"A. I did not."

"If you find from a fair preponderance of the evidence in this case that the price was fixed at $110,000, then your verdict should be for the plaintiff for the sum of $3,000. If you find that the value of the property was fixed at the value of $80,000, then your verdict should be for the plaintiff for $1,500."

As previously stated, there was a verdict and judgment for Riales for $3,000; and on this appeal Wallace makes the four contentions now to be listed and discussed:

I. The appellant says: "The court erred in its refusal to submit to the jury the controverted factual issue of whether or not the original contract between the parties had been terminated . . ." Under this topic appellant argues that even though he listed the property with Riales, still when Riales failed to make a sale *for cash* the contract was ended; and appellant says that such issue of termination should have been submitted to the jury. There are at least two answers to appellant's argument: (a) the appellant—as shown by his testimony previously copied in Footnote (1)—admitted that the contract he made with Riales had not been canceled; and (b) appellant did not request the trial court to submit to the jury any question concerning the termination of the original contract. A party failing to request a definite instruction is in no position to complain that one was not given. See *White* v. *McCracken,* 60 Ark. 613, 31 S. W. 882; *Ward Furniture Manufacturing Co.* v. *J. B. Isbell & Co.,* 81 Ark. 549, 99 S. W. 845; *Queen of Arkansas Ins. Co.* v. *Malone,* 111 Ark. 229, 163 S. W. 771; and *Jones* v. *Seymour,* 95 Ark. 593, 130 S. W. 560.[3]

II. The appellant says: "The court erred in refusing to instruct the jury as to the actual value of the land." Under this topic, appellant argues that the Musgrave's Bar property was actually worth only $80,000 and that he should not be required to pay a commission on a greater amount. We have previously copied a portion of the instructions given by the Court, telling the

[3] Other cases on this same point are collected in West's Ark. Digest, "Trial," Key 255.

jury: "If you find that the value of the property was fixed at the value of $80,000, then your verdict should be for the plaintiff for $1,500." The fact that the jury returned a verdict for $3,000 conclusively shows that the jury found that the value was fixed at $110,000. The appellant did not request any instruction embodying his theory of "actual value," and also failed to object to the instruction given by the Court.

III. The appellant next complains of the refusal of the Court to give appellant's requested instructions 2, 4, and 5. Instruction 2 reads:

"You are instructed that a broker is the exclusive agent of the person who hires him; that he cannot represent two principals except by agreement. If, therefore, you find that Mr. Riales was the agent of Doctor Husband then Mr. Wallace would not be liable to him for a commission unless there was a subsequent agreement to that effect."

Instruction No. 4 was a longer one embodying the same general thought; and instruction No. 5 stated that in the absence of a special agreement the broker is entitled only to a reasonable compensation. The trial court was correct in refusing each of these instructions. There was no evidence that Riales was ever the agent of Dr. Husband in any of the transactions, so the requested instructions 2 and 4 were abstract. As to the refusal of the Court to give his instruction 5, appellant is in no position to assign error, because the jury verdict necessarily found that Riales was operating under the agreement with Wallace.

IV. Finally, the appellant says: "The court erred in excluding from the jury the evidence of W. C. Cates." The trial court refused to allow this witness to answer a question, and ruled that it involved a collateral matter. Appellant argues most earnestly that the question and desired answer were not on a collateral matter, but on a matter that would have justified the giving of one of the appellant's refused instructions. Even if it be conceded —for the purpose of argument—that the answer sought to be elicited from Cates was *not* on a collateral matter, nevertheless, the appellant is in no position to complain

about the ruling of the trial court, because the record fails to show what Cates' answer would have been if the Court had allowed him to answer the question.

We have repeatedly held that an objection to the exclusion of testimony cannot be considered on appeal in the absence of a showing of what the testimony would have been. In *Lincoln Reserve Life Ins. Co.* v. *Morgan,* 126 Ark. 615, 191 S. W. 236, a situation was presented where the witness was asked a question and no answer was given. An error was assigned to the refusal of the Court to allow the witness to answer the question. In holding that the assignment was not well taken, Mr. Justice HART said:

". . . the record does not show what the witness would have answered or that his answers would have been in any wise prejudicial to its rights. It is well settled that a judgment will not be reversed unless it is shown that some prejudice will result to the rights of appellant. Hence, in order to obtain a review of the ruling of the trial court it was necessary to show what the answer of the witness would have been. *Ward* v. *Fort Smith Light & Traction Co.,* 123 Ark. 548, 185 S. W. 1085; *New Hampshire Fire Insurance Co.* v. *Blakely,* 97 Ark. 564, 134 S. W. 926; and *Boland* v. *Stanley,* 88 Ark. 562, 115 S. W. 163."[4]

Such, also, is the rule generally. In 53 Am. Jur. 90, this is stated:

"Thus, refusal of the court to permit a witness to answer questions is not error, in the absence of anything to show what the answers would have been."

We conclude, therefore, that the appellant is in no position to raise any question about the ruling in regard to the testimony of Cates.

We have reviewed the entire case and find no error.

Affirmed.

[4] Cases on this point are collected in West's Ark. Digest, "Appeal and Error," Key 692.

READ *v.* DAVIS.

4-9271 234 S. W. 2d 371

Opinion delivered December 4, 1950.

[redacted]

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

Greenhaw & Greenhaw, for appellee.

GRIFFIN SMITH, Chief Justice. Mrs. Mary Inez Read died in November, 1948. Her husband, Dan W. Read, and their only son and daughter—Carmen and James W. Read—are parties to this suit. Carmen and James inherited through their mother certain business property in Fayetteville, subject to their father's curtesy and the payment of debts.

Dickson street is north and Locust street is east of the land here involved. Lots 1 and 2 are a part of Block 5, original town of Fayetteville. They front on Dickson street and had a platted depth of 122 feet. For practical purposes the northeast corner of Lot 1 is the southwest intersection of Dickson and Locust streets.

In September, 1947, H. O. Davis and his wife alleged in their complaint against Dan W. and Inez Read that they owned realty having a 40-ft. frontage on Dickson street and extending south 122-ft. The Davis lot begins 63-ft. west of the northeast corner of Lot 1 and extends west 40-ft. An allegation is that in 1933 Dan W. Read and his wife conveyed to R. C. Ambrose and his wife "the east part of the property now owned by these plaintiffs," including a 10-ft. easement or private alley extending 63-ft. east from the present Davis property to Locust street. At that time Read and his wife owned all of the land of which it is now claimed the easement was a part. Subsequent conveyances of the Ambrose lot placed the title in Fulbright Investment Company, and that corporation conveyed to the Davises. In all descriptions the grant included "with all appurtenances thereunto belonging."

In their complaint of 1947 the Davises described a brick building constructed by the Reads on the north end of the 40-ft. strip, but asserted their own property lacked 14 inches of extending to the Read line; but [said the Davises], in disregard of their ownership of this area the Reads began building a frame structure near the south end of the 40-ft. lot, extending across the controverted 14 inches and virtually touching the Davis wall. The prayer was that a restraining order issue (1) to prevent the Reads from trespassing on the 14-inch strip, and (2) to keep them from interfering with the plaintiffs in opening the 10-ft. easement leading to Locust street.

In 1929 Dan W. Read conveyed a part of Lots 1 and 2 to his wife, but the description on the east and west side was stated as 112-ft., leaving in the grantor, *prima facie,* a 10-ft. strip extending across Lot 1 65-ft. westward from Locust street.

Answer and cross-complaint were filed by Attorney O. E. Williams on behalf of the three Reads. This was followed by the Davis answer and an amendment to the original complaint, dated June 1, 1949. Mrs. Inez Read died in November, 1948. In the amendment it was asserted that after the original suit was brought D. W. Read desired an out-of-court settlement. Davis and Read were members of the First Baptist Church of Fayetteville; and, at Read's request, three members of the church were agreed upon as arbitrators.

The three churchmen conferred with Dan W. Read and H. O. Davis, and then personally inspected the properties. They recommended that the easement be opened at Davis' expense; that Davis permit Read to attach his building to the east wall of the Davis Business College (the brick structure heretofore referred to), subject to written specifications, but in other respects Read would set his wall back thirty inches to afford each proprietor better window facilities.

Dan W. and Carmen Read refused to abide the result of arbitration. Williams, as their attorney, filed an answer to the cross-complaint. He asked that former pleadings be treated as amended and that the three—Dan W., James W., and Carmen Read—be substituted as defendants. Chancellor Lee Seamster, who by appointment succeeded Chancellor John K. Butt, disqualified because he had been associated with Greenhaw & Greenhaw in representing the Davises. This disqualification was evidenced by an exchange of circuits through agreement between Chancellor Seamster and Judge Maupin Cummings of the Fourth Judicial Circuit.

Numerous pleadings were filed, but we think the essentials, and conduct of resident parties, justified Chancellor Butt in calling the cause for trial August 16, 1949. The only named defendant not present in person was James W. Read, who lived in Oklahoma. It is not made certain that information that the property would be sold reached James before the court order was made, although H. O. Davis testified that Dan W. Read told him, when the settlement was being discussed, that he

had talked with James the night before, and James told him that whatever he (the father) did would be satisfactory.

Due to the fact that the amendment through which the Davises claim under the arbitration award had been erroneously filed by the Chancery Clerk (June 1, 1949) with papers in a cause styled *Davis* v. *Head,* Mr. Williams had not seen the pleading and was surprised when told in open court that the controversy had been referred to the judgments of disinterested persons. Williams asked for an opportunity to confer with his clients—whom he had represented for twenty years or more,—so the matter went over until afternoon. During the intermission H. O. Davis and his son, Frank, conferred with Read and his daughter, and following these talks Chancellor Butt announced in open court that the parties were in accord. The docket notation was, "Settled by agreement, as per precedent."

It is stated in the Davis brief that after announcement of the settlement Judge Butt congratulated the parties upon the course they had taken. Judge Seamster, however, believing there should be a written memorandum, prepared the following and it was approved: "August 16, 1949. Agreed that H. O. Davis will pay Reads $16,250 for the land between Davis property and Locust street facing Dickson street back to Mrs. Smith's property. Warranty deed and abstract showing marketable title. (Signed) H. O. DAVIS, DAN W. READ, CARMEN READ." Before a decree embodying the compromise could be signed, Chancellor Butt was killed (Aug. 27) in an automobile accident.

A month after the settlement a suggested decree was presented to Judge Cummings for entry *nunc pro tunc.* This occurred before the August term had expired. Because Williams had proceeded throughout in the utmost good faith, the inference is clear that he was unwilling to act for the Reads in their endeavor to recede from the agreement. In these circumstances the law firm of Sullins & Perkins, in an entirely appropriate manner, came

into the transaction with an oral motion that a hearing on the petition be postponed until James W. Read could give his testimony in open court. On November 14, 1949, at a term succeeding the August proceedings, a written motion was filed "to vacate the proposed decree."

In a letter Williams wrote to James W. Read, August 20th, he said the suit resulting in the agreement involved a claim by Davis to 14 inches extending from Davis' east wall and a 10-ft. right-of-way on the south end of the land. Williams confirmed the factual background resulting in appointment of the arbitrators, saying: "Your father, in an unguarded moment—in the goodness of his heart and without consulting me—made a proposal for the church to appoint three members [to settle the dispute] and agreed to be bound by their decision; [so] when we went to trial Tuesday, Davis abandoned his claim under the original suit and insisted on the arbitration agreement being carried out. We saw that our chance to successfully defend the suit on this theory was very slim and your father thought it preferable to sell the property to Davis rather than be forced to carry out the award. They had been negotiating for a sale for the purpose of settling the matter and your father had been asking $18,000, and Davis had offered $15,000, so they finally reached an agreement at $16,250. Your father said he was sure it would be agreeable with you and told Davis that he had talked with you on the telephone the night before.

"The agreement was signed by all parties present, the abstract was turned over to the abstractor to be brought down to date so the title could be examined. I understand that Davis sent your father a check for $1,000, and the balance will be paid when the deed is delivered; therefore we will be very much embarrassed if you do not execute the deed. All of the above was done in open court in settlement of this lawsuit."

Williams then said that he did not think the price "was much out of line, if any."

In another letter to James (August 25th) Williams said: "A formal judgment or decree has not been en-

tered of record, but has been made by the court and is binding on all [who participated"].

After the trial had ended and while the Court was hearing argument, attorneys for Davis and his wife were permitted to introduce certified copies of several deeds, one showing purchase of Lot 2 by Dan W. Read in 1933 under forfeiture for taxes of 1929. In explaining another deed one of the attorneys for Davis said that a part of Lot 2 adjoining the Davis property was conveyed to Dan W. Read, who owned it when his wife died.

We think the Chancellor on Exchange properly held that Dan W. and Carmen Read were bound by the court's action of August 16, 1949, but that James was not. James admitted that he talked with his father by telephone, but denied they discussed the sale. It is quite clear that Williams, without fault or carelessness, thought he was serving James in asking that the heirs of Mary Inez Read should be designated as parties to the litigation; and, while it is hard to rationalize that a father and son would converse by telephone and that the father would withhold from his son information so vital to the negotiations emphasized by the background here, the Chancellor on Exchange who heard and saw the witnesses testify did not believe that a preponderance of the evidence disclosed actual authority upon James' part, or that there was conduct from which reasonable minds would agree that the father's right to sell was implicit in the relationships that had existed, or that there had been ratification.

The Davises contend that because a decree becomes effective from the day it is rendered, and because the term during which the August order was made had ended when the modification as to James occurred, the Court was without power to act except to make the record speak the truth. *Hollabaugh* v. *Taylor,* 134 Ark. 415, 204 S. W. 628; *McConnell* v. *Bourland,* 175 Ark. 253, 299 S. W. 44; *Ingram* v. *Wood,* 172 Ark. 226, 288 S. W. 393; *Wright* v. *Ford,* 216 Ark. 55, 224 S. W. 2d 50. But if, as James contends, he did not authorize the sale or ratify it, and he was without knowledge regarding the sale, it would be

void as to his interest, even though those who were present are bound.

The Court found that the cash value of Dan W. Read's life interest was $1,818.37 and that Carmen's half interest, subject to the life estate, was $7,215.81. The Davises were directed to pay these sums into the registry. Net rents due the Reads were found to be $614.88. These computations, as such, are not complained of.

We do not agree with Davis and those in interest with him that the property Dan and Carmen Read were to sell should be affected by the south ten feet not conveyed by Dan W. Read to his wife, by the easement to which reference has been made, or by the purchase of Lot 2 by Dan W. Read from the State. When the controversy was before the Court August 16th the differences concerned a 14-inch strip and the easement. It was assumed by all that property east of the Davis holdings would pass under the sale. This erased from consideration the 14-inch strip. Effect of the decree preserving James' interest is to create a co-tenancy. This gives either tenant the right of reasonable use, including the easement.

It is vigorously urged by the Reads that Davis and his wife did not intend to acquire the property in co-tenancy with James. The point is stressed that if H. O. Davis had known the consequences of his offer of $16,250 he would not have made it. This may be true, but the fact that he is willing to take about half of what he wanted would not justify the court in taking from him all that the *bona fide* sellers could convey. It follows that the decree should be affirmed on each appeal; but, because title to realty is involved, and because rentals have continued to accrue, the cause is remanded to permit adjustments of incidental disputes without giving such actions a separate Chancery Court number.

Affirmed.

CITY OF BLYTHEVILLE *v.* LEWIS.

4-9300 234 S. W. 2d 374

Opinion delivered December 4, 1950.

Claude F. Cooper and *T. J. Crowder,* for appellant.

Gene Bradley, for appellee.

MINOR W. MILLWEE, Justice. Appellee, Mrs. Nola A. Lewis, owns a lot at the southeast corner of Division and Walnut Streets in the City of Blytheville. She applied to the city engineer for a permit to construct a commercial building on the property in which she proposed to maintain a real estate office. A city ordinance defines the "residence district" as that portion of the city lying outside the "fire limits" and provides that it shall be unlawful to erect, for business purposes, any building in said district until a permit is secured by the procedure set forth in the ordinance. Acting under provisions of the ordinance, the city engineer caused a notice of ap-

pellee's application to be published and the matter was referred to the city council when several property owners in the area filed a written protest stating that appellee's lot was in a residential district. Basing its action on the written protest, the city council denied the application without notice to appellee and without a hearing, as provided in the ordinance.

Appellee then filed this suit against appellants, City of Blytheville and its officers, asserting that the ordinance was void as to her property; that her lot was located in a well-established and expanding business district; and that the council's action in denying the permit was arbitrary, unreasonable and unwarranted by the terms of said ordinance.

The chancellor held the ordinance valid, but further found that appellee's lot was a part of an established business district; that the use of the lot for residential purposes was undesirable; that its use for business purposes would not tend to reduce the value of any residential property in the immediate vicinity; and that the action of the council in denying the permit was arbitrary and unreasonable. The court ordered issuance of the permit and enjoined appellants from interfering with appellee in the use of her property for business purposes.

There is little dispute in the evidence which shows that for more than 20 years a well-defined business district, known as "Crosstown", has been maintained along Division Street for several blocks northerly to the point where appellee's lot is located and with Walnut Street as the northern terminus of said district. Division Street is a part of U. S. Highway 61 that runs north to St. Louis, Missouri, and south to Memphis, Tennessee, from Blytheville. Appellee's lot lies on the east side of Division Street and is 150 feet north of the intersection of Highway 61 and Main Street, which is a part of State Highway No. 18. Both highways are heavily traveled.

There are approximately 50 businesses located along Division Street for several blocks immediately south of appellee's lot. Directly across Division Street from appellee's lot is the Rustic Inn, a drive-in lunch stand,

which has been in operation on said lot since 1932. Prior to 1932 the Rustic Inn was located for three or four years on the lot owned by appellee. Immediately south of appellee's lot is the David Real Estate Office which was erected early in 1948. Prior to erection of the real estate office this lot was the site of a filling station for several years. Across Walnut Street north of appellee's property are some vacant lots which are used as a playground. There is a residence facing Walnut Street located on the lot adjoining appellee's property on the east, but the owner acquired this property while appellee's lot was being used for business purposes. Appellee's lot was also formerly the site of a garage and filling station and has never been used for residential purposes.

Several witnesses testified that appellee's lot was more suitable for business purposes than as residential property on account of its location on an extensively traveled highway adjacent to the business district, and that the erection of a real estate office facing west on Highway 61, as contemplated by appellee, would not adversely affect the value of the lots lying east and north for residential purposes. None of the property owners who protested appellee's application either intervened or testified in the chancery court.

The Blytheville ordinance is practically identical in its provisions with the ordinance involved in *City of Little Rock* v. *Pfeifer,* 169 Ark. 1027, 277 S. W. 883. Under a state of facts and circumstances more favorable to the municipal authorities than those in the case at bar, this court held the attempt of the council to restrict the growth of an established business district to be arbitrary and unreasonable. The case of *City of Little Rock* v. *Joyner,* 212 Ark. 508, 206 S. W. 2d 446, involved the use of a lot adjacent to a business district and situated across the street from lots which had been rezoned for commercial use. We upheld the action of the chancery court in declaring the zoning ordinance void as applied to the Joyner property and enjoining interference with its use for commercial purposes. The following state-

ment from the Pfeifer case was reaffirmed: "As the size of the business district grows, it ceases to be a residence district to that extent within the purview of the zoning ordinance, and any attempt on the part of the city council to restrict the growth of an established business district is arbitrary. When a business district has been rightly established, the rights of owners of property adjacent thereto cannot be restricted, so as to prevent them from using it as business property." See, also, *City of Little Rock* v. *Sun Building & Developing Co.*, 199 Ark. 333, 134 S. W. 2d 583; *City of Little Rock* v. *Bentley,* 204 Ark. 727, 165 S. W. 2d 890.

Appellants argue that appellee has not exhausted her administrative remedies by seeking a reclassification of her property and is, therefore, not in position to question the action of the city council. The case of *City of Little Rock* v. *Hunter,* 216 Ark. 916, 228 S. W. 2d 58, is cited in support of this contention. The provisions with reference to reclassification, and the steps necessary thereto, which were involved in the ordinance under consideration in that case are not found in the Blytheville ordinance. Appellee fully exhausted the only administrative remedy afforded by the ordinance prior to institution of this suit.

The findings of the chancery court are supported by the preponderance of the evidence and the decree is accordingly affirmed.

PERSON *v.* MILLER LEVEE DISTRICT NO. 2.

4-9319 237 S. W. 2d 38

Opinion delivered December 4, 1950.

Rehearing denied March 26, 1951.

Shaver, Stewart & Jones and *L. K. Person,* for appellant.

Smith & Sanderson; for appellee.

ED. F. MCFADDIN, Justice. The levee of Miller Levee District No. 2 (hereinafter called "District") is located on lands of L. K. Person (hereinafter called "landowner") south and west of Red River in Miller County. In November, 1948, due to a caving river bank, the District decided to construct a setback levee, or loop, about two miles in length, with each end joining the old levee —the result being to make the new loop several hundred feet removed from the river. Insofar as this setback levee affected the landowner, Person, it meant: (1) the right-of-way for the setback levee took 20.75 acres of his land; (2) 18 acres of his land was between the old levee and the new, or setback, levee; (3) a roadway, or ramp, was constructed across the new levee to afford the landowner access to the said 18 acre tract; and (4) drainage problems were suggested not only as to the 18 acre tract, but also as to the lands behind the setback levee.

The District,[1] under its power of eminent domain,[2]

[1] Miller County Levee District No. 2 was created by Act 69 of 1911, and that Act has been amended by Act 71 of 1913, Act 25 of 1917, and Act 123 of 1921.

[2] In *Miller County Levee District No. 2* v. *Wright,* 195 Ark. 295, 111 S. W. 2d 469, we stated that §§ 4934, *et seq.,* of Pope's Digest were

filed condemnation proceedings against the landowner. The appraisers (acting pursuant to § 35-1103, Ark. Stats.) awarded the landowner $2,075 for the 20.75 acres actually taken for the right-of-way of the setback levee. This award was satisfactory to the landowner; and he accepted such amount, and no question is involved in this case as to the land actually taken for the right-of-way. But the landowner duly objected to the report of the appraisers as to the other elements of damage, *i. e.*, (1) inconvenience of crossing the setback levee to reach the 18 acre tract; and (2) damage to drainage. As to these two elements of damage, the case was tried to a jury in the Circuit Court.

The landowner had rented the lands to his son, L. K. Person III (hereinafter called "tenant"), who intervened to claim crop damage; and the tenant's claim was also tried to the same jury. The condemnation action was filed in November, 1948, and the setback levee constructed shortly thereafter, so that the work had been entirely completed prior to the trial in December, 1949; and the witnesses testified as to the actual effect of the work. The trial resulted in a verdict and judgment for the District, awarding no damages to either the landowner or the tenant on any of the three claims (*i. e.*, crossing, drainage, or crops) involved in the litigation. This appeal challenges that judgment.

The only question presented is whether there was substantial evidence to sustain the jury's verdict disallowing each of the said claims. On appeal to this Court, in a case such as this, the rule is well established that we affirm the judgment if the record shows substantial evidence to sustain the verdict. See *Wallis* v. *Stubblefield,* 216 Ark. 119, 225 S. W. 2d 332.[3]

I. *Inconvenience of Crossing the Levee to the 18 Acre Tract.* As previously stated, the District con-

the applicable Statutes in eminent domain proceedings by appellant District. These Sections, as amended by Act 177 of 1945, are now found in § 35-1101, *et seq.*, Ark. Stats. These last mentioned Statutes are governing.

[3] Other cases on this point are collected in West's Ark. Digest, "Appeal and Error," § 1001.

structed a ramp on both sides of the setback levee, thereby providing a roadway for access to the 18 acre tract outside the setback levee. The landowner and his witnesses testified that such ramp, or roadway, was entirely inadequate. On the other hand, the witnesses for the District testified to the contrary. The witness, Hall, said: "You wouldn't have any trouble getting to the 18 acres to work it."[4] We conclude that there was substantial competent evidence to sustain the jury's verdict refusing to award damages for inconvenience of crossing.

II. *Damage to Drainage.* The landowner claimed (a) that the construction of the new levee left the 18 acre tract in a pocket between the old levee and the setback levee; and (b) that, because of the slope of the ground, the setback levee interfered with drainage of the lands behind it. On the other hand, the witness, R. V. Hall, testified:

"Q. Has the construction of this levee in any manner affected the drainage of this land here?

"A. I cannot say it has.

"Q. Has it affected it anywhere?

"A. In my opinion, it is easier to drain now more than before . . ."

On these two matters, as on the one previously men-

[4] As a further example of the testimony for the District, we quote from that of R. V. Hall, the engineer of the District:

"Q. Where is the ramp there on the levee?

"A. It is in the extreme upper end where the new levee takes off from the old levee.

"Q. Right in here?

"A. Yes, sir. I marked it there.

"Q. What elevation does that ramp have; is it a steep ramp?

"A. No, sir. It is a very reasonable ramp. You can cross it without changing gears in an empty vehicle. . . ."

. . . . . .

"Q. In your opinion, is it hard to go from one side of the levee to the other?

"A. I don't see any real obstacle to it. There are lots of places on any farm where you have to be careful with equipment and watch where you are going.

"Q. How wide is the narrowest point after you cross the ramp?

"A. It is impossible to tell just where the levee stops and the road begins but any vehicle even sixteen or twenty feet wide could be run up on the levee and cross without any danger."

tioned, there is substantial competent evidence to support the jury's verdict denying a recovery.[5]

III. *Crop Damages Claimed by Tenant.* The tenant, L. K. Person III, by intervention and evidence, sought to establish that in the summer of 1948 he rented 38 acres of land from his father, plowed and disked it, and planted a winter cover crop on some parts in preparation for the 1949 planting; that the condemnation proceedings deprived him of the use of the 38 acres; and that he was entitled to crop damages. (See § 35-1103, Ark. Stats.; and *Ross* v. *Clark County,* 185 Ark. 1, 45 S. W. 2d 31). The jury returned a verdict allowing the tenant no damages and he has appealed.

The record brought to this Court makes it impossible for us to determine the location of the parcels of land comprising the said 38 acres, because the witness,

[5] As to the drainage of the 18-acre tract, the witness, Hall, testified:

"Q. What is the natural drainage to the 18 acres, Mr. Hall?

"A. Generally to the south.

"Q. Are your bar (borrow) pits sufficient in there to drain that 18 acres?

"A. In my opinion they are."

As to the drainage of the lands behind the new levee, the same witness testified:

"Q. Now, getting to these lands here, what is the general direction of the natural drainage of this acreage in here?

"A. As a general thing, it is to the south, . . .

"Q. Is there a ditch leading from the east side of this levee to the west side over here to this road?

"A. From the west side of the new levee to the road?

"Q. To the east side of the road?

"A. Yes, two ditches.

"Q. One on the north side and then one south of there?

"A. Yes, sir.

"Q. Now these are located here and drain into the canal which drains into the main line ditch which is on the west side of the public road; now, in the construction of the new setback, did that in any manner affect the drainage of this ditch here?

"A. Not that part extending from the new levee to the highway.

"Q. It only affected that part of it which the levee actually was built on?

"A. That's right.

"Q. And didn't affect that part extending from the west side of the levee to the road?

"A. That is right.

"Q. Or either ditch?

"A. That is right."

R. V. Hall, testified [6] from a map which, if introduced in evidence, is not in the record before us. (See *Smith* v. *Magnet Cove Barium Corporation,* 212 Ark. 491, 206 S. W. 2d 442, and *Adkins* v. *Willis,* 217 Ark. 287, 230 S. W. 2d 32.) In the absence of the map, we cannot say that the testimony—intelligible to the jury which saw the map—was not sufficient to support the verdict.

The burden is on the appellant to establish in this Court that error was committed in the trial court. (See *Clow* v. *Watson,* 124 Ark. 388, 187 S. W. 175.) Until such error has been established, the judgment of the lower court will not be reversed. In *Newald* v. *Valley Farming Co.,* 133 Ark. 456, 202 S. W. 832, an instrument referred to as "exhibit 8" was not in the transcript, and, in presuming the decree to be correct because of such material omission, this Court said:

"Exhibit 8 is not in the record and for aught that appears to the contrary the lands purchased by Terry and Taylor may be mentioned in exhibit 8. Every presumption is in favor of the correctness of the decision of the court below, and in order to warrant a reversal, error must affirmatively appear from the record. This has been established by an unbroken line of decisions in this court. Hence it was incumbent upon Terry and Taylor to have seen that exhibit 8 was in the transcript, and not having done so, the presumption is in favor of the correctness of the decree. *Norman* v. *Poole,* 70 Ark. 127, 66 S. W. 433; *Hardie* v. *Bissell,* 80 Ark. 74, 94 S. W. 611, and *Tatum* v. *Crownover,* 94 Ark. 58, 125 S. W. 610."

With the record before us in the condition in which it is, we cannot say that the evidence fails to support the

[6] In the testimony of the witness, Hall, we find such matters as these: "Mr. Hall, now let's look at this map over here before the jury . . .". Then, while the witness was explaining the map, he said, "The white line is the center of the new levee which has been built. . . . The old levee is the line colored red . . .". Then, after four pages of questions and answers we find this: "Is there anything else about your survey or map you would like to explain to the jury?"; and the witness then spent several pages talking about "this area of 2.9 acres," and "this marked 'C'-3.6 acres," and "this area 'A'-11.32 acres." All of the foregoing was probably most clear to the jury with the map there before it, and with the areas pointed out by the witness. But the testimony is practically meaningless to this Court on appeal because the map does not appear to have been introduced. At all events, it is not in the record before us.

jury's verdict which found that the tenant was not entitled to any recovery for crop damage.

Affirmed.

MINTON *v.* HALL.

4-9318 234 S. W. 2d 515

Opinion delivered December 4, 1950.

Wright, Harrison, Lindsey & Upton, for appellant.

Roy S. Dunn and *Chas. X. Williams,* for appellee.

HOLT, J. Appellees, Mrs. Eli Hall and Mrs. Verna Lee Bennett, sustained personal injuries March 28, 1949,

when the automobile in which they were riding, collided with a car driven by appellant, Dr. Minton. About three days after the collision, a claim adjuster, acting for appellant's liability insurance carrier, after determining that appellant was legally liable for the damages (which is now conceded by appellant) effected a settlement with Mrs. Hall and her husband for $300 and on April 14th, made a settlement with Mrs. Bennett and her husband for $500.

September 23, 1949, Mr. and Mrs. Hall and Mr. and Mrs. Bennett, filed the present suit against Dr. Minton seeking damages. Appellant pleaded, as a complete defense, the above settlements and releases procured from appellees. Mrs. Hall, in reply, alleged that she had never signed or authorized anyone to sign any release. Mr. Hall and Mr. and Mrs. Bennett replied that they were induced to sign the releases through fraud and misrepresentations.

A jury trial resulted in awards, in addition to the above settlements, of $500 to Mrs. Hall, $1,100 to Mrs. Bennett and $150 to Mr. Bennett.

This appeal followed.

Appellant says that "on this appeal the appellant relies only upon the failure of the court to direct or instruct verdicts in his favor."

He argues that (1) "the releases were valid and binding," and (2) "the releases and settlements had been ratified by the plaintiffs."

The evidence appears to be practically undisputed that Mrs. Eli Hall never signed any release or authorized anyone to sign a release for her. She testified: "Q. Do you remember someone talking to you about signing some instrument of writing? A. Yes, trying to get me to sign but I said, 'I'm not signing anything.' Q. Did you sign anything? A. No, sir, I sure didn't. Q. Did you authorize anyone to sign your name? A. No, sir, I sure didn't. Q. You sure didn't? A. I know that I didn't. Q. Why wouldn't you sign? A. Because I didn't

know how long I was going to be there (hospital) and I wanted to wait and see how I got along first. * * * Q. Mrs. Hall, you understand that your name is on a release now? A. I don't know, I've never seen my name on anything. Q. Has anybody told you that they signed your name on the release? A. Yes, my daughter told me that she did. Q. Now, when did you find that she had put your name on a release? A. I don't know whether it was after I came out of the hospital or while I was in the hospital. * * * Q. Did your husband ever tell you that he had signed the release? A. Yes, he told me that he had signed it and wanted me to sign it, and I said, 'I won't do it.' And I didn't. * * * Q. Did Mr. Barton want you to sign? A. Yes, sir, and I said I would not do it, and I didn't. Q. You told them you wouldn't? A. Yes, sir. Q. Did you know that Mrs. Bradshaw was signing your name on the release? A. No, sir."

Mrs. Bradshaw (Mrs. Hall's daughter) testified: "Q. Did your mother ever sign that release? A. No, sir, she didn't. Q. Who did sign it? A. I signed it. Q. At whose request did you sign that? A. Well, Mr. Barton told me to go ahead and sign it. He said, 'your dad has already signed it and it won't make any difference, you go ahead and sign it.' "

The above testimony was sufficient to warrant the finding by the jury that the release did not bind Mrs. Hall.

Unless, thereafter, Mrs. Hall subsequently ratified the release in question, she would not be bound by it. As to ratification, Mrs. Hall testified: "Q. Mrs. Hall, this is a $300 check marked Exhibit 'B'. It has your name on the back of it. A. Well, I'll tell you before I even look at it that I didn't sign it. I don't care if somebody has signed it, I sure didn't. * * * A. No, I don't know who put my name on the check, but I know that I didn't. Q. Do you know what happened or who took care of the check after you all got it? A. No, I don't. I never did see the check."

It appears that the draft with Mrs. Hall's name endorsed thereon, by some unauthorized person, was de-

livered to the hospital (to which Mrs. Hall had been taken, following her injuries) was in payment of Mrs. Hall's hospital bill of $85 and the remainder of $215 delivered to Mrs. Hall. She testified: "Q. I believe that you stated that some lady brought the money up and told you to give it to your husband. This was while he was gone for lunch, is that correct? A. Yes, sir. Q. Really, you didn't know what the money was for, did you? A. No, sir, I didn't. Q. You knew it wasn't for any settlement of yours because you hadn't signed anything, had you? A. That is right. Q. You knew that you hadn't made any settlement, didn't you? A. Yes, sir, I never did sign for anything."

The draft in question was made payable to Mrs. Hall, her husband, Eli Hall, and the hospital. Mrs. Dana Matthews (an employee and bookkeeper at the hospital) testified that she cashed the $300 draft for the hospital, and after deducting its bill for $85, gave the balance of $215 to Mrs. Hall for her husband, Eli Hall. She testified: "Q. Why did you give the money to Mrs. Hall? Why didn't you give it to Mr. Hall? A. Mr. Hall wasn't present. Q. If Mr. Hall had been present, you would have given the money to him? A. Yes, sir. * * * Q. Who gave you this check that you testified about taking and holding. A. I think that it was Mr. Hall. Q. Mrs. Hall as far as you know hasn't had anything to do with this check, has she? A. No, sir. * * * Q. She never had discussed it? A. No, sir. * * *"

Mr. Hall testified that when he signed the release and draft that he understood from appellant's adjuster that he was settling his own interest and not that of Mrs. Hall, his wife. We hold that the above testimony, when viewed in the light most favorable to Mrs. Hall, was substantial and warranted a finding by the jury that, in the circumstances, Mrs. Hall had not ratified the release and was, therefore, entitled to recover. (*Missouri Pacific Railroad Company, Thompson, Trustee,* v. *Lewis,* 211 Ark. 71, 199 S. W. 2d 325.)

The court, therefore, did not err in denying appellant's request for an instructed verdict in his favor, in the circumstances.

"The trial court is not authorized to take the case from the jury in the first instance, if there is some substantial evidence to support a verdict against the party making the request or in favor of whom it is directed. In determining the question here, we view the evidence in the light most favorable to the complaining party." *Harper* v. *Bankers' Reserve Life Insurance Company,* 185 Ark. 1082, 51 S. W. 2d 526.

As to the verdicts and judgments in favor of Mr. and Mrs. Bennett, we have reached the conclusion that there is no substantial evidence presented to support either. They claim, in effect,—and the jury found,—that they were induced to execute the release by false representations made by the claim adjuster to them, and that he took the release with him without giving them any opportunity to see that it was a general release rather than a limited one, as they claim. We find it unnecessary to consider such contention of appellees about the release because the evidence shows, without contradiction, that the claim adjuster left with the Bennetts a check or draft with the following writing plainly written on the face thereon: "Pay to Order of Verna Bennett, Hugh Bennett and Dr. Rogers Hederick—$500, Five Hundred and No/100 Dollars, in full settlement of the following account or claim arising out of an accident near Blue Mountain, Arkansas, 3-28-49, etc.," and on the back of the draft: "This draft constitutes settlement in full of the claim or account described on the face hereof and the payees by endorsement below accept(s) it as such.—Roger Hederick, Hugh Bennett, Verna Bennett."

Mr. Bennett was 63 years of age and his wife 47. Both could read and write. After the draft had been delivered to the Bennetts by the claim adjuster (Mr. Barton), Bennett testified: "My wife and I didn't look at the check until Mr. Barton left. We never paid any attention to it until Mr. Barton had gone." Following Mr. Barton's departure, the Bennetts testified, in effect,

that they examined the draft and noted Dr. Hederick's name was included as a payee. They then obtained Dr. Hederick's endorsement and after endorsing it themselves, took the draft to the bank, cashed it and kept the proceeds of $500. Such act on their part amounted to a general release and a ratification. What was said in the case of *St. Louis-San Francisco Railway Company* v. *Hall,* 182 Ark. 476, 32 S. W. 2d 440, applies here. It was there held: (Headnote 3) "Where plaintiff took advantage of a settlement paid for release from liability after knowledge of alleged misrepresentations, he will be held to have ratified the settlement," and in the body of the opinion, we said: "Assuming that the release had been procured as alleged by the appellee, his taking advantage of the settlement by depositing the check to his credit was a ratification of such release, for if he had been deceived he learned the truth and it was then his duty to disaffirm the contract as quickly as reasonable diligence would allow, and, having failed to do so and deriving all possible benefit from the transaction, he cannot now be relieved as by his conduct he has waived all benefit of, and relief from, the misrepresentations. *Wilson* v. *Strayhorn,* 26 Ark. 28; *Lamden* v. *St. L. S. W. Ry. Co.,* 115 Ark. 238, 170 S. W. 1001; *McCormick* v. *Daggett,* 162 Ark. 16, pgs. 22 and 23, 257 S. W. 358, and cases therein cited."

Accordingly, the judgment in favor of Mrs. Hall is affirmed, together with all her costs. The judgments in favor of Mr. and Mrs. Bennett are reversed and both causes dismissed, appellant to recover his costs in the Bennett cases.

DYE *v.* EBERSOLE.

4-9301 234 S. W. 2d 376

Opinion delivered December 4, 1950.

Claude Duty, for appellant.

Eli Leflar, for appellee.

George Rose Smith, J. This was originally a suit by the appellees, Leighton and Anne Ebersole, to reform a deed executed to them by F. D. Schneider and his wife. As written the deed conveyed a forty-acre tract, two twenties, and a triangular tract described as beginning at the northeast corner of a certain forty, thence south fifty rods, more or less, to a limestone corner rock; thence west thirty rods, more or less, to a limestone corner rock; thence northeasterly to the point of beginning; containing eight acres, more or less. This description of the triangular tract actually embraces an area of only 4.68 acres, instead of eight acres. The complaint alleged a mistake in the preparation of the deed and asked that it be reformed to describe a larger triangle that is bounded on the south and west by existing fence rows and that does comprise about eight acres.

The Schneiders filed an answer conceding the plaintiffs' right to reformation, but the suit was contested by the appellants, Ray and Milt Dye. The Dye brothers own the farm just west of the Ebersole farm and claim title up to the smaller triangle as originally described in the appellees' deed. Thus the suit became a boundary dispute between the Ebersoles and the Dyes. The chancellor upheld the Ebersoles' ownership of the larger triangle, granted the prayer for reformation, and quieted the Ebersoles' title as against the Dyes.

We think the evidence clearly and convincingly supports the chancellor's decree. The recorded chains of

title, as well as the history of actual possession, confirm the view that for at least thirty years the larger triangle has been part of the farm now owned by the Ebersoles. As far back as 1917 this tract was described in the Ebersole chain of title as beginning at the northeast corner of the forty, thence south to a limestone corner rock, thence west to a limestone corner rock, thence northeasterly to the point of beginning, containing eight acres, more or less. This same description, embracing eight acres, is found in all succeeding conveyances until 1945. In that year a partition decree was entered which for the first time used the description that includes only 4.68 acres. Likewise the Dyes' land, which comprises the rest of the forty, has been described at least since 1928 as containing only thirty-two acres. In the Dye chain of title the smaller triangle also appears for the first time in the 1945 decree. Although the Dyes' grantor testified that he intended to convey the exact land described in his deed, he also testified that this piece of ground has always been known as "The Thirty-Two."

On the question of possession the testimony is equally convincing. No witness testified that any of the Dyes' predecessors in title had ever been in possession of any part of the larger triangle. Fence rows mark the two sides of the triangle that jut out from the rest of the Ebersole land, and there is evidence that the appellees' predecessors had actual possession up to the fence rows. Many years ago fences enclosed the projecting triangle, but they have fallen into disrepair, leaving the fence rows as the visible boundaries. It is plain that a mistake occurred in the 1945 decree, and there has been no subsequent adverse possession by the Dyes or their predecessors that could have ripened into title.

The appellants rely heavily on Leighton Ebersole's conduct while a survey was being made by M. Hays, the county surveyor. Ebersole bought his farm in September, 1948, and the Dye brothers acquired theirs about a month later. The Dyes suggested that a boundary fence be erected, but the parties were unable to find the lime-

stone corner rocks. In this situation they jointly employed Hays to survey the line. Hays merely took the description used in both deeds and ran the line of the smaller triangle. Ebersole was present when this survey was made, but he did not then assert that the survey was erroneous. Ebersole explains his silence by saying that he had just moved to Arkansas and was a stranger in the community. He had employed a lawyer to examine his title, and he thought he should consult this lawyer before asserting title up to the fence rows. On the day after the survey he did visit his lawyer and was advised to have a survey made according to the fence rows. When the Dyes began building a fence along the boundary fixed by Hays, Ebersole objected and informed them that they were trespassing. Thereafter Ebersole brought this suit. This course of conduct does not establish either an agreed boundary line or an estoppel against Ebersole's claim of title. *Randleman* v. *Taylor,* 94 Ark. 511, 127 S. W. 723, 140 Am. St. Rep. 141.

Affirmed.

LEFLAR, J., not participating.

FERGUSON *v.* STATE.

4643 234 S. W. 2d 990

Opinion delivered December 4, 1950.

Rehearing denied January 15, 1951.

O. D. Longstreth, Jr., and *Joseph Brooks,* for appellant.

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

HOLT, J. June 13, 1950, a jury found appellant, George Ferguson, guilty of the crime of murder in the first degree. The penalty of death was imposed.

The only defense offered by appellant was that of insanity.

March 6, 1950, at about one P. M., appellant walked into the office of the Monarch Mill and Lumber Company, Little Rock, and without warning shot Durwood Miller, head shipping clerk, with a twelve gauge shot gun. The charge entered the side and back of the victim, killing him almost instantly. Miller was standing at his desk at the time. Ferguson had been employed by the lumber company for some time prior to the killing and Miller was his immediate supervisor.

Appellant, was by information, charged with the crime March 7, 1950, and thereafter on the 27th, committed to the State Hospital, where he remained for ob-

servation until April 21st. On the latter date, report was made which recited: "We have completed our examinations in the case of George Ferguson, colored, who was admitted to the State Hospital under Act No. 3 from Pulaski County, Arkansas, and I hereby certify that the following is a true and correct report of my findings in this case: Diagnosis: Without psychosis. 1. It is our opinion that George Ferguson was mentally competent and responsible for his actions at the time of their alleged commission. 2. It is further our opinion that George Ferguson is mentally competent and responsible at the time of this mental examination. Very truly yours, (signed) George W. Jackson, George W. Jackson M.D., Supt. & Examining Physician—(signed) Oscar Kozberg, Oscar Kozberg M.D., Asst. Supt. & Examining Physician."

May 12th, appellant filed petition requesting that he be recommitted for further observation. Thereafter, on the 18th, on a hearing, testimony being presented, his petition was denied and as indicated, he was put on trial and convicted June 13th.

This appeal followed.

Appellant's motion for a new trial contained three assignments of alleged errors. "1. That the court erred in denying the motion of defendant's attorneys that defendant be given certain stipulated personality tests by the State Hospital and that they be furnished with said information elicited by these tests thus violating the constitutional rights of the defendant by denying him process to obtain necessary witnesses and testimony essential to his defense.

"2. That the Court erred in admitting in testimony over the objections of defendant's Attorneys the report of and allowing the Doctors making report to testify as to their conclusions on the sanity of the defendant when said report and said testimony of Doctors was based in part and in fact framed as to its conclusions by statements obtained from the wife of said George Ferguson thus using his wife's testimony indirectly to convict him.

"3. That the verdict of the jury of murder in the first degree without recommendation, thus carrying the death penalty is not sustained by the evidence developed in this case and is contrary to the law of Arkansas applicable thereto."

This being a capital case, it becomes our duty to consider, in addition to the above assignments, all objections made and ruled upon by the trial court, whether or not included in the motion for a new trial, *Alexander* v. *State,* 103 Ark. 505, 147 S. W. 477.

—(1)—

As to appellant's first assignment, our statute (Ark. Stats. 1947, § 43-1301) provides that for the purpose of observation, the Circuit Judge shall "commit the defendant to the Arkansas State Hospital for Nervous Diseases, where the defendant shall remain under observation for such time as the court shall direct, not exceeding one month. 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."

As we view the record, this provision of the statute was literally followed in the present case. The specialists, Dr. Jackson and Dr. Kozberg, were "competent physicians" employed by the State Hospital to conduct mental tests. We find no evidence that the tests and observations used by those physicians were not proper and sufficient, as contemplated by the act, to support the above report, or that appellant's mental condition was other than that shown by the report.

Appellant argues that certain "personality tests" should also have been employed in determining the question of sanity, but we find no evidence to support such a contention. He also suggests that he was not kept under observation or "examined over the period required by the act." This suggested error was answered by

this court contrary to appellant's contention in *Brocklehurst* v. *State,* 195 Ark. 67, 111 S. W. 2d 527. Since the date of this decision (November 29, 1937) the Legislature of 1949 passed Act 256, section 3 of which provides: "Any order made by any Circuit Judge for the observation and examination of a defendant in a criminal case shall direct the superintendent of the State Hospital, or those in charge thereof, to hold, examine and observe the defendant for a period of not more than thirty days, but such order shall not be construed as directing that the party be retained for that period of time, if his condition is determined and proper report thereon can be made in a period of less than thirty days." (Now Ark. Stats. 1949 Supp. § 43-1306).

—(2)—

Appellant's second contention that the report was improperly admitted, for the reason that in arriving at their conclusions, the physicians based said report on a statement of appellant's wife which had been procured from a social worker, "thus using his wife's testimony indirectly to convict him."

The answer to this contention is that while the wife's statement, to the social worker, was considered along with all other information by the physicians while they had appellant under observation, however, no part of the wife's statement ever reached the jury except what was brought out by appellant on cross-examination. Neither appellant nor his wife testified in the case. We hold, in the circumstances, that appellant is in no position to complain and no prejudice to his rights appears.

—(3)—

Appellant's third assignment to the effect that the evidence was insufficient to warrant the jury's verdict is without merit. As has been pointed out, appellant's only defense was insanity. He did not testify and produced no witness in his own behalf. He must, therefore, rely, in defense, on any disclosures that might have arisen from any circumstances established by the prosecution,

and we find none. As we read the testimony, without attempting to detail it, it establishes every element of murder in the first degree. In other words, appellant's act amounted to the unlawful, willful, deliberate, malicious, and premeditated killing of Durwood Miller, without any mitigating circumstances or excuse whatever.

Next appellant objected to the following ruling of the trial court in chambers. "Let the record show that the court declares that inasmuch as no testimony has been introduced by the defendant bearing on the question of insanity and no instructions being offered to the court by either party, none will be given on this point," and says: "Not only did the court make such ruling as the above in chambers but he went further than that and over the strenuous objection of the defendant made the following statement to the jury: 'Gentlemen of the jury, the State has rested and the defense has also rested. In view of the fact that there was no testimony at all on the question of sanity, the court does not feel called upon to give you instructions on that subject.' "

We find no error here for the reason that, as above noted, we have been unable to find any evidence tending to contradict the above report of the examining physicians at the State Hospital, to the effect that appellant was sane at the time he killed Miller and on the date of trial. The court was not required to give an abstract instruction. *Clingham* v. *State,* 207 Ark. 686, 182 S. W. 2d 472.

We have not overlooked other objections made by appellant. It suffices to say that after a careful review, we find them to be without merit.

Finding no error, the judgment is affirmed.

4-9322 234 S. W. 2d 518

Opinion delivered December 11, 1950.

[redacted]

Willis & Walker, for appellant.

W. J. Cotton and *F. O. Butt,* for appellee.

GEORGE ROSE SMITH, J. This is in substance an attempt to set aside a final order that closed a receivership proceeding involving the Citizens Investment Company, a corporation. The insolvency proceedings were instituted in 1931 by the Arkansas Railroad Commission, under the authority of § 8 of Act 109 of 1931. The appellee was appointed as receiver for the corporation and served until his discharge by court order on December 28, 1948. Thereafter the appellants, three holders of preferred stock in the corporation, sought to obtain judgments against the receiver for the par value of their stock. The appellee demurred to the appellants' petition and also pleaded his discharge as a bar to the relief sought. On the pleadings the chancellor dismissed the petition, and this appeal is from the order of dismissal.

The record is comparatively short, although it is certified as a complete transcript of the seventeen-year receivership. The receiver was appointed in 1931 and filed an inventory of the corporate assets in 1933. Subsequently there were a few court orders approving the settlement of various claims, but the receiver is not shown to have filed any accounts after the 1933 inventory. In March of 1948 his conduct of the receivership was attacked in a petition filed by T. C. Heuer, a preferred stockholder. Heuer alleged that the receiver had been unfaithful to his trust in several respects, in that he had allowed claims held by the corporation to become barred by limitations, had allowed corporate property to forfeit for nonpayment of taxes, had redeemed such property in his own name, had failed to account for money received, and other similar allegations of misconduct. Apparently a hearing was held upon Heuer's petition, at which the court found that with its approval a stockholders' committee had been appointed to advise the receiver in winding up the corporate affairs. This committee concluded that the proceedings should be conducted informally and that the stockholders could not expect to realize more than 15% of the par value of their stock. The receiver was instructed by the committee to dispose of the assets by barter or sale with a view to realizing as near to 15% of the stock liability as possible. The court further found that the actual liquidation did not produce the expected 15% of the investors' claims but that the receiver had offered to pay the full 15%. The court held that all the stockholders had acquiesced in the handling of the proceedings and were estopped to complain. Heuer was accordingly given judgment for 15% of the par value of his stock. There was no appeal.

In December of 1948 the receiver petitioned for his discharge. Stating that he had settled with all creditors and with most stockholders he deposited in court a sum said to be sufficient to pay the remaining stockholders 15% of the face value of their stock. On the same day the court entered an order terminating the proceeding and discharging the receiver.

At the next term of court the appellants filed the petition now before us. In it they repeat almost verbatim the charges of fraud that were contained in Heuer's earlier pleading. The prayer is for judgment against the receiver for the par value of their stock, on the theory that the appellee failed to account for substantial assets of the insolvent corporation.

The petition, even when construed liberally on demurrer, was properly dismissed. The court's earlier judgment contains a finding that all preferred stockholders are estopped to question the regularity of the proceedings. On its face that decree is conclusive of the rights of these appellants.

It is argued, however, that these petitioners are not shown to have been parties to the insolvency action. Of course a judgment binds only the parties and their privies and is, in a later action between different parties, evidence of nothing except that it was rendered. *Biederman* v. *Parker,* 105 Ark. 86, 150 S. W. 897. Hence if this were an independent suit between the appellants and the appellee as an individual there would evidently be a question whether the appellants are bound by the earlier decree.

But this is not an independent suit. The appellants' petition was filed as an intervention in the receivership case. As stockholders they undoubtedly had the privilege of intervening if they chose to. *Randolph* v. *Nichol,* 74 Ark. 93, 84 S. W. 1037. The gist of their pleading is that the receiver failed to enforce certain claims, that he still has assets in his hands, and that the court erred in failing to require an accounting as a condition to the receiver's discharge. This is clearly an attempt to hold the receiver in his official capacity, and to such an attempt the receiver's discharge is ordinarily a complete answer. *O'Leary* v. *Brent,* 97 Ark. 372, 134 S. W. 617, Ann. Cas. 1912D, 904. Consequently the most we can do is to treat the petition as a complaint to vacate the order of discharge for fraud in its procurement or for unavoidable casualty. Ark. Stats. 1947, §§ 29-506 and 29-508. It may be doubted whether the facts pleaded sufficiently support either ground, but in any event the

petition so treated is demurrable for want of the jurisdictional requirement that it be verified. *Pattillo* v. *Toler,* 210 Ark. 231, 196 S. W. 2d 224; *Raymond* v. *Young,* 211 Ark. 577, 201 S. W. 2d 583. We must therefore hold that the chancellor correctly dismissed the petition.

Affirmed.

HOLT, J., not participating.

EOFF *v.* STATE.

4644 234 S. W. 2d 521

Opinion delivered December 11, 1950.

John H. Shouse, for appellant.

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

ED. F. MCFADDIN, Justice. Appellant was convicted and fined $250 for the unlawful possession of intoxicating liquor for purpose of sale (see § 48-901 (c), Ark.

Stats.); and by this appeal presents the issues now to be discussed:

I. *Sufficiency of the Evidence.* Boone County is a legally dry County, as that term is used in Initiated Act No. 1 of 1942 (§ 48-801 Ark. Stats.). According to competent evidence offered by the State—which on appeal we view in the light most favorable to the verdict [1] — the Sheriff of Boone County arrested the defendant on December 19, 1949, after having seen him throw a half-pint whiskey bottle from a car he was driving on the highway. Upon being interrogated by the Sheriff, appellant said he had only six pints of whiskey. These were seized; then two additional pints were found on appellant's person; and eight pints were found concealed under the hood of the car—making a total of sixteen pints, in addition to the half-pint bottle thrown away. Witnesses testified that appellant bore the reputation of being a "bootlegger." His explanation—that he was getting the whiskey for Christmas visitors at his home—did not cause the jury to find any doubt of his guilt. The evidence was sufficient to sustain the verdict. See *Richardson* v. *State,* 211 Ark. 1019, 204 S. W. 2d 477.

II. *Evidence as to Reputation.* Over appellant's objections several law enforcement officers were permitted to testify that the defendant had the reputation of being a bootlegger in that community on December 19, 1949, the date of the alleged offense. Such testimony was permitted under § 48-940, Ark. Stats., which is a part of Act 108 of 1935 and reads:

"In any prosecution . . . for any violation of this act, the general reputation of the defendant . . . for bootlegging . . . shall be admissible in evidence against said defendant. . . ."

Appellant argues that under the foregoing Statute, the evidence of reputation is admitted only in prosecutions for violation of Act 108 of 1935, and that he is now being prosecuted for violation of § 48-901, which is a part

[1] See *Allgood* v. *State,* 206 Ark. 699, 177 S. W. 2d 928. Other cases, recognizing this often declared rule, are collected in West's Arkansas Digest, "Criminal Law," § 1144 (13).

of Act 218 of 1943; and so appellant contends that the evidence as to reputation was improperly admitted. There is no merit to the appellant's argument: § 48-901 (c) (under which appellant was being here prosecuted) is a part of Act 218 of 1943, which Act amended Act 356 of 1941, which had amended Act 108 of 1935. In other words, in the case at bar, the appellant was being prosecuted under Act 108 of 1935, *as amended.* The constitutionality of § 48-940 was discussed and upheld in *Richardson* v. *State,* 211 Ark. 1019, 204 S. W. 2d 477; and the evidence here presented, as to reputation, is within the allowable limits of that case. Some of the other cases in which we have allowed evidence as to general reputation are: *Hughes* v. *State,* 209 Ark. 125, 189 S. W. 2d 713, and *Harris* v. *City of Harrison,* 211 Ark. 889, 204 S. W. 2d 167.

III. *Double Jeopardy.* As previously stated, Boone County is legally dry, as that expression is used in § 48-801, Ark. Stats. It was shown that because of the possession, on December 19, 1949, of the same sixteen pints of liquor, as here involved, appellant had pleaded guilty and paid a fine of $250 foı possession of more than one gallon of intoxicating liquor in dry territory, an offense under § 48-918, Ark. Stats. In the case at bar appellant claimed that his said conviction under § 48-918 prevented the present prosecution under § 48-901 (c). In other words, he pleaded "double jeopardy" under Art. II, § 8 of the Arkansas Constitution, which reads: ". . . No person, for the same offense, shall be twice put in jeopardy . . .".

Appellant invokes what is called the "same transaction test," which is stated in 22 C. J. S. 427:

"There is also another rule which declares that, if the prosecution under the second indictment involves the same transaction which was referred to in the former indictment, and it was or properly might have been the subject of investigation under that indictment, an acquittal or a conviction under the former indictment would be a bar to a prosecution under the last indictment. This rule is sometimes called the 'same transaction test.' "

But in elucidating on the "same transaction test," it is stated in 22 C. J. S. 437:

"*Offenses in Relation to Intoxicating Liquors.* Many transactions relating to intoxicating liquors have been divided into distinct crimes so that jeopardy for one is not a bar to prosecution for the other; . . ."

In *Albrecht* v. *United States,* 273 U. S. 1, 71 L. Ed. 505, 47 Sup. Ct. 250, the defendant was charged with illegal possession of liquor, illegal sale of liquor, and maintaining a common nuisance. The possession, the sale, and the maintaining of the nuisance were separate offenses carved out of the *same transaction.* The defendant pleaded former jeopardy under the Fifth Amendment of the United States Constitution.[2] Mr. Justice Brandeis, in holding against the plea of former jeopardy, used this language in the opinion to which there were no recorded dissents:

"The contention is that there was double punishment because the liquor which the defendants were convicted for having sold is the same that they were convicted for having possessed. But possessing and selling are distinct offenses. One may obviously possess without selling; and one may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and later sell, as appears to have been done in this case. The fact that the person sells the liquor which he possessed does not render the possession and the sale necessarily a single offense. There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit, and punishing also the completed transaction."

The holding in other jurisdictions is to the same effect as that of the United States Supreme Court. See *Vellis* v. *State,* 28 Ga. App. 468, 111 S. E. 683; *People* v. *Montgares,* 347 Ill. 562, 180 N. E. 419; *United States* v. *Dockery,* Dist. Ct. N. Y., 49 Fed. Supp. 907; *State* v. *Axley,* 121 Kan. 881, 250 Pac. 284; *O'Connor* v. *Common-*

[2] The applicable words are: ". . . nor shall any person . . . be twice put in jeopardy. . . ."

wealth, 176 Ky. 673, 197 S. W. 405; *Nixon* v. *State,* 148 Miss. 224, 114 So. 346; *State* v. *Nodine,* 121 Or. 567, 256 Pac. 387; and *Driskill* v. *United States,* 24 Fed. 2d 413, *certiorari* denied, 277 U. S. 600, 72 L. Ed. 1008, 48 Sup. Ct. 561. In fact, the text in 22 C. J. S. 440 declares the weight of authority to be:

"The giving away of intoxicating liquor and possession of the same liquor are distinct offenses; and prosecution for possession and sale of the same liquor has been generally held not to result in double jeopardy."

Arkansas has created two separate offenses: (a) the offense of possessing more than one gallon of liquor in dry territory, denounced by Act 91 of 1947 (§ 48-918, Ark. Stats.); and (b) the offense of the unlawful possession of liquor for purpose of sale, denounced by Act 108 of 1935, as amended by Act 356 of 1941 and again amended by Act 218 of 1943 (§ 48-901 (c), Ark. Stats.). The appellant's plea of guilty of offense (a) did not bar his present prosecution for offense (b); because Arkansas, by two separate legislative enactments, has carved out of the same transaction two separate offenses —*i. e.,* possession of an excessive amount of liquor in dry territory, and unlawful possession of liquor for purpose of sale. The United States Supreme Court in *Albrecht* v. *United States (supra)* recognized such to be the legal prerogative of the lawmaking power. Since the offenses are separate, the plea of "double jeopardy" was correctly denied.

Affirmed.

SNODGRESS *v.* HUFF.

4-9317 234 S. W. 2d 505

Opinion delivered December 11, 1950.

Fred A. Snodgress, for appellant.

Digby & Tanner, for appellee.

HOLT, J. Proceeding under Ark. Stats. 1947, §§ 51-701 *et seq.,* appellee, P. D. Huff, brought this action to recover $103.64 alleged due for labor performed and material furnished in drilling a water well for appellant, Charles Crider, and to foreclose a lien on the property on which the well was drilled. (Some phases of this lien statute, not material here, were considered in the recent case of *Franks* v. *Wood,* 217 Ark. 10, 228 S. W. 2d 480).

He alleged that he made a verbal contract in April, 1948, with Crider and wife, owners of the property, to drill the well and that the other appellants claim some interest in the property but that their interests were inferior to appellee's.

The evidence appears not to be in dispute and appellants do not question appellee's procedure in asserting a lien.

Material facts support the following findings of the Chancellor. "Fred Snodgress was the original record owner of the property involved in this controversy and he conveyed all his right, title and interest in said property to the defendants, (appellants) Melvin Eakins and Laura Eakins, his wife, by warranty deed, which said deed has never been placed of record in this county; that the defendant, Charles Crider, was married to the niece of the defendant, Melvin Eakins, and that the defendants, Melvin Eakins and Laura Eakins, his wife, sold or agreed to sell to the defendant, Charles Crider, the property involved in this controversy and hereinafter described, which said property adjoins the property owned and occupied by said defendants, Melvin Eakins and Laura Eakins, his wife, (not involved herein). That

the defendant, Charles Crider, and wife, entered into possession of subject property, commenced the erection of a dwelling house thereon and subsequently entered into an oral contract with the plaintiff for the drilling of a water well on subject premises. That the water well was drilled for the defendant, Charles Crider, on or about the 16th day of April, 1948, and that the defendants, Melvin Eakins and Laura Eakins, his wife, and each of them, had actual knowledge that the defendant, Charles Crider, was contemplating the drilling of the well; that the plaintiff, P. D. Huff, drove his drilling rig and equipment over and across the land owned and occupied by the defendants, Melvin Eakins and Laura Eakins, his wife, in order to reach the land occupied by the defendant, Charles Crider, and that the defendants, Melvin Eakins and Laura Eakins, his wife, made no objections thereto; that thereafter, and on June 1, 1949, the defendant, Charles Crider, executed his promissory note in the sum of Five Hundred Twenty-Five and No/100 ($525.00) Dollars, payable in 31 monthly installments, to cover the purchase price of subject property, which said promissory note recited that a warranty deed had that day been executed by Melvin Eakins and Laura Eakins, his wife, to Charles Crider, and that a lien was retained to secure the payment of the purchase price; that said deed was either never executed or never filed for record in this county. * * *

"That the said Charles Crider made payments on said promissory note in the sum of Twenty-Five and No/100 ($25.00) Dollars, and then defaulted in the payments thereof, and that there is now due and owing the defendant, Fred Snodgress, assignee of the defendants, Melvin Eakins and Laura Eakins, his wife, the sum of Five Hundred and No/100 ($500.00) Dollars and interest; that said Charles Crider was the equitable owner of subject land and premises, the legal title being held in Melvin Eakins and Laura Eakins, his wife, to secure the payment of the purchase price evidenced by said promissory note; that upon completion of said payments, Crider would have been entitled to a deed of convey-

ance and would hold the legal title to said property; that he defaulted in the payments, owing a balance thereon, but that neither the defendants, Melvin Eakins and Laura Eakins, his wife, nor their assignee, Fred Snodgress, have elected to, or have instituted foreclosure proceedings to foreclose the equity of the said Charles Crider nor has the said Charles Crider relinquished his equity and claim in said premises."

The trial court awarded appellee, Huff, a judgment against Crider only and declared a first lien in his (Huff's) favor on Crider's equitable interest only in said property and ordered said interest of Crider sold to satisfy said lien. The effect of the decree was to order a sale of the property subject to the vendor's lien above and affected Crider's interest only.

We hold that the decree was correct.

As has been indicated, Crider, at the time he contracted with appellee, Huff, to drill the well, and at the time it was completed, owned an equitable interest in the property by virtue of his agreement to purchase, and subsequent purchase, from the Eakins, who had full knowledge of the drilling of the well. He made one payment of $25 on the purchase price of $525 and owed the balance. No proceedings were taken to divest him of his equitable interest by foreclosure or otherwise. Huff did not contend that his lien for labor and materials in drilling the well was superior to the vendor's lien for the purchase price. He says: "Appellee does not and never did contend that his lien was superior to the vendor's lien for the purchase price."

Accordingly, the decree is affirmed.

4-9306 235 S. W. 2d 876

Opinion delivered December 11, 1950.

Rehearing denied February 12, 1951.

Shaver, Stewart & Jones and *L. K. Person,* for appellant.

T. B. Vance and *Keith & Clegg,* for appellee.

GRIFFIN SMITH, Chief Justice. Bailey Johnson sought to quiet title to that part of the bed of Cypress Lake lying north and east of the center line.[1]

The questions are (1) whether Johnson's purchase included, as a matter of riparian law, that part of the

[1] Johnson's wife was a party to the action. The land is in the northeast quarter of Section 29 and the south half of the northwest quarter of Section 28, etc., in Miller County.

lake bed to which he lays claim, leaving to L. K. Person as owner of land on the south a similar right, thus preventing Person from projecting his line to the north shore of the lake. In the alternative (2) it is contended by Johnson that an old fence had, by common consent, been recognized as the dividing line. Each litigant traces title to a partition suit instituted by John W. Dryden in 1895, but Person insists that subsequent transactions, wherein deeds and mortgages were executed, expressly described his boundary as the north shoreline, thus depriving Johnson of the interest he would otherwise have as a riparian proprietor. It is stipulated that the lake is non-navigable.

When the Dryden partition suit was filed, William P. Parks, the heirs of Cassius Leigh, and L. A. Byrne as trustee, were owners of undivided interests in the northeast quarter of section 29 and other lands. A decree shows the appointment of commissioners, their report that the property was apportionable in kind, the filing of exceptions, and an amended report by the commissioners conforming to the exceptions. The amended report was based upon consent of all that the land should be divided in the manner shown by detailed descriptions; whereupon it was approved and ordered to be recorded.

The land awarded Johnson's predecessor contains 89.06 acres, while Person's predecessors in title received 35.15 acres. Appellants contend that the effect of a stipulation was to eliminate from consideration the partition decree, and that the agreement was that the respective claims would go back to the title of Mattie D. Parks. Under this contention the entire northeast quarter of section 29 was conveyed to Byrne as trustee in 1887, and [say appellants] Byrne conveyed to Medora B. Candler all of the lake bed lying in the described area, and Mrs. Candler and her husband conveyed to Mrs. C. W. Person, appellant's mother.

Our construction of the stipulation is that it permitted the introduction of all deeds and other matters in the recorder's office. This would include the court's orders and decrees relating to the partition suit.

On October 10th, 1949, after the trial resulting in this appeal had been concluded, Mrs. C. W. Person undertook to intervene. She alleged that in December, 1943, she leased to the Amerada Petroleum Corporation ". . . all of the bed of Cypress Lake lying within the fractional northeast quarter of section 29, containing 35.79 acres, more or less." There was warranty of title. Oil was discovered, with royalties payable to L. K. Person, the grantor's son. The trial Court sustained a motion to strike the intervention—upon the theory, no doubt, that its consideration would require an entirely new trial or exhaustive supplemental hearings on allegations not previously made.

In her intervention Mrs. Person called attention to the partition suit, then asserted that deeds were not actually issued. It is claimed by L. K. Person that partition was not completed, therefore no final decree resulted.

Appellants think the Chancellor erred in not giving to certain record transactions the effect they contend the law would imply. They say it is clear from the Candler deed that the intention was to convey not only the 35.15 acres south of the lake, but to extend the grant (as the words express) to the north boundary of the lake. This property was mortgaged in 1923 to the St. Louis Joint Stock Land Bank under the same description. A commissioner's deed of 1934 vested title in S. L. Cantley as receiver for the Land Bank, and in 1935 the receiver conveyed to Mrs. Person. In 1946 Mrs. Person quitclaimed the lake bed to L. K. Person.

Appellees have invoked Rule 9, complaining of the insufficiency of appellant's abstract. In the reply brief the pleadings are abstracted, but it is insisted that the testimony has been fairly presented, and appellants stand on this alleged completeness.

The testimony is brought into the transcript on 112 typewritten pages. In dealing with it for the purpose of making an abstract, the attorney[2] has interspersed ex-

[2] L. K. Person is a member of the Arkansas Bar and perfected and prosecuted his own appeal and the appeal of Mrs. C. W. Person.

planatory comments, and has so sketchily shown what the witnesses testified to that a satisfactory understanding of the factual issues would require each member of the Court to read the entire record, as distinguished from the briefs and abstract. To determine whether the evidence has been substantially abstracted, the writer of this opinion read the transcript, with the result that it cannot be fairly said that all of the essentials have been appropriately dealt with. For example, a fence was built by Dan W. McClure. L. K. Person testified that he complained to McClure, who took the fence down. Question: "They did not repair any part that he took down." A. "I don't know. If Mr. McClure took the fence down there would not be any fence to repair?"

To understand the importance of testimony relating to the fence, Drainage District No. 2 must be mentioned. It was organized in 1916 with Dan W. McClure as president of the board of commissioners, Mrs. C. W. Person as secretary, and A. W. Duke as the third member. The purpose was to drain Cypress Lake (sometimes called Wynn Lake) and lands to the east by diverting the waters into Kelley Lake. Bonds aggregating $8,000 were sold. Mrs. C. W. Person was paid $559.02 (as an auditor's report disclosed) for "private ditch condemned." Jesse Smith, a defense witness, had testified that Dan McClure caused a fence to be built "down the middle of the lake between the old Dryden place and the Candler place," but McClure did not keep the fence in repair; that McClure "probably" took down a part of it in 1921—"it seems like some of it was taken down [but] I don't remember about that."

Appellant's abstract mentions the testimony of Eben McClure, Dan's son, found at pages 138-52, 195-98, and 314-16. There is no abstract of McClure's direct testimony on recall. As part of the examination the question was asked, "Do you know . . . . that any part of the fence in the middle of the lake was taken down in 1921?" A. "No, sir. . . . Calvin Davis and I worked the Dryden place in 1922 and I did not notice that any part of the fence had been taken down then."

In treating this testimony as unimportant for abstract purposes, appellants discuss testimony by Eben that followed immediately on cross-examination, emphasizing the part seemingly favorable, but omitting explanatory comments that the trial Court no doubt considered. The abstract shows that the witness testified that the middle of the ditch was considered the center of the line except at the "far end" where [the ditch?] got over. There was a narrow place in the lake, "and [the line] got a little farther on the land Mrs. Person owned on the opposite side of the lake." But this is not all of the answer made by the witness, who went on to say that the line, after encroaching on Mrs. Person's property, "dwindled out into a big wide basin on the far end. There it got on the southeast corner of the Dryden place and the northeast corner of the Candler place. From there on the lake went out and curved; one part went on the Person place about where the line of the Dryden place is, and the other—it came in the little narrow place."

While being cross-examined on recall the witness was again asked if he noticed that any of the fence had been taken down. The answer is copied in 19 typewritten lines of the bill of exceptions, not abstracted.[3] The transcript shows that when McClure gave the lengthy answer printed in the margin (footnote No. 3) Mr. Person said, "I think you are mistaken about it. I believe you are thinking about the old fence. The Negroes pasturing the cows built it." Answer by the witness: "I am not mistaken. I know about that particular fence. If there is any question about a fence, *that* is the only one I know anything about. Unless you have cleared [the land] in

[3] Question: "Did you notice any of the fence taken down?"

A. "[Mr. Person], right where the six acres of land were [my father's land between Dr. Candler], you know it came from the cutoff from due west to that north part of the line where the Candler place—where it joined the cutoff. You know the Dryden land ran 'plumb across' some 50 yards south of the ditch. It went into the cutoff place, made a turn, then followed the south bank of the lake south of the ditch. I don't know how it got back to the center of the lake there. It followed that way until, I think, it hit the Dryden line. I tried to work that land from the slope of the bank down to the new barn. Some old Negroes lived there a long time. The road came out of a patch of sandy land. It is still there, north of the old house."

the last few years, there is a thicket . . . right in there where they pulled all the stumps on the south side of the lake—where all the cypress trees run into your field."

A great deal of testimony by other witnesses is not abstracted. We must therefore assume there was a basis for all factual matters necessary to the Court's determination, and that the decree in such respects is supported by a preponderance of the evidence.

Appellees' position is that the property claimed by Johnson was described in the pertinent conveyances as being north of Cypress Lake, and until Byrne as trustee executed his deed there had been no attempt to treat the Person property as a tract extending to the north bank of the lake. When Person testified that his deed showed "35.15 acres and the lake bed" the Court asked: "You say it would show that prior to the time Byrne conveyed the land? Prior to the time Byrne owned it [did the deeds] show the lake bed?" A. "No, sir."

Appellants summarize the record in this way: After L. K. Person acquired facts regarding the fence he spoke to Dr. Candler about it, making the point that it should not be maintained for seven years, and the Doctor took part of the fence down, probably in 1921. At that time Person informed Dr. Candler of his claim of ownership extending to the north bank of the lake. Person paid his mother's debt to the Joint Stock Land Bank, and in this deed the description went to the north lake shore. This occurred in 1935, and [said Mr. Person] "since that time my mother has been in legal possession, slightly—just the slight acts Jesse [Smith] talked about on the witness stand."

Appellees argue that the Cantley deed was a quitclaim. The language was, "grant, sell, and convey" and there was no warranty. When the deed was executed the Land Bank was mortgagee. Foreclosure was not begun for nearly six months. Considerable acreage other than that purchased by Mrs. Person was included in what is termed the Smith and Blocker mortgage. It embraced

the land later acquired by Johnson. Person argues that because conditions of the trust deed had been broken, thus giving to the holder of the security the legal right to sell under power conferred by the instrument, it was immaterial that the receiver sold privately to Mrs. C. W. Person, for the private grantee acquired all interest the mortgagee took under the subsequent foreclosure. So, says Person, "the Court will presume that was done that should have been done, [therefore] insofar as appellees are concerned the sale was regular and valid."

We quite agree that the sale was valid and that it conveyed any equity the Land Bank then had, but it does not follow that any of the parties had in mind an obvious invasion of riparian rights. While the expression "to the north bank of Cypress Lake" circumscribed the boundary, the law extended Johnson's property to the center of any non-navigable waters touched by the land itself when the dispute relates to ownership by a proprietor on the opposite shore. *Gill* v. *Hedgecock,* 207 Ark. 1079, 184 S. W. 2d 262.

Until a comparatively recent period the lowlands of this area were not thought of in terms of appreciable value. The drainage ditch, while serving private purposes, was a statutory undertaking and its construction would not alone have the effect of marking individual property rights. But the Chancellor had evidence from which it could be found that the fence was a recognized partition, irrespective of testimony that in some places it had been torn down and that at other points maintenance was not observed. *Gregory* v. *Jones,* 212 Ark. 443, 206 S. W. 2d 18. The Chancellor did not think either side had established adverse possession. The Court appears to have predicated the decree on a belief that there was an agreed boundary, and that the trustee's deed —assuming it undertook to extend the southern proprietor's rights to the north bank of the lake—was not treated in that sense, possession remaining as fixed by law.

Appellants complain of the Chancellor's finding that the fence was built and maintained by tenants of Mrs.

C. W. Person. There was testimony to that effect, but whether it preponderated, or whether treated as a mere circumstance, is not controlling. This is true because, without an appropriate abstract of testimony, there is a presumption that the evidence sustained particular findings. From this Court's standpoint Mr. Person is not to be criticized for his abbreviated abstract. He had a right to select what to him appeared to be the substance of what all of the witnesses testified to; but, if in taking this course he passed on to this Court the presumptions attaching to the decree with its necessary implications, there can be no just complaint that we have not waived our rules, thereby assisting a litigant who expressly asserted reliance on the abstract after attention had been directed to its incompleteness.

To avoid effect of the partition decree of 1895 there must have been an appeal, a statutory proceeding to set the order aside, a timely bill of review, or a showing in the collateral attack here made that the Court was without power to act in respect of the subject-matter or parties. Failure, in the action relied upon, to show that deeds were executed, cannot prove fatal where rights of innocent purchasers are not the issue. A case in point is *Graham* v. *Graham,* 199 Ark. 165, 133 S. W. 2d 627. It was there held that if a court having jurisdiction rendered a decree requiring execution of a deed, the deed—insofar as rights of the parties are concerned—is unimportant; for, said Judge MEHAFFY, "[if the appellant Graham] was directed by the Court to deed the property to Mattie Graham, and there was no timely appeal from such order, title would vest without further formality, the deed being only the evidence or muniment of what had been done." [See Ark. Stats., §§ 29-126, 29-127, and 29-128; Leflar, Conflict of Laws, § 25.]

Time strengthens presumptions that a judgment or decree is valid. *Parsley* v. *Ussery,* 198 Ark. 910, 132 S. W. 2d 1. A decree confirming the commissioners' report in a partition proceeding is final. *Robertson* v. *Cunningham,* 207 Ark. 76, 178 S. W. 2d 1014. Analogous is the holding in *Dumas* v. *Owen,* 210 Ark. 505, 196 S. W.

2d 987, where effect of the confirmation of the report of a judicial sale is discussed. Confirmation, it is said, concludes any issue that might have been raised.

In the case at bar predecessors in title of the interested parties here filed their exceptions, procured an amended report, then agreed that the Court should partition. When the exact land was described in respect of each litigant, with the judicial direction that it become property of the several petitioners, respondents, and exceptors, this was binding upon them and their subsequent grantees.

A case that at first glance appears contrary to our holding here is *Kilgo* v. *Cook,* 174 Ark. 432, 295 S. W. 355. Kilgo was the owner of 12 acres in the bed of War Eagle Creek except two or three acres that had formerly contained a mill. The mill was destroyed and other structures were erected. The original government survey did not take notice of the creek, but included all of the area as land. Cook owned 30 acres east of War Eagle, his western boundary being the east bank of the stream. The acreage contended for by Kilgo was described in his deed, with certain measurements reading, ". . . thence east across War Eagle Creek to the east bank of same," etc.

In the opinion written by the late Judge McHaney it was held that Cook was not a riparian owner. It was then said: "Of course if appellee was a riparian owner on an unsurveyed or a meandered non-navigable stream he would take title to the middle or thread of the stream." There was added the further statement that "It [is] a proposition of law, well settled by the former decisions of this Court, that owners of land bordering on a non-navigable stream or lake, where the government survey meandered the boundary lines thereof, making fractional sections along the bed or shoreline of such stream or lake, such owners acquire title to the middle or thread of such lake or stream." The case is cited by Jones on Titles, § 349.

In the instant case there are fractional surveys and Cypress Lake was meandered, distinguishing the facts from *Kilgo* v. *Cook.*

When the decree had gone against the defendants they undertook to procure a new trial by bill of review, alleging false testimony, the discovery of certain records, etc. We do not think there was an abuse of judicial discretion in denying the petition.

Affirmed.

ASHLEY *v.* GARRETT.

4-9311 234 S. W. 2d 513

Opinion delivered December 11, 1950.

O. A. Featherston, for appellant.

Alfred Featherston, for appellee.

MINOR W. MILLWEE, Justice. Racia A. A. Ashley died intestate in Pike County in 1927 survived by his widow and seven children. At the time of his death, Ashley owned and resided upon 120 acres of land which he homesteaded in 1895. After his death, Ashley's widow and a son, Charlie Ashley, lived on the place until her death in 1937. In consideration of services rendered by Charlie in caring for their mother, the other six heirs in March, 1941, deeded to him 38 acres of the land, including the farm residence where Charlie has since resided. At the same time six of the heirs also conveyed 12 acres of the 120 acre tract to Elvia Wright, one of Ashley's daughters. Charlie Ashley and Elvia Wright in turn conveyed their interest in the remaining 70 acres to the other five heirs.

In July, 1941, a deed was drafted for the conveyance of the interests of four of the heirs in the remaining 70 acres to E. L. Ashley, owner of the other undivided one-fifth interest. This deed was signed and acknowledged by two heirs in July, 1941, and by another in August, 1942. Appellee, Artie Garrett, another daughter of Racia A. A. Ashley, deceased, refused to join in this deed, which was never placed of record.

E. L. Ashley died in 1948 survived by his widow, Eula Ashley, and eight children. After her husband's death, Eula Ashley moved on the 38 acre tract deeded to Charlie Ashley. Since 1941 E. L. Ashley and his widow and heirs have, at times, cultivated small parts of the 70 acre tract and paid the taxes thereon. None of the parties have ever actually resided on the 70 acres.

Appellee filed this suit against the other Ashley heirs praying for partition and sale of the 70 acre tract. There was also a prayer for an accounting of personal property belonging to the Ashley estate, but this feature of the suit was apparently abandoned.

Appellants defended solely on the ground that they had made a settlement with appellee which she accepted in full accord and satisfaction of her entire interest in her father's estate.

The chancellor found appellee to be the owner of an undivided one-fifth interest, and the widow and heirs of E. L. Ashley, deceased, the owners of an undivided four-fifths interest, in the 70 acre tract. A decree was entered ordering partition and sale of the lands and directing a division of the net sale proceeds in accordance with the adjudicated interests of the parties.

The testimony is in sharp dispute in regard to an alleged agreement by appellee to join with three other heirs in a deed of their respective interests in the 70 acre tract to E. L. Ashley. When the other deeds were executed in March, 1941, there was some discussion of this proposal. At that time appellee resided in Nevada County and had not been on the lands for several years. She testified that she then agreed to join in a deed to E. L. Ashley with the understanding that the timber would be sold from the whole 120 acre tract and the sale proceeds divided equally among the four heirs joining in such deed. She also stated that this agreement was made in reliance upon representations by some of the appellants that her share of such timber sales would amount to more than $500. Appellants' version of the agreement was that appellee was to sign the deed for one-fourth the proceeds of a sale of timber from the 70 acre tract.

In April or May, 1941, one of the appellants mailed to appellee, from Hot Springs, Arkansas, a money order for $16 which appellee cashed. According to appellants the $16 payment represented one-fourth of the proceeds of the sale of the timber off the 70 acre tract. Appellee refused to sign a deed subsequently presented upon being informed that the $16 payment was all that she was to receive from the sale of timber.

Appellants cite the case of *Barham* v. *Bank of Delight,* 94 Ark. 158, 126 S. W. 394, 27 L. R. A., N. S., 439, in support of their contention that appellee accepted the $16

money order in full settlement of her interest in her father's estate and was thereby estopped from thereafter claiming such interest. In that case the court held (Headnote 1): "Where a check is given in satisfaction of a disputed claim, and recites on its face that it is a payment in full, its acceptance constitutes an accord and satisfaction, although the creditor protests at the time that it is not all that is due him." The money order cashed by appellee in the case at bar did not recite that it was in full payment of her claim to the land. As owner of an undivided interest in the 70 acre tract, appellee was already entitled to one-fifth of the proceeds of any timber sales from said land. According to her testimony, she was to receive one-fourth of the timber sales from the entire 120 acre tract and did not accept the money order as full payment for her interest in the 70 acres. The chancellor's finding in appellee's favor on this issue is in accord with the well-established rule that evidence to support a parol contract to convey land must be clear, satisfactory and convincing. *Walk* v. *Barrett,* 177 Ark. 265, 6 S. W. 2d 310. The evidence on behalf of appellants does not measure up to this rule.

It is also contended that appellee was barred by laches from maintaining the instant suit. Appellants did not plead laches as a defense nor did they plead or claim adverse possession of the lands for the statutory period. Upon execution of the several deeds in 1941 and 1942, appellee and her brother, E. L. Ashley, became co-tenants of the 70 acre tract. In proceedings involving co-tenancy in real property the rule in this state is that, as between co-tenants, the possession of one is the possession of all unless there has been an actual ouster or the possession be hostile to the rights of the others. *Cannon* v. *Stevens,* 88 Ark. 610, 115 S. W. 388. It is, therefore, not essential that the plaintiff be in actual possession in order to maintain a suit for partition of lands among parties owning the same as tenants in common. Since it is neither contended nor shown that the possession of E. L. Ashley and his widow and heirs was adverse or hostile to appellee, she had constructive pos-

session of the lands when the suit was instituted and was not barred by laches from asserting her right to partition. *Cocks* v. *Simmons,* 55 Ark. 104, 17 S. W. 594; *Hill* v. *Cherokee Construction Co.,* 99 Ark. 84, 137 S. W. 553; 47 C. J. Partition, § 227.

The decree is affirmed.

BIRNSTILL *v.* BIRNSTILL.

4-9344 234 S. W. 2d 757

Opinion delivered December 18, 1950.

Marvin A. Hathcoat, for appellant.

John H. Shouse, for appellee.

HOLT, J. April 29, 1950, appellee, H. Fred Birnstill, sued for, and on the same day procured, a decree of divorce from appellant on the ground of separation for three years without cohabitation and the only issues presented, says appellant, are: "Whether the plaintiff (appellee), at the time, had been a resident of the State

of Arkansas for the length of time required by law, and the question of the property rights between the parties."

—1—

The preponderance, if not all, of the evidence shows that appellee moved from New York and established his home on a small tract of land (approximately ten acres) near Omaha, on January 9, 1950. He has lived on the property since and intends to make it his permanent home. He had purchased it about six years before. We hold that appellee had established residence requirements in accordance with the first subdivision of § 34-1208 Ark. Stats. (1947), which requires residence of three months next before the decree and two months next before the commencement of the suit.

—2—

As to the property rights. The decree recites: "It is . . . decreed . . . that plaintiff (appellee) pay defendant the sum of $60, payable $10 on May 1, 1950, and a like sum on the first day of each succeeding month until said amount is paid; that plaintiff pay all costs of this action including a $100 fee to attorney for defendant, said $100 to be paid not later than December 31, 1950."

The court, in effect, directed a lump sum payment of $60 (payable in six monthly installments of $10 each) as alimony and in so doing, went beyond his authority. The rule was announced by this court in the early case of *Brown* v. *Brown,* 38 Ark. 324, where it was held: (Headnote 6) "The court should not decree absolutely a certain and specific sum of money as alimony. Alimony is not a sum of money, nor a specific proportion of the husband's estate given absolutely to the wife, but is a continuous allotment of sums, payable at regular intervals, for her support from year to year, and continues only during the joint lives of the parties, or, in case of divorce from the bonds of matrimony, until the wife marries again, and should be a reasonable and certain sum, having in regard her state and condition in life, and the estate and income

of her husband, and be payable at stated and proper times."

The amount of such allowance is always in the sound discretion of the trial court.

The record reflects that the parties here were each 65 years of age at the time of the divorce and had been married since 1913. They separated in 1943. They had a daughter engaged in teaching (for about 15 years) in Buffalo, New York, and it appears that she is able and willing to care for her mother. The daughter owns her own home (7 rooms, modern and free of debt). Appellant lives with her and is absolutely dependent upon her for support. The daughter rents the two upstairs rooms in her home.

The appellee suffered amputation of his right arm (at the shoulder) about 45 years ago, and some 15 years ago fell and so injured his left arm as to render it practically useless. He has a housekeeper to whom he paid $40 per month. On being questioned by the court, he testified: "Your left arm was crippled. You say this lady who is now in the courtroom is your housekeeper? A. Yes, sir. COURT: Is it necessary that you have a housekeeper? A. It is absolutely necessary. I can't even take care of myself properly."

Appellee's home is worth approximately $1,000. He also owns a two-room house on leased land from the Missouri Pacific Railroad Company, for which he paid $100, and has been renting for $10 per month. He has no other property, but receives a pension of $85 per month.

In these circumstances, we hold that the error in the decree may be corrected by modification here, directing appellee to pay to appellant permanent alimony in the amount of $10 per month, these payments to continue subject to any future changed conditions or circumstances affecting the parties in interest.

"While a decree fixing alimony and maintenance for the support of the wife limits and defines the extent of the husband's obligation in that respect, it is always subject to modification by the court to meet the changed

situation and condition of the parties in interest, and may be increased or decreased as necessity requires," *Pledger* v. *Pledger,* 199 Ark. 604, 135 S. W. 2d 851, (Headnote 3).

With the above modification, the decree is affirmed.

HANDFORD *v.* HANDFORD.

4-9332 234 S. W. 2d 764

Opinion delivered December 18, 1950.

Chas. F. Cole, for appellant.

J. J. McCaleb, for appellee.

GEORGE ROSE SMITH, J. This suit arises out of a contract by which the appellee, Foster Handford, sold a sign business, including fixtures, supplies, equipment,

and good will, to his brother Charles, the principal appellant. Charles paid $10,000 in cash and gave notes for the balance of $6,000. This action was brought by Foster to obtain judgment on the notes and to foreclose a chattel mortgage on the assets of the business. In his answer Charles asked damages in the sum of $5,000 for violations of a clause in the contract by which Foster had agreed not to engage directly or indirectly in the sign business for a period of five years in ten specified counties. The chancellor fixed the damages at $100, credited that amount on the debt, and ordered foreclosure unless the balance were paid before the next day of court, an interval of about a month.

The evidence supports the chancellor's finding that Foster breached his contract "to some extent." Foster had owned sign shops in Batesville and Harrison. He sold the former to Charles and several months later sold the latter to four of his employees at Harrison, giving them permission to continue to use the name Foster Handford Sign Shop. The purchasers of the Harrison concern are shown to have made two sales under their trade name in the territory denied to Foster under his contract with his brother. It was also shown that Foster was bound to maintain certain signs for former customers and employed some one other than Charles for part of this work. Foster testified that at first he turned some of this work over to Charles, but he was dilatory in looking after it and charged more than Foster considered reasonable. It is not contended that Foster received any additional compensation for carrying out his maintenance contracts.

The appellant's chief insistence is that the trial court should have canceled the notes for fraud in their procurement. The answer asserted that Foster's violations of his contract constituted fraud, but there was no proof of anything except the isolated breaches that we have mentioned. The mere fact that a party to a contract subsequently violates one of its provisions does not necessarily prove that he executed the agreement with such a fraudulent intent as to warrant rescission. The burden was on Charles to prove the charge of fraud, and circumstances

consistent with an honest intent are not enough. *Stuttgart Rice Mill Co.* v. *Lockridge,* 185 Ark. 340, 47 S. W. 2d 596. The chancellor expressly found that Foster did not act in bad faith, and the preponderance of the testimony supports this conclusion.

There being no right to rescission, the remedies available to Charles are upon the contract. In cases of this kind the usual remedy is an action for damages to compensate past violations and for an injunction against future ones. *Bledsoe* v. *Carpenter,* 160 Ark. 349, 254 S. W. 677. In the present case there has been no request for injunctive relief.

The purchaser is entitled to such damages as will reasonably compensate him for the loss occasioned by the seller's violation of the agreement. *Culp Bros. Piano Co.* v. *Moore,* 162 Ark. 292, 258 S. W. 326. In that case we approved an instruction fixing the damages as the difference between the worth of the business in view of the seller's breach of contract and its worth had there been no breach. In the case at bar no testimony was offered touching upon this method of computing damages.

In the *Bledsoe* case, *supra,* we adverted to the amount of business lost by the vendee as a basis for measuring his right of recovery. This is the only yardstick that the chancellor could have applied on the record in this case. There was testimony, not contradicted, that the total profit made on the two sales made by Foster's successors at Harrison was only $65. Even if we assume that Foster should have employed Charles for the maintenance work there is nothing to show its monetary value, except Charles' testimony that he was offered $60 but considered it a $125 job. In these circumstances we cannot say that the chancellor's allowance of $100 as compensatory damages was error.

Affirmed.

FEAZELL *v.* SUMMERS.

4-9331 234 S. W. 2d 765

Opinion delivered December 18, 1950.

[redacted]

Wright & Curlee, for appellant.

Nell Powell Wright, for appellee.

MINOR W. MILLWEE, Justice. Appellee, James Odus Summers, sustained a disabling injury to his right hand on February 9, 1948, while working as a driller's helper in the drilling of a water well near Mountain Home in Baxter County, Arkansas. Claim for compensation was in due time filed with the Workmen's Compensation Commission against appellant, W. T. Feazell, owner of the drilling rig.

After separate hearings before a special referee and the full commission, the latter found: "1. That on Feb-

ruary 9, 1948, the uninsured employer, W. T. Feazell, was carrying on an employment in the State of Arkansas in which five or more employees were regularly employed in the same business or establishment, thus making the said employer subject to the jurisdiction of the Arkansas Workmen's Compensation Law and the provisions thereof.

"2. That the claimant, James Odus Summers, was an employee of the said W. T. Feazell on February 9, 1948, at which time he sustained an injury to his right hand, from which he was temporarily totally disabled to March 17, 1948, following which he was partially disabled to August 9, 1948, the said injury resulting in a 45 percent permanent partial disability to the right hand."

The commission issued an award which recites: "The respondent will pay to the claimant compensation at the rate of $20 per week from February 9, 1948, to March 17, 1948, and shall further pay to the claimant compensation at the rate of 65 per cent of the difference between the claimant's pre-injury weekly wage and his earnings between the period March 17, 1948, and August 9, 1948, following which compensation at the rate of $20 per week shall be paid to the claimant for 67½ weeks, being compensation for a 45 percent permanent partial disability to the right hand."

On appeal to the Baxter Circuit Court the findings and award of the commission were affirmed.

For reversal appellant contends that he was not subject to the provisions of the Workmen's Compensation Act at the time of the injury, (1) because he was not an employer of five or more employees as provided in the act, and (2) because appellee was an independent contractor. Under our well-established rule the findings of fact made by the commission will on appeal be given the same finality as the verdict of a jury and be affirmed, if there is sufficient competent testimony to support such findings. *Brooks* v. *Claywell,* 215 Ark. 913, 224 S. W. 2d 37.

The evidence on behalf of appellee tends to establish the following facts: Appellant resides at Mountain Home, Arkansas, where he has been engaged in the well drilling business for the past 12 or 13 years. He owns three drilling rigs each of which is operated by two men, a driller and his helper. The state line between Missouri and Arkansas is the northern boundary of Baxter County. While appellant's principal operations have been carried on in Baxter County, where the men operating the rigs also reside, he has at times engaged in drilling operations across the state line in Missouri. In August and September, 1947, the three rigs were being operated in Arkansas with six, and at times eight, men being employed. In October, 1947, appellant contracted to drill some wells for the Federal Government across the line in Missouri where two of the rigs were in operation at the time of appellee's injury in February, 1948. These rigs were moved back to locations in Baxter County, Arkansas, in the spring of 1948 where they were being operated at the time of the hearing before the commission.

Appellant paid the operators of the rigs an hourly wage prior to December, 1947, when he began paying appellee 45c, and the driller 55c, per foot for the number of feet drilled, with appellant furnishing the oil and grease and appellee and the driller furnishing the gasoline used in the drilling operation. Appellant also furnished the materials and parts for all repairs which were made by the operators. This arrangement was in effect at the time of appellee's injury while drilling a well for Loyd Byler in Baxter County. Appellant made the contract with Byler who paid appellant for the well and the latter in turn paid appellee and the driller by checks bearing the notation, "For Wages." This practice was usually followed on other jobs, but at times payment would be made to the driller who in turn paid his helper and the appellant.

At the time of appellee's injury the workmen in Missouri were being paid by the hour, but shortly thereafter this method was changed to a footage basis. On

other operations in both Arkansas and Missouri the workmen were paid hourly wages on some jobs and on a footage basis on others. Under either arrangement appellant had the right to terminate the employment at any time and the workmen could quit any time they chose. The operators were experienced workmen and very little supervision concerning the hours worked and the manner of drilling was necessary. Appellant exercised the same manner of control over the work when the men were paid on a footage basis as when they were paid by the hour.

There is some conflict in the testimony regarding the method of operation after December, 1947. Appellant testified that after that date he orally leased the rigs to the operators and received rentals from them on a footage basis, for use of the machinery. He was "not positive" but did not "believe" that he had ever had as many as 5 men working for him in Arkansas. This testimony was contradicted by the evidence on behalf of appellee as hereinbefore set out.

Ark. Stats. § 81-1302(c) which was in effect at the time of appellee's injury provides: " 'Employment' means every employment carried on in the State in which five (5) or more employees are regularly employed in the same business or establishment . . ."[1] It is insisted by appellant that, since two of his drilling rigs had been operating in Missouri for three months at the time of appellee's injury, the four operators of these rigs could not be counted in determining whether appellant regularly employed the necessary number of employees to bring him within the act's provisions. Because of different wording used in the compensation acts of the various states, there is little authority directly in point on the precise question. In *Palle* v. *State Industrial Commission,* 79 Utah 47, 7 Pac. 2d 284, 81 A. L. R. 1222, the court was considering an act which made every employer subject thereto, "that has in service three or

[1] This section was amended by Initiated Act No. 4 of 1948, which did not become effective until December 3, 1948. The amended section appears under the same section number in the 1949 cumulative pocket supplement to Vol. 7 of Ark. Stats.

more workmen or operators regularly employed in the same business . . ." The court held that in determining whether the requisite number of workmen was employed to subject the employer to the compensation act, it was immaterial that some of the men were working on a job at another place so long as all of them were doing work connected with the employer's business.

In *Elsas* v. *Montgomery Elevator Co.,* 330 Mo. 596, 50 S. W. 2d 130, and *McFall* v. *Barton-Mansfield Co.,* 330 Mo. 110, 61 S. W. 2d 911, the Missouri court held that employees outside the state may be included in determining the number employed by an employer under a provision which made no specific reference to place of employment. See, also, *Vantrease* v. *Smith,* 143 Tenn. 254, 227 S. W. 1023; *Republic Supply Co.* v. *Davis,* 159 Okla. 21, 14 Pac. 2d 222; 71 C. J., Workmen's Compensation Acts, § 134; 58 Am. Jur. Workmen's Compensation § 87.

It is undisputed that appellant's business of well drilling has at all times been centered in Baxter County, Arkansas. The very nature of the business required that his drilling rigs be operated at different locations. All of the operations, wherever conducted, were in furtherance of, and supervised from, the business in this state. We think the evidence was sufficient to warrant a finding by the commission that appellant's primary operations were in Arkansas and that the "employment" did not cease to be "carried on in the State," within the meaning of our statute, by reason of the Missouri operations which were only temporary and incidental to the principal business and employment in this state. Certainly the evidence warrants the conclusion that appellant was subject to the act when the two rigs were moved to Missouri in October, 1947, and after they were returned to Arkansas in the spring of 1948. It would be placing a narrow and restricted construction upon the act to say that the transient operations in Missouri in the *interim* destroyed the continuity of the employment relationship.

We are also of the opinion that there was sufficient evidence to sustain the commission's finding that ap-

pellee was an employee of appellant at the time of his injury. The case of *Irvan* v. *Bounds,* 205 Ark. 752, 170 S. W. 2d 674, involved the question of whether a workman engaged in the digging of a well for a stated sum per foot was an employee or an independent contractor within the meaning of our compensation act. This court upheld the commission's finding that he was an employee under facts somewhat similar to those in the instant case. It was there stated that no hard and fast rule for determining the relationship in every case could be laid down and that each case must necessarily be governed by its own peculiar facts. In that case we also held that in determining the relationship, the compensation act is to be given a liberal construction in favor of the workman and any doubt is to be resolved in favor of his status as an employee, rather than an independent contractor. See, also, *Parker Stave Co.* v. *Hines,* 209 Ark. 438, 190 S. W. 2d 620.

The fact that appellant furnished the machinery and tools for the work, that he had the right to terminate the services of appellee at will, and that appellee was paid "for wages" whether payment was by the hour or upon a footage basis, are all circumstances strongly indicating the employer-employee relationship. *Irvan* v. *Bounds, supra.* None of these factors alone may be said to be absolutely determinative of appellee's status, but all are important as bearing on the primary issue of the control reserved by appellant over appellee and his work. The evidence as a whole is sufficient to sustain the commission's finding that the control reserved by appellant over appellee and his work was incompatible with the relationship of employer and independent contractor and consistent with that of master and servant.

Appellant also insists that, even though he be held subject to the compensation act, the commission was not warranted in awarding appellee compensation at the rate of 65 percent of the difference between his pre-injury weekly wage and his earnings between March 17, 1948, and August 9, 1948, because there is no showing that appellee received less wages during the last mentioned

period than he was receiving prior to his injury. It is true that the evidence does not disclose the earnings of appellee between the dates specified. In reference to this differential the commission found: "This amount has not been clearly established by the evidence and will have to be ascertained by agreement of the parties hereto, if possible, or information submitted to the Commission for further direction." There is no contention that the commission was without power to make this direction. If it has not already been complied with, we can see no valid reason why it may not yet be done.

The judgment of the circuit court sustaining the order of the Workmen's Compensation Commission is affirmed.

GRAY *v.* CAMERON.

4-9326 234 S. W. 2d 769

Opinion delivered December 18, 1950.

Rehearing denied January 15, 1951.

Crumpler & Eckert, for appellant.

McKay, McKay & Anderson, for appellee.

GRIFFIN SMITH, Chief Justice. In 1944 A. A. Cameron leased from R. E. Thomas and his wife 35 acres on the north edge of the Haynesville oil field in Columbia

county. When Thomas died in 1945 his wife acquired by will the interest her husband had in the property. She married again and is now Martha Gray, the appellant.

In December, 1942, the Arkansas Oil and Gas Commission limited drilling in this field to a well to eighty acres, to be within 100 feet of the center of a north-south drilling unit. To meet this requirement as to some of the land affected by leases in litigation here it was necessary to unitize. An agreement to this effect was executed April 29, 1946. The operational area is designated as the Reed-Biddle Unit. Thomas had owned forty acres when the Cameron lease was consummated, but five acres in the southeast corner had been leased to another.

A producing well, or "pumper," was completed on the unitized 80. Since other acreage in the drilling tract is not involved in this suit we mention only the matters affecting appellant's claimed rights.

Only 8.81 acres of the Thomas-Cameron lease became a part of the Reed-Biddle Unit for the purpose of apportioning production. This left 26.19 acres of the leased 35 beyond the unitized boundary; but, as the proof shows, subject in some slight degree to distant drainage into the producing well, accountable oil came from the 80 acres. Payment was in proportion to the acreage or other interest each participant's contribution bore to the whole. Result is that appellant is compensated in the proportion 8.81 bears to 80, with no allowance for the non-included area of 26.19 acres.

Mrs. Gray sued in January, 1950, to cancel that part of the lease not within the 80 acres, and for $20,000 as damages. The Chancellor found that the unitization agreement, in consequence of which the producing well was drilled, supplemented the 1944 lease and expressly retained control of the acreage in dispute.

The original lease was executed with knowledge that rules of the Oil and Gas Commission did not allow drilling on the grant, for there is the provision that the acreage might be merged with adjoining tracts sufficient to constitute a drilling unit. In that event the lessor would

share ratably in the royalty payments applicable to the entire unit "in the proportion which the acreage in the tract herein conveyed bears to the entire acreage contained in the drilling unit."

If this were all there would be substance to a claim that appellant should share in production from the 80 acres under a 35-80 ratio. But it is not all. Others owning leases or royalties in this area—a field thought by experts most likely to produce oil and gas in paying quantities—joined with appellant in unitization. The agreement was in response to proposals by Skelly Oil Company and others. The unitization agreement recites ownership of the 26.19 lease and the interests of others. There is reference to Blain Dunbar's ownership "of a certain oil and gas lease dated May 12, 1944, [the Thomas-Cameron transaction] covering, among other lands, [the south 13.81 acres less five acres formerly sold] which lease was duly recorded," etc.

The unitization contract affecting leases, royalties, and overriding royalties, provides that operations carried on [in good faith] or continued production shall prevent lease forfeitures, irrespective of *where* on the 80 acres the primary undertaking occurs. The language is: "Drilling or production shall be taken and accepted as drilling, producing, and lease operations under the terms of each and all of the oil and gas leases referred to above, and such operations . . . on any part [of the unitized area] shall have the same effect as if such operations . . . had been done on, or such production obtained from, each and all of the tracts in said communitized area, to the end that such operations . . . shall continue all of said oil and gas leases above mentioned in full force . . . as to all of the lands covered by this communitization agreement, and as to all of the other lands covered by any and all of said leases so long as there may be . . . production on the communitized area."

The effect of this agreement is twofold. It provides that "operations for drilling"—a term no doubt

well understood in the oil fields—or [actual] drilling or production on any of the unitized area shall continue the leases as to acreage within the unit; but, secondly, the leases shall continue "as to all other lands," etc.

The testimony and stipulated facts may be briefly summarized. A professional lease buyer would pay $35 per acre ($916.65) for a lease on the outside land. A geologist whose competency was conceded could not say, with a fair degree of certainty, how much oil was being drained from the subject acreage.

Production comes from the upper petit lime at a depth of 5,608 to 5,622 feet. The producing well cost $50,000 and the yield lacked $24,000 of having reimbursed those who financed the venture. Pump production had averaged 14 barrels a day with prices ranging from $1.20 to $2.40. The well is separated from appellant's land "by a forty," but drilling was not in the exact center of the 80-acre tract.

Appellees argue that with production gradually dwindling (estimating current pipeline deliveries at twelve barrels per day as distinguished from the 1946-'49 average), the half of an eighth royalty appellant owns in the subject matter would amount to about 64c per day if oil sold at $2.60 a barrel. It is stipulated that a geologist familiar with the Haynesville field would testify that a prudent person would not drill to the petit lime as a north offset to the Reed-Biddle Unit.

It is not convincingly shown that damages should have been awarded for failure to develop. Under rules of the Oil and Gas Commission a well could not be put down on the small tract, and nothing in extenuation is shown.

In *Ezzell* v. *Oil Associates, Inc.,* 180 Ark. 802, 22 S. W. 2d 1015, it is said that the forfeiture of a lease will be allowed when that course is supported by the principles of equity and such relief is essential to the public and private interests in the development of mineral lands, "and where such forfeiture does not contravene plain and unambiguous stipulations in the lease."

The lease form used in the Thomas-Cameron transaction, known as Form No. 88, was discussed in *Poindexter* v. *Lion Oil Refining Co.,* 205 Ark. 978, 167 S. W. 2d 492. Ezell's case was cited, where the area in controversy involved 1,170 acres. In addition to the contractual feature of the case at bar, facts in the Poindexter litigation differ from those here. Poindexter demanded that offset wells be drilled when it became evident that large production from adjacent properties was causing substantial drainage. In the field where Poindexter had interests rules permitted a well to each forty acres. The defendant there very frankly admitted that it wanted to hold the lease in the hope that some other operator would discover oil by drilling to an unknown formation. If a speculative venture of this kind showed that the plaintiff's lands should be drilled, there would be a fair chance of profit. Production from the operating wells was large compared with production from the unitized 80 here. The opinion says:

"Oil has been and is now produced in more than paying quantities upon the land immediately adjoining the leased premises, the wells being as close to it as the rules of the commission will permit. The probability of substantial drainage has been proved. . . . There is no comparison . . . between the amount of royalties the lessor would receive in the event there was production and the mere pittance which he is entitled to as delay rentals."

But even in the Poindexter case the defendant was allowed six months within which to begin drilling on the disputed acreage as an alternative to cancellation.

Should it be conceded—a matter we do not decide—that ambiguous language characterizes some parts of the unitization agreement, the overall purpose was to guarantee a well for the benefit of all whose acreage was involved. It is not suggested that fraud or undue influence was exerted or that anyone was overreached; there-

fore we cannot read out of the final contract "all of the other lands covered by any and all of said leases."

Affirmed.

Mr. Justice GEORGE ROSE SMITH dissents.

MASON *v.* JARRETT.

4-9307 234 S. W. 2d 771

Opinion delivered December 18, 1950.

Claude F. Cooper, for appellant.

Percy A. Wright and *Ed B. Cook,* for appellee.

ED. F. MCFADDIN, Justice. This is an appeal by the defendants (Mason and Wright) seeking to reverse a judgment rendered against them in an action of ejectment.

In June, 1949, appellee, as plaintiff, filed this action, claiming to be the owner and entitled to the possession of "all that part of the *Northeast Quarter* of section 23.[1] . . . lying north of the drainage canal in . . . Mississippi County, Arkansas." He alleged that he ac-

[1] Italics our own. We have omitted the Township and Range and other portions of the description not in issue.

quired title by duly recorded deed from Z. B. Harrison, dated March 13, 1943, and that the defendants had wrongfully held possession since February, 1948. The defendants, being duly summoned, filed a pleading entitled "Demurrer," asserting that the plaintiff had failed to file any muniments of title. This pleading does not appear to have been presented to the Court; but on January 3, 1950, plaintiff filed an amended complaint, describing the land as being in the *Northwest* Quarter of section 23, instead of the *Northeast* Quarter, as stated in the original complaint. The plaintiff deraigned his title: (a) State to Z. B. Harrison; (b) Z. B. Harrison to plaintiff, by said deed of March 13, 1943; and (c) Z. B. Harrison to plaintiff by correction deed of July 23, 1949. The amended complaint also repeated the allegations as to plaintiff's right to possession and defendants' wrongful withholding.

After overruling defendants' motion to dismiss—subsequently to be discussed—the Court tried the case to a jury on January 27, 1950; and allowed the plaintiff to introduce in evidence his said correction deed of July 23, 1949—subsequently to be discussed. From a jury verdict and judgment for plaintiff, defendants bring this appeal.

I. *Motion to Dismiss.* Appellants claim that the Court erred in denying their motion to dismiss. They say that they were summoned to defend an action involving the *Northeast* Quarter of section 23, and that when plaintiff amended his complaint to describe the *Northwest* Quarter of section 23 he, in effect, commenced a new action, and they were entitled to be brought in by a new process. We hold that the trial court ruled correctly in denying the motion to dismiss.

Section 27-1160, Ark. Stats. (1947) says:

"The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleadings . . . by correcting a mistake in the name of a party, or a mistake in any other respect, . . ."

The amended complaint, insofar as a change of description from *Northeast Quarter* to *Northwest Quarter,* was merely the correction of a mistake. In *Smith* v. *Halliday,* (Ark.) 13 S. W. 1093,[2] there was involved an ejectment action in which the trial court had granted leave to plaintiff to correct a mistake in the description of the lands; and of such permission Mr. Justice HEMINGWAY said:

"That the court can, and in the exercise of its discretion should, grant such leave, it requires no argument to establish. Where the ends of justice require it, the amendment should be granted upon terms that will prevent surprise and injustice. . . . The amendment tendered no new issue but simply substituted a correct for an incorrect description of the property in controversy . . ."

In the case at bar the correction of the description resulted in no loss of rights to either side, so the Court correctly denied the motion to dismiss.

II. *The Deed of July 23, 1949.* After filing this action, plaintiff learned that his said deed of March 13, 1943, contained a misdescription of the lands, so he obtained a correction deed dated July 23, 1949, which correctly described the lands and also recited:

"This quitclaim deed is executed for the purpose of correcting a quitclaim deed executed by these same parties on the 13th day of March, 1943, in which deed the description set forth the NORTHEAST QUARTER when it should have been the NORTHWEST QUARTER of said Section, Township, and Range."

By formal pleading, and also seasonably in the course of the trial, the defendant objected to the introduction of the said correction deed. The trial court admitted the deed; and the appellants, in claiming error, rely on the well known rule: "A title acquired after the commencement of an action of ejectment will not

[2] The opinion is not contained in the Arkansas Reports, but may be found in the Southwestern Reporter. In Vol. 54, Page XII of the Arkansas Reports, this case is listed as one omitted from Vol. 53 of the Arkansas Reports.

support the action." The defendants argue that the plaintiff had no title until he obtained the correction deed. They cite and rely on *Percifull* v. *Platt,* 36 Ark. 456, and *Dickinson* v. *Thornton,* 65 Ark. 610, 47 S. W. 857, in each of which cases the plaintiff, after filing an action in ejectment, obtained, and attempted to assert, a title which he did not previously possess. Those cases enunciated and applied the well known rule, just stated: but in the case at bar we are not concerned with a *new title,* but with a *correction deed,* which is the confirmation of a title already possessed. A correction, or reformation, deed does *now* perfectly what was done *then* imperfectly. In 45 Am. Jur. 591,[3] in discussing the effect of a decree reforming an instrument, the rule is stated:

"Operation and Effect; Relation Back. Upon the reformation of an instrument, the general rule is that it relates back to, and takes effect from, the time of its original execution, especially as between the parties thereto and as to creditors at large and purchasers with notice. Accordingly, upon the correction by the court of a deed which defectively describes premises the equitable title to which is in the vendee, his legal title relates back to its execution and delivery."

In *Beckius* v. *Hahn,* 114 Neb. 371, 207 N. W. 515, 44 A. L. R. 73, the Supreme Court of Nebraska, in deciding that the effect of a reformation *deed*[4] was the same as that of a reformation *decree,* said:

"Certainly the parties may do voluntarily that which a court of equity would have compelled them to do. The parties, then, having voluntarily reformed the

[3] See also 53 C. J. 1055. An interesting case is that of *Stockley* v. *Cissna,* 119 Fed. 812, in which the Circuit Court of Appeals of the Sixth Circuit, in an opinion by Judge Lurton, held that a grant of land by the State of Tennessee related back to the date of the entry, and was sufficient to support an action of ejectment for the land granted, although such action was commenced during the time of the entry and before the date of the grant.

[4] In 18 C. J. 217 the holdings are summarized in this language:

"Where there is no fraud and the rights of third persons have not intervened, and equity could have reformed the deed, it may be amended by a subsequent instrument so as to effectuate the intention of the parties. This general rule applies to a mistake in the description, . . ."

deed, the effect is as though the original deed had expressed the intention of the parties."

To the same effect is the case of *Polk* v. *Carey*, 247 S. W. 568, in which one of the Texas Courts of Civil Appeals used this language in regard to a correction deed:

". . . the second deed, with its particular description of the land, conveyed, as between the parties thereto, related back and became effective as of the date of the first deed. A second deed can be looked to in aid of a description given in a prior deed."

So, in the case at bar, the plaintiff actually owned the lands involved—though under an incorrect description—before he filed this action; and the correction deed, when executed, related back[5] to the plaintiff's original deed of March 13, 1943, and was not a new or after-acquired title within the rule stated in *Percifull* v. *Platt (supra)* and *Dickinson* v. *Thornton (supra)*. Appellants' assignment is without merit.

III. *Sufficiency of the Evidence.* Finally, appellants say that there was no evidence that the lands involved were in the State of Arkansas. We find this contention to be without merit. The lands here involved, fronting 115 feet on the Highway, were situated north of a drainage ditch (called "State Line Ditch"), and south of the boundary line between the States of Arkansas and Missouri. The fact that the drainage ditch was called "State Line Ditch" caused some people to believe that it was, in fact, located on the State line. But it was shown that at the locality here involved the ditch was constructed 115 feet south of the State line. The Drainage District specifications, so stating, were in evidence; one of the workmen who constructed the ditch so testified; an engineer who surveyed the disputed lands so testified, and his plat is in the transcript. In short, there is abundant evidence to support the verdict to the effect that the lands are in Arkansas. Evidently the jury

[5] In 15 American Decisions 246, following the case of *Jackson* v. *Ramsay*, 3 Cowen 75, there is a splendid note on the "relating back" cases. See also *Laurissini* v. *Corquette*, 25 Miss. 177, 57 American Decisions 200.

accepted appellee's insistence that the defendants were "squatters" who, during high water, anchored a house boat on the bank of the drainage ditch, and then undertook to defend their possession, not by strength of title in themselves, but by attempting to find some flaw in plaintiff's title.

Affirmed.

BEATTY *v.* PILCHER.

4-9283 235 S. W. 2d 40

Opinion delivered December 18, 1950.

Rehearing denied January 22, 1951.

Bernard Whetstone, for appellant.

Surrey E. Gilliam, for appellee.

Ed. F. McFaddin, Justice. This is an appeal from a judgment based on a jury verdict awarding Mr. and Mrs. Pilcher (appellees) damages because of injuries which she sustained when a section of the seats collapsed at a performance of appellant's[1] circus in El Dorado in 1947.

Mrs. Pilcher, accompanied by her small son, went to the circus as a paying patron; and was assigned to a seat located five rows from the top in the reserved seat section. As other patrons took seats in that section, the platform boards—on which the chairs rested—began to make cracking and popping sounds. Patrons became apprehensive that the section might collapse, but the usher repeatedly assured them that it was safe. Relying on such assurances, Mrs. Pilcher remained in her seat; in a few minutes the section collapsed, and she received the injuries which caused this litigation. Her son was unharmed.

The appellant urges a number of grounds for reversal which we find unnecessary to discuss in detail. Briefly we mention:

(1)—The matter of the defendant having liability insurance slipped into the case by inadvertence when one witness was being questioned; but the trial court promptly cautioned the jury against consideration of such answer, and such caution by the Court eliminated the error. See *Neely* v. *Goldberg*, 195 Ark. 790, 114 S. W. 2d 455, and *Malco Theatres* v. *McLain*, 196 Ark. 188, 117 S. W. 2d 45.

(2)—The trial court did not abuse its discretion in limiting the defendant in the cross-examination of Dr. Murphy—when he was recalled—to the particular point

[1] Originally a number of parties were listed as defendants, but the only one remaining at the time of the trial below was Standard Circus Corporation. It is the only appellant here, but we have styled the opinion just as the attorneys had the case listed in the briefs.

on which the defendant had reserved the right to recall the doctor. See *Shinn* v. *State,* 150 Ark. 215, 234 S. W. 636, and *McCord* v. *Bailey,* 195 Ark. 862, 114 S. W. 2d 840.

(3)—The trial court did not abuse its discretion in refusing a new trial on the ground of alleged newly discovered evidence. See *Dickie* v. *Henderson,* 95 Ark. 78, 128 S. W. 561; *Citrus Products Co.* v. *Tankersley,* 185 Ark. 965, 50 S. W. 2d 582; and *Turner* v. *Richardson,* 188 Ark. 470, 65 S. W. 2d 1071.

(4)—The evidence was sufficient to support the verdict. It seems to be conceded (a) that the seats collapsed; (b) that Mrs. Pilcher, a paying guest, received injuries; and (c) that the usher gave assurances of safety. Mrs. Pilcher's contributory negligence was a question for the jury, as is hereinafter discussed. There was evidence from which the jury could have found that the defendant was negligent in locating the posts of the section—which collapsed—on soft ground that contained holes. One of the officials of the circus testified:

"... it so happened that the supports under the ones (planks) of the section where Mrs. Pilcher was sitting were set up directly over this soft dirt; and the support finally gave way when the section became filled and the end of the platform just settled down; and as it did this, it caused the platform to become uneven, and the chair in which Mrs. Pilcher was sitting to turn over. The afternoon[2] crowd possibly was not large enough in this particular section to cause the ground to give way."

Having disposed, rather summarily, of four of appellant's contentions, we come to the points that merit more extended discussion. These relate to instructions and the amount of the verdict.

I. *Instructions.* The appellant insists that the Court, in effect, told the jury that Mrs. Pilcher could not be guilty of contributory negligence if she relied on the usher's assurance that the seats were safe; and appellant claims that the jury should have been allowed to deter-

[2] Mrs. Pilcher was injured at the night performance, when the crowd was larger than that at the afternoon performance.

mine whether Mrs. Pilcher was guilty of contributory negligence in remaining in her seat, even after the assurance of safety had been given. Appellant says:

" . . . appellant's theory of the law relating to the subject is covered almost entirely by one Arkansas case (*Bulman Furniture Co.* v. *Schmuck,* 175 Ark. 442, 299 S. W. 765, 55 A. L. R. 1039), which in itself almost completely supports every objection made by appellant to the giving of appellees' requested instructions and also the refusal to give most of appellant's requested instructions, . . ."

In *Bulman* v. *Schmuck,* 175 Ark. 442, 299 S. W. 765, 55 A. L. R. 1039, a householder purchased a stove from a merchant who agreed to install it. After the stove had been used a short time, the householder, observing that the wall behind the stove was scorched, concluded that the stove was too close to the wall for safety. The householder complained to the merchant, who agreed to move the stove, but the householder was also assured that the stove could be used without danger, even without such moving. In the face of the obvious danger, and while still believing it to be unsafe, the householder resumed the use of the stove without moving it; the wall became ignited and the house was destroyed by fire. In the action by the householder for damages for loss of the house, the trial court instructed the jury:

" 'You are instructed that, although you find from the evidence in this cause that plaintiffs at first believed the stove was so near to the wall as to be dangerous if used, yet, if you find that the plaintiffs relied upon the statements, if any, of the defendant, or its servants, that it was safe to use the stove in its position, then plaintiffs would not be guilty of contributory negligence by using it.' "

In holding the above quoted instruction to have been erroneous, Mr. Justice MEHAFFY, speaking for this Court, said:

"We therefore hold that it was improper to tell the jury as a matter of law that, if the appellees first be-

lieved the stove was so near the wall as to be dangerous if used, but that, if the plaintiffs relied on the statements of the defendant's servants, they were not guilty of contributory negligence. This was a question about which fair-minded men might differ, and it was therefore the court's duty to submit this question to the jury—the question of contributory negligence. If plaintiffs thought it was dangerous, and defendant's servants stated that it was safe, this raised a question of fact for the jury. And it was the duty of the court to let them determine from the evidence whether the plaintiffs were guilty of contributory negligence."

From the foregoing, it is clear that the case of *Bulman* v. *Schmuck*[3] (*supra*) holds that a householder cannot, *in the face of obvious danger,* blindly rely on an assurance of safety, and thereby become entirely free of contributory negligence. The Bulman-Schmuck case—in regard to reliance on an assurance of safety—follows the same test that applies in master and servant cases, which is: if the servant, suspecting danger, demurs to the performance of the desired acts, and the master, to overcome the servant's hesitation, assures him that no danger exists, then the servant may rely on the assurance of safety, and be free of contributory negligence, *unless* the danger is obvious.[4]

We find no reported case involving a patron of a circus relying on an assurance of safety concerning seats.[5] Assuming, however, that the status of Mrs. Pil-

[3] The case of *Bulman* v. *Schmuck (supra)* is also reported in 55 A. L. R. 1039 and is followed by an Annotation: "Reliance on dealer's or manufacturer's assurance that article is not dangerous, as affecting question of contributory negligence."

[4] In *Dalhoff Construction Co.* v. *Luntzel,* 82 Ark. 82, 100 S. W. 743, where the appellee was the servant, the Court stated the rule:

"Appellee had the right to rely, without being held to have assumed the risk, upon the assurance of his employer that it was safe to use the defective jack until the new one was supplied, and the danger was not so obvious that it can be said that he was guilty of contributory negligence in using it. *King-Ryder Lumber Co.* v. *Cochran,* 71 Ark. 55, 70 S. W. 606; *Fordyce* v. *Edwards,* 60 Ark. 438, 30 S. W. 758; Labatt on Master & Servant, § 302."

[5] In *Anderson* v. *Kansas City Baseball Club,* Mo. Sup., 231 S. W. 2d 170, there was involved a situation where a patron at a baseball game received an assurance of safety that she would not be hit by a ball, even though her seat was not protected by a screen. The

cher is identical with that of the householder in the case of *Bulman* v. *Schmuck* (*supra*), we examine the instructions in the case at bar to see if they contain the same vice as existed in *Bulman* v. *Schmuck* (*supra*). Plaintiff's Instruction No. 6 in the case at bar is the one of which appellant most seriously complains as eliminating contributory negligence. It reads:

"The jury are instructed that if you find from a preponderance of the evidence in this case, that at and just before the section of reserved seats fell and injured plaintiff, if you find same to be true, that the plaintiff herself, or others in her presence and hearing, called the attention of the employees of the defendant that the seats were popping and cracking and that the said employees of the defendant assured the plaintiff or others in her hearing that said seats were safe, or words to that effect, then you are told that the plaintiff had the right to rely on such assurances of safety, if you find same to be true." Appellant says this instruction, in using the words, "right to rely on such assurances of safety," entirely eliminated the defense of contributory negligence. In other words, appellant says that this instruction has the same vice as the Instruction No. 2—previously copied—in the Bulman-Schmuck case. But we do not agree with appellant's contention.

In the Bulman-Schmuck case the Court told the jury that the "plaintiffs would not be guilty of contributory negligence." Such language was a "binding instruction"[6] against the defense of contributory negligence; whereas, in the case at bar, the Court told the jury that the plaintiff had a "right to rely on such assurances of safety." This was not a binding instruction, because even in relying on the assurance of safety, the plaintiff

Supreme Court of Missouri held that the risk and hazards were so obvious—from the absence of a screen—that she could not rely on the assurance of safety and be free of negligence.

In Negligence Compensation Cases, Annotated, New Series, Vol. 1, P. 471, there is an Annotation: "Liability for injuries due to defective grandstands or bleachers." One of the cases cited in the Annotation is that of *Miller* v. *Johnson*, 184 Ark. 1071, 45 S. W. 2d 41.

[6] For discussion of the expression "binding instruction," see *Reynolds* v. *Ashabranner*, 212 Ark. 718, 207 S. W. 2d 304, and cases there cited.

could have been guilty of contributory negligence. Mrs. Pilcher could have relied on the fact that the usher believed he was then telling the truth when he gave her the assurance, and yet Mrs. Pilcher could have been guilty of contributory negligence in remaining in the section when other patrons crowded into it, as the evidence showed they did. Relying on an assurance of safety does not necessarily mean that one is thereby free of contributory negligence. In the Bulman-Schmuck case, this Court said:

"The fact, that they were assured of its (the stove's) safety by the defendant and relied on such assurance, would not entitle them to recover, if they knew of, and appreciated, the danger."

And in the same case this Court also said:

"If the plaintiffs believed it (the stove) to be unsafe, but relied on the statement of the defendant's servant, it would be a question for the jury to determine whether there was contributory negligence."

In the case at bar the trial court, in giving plaintiff's Instruction No. 6, definitely left to the jury for determination the issue of contributory negligence. In the Court's general instruction, the jury was told:

"The defendant in this case has interposed the defenses of contributory negligence and/or assumed risk; these are affirmative defenses, and the burden of proof is upon the defendant to prove by a preponderance of the evidence its defenses of contributory negligence and/or assumed risk, unless such defenses are established by the testimony introduced on behalf of the plaintiffs."

Then, in the plaintiff's Instruction No. 1, the Court, after telling of the essentials required to be established by the plaintiff to support a recovery, added this language:

" . . . and that said plaintiff was not herself guilty of contributory negligence, . . . "

And again, in plaintiff's Instruction No. 2, the Court, in telling the jury of the plaintiff's duty to show defendant guilty of causal and proximate negligence in the condition of the section, said:

" . . . that the same could have been discovered by a reasonable inspection thereof by the defendant, and that such conditions, if true, were not known to the plaintiff and that she was not herself guilty of contributory negligence, . . . "

Thus we conclude that the plaintiff's Instruction No. 6, when read with the Court's general instruction, and plaintiff's Instructions No. 1 and No. 2, submitted the defense of contributory negligence to the jury. We therefore conclude that the vice which existed in the instructions in the Bulman-Schmuck case does not exist in the instructions in the case at bar.

II. *Excessive Verdict.* The jury awarded Mr. Pilcher $1,000 as his damages for loss of conjugal services and for medical expenses he paid occasioned by his wife's injuries. Such award is not excessive. The jury awarded Mrs. Pilcher $7,500 for her injuries, physical pain, and mental anguish; and such award is claimed to be excessive. It would unduly prolong this opinion to detail the testimony relating to the injuries sustained by Mrs. Pilcher and her pain and suffering. According to objective symptoms, there is an entire absence of any permanent impairment. The majority of the Court has concluded that the verdict in her favor is grossly excessive by at least $2,500.

Therefore, if within fifteen juridical days, a remittitur of $2,500 be entered by Mrs. Pilcher, then the judgment as to her will be affirmed for $5,000. If such remittitur be not entered, the cause as to Mrs. Pilcher will be reversed and remanded for a new trial because of the excessive verdict.

Affirmed on condition of remittitur.

George Rose Smith, J., dissenting. Justice Dunaway and I think the court erred in giving instruction No. 6, quoted in the majority opinion. Regardless of the references to contributory negligence that were made in other instructions, a jury of laymen would naturally interpret the questioned instruction as an affirmative charge limiting the issue of fact to that of whether the

assurances of safety were given and whether Mrs. Pilcher really relied upon them. As the evidence was virtually undisputed on both these points we consider instruction No. 1 to have been in effect a peremptory charge for the plaintiff. It is our view that the court should have refused this instruction and should have given instead an instruction requested by the defendant, which would have told the jury that in spite of the assurances of safety the plaintiff was still required to exercise reasonable care in the circumstances—the assurances of safety of course being one of the circumstances to be considered.

DOBSON *v.* OIL AND GAS COMMISSION OF THE STATE OF ARKANSAS.

4-9312 235 S. W. 2d 33

Opinion delivered December 18, 1950.

Rehearing denied January 22, 1951.

Arnold & Arnold, for appellant.

Ike Murry, Attorney General, *Francis W. Wilson,* Assistant Attorney General, *Forrest M. Darrough, Joseph A. Gill, Davis & Allen* and *Gaughan, McClellan & Gaughan,* for appellee.

George Rose Smith, J. The basic question in this case is whether our statutes empower the Oil and Gas Commission to compel the unitization of an entire oil and gas field. An area is said to be unitized when various ownerships are treated as a unit in the production of oil and gas. In the usual case the owners of several small contiguous tracts, totaling perhaps forty acres, agree that a single well shall be drilled in the unitized area and that all the owners shall share proportionately in the oil and gas, regardless of whose land happens to be the situs of the well. In this case the principle of unitization has been carried a good deal farther. The Commission has ordered that all wells in the McKamie-Patton field, which comprises over 5,000 acres, shall be developed by a single operator as if there were only one lessor and one lessee. Under this order the numerous royalty owners receive a specified proportionate part of the entire field's production, no matter how much or how little oil or gas is produced from their individual lands. The court below upheld the Commission's power to unitize the field and acccordingly decreed that the appellants' royalties should be computed on the basis of the unitization order rather than on the basis of the oil and gas actually withdrawn from their lands.

There is no real dispute about the facts that led to the Commission's decision to unitize the McKamie-Patton field. The discovery well in this field was completed as a producer in 1940. During the next few years drilling operations throughout the field established the character and boundaries of the producing formation. The pool is a long ellipse, with deposits of oil in a narrow continuous band around the perimeter. Inside this band of oil is a large concentration of wet gas which originally furnished the drive that forced the oil to the surface. Outside the band of oil is a layer of salt water, but its inward pressure has never been great enough to drive the oil upward.

At first the oil wells in the field were satisfactory producers, as the gas pressure was sufficiently strong to force the oil to the surface. There were also gas wells drawing gas from the pocket within the perimeter of oil. But it was soon determined that the subterranean gas pressure was falling with dangerous rapidity. We need not detail the extensive proof that was taken below to show that conservation measures were urgently needed. It is enough to say that millions of barrels of oil and billions of cubic feet of gas would have been lost forever unless the decline in underground pressure could be arrested.

There were two factors leading to the drop in underground gas pressure. First, the producing gas wells were drawing off gas and thus diminishing the expansive force of the gas pocket. Second, the oil wells were also draining off quantities of gas that came to the surface intermixed with oil. The science of conservation indicated that gas should be reinjected into the gas pocket to preserve the subterranean pressure. This meant that the operators of gas wells would have to be content to separate the butane and other distillates in the wet gas and return the dry gas to the earth, while the operators of oil wells would likewise be required to separate the oil and reinject the remaining gas.

It is obvious that these measures could be adopted only if the field were operated as a unit. A person owning a producing gas well could not be expected to agree

that his salable dry gas should be put back into the ground merely to provide his neighbor with the pressure needed to operate his oil well. Nor would the owner of an oil well forego the sale of marketable gas unless he could expect to benefit from that action.

By 1947 the operators (as distinguished from the royalty owners) were attempting to achieve field-wide unitization on a voluntary basis. An elaborate contract was prepared by which all the operators and royalty owners were to agree that the whole field would be developed as if there were only one lessor and one lessee. The oil and gas deposits underlying each tract were estimated as accurately as possible, and each royalty owner was assigned a percentage interest in the production of the whole field, regardless of the amount of oil or gas that might be produced from the particular well in which he had an interest.

As might have been expected, not everyone was willing to sign the agreement. It was executed by 97% of the operators and by 75% of the royalty owners, but the appellants and others refused to join in the plan, preferring to develop their acreage independently. These appellants own the mineral interest in a forty-acre tract and had previously joined their neighbors in voluntarily forming a 160-acre drilling unit on which there is a producing oil well. The other royalty owners in this drilling unit agreed to the field-wide unitization contract, but the appellants refused to sign it.

In October of 1948 the operators who had unsuccessfully attempted to unitize the field by voluntary action applied to the Commission for an order compelling unitization. Their petition recited that 97% of the operators and 75% of the royalty owners had agreed to the plan. After a hearing the Commission ordered that the field be unitized pursuant to the plan outlined in the proposed contract. Other operators and royalty owners later agreed to the order, so that by the time this case was tried the contract had been signed by all the operators and by 96% of the royalty owners.

Under the unitization plan these appellants were assigned an interest of .003004% of the total oil and gas produced in the field. Their grievance is that their royalties from the oil well on their drilling unit would, at least up to the date of trial, greatly exceed the sums allotted them under unitization. During the first year after the Commission's order became effective the appellants would have been entitled to royalties of $9,562.59 on the oil produced from their well. But under the unitization order their share amounts to only $2,789.45. The company that had been named to operate the entire field tendered checks for the appellants' share under the plan, but the appellants declined the tenders and brought this suit to collect from their own lessee the royalties on their share of the oil and gas actually produced from their drilling unit. The chancellor, sustaining the validity of the Commission's order, refused to grant the relief prayed.

At the trial much testimony was taken to show that in the long run forced unitization will benefit both the public and the royalty owners in the field. This evidence shows pretty conclusively that over a period of years this method of developing the pool will avert a substantial waste of mineral resources and will ultimately provide a greater return to operators and royalty owners alike. But such testimony manifestly goes only to the wisdom of legislation authorizing compulsory unitization or to the issue of constitutionality if such a statute were enacted. When the question is merely one of interpretation such evidence is of little value to the courts unless the statute contains some ambiguity that may be clarified by proof of the possible effects of the law.

The pertinent acts are collected as Chapter 1 of Title 53, Ark. Stats. 1947. We are unable to find in this chapter any provision empowering the Commission to compel the unitization of an entire pool, no matter how desirable that course may be. It is true that § 53-110 sweepingly prohibits the waste of oil or gas, but it does not follow that the General Assembly has thereby undertaken to delegate to the Commission the power to impose any

means of waste prevention that it may choose. On the contrary, § 53-111 includes a detailed enumeration of the measures to be used by the Commission in attaining the goal of conservation. Subsection *I* of this section permits the Commission to regulate secondary recovery methods, such as the reinjection of gas, but this subsection cannot fairly be construed to mean that the Commission can require a resort to secondary recovery methods against the wishes of those who own the pool.

This construction has also been placed upon our statutes by Robert E. Hardwicke, a recognized authority in the field of oil and gas law. In an article entitled "Oil Conservation: Statutes, Administration, and Court Review," 13 Miss. L. Journal 381 (1941), Mr. Hardwicke wrote: "No state has yet passed a law authorizing the regulatory body to *require* unit operations." Among the statutes considered and cited by the author in making this statement are the ones we are now construing.

The appellees candidly admit that there is nothing in our legislation to authorize compulsory unitization when that procedure is opposed by a majority of the operators and royalty owners. But, it is argued, the power does exist when "a substantial majority" of the interested persons agree to the plan. Section 53-115 (*C*) is relied on to support this contention. But all that subsection does is to declare that *voluntary* unitization agreements shall not be held to violate our statutes relating to trusts, monopolies, etc. We find no language in this subsection or elsewhere to indicate that a petition signed by a substantial majority of those concerned confers on the Commission any greater power than that conferred by a petition signed by only a small minority. We think it clear that the legislature has not yet undertaken to empower the Commission to direct the unitization of an entire field.

Nor may the courts achieve this result without statutory authority. That contention was made and rejected in *Western Gulf Oil Co.* v. *Superior Oil Co.*, 92 Calif. App. 299, 206 P. 2d 944. There the operators in part of an oil field had incurred great expense in installing equipment

for the reinjection of gas. Operators in other parts of the field refused to contribute to this expense, although it was conceded that the increased gas pressure resulting from reinjection would enable the non-assenting operators to recover a greater part of the oil deposits underlying their own holdings than would otherwise have been possible. The court held that in the absence of statute it was without authority to compel the defendants to join in the plan or to bear any part of the cost. With that view we agree. Almost any improvement a man makes on his own land is likely to make that of his neighbor either more or less valuable. But, with a notable exception involving nuisances, the courts have never undertaken to require payment for such incidental benefits or to award compensation for such incidental damage. We conclude that at present the goal of field-wide unitization can be reached only by voluntary coöperation.

This conclusion necessitates the consideration of two more questions. The first concerns the amount of oil and gas on which the appellants can require their lessee to pay royalties. Before the effective date of the unitization order the Commission had fixed the maximum daily production for each oil well in the field. The allowed production for the appellants' well, known as Wheat Unit No. 1, was 250 barrels daily. But under the unitization plan the Commission merely set a blanket allowance for the entire pool, leaving the operator free to decide which wells should be used as output wells. Some of the wells were used for the reinjection of gas, and we were told in the oral argument that some less efficient producing wells were plugged. It happened that Wheat Unit No. 1 was selected as an output well, the reinjected gas being used to drive oil upward through this well. Consequently, the daily output of the appellants' drilling unit has risen from the original allowance of 250 barrels to about 312 barrels a day during the first year of the unitization operations. The appellants insist that since their lease provides for a royalty on all the oil and gas produced from their drilling unit they are entitled to be paid on the basis of the increased production that has resulted from unitization, even though they have not joined in the plan.

We deem this contention unsound. If the appellants had been the sole owners of Wheat Unit No. 1, and if the Commission had undertaken to unitize only the rest of the field, no doubt this well would have continued to operate under a restriction upon production. But the other owners of the drilling unit joined in the unitization contract, and as a result of their coöperation the well has been used solely for production. There is no equity in the appellants' insistence that they should share in the fruits of unitization while being relieved of its burdens, those burdens being an immediate reduction in royalties for the sake of greater returns over a period of years.

The relationship of the co-owners in a drilling unit is at least analogous to that of tenants in common. What the appellants' co-owners have done is to enhance the immediate value of the common property at a sacrifice to themselves. This situation may be likened to that in which one cotenant makes improvements without the consent of the others. Such a tenant will be given the benefit of his improvements upon partition, either by a division awarding him the improved area or by an allowance of a larger share in the proceeds of sale. *Dunavant* v. *Fields,* 68 Ark. 534, 60 S. W. 420.

The conservation statutes confirm this view. Section 53-114 (*D*) declares that "a producer's just and equitable share of the oil and gas in the pool . . . is that part of the authorized production for the pool . . . which is substantially in the proportion that the quantity of recoverable oil and gas in the developed area of his tract in the pool bears to the recoverable oil and gas in the total developed area of the pool, in so far as these amounts can be practically ascertained." Here the appellants seek to obtain more than their "just and equitable share" by levying a toll upon oil and gas that pass through Wheat Unit No. 1 only because the operator of the unitized field has selected it as an output well. Their effort must fail. The appellants' royalties should be based on that part of the production from Wheat Unit No. 1 that is determined by the Commission to constitute a withdrawal from the tracts making up the drilling unit

in which the appellants have an interest. On the basis of this record the appellants' royalties are to be computed on a daily production of 250 barrels of oil for the period up to the date of trial and thereafter until the Commission fixes some greater or lesser amount in order to assure the appellants of their just and equitable share of the pool. Of course all other royalties on minerals passing through Wheat Unit No. 1 should be paid into the common fund that is to be distributed among the royalty owners bound by the unitization agreement.

Second, the appellants contend that the purchaser of the oil produced from their well should be required to pay them treble the amount of their royalties, under § 53-514. We hardly think this section applies to the present situation. In substance it provides that an operator who conspires with the purchaser to obtain more than his share of the production shall forfeit his leasehold interest, and that a purchaser participating in such a transaction shall forfeit treble the value of the royalty. Here there is nothing even resembling a conspiracy; the lessee and the purchaser have simply acted upon the assumption that the unitization order bound the appellants. That the purchasing company was mistaken in this assumption does not make it liable for a penalty, especially in a court of equity. See *Turner* v. *Smith,* 217 Ark. 441, 231 S. W. 2d 110.

The decree is reversed and the cause remanded for the determination of the amount of the appellants' royalties. Up to the entry of the final decree these royalties will be computed under the Commission's order restricting the production of Wheat Unit No. 1 to 250 barrels a day. Thereafter the Commission, after notice and a hearing, may vary this allowance in order to provide the appellants with no more or less than their fair share of the pool, but without imposing upon them any part of the cost of the reinjection operations.

We do not pass upon the question of whether the payments of back royalty to the appellants should bear interest, that being a matter for the chancellor to decide in the first instance.

GOODMAN *v.* PHILLIPS.

4-9337 235 S. W. 2d 537

Opinion delivered January 15, 1951.

Eichenbaum, Walther & Scott, for appellant.

W. B. Howard, for appellee.

HOLT, J. Appellee, Evelynea Phillips, brought this suit against appellants to recover damages resulting from alleged slanderous words spoken about her, in her presence, and in the presence of others. From a judgment rendered on a jury's verdict awarding her $1,000, compensatory damages, comes this appeal.

For reversal, appellants contend (1) that the evidence was not sufficient to support the verdict and (2) that the verdict was excessive.

— (1) —

Appellee alleged in her complaint "that on the 13th day of December, 1948, plaintiff, while shopping in de-

fendants' place of business, purchased of and from defendants a lady's skirt, tendering as payment therefor a twenty-dollar federal reserve note; that said note was handed to M. Pulliam, a clerk of the defendants, Heinemanns, Inc.; that upon receipt of the note the said clerk caused the same to be transmitted to the defendant, Herbert Goodman, manager of the store. Upon receipt of the bill, the said Goodman summoned the city police, took the bill, and in the presence of his said clerk accosted plaintiff, exhibited said money to her and referring to same said: 'This is a bad bill, we have gotten hold of some more like it, I would know one any time I saw it;' that he (Goodman) then proceeded to interrogate plaintiff with numerous and embarrassing questions designed to cause plaintiff to admit that she had uttered the said bill with knowledge that it was counterfeit; . . . that as a result of investigation made by defendants, the said Goodman finally said, 'It is a good bill' and plaintiff was allowed to depart from defendant's store.

"That said false charge of uttering a counterfeit bill embarrassed and humiliated plaintiff, subjected her to great mental anguish, and caused plaintiff to become so overcome by nervousness that she was confined to her home for a period of two days and injured plaintiff's good name and reputation," etc.

Appellee went to appellants' mercantile store in Jonesboro, and after purchasing several items for which she paid cash, selected a skirt and offered to the clerk, Mrs. Anne Pulliam, a new $20 bill in payment.

As to subsequent events, appellee testified: "Q. She went to get your change? A. And she was gone a good bit before she came back, and when she came back she said 'I will have your change directly.' . . . Then she went back again and was gone a good while again, and when she came back Goodman was with her. . . . Q. All right, What did he (Goodman) do and say at the time, if anything, Mrs. Phillips? A. Well, he walked up to me and said 'this is a bad bill.' . . . And what else did he say? A. He said 'did you know you had the bill?' . . . I said, 'No, sir.' . . . Q. He said it

was a counterfeit bill? A. Yes, sir. Q. And he said you knew it was a counterfeit bill? A. He didn't say I knew it was. He said 'Did you know it was?' . . . Well, he said, 'Can't you think where you got the bill?' I said 'No, sir.' . . . I said, 'No, I can't. I will have to have time. I got two bills from my son. He got them from his dad. I suppose they came from the Bank of Trumann.' . . . He wanted to know if I had any more bills like that. I said 'I wouldn't know.' That I would look and see. . . . And I looked, and showed him two more bills. And he said 'No, you don't have any others like this one. This is a bad bill. I have gotten hold of some more like it.' . . . And he said 'I would know one from a good bill any time I would see it.' . . . 'I have heard there was counterfeit money out and I would like to find where it is coming from.' . . . He then turned away with the bill and walked off. . . . Then I told the lady, Mrs. Pulliam, 'It hurts me to have to stand and wait like this. I'm going to have to take a rest tablet.' . . . Well, I kept standing there a good while, and then I looked up and saw the policeman coming and Goodman was with him. . . . And it scared me when I saw him coming. . . . He was coming from the direction of his office. . . . The policeman walked up and said 'You're the one had the bill?' I said 'Yes, sir.' Q. 'You're the one that had the bill,' and you said you were? A. Yes, sir. And Goodman began showing him the bill. . . . He (Goodman) said 'You can tell this is a bad bill. The flag droops more than the other, and the shrubbery is more than the other.' He said 'You can tell it is a bad bill by looking through the glass.' . . . Well, Goodman turned and walked away again. . . . Then the policeman said 'Are you willing to go to headquarters with me for further questioning and examination of the bill?' . . . And I said 'I suppose so.' About that time Goodman came back. He said 'I have called the bank and they said if it had either a 'G' or an 'H' on it, it is a good bill. He gave me the bill and disappeared. Then Mrs. Pulliam said 'I'm sorry to have held you so long.' A. And the policeman said 'I'm sorry, lady, this happened

this way, but it's my job to look into these things.' . . . Q. Did you ever have anybody accuse you of doing anything wrong before? A. No, sir. Q. And that is the reason it scared, humiliated and embarrassed you? A. Yes, sir. Q. After he told you it was a good bill and the clerk apologized to you and the policeman apologized to you, did you leave the store at that time? A. Yes, sir."

When we consider the above testimony in the light most favorable to appellee, and the jury's verdict, as we are required to do, (*Braman and The Gus Blass Company* v. *Walthall,* 215 Ark. 582, 225 S. W. 2d 342) we hold that it was substantial and sufficient to warrant the verdict.

Goodman's statement to appellee in the presence of Mrs. Pulliam that the bill was "bad," "counterfeit," "I have gotten hold of some more like it . . . I would know one from a good bill any time I would see it, I have heard there was counterfeit money out and I would like to find out where it is coming from," his query: "Did you know you had the bill?", his action in calling the police without appellee's knowledge, his statement to the policeman in appellee's presence, after he came to the store, that "you can see this is a bad bill," and the policeman's query "Are you willing to go to headquarters with me for further questioning and examination of the bill?", all warranted the jury in finding that appellants' actions and conduct, in the circumstances, implied, and were meant to charge Mrs. Phillips with knowingly passing a counterfeit bill, a crime, and actionable *per se,* when, in fact, the bill was perfectly good.

We held in *Dean* v. *Black & White Stores, Inc.,* 186 Ark. 667, 55 S. W. 2d 500, (Headnote 1): "Under Crawford & Moses' Dig., § 2396, (Ark. Stats. 1947, § 41-2409, page 136) providing that it is slander to charge one with a crime, it is not necessary that the words themselves show that a crime is charged; if it appears from the connection in which the charge was made, or from the circumstances attending its utterance that it intended or

understood to impute a crime, it will be regarded as actionable *per se.*"

In *Greer* v. *White,* 90 Ark. 117, 118 S. W. 258, this court said: "Defamatory language must be interpreted as it would be understood by the reader or hearers, taking into consideration accompanying explanations and the surrounding circumstances which were known to the hearer or reader." 25 Cyc. 357. This implies that attending circumstances not known to the hearers are not to be considered in determining whether or not the words spoken are slanderous in themselves. It is immaterial what meaning the speaker really intended to convey by the language used if the words spoken are in fact slanderous, and in *Jackson* v. *Williams,* 92 Ark. 486, 123 S. W. 751, we find this language:

"As stated in 25 Cyc. 335, 'the rule now is that the words are to be taken in their plain and natural meaning, and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used and the ideas they are adapted to convey to those who heard or read them.' "

— (2) —

As to the excessiveness of the verdict, but little need be said. The rule is stated in *Gaines* v. *Belding,* 56 Ark. 100, 19 S. W. 236, as follows: "The verdict of the jury in an action for slander will not be set aside for excessive damages unless there is some suspicion of unfair dealing, or unless the case be such as to furnish evidence of prejudice, partiality or corruption upon the part of the jury. 'The case must be very gross and the damages enormous to justify ordering a new trial on a question of damages.' "

We cannot say, in the circumstances here, and guided by the above rule, that the verdict is excessive.

Accordingly, it is affirmed.

4641 235 S. W. 2d 539

Opinion delivered January 15, 1951.

[redacted]

L. Weems Trussell, for appellant.

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

MINOR W. MILLWEE, Justice. The defendant, Josie Bell Keith, was tried and convicted under an indictment charging her with assault with intent to kill Sadie Hughes, the punishment being fixed by the jury at five years in the penitentiary. Defendant has appealed, and the first five assignments in the motion for new trial challenge the sufficiency of the evidence to support the verdict and judgment. The defendant and prosecuting witness, Sadie Hughes, are negro women residing at Sparkman, Arkansas.

Sadie Hughes testified that shortly before noon on June 28, 1949, she was walking along the road from her home to the business section of Sparkman when she noticed defendant's automobile parked in the road ahead. Defendant was seated in the car and the two women spoke to each other as Sadie walked by. Defendant then started her car, drove past the prosecuting witness, and again stopped across the road in front of Sadie. Defendant then jumped out of the car and fired a pistol twice at Sadie who ran a short distance into the front yard and through the front door of the home of Lizzie Wright. Defendant went into the Wright house through the back door and chased Sadie from room to room onto the back porch where Sadie grabbed hold of either the gun, or defendant's arm, and they both fell from the porch to the ground. In the ensuing scuffle on the ground, de-

fendant fired the gun again, the bullet grazing the side of Sadie's head. According to Sadie, the defendant then said: "Don't wipe the G-- d--- blood off your face; if I had another bullet, I'd finish you up."

The testimony of Sadie relative to the shooting in front of the Lizzie Wright home was corroborated by the testimony of Dorothy Jean Daniels, a 16-year-old girl. Dorothy testified that she was sitting on Lizzie Wright's front porch and that defendant fired the first shot before she alighted from her car and then fired the second shot as Sadie was running toward the Wright home. The third shot was fired as witness was going around to the back of the house. When she reached the back yard, defendant was standing beside Sadie with the pistol in her hand and Sadie's face was bleeding. Shortly thereafter Maggie Cowan, an elderly woman, came up and persuaded defendant to leave.

In opposition to the State's testimony, defendant offered several witnesses who testified that they heard only the one shot fired in the Wright back yard. They also testified that in the altercation in the back yard defendant struck Sadie with the pistol after the latter struck her with a stick and that the gun was discharged in the ensuing scuffle.

Maggie Cowan, a witness for the State, who lived a block and a half away, also testified that she heard only one shot and "didn't pay any attention to just what it was" until informed of the trouble. On cross-examination she described Sadie's wound as follows: "I judged it was a shot. It didn't seem to be a lick that she had struck her. It seemed to be a glance, I just judged, where a bullet had struck. It didn't cut the width of it except it cut a gash."

In rebuttal the State offered proof tending to show that some of the defense witnesses were not present at the scene of the shooting.

Defendant interposed the plea of self defense. Although she did not testify in the case, there was evidence by both the State and defendant that the shooting was

motivated by defendant's belief that the prosecuting witness had been having illicit relations with defendant's husband. The prosecuting witness is a married woman with four children. She strenuously denied having any improper relations with defendant's husband. The husband of Sadie Hughes testified that defendant came to his barber shop twice before the shooting and told him that she had heard that her husband was having illicit relations with Sadie. This witness stated that he had never seen anything that would cause him to be suspicious of his wife and told defendant he, "didn't think there was anything to it."

We have repeatedly held that in order to constitute the crime of assault with intent to kill a specific intent to take the life of the person assaulted must be shown, and the evidence must be such as to warrant a conviction for murder if death had resulted from the assault. *Allen* v. *State,* 117 Ark. 432, 174 S. W. 1179. Appellant earnestly contends that the evidence here does not measure up to these requirements. It is argued that the testimony of Sadie Hughes and other witnesses for the State is exaggerated, unreasonable and unworthy of belief and our attention is directed to certain inconsistencies in such testimony and the version of the shooting given by defense witnesses. The jury were the judges of the credibility of the various witnesses and we must consider the evidence in the light most favorable to the State. As thus viewed, we hold it ample to sustain the verdict.

The most serious question in the case arises in connection with the sixth assignment in the motion for new trial which alleges error in the court's ruling on the State's objection to certain testimony of the witness, Benjamin Daniels. This witness testified that about a month before the shooting Sadie Hughes told him to tell defendant that she, Sadie, was having improper relations with the defendant's husband; that she had an automatic and was ready any time. The prosecuting attorney objected to that part of the testimony concerning improper relations between Sadie and defendant's husband. In sustaining the objection the court ruled as follows:

"Ladies and gentlemen of the jury, the only purpose for which this testimony could be given would be to go to the credibility of the prosecuting witness when she testified she had had no relationship with the husband of the defendant and for that purpose you may consider it but not as a defense to this alleged crime." Daniels further testified that when Sadie Hughes asked him to deliver the message to defendant, he informed her that he was not a news carrier. There is no showing that defendant ever received information of the alleged conversation.

In *Flowers* v. *State,* 152 Ark. 295, 238 S. W. 37, the accused testified in detail about information that he had received of improper relations between his wife and the person assaulted shortly before the assault. In affirming the conviction for assault with intent to kill the court said: "The fact of intimacy between appellant's wife and the assaulted person and appellant's receiving information thereof did not constitute a justification in law for the assault (*Fisher* v. *State,* 149 Ark. 48, 231 S. W. 181), but those facts were proper for the consideration of the jury in mitigation of the offense and also in determining whether or not the assault was made upon a sudden heat of passion and upon apparently sufficient provocation. Appellant was therefore entitled to an instruction on those subjects, and, if he had asked for it in proper form, the court should have given an instruction telling the jury that they should consider these facts and the circumstances under which appellant received the information, the length of time before the assault and the circumstances under which he made the assault, in determining whether the passion under which he acted at the time was suddenly aroused, and whether the provocation was apparently sufficient to make the passion irresistible."

It is noted that the rule stated is predicated upon a showing that the accused had received information of the illicit relations between his wife and the person assaulted. There is an absence of proof in the instant case that defendant was ever informed of the alleged conversation between Sadie Hughes and Benjamin Daniels and no pas-

sion could be aroused or provocation furnished by a statement which was never communicated to the defendant.

In some jurisdictions evidence of improper conduct by a deceased toward defendant's wife has been held admissible in homicide cases, even though uncommunicated to the defendant, in support of a plea of self-defense where such evidence tends to shed light as to who was the aggressor. See Anno. 44 A. L. R. 860. The record shows that the testimony objected to in the instant case was not offered for that purpose, and the fact that defendant voluntarily entered into the difficulty with the prosecuting witness and was the aggressor throughout seems to be undisputed. Moreover, other evidence was admitted without objection tending to show that defendant did receive information from other sources relative to alleged improper relations between her husband and Sadie Hughes, and the jury was told in Instruction No. 10 that it could not convict defendant of assault with intent to kill if she acted under a sudden heat of passion caused by a provocation apparently sufficient to make such passion irresistible. Since it was not shown that defendant was ever informed of the conversation between Sadie Hughes and Benjamin Daniels, we think the court properly limited the jury's consideration of such testimony.

Assignments Nos. 7, 8, 9 and 11 of the motion for new trial allege improper influence upon and misconduct of the jury which resulted in defendant's not receiving a fair trial. In the absence of anything in the record to support these assignments of error, they will not be considered. *Conley* v. *State,* 180 Ark. 278, 21 S. W. 2d 176.

In assignments 10 and 12 error is alleged in the court's refusal to declare a mistrial when the prosecuting attorney asked Benjamin Daniels on cross-examination: "Q. Isn't it a fact that all the colored people are afraid of Josie Bell Keith?" The court promptly sustained defendant's objection to the unanswered question, told the jury that the question was improper and further asked that each juror raise his hand if he could and would disregard the question. The record reflects that each juror

raised his hand. The action of the trial court removed any prejudice resulting from the unanswered question. *Jutson and Winters* v. *State,* 213 Ark. 193, 209 S. W. 2d 681.

Assignment No. 13 is that the court erred in holding Sterling Hughes, a 10-year-old boy, not qualified to testify. In the course of the examination of the boy by counsel and the court, questions were asked and answers given as shown below.[1] In *Crosby* v. *State,* 93 Ark. 156, 124 S. W. 781, it was held that the trial court was in error in holding that a 10-year-old boy was competent to testify under an examination very similar to that disclosed here. The common law rule prevails in this state as to the competency of witnesses in criminal cases. This rule is that a witness of any age may testify if, upon examination by the court, the witness appears to have sufficient intelligence to comprehend the nature and obligation of an oath and understands that there may be punishment for false swearing. *Durham* v. *State,* 179 Ark. 507, 16 S. W. 2d 991.

Another well settled rule is that the question of competency is left to the sound discretion of the trial judge and in the absence of clear abuse of the judicial discretion exercised, it is not reviewable upon appeal. *Yother* v. *State,* 167 Ark. 492, 268 S. W. 861. In *Payne* v. *State,* 177 Ark. 413, 6 S. W. 2d 832, the court quoted with approval the following language of Justice BREWER, speak-

[1] Q. What happens to boys and girls that don't tell the truth? A. They tell stories. Q. What happens to them if they tell stories? A. I don't know. Q. What does the Sunday School teacher tell you happens to them if they tell lies or stories? A. I don't know. Q. Do you know it is wrong to tell a story? A. Yes, sir. Q. Can you tell this jury the truth about what happened over there near your home about a year ago? A. Yes, sir. Q. Do you remember about it and can you tell them? A. Yes, sir. BY THE COURT: Q. Boy, what would happen to you if you were to tell a story, would you be punished in any way if you should tell a story? A. Yes, sir. Q. Who would punish you? A. Whipping. Q. Would you get any other punishment besides that? A. I don't know. BY THE COURT: I don't believe he understands the solemnity of an oath. BY MR. TRUSSELL: Q. When I asked you if you went to Sunday School do they teach you anything about God in Sunday School? A. Yes, sir. Q. What do they tell you in Sunday School will happen to bad boys that do wrong and tell lies? A. Go to jail. Q. Do they go anywhere else? A. Yes, sir. Q. Where do they go, did they tell you anything about that? A. No, sir.

ing for the court, in *Wheeler* v. *United States,* 159 U. S. 523, 16 S. Ct. 93, 40 L. Ed. 244: "The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous." See, also, *Hudson* v. *State,* 207 Ark. 18, 179 S. W. 2d 165. We cannot say that there was an abuse of discretion on the part of the trial judge in holding that the Hughes boy did not comprehend the sanctity and obligations of an oath.

The last assignment of error is that the court erred in giving instructions 2 to 14, inclusive. There was only a general objection to each of the instructions which were given on the court's own motion. We have carefully examined the instructions and find that they correctly declare the law as generally given in such cases. None of the instructions are inherently erroneous and we do not review the ruling of the trial court unless a specific objection is made to such instructions. *Tong* v. *State,* 169 Ark. 708, 276 S. W. 1004.

Other alleged errors are argued in the brief which were not brought forward in the motion for new trial and no objections were made to the ruling of the court on such matters at the trial. We find no prejudicial error, and the judgment is affirmed.

ROBINSON, J., dissents.

YAHRAUS *v.* CONTINENTAL OIL COMPANY.

4-9448 235 S. W. 2d 544

Opinion delivered January 15, 1951.

J. H. Carmichael and *Josh W. McHughes,* for appellant.

Moore, Burrow, Chowning & Mitchell, for appellee.

PER CURIAM. A directed verdict for the defendant was rendered May 24, 1950, during the March term of Pulaski Circuit Court. The plaintiff's motion for a new trial was overruled June 23d and 120 days given for filing a bill of exceptions. The March term expired Sept. 24th and the September term began the following day—the fourth Monday. October 20th appellant was given an extension of 30 days for the bill of exceptions and it was filed November 14th. This extension was given after the original allowance of 120 days had expired. Appellee contends that with expiration of the time first given the trial court was without jurisdiction to make the supplemental order. The Court thinks the intent of Act 90 of 1949 was to permit the judge to grant additional time during the succeeding term, provided such extension does not go beyond the statutory time for appeal. The motion is therefore denied.

CROWN COACH COMPANY *v.* FORT SMITH INTERURBAN LINES, INC.

4-9303 235 S. W. 2d 544

Opinion delivered January 15, 1951.

L. M. Crouch, Jr., Thomas Harper, Bailey & Warren, Eugene Bailey and *Walls Trimble,* for appellant.

David L. Ford and *Hardin, Barton & Shaw,* for appellee.

PAUL WARD, J. This appeal involves an order issued by the Public Service Commission, which was appealed to the Circuit Court of Pulaski County and there modified and affirmed, and also involves the modification made by the lower court, which is here on cross-appeal. The facts and circumstances connected with and surrounding the order of the Public Service Commission are as follows:

Since about the year 1930 the appellants and their predecessors have operated bus lines separately, from Fort Smith, Arkansas, to Mansfield, Arkansas, and intermediate points over Highway No. 71, a distance of approximately 30 miles. This portion of appellants' bus

route is only a small part of the territory covered by them, and they have been operating at all times under licenses from the Public Service Commission or from its predecessor, the Arkansas Corporation Commission.

In 1935 the predecessor of appellee applied to and was granted a certificate of public convenience and necessity by the Arkansas Corporation Commission permitting it to carry passengers over the above mentioned route, but the said certificate was conditioned to allow the applicant to carry passengers only in connection with carrying the U. S. mail. Consequently, pursuant to said conditional certificate the appellee and its predecessors have at all times since been limited to carrying passengers in connection with carrying the mail. It appears that the U. S. mail contract along said route is renewed every four years, at which time the contract goes to the lowest acceptable bidder and that appellee will be compelled to negotiate another government mail contract in the near future.

Appellee being apprehensive that it might not be the successful bidder for the mail contract and realizing that in such event it could no longer carry passengers under the conditional certificate mentioned above, made application to the Public Service Commission on January 14, 1949, to have the aforementioned condition eliminated from its certificate.

On August 17, 1949, the appellants filed their protest and on October 19, 1949, the Commission made its finding in favor of the applicant, removing the said condition. Upon appeal to the lower court the finding of the Commission was affirmed, but also modified by an order of the court which reads as follows:

"Should a future showing be made that the continued operation of appellee over U. S. Highway No. 71 between Fort Smith, Arkansas, and Mansfield, Arkansas, by means of a greater number of schedules than those in effect at the time of the granting of this order, would entail a destructive rather than a healthy competition and that public convenience and necessity would be best

served by restoring the restriction herein removed from appellee's certificate, then the Commission may restore such restriction, and, in determining whether this should be done, the fact that appellants, Crown Coach Company and Continental Central Lines, and their predecessors, first operated the route as certificated carriers would be a factor in the situation to be considered by the Commission."

Appellee appeals to this court from the above order of modification and appellants appeal from the order affirming the Commission.

Most of the testimony taken before the Commission is not in conflict. Appellee makes three round trips daily between Fort Smith and Mansfield and carries passengers on the same busses that carry the mail and is rendering a valuable service to the communities it serves and it would be a great inconvenience for this service to be discontinued. Appellant, the Crown Coach Company, operates five round trips daily over the same route and gives satisfactory service, while appellant, the Continental Central Lines, operates three round trips daily over the same route and also gives satisfactory service. The evidence does not disclose that there is at present any additional bus service needed over this route over and above the service rendered by the two appellants and by the appellee. If for any reason the service of the appellee in carrying passengers should be discontinued there is no showing that appellants are not ready, able and willing to supply the additional service, but it does tend to show that appellants would be in position to do so.

The testimony further discloses that appellee covers in its route two portions of territory that are not traveled by appellants. In the first instance the appellee's busses follow a different route out of Fort Smith and run through a portion of south Fort Smith different from the route taken by appellants' busses, but this territory is within the corporate limits of the City of Fort Smith. In the second instance appellee's busses cover a route from the town of Mansfield to the nearest and most con-

venient point on Highway No. 71 for a distance of one-fourth to one-half a mile, which the evidence shows to be a convenience for the people of Mansfield. It further appears that appellants have no intention of routing their lines into the town of Mansfield proper and one reason given for this is that the highway from No. 71 to Mansfield is not suitable for the operation of their busses. Also there is testimony showing that appellee by virtue of being a local carrier renders a character of service not rendered by appellants by reason of the fact that it is in a position to and does accommodate passengers frequently who want to travel in their work clothes with bundles in their arms and who may want a little extra time to make purchases or attend to other personal conveniences.

Appellants' testimony is to the effect that they are operating on a narrow margin of profit and that it would probably cause their businesses to operate at a loss if there was only a slight decline in the passenger load which they carry, and it is contended, that appellee on its present schedule would in all probability operate at a loss if it did not have the revenue derived from the mail contract.

In this situation and under the above set of facts and circumstances appellants earnestly and ably insist that the judgment of the lower court which affirmed the order of the Commission be reversed and appellee just as ably and earnestly insists that the said judgment be affirmed with the modification eliminated and that it be allowed to operate its bus line free from said restrictions and on any schedule desired by it and approved by the Commission. We are not wholly in accord with either view. To allow appellee the privilege of instigating a service additional to that now provided by all three of the bus lines here concerned, would be against the undisputed evidence which discloses that such additional service is neither a convenience nor a necessity at this time. In addition, it is speculative at this time as to whether or not appellee will be unable to renew its mail contract when it expires. If the government contract is

renewed appellee will continue to be in a position to furnish all the service needed at the present time as indicated by the evidence in this case.

It follows from what has been said that this court does not agree that the communities now served by these bus lines should be deprived of any of the service which they now have and which the evidence shows is needed, nor do we agree that the appellee should be deprived of its business enterprise without some opportunity to save it in case it does lose the mail contract. It is our opinion that the Arkansas Public Service Commission should grant appellee a certificate of public convenience and necessity restricted only by the provision imposed by the lower court as set forth above and by the further provision that appellee must continue operations under its present schedule as long as it retains the mail contract, and in the event it loses the mail contract it can apply to the Commission for a change of schedule.

It does not follow that appellee shall have the right to voluntarily discontinue its mail contract, but will be bound to make a *bona fide* effort to retain same and to renew it when the opportunity arises from time to time, and the good faith of appellee in this connection together with the condition imposed by the lower court shall be considered by the Public Service Commission if application is made by appellee for a change of schedule. This court has established a precedent for this character of modification in the case of *Southwestern Greyhound Lines, Inc.* v. *Mo. Pac. Transportation Co.,* 211 Ark. 295, 200 S. W. 2d 772.

The judgment of the lower court is modified and affirmed on direct appeal and affirmed on cross-appeal, with directions to the lower court to enter judgment in conformity with the above opinion and to certify same to the Public Service Commission.

ROBINSON, J., dissents.

CONTRACTORS *v.* JONES.
STATE LICENSING BOARD FOR GENERAL CONTRACTORS *v.* JONES.

4-9377 235 S. W. 2d 547

Opinion delivered January 15, 1951.

[redacted]

William J. Smith, for appellant.

Russell V. Johnson and *Rose, Meek, House, Barron & Nash,* for appellee.

ROBINSON, J. This appeal arises out of the action of the State Licensing Board for General Contractors, hereinafter referred to as the "Board", in refusing to issue a license to appellees, Claude Jones, Jack C. Jones and Grady S. Jones, partners doing business as J & J Construction Company, hereinafter referred to as the

"Contractors". When the Board refused to issue the license, the Contractors appealed to the Pulaski Circuit Court and, after a hearing before Judge Guy Amsler, the action of the Board was overruled and the issuance of the license was ordered. The Board then appealed to this Court.

Section 71-701 Ark. Stats. (1947) provides: "For the purposes of this act (71-701—71-719) a General Contractor is defined to be any person, firm, partnership, co-partnership, association, corporation, or other organization, or any combination thereof, who for a fixed price, commission, fee or wage attempts to or submits a bid or bids to construct, or undertakes to construct, or assume charge of the construction, erection, alteration, repair, or have constructed, erected, altered or repaired, under his, their or its direction, any building, highway, sewer, grading, or any improvement or structure when the cost of the undertaking is ten thousand dollars ($10,000.00) or more, and one who shall engage in the construction or superintending the construction of any structure or any undertaking or improvements, as above mentioned, in the State of Arkansas, costing ten thousand dollars ($10,000.00) or more, shall be deemed to have engaged in the business of general contracting in the State of Arkansas, provided that this definition shall not include architects or engineers, whose only financial interest in the projects shall be the architectural or engineering fees for preparing plans and specifications, surveys and supervision."

Section 71-713 Ark. Stats. (1947) provides: "Any person, firm, or corporation not being duly authorized, who shall engage or attempt to engage in the business of general contracting in this State, except as provided for in this act (71-701—71-719), and any person, firm, or corporation presenting or attempting to file as their own the license certificate of another, or who shall give false or forged evidence of any kind to the Board, or to any member thereof, in obtaining a certificate of license, or who shall impersonate another, or who shall use an expired or revoked certificate or license, shall be deemed

guilty of a misdemeanor, and shall be liable to a fine of not less than one hundred dollars ($100), nor more than two hundred dollars ($200), for each offense, each day to constitute a separate offense. And provided further that no action may be brought either at law or in equity to enforce any provision of any contract entered into in violation of this act."

Section 71-719 Ark. Stats. (1947), provides authority for the Circuit Court to review the action of the Board, and the Circuit Court's judgment is reviewable here.

The Contractors are residents of Oklahoma with their principal office in Oklahoma City. They have done considerable work over a period of years for the United States Government in the construction of power lines. On February 15, 1950, the Southwestern Power Administration of the Department of the Interior of the United States Government advertised in Oklahoma newspapers asking for sealed bids on the construction of a 66-mile power line from Norfork Dam to a point 5 miles west of Pocahontas, Arkansas. On the 22nd day of March, 1950, the Contractors submitted a bid for the construction of the power line and on March 31st signed a contract therefor. With this project in mind on February 27th, before submitting a bid or entering into a contract, the Contractors wrote the Secretary of State for the State of Arkansas as follows:

"We are anticipating some construction work in the State of Arkansas and understand that it is necessary that we have an 'Arkansas Contractors License' or that we file 'qualification and financial information with your state before we are eligible to commence work on the construction project.'

"Please furnish us with the necessary forms for execution and filing with your state.

"If your office does not handle this license, we will appreciate your forwarding this letter to the proper department so that we may immediately qualify in the state of Arkansas."

Evidently the Secretary of State turned the above mentioned letter over to the Board, for on March 2, 1950, the Board mailed to the Contractors necessary forms for use in applying for a contractor's license in this State. Incidentally, it will be noticed that the Contractors' letter to the Secretary of State stated that they understood it was necessary to obtain an Arkansas Contractor's license before they would be eligible to commence work on the construction of a project in this State. In the letter of the Board to the Contractors on March 2nd, nothing was said about the Contractors being in error as to their understanding as to what the law of Arkansas provides in this regard.

On March 9th the Contractors wrote to the Board as follows:

"Attached hereto is our Check No. 1546 in amount $50.00 which we have had certified and which is in payment for a General Contractor's License in your state provided we secure approval. In addition we attach hereto statement of Experience and Financial Condition together with the required affidavits and etc.

"It is our intention to bid on some work in the State of Arkansas in the very near future, and we would appreciate anything that the Board can do to expedite the application filed herewith."

On March 10th the Board wrote to the Contractors as follows:

"We acknowledge receipt of your application for a contractor's license, which seems to be complete with one exception. Please advise the answer to Question 15, Page 3."

On March 13th the Contractors wrote to the Board:

"In connection with our application for contractors license in your state, we have your letter of March 10, 1950, asking for answer to question 15, Page 3. The answer is *yes* we do file semi-annual reports with the Bureau of Contract Information in Washington, D. C.

We are sorry this answer was not on the application originally."

The Contractors heard nothing further from the Board until April 18th when they received a letter as follows:

"In your application for a contractor's license you attached a 'list of equipment owned as of December 31, 1948.' Your financial statement is dated December 31, 1949.

"Inasmuch as your equipment shows approximately one-third of your entire net worth, it will be necessary for you to furnish the information requested in Question 11, Page 7, as of December 31, 1949. Your prompt attention will be appreciated. The next meeting of the Board has been tentatively set for May 4."

On April 20th the Contractors wrote to the Board:

"As requested in your letter of April 18th, we attach hereto a list of our equipment owned as of December 31, 1949, and which we wish you to incorporate in our application for a contractor's license in answer to Question 11, Page 7.

"Should any additional information be required do not hesitate to advise us accordingly."

Apparently the next thing the Contractors heard from the Board was that the granting of the license had been refused because the Contractors had made a bid and executed a contract for the power line to be constructed from Norfork Dam to Pocahontas while the application for the license was pending and before the actual issuance of the license. There is no showing that the License was refused for any other reason. Judge Amsler of the Pulaski Circuit Court in directing the Board to issue the license based his opinion on the ground that the Act makes a distinction between a "general contractor" and "general contracting", and it is only "general contracting" that the Statute prohibits until the issuance of the License, and the Judge wrote an able opinion in this respect which is a part of the record.

However, conceding without deciding that for the purpose of issuing a license there is no distinction between "general contractor" and "general contracting", we are of the opinion that the ruling of the Circuit Court should be affirmed because the action of the Board in refusing the license under the facts and circumstances is not justified by the record.

Section 71-709 Ark. Stats. (1947) provides: "The Board, in determining the qualifications of any applicant for original license, or any renewal license, shall, among other things, consider the following: (a) experience, (b) ability, (c) character, (d) the manner of performance of previous contracts, (e) financial condition, (f) equipment, (g) any other fact tending to show ability and willingness to conserve the public health and safety, and (h) default in complying with the provisions of this act, or any other law of the State.

. . . . . .

It is the contention of the Board that the applicant violated the law by submitting a bid and executing a contract on the project herein mentioned before the license was actually issued, and for that reason it was justified in refusing to issue the license. The Act does not say that the Board shall not issue a license if there has been a default by the applicant in complying with the provisions of the Act, or if he has violated any other law of the State—it merely states that such default in complying with the provisions of the Act or any other laws of the State shall be taken into consideration by the Board.

Everything in the record indicates that the applicants are experienced, that they have ability and good character, that the manner of their performance of previous contracts has been good, that their financial condition is sound, that their equipment is substantial. In fact, there is not one scintilla of evidence in the record which would justify a ruling that the license should not be issued unless the act of the Contractors in submitting a bid and entering into the contract while their application for a license was pending could be construed

as not only a violation of the provisions of the Act or some other law of the State of Arkansas, but such a serious violation that they should not be issued a license.

We do not believe the record justifies such a finding. In the first place the Contractors are residents of Oklahoma; they submitted their bid in Oklahoma and executed their contract in Oklahoma through an office of the Government located in Oklahoma. They did not commit one single act in the State of Arkansas except to come and look at the location of the proposed project and to apply for a license, until after the Circuit Court had held that they should be granted a license. It does not appear that they had any intention whatever of violating the provisions of the Act or any law of the State of Arkansas. They made an application for a license in what appears to be the usual and customary manner.

In the first letter they wrote in applying for the license they stated: "We are anticipating some construction work in the State of Arkansas and understand that it is necessary that we have an Arkansas Contractor's License, or that we file qualifications and financial statement with your State before we are eligible to commence work on the construction project." It can be seen from this letter it was the *understanding of the Contractors* that they had to have a license before they would be eligible *to commence work on the construction project,* and not that they had to have a license before they could make a bid or execute a contract in Oklahoma. In none of the letters of the Board to the Contractors subsequent to that time did the Board disabuse the Contractors' minds of that idea.

The Contractors, being sure of their position from the standpoint of experience, ability, character, manner of performance of previous contracts, financial condition, and equipment, assumed that the license would be issued any day, and had no intention of violating any provisions of the Act or any laws of this State by submitting a bid and executing a contract before the license was actually issued.

We believe the record shows that the Contractors acted in utmost good faith and did not violate the spirit or the intention of the Act.

The powers of the Board should not be exercised in a capricious, unreasonable or arbitrary manner. *Carville* v. *Smith,* 211 Ark. 491, 201 S. W. 2d 33.

The judgment of the Pulaski Circuit Court is affirmed.

GEORGE ROSE SMITH, J., not participating.

MORLEY, COMMISSIONER OF REVENUES *v.* BERG.

4-9325 235 S. W. 2d 873

Opinion delivered January 15, 1951.

Rehearing denied February 12, 1951.

O. T. Ward, Lawrence B. Burrow and *J. Bruce Streett,* for appellant.

Gaughan, McClellan & Gaughan, for appellee.

George Rose Smith, J. This is an action by D. R. Morley, Commissioner of Revenues, to enjoin the appellees, H. M. Berg, A. R. Allen, C. C. Allen, and Paul Smith, from taking sand and gravel from the bed and bars of that part of the Ouachita River that lies within a certain eighty-acre tract. On the first appeal we sustained the Commissioner's authority to bring the suit. 216 Ark. 562, 226 S. W. 2d 559. The question now presented is whether the right to remove these minerals is vested in the Allens or in J. W. Sanders. The answer depends upon whether a former Commissioner of Revenues, O. A. Cook, was authorized to withdraw this eighty-acre tract from a lease previously granted to Sanders and then lease it to the Allens.

The Commissioner has the power to execute leases for the taking of sand and gravel from the beds and bars of navigable rivers. Ark. Stats. 1947, § 10-1001. Under successive leases granted from time to time Sanders has been operating in the vicinity north of Camden since 1926. His most recent lease, executed in 1944 and amended in 1947, gave him the exclusive right to remove sand and gravel from the Ouachita in nine specified sections of land. In 1948 Commissioner Cook notified Sanders that an investigation had disclosed that Sanders had not developed the tract now in controversy and that in view of the great amount of other acreage included in Sanders' lease the retention of this tract was not necessary to protect Sanders in his development. Cook accordingly undertook to withdraw this tract from Sanders and lease it to the Allens.

When Morley became Commissioner he concluded that his predecessor had been without power to cancel any part of Sanders' lease as long as minerals were being

produced in commercial quantities. Morley therefore notified the Allens that their lease was void and that the Sanders lease was reaffirmed. The appellees, however, continued their operations, and Morley brought this suit for an injunction. The chancellor dismissed the complaint upon the theory that Cook acted within his authority in partly canceling the Sanders lease.

The statute provides that the area to be leased to any one person shall not exceed a total acreage necessary to protect the development, such total to be determined by the Commissioner in each instance. The appellant contends that since this determination was made when Sanders received his lease in 1944, the question could not be re-examined at a later date as long as the lessee continued commercial production from any part of the leasehold. It is conceded that the State is here acting in its proprietary capacity, and the appellant insists that it is therefore bound by its contracts just as a private person would be.

In the main we agree with these contentions, though not with the conclusion reached by the appellant. In making an original lease the Commissioner is certainly under a duty to exercise reasonable judgment in fixing the lessee's total area, neither granting so little as not to make the lessee's investment for equipment worthwhile nor granting so much as to be clearly beyond the lessee's capacity to develop the leasehold within a reasonable time. Further, after the original area has been fixed the Commissioner cannot arbitrarily abrogate the State's contract by canceling the lease in whole or in part as long as the lessee performs his duties.

But it does not follow that later events may not warrant a reconsideration of the area to be held exclusively by the lessee. Even in the case of private persons it is well settled that the lessor of a mining lease is entitled to assert a forfeiture if the lessee fails to develop the leasehold with a view to the best interests of both parties. We have often pointed out that since the principal consideration to the lessor is his expectation of receiving royalties, there is an implied obligation on the part of the

lessee to develop the entire property so that the lessor may obtain the expected income that induced him to grant the lease. *Mansfield Gas Co.* v. *Alexander,* 97 Ark. 167, 133 S. W. 837; *Millar* v. *Mauney,* 150 Ark. 161, 234 S. W. 498. Of course, the rapidity with which the lessee should proceed with his development depends upon the particular circumstances of each case, but in the absence of an agreement to the contrary the implied duty of complete development is inherent in all mining leases that provide a royalty to the lessor. Here the only consideration to be paid to the State is the royalty upon the sand and gravel.

In the light of these principles we think Cook was warranted in withdrawing this eighty-acre tract from Sanders. The lease included the bed and bars of the Ouachita in nine sections of land. As to five sections south of Camden, however, it is shown that a former Commissioner induced Sanders to include them in his 1944 lease merely to enable Sanders to prevent trespassers from wrongfully removing sand and gravel. As it does not appear that the State expected Sanders to develop these five sections we do not take them into account in determining the extent to which Sanders has complied with his implied duty.

Sanders described his method of operating since about 1943. He drags a large bucket across the bed of the river to take out the sand and gravel. In times of high water the current brings down additional deposits from a half mile of shoal that is just above Sanders' point of activity. Over a period of seven years Sanders has moved up and down along a quarter-mile segment of the river in Section 11, the natural replacements having been more than sufficient to supply his needs. Indeed, he admits that he has plenty of sand and gravel in Section 11 and could have excavated more had there been a market for it.

The tract assigned to the Allens lies in Section 10, about a mile upstream from Sanders and past the large shoal that has heretofore replaced his withdrawals. There is no proof to indicate that the Allens' taking of sand

and gravel has affected the supply available to Sanders at his established location. It was shown that considerably larger concerns operating on the Arkansas River have been granted territories larger than that held by Sanders north of Camden, but the proof also shows that these operators move up and down their entire segments of the river several times a year in order to find the minerals they need.

On the record made in this case, to which Sanders is not a party, we cannot say that Cook acted arbitrarily in deciding that Sanders was not properly developing the tract now leased to the Allens. Sanders testified at the trial, but he did not undertake to say when, if ever, his development would have extended to the disputed tract. He admitted that he has ample deposits at his present site and that there are additional deposits in other sections north of Camden that are still in his exclusive territory. His only real complaint is that the Allens have sold sand and gravel to purchasers who would have bought from him had he been the only dealer in the vicinity.

Section 10-1001 limits each lessee to an area necessary to protect development, and the appellant strongly argues that the intent of this language is to impose on the State an obligation to protect the investment of its lessee by shielding him from competition. On the particular facts of the case at bar this argument is not persuasive. Sanders appears to have made his investment at least as early as 1943, when the five sections south of Camden had not yet been included in his lease. Hence he made his outlay at a time when he was vulnerable to competition from any one who might obtain a lease upon the southern sections, and it is not shown that competition from that area would have been any less injurious to his investment than the activities of the Allens have proved to be.

But, apart from these circumstances, we do not agree that the language in question was intended to guard the lessee against competition. The statute does not say that each lessee is to be guaranteed a *minimum* area large

enough to protect development under monopolistic conditions; it says that the lessee's total acreage shall not *exceed* that necessary to protect development. We hardly think the legislature meant to disregard the spirit of Article 2, § 19, of our constitution, which prohibits monopolies in any form. It is more reasonable to believe that by the language in question the legislature sought merely to assure each lessee of sufficient territory to justify the requisite investment to develop the acreage under conditions of fair competition. Certainly the lessee of a lease between private persons could not justify the retention of undeveloped acreage merely to enable him to fend off competition in the market. We are not convinced that the General Assembly framed this statute for the purpose of putting the State in a worse position than that occupied by private lessors.

Affirmed.

GRIFFIN SMITH, C. J. (Dissenting). Effect of the opinion is to say that one Commissioner has the power and did not abuse his discretion in canceling a lease, but that the succeeding Commissioner, who found that the cancellation was without notice, could not restore to the former lessee the acreage assigned by a third Commissioner, who admittedly intended that the property should be protected against unlawful mining. I do not agree that in the circumstances of this case there was an implied condition that the lease would be worked. The question of protecting Sanders against competition is a remote incident, mentioned collaterally in the testimony, and determination of the appeal should not turn on an immaterial issue; nor should the transaction be likened to an oil and gas lease where offset wells drain the stratum. Oil and gas leases are controlled by a different statute and by decisions peculiar to the fugitive nature of the mineral.

It is my view that the State has the right, through its Commissioner to whom supervision has been delegated, to *conserve* as well as lease, and that the state is not under an obligation in all cases to authorize the tak-

ing of sand and gravel. I would therefore uphold the action of Commissioner Morley.

PFAFF, ADMINISTRATRIX *v.* HEIZMAN.

4-9329 235 S. W. 2d 551

Opinion delivered January 15, 1951.

John R. Thompson, Bailey & Warren and *Walls Trimble,* for appellant.

Leffel Gentry and *U. A. Gentry,* for appellee.

H. B. Stubblefield, amicus curiae.

ED. F. MCFADDIN, Justice. This is a sequel to *Pfaff* v. *Clements,* 213 Ark. 852, 213 S. W. 2d 356. In that case we upheld a family settlement, wherein all of the adult heirs of Samuel Ernest Pfaff allowed Mrs. Annie Mae Pfaff (widow of Terrence O. Pfaff) to receive their interests in the share of her husband in the estate of his father, Samuel Ernest Pfaff. But the opinion in that case recited that Carl E. Heizman II was a minor at the time of said settlement. He repudiated the settlement

and is now claiming his interest against Annie[1] Mae Pfaff. As the widow of Terrence O. Pfaff she claims dower; and Carl E. Heizman II contends that she is not entitled to dower. Such is the crux of the argument in the present litigation, in which the facts are substantially as follows:

Samuel Ernest Pfaff died intestate on May 1, 1945, and his son, Terrence O. Pfaff, was appointed administrator. The real estate of Samuel Ernest Pfaff was never taken in charge by the administrator and was all the time held by some of the heirs. On April 17, 1946—and before the expiration of the time for filing claims against the estate of Samuel Ernest Pfaff—the said Terrence O. Pfaff died intestate and without issue surviving him. After the death of Terrence O. Pfaff all the debts against the estate of Samuel Ernest Pfaff were paid from the personalty of that estate so that the lands were never taken in possession by the administrator.

Annie Mae Pfaff, widow of Terrence O. Pfaff, claimed dower in her husband's interest in the real estate of Samuel Ernest Pfaff, since the son survived the father. Carl E. Heizman II, in resisting the dower claim, contended that until the estate of Samuel Ernest Pfaff had been *closed,* his real estate did not descend to his heirs to such an extent as to permit the widow of an heir to be entitled to dower therein. In other words, the claim was, that the widow of the heir could have no dower until the estate of the ancestor had been closed, for then only was the heir seised of an indefeasible estate of inheritance. The Chancery Court—evidently relying on the case of *Tate* v. *Jay,* 31 Ark. 576—decreed that Annie Mae Pfaff was not entitled to dower under the facts in this case. This appeal challenges the correctness of that decree.

In *Tate* v. *Jay, supra,* the facts were: Joseph W. Clay, *Sr.* died intestate, the owner of real estate, and survived by three heirs, one of whom was Joseph W.

[1] In *Pfaff* v. *Clements,* 213 Ark. 852, 213 S. W. 2d 356, the name was spelled "Anna," whereas here it is "Annie." No explanation is found in the brief as to the variation.

Clay, *Jr.*, whose wife was then Mary Clay. Joseph W. Clay, Sr. owed considerable debts; and his administrator (Fletcher) took charge of all the realty, as well as all the personalty, and continued to hold the realty for settlement of unpaid debts even to the time of the trial in the case. Even though Joseph W. Clay, Jr. resided on some of the said lands, nevertheless he all the time paid rent to Fletcher, as administrator of his father's estate. During the continuance of such situation (and while the administrator still had charge of the lands), J. W. Clay, Jr. died intestate, and his wife, Mary Clay,[2] claimed of his father. The Supreme Court held that Mary Clay had no dower, saying:

"The decision of the whole case turns upon the question of seizin.

"Was the husband, during coverture, seized of an estate of inheritance? Such seizin, during coverture, and the death of the husband, entitle the widow to dower. Was the husband seized of the land? Seizin is either in deed, or in law; seizin in deed, is actual possession; seizin in law, the right to immediate possession. Unless such seizin existed during coverture there can be no dower, because it is an indispensable requisite to her right to dower, so declared by Statute. . . ."

The Court then pointed out: (1) that under § 2210, Gantt's Digest,[3] the widow is entitled to dower in lands "whereof her husband was seized of an estate of inheritance"; (2) that under § 68, Gantt's Digest,[4] lands were assets in the hands of the administrator for the payment of debts of the intestate; and (3) that Joseph W. Clay, Jr. "as such heir . . . held an interest in the land but not a right to immediate possession". The holding in *Tate* v. *Jay, supra,* is, and was, correct under

[2] Mary Clay remarried and became Mary Tate.

dower in Joseph W. Clay, Jr.'s interest in the real estate

[3] This is now § 61-201, Ark. Stats. Even though in the present case the dower sought by Mrs. Annie Mae Pfaff is under § 61-206, Ark. Stats., nevertheless, the requirements of seisin are the same as under § 61-201, Ark. Stats. See *Roetzel* v. *Beal,* 196 Ark. 5, 116 S. W. 2d 591.

[4] This is now § 62-411, Ark. Stats.

the facts there existing—*i. e.,* the widow of the heir is not entitled to dower in the lands of the ancestor if and when those lands are needed to pay the debts of the ancestor. Such is really the holding in *Tate* v. *Jay, supra;* and to that extent the holding is correct, although the reason given for the holding was broader than was necessary.

A treatise might be written on sufficiency of seisin[5] to sustain dower,[6] citing our cases from *Tate* v. *Jay, supra,* to *Brack* v. *Coburn,* 210 Ark. 334, 196 S. W. 2d 230; but such is unnecessary to the decision of the present case. This Court has repeatedly held that upon the death of the owner intestate, the title to his real estate instantly vests in his heirs, subject to be divested by sale to pay his debts. We mention some such cases:

(a)—In *Hall* v. *Brewer,* 40 Ark. 433, the Court said: "Our statute makes lands assets in the hands of the executor or administrator for the payment of debts. The title descends to the heir, subject to this burden".

(b)—In *Stewart* v. *Smiley,* 46 Ark. 373, the Court said: "The statute confers the power upon an administrator to control the lands of his intestate for the purpose of paying debts. His authority in that respect is derived solely from the statute, for at common law the administrator had nothing whatever to do with the lands of his intestate". In that case, the administrator did not need the lands to pay the debts; so it was held that he had no right to collect the rents. Even while administration was pending, the heirs took charge of the lands and rented the lands and had a partition. When the administrator *de bonis non* sought to collect rents from the tenant it was held that the administrator had no right to the rents.

(c)—In *Chowning* v. *Stanfield,* 49 Ark. 87, 4 S. W. 276, the Court said: "An administrator is not entitled

[5] In some of the older books, the word is spelled "seizin." Either way seems to be correct; but modern usage is "seisin."

[6] In 4 Arkansas Law Review 246, there is a case note entitled, "Requirement of seisin as basis for award of dower." See also 15 Tulane Law Review 455 containing article, " Seisin in the Common Law."

to the possession of lands unless they are needed to pay the intestate's debts. . . . As a naked legal title bears none of the substantial fruits of real estate, it could be of no benefit to the administrator in paying debts and cannot therefore be regarded as assets in his hands."

(d)—In *Hopson* v. *Oxford,* 72 Ark. 272, 79 S. W. 1051, it was held that when the administrator had in fact taken possession of land to pay debts, then the heirs could not maintain ejectment against the tenants holding under the administrator. That opinion, in effect, recognized that actual possession had to be taken by the administrator to defeat the heirs, for the opinion recites: "Upon the death of Mrs. Alexander the legal title to her lands descended upon and vested in her heirs at law, subject alone to the payment of her debts."

(e)—In *Doke* v. *Benton Co.,* 114 Ark. 1, 169 S. W. 327, 52 L. R. A., N. S. 870, the Court said: "The administrator of an estate is not the owner or proprietor of the lands of the estate, nor the agent of the heirs within the meaning of the statute relating to mechanics' liens. Lands and tenements are only assets in the hands of an administrator for the payment of debts of an intestate when the personal property of the estate is insufficient to pay the debts."

(f)—One of our latest cases on this point is *Dean* v. *Brown,* 216 Ark. 761, 227 S. W. 2d 623, in which we said:

"Our statute provides that immediately upon the intestate's death, the title to *real estate* descends to the heirs at law, subject to the widow's dower and the payment of debts. See § 61-101, Ark. Stats. 1947. The two sections (§ 62-411 and § 62-911, Ark. Stats. 1947), concerning lands as assets in the hands of the administrator, have been uniformly construed to mean that the title to the lands passes direct to the heirs on the death of the intestate, subject to the rights of the administrator to have the Probate Court sell the lands if such be necessary to pay the debts of the deceased. See *Hopson* v. *Oxford,* 72 Ark. 272, 79 S. W. 1051; *Jones* v. *Jones,* 107 Ark. 402, 155 S. W. 117; *Doke* v. *Benton County Lbr. Co.,*

114 Ark. 1, 169 S. W. 327, 52 L. R. A., N. S. 870; *Campbell* v. *Smith,* 167 Ark. 633, 268 S. W. 359 and 880; and *Miller* v. *Watkins,* 169 Ark. 60, 272 S. W. 846."

Thus our cases, in effect, have recognized that upon the death of the ancestor intestate, the heirs become seised, subject to be disseised if the lands are needed to pay the debts of the ancestor. If the heir be seised during his lifetime, then his widow is entitled to dower, but subject to have such dower divested if the burden (of prior debts) be asserted which rested on the land when it descended to the heir.[7]

The effect of our subsequent cases on the statements regarding seisin, as contained in *Tate* v. *Jay, supra,* need not now be considered at further length; because it is sufficient to the holding in the case at bar to point out one essential fact which distinguishes this case from *Tate* v. *Jay;* and that fact is, that in *Tate* v. *Jay* the lands were all the time held by the administrator to pay the debts of the ancestor, whereas in the case at bar the administrator of the ancestor never had possession of the lands and the personal property of such ancestor was all the time sufficient to pay the debts of his estate and did pay such debts. Therefore, since (1) Terrence O. Pfaff survived his father, Samuel Ernest Pfaff, and (2)

[7] Several instances may be mentioned in which an inchoate right of dower in real estate may be divested after the husband's seisin and without release executed by the wife or without her misconduct: as (a) liens created on the land prior to marriage, *Deloney* v. *Dillard,* 183 Ark. 1053, 40 S. W. 2d 772; (b) liens for purchase money, even when lands were acquired after marriage, *Bothe* v. *Gleason,* 126 Ark. 313, 190 S. W. 562; (c) forfeiture and sale of land for taxes if the lands be unredeemed, *McWhirter* v. *Roberts,* 40 Ark. 283; or (d) when the husband's title is barred by limitations under conditions stated in Act 84 of 1935, as found in § 61-226, Ark. Stats.

In Kent's Commentaries, 14th Ed., Vol. 4, Page *50, in discussing divesting of widow's dower on disseisin of the husband, the general rule is stated:

"As a general principle, it may be observed, that the wife's dower is liable to be defeated by every subsisting claim or incumbrance in law or equity, existing before the inception of the title, and which would have defeated the husband's seisin."

Likewise, in Tiffany on Real Property, 3rd Ed., § 508, the rule is stated:

"Since the right to dower is dependent on the husband's estate, if the latter is defeated by reason of an entry or judgment under a title paramount, the dower right is also defeated."

all the debts of Samuel Ernest Pfaff were paid by the personal property of his estate, and (3) the lands were never taken in charge by the administrator: we hold that Annie Mae Pfaff (widow of Terrence O. Pfaff) is entitled to dower in her husband's interest in the lands of Samuel Ernest Pfaff.

The decree of the Chancery is reversed and the cause is remanded, with directions to enter a decree in accordance with this opinion.[8]

ARKANSAS GAME AND FISH COMMISSION *v.* EDGMON.

4-9304 235 S. W. 2d 554

Opinion delivered January 15, 1951.

[8] This case was submitted to this Court on November 20, 1950, and was discussed in consultation and a unanimous conclusion reached. Since such consultation, the terms of office of Justices ROBERT A. LEFLAR and EDWIN E. DUNAWAY have expired and Justices J. PAUL WARD and SAM ROBINSON have become members of the Court. The latter two have not participated in the consideration and decision of this case.

Ed E. Ashbaugh, for appellant.

Neill Bohlinger, for intervening appellant.

GRIFFIN SMITH, Chief Justice. The executive secretary of the State Game and Fish Commission declined to authorize payment of $105 to four persons who claimed to have killed seven wolves over six months old, as evidenced by certificate of the Boone County Court. See Act 183 of 1949. The statute is entitled "An Act to authorize . . . counties . . . to pay bounties for the killing of wolves and to provide that the State . . . shall pay an equal sum as a bounty, and for other purposes." The emergency clause is a finding that farmers are suffering irreparable damage "from wolves destroying cattle and other live stock." The measure received two-thirds of the votes of all members elected to each branch of the General Assembly.

The complaint is a petition for mandamus alleging that Boone county has paid bounties on the basis of $20 for each wolf killed; but, § 2 of Act 183, the amount payable by the State cannot exceed $15.

The answer, among other defenses, asserts that T. H. McAmis as Secretary of the Game and Fish Commission, Sec. 7, Amendment No. 35 to the Constitution, is not permitted to disburse the fund unless the Commission expressly directs payment; that none of the scalps for which a bounty is claimed is that of a wolf, hence the public has been defrauded by the substitution of dog scalps; and further, Act 183 is void because it is in conflict with Amendment 35 in that appropriations by the General Assembly may only be made for purposes enumerated in the Amendment or coming within its scope by necessary implication.

The Chancellor held that the certificate issued by the County Judge was conclusive and rejected expert witnesses who would have testified that the scalps came from dogs. One of the witnesses had spent 22 years as an employe of the U. S. Fish and Wild Life Service,

trapping wolves in ten states. His reasons for asserting that the scalps in question were spurious were set out in detail for the purpose of making up a record.

Power of the Legislature to change an initiated constitutional amendment is presented by the plea that Act 183 received two-thirds of the votes of each branch of the lawmaking body. The Act, by § 4, appropriates from the Game Protection Fund $6,000 for each year of the biennium ending June 30, 1951, to pay bounties as set out in § 2.

In *W. R. Wrape Stave Company* v. *Arkansas State Game and Fish Commission,* 215 Ark. 229, 219 S. W. 2d 948, we said that the underlying purpose of Amendment 35 was to vest in the Commission power to control, manage, restore, conserve, and regulate the State's bird, fish, game, and wild life resources, and that funds arising from all sources were to be spent by the Commission for the purposes mentioned. Section 8 of the Amendment contains this additional language: "All moneys shall be deposited in the Game Protection Fund with the State Treasurer, and such moneys as are necessary, including an emergency fund, shall be appropriated by the Legislature at each legislative session for the use of the Game and Fish Commission *as hereto set forth.*"

We said in the Wrape Stave case that "money received from sources mentioned in the Amendment is not available—even with legislative approval—for any uses other than those expressed or necessarily implied."

Appellant is correct in saying that the General Assembly cannot disburse Game and Fish funds. It should, as the Amendment contemplates, make appropriations to carry into effect the will of the people who adopted the instrument as a part of our Constitution; but in doing this the fundamental intent must be kept in sight.

This brings us to a consideration of the legislative right to amend, repeal, or otherwise change an initiated constitutional amendment. Under "General Provisions," Amendment No. 7, "measure" is defined as including any bill, law, resolution, ordinance, charter, constitu-

tional amendment, or legislative proposal or enactment of any character. Neither the Governor nor any Mayor shall have power to veto measures initiated by or referred to the people. The following paragraph then appears: "No measure approved by a vote of the people shall be amended or repealed by the General Assembly or by any City Council, except upon a yea and nay vote on roll call of two-thirds of all members elected to each house of the General Assembly, or of the City Council, as the case may be." Another provision prohibits the General Assembly from submitting "measures" to the people "except a proposed constitutional amendment or amendments as provided for in this Constitution."

Some of the cases in which reference is made to Amendment No. 7, and the construction given it where issues differed from those before us, are shown in the footnote.[1]

The word "measure" or "measures" appears in each of the eight paragraphs under General Provisions. There are no numbered sections other than § 1. It will be observed that the definition of "measure" is that it shall include constitutional amendment[s] "or legislative proposals of any character." If the language should be literally construed, then a constitutional amendment applicable to Little Rock alone, or to any other city, could be repealed by a vote of two-thirds of the members elected to the city council. By § 22 of Art. 19 of the Constitution, the General Assembly may submit constitutional amendments—not exceeding three at a session—for approval or rejection by the people. These amendments are spoken of as "measures," hence if the definition in Amendment and Repeal is applied throughout, then any or all of the more than forty amendments to

[1] *Smith* v. *Lawson*, 184 Ark. 825, 43 S. W. 2d 544; *Coleman* v. *Sherrill*, 189 Ark. 843, 75 S. W. 2d 248; *Reeves* v. *Smith*, 190 Ark. 213, 78 S. W. 2d 72; *Beene* v. *Hutto*, 192 Ark. 848, 96 S. W. 2d 485; *Johnston* v. *Bramlett*, 193 Ark. 71, 97 S. W. 2d 631; *Carpenter* v. *City of Paragould*, 198 Ark. 454, 128 S. W. 2d 980; *Warfield* v. *Chotard*, 202 Ark. 837, 153 S. W. 2d 168; *Howard* v. *Stafford*, 203 Ark. 736—dissenting opinion by Mr. Justice FRANK G. SMITH at p. 740, 158 S. W. 2d 929; *Morton and Ashcraft* v. *State*, 207 Ark. 704, 182 S. W. 2d 675; *Chastain* v. *City of Little Rock*, 208 Ark. 142, 185 S. W. 2d 95; *Dixon* v. *Hall*, 210 Ark. 891, 198 S. W. 2d 1002: *Cobb* v. *Burress*. 213 Ark. 177, 209 S. W. 2d 694.

the constitution could be repealed by the required vote of the legislature. The result would be that initiated Acts and constitutional amendments would stand on about the same footing.

It is inconceivable that in defining constitutional amendment as a *measure* the purpose was to invest the General Assembly with power (a) to repeal a constitutional amendment, or (b) with authority to amend an amendment—a power that could be exercised to such an extent that the entire meaning of a constitutional provision achieved through amendment could be changed by legislative action.

The clear intent of the Initiative and Referendum Amendment was to give the people enlarged legislative and constitutional powers. Certainly if the purpose had been to take away fundamental security then enjoyed or to be acquired under the Amendment, the right of two-thirds of those elected to the General Assembly to treat amendments as though they had been referred to it would have been expressed in more emphatic terms.

The decree is reversed and the cause dismissed.

[The decision in this case was reached in December, 1950, and the result concurred in by all of the judges, two of whom are not now on the court. Mr. Justice WARD and Mr. Justice ROBINSON, therefore, did not participate in a determination of the issues, or in consideration of the opinion].

EAST TEXAS MOTOR FREIGHT LINES, INC., *v.* WOOD, JUDGE.

4-9433 235 S. W. 2d 882

Opinion delivered January 22, 1951.

[redacted]

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

Harper, Harper & Young, for appellee.

PAUL WARD, J. The petitioner here seeks a writ of prohibition to restrain the Circuit Court of Sebastian County from proceeding further in a case now pending in said county. In the said pending suit the Arkansas Motor Freight Lines, Inc., seeks recovery for damages to personal property caused by a collision between one of its trucks and a truck belonging to the East Texas Motor Freight Lines, Inc., in Hot Spring County, Arkansas. When the defendant, the petitioner here, was served with summons it appeared only for the purpose of filing a motion to quash the service of summons. The judge of the Sebastian County Circuit Court, who is the respondent here, overruled the motion to quash and thereupon the East Texas Motor Freight Lines, Inc., petitions this court for a writ of prohibition.

The facts essential to a determination of the issue involved are stipulated and agreed as set out below.

The Arkansas Motor Freight Lines, Inc., is an Arkansas corporation with its articles of incorporation filed in the Fort Smith District of Sebastian County, Arkansas, where its principal office and place of business are located. The petitioner is a Texas corporation, but has a permit to haul freight in parts of Arkansas including Highway No. 67 which runs through Hot Spring County where the collision occurred, but has no permit

to operate in Sebastian County. It is further stipulated that the Arkansas Motor Freight Lines, Inc., relies on Act 182 of 1947 for venue in Sebastian County.

Thus, the issue presented by petitioner for this writ is clearly defined and involves only a correct interpretation of the act mentioned above. Said Act 182 amended Act 317 of 1941, and the effective section of Act 182 reads as follows:

"Section 1. Section One of Act 317 of the Acts of the General Assembly of Arkansas of 1941, be and the same is hereby amended to read as follows: 'Any action for damages to personal property by wrongful or negligent act may be brought either in the County where the accident occurred which caused the damage or in the county of the residence of the person who was the owner of the property at the time the cause of action arose.' "

It is the contention of the petitioner that this Act does not apply to corporations but only to individuals and calls special attention to the use of the word "residence". It is urged that the word "residence" was meant to apply only to individuals and that if it had been the intention of the Act to apply to corporations it would have contained the words "residence or domicile". It is further contended, and correctly so, that it is proper to consider the intent of the Legislature as it is gathered from the language of the act itself and from the language of the emergency clause. The emergency clause reads as follows:

"It is found and declared that in many instances litigants to actions for personal injury and property damage have a cause of action growing out of the same accident and that the jurisdiction for property damage is in one County and for personal injury in another County, and that as a result thereof an inconvenience and expense arises to the litigants and multiplicity of suits results therefrom, and because of these conditions and this Act being necessary for the immediate preservation of the public peace . . ."

It is stated that if Act 182 is construed to apply to corporations it would be possible for a corporation to file its articles in the smallest county in the state and bring all of its actions for property damage in said county and that in such event the small county would be faced with financial embarrassment and that therefore it is reasonable to assume that the Legislature had no such intention. In addition to the above other related reasons and arguments are ably advanced by petitioner which, when carefully weighed, present a question not without some difficulties.

It is apparent that Act 182 does not accomplish fully the purposes set forth in the emergency clause and that it may make possible the financial difficulty suggested above. Notwithstanding this however, it is our opinion that Act 182 of 1947 applies to corporations as well as to individuals. There are two words in the Act which might in common usage be associated with an individual or natural person, rather than with a corporation, to-wit: the words "residence" and "person". There is no difficulty in concluding that the word "person" used in the Act could have been meant to apply to a corporation as well as to a natural person. Ark. Stats. § 27-109 reads in part, "The word 'person' includes a corporation as well as a natural person" and this section was applied in the case of *Harger* v. *Okla. Gas & Electric Co.*, 195 Ark. 107, 111 S. W. 2d 485. Many other cases could be cited to the same effect. The application of the word "residence" to include a corporation is sustained in legal parlance though perhaps not with as much weight and clarity as in the case of the word "person". We find in 13 Am. Jur. p. 1073 that a corporation is repeatedly mentioned as having a "residence". To the same effect see 19 C. J. S. p. 976, § 1296. Our own court in the case of *Central Manufacturers' Mutual Ins. Co.* v. *Friedman,* 213 Ark. 9, 209 S. W. 2d 102, 1 A. L. R. 2d 557, recognized that the word "domicile" includes "residence."

Having arrived at the permissible legal interpretation of the words "person" and "residence", it is not

difficult to conclude from a careful reading of Act 182 of 1947, that it applies to corporations as well as to individuals, and we so hold.

The writ is denied.

GEORGE ROSE SMITH, J., dissenting. I agree that a close question is presented, but I think it should be decided the other way. The word person often refers to a corporation, but not invariably. No one would suppose that a statute referring to persons of unsound mind was meant to apply to corporations. In Act 182 the legislature declared its purpose to relieve litigants of having to sue in more than one county for personal injuries and property damages arising out of the same accident. A corporation can no more sustain personal injuries than it can be of unsound mind. Hence the legislature apparently intended to refer only to natural persons in this particular statute. I, therefore, think the writ should issue.

COLTHARP *v.* COLTHARP.

4-9343 235 S. W. 2d 884

Opinion delivered January 22, 1951.

Kaneaster Hodges, for appellant.

Pickens, Pickens & Ponder, for appellee.

George Rose Smith, J. This is an action by the appellant, Elizabeth Jane Coltharp, to obtain a divorce on the ground of desertion. The chancellor granted the divorce, awarded appellant $35 a month for the support of herself and her minor son, and adjudicated the property rights of the parties. Upon this appeal the appellant contends that the decree should have been more liberal as to alimony and property rights.

The couple were married in 1946, while Coltharp was a student in college. They separated about a year later. Coltharp had been a colonel in the Army Air Forces during the second World War, and after the separation he reentered the army and served for about eighteen months at a salary of more than $700 a month. Before the trial, however, he was relieved from active duty, and when the case was tried he was again a student in college, receiving as his only income an allowance of $105 a month under the statute popularly known as the G. I. Bill of Rights.

In these circumstances we think the chancellor's allowance of alimony was as generous as the appellant can fairly demand. The husband's ability to pay is a foremost consideration in a case of this kind. *Lewis* v. *Lewis,* 202 Ark. 740, 151 S. W. 2d 998. The appellant insists that the appellee's potential earning capacity is equal to his military pay, but the record does not support this conclusion. It is a matter of common knowledge that in the military service some young men earned during the war a great deal more than their training would have enabled them to earn in civilian life. Here the appellee had not even finished his education when the case was tried. The appellant does not undertake to say in what line of work the appellee is qualified to earn $700 a month—except by re-

turning to the army, which he evidently would not wish to do even if that option were open to him. The appellant is not destitute; she lives in the home of her parents, both of whom are employed. The record as a whole does not convince us that the trial court was wrong in awarding the appellant only a third of the appellee's $105 monthly income.

As to the property settlement, a great deal of conflicting testimony was taken concerning the appellee's financial condition. The preponderance of this evidence supports the view that at the date of trial the appellee's assets consisted of two lots in Texas, an automobile, three life insurance policies in private companies, an expected dividend from a National Service life insurance policy, and a remainder interest in certain lots in Newport, in which his mother has a life estate. The trial court ordered the appellee to convey the Texas realty to the appellant, which has been done. He further ordered that the appellee surrender to the appellant all his insurance policies except the National Service contract, and that he use the dividend from the latter to pay a $150 fee to the appellant's attorney and the rest to the appellant. In announcing his decision the chancellor said: "I have taken all that he has and given it to her, and I am retaining jurisdiction and have already stated that I will open it up for consideration again when he completes his education without your having to show any change in her circumstances and show only that he is making more money." We see no reason to disturb the trial court's distribution of the appellee's property holdings. By statute a wife who obtains a divorce is entitled to a one-third interest in her husband's property, Ark. Stats. 1947, § 34-1214, and here the allowance exceeded that required by the statute.

Two other contentions require only a few words. First, there was objection to some testimony offered by the appellee as to occurrences during the marriage, but this evidence went principally to the question of who was at fault in causing the separation. It had at most a very remote bearing on the issues now before us, and

even if the testimony was incompetent its admission in this chancery case is not shown to have been so prejudicial as to call for a new trial. Second, it is urged that a fee of $150 is not adequate compensation for the services rendered by the appellant's attorney. We think this to be true, but here again the husband's financial condition must be considered. We have sanctioned the trial court's refusal to allow any fee at all when the relative resources of the parties warranted that course. *Zeddy* v. *Zeddy,* 180 Ark. 235, 21 S. W. 2d 157. Here the fee allowed is undoubtedly modest, but it is commensurate with the defendant's ability to pay.

The decree is affirmed, the appellee to pay the costs.

WARD, J., not participating.

LAFLIN *v.* DRAKE.

4-9299 237 S. W. 2d 32

Opinion delivered January 22, 1951.

Abe Collins and *Charles R. Garner,* for appellant.

U. A. Gentry and *Moore, Burrow, Chowning & Mitchell,* for appellee.

GRIFFIN SMITH, Chief Justice. The appellees are daughters and sole heirs at law of U. L. Thacker. The litigation involves Lot 4 of Block 60, in Mena. Betterments assessed by Paving Improvement District No. 6 were not paid for 1940 and the property was included in a list of lots sold for delinquencies. Tax, interest, and cost, amounted to $14.72. At the foreclosure sale B. B. Laflin, Sr., bid $25 and was declared the purchaser. It is stipulated that for many years prior to 1941 general taxes were assessed in Thacker's name and the tax value for 1941 was $1,250. The lot contained a brick building worth $6,000 when forfeiture occurred, and it is worth that sum now.

In February, 1949 appellees filed a pleading styled "Intervention by Petition for Bill of Review." It was given the Chancery Court docket number used in the foreclosure. This suit was the result of an action taken by Laflin in March, 1947, when he intervened in the foreclosure proceedings by alleging that through error the comissioners issued a deed instead of a certificate of purchase. This deed was promptly approved; but, said the intervener, since the time for redemption had expired when the petition was filed in 1947, and the landowner had not offered to pay the adjudicated sum, the transaction should be judicially completed.

The Court directed the Clerk to execute a deed superseding the one prematurely issued. The old order of confirmation is dated January 27, 1942. In asking for

a new deed the intervener assured the Court that the foreclosure was regular in all respects and that the attending circumstances were of an approved pattern, therefore the sole matter for consideration was the naked formality of rectifying an obvious mistake made five years earlier. No service was had on the landowner, nor was notice of any kind or information given.

Thacker died in June, 1948—about eight months before the present action was brought. His daughters were non-residents and did not know of the Laflin purchase until an abstracter called their attention to the substituted deed when they undertook to sell the property. The deed in question was recorded April 14, 1947.

The bill of review alleges that the complaint of 1941, publication of notice of the suit, the decree, and the commissioner's notice of sale—all listed the owner as R. E. Johnson. Although Thacker bought the lot in 1919 and did not have his deed recorded, the real owner was generally known and had at all times been in possession through tenants.

Urged as an additional vice was the fact that the foreclosure decree, after fixing the lien, directed that if the item of $14.72 should not be paid and the obligation discharged within twenty days "from the date of this decree, said lien shall be forever foreclosed and the lands condemned." The Clerk, as commissioner, was ordered to conduct the sale ". . . after having first advertised . . . weekly for two consecutive weeks." Without waiting for the 20-day period to expire notice was given December 12, 19, and 26. The decree was dated December 4, so the result was that the publication of December 26th was the only notice given after the time allowed for paying without further cost had terminated.

Because of state aid, benefits were not collected for two years preceding the 1940 delinquency—1935 and 1938; nor were property owners required to pay for 1942 and 1943.

In disposing of the bill of review the Chancellor found that Thacker owned eight lots and had consistently

paid assessments on them; or, after default, had redeemed in a timely manner. The only exception was his failure to pay on Lot 4 for 1940. The sale was conducted January 24, 1942. After improperly receiving the deed within a few days Laflin did not undertake to change the tax listing. He did not offer to pay improvement district assessments; nor did he, until 1948, pay state and county taxes. Thacker's 1919 deed was recorded July 16, 1946.

It was stipulated that Laflin did not inform Thacker that he had bought the lot; neither did he, after Thacker's death, bring his claim to the attention of either of the appellees.

Appellants insists the present suit must fail because, as it is urged, the attack is collateral; that proceedings to vacate the order of confirmation had to be brought within six months, and that the long delay bars recovery. *Wardlow* v. *McGehee,* 187 Ark. 955, 63 S. W. 2d 332; likewise, says appellant, any error in the preliminaries and decree not going to the power to sell was cured by confirmation: and this would include the want of sufficient publication—that is, two weeks beginning when the twenty days had expired. *Neff* v. *Elder,* 84 Ark. 277, 105 S. W. 260.

It is also contended that the disparity between actual worth of the property (assuming this was a matter of common knowledge to the commissioners) and the price paid by Laflin was not sufficient to shock the conscience of a court of equity, thereby creating a conclusive presumption that fraud was not practiced on the court in procuring the decree or confirmation. *Schuman* v. *Cherry,* 215 Ark. 342, 220 S. W. 2d 187. [But see *Moon* v. *Georgia State Savings Association,* 200 Ark. 1012, 142 S. W. 2d 234].

Of course, if the order, judgment, or decree is void it may be attacked collaterally. *McDonald* v. *Fort Smith & Western Railroad Co.,* 105 Ark. 5, 150 S. W. 704. In collateral attacks facts relied upon to avoid consequences of a judgment or decree must appear upon the face of

the record. The record includes all of the pleadings, *Morrison* v. *St. Louis & S. F. R. Co.,* 87 Ark. 424, 112 S. W. 975. It also includes exhibits when they are made a part of the pleadings, *McMillan* v. *Morgan,* 90 Ark. 190, 118 S. W. 407.

The paving district's complaint of Sept. 23, 1941, shows that Lot 4 was listed as the property of R. E. Johnson. This error was carried into all proceedings where ownership was referred to, hence it definitely appears that the property was treated as belonging to Johnson—a supposition contradicted by the amendment to Laflin's intervention where he affirmatively asserted that "U. L. Thacker, who was the owner of said lot [at the time it was sold] failed to pay the amount [found to be due the district"].

There can be no contention that the names—U. L. Thacker and R. E. Johnson—are similar. "Stith" and "Smith" might cause an honest doubt, but *idem sonans* can hardly be thought of as a rule sufficiently pliable to reach Thacker when "h" is the only letter in Johnson common to the two names and phonetics affords no aid.

There is a statement in *Stith* v. *Pinkert,* 217 Ark. 871, 234 S. W. 2d 45, that Act 207 of 1937, § 4, providing for publication of notice of sale, "contains no requirement that the owner or supposed owner be named."

The matter to which references was there made appears as § 20-444, Ark. Stat's. The section immediately preceding directs that all delinquent property be included in one suit, with publication for two weeks by warning order "or notice of the pendency of such suit." It is then provided that all persons, firms, corporations, etc., claiming an interest in [the following described real property] shall be treated as having been warned by the notice that suit is pending "to enforce [the] collection of certain . . . taxes or assessments *on the subjoined list of lands, each supposed owner having been set opposite his . . . lands, together with the amount severally due from each.*"

The notice emphasized in the sentence quoted from *Stith* v. *Pinkert* is the advertisement (for two consecutive weeks) that "such sale" will be held. The language in Ark. Stat's, § 20-444, dealing with "all cases where notice has been properly given as aforesaid" is directed to procedure preceding the final notice—and this last notice, as the Stith-Pinkert opinion points out, does not require that the name of the owner or the supposed owner be there given.

Prior to 1937 the statute applicable to municipal improvement foreclosure suits (C. & M. Digest, § 5677) required that the last owner of property be named in the suit or warning order, to be listed as the name appeared in the recorder's office. Then (Pope's Digest, § 7308), as now (Ark. Stat's, § 20-417), the warrant authorized the delinquent assessment to be made "from the owner of real property," etc. The direction in Act 125 of 1913 (C. & M. Digest, § 5677, Ark. Stat's, § 20-424) is that the name of the last owner as shown in the recorder's office must be given "unless the commissioners know that some other party has acquired title; in which event such actual owner shall be made the defendant." [See compiler's notes, Ark. Stat's, v. 2, pp. 1434-35, where (p. 1435) it is suggested that § 20-424 may have been superseded or affected by Act 207 of 1937].

Act 101, approved February 17, 1937, and as to the matter pertinent here superseded by Act 207 of the same session, contained language in many respects similar to expressions found in Act 207. A material difference is that Act 101 required the name of the owner to be listed, while Act 207 says that "the proceedings and judgment shall be in the nature of proceedings in *rem,* and it shall be immaterial that the ownership [of any lot] be incorrectly alleged in said proceedings, and judgment shall be *enforced against such property, and not against any other property or estate of said defendant.*"

Act 130 of 1939 amended § 7315 of Pope's Digest by reducing to two weeks the time required for publishing a warning order. It is a substantial copy of Act 402 of

1909, construed by Judge HART in *Simpson* v. *Reinman,* 146 Ark. 417, 227 S. W. 15. In the opinion the Act is erroneously referred to as No. 502. [For a different procedure—not applicable here because it came later, see Act 195 of 1949].

The opinion by Judge HART shows that on January 4, 1917, Reinman and associates brought an action in unlawful detainer against Tillman Green to recover 90 acres. In May, 1919, Dr. R. A. Simpson intervened and procured a transfer to chancery court. It was shown that J. C. Budd owned the land in 1912 and rented to Green for five years. Green was in possession when Reinman sued. The property was sold as the result of attachment proceedings against Budd and purchased by Dr. Simpson. Budd later quitclaimed to Simpson. Reinman and those interested with him had bought the land when road district betterments were foreclosed. On December 20, 1913, they procured a certificate of purchase, followed by a commissioner's deed dated December 21, 1914. Reinman testified that in 1916 he made an oral contract with Green to rent on a third and fourth basis. This was urged as evidence of possession.

It will be observed that nearly four and a half years elapsed between issuance of the tax deed and Dr. Simpson's suit, and more than five and a half years elapsed between the decree and the intervention. The commissioners executed a deed that recited confirmation.

Similarity between the Reinman case and the litigation here is that in undertaking to foreclose the lien on the 90 acres to which J. C. Budd had paper title, the commissioners advertised the property in the name of A. E. Adams as the supposed owner, while in the case at bar Johnson was substituted for Thacker.

Judge HART, in speaking of Budd's rights, said that the paper title holder was no more bound by the proceedings against Adams as the "supposed owner" than had been the real owner in another case to which attention was called where J. E. Eubanks was named as the presumptive owner. *Farmers & Merchants Bank* v. *Layson Lum-*

ber Co., 87 Ark. 607, 113 S. W. 793. Nor, said Judge HART, did the Court's construction ignore the statutory provision making it immaterial that the ownership of the land be incorrectly named in the proceedings; but, [continued the Judge] if there had been any ground for listing Adams as the supposed owner, it would have been immaterial that his name appeared incorrectly in the notice. Neither did the legislative directive for a general notice to all interested persons, requiring them to appear and make defense within the designated period, resolve the proceding into an action *in rem* as distinguished from an action *quasi in rem.*

The Court's majority in the Reinman case, as expressed by Judge HART, held that the legislature intended that an owner in possession should have constructive notice sufficiently substantial *to lead to actual notice,* "and thereby enable him to make his defense." It was further held that use of the words "supposed owners" achieved a useful purpose in relieving the commissioners of the burden of deciding between adverse claims in those cases where it would be necessary to trace title; but the commissioners are not without statutory responsibility.

The "supposed owner" would be the person believed to be such, and in the circumstances of the Reinman case, ". . . the commissioners would be charged with knowledge that the land belonged to the person in possession of it." "In short," said Judge HART, "a majority of the Court is of the opinion that the designation by the commissioners, under the statute, of the person as the 'supposed owner,' [when by exercising the slightest care they could have ascertained that Adams was not such owner] is not a compliance with the statute . . . Notice to [Adams] was not notice to the 'supposed owner' or the person they believed to be the owner as required, and the sale is therefore invalid."

We think that appellees in the case at bar had a right to accept as true the accurate statement made by Laflin in his response to appellees' petition: that Thacker owned the lot when it forfeited. The record, irrespective

of testimony, shows that the lot was being foreclosed as Johnson's property. Certainly appellant would be required, under the Simpson-Reinman decision, to overcome the presumption of negligence upon the part of the commissioners that, *prima facie,* attached to them under the pleadings and record.

Chancellor John E. Martineau, who tried the Reinman case and decided all the issues in favor of the tax-title purchaser, allowed witnesses to testify regarding circumstances attending the sale, ownership of the property, and kindred subjects. The same procedure was followed here, where the only surviving commissioner testified that the district was organized in 1931, that he had always understood Thacker owned the lot, and in fact knew it belonged to him.

Question by the Chancellor: "Who was in possession of this property when the district was organized?" A. "U. L. Thacker. It was rented to different parties, but as far as I know [Thacker] was the owner of it."

W. N. Martin, lawyer and abstracter, was collector for the district when the foreclosure was certified and prepared the delinquent list for another attorney who acted for the commissioners. Johnson's name appeared as the supposed owner: Question: "Who did you understand owned that property at the time this suit was filed?" A. "Mr. Thacker. I had never seen his deed to the lot, but it was the general understanding that he had been owning it for quite a number of years."

R. E. Johnson testified that he owned property separated from Thacker's by another lot. He had no interest in Lot 4 and had at no time claimed any.

If, on collateral attack, testimony is inadmissible for the purpose of impeaching the record, in the controversy here the record is in conflict with an essential fact admitted by Laflin. Other facts bringing the case within the Simpson-Reinman decision are covered by comprehensive stipulations.

Our conclusion is that the Chancellor correctly held that Thacker's heirs should prevail. The decree is affirmed.

[The decision in this case was reached in December, 1950, and the result concurred in by six of the judges, two of whom are not now on the court. Mr. Justices WARD and Mr. Justice ROBINSON, therefore, did not participate in a determination of the issues, or in consideration of the opinion].

Mr. Justice GEORGE ROSE SMITH concurs.

ED F. MCFADDIN, Justice. (Dissenting). Heretofore we have accorded some degree of finality to foreclosure proceedings in Improvement District cases; and we have also accorded some degree of finality to orders confirming the sales and approving the deeds in such cases. The holding in the present case does much to destroy all such ideas of finality.

A lengthy dissent might be written, discussing the line of demarcation between a collateral attack and a direct attack on a judgment, and also showing that the present suit is a *collateral attack* by all the tests stated in all the cases. A lengthy dissent might also be written listing our cases which hold that Improvement District foreclosures are proceedings *in rem*. But I forego the writing of such a dissent, in the hope that the future cases of this Court will serve to limit and distinguish the present case, and thus eventually get us back to what I regard as the authentic holdings on these points.

It is my view that the case at bar is ruled by *Pinkston* v. *Schuman*, 210 Ark. 896, 198 S. W. 2d 66; *Pinkert* v. *Lamb*, 215 Ark. 879, 224 S. W. 2d 15, and *Stith* v. *Pinkert*, 217 Ark. 871, 234 S. W. 2d 45, and cases cited in those opinions.

4-9354 235 S. W. 2d 886

Opinion delivered January 22, 1951.

Opie Rogers and *W. F. Reeves,* for appellant.

N. J. Henley, for appellee.

HOLT, J. D. W. Smith died intestate March 18, 1948. He left surviving six adult children, three of whom are appellees and the other three the appellants. Essential facts are not in dispute. Appellees lived in the farm home with their father, whose wife had predeceased him.

February 24, 1948, the father, D. W. Smith, executed and delivered to appellees an instrument, in form a warranty deed, to his farm home, the land involved here, (appellants were not mentioned in the instrument) in consideration of appellees agreeing to care for him so long as he might live and to pay his debts and funeral expenses.

The land conveyed (approximately 135 acres) was in four calls, two were definite in description and two indefinite. The deed also contained this clause: "I make this

deed with the express understanding that Pauline Burr Smith shall have no part herein either at this time or later. This deed does not become effective until my death.'' Pauline Burr Smith was the wife of appellee, Hugh Smith.

It is undisputed that appellees, in keeping with their agreement, cared for their father until his death and paid all his obligations and funeral expenses.

Appellants brought the present suit March 16, 1949. They alleged that the purported deed was void because the land was not properly and sufficiently described. ''That said instrument was testamentary under the provision of the same and was not intended to pass the title at once, but provided: 'I make this deed with the express understanding that Pauline Burr Smith shall have no part herein either at this time or later. This deed does not become effective until my death.' That at the time of the execution of said instrument the said Pauline Burr (Brewer) Smith was the wife of defendant, Hugh Smith, and was intended to disinherit her from ever sharing in the property of the deceased and was therefore testamentary, and was and thereafter did become a will. Plaintiffs also say that there was no intention to pass the title immediately to the defendants herein, and it was the intention of said D. W. Smith for title not to pass until after the death of the said grantor; and said instrument not having been witnessed as required by law, the same is void, and the defendants herein have no title except as heirs of D. W. Smith, deceased, in said lands.''

Appellees interposed a general denial and in a cross-complaint, conceded that parts of the description of the land were inaccurate and asked for reformation to show proper description in accordance with the intention of the parties.

The court determined all issues in favor of appellees. The decree recited: ''The trial court is of the opinion that the instrument is a deed and that the provision, 'The deed does not become effective until my death,' amounts only to a reservation in the grantor of a life estate. . . . Since it is admitted that it was the intention of the father

to convey all the lands herein involved, this court is of the opinion that mistake or inaccuracy of description would not defeat that intent. The contract between him and the defendants provided for the conveyance of all of the farm." Reformation of the description in the deed was ordered as prayed, title to the land involved was quieted and confirmed in appellees and appellants' complaint dismissed for want of equity.

The decree was correct. The instrument in question was, in effect, a valid warranty deed and not testamentary in character. It was delivered to grantees, appellees, by the grantor during his lifetime and the provision "this deed does not become effective until my death" amounted to a reservation in the grantor, D. W. Smith, of a lifetime estate only. The provision that Pauline Burr Smith, wife of appellee, Hugh Smith, "shall have no part herein either at this time or later," must be treated as surplusage, and does not change the effect of the instrument here, which contains every essential element necessary to convey to appellees a fee simple title, subject only to the life estate of their father (grantor).

The applicable rule is stated in 26 C.J.S., § 45, p. 246: "A deed containing a provision that it is not to take effect until the grantor's death is actually delivered to the grantee during the lifetime of the grantor, it will be sustained as a present grant of a future interest." The textwriter cites in support of the text *Owen* v. *Owen,* 185 Ark. 1069, 51 S. W. 2d 524. We there said: "The deed to the home place also contains a covenant that the father is to remain in possession of that during his life, and that the deed should not become operative until his death. This was a valid covenant. *Reynolds* v. *Balding,* 183 Ark. 397, 36 S. W. 2d 402," and in *Sutton* v. *Sutton,* 141 Ark. 93, 216 S. W. 1052, we held (Headnote 2):

"An instrument, in the form of a warranty deed, and acknowledged as such, and so headed, conveying land to a grantee, 'and unto his heirs and assigns forever,' but with an habendum clause making the instrument inoperative until the grantor's death, is a deed and not a will; the

limitation does not defeat the passing of title, but does reserve possession to the grantor during his lifetime."

The court did not err, in the circumstances, in reforming certain misdescriptions in the deed. These mistakes were mutual. It was undisputed that the grantor, D. W. Smith, intended to convey his farm, which was all the real estate he owned at the time, for the consideration that appellees, grantees, would care for him during his life and pay his debts and funeral expenses. There appears to be no doubt as to the land the grantor intended to convey, and appellees (grantees) intended to receive. See *Walker* v. *David,* 68 Ark. 544, 60 S. W. 418.

As has been pointed out, appellees faithfully performed all of the conditions imposed and were entitled to reformation as prayed.

Accordingly, the decree is affirmed.

NOWLIN *v.* COOPER.

9346 235 S. W. 2d 888

Opinion delivered January 22, 1951.

Alonzo D. Camp, for appellant.

D. Leonard Lingo, for appellee.

MINOR W. MILLWEE, Justice. Appellants are the nephews, nieces and other collateral heirs of Mattie Now-

lin, deceased. They brought this suit against appellees, J. W. Cooper and wife, Buna Cooper, to set aside a deed executed by Mattie Nowlin to appellees. The original complaint contained several allegations of fraud, undue influence, duress and coercion on the part of appellees in the execution of the deed. These charges were subsequently abandoned and the case was tried on the sole issue of whether the consideration for said deed had failed. The chancellor held that it had not, and dismissed appellants' complaint for want of equity.

Mattie Nowlin, an aged widow, was a resident of Hoxie, Arkansas, and for several years prior to 1947 was employed by and made her home with the appellees. She owned a rent house in Hoxie valued at about $4,000 or $5,000 in which she had formerly resided. On April 29, 1947, Mattie Nowlin executed and delivered a warranty deed to appellees to the lot in Hoxie in consideration of appellees' agreement to "support and care for grantor until her death and then to give her fitting burial." Possession and use of the property were reserved in the grantor until her death.

Sometime before the execution of the deed, the exact date not being shown, Mrs. Nowlin learned that she had cancer of the breast. Her physician, Dr. Tom A. Petty of Walnut Ridge, Arkansas, contacted Dr. Carl A. Rosenbaum, a cancer specialist in Little Rock, Arkansas, and arrangements were made for Mrs. Nowlin to be given treatment under the joint program of the Arkansas University School of Medicine and the American Cancer Society. Mrs. Nowlin, accompanied by Mrs. Cooper, came to Little Rock on May 7, 1947, when she was admitted to the University Hospital for treatment. Mrs. Cooper waited in the lobby of the hospital while Mrs. Nowlin executed a hospital admission form. Under her signature to this form there appears the following notation by the admission clerk: "Financial Arrangements, Charity."

Mrs. Cooper gave the hospital a local telephone number to call in case of an emergency. She visited Mrs. Nowlin while in the hospital and furnished blood for a

transfusion. Mrs. Nowlin underwent an operation and remained in the hospital until May 29, 1947, when she was removed to a convalescent home for cancer patients near the hospital where she remained until June 12, 1947. While in the convalescent home she received daily X-ray treatments at the hospital as an "out patient." She returned to the home of appellees on June 12, 1947, where she remained until August 15, 1948, when she was taken to St. Bernard's Hospital at Jonesboro, Arkansas, where she died on September 15, 1948.

During the 14 months that Mrs. Nowlin lived in the home of appellees after execution of the deed in 1947, the undisputed evidence is that she received every attention at the hands of appellees that her condition required. She had her own private room and appellees furnished her meals, laundry, utilities and treated her as a member of the family. She was bedfast a good portion of the time and the incision from the operation required frequent dressing. The first two or three weeks this unpleasant task was performed by a registered nurse, who was a friend of both Mrs. Nowlin and Mrs. Cooper, and thereafter this service was performed by Mrs. Cooper. Several witnesses attested to the excellent treatment given Mrs. Nowlin by appellees and of the family-like affection that existed between them. One of the appellants visited Mrs. Nowlin twice and another once after eecxution of the deed. There is an absence of any showing that they offered to care for Mrs. Nowlin or that she ever sought their assistance.

When Mrs. Nowlin's condition grew worse in August, 1948, Mrs. Cooper made arrangements for her admission to St. Bernard's Hospital at Jonesboro, Arkansas, and accompanied her in the ambulance to the hospital. She made visits to the hospital for the next 29 days, making the trips by train or bus daily between the hours of 1:00 P. M. and 6:00 P. M. Mrs. Cooper also made arrangements for the funeral according to plans previously made by deceased. Burial took place in the Powhatan Cemetery on a family plot that had been selected by Mrs. Nowlin.

Appellees paid hospital and doctor bills in connection with Mrs. Nowlin's last illness in the sum of $309.03 which included the hospitalization at St. Bernard's Hospital at Jonesboro. Mrs. Nowlin had a burial policy with the Bryan Funeral Home at Hoxie which provided for burial services in the amount of $300. Appellees paid the Bryan Funeral Home $31.25 for additional services not covered by the policy and for the erection of a monument costing $71.60. Mrs. Nowlin continued to collect the rents from the property in controversy after execution of the deed to appellees. In her last illness she gave $200 to appellees with instructions to use the money to help defray expenses incurred in connection with her illness.

The University Hospital is operated in connection with the University of Arkansas School of Medicine. The evidence reflects that 98% of the patients are admitted as charity cases and collections are made from only 2% of the patients admitted. The director of the hospital testified: "After admission, if the patient is classified or it is found that they can pay, at that time we make a notation to bill the patient upon discharge." He further testified that no account was ever set up for Mrs. Nowlin's treatment and no bills rendered for the services performed. Mrs. Nowlin's board and room at the convalescent home in the amount of $42.95 was paid by the State of Arkansas on a warrant authorized by Dr. Rosenbaum as disbursing officer of the Arkansas Cancer Control Commission. It was shown to be the custom of physicians in rural sections without adequate facilities for treating cancer to refer their patients to Dr. Rosenbaum for treatment under the joint program of the medical school and the Cancer Control Commission. Whether this service is confined to charity cases is not shown in this record.

Appellants earnestly contend that the consideration for the deed failed under our holdings in *Edwards* v. *Locke,* 134 Ark. 80, 203 S. W. 286, and *Goodwin* v. *Tyson,* 167 Ark. 396, 268 S. W. 15. These cases are authority for the proposition that an intentional failure upon the

part of the grantee to perform the contract of support which constitutes the consideration for the deed, raises the presumption of such fraudulent intention from the inception of the contract, and therefore vitiates the deed based upon such consideration. It is insisted that the burden resting on appellees under the deed to support and give Mrs. Nowlin a fitting burial was shifted by them to the State and other third parties. In this connection it is argued that appellees fraudulently facilitated Mrs. Nowlin's entrance to the University Hospital as a pauper and "wilfully permitted" her to be buried in a free burial lot at Powhatan. The evidence on these points is that, prior to execution of the deed, a physician of Mrs. Nowlin's own choice arranged for her treatment at the University Hospital under the cancer control program; and that burial was made at the place and in the manner previously designated by Mrs. Nowlin. It is not unusual for towns the size of Powhatan to maintain a "free" cemetery.'

We conclude that the chancellor correctly held that appellants did not sustain the burden of showing an intentional failure on the part of appellees to perform the contract which furnished the consideration for the deed. It is undisputed that Mrs. Nowlin received all the care and support contemplated by her upon execution of the deed. There is no evidence of any complaint from her as to the treatment she received. If fraud was committed by appellees in connection with the treatment at the University Hospital, it was not practiced upon Mrs. Nowlin but upon the State. Whether the State may recover from appellees for services rendered by the University Hospital is not an issue here.

The decree is affirmed.

WARD, J., disqualified and not participating.

4-9360 235 S. W. 2d 868

Opinion delivered January 22, 1951.

[redacted]

Dave E. Witt and *O. D. Longstreth, Jr.*, for appellant.

Talley & Owen and *Robert L. Rogers II*, for appellee.

MINOR W. MILLWEE, Justice. This is a suit by appellant, C. D. Ulrich, to quiet his title to a 40-acre tract of land in Pulaski County. Appellee, George Bolden, filed an answer and cross-complaint claiming ownership of an undivided one-fourth interest in the land and asking that said land be partitioned, sold and the sale proceeds di-

vided according to the respective interests of the parties. This appeal is from a decree granting the relief prayed by appellee Bolden.

The facts are not in dispute. George F. Moore owned the 40 acres in controversy at the time of his death, testate, in 1921. Under his will the land was devised to four of his children, one of whom was Minnie Bolden, deceased, mother of appellee, George Bolden. Oscar H. Winn acquired the interest of the other three devisees under the will of Gorge F. Moore and thereafter, on January 8, 1926, sold the land to appellant under a conveyance purporting to convey the whole title. Appellant went into possession in 1926 and built a house and other buildings on the land where he has since resided. He also fenced the property and has paid all taxes upon and cultivated the land under claim of title since his entry in 1926.

Appellee, George Bolden, is the sole heir of Minnie Bolden, deceased. He was two years of age at the time of the death of his grandfather in 1921 and reached his majority on July 5, 1940. The instant suit was filed on June 30, 1949.

The only issue is whether appellee is barred from claiming title to an undivided one-fourth interest in the land by the seven-year statute of limitations (Ark. Stats., § 37-101). This statute contains a saving clause to minors for a period of three years after attaining majority. This question was decided adversely to appellee's contention in *Jackson* v. *Cole,* 146 Ark. 565, 226 S. W. 513, 1064, where, under a similar state of facts, the court held that adverse possession of land for the statutory period will bar recovery by an infant when he fails to sue within three years after attaining his majority. In reaching this conclusion the court approved the rule stated in 7 R. C. L., Co-tenancy, pages 854-855, as follows: "A conveyance to a stranger to the title, by one co-tenant, by an instrument purporting to pass the entire title in severalty, and not merely such co-tenant's individual interest, followed by an entry into actual, open and exclusive possession by such a stranger, under claim of ownership in severalty, amounts to a disseisin of the other co-tenants, which, if

continued for the statutory period, will ripen into good title by adverse possession. . . . In considering this question the familiar principle is recalled that when one enters upon land, he is presumed to enter under the title which his deed purports upon its face to convey, both as respects the extent of the land and the nature of his interest."

The following statement in Freeman on Co-tenancy (2d Ed.), § 197, was also approved in that case: "A conveyance by one co-tenant, purporting to convey an estate in severalty, cannot operate to the prejudice of another. This is true only so far as the immediate effect of such conveyance as a transfer of title is concerned. It does not follow that no rights can grow out of it, nor that it is, even as against the other co-tenants, mere waste paper for all purposes. Such a conveyance constitutes color of title. The entry of the grantee made under the deed, and claiming an interest co-extensive with that with which the deed purports to deal, is an entry under color of title. The co-tenants are therefore bound to take notice of the deed and of the entry made under it, and to take such steps as may be required to enforce a recognition of their legal rights. Should they fail to do so within the time prescribed by the statute of limitations, their rights will be no longer susceptible of enforcement; and their interests, by operation of that statute, will vest in the party in possession under the deed."

The above rule was recognized in the earlier cases of *Ashley* v. *Rector,* 20 Ark. 359; *Brown* v. *Bocquin,* 57 Ark. 97, 20 S. W. 813; *Parsons* v. *Sharpe,* 102 Ark. 611, 145 S. W. 537; and the later case of *Bowers* v. *Rightsell,* 173 Ark. 788, 294 S. W. 21. See, also, Jones, Arkansas Titles, § 1506; 2 C. J. S., Adverse Possession, § 72 (m); 1 Am. Jur., Adverse Possession, § 59. The same rule has been applied where there is entry and possession under an executory contract by one tenant to convey the whole title although the vendee does not acquire the legal title until long after his entry. See cases cited in 27 A. L. R. 18.

In construing § 37-101, *supra,* we have also repeatedly held that the infant's right, against one who takes posses-

sion of his land, accrues at once and is barred three years after the infant reaches his majority, in the absence of any showing of fraud practiced on the infant by the other party. *Reed* v. *Money,* 115 Ark. 1, 170 S. W. 478; *Nixon* v. *Norton-Wheeler Stave Co.,* 207 Ark. 838, 183 S. W. 2d 300.

When Oscar Winn acquired the undivided three-fourth's interest in the 40-acre tract from three of the four devisees under the will of George F. Moore, he and appellee, George Bolden, became tenants in common. When Winn purported to convey the whole title to appellant in 1926, the statute of limitations began to run against appellee who reached his majority on July 5, 1940. Appellee, having waited until nearly nine years after becoming of age before filing his cross-complaint to recover an interest in the property, is barred under the statute.

The decree is accordingly reversed and the cause remanded with directions to enter a decree dismissing appellee's cross-complaint and quieting appellant's title to the whole of the 40-acre tract in controversy.

CHIDESTER SCHOOL DISTRICT No. 50 *v.* FAULKNER.

4-9330 235 S. W. 2d 870

Opinion delivered January 22, 1951.

L. B. Smead, for appellant.

C. Stanford Harrell and *J. Bruce Streett,* for appellee.

HOLT, J. February 10, 1949, the Directors of School District No. 14, Ouachita County (referred to as Reader District) entered into written contracts with appellees, Mr. and Mrs. Faulkner, to teach a nine months term of school to begin September 5, 1949, at salaries of $200 and $140 per month, respectively. These contracts were authorized at a meeting of the Reader School Board at which all three members were present, and were signed by two board members, along with appellees.

June 1, 1949, by proper procedure under Initiated Act No. 1 of 1948 (Ark. Stats., 1947, Cumulative Pocket Supplement 1949, § 80-426, *et seq.*), Reader District was consolidated with appellant, Chidester District No. 59. The appellant, district, and its directors refused to accept and honor appellees' contracts with the Reader District and the present suit was instituted by appellees to enforce "specific performance (of the contracts) and for judgment against the defendant (Chidester District) for the amount due under their contracts," etc.

There was a trial, and a decree on April 25, 1950, awarding Mr. Faulkner $1,800 and $1,260 to Mrs. Faulkner. During the trial, the parties stipulated in accordance with the following findings of the Chancellor: "The Court

further finds that counsel for plaintiffs and defendants have agreed that if a decree is entered in favor of plaintiffs, that the amount of the judgment to which each of them will be entitled is the full sum due under their contracts."

The material facts appear to be practically undisputed.

Appellants state the issues as follows: "The theory of the appellees upon the trial was that the Chidester District was bound under the law to either employ them as teachers or to pay their salaries. The theory of the appellants is that, while they recognize the law to be that a school district is bound to carry out all contracts which have been, in good faith, entered into by a district which is annexed to it, that the contracts here were made at a time and under such circumstances that they were tainted with either actual or constructive fraud and not valid."

They further argue that the contracts were void because they would extend beyond the term of all the members of the Board in office at the time, because they were executed only for use by the Gurdon District, because of impossibility of performance and finally because appellees were not qualified.

As indicated, the record reflects that all three of the Reader District directors were present at the regular meeting of the Board when the contracts here were authorized and approved. They were signed by appellees and two members of the Board. These directors, along with appellees, testified positively (and without contradiction) that there was no fraud, actual or constructive, or collusion in the execution of these contracts. The directors were familiar with the provisions of Act No. 1. Appellees were excellent teachers and fully qualified and at all times stood ready to perform under the contracts, and it is undisputed that they had been unable to secure other employment during the nine months period for which they were employed to teach.

The primary and decisive question is whether these contracts, in the circumstances, were valid. We hold that they were.

Section 4 of Act 1, above, (§ 80-429, 1949 Supplement), provides: "Construction of Act.—No construction shall be given to any part of this Act (§§ 80-426—80-429) that would result in impairing the obligations or any valid contract of any school district. 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. (Init. Meas. 1948, No. 1, § 4, Acts 1949, p. 1414)."

It thus became the duty of the Chidester District, to which Reader had been annexed, to honor and perform all valid contracts of the Reader District.

Here, the Faulkners were employed for a nine months term. The fact that the term would extend beyond the term of all the Board members in office when the contracts were made (February 10, 1949) does not, as appellants argue, make them void.

In *Gardner* v. *No. Little Rock Special School District,* 161 Ark. 466, 257 S. W. 73, this court approved the general rule announced in 24 R.C.L., page 579, as follows: "In the absence of an express or implied statutory limitation, a school board may enter into a contract to employ a teacher or any proper officer for a term extending beyond that of the board itself, and such contract, if made in good faith and without fraudulent collusion, binds the succeeding board. It has even been held that, under proper circumstances, a board may contract for the services of an employee to commence at a time subsequent to the end of the term of one or more of their number and subsequent to the reorganization of the board as a whole, or even subsequent to the terms of the board as a whole. The fact that the purpose of the contract is to forestall the action of the succeeding board may not, of itself, render the contract void. But a hiring for an unusual time is strong evidence of fraud and collusion, which, if present, would in-

validate the contract." See, also, *School District No. 45, Pope County* v. *McClain,* 185 Ark. 658, 48 S. W. 2d 841.

The fact that the contracts here were signed by only two of the directors of the Reader District does not invalidate them for the reason that it is undisputed that they were authorized and made at a regular meeting, attended by all three of the members of the Board and all voted for the execution of the contracts.

The rule announced in *Center Hill School District No. 32* v. *Hunt,* 194 Ark. 1145, 110 S. W. 2d 523, applies with equal force here. There we held (Headnote 2): "Schools and School Districts—Contracts with Teachers. —Though one of the three directors had moved out of the district, where all of them, without notice of a meeting, got together to employ a teacher, a contract signed by two of the three of them was valid, since where all participated in the meeting notice was not necessary."

As to appellants' contention that the contracts were executed for use by the Gurdon District, but little need be said. The preponderance, if not all of the evidence, supports the following findings of the Chancellor: "The testimony shows that there was some effort made by the Reader District to consolidate with the Gurdon District, in Clark County. The effort to consolidate with the Gurdon District was never consummated, and, as the court sees it, the effort to consolidate with the Gurdon District has no material bearing on the issues involved in this action."

The fact remains that the Reader District was properly consolidated with the Chidester District, and as pointed out, Chidester District was liable for Reader's valid contracts.

Finally, appellants say that appellees were not qualified to teach in the Chidester District. This contention is without merit. Ark. Stats., 1947, § 80-1209, provides: "No teacher shall be employed in any common school of the State who is not licensed to teach in the State of Arkansas, by a license issued by the State Board of Education."

It is undisputed that both appellees held certificates to teach in this State, issued by the State Board of Education. See *Lee* v. *Mitchell,* 108 Ark. 1, 156 S. W. 450.

Having concluded that the contracts here involved are valid, and in view of the stipulation of the parties above to the effect that should we hold the contracts valid (as we do), each of the appellees would be entitled to recover the full amount set out in their contracts, the decree is in all things affirmed.

BOWEN *v.* RIGGAN.

4-9335 235 S. W. 2d 967

Opinion delivered January 22, 1951.

Rehearing denied February 19, 1951.

Norton & Norton, for appellant.

E. J. Butler, for appellee.

GRIFFIN SMITH, Chief Justice. In December, 1948, Eugene Woods, Sr., contracted to sell L. L. Riggan a farm near Shell Lake in St. Francis County for $45,000, payable $500 January 1, 1949, $4,500 a year later, and the remainder at $5,000 per year. All deferred payments were due January 1 of successive years, and the notes drew interest at four percent. A deed was placed in escrow, to be delivered when $10,000 had been paid and when appellee's three-year lease contract running through 1951 had been performed. The balance of $35,000 was to be secured by deed of trust in Woods' favor. While the contract is silent regarding the buyer's right to pay installments before maturity, each of the notes reads "on or before."

Appellant Bowen is a Memphis realtor authorized to do business in Arkansas. He received information that Riggan wished to sell his farm, and procured a listing at $55,000. Shortly thereafter C. I. Shade, representing Bowen, drove to Riggan's home and told him that an offer on the place had been procured, but that certain details were to be disposed of. Riggan went to Bowen's office and was told that Dr. N. B. Hendrix would buy the farm for $50,000. Shade testified that Riggan deliberated a few minutes, made some calculations, then said in effect that the offer was satisfactory. Dr. Hendrix, however, did not want to be bound on installment payments that could not be discharged at his convenience. Riggan thought the obligations were payable "on or before." It was Shade's understanding that all details were agreed upon unless it should be found that the notes could not be paid before maturity. In that event Woods was to be consulted.

A tentative agreement in contract form was written. Shade testified that Riggan was willing to sign, but that Bowen thought it would not be a good policy for the seller to sign before the buyer did. At Bowen's suggestion the memorandum was marked o. k. and initialed by Riggan.

It was Riggan's contention that he did not intend to be bound until Woods' wishes in the matter had been ascertained, hence he declined to affix his signature to the proposed contract, and this, he thought, was understood by all who were present.

Dr. Hendrix proposed to pay $30,000 in cash and to execute a mortgage for the balance, with interest at four percent. The Doctor was willing to purchase merchandise in a store or commissary operated by Riggan on the farm. Riggan was informed that Bowen's commission would be $2,500. According to Bowen, Riggan said, "That would give me [a profit] of $2,500, the crop I have harvested this year, and what I have made out of the store: that is all right."

A check for $5,000 was given by Dr. Hendrix when the o.k.'d document was presented to him with the explanation by Bowen that the only matter to be determined was whether the Riggan notes in Wood's favor could be paid before maturity. Riggan just as earnestly insists that in addition to this factor it was verbally agreed that the negotiations were not to be regarded as final until Woods' consent had been procured. L. L. Vandervort, also connected with the Bowen agency, heard the conversations and testified that the only matter for future determination was the right to pay Riggan's notes. No question is made regarding the Hendrix check.

Two days later Riggan called Bowen by telephone. He said that in making the contract he had overlooked his obligation to pay Woods about $1,800 in interest, and the negotiations should be considered as ended. Bowen protested, insisting there was a valid contract. Riggan did not, according to Bowen's testimony, undertake to abandon the sale because Woods had failed to consent. The sole reason was that the interest item had been overlooked, although he did mention that Woods did not "entirely approve" the deal.

On November 17th Norton & Norton, attorneys, wrote Riggan that Bowen had consulted them regarding his commission. The client had been advised that payment could

be enforced if a purchaser ready, willing, and able to perform had been procured. Appellee thinks the rule of *Peebles* v. *Sneed,* 207 Ark. 1, 179 S. W. 2d 156, is applicable because oral conditions were interposed and the writing in its unsigned form was not the entire contract.

If the issue rested upon this point alone we would agree that there was substantial testimony for a jury finding that full accord was dependent upon Woods' approval and that it was not given.

When the Norton law firm wrote Riggan that Bowen claimed his commission, Riggan asked legal advice of Rieves & Smith. In the meantime Dr. Hendrix employed Mann & McCulloch, who in a letter of November 18th informed Riggan that the Doctor would insist upon his contractual rights. In an effort to reach a full understanding, Riggan attended a conference in West Memphis Dec. 1, where the disputed issues were discussed with Rieves, Vandervort, N. M. Norton, and Smith. Bowen suggested the possibility of getting Dr. Hendrix to pay $1,000 for fixtures in the store as a means of enabling Riggan to realize a margin of profit after payment of interest. He also agreed to cut his commission $500. This would give Riggan $1,500 more than the former negotiations called for; and, since the interest in exact figures was $1,780, these concessions would lack but $280 of taking care of the obligation Bowen had been led to believe was bothering Riggan. The conference of Dec. 1st lasted about an hour. Bowen then went to Memphis and secured Dr. Hendrix' approval of the new terms. The Doctor, however, had been negotiating for a farm manager and insisted that he should have a reasonably prompt compliance upon Riggan's part. December 2d Bowen went to Forrest City where counterparts of the November 15th proposal had been left with Mann & McCulloch. Bowen procured two copies, took them to West Memphis, and left them with Rieves and Smith. Neither of the West Memphis attorneys was in his office at that time, so Bowen dictated to their secretary a memorandum to be executed by Riggan.

The essentials of the December conference are emphasized by the testimony of Riggan when questioned by his attorney, Mr. Rieves:

Question: "Was there a proposal that if you would accept $1,000 for the store fixtures and Mr. Bowen would take $500 from his commission the differences might be adjusted?" A. "Yes, sir." Q. "Did you leave my office and call me by telephone later?" A. "Yes, sir." Q. "What authority did you give me at that time?" A. "I told you that if you thought it was the right thing to do I would go along with it." Q. "On December 5th following Mr. Bowen's visit to my office did you agree to a settlement?" A. "Yes, sir." Q. "Did I at that time dictate to my stenographer an addendum to the contract [of November 15th] and have you sign it?" A. "Yes, and I saw this [addendum] torn loose from the contract of sale."

At this point Mr. Rieves said, "The defendant is not claiming any condition under the contract made on December 2d."

Following the conference to which reference has been made Riggan left, then telephoned Rieves. There is this stipulation: "When the telephone call came to the office of Rieves & Smith in West Memphis, and Mr. Rieves answered, it was Riggan calling, and Riggan said he accepted the proposition made by Bowen for reduction of the commission by $500 and payment of $1,000 for the store fixtures."

Appellee does not contend that through any express language there were any reservations when the substituted agreement was made. His position is that because in the first instance he had stipulated that no deal would be completed unless Woods agreed to it, and because he had this alternative in mind when the Memphis conference was held, and when he telephoned to Rieves, appellant should have understood the tentative nature of their negotiations, hence a question of fact was made for the jury.

It is undisputed that Dr. Hendrix was informed of Riggan's acceptance of the counter offer, and that he un-

conditionally accepted it, while at the same time urging haste because he had to give the prospective farm manager a definite answer regarding employment. When Riggan continued to procrastinate, Dr. Hendrix had his attorneys write that the negotiations were at an end. The letter is dated December 14th, but refers to a conference with Riggan and Rieves held the previous day. At that time Riggan declined to go ahead with the deal without Woods' approval. Woods was on a hunting trip and would not be available for a week. Riggan was notifed December 17th that Dr. Hendrix would not wait any longer.

It will be observed that throughout the testimony the supplemental transaction resulting from the conference of December 1 is referred to by appellee as "addenda." We are in accord with this view. It may be true that Riggan had in mind the condition he had imposed in respect of the writing dated November 15th—the consent of Eugene Woods. But it is stipulated that the final negotiations were without reservations, and certainly Bowen was justified in believing that the objections had been eliminated. In these circumstances there was no substantial testimony upon which the jury could find that appellant had not produced a buyer ready, able and willing to buy.

Since Bowen produced a purchaser ready, willing, and able to buy under a contract accepted without conditions, the commission was earned and appellant was therefore entitled to an instructed verdict.

The judgment must be reversed, with judgment here for appellant. It is so ordered.

Justices Holt and Millwee dissent.

Greer, Trustee *v.* Blocker, Receiver.

4-9393 236 S. W. 2d 77

Opinion delivered January 22, 1951.

A. F. Triplett and *A. F. House,* for appellant.

Quinn & Williams, for appellee.

ED. F. MCFADDIN, Justice. This appeal, though separately numbered, is intertwined with the original controversy between the same parties stated in Case No. 9336, today decided by this Court. We will refer to the original controversy as "Case No. 9336" and the present one as "this case." The facts here are as follows:

The decree was entered by the Miller Chancery Court on June 16, 1950, in Case No. 9336; and the Trustee and Bondholders promptly appealed and filed the transcript in this Court on July 12, 1950, naming the Receiver as an appellee, along with the Landowners. The Trustee and the Bondholders filed their brief in this Court on August 21, 1950, in Case No. 9336. On September 1, 1950, Blocker, Receiver, filed in the Miller Chancery Court his petition, stating that Case No. 9336 was pending in the Arkansas Supreme Court and that Blocker, Receiver, was an appellee, and that he would need the continued services of his attorneys (Messrs. Quinn & Williams) to represent him in the Supreme Court, just as they had represented him in the Miller Chancery Court. The Receiver prayed that the Chancery Court make an allowance of twenty-five hundred dollars ($2,500) to said attorneys for representing the Receiver "in all of the courts in which this case has been or will be heard."

Greer, Trustee, and the Bondholders (parties in Case No. 9336) appeared and resisted the said petition of the Receiver for attorneys' fees. The Chancery Court on September 8, 1950, rendered a decree, reciting:

"The Court being well and sufficiently advised doth find that it is proper for the Receiver to participate in the suit which is now pending in the Supreme Court of Arkansas, and said Receiver is directed to continue to do so; and this Court reserves for further consideration the question as to an additional allowance to counsel for the Receiver."

From that decree Greer, Trustee, and the Bondholders, have appealed to this Court in the present case. As regards the amount of the fee to be ultimately paid the attorneys for the Receiver, there is no final and appealable order from which the Trustee and Bondholders can appeal at this time. See *State* v. *Riley,* 194 Ark. 485, 107 S. W. 2d 548. See, also, cases collected in West's Arkansas Digest "Appeal and Error," § 66.

But the Trustee and Bondholders claim that the Chancery Court erred in the present case in directing the Receiver to be represented in this Court in Case No. 9336. They say that Case No. 9336 is primarily between the Bondholders on one side, and the Landowners on the other; and that "There is no need for the Receiver to be participating in the appellate proceedings." They therefore ask this Court to reverse the Miller Chancery Court in directing the Receiver to be represented in this Court by attorneys.

Of course a Receiver is an officer of the Court. The New York Court stated this very clearly in *People* v. *Security Life Insurance Co.,* 79 N. Y. 267:

"Since the receiver is an officer—or, as he is sometimes called, 'the hand'—of the court, it would be singular if he could not at any time go to it with his complaint, or for instructions in regard to any matter touching the fund placed in his custody. . . . He is not to advocate the cause of one claimant against another. Between them he is indifferent, owing a like duty to all; and for that reason should as far as possible—see to it that each has an equal opportunity to enforce his claim. He stands as their representative, and is bound to give them reasonable aid."

Nevertheless, in Case No. 9336 the Trustee and Bondholders sued the Receiver. He asked the Chancery Court

for instructions as to what he should do. The Court gave him such instructions; the Trustee and Bondholders, being dissatisfied with such instructions in Case No. 9336, have, by appeal, prayed this Court to change the instructions that the Chancery Court gave the Receiver. Certainly the Chancery Court had a right to direct the Receiver to defend Case No. 9336 in this Court, since the Trustee and Bondholders had named him as an appellee in this Court in the identical case in which they sued him in the Chancery Court. To hold otherwise would allow the Trustee and Bondholders to cause the Receiver to default in a case in which they had sued him. Such would violate all the spirit of fair play and representation by counsel fundamental in our Anglo-Saxon system of justice.[1] The mere statement constitutes the answer to the appellants' contention in this case.

We hold that under § 36-105 and § 36-116, Ark. Stats., the Chancery Court was correct in directing the Receiver to have his attorneys represent him[2] in Case No. 9336 in this Court. We furthermore state that the attorneys for the Receiver in that case submitted a splendid brief and made an able oral argument.

Affirmed.

Justice GEORGE ROSE SMITH not participating.

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[1] In *Hightower* v. *Hawthorn*, Hempstead's Circuit Court Reports (of cases decided in the Territory of Arkansas in 1826), at Page 43, there is this statement:

"To deny the party the right to appear by attorney, is at once shutting out from him that source of information and that exercise of his legal rights which would enable him to make a just and fair defence to the suit brought against him."

See, also, 64 C. J. 232.

[2] See 53 C. J. 379; and see, also, 45 Am. Jur. 217 and 221.

BURTON *v.* WARD, CHANCELLOR.[1]

4-9444 236 S. W. 2d 65

BEEDEVILLE SPECIAL SCHOOL DIST. NO. 28 *v.* BONE, JUDGE.[1]

4-9451

Opinion delivered January 22, 1951.

Pickens, Pickens & Ponder, for petitioner in case No. 4-9444.

Kaneaster Hodges, for petitioner in case No. 4-9451.

Pickens, Pickens & Ponder, for respondent.

ED. F. MCFADDIN, Justice. Each of these cases is an original proceeding seeking a writ of mandamus for trial

[1] Although the terms of office of the Chancellor and the Circuit Judge have expired since the filing of the cases, nevertheless we have used the original styling as the relief sought is against the Court as such.

of a pending cause. The cases involve the same controversy and are therefore consolidated.

FACTS

On July 8, 1950, Beedeville School District of Jackson County (hereinafter called "Beedeville") filed eminent domain proceedings in the Jackson Circuit Court against D. H. Burton and wife (hereinafter called "Burton"). The complaint alleged: that Beedeville had a two acre campus but needed an additional tract of 10.35 acres (definitely described) owned by Burton; that negotiations for purchase had been unsuccessful; and that Beedeville sought to exercise the right of eminent domain [2] to acquire the 10.35 acre tract. The prayer was that the Court enter an order taking the property for use of Beedeville and that a jury be impanelled to determine the amount Beedeville should pay Burton.

Burton filed answer and motion to transfer to equity in which pleading it was alleged "that the taking . . . is arbitrary, capricious, . . . not being done in good faith and is beyond the privilege conferred by the eminent domain Statutes of this State . . .; that it is not necessary for said school district to take said above described land; and that said tract of land is excessive for the use of said school district . . .; that said defenses are exclusively cognizable in equity . . .". The Circuit Court, on September 11, 1950, transferred the case to the Chancery Court. The Chancery Court, on October 24, 1950, transferred the cause back to the Circuit Court. Thereupon Burton, on November 13, 1950, filed in the Supreme Court case No. 9444 which is a petition praying that we issue a mandamus requiring the Chancery Court to take jurisdiction and hear the cause.

After the Chancery Court transferred the eminent domain proceedings back to the Circuit Court on October 24, 1950, as above mentioned, Beedeville, on November 15, 1950, applied to the Circuit Court to fix the

[2] The Statute giving a school district the privilege of eminent domain is § 80-403, Ark. Stats., which provides that the procedure in such a case shall be the same as for municipal corporations and counties, for which see § 35-901, *et seq.*, Ark. Stats.

amount of money Beedeville should deposit in order to make an immediate entry on the 10.35 acre tract. The Circuit Court refused to make such an order until case No. 9444 should be decided by the Supreme Court. Thereupon Beedeville, on November 24, 1950, filed in the Supreme Court case No. 9451, which is a petition praying that we issue a mandamus requiring the Circuit Court to assume jurisdiction of the eminent domain proceedings and fix an amount of money to be deposited in the registry of the Circuit Court preparatory to immediate entry on the 10.35 acre tract.

OPINION

In the briefs it is conceded by both sides that the impassé between the Circuit Court and the Chancery Court arises because of the doubt on the part of the Chancery Court as to whether the Burton answer and motion to transfer to equity stated sufficient equitable defenses to deprive the Circuit Court of its usual jurisdiction in eminent domain proceedings. To sustain the Chancery jurisdiction Burton cites and relies on the following cases, *inter alia: Gilbert* v. *Shaver,* 91 Ark. 231, 120 S. W. 933; *Niemeyer et al.* v. *Little Rock Etc. Ry.,* 43 Ark. 111; and *Selle* v. *Fayetteville,* 207 Ark. 966, 184 S. W. 2d 58. To defeat the Chancery jurisdiction, Beedeville cites and relies on the following cases, *inter alia: St. L. I. M. & So. Ry.* v. *Ft. S. & V. B. Ry.,* 104 Ark. 344, 148 S. W. 531; *Butler Rd. Co.* v. *St. L. Rd. Co.,* 132 Ark. 426, 200 S. W. 1007; *Cloth* v. *C. R. I. & P. Ry. Co.,* 97 Ark. 86, 132 S. W. 1005; *Young* v. *Gurdon,* 169 Ark. 399, 275 S. W. 890.

This Court has frequently held that in an eminent domain proceeding in the Circuit Court, the only issue to be tried is the value of the property taken. In *Niemeyer, et al.* v. *L. R. Ry. Co.,* 43 Ark. 111, Justice EAKIN, speaking for this Court said of an eminent domain trial in Circuit Court:

"The proceeding under our statute is a special one, directed solely to the object of determining the compenstation to be paid the owner of the property proposed to

be taken. No provision is made for any issue upon the *right* to condemn. . . ."

In *St. L. I. M. & S. Ry.* v. *Faisst,* 99 Ark. 61, 137 S. W. 815, Chief Justice McCulloch, speaking for this Court said:

"This court has held in a number of cases that the statutory proceeding to condemn land for right-of-way for railroads is special, to ascertain the compensation to be paid the owner for the land to be taken and that no provision is made for an issue upon the right to condemn." (Citing cases.)

In that case, the landowner had failed to file a motion to transfer to equity, where the right to condemn could have been questioned; and of such failure Chief Justice McCulloch said:

"In order for appellees (Landowners) to have obtained the relief pointed out in the cases cited above, they should have filed a plea setting forth the facts relied on to entitle them to such relief and then asked for a transfer of the case to the court which can give relief. . . ."

In *State Highway Comm.* v. *Saline County,* 205 Ark. 860, 171 S. W. 2d 60, the same rule—as to compensation for property taken being the only question in Circuit Court cases—was applied to highway condemnations. In *Selle* v. *Fayetteville,* 207 Ark. 966, 184 S. W. 2d 58, the late and beloved Justice Frank G. Smith, in his usual careful manner stated:

"Now the city had the right to determine what land it would condemn for airport purposes, and the quantity thereof, and if the case were tried at law, no question could have been litigated except the value of the land which it proposed to take. Had the property owners thought more land was being condemned than was required, or that land was about to be condemned which would not be devoted to airport purposes, but was being acquired for sale at a profit, an answer should have been filed raising those questions, with a motion to transfer to equity, as stated in the case of *St. L. I. M. &*

S. R. Co. v. *Ft. Smith & Van Buren R. Co., supra.* (*City of Richmond* v. *Carneal,* 129 Va. 388, 106 S. E. 403, 14 A. L. R. 1341).

"Upon the transfer to equity, had that relief been asked, not only could these questions have been determined, but the value of the land could have been adjudged, had the contention of the landowners been sustained, this being upon the theory that the Chancery Court having obtained jurisdiction for one purpose, would retain jurisdiction for all purposes. . . ."

Thus, it is clear that the landowner, in order to challenge the right or extent of the taking, may file answer and motion to transfer to equity, which is what Burton did in the case at bar. We have previously copied the pertinent statements in the Burton pleadings, which stated: that the taking was arbitrary, discriminatory; not being done in good faith; that it was not necessary for the school district to take the lands; and that the taking was excessive. Beedeville claims that these allegations are mere conclusions and do not contain a sufficient detailing of facts, and cites and relies, *inter alia,* on: *St. L. I. M. & S. Ry. v. Ft. Smith & Van Buren Ry.,* 104 Ark. 344, 148 S. W. 531, and *Butler County Rd. Co.* v. *St. Louis Rd. Co.,* 132 Ark. 426, 200 S. W. 1007. In each of these cited cases, there was involved only the matter of trackage of one railroad line across another railroad line, whereas, in the case at bar, 10.35 acres is involved as compared with an already existing campus of only two acres.

Under the facts in this case, wherein the proposed taking is more than five times the existing property, we hold that the allegations were sufficient to present the issue of the right to condemn and the extent of the taking; and that the alegations were sufficient to justify the transfer of the eminent domain proceedings to the Chancery Court; and that the cause should be tried in that forum. It follows that Burton's petition for mandamus to the Chancery Court is granted, and that Beedeville's petition for mandamus to the Circuit Court is

denied. Costs of both mandamus proceedings in this Court are to be paid by Beedeville.

Mr. Justice MILLWEE and Mr. Justice GEORGE ROSE SMITH dissent. Mr. Justice J. PAUL WARD disqualified and not participating.

MILLWEE, J. (Dissenting). I cannot concur in the conclusion of the majority that the landowners' answer was sufficient to invoke equitable relief. Apparently this conclusion was reached on the authority of the quoted statement from the case of *Selle* v. *Fayetteville,* 207 Ark. 966, 184 S. W. 2d 58.

While the majority dismisses the case of *St. L. I. M. & S. Ry. Co.* v. *Fort Smith & Van Buren Railway Co.,* 104 Ark. 344, 148 S. W. 531, because it only involved the matter of trackage of one railroad line across another, it will be noted that this case is the only Arkansas authority cited in support of the statement in the Selle case, which the majority so fondly embraces. Although many allegations of fraud are detailed on pages 349 and 350 of the opinion in that case, the court in reference thereto said: "They were too vague and indefinite, and amounted to only statements of conclusions which were not sufficient to warrant a restraint of appellee's right to exercise its charter powers." The question of the amount of land taken was not an issue in the case.

In 14 A. L. R. 1431, which is the other authority cited in the Selle case, the annotator states the following rule laid down by the authorities: "It is a general principle that the Legislature cannot authorize the taking of property in excess of that required for the public use, such excess to be sold or devoted to private use." As an abstract proposition of law the statement in the Selle case is correct although it is *obiter dictum* and the sufficiency of pleadings was in no manner involved therein. The statement that an excessive taking is sufficient to warrant equitable relief is, of course, based on the assumption that a proper pleading has been filed setting forth facts sufficient to warrant a conclusion that the taking is actually excessive. Can it be said that it is any

less a conclusion to say that the taking is "excessive," than to say that it is "arbitrary," "capricious," "discriminatory" or "wantonly injurious"? All the cases cited in the first paragraph of the opinion of the majority are authority for the well established rule that the answer must state facts from which a court can draw conclusions; and that the mere statement of a conclusion is not sufficient to invoke equitable relief.

In the case of *Niemeyer and Darragh* v. *Little Rock Junction Railway,* 43 Ark. 120, relied on by the landowners, this court upheld the action of the chancellor in refusing to enjoin the taking where the pleadings contained a more detailed statement of facts than is set forth in the instant case. See, also, *St. L. I. M. & S. Ry. Co.* v. *Faisst,* 99 Ark. 61, 137 S. W. 815.

Since the allegations of the answer do not set forth sufficient facts to invoke equitable relief, the chancellor was correct in declining to assume jurisdiction and in remanding the case to the circuit court for trial. The school district's petition for mandamus to the circuit court should, therefore, be granted.

JUDGE GEORGE ROSE SMITH concurs in this dissent.

GREER, TRUSTEE *v.* BLOCKER, RECEIVER.

4-9336 236 S. W. 2d 68

Opinion delivered January 22, 1951.

A. F. Triplett and *A. F. House,* for appellant.

Quinn & Williams, Atchley & Vance, and *Shaver, Stewart & Jones,* for appellee.

ED. F. MCFADDIN, Justice. This litigation is an effort by bondholders of a drainage district to collect unpaid bonds and interest. McKinney Bayou Drainage District of Miller County, containing approximately 31,893 acres, was organized by order of the County Court on May 4, 1923, under the provisions of the General Drainage Law, as now found in § 21-501, *et seq.,* Ark. Stats. The assessment of benefits, totaling $1,045,246[1] was confirmed by order of the County Court on August 21, 1923.

The cost of the improvement, as reflected by the records of the District, was $450,000. To pay such cost the Commissioners of the District, at a meeting on January 14, 1924, adopted a resolution[2] for the issuance of bonds

[1] In a proceeding not here questioned, the benefits were reduced on a few tracts prior to the issuance of the bonds, so that the ultimate total of assessed benefits probably became $1,028,425. With this explanation, we find it more convenient to refer to the benefits as "$1,045,246.00" since such figure appears throughout the briefs.

[2] The resolution of the Commissioners reads in part:

"On motion duly seconded and unanimously carried, it was resolved that in order to pay for the proposed drainage improvement in said District it will be necessary to issue bonds in the sum of $450,000

totaling $450,000, to be dated January 1, 1924, and bear interest at 5½ per cent per annum, with interest payable semi-annually, and the first bond to be due August 1, 1928, and the others serially annually thereafter. Accordingly, on January 14, 1924, the County Court of Miller County duly entered an order levying and assessing a tax of $943,274.75 on the benefits, to pay the bond issue and interest thereon, the Court order reading in part:

"It is further considered, ordered and adjudged that the said tax hereinbefore assessed shall be divided into installments, and that the said installments shall be due and payable as follows: For the year 1924 Five and Forty-Three Hundredths (5.43%) per centum of the assessed benefits, producing for the said year 1924 the sum of Fifty-Six Thousand Seven Hundred Fifty-Six and 85/100 Dollars ($56,756.85); for each of the years 1925 and 1926 Two and Six-Tenths (2.6%) per centum of the assessed benefits, producing for each of said years 1925 and 1926 the sum of Twenty-Seven Thousand, One Hundred Seventy-Six and 39/100 Dollars ($27,176.39); and for each of the years 1927 to 1948, inclusive, Three and Seventy-Six Hundredths (3.76%) per centum of the assessed

which, with ten per centum added for unforeseen contingencies, amounts to $495,000; that the County Court of Miller County, Arkansas, be called upon to enter upon its records an order providing that there shall be assessed upon the real property, including the lands, railroads and tramroads within said District and declared to be benefitted by said improvements, a tax amounting to the sum of $943,274.75, being the amount of the principal and interest on said bonds plus ten per centum for contingencies, the interest on said bonds being at the rate of five and one-half per centum per annum, payable semi-annually.

"That the total cost of said improvement is greater than should be levied and collected in a single year, and that said tax, when assessed, be divided, as is required by law, into annual installments, and that there be collected for the following years installments of said tax sufficient to produce the following amounts:

"For the year 1924, five and forty-three hundredths (5.43%) per centum of the assessed benefits, producing for said year 1924 the sum of $56,756.85; and

"For each of the years 1925 and 1926 two and six-tenths (2.6%) per centum of the assessed benefits, producing for each of said years 1925 and 1926 the sum of $27,176.39;

"For each of the years 1927 to 1948 inclusive three and seventy-six hundredths (3.76%) per centum of the assessed benefits, producing $39,301.25 for each of said years 1927 to 1948 inclusive.

"Said collections to be credited first upon the interest accruing upon said levy of the assessment of benefits."

benefits producing for each of said years the sum of Thirty-Nine Thousand, Three Hundred One and 25/100 Dollars ($39,301.25); which collections shall be credited first upon the interest accruing upon the said levy."

It will be observed that this Court order levied a tax of $943,274.75 which was 93.35 per cent of the total assessed benefits of $1,045,246. If every property holder had paid the annual installment when due, $943,274.75 would have been collected by 1948; and such amount, as calculated in 1924, would have been sufficient:

(a) To pay the 5½ per cent interest promptly when due on each outstanding bond;

(b) To pay the $450,000 bonds promptly as due; and

(c) To provide 10 per cent of the total of said bonds and interest for unforeseen contingencies. The bonds and interest were secured by pledge or mortgage to the Trustee of ". . . all uncollected assessments levied by the County Court upon the real property, public roads, railroads and tramroads in said District, together with all assessments that may hereafter be levied thereon, . . ."

On August 6, 1928, (five days after the maturity of Bond No. 1 of the District) the Commissioners of the McKinney Bayou Drainage District filed a petition in the Miller Chancery Court, praying that a Receiver be appointed for the District in order to prevent a multiplicity of suits by the bondholders. The petition alleged, *inter alia,* that the District should have collected by August 1, 1928, a total of $150,410.88, but in fact had collected only $119,748.43; that due to delinquencies in collection the District was unable to meet its maturing bonds, and interest. C. M. Blocker was appointed Receiver of the District on August 7, 1928, and took charge of the drainage system and all assets of the District, and has continued as such Receiver up to this date.

During the entire course of the receivership annual reports have been rendered, listing all items of receipts and disbursements, and the total of outstanding and unpaid bonds and interest. As to the correctness of the

figures in these annual reports, no question is presented. Each such report was approved by the Chancery Court without objection, save the one filed for the annual period ending July 31, 1949.[3] In that report the Receiver stated: that under the County Court order of January 14, 1924, taxes were to be collected through 1948; that he had so collected the taxes and some property holders had paid in full the entire twenty-five annual installments; that other property holders had defaulted and the District held title to approximately 13,000 acres of land purchased at the foreclosure sales for delinquent assessments; that there were no more taxes to be collected under the 1924 levying order; that he had only $18,282.47 on hand in cash, together with the title to 13,000 acres of land, and the unforeclosed delinquencies for 1947 and 1948 assessments;[4] and that the unpaid bonds of the District are $175,772.08 and the unpaid interest on the bonds is $132,380, making a total of unpaid bonds and interest of $308,152.08. The Receiver asked directions of the Chancery Court and, in effect, sought permission to be allowed to distribute the lands and the money on hand to the Bondholders *pro rata,* and thereby close the receivership and liquidate the District. The 1949 report precipitated this litigation.

The Trustee[5] for the Bondholders, together with parties holding the greater portion of all the outstanding bonds, filed pleadings in the Chancery Court, naming as defendants the Receiver, Blocker, and also ten Landowners in the District as a group to represent and defend for all the Landowners.[6] The pleadings of the Trustee and the Bondholders alleged: that all the assessed benefits had not been levied— i. e., only 93.35 per cent had been levied by the County Court order; that the assessment of benefits bore interest, as provided by Act 177 of 1913 and Act 467 of 1919; that the Chancery Court should direct the Receiver to apply to the County Court for a levying

[3] One subsequent report is still pending.

[4] In the oral argument before this Court, it was stated by all parties that these delinquencies had now been foreclosed.

[5] The original Trustee had resigned, and J. Ripley Greer became the substitute Trustee. His capacity, as such, is not questioned.

[6] The sufficiency of such number to make a representative defense for all is not questioned.

order on the balance of the unused benefits and on the interest of the benefits; and that the Receiver, from collections so made, should pay the outstanding bonds and interest thereon.

The Receiver, by his answer, presented these issues:

(1) That either by cash, or by taking of property, he had collected all the twenty-five annual installments of tax that had been levied and the power to tax had been exhausted; and

(2) That interest on the benefits was calculated and included in the assessed benefits and cannot be again collected.

The defendant Landowners adopted the Receiver's defenses and also presented these additional issues:

(3) That 6.65 per cent of the original assessed benefits is all that could possibly remain due on the assessed benefits on any tract of land;

(4) That the Bondholders' right to recover on bonds and interest is limited (by § 37-209, Ark. Stats.) to those bonds which became due within five years before the filing of the Bondholders' petition in this case (which date was November 2, 1949);

(5) That the right to collect any deferred installment of interest on the benefits is limited by § 20-1128, Ark. Stats.) to the interest due within three years before the filing of suit therefor; and

(6) That "the Receiver . . . holds . . . more than 10,000 acres of land . . . bought . . . in at foreclosure . . . for delinquent taxes . . . and said lands should be ordered sold . . . prior . . . to any additional levy of taxes . . . ."

A trial in the Chancery Court resulted in an opinion by the Chancellor, stating in part:

". . . that in the place of asking for an additional levy which would result in another forfeiture of the 13,000 acres of land and an additional debt to be later

retaxed, . . . it is the duty of the bondholders to take the assets of the District and take such remedy as they desire or may be entitled to under the law to dispose of the assets and pay their debt."

The decree of the Chancery Court, pursuant to the foregoing opinion, dismissed the pleadings of the Trustee and the Bondholders; and they have appealed, being here styled appellants. The Receiver, Blocker, and the Landowners are here styled appellees. Each of the said six issues, made by the pleadings of the Receiver and the Landowners, is presented here; and we will discuss and decide such of the issues as require decision at this time.

I. *Appellees' Claim: "Power to Tax is Exhausted."* This is the Receiver's first issue. The appellees quote § 21-542, Ark. Stats: "The county court shall . . . enter . . . an order . . . , providing that there shall be assessed upon the real property of the district *a tax sufficient to pay the esimated cost of the improvement with ten (10) per cent added for unforeseen contingencies: . . . "* and urge that the italicized language fixes the maximum of tax liability. Appellees claim: that the proceeds of the $450,000 bond issue went to pay the cost of the improvement; that the full amount of interest on that bond issue (as calculated at the time of the levying order) was $407,522.50, making a total of bond issue and interest of $857,522.50; that the 10 per cent. of the last mentioned figure is $85,752.25; and that the bond issue, together with interest to pay all bonds at maturity thereof, and also with the 10 per cent. added for unforeseen contingencies, was thus $943,274.75. This last named figure—say the appellees—is the maximum figure which the law—*i. e.,* § 21-542, Ark. Stats., as quoted—allows to be collected for the improvement. Therefore, the appellees most earnestly urge that when the County Court order of January 14, 1924, levied a tax of $943,274.75 on the assessed benefits, such order exhausted the power of the County Court to act; and that the Landowners cannot be taxed anymore for the said improvement. The Receiver's brief states the appellees' contention in this language:

". . . The levy here is expressly shown to be the amount necessary to pay the cost of the improvement, with interest on the bonds of the District, plus ten per cent for unforeseen contingencies. The levy, literally and completely, complies with the terms of the statute, being in the amount provided by the statute; and is a complete limitation upon the amount of assessments the property shall pay for the improvement."

There is a clear fallacy in the appellees' argument. The schedule of maturities of bonds, as made in 1924, has not been fulfilled by the District, with the result that the interest has continued to accrue on the unpaid bonds. The Statute (§ 21-540) says: ". . . the interest to accrue on account of the issuing of said bonds shall not be construed as a part of (the cost of) construction . . . ." Since the bonds bore interest until paid, the interest on the bonds until paid can be added to the cost of the improvement, plus the 10 per cent. for unforeseen contingencies, before any question can arise that "the power to tax has been exhausted." In other words, § 21-542, Ark. Stats., and the case of *K. C. So. Ry. Co.* v. *Road Imp. Dist. No. 6,* 139 Ark. 424, 215 S. W. 656, 217 S. W. 773, relied on by the appellees, afford them no support under the facts in this case.

The bonds herein were duly and legally issued; and the Statute, and also the bonds and mortgage to the Trustee, have pledged all of the assets of the District to the payment of the bonds and interest. Section 21-554, Ark. Stats., says in part:

"All bonds issued by commissioners under the terms of this act (§§ 21-553—21-555) shall be secured by a lien on all lands, railroads and tramroads in the district, and the board of directors shall see to it that a tax is levied annually, and collected under the provisions of this bill, so long as it may be necessary to pay any bond issued or obligation contracted under its authority; . . ."

Also, § 21-555, Ark. Stats., says:

"To the payment of both the principal and interest of the bonds to be issued under the provisions of this act,

the entire revenues of the district arising from any and all sources, and all real estate, railroads and tramroads subject to taxation in the district are by this act pledged; . . ."

Each bond issued by the District recited:

". . . For the faithful performance of all covenants, recitals and stipulations herein contained, for the proper application of the proceeds of the taxes heretofore or hereafter levied, and for the faithful performance in apt time and manner of every official act required and necessary to provide for the prompt payment of the principal and interest of this bond, as the same matures, the full faith, credit, assessment of benefits heretofore or hereafter assessed, and all other resources of said drainage district are hereby irrevocably pledged."

Furthermore, the mortgage of the District to the Trustee to secure the bond issue recites:

". . . the said McKinney Bayou Drainage District . . ., doth heerby pledge, assign, transfer, mortgage and set over to the said . . . Trustee, all uncollected assessments levied by the County Court upon the real property, public roads, railroads and tramroads in said District, together with all assessments that may hereafter be levied thereon, . . ."

Thus there is no escape from the conclusions: (a) that the District has, by law and by fact, pledged all its assets, as well as its full faith and credit; and (b) that the Statute allows the pledging of all the benefits and interest thereon. It is admitted by the pleadings of the Landowners, and clearly established by the evidence, that the total tax levied to date is an amount equal to 93.35 per cent. of the assessed benefits; so unquestionably there remains an amount equal to 6.65 per cent. of the assessed benefits, plus also interest in some amount on the assessed benefits. With its full faith and credit pledged, and with these assets remaining, the District cannot claim that its power to tax has been exhausted.

An enlightening case is that of *Chicago Mill & Lumber Co.* v. *Drainage District No. 17*, 172 Ark. 1059, 291

S. W. 810. In that case a large property holder, who had paid taxes regularly, sought to enjoin the District from obtaining an additional levy to pay bonds which had defaulted because other property holders had failed to promptly pay their taxes. The similarity between that case and the case at bar is quite striking. We do not now review it in detail, but we cite it as a case worthy of study on the issue here discussed.

Finally, on this point, we consider § 21-550, Ark. Stats., as applicable:

"If the tax first levied shall prove insufficient to . . . pay the bonds, both principal and interest, . . . the board shall . . . report the amount of the deficiency . . . and the county court shall thereupon make . . . further . . . levies . . ."

Thus, we hold that the "power to tax" has not been exhausted and that the Chancery Court should direct the Receiver to proceed for the Board under § 21-550, Ark. Stats.

II. *Interest on Assessed Benefits.* This is the secon issue presented by the Receiver. Act 279 of 1909—commonly called "The Drainage District Act"—did not contain language sufficiently clear, so the Legislature adopted Act 177 of 1913 which amended and supplemented the 1909 Act, and provided in § 10:

"When assessments of benefits are made in drainage and other improvement districts, the land owners shall have the privilege of paying the same in full within thirty days after the assessment becomes final. But all such assessments shall be made payable in instalments, so that not more than twenty-five per cent shall be collectible in any one year against the wishes of the land owner, and in the event that any land owner avails himself of this indulgence, the deferred instalments of the assessed benefits shall bear interest at the rate of six per cent per annum, and shall be payable only in instalments as levied.

"The levy of the assessment may be made by way of proportional amounts of the total assessed benefits,

and interest need not be calculated until it is necessary to do so to avoid exceeding the total amount of benefits and interest."

Then by Act 467 of 1919 the Legislature further provided:

"Where assessments of benefits have been made in drainage districts organized either under general or special acts, the property owner shall have the right to pay such assessments in full within sixty days after the passage of this Act, but if he does not avail himself of this privilege, the assessment of benefits shall bear interest at the rate of six (6%) per cent per annum, and shall be payable only in installments as levied. The interest need not be computed until necessary to be sure that the collections have not exceeded the total amount of benefits and interest; or the interest may be first collected."

With the above quoted laws in effect, the McKinney Bayou Drainage District was organized in 1923 and issued its bonds in 1924. The resolution of the District, adopted on January 14, 1924, as previously copied, after providing in detail for the percentage of money to be collected each year, concludes with this language:

"Said collections to be credited first upon the interest accruing upon said levy of the assessment of benefits."

The levying order of the County Court, as previously copied, likewise concludes with the words:

". . . which collections shall be credited first upon the interest accruing upon the said levy."

Furthermore, when the Commissioners filed the petition for receivership of the McKinney Bayou Drainage District in 1928, they prayed the Chancery Court that a Receiver be appointed to collect the tax, with the "collections of said tax to be credited first upon the interest accruing upon said levy of the assessment of benefits". That interest can be collected on assessed benefits in a District like the one here involved is established by a

long line of cases, of which the following are only a few:[7] *Oliver* v. *Whittaker,* 122 Ark. 291, 183 S. W. 201; *Jones* v. *Fletcher,* 132 Ark. 328, 200 S. W. 1034; *Skillern* v. *White River Levee District,* 139 Ark. 4, 212 S. W. 90; *Pfeiffer* v. *Bertig,* 141 Ark. 531, 217 S. W. 791; *Summers* v. *Cole,* 144 Ark. 494, 223 S. W. 721; *Phillips* v. *Tyronza & St. Francis Road Imp. District,* 145 Ark. 487, 224 S. W. 981; *Chicago Mill & Lumber Co.* v. *Drainage District No. 17,* 172 Ark. 1059, 291 S. W. 810; *Richey* v. *Long Prairie Levee District,* 203 Ark. 1, 155 S. W. 2d 582; and *Flat Bayou Drainage District* v. *Atkinson,* 217 Ark. 575, 232 S. W. 2d 76.

The appellees seem to concede that it is legally possible for benefits to bear interest; but claim that in the case at bar the interest on the benefits was actually included in the assessed benefits; and thereby the appellees seek to bring this case within the proviso found by Act 285 of 1941; and claim that they are entitled to the benefits of the said proviso in the 1941 Act. In the case of *Holthoff* v. *State Bank,* 208 Ark. 307, 186 S. W. 2d 162, we discussed the 1941 Act in the last section of that opinion where the same contention was made as here.

We find no merit to appellees' contention. In the case at bar the assessors left no written memorial to the effect that interest was included in the assessment of benefits, and no one directly testified to such effect. Rather, the entire defense is based on inferences to be derived from calculations. An examination of the assessed benefits on certain delinquent tracts of land, as shown in the transcript, rather convincingly reveals that the benefits were assessed on a "flat acreage basis" and not on any calculation of cost of improvement plus interest on benefits: some tracts were assessed benefits of $40 an acre, others at $50 an acre. From that part of the list of assessments found in the transcript, we

[7] It is true that some of these cases involve Districts organized under Special Acts, but each of such Special Acts contained provisions sufficiently similar to Act 177 of 1913 and Act 467 of 1919 as to make the case worthy of citation on the point here at issue.

are impressed with the fact that the benefits were assessed on a "flat acreage basis".

But irrespective of the foregoing, a complete answer to appellees' contention is found in our holding in *Holthoff* v. *State Bank, supra,* (frequently referred to as the "Kersh Lake Case"), wherein we used the following language in disposing of a contention similar to that now made by appellees:

"We furthermore point out that the certificates of indebtedness were issued by the district in 1919, and some of them still remain unpaid. The 1919 Act allowed interest. The 1941 Act could not defeat the interest while obligations were outstanding based on the collectibility of the interest. The Legislature in 1941 could not pass an act that impaired the obligation of the contract existing when the certificates were issued. In *Broadway-Main Street Bridge District* v. *Mortgage Loan & Insurance Agency*, 195 Ark. 390, 112 S. W. 2d 648, we said:

" 'Interest of bondholders in assessments could not be impaired without the consent of all of them.' To the extent that the collection of interest on the benefits is necessary to pay the outstanding indebtedness of the district, the 1941 Act could have no application."

III. *Limitations Against the Bonds and Interest.* This is issue No. (4) of the Landowners. They make their contention in this language:

"All bonds matured on the first day of August, 1928 to 1948. Coupons, in the amount of $27.50 each, matured on the first day of February and the first day of August of each year. The within suit was filed on the 2d day of November, 1949.

"Defendant landowners contend that all bonds and coupons maturing five years prior to the filing of this suit are barred by the statute of limitations, Ark. Stats. § 37-209, which provides:

" 'Action on promissory notes, and other instruments, not under seal, shall be commenced within 5 years after the cause of action shall accrue, and not after.' "

The Receiver, Blocker, did not plead Limitations. Instead, his pleading asserted:

"It is true that the Receiver has at all times recognized the validity of all outstanding bonds issued by the District and has not questioned their validity."

The quotation is true in every sense: because in each annual report the Receiver listed as a debt of the District the total of bonds and interest outstanding; and (save only the 1949 report here involved) the Chancery Court approved each such report, thereby placing the stamp of judicial approval on the continued acknowledgment of the bonds and interest as legal and valid obligations of the District.

Furthermore, in 1941 some of the Bondholders intervened in the receivership proceedings and asked that they have payment of their bonds and interest coupons, some of which were past due since 1930. The Chancery Court, in refusing to order preferential payment of said bonds and coupons, stated in the 1941 decree:

"That said bonds and interest coupons are the legally issued and valid, subsisting and outstanding obligations of said drainage district, payable and receivable by the Receiver of this court as other outstanding bonds and interest coupons of said district."

Thus the Receiver, with the approval of the Chanvery Court, has all along recognized the bonds and interest coupons as valid, subsisting obligations. In the case of *Street Improvement District* v. *Mooney*, 203 Ark. 745, 158 S. W. 2d 661, the Commissioners had filed annual reports recognizing the validity of a certain claim. Later, when the District sought to plead Limitations against such claim, this Court denied the plea since the recognition of the claim in each annual report "established a new period from which the statute of limitation began to run". The holding in the reported case is applicable here. McKinney Bayou Drainage Dis-

trict, acting through its Receiver[8]—appointed by the Chancery Court on the petition of the Commissioners of the District—has, with Chancery Court approval, regularly and annually up to and including 1948, acknowledged all unpaid bonds and interest coupons as valid debts of the District. The Landowners cannot plead Limitations against the Bondholders, because the Statute has been tolled up to and including the approval of the 1948 report.

IV. *Limitations Against Collection of Interest on Benefits.* In their answer in the Chancery Court, the Landowners stated as regards interest on benefits:

"That the right to collect deferred installments aforesaid which became due more than three years prior to the filing of the petition herein is barred by the provisions of Ark. Stat. § 20-1128."

By this pleading we understand that the Landowners are claiming that if the County Court order of 1924 levied interest on the assessment of benefits, then all such uncollected interest is barred which matured more than three years prior to filing suit therefor. Such plea poses the interesting question of the correct formula for computing interest on assessed benefits when the collection rate for each annual payment is less than six per cent. Several different contentions could be stated and argued;[9] but we need not discuss them in the case at bar because they are not presented as justiciable issues. This is a proceeding in which the Bondholders and Trustee petitioned the Chancery Court to instruct the Receiver to apply to the County Court for an order of collection.

[8] In *Gossett* v. *Fordyce Lumber Co.*, 181 Ark. 848, 28 S. W. 2d 57, we said: "So it will be seen that the Receiver, for the time being, steps into the shoes of the Board of Commissioners and acts for it."

[9] Attention is called to the following cases as being some that bear on the calculation of interest on assessed benefits in some instances: *Oliver* v. *Whittaker*, 122 Ark. 291, 183 S. W. 201; *Jones* v. *Fletcher*, 132 Ark. 328, 200 S. W. 1034; *Skillern* v. *White River Levee District*, 139 Ark. 4, 212 S. W. 90; *Pfeiffer* v. *Bertig*, 141 Ark. 531, 217 S. W. 791; *Summers* v. *Cole*, 144 Ark. 494, 223 S. W. 721; *Phillips* v. *Tyronza & St. Francis Road Imp. District*, 145 Ark. 487, 224 S. W. 981; *Chicago Mill & Lumber Co.* v. *Drainage District No. 17*, 172 Ark. 1059, 291 S. W. 810; *K. C. Ry. Co.* v. *Road District*, 139 Ark. 424, 217 S. W. 773; and *Richey* v. *Long Prairie Levee District*, 203 Ark. 1, 155 S. W. 2d 582.

When a property holder makes the plea of Limitations in a suit against him to collect such interest, there will be a justiciable issue before us on such plea of Limitations.

CONCLUSION

There remain for consideration only issues No. 3 and No. 6 presented by the Landowners: these relate to the 6.65 per cent. of uncollected benefits and the disposition of the lands held by the Receiver; and they blend into the points already discussed. Since there are uncollected benefits and some interest thereon the Chancery Court should direct the Receiver to apply to the County Court for an order of collection; and the County Court may make the collection rate per annum at such a figure or percentage and over such period of years as may be deemed wise and best. Also the Chancery Court should direct the Receiver to ascertain and report the wise way to dispose of the lands on hand, so that the most money may be realized therefrom: in short, the Chancery Court should direct the Receiver to undertake the liquidation of the debts of the District in accordance with this opinion.

The decree of the Chancery Court is reversed and the cause is remanded with directions to enter a decree and to proceed in accordance with this opinion.

Justice George Rose Smith not participating.

PROVANCE *v.* ARNOLD BARBER & BEAUTY SUPPLY CO.

4-9349 235 S. W. 2d 970

Opinion delivered January 29, 1951.

Dinning & Dinning, for appellant.

Beloit Taylor and *A. D. Whitehead,* for appellee.

ROBINSON, J. The appellee, Arnold Barber & Beauty Supply Company, filed suit in the Phillips Circuit Court alleging it had sold certain beauty shop equipment in the sum of $1,953.32 on a title retaining contract to Mrs. Opal Parker, and that there was a balance of $526.79 due on the purchase price, for which it asked judgment. On the same day appellee filed an Affidavit and Bond, and obtained an Order of Attachment directing the Sheriff to take possession of the said property.

The appellant Virginia Provance, with permission of the Court, filed an Intervention in the case in which she alleged in substance that several months prior to the filing of this suit she had formed a partnership with Opal Parker and had purchased a one-half interest in the personal property in question; that she is now the owner of such one-half interest and has possession of the property and that such interest is not subject to attachment for any debt that might be owed by Opal Parker to appellee. To this Intervention the appellee filed a Demurrer setting up two grounds, as follows: First, "The defendant Opal Parker had no title to the property purported to be sold to Virginia Provance, hence she could not acquire a partnership interest in property or chattels in which the defendant had no title of ownership"; Second, "Virginia Provance could not acquire a partnership interest in property or chattels in which the defendant had no title of ownership."

The trial court sustained the Demurrer. Intervener elected to stand on her Intervention and refused to plead further. Thereupon the court dismissed the Intervention and the Intervener has appealed to this Court.

It is our opinion the Demurrer should have been overruled. Under its title retaining contract the seller had two remedies: It could replevin the property or it could sue on the debt. It had to elect—it could not do both.

In the case of *Nashville Lumber Company* v. *Robinson,* 91 Ark. 319, 121 S. W. 350, the Court said: "When this debt became due and was unpaid, the vendor, having reserved the title until the purchase price was paid, had its election to take either of two courses. It could elect to retake the property and thus in effect cancel the debt, or it could bring its action to recover the debt, and thus affirm the sale and waive reservation of title."

"When the debt becomes due the vendor, in sales of this character, may bring an action to recover the debt, and by this he affirms the sale and waives the reservation of title; or he may elect to take the property and, by doing so, cancels the debt. He may not, however, have both remedies, and where he elects to take the property, an action to recover on the debt is barred." *McCain* v. *Fender,* 188 Ark. 1139, 69 S. W. 2d 867.

In *Laird* v. *Byrd,* 177 Ark. 1114, 9 S. W. 2d 571, the Court stated: "It is well settled in this State that one who sells personal property with reservation of title, upon the purchaser's default, may either treat the sale as cancelled and bring an action of replevin or treat the sale as absolute and sue for the purchase money."

When appellee elected to sue on the debt in preference to filing suit to replevin the property, the sale was treated as absolute, and appellee was in the same position as it would have been if title had not been retained in the first place.

Reversed with directions to overrule the Demurrer.

DENT *v.* ALEXANDER.

4-9381 235 S. W. 2d 953

Opinion delivered January 29, 1951.

Batchelor & Batchelor, for appellant.

Partain, Agee & Partain and *Wilson & Starbird,* for appellee.

HOLT, J. Appellants instituted this suit against appellees seeking injunctive relief. They alleged, in effect, that appellees diverted overflow or surface water from their own lands into drainage ditches, accelerated the flow of the water, and caused it to flow upon the lands of appellants in an unnatural channel and in increased volume.

More specifically, they alleged that they "without the consent of plaintiffs (appellants) or either of them and over the protest of plaintiffs, cut a ditch across

. . . a natural barrier of high ground . . . to a depth of three or four feet and also deepened or cut a ditch in an easterly direction across the Southeast Quarter . . . toward the land of plaintiff, Vivian Cazort Dent, (appellant) and thereby directed the surface water off the lands of defendants (appellees) together with another large body of land across and onto the lands owned by plaintiff, Vivian Cazort Dent, and being cultivated by plaintiff, Vinsett. Plaintiffs state that said wrongful diversion of surface water, from its regular, long established, and natural water course onto the lands of plaintiff, Vivian Cazort Dent, and the crops and cultivated lands of Fred Vinsett, will cause continuing overflow, great and irreparable damage'' and a continuing nuisance.

They prayed that the ditches constructed by appellees be declared nuisances, that same be ''abated and abolished'' and that appellees ''be restrained from reopening them and directly or indirectly discharging the surface water onto plaintiffs' lands'' and for all other equitable relief. No monetary damages were sought.

Appellees interposed a general denial.

From a decree dismissing appellants' complaint for want of equity comes this appeal.

The record reflects that appellant, Vivian Dent, owns approximately 560 acres of land in sections 12 and 13, township 8 north, range 31 west in Crawford County, near the Arkansas River. On this land is a depression known as Rose Lake covering from two to five hundred acres, depending upon the rain fall. Water drains into this lake from about 2,000 acres of low, flat, Arkansas River bottom land, which embraces all the lands involved here.

Appellee, Willis Arnold, owns the southwest quarter of section 14, and appellee, J. F. Alexander, owns all of the southeast quarter of said section except 20 acres in the northwest corner. Drainage from appellees' tracts is northeasterly for approximately one mile into Rose

Lake. The elevation of appellees' lands is approximately five feet above the water level of Rose Lake.

A large number of witnesses were presented by the parties in this case, and after a patient hearing, the Chancellor, on conflicting testimony, made the following fact findings: "In every case, it is necessary that the plaintiff make out a case by a fair preponderance of the evidence. The engineers' surveys, of course, show that the area that they complain of drains towards Rose Lake. Aside from that, I think the evidence is sufficient to show that that is true. . . . In a flat country, like that, a person can look over it and say, 'Well it drains this way,' and look at it from another point and say, 'no, it drains that way.' What is called a ridge may be a little swell or contour a foot or two higher than it is some place else. Maybe looking across the thing at a distance, it will be perfectly flat, but it is that much higher, and, most of us, at least, are not trained well enough to judge those matters, without a survey. If we had nothing else, a survey would determine this litigation. If it were true that by a little ditch that runs out west of the Arnold line a little way the water would be caught from a hundred and twenty or 140 acres—if it did so—; if all of it were diverted from going in a southwesterly direction and if all of it would go into Rose Lake, considering the territory that supplies Rose Lake with water, I doubt if there ever would be a time when it would raise it one inch. The territory just isn't sufficient for it to do that. Of course, when you see water that is accumulated in a ditch three or four feet wide and four or five feet deep, that comes pretty fast and looks muddy, it looks like it is doing lots of damage, but when you spread it out over a good large area, it doesn't amount to anything. The complaint will be dismissed for want of equity."

Without attempting to detail the testimony, after reviewing it all, we have concluded that the findings of the Chancellor are not against the preponderance of the evidence.

Appellants say: "Should this court determine that the finding of the Chancellor is not against the pre-

ponderance of the evidence, the fact remains that the flow of surface water from the land of appellees has been accelerated and caused to flow into the appellant's land in greatly increased quantities."

As indicated, the Chancellor found that any accelerated flow of the natural drainage into Rose Lake did not warrant equity intervention.

As one witness (who was well acquainted with the area, had lived in Crawford County for 46 years, and a member of the Levee Board for 25 years), testified: "The water carried by the ditches in question would not make any appreciable contribution to the area of the lake. I don't think it would be a drop in the bucket. It wouldn't raise it any I don't think."

A well established rule is that as against overflow or surface waters, "a land owner has the right to defend himself as against a common enemy, without rendering himself liable for damages, unless he unnecessarily injures or damages another for his own protection," *Leader* v. *Mathews,* 192 Ark. 1049, 95 S. W. 2d 1138, or as expressed in *Bohn* v. *Salt Lake City,* 79 Utah 121, 8 Pac. 2d 591, 81 A. L. R. 256: "A landowner is under no duty to receive upon his land surface water from the adjacent property, but in the use or improvement of it he may repel such water at his boundary. . . . A landowner incurs no liability by reason of the fact that surface water falling or running onto his land flows thence to the property of others in its natural manner. But he may not use or improve his land in such a way as to increase the total volume of surface water which flows from it to adjacent property, or as to discharge it or any part of it upon such property in a manner different in volume or course from its natural flow, to the substantial damage of the owner of that property."

In the present case, no damages have been sought, and the preponderance of the testimony shows, as the trial court found, that appellants have not been substantially or unnecessarily damaged or injured by any accelerated flow of the surface waters, in the circum-

stances here. The test, as just quoted, is not whether the flow of the waters has been accelerated, but whether such acceleration injured or damaged the lands of appellants.

Finding no error, the decree is affirmed.

GRIFFIN SMITH, Chief Justice, concurs.

COLLINS *v.* MCCOY.

4-9368 236 S. W. 2d 442

Opinion delivered January 29, 1951.

Rehearing denied March 5, 1951.

Will Shepherd, for appellant.

John Sherrill and *Thomas J. Bonner,* for appellee.

GRIFFIN SMITH, Chief Justice. In June, 1942, Lots 17, 18, 19, and 20, Block B, Fletcher and Clark's Addition to Little Rock, were owned by Walthour-Flake Realty Company. The lots face south on East Third Street, but No. 20 "corners" on Fletcher street and is

therefore west of Lot 19. The controversy is over the line between Lots 19 and 20.

Before Walthour-Flake contracted to sell Lot 20 Joe Hamilton rented and occupied a small residence on it, spoken of as a shotgun house. Lots 17, 18, and 19 were then vacant. Whether Hamilton was placed in possession by Manie Schuman, whose tax title was dealt with in a Chancery proceeding by Walthour-Flake, or whether the successful party in that suit rented the house to this tenant, is not controlling here.

August 26, 1942, Nelson McCoy and his wife, Helen, contracted with Walthour-Flake for the purchase of Lot 19. They later acquired Lot 18, but title to it is not questioned. Eddie Collins—August 27, 1942—contracted to buy Lot 20. Payments were made in each instance and deeds were later executed, hence the grantor is not directly concerned here. Nelson McCoy died, and his wife Helen owns Lots 18 and 19. The McCoy home, built in 1943 partly on Lot 18 and partly on 19, is shaded during the summer months by a north-south row of mulberry trees set approximately 30 feet east of where appellee claims her true west boundary is. In 1944 Collins remodeled and later greatly enlarged the house on Lot 20, and in doing so he encroached about three feet on Lot 19 if the dividing line between 19 and 20 is where a surveyor who testified for appellee said it should be. Appellant insists that, before signing the contract to purchase, the line was shown him by Mr. Flake and two engineers—"and there was a man with two big books."

There is no substantial testimony that any part of the original house extended onto the area now claimed to be part of Lot 19. The first expedition over the disputed area occurred when the remodeling began in 1944. Appellant, however, contends that when Walthour-Flake pointed out the lines to him he then talked with Leon Flake of the real estate agency and by verbal commitment agreed to purchase. With this understanding he went into possession not as a renter, but as a purchaser whose contract was to be delivered in circumstances satisfactory to buyer and seller.

August 5th, 1949, appellee sought in a Chancery action to enjoin Collins from interfering with her possession of Lot 19. When a demurrer to the complaint was filed the plaintiff dismissed the suit without prejudice. On August 31 ejectment pleadings were filed. Appellant contends that the suit at law was not brought within seven years from Collins' entry under his contract, and that he relied upon the boundaries he says were pointed to.

By agreement a jury was dispensed with and all matters of law and fact were determined by Judge Amsler, whose decision was in favor of the owner of Lot 19. Appellant contends (a) that the factual issues were not sustained by substantial testimony, and (b) that the court erred in not granting a retrial because of newly-discovered evidence.

When we consider the trial court's right, where a jury has been waived, to pass upon the credibility of witnesses as a part of the judicial duty to ascertain what the facts are, the argument for a defendant's instructed verdict must fail. Appellant made contradictory statements regarding the time of his entry and flatly denied most of the essential testimony given by appellee concerning protests she made when encroachments occurred. Collins testified that the mulberry trees were in place and were bearing bushes when he bought Lot 20, while Helen McCoy says she planted them for shade purposes.

The trial court did not believe Collins' testimony that the line now contended for was pointed out to him by agents of the grantors, and the court took into consideration the fact that Walthour-Flake owned both of the lots when the transaction occurred and sold each by legal descriptions. A surveyor employed by appellee and one employed by appellant did not disagree in respect of the true line except that appellant's surveyor testified to street alterations and discussed resulting shifts if effect should be given these alterations.

Nor do we think the court abused its discretion in refusing to grant a new trial. In addition to three formal allegations usually found in such motions, appellant

alleged (1) that the cause should have been transferred to equity; (2) that the trial defendant's counsel did not know that Manie Schuman's son-in-law, Maurice W. Kaye, had rented Lot 20 while Schuman claimed it under his tax deed; that Walthour-Flake became the owner Dec. 23, 1941, and that the same tenant remained in the building; (3) that Harry Levinson, a former city engineer, told appellant's counsel after the trial that he (Levinson) was familiar with the addition in which the lots were situated and with the streets adjoining them, and that in his opinion the blue print used at the trial did not conform to the lines that would appropriately circumscribe the lots in question; (4) that after the trial J. D. Walthour of the real estate firm heretofore mentioned told the defendant's counsel that "the present fence and boundary line had existed for more than seven years, therefore Collins went into possession of the 30 feet in dispute; and, (5) that he (defendant's counsel) was not informed regarding a chancery suit filed in 1936 by Moorehead Wright, trustee, to foreclose a mortgage on Lots 17 and 20, and other property. J. R. Connor was appointed receiver and collected rentals on these lots through December, 1939, and later Manie Schuman made certain improvements, etc.

The Court did not err in refusing to transfer the cause to equity upon completion of the testimony because, as appellant alleged, the plea of estoppel was not available. The answer is that the defendant did not plead estoppel, or offer to do so. There was no suggestion that the answer should be amended.

Appellant must have known, from the nature of the pleadings and character of the controversy, that appellee would not admit that she negligently stood by while the construction was being done, or that she impliedly acquiesced in appellant's course of conduct; hence estoppel *in pais* was available to appellant. Certainly when the testimony developed he had an opportunity to ask permission to amend the answer. In *Lacey* v. *Humphres*, 196 Ark. 72, 116 S. W. 2d 345, Mr. Justice McHaney, speaking for the court, emphasized an old rule to the

effect that ". . . a party who, by his acts, declarations, or admissions, either deliberately or with wilful disregard of the interests of another, induces him to conduct or dealings which he would not have otherwise entered upon, is estopped to assert his rights afterwards to the injury of the party so misled". There was citation to an opinion written by Mr. Justice HART—*Thomas* v. *Spires,* 180 Ark. 671, 22 S. W. 2d 553. It has been held that the doctrine of estoppel necessarily implies the existence of some legal right which the party against whom it is asserted would, but for his conduct, fraud, or acquiescence, otherwise have been entitled to enforce. *Ketcham Mortgage Co.* v. *Walker,* (Texas Civil Appeals) 94 S. W. 2d 806.

An interesting discussion of estoppel *in pais,* involving ejectment, is the opinion of Mr. Justice SWAYNE: *Dickerson* v. *Colgrove,* 100 U. S. 578, 25 L. Ed. 618. Citations in support of the proposition that the plea is maintainable at law are to be found in 50 A. L. R., at p. 967.

A late expression of this court is *Gambill* v. *Wilson,* 211 Ark. 733, 202 S. W. 2d 185, opinion by Mr. Justice FRANK G. SMITH.

The court did not abuse its discretion in refusing a new trial because the former engineer, Levinson, thought the blue prints used at trial might be incorrect.

On the fourth assignment: that Walthour would testify regarding fences and boundary lines and their existence for more than seven years—appellant's counsel knew the source of his client's title and had every opportunity to inform himself regarding the particular matter now urged. The same principle applies to the foreclosure suit. The chain of title affecting Lot 20 was involved in the old action.

Other reasons were urged for a new trial, but none was of a character involving an abuse of discretion.

Affirmed.

NORWOOD *v.* HEASLETT.

4-9375 235 S. W. 2d 955

Opinion delivered January 29, 1951.

[redacted]

Collins & Garner, Shaw & Spencer and *E. K. Edwards,* for appellant.

Gordon B. Carlton and *Byron Goodson,* for appellee.

GEORGE ROSE SMITH, J. This is an action by the devisees of B. S. Petefish to set aside a sale at which lands of the estate were sold to pay debts. Appellant Norwood was the purchaser at the sale, and the other appellants are his immediate and remote grantees. The chancellor found that Norwood and the administrator of the estate had been guilty of fraud in inducing the probate court to order the sale. The decree declared the

sale void, canceled the various deeds to the appellants, quieted title in the appellees, and gave money judgments for the value of timber cut by three of the appellants.

Petefish died on February 3, 1934. His will, probated in the following month, devised his real estate to his widow for life with remainder to the five appellees, who are the testator's grandchildren. When the will was probated the court appointed W. E. Jones as administrator. Mrs. Petefish elected to renounce the will and take dower. Several creditors filed claims against the estate, and the process of administration lasted for about seven years. In September of 1940 the assets that then remained, consisting of 516 acres of unimproved land, were sold by Jones pursuant to the order now under attack. Jones accounted for the proceeds of sale and filed his final settlement, which was approved. There were no further proceedings until this suit was filed in 1949.

The record and the briefs are long, but we deem three questions to be controlling.

I. The chancellor found that Jones as administrator and Norwood as attorney for Mrs. Petefish practiced a fraud on the probate court in obtaining the order to sell the real estate to pay debts. The chancellor concluded that the personal property had actually been sufficient to pay all debts and that the land had been needlessly sold. It was found that when Jones obtained the order of sale in 1939 the personal property was insufficient to pay the remaining claims only because Jones had previously made two illegal disbursements. First, in 1934 he had paid $101.70 to redeem the lands from a forfeiture for the 1933 taxes; and second, in 1936 he had paid Mrs. Petefish her statutory allowance of $300 even though, as the chancellor found, the value of the personal property amounted to only $213.73. The funds disbursed by Jones in excess of the value of the personal property had come from the proceeds of timber sold under court order in 1934. The chancellor held that these two expenditures were illegal and that had they not been made there would have been no need to sell the lands

to pay creditors. Norwood's connection with the matter lay in the fact that when Jones gave notice of his intention to apply for an order of sale Norwood filed for Mrs. Petefish an intervention by which she consented that the sale might be made free of her dower.

We think the chancellor erred in finding that the sale was induced by fraud. This is not an attack launched in the probate court under Ark. Stats. 1947, § 29-506; it is an independent suit in equity to set aside the order of sale. Of course a court of equity may set aside a judgment at law for fraud, but that fraud cannot consist of false actions or testimony the truth of which was in issue in the earlier case. It must be fraud in the procurement of the judgment, such as deception that keeps the adversary away from court or an attorney's wrongfully assuming to represent a party and conniving at his defeat. See *Alexander* v. *Alexander,* 217 Ark. 230, 229 S. W. 2d 234, for a review of the authorities.

Here the asserted fraud was not of this nature. Admittedly Jones had paid $101.70 to redeem the lands from the 1933 tax sale, but that payment was in obedience to an order of the probate court entered in 1934. Whether the administrator should have made this payment was the precise issue before the court when the order was made. Similarly, Jones paid the widow's allowance when ordered to do so. Whether the personal property was sufficient to justify the full payment was an issue the probate court had to decide in directing that the payment be made. One of these disbursements was made in 1934 and the other in 1936. It was not until 1939 that Jones represented to the court that the lands were needed for the payment of debts. We are not convinced that Jones perpetrated a fraud on the court by failing to attack the earlier transactions, but in any event the exact issue before the probate court was whether the personal property was sufficient to satisfy all claims. If the deliberate action of the probate court is subject to revocation in equity upon allegations such as these no one can rely upon the integrity of probate sales, for

fear that the issues may be retried in chancery a decade later.

II. It is insisted that Norwood's purchase should be set aside because he was Mrs. Petefish's attorney and was therefore an ineligible buyer. If Mrs. Petefish had raised this question in a timely manner we should unhesitatingly agree that Norwood violated his fiduciary duty by assuming a position in which his duty to his client conflicted with his personal interest. *Wright* v. *Walker,* 30 Ark. 44. But in the many years since the sale Mrs. Petefish has never questioned the transaction. Norwood represented the widow alone, whose dower interest was wholly separate from the rights of the appellees as devisees. Even though he should not have bought land in which his client had an interest, of what concern is that to these appellees? Norwood represented neither them nor Jones; he owed them no fiduciary duty. If he had not bought the property no doubt some stranger would have, and it is not contended that the appellees' interest could not have been sold to a stranger if necessary to pay debts of the testator. As far as the appellees are concerned, Norwood was a stranger.

Complaint is also made of the fact that soon after receiving the administrator's deed Norwood sold the land to appellant McMillan, who was one of the appraisers named in the order of sale. We have held that one who acts as an appraiser can acquire only a voidable title by purchasing at the sale. *Brown* v. *Nelms,* 86 Ark. 368, 112 S. W. 373. But here the appraisement was not a factor in the 1940 sale. The land was first offered at public sale in 1939, but there were no bidders. Pursuant to the statute then controlling, Pope's Digest, § 162, the court ordered that the property be sold a year later free of the appraisement. Thus McMillan's appraisal had no bearing on the second sale, and we can see no reason why he should not be permitted to buy from the successful bidder.

III. Thomas T. Heaslett, the youngest of the appellees, reached the age of twenty-one less than two years

before this suit was filed, and he insists that he is entitled to redeem the lands from a sale for the 1934 taxes. Ark. Stats., § 84-1201. Jones paid the 1933 taxes, but the land forfeited to the State for non-payment of the 1934 taxes. The administrator's sale was expressly made subject to these taxes. After Norwood bought the property he redeemed it from the State, under Ark. Stats., § 84-1219. Such a redemption is a mere payment of taxes and does not purport to convey title. *Pyburn* v. *Campbell,* 158 Ark. 321, 250 S. W. 15. Hence all that Norwood did was to pay the back taxes. He and his grantees are not relying on a tax title to cut off the rights of Thomas T. Heaslett; so the statutory right of redemption is inapplicable.

The decree is reversed and the cause dismissed.

GRIFFIN SMITH, Chief Justice, and MCFADDIN, J., dissent.

CAMPBELL *v.* FENDER.

4-9353 235 S. W. 2d 957

Opinion delivered January 29, 1951.

J. Fred Parish, for appellant.

Pickens, Pickens & Ponder, for appellee.

GRIFFIN SMITH, Chief Justice. On June 25, 1949, J. C. Campbell purchased a used automobile from appellee, who did business at Newport as Fender Motor Company. Campbell first bought an old Dodge car, paying appellee for it, then on June 25th he traded it to appellee for a 1940 Ford. He was allowed $50 for the Dodge—the amount he had paid. The agreed price of the Ford was $595 and Campbell executed a title-retaining note for the difference of $545. Before consummating the deal Fender told Campbell the note would have to be signed by the purchaser's father or mother. The mother signed as a co-maker and testified that she did so to enable J. C. to have the car.

Young Campbell testified that he paid $160.50, then returned the car in mid-August and disaffirmed the contract. Fender testified that $195 had been paid, but credits on the note from which he read total $145.50.[1]

In attempting to return the car Campbell drove it to a lot adjoining appellee's property and left it, after explaining, in effect, that the contract was being disaffirmed.

The trial court, sitting as judge and jury, found that Campbell's offer to return the property had not been accepted and gave judgment against each of the defendants for $386.74, with interest from August 25, 1949. The credit differences testified to are not accounted for, but appellant does not complain of the amount as such. Appellant's objections are (a) that the mother was an ac-

[1] On cross-examination, in response to the question, "How much credit is [Campbell] entitled to on the note?" Fender replied, "it would be $108, plus $87.50—in other words, $195." But he had previously testified (when asked to identify payments indorsed on the note) that $145.50 had been paid in five installments. It would seem, therefore, that the total of $195 was a credit against the purchase price of $595 and included the Dodge transaction. This is emphasized by the statement that $50 was paid June 25th when the note was executed, and it "ties in" with the Dodge deal.

commodation indorser, and since there was no lawful obligation in respect of the minor, she should not be held; and (b) when the car was returned the debt was discharged. Appellee thinks Campbell ratified the contract by selling the subject-matter. There was testimony that Campbell sold the car to his brother, Lew, but this is not seriously argued. In any event the contention would fail, in view of Lew's apparent acquiescence in the return.

We said in *Crutcher* v. *Barnes,* 207 Ark. 768, 182 S. W. 2d 867, that the right of a minor to rescind a voidable contract was personal and that an adult party to the contract cannot take advantage of the minor's status. In the case at bar Campbell's right to rescind could not be defeated by appellee's refusal to accept the car, hence the trial court was in error in rendering judgment against J. C. Campbell and in not giving judgment for the money paid. But the mother's situation is different. Young Campbell testified that he did not tell Fender how old he was, and Fender says he did not know. The requirement for an additional signature to the note was in keeping with practices of the bank where the paper was negotiated. When Campbell quit paying, Fender reacquired the note he had indorsed to the bank—a transaction that could not prejudice either of the appellants or change the nature of the contract.

Our conclusion is that while the judgment as to J. C. Campbell must be reversed with directions that the amount he paid be refunded, Mrs. Campbell is liable to the full extent of the note, for which judgment should be given. This would include any sum the minor receives from the required refund by Fender. When the judgment is paid the mother is entitled to the car or its value as of the time of the son's disaffirmance.

Reversed; cause remanded.

4-9373 235 S. W. 2d 959

Opinion delivered January 29, 1951.

Marvin A. Hathcoat, for appellant.

ED. F. MCFADDIN, Justice. This appeal challenges a decree which (a) granted the husband a divorce; and (b) refused to award the mother support money for their minor child.

Mr. and Mrs. Stimmel were married in 1931, and their daughter, Bette Jean, was born in 1933. The family lived in Brooklyn, New York. Mr. Stimmel became enamored of another woman; and several separations, and reconciliations, occurred; also there were divorce proceedings filed and withdrawn, both in Michigan and New York. On September 29, 1949, Mr. Stimmel arrived in Little Rock, Arkansas, and engaged a room

for which he paid rent for several weeks but which he occupied for a few days. On October 3rd he became a soliciting agent for an insurance company in Arkansas; and on October 13th he rented a room in Harrison, Boone County, Arkansas. He solicited insurance in Boone, and other counties of Northwestern Arkansas, and made one or more trips to Missouri. Then on December 6th he filed in Boone County, Arkansas, his present suit for divorce, alleging three years separation (the seventh ground for divorce set forth in § 34-1202, Ark. Stats.). Mrs. Stimmel, a resident of Brooklyn, New York, resisted the divorce and also sought an award of support for herself and daughter, in her custody. The Chancery Court granted Mr. Stimmel a divorce and refused to order him to pay any support money; and Mrs. Stimmel has appealed.

We hold that the learned Chancery Court erred in granting Mr. Stimmel a divorce. Some of the Judges of this Court are of the opinion that Mr. Stimmel did not prove a *bona fide* residence in Arkansas within the purview of our cases, such as *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585, and *Swanson* v. *Swanson,* 212 Ark. 439, 206 S. W. 2d 169. Mr. Stimmel "stopped off" in Little Rock on September 29th, en route to San Antonio, Texas. The renting of a room in Little Rock and in Harrison, and the other acts he did, are not deemed sufficient to constitute a *bona fide* residence for two months before the filing of the suit. The essential as to *bona fide* residence must exist not only at the time the decree be rendered, but also must have existed at the time the suit was filed.

Other Judges of this Court are of the opinion that, irrespective of the matter of *bona fide* residence, nevertheless Mr. Stimmel failed to have corroboration of his alleged ground of divorce. Our cases hold that the plaintiff's testimony, as to grounds for divorce, must be corroborated and that a divorce cannot be granted without such corroboration. See *Allen* v. *Allen,* 211 Ark. 335, 200 S. W. 2d 324, and other cases there cited. Even if Mrs. Stimmel had admitted the three-year separation,

still, under our holdings, such was not sufficient corroboration; for in *Pryor* v. *Pryor,* 151 Ark. 150, 235 S. W. 419, Mr. Justice WOOD, in quoting from earlier cases, said:

"'. . . divorces are not granted upon the uncorroborated testimony of the parties and their admissions of the truth of the matters alleged as grounds therefor. . . .'"

The only witnesses whose testimony tended to corroborate Mr. Stimmel were Mr. and Mrs. Carpenter. Mr. Carpenter testified that all of his information about Mr. Stimmel's alleged ground for divorce was acquired from what Mr. Stimmel had told him.[1] Mrs. Carpenter likewise admitted that she had no firsthand information on the matter and only knew what Mr. Stimmel had told her. The testimony of these parties is not sufficiently competent to constitute corroboration.

So, because of absence of proof of *bona fide* residence, and also because of the absence of corroborative testimony, we conclude that the divorce decree should not have been granted Mr. Stimmel.

On the question of support money for the minor daughter, we are unanimously of the opinion that the learned Chancellor was in error in refusing to make an award. The mother, having the custody of the minor, was entitled to an award; and the evidence shows that Mr. Stimmel was able to make some contribution. Without detailing the evidence, it is sufficient to say that Mr. Stimmel should now be ordered by the Chancery Court

[1] Here is Mr. Carpenter's testimony:

"Q. Do you know the defendant, Violet V. Stimmel?

"A. Only from what I have heard. I have never met her personally.

"Q. During the period of your acquaintance with Mr. Stimmel, has he lived or cohabited with Mrs. Violet Stimmel?

"A. I have very good reason to know that he hasn't.

"Q. In other words, if he has lived with her it is beyond your knowledge?

"A. Yes, sir.

"Q. You think that he has not?

"A. Absolutely not. I gain that from correspondence I had with him at different points."

to pay his wife for the support of the minor daughter the sum of $20 per month from January 1, 1950. From such an award there may be deducted any amounts shown to have been paid by Mr. Stimmel during such period. The order for support money will continue until changed conditions are shown.

The decree of the Chancery Court is reversed and the cause remanded, with directions to enter a decree in accordance with this opinion and without prejudice to Mr. Stimmel's right to file a new suit for divorce if and when he establishes *bona fide* residence in Arkansas.

Justices MILLWEE, WARD, and ROBINSON dissent as to residence and corroboration, but agree as to support money.

TERRELL *v.* LOOMIS.

4-9374 235 S. W. 2d 961

Opinion delivered January 29, 1951.

Tom Kidd, for appellant.

Guy B. Reeves, for appellee.

MINOR W. MILLWEE, Justice. On June 3, 1949, appellee, Leslie D. Loomis, purchased an automobile from Aubrey Blevins Sales Co. of Delight, Arkansas. The parties executed a conditional sales contract under which title to the automobile was to be retained in the seller until a $622.68 balance on the purchase price was paid in twelve monthly installments of $51.89 each. The contract and note for the monthly payments were immediately assigned to and purchased by appellee, General Contract Purchase Corporation, hereinafter called credit corporation.

Appellant, Alton Terrell, operates an automobile supply business at Murfreesboro, Arkansas. He sold to Loomis and installed on the car in controversy certain parts between the dates of July 13 and July 19, 1949. After driving the car about four months, Loomis defaulted in his payments to the credit corporation and left the car with appellant to whom Loomis was still indebted for a balance of $101.24 remaining due on the July parts account. The credit corporation brought this action against Loomis and appellant to recover possession of the automobile.

Appellant filed an answer and cross-complaint seeking judgment against Loomis for the balance due on the

parts bill. He also alleged that he had a first and paramount lien upon the automobile by virtue of a properly verified account of the amount due by Loomis, which appellant filed in the office of the Circuit Clerk of Pike County on November 15, 1949. Trial before the court, sitting as a jury, resulted in judgment for appellees. The court found that the credit corporation was entitled to possession of the automobile. Appellant's claim of a lien upon the car for parts furnished Loomis was denied and his cross-complaint dismissed.

Appellant's claim of a superior lien is based upon Ark. Stats., §§ 51-404 to 51-412. Section 51-404 provides that automobile firms and repairmen shall have an absolute lien upon automobiles for labor performed and materials furnished in the repair of a vehicle. Under § 51-409, if a repairman voluntarily parts with possession of the vehicle, he may still preserve his lien by filing with the circuit clerk of the county in which the debtor resides, a verified statement of the lien account "within ninety (90) days after such work or labor is done or performed, or materials furnished. . . ." By § 51-412 it is expressly provided that such repairmen's liens shall be subject to the lien of a vendor of automobiles for the balance of the unpaid purchase price under a contract retaining title until the purchase money is paid.

Appellant filed his lien with the circuit clerk on November 15, 1949, which was more than 90 days after the last item of materials was furnished, but within 90 days of the last payment on the account. The provision of § 51-409, *supra,* with reference to time of filing the lien, is identical with that contained in the Mechanics and Materialmen's Lien Statute (Ark. Stats. § 51-613). In construing that section this court has repeatedly held that the 90 days begins to run from the date of the last debit item on the account. *Geisreiter* v. *Standard Lumber Co.,* 187 Ark. 893, 63 S. W. 2d 347. Hence, appellant filed his lien too late and the trial court correctly so held. Even if appellant had filed his lien in time, same would be subject to the vendor's lien of the credit corporation under the conditional sales contract in view of the

express provisions of § 51-412, *supra*. *Corning Motor Co.* v. *White*, 173 Ark. 144, 293 S. W. 46; *Powell* v. *Pacific Finance Corporation*, 216 Ark. 884, 227 S. W. 2d 965.

But appellant contends that the trial court erroneously held that the credit corporation had a valid lien on the automobile in controversy because a copy of the conditional sales contract was not filed with the circuit clerk of Pike County as required by Act 142 of 1949 (Cum. Pocket Suppl. Ark. Stats., §§ 75-101—75-191). This is the "Uniform Motor-Vehicle Administration, Certificate of Title and Anti-Theft Act" which contained the emergency clause and was approved by the Governor on February 23, 1949. Article V, § 60(a) of the act provides that no conditional sales contract upon a registered vehicle is valid as against the creditors of the owner acquiring a lien until the requirements of the article have been complied with. Section 60(c) of Article V provides: "The holders of title retaining notes or contracts of purchase of any motor vehicle to be registered under this Act is hereby required to file copies of such notes or contracts with the Circuit Clerk and Recorder in the county where the payer resides. . . ."

Section 93 of Act 142 reads as follows: "The Commissioner may allow such time after the passage and approval of this Act, within which all motor vehicles covered by the provisions of this Act shall be registered as provided herein. After the expiration of such time it shall be (a) misdemeanor for any person, firm or corporation to operate a vehicle upon the highways of this state without first complying with the provisions of this Act." Pursuant to this section, the Commissioner of Revenues, on December 16, 1949, entered an order fixing January 1, 1950, as the effective date for registration of titles for motor vehicles as provided in the act.

Appellant argues that § 93 is unconstitutional as an unlawful delegation of legislative authority to the Commissioner of Revenues. The applicable rule is stated in *State* v. *Davis*, 178 Ark. 153, 10 S. W. 2d 513, as follows: "While it is a doctrine of universal application that the

functions of the Legislature must be exercised by it alone, and cannot be delegated, it is equally well settled that the Legislature may delegate to executive officers the power to determine certain facts, or the happening of a certain contingency, on which the operation of the statute is by its terms made to depend. 12 C. J. 846, and 6 R. C. L., paragraph 165, p. 164. This principle has been frequently recognized by this court. *Harrington* v. *White,* 131 Ark. 291, 199 S. W. 92; *Howard* v. *State,* 154 Ark. 430, 242 S. W. 818; and *Summers* v. *Road Improvement District No. 16,* 160 Ark. 371, 254 S. W. 696." See, also, *Wiseman* v. *Phillips,* 191 Ark. 63, 84 S. W. 2d 91; 11 Am. Jur., Constitutional Law, § 216; 16 C. J. S., Constitutional Law, § 138(a); Cooley's Constitutional Limitations (8th Ed.) p. 227.

In *Harrington* v. *White, supra,* and in the earlier cases of *Boyd* v. *Bryant,* 35 Ark. 69, and *Nall* v. *Kelley,* 120 Ark. 277, 179 S. W. 486, we approved the rule announced in *Cincinnati, etc., Rd. Co.* v. *Commissioners,* 1 Ohio State 77, as follows: "The true distinction is between the delegation of power to make the law, which necessarily involves the discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first can not be done. To the latter no valid objection can be made." In *Albert* v. *Milk Control Board,* 210 Ind. 283, 200 N. E. 688, the Indiana Court held valid an act requiring each milk dealer to obtain a license within 30 days after the act took effect or within an extended period prescribed by the milk control board. See, also, *Howes Bros. Co.* v. *Massachusetts Unemployment Compensation Comm.,* 296 Mass. 275, 5 N. E. 2d 720; *Royer* v. *Public Utility Dist. No. 1 of Benton County,* 186 Wash. 142, 56 Pac. 2d 1302.

We are of the opinion that in § 93, *supra,* the Legislature did not delegate the power to make a law, but that it made a law and delegated the power to the commissioner to ascertain certain facts as a basis for putting the title and lien registration features of the law into operation. The Uniform Act was adopted after the

regular period for licensing and registering motor vehicles for the year 1949 had expired. The Act contains radical changes in connection with registration and transfer of title, filing of liens and administration of the motor vehicle laws generally. Adoption of the Act necessitated the setting up of new methods, forms and machinery for its proper execution. The Legislature itself allowed time within which to do this and delegated the power to the commissioner to ascertain the facts which call the title and lien registration features of the statute into operation. The Act is mandatory in all that it requires and the commissioner was bound to reasonably exercise the discretion granted under § 93. It follows that the credit corporation was not required to file copies of its contract and note with the circuit clerk of Pike County either at the time the conditional sales contract was executed or at the time appellant furnished the parts and sought to establish a lien upon the automobile in controversy. The trial court was, therefore, correct in holding that the credit corporation had a valid lien on the car.

The trial court erred in denying appellant judgment against Loomis on the cross-complaint for the balance due on the parts account. It is undisputed that Loomis owed appellant a balance of $101.24 on the account. That part of the judgment dismissing the cross-complaint against Loomis is accordingly reversed and the cause remanded with directions to enter judgment for appellant against Loomis in the sum of $101.24 with interest from August 1, 1949. In all other respects the judgment is affirmed.

MILLIGAN *v.* MILLIGAN.

4-9359 235 S. W. 2d 964

Opinion delivered January 29, 1951.

John W. Baxter, for appellant.

Charles D. Atkinson and *Chas. W. Atkinson,* for appellee.

Ed. F. McFaddin, Justice. This is a child custody contest. The parties were married in 1942; their baby was born on May 30, 1948; the separation occurred in 1949; and a divorce decree—on the ground of indignities—was granted to the husband on February 8, 1950. As to the correctness of the divorce decree, no issue is made; but Mrs. Milligan claims that the Chancery Court erred in awarding Mr. Milligan the custody of the child, a little girl only twenty months old at the time of the decree.

A careful study convinces us that the Chancellor was correct in his decision. The evidence clearly establishes that Mrs. Milligan did not properly care for the child when she had its custody; and Mrs. Milligan's own testimony indicates that she probably could not care for the child if the custody should now be awarded to her. On the other hand, Mr. Milligan's mother and sister both testified that they had assisted Mr. Milligan in caring for the child while he had her custody, and the evidence preponderates to the conclusion that they will continue to do so. The mother, of course, has the right of visitation under such conditions as may be prescribed by the Chancery Court.

In what was evidently a most desperate attempt to prevent Mr. Milligan from having the custody of the child, Mrs. Milligan testified that he was not the father of it. She even named one whom she claimed to be the father. Without discussing the legal competency of such testimony,[1] we point out: (1) that the Milligans were

[1] See *Morrison* v. *Nicks,* 211 Ark. 261, 200 S. W. 2d 100; and *Kennedy* v. *State,* 117 Ark. 113, 173 S. W. 842, L. R. A. 1916B, 1052, Ann. Cas. 1917A, 1029.

living together part, if not all, of the full period of gestation; and (2) that witnesses testified that the Milligans slept together in the one bed in the home. The Chancery Court found that Mr. Milligan was the father of the little girl, and the evidence supports that finding.

The decree is affirmed.

SIMPSON *v.* THAYER.

4-9352 235 S. W. 2d 965

Opinion delivered January 29, 1951.

Boyd Tackett and *Shaver, Stewart & Jones,* for appellant.

George E. Steel and *E. K. Edwards,* for appellee.

PAUL WARD, J. Appellees, Charles Thayer and Roy Thayer, are the surviving brothers and sole heirs of Carrie I. Simpson, deceased wife of appellant, Dr. W. B. Simpson. In 1947 appellant filed suit in the Howard Chancery Court against appellees, as heirs of his deceased wife, seeking to have them declared trustees of the legal title to certain lands. The complaint alleged that appellant paid for the lands but took title in his

wife's name under a long standing agreement between them that said lands would belong to them jointly and that she would hold the title as an estate by the entirety.

After issue was joined the cause was tried on January 5, 1948. At this trial appellant and other witnesses gave testimony tending to support the entirety theory alleged in his complaint. Several witnesses testified for appellant that Mrs. Simpson claimed no interest in the lands, but held the legal title thereto in trust and for the convenience of appellant. There was also testimony by appellant and others that on several occasions during Mrs. Simpson's last illness she expressed a desire to execute a deed or will in favor of appellant, but that this was never done.

The Chancellor entered a decree on March 8, 1948, dismissing appellant's complaint for want of equity. On appeal to this court this decree was affirmed on February 7, 1949, in *Simpson* v. *Thayer,* 214 Ark. 566, 217 S. W. 2d 354.

On April 14, 1949, appellant and appellees entered into a settlement contract which recites: "Both parties hereto desire to avoid further litigation relative to the title and ownership of the following described lands in Howard County, Arkansas, to-wit: . . ." This recital is followed by a description of all the lands involved in the original suit. Under this agreement appellant paid appellees $6,750 for full title to the home place in Nashville, Arkansas, and an undivided one-half interest in the 335 acres of farm lands. Appellees executed and delivered to appellant proper deeds in compliance with the settlement contract.

On August 29, 1949, appellant filed the instant suit to set aside the decree of March 8, 1949, and to obtain a new trial upon the ground of newly discovered evidence. The complaint in the instant case, supported by appellant's affidavit, alleged that a warranty deed was duly executed by Mrs. Simpson to appellant on September 29, 1928, and acknowledged and delivered to appellant on October 9, 1928, conveying to him two of the four prop-

erties involved in the original suit, to-wit: the 220 acre "Blackwood Place" and the "Home Lots" in Nashville, Arkansas; that said unrecorded deed was lost, but its loss was not discovered until a month after Mrs. Simpson's death on June 26, 1947; that prior to the trial of the original action, appellant made and caused to be made a diligent search for such deed without success; and that in July, 1949, appellant's niece found the lost deed while cleaning his home in Nashville.

It was further alleged that the newly discovered evidence would supply clear and convincing proof which would have produced a different result in the trial of the original cause; that such evidence was not cumulative; that plaintiff used due diligence in attempting to secure evidence of the lost deed before trial; and that such evidence could not have been discovered before the first trial by the exercise of reasonable diligence.

Appellant's affidavit attached to the complaint recites: "Said deed was lost by affiant, but its loss was not discovered until about a month after Mrs. Simpson died, her death having occurred on June 26, 1947. He made a diligent search for said deed in all places where he believed it might be found, including the place in his home where he was accumstomed to keep his deeds and papers. Furthermore, after suit was filed and prior to the trial, he called upon two of his friends to make a search for the deed. Affiant and said friends made a careful and painstaking search of the whole house, going through papers, opening envelopes, etc., but the deed could not be found. The deed never having been recorded and the Notary Public who witnessed the deed and took the acknowledgment being dead, affiant, having no proof to substantiate the fact of the execution of the supposedly lost deed, made no reference to it at the trial."

Upon a hearing in the lower court the learned Chancellor found "that the complaint in equity to set aside the Decree of this court entered in the above styled cause on March 8, 1948, and the motion for the granting of a new trial of said cause, heretofore filed herein, are

without equity and should be dismissed." From which decree comes this appeal.

Appellant contends that the decision of the lower court should be reversed and that he should be granted a new trial at which he could introduce the deed from his deceased wife to himself. In support of this contention his able attorneys advanced several arguments supported by authorities and appellees' counsel likewise has advanced many astute arguments and cited numerous authorities in support of the order of the lower court. After a careful consideration of all the reasons advanced pro and con we have decided to affirm the holding of the learned Chancellor and to rest this decision solely upon the proposition that appellant did not exercise due diligence in his efforts to locate the lost deed before the first trial of this cause on January 5, 1948. It is undisputed that Dr. Simpson on the last mentioned date, and for years before, knew of the existence of the deed. He admitted that the deed was delivered to him soon after it was executed in 1928; that the inscription on the back of the deed was in his own handwriting. His own testimony is to the effect that he made no serious effort to locate the deed until Sunday before the trial. It appears from the record that the trial began on January 5, 1948, and by reference to a calendar of that date it appears that January 5th was on Monday. He had this search made on Sunday by two neighbor women, as he was not feeling well that day and could not take part in the search.

According to his testimony the two neighbors went through a good many drawers of papers but there were three rooms in the house that had drawers with papers in them, and that his house contained nine rooms. Witness told his attorney of the existence of said deed, but no request or effort was made to obtain additional time for a thorough search. True it is that the doctor gave his reasons for not trying to rely on the lost deed at the first trial, but also stated that he wanted to try to get the title through testimony of witnesses his wife talked to and that he thought he had sufficient evidence. This

decision would naturally lead to the conclusion that Dr. Simpson did not lay great importance on the necessity of finding the lost deed and lends support to the contention of appellees that he did not deem it necessary to make a thorough search.

Appellant had his day in court in January of 1948, and the decision against him then was affirmed later by this court. The solemnity of a judgment under such circumstances and especially after the lapse of more than a year is such that the judgment should not be reopened on the ground of newly discovered evidence unless the right to do so is well established. It is our opinion that the evidence of due diligence on the part of appellant does not justify a reopening of this case.

Affirmed.

Justices McFaddin and Millwee concur.

Woods *v.* Bell.

4-9390 236 S. W. 2d 63

Opinion delivered February 5, 1951.

John E. Hooker, for appellant.

Reinberger & Eilbott, for appellee.

MINOR W. MILLWEE, Justice. The sole issue in this case is whether plaintiff (appellant) is a legitimate child and heir-at-law of Will Bell, deceased, and therefore entitled to share in his estate. Will Bell was an elderly negro who resided at Pine Bluff, Arkansas, for several years prior to his death, intestate, in 1949. He owned several lots in Pine Bluff at the time of his death. Bell was married to defendant, Lucille Bell, in 1942 and a son, Will Bell, Jr., was born of this marriage.

Plaintiff brought this partition suit against Lucille Bell as the widow of Will Bell, deceased, and guardian of Will Bell, Jr. She alleged that she was a daughter of deceased by a former marriage and that she and Will Bell, Jr., were the sole heirs of Will Bell, deceased, and tenants in common of the lots, subject to the dower rights of Lucille Bell. The answer of Lucille Bell denied these allegations. Trial resulted in a decree dismissing plaintiff's complaint.

The chancellor found that plaintiff was the daughter of Will Bell, but concluded that the evidence was insufficient to establish a marriage of Bell to plaintiff's mother. There being no record proof of such marriage, plaintiff sought to prove the existence thereof by reputation. She offered the testimony of her uncle and two aunts on this point. This evidence tended to show that plaintiff's mother, Helen Holloway, resided with her parents in Cleveland County about 1905; that Will Bell was working at a mill near the Holloway home at that time; and that an illicit relationship was carried on between Bell and plaintiff's mother for an indefinite period about this time. While they stated that Helen and Will "were supposed" to be married, none of the witnesses were able to establish a place where the parties actually lived together nor was it shown that they held themselves out as husband and wife at that time.

The following testimony of plaintiff's uncle, Thomas Holloway, is typical: "Q. Going back now about when

was it your sister, Helen, and Will Bell started corresponding, I believe you called it? A. It was something like 1905. Q. By corresponding, you mean they were living together? A. I didn't see them living together. Q. What was she doing, keeping house for him? A. At the time I saw him, he was visiting, like a man is courting. Q. When the Mill was in Arkansas did they live together at all? A. I don't know. Q. Did you visit at their house? A. I lived with my mother. Q. Were they all there together? A. No, sir. Q. But when he went to Steen, Mississippi, she went with him? A. Yes, sir. The Court: Do you know of your own knowledge? A. I was just told that by him." There was no evidence of the issuance of a license or the performance of a marriage ceremony.

Common-law marriages have never been recognized in this state. *Furth* v. *Furth,* 97 Ark. 272, 133 S. W. 1037. However, this court has held that marriage may be proved in civil cases by reputation, the declarations and conduct of the parties and other circumstances usually accompanying the relation. *Farmer* v. *Towers,* 106 Ark. 123, 152 S. W. 993; *Thomas* v. *Thomas,* 150 Ark. 43, 233 S. W. 808. In these cases there was evidence to establish a time and place of a marriage ceremony followed by cohabitation for several years during which time the parties held themselves out as man and wife. In the Farmer case the marriage records of the county had been destroyed by fire and it was impossible to prove the marriage by record evidence. In the Thomas case there was proof of the issuance of a license and the performance of a marriage ceremony. The chancellor correctly concluded that the evidence was not sufficient to establish a valid marriage in Arkansas.

Plaintiff contends that even if there was no valid marriage in this state, a legal marriage was consummated in Mississippi. It is true that Mississippi recognizes the validity of common-law marriages. In *Sims* v. *Sims,* 122 Miss. 745, 85 So. 73, the Mississippi court held that common-law marriages were validated by § 3249, Code of 1906 (§ 2556, Hemingway's Code). This

holding has been followed in later cases. *D'Antonio* v. *State,* 187 Miss. 648, 191 So. 281. It is also true that a common-law marriage contracted in another state where such marriage is valid, will be treated as valid in Arkansas. *Evatt* v. *Miller,* 114 Ark. 84, 169 S. W. 817, L. R. A. 1916C, 759.

Again, there is a paucity of proof that a common-law marriage was actually consummated in Mississippi. In this connection Thomas Holloway testified that Bell, after returning from Mississippi, told witness that Helen went to Mississippi with him and he referred to witness as his brother-in-law. Plaintiff's aunt testified that in 1910 her father became ill and she wrote a letter to Will Bell somewhere in Mississippi in an effort to get in touch with Helen and that Helen returned to Arkansas in response to this letter. This witness first testified that plaintiff was not born at that time. She later stated that plaintiff was born before 1910 and that someone sent plaintiff to her grandmother's home where she lived for several years. Thomas Holloway testified that plaintiff was born in Cleveland County, Arkansas. Plaintiff stated that she was born in Mississippi in 1907. Plaintiff's mother later married Kelsey Goings and they lived at Woodson, Arkansas. They later separated and in 1930 plaintiff and her mother moved to St. Louis, Mo., where her mother died in 1948. There is no evidence of a divorce by either Helen or Will. There is no direct evidence of a definite time or place of cohabitation of the parties in Mississippi and no proof that they held themselves out as husband and wife in that state. In fact no witness testified that they ever saw them living together.

Like the chancellor, our sympathies are with plaintiff. After observing the witnesses as they testified and carefully weighing and evaluating the evidence, the chancellor concluded that he was "far from being convinced these two people were married." We cannot say that this conclusion is against the preponderance of the evidence.

Affirmed.

ROBERTS *v.* BILLINGSLEY.

4-9384 236 S. W. 2d 79

Opinion delivered February 5, 1951.

Herrn Northcutt and *Gus Causbie,* for appellant.

W. E. Billingsley, for appellee.

ED. F. MCFADDIN, Justice. This is a dispute as to ownership of two parcels of land, called "C" and "A," in the Town of Franklin, Izard County, Arkansas. Each parcel contains approximately one-half acre. Parcel "C" is south of State Highway 56; and Parcel "A" is north of the highway.

For the recovery of the two parcels, appellee filed action in ejectment against appellant, who in turn filed answer and cross-complaint, seeking to have his title quieted. The case was transferred to the Chancery Court and resulted in a decree adjudging appellee to be the owner of Parcel "C," and refusing relief to all parties as to Parcel "A." By appeal and cross-appeal the entire controversy comes to this Court. A careful study of

the entire record convinces us that the Chancery Court should be affirmed on both direct and cross-appeal.

As to Parcel "C": Lee Billingsley had a complete record title from T. G. Sangster, the admitted common source of title. Roberts' alleged chain of title from Sangster was defective because it was based on a deed undelivered by Sangster. See *Miller* v. *Physick,* 24 Ark. 244; *Bray* v. *Bray,* 132 Ark. 438, 201 S. W. 281; *Cavett* v. *Pettigrew,* 182 Ark. 806, 32 S. W. 2d 808; *Graves* v. *Carlin,* 194 Ark. 473, 107 S. W. 2d 542, and *Ransom* v. *Ransom,* 202 Ark. 123, 149 S. W. 2d 937. Furthermore, Billingsley had actual possession of Parcel "C" for more than seven years before Roberts committed the trespass that initiated this litigation. See § 37-101, Ark. Stats.; *Fletcher* v. *Josephs,* 105 Ark. 646, 152 S. W. 293; *Smart* v. *Murphy,* 200 Ark. 406, 139 S. W. 2d 33, and *Hart* v. *Sternberg,* 205 Ark. 929, 171 S. W. 2d 475.

As to Parcel "A": Neither party showed any possession, and the record title of each party was defective because the plat—of East Addition to the Town of Franklin—as brought into the record, did not sufficiently identify Parcel "A" as being within the boundaries of Lots 1, 2, and 3 of Block 1 of East Addition to said Town. Furthermore, Exhibits 7 and 8, offered in evidence in the trial court, and apparently relating to a tax confirmation decree, are not found in the transcript; and without them we cannot say that the decree is in error. See *Irby* v. *So. B. & L. Assn.,* 67 Ark. 287, 54 S. W. 744; *East Arkansas Lumber Co.* v. *Swink,* 128 Ark. 240, 194 S.W. 5, and *Smith* v. *Magnet Cove Barium Corp.,* 212 Ark. 491, 206 S. W. 2d 442.

We, therefore, affirm on direct and cross-appeal and assess the costs against the appellant.

Mr. Justice Ward disqualified and not participating.

OLIVER *v.* CONLEY.

4-9363 236 S. W. 2d 80

Opinion delivered February 5, 1951.

Hale & Fogleman, for appellant.

Rieves & Smith, for appellee.

PAUL WARD, J. Appellee, James Conley, plaintiff below, brought this action in the lower court against Charles Oliver, appellant, to recover for personal injuries sustained in a collision by the car in which he was riding with a truck owned by appellant and being driven by his employee, Herman Melcher. The trial below resulted in a judgment in favor of Conley and against Oliver in the amount of $3,000, from which judgment appellant appeals to this court.

In the trial below Conley contended that the collision was a result of the negligent manner in which Melcher

was driving the truck at the time and appellant defended on the ground that his driver was not negligent, but that Conley was guilty of negligence on his part. The car in which Conley was riding was being driven at the time by Fred Lauderdale, and it is the contention of appellant that said Fred Lauderdale was guilty of negligence and also that his negligence would be imputed to Conley because they were at the time on a joint enterprise. On appeal appellant urges several grounds for a reversal of the judgment, but the principal one relied upon appears to be that there is no substantial evidence to sustain the verdict of the jury.

Since our holding is against appellant on this contention it is necessary under the well-established rule to set forth below only a sufficient resume of the testimony to show substantial evidence to support the finding of the jury.

All of the occupants of the car in which Conley was riding were colored people and he and some of the others involved lived on a plantation owned by one Oliver Woollard. On Saturday afternoon late on the 4th day of October, 1947, plaintiff contacted a colored boy named Dan Newton, whose father owned a car and they planned a trip to Turrell for the purpose of buying a hat for Conley, and perhaps also to spend the evening in pleasure. They remained in Turrell until about four o'clock the next morning, which was Sunday morning, at which time Conley and Dan Newton started back home, taking along with them five and possibly six other passengers. Fred Lauderdale, a 16-year-old Negro, who by arrangement was to and did drive the car, had had experience in driving. In the front seat with him was Dan Newton and one Andrew Washington. In the back seat with Conley was a Negro woman named Lillie B. Lewis and two Negro men called "Trouble" and Paign. Conley was seated behind the driver and Lillie was sitting on his lap, or as he expressed it, she was sitting down between his legs.

Appellee's witnesses stated that the car in which they were riding was a 1941 DeSoto with good sealed

beam headlights. While proceeding home and going south on U. S. Highway No. 61 they met appellant's truck and the collision occurred in which appellee was injured.

Testimony on behalf of appellee showed that his car (a DeSoto) was being driven about 35 miles per hour on the right side of the road (which was the west side) with good lights, when it met the truck driven by appellant's employee and that the truck, coming from the south, appeared to swerve and wobble and cut to the right and then back across the center line; and that this caused the collision and serious injury to appellee. Two men who were squirrel hunting came to the scene of the collision a few minutes after it happened and testified they saw tire marks and also mud on the pavement indicating that the truck was on the wrong side of the road at the time and place the cars collided. There was testimony by the driver of the truck and also another witness who arrived later contradicting the above, but it was not sufficient to take the question of negligence from the jury.

One of the squirrel hunters mentioned above, on cross-examination, attempted to draw a plat showing the location of the cars, tire tracks and mud, but on redirect examination it was shown to be wrong and the court refused to admit it as an exhibit over the objections of the appellant. In our opinion this was not error because the evidence shows the plat was drawn in the presence of the jury and witness stated he was a mechanic and not a draftsman, and in all events the jury had knowledge of all the facts and could draw its own conclusions.

The evidence showed that the front of appellee's car struck the truck behind the front fender, and from this appellant argues these physical facts are conclusive that appellee was negligent, citing *Mo. Pac. Railroad Co.* v. *Moore,* 199 Ark. 1035, 138 S. W. 2d 384. We are unable to agree. If the collision took place as appellee's witnesses testified the point of impact could have been the same.

Neither do we think the court erred in allowing one of appellee's witnesses to state that Lillie B. Lewis (this Negro woman in the car) was laid out on the ground and covered up. We agree this testimony had little if any probative value to show the speed at which appellant was driving, but it was a part of the entire picture as the witness saw it. Also appellant's testimony brought out facts of similar import.

Finally it is contended by appellant that this case should be reversed because of the lower court's refusal to give certain requested instructions. We are unable to find any merit in this contention. The court gave twelve different instructions which we think fully and accurately covered the issues involved in the trial of the cause of action and the last one admonished the jury to "take no one instruction given you to be the whole law of the case but you will take all of them as such." No objection was made to any of these instructions. The instructions requested by appellant related to the matter of "joint enterprise" and contributory negligence, but as stated above these points were properly covered in the instructions given by the court.

Affirmed.

WILKINS *v.* CITY OF HARRISON.

4642 236 S. W. 2d 82

Opinion delivered February 5, 1951.

Joe Van Derveer and *Merle Shouse,* for appellant.

W. J. Cotton, for appellee.

HOLT, J. The four appellants were convicted in the Mayor's Court in the City of Harrison on an information charging an alleged crime, committed as follows: "That said defendants, Paul H. Wilkins, William B. Lynch, Jim Stratton, and I. T. Ingram, did on the 25th day of April, 1950, unlawfully enter upon the streets of the City of Harrison, and private residences, business establishments, and offices within the incorporated limits of said city without having been requested or invited to do so by the owner or owners, occupants or occupant, of said private residences, business establishments or offices, for the purpose of soliciting orders through the sale of coupon, or otherwise, for portrait photographic work, enlargements of portraits, and tinted portraits whether in water colors or in oils, against the peace and dignity of the City of Harrison."

Fines of $50 each were assessed. On appeals to the Circuit Court, appellants were tried before the court, sitting as a jury, found guilty as charged and again a fine of $50 against each appellant imposed.

This appeal followed.

For reversal, appellants earnestly contend that the ordinance upon which the charges were based is an un-

reasonable abuse of police power, and violates the 14th Amendment to the Constitution of the United States and Art. 2, § 8 of the Constitution of Arkansas.

The ordinance in question provides: "Section 180. UNINVITED CALLERS. The practice of going in and upon private residences, business establishments or offices in the City of Harrison, Arkansas, by solicitors, peddlers, hawkers, itinerant merchants and transient vendors of merchandise, not having been requested or invited so to do by the owner or owners, occupants or occupant of said private residences, business establishments or offices for the purpose of soliciting orders for the sale of goods, wares and merchandise and/or for the purpose of disposing of and/or peddling or hawking the same, is hereby declared to be a nuisance and punishable as misdemeanor.

"Section 181. POLICE DUTY. The Police Department of the City of Harrison, Arkansas, is hereby required and directed to suppress the same, and to abate any such nuisance as described in § 180.

"Section 182. EXCEPTION. The provisions of § 180 shall not apply to persons employed or representing an established merchant, business firm or corporation located and regularly doing business in the City of Harrison, Arkansas, or to farmers selling any food item raised or produced by themselves and/or permanently established residents, or any one duly licensed by the City of Harrison, Arkansas.

"Section 183. PENALTY. Any person convicted of perpetrating a nuisance, as described and prohibited in § 180, upon conviction thereof, shall be fined in a sum not less than five ($5) dollars nor more than fifty ($50) dollars."

Essential facts which were stipulated were to the following effect. Appellants were employees of Olan Mills, Inc., of Tenn., authorized to do business in this State and with its principal place of business in Dallas, Texas. Appellants were engaged in pursuing the business of their employer in Harrison and their activities

were within the provisions of said ordinance. The manner in which the business of their employer is conducted is substantially, as set forth in appellants' brief: "Under the supervision of the Dallas office, an advance sales unit of two to five salesmen will canvass a municipality soliciting orders for photographs, such orders subject to acceptance by the Dallas office, to be there manufactured, processed and finished for future delivery; when an order is accepted, the customer is notified where and when to appear for a sitting, usually at a leading hotel of the city, and a deposit of 50c is taken; at the appointed time and place the corporation's cameraman takes the exposure and collects an additional 50c; the exposed negatives are then sent by mail to the Dallas plant where they are developed and processed and the proofs manufactured; these proofs are then sent by mail to another representative, called a 'proof passer,' who notifies the customer of the time and place when he may inspect the proofs and place his order for pictures; such orders are then sent by mail to the Dallas plant where the photographs are manufactured and processed and mailed directly to the customer cash on delivery; no part of the processing, developing, manufacturing or finishing is carried on in the State of Arkansas."

We agree with both of appellants' contentions above and hold that the ordinance is not only an abuse of, and an unreasonable exercise of the municipality's police power and void, but it also violates Amendment 14 of the Constitution of the United States and Art. 2, § 8 of the Constitution of Arkansas.

At the outset, we point out that on the undisputed facts appellants were solicitors as distinguished from hawkers or peddlers. The latter are those who go from place to place, or from house to house, selling and delivering goods which they carry with them, and not such as take orders (as did appellants) only for goods to be later shipped in course of commerce. *Crenshaw* v. *State of Arkansas*, 227 U. S. 389, 33 S. Ct. 294, 57 L. Ed. 565 (1913).

In order to be a valid enactment, an ordinance must come within the scope of the powers granted cities and towns under §§ 19-2303 and 19-2304, Ark. Stats., 1947, promulgated in the proper exercise of police powers, and must bear some reasonable relation to the public health, safety, morals, welfare, comfort, or convenience. We hold that the ordinance here bears no reasonable relation to any of these essential requirements necessary to the exercise of police powers. It must, therefore, be struck down and declared void for this reason.

The ordinance declares the business (photography) in which appellants were engaged a nuisance, but this declaration does not make it so. "It has been several times said that a municipal corporation cannot declare that to be a nuisance which is not such *per se;* in other words, no mere *ipse dixit* can convert that thing into a nuisance which is not such in fact." *Merrill* v. *City of Van Buren,* 125 Ark. 248, 188 S. W. 537, and in *Stuttgart Rice Mill Company* v. *Crandall,* 203 Ark. 281, 157 S. W. 2d 205, we said: "The right to engage in an employment or profession, or to carry on a business not in itself hurtful and not pursued in a manner harmful to the public, is a common right."

"Photography is an honored calling which contributes much wealth to living. Like all honest work, it is ennobling. . . . The economic philosophy generally accepted in this country that ordinarily the public is best served by the free competition of free men in a free market." *State* v. *Ballance,* 229 N. C. 764, 51 S. E. 2d 731, 7 A. L. R. 2d 407, and in *State* v. *Cromwell,* 72 N. D. 565, 9 N. W. 2d 914, the court said:

"Why is the business of photography any more charged with the possibility of harm to the public, or to any individual than is any other of the ordinary occupations in which men engage. . . . So far as knowledge, training and skill are concerned . . . they are required by the farmer, the storekeeper, the carpenter, the machinist, the tailor, the actor, the musician—in fact by every individual successfully engaged in a definitely specialized occupation. . . ."

In *Jewel Tea Company* v. *Town of Bel Air, et al.*, 172 Md. 537, 192 Atl. 417, the court had for consideration the validity of an ordinance identical, in effect, with the one here, (in fact, the Harrison ordinance appears to be an exact copy except the name of the city). In brief, the facts were, in effect, that the business of the tea company was the sale of teas, coffee, extracts, etc., through solicitors or agents who went from house to house, ringing door bells of customers, old and new. The solicitors took orders which were sent to Washington, D. C., to be filled for shipment and delivery to customers in Bel Air. There, the tea company contended that the ordinance was void because the town of Bel Air had no authority to declare such business as conducted by the tea company's agents or solicitors a nuisance, and that it contravened Amendment 14 of the Constitution of the United States in that it denied appellants the equal protection of the law and was discriminatory. That court in upholding both of these contentions declared the ordinance there void for the reason that it bore no relation to the public health, safety, morals or general welfare, and unconstitutional for the reason that it discriminated against the nonresident in favor of the resident business, and was a denial of property rights without due process of law, contravening Amendment 14 of the Constitution of the United States. The court there said:

"We fail to see how the solicitation or conduct of a legitimate mercantile business or trade can be resolved into a health, safety, or general welfare regulation by suppression by a town ordinance. It requires no discussion to convince one that the ordinance . . . regulating or forbidding the business of the plaintiff, has no relation to public health, safety, or the general welfare of the community. . . . Both ordinances, . . . are void because they discriminate against the nonresident in favor of the resident business, and thus violate the 14th Amendment to the Federal Constitution."

So here, we hold the ordinance clearly violates the due process clause of the 14th Amendment to the Federal Constitution, in that it abridges the rights of appellants

to engage in a lawful occupation and discriminates against them, nonresidents in favor of local businesses, and therefore unconstitutional.

Accordingly, the judgments are reversed and the causes dismissed.

GRIFFIN SMITH, Chief Justice, and MILLWEE and MCFADDIN, JJ., concur.

HOPE *v.* HOPE.

4-9310 236 S. W. 2d 572

Opinion delivered February 5, 1951.

Rehearing denied March 12, 1951.

C. T. Cotham and *Lee Miles,* for appellant.

Henry M. Britt and *Mallory & Rasmussen,* for appellee.

GRIFFIN SMITH, Chief Justice. Our decision turns primarily upon the effect to be given a deed executed March 9, 1926, by which James Hope and his wife, Lillie, conveyed to Community Bank & Trust Company two tracts of land for the benefit of William Thomas Hope, their insane son; but, in determining the purpose of this conveyance, it is necessary to say whether the lands were ancestral estates or new acquisitions by the afflicted son. Other points of controversy involve the attempt of William's parents to reacquire the property after their son died in 1936 (a) by inheritance if the estate were ancestral, and (b) by virtue of a probate court order of 1937 purporting to vest title in these claimants, supported by a quitclaim deed executed by a special commissioner for Community Bank long after that institution failed. Also involved are pleas of adverse possession, limitation of actions, estoppel, laches, and claims of third parties who contend they were innocent purchasers, etc.

William Thomas Hope joined the army before the United States became a participant in World War I in 1917. He was honorably discharged Dec. 27, 1917, under a finding of chronic dementia, and was entitled to compensation on the basis of total disability—$100 per month at that time.

James Hope was appointed guardian of the person and curator of the estate of his insane son. At a time not designated the ward's monthly compensation was increased to $125. There is testimony that the first payments to the guardian represented accumulations, one check being for $2,000, the other for $700.

The Jones 120-acre tract was sold to James Hope April 15, 1924. Marshall Braughton and his wife sold Hope the Kesler place (160 acres) July 28, 1920.

It is admitted by most of the members of the Hope family who testified, and not denied by any of them, that James—a heavy drinker and at times in trouble with the

law—treated money received from the government as his own and squandered a great deal of it. This came to the attention of officials in the Veterans Bureau and criminal action was considered. The difficulty was composed when James agreed to resign as his son's guardian and deed to the Community Bank for the ward's benefit the Jones and Kesler places. With the bank's failure in 1931 J. O. Langley was appointed guardian, and when Thomas Hope died Langley was made administrator. Shortly after Langley became administrator James and Lillie Hope (through their attorney, A. T. Davies) filed their petition in probate court asserting that there were no debts against Thomas' estate, and listing the personal property. It consisted of $6,876 in prime securities, $359.54 in cash, and a $3,000 mortgage note. It was represented that the estate consisted of "certain moneys and property obtained through the U. S. Government" by reason of services in the army. The land described in the petition included the subject-matter of this litigation. The probate court order was that all real property belonging to the estate of William Thomas Hope, "*now in the possession* of James Hope and Lillie Hope," be vested in the petitioners.

An undated petition by Davies for a fee states that he was employed by James Hope, guardian, and that the ward's real property was valued at $15,000. But Davies testified that James Hope had squandered his son's money; and, while Lillie Hope claimed she had paid for the Jones place, and perhaps had put some money in the Kesler farm, she was willing to execute the deed to the Community Bank "to keep Jim out of the penitentiary." Davies was paid $100 for representing James Hope, and represented Mrs. Hope when the estate was "wound up."

The Hopes had eight children, six of whom are living. Three have made deeds to their mother conveying any interest they may have had, but the three appellees have retained their shares unless a controlling contention of appellants can be maintained.

In 1924 Joe Hope, son of James and Lillie, was killed while serving as a city fireman in Little Rock. Mrs. Hope

insists that she collected insurance amounting to $4,000. She had forgotten the name of one of the companies. A letter from Aetna Life affirms payment of $2,000 June 5, 1924, but the company's retained records did not show the name of the beneficiary. Police and Firemen's Insurance Association of Indianapolis paid Mrs. Hope $2,000. Her indorsement shows that the check was cashed July 26, 1924. One of the pleadings filed in Mrs. Hope's behalf asserts that between Dec. 27, 1917, and June 26, 1936 (when William died) 222 monthly payments of $25 had been made under § 401 of the War Risk Insurance Act. Although these remittances, says Mrs. Hope, were intended for her benefit, they were received by the guardian and the money was dissipated. It is conceded by Mrs. Hope, however, that she collected this aggregate of $5,550 from her dead son's personal estate, and receipted for it.

While Lillie, Walter, and Glen Hope insist in their brief that the greater portion of money paid on the Kesler place "as [was true] of the Jones tract" was paid over a period of five years, yet Lillie Hope says that she paid the balance of $1,733.33, with accumulated interest. Before Joe's death Lillie had accumulated $250 through peddling, she said. When the checks from Joe's insurance came she deposited them in the Como Bank, "and the same year I used $3,000 on the place Walter [Hope later bought]—the G. T. Jones place." The explanation was that she gave James a check for the $3,000 just mentioned and thought he would take a deed in her name. She sold Walter Hope a part of the realty "and $3,800 was paid cash in hand. The papers were executed by J. R. Lynus—the real estate man who died recently." Mrs. Hope contended that she gave each of the appellees $100 from the proceeds of this sale. Henry Hope flatly denied receiving the money mentioned by his mother, but said his father had seven horses when he died. Six were sold and the proceeds divided. The witness took a mare instead of money.

Henry insisted that in a way he knew his mother was selling timber and some of the land, but she and his

father had always told him and the other appellees that the land itself would be kept for them, hence (inferentially) he supposed she was selling her life interest and did not suspect that warranty deeds in fee were being executed.

James Hope died in 1941 and the widow claimed under the probate court order and the special bank commissioner's deed, hence she took the whole. The year James died he and Lillie sold 40 acres of the Jones tract. After James died Lillie sold the Kesler farm. It was the subject of four transfers before title, *prima facie,* vested in the mother of Lucile Phillips, one of the appellants. The Phillips claim of ownership is by inheritance through her mother.

The Chancellor found that the deed from James and Lillie Hope to Community Bank was intended as payment of money James had squandered; that Lillie's action in joining as a maker was with knowledge of the purpose to be served—restitution. We agree that this determination was correct. The fallacy of appellants' contention that the deed was intended as a mortgage becomes apparent when consideration is given undisputed testimony that when the transaction occurred the guardian's indebtedness was more than $8,000—an amount in excess of what the two farms cost, and there was no suggestion that the appellants be permitted to pay the so-called mortgage. It may be argued that this conduct is consonant with their contention that the estate was not a new acquisition, hence if the deed were not absolute the property would go to the mother or father, Ark. Stat's, § 61-110, and an offer to pay the indebtedness would be an idle gesture.

We quite agree that much of the evidence indicates that Lillie's money possibly paid for the Jones place. There is no one to dispute her testimony that she gave James a check for $3,000 with instructions to have the deed made in her favor. But it is equally certain that she willingly concurred in the suggestion that the two places should be turned over to Community Bank in substitution of the money James had squandered. This she

had a right to do, and in signing the deed she parted with the equitable title she claims, predicated upon issuance of the $3,000 check—a title that in other circumstances she might be able to establish, hence there can be no application of the principle announced in *Roberts* v. *Burgett*, 209 Ark. 536, 191 S. W. 2d 579, or in *Harris* v. *Collins*, 202 Ark. 445, 150 S. W. 2d 749; nor can there be a resulting trust, as contended for by Lillie Hope, when the controlling purpose was to transfer the property absolutely for the benefit of the minor's estate as a means of partial accounting. Under this view the lands were acquired by the afflicted ward and could not be treated as ancestral.

Little need be said concerning the bank commissioner's quitclaim deed. The bank had no interest of its own and could not convey more than it had. Possession under color of title is not a problem, because in the very nature of administration and guardianship here, the insane ward could not be in personal possession. It is true that the property remained on the taxbooks first in James' name and later in Lillie's. But for several years the bank paid taxes from the trust fund long after Thomas died. Of course the guardian's powers terminated with death of the ward. Ark. Stat's, § 57-459.

The petition in probate court not only asserted that there were no debts against the estate, but disclosed substantial personal assets. In these circumstances the administrator did not take possession of the realty; on the contrary, it vested at once in the parents for life, with remainder in fee to the six brothers and sisters, subject to the probate court's right of divestiture if it should be shown that the administrator's report was incorrect, and in fact there were debts that could not be paid from the personal property. *Pfaff, Administrator,* v. *Heizman, ante* p. 201, 235 S. W. 2d 551.

The decree is lengthy, covering all of the rights found by the Chancellor to have the necessary factual and legal support. Since the decree will be of record in the county where the real property lies and where the several judgments must be enforced, it is not necessary

to detail specific findings, none being incorrect when the prinicipal issues are disposed of.

Affirmed.

AETNA LIFE INSURANCE COMPANY *v.* LEMAY.

4-9366 236 S. W. 2d 85

Opinion delivered February 5, 1951.

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

Pat Robinson, for appellee.

ROBINSON, J. This appeal is the result of a jury verdict for the plaintiff in a suit involving that part of an insurance policy providing for double indemnity in event of accidental death of the insured, John Clint Lemay. By its verdict the jury found that death was accidental within the meaning of the policy.

The sole issue here is whether there is substantial evidence to support the verdict. If there is such evidence

the case must be affirmed; otherwise, reversed. *The Mutual Life Insurance Company of New York* v. *Springer,* 193 Ark. 990, 104 S. W. 2d 195.

The evidence is viewed in the light most favorable to the appellee and we indulge all reasonable inferences in favor of the judgment. *Mutual Benefit Health & Accident Ass'n* v. *Basham,* 191 Ark. 679, 57 S. W. 2d 583.

The provision of the policy in issue provides: "If the death of the insured occurs before default in payment of premium and before the first anniversary of the date of this policy which follows the age of 70 years, and such death results directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental means within 90 days from the occurrence of such accident, and if such accident is evidenced by a visible contusion or wound on the exterior of the body (except in case of drowning and internal injuries revealed by an autopsy), and if such death does not result from suicide, while sane or insane, nor from military or naval service in time of war, nor from an aeronautic flight or submarine descent, nor directly or indirectly from disease in any form, then the Company will pay a sum equal to the sum described in this policy as the sum insured in addition thereto."

On the 30th day of May, 1948, the insured, John Clint Lemay, died as the result of a gunshot wound inflicted by Carroll Hamn, the Constable at Stamps, Arkansas. The injury being violent and external the presumption is that it was accidental and the burden is on the Insurance Company to show otherwise. *Metropolitan Cas. Ins. Co.* v. *Chambers,* 136 Ark. 84, 206 S. W. 46. However, such presumption is not conclusive and may be rebutted. *Gilman* v. *New York Life Insurance Co.,* 190 Ark. 379, 79 S. W. 2d 78, 97 A. L. R. 755; *Missouri Pacific Railroad Co.* v. *Forsee,* 181 Ark. 471, 26 S. W. 2d 108; *Missouri Pacific* v. *Hull,* 182 Ark. 873, 33 S. W. 2d 406.

The facts are substantially as follows:

Hamn is a man 69 years of age, is rather frail, weighing 135 pounds, and at the time of the killing had

just three days previously been released from the Veterans' Administration Hospital where he had been confined for 7 weeks. He has a service connected total disability from the First World War. Lemay had some real or imaginary grievance against Hamn by reason of Lemay having been charged with a misdemeanor. On the morning of the day of the killing Hamn and Lemay had both gone to the grocery store. Lemay was drinking and told Hamn that he, Hamn, had "butchered" him up. Hamn then saw Lemay was drinking and mad. Lemay "invited" him out, but Hamn told Lemay he would get out. Hamn left the store because he did not want to have any trouble with Lemay.

Hamn next saw Lemay that afternoon at Baker's Drug Store. He went in to get a "coke" and not long thereafter Lemay entered and told Hamn that he had come in there to beat him up; he grabbed Hamn by the collar and tie and attempted to strike him, but missed. Mr. Baker spoke up and said he didn't want any trouble in there and helped separate the two. The above facts as shown by the evidence stand uncontradicted.

Hamn then testified that after they were separated Lemay stepped off toward the showcase and Hamn stayed at the soda fountain, and shortly thereafter Lemay "came back at him like a hyena," grabbed and hit him. Hamn told Lemay to quit beating him and consider himself under arrest. Lemay replied: "I am not considering no arrest, you cannot arrest me."

"Q. Did you at any time warn him you would have to shoot him?

"A. I told him I would have to hurt him. I never did say anything about shooting him. I told him I would have to hurt him if he didn't quit beating on me."

Witness was physically unable to defend himself against Lemay. His hands being sore and swollen, he could not have hurt Lemay if he had hit him. There was no way to get out of the door; he could not get loose from Lemay.

"Q. Tell us about the shooting itself.

"A. I had to stop him some kind of way and that is why I pulled the gun. I never did get it off my hip. I just barely got it out of my scabbard." Witness was attempting to stop Lemay from beating him.

Morris Davis, the City Marshal at Stamps, testified that he heard Lemay make the threat that he "was going to kill Mr. Hamn."

Austin Brown was in the drug store at the time of the difficulty and when he looked Lemay was hitting Hamn and had knocked him over the soda fountain. He and Baker separated them. Hamn was in no position from which he could retreat. After the first separation another customer came in and the three separated the men again. There were three separate encounters. It was on the third encounter that Lemay was shot. Lemay had Hamn by the throat and was choking him down and Hamn pulled his gun and fired.

The sum and substance of the testimony of Seth Baker, Morris Davis, Austin Brown, and Carroll Hamn shows clearly that Lemay was the wrong-doer and the aggressor; he brought on the trouble himself, and his conduct and actions were calculated to bring about the very thing that did happen.

These witnesses, along with Lin Peavy and Joe Allen, who were called as witnesses by the appellee, were all the witnesses who testified in the case. We have carefully examined the testimony of Peavy and Allen and find that it cannot be classified as substantial evidence which would support a verdict.

Allen was not in the drug store when the trouble first started, but came in after the initial encounter had taken place, and helped separate the men when the next clash occurred, according to his testimony. Hamn stayed at the soda fountain and Lemay crossed over on the opposite side of the store. The last time he saw them they were near the middle of the store. He also testified that he heard Lemay call Hamn a "G. D. S. O. B." He did not actually see the shooting.

Lin Peavy was not in the store prior to the shooting. He testified that as he passed the drug store he saw the two men moving around. At that time they were within two or three feet of each other, and while he was looking the gun was fired; that Lemay was not armed.

It is our opinion that the evidence to the effect that Lemay was the aggressor and brought on the difficulty, and persisted to the point where Hamn shot him in self-defense, is not in substantial dispute, and that the verdict, as a matter of law, is without support.

The law in this State covering a situation of this kind is stated in *Price* v. *Business Men's Assurance Company of America,* 188 Ark. 637, 67 S. W. 2d 186. In that case Mr. Justice HUMPHREYS speaking for the Court said: "The general rule of law is that death resulting from bodily injuries effected solely through accidental means (where the claim is under an insurance policy) does not include death resulting from wounds received in an encounter provoked by the insured, or in which he was the aggressor, and from which he did not attempt to retire in good faith." See, also, *Metropolitan Cas. Ins. Co.* v. *Chambers, supra.*

Since the case appears to have been fully developed in the Circuit Court, it is our opinion that it should be reversed and dismissed.

It is so ordered.

KIMMER *v.* NELSON.

4-9387 236 S. W. 2d 427

Opinion delivered February 12, 1951.

Chas. F. Cole, for appellant.

R. W. Tucker, for appellee.

GRIFFIN SMITH, Chief Justice. The Chancellor found that prescriptive rights entitled Owen Nelson and his wife to use a road across property claimed by Arthur Kimmer through purchase in 1946, but permitted Kimmer, who is the appellant here, to determine alternatively what fences he would remove.

An engineer's drawing shows the road to be within McNair's Addition to the town of Cushman. Block 12 is in the southeastern portion of the addition. With the exception of Nelson's home the property lying east of Fourth street is undeveloped. It was probably laid off for expansion purposes and is identified as "13"—a theoretical block. Fourth street extends north and south between 12 and 13. South street is an east-west thoroughfare north of block 12 and the area marked 13.

Appellant's exhibit shows that approximately 1,200 feet north of Nelson's home "center of section 9" has been indicated. A line projected south would pass to the west of Nelson's home, but east of the drawing marked Fourth street. The house and curtilage occupy an acre and were acquired by the Nelsons in 1945.

Mrs. Walter Benton testified that she and her husband built the house in 1909. Property across which the road runs was owned by a man named Einstein whose agent was Ed Reeves. At that time Mrs. Benton's father owned 80 acres and gave her the acre in the southwest corner "next to the section line." She thought the section line was 30 feet west of Nelson's plot. Appellant contends that Mrs. Benton's references to a line pointed out to her by her father were directed to the section line and that it was clear from other statements she made that the home place was laid off thirty steps east of the section line. The line would be the eastern limit of McNair's Addition.

Appellant admits that the road, if one existed, formerely ran northwesterly from a place of beginning in front of Nelson's home. It traversed the area now claimed to be Fourth street, then went diagonally across block 12 and into South street west of the middle of the block. But, said appellant, if the way once existed it had fallen into general disuse. For this reason he closed the exit into South street. He also closed Fourth street where it enters, or rather intersects, South street, then continued the fence southward in a manner blocking the exit from Fourth street to Nelson's home. This was done on the theory that the outlet to which Nelson was entitled was east of the strip of land claimed to be Fourth street, therefore Nelson had an outlet north along the section line. The plat shows Fourth street to be 50 feet wide, but there is testimony that in traveling north a steep hill caused by a sharp depression would be encountered.

Under the optional rights granted by the court appellant chose to open Fourth street where it enters South street, and also at the old entrance opposite Nelson's home. Pending appeal appellant was permitted to maintain gates for Nelson's convenience, but if the decree should be affirmed the impediments were to be removed.

The evidence is sufficient to support the decree. While block 12 was wooded and apparently had not been appreciably developed, the Nelson property had been occupied from time to time as a residence for forty years and no one had questioned the right to use Fourth street or the diagonal route across block 12. Certainly Fourth street was open to the public, and if it be conceded that the right given Mrs. Benton by Reeves was initially permissive, personal, and involved temporary accommodation, the unexplained failure to object when the Benton property changed hands from time to time and others used the roadway as a matter of course justified a generally accepted belief that traffic was not objected to. *McGill* v. *Miller,* 172 Ark. 390, 288 S. W. 932.

The fair inference to be drawn from preponderating testimony is that for the greater part of a half century

use of the thoroughfare was not questioned and that to the extent of the limited travel in that area those who utilized the way believed they had a right to do so, and their actions were open, notorious, and adverse. In these circumstances the original restriction in the nature of a permissive use in favor of particular persons was abandoned through the long lapse of time.

Affirmed.

Mr. Justice WARD disqualified and did not take part in the consideration or determination of this case.

JAMES *v.* STATE.

4646 236 S. W. 2d 429

Opinion delivered February 12, 1951.

N. J. Henley, for appellant.

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

ROBINSON, J. The appellant was convicted in the Van Buren County Circuit Court on a charge of obtaining personal property by false pretense. The sole question presented to this Court is the sufficiency of the evidence to sustain the charge set out in the information which, omitting the formal parts, is as follows:

"The said defendant, on the 1st day of January, 1949, in Van Buren County, Arkansas, did unlawfully, wilfully, falsely, fraudulently, feloniously and with felonious intent to obtain from Ray Lewis a certain check in the sum of $1,430, which had been delivered to the said Ray Lewis in payment for lumber by H. H. Youngblood, drawn on the Douglas County Bank of Omaha, Nebraska, and purportedly signed by R. A. Langill, as maker, did, as agent of the said H. H. Youngblood, falsely, wilfully, fraudulently and feloniously represent to the said Ray Lewis that he, the said Gordon James, would pay $800 in cash for said check, and give to the said Ray Lewis a check on him the said Gordon James for $630 as a balance on same, and did further represent that he had sufficient money to take care of said check in the sum of $630; that he owned his home at 2103 College Street, Springfield, Missouri, which was very valuable and that said check would be paid when presented for payment; relying upon this statement of facts by the defendant, the said Ray Lewis took said check in the sum of $630; the said check went its usual course and in due time returned with notation 'No Account.' That defendant in truth and in fact well knew at the time of giving the check that there would be no balance in the bank at Branson, Missouri, on which it was drawn to pay said check when it was presented; that the defendant made the unlawful, wilful, false, fraudulent and felonious representation to Ray Lewis, with the felonious intent to cheat and defraud and did cheat and defraud him, the said Ray Lewis, in the amount of $630, against the peace and dignity of the State of Arkansas."

Ray Lewis is engaged in the lumber business at Clinton, Arkansas. In due course of trade, on October 7, 1948, one H. H. Youngblood endorsed and transferred to Lewis a check in the sum of $1,430, drawn by R. A. Langill, in favor of Youngblood, on the Douglas County Bank of Omaha, Nebraska. This check was not paid upon being presented to the bank by Lewis.

In November or December, 1948, the exact date being in dispute, but immaterial, the appellant, Gordon

James, whose home is in Springfield, Missouri, went to Clinton and contacted Lewis in regard to the $1,430 Langbill check which Lewis had received from Youngblood.

The appellant and Lewis entered into a deal whereby for the consideration of $800 cash and appellant's postdated personal check in the sum of $630 drawn on the Security Bank, Branson, Missouri, Lewis turned over to appellant the Langill check. It was understood between the parties that appellant did not have the money in the bank at the time he gave his personal check to Lewis. Lewis testified, however, that appellant promised that the check would be good by January 1st.

When James, the appellant, left Clinton by automobile, Lewis suspected that Youngblood might be with him and had the car intercepted by officers of the law. His suspicion proved to be correct, and Youngblood was arrested and brought back to Clinton. The appellant voluntarily returned to Clinton and went to see Lewis the next day.

The appellant states that he had made a deal with Youngblood for the purchase of a truck and since Youngblood had been arrested, he realized that the deal could not be consummated. Therefore, he offered to return the $1,430 Langill check to Lewis if Lewis would return appellant's check for $630, and Lewis could keep the $800 cash and credit it on the Langill check. Lewis admits that appellant called upon him the following morning after the arrest of Youngblood, but does not remember if appellant offered to return the $1,430 check. In any event Lewis kept the $800 cash. At this time Lewis knew, as he had known all along, that appellant did not have the $630 in the bank. However, appellant's check was presented to the bank for payment and returned marked "No Account."

During all of this time, no effort was made to bring about the arrest of appellant, but 8 months later in August, 1949, he was arrested upon the present charge.

A postdated check taken by the payee with full knowledge that it is postdated, and where it is not represented by the maker as being good at the time given, but that the money would be deposited in the bank at some future date, is no more than a promissory note. It is a promise to do something in the future, and is not a representation upon which a charge of false pretense can be successfully based. For a false representation to amount to a crime, it must relate to an existing fact or a past event. In speaking for the Court in the case of *Fisher* v. *State,* 161 Ark. 586, 256 S. W. 858, Mr. Justice HART said:

"It is well settled by our decisions that a false pretense is a false representation of an existing fact or past event by one who knows that it is not true, and which is of such a nature as to induce the party to whom it is made to part with something of value, and it is only necessary that the false pretense be the inducing motive to the obtaining of the goods or money by the defendant." See, also, *Parker* v. *State,* 98 Ark. 575, 137 S. W. 253; *Lawson* v. *State,* 120 Ark. 337, 179 S. W. 818, and *Lamb* v. *State,* 202 Ark. 931, 155 S. W. 2d 49.

But, the State contends the appellant represented that he owned his home, that this representation was false and thereby sufficient to sustain the charge. We do not agree with this view. Lewis had a check in the sum of $1,430 drawn on a bank in Omaha by a person apparently unknown to Lewis. The check had been dishonored by the bank upon which it was drawn, and, for this check, appellant gave Lewis $800 in cash and a postdated check for $630. Neither Lewis nor L. N. Woodell, who was interested with Lewis in the transaction testified that they would not have accepted the $800 cash and the postdated check in exchange for the Langill check if the representation as to home ownership had not been made by appellant. Even if appellant had owned his own home, Lewis and Woodell could hardly have thought it would not be exempt from execution on a judgment of the kind which could be obtained on the postdated check. It was not such a representation as

would cause any one to part with anything of value. Furthermore, there is no showing that appellant was not the owner of an equity in the property. Lewis did not ask that the postdated check be secured by a mortgage nor did he even ask for a legal description, nor obtain an abstract or have one examined.

In view of the character of representations made by appellant regarding his ownership of a home, the testimony regarding this phase of the transaction does not substantially show that reliance upon these alleged assertions motivated release of the $1,430 check.

Reversed and dismissed.

DERRICK ET AL. *v.* ROCK ET AL.

4-9362 236 S. W. 2d 726

Opinion delivered February 12, 1951.

Rehearing denied March 19, 1951.

Grubbs & Grubbs, for appellants.

Ed Trice, John F. Gibson and *Thomas L. Cashion,* for appellees.

George Rose Smith, J. This appeal involves two cases consolidated for trial below. Both arise out of an automobile collision that occurred at about eleven o'clock on the night of June 13, 1949. There was evidence from which the jury might have found the facts to be these: Appellant Derrick is an employee of appellant, Dorothy V. Flowers, who owns a bottling plant at Eudora. On the night of the collision Derrick was returning from a business trip to Mississippi, driving a sedan owned by Mrs. Flowers. Derrick's wife was seated beside him, and appellee, L. W. Tindall, and his wife were riding in the back seat. At a point on the highway about six miles north of Eudora the group noticed that a house to their left had just burned and was still a smoldering bed of coals. Derrick slowed the car either to a complete stop or to such a reduced speed that it was barely moving. He also turned off his lights. Mr. and Mrs. Edward Rock, appellees, had been traveling some distance behind the Flowers car at about forty-five miles an hour. Rock rounded a curve and did not see the unlighted vehicle until it was too late to avoid a collision. He attempted to swerve to his left around the Flowers sedan but could not do so, his car striking the left rear side of the sedan.

In the first suit Mr. and Mrs. Rock sued Derrick and Mrs. Flowers for personal injuries and property damage and recovered judgments for $800 and $2,000 respec-

tively. Both defendants appeal from these judgments. In the second suit Tindall, a passenger in the Flowers car, sued Rock and Mrs. Flowers for personal injuries. He received a verdict for $20,800 against Mrs. Flowers alone, and she appeals.

The appellants urge six grounds for reversal, but only four need be discussed. First, it is argued that the appellants were entitled to directed verdicts in their favor. In making this contention the appellants treat the two cases independently and argue that the evidence adduced by the Rocks in their case was not sufficient to go to the jury and that the evidence offered by Tindall was likewise insufficient to make a *prima facie* case. But the cases cannot be viewed separately. They were consolidated for trial, all the evidence being submitted to a single jury. After the Rocks had rested their case Tindall presented his witnesses. The jury were entitled to consider all the evidence in arriving at their verdict in each case. The opposite rule would mean that if Tindall intended to rely on testimony already given by the Rocks he would have had to recall them for a repetition of testimony already heard by the jury. Such duplication would defeat the economy of presentation that is the main reason for consolidated trials. When the evidence is viewed as a whole the jury could have found that the accident happened as we have stated, and on those facts the appellants were not entitled to directed verdicts.

Second, it is contended that Rock was guilty of contributory negligence as a matter of law. The argument is that Rock should have seen the unlighted Flowers car in time to avoid hitting it. It is true that the highway was perfectly straight for at least 500 feet before the point of collision and that Rock's view was unobstructed. Even so, the appellants' contention would mean that one who stops his car in the dark on a straight highway can never be liable to the driver of a following vehicle, since the latter would be negligent in failing to see the stationary car. That is not the law. One who drives at night too rapidly to stop within the range of his own headlights is not negligent as a matter of law; the issue

is one of fact for the jury. *Coca-Cola Bottling Co.* v. *Shipp,* 174 Ark. 130, 297 S. W. 856.

Third, it is insisted that Tindall was a guest of the Derricks and therefore cannot recover by showing that his host was guilty of mere negligence. Ark. Stats., 1947, §§ 75-913 and 75-915. Again a question of fact was presented. Tindall testified that Derrick had talked to him about taking a job at the bottling plant. According to Tindall, Derrick had mentioned the matter to Mr. Flowers, who wanted to interview Tindall. Tindall was already employed, but he agreed to go with the Derricks to discuss the proposed job with Flowers. Flowers himself admitted that he met Tindall in Mississippi on the evening in question and talked to him about a position that had been vacant for several months. Flowers denied that he had requested Derrick to bring Tindall over for an interview. From this testimony the jury were justified in concluding that Tindall's presence was mutually beneficial to himself and Mrs. Flowers and that he was not a mere guest. *Arkansas Valley, etc., Co.* v. *Elkins,* 200 Ark. 883, 141 S. W. 2d 538.

Fourth, error is assigned in the admission of testimony to the effect that Rock had no liability insurance. A detailed statement of the manner in which this testimony entered the record is necessary. Tindall had a policy of hospitalization insurance that provided certain benefits if he should be injured while riding in a private conveyance. After the accident an adjustor for the insurer visited Mrs. Tindall to find out whether the claim was covered by the policy. During the interview the adjustor wrote out a statement that he intended for her to sign, though in fact her signature was never requested. This statement described the manner in which the collision happened and also contained this sentence: "Mr. Rock told me that he did not have any insurance on his car to take care of our damages."

Mrs. Tindall's testimony at the trial was somewhat at variance with the statement jotted down by the adjustor. Mrs. Flowers' attorney laid a foundation for impeachment by asking Mrs. Tindall whether she had

made the statements (omitting the sentence we have quoted) that were contained in the adjustor's memorandum. Mrs. Tindall denied having made them.

Later on the adjustor was called by Mrs. Flowers to show that Mrs. Tindall's earlier version of the accident differed from her testimony at the trial. The memorandum, except for the quoted sentence, was read to the adjustor, who said that Mrs. Tindall had made the statements attributed to her.

On cross-examination Tindall's attorney then attempted to present the omitted sentence to the jury. In chambers the judge ruled that the sentence was admissible only if the adjustor testified that the entire memorandum had been read; in that case he could be impeached by cross-examination as to the omitted sentence. Tindall's attorney then asked the adjustor whether the entire memorandum had been read, and the witness replied that it had not been. Tindall's attorney, in obedience to the court's ruling, pursued the matter no further.

Rock's attorney, however, continued to press the point and insisted that the entire statement should be put in evidence. The court finally permitted this to be done, instructing the jury that the sentence in controversy had nothing to do with the case of *Tindall* v. *Flowers* but that it might be considered in the Rocks' case as a matter bearing on the adjustor's credibility.

It is settled that when the matter of insurance coverage is unnecessarily and gratuitously injected into the trial the effect may be so prejudicial that a mistrial should be declared. *Ward* v. *Haralson,* 196 Ark. 785, 120 S. W. 2d 322. And where, as here, there are two or more defendants it is improper to show that one of them is not protected by insurance. *Brown* v. *Murphy Transfer & Storage Co.,* 190 Minn. 81, 251 N. W. 5; *Graves* v. *Boston & M. R. R.,* 84 N. H. 225, 149 A. 70; *Rojas* v. *Vuocolo,* 142 Tex. 152, 177 S. W. 2d 962.

Various arguments are made to support the admission of this evidence. It is said that the appellants invited the error by using the memorandum in the first

place. But the answer is that they did not offer the writing in evidence; it was used merely as a means of refreshing the adjustor's memory. It is also argued that since part of the memorandum had been read the appellees were entitled to introduce the rest. As a general rule this is true, but the reason is that the full import of a statement may not be clear unless the context is considered. The context is, therefore, admissible to the extent that it is relevant and explanatory of what has gone before. Wigmore on Evidence, § 2113. Here the reference to insurance was not relevant to the case or explanatory of Mrs. Tindall's description of the accident as recorded by the adjustor. Nor can we see how the introduction of this testimony had any bearing upon the adjustor's credibility. He had stated that the memorandum had not been read in its entirety. If anything the introduction of the omitted sentence tended to confirm his veracity rather than to impair it.

Was the error prejudicial? As between the Rocks and the appellants there can be no doubt that it was. The question of Derrick's negligence was sharply disputed. Both the Derricks, and Mrs. Tindall as well, denied that he turned off his lights when he slowed down. The issue could easily have been decided either way. Rock was a young man of twenty-three, employed as a government clerk. Mrs. Flowers was apparently a woman of considerable means. She had filed a counterclaim against Rock for the damage to her car. In view of all these facts it is not possible to be sure that young Rock's lack of insurance protection did not directly influence the jury. The same considerations apply to the verdict in favor of Mrs. Rock, since a finding in favor of her husband would naturally and logically indicate a similar decision in her case.

In Tindall's case the question is more difficult. The improper evidence was introduced not by Tindall but by the Rocks. This, however, is not enough to shield Tindall from the effects of the error. We have already seen that consolidated cases must be viewed as a whole, that each plaintiff may claim the benefit of testimony introduced

by the others. It is a necessary corollary that each also risks the possibility of error being brought into the record by his co-plaintiffs. Tindall cannot rely on the Rocks to help him make his case and at the same time disclaim responsibility for errors that occurred in the process.

Granted that Tindall is chargeable with the error, there is still no ground for reversal unless the incompetent testimony prejudicially affected the issues between him and Mrs. Flowers. We have suffered great anxiety in the study of this question, but there is no theory by which we can conscientiously say that the error was harmless in Tindall's case. Tindall had sued both Rock and Mrs. Flowers. The jury found that he was not a guest and was free from contributory negligence. He was therefore entitled, under any theory of the case, to recover either from Rock or from Mrs. Flowers. The jury had to make exactly the same choice in the Tindall case as in the Rock case—between imposing liability upon a young man of modest means, without insurance protection, or upon a woman having substantial property holdings. No one can say that the jurors' minds were indifferent to Rock's lack of insurance. Further, the verdict in favor of Rock absolved him of contributory negligence in the slightest degree. The jury would have had to contradict itself to find that Rock was liable to Tindall. We realize that inconsistent verdicts are legally possible in a consolidated trial, but that abstract rule does not compel one to assume that neither verdict is ever influenced by the other.

Reversed and remanded for a new trial.

Ed. F. McFaddin, Justice (Dissenting). I agree with the majority in its holding that the judgment should be reversed in the case of *Rock* v. *Flowers,* on the ground that Rock insisted on bringing the insurance matter into the case. But I respectfully dissent from so much of the majority holding as reverses the judgment obtained by Tindall against Flowers. This dissent is for several reasons: Tindall did not commit the error that brought the insurance angle in the case; the Court told the jury *not* to consider the insurance matter in the Tindall case; and

we have repeatedly held that cautionary instructions will cure prejudicial statements regarding the matter of insurance.

The majority opinion says, as regards the insurance angle:

"Tindall's attorney, in obedience to the court's ruling, pursued the matter no further.

"Rock's attorney, however, continued to press the point and insisted that the entire statement should be put in evidence. The court finally permitted this to be done, instructing the jury that the sentence in controversy had nothing to do with the case of *Tindall* v. *Flowers* but that it might be considered in the Rocks' case as a matter bearing on the adjustor's credibility."

It will be observed that Tindall's attorney did not bring the insurance angle in the case; and when Rock's attorney insisted on developing the insurance matter, the Court ruled:

"By the Court: The statement has been offered by the defendant, Mrs. Flowers, and the other defendant and seeks to withhold part of the same as a complete statement of the witness, Mrs. Tindall, and the Court is holding that it has nothing in the world to do with the case of *Tindall* v. *Flowers,* . . ."

Then the Court instructed the jury:

"By the Court: Gentlemen of the jury, the question and answer that is now about to be propounded to the witness will be completely disregarded by you as any evidence between the plaintiff, Tindall, and the defendants, Flowers and Mr. Derrick. You may only consider them for the purpose of discrediting or impeaching this witness in the case of *Rock* v. *Mrs. Flowers* and so forth. You can and will do that."

Thus, the Court specifically told the jury that anything about the insurance was not to be considered in the case of *Tindall* v. *Flowers;* and the limiting by the trial court, of the effect of the evidence in a consolidated

case,[1] has heretofore been upheld. In *Murray* v. *Jackson,* 180 Ark. 1144, 24 S. W. 2d 960, there was evidence admissible in favor of one party and inadmissible in favor of the other; and the Court limited the effect of the evidence. A husband (Mr. Mitchell) sued a defendant for damages to a car, and an occupant (Mrs. Jackson) sued the same defendant for her personal injuries. The wife (Mrs. Mitchell) testified as to Mrs. Jackson's injuries. It was claimed that Mrs. Mitchell's testimony, being inadmissible in the suit brought by Mr. Mitchell, should not be allowed to support Mrs. Jackson's case. The trial court told the jury that Mrs. Mitchell's testimony "could only be considered by it as to the claim of Mrs. Jackson, and could not be considered as to the claim of" Mr. Mitchell. We held that the limiting by the trial judge of the effect of the evidence took Mrs. Mitchell's testimony away from Mr. Mitchell's case, and saved Mrs. Jackson's case from error. I submit that the language of the trial judge in the case at bar took the incompetent testimony away from Mr. Tindall's case and saved it from error.

Furthermore, we have repeatedly held that any error in bringing the insurance angle into a case can be cured by cautionary instructions of the Court. In *Neely* v. *Goldberg,* 195 Ark. 790, 114 S. W. 2d 455, Mr. Justice DONHAM discussed this question at length and made reference to Annotations in American Law Reports.[2] Likewise, in *Malco Theatres* v. *McLain,* 196 Ark. 188, 117 S. W. 2d 45, the same question was again discussed. I respectfully submit that the majority opinion is against the holding in these cases.

The majority opinion says:

"Granted that Tindall is chargeable with the error, there is still no ground for reversal unless the incompetent testimony prejudicially affected the issues between him and Mrs. Flowers."

[1] Our Statutes authorize the consolidation of two cases, just as was done here. See §§ 27-1304, *et seq.,* Ark. Stats.

[2] In 4 A. L. R. (2d) 821 there is a recent Annotation on the point.

Tindall committed no error in the trial of the case; and this Court should not charge him with an error. Neither can the majority say that the incompetent testimony prejudicially affected the issues between Tindall and Mrs. Flowers, except by (a) the refusal to give any effect to the cautionary instructions of the Court, as previously copied; and (b) the speculation in which the majority indulges. Tindall is being forced to try his case again, when his attorney has committed no error and the Court gave the jury the cautionary instructions which we have repeatedly approved. So as to Tindall, I respectfully submit that the judgment should be affirmed.

Justices MILLWEE and ROBINSON join in this dissent.

HALL *v.* YOUNG.

4-9382 236 S. W. 2d 431

Opinion delivered February 12, 1951.

James P. Baker, for appellant.

David Solomon, Jr., for appellee.

MINOR W. MILLWEE, Justice. Appellee was awarded a verdict and judgment in circuit court against appellant for $1,400 compensatory damages and $100 punitive damages as the result of an automobile collision. The collision occurred about 9:00 p. m., March 11, 1950, while appellee was driving east on State Highway 20 about a mile west of Walnut Corner in Phillips County. Appellant and four other young men were returning to Marvell from a night club near Forrest City, Arkansas. Appellant and two of his companions had been drinking heavily since early in the afternoon and had stopped at Walnut Corner for the last drink shortly before the collision. It was raining and the highway was only 14 feet wide at the point of the collision. The shoulders of the road had been recently graded and were muddy.

We will not attempt to detail the testimony. It is sufficient to say that the jury was warranted in concluding that the collision was the proximate result of appellant's gross and wanton negligence in operating his car on a rainy night over the narrow, slippery road at an excessive speed while intoxicated. Under our holding in the recent case of *Miller* v. *Blanton,* 213 Ark. 246, 210 S. W. 2d 293, 3 A. L. R. 2d 203, the evidence, when viewed in the light most favorable to appellee, was sufficient to sustain the verdict for both compensatory and punitive damages.

A more serious question is presented with reference to the admissibility of certain evidence. On cross-examination of appellant, the following occurred: "Q. Jim, how many accidents have you been in while you were driving an automobile? Mr. Baker: I object to the question. The Court: The objection is overruled. Mr. Baker: Note my exceptions. A. Four, I believe." In *Pugsley* v. *Tyler,* 130 Ark. 491, 197 S. W. 1177, the defendant was required on cross-examination to state whether he had previously driven his automobile past another team of horses frightening them and causing the

team to run away. In holding that the trial court committed reversible error in admitting the testimony, Justice HUMPHREYS, speaking for the court, said: "This court has adopted the rule, where the sole issue is one of negligence or non-negligence on the part of a person on a particular occasion, that previous acts of negligence are not admissible."

In *Schwam* v. *Reece,* 213 Ark. 431, 210 S. W. 2d 903, we held that the trial court properly excluded evidence showing the speed and manner in which one of the parties were driving on another trip prior to the accident in question. See, also, *Harper* v. *Dees,* 214 Ark. 111, 214 S. W. 2d 788. There are cases where previous acts of negligence of the driver of a motor vehicle may be shown to establish his reputation as an incompetent driver; as where it is charged that an employer was negligent in selecting an independent contractor whose reputation as an incompetent driver was known, or should have been known, to the employer (*Ozan Lumber Co.* v. *McNeely,* 214 Ark. 657, 217 S. W. 2d 341); also where a father is charged with negligence in permitting a son to drive the father's automobile with knowledge of the son's recklessness. *Chaney* v. *Duncan,* 194 Ark. 1076, 110 S. W. 2d 21.

D. W. Galloway, a state policeman, testified that after making an investigation of the accident shortly before midnight, he talked with appellant at Marvell. Appellant told witness that he had been drinking "pretty heavy" and said: "I am pretty drunk." Galloway was then asked: "In your opinion was this man (appellant) intoxicated at the time of the accident?" Over appellant's objection and exception, Galloway answered: "I saw the defendant approximately forty-five minutes or an hour after the accident and he was, in my opinion, drunk at the time, and in my opinion, he was drunk at the time of the accident." It was shown that appellant made no statement to the witness as to whether he was drunk at the time of the accident. From other testimony given by Galloway and others it is also clear that the conversation with appellant occurred at least two hours after the collision. It was competent for the officer to state

whether appellant was intoxicated at the time of their conversation. *American Bauxite Co.* v. *Dunn,* 120 Ark. 1, 178 S. W. 934. There may be cases where a witness's observation of another person's appearance and conduct is such as to warrant an opinion of the witness as to the state of intoxication at some reasonable period of time prior to the making of such observation. But the circumstances in the instant case do not afford a proper basis for the officer's opinion that appellant was drunk at the time of the collision. This was one of the ultimate questions to be determined by the jury from all the facts and circumstances.

We conclude that it was error to admit the above testimony of appellant and Galloway. A majority of the court are also of the opinion that admission of this testimony resulted in such prejudice to appellant as to call for a new trial.

We have examined other assignments of error argued by appellant and find them to be without merit. The excessiveness of the verdict is argued, but this question may not arise on another trial. For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

[redacted]

BLAKE *v.* DENMAN.

4-9367 236 S. W. 2d 433

Opinion delivered February 12, 1951.

[redacted]

W. Harold Flowers and *L. Clifford Davis,* for appellant.

Denman & Denman, for appellee.

ED F. MCFADDIN, Justice. In this partition suit filed by appellee, the appellants have pleaded a variety of defenses, but all without avail.

John Blake owned a tract of approximately twenty acres, on which an out-of-State party acquired the tax title. Blake then retained W. F. Denman, an attorney at Prescott, to recover the title. Denman was successful; and for his fee, he received from John Blake and wife a warranty deed to an undivided one-third interest in the land. The deed was duly executed, acknowledged, delivered and recorded in 1937.[1] By agreement with Denman, Blake occupied the land and paid taxes until his death in 1941. His widow and heirs at law continued the arrangement; and the co-tenancy relationship was not disputed prior to this litigation. In 1949 Denman filed this suit for partition; and the widow and heirs of John Blake (appellants here), in resisting, asserted the defenses hereinafter to be discussed. A trial resulted in a decree for the plaintiff; and the defendants have appealed.

I. Appellants claim that the 1937 deed from Blake and wife to Denman should be set aside "because the acquisition by the attorney from his client of part of the subject-matter of the litigation, along with the other elements of bad faith surrounding the transfer, creates a condition of unfairness which equity will not allow to stand." Appellants cite, *inter alia, Maloney* v. *Terry,* 70 Ark. 189, 66 S. W. 919, 72 S. W. 570; *Thweatt* v. *Free-*

[1] Contemporaneous with the deed, Denman made a $50 loan to Blake, and as security therefor, Blake and wife duly executed, acknowledged and delivered a deed of trust on the remaining two-thirds interest in the land. The $50 loan was duly paid in the course of time.

man, 73 Ark. 575, 84 S. W. 720; *McMillan* v. *Brookfield,* 150 Ark. 518, 234 S. W. 621; *Swaim* v. *Martin,* 158 Ark. 469, 251 S. W. 26; *Powell* v. *Griffin,* 178 Ark. 788, 13 S. W. 2d 18; *Goode* v. *King,* 189 Ark. 1093, 76 S. W. 2d 300; and *Chavis* v. *Martin,* 211 Ark. 80, 199 S. W. 2d 598. These cases correctly declare principles of law; but the facts in the case at bar do not bring it within their holdings. There is no absolute incapacity for dealing between client and attorney; and although transactions between them will be carefully scrutinized, yet those which are obviously fair and just will be upheld.

A review of the evidence in the case at bar convinces us—just as it did the Chancery Court—that W. F. Denman dealt fairly and justly with John Blake; that Denman rendered his client valuable services and received therefor the deed in question as a reasonable fee; that no fraud or overreaching of any kind was practiced; that the deed was and is valid and conveyed the one-third interest therein stated.

II. The appellants claim that "the Court erred in not dismissing the complaint for the reason that it is barred by the seven years Statute of Limitation." To support their plea of limitations and laches, appellants cite, *inter alia,* § 37-101, Ark. Stats.; *Avera* v. *Banks,* 168 Ark. 718, 271 S. W. 970; *Daniels* v. *Moore,* 197 Ark. 727, 125 S. W. 2d 456; *Gibbs* v. *Pace,* 207 Ark. 199, 179 S. W. 2d 690; *Burbridge* v. *Bradley Lumber Co.,* 214 Ark. 135, 215 S. W. 2d 710; *Buckner* v. *Sewell,* 216 Ark. 221, 225 S. W. 2d 525; and *Grimes* v. *Carroll,* 217 Ark. 210, 229 S. W. 2d 668. Again, we observe that the facts in the case at bar do not bring it within the purview of the cited cases. The 1937 deed made Denman a co-tenant with Blake, who, by agreement, continued to occupy the land, and in return therefor paid the taxes. In *Hildreth* v. *Hildreth,* 210 Ark. 342, 196 S. W. 2d 353, we stated:

"The general rule is that the possession of a tenant in common is the possession of his co-tenants, and that in order for the possession of a tenant in common to be adverse to his co-tenants, knowledge of such claim must be brought home to them directly or by such notorious

acts of unequivocal character that notice may be presumed. *Singer* v. *Naron,* 99 Ark. 446, 138 S. W. 958."

There is an entire absence in this record of any evidence that any notice of any adverse claim was given to Denman, either by John Blake in his lifetime, or by his widow and heirs after his death. In short, there is no evidence on which to base appellants' claims of limitations or laches against Denman as a co-tenant.

CONCLUSION

It would unduly prolong this opinion to discuss all the other arguments advanced by appellants. It is sufficient to say that we have studied all such arguments and find them to be without merit.

Affirmed.

WEIR *v.* BRIGHAM.

4-9369 236 S. W. 2d 435

Opinion delivered February 12, 1951.

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

J. M. Smallwood, for appellee.

ED F. MCFADDIN, Justice. The sole issue is whether the appellant is the complete and absolute owner of certain real estate. Appellees contracted to buy the property from appellant if she had a good merchantable title to the entire premises.[1] After an examination of the proffered abstract, appellees claimed that appellant's title was defective; and this litigation ensued.

The facts appear to be undisputed. Prior to October 23, 1947, Louis F. Harms was the owner of the property here involved, and his wife, Meta Harms, had only an inchoate dower interest. On that day, they executed, acknowledged, and seasonably recorded this deed:

"THAT WE, Louis F. Harms and Meta Harms, his wife, for and in consideration of the sum of———— One & No/100————DOLLARS, cash in hand paid by Louis F. Harms and Meta Harms, his wife, the receipt of which is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said Louis F. Harms and Meta Harms, his wife, and unto their heirs and assigns, forever, the following lands, (Here follows the described land.) . . . The purpose of this deed is to convey from Louis F. Harms, . . . an undivided one-half (½) interest in and to all of the above described property to Meta Harms, his wife, with the distinct understanding that it is intended by this deed, which is made to Louis F. Harms and Meta Harms, his wife, that the survivor shall take all of said property, meaning that if Meta Harms, the wife, should precede in death Louis F. Harms that Louis F. Harms or L. F. Harms takes all of the property described herein outright, or that if Louis F. Harms or L. F. Harms should precede Meta Harms in death that Meta Harms takes all the property described herein outright, free from any and all claims of the heirs of either.

"TO HAVE AND TO HOLD the same unto the said Louis F. Harms and Meta Harms, his wife, and unto

[1] The contract permitted a reservation of a portion of the minerals, but that is not germane to this decision.

their heirs and assigns, forever with all appurtenances thereunto belonging.

"And we hereby covenant with said Louis F. Harms and Meta Harms, his wife, that we will forever warrant and defend the title to said lands against all lawful claims whatever.

"And I, Meta Harms, wife of the said Louis F. Harms, for and in consideration of the said sum of money, do hereby release and relinquish unto the said Louis F. Harms and Meta Harms, his wife, all my rights of dower and homestead in and to said lands.

"WITNESS our hands and seals on this 23rd day of October, 1947.

/s/ Louis F. Harms (L.S.)

/s/ Meta Harms (L.S.)"

Sometime after the recording of the deed, the said Louis F. Harms died intestate, survived by his one son, Edward Harms, and his widow, Meta Harms, who later became Meta H. Weir, and is the appellant herein. By virtue of the foregoing deed, Meta Harms Weir claims to be the absolute owner of the property; but appellees claim that Edward Harms has an interest in the land on the theory that the deed was insufficient to create a tenancy by the entirety.

We are thus presented with the question, whether a husband—already the owner—can create an entirety estate in land by executing a deed directly to himself and wife; and this necessitates a review of the nature of an estate by entirety. Some of our cases are: *Robinson* v. *Eagle,* 29 Ark. 202; *Branch* v. *Polk,* 61 Ark. 388, 33 S. W. 424, 30 L. R. A. 324, 54 A. S. R. 266; *Roulston* v. *Hall,* 66 Ark. 305, 50 S. W. 690, 74 A. S. R. 97; *Robertson* v. *Robinson,* 87 Ark. 367, 112 S. W. 883; *Parrish* v. *Parrish,* 151 Ark. 161, 235 S. W. 792; *Dennis* v. *Dennis,* 152 Ark. 187, 238 S. W. 15; *Stewart* v. *Tucker,* 208 Ark. 612, 188 S. W. 2d 125; and *Ryan* v. *Roop,* 214 Ark. 699, 217 S. W. 2d 916.[2]

[2] For other cases, see West's Arkansas Digest, "Husband and Wife," § 14.

In *Roulston* v. *Hall* (*supra*), Mr. Justice HUGHES, speaking for the Court, said:

"Where land is conveyed to husband and wife, they do not take by moieties, but both are seized of the entirety, — the whole in contradistinction to a moiety or part only. *Robinson* v. *Eagle,* 29 Ark. 202; 2 Kent's Comm. 132; 4 Kent's Comm. 414. They are called tenants by entirety. Estates by entirety are sometimes spoken of as joint tenancies, but not with strict accuracy. Like a joint tenancy they possess the quality or survivorship. Husband and wife are but one person in law and a conveyance to husband and wife is, in legal contemplation, a conveyance but to one person. *Shaw* v. *Hearsey,* 5 Mass. 521; *Dias* v. *Glover,* Hoff. Ch. (N. Y.) 71; *Ross* v. *Garrison,* 1 Dana 35; *Gibson* v. *Zimmerman,* 12 Mo. 385; Boone's Law of Real Property, § 365.

"The rule of the common law, that a conveyance to husband and wife constitutes them tenants by the entirety—the survivor taking the whole estate—is not changed by the abolition of joint tenancies, nor by the act of the legislature enabling married women to acquire and hold property separate from their husbands. See *Marburg* v. *Cole,* 49 Md. 402; *Diver* v. *Diver,* 56 Pa. St. 106; *Jones* v. *Chandler,* 40 Ind. 588; *McDuff* v. *Beauchamp,* 50 Miss. 531; *Garner* v. *Jones,* 52 Mo. 68; *McCurdy* v. *Canning,* 64 Pa. 39; *Bennett* v. *Child,* 19 Wis. 362; *Hulett* v. *Inlow,* 57 Ind. 412, S. C. 26 Am. Rep. 64; Re Shaver, 31 Upper Can. Q. B. 605; *Robinson* v. *Eagle,* 29 Ark. 202."

In *Stewart* v. *Tucker,* 208 Ark. 612, 188 S. W. 2d 125, Mrs. Wilson, owner of the property, married Mr. Tucker and made a contract with him that if he should survive her, he would receive full title to the property. Mr. Tucker survived and claimed the property as an estate by entirety under the said contract. In holding that no estate by entirety was created by the said contract, Mr. Justice ROBINS gave a scholarly review of estates by entirety and the similarity between them and joint tenancies. We quote:

"The Supreme Court of Michigan, in the case of *Pegg* v. *Pegg,* 165 Mich. 228, 130 N. W. 617, 33 L. R. A., N. S., 166 Ann. Cas. 1912C, 925, had to construe a deed executed by Davis Pegg to Mary C. Pegg, his wife. By this deed, which contained the usual covenants of warranty, the husband conveyed to his wife an undivided one-half interest in 160 acres, and there was inserted between the granting and the *habendum* clauses the following language: 'The object and purpose of this deed is to convey to said second party such an interest in said land that the parties hereto will have an estate in entirety, and that the same shall survive and vest in the survivor as a full and complete estate.' After the deed was executed and recorded the grantor died. The widow asserted a claim, resisted by grantor's children, to the entire estate as survivor. The Michigan court, in denying the right of the widow to the entire estate, said: 'In order to own the whole, as survivor, she would have to be seized of the whole before his death. Whatever vested in her as survivor must have been owned by both her and her husband before his death, and each must have been seized of the whole. As neither one was seized of the whole, but both held by distinct titles, they could not have been tenants by the entirety. Neither were they tenants by entirety of the undivided half conveyed to her, because Davis Pegg reserved no interest in the undivided half he conveyed to complainant. The deed as a whole cannot be construed as creating a tenancy by entirety, because the law was not followed in creating it. At the common law, the unities of time, title, interest and possession had to be observed in creating such an estate. Blackstone, Commentaries, book 2, p. 182; Washburn on Real Property, vol. 1 (6th Ed.), p. 529. See suggestion in *Basset* v. *Budlong,* 77 Mich. 338, 43 N. W. 984, 18 Am. St. Rep. 404. The common law has remained unchanged in this respect and is now in force. In the attempt to create an estate by entirety, in the case under consideration, neither the unity of time nor title was observed. The estate was not created by one and the same act, neither did it vest in them at one and the same time. . . . By reason of these considerations, the deed must be read as

though the "clause" had been omitted. The deed created a tenancy in common between complainant and her husband, and upon his decease his undivided one-half of the premises descended to his heirs.'

"The common law of England (except where it is inconsistent with our constitution and statutes) has been put in force in this state by the General Assembly. Section 1679 of Pope's Digest. Under the common law, as pointed out in *Pegg* v. *Pegg, supra,* such an agreement as the one relied on by appellees is not sufficient to create an estate by the entirety, as to the real and personal property of Cordelia Wilson Tucker, in Cordelia Wilson Tucker and her husband, Frank H. Tucker, as contended by appellees, and as held by the lower court. No statutory enactment has changed the rule of the common law and it must control here. We conclude that the lower court erred in holding that the alleged written agreement entered into between Frank H. Tucker and his wife, Cordelia Wilson Tucker, was sufficient to create in Frank H. Tucker and his wife an estate by the entirety as to the property involved herein."

The holding in *Stewart* v. *Tucker* (*supra*) is determinative of the case at bar. While there are authorities from some jurisdictions [3] which hold that an estate by entirety may be created by deed directly from the husband to the wife, yet the weight of authority is in accordance with the case of *Pegg* v. *Pegg* (*supra*) which we followed in *Stewart* v. *Tucker* [4] (*supra*). We continue to adhere to our previous holding.

Neither can it be successfully urged that Mrs. Meta Weir became the owner of all of the property by virtue

[3] In a series of well considered annotations, there may be found listed and discussed many of the cases on the point here under consideration. These annotations are:

"Character of tenancy created by instrument purporting to convey one's own title or interest to himself and another" in 62 A. L. R. 514, 137 A. L. R. 348, 166 A. L. R. 1026; also, "Creation of right of survivorship by instrument ineffective to create estate by entireties or joint tenancy" in 1 A. L. R. 2d 247; and, "Validity and effect of conveyance by one spouse to other of grantor's interest in property held as estate by entireties" in 8 A. L. R. 2d 634.

[4] In *Rockamore* v. *Pembroke,* 208 Ark. 995, 188 S. W. 2d 616, we cited and followed *Stewart* v. *Tucker* on the same point here discussed.

of the deed of October 23, 1947. In *Hicks* v. *Sprankle,* 149 Tenn. 310, 257 S. W. 1044, the wife, being already the owner of the fee, made a deed to herself and husband, as grantees, and the *habendum* clause recited that the grantees were to hold the property "as an estate by the entirety." The Tennessee Supreme Court (1) held that the wife's name as grantee was mere surplusage, and (2) struck down the *habendum* clause as being in conflict with the granting clause: with the net result that the husband was held to be the exclusive owner of the property. We cannot follow that case, because ever since *Beasley* v. *Shinn,* 201 Ark. 31, 144 S. W. 2d 710, 131 A. L. R. 1234, it has been the rule in this State that the intention of the parties is to be gathered from the entire document, and that even when the *habendum* clause is in conflict with the granting clause, we use the *habendum* clause to aid in determining the intention of the parties in order to give effect thereto.[5] From the deed in question it is clear that it was not the intention of the parties to make Mrs. Harms sole owner of all the property at the time of the execution of the deed. Neither can we hold that an estate by entirety was created by the deed, because there were not present the legal formalities essential to the creation of such an estate—that is, the four unities of interest, title, time, and possession. Thus the conclusion is inescapable, that the deed of 1947 made Mr. and Mrs. Harms tenants in common in the property, and Mr. Harm's interest passed to his heir at law under the Statute of descent and distribution, subject to dower and homestead, if any.

In the briefs attention is called to Act 86 of 1935, now found in § 50-413, Ark. Stats., which allows spouses to convey directly to each other. From that Statute, appellant urges that an estate by entirety can be created by such a conveyance as is involved in this case. We reject that contention. An estate by the entirety partakes of the nature of a joint tenancy to the extent of requiring the concurrence of the four unities of interest, time,

[5] Some of our cases, following the rule of *Beasley* v. *Shinn,* are: *Stewart* v. *Warren,* 202 Ark. 873, 153 S. W. 2d 545; and *Carter Oil Co.* v. *Weil,* 209 Ark. 653, 192 S. W. 2d 215.

title and possession, as previously mentioned; and these unities did not concur in the deed here in question. The interest of a husband in the estate by entirety can be conveyed to his wife by virtue of the said Act 86 of 1935: such was our holding in *Ryan* v. *Roop,* 214 Ark. 699, 217 S. W. 2d 916. But an estate by the entirety can come into existence only when the required essentials are observed, just as is pointed out by Mr. Justice ROBINS in *Stewart* v. *Tucker* (*supra*). Those essentials did not exist in *Stewart* v. *Tucker* and do not exist in the case at bar.

The Circuit Judge correctly held that Mrs. Weir was not the full and complete owner of the premises.

Affirmed.

WATSON *v.* DRAINAGE DISTRICT NO. 3, CRITTENDEN COUNTY.

4-9385 236 S. W. 2d 423

Opinion delivered February 12, 1951.

[redacted]

Cecil B. Nance, for appellant.

Hale & Fogleman, for appellee.

George Rose Smith, J. In 1949 the appellee, Drainage District No. 3 of Crittenden County, petitioned the county court to levy annually for ten years a tax of 5% of the assessed benefits for the purpose of cleaning out and maintaining the district's drainage system. Ark. Stats., 1947, § 21-533. The appellant, a landowner within the district, protested the proposed levy on the theory that the benefits assessed against his land had been paid in full and that any additional levy would have to be authorized by a majority of the landowners, as set forth in *Cox* v. *Drainage Dist. No. 27,* 208 Ark. 755, 187 S. W. 2d 887. The county court found that the assessed benefits had not been paid in full and that a sufficient amount of uncollected benefits remained to permit the suggested levy. The court levied the tax as requested, and the circuit court affirmed the order. The case was then brought to us.

All material facts are stipulated. The district was organized under the general law in 1916, to construct a drainage system at an estimated cost of $228,911.32. Bonds in the amount of $240,000 were issued, and the commissioners estimated that the total cost of the improvement, including interest on the bonds and a 10% margin of safety, would be $430,925. Benefits assessed against the lands totaled $440,478.50. To pay the bonds the county court originally levied a tax of 3½% of the benefits for 1917 and 5% annually for the next nineteen

years, making a total of 98½% of the assessed benefits. In 1921 a second bond issue of $35,000 was sold, and the tax was increased to 6½% annually for the years 1927 through 1936. It is agreed that the total tax levies from 1917 through 1939, when the bonds were retired, have amounted to 123.6% of the assessed benefits. After 1939 the district was dormant until the present petition was filed in 1949.

Of course, the reason the district was able to collect more than the face amount of the benefits is that the assessed benefits bear interest at 6% per annum if the landowner does not elect to pay his assessment in full when the district is formed. Ark. Stats., §§ 21-540 and 21-541. The main issue in this case concerns the method of calculation to be used in determining when the landowner has paid the full amount of his assessed benefits, together with interest. We have touched upon this question several times, but we have not had occasion to state the formula that is to be applied in all cases.

The case that comes nearest to reaching this question is *Richey* v. *Long Prairie Levee Dist.*, 203 Ark. 1, 155 S. W. 2d 582. There the district levied an annual tax of 6% of the assessed benefits from 1918 through 1922 and thereafter an annual tax of 8.75%. We approved the trial court's use of the ordinary rules governing the application of partial payments. Under these rules the annual payments of 6% in the early years merely discharged the interest, and it was not until the tax was increased to 8.75% that the landowner began making payments on the principal.

The present case is somewhat different in that until 1927 the annual levies were *less* than the 6% interest rate. The question naturally arises, should the uncollected interest be added to the principal and be available for future tax levies? A study of the statutes convinces us that this was not the legislative intention. Until the passage of Act 177 of 1913 (Ark. Stats., § 21-540), the assessment of benefits did not bear interest. We had previously held that in the absence of statute the interest on borrowed money should be included as part of the

cost of construction. *Fitzgerald* v. *Walker,* 55 Ark. 148, 17 S. W. 702. In practice this decision meant that the benefits from the proposed improvement had to exceed both the principal and interest of the bonds, else the cost of construction would be greater than the benefits.

It is evident that a primary purpose of Act 177 of 1913 was to alleviate this situation. The statute was first construed in *Oliver* v. *Whittaker,* 122 Ark. 291, 183 S. W. 201. There, after referring to the *Fitzgerald* case, we said that additional burdens could not be cast on the landowners unless the assessment of benefits could be made to bear interest. It was pointed out that the 1913 statute gave the landowner the option of paying his assessment in full when the district was formed. If that option was not exercised the interest on the bonds would be met by the interest on the deferred payments of assessments. That holding makes it clear that one purpose of the 1913 law was to permit interest on benefits to offset interest on bonds. Even more indicative of the legislature's thought was the statute construed in *Pfeiffer* v. *Bertig,* 141 Ark. 531, 217 S. W. 791. That statute provided that if the commissioners had to borrow money to construct the improvement they could fix a rate of interest on the assessed benefits sufficiently high to meet the interest on the bonds. Here again the two interest factors were closely allied.

In the light of this legislative history we cannot believe that the legislature intended that uncollected interest should be added to the principal. In this case, for example, the district was dormant from 1939 to 1949. During those years no taxes were levied; the landowners were in no sense in default in failing to pay interest on their assessments. They were not then taking advantage of the option to pay in installments, for no installments were due. It is not reasonable to think that the legislature meant for the landowners' potential liability to be increased by 60% during such a period of inactivity. Rather, it is our conclusion that the annual interest on the assessed benefits was available to the district if it chose to collect all or any part of it by the levy of a

tax, but in any given year the district's failure to collect the full amount of interest operated as a waiver of the uncollected amount.

Hence, in the absence of some other procedure expressly adopted by the district, the rule is that the annual payments should be applied first to interest. If the annual levy is not more than 6% the principal remains intact. Payments in excess of 6% of the unpaid principal reduce it to the extent of the excess, but payments of less than 6% of the unpaid balance do not increase the principal by the addition of the uncollected interest. When this formula is applied to the present case the uncollected benefits are found to be ample to support the tax now complained of. In only ten years, 1927 through 1936, have the landowners been required to pay more than 6% of the benefits. In those years they paid 6½% annually, thereby reducing the principal one-half of 1% in 1927 and slightly more in the succeeding years as the unpaid balance became progessively smaller. Without encumbering this opinion with mathematical calculations it is enough to say that there are plainly enough uncollected benefits to warrant the levy of this tax.

The appellant further contends that even though the benefits are sufficient when so computed, the effect of Act 285 of 1941 (Ark. Stats., § 21-541) was to remove this district from the operation of the statutes that provide for interest on the assessment of benefits. Act 285 slightly amended the 1919 statute which provided for such interest and also added this proviso: "provided, that this act shall 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." The present contention is based in part on the fact that in this district the amount of the assessed benefits exceeded the total of principal and interest on the bonds and therefore "included" the interest on borrowed money. This same argument was made and rejected in *Flat Bayou*

Dr. Dist. v. *Atkinson,* 217 Ark. 575, 232 S. W. 2d 76. We adhere to our ruling in that case.

It is also said that certain proceedings in the organization of the district show that interest on the bonds was included in the assessed benefits. In estimating the total cost of the improvement the commissioners calculated the interest that would accrue on the bonds. In petitioning the county court for the levy of the original tax the commissioners represented the total cost to be $430,925, which was stated to include interest and a margin for contingencies. The order levying the tax recited these facts with respect to estimated costs. And in the assessment list there was a column in which the total tax to be paid upon each tract was estimated, these totals amounting to $421,506.03 in all.

These facts undoubtedly show that the interest on the bonds was calculated as a part of the cost of construction. But this is only one of the requirements of the proviso in Act 285; the other is that this item be included in the assessment of benefits. The Commissioners must not only have valued the benefits to the various lands but also have included therein the interest on money to be borrowed. In the absence of some written evidence in the assessment proceedings to show that such a course was followed by the commissioners, Act 285 has no application.

Finally, the statute of limitations is urged as a bar to the proposed maintenance levy. This position is unsound. The drainage law provides that the district shall not cease to exist upon completion of its drainage system but shall continue for the purpose of keeping the ditches free from obstruction and preserving them. To this end the commissioners may from time to time apply to the county court for the levy of additional taxes. § 21-533. The lawmakers evidently realized that a drainage system will from time to time be obstructed by sediment, weeds, saplings, etc. The entire system may become worthless unless the ditches are kept clear so that the water will flow as intended. The statute therefore vests in the district a continuing power to maintain its

drainage system. In some cases, such as the present one, there may be no need for the exercise of this power for many years. Here it is stipulated that no substantial sums have been expended for maintenance since the district was created in 1916. There is certainly nothing in the statute to indicate that this drainage system, constructed at a cost of over $400,000, must be allowed to become obstructed and useless merely because maintenance was unnecessary for many years. It was to provide for this situation that the commissioners were vested with a continuing power to maintain the system. The statute of limitations plays no part in the matter until there is levied a tax which gives the district an enforceable cause of action.

Affirmed.

GRIFFIN SMITH, C.J., concurs in part and dissents in part.

ED. F. MCFADDIN, Justice (Concurring). I agree with the result reached by the majority in the case at bar: but concur to emphasize my views on one particular matter.

I am of the opinion that the "interest-on-benefits," having ceased in 1939 when the bonds were paid off, would not again commence to run until the District issued bonds, or incurred indebtedness, that bore interest. In other words, it is not the levying of a tax for maintenance work that will set the "interest-on-benefits" machinery in operation: rather, it is the incurring by the District of interest-bearing indebtedness. The history of the legislation, as outlined in the majority opinion, clearly points to such a conclusion: after the holding in *Fitzgerald* v. *Walker,* 55 Ark. 148, 17 S. W. 702, the Legislature adopted Act 177 of 1913 which provided that the benefits would bear interest; in *Oliver* v. *Whittaker,* 122 Ark. 291, 183 S. W. 201, it was shown that the effect of the 1913 Act was to allow sufficient cushion to make the bonds salable. As I see it, the entire idea of "interest-on-benefits" was to make salable the bonds of a District. So when all the bonds are paid, there is no occasion for

the benefits to bear interest until new bonds are issued, or other interest-bearing obligations incurred.

The majority opinion seems to recognize such legislative history, for it contains this language in speaking of *Oliver* v. *Whittaker*:

"That holding makes it clear that one purpose of the 1913 law was to permit interest on benefits to offset interest on bonds. Even more indicative of the legislature's thought was the statute construed in *Pfeiffer* v. *Bertig,* 141 Ark. 531, 217 S. W. 791. That statute provided that if the commissioners had to borrow money to construct the improvement they could fix a rate of interest on the assessed benefits sufficiently high to meet the interest on the bonds. Here again the two interest factors were closely allied."

Thus, the "interest-on-benefits" has always been something to offset the interest on the bonds; and when there are no bonds to bear interest, then there is no "interest-on-benefits." In the case at bar there is no occasion for the majority to state when, if ever, the benefits would begin to bear interest, because the unpaid benefits, regardless of interest, are sufficient to yield a large amount; and the appeal in this case posed the question of whether any benefits remained to support the tax levy made.

For illustration, I take the case of the benefits assessed against the lands of the appellant, as shown by the stipulated facts: in 1916, the benefits assessed against his land were $6,546.50. He paid his taxes regularly each year, but the tax levy from 1917 to 1926, inclusive, was less than six per cent per annum, so in effect, during those years he paid only the interest on his benefits. It was only from 1927 to 1936, inclusive, that the tax rate exceeded six per cent per annum. So in those years he paid on his benefits only such amount as exceeded the six per cent each year. I have made a detailed calculation and arrived at the conclusion that in 1939, when all outstanding bonds of the District were retired, the remaining benefits unpaid by the appellant amounted to

$5,754.87: so he has only paid $791.63 on his total benefits of $6,546.50. Thus, there remained in 1949 a substantial sum of benefits against which the maintenance tax could be levied. Just because the maintenance tax was levied in 1949 does not set in operation the Statute providing for "interest-on-benefits" on the $5,754.87. If such "interest-on-benefits" should resume, then it is clear that the appellant would never reduce the benefits which are a lien on his land, unless there should be levied a maintenance tax in excess of six per cent per annum. In my opinion, the $5,754.87 remaining benefits on appellant's land do not begin to bear interest until bonds or interest-bearing indebtedness be issued by the District. The effect of my views would be that the payment of the tax in 1949, and subsequent years, would go to reduce the amount of unpaid assessed benefits.

But the question in this case, as previously stated, is whether there *are* benefits, and not *when* the benefits will begin to bear interest. Therefore, my concurrence is *dicta;* but it is uttered to aid those who in the future may consider this matter of "interest-on-benefits" when the question may become necessary to a decision.

Mr. Justice WARD joins in this concurrence.

BRISSAUD *v.* ROGERS.

4-9376 236 S. W. 2d 439

Opinion delivered February 12, 1951.

John W. Cloer, for appellant.

Eli Leflar, for appellee.

PAUL WARD, J. The parties hereto entered into a contract on January 11, 1950, whereby appellee was to sell and appellant was to buy a farm for $3,450. Due to difficulties arising over the title and acceptability of the land, Rogers sued Brissaud for specific performance in the Chancery Court and secured a decree from which appellant, Brissaud appeals.

O. P. Rogers owned 160 acres of land and on above date he listed it for sale with J. P. Pettey, a real estate broker in Springdale, representing that there was a well 900 feet from the house, a running creek and spring, 60 acres of tillable land, 100 acres of pasture and timber land, and that the land would carry a loan of $2,000. Brissaud, having been licensed as a real estate agent a few days previously, was in the office and heard the above listing. He asked appellee to take him out to the farm, a distance of about 12 miles, and show him the place. This was done and appellant spent some thirty minutes looking over the buildings, but did not go over the place because he had on his "good clothes." On the return trip appellant expressed a desire to buy the farm

and after getting appellee to reduce his first offer, they agreed on the price of $3,450 and upon arriving at Pettey's office entered into the following contract.

"OFFER AND ACCEPTANCE

"Springdale, Ark., Jan. 11, 1950.

"To J. P. Pettey, Agent

"You are hereby authorized to offer for my account the sum of thirty-four hundred fifty dollars for the following described property. The northeast quarter of the northeast quarter and the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of Sec. 24, Twp. 17 N., Range 29 west, and the northwest quarter of the southwest quarter of Sec. 19, Twp. 17, R. 28 west containing 160 acres more or less. This amount is to be paid in the following manner:

"Cash or trade as per statement below.....$.....
"Loan to be assumed or placed for my account.
"Cash .....$ 100
"Balance payable $3,350
"When deed and abstract are delivered to the buyer and title is acceptable.....$.....
"Total.....$3,450

"TRADE OR OTHER SPECIAL CONDITIONS

"Buyer to pay the commission and the 1949 taxes. Buyer to have title examined and if good payable as above, time to close said deal 15 days from date.

"GENERAL CONDITIONS

"It is understood that the seller shall furnish abstract of title continued to date showing merchantable title, or policies of title insurance, pay all taxes now due or delinquent, and make conveyance to me by warranty deed, date of which shall fix time for dating of notes and adjustment of rents, interest and insurance. Possession given when title is accepted.

"Attached hereto is check for $100 as earnest money which shall apply as part of purchase price if this offer is accepted within ..... days from date; otherwise to be returned to me. If for any reason I fail to carry out my part of this agreement said earnest money is to be forfeited as liquidated damages.

"Receipt of earnest money as stated above is hereby acknowledged.

"Signature /s/ Francis Brissaud

"Address R. No. 6, Fayetteville, Ark.

"J. P. Pettey, Agent.

"THE ABOVE OFFER IS HEREBY ACCEPTED this 11th day of Jan., 1950.

"/s/ O. P. Rogers,

708 S. 7 St., Rogers, Ark.

Owners."

On February 5 appellant went out to look at the land again and found out, he says, that the land was not as represented; that there were only about 20 acres in cultivation, that the creek and spring were dry except after a rain and the well was more than 900 feet from the house. The next day appellant had Pettey to call Rogers to his office and when he arrived he was told appellant wanted to forfeit the $100 as the land was not as represented, and thereupon Pettey gave Rogers a check for $90 retaining $10 for work on the abstract. Rogers took the check but came back within an hour and returned it to Pettey stating that Brissaud "had bought himself a farm."

The testimony shows there were not 60 acres in cultivation, but appellee contends that "tillable" land does not necessarily mean land in cultivation. The evidence is in dispute as to how much "tillable" land there was, but there was some evidence that there was as much as 60 acres. There is evidence showing the well to be 990 feet from the house, but appellee says he told Brissaud on the first trip, it was about three blocks.

Also there is a conflict as to the creek and spring, but some testimony that they had been dry only once in several years. We deem it not necessary to set out more fully the testimony because we think the finding of the lower court was not against the preponderance on these points. It must be remembered also that appellant had an opportunity to view the farm before he agreed to buy and it cannot be said he relied entirely on the representations made by Rogers.

Brissaud also defended on the ground that the title was not good. His attorney in a written opinion, pointed out certain defects, but we think appellant at the close of the testimony waived such defects as may have existed. When the court called appellant's attention to a confirmation decree in the abstract of title the following procedure took place.

The Court: "There's a confirmation decree in the abstract."

Mr. Cloer: "No, there isn't."

The Court: "Yes there is."

Mr. Leflar: "In February, 1948."

Mr. Cloer: "Let's see. Well, I don't know. I didn't know that was in there; but we are relying on misrepresentations."

It is insisted that appellee agreed to a recision and also is estopped from recovering because he took the $90. We are unable to find merit in this contention. The check was returned within an hour and appellant testified that he was not hurt or damaged in any way, which removed the chief element of estoppel. Moreover appellant waived any rights he might have had when some twenty days later he demanded the $100 be returned to him.

The final question to be decided, that of "liquidated damages," is a very interesting one and calls for a careful investigation of the authorities. Under the terms of the offer and acceptance agreement set out above does Brissaud have the right to discharge all obligations im-

posed on him by forfeiting the $100 or does Rogers have the right to have the contract performed in its entirety? Surprisingly this question has never, so far as our investigation discloses, been directly passed upon by this court. The nearest approach has been *Parks* v. *Johnston,* 188 Ark. 711, 67 S. W. 2d 583 in 1934, which sustained specific performance. This, however, cannot be considered more than persuasive because the contract out of which the question arose was as noted in the "statement of facts" . . . "started orally and carried on by telephone and in writing" and nowhere is the specific wording set out. In this connection the court said: "It was a contract of sale and purchase, not an option to buy . . ." which appears to be the reasoning followed in the courts of other states which hold that a mere "liquidated damages" clause does not prevent specific performance. There is an informative case note in the spring 1950 Ark. Law Review, Vol. 4, p. 237, which cites numerous cases and concludes in harmony with the weight of authorities, that, "if the contract states merely that upon breach thereof a certain sum of money will be paid by the defaulting party as liquidated damages . . . it will be construed as agreements for performance of the respective obligations. . . ." An exhaustive note in 98 A. L. R. at page 888 is to the same effect and appears to be in accord with the weight of authority. The reasoning is based on the intention of the parties expressed in the contract, but it is also stated that before specific performance is denied it must appear affirmatively that the intention was otherwise. This is because the primary object of a sales contract is deemed to be performance.

We are in accord with the holdings and reasons set out above and when applied to the contract in this case hold with the learned Chancellor that Rogers was entitled to have specific performance.

Affirmed.

CRAIN *v.* KEENAN, ET AL.

4-9391 236 S. W. 2d 731

Opinion delivered February 19, 1951.

Rehearing denied March 19, 1951.

R. M. Priddy and *Caviness & George,* for appellant.

Scott & Goodier and *O. J. Fergeson,* for appellees.

GEORGE ROSE SMITH, J. This is a suit by J. H. Crain to enforce an oral contract by which the appellees, Dan Keenan and his son Robert, agreed to buy for Crain a farm in Yell County. According to Crain, the Keenans were to pay not more than $15,000 for the land and take title in their own names. Crain was then to pay them $4,000, plus $500 for their expenses, and the Keenans were to deed the land to Crain and take a mortgage for the rest of the purchase price, payable in five years with 6% interest. The Keenans did buy the farm, but they insist that the purchase was for their own benefit and that they then rented the land to Crain. The chancellor held that such a contract, even if made, would be

unenforceable under the statute of frauds. The complaint was therefore dismissed.

The chancellor was in error in thinking the contract to be within the statute of frauds. By its terms the statute does not apply to resulting trusts. Ark. Stats. 1947, § 38-107. Although the complaint treats the transaction as an equitable mortgage the proof establishes a resulting trust. "Where a transfer of property is made to one person and the purchase price is advanced by him as a loan to another, a resulting trust arises in favor of the latter, but the transferee can hold the property as security for the loan. . . . In the situation stated in this Section the result is the same as though the transferee first lent the amount of the purchase price to the borrower and the borrower then paid the amount so borrowed to the vendor and the conveyance was then made by the vendor to the lender." Rest., Trusts, § 448.

A more difficult question is whether the appellant's proof is sufficient to establish the trust. In dozens of cases we have held that the evidence to engraft a resulting trust upon a deed absolute in form must be clear and convincing. Rest., Trusts; Ark. Anno., § 458. But here the record is so replete with circumstances corroborative of Crain's testimony that we think his heavy burden of proof has been met.

Crain first became interested in buying the farm in November of 1948. He arranged for J. M. Barker, a banker of Atkins, to buy the land in his own name for as much as $14,000 and then transfer it to Crain for $4,000 in cash and a mortgage on the farm and on Crain's home, the debt to be payable in five years with 6% interest. It will be seen that this arrangement was quite similar to that now relied on by Crain.

Appellant testified that in December of 1948 the Keenans offered to buy the land for him on the terms that we have set out, saying that they might be able to get it a little cheaper than Barker could. Their interest in the matter apparently lay in the fact that they own a cotton gin and regarded Crain as a potential customer.

Crain then visited Barker and terminated the latter's agency to buy the land. Barker corroborates Crain both as to the original agreement and as to its termination. L. C. Hastons testified that he was present when the Crain-Keenan contract was made, and he too corroborates Crain.

There is much other testimony to support the existence of the oral agreement. Four apparently disinterested witnesses quoted Dan Keenan as having said that Crain had bought the land or that the Keenans had lent him the money to buy it. Crain took possession in January and did very extensive work in destroying Johnson grass, uprooting stumps, and otherwise preparing for cultivation. Crain estimated these expenses at $1,500, which he says he would not have spent as a mere tenant. He also paid in full for the poison used on the crops, though a tenant would have charged a fourth of the expense to his landlord.

The tenant who had farmed the land in 1948 as a tenant from year to year had not been given notice to vacate. Crain says that the Keenans paid this former tenant $300 to release the land, and Crain reimbursed them. Crain's canceled check for this $300 was introduced in evidence. After Crain took possession he leased part of the land to his son for five years, which he would hardly have done as a tenant. The son used the lease as a basis for obtaining a government loan to repay the Keenans for a tractor which they had bought for the son. Whether the Keenans knew about the five-year lease is a disputed matter, but Crain testified that they did.

In May of 1949 Dan Keenan obtained from Crain a right-of-way across part of the farm for a levee district. Keenan says that this deed was merely to protect the district against crop damage, but the instrument says nothing about crops; it purports to grant a perpetual easement across the land. Robert Keenan had been a commissioner of the district for three years and had never heard of the district's obtaining an easement from any other tenant. The Keenans admit that they them-

selves did not execute a deed to the district for the right-of-way.

This testimony is not undisputed, but it need not be. *Murchison* v. *Murchison,* 156 Ark. 403, 246 S. W. 499. Both the Keenans deny that the contract was made, and their testimony is not entirely without support. They undoubtedly exercised considerable supervision over the farm in 1949, even to the extent of directing that two small houses and a barn be taken down and that another house be constructed. They also collected some rent from a tenant, though Crain says that he was to receive credit for this collection. Even though the Keenans' conduct to some extent indicates a claim of ownership, it must be remembered that title was still in them, the execution of the oral contract having been delayed on account of certain defects in the title that had to be cured. Nor is it without significance that in this interim a change in the levee had materially increased the value of the farm. On the whole we do not think that the appellees' testimony seriously weakens the strong case made by the appellant.

There is also a dispute as to the consideration paid by the Keenans for the land. Their deed recited a payment of $12,000, and the revenue stamps were at first calculated on that basis. But the Keenans testified that they paid $14,000, and the agent for the seller corroborated their statement. They introduced a receipt showing that $14,000 was paid. We all know that deeds often do not show the true consideration, and here the appellees have satisfactorily shown that $14,000 was paid.

Reversed and remanded for further proceedings.

TRIEBSCH *v.* ATHLETIC MINING & SMELTING COMPANY.

4-9420 237 S. W. 2d 26

Opinion delivered February 19, 1951.

Rehearing denied March 19, 1951.

Gutensohn & Ragon and *Franklin Wilder,* for appellant.

Daily & Woods, for appellee.

ED. F. MCFADDIN, Justice. This is a claim by appellant against appellee for a compensation award under the Arkansas Workmen's Compensation Law (see § 81-1301, *et seq.,* Ark. Stats.).

At all times herein, appellee operated a smeltery for processing zinc ore. In the plant, two furnaces were located in each of five buildings or "blocks." Furnaces 1 and 2 were located in Block 1, which was the most westerly block. In the smeltering process the ore was heated in the furnaces in order to remove impurities; and the fumes from the heated ore escaped through condensers along the side of the furnaces. After the "cooking" was completed, the refined product was available for further processes of manufacturing. Each "block" was equipped with doors on each side and end of the building; and at times doors were opened to allow ventilation in the block and to aid the removal of smoke and gaseous fumes. Temperature and weather affected the smoke and gas conditions within each block: that is to say, these conditions were worse at night than in the daytime; they were worse in cold than in warm weather and they were worse in humid than in dry weather. The management had respirators available for the use of employees desiring them.

For about nineteen years appellant (also referred to as claimant) was employed by appellee (also referred to as employer) as a fireman of some of the said furnaces at the smelting plant. In 1944, it was discovered that claimant's breathing was impaired and the doctor diagnosed his trouble as bronchial asthma or bronchiectasis; but appellant continued to work and inhale the fumes and smoke until his collapse, shortly to be mentioned. Appellant reported for work as a fireman of the furnaces in Block 1 at 10:00 p. m. on the night of January 28, 1949, and was to work until 6:00 a. m. of January 29th. In the course of his work on that night appellant collapsed and suffered a physically disabling attack, or breakdown, so that he is now totally and permanently disabled.

Appellant's claim was filed with the Workmen's Compensation Commission on May 11, 1949, and resulted in three hearings: the first was by Commissioner Caperton at Fort Smith on June 22, 1949; the second was by Commissioner Holmes at Fort Smith on December 15,

1949; and the third hearing was before the entire Commission at Little Rock on May 23, 1950.

At the first hearing, the employer sought to defeat the claim as not having been filed within the time provided by § 14 (c) (1) and § 17 of the Workmen's Compensation Law (as found in §§ 81-1314 and 81-1317, Ark. Stats.). The Commission was correct in overruling such contention of the employer; because the evidence showed that on January 29, 1949 (the day after appellant's collapse) Mr. Dean, appellee's foreman, knew of the claimant's disability, and on February 28th told the appellant that he could not work any longer and advised him to obtain benefits under a total disability life insurance policy which appellant was carrying. Furthermore, some time later, appellant inquired of the president of the appellee company as to Workmen's Compensation benefits. In view of the foregoing, we hold that the employer had timely knowledge of the claimant's injury; and that the provisions of § 81-1317, Ark. Stats., required the overruling of the employer's motion to dismiss the claim.

Likewise, at the first hearing, the employer sought "to require claimant to amplify his claim to state whether the claim is based upon an *accidental injury* or an *occupational disease*. . . ." The Commission was correct in overruling this motion which was designed to make the claimant elect under what particular section of the Workmen's Compensation Law he was seeking to recover. We have many times held that the Workmen's Compensation Law should be broadly and liberally construed; and that doubtful cases should be resolved in favor of the claimant. See *Hunter* v. *Summerville,* 205 Ark. 463, 169 S. W. 2d 579; *Elm Springs Canning Co.* v. *Sullins,* 207 Ark. 257, 180 S. W. 2d 113; *Nolen* v. *Wortz Biscuit Co.,* 210 Ark. 446, 196 S. W. 2d 899; and *Batesville White Lime Co.* v. *Bell,* 212 Ark. 23, 205 S. W. 2d 31.[1] In the case at bar the appellant was entitled to have the facts submitted to the Commission on any provision of the Workmen's Compensation Law that would justify an award

[1] For other cases so holding, see West's Arkansas Digest, "Workmen's Compensation," Cumulative Pocket Part, §§ 51 and 52.

in his favor; and the technical motion to require him to "elect" is not within the purview of that Law.

We believe that this "election" matter was one of the major factors which caused the Commission to fail to make an award for the claimant. That the Commission at all times was thinking in terms of *occupational disease* — rather than *accidental injury* — is clearly apparent:

(1) At the first hearing before Commissioner Caperton, we find this in the record:

"BY COMM'R. CAPERTON:

"Q. I am going to ask a question and I don't want any objections to it because I am asking it for a purpose. Do you know, in the 19 years of your employment at the Athletic Mining and Smelting Company of any person that has suffered or has a disability as a result of breathing any of the ingredients at the smelter?

"A. No. I couldn't say as I do."

(2) Again, when a witness, who was also a fellow workman with the claimant, was testifying at the first hearing, we find this in the record:

"BY COMM'R. CAPERTON:

"Q. Do you work pretty close to Mr. Triebsch?

"A. Yes sir.

"Q. Have you had any trouble breathing fumes out there?

"A. No sir."

(3) After the conclusion of the first hearing, and at the suggestion of Dr. Cull [2] and the Commission, ten fellow employees of the claimant were examined to see whether any of them suffered from symptoms of an oc-

[2] Near the conclusion of the first hearing, the Commissioner said, as regards an examination of the claimant:

"I am not going to order it now. I want to talk to Dr. Cull and I want to find out if he is really qualified to make such an examination."

cupational disease. Likewise the University of Arkansas was requested and did make a report on fume conditions at the employer's plant.

(4) A great variety of medical and other expert evidence was thus accumulated and heard on the matter of *occupational diseases*. All sorts of hypothetical diseases were discussed in the hearings. At least eight doctors were consulted in one way or another; and the Commission's fifteen page opinion of August 25, 1950, contains statements like this:

". . . According to Mr. Robertson's testimony he had been employed as a fireman at the respondent's plant for thirty (30) years, and had worked close to the claimant during the past several years. It was also the testimony of Mr. Robertson that he had no breathing trouble. . . ."

(5) Furthermore, Dr. Cull's various reports are quoted in the opinion of the Commission, and from these reports we notice the following excerpts:

"All in all, I can find nothing in these reports of Dr. Martin as to history and findings which one would not expect to find in a group of workmen engaged in similar occupations and in which no dust, gas or fume hazards are involved, and in which men work under conditions in which they are subjected to similar changes of temperature, drafts, etc., as, for instance, would be the case in the semi-open sheds used in many manufacturing industries.

. . . . .

"As a result of all these ailments, I regard Mr. Triebsch as totally and permanently disabled, but do not feel that any of these ailments has resulted from his occupation or the nature of his employment."

We have dwelt on the *occupational* phase in this case in considerable detail, because the Commission, on its own initiative, spent several months on the question of *occupational* conditions, and we are convinced that the trend of the hearing caused the Commission to base its

opinion on that point. There is substantial evidence to support the Commission's finding that the claimant in this case is not suffering from an *occupational disease;* and the Commission's findings on that phase of the case is final. See *Lundell* v. *Walker,* 204 Ark. 871, 165 S. W. 2d 600; *J. L. Williams & Sons, Inc.* v. *Smith,* 205 Ark. 604, 170 S. W. 2d 82; and *Tinsman Manufacturing Co.* v. *Sparks,* 211 Ark. 554, 201 S. W. 2d 573.[3]

But on the *accidental injury* phase of the case, the uncontradicted evidence shows that the claimant suffered an *accidental injury* within the purview of our cases, such as: *Herron Lumber Co.* v. *Neal,* 205 Ark. 1093, 172 S. W. 2d 252; *McGregor* v. *Arrington,* 206 Ark. 921, 175 S. W. 2d 210; *Harding Glass Co.* v. *Albertson,* 208 Ark. 866, 187 S. W. 2d 961; *Sturgis Brothers* v. *Mays,* 208 Ark. 1017, 188 S. W. 2d 629; *Murch-Jarvis Co.* v. *Townsend,* 209 Ark. 956, 193 S. W. 2d 310; and *Batesville White Lime Co.* v. *Bell,* 212 Ark. 23, 205 S. W. 2d 31.

In *Herron Lumber Co.* v. *Neal (supra),* the worker had a gastric ulcer which ruptured while he was performing a task that required extra energy. We held that the worker suffered an *accidental injury* within the purview of the Workmen's Compensation Law, and quoted from 71 C. J. 607:

" 'Injury from strain or over-exertion due to a physical condition predisposing the employee to injury is an injury within the terms of the various workmen's compensation acts. . . .' "

In *McGregor* v. *Arrington (supra),* the worker was a carpenter. He had an impaired heart, and, in trying to move a plank, he overexerted himself and suffered a collapse and died. We allowed compensation, saying that the decedent's death resulted from an accidental injury arising out of and in the course of his employment.

In *Harding Glass Co.* v. *Albertson (supra),* the worker also had an impaired heart; and while at work

[3] For other cases so holding, see West's Arkansas Digest, "Workmen's Compensation," Cumulative Pocket Part, § 1939.

suffered a heat prostration and died. In allowing compensation, we quoted from Schneider on Workmen's Compensation Text, Vol. 4, § 1328, p. 543:

" 'It may be stated generally that if the conditions of the employment, whether due to over-exertion, excessive heat, excessive inhalation of dust and fumes, shock, excitement, nervous strain or trauma, tend to increase an employee's blood pressure sufficiently to cause a cerebral hemorrhage, such result constitutes a compensable accident within the intent of most compensation acts, though the employee may have been suffering from a pre-existing diseased condition which predisposed him to such result, or where such result would have occurred in time due to the natural progress of such pre-existing condition. . . . The majority of the American courts follow the English rule as set out in the case of *Clover, Clayton & Co.* v. *Hughes* (1910), A. C. 242: "An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or condition of health." ' "

In *Sturgis Brothers* v. *Mays (supra),* the worker, in the course of his employment, overtaxed his previously weakened heart and died. In allowing compensation, we quoted a leading case:

" 'Nor is it a defense that the workman had some predisposing physical weakness but for which he would not have broken down. If the employment was the cause of the collapse, in the sense that but for the work he was doing it would not have occurred when it did, the injury arises out of the employment.' "

In *Murch-Jarvis Co.* v. *Townsend (supra),* the worker became disabled from inhaling fumes and dust in the course of his work in a smelter room. We held such disability to be "an accidental injury within the meaning of our Workmen's Compensation Law," saying:

"There are numerous cases from other jurisdictions holding that a disease, or an aggravation thereof, resulting from inhalation of dust particles or fumes may con-

stitute an accident, or injury, within the meaning of the particular act involved."

In *Batesville White Lime Co.* v. *Bell (supra),* the inhalation of dust particles caused heart trouble. We held such to be an accidental injury, saying:

"Now there is nothing in the proof in this case to justify a conclusion that the injury to appellee's heart by breathing the excessive amount of dust was one which appellee might have reasonably expected or anticipated. Certainly it was accidental as far as he was concerned; and there is much authority for a holding that an injury, not necessarily the result of one impact alone, but caused by a continuation of irritation upon some part of the body by foreign substances may properly be said to be accidental."

With the cases above mentioned having established a rule of decision, we apply such to the facts in the case at bar, which facts we now examine:

(a) It is undisputed that in 1944 the claimant was advised by his doctor that he was suffering from bronchitis, bronchiectasis, bronchial asthma, or some such respiratory ailment, which, regardless of name, made it difficult for the claimant to breathe; and it is also undisputed that this impaired breathing continued to trouble him at all times until his collapse. So we have a pre-existing ailment of some kind shown by undisputed evidence.

(b) Furthermore, it is undisputed that there was an increased work load on the night in question with increased smoke and fumes. We quote from appellant's testimony which is entirely undisputed on this point:

"Q. When you reported to work that evening were there orders for a heavier output that night?

"A. Yes sir.

"Q. Explain the orders.

"A. There were orders from the man I relieved that they wanted more metal.

. . . . .

"Q. In other words, they wanted a heavier[4] output that night?

. . . . .

"A. Yes sir.

. . . . .

"Q. You had to put more gas into the furnaces to get more metal?

"A. Yes sir.

"Q. By doing that, what did it do with reference to creating more smoke and fumes?

"A. It materially created more smoke and fumes.

. . . . . .

"Q. Was there any heavy concentration of smoke or fumes and oxide in this Block No. 1?

"A. It was pretty heavy that night.

"Q. Was it noticeably so?

"A. Yes sir."

There were also introduced the United States Weather Bureau reports from the station in Fort Smith, located about three-quarters of a mile from the appellee's plant, and without any natural or artificial barriers between the two places. The temperature readings were from a high of 18 degrees Fahrenheit at 10:00 p. m. the night

[4] At the second hearing held on December 15, 1949, another worker testified as to the work load on the night in question:

"Q. Well, did they start a new process?—Out there at that plant?

"A. Well, along about that time, to the best of my knowledge, they did.

"Q. What time was that?

"A. Along in the latter part of January.

"Q. Of what year?

"A. Of 1949.

"Q. All right, now. We've got that date fixed, and you say the best of your recollection is that they did start a new process?

"A. Yes, sir.

"Q. Do you know what this process consisted of?

"A. Well, it increased the work load.

"Q. And just state whether or not it did cause more dust and smoke in there, or not.

"A. It did."

of January 28th, to a low of 14 degrees Fahrenheit at 6:00 a. m. the morning of January 29th.

(c) Finally, it is also undisputed that the appellant collapsed in the course of his work on the night in question and under the circumstances and conditions previously mentioned. He testified:

"Q. When did you first notice the severity of your condition that night?

"A. It was along close to midnight.

"Q. Was there any particular activity going on at that time?

"A. Yes sir, the metal drawers.

"Q. In other words, you say when the metal drawing is going on, it discharges more smoke, and about that time is when you first noticed the severity of your condition that night?

"A. Yes sir.

"Q. Now, go ahead and state whether or not that condition got better or worse.

"A. It just kept getting a little worse, and along about 2:00 o'clock, I was practically done.

"Q. What do you mean by 'practically done'?

"A. I got to where I couldn't hardly go any more.

. . . . . .

"A. Well, some time during the night I was choking so bad, I passed out—how long, I don't know—and then come back."

Therefore, to summarize: we have in the case at bar undisputed facts which are similar in essential respects to those which existed in the six cases hereinbefore discussed, in each of which compensation was awarded. These facts are: a pre-existing ailment, an increased and overtaxing effort to accomplish the work load under the conditions existing, and a collapsed worker resulting therefrom. These make a case of *accidental*

injury within the purview of the Workmen's Compensation Law.

We hold that the Commission erred in failing to make an award because of the accidental injury suffered by claimant. Therefore the judgment of the Circuit Court is reversed and the cause is remanded, with directions that the Circuit Court remand the claim to the Workmen's Compensation Commission, with directions to make an award for the claimant in accordance with this opinion.

Mr. Justice HOLT not participating.

GEORGE ROSE SMITH, J., dissenting. If it were our duty to view the evidence in the light most favorable to the claimant I should agree with the majority opinion. But we are required to sustain the Commission's findings if supported by substantial evidence, and I do not see how it can be said that this record lacks such evidence.

The notion that the Commission tested the case on the basis of an occupational disease alone is untenable. The Act contains an exclusive list of occupational diseases; no other disease may be so classified unless the Commission amends the list. Ark. Stats. 1947, §§ 81-1314 and 81-1343 (11). The appellant's principal malady is nephritis, a serious kidney disease. He also suffers from bronchitis or bronchial asthma. Since none of these diseases is classified as an occupational disease it seems to me to be beside the point to suppose that the Commission denied the claim solely because no occupational disease existed. That was not even an issue in the case.

On the issue of accidental injury there is much evidence that is ignored by the majority. On this point the Commission stated in its opinion: "There is no evidence of any accidental injury or other unusual happenings or events during the claimant's last working day or in fact any other working days during his entire employment." The so-called "collapse" referred to by the majority appears to have occurred after Triebsch went home. Triebsch testified that he worked the entire shift on the night in question.

The culmination of appellant's illness on January 28 was by no means sudden or unexpected. He himself testified that for eighteen months his work had been too difficult for him. He often had to go outside and rest, while a fellow employee took his place. Other employees testified to the same effect, readily admitting that over this long period of time they had to help Triebsch with his work. As was inevitable, the appellant's kidney disease finally reached the point of totally disabling him.

It is not unusual for men to become disabled as a result of old age or disease; it happens to almost every one. But such a case is not compensable unless the employee's condition is aggravated by some accident occurring in the course of his employment. There is convincing medical testimony to the effect that nothing in the conditions at the smelter had any aggravating effect upon the claimant's maladies. Triebsch was a sick man and no doubt should not have worked at all during the last eighteen months. But there is substantial evidence to show that any labor at all would have brought on his disability. This being true, the disability is not compensable merely because the inevitable at last occurred, without the intervention of an accident. At least there was positive evidence to that effect, and I do not feel authorized to substitute my judgment for that of the Commission.

GRIFFIN SMITH, C.J., joins in this dissent.

ROBINSON *v.* MISSOURI PACIFIC TRANSPORTATION COMPANY.

4-9361 236 S. W. 2d 575

Opinion delivered February 19, 1951.

O. D. Longstreth, Jr., Joseph Brooks and *Dave Witt,* for appellant.

William J. Smith, Pat Mehaffy and *Henry Donham,* for appellee.

MINOR W. MILLWEE, Justice. Plaintiff, David E. Robinson, and six other former employees of defendant, Missouri Pacific Transportation Co., brought separate actions in the Clark Circuit Court against the company and two of its employees, John F. Rea and T. T. Allen.

According to the allegations of the complaints some of the plaintiffs are residents of Pulaski County while others reside in Jackson and Van Buren Counties. Each complaint alleges: "The defendant, Missouri Pacific Transportation Company, is a corporation organized under the laws of the State of Delaware, authorized to do business in the State of Arkansas, and having a branch office and place of business in Clark County, Arkansas.

The defendant, John F. Rea, is a citizen and resident of Pulaski County, Arkansas, and is employed by the Missouri Pacific Transportation Company as District Supervisor in charge of a district including all of the State of Arkansas. The defendant, T. T. Allen, is a citizen and resident of Desha County, Arkansas, and is employed by the Missouri Pacific Transportation Company as a Division Supervisor, subordinate to the defendant Rea. The Missouri Pacific Transportation Company is engaged in the business of operating a line of motor buses throughout the State of Arkansas, and in all the transactions hereinafter set forth it acted by and through its agent and employees, John F. Rea and T. T. Allen, who were duly authorized by it and acting within the scope of their employment.''

It was further alleged that each plaintiff had been formerly employed by the transportation company as a motor coach operator under a contract between the company and the Brotherhood of Railway Trainmen, which provided that no employee might be dismissed without a fair and impartial hearing; that about March, 1947, the company, through its employees, Rea and Allen, unlawfully and maliciously conspired with the vice-president and general manager of the company and the operators of a private detective agency to bring about plaintiff's discharge by manufacturing false testimony and lodging false charges of breach of trust in failing to account for fares collected by plaintiff; that as a result of said conspiracy a hearing was held at Little Rock, Arkansas, before defendant, John F. Rea, on such false and manufactured testimony resulting in plaintiff's wrongful discharge; that plaintiff was thereby deprived of his employment and his present and future earning capacity; and that the good name and reputation which he formerly enjoyed were thereby defamed, resulting in great shame, humiliation and mental anguish. Each plaintiff prayed judgment for $70,000, actual damages, and $10,000, punitive damages.

The record reflects that a summons, issued to the sheriff of Clark County, was served upon the defendant

transportation company by delivering a copy to Grant R. Allen, agent in charge of said company. Defendant, John F. Rea, was served with summons in Pulaski County and defendant, T. T. Allen, was served in Desha County.

After the cases were removed to U. S. District Court and remanded to the Clark Circuit Court, the defendants filed in each of the cases a motion to quash service of process. Each motion alleged, *inter alia,* that the cause of action did not arise in Clark County; that plaintiff was not a resident of Clark County; that the circuit court of Clark County was without venue of the action; and that the process issued out of said court and served upon each of the defendants was invalid.

Each plaintiff filed a response to the motion admitting that he was not a resident of Clark County; that the transportation company was a Delaware corporation with an authorized Arkansas agent for service who had not been served with process in the action. The cases were consolidated for the purpose of a hearing on said motions resulting in separate orders which recite: "That the motion of the defendants to dismiss for improper venue should be and the same is hereby sustained and the cause of action is hereby dismissed for want of proper venue." Although each order also recites the filing and overruling of a motion for new trial, it was conceded in the oral argument that no written motion for new trial was filed and that no testimony was heard on the motions to quash service.

A motion has been made by defendants to dismiss the appeal for non-compliance with our Rule 9 because plaintiffs' abstract of the record is deficient in several alleged particulars. In this connection it should first be noted that the motions to quash were sustained and the cases dismissed solely on the ground of improper venue. The validity of this holding is the only point raised by plaintiffs on this appeal. It is true that there are certain allegations in the motions to quash, and the responses thereto, pertaining to jurisdiction and other matters which do not bear directly on the issue of venue. We

have held that where only one point is raised on appeal, an abstract of the record on that point alone is a sufficient compliance with the rule. *St. L. I. M. & S. R. Co.* v. *Craft,* 115 Ark. 483, 171 S. W. 1185, L. R. A. 1916C, 817. While plaintiffs' abstract is not as complete as it might be, we deem it sufficient to cover the point raised and hold that the motion to dismiss should be denied.

In the absence of a motion for new trial, we will only consider errors apparent from the record itself. *Burns* v. *Harrington,* 162 Ark. 162, 257 S. W. 729; *Stone* v. *Bowling,* 191 Ark. 671, 87 S. W. 2d 49. It is apparent from the record that none of the parties to the instant suits are residents of Clark County and that service of process was obtained upon the agent in charge of the transportation company's office in Clark County.

Defendants contend that venue in the several actions is controlled by either Ark. Stats., § 27-610 or § 27-612, or both, while plaintiffs insist that the actions are maintainable in Clark County under § 27-613. These statutes read: "(27-610) All actions for damages for personal injury or death by wrongful act shall be brought in the county where the accident occurred which caused the injury or death or in the county where the person injured or killed resided at the time of injury, and provided further that in all such actions service of summons may be had upon any party to such action, in addition to other methods now provided by law, by service of summons upon any agent who is a regular employee of such party, and on duty at the time of such service. (Acts 1939, No. 314, § 1, p. 769).

"(27-612) All civil actions for the recovery of damages brought against a non-resident of the State of Arkansas may be commenced in the county where the accident occurred which caused the injury, or death, or in the county where the person injured, or killed, resided at the time of the injury. Service of process may be had in any county of the State where the defendant, or any of them, may be found. (Acts 1947, No. 347, § 1, p. 778.)

"(27-613) Every other action may be brought in any county in which the defendant, or one of several defend-

ants, resides, or is summoned. (Civil Code, § 96; C. & M. Dig., § 1176; Pope's Dig., § 1398.)"

In determining the applicability of § 27-610, *supra,* this court has distinguished between actions for physical injuries to the body and those involving injuries resulting from malicious prosecution, libel and other actions for defamation of character in general. In *Coca-Cola Bottling Co.* v. *Kincannon, Judge,* 202 Ark. 235, 150 S. W. 2d 193, 134 A. L. R. 747, the complaint alleged that, by reason of drinking a portion of the contents of a bottle of Coca-Cola which contained a deleterious substance, the plaintiff had suffered certain physical injuries to her body described in the complaint. The court held that the action was one for personal injuries within the meaning of the statute, saying: "It is to such injuries, that is, personal injuries, to which the act relates, and not such actions as malicious prosecution, etc., which are not ordinarily understood to be personal injuries." See, also, *Coca-Cola Bottling Co.* v. *McNeece,* 191 Ark. 609, 87 S. W. 2d 38.

In *Baker* v. *Fraser,* 209 Ark. 932, 193 S. W. 2d 131, we held that a civil action for libel was not localized by § 27-610 and in reference thereto said: "Act 314 of 1939 refers only to venue in 'actions for damages for personal injury or death by wrongful act,' and therefore does not concern or localize actions for libel. Furthermore, since libel is not a localized action, Act 21 of 1941 does not apply. We conclude that we have no statute in Arkansas that localizes a civil action for libel, and venue should be determined by general principles." In that case we also approved the following rule stated in 37 C. J. 19; "Actions for defamation are generally considered as transitory, and may be brought in any jurisdiction or county in which the defendant may be found."

Our holding in the Baker case seems to be in line with the rule followed generally in other jurisdictions, which is stated in 56 Am. Jur., Venue, § 15, as follows: "Many of the statutes governing the venue or place of trial of tort actions variously require that actions for injury to the person or personal injury actions be

brought in the county of the residence of either the defendant or the plaintiff, when the defendant can be found and served with process in the latter county, or in the county where the cause of action arose or the injury occurred. A personal injury or injury to the person as these terms are used in the venue statutes is generally construed not to include every invasion of a personal right, such terms being usually limited to physical or bodily injuries. Such statutes properly construed determine the venue of an action for injuries resulting in death, in the absence of any special venue provision applicable to death actions, and likewise have been held to govern the venue of an action for illness resulting from the defendant's wrongful act. However, actions for alienation of affections and actions for defamation of character generally are deemed not to come within the meaning of statutory provisions governing the venue of actions for personal injuries or injuries to the person." See, also, *Ark. Life Ins. Co.* v. *Am. Nat. Ins. Co.,* 110 Ark. 130, 161 S. W. 136; Anno. 134 A. L. R. 754. Each of the instant actions is for an alleged conspiracy to cause the wrongful discharge of plaintiffs, which is transitory and falls within the general class of actions for defamation of character. We conclude that such action is not for a personal injury within the meaning of § 27-610 and, therefore, not localized by that statute.

Defendants also insist that if § 27-610 is not applicable, then § 27-612 should be held to govern. Our attention is directed to the fact that the Baker case, *supra,* was decided prior to the enactment of § 27-612, which is § 1 of Act 347 of 1947. It is insisted that the latter statute was passed in view of the construction which we placed on § 27-610 in the Baker case. The greater portion of Act 347 of 1947 is devoted to the matter of jurisdiction over non-residents with particular emphasis upon foreign corporations unauthorized to do business in this state. While § 1 of the Act (§ 27-612) purports to fix the venue of actions against non-residents in "all civil actions for the recovery of damages," it is noted that the venue specified is either the county "where the accident occurred which caused the injury, or death," or

the county "where the person injured, or killed, resided at the time of the injury." Thus the act is practically identical in its terms and meaning with the provisions of § 27-610 except that it is made specifically applicable to non-residents and the language is permissive while the language of § 27-610 is made restrictive by the use of the word "shall." If the Legislature intended to make § 27-612 applicable to the type of action involved here, it failed to do so because it limited the counties specified for venue to those connected with personal injury or death. As we construe the statute, it did not localize, or change the venue law relative to, the instant actions.

We conclude that plaintiffs are correct in their contention that the present actions fall within the general provisions of § 27-613, *supra,* under which venue may be laid in any county where one of the defendants is summoned. The record reflects that service was had upon an agent in charge of the defendant transportation company's place of business in Clark County. This type of service has been upheld in many cases. *Meeks* v. *Waggoner,* 191 Ark. 189, 85 S. W. 2d 711; *Missouri Pacific Transportation Co.* v. *Pipkin, Judge,* 199 Ark. 339, 133 S. W. 2d 851. In the Meeks case this court noted the force and justice of petitioners' complaint that they would be forced to trial in a county where none of the parties or witnesses resided, and where the cause of action did not arise, but said: "The Legislature, however, prescribes the venue of actions and the manner of serving summons upon defendants, and with the wisdom of its action in such matters the courts have nothing to do."

The judgments are reversed, and the causes remanded with directions to overrule the motions to quash service.

CARRIGAN *v.* CARRIGAN.

4-9379 236 S. W. 2d 579

Opinion delivered February 19, 1951.

Mallory & Rasmussen, for appellant.

Hebert & Dobbs, for appellee.

ED. F. MCFADDIN, Justice. This appeal stems from the efforts of the appellant, Iverna Carrigan, to collect from her former husband, Walter Isaac Carrigan, her judgment for unpaid alimony. The question now to be decided is whether the decree of the Garland Chancery Court in appellant's prior suit (No. 16,125) was *res judicata* in appellant's present suit (No. 25,534) in the same Court.

In August, 1941, the Garland Chancery Court granted Iverna Carrigan a divorce from Walter Isaac Carrigan; and in the decree he agreed, and the Court directed him, to make semi-monthly payments of alimony. Shortly after the decree, Walter Isaac Carrigan married his present wife, Ruby Carrigan, and allowed his alimony payments to appellant to become, and remain, in arrears. In February, 1949, Iverna Carrigan filed against Walter Isaac Carrigan her petition (in Case No. 16,125) in the Garland Chancery Court, seeking, *inter alia,* (a) judgment for back alimony in the sum of $13,884, and interest; and (b) "an order sequestering[1] the property of the defendant, Walter Isaac Carrigan, until he shall comply with the orders of this Court, . . .".

There was a trial in Case No. 16,125: eight witnesses testified, and the transcribed testimony and exhibits contained 79 pages. On April 20, 1949, a decree was rendered in favor of Iverna Carrigan for $16,014.66 back alimony. The decree also stated:

". . . That the evidence fails to show that the defendant, Walter Isaac Carrigan, is the owner of any property, real or personal; that there is insufficient evidence to establish a basis for ordering a writ of sequestration. . . .

". . . that the prayer of plaintiff's petition for an order sequestering the property of the defendant until he shall comply with the orders of this Court be, and the same is hereby, denied . . ."

Thereafter, when execution, issued on the $16,014.66 judgment was returned *nulla bona,* Iverna Carrigan instituted, on October 4, 1949, in the Garland Chancery Court, the present suit, No. 25,534, against Walter Isaac Carrigan and Ruby Carrigan. The petition alleged, *inter alia,* that Walter Isaac Carrigan was in truth and in fact the owner of the Shamrock Liquor Store which was fraudulently in the name of his present wife, Ruby Car-

[1] Sec. 34-1212, Ark. Stats., provides for such sequestration; since it reads:

"Courts of equity may enforce . . . decrees or orders for alimony . . . by sequestration of the defendant's property, . . ."

rigan, in order to prevent Iverna Carrigan from collecting her judgment; and prayed, *inter alia,* that defendants be required "to divulge to the Court and to the plaintiff the true ownership of said business, namely, Shamrock Liquor Store, . . . and any other assets, real or personal, in which the defendant, Walter Isaac Carrigan, had an interest or may have an interest, . . ."

In resisting Case No. 25,534, the defendants claimed that Ruby Carrigan was the real owner of the Shamrock Liquor Store, and stated in their answer:

". . . That in said cause number 16,125 in the Garland Chancery Court of Arkansas the plaintiff herein sought an order of sequestration of the property of the defendant, Walter Isaac Carrigan, and that in such cause said defendant, Walter Isaac Carrigan, fully divulged to this court and to the plaintiff herein, the true ownership of said business, namely Shamrock Liquor Store. . . . The defendants further state that the plaintiff is not entitled to any relief . . . in that both defendants herein have, in the said cause 16,125 in Garland Chancery Court, heretofore fully revealed and divulged to this court all of their respective assets . . ."

At the trial of Case No. 25,534 the plaintiff introduced the judgment and some of the pleadings in Case No. 16,125, and consented that the defendants might introduce all the other pleadings. Then the defendants sought to introduce all of the *transcribed testimony and exhibits* in Case No. 16,125, offering as a reason for such introduction:

"In this proceeding" it is asked "that the defendants be required to divulge to the court and to the plaintiff true ownership of the business, namely, Shamrock Liquor Store. In the cause in which the transcript was made, there was a prayer for sequestration of the property of the defendant, Walter Isaac Carrigan, and to show cause why he had not paid alimony. Thus the issues in that cause and this cause are the same and identical insofar as showing or divulging what property the defendant, Walter Isaac Carrigan, owned, . . ."

Over the objection of Iverna Carrigan the trial court admitted into evidence all the said testimony and exhibits in Case No. 16,125; and in the final decree in Case No. 25,534 (the present case) the Chancery Court denied plaintiff's petition, saying:

"That the issue herein of whether the defendant, Walter Isaac Carrigan, was on the 20th day of April, 1949, and prior thereto, the owner of any property located in Garland County, Arkansas, or the owner of the Shamrock Liquor Store . . . was an issue in the hearing in which the decree rendered in Chancery Action No. 16,125, wherein the plaintiff in this cause was plaintiff and the defendant in this cause, Walter Isaac Carrigan, was defendant and prayer for sequestration of said defendant's property was made."

The net effect of the decree of the Chancery Court in this Case No. 25,534 was to deny Iverna Carrigan's petition on the basis that the decree in Case No. 16,125 was *res judicata* of the issues in Case No. 25,534. The ruling on *res judicata* is determinative of Iverna Carrigan's present appeal. In *Mo. Pac. Rd. Co.* v. *McGuire,* 205 Ark. 658, 169 S. W. 2d 872, and again in *Shatford* v. *Shatford,* 214 Ark. 612, 217 S. W. 2d 917, we stated the rule of *res judicata* from 30 Am. Jur. 908:

" '. . . the doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.' " See, also, 34 C. J. 742.

The defendants' pleadings in Case No. 25,534, as previously copied, sufficiently pleaded *res judicata.* (See *Bolton* v. *Mo. Pac. Rd. Co.,* 148 Ark. 319, 229 S. W. 1025; see, also, 30 Am. Jur. 990; and Freeman on "Judgments", 5th Ed., § 804.) Under the plea of *res judicata,* it was proper for the Court to examine the evidence offered in Case No. 16,125 to see whether the matters presented in Case No. 25,534 had been decided in the

former case. In *McCombs* v. *Wall,* 66 Ark. 336, 50 S. W. 876, Mr. Justice BATTLE quoted, with approval, this language from *Russell* v. *Place,* 94 U. S. 606, 24 L. Ed. 214.

" 'It is undoubtedly settled law that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties. But to give this operation to the judgment it must appear either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered,—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.' "

An examination of the evidence offered in Case No. 16,125 clearly discloses that the same question presented in the Case No. 25,534—*i. e.,* Walter Isaac Carrigan's ownership of the Shamrock Liquor Store—was the point at issue to which the evidence was directed, and was the matter definitely decided, in the Case No. 16,125. Likewise, the nature of the proceeding instituted by Iverna Carrigan in Case No. 16,125 is sufficiently similar to the nature of the proceeding in Case No. 25,534, so as to make applicable the rule of *res judicata.*

It cannot be successfully urged that the plea of *res judicata* should be denied, on the ground that Ruby Carrigan was not a *party* to Case No. 16,125. She was the wife of Walter Isaac Carrigan and was present and testified in the trial of Case No. 16,125; in fact, she was the witness whose testimony consumed a large part of the record in that case. In *Collum* v. *Hervey,* 176 Ark. 714,

3 S. W. 2d 993, we held that the rule of *res judicata* applied to a wife who was not a party to the former litigation, but who necessarily knew of it, and whose rights were directly affected by it. In *Hill* v. *Village Creek Dist.*, 215 Ark. 1, 219 S. W. 2d 635, the rule of *res judicata* was applied to a brother who testified, and assisted his sister, who was a party in the former suit. The rationale of these cases is applicable here. In 30 Am. Jur. 960, in discussing what persons are bound by previous litigation, even though not formal parties of record, the holdings of the cases are summarized in this language:

"The strict rule that a judgment is operative, under the doctrine of *res judicata,* only in regard to parties and privies is sometimes expanded to include as parties, or privies, a person who is not technically a party to a judgment, or in privity with him, but who is, nevertheless, connected with it by his interest in the prior litigation and by his right to participate therein, at least where such right is actively exercised by the employment of counsel, control of the defense, filing of an answer, payment of expenses or costs of the action, or doing of such other acts as are generally done by parties." See, also, Freeman on "Judgments" (5th Ed.) § 432, *et seq.*

Neither can appellant successfully say that Case No. 25,534 should be considered as a petition to set aside the decree in Case No. 16,125 on the ground of newly discovered evidence; because there is no showing that would take the case at bar out of the holding in the case of *Papa* v. *Jackson,* 188 Ark. 1167, 67 S. W. 2d 187.

The decree is affirmed.

4-9505 236 S. W. 2d 582

Opinion delivered February 19, 1951.

[redacted]

Robert E. Diles and *Clayton Freeman,* for petitioner.

Ike Murry, Attorney General, and *Cleveland Holland,* Assistant Attorney General, for respondent.

PER CURIAM.

Respondents are the Board of Apportionment created by Amendment No. 23 to the Constitution, Sec. 1. The question is whether, under Sec. 4 of the Amendment, a reapportionment should have been made on or before February 1. Section 5 authorizes mandamus where the Board has failed to perform its duties. The response was to a petition by Carpenter in which it was alleged that the Federal census had been completed and that the Board had failed to act.

In extenuation the Board says that when it met January 26th, 1951, official census figures by counties were not available. Attached to the response is a telegram from Roy V. Peel, Director of the Census, who says that the official statistics should be available early in March, that the preliminary figures are at hand, and that ordinarily the difference between preliminary and final counts is slight.

With this information at hand the Board adjourned until it could obtain the official figures. In oral presentation counsel for the petitioner said that he did not ques-

tion accuracy of the Director's telegram, but did insist that the Board proceed on the basis of unofficial enumeration, subject to final verification, correction to be made if changes should be required by the final count.

There is no constitutional warrant for this procedure. No doubt those who wrote Amendment 23 and the people in adopting it thought that final census figures would be available not later than February 1. But it will not be presumed that the intention was to require the Board to act when the official data upon which its apportionment rested could not be procured. The Amendment makes no provision for a temporary setup and none seems to have been impliedly contemplated. The principle thought by the respondents to be applicable was discussed in *Childers* v. *Duvall,* 69 Ark. 336, 63 S. W. 802. It was there held that until the Director, by bulletin or otherwise, published results of the census, no official notice could be taken of a county's population.

The petition for mandamus is dismissed, but without prejudice.

GULF INSURANCE COMPANY *v.* HOLLAND CONSTRUCTION COMPANY.

4-9383 236 S. W. 2d 1003

Opinion delivered February 19, 1951.

Rehearing denied March 26, 1951.

Carter & Gallagher and *Pickins, Pickins & Ponder,* for appellant.

Kaneaster Hodges, for appellee.

PAUL WARD, J. In the lower court appellee, Holland Construction Company, was the plaintiff and brought suit to recover on an insurance policy to compensate it for damages caused to a ditching machine. The Gulf Insurance Company, the insurer, and the appellant here, defended principally on three grounds: First, that the policy provided that notice of any damage must be given immediately; second, that the policy provided the assured shall within sixty days after the damage make a written statement showing among other things the value of each article damaged; and third, that the policy provided that the suit must be brought within twelve months from the date of damage. Appellant takes the position that none of these provisions of the policy was complied with.

On February 3, 1946, the Gulf Insurance Company of Dallas, Texas, through its agent, R. H. Siegfried Company of Tulsa, Oklahoma, issued its policy to the Holland Construction Company, at that time located in Tulsa, Oklahoma, covering damage to assured's property—the policy to remain in effect for one year. On January 10, 1947, appellee's ditching machine was damaged in Jefferson County by falling through a bridge while it was being transported along the highway by the

Gregory Heavy Hauling Company under contract to do so with appellee. The damage amounted to $2,060 which amount is not questioned. Soon thereafter the Gregory Company sued appellee in Pulaski County for its hauling fee, and in this suit appellee by cross-complaint sought judgment against the Gregory Company for the damage to its machine. About the time the Pulaski County suit was filed in July, 1948, appellee wrote to appellant informing it of the suit and the cross-complaint, and requested appellant to take over, but appellant did not see fit to do so. The Pulaski County suit was tried about eight months later and resulted in a judgment for the Gregory Company on its complaint and appellee recovered nothing on its cross-complaint. The Gulf Insurance Company refused to accept liability under its policy and the Holland Construction Company filed this suit against it in the Jackson County Circuit Court on January 1, 1950, asking for judgment in the amount of $2,060 together with penalty and attorney fees. The trial there resulted in a judgment for appellee from which appellant appeals to this court.

The applicable provisions of the policy referred to above are set out below:

"The assured shall report to the company or to an agent of the company, every loss or damage which may become a claim under this policy, immediately when such loss or damage comes to his knowledge."

"Within sixty (60) days after loss or damage the Assured shall make written statement to the Company, signed and sworn to by him stating the place, time and cause of loss or damage, the interest of the Assured and all others in the property, cost price of each article lost or damaged, from whom purchased or obtained, the value at time of loss, the amount of loss or damage claimed, the total amount of insurance carried on the property covered by this policy, the total value of all property covered by this policy on the date the loss occurred, and the value of the property in the specific location where the loss occurred. The Assured shall if required, exhibit damaged property, submit to an examination under oath,

and produce bills or certified copies thereof if originals be lost covering the property lost or damaged. Failure by the Assured either to report the said loss or damage or to file such complete proof of loss as above provided, shall invalidate any claim under the policy."

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity unless the assured shall have fully complied with all the requirements of this policy, nor unless commenced within twelve months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the State Wherein this policy is issued, then in that event no suit or action under this policy, shall be sustainable unless commenced within the shortest limitation permitted under the laws of such state."

Answering the above mentioned three defenses in order, appellee contends that notice was promptly given to appellant's agent in Oklahoma; that appellant through its agent in Oklahoma waived by its actions and custom a strict compliance with the sixty days provision, and that the period in which to bring suit is governed by the laws of Arkansas and also that this provision was likewise waived. Since these issues involve questions of fact and since we are upholding the judgment of the lower court it becomes necessary to set out only sufficient testimony to sustain the findings of the jury.

The testimony shows this suit was filed nearly four years after the policy sued on was issued by appellant's agent, the Siegfried Company, in Tulsa, Oklahoma; that no written statement was filed in sixty days by appellee as specified by the policy; that appellee's machine was damaged to the extent of $2,060 on January 10, 1947, and covered by the policy issued by appellant and counter-signed and delivered by its agent in Tulsa.

Appellee's testimony is to the effect that it had been doing business with appellant through its said Oklahoma agent for many years and had had some prior claims which had been handled just like this one. On this oc-

casion H. T. Holland, Jr. called a member of the Oklahoma Agency and gave notice of the damage a few days after it happened and was informed the matter would be handled in the usual way; and the agent put the matter in a suspense file because they were awaiting the outcome of the trial in Pulaski County to see if the Gregory Heavy Hauling Company would pay the damage. The Oklahoma Agency in handling similar claims before had never required a detailed written proof of loss within sixty days, and in fact it would be impossible for this to be done in the detail required because it would often take three or four months to get parts for repairs. In fact the proof was always made on a printed blank which was in possession of and furnished by the insurance company for the purpose.

Notwithstanding there was some contradictory testimony, we are of the opinion there was substantial evidence to sustain the jury's finding in favor of appellee. The court was justified in submitting the case to the jury on these questions. *Glens Falls Ins. Co.* v. *Jenkins,* 169 Ark. 1015, 277 S. W. 541; *Security Ins. Co.* v. *Van Norman,* 195 Ark. 200, 111 S. W. 2d 561; *National Union Fire Ins. Co.* v. *Wright,* 163 Ark. 42, 257 S. W. 753. In the last mentioned case the court used this language: "If an authorized agent, within the time specified for making proof of loss under the policy, enters into negotiations for the adjustment of the loss, or otherwise treats this requirement of the policy as having been complied with, or as waived, then the company cannot thereafter defend upon the ground that a proof of loss was not furnished."

However it is contended that the law of Oklahoma which provides for only one year would control and in support appellant cites the following Arkansas cases: *Lindauer & Co.* v. *Del. Mut. Safety Ins. Co.,* 13 Ark. 461; *Franklin Life Ins. Co.* v. *Galligan,* 71 Ark. 295, 73 S. W. 102; *Franklin Life Ins. Co.* v. *Morrell,* 84 Ark. 511, 106 S. W. 680; *Mass. Bonding & Ins. Co.* v. *Home Life & Acc. Co.,* 119 Ark. 102, 178 S. W. 314; *St. Francis Box & Lbr. Co.* v. *Perry,* 125 Ark. 413, 189 S. W. 47. A careful

reading of these cases disclosed that they are not applicable here but apply to some substantive clause in the policy and not to the period of limitation in which suit may be filed, which is a matter of procedure and not of substantive law. The general rule recognized by our court is well stated in Vol. 29 Am. Jur., § 1394, p. 1041, where it is said: "Where the statutes of the forum make void all agreements whereby the time for the bringing of actions is fixed at a period less than that prescribed by law, a contractual stipulation made in another jurisdiction is not available as a defense."

There is such a statute in Arkansas and it is found in Ark. Stats., 1947, Vol. 6, § 66-508, which reads: "Hereafter an action may be maintained in any of the courts of this State to recover on any claim or loss arising on a policy of insurance on property or life against the company issuing any such policy, or the sureties on the bond required by the laws of this State as a condition precedent to its right to do business in this State, at any time within the period prescribed by law for bringing actions on promises in writing; and any stipulation or provision in any such policy of insurance requiring such action to be brought within any shorter time or be barred shall be, and the same is hereby declared void."

In the case of *Liebe* v. *Sovereign Camp W. O. W.*, 205 Ark. 540, 170 S. W. 2d 370 we find this language: "The limitation clause in the policy above quoted would be void under § 7668, Pope's Digest, but for the provisions of § 7857 excluding fraternal benefit societies from all the provisions of the insurance laws of the State, . . ."

Appellant further contends that appellee has in some way, by reason of its cross-complaint in the Pulaski Circuit Court and by the outcome of same, caused appellant to lose its right of subrogation; and that the pleadings in that case should have been introduced in evidence to show that appellee was negligent, and therefore could not recover in this suit under the terms of the policy. We find no merit in this contention. According to the

undisputed testimony appellee was notified of this suit in ample time to have joined had it desired to do so. The most the Pulaski Circuit Court could have decided was that the Gregory Heavy Hauling Company was not negligent. The question of appellant's negligence under the terms of the policy was properly an issue in this suit. It was pleaded in appellant's answer and was submitted to the jury under proper instructions.

What has already been said disposes of appellant's objections to instructions both given and refused since they involve the same issues already passed on.

The judgment of the lower court is affirmed.

FORT SMITH APPLIANCE & SERVICE CO. *v.* SMITH.

4-9386 236 S. W. 2d 583

Opinion delivered February 19, 1951.

Martin L. Green and *Lawrence S. Morgan,* for appellant.

Bland, Kincannon & Bethell, for appellee.

ROBINSON, J. This case grows out of an agreement which the appellant, plaintiff in the Circuit Court, claims is a conditional sales contract, and appellee contends is a consignment. The jury found for appellee.

Appellant urges as errors the giving by the court of instruction No. 4 requested by appellee and the refusal to give instruction No. 12 requested by appellant. The contract involved is as follows:

"CONSIGNMENT AGREEMENT

"This agreement made and entered into this the 25th day of September, 1947, by and between Fort Smith Appliance & Service Company, hereinafter referred to as the consignor, and Jim Smith, doing business as the Smith Sales Company, hereinafter referred to as the consignee, Witnesseth:

The consignor hereby consigns to Jim Smith, doing business as the Smith Sales Company, the following described personal property, to-wit:

(Here is listed property)

"It is agreed and understood by the parties hereto that the said Jim Smith shall pay to the said Fort Smith Appliance & Service Company the sum of Nineteen Hundred Dollars ($1900) for all of the above described furniture on or before September 25, 1948, and it is further agreed that in the event the said Jim Smith shall sell any part of the above described property for cash, he shall at that time pay to the said Fort Smith Appliance & Service Company the amount set opposite said item in the foregoing list. In the event the said Jim Smith shall sell any part of the above described property on credit, then and in that event the said Jim Smith shall pay for said property when he has received payment for the same on or before September 25, 1948, whichever date shall first occur.

"It is further agreed that on or before September 25, 1948, the said Jim Smith shall purchase and pay for all of said furniture, paying the total price of Nineteen

Hundred Dollars ($1900) as herein provided; that after September 25, 1948, if the said Jim Smith shall have failed to pay the whole of said sum, then and in that event the said Jim Smith agrees to pay interest at the rate of six per cent (6%) per annum on the unpaid balance. Title on the above described shall be retained by the said Fort Smith Appliance & Service Company until payment has been made for all or part of said furniture, as herein provided, and in the event said sum of Nineteen Hundred Dollars ($1900) has not been paid on or before September 25, 1949, then and in that event the Fort Smith Appliance & Service Company shall have the right to declare the whole amount due and treat this agreement as a completed sale, or, at its option may retake possession of said property as its own, without demand, notice or process of law."

Instruction No. 4:

"Under the law a buyer is deemed to have accepted the goods when he indicates to the seller he has accepted them, or, when the goods have been delivered to him and he does some act inconsistent with the seller's ownership of the goods without indicating to the seller that he has rejected them. So in this case, you shall find that Jim Smith did not accept the goods unless he indicated to Fort Smith Service & Appliance Company that he had accepted them, or unless after the goods were delivered to him he did some act inconsistent with the seller's ownership of the goods without indicating to Fort Smith Service Company that he had rejected the goods.

"In this connection, you are advised that if you find that Jim Smith sold any of the goods between September 25, 1947, (date of contract) and September 25, 1948, such sale being made for the account of Fort Smith Service & Appliance Company and not for his own, Jim Smith's, account, such sale would not be an act inconsistent with the seller's ownership of the goods, it being the finding of this court as a matter of law that for said period of time between September 25, 1947, and September 25, 1948, the goods were on consignment for the

account of the seller Fort Smith Service & Appliance Company."

In the above instruction the court told the jury that, as a matter of law, for the time stated, the merchandise was on consignment. In our opinion the contract is not so clear and free of ambiguity that the court could say what it meant as a matter of law. In a situation of this kind it must be left to a jury to determine what was the intention of the parties. Ordinarily it is the duty of the Court to construe a written contract and declare its meaning to a jury, but, where there is a latent ambiguity, parole evidence is admissible to explain the meaning of the parties, and then it is a question for the jury and should be submitted to a jury. *Walden* v. *Fallis,* 171 Ark. 11, 283 S. W. 17, 45 A. L. R. 1396; *Lutterloh* v. *Patterson,* 211 Ark. 814, 202 S. W. 2d 767; *Ellege* v. *Henderson,* 142 Ark. 421, 218 S. W. 831. Regardless of whether the ambiguity is patent or latent, if the intention of the parties is not clear it is a question for the jury. *Walden* v. *Fallis, supra.*

In all probability, appellant's instruction No. 12 refused by the court will not again be requested as it would be in contravention of our holding that the intention of the parties is a jury question because of the ambiguity of the contract.

There is irreconcilable conflict between that portion of appellee's instruction No. 4 declaring the agreement to be a consignment and several of the instructions touching on warranties on the part of appellant and the right to ratify or rescind on the part of appellee, but such inconsistency is not likely to occur in the next trial.

For the error in giving appellee's instruction No. 4, the case is reversed.

4-9358 236 S. W. 2d 585

Opinion delivered February 19, 1951.

Ted McCastlain and *Fletcher Long,* for appellant.

Jno. B. Moore, Jr., for appellee.

GEORGE ROSE SMITH, J. This is an action brought by the appellants, E. B. Sain and J. B. Sain, Jr., to impress a lien upon twenty-seven bales of cotton which they picked in 1949 with a mechanical cotton picker. The cotton was grown by J. B. Sain, Sr., as a tenant upon lands owned by the appellee partnership. There was evidence that the partnership had rented the land to Sain, Sr., upon the understanding that his brother and son, the plaintiffs, would pick the cotton at maturity without charge. The complaint was dismissed by the trial court, and this appeal followed. E. B. Sain died while the appeal was pending, and the cause has been duly revived.

Ralph Abramson, manager of the partnership, testified that he rented the land to Sain, Sr., upon the latter's

assurance that his son and brother owned a cotton picker and would gather the crop without charge. After the crop was picked and ginned the partnership applied the amount due the tenant, being $1,282.53, upon an indebtedness carried over from preceding years. Sain, Sr., admits the existence of this debt but denies having told Abramson that his brother and son would pick the cotton for nothing.

Neither of the plaintiffs was present when the rental contract was made in the spring, and both disclaimed knowledge of any understanding that they were not to be paid for their services. According to the appellants, in the fall they agreed with Sain, Sr., to pick the cotton at the prevailing market price, which amounted to $1,079.62 for the twenty-seven bales. It took them four days to pick the cotton with the mechanical picker, a machine for which they had paid $8,200. Their employee, Curtis Stokes, operated the picker part of the time at wages of $10 a day, and the plaintiffs operated it themselves the rest of the time. When the landlord refused to pay for their work they brought this suit to enforce a lien.

It is argued that the plaintiffs, owing to their close relationship to Sain, Sr., were estopped to make a charge for their services. The appellees have failed to show, however, that either of the plaintiffs knew that the partnership expected them to pick the cotton as a favor to Sain, Sr., and in these circumstances the evidence is insufficient to make out an estoppel. Nevertheless the decree must be affirmed, with a slight modification, upon another ground. For their lien the appellants rely upon Ark. Stats. 1947, §§ 51-301 and 51-317, giving laborers a lien upon the production of their work. Under these statutes the appellants have no lien for the services of Curtis Stokes, for the lien is given to the one who performs the labor and not to one who hires labor performed and pays for it. *Valley Pine Lbr. Co.* v. *Hodgens,* 80 Ark. 516, 97 S. W. 682.

Nor have the appellants a lien for the charges while the owners were operating the picker themselves. We

have held that the statute must be strictly construed, that the claimant must bring himself strictly within its terms, and that "the plaintiff must perform manual labor." *Flournoy* v. *Shelton & Co.,* 43 Ark. 168. This does not mean that the laborer must work with his bare hands alone; he is within the statute even though he uses simple tools that are merely incidental to his labor. In a borderline case, *Klondike Lbr. Co.* v. *Williams,* 71 Ark. 334, 75 S. W. 854, the Act was held to apply to one who used a wagon and team in his work; but that is as far as the cases have gone. Indeed, the *Klondike* case was explained in *St. L., I. M. & S. Ry. Co.* v. *Love,* 74 Ark. 528, 86 S. W. 395, where we said: "That decision proceeds correctly upon the theory that the use of the team or tools by the laborer in his work enters into and becomes a part of his own labor."

It is evident that the use of the plaintiffs' cotton picker did not enter into or become a part of their labor. The values are far too disproportionate for the machine to be subordinated to the labor of its operator. Under their contract the Sains were to receive more than $250 a day for gathering the crop, but the operator of the machine was paid only $10 a day. The primary commodity sold by the Sains was not manual labor but mechanical performance.

Cases arising under the various artisan's and mechanic's lien statutes are readily distinguishable. Those statutes, such as the one applicable to automobile repairmen, contemplate skilled work that is ordinarily performed with elaborate costly equipment. The need for those laws lay in the fact that such artisans were not covered by statutes designed to protect manual labor alone. If the owners of mechanical cotton pickers are to have a lien for their charges they too must seek additional legislation.

A majority of the court are of the opinion that the Sains were entitled to a lien for their own labor in operating the cotton picker and hauling the crop to the gin. The evidence indicates that they worked four days each and that $10 a day is reasonable compensation for this

labor. The decree is therefore modified to provide a judgment and lien for $40 for each of the Sains' services, and the cause is remanded for the enforcement of these liens, if necessary.

HUMPHREY, STATE AUDITOR *v.* GARRETT.

4-9264 236 S. W. 2d 569

Opinion delivered February 19, 1951.

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

Neill Bohlinger, for appellee.

GRIFFIN SMITH, Chief Justice. Act 166, approved February 25, 1949, appropriates $50,000 for each year of the biennium ending June 30, 1951. The purpose expressed in Sec. 1 is to support and assist colleges of the state having at the time the Act was passed a senior class in pharmaceutical education. Section 2 authorizes the State Board of Pharmacy to spend the appropriation as made in Sec. 1 and invests the Board with full power "to use its discretion in the manner in

which said funds shall be disbursed so long as the intention of the Act is carried out."

F. B. Garrett, a taxpaying citizen, brought an action to restrain J. Oscar Humphrey as Auditor of State from converting into warrants vouchers drawn against the appropriation, and to prevent J. Vance Clayton as Treasurer of State from paying any warrants that had been issued. He alleged that, inasmuch as the appropriations were from the general revenue fund, the vote in the House of Representatives upon which passage of the measure had been sustained by the presiding officer was insufficient under the constitution to accomplish the intended purpose because (a) the general revenue fund was not made up of moneys raised or collected for educational purposes or for any of the excepted purposes set out in Amendment No. 19 to the constitution; (b) at the time Act 166 was passed more than $2,500,000 had been appropriated for the biennial period beginning July 1, 1949; (c) only one college could qualify under the Act, and it was a denominational or religious school; and, (d) the design of expenditure brought the appropriation within the terms of Art. 5, Sec. 31, of the constitution.

It was stipulated that the legislation originated as House Bill No. 54 and received 65 affirmative votes on final roll call—less than two-thirds of that body.

The proof showed that the one educational institution capable of qualifying under the Act was the College of the Ozarks at Clarksville, where a department of pharmacy was established in 1946 at the request of the State Board of Pharmacy. Dr. Fred Walker, president of the institution, testified that it was the synodical college of the Presbyterian Church, U.S.A., but said that students in the school of pharmacy were not given religious instructions; that applicants of all faiths and of no faith would be accepted if otherwise qualified.

Our determination turns upon the two constitutional requirements for voting, and other questions are not reached. Article 5, Sec. 31, presents little difficulty.

It provides that "No state tax shall be allowed, or appropriation of money made, except to raise means for the payment of the just debts of the state, or for defraying the necessary expenses of government, . . ." etc. We have held that the legislature has the right to determine what is a necessary expense. *State* v. *Sloan,* 66 Ark. 575, 53 S. W. 47, 74 Am. St. 106; *State* v. *Moore,* 76 Ark. 197, 88 S. W. 881, 70 L. R. A. 671. But this determination can not be arbitrary to such an extent that things or purposes clearly "outside of the line of necessary expenses of government" may receive monetary benefactions. In such cases the courts hold as a matter of law that the constitutional provision is the bulwark its framers intended. *Belote* v. *Coffman,* 117 Ark. 352, 175 S. W. 37. In *Hudson* v. *Higgins,* 175 Ark. 585, 299 S. W. 1000, it was held that where the state had adopted a policy involving the education of a part of its citizens and a school had been established for that purpose, its maintenance became a necessary expense of government within the meaning of Art. 5, Sec. 31.

The result of our decisions affecting the constitutional provision in question is that the legislative discretion will not be disturbed. It is only in those cases where the discrepancy between an expressed objective and *actuality* is so great that no reasonable person would believe that the purported purpose was a necessary expense of government that the courts will intervene. The facts here do not justify us in holding that the general assembly was wrong *as a matter of law* in saying that the appropriation it sought to make by House Bill No. 54 was for necessary expenses of government.

But while Art. 5, Sec. 31, is not an impediment, Amendment No. 19 was properly invoked. The wisdom of the policy that burdens appropriations with this handicap may be questioned and the procedure criticized, yet the fact remains that in 1934 the electorate adopted the amendment by a vote of 99,223 to 25,496—a majority of almost four to one.

It is insisted, however, that the clear intent was to exempt appropriations of the kind we are dealing

with. This, say appellants, is true because the first sentence of the third section of the amendment creates a classification that is excluded from the three-fourths vote requirement—"*Except moneys raised or collected for educational purposes,*" etc. It must be conceded that a school of pharmacy necessarily has an educational aim, and if the appropriation had been made from any tax source bottomed on education, or if it had been from an available school fund within the purview of Amendment No. 19, then a majority vote of members elected to each branch of the general assembly would have been all that was required, in so far as Art. 5, § 31, and Amendment No. 19, are concerned.

In Act 166, unfortunately, the authority to draw vouchers and to pay with warrants designated the *general revenue fund.* State Comptroller Lee Roy Beasley testified that prior to 1945 a multiplicity of accounts had been maintained in the treasurer's office—more than 100. Act 311 of 1945 reclassified them under five principal headings. One division was General Revenues (note the plural). From the various sources spoken of the General Revenue Fund (singular) was set up through percentage charges against other revenues and from independent sources. Act 311 of 1945 was amended by Act 114 of 1947; Act 114 was in turn amended by Act 489 of 1949, and the 1945 and 1947 measure were further amended by Act 490 of 1949. Largely, however, the general revenue *fund* comes from a percentage charge against *funds.*

Since we are not concerned with particular legislation other than Act 166, but only with practical results, it may be said that the *general fund* becomes, in a sense, a residual available for miscellaneous operational purposes—such, for instance, as payment of the necessary expenses itemized in the general appropriation bill (see § 30, Art. 5 of the constitution and § 4 of Amendment No. 19). An example is to be found in Act 50 of 1949. The availability of this *fund,* when dealt with under the restrictions of Amendment 19, is not confined to a par-

ticular purpose when other constitutional necessities are met.

But while the general revenue *fund* is available for any lawful use, it does not follow that an allotment from it, made after $2,500,000 has been appropriated for the biennium, may be made by a bare majority of all members elected to each branch of the general assembly in reliance on the phrase, *"Except moneys raised or collected for educational purposes."*

It is urged that because cash or its equivalent in credits coming to the general *fund* by reason of levies and percentage transfers had a generic origin in General Revenues or may have come from some unpledged source, a presumption arises that when commingling occurred *some* money raised or collected for educational purposes went to this *fund;* and no doubt this is true. The judicial duty, however, is to construe the constitution in such a way that an expressed purpose, or a result flowing from reasonable implication, will be given effect.

We know that Amendment No. 19 was adopted during the depression days following 1933, and while language used by those who drafted the proposal clearly excludes from its stringent provisions moneys raised or collected for educational purposes, we must consider the amendment in the light of laws and practices effective at that time. If by fair analysis it could be said that the selected words in the order used were sufficiently elastic for adaptation to changes in systems, still it is not possible to believe that the exception in favor of moneys raised or collected for educational purposes is broad enough to support appellants' contentions in the case at bar.

We express no opinion regarding validity of the so-called stabilization law or the procedures promulgated by amendatory Acts. Our decision goes only to Amendment No. 19 and its effect on Act 166, and to Art. 5, § 31, of the constitution.

For the reasons mentioned the decree must be affirmed, and it is so ordered. The Clerk is directed to issue an immediate mandate.

Mr. Justice GEORGE ROSE SMITH did not participate in the consideration or determination of this case, his disqualification having been certified to the Governor, who designated the Honorable RALPH ROBINSON as special judge.

[redacted]

HAWKINS *v.* HAWKINS.

4-9380 236 S. W. 2d 733

Opinion delivered February 26, 1951.

[redacted]

Kenneth C. Coffelt, for appellant.

Quinn Glover and *Carl Langston,* for appellee.

PAUL WARD, J. This case involves a question of first impression in this state and calls for a decision of whether an adopted child, having been later adopted, can inherit from its first adoptive parents. The matters leading to a presentation of this question are as follows:

Jacob B. Hawkins died on the 22nd day of April, 1950, leaving a will bequeathing to Clyde Eugene Brown

one dollar and all the remainder of his property to his wife, Dantie U. V. Hawkins, the appellee herein. As will appear the said Clyde Eugene Brown is the adopted son of deceased by the first adoption. The clause in the will pertaining to the adopted son is as follows:

"2. Not being unmindful of Clyde Eugene Brown who was the child of my former wife, said child being adopted by me and subsequently said child was adopted to other adoptive parents thereby releasing me from further legal liability on behalf of said minor child but in order that no discrepancy may arise as to my intent concerning said child I hereby bequeath to the said, Clyde Eugene Brown, the sum of One and no/100 Dollar ($1.00)."

On May 2nd, 1950, the widow offered the will for probate and the petition mentioned, as surviving spouse, heirs and devisees, herself and the brothers and sisters of the deceased but made no mention of the adopted son. Two days following the will was admitted to probate by order of the probate court. One week following the brothers and sisters mentioned in the petition to probate, who are appellants here, filed a petition to set aside the will on the ground of lack of mental capacity on the part of the testator and later the petition was amended to include undue influence, and alleging the deceased had property to the value of $15,000 at the time of his death. On May 24th, 1950, appellee filed an answer admitting the will, that the deceased was not survived by father or mother, that the property was valued at approximately $15,000, but denied petitioners' allegations of mental incapacity and undue influence and also denied that the appellants were the lawful heirs of the deceased or that they were entitled to any of his property either under the will or as lawful heirs and further stated that appellants were strangers to the will. Service was had only on appellee.

After much testimony was taken by both sides touching principally the questions of mental capacity and undue influence the trial court on July 15, 1950, rendered its judgment denying appellants' petition on the ground

that neither lack of mental capacity nor undue influence had been proven and disposing of the other question in the following language:

"The court finds further that it is unnecessary to decide the question of law as to whether or not the plaintiffs are interested persons eligible to contest the probate of this will within the meaning of Arkansas Statutes, § 62-2113, in view of the findings made by the court herein; the said question has become moot."

The section mentioned above is part of the 1949 Probate Code and reads as follows:

"*How will is contested.* An interested person may contest the probate of a will, or any part thereof, by stating in writing the grounds of his objection thereto and filing the same in the court."

Appellants prosecute this appeal from the judgment of the lower court and in the briefs and oral arguments of both sides we are confronted with the question of whether or not appellants are *interested persons* and, therefore, whether or not they have any standing in court to contest the validity of the will. The answer to that question depends on whether or not Clyde Eugene Brown, as an adopted child, can inherit from the deceased even though the said child had again been adopted by other parents several years before the death of the deceased and the same relationships still existed at the time of the death of the testator.

It is our judgment that Clyde Eugene Brown was and is an heir of Jacob B. Hawkins and that consequently appellants are not interested parties having had no right to maintain this action in the lower court and cannot prosecute this appeal in so far as it relates to the validity of the will. As stated, this question has never, so far as we are informed, been before this court, but we find no valid reason why an adopted child cannot inherit from its first adoptive parents. We have held that an adopted child can inherit from its natural parents and this is now the settled law of this state. In fact the 1947 adoption law expressly provides that the adopted

child should inherit from its natural parents. Our adoption statute of 1947 (§ 56-110 of the Statutes of Arkansas) provides three grounds whereby an adoption may be annulled, but it is not contended that such a procedure was followed in this case.

A study of the authorities of other states on this point seems to support the view which we herein adopt. Appellant cites the Oklahoma case of *Talley's Estate,* (*Harris* v. *Burgess*), 188 Okla. 338, 109 Pac. 2d 495, 132 A. L. R. 773, which holds to the contrary. The opinion admits, however, that a research of the authorities indicates a greater number of holdings from other states are not in accord with the conclusion it reached. We think it is possible also that the facts in the Oklahoma case might have had some bearing on the decision. There the child was 14 years old when adopted and gave his consent and some five years later he was re-adopted by his natural parents, wherein he again consented, and the last adopting order cancelled and voided the first adoption. One of the main reasons given for the decision reached was that when, by the second adoption, the first adoptive parents were relieved of all legal responsibility for the care and education of the child it would logically follow that the child would lose its right of inheritance. We cannot agree that this is sound logic and submit that it is contrary to the reason for the well established rule that an adopted child does inherit from its natural parents (as was acknowledged to be the law in Oklahoma), because a natural parent is likewise not legally obligated to support and educate a child which has been adopted. It might be added that a natural parent is under no obligation to support a child over twenty-one years of age, but this does not prevent the child from being an heir.

On the other hand there are many decisions in different states which hold that a twice adopted child does inherit from its adoptive parents.

In Re Sutton Estate, 166 Minn. 426, 201 N. W. 925; *Holmes* v. *Curl,* 189 Iowa 246, 178 N. W. 406; *Dreyer* v. *Schrick,* 105 Kan. 495, 185 P. 30; *Patterson* v. *Browning,*

146 Ind. 160, 44 N. E. 993; *In Re Egley's Estate,* 16 Wash. 2d 681, 134 P. 2d 943, 145 A. L. R. 821.

The reason given in most of the cases appears to be that once the statute invests the child with the right to inherit from an adopting parent his right cannot be taken away by the mere fact that he is later adopted by other parents. Some authorities call attention to the injustice that might result from a different holding, stating that it would enable adoptive parents, for reasons of their own, to promote a second adoption for the sole purpose of disinheriting the adopted child. We are impressed with the reasoning set forth above to the extent that we have decided to go along with what appears to be the weight of authority.

Having come to the conclusion that Clyde Eugene Brown is an heir to the estate of Jacob B. Hawkins the same as if he were a natural son it must naturally follow that appellants, who are the brothers and sisters of the said Hawkins, cannot be interested persons in the sense that they can maintain a suit to contest the validity of Hawkins' will. Since the legal heir was not made a party to this suit the judgment of the lower court was a nullity. We of course express no opinion as to the validity of the will as that question is not before us.

The appeal is dismissed and the trial court is directed to vacate its judgment herein and dismiss the cause of action.

DIXIE CULVERT MANUFACTURING COMPANY *v.* RICHARDSON.

4-9398 236 S. W. 2d 713

Opinion delivered February 26, 1951.

J. H. Spears, Malcolm W. Gannaway and *James B. Gannaway,* for appellant.

Fletcher Long and *H. M. McCastlain,* for appellee.

George Rose Smith, J. This suit was brought by the three appellees, Mr. and Mrs. H. C. Richardson and J. W. Buck, for personal injuries sustained when a car in which they were riding struck a truck owned by the appellant. Buck, who owned the car, also sought property damages. The jury returned verdicts for all three plaintiffs, assessing Buck's damages at $500, Richardson's at $1,500, and Mrs. Richardson's at "no damage." The court entered judgments on the verdicts, including a judgment for Mrs. Richardson for her costs. We affirm the latter judgment, as Mrs. Richardson has not cross-appealed, and the appellant has waived any error in the judgment for costs by failing to argue the point.

It is contended that the appellant was entitled to a directed verdict. The collision occurred on a rainy night at a point on U. S. Highway 70 some ten miles west of Forrest City. The appellant's truck, loaded with 25,000 pounds of steel, had lost a wheel, and its driver was compelled to leave it on the traveled portion of the highway while he went for help. In this situation a flare should be placed approximately 100 feet behind the disabled vehicle. Ark. Stats., 1947, § 75-722. There was testimony that appellant's driver put the flare only ten feet down the highway. A state policeman estimated the distance as about twenty-five feet. Richardson, who was driving the Buck car, testified that he did not see the stalled truck until it loomed up fifty or seventy-five feet in front of him, when it was too late to avoid a collision.

He did not see the flare until he got out of the car after the accident; it was then burning smokily. On this testimony the trial court correctly submitted to the jury the issues of negligence and contributory negligence.

The court erred, however, in permitting the appellant's driver to be questioned about a conviction for speeding a month after the accident and in telling the jury that this conviction might be considered as bearing upon the driver's credibility. It may be doubted whether the crime of speeding involves enough immorality to make a conviction relevant to the question of veracity, under common law principles. See Wigmore on Evidence, § 926. But in this State the matter is governed by statute. Section 75-1012 provides that a conviction for a traffic violation less than a felony shall not affect the offender's credibility as a witness in any civil or criminal proceeding. Speeding is not a felony. Sections 75-601 and 75-1004. It was therefore error for this conviction to go to the jury on the question of credibility.

Reversed and remanded as to Richardson and Buck.

BERKLEY *v.* RICE.

4-9370 236 S. W. 2d 714

Opinion delivered February 26, 1951.

John J. Cravens, for appellant.

David L. Ford and *Mark E. Woolsey,* for appellee.

GRIFFIN SMITH, Chief Justice. The controlling issue is whether the indorsement on a note showing, *prima facie,* that $100 had been paid, tolled the statute of limitation, thus entitling the holder to a lien on certain lands for the purchase price. It was stipulated that unless the note were barred the realty should be charged with the obligation.

A. E. Rice, plaintiff below and appellee here, was a brother of Mrs. Lydia Berkley, who died in November, 1948. Appellee and other heirs of their father and mother, W. E. and S. E. Rice, sold to Mrs. Berkley about 215 acres they had inherited. The deed was executed in 1920. Appellee accepted his sister's note for $1,333.33. Some payments were made and there were renewals, the last for $1,808.23, dated November 1, 1936, and due eleven months later. Payment of $6.40 by check is shown as of July 6, 1937. The next indorsement is "Nov. 14, 1947, by cash $100."

On January 12th, 1948, Mrs. Berkley deeded the property to her two children: James W. Almond and Venia Shelby. Appellee brought suit while his sister was living, but she died without filing an answer. The cause was prosecuted as an action in *rem* and resulted in a decree fixing a lien on 109 acres claimed by James Almond under his mother's deed. Mrs. Shelby settled with appellee, procuring a release and dismissal. Her title to 106 acres is not questioned. Almond and his wife have appealed from a decree that with interest $2,885.63 was due on the note, and from an order directing sale of the property to satisfy the judgment.

Neither of the appellants nor any of their witnesses had personal knowledge of any directions given by Mrs. Berkley concerning the $100 payment. Appellee had not questioned his sister's right of possession throughout the years, but testified that his sister had frequently told him the land was to stand good for the debt. Appellee moved onto the farm in 1945 with Mrs. Berkley's permission, remaining about sixteen months. The roof of the house was in bad shape and was replaced by appellee at a cost of $125 exclusive of his own labor. Relations with Mrs. Berkley were such that he assumed the improvement so made would balance fair rentals, but nothing was said by either concerning this item. Mrs. Berkley paid taxes for two years, taking receipts in appellee's name. The receipt for 1946 was mailed to appellee by his sister who in a letter said that she had been to Ozark [on "Wednesday the 5th"] where taxes were paid, "and I will send you the receipt." Admissibility of this testimony was questioned on the ground that the letter did not show what year was referred to. On redirect examination appellee testified that the 1946 receipt came in an envelope postmarked 1947. The other receipt covered 1945 taxes.

When appellee moved from the farm and returned to Charleston he left some of his personal belongings. Shortly thereafter Mrs. Berkley came to appellee with Harley Owens "and wanted me to rent him the place, . . . so I let him have the place [for a year for $100"]. On former occasions—before the note was renewed in 1936— Mrs. Berkley had permitted appellee to take such things as live stock, etc., and apply the value on the debt. When Owens paid the rent to appellee he applied it as a credit—"just like former transactions had been handled." In general, appellee's explanations were that Mrs. Berkley had always acknowledged the debt and contemplated that money or its equivalent coming into appellee's hands would be retained for credit purposes. There was no question in appellee's mind regarding Mrs. Berkley's intention that the rent payment was to be retained by him—and, as he expressed it, "that was all she owed me." With knowledge that the

rent had been paid and retained by appellee Mrs. Berkley did not ask for an accounting.

Appellants, in contesting the Chancellor's finding that the statute of limitation was tolled by the rent payment, cite our holding in *Buss* v. *Cooley,* 205 Ark. 42, 167 S. W. 2d 867. We there said that an admission of a barred debt may be inferred from a partial payment, but [a promise to pay] is not to be implied where the payment is accompanied by circumstances or declarations of the debtor showing it was not his intention to acknowledge the debt or to pay the balance. But in *Street Improvement District No. 113 of Hot Springs* v. *Mooney,* 203 Ark. 745, 158 S. W. 2d 661, it was held that parol proof is admissible to show that, as between debtor and creditor, but one obligation exists, "thus identifying the debt to which the promise related." In the Mooney case the court quoted with approval (p. 751) the statement from American and English Encyclopedia of Law that a mere acknowledgment of a claim as an existing obligation "is such an admission as the law will imply therefrom a new promise to pay, which will start the statute anew, when it is not accompanied by anything negativing the presumption of an intention to pay the debt."

Wood on Limitations, vol. 1 (4th Ed.), p. 344, says that where subsistence of a debt is acknowledged certain requisites are indispensable, the first being that the acknowledgment must be in terms sufficient to warrant the inference of a promise to pay, hence ". . . the theory upon which the courts proceed is that the old debt forms a good consideration for a new promise, either express or implied, and that any clear and unequivocal admission of the debt as an existing liability carries with it an implied promise to pay, unless such inference is rebutted either by the circumstances or the language used."

Although appellee's testimony will not be regarded as undisputed—he being an interested party—there is no affirmative evidence, other than implications that might arise from Mrs. Berkley's deed, contradicting the assertion that she repeatedly told appellee the property was to pay the debt. The attending circumstances not only

attest Mrs. Berkley's willingness that the rent money be retained by appellee, but imply a recognition of the old obligation. A fair inference is that in taking Owens to appellee and permitting the money to be paid to him, the debtor intended that the rent should apply on the old debt; therefore the Chancellor correctly sustained appellee's version of the transactions, and the decree must be affirmed. It is so ordered.

TONEY *v.* TONEY.

4-9292 236 S. W. 2d 716

Opinion delivered February 26, 1951.

David Solomon, Jr., for appellant.

D. S. Heslep, for appellee.

GRIFFIN SMITH, Chief Justice. A plantation known as the McGehee Place was devised to six heirs in equal shares. One of the beneficiaries was McKenzie Toney, ["whose] interest is to be entailed on his three children," naming them. The question is whether the father took a fee, as the Chancellor held, or only a life estate. The parent had acquired the remaining five-sixths.

Appellee cites some of our cases holding that the law favors early vesting of estates. So, where a will is susceptible of a dual construction, *Doake* v. *Taylor,* 195 Ark. 490, 112 S. W. 2d 958, and under one the estate becomes vested, but the other would create a contingent remainder, a meaning resulting in expeditious investiture will be adopted if that result can be reached without doing violence to the testator's words. The public policy upon which this rule is based has been frequently discussed.

We are cited to our earlier cases construing wills and deeds where the grant or devise by its terms was absolute, but an attempt had been made by subsequent language to restrict or create exceptions. The subject was discussed in *Mason* v. *Jackson,* 194 Ark. 236, 106 S. W. 2d 110, 111 A. L. R. 1071, where an attempt was made to reserve a half interest in minerals. Mr. Justice BUTLER, who wrote the Mason-Jackson opinion, said [in discussing deeds] that if there is a clear repugnance in the nature of the estate granted and that limited in the *habendum,* "the latter yields to the former."

In *Beasley* v. *Shinn,* 201 Ark. 31, 144 S. W. 2d 710, 131 A. L. R. 1234, the grantors executed and the grantees accepted a deed containing this provision: "It is expressly agreed and understood by the parties that one-half of the mineral rights in and under said land has been retained by a former grantor." This language was in a clause following a grant, but preceding the *habendum.* The reservation contradicted the grant. In giving effect to the intentions of the parties the opinion written by Mr. Justice BUTLER was discussed. It was then said: "To the extent that this opinion conflicts with *Mason* v. *Jack-*

son . . . and other cases involving mineral reservations, they are overruled."

While the Beasley-Shinn case was expressly limited to mineral reservations, the scope was later broadened, *Carter Oil Company* v. *Weil,* 209 Ark. 653, 192 S. W. 2d 215. The opinion was written by Mr. Justice FRANK G. SMITH in a comprehensive review. The result reached in the controversy then before the court was held to be a rule of construction as distinguished from a rule of property. A dissenting opinion was written by Mr. Justice ROBINS who in urging that the majority construction should at least have a prospective application said that he had no quarrel with the result in *Beasley* v. *Shinn.* On the contrary it was Judge ROBINS' view that the facts there justified reformation of the deed.

The foregoing cases are mentioned because appellee relies upon decisions in which strictness was observed. *Moody* v. *Walker,* 3 Ark. 147.

We must next consider what the testator meant when she said, "I will to my six heirs each a sixth interest in the McGehee place, [but] . . . McKenzie Toney's sixth interest is to be entailed on his three children."

By statute a fee tail becomes a life estate in the first taker with remainder "in fee simple absolute" to the person to whom the estate tail would first pass according to the course of the common law. Ark. Stat's § 50-405; *Mitchell* v. *Mitchell,* 208 Ark. 478, 187 S. W. 2d 163.

In the case at bar phraseology suggests a probability that the will was written by the testator after consultation with an attorney, or that an attorney prepared it in accordance with the testator's directions. The wording is unusual in that the purpose to limit the first estate is sought to be effectuated by *entailing Toney McKenzie's interest on the three named children.*

In Jarman on Wills, (seventh edition, by Sanger) vol. 2, pp. 880-81, it is said that if real or personal property is directed to be entailed on A and his heirs, "it

seems that A only takes a life interest, with remainder to his heirs in tail or absolutely, according to the nature of the property." A definition sometimes quoted with approval is to be found in *Stearns* v. *Curry,* 306 Ill. 94, 137 N. E. 471. After saying that a suggested interpretation took no account of the words "by entail," the opinion contains this observation: " 'Entail' as a noun means 'a fee abridged' or limited to the issue or certain classes of issue instead of descending to all the heirs. . . . In wills, however, technical words are unnecessary, and any words which indicate an intention to create an estate which shall pass to the lineal descendants of the grantee are sufficient."

Of course an express grant in fee will not be reduced to a life estate by mere implication arising from a subsequent gift over, *Mansfield* v. *Shelton,* 67 Conn. 390, 35 A. 271, 52 Am. St. Rep. 285, and cases commented on in 27 LRA (NS) 1047. Any subsequent language of an appropriate nature clearly indicating the testator's purpose to limit the devise to the first taker and definitely disclosing the individuals or class selected in succession is sufficient if in other respects there is no trespass upon statutory treatment.

The word "entailed" would have but little if any meaning if we should hold that the senior McKenzie acquired a fee simple estate.

Reversed, with directions to dismiss the action, a proceeding which sought to remove a cloud from appellee's title.

RITCHIE GROCER COMPANY *v.* ARNOLD.

4-9397 236 S. W. 2d 718

Opinion delivered February 26, 1951.

Bernard Whetstone, for appellant.

Ovid T. Switzer and *W. P. Switzer,* for appellee.

MINOR W. MILLWEE, Justice. Appellant, Ritchie Grocer Co., obtained a personal judgment against Frank C. Arnold and wife in the circuit court of Ashley County on October 18, 1949. Subsequently two successive executions were issued on said judgment directed to the sheriff of Ashley County and returned *nulla bona.*

On July 8, 1950, appellant brought the instant suit in the Union Chancery Court against the Arnolds, John Titus, John D. McClain and Universal C. I. T. Credit Corporation, hereinafter called Universal. After setting out the proceedings against the Arnolds in the Ashley Circuit Court, the complaint alleges that Frank C. Arnold on March 6, 1950, traded his 1939 model automobile to John Titus for a 1950 model truck, receiving a credit of $406.31 for the old car on the trade; that Titus traded the old car to John D. McClain; that a title retaining contract to secure payment of the balance of the purchase price of the truck was assigned by Titus to Universal, a corporation with one of its principal offices in Union County; that all defendants except Universal were residents of Ashley County; that appellant had no adequate remedy at law and was entitled to the assistance of the Union Chancery Court in the satisfaction of its judgment against Frank C. Arnold and wife. The complaint prayed for attachment and sale of the 1950 model

truck, and that Titus and McClain be required to account to appellant for conversion of the 1939 model car.

Summons issued out of the Union Chancery Court, directed to the sheriff of Union County, was served on the agent in charge of Universal's place of business in Union County. Summons directed to the sheriff of Ashley County was served on each of the other defendants in Ashley County. A writ was also served on Frank C. Arnold by the Ashley County sheriff attaching the 1950 model truck.

On July 18, 1950, all of the defendants except Universal appeared specially and filed a motion to quash the service of process had upon them in the suit. The motion was heard upon the complaint, attachment and summons with the returns thereon. This appeal challenges the correctness of the chancellor's action in sustaining the motion, dissolving the attachment and dismissing the suit.

Appellant concedes that the present suit was maintainable in Ashley Chancery Court under our holding in *Morgan Utilities, Inc.* v. *Perry Co.*, 183 Ark. 542, 37 S. W. 2d 74, but asserts that venue also lies in Union Chancery, since Universal was served with process in Union County.

The instant proceeding is one for discovery in aid of execution under the provisions of Ark. Stats., § 30-901, which provides: "After an execution of *fieri facias* directed to the county in which the judgment was rendered, or to the county of the defendant's residence, is returned by the proper officer, either as to the whole or part thereof, in substance, no property found to satisfy the same, the plaintiff in the execution may institute an action, by equitable proceedings, in the court from which the execution issued, or in the court of any county in which the defendant resides, or is summoned, for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, and for subjecting the same to the satisfaction of the judgment; and in such actions, persons indebted to

the defendant in the execution, or holding the money or property, in which he has an interest, or holding the evidences or securities for the same, may be also made defendants."

In *Morgan Utilities, Inc.* v. *Perry County, supra,* plaintiffs instituted suit in the Perry Chancery Court to enforce a judgment and execution issued out of the circuit court of Perry County. Some of the judgment debtors resided in Perry County and others in Pulaski County and each was served with summons in the discovery suit in the county of his residence. The Pulaski County defendants contended that the suit had not been brought "in the court from which the execution issued" and that, since said defendants were not residents of, or summoned in, Perry County, the court acquired no jurisdiction over them. This court traced the history of the statute pointing out that it was lifted out of the Kentucky Code and held that "the court from which the execution issued" referred to the circuit court as constituted both in Kentucky and Arkansas at the time of the adoption of the statute. After stating that the circuit court, as then constituted, was one of dual jurisdiction of both actions at law and suits in equity, the court said: "It is not to be doubted that, as constituted at the time of the adoption of the Code, of which, as we have seen, § 4366, *supra,* is a part, where a judgment at law had been obtained and execution thereon issued from the law side, to maintain the action contemplated by the statute, the proceedings must have been instituted in chancery, for it was provided: 'The plaintiff in execution may institute an action by *equitable proceedings,*' which is in the nature of a creditor's bill 'for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled.' Therefore, the provision that the action might be brought 'in the court from which the execution issued' could not be taken in its literal sense and meant, and could only mean, that branch of the court having equity jurisdiction, to-wit, the chancery court whose presiding officer was the same individual sitting in law court. To

interpret the statute any other way would be to render it impotent."

We think it is clear from the language of § 30-901 that proceedings for discovery against a third party must be in connection with proceedings against the judgment debtor who is an indispensable party to the suit. It is also clear that "the defendant" designated in the language, "or in the court of any county in which *the defendant* resides, or is summoned," has reference to the judgment debtor defendant. When a suit is instituted against the judgment debtor in the proper forum for discovery of his property then third persons indebted to him or holding property in which he has an interest may be made parties defendant. The record discloses that the judgment debtors, Frank C. Arnold and wife, were residents of Ashley County during the course of all the proceedings herein and were served with summons in Ashley County where the property sought to be attached was situated. Since the executions against the Arnolds did not issue from the Union Chancery Court and said judgment debtors were neither residents of, nor summoned in, Union County, it follows that the chancery court of Union County was wholly without jurisdiction of the instant suit. The chancellor correctly so held, and the decree is affirmed.

MEYER *v.* STATE.

4648 236 S. W. 2d 996

Opinion delivered February 26, 1951.

Rehearing denied March 26, 1951.

[redacted]

Franklin Wilder, for appellant.

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

ROBINSON, J. The appellants were charged in seven separate informations with the violation of § 82-902, Ark. Stats. The cases were consolidated and tried together. Specifically, the defendants were charged with: first, possessing for the purpose of sale adulterated bologna; second, manufacturing adulterated bologna; third, possessing for the purpose of sale adulterated hamburger; fourth, manufacturing adulterated hamburger; fifth, possessing for the purpose of sale adulterated wieners; sixth, manufacturing adulterated wieners; seventh, possessing for the purpose of sale adulterated horsemeat. They were convicted of the first six charges and acquitted of the seventh. Section 82-902, Ark. Stats., is as follows:

"It shall be unlawful for any person to manufacture, sell, offer for sale, or have in possession for the purpose of sale within the State any article of food or drug which is adulterated or misbranded within the meaning of this Act. . . .". (Sections 82-902—82-910).

The alleged grounds for reversal are as follows: first, the Court's refusal to grant a change of venue; second, the Court's instruction defining, as a matter of law, the meaning of bologna, wieners and hamburger; third, the fact that the defendants were prosecuted in the Circuit Court before they had been granted a hearing before a Health Officer; fourth, the Court's refusal to grant a continuance; fifth, the failure of the prosecution to introduce in evidence the samples of meat products which witnesses for the State had examined, and upon which they based their testimony that it was horsemeat; sixth, that the possession for sale is a necessary in-

gredient of manufacturing adulterated food in this case and, therefore, a part of the same offense.

The appellants operated the Fort Smith Provision Company. Late in the afternoon of September 15, 1950, Arthur Larimore, Sanitarian for the State of Arkansas assigned to Sebastian County, along with other officers went to the defendants' aforesaid place of business and discovered what one of the officers, who had had experience as a butcher, identified as the carcass of a horse and who testified in detail how the carcass of a cow differed from that of a horse. A local veterinarian was also called in to examine the carcass and he pronounced it as being that of a horse. A sample of this meat was cut from a hind quarter and the officers obtained from a walk-in cooler samples of wieners, bologna and hamburger. These samples were sent to the Federal Security Agency, Washington, D. C., for the purpose of proving the kind of meat in the various samples, the samples being numbered so that they could be properly identified.

Otto Meyer denied to the officers that the carcass was that of a horse, but stated it was from a big Holstein cow, and that the hide had been left in a pasture where they had butchered, and he gave the officers the location of this pasture. The officers went there but found no cow hide and no evidence of a cow having been butchered, but they did find evidence of the fact that numerous horses had been butchered. The government experts in Washington, D. C., to whom the samples were sent appeared at the trial and testified that all of the samples were composed of horsemeat.

As to appellants' contention that the Circuit Court erred in not granting a change of venue, Initiated Act No. 3 broadened the Circuit Court's power in this regard as we held in the case of *Bailey* v. *State,* 204 Ark. 376, 163 S. W. 2d 141, and in the case of *Robertson* v. *State,* 212 Ark. 301, 206 S. W. 2d 748. Before the trial Court's action in refusing to grant a change of venue will be reversed by this Court, it must appear that there was an abuse of judicial discretion on the part of the trial

court, and we cannot say there was such an abuse of discretion in this case. Appellants produced in Circuit Court several witnesses, in addition to evidence of articles and pictures in newspapers, and evidence as to the circulation of the newspapers, but the witnesses knowledge of any feeling in the county against the defendants was very limited, and the articles and pictures in the newspapers were no more than is the custom and practice of newspapers. It was just a plain case of reporting the news and it does not appear that there was a studied effort or plan to build up public feeling and prejudice against the defendants.

Appellants moved for a continuance on the ground that their attorney who was to try the case had only been employed a few days, and that they had not had sufficient time to prepare for trial. Appellants were arrested on the 15th day of September, 1950. The Prosecuting Attorney subscribed and swore to the informations before the Circuit Clerk on September 21, and bench warrants were issued September 22nd. Defendants, by their attorneys, filed a Motion to Dismiss on September 26th. A Motion for a Bill of Particulars was filed and granted on September 26th, and the Bill of Particulars filed on September 28th, and then it appears that appellants changed attorneys. On October 2nd, the new attorney filed a Motion for a Change of Venue, which was overruled by the Court, and on October 5th he filed the Motion for a Continuance, which was overruled, and the case thereupon proceeded to trial that day.

The appellants had about three weeks to get ready for trial. This Court has held in a long line of decisions that Motions for Continuances are addressed to the sound judicial discretion of the trial court and a reversal can be had only where it is shown by the record that a refusal to grant a continuance was an arbitrary abuse of discretion. *Morris* v. *State,* 197 Ark. 778, 126 S. W. 2d 93; *Smith* v. *State,* 200 Ark. 1152, 143 S. W. 2d 190; *Collier* v. *State,* 202 Ark. 939, 154 S. W. 2d 569. The fact that the lawyer, who actually tried the case had

been employed only a few days, although other counsel had been representing the appellants from the first, is not sufficient to call for a reversal of the case. *Hamilton* v. *State,* 62 Ark. 543, 36 S. W. 1054; *Therman* v. *State,* 205 Ark. 376, 168 S. W. 2d 833.

Next, appellants contend that they could not be legally prosecuted in Circuit Court until such time as they were granted a hearing before the Health Officer. We do not so construe § 82-905. According to the appellants' construction of the statute, no one could ever be prosecuted for violation of the statute before a Health Officer took action, regardless of the fact that some Health Officer might be derelict in his duty of bringing the violator to account. Section 82-906 provides:

"It shall be the duty of each Prosecuting Attorney to whom the State Health Officer shall report the violation of this Act, *or to whom any Health or Food or Drug Officer or Agent of the State Board of Health shall present satisfactory evidence of any such violation,* to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the State, without delay, for the enforcement of the penalties as in such case herein provided."

Thus, even if the Prosecuting Attorney had to have a report from a State Health Officer or Agent of the State Board of Health before he could act (which we do not hold), he had a report from Mr. Larimore, the State Sanitarian.

The court told the jury as a matter of law that "bologna" means a "seasoned sausage prepared from the flesh of cattle, sheep, swine or goats"; that the word "wiener" or "frankfurter" means a "sausage prepared from the flesh of cattle, sheep, swine or goats"; and that the word "hamburger" or "hamburger steak" means "a mixture of ground or chopped beef and seasoning". These definitions are given in Webster's International Dictionary, 2nd Edition. The courts will take judicial knowledge of the meaning of the words in the English lauguage, *Eureka Vinegar Company* v. *Gazette*

Publishing Company, 35 Fed. 570, and our Courts will take judicial knowledge that bologna, hamburger and wieners are food products prepared from the meats named in the dictionary, and not from horsemeat. We know bologna is a seasoned sausage prepared from the flesh of cattle, sheep, swine or goats, just as we know beef is the flesh of a bull, an ox, or a cow, because the dictionary says so.

"The meaning of English words and phrases is within the judicial knowledge of the Court." (20 Am. Jur. 89). When horsemeat is used in the manufacture of the well-known and widely used products recognized in the English language as hamburger, bologna, wieners, and frankfurters, such products are adulterated within the meaning of our statute, unless of course, the product was openly held out to be horsemeat. There is no contention that such is the case here. The evidence proving that the defendants manufactured and possessed for sale bologna, wieners and hamburger adulterated with horsemeat is overwhelming.

The failure of the prosecution to introduce samples of the meat obtained when appellants were arrested is next assigned as error. There is no merit to this contention. "The testimony of the witness who has obtained, by the employment of any of his senses, personal knowledge of the physical condition or attributes of an article of personal property is primary evidence of its character and condition. . . . A witness may testify that oleomargine which is alleged to have been illegally sold resembled butter without producing the article sold or explaining its nonproduction. . . .

"The best evidence rule deals with writings alone, not with objects, and the fact that exhibition of such objects to the jury would more clearly and forcefully explain their nature, appearance or condition, is not a valid objection to oral evidence concerning such matters." Underhill's Criminal Evidence, 4th Edition, 145-6.

It is argued that there is no evidence upon which can be based the conviction of Otto Meyer, Jr. Frankly,

in this respect we have carefully explored the record in an effort to sustain this contention, as the son may have been dominated by the father, but the evidence of the guilt of the son is just as positive as that of the father, and there is no evidence that he is of such tender years as to render him not legally responsible for his acts, or to raise a presumption that makes it the duty of the State to prove his mental capacity. (In fact, there is no evidence in the record that he is a minor, but it is suggested in appellants' brief.)

Before going into the trial of the case, appellants filed Motions to Dismiss those cases charging "possessing for sale" on the grounds that that particular charge is a necessary element of the offense of manufacturing adulterated food, and that, therefore, appellants were being tried twice for the same offense. This brings us to a consideration of just what is meant by manufacturing food which is adulterated. Webster's International Dictionary says, "adulterated" means "to corrupt, debase, or make impure by an admixture of a foreign or a baser substance". It is not a violation of the law to manufacture meat products from horsemeat; nor is it a violation of the law to sell products manufactured from horsemeat, or to possess for sale such articles. But, it becomes a violation of the law when adulteration takes place. Adulteration occurs at the time when the article is possessed for sale as the genuine product although it actually contains baser substances. One could manufacture for his own use what appeared to be an ordinary wiener made of beef, pork or mutton but which, in fact, contained horsemeat and it would not be an adulterated product within the meaning of the Statute. So, in the case at bar, the defendants had to possess the bologna, hamburger, and wieners for the purpose of sale, although they had manufactured such products, before they would be guilty of manufacturing adulterated food, as possessing it for sale or selling it while representing it, directly or indirectly, to be something else than what it is, implements the adulteration within the meaning of the Statute.

The situation in this case differs from the manufacture of whiskey and possession of same for the simple reason that, under the statutes making it illegal to manufacture whiskey, it is against the law to make it for one's own use or to give it away, although there is no fraudulent representation as to what it is.

Possessing the imitation bologna, wieners, or hamburger for sale is a necessary ingredient of the offense of manufacturing adulterated food in this case, and, therefore, the defendants could not be convicted on both charges. *Fox* v. *State,* 50 Ark. 528, 8 S. W. 836. Appellants' Motions to Dismiss for this reason should have been granted.

Cases Nos. 1873, 1877 and 1878 are reversed and dismissed. Cases Nos. 1874, 1875 and 1876 are affirmed.

HOLT, J., not participating.

BUCKNER *v.* WRIGHT.

4-9396 236 S. W. 2d 720

Opinion delivered February 26, 1951.

Bernard Whetstone, for appellant.

Mahony & Yocum, for appellee.

ED. F. MCFADDIN, Justice. Appellants, as plaintiffs, instituted this suit, seeking cancellation of a deed purportedly executed by them to J. A. Wright, but which deed appellants denied executing. Appellees are the widow, and devisees under the will, of J. A. Wright. We will refer to the parties as they were styled in the lower court.

The complaint alleged: that "plaintiffs were the owners of an undivided one-half interest in the oil, gas and other minerals, as well as the surface," of twenty acres of land in Union County, "evidenced by quitclaim deed from J. A. Wright and Isa Wright dated April 6, 1937"; that by mineral deeds, plaintiffs have disposed of three eighths of the minerals, leaving "the surface rights and one-eighth (1/8) of the royalties still belonging to the plaintiffs"; and that "on September 27, 1948, there was placed of record . . . a purported quitclaim deed purportedly signed by these plaintiffs and dated June 1, 1937, to an 'undivided 1/2 interest in the minerals'

in the property in question and above described, to J. A. Wright". The plaintiffs denied the execution of the June 1, 1937, instrument and prayed that it be cancelled.

The gist of the plaintiffs' case was: that on April 6, 1937, J. A. Wright conveyed to them the surface rights and one-half of the minerals in twenty acres; that they promptly recorded their deed, and have all the time considered themselves to be the owners not only of the surface but also of one-half of the minerals; that J. A. Wright died testate on April 30, 1948, survived by defendants, as his widow and devisees; that on September 27, 1948, defendants placed of record a deed dated June 1, 1937, purporting to have been signed and executed by plaintiffs and purporting to convey to J. A. Wright one-half of the minerals in the twenty acres. Since plaintiffs claim to have received only one-half of the minerals from J. A. Wright by the deed of April 6, 1937, it is apparent that if the deed of June 1, 1937, be valid, then plaintiffs do not own any minerals under the twenty-acre tract. In their efforts to defeat the June 1, 1937, deed, plaintiffs not only denied its execution but also pleaded limitations, laches and estoppel. The Chancery Court found against plaintiffs on all points; and they have appealed.

I. *Execution of the Deed Dated June 1, 1937.* The original deed, so dated, was presented to the plaintiffs; and their denials of execution were considerably weakened by their equivocal and evasive answers. Tommie Buckner said: "It looks like my signature"; and again, "In June I say I didn't have anything to do with it". Vera Buckner said: "It seems to have my signature, but I don't know anything about it, myself. I don't remember it. I ain't going to say it is not my writing; but if I signed it, I didn't understand what I was signing." The Notary Public, who took the acknowledgment of the plaintiffs to the June 1, 1937, deed, positively testified that they appeared and acknowledged the execution of the said deed. An expert in handwriting testified as to the genuineness of the signature of Tommie Buckner.

Without detailing all the evidence, it is sufficient to say that we reach the conclusion—as did the trial court—that the plaintiffs executed the said deed of June 1, 1937.

II. *Limitations.* The twenty-acre tract was wild and unimproved; and plaintiffs claimed that they had paid taxes on the land for more than seven years, and thereby sought to claim the minerals by limitations under § 37-102, Ark. Stats. Such claim is without avail. This suit does not involve the surface rights of the twenty acres: it involves only the minerals; and the taxes paid by the plaintiffs were the general—or land—taxes. The plaintiffs' case presupposed outstanding minerals—to the extent of one-half — when plaintiffs received their deed of April 6, 1937, from J. A. Wright. Therefore, when plaintiffs executed the deed here in question to J. A. Wright on June 1, 1937, such deed constituted, between the parties, constructive severance of the remaining one-half of the minerals. Thus, the plaintiffs' payment of general taxes after 1937 would not constitute adverse possession of the minerals, anymore than possession of the surface would have supported a claim of adverse possession against the owner of the minerals. We have repeatedly stated that possession of the surface is not adverse to the owner of the constructively severed minerals. See *Bodcaw Lumber Co.* v. *Goode,* 160 Ark. 48, 254 S. W. 345, 29 A. L. R. 578; *Claybrooke* v. *Barnes,* 180 Ark. 678, 22 S. W. 2d 390, 67 A. L. R. 1436; *Skelly Oil Co.* v. *Johnson,* 209 Ark. 1107, 194 S. W. 2d 425; *Jones* v. *Brown,* 211 Ark. 164, 199 S. W. 2d 973; and *Brizzolara* v. *Powell,* 214 Ark. 870, 218 S. W. 2d 728.

III. *Laches and Estoppel.* Plaintiffs say that J. A. Wright did not record the deed of June 1, 1937; that he remained silent while plaintiffs executed an oil and gas lease in 1944; that his death has destroyed plaintiffs' opportunity to have his testimony; and that the defendants signed a Unitization Agreement in 1948 covering forty acres of land, including the twenty-acre tract here involved, which unitization instrument showed that the plaintiffs had also signed it. In these facts we cannot find the required essentials to support plaintiffs' claim

either of laches or estoppel. When we hold—as we have—that plaintiffs executed the deed of June 1, 1937, here in question, then the necessary result of such holding is that they knew of the deed regardless of recordation. Therefore, the failure of J. A. Wright, to record his deed, could not adversely affect these plaintiffs. The execution by them of the oil and gas lease in 1944 could not be an act sufficient to constitute laches or estoppel in plaintiffs' favor against J. A. Wright or his estate, because the lease was not in his chain of title. (See *Abbott* v. *Parker,* 103 Ark. 425, 147 S. W. 70; and *Etchison* v. *Dail,* 182 Ark. 350, 31 S. W. 2d 426.) Likewise, since the plaintiffs deny the execution of the June 1, 1937, deed, we fail to see how J. A. Wright's death could have possibly deprived them of any testimony regarding the fact of the execution of the deed. As for the unitization instrument in 1948: it does not attempt to say that any particular one of the twenty signers owned any particular interest in the forty acres covered by the unitization; and the defendants were not required to know the mineral interest claimed by each of the persons who signed that instrument. So we find no merit in plaintiffs' plea of laches or estoppel.

IV. *"Deed Conveyed No Beneficial Interest".* Under this quoted heading the plaintiffs, in their brief in this Court, engage in considerable speculation as to why the deed of June 1, 1937, was executed, and why J. A. Wright never placed it of record. We are asked to apply in this suit, such cases as *Turner* v. *Martin,* 211 Ark. 376, 200 S. W. 2d 495; and *Woodruff* v. *Miller,* 212 Ark. 191, 205 S. W. 2d 181. Those cases are not applicable here, because there are no facts in the case at bar to bring it within the rule of either of the cited cases. We cannot join the plaintiffs in their present speculations, because they testified that they did not execute the deed of June 1, 1937; and that was the point decided by the trial court. Plaintiffs cannot now be heard to say that they "might have executed" the said deed for

some purpose, when their entire evidence is a denial—and not an explanation—of execution.

Finding no error, the decree is affirmed.

REYNOLDS *v.* MCNEILL.

4-9348 236 S. W. 2d 723

Opinion delivered February 26, 1951.

Homer T. Rogers and *Gaughan, McClellan & Gaughan,* for appellant.

Keith & Clegg, for appellee.

George Rose Smith, J. This is an action by the appellants to cancel an oil and gas lease which they executed to appellee McNeill on April 7, 1949. The lease was for a term of six months and as long thereafter as oil or gas was produced in paying quantities. The lessee paid nothing for the lease, the instrument containing this provision: "The consideration for the execution of this lease is: Lessee agrees to begin the drilling of a well . . . before the 15th of May, 1949, and to continue . . . with due diligence . . . to a depth of 5,000 feet unless oil or gas in paying quantities is found at a lesser depth. It is agreed that if said well is not commenced and drilled, as herein provided, this lease shall terminate as to both parties without further release or assignment."

The appellants filed this suit on February 16, 1950, alleging that the lessee had failed to drill to 5,000 feet, had failed to produce oil or gas in paying quantities, and had abandoned the well that had been completed. The chancellor, refusing to declare an immediate forfeiture, entered a decree allowing the appellees sixty days in which to produce oil or gas in paying quantities.

When the lease was executed the lessors knew that McNeill could not finance the well and would have to obtain outside aid. The Petersen Drilling Company agreed to drill the well and did drill it to a depth of 3,870 feet, at a cost of about $40,000. On May 31 a successful attempt was made to obtain production at about 2,800 feet. Whether this initial production was "in paying quantities" is a disputed issue.

There is really very little testimony as to production in the early days of the well, as neither member of the Petersen partnership testified at the trial. McNeill testified without objection that M. Q. Petersen had told him that the well was making twenty-five barrels of oil a day. Bill Griffin was employed to pump the well from July 7 until pumping was discontinued late in November, and he testified that during this period the well produced about two barrels a day. Appellant Dan Reynolds said that all the well ever pumped was about two and

a half barrels a day, but there is little in his testimony to indicate that he had extensive first-hand knowledge of the well during the period immediately after it was completed.

On this point the most convincing evidence is a report made by Petersen to the Oil and Gas Commission, in which it was stated that the well at first produced twenty-five barrels (apparently daily). This report was not objected to, and in any event we think it was admissible as a memorandum of a fact made in the regular course of business. Ark. Stats., 1947, § 28-928. Petersen had drilled the well, and his statement as to its initial production is entitled to much more weight than that of other witnesses who had little or no personal knowledge of the facts. We conclude that the well at first produced twenty-five barrels a day, and practically all the testimony indicates that such production must be considered to be "in paying quantities" as that phrase is used here. See Summers, Oil and Gas, § 306.

A pump was installed not later than July 7, and thereafter the well produced about two or three barrels of oil a day, and a far greater quantity of salt water, until pumping was discontinued in the latter part of November. Petersen then notified the Oil and Gas Commission that he considered the well to be dry and intended to plug it on December 7.

McNeill, however, believed that the well could be reworked and made to produce commercially. It was his theory, shared by Dan Reynolds and others, that fine sand had filtered into the bottom of the drill casing and had obstructed the flow of oil. If this sand could be cleaned out the well might again produce at its original depth or at some higher point. Upon this theory McNeill obtained Petersen's permission to use the equipment that was still at the well. Petersen then notified the Commission that the well had been turned over to McNeill for further testing.

In December A. H. Pesnell agreed to rework the well for McNeill, but due to a misunderstanding with

Petersen that agreement was not carried out. McNeill then made a similar contract with appellee, Watts, a drilling contractor. At least as late as January appellants, Dan and James Reynolds, knew of McNeill's efforts and made no contention that the lease had forfeited; in fact, they were then endeavoring to obtain an assignment of the lease to themselves. But when Watts attempted to enter the land with his equipment on February 13 he was told by the Reynolds brothers that they considered the lease no longer valid. This suit was filed three days later.

The chancellor was right in refusing to declare a forfeiture. The lessee and his assignees had spent large sums in successfully attaining production within the primary term of six months. When that event occurred a valuable estate vested in the lessee, to continue as long as oil or gas was produced in paying quantities.

The appellants contend, however, that the estate terminated at the end of the primary term because oil was no longer being produced in commercial amounts. According to the weight of authority, and we think the better view, when the lessee's estate has vested it does not automatically terminate upon a temporary cessation of production. In ventures of this kind the lessee makes a very substantial investment and bears the entire loss if the well is unproductive. It would be harsh and inequitable to say that upon a temporary stoppage of production the lessor can declare a forfeiture and take over the property himself. Hence most authorities allow the lessee a reasonable time within which to reinstate paying production. For instance, in a case where the derricks blew down in a heavy storm, and later burned, the lessor was not permitted to declare the lease at an end because his royalties had ceased for the time being. *Zeller* v. *Book,* 28 Ohio C. C. 119. Similarly, in *Blair* v. *Ohio Nat. Gas Co.,* 12 Ohio C. C. 78, 5 Ohio C. D. 619, a gas well went dry after flowing for about seven years. The lessee first tried to remove the pipe and clean the well, but that attempt failed. He then staked out a new location for the drilling of an oil well. The court refused to

allow a forfeiture. Other cases include *Wilson* v. *Holm,* 164 Kan. 229, 188 P. 2d 899, and *Watson* v. *Rochmill,* 137 Tex. 565, 155 S. W. 2d 783.

We are not willing to say that the chancellor was wrong in giving the appellees sixty days of grace in which to resume paying production. The lessee has never relaxed his efforts to make this well profitable to the lessors. When the output of salt water became too great for the pump Petersen removed the pipe and installed a larger one in the hope of increasing the withdrawal of oil. After Petersen gave up the well McNeill took it over and was about to begin cleaning out the sand when the lessors abruptly decided that a forfeiture had occurred months before. Dan Reynolds testified with commendable candor that he thought the well had possibilities and that if the lease should be canceled he intended to try to rework the well by removing the sand in the casing. McNeill and those working with him have expended over $40,000 in attaining production and in attempting to continue that production. They have not abandoned their efforts for any appreciable time. The appellants did not make their dissatisfaction known until three days before suit was filed. They are not in a position to complain of the chancellor's ruling.

Affirmed.

[redacted]

BARGER *v.* BAKER.

4-9401 237 S. W. 2d 37

Opinion delivered March 5, 1951.

[redacted]

John H. Thompson and *J. K. Shamburger,* for appellant.

T. E. Abington, for appellee.

ROBINSON, J. This is a contest between mother and daughter as to the ownership of a piece of real estate. The property was bought from one Smythe, son-in-law of the mother, appellant, and the brother-in-law of the daughter, appellee, the deed naming both mother and daughter as grantees.

The daughter claims that she made the down-payment and all subsequent payments on the property out of her own funds, that she bought the property personally, that the mother owned no part of it; but the deed was made to her and her mother due to the fact that her brother-in-law and sister told her that since she was only 20 years of age at the time of the transaction, the deed would have to be made to both her and her mother, so that the brother-in-law and sister could sell the note for the deferred payments, thereby getting all of their money at once. The daughter claims further that the mother at the time promised to give her a deed just as soon as she became 21 years of age, but has refused to abide by such agreement.

The mother denied this version of the transaction and stated that she furnished part of the money with which the property was bought, and for that reason she is named as one of the grantees in the deed and that she is the rightful owner of one-half interest in the property. The chancellor found in favor of the daughter.

It would serve no useful purpose to set out here the evidence in the case. Suffice it to say that both parties produced evidence corroborating their version of the facts, but the finding of the chancellor is supported, not only by a preponderance of the evidence, but by clear and convincing testimony and meets the requirement that trusts resulting by operation of law must be established by evidence which is full, free and convincing. *Ripley* v. *Kelly,* 207 Ark. 1011, 183 S. W. 2d 793; *Grayson* v. *Bowlin,* 70 Ark. 145, 66 S. W. 658.

Affirmed.

4-9389 236 S. W. 2d 1006

Opinion delivered March 5, 1951.

Hays, Williams & Gardner, for appellant.

Reece Caudle and *Robt. J. White,* for appellee.

ED. F. MCFADDIN, Justice. This is the second appeal in this case: see *Mortensen* v. *Ballard,* 209 Ark. 1, 188 S. W. 2d 749, wherein the complaint is set out *in extenso.* On September 5, 1944, Mortensen filed suit seeking: (a) to have the defendant, Evelyn Pearson Ballard, declared a trustee for him in the real estate and corporate stock of the Pearson Hotel Company, and (b) judgment against the Pearson Hotel Company (a corporation) for money alleged to be due him for services rendered. Demurrers were sustained by the trial court; and on the first appeal

we held that the complaint stated a cause of action; and we remanded the cause to the Chancery Court for further proceedings.

Thereupon, each defendant, by separate pleading, denied the material allegations of the complaint, denied plaintiff's claim of a partnership between himself and Evelyn Pearson Ballard, and affirmatively pleaded limitations, laches and estoppel against any claim of the plaintiff. The taking of depositions extended over several years, resulting in a transcript in excess of 700 pages and printed briefs totaling 291 pages. The Chancery decree was in favor of the defendants, and the plaintiff has appealed. We will refer to the parties as they were styled in the lower court; and will separately discuss plaintiff's case against each of the defendants.

I. *Mortensen's Claim Against the Defendant, Evelyn Pearson Ballard.* We hold that the plaintiff's alleged cause of action is barred by limitations, even assuming—but not deciding—that he established his case on other issues. Mortensen testified that he and Evelyn Pearson Ballard were partners in the hotel business in Texas from 1924 to 1926, and that from the assets of the Texas partnership, the Pearson Hotel in Russellville had its inception as a partnership in 1926. It was shown that a partnership income tax return was made to the United States Government in 1926 and 1927 for the Pearson Hotel of Russellville, showing the plaintiff, Mortensen, and the defendant, Evelyn Pearson (now Ballard) as equal partners. But on June 21, 1927, the partners formed a corporation to take over the partnership assets in order to refinance the hotel building in Russellville against the pressing claims of creditors.

So the corporation, "Pearson Hotel Company," was organized; and many creditors took preferred stock in the corporation in lieu of claims against the former partnership. The common stock of the corporation, consisting of 100 shares, was issued: 90 shares to the defendant, Evelyn Pearson (now Ballard); 2 shares to the plaintiff, Mortensen; and 2 shares to each of four other individuals. The plaintiff claims that an agreement was made between

him and Evelyn Pearson Ballard that she would hold, as trustee (equally for himself and her), the said 90 shares issued to her. But the plea of limitations arises at this point: because even assuming a trust relationship, there was nevertheless a definite repudiation of the trust brought home to the plaintiff, and then an unreasonable delay thereafter before the filing of this suit.

The plaintiff testified that his first information of such denial of the alleged trust relationship was in 1944, when he talked to Evelyn Pearson Ballard, and she told him that he had no interest in the stock. The defendant, Evelyn Pearson Ballard, testified that the plaintiff never had any interest in the 90 shares of stock and she had frequently so informed him. Such is the testimony between the parties. There is, however, overwhelming testimony from disinterested witnesses supporting Evelyn Pearson Ballard. One such witness was W. O. Cooper, who testified that sometime in 1927, after the organization of the corporation, he went to Russellville to see Mortensen in an effort to collect a judgment that Cooper's associate held against Mortensen; that Mortensen then denied any ownership in the hotel corporation except the two shares in his name; and that Cooper went to Evelyn Pearson Ballard and received verification of Mortensen's statements. Later, Cooper, Morgan, Mortensen and Ballard were all present, and defendant stated that Mortensen had no interest whatsoever in the hotel property or the corporation, except the two shares in his name. That was in 1927. Furthermore, Judge J. B. Ward[1] testified:

"Q. With reference to June, 1927, when the corporation was formed, when did you first learn that Mr. Mortensen had claimed or was claiming any interest in the property or the stock of the corporation?

"A. I wouldn't be sure about that. It was some time afterwards, a year or maybe it might have been less or it might have been more. There seemed to have been

[1] Judge Ward is now the Chancellor of the Eighth Chancery District, of which Pope County is a part, and because he was a witness in this case, Chancellor Wofford of the Tenth Chancery District tried this case.

some trouble down there. I don't know just all the details about it. Mr. Mortensen talked to me about it and claimed at that time to own an interest in the hotel.

"Q. Did he state whether or not Mrs. Ballard had denied to him that he had any interest in the property?

"A. He said she was denying that he had any interest and wanted to know what to do.

"Q. That was about a year after the formation?

"A. That was about a year, maybe not quite a year and maybe a little over a year.

"Q. What did you advise him?

"A. I advised him that I was representing the hotel company at that time, and if he had any interest he had better secure the services of a lawyer to protect his interest.

"Q. Have you had more than one such conversation with him?

"A. I had a good many.

"Q. What did he state with reference to Mrs. Pearson admitting or denying his interest in the property or stock of the corporation?

"A. All those conversations were based on the theory that she was denying that he had any interest in the property, and wanted to protect it."

The law is well settled that limitation begins to run, even as against an express trust, when knowledge is brought home to the beneficiary of the trustee's repudiation of the trust and that the trustee is holding adversely to the beneficiary. See *McGaughey* v. *Brown,* 46 Ark. 25; *Leach* v. *Moore,* 57 Ark. 583, 22 S. W. 173; and *Sprigg* v. *Wilmans,* 204 Ark. 863, 165 S. W. 2d 69. In 34 Am. Jur. 140, the holdings are summarized:

"It has repeatedly been affirmed that when a trustee of an express trust denies the trust and assumes the absolute ownership of the property, and his claim is brought home to the *cestui que trust,* a cause of action

exists in favor of the latter from the time he receives notice of the repudiating by the trustee, and the statute begins to run from that time, for such denial and adverse claim, together with communication of knowledge thereof, constitute an abandonment of the fiduciary character in which the trustee has stood to the property."

In 1927 actual knowledge was brought home to the plaintiff, Mortensen, that the defendant, Evelyn Pearson Ballard, had repudiated any possible trust relationship regarding the 90 shares of stock in the Pearson Hotel Company, and that she had openly stated that it was her own stock. Mortensen then waited from 1927 until 1944 —17 years—before filing this suit to have the trust declared. He is therefore barred by limitations.

II. *Mortensen's Claim Against the Pearson Hotel Company (the Corporation) for $18,335.15 for Services Rendered.* We conclude that Mortensen is not entitled to recover, because he failed to show that his services were worth more than the total of the items which he admitted receiving from the corporation. Mortensen based his claim on a resolution purportedly adopted on August 12, 1929, at a meeting of the Board of Directors of the corporation. The resolution stated that Mortensen would receive a salary of $250 per month for services as assistant manager; but this purported resolution is void: there were five directors of the corporation, and at the meeting of August 12, 1929, there were present only Mortensen and two other directors, so his presence was required to constitute a quorum.

In *Oil Fields Corp.* v. *Hess,* 186 Ark. 241, 53 S. W. 2d 444, and again in *Cook* v. *Malvern Brick & Tile Co.,* 194 Ark. 759, 109 S. W. 2d 451, we quoted with approval from Vol. 14a C. J. 136, as follows:

" 'An officer is without authority to fix or increase his own salary. Directors are precluded from fixing, increasing, or voting compensation to themselves for either past or future services by them as directors or officers, unless they are expressly authorized to do so by the charter or by the stockholders. *The director who claims com-*

pensation for his services, being disqualified from voting on the question, if he is necessary to make up a quorum of the board, or if his vote is necessary to the result, the resolution will be void.' " (Italics our own.)

To the same effect, see the Annotation in 175 A. L. R. 577, entitled "Participation by corporate director in vote or meeting fixing compensation for his own services," wherein the holdings are summarized:

"In the absence of authorization by statute or by the corporate charter or bylaws a director cannot be counted in order to constitute a quorum necessary to act on a proposition to fix his salary or compensation."

When we strike the resolution of August 12, 1929—as we must under the authorities cited—then Mortensen may recover for his services on a *quantum meruit* basis and not at the rate of $250 per month. In 13 Am. Jur. 976, the rule is stated:

"The rule to be deduced from the modern and best considered cases is that a person, although a director or other officer of a corporation, may recover the reasonable value of necessary services rendered to a corporation, entirely outside the line and scope of his duties as such director or officer, performed at the instance of its officers, whose powers are of a general character, upon an implied promise to pay for such services, when they were rendered under such circumstances as fairly to indicate that the parties intended and understood they were to be paid for, or ought to have so intended and understood."

See, also, *Stout* v. *Oates,* 217 Ark. 938, 234 S. W. 2d 506 (decision of December 11, 1950).

What is the evidence as to the services rendered by Mortensen? He testified that he was assistant manager of the hotel, and also serviced the elevator and other electrical equipment; that he worked at the hotel from 1929 until 1934; that from 1934 to 1939 he was employed by the Works Progress Administration of the United States

Government[2]; and that in 1939 he returned to the hotel and worked there until 1944. As against the services rendered, Mortensen admitted that he was all the time furnished his room and meals, and that his "laundry bills, medical bills and other incidental expenses" were all the time paid by the hotel. Notwithstanding all that he received, Mortensen contends that the hotel company owed him a balance of $12,428.19 in 1939; so the excess of his claimed salary above his furnished items from 1939 to 1944 would calculate $5,906.96, in order to make the total of $18,335.15, as claimed.

As shedding light on Mortensen's claim against the Pearson Hotel Company, we mention a significant portion of the evidence. In 1936 the Pearson Hotel Company obtained a loan from the Reconstruction Finance Corporation. Mortensen was president of the hotel company at that time, even though he was employed by the Works Progress Administration. The Reconstruction Finance Corporation required of the hotel company a signed statement "relating to compensation of officers, directors, employees and agents of the Pearson Hotel Company." Mortensen signed such instrument which listed the

[2] Here is his testimony:

"Q. During the time you were assistant manager were you away from the hotel, and if so, explain why and for how long?

"A. I was away most of the time from 1934 to 1939 inclusive. The depression came on in 1929 and 1930, but by 1933 business was bad everywhere. . . . The hotel business was bad and barely able to meet the financial obligation already. And so, I took a job with the W.C.A. to superintend some remodeling work out here at Tech. That was in 1933. And I received $100 a month for that. . . .

"Q. During that time did you come back to the hotel and service the various electrical equipment of the hotel just as you had done?

"A. During that time I stayed at the hotel and went out to the Tech buildings during the day time. I was at the hotel in and out. I didn't have to be on the job permanently. But in 1934 I accepted a job with Public Works Administration known as the P.W.A. at an increased rate of pay. From then on, that was the first of August, 1934—my first assignment was Fayetteville, Arkansas—from then on up until the agency ceased functioning I was all around Russellville at different points, and I would come in here on week ends and whenever they notified me that something that was necessary for me to see about. At the same time, I kept looking after the equipment and checking it over when I would come in.

"Q. Since you returned from working for the Government have you performed all the regular duties of assistant manager of the hotel?

"A. I performed the same duties I did before, to the extent of my physical ability. The rheumatism had taken charge of me and it was pretty bad."

monthly compensation of the manager, each clerk, and all waitresses, bellboys and kitchen help. The manager's salary was fixed at $150 a month for Mrs. Ballard. Mortensen's name is not listed as having any claim for back compensation, or as expecting any monetary compensation for services to be rendered to the hotel company in the future; and the hotel company and its officers agreed in the instrument:

"So long as the undersigned is indebted to the RFC Mortgage Company, the undersigned will not increase the compensation (either directly or through appointment to any additional office or position) of any of its officers, directors, employees or agents above the respective amounts shown on such schedule, . . ."

Thus in 1936 Mortensen did not make any claim to the Reconstruction Finance Corporation for back salary and agreed with that agency that he would not claim any salary. While the Reconstruction Finance Corporation is not a party to this case, we nevertheless consider the foregoing agreement as highly significant.

From a review of all of the evidence, we are convinced that Mortensen rendered his services to the hotel company to equal his room, meals, laundry, medical bills and his other bills from various merchants in Russellville, all of which he admitted were paid by the hotel company. At all events, when Mortensen's services are measured on a *quantum meruit* basis, we cannot say that the finding of the Chancery Court in favor of the hotel company is contrary to the preponderance of the evidence.

The decree is in all things affirmed.

HIGGINS *v.* BARNHILL.

4-9408 236 S. W. 2d 1011

Opinion delivered March 5, 1951.

Rhine & Rhine and *Cecil Grooms,* for appellant.

Kirsch & Cathey, for appellee.

ROBINSON, J. In the Greene County preferential primary held on July 25, 1950, there were 7 candidates for the office of County Judge. Harvey Farrell received 2,083 votes, J. Moss Payne, 1,257 votes, and Ray Higgins, the appellant, 1,251 votes. Prior to the general primary election held in August, Payne withdrew from the race and requested George Barnhill, Chairman of the County Democratic Central Committee, to leave his name off the ballot at the general primary election. Barnhill conferred with Harvey McLerkin, Secretary of the Committee, and they complied with Payne's written request and did not place his name on the ballot for the next primary election.

Just as soon as appellant, Ray Higgins, learned that Payne had withdrawn from the race, he requested that his name be placed on the ballot. This request was refused and Higgins filed a Petition for a Writ of Mandamus in the Chancery Court to compel the Committee to place his name on the general primary ballot. The court denied the Writ and Higgins has appealed.

As to the jurisdiction of the Chancery Court, § 33-101, Ark. Stats., provides: "The Circuit and Chancery Court shall have power to hear and determine Petitions for the writ of mandamus and prohibition, and to issue such

writs to all inferior courts, tribunals, and officers in their respective jurisdictions."

If appellant was entitled to have his name placed on the ballot, and the Chairman and Secretary of the County Democratic Central Committee refused to have his name printed thereon, then the Chairman and Secretary would be refusing to perform a ministerial duty, and could be compelled by mandamus from the Chancery Court to carry out such duty. This point was decided in the case of *Irby* v. *Barrett,* 204 Ark. 682, 163 S. W. 2d 512, appealed from the Pulaski Chancery Court, wherein Mr. Justice SMITH, speaking for the Court, said: "We conclude, therefore, that the Chairman and Secretary of the State Committee exceeded their power in refusing to perform the ministerial duty of certifying Petitioner as one who had complied with the laws of the State, and the rules of the party as he admittedly has done. The Decree of the court below will, therefore, be reversed, and the cause will be remanded with directions to award the Writ of Mandamus."

The question presented here is not moot because, if we fail to pass on the issue for the reason that at this late date the decision of this Court could avail the appellant nothing, it is possible that, by reason of the time element involved between the two primary elections and the time necessary to perfect an appeal to this Court, the point involved could never be decided before becoming moot.

This Court has said: "The question presented is one which may arise at any election hereafter held where ministerial officers usurp a judicial function. There is here a question of practical importance and of great public interest, and if not now decided, some other candidate may be deprived of the right to run for a public office, and his right to do so may become a moot question before it could be decided, on account of unavoidable delay in the law." *Carroll* v. *Schneider,* 211 Ark. 538, 201 S. W. 2d 221.

Likewise, in the case at bar, we have a question that may arise at any future election and a decision could not

be obtained until the question had become moot. We, therefore, proceed to pass on the principal issue involved.

The Chairman and Secretary of the Committee were not in error in refusing to place appellant's name on the ballot. Section 3-211, Ark. Stats., provides:

". . . If no candidate receives a majority of votes cast for an office at the preferential primary election, the names of the two candidates who received the highest number of votes for an office, or position, shall be printed upon the ballots at the general primary election."

In the case of *Bohlinger* v. *Christian,* 189 Ark. 839, 75 S. W. 2d 230, a somewhat similar situation existed. There, two representatives were to be elected. Bohlinger was third man as to the number of votes received, and he claimed he was the rightful nominee instead of one of the others who had received a greater number of votes for the reason that such other person was not qualified to hold the office. This Court held that even though one of the others might be disqualified, still, such disqualification would not inure to the benefit of Bohlinger, because he had not received enough votes to nominate him, regardless of any other circumstances.

In order to hold that the third man is entitled to have his name placed on the ballot when for some reason the first or second name does not appear thereon, we would have to read into the Statute something that is not there. If the Legislature had intended that the third man's name could be placed on the ballot in such circumstances, it would in all probability, have so provided in the Act. In fact, an Act was introduced to accomplish this very thing, but did not pass. It died on the calendar—H. B. 97 (1945). The Statute makes no provision whatever for the name of anyone being placed on the ballot at the general primary election except the names of the two who received the highest number of votes cast for that office at the preferential primary. If it were otherwise, neither of the two leading candidates would ever know for certain who his opponent would be until the ballots were actually printed. This may be the reason the Legislature let H. B. 97 (1945) die on the calendar, but, regardless of the rea-

son, the Legislature certainly had the matter under consideration, and made no change in the law.*

Affirmed.

BUSH, ADMINISTRATRIX *v.* EVANS.

4-9412 236 S. W. 2d 1013

Opinion delivered March 5, 1951.

* In the autumn 1944 issue of the Arkansas Historical Quarterly, it is said: "When a winner of a plurality or a runner-up in the first primary withdraws prior to the second race the ballot in the run-off includes only the name of the single remaining aspirant. Having no opponent, this candidate polls all votes cast in the second primary. . . . Amendment 29 requires majority nominations in direct primaries. The current enabling Statute, Act 238 of 1943, on the other hand, expressly states that 'the names of the *two* candidates who receive the highest number of votes for an office, or position, shall be printed upon the ballots at the general (run-off) primary election.' This provision denies a place on the second primary ballot to the candidate running third in the first primary, even when the winner or the runner-up, or the winner and the runner-up, withdraw."

[redacted]

W. J. Morrow and *George O. Patterson,* for appellant.

Wiley W. Bean, for appellee.

HOLT, J. August 16, 1949, Dwight and Iva Evans, husband and wife (appellees) filed the following verified joint claim against the estate of George W. Hutson, who died June 6, 1949: "TO: Helen Bush, administratrix of the goods, chattels and credits of George W. Hutson, Deceased, and Garner Taylor, Clerk of the County of Johnson, Clarksville, Arkansas. May 1, 1946, to February 27, 1949, To services rendered as follows: Services rendered by Dwight Evans and Iva Evans, husband and wife, as companions, servants, nurse, managers of household, cooking for, shaving, preparing and furnishing 306 meals for deceased in claimant's home, and for general care; said services continuing for a period of 765 days, at the special instance and request of the decedent during the life time, at the express, agreed, and reasonable value of two dollars ($2.00) per day, no part of which said sum has been paid. TOTAL AMOUNT OF CLAIM:— $1,530, Dwight Evans, Iva Evans.

"Comes the claimants, Dwight Evans and Iva Evans, and upon oath say that the matters and things set out in the foregoing claim are true and correct. Witness my hand and seal on this 16th day of August, 1949. (SEAL) Wiley W. Bean, Notary Public, My Commission expires March 15, 1950."

In response to request for "Bill of Particulars," appellees asserted "that said claim is based upon the periods when no one was living in the home of the deceased; that such services were rendered between May 1, 1946, and March 2, 1947; from September 14, 1947, to September 20, 1948, and from October 30, 1948, to February 27, 1949; that claimant, Dwight Evans, shaved the deceased at all times when others lived in the house with him until on or about October 30, 1948, when he and the tenant, Ola Park, had a disagreement."

The administratrix (adopted daughter of deceased) disallowed the claim and on appeal to the Probate Court, Iva was awarded $150, but Dwight was denied any recovery.

The cause is here on appellant's direct appeal and cross appeal of appellees.

While the claim here, as filed and presented, was designated as the joint claim of appellees, as the testimony developed and appeared to warrant, the trial court treated the claim as a separate claim of each spouse. This the court had the right to do, in the circumstances.

Appellees say: "George Hutson, deceased, accepted the beneficial results of claimants' services, and the law implies a previous request and a subsequent promise to pay."

Both appellees testified in this case. Neither had been called by appellant, the opposite party. Their testimony tended to show an oral agreement with the deceased to pay for the services which each claimed to have rendered. Appellant earnestly contends that this testimony of appellees as to any transactions with the deceased was incompetent and violative of § 5154, Pope's Digest, which provides:

"In civil action, no witness shall be excluded because he is a party to the suit or interested in the issue to be tried. Provided, in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator, intestate or ward, unless called to testify thereto by the opposite party. Provided further, this section may be amended or repealed by the General Assembly, Sched., § 2, Const."

Since, as indicated, we treat the claims as separate, although Dwight and Iva may be interested in each other's claim, the above statute does not make the testimony of each, on the other's claim, incompetent. § 28-603, Ark. Stats. 1947, provides: "In any civil action in the courts of this State a husband or wife may testify as a

witness in behalf of the other when called as such witness by the other spouse, but cannot be called as a witness by the opposite party. (Acts 1937, No. 320, § 1, p. 1218; Pope's Dige., § 5156.)"

In the recent case of *Meers* v. *Potter,* 208 Ark. 965, 188 S. W. 2d 500, wherein M. H. Potter and Sudie Potter (husband and wife) filed separate claims as against an estate, we said: "It is first insisted that it was error to permit M. H. Potter to testify about the alleged agreement between deceased and Sudie Potter, and that his testimony for this purpose was incompetent under § 5154 of Pope's Digest and Schedule, § 2, of the Constitution of 1874. It has been repeatedly held that this statute applies only to those who are technically parties to the suit, and is not applicable to parties merely interested in its result. *McRae* v. *Holcomb,* 46 Ark. 306; *Smart, Administratrix,* v. *Owen,* 208 Ark. 662, 187 S. W. 2d 312. In construing the statutes in *McRae* v. *Holcomb, supra,* this court said: 'The constitution establishes a general rule that makes all persons who are of sufficient intelligence and not otherwise disqualified, competent witnesses, irrespective of their participation in the suit, or their interest in the result. But to this general rule there is one exception, *viz*: Where the action is by or against an executor, administrator, etc., and the witness is a party to the record, he shall not speak of personal transactions with the deceased, where, by the nature of the case, the privilege of testifying cannot be reciprocal. But mere interest in the issue to be tried does not disqualify.' M. H. Potter is not a party to the claim of Sudie Potter, and while it is true that he is interested, the statue does not render his evidence incompetent, as to the claim of his wife."

The burden of proof was on appellees to show facts which would warrant the inference that there was an expressed or implied contract or agreement to pay for the services.

Dwight Evans testified on behalf of his wife that she served the deceased approximately 300 meals. "The Court: Your husband testified you served something

over 300 meals. What was the value of the meals, each meal? A. I figured it would be $.50 a meal."

Two of deecased's brothers, O. L. and W. C. Hutson, testified. O. L. Hutson: "Q. Did you have occasion to visit with your brother during his last years? A. Once a week most of the time before he died. Q. He lived alone? A. Lived alone about 12-18 months. Q. Can you tell the court whether or not Dwight Evans and his wife helped to take care of him? A. I don't know about taking care of him. When I was down there, Dwight was there part of the time. Only thing I knew was that George told me Dwight was awfully good to him, shaved him about once a week, kind of saw about him, about the only ones around there that could see about him. I was there most of the time on Saturday. That is about all I know."

W. C. Hutson tended to corroborate his brother, and (quoting from his testimony): "Q. Tell the court whether or not Dwight Evans rendered him a service during those months he lived alone. A. All I can tell is what my brother said, said Dwight Evans was awfully good to him, said he would come down and shave him once a week. That is about all I know. Q. Did he state to you whether or not he visited him frequently? A. Said hardly ever a day passed but what he would be there some time of the day."

Ellis Bush testified relative to the understanding between appellees and the deceased: "Q. What do you know about the services Mr. Evans and his wife rendered? A. The only service I know about is that Dwight went down and shaved him once a week, part of the time he cut his hair. Once my wife shaved him, and I shaved him. Q. What did he (meaning Dwight) do with reference to furnishing meals? A. If he ever did, I didn't know it."

Namon Looper corroborated Mr. Bush's testimony.

Ola Parks testified: "Q. You have any personal knowledge of what Mr. Evans did before you moved there? A. No, no more than George said he shaved him

for the pasture and barn rent. I shaved him every Saturday and after he went to the hospital.'

Virgil Knight, who had lived across the street from deceased since March, 1946, testified: "Q. Do you know anything about Mr. Evans performing some services? A. Yes sir, I saw him over there. Q. Ever talked to Mr. Evans about the circumstances under which he was performing these services? A. He and Mr. Hutson told me he was using the garden and pasture and barn for his services, shaving him. Q. Mr. Evans told you? A. And Mr. Hutson. Q. Know anything about Mr. Hutson being furnished meals by Mr. Evans other than what Mr. Evans told you? A. Saw Dwight take Mr. Hutson up for meals. Q. You have no interest in this case? A. None."

As to Dwight's claim, much significance is attached to his testimony that about one year before George Hutson died, he, Dwight, purchased some land from the decedent, paying therefor $1,000 cash, and that at the time of this purchase from one-half to two-thirds of the services for which he made claim had already been rendered decedent. "Q. You had rendered part of this service before that time? A. Yes sir. Q. In fact, the biggest part? A. One-half or two-thirds. . . . Q. You paid him $1,000 for it? A. Yes sir. Q. That was after he was indebted to you? A. Yes sir. Q. He owed you, you paid him $1,000. A. Yes sir. Q. Why didn't you deduct the amount he owed you? A. I don't know why."

There was some other evidence that decedent had permitted Dwight the use of a barn, pasture and garden privileges in return for services rendered.

We think it unnecessary to attempt to detail all the testimony. It suffices to say that after reviewing it all, we agree with the findings of the trial court that the preponderance of the competent testimony falls far short of supporting any award, in the circumstances, to Dwight Evans, it appearing that he had been fully compensated for any services by the use of the barn, pasture and garden of decedent.

We also are unable to say that the court's finding that Iva Evans should be awarded $150 for her services, in the circumstances, was against the preponderance of the competent testimony.

Accordingly, the judgment is affirmed on both direct and cross appeal.

WERBE *v.* HOLT.

4-9395 237 S. W. 2d 478

Opinion delivered February 26, 1951.

Rehearing denied April 2, 1951.

J. R. Crocker, Thos. F. Butt and *O. E. Williams,* for appellant.

Sullins & Perkins, Price Dickson and *Lee Seamster,* for appellee.

HOLT, J. This is the second appeal in this case. See *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, opinion delivered April 24, 1950, for opinion in first appeal wherein we reversed on a procedural matter.

A will contest is presented in which appellants seek to set aside, for lack of mental capacity and undue influence, a will probated as that of F. C. Werbe. Appellants are the alleged adopted son and the heirs-at-law of the deceased, Werbe. Under the terms of his will, Mr. Werbe left all his estate to Mrs. Jessie Holt, his housekeeper.

After a somewhat extended and patient hearing, the trial court found the will valid, that the petition of appellant, James Earl Werbe, and that of the other appellants, as interveners, should be denied. The court did not pass upon the legality of Earl Werbe's adoption or the claims of the remaining appellants that they were the heirs-at-law of the deceased. (See *Hawkins* v. *Hawkins, ante,* p. ....., 236 S. W. 2d 733, opinion handed down this day, wherein the status of an adopted child is considered.)

From the decree comes this appeal.

For reversal, appellants argue (1) "the court should have found whether Earl Werbe was legally adopted," and (2) "undue influence was used in procuring the execution of the alleged will."

(1) Since we have reached the conclusion that the decree should be affirmed, it becomes unnecessary to consider appellants' first contention that Earl Werbe was the legally adopted son of the deceased, and the remaining appellants his heirs-at-law.

(2) No principle of law appears to be more definitely settled than that the burden of showing lack of mental capacity and undue influence in making a will rests on the contestant. As early as 1858, when the decision in *McDaniel ad.* v. *Crosby, et al,* 19 Ark. 533, was announced and through a long line of subsequent cases, we have adhered to the above rule. A few of such cases

are: *Jenkins, et al* v. *Tobin, et al,* 31 Ark. 306; *McCulloch* v. *Campbell,* 49 Ark. 367, 5 S. W. 590; *Taylor* v. *McClintock,* 87 Ark. 243, 112 S. W. 405; *Smith* v. *Boswell,* 93 Ark. 66, 124 S. W. 264; *Emerich* v. *Arendt,* 179 Ark. 186, 14 S. W. 2d 547; *McWilliams* v. *Neill,* 202 Ark. 1087, 155 S. W. 2d 344; *Shippen* v. *Shippen,* 213 Ark. 517, 211 S. W. 2d 433; *Blake* v. *Simpson, Administrator,* 214 Ark. 263, 215 S. W. 2d 287; *Walsh* v. *Fairhead, Executrix,* 215 Ark. 218, 219 S. W. 2d 941; *Simpson* v. *Burge,* 216 Ark. 132, 204 S. W. 2d 830.

In *Shippen* v. *Shippen, supra,* we said: "We have often defined mental capacity such as must be possessed by a testator in order for him to make a valid will. The rule has been generally expressed that sound mind and disposing memory, constituting testamentary capacity, is, (a) the ability on the part of the testator to retain in memory without prompting the extent and condition of property to be disposed of; (b) to comprehend to whom he is giving it; and (c) to realize the deserts and relations to him of those whom he excludes from his will. (Citing a number of cases.) And the burden of proof, in cases of this kind, is on the contestant, who asserts the mental incapacity of the testator."

The rule as to undue influence which appears to have been followed in all subsequent opinions on the subject, was announced by this court in *McCulloch* v. *Campbell, supra,* in this language: "As we understand the rule, the fraud or undue influence, which is required to avoid a will, must be directly connected with its execution. The influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion, or any other cause that deprives the testator of his free agency in the disposition of his property."

"The testator may take into account, when considering his duties to relatives, past neglect, indifference, estrangement, and the like." *Parette* v. *Ivey, Executor,* 209 Ark. 364, 190 S. W. 2d 441.

F. C. Werbe died October 21, 1948. His wife had died in 1944 after a long illness. They had no children

of their own. Werbe executed his last will July 13, 1948, by which he gave all of his estate to appellee, Jessie Holt, his housekeeper, who had lived in his home since 1934.

A large number of witnesses were presented by the litigants and much of the evidence is in irreconcilable conflict. We do not attempt to set it out in detail since to do so would unduly extend this opinion.

Appellant, Earl Werbe, now 38 years of age, married and a resident of Indiana, was taken into the home of his foster parents in Indiana when he was about eight years of age. Mr. and Mrs. Werbe moved to Fayetteville in 1927 and the deceased became a professor in the University of Arkansas. Earl was about seventeen years old at the time, but did not go with them to Arkansas or live with them thereafter. He visited them at Fayetteville five or six times, the first visit was some time in 1934 and at that time Mrs. Holt was their housekeeper. He made his last visit in 1938 or 1939. He did not go to Fayetteville when his foster mother died. He testified that the deceased had expressed the intention of giving him his property at his death. A will to this effect was made some time prior to the will in question here, as was also a deed, which deed, however, was recalled before the execution of the present will. There was other evidence that deceased had made statements that he had intended for Earl to have his property.

Appellee, Jessie Holt, testified that she came to the home of deceased and his wife in 1934 and remained as housekeeper for about fifteen years. Until Mrs. Werbe's death, she worked for her board and keep. She nursed his wife who had suffered with goiter and a mental illness for a long period prior to her death in 1944. Thereafter, she continued as housekeeper, performing all the necessary duties in the home until Mr. Werbe died in October, 1948, on the promise and understanding that she was to have $40 a month, and his property at his death. Mr. Werbe, as indicated, made her his sole beneficiary in his will in accordance with his promise, but was unable to pay her $40 per month. On the same day, July 13, 1948, when the will in question was executed

decedent also made a deed to appellee, Mrs. Holt, to his property. She testified, in effect, that she attempted no undue influence over him and that he possessed mental capacity. She was not present when he made his will.

Two prominent attorneys witnessed the will in question, one of these attorneys prepared it, both witnessed it, and both testified that the deceased knew what he was doing, and possessed mental capacity at the time he executed the will.

Dr. Miller, a reputable and prominent physician, who had attended the deceased, as his family doctor from about 1940 through his last illness, testified that Mr. Werbe possessed testamentary capacity, when the present will was made.

Another physician, whose qualifications are unquestioned, testified that he had attended deceased over a period of the last two years of his life, his last visit being on July 26, 1948. "Q. From your examination, from the visits there with him, and the conversations with him and from your observations, state what, in your opinion, was his mental condition at that time? A. I believed his mental condition was normal. . . . Q. What was his mental condition on the 13th day of July, 1948? A. I will have to base my answer on my observations of his condition before and after that date. I didn't see him then, but my opinion based on that (is that) as being mentally normal. A. I found Mr. Werbe, from his observations to me, in my opinion, to be rather quick and clear, mentally. A. His (F. C. Werbe's) temperament, based on my few visits, did indicate and my impression was that he was something of a cross, cantankerous old man."

A nurse, who attended the deceased twice a week under Dr. Miller's instructions, testified that she gave Mr. Werbe injections twice a week under Dr. Miller's orders, the last time about three or four hours before his death. "Q. From your conversations with him and your observations of him and your experience in seeing sick people, what in your opinion was his mental condi-

tion during the time you visited him in '48? A. Perfectly all right.'' She further testified that she observed Mrs. Holt during her visits and that Mrs. Holt was caring for the deceased. The nurse further testified that the injections which she gave deceased would not make him groggy or produce coma.

A former student at the University testified that about six months or a year before Mr. Werbe died, Mr. Werbe told witness: ''A. When I die, the housekeeper will get the place, she has earned it.''

A number of other witnesses testified that deceased, shortly before his death, had said that he was going to give his property to appellee.

The cause comes to us for trial *de novo*.

As indicated, on the fact question whether deceased had been unduly influenced or lacked mental capacity when he executed the will in question here, the trial court on conflicting testimony found against appellants, contestants of the will, and after a review and consideration of all the testimony presented, we are unable to say that the court's findings were against the preponderance of the evidence.

Accordingly, in keeping with our long established rule, the decree must be, and is affirmed.

JUNIOR *v.* STATE.

4649 236 S. W. 2d 1016

Opinion delivered March 5, 1951.

[redacted]

Oscar Barnett, for appellant.

Ike Murry, Attorney General, *Robert Downie,* Assistant Attorney General and *R. Ben Allen,* Special Assistant Attorney General, for appellee.

PAUL WARD, J. Appellant, R. T. Junior, was indicted for assault with intent to kill one George Matlock with a single barrel shotgun on September 17, 1949. He was tried and found guilty by the jury and sentenced to two years imprisonment. In appellant's motion for a new trial three principal grounds for a reversal are set forth, which will be discussed later.

The material facts are as follows. On the date in question, which was a Saturday, George Matlock, the prosecuting witness, had been in Hot Springs where according to his statement he had purchased a half pint of liquor and returned to Malvern in the afternoon. After calling at the homes of some of his friends he went to the home of Deak Mixon about five or six o'clock that afternoon. At Mixon's home at that time there were his wife, Hattie Mixon, his daughter, Mary Mixon, and one Grady Mixon. The defendant was either at the Mixon home at the time or came in soon after George Matlock arrived. In a short time Matlock and the defendant became engaged in a fuss or an argument, apparently because Matlock gave some of those present a drink of liquor, but refused to give the defendant a drink. Although Matlock denies it, some of those present insisted that Matlock had a knife and threatened the defendant and then threatened to go get a gun to kill him. At any rate Matlock left the Mixon home and, according to his statement, went to the home of his cousin, Buster Matlock. The shooting occurred a little while later around the

hour of seven-thirty or eight o'clock when George Matlock and the defendant met on the road or street somewhere between the Mixon home and Buster Matlock's home. At the time of the shooting no one was present except the two parties mentioned, and they gave different versions. Defendant claims that Matlock, with his hand behind him, was advancing on defendant and the shot was fired after Matlock failed to halt. The evidence does not disclose that Matlock had a gun, but it was testified by one witness that a knife was found the next morning at the scene of the shooting and that it looked like the knife which Matlock had at the Mixon home.

The first ground upon which appellant seeks a reversal is that there is not sufficient evidence to support the verdict of the jury. With this we cannot agree.

The second ground of contention is that the court erred in excluding certain testimony. Hattie Mixon, a witness for the defendant, in rebuttal was not allowed to answer a certain question asked by appellant's attorney, and it is insisted that the court committed error in refusing to allow her to answer.

"Q. Did you see him (Buster Matlock) up there the night that George and Junior had the difficulty?

"A. Yes, I seen him up there.

"Q. Did he make some statement about George?

"Mr. McClellan: To which I object it is hearsay evidence.

"The Court: Objection sustained.

"Mr. Barnett: If the court please, I am offering this corroboration of what the witness himself (Buster Matlock) said there on the witness stand."

Buster Matlock testified that he saw George Matlock before the shooting and that George had asked him if he had a gun. We think the court committed no error. In the first place the evidence does not show that this information was ever communicated to the defendant, and in the second place if Buster Matlock's statements were true

it would have been no corroboration to allow Hattie Mixon to answer, since all information came from the same source—Buster Matlock. Furthermore, the defendant did not show what the answer would have been.

Appellant contends finally that the court erred in refusing to give defendant's Instruction No. One, and also erred in giving one instruction it did give. Both instructions relate to self-defense and will be considered together.

Appellant's Instruction No. One which was refused by the court is set out below:

"The Court instructs the jury that if you find and believe from the evidence that defendant had good reason to believe, from the words, acts and conduct of George Matlock, that the said George Matlock had a design to do defendant some great personal injury or bodily harm, and that defendant had reasonable cause to believe there was imminent danger that such design was about to be accomplished, then defendant had a right to act on appearance, and shoot the said George Matlock to prevent accomplishment of such design, even though said shooting resulted in the death or damage to said George Matlock.

"In this connection you are further instructed that the law did not require the defendant to retreat or wait until the said George Matlock actually attacked him, nor was the defendant required to nicely gauge the force used, but that he could use any means for his protection that appeared reasonably necessary under the circumstances; neither is it necessary that defendant's danger should have been real or actual, or that it should have been pending or about to fall, but if defendant had reasonable cause to believe, and did believe these facts and that he shot George Matlock to prevent such expected harm, then you must acquit the defendant on the grounds of self-defense, even though you may believe the said George Matlock did not intend to do the defendant any personal injury or bodily harm."

Conceding, without deciding, the above is a correct statement of the law it is our view that the court gave

other instructions which were proper and covered the matters contained in the requested instruction. The following are excerpts from the court's instructions.

"The defendant cannot be convicted of assault with intent to kill if you find he acted in necessary self-defense of his person, or acted in a sudden heat of passion upon a provocation apparently sufficient to make the passion irresistible. If you find that he acted in necessary self-defense, he would be justifiable.

* * * * *

"If you believe from the evidence that the defendant, without any fault or negligence on his part, was himself assaulted by the prosecuting witness with such violence as to make it appear to the defendant at the time, while he was acting without fault or carelessness on his part in coming to such conclusion that the prosecuting witness manifestly intended and endeavored to kill him, or to do him great bodily harm, and that the danger was imminent and impending, then, in that case, you are instructed that the defendant was not bound to retreat, but had the right to stand his ground under such circumstances and to repel any force with force, and if need be, kill his adversary to save his own life or prevent his receiving great bodily injury."

Appellant's objection to the court's instructions was general and we find no error in the instructions as given.

For the reasons given the judgment of the lower court is affirmed.

ROBINSON, J., dissenting. By having refused to give Instruction No. 1 requested by the defendant, but having given the last instruction set out in the majority opinion, the Court told the jury without qualification: "If you believe from the evidence that the defendant without any fault or negligence on his part *was himself assaulted by the prosecuting witness with such violence . . .*" (Italics ours).

Thus, according to the law as announced by the trial court and which is being approved by this Court, one has

to be actually assaulted with violence before he is justified in taking whatever action he honestly believes, without fault or carelessness on his part, is necessary to save his own life, or to protect himself from great bodily injury. It is true the trial court also told the jury that the defendant could not be convicted if he acted in necessary self-defense, but further told the jury that the defendant had to be actually assaulted with violence before he could act in necessary self-defense.

There is evidence in this case that prior to the shooting, the prosecuting witness had attempted to cut the defendant with a knife, and when he was not able to catch the defendant after running him around the house, the prosecuting witness went to get a gun and did try to get a gun from his cousin. According to the evidence the defendant did not know but that the prosecuting witness had obtained a gun.

Up to this hour, without exception, this Court has held that the defendant is justified in acting, in this kind of a situation, as it honestly appears to him, without fault or carelessness on his part, to be necessary to save his own life or protect himself from great bodily harm. One of the leading cases on the subject is that of *Smith* v. *State,* 59 Ark. 132, 26 S. W. 712, wherein this Court said:

"The instruction of the court upon the right of self-defense is not correct. It is true that, in ordinary cases of one killing another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary. But, to whom must it appear that the danger was urgent and pressing? According to reason and the weight of authority, it must so appear to the defendant. To be justified, however, in acting upon the facts as they appear to him, he must honestly believe, without fault or carelessness on his part, that the danger is so urgent and pressing that it is necessary to kill his assailant in order to save his own life, or to prevent his receiving a great bodily injury. He must act with due circumspection. If there is no danger, and his belief of the existence thereof be

imputable to negligence, he is not excused, however, honest the belief may be. 'The law,' says Judge CAMPBELL, of Michigan, 'does not hold men responsible for a knowledge of facts, unless their ignorance arises from fault or negligence.' "

This case has been cited with approval by this and other courts for more than half a century, being recently cited in the case of *Pendergrass* v. *New York Life Insurance Company,* 181 Fed. 2nd 136.

"It is true that we have many times held that the right of an individual to fight in self-defense arises from his belief for the necessity of it, and not from the belief of the jury as to the necessity of it." *Johnson* v. *State,* 171 Ark. 203, 284 S. W. 28.

"It is the apparent, and not the real or actual necessity of taking another's life to protect oneself from death or great bodily harm at the hands of the person killed, which controls the determination of the question whether the killing was justifiable or excusable as having been done in self-defense. Killing an assailant may be excusable although it turns out afterward that there was no actual danger." 26 Am. Jur. 251.

When the defendant has successfully avoided being cut with a knife by the prosecuting witness, the aggressor, who leaves with the stated intent of obtaining a gun, and does actually seek to borrow a gun, then the defendant, who has not been the aggressor, has not sought any difficulty and has not been drinking, but who honestly believes, without fault or carelessness on his part, that the prosecuting witness has obtained a gun and there is imminent danger of the prosecuting witness killing the defendant or causing him great bodily injury then the defendant should not have to wait until the aggressor actually commits the assault with violence before taking steps to protect himself.

For the reasons set out herein, I respectfully dissent.

SUITS *v.* CHUMLEY, ADMINISTRATOR.

4-9415 236 S. W. 2d 1001

Opinion delivered March 5, 1951.

[redacted]

Hardin, Barton & Shaw, Robert L. Jones, Jr., and *P. H. Harding,* for appellant.

Geo. W. Johnson, Robert E. Johnson and *Harper, Harper & Young,* for appellee.

MINOR W. MILLWEE, Justice. Appellant, Frank Suits, filed his claim in the sum of $2,700 against the estate of John H. Chumley, deceased, for services rendered decedent for three years prior to Chumley's death in August, 1949. This appeal is from the judgment of the probate court disallowing the claim.

John H. Chumley owned and operated a farm in Sebastian County for many years. During the last few

years of his life his farming operations were confined principally to livestock raising with a herd of from 30 to 50 cattle. Appellant lived on decedent's farm at different times beginning in 1939 performing general farm labor. Appellant married in 1944 and continued to reside with and work for decedent. The evidence is conflicting as to the continuity of appellant's residence on the farm and the performance of services during the three-year period immediately preceding Chumley's death. While appellant and his wife testified that he was not paid for his work, it was admitted that he paid no house rent and that decedent furnished groceries for appellant and his family when he was not working out on other jobs.

Appellant testified that he would "take different spells" of working in the coal mines for others for a month or two months at a time while still living with decedent during the three-year period. He first estimated that he worked for others a third of the time during this period, but later stated that he only worked a month or two each year and denied working anywhere else the last year.

About five or six weeks prior to Chumley's death appellant began work at a sawmill in Scott County where he worked until about two weeks before Chumley's death. There is evidence that during this period appellant's wife and two children lived with him at the sawmill part of the time and with her father part of the time. Appellant testified that decedent sent him to work in Scott County in order that the mill might be moved on decedent's place to cut timber for the construction of another house and barn on the place. Decedent was then 73 years of age and crippled by the loss of a leg in July, 1946. There were already five houses on the place and four of these were unoccupied most of the time.

Appellant's witness, Constable Rogers Condrey, testified that about two or three weeks before Chumley died the latter was in Mansfield inquiring of appellant's whereabouts and stated that he was sick and needed appellant; that witness told decedent that appellant said

he had to go away to get some money and decedent replied: "Well, I'm going to pay him. I'm going to take care of them."

Appellant's wife testified that she had heard decedent ask appellant on two or three different occasions what he would do if he had a certain amount of money. She also stated that appellant would threaten to move to California and decedent would beg him to stay and say that appellant would be rewarded after decedent's death for doing so.

Jess Grissom stated that he lived on decedent's place for six months in 1945 and that decedent told witness that appellant had been so good to him that he intended for appellant to have everything he owned at decedent's death.

Appellee offered testimony tending to show that appellant lived on decedent's place only a part of the three-year period immediately preceding Chumley's death. One neighbor testified that decedent was at his place during hay cutting time in the summer of 1949 looking for some help; that witness asked decedent about appellant and decedent replied that "he got rid of him". A forest ranger, whose place adjoined decedent's farm, stated that five weeks before Chumley's death he helped the latter extinguish a fire on his place; that appellant was not living there at that time and that there were other times during the three-year period that he did not live on decedent's place. Another neighbor stated that appellant lived on decedent's place "off and on" during the three years and that another man lived in one of decedent's houses and worked for him in 1947.

Rice Bruce, who lived in the community, told of conversations with appellant in which the latter stated that decedent paid him for his work; that he could make more money working for others, but that he liked to be with decedent. He also stated that appellant and decedent were "great cronies" and that appellant frequently moved on and off the place during the three-year period. Although appellant testified in rebuttal, he made no de-

nial of the conversations related by Bruce. Several witnesses who had worked for decedent at different times stated that he always paid them in cash.

In urging reversal of the judgment appellant correctly states the rules of law which we have followed in cases of this kind. Here appellant and his family resided with decedent in his home during the time the services are alleged to have been performed. Under these circumstances, and even though the parties were not related by consanguinity or affinity, the presumption is that the services were gratuitous and the burden of proof was upon appellant to show otherwise. *The Peoples National Bk. Admr.* v. *Cohn,* 194 Ark. 1098, 110 S. W. 2d 42. It was incumbent on appellant to establish an agreement, either express or implied, that compensation should be paid for services rendered. The obligation to pay will be implied if the circumstances in proof are sufficient to show that, at the time the services were rendered, it was understood by both claimant and decedent that the former should receive compensation. Where the evidence is sufficient to establish an implied promise of compensation, the claimant may recover on a *quantum meruit* basis. *Nissen* v. *Flournoy,* 160 Ark. 311, 254 S. W. 540.

It is fairly certain from the testimony that appellant performed some services for decedent during a considerable portion of the three-year period for which he seeks judgment on his claim. If it should be conceded that the evidence was sufficient to establish an implied promise of compensation, the question whether appellant was actually paid for his services still remains a sharply disputed one of fact. If the testimony of Rice Bruce is to be credited, appellant was paid for his work. There are other circumstances in evidence which point to this conclusion. In weighing the conflicting testimony on this issue, the trial court had the advantage of observing the demeanor of the witnesses and their manner of testifying.

Appellant also insists that reversible error was committed in the admission of evidence of decedent's general reputation for paying his debts promptly in cash. Cases from other jurisdictions are cited in support of this con-

tention, but we find it unnecessary to pass on the question. As in chancery cases, we try appeals from the probate court *de novo* and consider only the competent testimony regardless of the ruling of the trial court on the challenged evidence. *Harrell* v. *Southwest Mortgage Co.*, 180 Ark. 620, 22 S. W. 2d 167; *Walsh* v. *Fairhead, Executrix,* 215 Ark. 218, 219 S. W. 2d 941; *Morris* v. *Arrington, Administratrix,* 215 Ark. 564, 221 S. W. 2d 406. After disregarding the challenged evidence, we cannot say that the judgment disallowing appellant's claim is against the greater weight of the competent evidence.

The judgment is affirmed.

ALTUS COOPERATIVE WINERY *v.* MORLEY, COMMISSIONER OF REVENUES.

4-9414 237 S. W. 2d 481

Opinion delivered March 5, 1951.

Rehearing denied April 2, 1951.

John Cravens, Jeta Taylor and *Mark E. Woolsey,* for appellant.

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

George Rose Smith, J. The only question in this case is whether an agricultural cooperative association, organized under Ark. Stats. 1947, Title 77, Ch. 10, is entitled to manufacture wine from grapes grown by its members, and sell the wine at wholesale, without paying the privilege taxes imposed by the State upon other wineries. To test this question the appellee, as Commissioner of Revenues, brought this suit to collect the taxes in question from the appellant. The winery defended the case upon the ground that as an agricultural cooperative it is exempt from all taxes except ad valorem property taxes and its annual franchise tax of $10. § 77-1023. The judgment below was for the Commissioner.

We agree with the trial court. Under the statute an agricultural cooperative association is relieved of license and privilege taxes, but to be free of those burdens the association must be acting within the powers granted to it. Those powers include the following activities in connection with agricultural products: "Producing, marketing, selling, harvesting, dairying, preserving, drying, processing, canning, packing, milling, ginning, compressing, storing, transporting, handling, or utilization." § 77-1006.

It will be observed that of the seventeen words we have quoted, fifteen pertain to the most fundamental processing of agricultural products. All crops must be produced, harvested, handled, transported, and sold. Vegetables must be preserved by drying, canning, or packing. Cotton must be ginned and compressed; wheat and rice must be milled; and so with the other elementary activities that are mentioned.

The appellant relies upon the other two words, "processing" and "utilization", to support its argument that the conversion of grapes into wine is an activity contemplated by the statute. But under the familiar rule

of *noscitur a sociis* these two words of general import are restricted by the limited sense of their context. Sutherland, Statutory Construction, (3d Ed.) § 4908. The association's processing and utilization of its agricultural products must be confined to activities similar to the basic operations named in the statute.

We think it clear that the manufacture of wine does not come within the purview of the statute. In its brief the appellant gives an interesting history of wine-making and of the growth of cooperative associations, but it is more pertinent to examine our own legislative experience. The making of intoxicants, when lawful, has long been closely regulated by the State and has long been treated as a source of revenue by taxation. Unlike the activities of common right that are enumerated in the statutes relating to cooperatives, the manufacture of intoxicants is a privilege to be exercised only under strict governmental supervision. We are not convinced that the legislature chose the words "processing" and "utilization" as a means of empowering cooperative associations to enter a field so foreign to their agricultural activities.

Affirmed.

BRYANT *v.* KILPATRICK.

4-9410 237 S. W. 2d 465

Opinion delivered March 5, 1951.

Rehearing denied April 9, 1951.

James M. Gardner and *W. Leon Smith,* for appellant.

Adams & Willemin, for appellee.

GRIFFIN SMITH, Chief Justice. The Sloan Motor Company of Kennett, Mo., sold a used Chevrolet automobile to W. H. and Bob Bryant. The Bryants operate farms in Mississippi county, Arkansas, and reside there.

The Motor Company paid to John O. Hager, *alias* Robert W. Brooks, $1,400 for the car, receiving delivery at Kennett following a conversation with the seller who called by telephone from Greenway, in Clay county, Arkansas. Hager was a hot-check artist who in October, 1949, was operating in St. Louis. He responded to a newspaper advertisement through which Robert J. Kilpatrick offered to sell the Chevrolet for $1,800. After a short period of negotiation Kilpatrick accepted an offer of $1,695, but Hager represented to the seller that his name was Brooks. Payment was made the following day. When "Brooks" called at Kilpatrick's home during the late afternoon he presented what appeared to be a cashier's check on the St. Louis County National Bank of Clayton, Mo., for $1,700, receiving the car and five dollars.

Kilpatrick gave Brooks his Missouri certificate of title. The printed form intended for use in assigning was left blank and was not notarized. Hager, still claim-

ing to be Brooks, sold the car to the Motor Company and delivered the incomplete document. The cashier's check was a forgery. Upon apprehension Hager, admitting his correct name, was charged with larceny by fraud and entered a plea of guilty.

Kilpatrick carried with Consolidated Underwriters[1] a policy of insurance covering loss by theft, larceny by fraud, and risks not pertinent here. It was stipulated that idemnification was the actual cash value of the car. Following an investigation a settlement was agreed to whereby the insurance company paid Kilpatrick $1,595. Kilpatrick, in an action to replevy from the Bryants, alleged that the car was worth $1,800. Consolidated Underwriters intervened. The defendants' motion to transfer to equity because the intervener's claim rested on subrogation was overruled. Also overruled was a motion to dismiss as to Kilpatrick because he had been paid.

A jury was waived and the court found (a) that the value of the car when Kilpatrick delivered it to Hager was $1,695; (b) that the plaintiffs were entitled to judgment for that sum, and (c) the car at the time of trial was worth $1,350. The appeal questions the court's factual finding that the value was $1,695. It is also insisted that subrogation does not lie in favor of an insurance company when it has paid the loss and the controversy is between such company and an innocent purchaser.

Shortly after the car was purchased by Kilpatrick it was involved in a rear-end collision, but there was testimony that the damage had been repaired. However, Kilpatrick testified that while the automobile had apparently been restored to its original condition, neither he nor his wife was satisfied with it. The mere fact that it had been in a minor wreck gave Mrs. Kilpatrick a feeling of apprehension. On cross-examinaiton Kilpatrick intimated that the reduced value from his own standpoint might have been $300 or $400, yet when asked whether the written acknowledgment of payment by the insurer

[1] The insurer was a reciprocal insurance exchange owned by Henry Burr and other individuals who were named.

was an admission that the cash or market value had been received he replied, "No: I accepted the amount paid me as not being the cash value—I didn't think I got . . . what the car was actually worth". He had previously testified that the fair market value at the time *Brooks* procured it was $1,800. Another stipulation fixes the value at Kennett when *Brooks* sold to the motor company, but this stipulation is the agreement of counsel that if Wallace Sloan [of the Sloan Motor Company] should testify he would say that the value was $1,700 to $1,800.

Appellants urge that Sloan's evaluation had reference to the Kennett market, and this testimony would not be competent to show the true value in St. Louis. The car was new when Kilpatrick bought it late in August, 1949, but the price is not shown; nor is there any testimony regarding extra equipment. The insurance policy is not in the record, but the essentials are agreed to, including appellants' acquiescence in the right of subrogation under protest that enforcement of the right was an exclusive equitable remedy. The defendants requested a finding that Kilpatrick had no recoverable interest in the subject-matter and that Consolidated was the owner of the cause of action; but another requested direction was that *under the findings of the court* Kilpatrick alone could recover, and he could not have judgment for more than $100.

There was sufficient evidence to support the judgment that the *plaintiffs* were entitled to possession. Proof is lacking that Kilpatrick was paid in full for his loss—that is, his settlement with Consolidated did not absolve Hager, unless by the attempted purchase title passed. Inferentially a small settlement between Kilpatrick and the insurer will be made, but this is speculation and is worth nothing factually unless the court considered it from the standpoint of self-interest in determining credibility of the witness.

We are not persuaded that a difference between market value of the car in St. Louis and at Kennett would be implied as a matter of law, requiring the plaintiffs to make proof; but even so, there was substantial testimony

to sustain the court's finding when consideration is given the law's policy that credibility is to be determined by the trial court.

The paramount question is whether the defendants were innocent purchasers. Facts in some respects similar and involving analogous principles were before the court in two recent cases, *Pruitt Truck & Implement Co.* v. *Ferguson,* 216 Ark. 848, 227 S. W. 2d 944, and *Dobbins* v. *Martin Buick Co.,* 216 Ark. 861, 227 S. W. 2d 620. A distinction emphasized by appellants is that in the Ferguson case the certificate of title was not assigned to Craft until deferred payments had been met. In the Dobbins case the Martin Buick Company, domiciled at Cookeville, Tenn., delivered an automobile to Atkinson whose check was drawn on a non-existent account in Georgia. The seller gave Atkinson an invoice in which the car was identified. It showed the price to be $1,825, but there was no acknowledgment, and the decision turns on the point that the invoice executed by Martin was not a bill of sale and the certificate of registration procured in Arkansas did not invest Baker (or Dobbins to whom Baker sold the car) with title attributes of sufficient value to support the sale Baker made to Dobbins. It was contended that Martin was estopped to deny Dobbin's title. However, the opinion expressly states that estoppel would be determined by the law of Arkansas where the property was found, while in the Pruitt-Ferguson case it was said that the valadity of foreign-created titles in chattels brought here is to be determined by the laws relating to contracts and certificates of title in the state where made or issued.

As has been said of the original transactions, Kilpatrick did not legally acknowledge the transfer, though no doubt he would have done so had a notary been conveniently available. But the Supreme Court of Missouri has determined the issue against appellants' contentions. The holding in *Peper* v. *American Exchange Natl. Bank in St. Louis,* 210 S. W. 2d 41, is that the statute dealing with the sale of a used automobile is broad enough to authorize the Commissioner of Motor Vehicles to require

the valid holder of a certificate of title not only to indorse thereon [the name of the person to whom the transfer is made], but to require an acknowledgment as part of the assignment. Mo. R. S. A., § 8382. In the case just cited the Missouri Court said: "Defendant bank can not be [an innocent mortgagee] because it had the . . . certificate in its possession and knew that the assignment was not acknowledged." Other Missouri cases are to the same effect.

We conclude, therefore, (a) that when Kilpatrick filed his suit Consolidated had the right to intervene; (b) that there was substantial evidence of valuation; (c) that under the Missouri decisions appellants were not innocent purchasers, and (d) the judgment was free from other objections urged in avoidance.

Affirmed.

SERVICE FIRE INSURANCE COMPANY *v.* PAYNE.

4-9388 236 S. W. 2d 1020

Opinion delivered February 12, 1951.

Rehearing denied March 26, 1951.

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

James R. Hale and *Courtney C. Crouch,* for appellee.

HOLT, J. A jury awarded appellee, J. C. Payne, $2,850 resulting from the destruction of appellee's truck by fire. Insurance was carried on the truck by appellant, Service Fire Insurance Company.

From the judgment is this appeal.

For reversal, appellant contends that "appellee, Payne, on three separate occasions breached the terms of his insurance contract which rendered the policy inoperative in that: in July of 1948 he borrowed $1,200 on the insured vehicle from the First National Bank in Springdale, Arkansas, and executed a second mortgage on the truck.

"In January or February of 1949 he sold a one-half interest in the truck to one John Shastid. In July of 1949 he sold out his entire interest to John Shastid."

The evidence, when stated in its most favorable light to appellee, as we must do, was to the following effect: May 14, 1948, appellee purchased a White truck, with trailer attached, from Schmieding Bros., Springdale. A part of the purchase price was financed by Universal C.I.T. Credit Corporation (hereinafter referred to as C.I.T.) through its Ft. Smith office. Harvey Mixon was manager in charge of that office. C.I.T. required that the truck be insured by appellant, company, and both the financing and insurance coverage were handled and controlled by C.I.T. The application form used in this connection was a combination application for financing

and insurance. It was prepared in Schmieding Bros.' office by Harvey Mixon and Schmieding and the application form used was furnished by C.I.T. Appellee had nothing to do with procuring the insurance on the truck. He paid all premiums through Schmieding Bros. and C.I.T.

Shortly after the policy was issued, in February, 1949, appellee sold, under a verbal agreement a half interest in the truck to John Shastid, but before making the sale, appellee discussed the matter fully with Ray Purrier, manager of Schmieding Bros.' office, and had Purrier take it up with Harvey Mixon, manager of C.I.T. in Ft. Smith. C.I.T. made no objection to the sale to Shastid, demanding only that appellee remain bound on the "C.I.T. paper."

In July, 1949, appellee made a conditional sale of his remaining interest in the truck to Shastid, retaining title until paid, but Shastid has not paid appellee anything on this other half interest.

In July, 1948, appellee with H. C. Schmieding as co-maker or surety, borrowed money from a Springdale Bank and as security gave a mortgage on the truck in question.

Appellee dealt with C.I.T. and Schmieding Bros. only in procuring the insurance and paying the premiums.

Appellant contends that appellee breached the following provisions (which we designate as (a) and (b) respectively) in the policy and therefore is not entitled to recover anything on the policy:

(a) "This policy does not apply under any of the coverages, while the automobile is subject to any bailment lease, conditional sale, mortgage or other encumbrance not specifically declared and described in this policy."

(b) "Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop

the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed except by endorsement issued to form a part of this policy."

These provisions of the policy are valid and binding unless waived by appellant. This question of waiver was submitted to the jury, under proper instructions, and we hold that there was substantial evidence presented to warrant the jury in finding that there was a waiver by appellant.

The policy here was so written that it was made payable to appellee, the purchaser (insured) and C.I.T. It contained this provision: (c) "The insured under this policy is the above named Purchaser/Insured, the Dealer who endorsed or assigned the Purchaser's obligation, and Universal C.I.T. Credit Corporation or any affiliated or subsidiary company thereof; any loss hereunder shall be payable to the above as their interests may appear."

Appellant, insurance company, and C.I.T., on all the evidence here presented, were, in effect, so closely connected and related to the entire transaction, both participating, as to be parties to it from the beginning.

" 'Forfeitures are not favored in law,' and 'courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that, by conformity thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop, and ought to estop, the company from insisting on a forfeiture, though it might be claimed under the express letter of the contract.' " *American Life Association* v. *Vaden,* 164 Ark. 75, 261 S. W. 320.

The rule is stated in 45 C. J. S., Insurance, § 704, p. 671, in this language: "A waiver arises from acts, words, or conduct on the part of the insurer, done or

spoken with knowledge of a breach of condition, which amount to a recognition of the policy as a valid, existing, and continuing contract, or which are inconsistent with an intent to declare a forfeiture, or which are such as reasonably to imply a purpose not to insist on a forfeiture." (Citing *Home Life & Accident Co.* v. *Scheuer,* 162 Ark. 600, 258 S. W. 648.)

A fair inference, we think, would have warranted a finding by the jury that appellant, insurance company, had knowledge of the conditional sale of the truck, as well as the mortgage to the bank, through the knowledge thereof of C.I.T. and H. C. Schmieding.

We attach significance to the fact (apparently not disputed) that following the almost complete destruction of appellee's truck by fire, appellant's insurance adjuster took charge of what remained of the truck and appellant paid C.I.T. (one of the insured in the policy) $1,400, the balance due it from appellee, but refused to pay the other insured (appellee) anything. Just why appellant should treat the policy as valid in so far as C.I.T. was concerned and void as to appellee, is seemingly unexplained.

The rule is well settled that although the policy, as above indicated, provided that no waiver of the terms of the policy could be effective "except by endorsement issued to form a part of this policy," such provision may be waived orally.

We said in *Connecticut Fire Insurance Company* v. *Boydston,* 173 Ark. 437, 293 S. W. 730: "It is the settled law of this State that any condition inserted in a policy for the benefit of the insurer may be waived by it, and that an insurance agent authorized to waive a forfeiture in a policy may do so orally, though the policy provides that the waiver must be indorsed on the policy." (Citing a number of cases.)

In the recent case of *Southern Farmers Mutual Insurance Company* v. *Garrett,* 212 Ark. 577, 206 S. W. 2d 463, which involved a provision in an insurance policy identical with section (a) above, we said: "The ques-

tion presented by this record is whether there had been a waiver and the verdict of the jury is conclusive of this issue of fact.

"These provisions of the policy, if waived at all, were waived by the president of the company. Having been inserted for the benefit and protection of the company, they may be waived by it. The Chapter on Insurance, West Digest of Arkansas Reports, §§ 375-6, cites a number of our cases to the effect that such provisions may be waived, and having been waived as found by the jury, the policy was in force when the collision occurred."

We have not overlooked appellant's contention that the trial court erred in instructing the jury that it could not return a verdict for appellee for more than $2,850. We hold that there was no prejudicial error in so instructing the jury, in the circumstances.

As above indicated, appellee was the owner of the truck, appellant had issued the policy to him and C.I.T. as the insureds, damage to the truck had occurred, and appellee was entitled to sue and recover the amount of the damage. In his complaint, appellee asked damages for himself in the amount of $2,850 and for $1,400 for the use and benefit of C.I.T. Since C.I.T. had already been paid, the appellant could not have been prejudiced by the instruction which limited appellee's verdict to $2,850.

Finding no error, the judgment is affirmed.

CLARK *v.* HOLT.

4-9423 237 S. W. 2d 483

Opinion delivered March 12, 1951.

Woody Murray, James M. McHaney and *Owens, Ehrman & McHaney,* for appellant.

Ben C. Henley and *J. Smith Henley,* for appellee.

MINOR W. MILLWEE, Justice. This appeal challenges the validity of proceedings to annex certain territory to the town of Lead Hill, Arkansas, under the provisions of Ark. Stats., §§ 19-301, 302. Appellants are residents and property owners of Lead Hill. On March 24, 1950, they brought this action in the circuit court pursuant to Ark. Stats., § 19-303 to set aside an order of the Boone County Court entered on March 3, 1950, annexing a 183-acre tract to the town of Lead Hill and to restrain appellees, petitioners for said annexation, from further action under said order. Appellants attacked the validity of the annexation proceedings on several grounds and appellees answered with a general denial.

Upon trial of the issues, the circuit court entered a judgment holding the annexation proceedings valid.

The first contention for reversal is that the order of annexation is void because the territory sought to be annexed is not contiguous to the town of Lead Hill as required by § 19-301, *supra.* Since we have concluded that this contention must be sustained, we find it unnecessary to discuss the other three grounds of invalidity urged against the proceedings.

Lead Hill is an incorporated town with a population of 150 to 200 persons and so located that it will be on the shore of the reservoir created by the construction of Bull Shoals Dam by the federal government. When the dam is completed, the reservoir, when flooded, will inundate approximately half the territory of Lead Hill thus necessitating the relocation of many of the residences and business establishments of the town. The federal government compensates owners for the lands and improvements flooded. It is also the policy of the government to reimburse the town for the construction of equivalent streets, alleys and drainage facilities in the relocation area.

In compliance with a government requirement, 37 property owners of the town, including the principal appellee, J. R. Holt, presented a petition to the government in August, 1948, favoring a relocation adjacent to and northwest of the original town. Government engineers surveyed and platted 95 acres in the area favored, 50 acres of which were laid out in lots and blocks, at a cost of $2,400. In February, 1949, the 95-acre tract was annexed to Lead Hill and in March, 1949, the government entered into a contract agreeing to compensate the town in an amount not to exceed $13,500 for the construction of streets, alleys and other facilities in the northwest site. At the time of the instant hearing, this work had not been started because final government approval had not been given, but the work was expected to be completed in August, 1950.

Although appellees sought to attack the validity of the annexation of the northwest area in the instant suit, the trial court sustained appellants' objections to the testimony offered for that purpose and the validity of that proceeding is not involved here.

The 183-acre tract sought to be annexed in this suit is located south of Lead Hill. Appellee J. R. Holt and three or four others acquired the tract sometime after annexation of the northwest area. At the time of the trial, appellees, at their own expense, had platted a considerable portion of the tract, lots had been sold to pur-

chasers in Arkansas and several other states and considerable construction work had been done in the opening and graveling of streets. The main body of the 183-acre tract is located about one-half mile south of the south boundary of the original town of Lead Hill. The only connection of the main body of the area sought to be annexed with Lead Hill is by a strip of land 50 feet wide and 3060 feet long. This strip has not been dedicated for public use, is not platted into lots and blocks and its dimensions and location would seem to render such platting impracticable. The strip traverses rough, hilly land. Although a road might be built over it, the cost would be excessive. In going from Lead Hill to the area in controversy it is necessary to travel over a county road located outside the corporate limits and running parallel with the 50-foot strip.

Under § 19-301, *supra,* if the territory sought to be annexed is not "contiguous and adjoining" the municipality, the proceedings are without legal effect. Able counsel for appellees assert that the requirement of contiguity must be considered in the light of the purpose for which annexation is sought and the peculiar circumstances existing in each case. We appreciate the fact that the relocation of a large part of a town presents a problem not ordinarily involved in annexation proceedings and a situation apparently different from that contemplated by the framers of our statutes. Having adopted the statutory procedure of annexation, however, it was incumbent on appellees to comply with the requirement as to contiguity.

This court has not passed on the exact question presented. In the famous case of *Vestal* v. *Little Rock,* 54 Ark. 321, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778, the court said: "By contiguous lands we understand such as are not separated from the corporation by outside land; and we think the statute permits the annexation of any such lands, and that the court is justified in making an order to annex them, whenever they are so situated with reference to the corporation that it may reasonably be expected that after annexation they will unite with

the annexing corporation in making up a homogeneous city, which will afford to its several parts the ordinary benefits of local government. But however near they may be to the petitioning corporation, if they are so circumstanced with reference to it that it could not reasonably be expected that the parts would amalgamate and organize a municipal unit which would afford to each the ordinary benefits of local government, it would not be reasonable and proper to order their annexation. When actual unity is impracticable, legal unity should not be attempted, but the incongruous communities should be left to independent control. In all cases, however, where actual unity is practicable, legal unity should be ordered as promising the greatest aggregate of municipal benefits."

In 37 Am. Jur., Municipal Corporations, § 27, it is said: "The legal as well as the popular idea of a municipal corporation in this country, both by name and use, is that of oneness, community, locality, vicinity; a collective body, not several bodies; a collective body of inhabitants—that is, a body of people collected or gathered together in one mass, not separated into distinct masses, and having a community of interest because residents of the same place, not different places. So, as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation." See, also, 62 C. J. S., Municipal Corporations, § 9 b.

Appellees contend that under the language of the Vestal case the statute only requires mechanical contiguity. Courts of other states have disapproved similar attempts to annex outlying territory by the device of a narrow, shoestring strip such as that employed in the instant case. The case of *Wild* v. *People,* 227 Ill. 556, 81 N. E. 707, involved the validity of the incorporation of a village under a statute requiring that the territory included therein be contiguous. In condemning the inclusion of outlying lands by use of a half mile strip connecting with the main corporate body, the court said: "It is apparent that the 50-foot strip is merely included

for the purpose of connecting the piece of ground at the west end thereof with other territory in the village. It is also apparent that the piece of ground at the west end of the strip is not in fact contiguous to grounds in the village other than that strip. The use of that strip to connect the tract at its western extremity with other territory in the village is a mere subterfuge, and not a compliance with the law. It is useless to discuss the plea farther." See, also, *People* v. *City of Lemoore,* 37 Cal. App. 79, 174 Pac. 93; *City of Wichita Falls* v. *Bowen,* (Tex. Civ. App.) 175 S. W. 2d 732.

Several of our cases involve efforts of the village of Omaha to establish a border town status in order to take advantage of a lower gasoline tax rate. The village, which is situated four miles south of the Arkansas-Missouri line, was incorporated so as to include lands four miles long and one-fourth mile wide extending from the village along a U. S. highway to the state line. While the incorporation was held void because the four-mile strip consisted of agricultural and timbered lands not needed for legitimate expansion of the town, it was also condemned as a transparent subterfuge to obtain the lower tax rate of Missouri. In the last of these cases, *Park* v. *Hardin, Commissioner of Revenues,* 203 Ark. 1135, 160 S. W. 2d 501, we said that the end sought by such efforts could not be realized "by reaching out, lasso-like, to harness space."

It is undisputed that the nearest point of the town of Lead Hill to the proposed south addition is 3060 feet except for the intervening 50-foot strip. The evidence is insufficient to show an intent, immediate or prospective, to utilize the strip in the development of the addition. The only apparent purpose of the strip is to provide a connecting link with the lands actually sought to be annexed. For all practical purposes, a half mile gap will divide the old town from the proposed addition and the essential of contiguity is lacking. The judgment is accordingly reversed and the cause remanded with directions to set aside the order of annexation.

4-9400 237 S. W. 2d 469

Opinion delivered March 12, 1951.

Rehearing denied April 9, 1951.

[redacted]

R. W. Tucker, for appellant.

Chas. F. Cole, for appellee.

PAUL WARD, J. C. D. Rutledge filed a suit in circuit court to recover damages from Universal C. I. T. Credit Corporation for the wrongful conversion of an automobile. The material part of the complaint states: "That on or about July 10th, 1949, defendant, Universal C. I. T. Credit Corporation and its agents and employees unlawfully took possession of said automobile without any authority or right, and without the knowledge and consent of the plaintiff and converted the same to its own use"; the defendant entered a general denial. At the close of the testimony the court sustained defendant's motion for an instructed verdict, from which plaintiff appeals.

The issue before the lower court was whether there was an unlawful conversion, and the only issue before

us is: was there sufficient evidence to make a jury question.

Rutledge bought a Lincoln automobile November 10, 1948, in the State of Georgia and (by his wife) signed a conditional sales contract which was accepted by the Universal C. I. T. Credit Corporation. After making six monthly payments he moved to Batesville, Arkansas, with the knowledge and consent of the Credit Corporation. He was behind with his payments and applied to the local credit office for re-financing, without success. Some days later Gid Massey, an employee of the local agent, found the car at a filling station and took the keys. Then he went to appellant's home which was just behind the filling station and there he had a conversation with appellant and his wife about the possession of the car. He told them he had been instructed to take it and would store it in a local garage and would cooperate with them if they could find a buyer. Appellant did not give his permission, but he did not object. Massey then drove the car to appellant's house where Mrs. Rutledge removed some personal effects from the car. Mrs. Rutledge looked after business affairs for appellant because he was afflicted.

The following are excerpts from Mrs. Rutledge's testimony:

"Q. At any time did you consent? A. He didn't ask for my consent he just told me he was taking it. Q. You didn't object to his taking the car? A. There was no way to object. Q. He didn't get it by any trick or through fraud? A. No he just came and told me he had taken it. Q. You didn't offer any objections? A. I couldn't object. He told me what he was doing."

The nephew of appellant testified that appellant and his wife told him (before the alleged conversion) that they were going to lose the car if they did not make the payments; that he took a boy to Rider's garage (where the car was stored by the Credit Corporation) to buy the car; he looked at it and seemed to like it and went to appellee's local office to see if he couldn't drive it and was told he could not because it was not insured,

but to come back later and an employee would go with him and drive him; but the boy bought another car that same afternoon and never went back to appellee's office. Appellant's brother testified that a man came up from Little Rock to look over the car and that he did so and that he started the motor and ran it; said he would buy it if it drove all right; he told the man the C. I. T. had charge and that he went to see the C. I. T. man and was told he could drive it for what was against it, and nothing was done about it.

The sales contract contained the following provision: "If Customer defaults on any obligation under this contract, or if the holder shall consider the indebtedness or the car insecure, the full balance shall without notice become due forthwith . . . Customer agrees in any such case to pay said amount at holder's election, to deliver the car to the holder, and the holder may, without notice or demand for performance or legal process, enter any premises where the car may be found, take possession of it . . . and retain all payments as compensation for use of the car while in Customer's possession. The car may be sold with or without notice, at private or public sale (at which the holder may purchase) with or without having the car at the sale; the proceeds less all expenses shall be credited on the amount payable hereunder; Customer shall pay any remaining balance forthwith as liquidated damages for the breach of this contract and shall receive any surplus."

The contract having been executed in the State of Georgia it must be construed according to the laws of that state. *Lawler* v. *Lawler,* 107 Ark. 70, 153 S. W. 1113; *Peppers* v. *Penn. Door & Sash Co.,* 171 Ark. 521, 285 S. W. 5; *Motors Securities Co.* v. *Duck,* 198 Ark. 647, 130 S. W. 2d 3. A provision such as the one set out above from the sales contract in this case was approved by the Court of Appeals of Georgia in the case of *Matthewson et al.* v. *Brigman Motors Co.,* 23 Ga. A. 304, 98 S. E. 98, and we quote the syllabus prepared by the Court.

"Where a vendor sells certain property, to be paid for in installments by the vendee, and enters into a writ-

ten contract with the vendee, retaining the title to the property, with a stipulation in the contract that, 'if any of the installments are not paid, the vendor shall have the right to take possession of said property without any legal process, and all payments made up to the time of default shall be applied as rental for said property and depreciation in value' the contract is one of conditional sale and not of lease . . .; but where the vendee defaults as to some of the payments, the vendor, as between himself and the vendee, nevertheless has the right, under the contract, so far as mere possession of the property is concerned, to remove it without any legal process.''

The same rule also applies in Arkansas as was held in the case of *Ellis* v. *Smithers,* 206 Ark. 247, 174 S. W. 2d 568.

Thus it appears that appellee had a right to take possession of the automobile in this case without legal action just so long as it did not use any force, deception or fraud. Under the pleadings and the testimony in this case it is our opinion that there is no evidence to support a finding of a jury that appellee converted appellant's automobile.

No error appearing, the judgment of the lower court is affirmed.

BAILEY, TRUSTEE *v.* MARTIN.

4-9411 237 S. W. 2d 16

Opinion delivered March 12, 1951.

Richard Mobley, for appellant.

Hays, Williams & Gardner, for appellee.

MINOR W. MILLWEE, Justice. This is a suit by Robert Bailey, as trustee for his two sons, to restrain appellee, Tom Martin, from trespassing on certain lands, to cancel a deed under which appellee claims title, and to quiet appellants' title to the property. Under the pleadings and testimony, both parties claimed record title to the disputed tract as well as title by adverse possession and appellee also asked that his title be quieted. The case was tried by the chancellor on exchange upon depositions resulting in a decree dismissing appellants' complaint and dissolving an injunction issued against appellee at

the beginning of the suit temporarily restraining him from trespassing on said lands.

The area in dispute is the north half of a trapezoid tract containing 28.39 acres. J. B. Campbell, formerly owned a fractional 40-acre tract in Pope County described as, "The fractional NW¼ of SW¼ of Section 6, Township 7 N, Range 20 West, containing 53.89 acres more or less." On January 17, 1917, Campbell and wife executed separate warranty deeds to Ben Woods and James Edwards. Each of the deeds described by metes and bounds the *south half* of a tract located within the aforesaid fractional 40-acre tract, as follows: "Beginning at a point 34 rods East of the Northwest (NW) corner of said NW Fr. SW¼ and running thence East 73.72 rods to the Northeast (NE) corner of said NW Fr. SW¼; thence South 80 rods to the Southeast (SE) corner of said NW Fr. SW¼; thence West 39.84 rods; thence Northwest (NW) along the top of the Mountain to Point of Beginning containing 15 acres, more or less." On the same date Ben Woods and wife conveyed by warranty deed to Pope County Real Estate Co. describing the property as in the two previous deeds except that it conveyed the *north half* of the tract. The deed to Ben Woods was recorded December 1, 1917, and the deed from Woods to the real estate company was recorded December 23, 1918. The deed to James Edwards was recorded March 12, 1919.

On February 28, 1920, the sheriff of Pope County, as the result of an execution sale against James Edwards, executed a sheriff's deed to Tom Henry of the land deeded to Edwards. On July 18, 1921, Tom Henry and wife conveyed by quitclaim deed to Robert Bailey, as trustee, the *south half* of a tract described by metes and bounds as follows: "Beginning 34 rods East of the Northwest (NW) corner of the said NW¼ of SW¼ and running thence East 73.72 rods to the Northeast (NE) corner of said NWFRSW¼; thence East 39.84 rods; thence Northwest (NW) along the Mountain to Point of Beginning and containing 15 acres, more or less." This deed further recites an intention to convey all interest in

"the land that formerly belonged to Perk Edwards, and sold by the sheriff under execution and bought in by Tom Henry." This deed was recorded October 26, 1921.

Robert Bailey sold the property to W. N. Lucy in December, 1921, under an unrecorded conveyance. Lucy and wife executed a mortgage to Bailey, as trustee, on December 29, 1921, describing the land as in the original deed from J. H. Campbell and wife to James Edwards, the description beginning, "The south half" and ending "containing 15 acres more or less." Appellants also introduced a warranty deed from W. N. Lucy and wife to Robert Bailey, trustee, dated May 24, 1922. In this deed the south half of the tract is described as containing 28.39 acres for the first time. In this connection Mr. Bailey testified that he only bought back from Lucy what he had sold him. This deed was not placed of record until October 21, 1948. On November 14, 1925, appellants entered into a sale contract of the property to Dell Goddard describing the property as the south half of the described tract, containing 15 acres more or less.

After appellants obtained the deed from Tom Henry in 1921 the property was carried on the tax records in appellants' name as "Pt. NWSW, 15 acres" from 1922 to 1947. The Pope County Real Estate Company assessed and paid taxes on "Pt. NWSW, 15.34 acres" from 1919 to 1947.

The Pope County Real Estate Co. was a corporation formerly owned by J. F. Hogins and W. O. Bonds. Hogins died in 1927 and Bonds in 1944. In September, 1948, the heirs of Hogins and Bonds executed a quitclaim deed to appellee to the *north half* of the tract as described in the deed from Ben Woods and wife to the Pope County Real Estate Co. This deed was recorded on November 20, 1948. Appellants filed this suit on February 26, 1949, after appellee began cutting timber on the north half of the 28.39-acre tract.

As to possession of the north half of the 28.39-acre tract the evidence is in sharp dispute. Appellee offered testimony showing that after the real estate company

acquired its deed from Ben Woods in 1917, Leslie Hogins, son of J. F. Hogins, entered into possession of the disputed tract in the early 1920s and constructed a chicken ranch on the property which he abandoned about a year later. After execution of the sales contract to Dell Goddard in 1925, the latter testified that he constructed or repaired a house on the north half of the 28.39-acre tract, but the preponderance of the evidence discloses that this house was located on the south half. Goddard did not move on the property until about 1928 or 1929 and abandoned it about a year later when he decided that he could not make the payments under the contract.

Walter Dennis moved on the north part of the tract in 1931 as the tenant of Mrs. J. F. Hogins, representing the real estate company. He remained on the property until 1933.

In 1933 or 1934 Tom Simpson, Jr. moved on the north half of the tract where he remained until 1941. The evidence is in sharp dispute as to whether he was a tenant of appellants, a tenant of the real estate company, or merely a squatter. Mrs. Hogins testified that the Simpsons moved on the property with her permission under an agreement with Mrs. Tom Simpson, Jr. She recalled that Mrs. Simpson brought her some black berries to apply on the rent when the Simpsons first moved on the property. Although Tom Simpson, Jr. testified that he was the tenant of appellants, he did not deny that they moved on the property under the arrangements made by his wife. He paid no rent to appellants, but stated that he was to remain on the premises on the condition that he keep fire out of the timber on the place. After Tom Simpson, Jr. moved in 1941 or 1942, Mrs. Oliver Simpson moved on the place for a short time and moved off when Robert Bailey approached her about paying house rent. Ernest Standridge moved in the house on the north part of the tract in March or April, 1945, and remained there about a year as a tenant of appellants.

Walter Dennis testified that there was a wire fence dividing the north and south parts of the 28.39-acre tract

while he lived on the north part. Although Tom Simpson, Jr. testified that there was "no fence to amount to anything", between the two properties, he further testified that he built a fence while living on the property, but that this fence was not on the line. Lloyd Jolley testified that he removed about 15,000 feet of timber from the north part of the tract sometime between 1920 and 1925 under a purchase from Hogins and Bonds.

It is undisputed that Tom Simpson, Sr. has lived on the south half of the 28.39-acre tract since 1933 as the tenant of appellants and appellee does not question appellants' title to the south half. Simpson testified that appellants paid him to cut some underbrush from the north part of the tract about 1940.

Robert Bailey and J. F. Hogins were personal friends. Mr. Bailey was attorney for Mrs. Hogins in the administration of the J. F. Hogins estate from 1927 to 1932 but stated that he had never represented the real estate company and had nothing to do with any real estate involved in the Hogins estate. Appellee offered testimony of certain conversations and actions by appellants indicating their knowledge and recognition of the title of the Pope County Real Estate Company to the tract in controversy over the years prior to 1946. This testimony was stoutly disputed by appellants and it would serve no useful purpose to detail it here.

The tract in controversy is located near the City of Russellville along Skyline Drive, a mountain road constructed about 1939, which runs north and south through the entire 28.39-acre tract. In the past few years the tract has increased in value because of its availability for residential building sites. In 1946 appellant Craig Bailey, son of Robert Bailey, moved on an adjoining tract and shortly thereafter appellants began certain improvements on the tract in dispute by removing underbrush and levelling a part of the tract with a bulldozer.

In order to prevail in the instant suit the burden was on appellants to show either record title to the north

half of the tract or title by adverse possession, and the question here is whether the chancellor erred in his findings against appellants on this issue. We have repeatedly held that in a suit to quiet title the plaintiff must recover on the strength of his own title. *Nix* v. *Pfeifer,* 73 Ark. 199, 83 S. W. 951; *Chavis* v. *Henry,* 205 Ark. 163, 168 S. W. 2d 610.

We think it is apparent that there was a mistake of the scrivener in the deed from J. B. Campbell and wife to Ben Woods in 1917 in conveying the *south half* of the tract instead of the *north half* as intended. A consideration of the acreage contained in the fractional northwest quarter, the location of the 28.39-acre tract within the fractional quarter and the metes and bounds description used in the deeds executed by the Campbells demonstrate that the whole 28.39-acre tract is not the *south half* of any subdivision of land. The testimony of two surveyors clearly shows that the deed to appellants' predecessor in title, James Edwards, was intended to convey the south half of the 28.39-acre tract, containing 15 acres, more or less.

Appellants' claim of record title is based on the quitclaim deed from Tom Henry and wife dated July 18, 1921. It is clear from the metes and bounds description employed in this deed that it does not set out the boundaries of any tract of land and is void for indefiniteness of description. Appellants could not strengthen their record title to the disputed north half of the tract by the conveyance from W. N. Lucy and wife in 1922 in which the whole 28.39-acre tract was attempted to be conveyed for the first time. Whether the deed from Tom Henry and wife could be reformed in a proper suit is not an issue here. *Thomason* v. *Abbott,* 217 Ark. 281, 229 S. W. 2d 660. It follows that appellants' claim of record title to the tract in controversy must fail.

Appellants contend that they and their predecessors in title have had constructive adverse possession of the entire 28.39-acre tract under color of title since 1917. Appellants rely on *St. Louis Union Trust Co.* v. *Hillis,* 207 Ark. 811, 182 S. W. 2d 882, and similar cases which

hold that a grantee in actual possession under an instrument constituting color of title is deemed in constructive possession of the entire body of land described in the instrument. While color of title is not necessary to give title by adverse possession, it is necessary to extend the title so acquired beyond the limits of actual possession. *Bradbury* v. *Dummond,* 80 Ark. 82, 96 S. W. 390, 11 L. R. A. 772. We have also held that actual possession of a tract of land under an instrument giving color of title to it and to an adjacent tract does not draw to it the constructive possession of the adjacent tract, as against its true owner, unless his boundaries have been invaded by actual possession and occupancy of a part of his tract. *Haggart* v. *Ranney,* 73 Ark. 344, 84 S. W. 703.

In *St. Louis I. M. & S. Ry. Co.* v. *Moore,* 83 Ark. 377, 103 S. W. 1136, the court said: "This court has recently held that there can be no constructive adverse possession of land against the owner when there is no actual possession of any part of his land. *Haggart* v. *Ranney,* 73 Ark. 344, 84 S. W. 703. When one takes possession of one of two adjoining tracts of land under a deed conveying both tracts to him, if the actual title to the two tracts is in different persons, his actual possession of one tract will not give constructive possession of the other so as to oust the owner of that tract. The reason for this is that in such a case the possession of one tract is no notice to the owner of the other tract that his land is claimed adversely. If the law were otherwise, one by buying a small tract and taking a deed conveying the adjacent unimproved lands with the tract bought might, by taking possession of the tract bought become constructively in the possession of the land without any visible act to notify the owners thereof of such adverse claim." See, also, *Hardie* v. *Investment Guaranty & Trust Co., Ltd.,* 81 Ark. 141, 98 S. W. 701; *Carter* v. *Stewart,* 149 Ark. 189, 231 S. W. 887, 232 S. W. 936; *Anthony* v. *International Paper Co.,* 207 Ark. 396, 180 S. W. 2d 828; *Staton* v. *Moore,* 210 Ark. 416, 196 S. W. 2d 573.

Under the rule followed in the cases cited it was incumbent on appellants to prove actual possession of at

least a part of the north half of the 28.39-acre tract for the statutory period. Appellants' deed from Tom Henry and wife in 1921, being void because of indefiniteness of description, did not constitute color of title. *Dickson* v. *Sentell,* 83 Ark. 385, 104 S. W. 148. At the time appellants went into possession of the south half of the 28.39-acre tract the north half was in the actual possession of appellee's predecessor in title, Pope County Real Estate Co. The same situation existed when W. N. Lucy and wife executed the deed to appellants in 1922. If it be conceded that this deed gave appellants color of title, the trial court was warranted in concluding that appellants did not maintain actual possession of a part of the north half for seven years continuously while in possession of the south half.

As previously indicated, the evidence is in sharp dispute as to actual possession of the north half of the tract since 1925. Dell Goddard's possession under his 1925 contract with appellants, if not actually confined to the south half, lasted only 3 or 4 years at the most. Walter Dennis had possession as tenant of the real estate company from 1931 to 1933. We think the preponderance of the evidence shows that Tom Simpson, Jr. entered possession in 1933 as the tenant of Mrs. J. F. Hogins who represented the real estate company. 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 such owner. *Britt* v. *Berry,* 133 Ark. 589, 202 S. W. 830. The evidence here is insufficient to show proper notice to Mrs. Hogins of a change in the permissive possession under which Simpson entered. After Mrs. Oliver Simpson left the property in 1942, it was apparently vacant until Standridge entered in 1945.

It is well settled that in order to confer title by adverse possession, the possession must be shown to have been continuous for the full statutory period. *Sanderson* v. *Thomas,* 192 Ark. 302, 90 S. W. 2d 965. During the intervening periods of vacancy of the north half from 1941 to 1946 there was nothing to indicate to the

legal owner, had he visited the place, that any one was in possession of the land claiming it as his own. Under these circumstances, appellants did not hold that continuous and unbroken possession for the statutory period which is essential to confer title by adverse possession. *Norwood* v. *Mayo,* 153 Ark. 620, 241 S. W. 7.

On the whole case we cannot say that the chancellor's conclusion, that appellants did not establish title and right to possession of the disputed tract, is against the preponderance of the evidence. The decree is, therefore, affirmed.

WASHINGTON COUNTY FARMERS MUTUAL FIRE INSURANCE COMPANY *v.* REED.

4-9427 237 S. W. 2d 888

Opinion delivered March 12, 1951.

Rehearing denied April 16, 1951.

O. E. Williams, for appellant.

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

ROBINSON, J. This appeal involves a ten-day vacancy clause in a policy of fire insurance. The appellant Insurance Company contends that the insured property had been vacant for more than ten days at the time it was

destroyed by fire, and that under the terms of the policy the Company is, therefore, not liable.

Appellee Reed denies that the house had been vacant for ten days at the time it was destroyed, and alleges that if it had been vacant for that period of time, the Insurance Company waived the ten-day vacancy clause.

The case was tried in the Chancery Court because of a mortgage foreclosure being involved, the Chancellor finding in favor of the assured, who is the appellee, on the insurance feature of the case.

Circumstantial evidence was introduced tending to prove the house was vacant at the time of the fire, but just how long this vacancy had existed is a matter of speculation. The property was mortgaged to the Federal Land Bank of St. Louis. The policy of insurance was issued on appellee's application September 2, 1945. The application was made out on a regular form furnished by the Insurance Company and nothing was set out therein regarding a forfeiture in the event of a ten-day vacancy at the time a fire might occur. The policy was not delivered to the appellee, but was sent to the mortgagee. It does not appear that the appellee, Bessie C. Reed, or anyone acting for her, ever had possession of the policy or saw it until after the fire.

The house destroyed was a large 14-room country home, and from pictures taken after the fire, of the rock and concrete remains, it appears to have been a handsome and substantial structure. There was only $2,000 fire insurance on it, and the evidence is that some months before the fire, the appellee endeavored to obtain additional insurance as she was having some alterations and repairs done on the place. There is evidence to the effect that, at this time, the appellant Insurance Company inspected the house, which was vacant, and was informed of it being vacant about one-half the time, this statement being made to Mr. Dorman, Secretary and Treasurer of the Insurance Company, who had authority, not only to write policies, but to sign and deliver them. He could also waive the vacancy clause of the policy. *Home Fire*

Insurance Company v. *Wilson,* 118 Ark. 442, 176 S. W. 688, L. R. A. 1918E, 409. Although according to this evidence the Insurance Company was informed that the house was vacant about one-half the time and knew that the property owner was seeking additional protection, that the policy had been sent to the mortgagee, and that the property owner thought the house was protected to the extent of $2,000, notwithstanding the house was vacant one-half the time, the Insurance Company did not, even then, inform the owner that the property was not covered by insurance when vacant for as much as ten days.

The ten-day vacancy defense was not set up against the mortgagee although the mortgage clause did not specifically mention a ten-day vacancy situation, but in effect the Insurance Company paid the loss to the mortgagee by buying the note and mortgage for the full amount owed thereon including interest, and then, in an effort to recoup the loss, filed suit to foreclose the mortgage.

Moreover, there is evidence to the effect that the house was vacant at the time the policy was issued, that an agent of the Insurance Company inspected the property and, notwithstanding the fact that the Insurance Company knew the property was vacant, it continued to collect premiums for four years. *Farmers' Union Insurance Company* v. *Hill,* 205 Ark. 139, 167 S. W. 2d 874, was a case wherein the Insurance Company defended on the ten-day vacancy clause in the policy and, also, that there was a false answer in the application to the effect that there was no other structure within 100 feet of the property to be insured. There this Court said:

"Hoggard (Insurance Company's agent) knew the building was not completed and that it had never been occupied by anyone. He had been in and about the building at different times and knew that there was another building within less than 100 feet of the building in question. Under these facts, it is our view that appellant's agent Hoggard waived the occupancy provision and the untrue statements of appellee in the application

as to the distance of the nearest building, or risk, to the property in question, and the length of time that it had been occupied prior to the application. Notice to Hoggard, appellant's agent, was notice to the principal, appellant, and appellant has waived any right to claim forfeiture of the insurance on account of appellee's false answers in the application or for violation of the provision of the policy."

The case of *National Surety Company of New York* v. *Fox,* 174 Ark. 827, 296 S. W. 718, 54 A. L. R. 458, involved a policy of burglary insurance. The Insurance Company defended on the ground that the policy only covered the property while the house was occupied by the assured and, at the time of the burglary, the premises had been rented to other people. The assured testified that subsequent to the issuance of the policy, he rented the premises to other people and told the general agent of the insurance company about renting the property, and Mr. Newell, the agent, made no objection, the record revealing that Newell had authority to issue policies and that he had issued the policy in question. This Court held that the assured, in these circumstances, could recover and said:

"Forfeitures are not favored in law, and any agreement, declaration or course of action on the part of an Insurance Company which leads the insured honestly to believe that by conforming thereto, a forfeiture of his policy will not be incurred, followed by conformity on his part will estop the insurance company from insisting upon forfeiture. The rule thus announced has been steadily adhered to by this Court." *German Insurance Company* v. *Gibson,* 53 Ark. 494, 14 S. W. 672; *Interstate Business Men's Accident Association* v. *Green,* 132 Ark. 546, 201 S. W. 799.

If in fact the Chancellor found that the house had been vacant ten days at the time of the fire, all the facts in this case considered together would sustain a finding that the Insurance Company waived the ten-day vacancy clause.

Affirmed.

ROBINSON *v.* ROBINSON.

4-9438 237 S. W. 2d 20

Opinion delivered March 12, 1951.

Frances D. Holtzendorff, for appellant.

Guy B. Reeves, for appellee.

GEORGE ROSE SMITH, J. This is a petition by the appellant for permission to visit her two children, who are in the custody of the appellee, the appellant's former husband. For reasons to be stated the chancellor denied the petition.

The couple were divorced in Pulaski County in 1945, and at that time the father was awarded custody of the three children. In October, 1948, the parties entered into an elaborate contract governing the future custody of the children, and this contract was approved by the court. The contract provided that appellant should have the custody of the eldest child, a son, and that the appellee should have the custody of the two daughters. The appellant then intended to move to California, and the contract provided that she might take the son with her, though the decree approving the contract retained jurisdiction over the child. The contract also provides that either party shall be allowed to visit chil-

dren in the custody of the other, at all reasonable times, but the party so desiring to visit shall first file a petition requesting the court to determine the period of visitation.

The appellant did move to California and was living there when her son was accidentally killed by a teen-age motorist. Upon being notified of his son's death the appellee insisted that the body be returned to this State for burial, and he prevailed upon the chancellor to send a telegram to the appellant ordering the return of the child's body. The appellant refused to obey this directive, explaining at the hearing below that her son had asked to be cremated and had stated in the presence of his father that he did not want to be returned to Arkansas if he should die. She obeyed her son's wishes by having his remains cremated.

In 1950 the appellant returned to Arkansas to live and filed the present petition. At first, without hearing any testimony, the chancellor denied the petition and entered an order enjoining the appellant from visiting the two children. As no evidence had been heard this order must have been based upon the appellant's disobedience of the court's telegram.

This was error. The court's retention of jurisdiction over the child did not include the power to direct the disposition of his body. Obviously funeral arrangements had to be made either by the father or by the mother. On the facts in this case we hold that the mother, by virtue of her custody, had the paramount privilege of burial. We agree with the holding in *Rader* v. *Davis,* 154 Iowa 306, 134 N. W. 849, 38 L. R. A. (N. S.) 131, where the parents were divorced and the mother was awarded custody of a child, who later died. The court held that "it was for the mother to say how the body should be controlled, where the funeral services were to be conducted, and where and how the child should be buried."

After the original injunctive order had been entered the appellant was granted an appeal from that order

and was also permitted to introduce testimony as to the correctness of the order. Only the two parties appeared as witnesses. The appellee's testimony is to the effect that the appellant is not a fit person to visit the children, that she will poison their minds against their father, that she was formerly addicted to narcotics, and that she is not mentally stable. The appellant's testimony was mainly a denial of these accusations.

Nearly all the appellee's testimony was incompetent and was objected to by appellant. Practically everything that appellee related concerned incidents that occurred before the agreement and decree of 1948. That agreement was an effort to settle past differences and to chart a course for the future. It confers upon each party the unqualified privilege of visitation, subject only to the court's power to prescribe the length of the visits. The appellee had the burden of showing some changed conditions that would warrant the court in refusing to enforce the rights conferred by the contract and the decree approving it. There is virtually no testimony in the record to indicate any change in the condition of the parties since the contract was made and approved. The appellee clearly failed to sustain his burden of proof.

The decree is reversed, and under our power of superintending control over trial courts, Ark. Const., Art. 7, § 4, we have concluded from an examination of the entire record that in fairness to the chancellor of the Second Division, as well as to the parties, the cause should be transferred to the First Division for further proceedings. The cause is accordingly remanded with directions to that effect. The pendency of these proceedings has prevented the appellant from seeing her children since her return to this State. Until such time as the trial court fixes the appellant's rights of visitation the appellee is directed to bring the children to the office of the Pulaski County Juvenile Court, where the appellant will be permitted to visit the children, under the court's supervision and in the absence of the appellee, for a period of two hours each week.

ROBINSON, J., not participating.

ARKANSAS STATE LICENSING BOARD FOR GENERAL CONTRACTORS *v.* ROSAMOND.

4-9418 237 S. W. 2d 22

Opinion delivered March 12, 1951.

Campbell & Campbell and *William J. Smith,* for appellant.

Hebert & Dobbs and *Richard W. Hobbs,* for appellee.

HOLT, J. This cause comes here from a decree dismissing appellant's petition for injunctive relief against appellee, for the alleged violation by appellee of Act 124 of the Acts of 1939, enacted to "regulate the practice of General Contracting in the State of Arkansas." (Now § 71-701, *et seq.,* Ark. Stats. 1947.) This act was amended in a manner not material here by Acts 217 of 1945 and 149 of 1949.

Appellant alleged and contended that "appellee is engaging in the business of contracting as defined by the licensing law in that he is supervising the construction of a motor court and hotel in the City of Hot Springs, the cost of which will exceed $100,000, without a license to engage in the business of contracting in the State of Arkansas."

Appellee defended on the ground that he was acting as an employee only, was not a general contractor within the meaning of the above licensing law, and the trial court, as above indicated, upheld appellee's contention.

The material facts are not in dispute. The exact question presented here was decided by this court in the

recent case of *Arkansas State Licensing Board for General Contractors* v. *Lane,* 214 Ark. 312, 215 S. W. 2d 707.

The facts in the Lane case were not materially different from those presented here, and we there held against appellant's contention that Lane was a general contractor within the meaning of Act 124, and the definition of that term as shown in § 1 of the Act, § 71-701, Ark. Stats. 1947.

Appellee, Rosamond, here was employed by Mr. Anthony, the owner, as a foreman to supervise the workers in the construction of a building costing approximately $100,000. "Q. Then your sole agreement with Mr. Anthony was merely to act as a, might say, a foreman, is that correct? A. Yes, sir, that's right. . . . Q. Who pays the laborers up there? A. Mr. Anthony. Q. Do you have any right to pay any worker if he happened to quit the job at any time? A. No, sir, I don't. Q. All checks are made payable by Mr. Anthony? A. Yes, sir. Q. And he pays for all materials? A. He pays for everything, yes, sir. Q. If you did not perform your duties in conformity with Mr. Anthony's instructions, do you have any contract of employment which would secure your continued employment? A. No, sir, I have not. Q. Does he have the right to fire you at any time? A. He can fire me any time he gets ready. I am only working as an employee, same as the rest of them up there. . . . Q. In other words, you're working solely under the direction and under the orders of Mr. Anthony? A. Yes, sir, that's right."

Appellee had never worked for Mr. Anthony (owner) before and had no contract with him to construct the building. He was working on a basis of $125 per week, but should he fail to work a full week, his pay was figured on an hourly basis. He testified: "Q. 'I am working for $125 per week salary.' Q. Will you explain to the Court what you meant by that statement—the basis upon which you're paid in other words? A. If I don't get in a full week, it's figured out as hourly wages. Sometimes I just work when Mr. Anthony is on the job, he tells me what to do— Q. In other words, Mr. Rosa-

mond, you are working on an hourly basis? A. Yes, sir. Q. And $125 week salary which you stated you were receiving is based upon a 44-hour week? A. 44-hour week, yes, sir. Q. Now if you only work 20 hours during a week, you wouldn't receive $125, would you? A. No, sir."

There were no bids on the construction of the building, and no contract let for its construction. Appellee paid for none of the material used. All purchases that he made were under the direction of Mr. Anthony, the owner, and were paid for by Anthony. Appellee could hire or discharge certain employees or workers on the job, but his acts in this connection could be nullified by Anthony.

It is suggested by appellant that we should overrule the Lane case, but this we decline to do. That decision is the law of the present case.

Accordingly, the decree is affirmed.

MARLIN *v.* HARRISON, RECEIVER.

4-9430 237 S. W. 2d 24

Opinion delivered March 12, 1951.

Alonzo D. Camp, for appellant.

M. J. Harrison, for appellee.

Ed. F. McFaddin, Justice. This appeal is an attempt by appellant to surcharge the final report of the appellee, as Receiver of Better Way Life Insurance Company. Background cases to the present one are: (a) *Better Way Life Ins. Co.* v. *Linder,* 207 Ark. 533, 181 S. W. 2d 467, in which we refused to set aside a judgment rendered against the company; (b) *Better Way Life Ins. Co.* v. *Graves,* 210 Ark. 13, 194 S. W. 2d 10, in which, *inter alia,* we upheld a judgment declaring the company to be insolvent, and affirmed the appointment of a receiver; and (c) *Marlin* v. *Harrison, Receiver,* 214 Ark. 342, 216 S. W. 2d 45, in which we sustained the claims of Pennington, Brown, and Carter against the Better Way Life Insurance Company, and also sustained the right of the Receiver to foreclose a mortgage on Marlin's lands in Poinsett County.

On March 17, 1950, appellee filed in the Pulaski Circuit Court (in which the receivership was pending) his final report as Receiver of the Better Way Life Insurance Company. In this report appellee showed $10,079.29 realized from the Poinsett County mortgage foreclosure case; listed five items (totaling $5,623.84 and interest) as claims previously allowed by the Court's orders in the receivership; and listed three claims (totaling $587.80) as still pending for allowance. Appellee prayed for a reasonable fee for his services as Receiver and also for an order of distribution to close the receivership.

Thereupon, appellant Marlin filed exceptions to each of the eight claims and charged that the Receiver had been guilty of negligence in the entire proceedings to such an extent that he was entitled to no fee, and also that all of the eight claims should be charged against the Receiver, personally. On April 22, 1950, there was a hearing on the Receiver's report, and Marlin's exceptions, and a judgment was entered denying all of the said exceptions and approving—with slight modifications—the Receiver's report. From that judgment Marlin has appealed.

As to the five claims previously allowed by the Court in the receivership matter: each was heard in open court at some previous term and none of the evidence on any of the five claims is in the present bill of exceptions; so, because of the absence of the evidence—and independent of other defenses—appellant necessarily fails in his attack on each of these five claims. As to the three claims allowed by the present judgment: one was for $80 for the Receiver's bond premium; and another was for $7.80 for publication of notice. We affirm the allowance of these claims. The third claim was that of C. W. Garner, Attorney, for $500 for services rendered, at the request of Marlin, for the Better Way Life Insurance Company, in the course of the receivership. The Court allowed this claim in the amount of $250, and we affirm such allowance.

The only remaining matter is the Court's allowance of a fee of $750 to Harrison for all of his services as Receiver. This item is the one most bitterly contested by the appellant whose counsel, in the well prepared brief filed here, cites many cases and texts to support the rules: (a) that a receiver occupies a fiduciary relation and is governed by the general rules applicable to trustees; (b) that a claim to be presentable and provable in receivership must be one against the corporation or person whose property is in receivership; and (c) that if the assets of the receivership be wasted through the negligence of the receiver, then he will be personally charged with the resulting loss.

These are wise and salutary rules, but Harrison has not violated any of them: (a) in everything that he did in this case, he was faithful to the trust imposed on him; (b) this Court has put the stamp of approval[1] on the claims of Pennington, Brown, and Carter against the Better Way Life Insurance Company, so the Receiver did not wrongfully allow those claims; and (c) the Receiver has not suffered the assets of this estate to be wasted. We conclude that the fee allowed the Receiver is reasonable.

[1] See *Marlin* v. *Harrison, Receiver,* 214 Ark. 342, 216 S. W. 2d 45.

The judgment is affirmed and the Circuit Court is directed to make final distribution and close the receivership.

ROBINSON, J., not participating.

VINCENT *v.* INDEPENDENT GIN CORPORATION OF MCCLELLAND.

4-9429 237 S. W. 2d 486

Opinion delivered March 19, 1951.

John D. Eldridge, Jr., for appellant.

J. Ford Smith, for appellee.

HOLT, J. In October, 1948, appellant, L. O. Vincent, together with R. L. Cole, purchased a gin from H. O. Moody, which they operated during most of the 1948 ginning season at McClelland, Woodruff County, with Vin-

cent, as manager in charge. After some negotiations, Vincent and Cole sold the gin to appellee, Independent Gin Corporation of McClelland, for $65,000. Vincent was a large land owner and cotton producer. In 1948, on his own, and leased lands, which he operated, he harvested and ginned approximately 700 bales of cotton. As an inducement and part of the consideration for the above sale to appellee, Vincent represented to appellee that he would gin all cotton raised by him at appellee's gin, his only demand being that prices for ginning be competitive, and services at the gin satisfactory.

The deed which Vincent and Cole executed and gave appellee, contained this provision: "It is understood and agreed, as a part of the consideration for the sale of the above property, that grantor, Richard L. Cole, will not establish a ginning plant within a radius of five miles of the Town of McClelland, Arkansas, for a period of ten years. It is further understood and agreed that the other grantor, L. O. Vincent, as a part of the consideration for the sale of the above property, will for a period of five years gin all of the cotton grown by him on lands owned and rented by him at the gin sold by this deed, provided the services furnished by said gin are satisfactory and its prices competitive."

Following this sale, in the fall of 1949, Vincent, who owned a half interest in the Little Dixie Gin in Prairie County, ginned the first two bales only of his cotton at appellee's gin, and the remainder at the Dixie, and at the Farmers Gin in Cotton Plant.

Appellee brought the present suit November 15, 1949. His prayer for relief was that appellant "be temporarily enjoined from taking and delivering cotton grown on lands owned and rented by him to any gin other than the one operated by plaintiff to be ginned." That appellant be required to perform the contract and agreement entered into with appellee and upon final hearing "that the defendant (appellant) be permanently enjoined from ginning his cotton at any other gin other than the one sold by him to the plaintiff for a period of five years, or for such a time less than five years as the service at said gin

shall be satisfactory and its price competitive," and in an amendment to his complaint asked for damages in the amount of $2,400.

Appellant, after the trial court had overruled a demurrer, and a motion to transfer to law (at the close of all the testimony) which he had filed, answered with a general denial.

Upon a hearing, the court found that appellee was entitled to injunctive relief and decreed that "L. O. Vincent, be and he is hereby directed to gin all cotton grown on lands owned by him or rented by him at the Independent Gin Corporation at McClelland, Arkansas, for a period of five years from date of April 8, 1949, in so long as the services furnished by said gin are satisfactory and its prices competitive. * * * That the plaintiff take nothing from the defendant as damages for defendant's failure to gin cotton grown by him at the gin belonging to the plaintiff as of the date of this decree."

The cause comes here on appellant's direct appeal, and appellee's cross appeal from that part of the decree denying damages for appellant's failure to fulfill his contract.

Appellant first contends that the suit was improperly brought in equity and that the court erred in refusing to transfer to law. We cannot agree.

Here, appellee sought damages already accrued and in addition, to enjoin any future breaches of the contract over the remaining five-year period.

In the circumstances, we hold that equity had jurisdiction. In *Bledsoe* v. *Carpenter,* 160 Ark. 349, 254 S. W. 677, a case wherein the facts, in effect, were similar to the present case, Chief Justice McCulloch, speaking for this court, said: "It is next contended that appellees could not, at the same time, maintain an action for damages and to restrain the breach of the contract. The suit is to recover damages already accrued and to restrain future breaches, and we are of the opinion that an action is maintainable to secure relief on both grounds. The injured party is not, under those circumstances, put to an

election, for he has two distinct, mature rights of action. We are also of the opinion that both may be prosecuted in a court of equity, where jurisdiction is conferred for the purpose of granting relief by injunction, and, to prevent a multiplicity of actions, that court should grant complete relief by awarding damages," and in *Hultsman* v. *Carroll,* 177 Ark. 432, 6 S. W. 2d 551, we used this language:

" 'Where one has made a valid contract restricting the use to which he may put his land, a violation of such restriction by him will be restrained by injunction; such covenants are usually made at the time of a conveyance, the grantee agreeing not to use the land conveyed in certain ways, or the grantor limiting his use of other land retained by him.' 22 Cyc. 859.

"If the contract is not contrary to public policy and the violations of the contract are continued from day to day, like the selling of gasoline, and the contract is not unreasonable, a court of equity will restrain the violation of the contract."

As early as *Conway et al., Ex Parte,* 4 Ark. 302, this court held "a court of chancery will interfere, by injunction, where the remedy at law is doubtful or difficult or to prevent a multiplicity of suits."

After a review of all the evidence, we hold that the preponderance thereof is not against the chancellor's finding that the services furnished appellant by appellee at its gin were satisfactory and the prices competitive, and the contract should be enforced in accordance with its terms. The contract was in all respects a valid one, not against public policy or in restraint of trade. See *Bledsoe* v. *Carpenter,* above.

The court properly enjoined appellant from future breaches of the contract, but erred in denying appellee damages for the breach by appellant which had already occurred.

As pointed out above, equity had jurisdiction to grant an injunction and also the power to award damages in one and the same suit.

On the question of the amount of the damages, it was stipulated that appellant had ginned 274 bales at the Dixie and Farmers Gins. On the record presented, without detailing the testimony, we think the great preponderance, if not the undisputed facts, show that appellee has been damaged not less than $2.13 on each of these 274 bales, which were not ginned at appellee's gin, or a total of $583.62, and that appellee should have a decree for this amount.

Accordingly, the decree is affirmed on direct appeal and reversed on appellee's cross appeal and decree is entered here for appellee in the amount of $583.62, together with its costs in both courts.

BAKER *v.* TAYLOR & COMPANY.

4-9413 237 S. W. 2d 471

Opinion delivered March 19, 1951.

U. J. Cone, for appellant.

A. F. Triplett and *Coleman, Gantt & Ramsay,* for appellee.

ED. F. MCFADDIN, Justice. This appeal results from the unsuccessful effort of appellants to recover a deposit made on a land purchase contract.

The real estate of Arthur McCoy was owned by his heirs in eight equal shares: seven shares being owned by his seven surviving adult children, and one share by his two minor grandchildren, whose guardian is The Simmons National Bank. The McCoy heirs listed the lands for sale with Taylor & Company, a real estate agency, hereinafter called "Taylor". On June 15, 1949, appellants (Cone C. Baker and Maye Baker, his wife) executed a written instrument, offering to pay $7,500 for "the McCoy place, on the Little Rock highway"; and two days later deposited with Taylor the sum of $500 as down payment on the purchase price, and received a receipt:

"Received of Cone C. Baker and Maye E. Baker—Five hundred and 00/100—Dollars Cash deposit on McCoy Place on Hgw. No. 65. Sale price $7,500. To include split fence posts, sawed fence posts, hot water heater and furnishing a clear title to the purchaser within 60 days. Subject to owners' acceptance.

TAYLOR & CO."

Appellants were advised by Taylor that the offer of purchase had been accepted, that the deed was being sent to the heirs for signature, and that authority was being obtained from the Probate Court to convey the interest of the minors. Appellants advised Taylor how they desired to be named as grantees in the deed; and also the appellants had the garden plowed, peas planted, the yard mowed, the fences repaired, and the property otherwise improved. Notwithstanding all these matters, appellants, on July 11, 1949, wrote Taylor:

"Due to a number of considerations, it is best for us to fore-go the proposed purchase of the McCoy place, the fence posts and hot water heater as mentioned in your memo concerning such proposed sale.

"We have to ask that you return the deposit of $500."

On October 3, 1949, appellants filed action at law against Taylor to recover the $500 deposit. For defense,

Taylor (a) stated that the money was held by it as a mere stakeholder, (b) moved transfer of the case to equity, and (c) interpleaded the fund as between the appellants and the McCoy heirs. (See § 27-817, Ark. Stats.). The transfer to equity was granted, and the cause was heard with the appellants and the McCoy heirs as the opposing parties.

In addition to the facts already recited, the evidence showed: that the McCoy heirs had authorized Taylor to accept the appellants' offer; that such acceptance had been promptly communicated to appellants; that the deed had been executed by some of the adult heirs and was en route to the others; that the guardian of the minors had taken proper steps to obtain Probate Court authority to convey the interest of the minors; that the abstract had been prepared and tendered to appellants; and that the change of mind by appellants was caused by no fault or delay on the part of the McCoy heirs, or Taylor, but rather because the appellants found another place which they preferred over the McCoy place. From a decree awarding the $500 to the McCoy heirs, the appellants bring this appeal.

The facts in the case at bar clearly distinguish it from such cases as *McKinney* v. *Jones,* 210 Ark. 912, 198 S. W. 2d 415; *Polk* v. *Gray,* 211 Ark. 24, 198 S. W. 2d 847; *Gowen* v. *Sullins,* 212 Ark. 824, 208 S. W. 2d 450; and *Hall* v. *Weeks,* 214 Ark. 703, 217 S. W. 2d 828. Here the amount deposited was relatively small as compared with the total price to be paid; the vendees attempted to rescind within twenty-eight days after signing the contract, although the vendors had sixty days to complete the title and transfer; there was no failure or refusal of the vendors to perform; they could have performed within the time allowed; there was no mutuality of rescission; and the contract gave the vendees no right to rescind.

Appellants cannot rely on the Statute of Frauds:[1] (a) the written instrument of June 15th was signed by them as "the party to be charged" within our holding

[1] See § 38-101, Ark. Stats.

in *Jones* v. *School Dist.,* 137 Ark. 414, 208 S. W. 798; (b) the description of the property was sufficient to furnish the key for its location within our holding in *Rawls* v. *Free,* 184 Ark. 737, 43 S. W. 2d 540; and (c) the appellants took possession of the lands and made improvements. The verbal acceptance of the appellants' offer was sufficient to bind them, for in *Jones* v. *School Dist.,* 137 Ark. 414, 208 S. W. 798, Mr. Justice HART said:

" . . . Our court has adopted the rule that a verbal acceptance of a written offer to sell land is sufficient to constitute a binding agreement on which to charge the person by whom the memorandum is signed. If the memorandum is otherwise sufficient when it is assented to by the purchaser, the contract is consummated by the meeting of the minds of the two parties, and the evidence to make it valid is supplied by the signature of the parties sought to be charged. . . . "

While we do not find in the cases of this Court one which contains facts like those in the case at bar—in which the vendees, notwithstanding their default, seek to recover the amount paid under an executory contract for sale of land—nevertheless there are cases from other jurisdictions enunciating principles which are adverse to vendees similarly situated.[2] We quote from some of the cases:

A — In *Hansbrough* v. *Peck,* 5 Wall. (U. S.) 497, 18 L. Ed. 520, the Supreme Court of the United States said:

" . . . And no rule in respect to the contract is better settled than this: that the party who has advanced money, or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done. . . . "

[2] For cases other than those here quoted, see Annotations, "Vendee's right to recover amount paid under executory contract for sale of land," in 59 A. L. R. 189, 102 A. L. R. 852, and 134 A. L. R. 1064. See, also, American Law Institute's Restatement of the Law of Contracts, § 355 (4) and also § 357.

B — In *Baston* v. *Clifford,* 68 Ill. 67, 18 Am. Rep. 547, the Supreme Court of Illinois said:

" . . . where the vendor is in no default, and is ready and willing to perform the contract on his part, the vendee cannot recover back money paid by him on the contract. . . . "

C — In *Ketchum* v. *Evertson,* 13 Johns. (N. Y.) 359, 7 Am. Dec. 384, the New York Court said:

" . . . It may be asserted with confidence, that a party who has advanced money, or done an act in part performance of an agreement, and then stops short, and refuses to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, has never been suffered to recover for what has been thus advanced or done. . . . It would be an alarming doctrine to hold, that the plaintiffs might violate the contract; and, because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have."

The principles expressed in the quoted cases are sound, and we apply them to the case at bar. The decree of the Chancery Court is affirmed.

THOMPSON *v.* MORRIS.

4-9405 237 S. W. 2d 473

Opinion delivered March 19, 1951.

W. J. Dungan, for appellant.

John C. Eldridge, Jr., J. Ford Smith and *Owens, Ehrman & McHaney,* for appellee.

George Rose Smith, J. This suit involves the title to a tract of land that is 208 feet long from north to south and 100 feet wide from east to west. McCrory School

District No. 12 formerly owned a larger tract of which this land is the west 100 feet. In 1947 the school board decided to close the school and to offer the property for sale at public auction. Two sales were held. At the first sale, in August, the appellee G. L. Morris bid $2,200 for the east 119 feet of the school property, which was the situs of the schoolhouse and is not here in controversy. At the second sale, about a month later, the appellant V. M. Thompson bid $1,325 for the 100-foot strip now in dispute. On September 13, 1947, the district executed deeds to the respective purchasers.

What the chancellor found to be a public street runs the length of the 100-foot strip. If we assume the public right-of-way to be 40 feet wide, the street is so situated within the 100-foot strip that it lies 13 feet from the east boundary and 47 feet from the west boundary. In December of 1947 Thompson erected a barrier across the street. This suit was immediately brought by Morris to compel Thompson to remove the obstruction. From many pleadings three issues emerged: First, whether a public street has in fact been established by prescription; second, whether Morris' deed from the school district should be reformed to include the 13-foot strip that lies east of the street; and third, whether Morris and his two co-plaintiffs have acquired title by adverse possession to the 47-foot strip that lies west of the street. The chancellor ruled for the plaintiffs on all three issues, with the result that Thompson was held to have acquired nothing by his deed from the district.

I. The decided weight of the testimony supports the chancellor's finding that a public street has been established by prescription. Several witnesses testified that the public has used this thoroughfare for at least thirty-five years. The mayor of McCrory testified that the town has maintained the street for thirty-five years. He said that in appearance this street is like any other gravel street in the town. There is a railroad right-of-way abutting the south border of the 100-foot strip, and it is undisputed that for many years the railroad company has maintained an asphalt public crossing where this street crosses the tracks.

Thompson argues, however, that since this tract was uninclosed the public user should be deemed permissive. It may be doubted whether this rule applies when the land, although uninclosed, is nevertheless occupied. See *Batson* v. *Harlow,* 215 Ark. 476, 221 S. W. 2d 17. But in any event the fact that the town maintained the street for more than seven years is fatal to Thompson's contention. We have frequently held that when the public authorities assert their dominion by working the thoroughfare the public user is under a claim of right. *Patton* v. *State,* 50 Ark. 53, 6 S. W. 227; *Merritt Merc. Co.* v. *Nelms,* 168 Ark. 46, 269 S. W. 563.

We think the chancellor erred, however, in finding the public easement to be sixty feet wide. Most of the evidence shows that the gravel surface has been from twenty to twenty-five feet wide. There is also evidence that this street has shoulders like those of other unpaved roads. The street is a continuation of Johnson street, which is south of the railroad and forty feet wide. We accordingly modify the decree to provide that the easement is forty feet in width and so situated as to be a continuation of Johnson.

II. Next is the question of reforming Morris' deed to include the east thirteen feet of the 100-foot strip. When the school board decided to sell the entire school tract C. H. Koon, the superintendent, was instructed to obtain a description and advertise the property for sale. Koon was advised by an attorney that the district had lost title to the land west of the street and should sell only that part of the school lands lying east of the street. Koon and the school janitor then attempted to measure the width of the tract east of the street and concluded that it was 119 feet. Accordingly the property was so advertised. When the first sale was held Koon undoubtedly thought that the district was selling, and Morris thought that he was buying, all the school land east of the street. If this were all the testimony we should agree that a mutual mistake occurred.

But before the deed was executed or the money paid it was learned by the school board that the east 119 feet

of its land did not extend to the street. Morris asked for a quitclaim deed to the rest of the property, but the board refused his request. Not only the board members but also Morris testified that when the mistake was discovered the board offered to release Morris from his bid. Morris refused this offer, and when he paid for the property and received his deed on September 13 he knew that the board had sold the 100-foot strip on the preceding day. In fact, Morris had attended the second sale and had been outbid by Thompson. In these circumstances it cannot be said that a mutual mistake occurred. Both the grantor and the grantee knew that the deed described only the east 119 feet. Morris testified that he still thought the description extended to the street, but at most that was merely a mistake as to the legal effect of the deed. Such a mistake does not warrant reformation. *Fullerton* v. *Storthz,* 182 Ark. 751, 33 S. W. 2d 714. That part of the decree granting reformation is reversed.

III. The remaining issue is that of adverse possession of the 47-foot strip west of the street. Thompson first contends that title to land owned by a school district cannot be acquired by adverse possession. That is perhaps the majority rule elsewhere, but in this State it is well settled that the statute of limitations runs against a city, county, or school district, in the absence of a statute to the contrary. *Fort Smith* v. *McKibbin,* 41 Ark. 45, 48 Am. Rep. 19; *Clarke* v. *Sch. Dist. No. 16,* 84 Ark. 516, 106 S. W. 677.

There are three appellees who own land that adjoins the 100-foot strip along its 208-foot western boundary. First is Morris, who owns the south fifty feet of the abutting property. We agree with the chancellor's holding that Morris has acquired title to his segment of the 47-foot strip west of the street.

In 1930 Morris built a cotton gin on part of the railroad right-of-way which he had leased. In 1933 and 1935 he bought tracts just north of the right-of-way which totaled 50 feet in width and 104 in length along the right-of-way. It was Morris' belief that his purchase extended

to the street in question, but in fact the property described in his deeds extends only to the school property.

We think the preponderance of the testimony shows that Morris took possession up to the street and held it for well over seven years. In connection with his cotton gin Morris constructed a small office building which he locates as having been wholly within the area now in dispute. This building was used as an office from its construction in 1933 until it was replaced by a concrete platform in 1947. Morris also used part of the area to store hulls that were blown from the gin, these hulls being removed each spring. Another part of the area was used as a cotton yard where customers could park their trucks and wagons while waiting to have their cotton ginned. It is shown to be customary for cotton ginners to maintain such a yard for their patrons. We are convinced by the testimony that Morris intended to and did take actual possession of the strip in controversy.

Thompson contends, however, that Morris' possession was not continuous, as it was limited to the three or four months in each year that make up the ginning season. We do not agree. It is true that adverse possession must be uninterrupted, but what constitutes continuity depends to some extent upon the nature of the property. Where a summer cottage was occupied only during the summer months for fifteen years the possession was held to be continuous, for the occupancy was "in the manner that property of this type would normally be occupied." *Cotton* v. *McClatchey,* 277 Mich. 109, 268 N. W. 894. The same rule has been applied where a summer camp for boys was operated for only two or three months each year. *Hoban* v. *Bucklin,* 88 N. H. 73, 184 A. 362, modified on other grounds, 88 N. H. 73, 186 A. 8. Here the true owner must be taken to have known that cotton gins do not do business the year round. The use of the gin and its appertaining office and cotton yard during every ginning season for fourteen years was sufficient to put the owner on notice that the property was adversely held.

The other two abutting owners, appellees Fletcher and Spain, failed to prove adverse possession of their

segments of the 47-foot strip. Until 1945 Spain owned all the abutting land north of the Morris tract. Spain admitted frankly that he knew the school district owned land between his property and the street and testified that he did not intend to claim the school property. In 1945 Spain sold part of the abutting property to Fletcher, but Fletcher's possession could have been adverse only from 1945 until Thompson filed his answer to Fletcher's intervention in 1948, a period of less than seven years. Hence we must reverse that part of the decree which finds that Fletcher and Spain have acquired title by adverse possession.

The cause is remanded for the entry of a decree in accordance with this opinion and for further proceedings with reference to two issues not yet fully developed: First, Thompson's claim for damages by reason of the issuance of an injunction *pendente lite,* and second, Morris' claim to an easement of necessity to give him ingress to the land he bought from the district.

HOLT, J., dissents.

NEWBERRY *v.* NEWBERRY.

4-9417 237 S. W. 2d 477

Opinion delivered March 19, 1951.

W. J. Cotton, for appellant.

Merle Shouse, for appellee.

GRIFFIN SMITH, Chief Justice. August 26, 1949, John F. Newberry executed and delivered to his son, Woodrow, a deed to 183.19 acres. The complaint resulting in this appeal was filed by another son, Burk, but the decree was based on a separate action by Woodrow asking that his title be quieted.

In 1915 Alexander Newberry, for a recited consideration of $100, sold to *his* son, John F. Newberry, four acres. It is a part of sixteen and a fifth acres claimed by Burk, who says that *his* father, John F. Newberry, held the property in trust and had fraudulently disposed of it when the August, 1949, deed was delivered. In the alternative Burk, in his original pleading, asked that he have judgment for $900 with interest from December 13, 1924, to compensate the 46.62 acres he purchased from his grandfather on that date.

Included in the 46.62 acres were the 16.20 acres Burk says were to be held in trust, but in particularizing he asserted that "four of this were deeded by me to John F. Newberry prior to this [time]."

A. A. Newberry—Burk and Woodrow's brother—intervened, but it is conceded that Burk and Woodrow are the interested parties.

Whether Burk deeded four acres to his father (as he asserted in his complaint of October 12, 1949) appears doubtful. The deed from Alexander Newberry to John F. is in the record. Some of the witnesses spoke of the remaining land as twelve acres, plus a fraction.

In a deposition from which the Chancellor could have found that the witness had a clear understanding of his

business affairs and a comprehensive grasp of his relationship to the contending parties, John F. Newberry (then between 73 and 74 years of age) testified that in 1924 he and Burk "got in a swap about some lands." John F. had previously acquired 46 acres and Burk was buying the Alexander Newberry home place, containing 140 acres. It is conceded that Burk paid for this land; but, said John F., Burk wanted the 46 acres I had and I wanted [the particular 12 and a fraction acres], so it was agreed that the exchange should be made, "just like swapping horses."

Responsive to this agreement Alexander Newberry executed to John F. his deed to 16.20 acres, dated December 1, 1924. John F.'s deed to the 46 acres is not in the record, but Burk testified that he took this property. He was asked: "What did you give your father for the 46 and a fraction acres he deeded to you?" A. "We divided the land." Q. "In other words, you took the 46 acres from him and he took the 16 acres from your grandfather—is that what you are trying to tell the court?" A. "Yes, sir." Q. "I believe you stated that your father had also purchased from your grandfather four and a fraction acres prior to this time: is that correct?" A. "Absolutely." Burk then stated that he did not think the smaller tract was included in the 16.20 acres.

On redirect examination Burk testified it was his understanding that the 46 acres were given to him for the *use* of the 16.20. A little later he said that the deed from his father had absolutely nothing to do with the return of the 16.20 acres.

There was testimony pro and con regarding Burk's contention that his father promised to surrender the acreage when he was through with it. Indeed, it might be said that a preponderance of the evidence supports Burk's insistence that his father, from time to time, had either expressed an intention to give him the land, or to "make things right with him," thereby establishing in Burk's mind a conviction that he would eventually become the beneficiary.

A brother-in-law of Woodrow and Burk testified that he had lent money to his father-in-law and that the land was mortgaged to secure this debt, an obligation since paid. One of John F.'s daughters testified she had heard Burk say that he and his father swapped lands, "and I did not at any time hear Burk claim he was to get the twelve acres when Father was through with it—not until Dad went to fix up his business [by deeding the property] to Woodrow." Another daughter was at home "when they traded" and did not hear anything except that the lands had been exchanged. In mentioning the actual transaction another witness (Earl Sims, John F.'s son-in-law) testified: "Burk told me he had swapped lands—had exchanged the bottom below the barn for the other land down there. Burk built a home on the 46 acres and had been living there."

The Chancellor found that John F. Newberry was mentally competent when he executed and delivered the deed of August 26, 1949, that he was not coerced in the sense that the transaction was not his voluntary act, and that when Burk allowed his grandfather to convey 16.20 acres directly to John F. there was an unconditional exchange between father and son whereby Burk took from the 140 acres the tract deeded to John F. and used it to acquire 46 acres his father then owned. Oral testimony is competent to show that the actual consideration for realty is different from the recited consideration, or that it has not been paid. *Sewell* v. *Harkey,* 206 Ark. 24, at p. 27, 174 S. W. 2d 113. A resulting trust may be shown by parol testimony, but the evidence must be clear, cogent, and convincing. *Harbour* v. *Harbour,* 207 Ark. 551, 181 S. W. 2d 805. Expressed differently, the evidence must be "clear, satisfactory, and convincing," *Murchison* v. *Murchison,* 156 Ark. 403, 246 S. W. 499. But the requirement is not that the testimony be undisputed.

Tested by these rules there is no basis for overturning the decree.

Affirmed.

MORRELL *v.* HILL, TREASURER.

4-9452 237 S. W. 2d 467

Opinion delivered March 19, 1951.

Yates & Yates and *Wilson & Starbird,* for appellant.

Jeta Taylor, John Cravens and *Mark E. Woolsey,* for appellee.

GEORGE ROSE SMITH, J. This is an action by sixty-two patrons of Pleasant View School District No. 4 to set aside a judgment by which the Franklin Circuit Court found that on March 1, 1949, the district had at least 350 children of school age and was therefore not automatically dissolved on June 1 of that year. Ark. Stats. 1947, § 80-426; *Stroud* v. *Fryar,* 216 Ark. 250, 225 S. W. 2d 23. This appeal is from the trial court's refusal to vacate its earlier judgment.

After the above statute was adopted in 1948 this district annexed six other districts in an effort to avert dissolution for want of 350 enumerated pupils. The county board of education took the position that these annexations had not brought the district's student population up to the required number. The district then sued for a writ of mandamus to compel the county board to recognize the fact that the district had complied with the statute. By agreement the case was heard by the trial judge in his chambers at Van Buren, and a judgment was entered granting the writ of mandamus. That is the judgment now under attack.

Three days later the present appellants filed this suit to vacate the judgment for fraud. The gist of their complaint is that the earlier case had been set for trial at Ozark, where some of the appellants were prepared to testify in opposition to the suit, but by fraud the case was wrongfully heard at Van Buren at a time when the court was not lawfully in session. Upon the filing of this complaint the district asked us to prohibit the maintenance of the suit, on the theory that the judgment in the mandamus proceeding had settled the issues adversely to these appellants. We refused to issue a writ of prohibition, holding that the appellants were entitled to be heard upon their allegation that the first judgment had been obtained by fraud. *Pleasant View Sch. Dist. No. 4* v. *Kincannon, Judge,* 216 Ark. 843, 227 S. W. 2d 941. That opinion became the law of the case, and it left open for further consideration only the question of whether the original judgment was obtained by fraud.

The court below held that the accusations of fraud were not proved, and we agree with that view. The principal charge of fraud is based upon the fact that the earlier case was tried in chambers at Van Buren instead of in the courtroom at Ozark. But it was within the power of the parties to that suit to agree, as they did, that the cause should be tried in chambers in the county of the judge's residence. Ark. Stats., § 22-362. All that these appellants have shown is that they were interested in the outcome of the earlier case and would have liked

to be heard on the issue of the number of enumerated children in the district. But the appellants were not parties to that case, did not intervene in it, did not employ an attorney to act in their behalf, and did not even communicate their desires to the parties or the attorneys in the case. In view of these circumstances we have no basis for saying that the parties to that suit committed a fraud on the court by agreeing to try it at Van Buren.

It is also said that the original judgment was procured by fraud because the parties introduced affidavits instead of calling the witnesses to testify in person. But this too is a matter that lay within the control of the litigants. Had they chosen they could have agreed upon a statement of facts without even obtaining affidavits. Instead, they agreed to treat the affidavits as depositions. This amounted to nothing more than a waiver of the privilege of cross-examining adverse witnesses. We do not see how the appellants, as strangers to that case, are in a position to criticize the course that the litigants took, much less to say that it was a fraud on the court.

Affirmed.

WEEMS, ADMINISTRATOR *v.* SMITH.

4-9431 237 S. W. 2d 880

Opinion delivered March 19, 1951.

[redacted]

Jack Williamson, for appellant.

Pat Robinson, for appellee.

ROBINSON, J. There are two questions involved in this appeal. One is the validity of an alleged holographic will; the other is the jurisdiction of the Probate Court in regard to ownership of personal property. Since our decision is in favor of the will, the other question passes out of the case.

Sidney Smith committed suicide by shooting himself while sitting in a chair on the front porch of the house in which he lived. It was in the daytime. Neighbors heard the shot, immediately went to the house, and found Smith sitting in a rocking chair mortally wounded. By the side of the chair was his hat and inserted in the hat-band was the following writing, which is in issue here:

> "Sallie god Bless you
> Ben so sweet and good to me
> god Bless all the Ladies that
> been so sweet & good to me
> and you Mr. & Mrs. Conden
> Sallie you know my troubles Better
> than eny one else 35 year
> Since 1914 tell Mr. Meeks to
> help on Burial
> no Doctor and not able
> To go to one Salle this
> is to much on you
> Sallie god Bless you
> for being so Sweet & good To
> me this house blong to you
> and every Sidney Smith
> every thing in it
> Dear Sallie you was so sweet
> and good To Me"

An attempt was made to probate the foregoing writing as the will of Sidney Smith. The Probate Court

Sallie god Bless you
Ben so sweet and good Tow me
god Bless all the Lading tha
been so sweet + good Tow me
and you Mr + Mrs Cauldwell
Sallie you know my husbd Bitter
than any one Else 35 year
Since 1914 tell Mr Meaks To
help on Burial
no Doctor and not able
To go To one Sallie this

To To much on you

Sallie god Bless you
for being so sweet + good To
me this House Belong To you
and long Sidney Smith
every thing in it

Dear Sallie you Was so sweet
and Good To me

refused to admit it to probate as such and Sallie Smith has appealed on that point, but the Court held that $600 cash in the house, at the time of Smith's suicide, was the property of Sallie Smith, having been given to her by Sidney Smith on the day he killed himself, and the Administrator has appealed from that finding. The evidence sustains the Court's finding that Smith had made a gift of the money to Sallie Smith before taking his own life, but it is not necessary for this Court to pass on the question of the jurisdiction of the Probate Court in respect to the gift, because the undisputed evidence is that Sallie Smith, to whom Sidney Smith made the $600 gift, is one and the same person as the "Sallie" named in the instrument we hold to be the valid holographic will of Sidney Smith. Sallie Smith was his sister-in-law, being the widow of a deceased brother, and for many years had been the loyal and faithful housekeeper for Sidney Smith who was an invalid.

The writing in question meets all the essential requirements of an holographic will from any practical point of view. There is no contention that every word of it is not in Smith's handwriting. It is not disputed that Smith was possessed of testamentary capacity, nor is it suggested that the will is tainted with fraud, constraint, or undue influence.

The point which has given us some concern is whether the requirement that the signature must be at the end of the will has been met. "While the requirement of a Statute that a will be signed at the foot or end seems on the face of things to present a simple question, the cases are difficult in practical application. A signature may be in such a position that it will be held without question to be at the foot or end of the instrument, and again it may be so far from the end that all will agree that the instrument is not signed at the end: but, between these extreme cases occur a multitude of cases in which the question whether the Statute has been observed is one of great difficulty, each of which must be determined largely in the light of its own facts." (57 Am. Jur., 214).

In the case of *Brochers* v. *Brochers,* 145 Ark. 426, 224 S. W. 729, this Court held that an unsigned postscript to a letter written by Brochers to his father was not a valid holographic will because it was not signed at the end. However, the case at bar is readily distinguishable from the Brochers case and we do not mean to impair the holding of the opinion in the Brochers case, although in the new Probate Code it is not provided that a holographic will has to be signed at the end. (Ark. Stat., § 60-404.) This section of the Code is not applicable in this case for the reason that Smith died a few months prior to the effective date thereof. In the Brochers case, the facts were stated by the Court as follows:

"At the time of executing the alleged will, Charles S. Brochers was a soldier in the United States Army at Camp Beauregarde. A number of years prior to his enlistment in the Army his mother and father had separated and obtained a divorce. Charles S. Brochers was the business manager of a bakery operated by his mother, and during his entire life had resided with her. He was 28 years of age. During his military service he procured a policy of insurance from the War Risk Bureau of the United States government, in which policy his mother was designated as the beneficiary. At the time the alleged will in question was filed for probate, the mother of the deceased had been drawing monthly payments of $57.60 under the terms of the policy from the United States government. The alleged will offered for probate by appellant consisted of a statement in the nature of a postscript to a letter written by Charles S. Brochers to his father from Camp Beauregarde, Louisiana. The statement itself was not signed but appeared after the signature of the deceased, and is as follows: 'Papa, if I die for my country, I want you to receive my insurance money. Goodbye.' . . . The letters written by Charles S. Brochers to his mother both before and after the letter in question, contained the information that an allotment had been made to her and that he had procured an insurance policy in which she had been made the beneficiary."

The instrument we hold to be the valid holographic will of Smith was written with the sense of impending death and there is no question about the testamentary qualities of the will. The evidence is that Smith was not an educated man and it is obvious that the words "everything in it", appearing under his signature, form a part of the sentence before the signature. There is not the least intimation or suggestion that the words appearing immediately under the signature and a part of the sentence before the signature are not in the handwriting of Smith. In the case of *Musgrove* v. *Holt,* 153 Ark. 355, 240 S. W. 1068, it is stated:

"In *Owens* v. *Douglas,* 121 Ark. 448, 181 S. W. 896, the Court said: 'The purpose of our Statute in requiring wills to be signed at the end thereof is to provide against fraud, and this statutory requirement must not be frittered away by loose interpretation.' When this will is scanned as a whole, there is no such intervening space between its provisions as to suggest that the will was not signed at the end of the testamentary dispositions, and, therefore, at the end of the will." The writing at the very bottom of the will in the case at bar is not a dispositive provision and does not affect the will one way or the other.

The validity of the will is not affected by superfluous or useless words which follow the signature. (57 Am. Jur. 440). The purpose of the Statute in requiring wills to be signed at the end is to prevent fraud. No fraud is suggested in this case and, under all the facts and circumstances, we think there was a substantial compliance with the Statute as shown by the will itself set out above.

In the light of all the facts in the case we are of the opinion that the writing in question is the valid will of Sidney Smith. Therefore, since the $600 cash was in the house at the time of Smith's death, Sallie Smith is the owner of it under the terms of the will, regardless of whether Sidney Smith had previously given her the money, and, therefore, the gift feature of the case is moot.

Reversed on the cross-appeal with directions to admit the will to probate as the valid will of Sidney Smith,

the costs to be assessed against the appellant Administrator.

GEORGE ROSE SMITH, J., dissenting. I am unable to agree that this will was signed at the end. In the Owens case, cited by the majority, we held that the will must be signed at the end of the testamentary clauses. As far as a will like this one is concerned, the authorities are in complete agreement as to what constitutes the end of the will. The end is "the physical termination of the testamentary provisions." Alexander on Wills, § 422. "Of course, if a dispositive provision is clearly below or after the testator's signature, the will is not signed at the end." Atkinson on Wills, § 118.

Here the testator had conveyed the house to his sister-in-law; so the sole dispositive clause in the will is the words, "and everything in it." The last three of these words are clearly below the testator's signature. To hold that this will is signed at the end is simply to ignore the statute and every authority on the subject.

It will not do to say that the statute was intended to prevent fraud, and here there is no suspicion of fraud. The requirement of two witnesses to an attested will is also intended to prevent fraud, but I do not suppose the majority would brush aside the need for two witnesses in cases where no fraud was suggested. The inescapable fact is that this will was not signed at the end, and no amount of judicial discussion can change that fact.

SEUBOLD *v.* FORT SMITH SPECIAL SCHOOL DISTRICT.

4-9443 237 S. W. 2d 884

Opinion delivered March 26, 1951.

Franklin Wilder, for appellant.

Daily & Woods, for appellee.

ED. F. MCFADDIN, Justice. The appellants are attacking the requirement, that school children be vaccinated against smallpox.

Mr. and Mrs. Frank Seubold, residents of Fort Smith, have three children, Ruth, Frank, and T. K., who are 13, 10 and 8 years of age respectively. The parents, for themselves and the minors, filed suit in the Chancery Court against the Fort Smith School District and its School Superintendent, alleging, *inter alia*:

"That the said Ruth Ann Seubold, Frank N. Seubold, and T. K. Seubold are all of good moral habits, are free from infectious disease, and are not suffering from any disability whatsoever. That they have applied to the defendants for admission to the proper schools within the jurisdiction of the defendant, . . . but that the said defendants have refused, and now continue to refuse, to admit them. That the said defendants, in refusing to admit them, are acting for and in behalf of the State of

Arkansas, or under color or pretense of its laws, and are thereby denying to the plaintiffs the equal protection of the laws, contrary to Amendment Fourteen to the Constitution of the United States. . . . That the said defendants unlawfully and without warrant of law, are enforcing, as a condition precedent to admission to the schools, the following administrative rule or regulation:

" 'Section 4. *Smallpox Vaccination.*

" '(a) No person shall be entered as a teacher, employee or pupil in a public or private school in this State without having first presented to the principal in charge or the proper authorities, a certificate from a licensed and competent physician of this State certifying that the said teacher, employee or pupil has been successfully vaccinated; or in lieu of a certificate of successful vaccination, a certificate certifying a recent vaccination done in a proper manner by a competent physician; or a certificate showing immunity from having had smallpox.'

"Plaintiffs state that the said defendants, and each of them, should be restrained and enjoined from enforcing said rule, or regulation set out above for the reason that said rule or regulation is unlawful and void, for the following reasons:

"Said rule or regulation is so arbitrary, capricious and unreasonable that its enforcement against the said plaintiffs would amount to a deprivation of their liberty and property without due process of law, contrary to Amendment Fourteen to the Constitution of the United States. Said rule or regulation is arbitrary, capricious and unreasonable, because, first, there is no emergency existing to justify compulsory inoculation against smallpox; second, inoculation with smallpox vaccine is not only unnecessary, but is positively dangerous to the health and safety of the plaintiffs, in that it lowers natural resistance to infectious diseases, and in that the vaccine itself is dangerous and constitutes an undue risk to the health and safety of the plaintiffs."

The prayer of the complaint was that the defendants be enjoined from requiring the Seubold children to be

vaccinated. The trial court sustained the defendants' demurrer and dismissed the complaint; and the plaintiffs have appealed. We will refer to the parties as they were styled in the trial court.

Preliminary to a decision of the case at bar, we call attention to some of our earlier cases upholding the requirement of smallpox vaccination. In *State* v. *Martin,* 134 Ark. 420, 204 S. W. 622, we upheld the power of the State Board of Health to make rules requiring the compulsory vaccination of school children, and we sustained conviction of a party who refused to have children vaccinated. In *Allen* v. *Ingalls,* 182 Ark. 991, 33 S. W. 2d 1099, there was a challenge of the validity of the rule of the State Board of Health requiring the vaccination of school children; and we held: that Act 96 of the General Assembly of 1913[1] authorized the State Board of Health to adopt and promulgate rules designed to promote public health; that the rule of the State Board of Health requiring vaccination of school children was valid; and that the School Board did not abuse its discretion in requiring children to be successfully vaccinated against smallpox. With these cases in mind, we come to the matters to be decided in the present litigation.

I. *The Fort Smith School Authorities Were Enforcing a Valid Regulation.* We take judicial notice of the rules of the State Board of Health. (See *State* v. *Martin, supra,* and cases there cited.) Such rules, in addition to § 4 (a) as copied in the complaint, further provide:

"(b) The responsibility for the enforcement of this regulation rests equally on each and every member of the school board, the superintendent, principal, or teacher in charge, and the parent or guardian of the pupil, and each of them shall be separately and individually liable for permitting any violation of this regulation. If, in the discretion of the health authority having jurisdiction, any person to whom this regulation applies shall have physical disability which may contraindicate vaccination, a certificate to that effect, issued by the said health officer, stating the contraindication, may be accepted in lieu of a

[1] Act 96 of 1913 is now § 82-110, *et seq.*, Ark. Stats.

certificate of vaccination, provided that the exemption shall not apply when such disability shall have been removed.

"(c) The school boards, school superintendents, school teachers, parents and guardians shall be equally responsible for the enforcement of the compulsory vaccination law. They shall furnish such information to the health authorities from time to time as may be required."

Plaintiffs admit, that in *State* v. *Martin* (*supra*) and in *Allen* v. *Ingalls* (*supra*) we upheld the regulations of the State Board of Health requiring smallpox vaccination, but they seek to avoid those causes by the claims: (a) that those cases were decided prior to 1931; (b) that the Arkansas General Assembly of 1931 adopted Act 169, commonly known as the "School Law," which gave the State Board of Education control of all school matters; and (c) that said Act 169 impliedly repealed the authority of the State Board of Health to make regulations requiring vaccination of school children.

We find no merit in plaintiffs' argument. The Act 169 of 1931 was an Act to codify the school laws of Arkansas. Its caption is "An Act to Provide for the Organization and Administration of the Public Common Schools." It was not the purpose of the Act 169 to interfere with health matters; and the Act 169 did not in any manner repeal Act 96 of 1913 which gave the State Board of Health authority to make and enforce regulations for public health. The Act 169 contains no express repeal of the powers theretofore exercised by the State Board of Health and sustained in *State* v. *Martin* (*supra*), and *Allen* v. *Ingalls* (*supra*). Neither does the Act 169 impliedly repeal the powers of the State Board of Health regarding the requirement of vaccination for school children.

What has just been said makes it unnecessary to discuss, whether the Fort Smith School Board, under the authority of such cases as *Isgrig* v. *Srygley*, 210 Ark. 580, 197 S. W. 2d 39, could have adopted the rule requiring vaccination even in the absence of any rule of the State Board of Health.

II. *The Complaint Alleged That the Seubold Children Were Normal Children.* As previously copied, the complaint said "That the said Ruth Ann Seubold, Frank N. Seubold, and T. K. Seubold are all of good moral habits, are free from infectious disease, *and are not suffering from any disability whatsoever.*" (Italics our own.) The rule of the State Board of Health, as previously copied, provides that if ". . . any person to whom this regulation applies shall have physical disability which may contraindicate[2] vaccination," . . . then vaccination may be omitted . . . "provided that the exemption shall not apply when such disability shall have been removed." Since the complaint alleged that the Seubold children were normal children and did not claim any exemption under the said rule of the State Board of Health, therefore there was no reason for the Fort Smith School Board to treat the Seubold children differently than other children.

III. *The Plaintiffs' Allegation—That the Rule Requiring Vaccination Is "Arbitrary, Capricious and Unreasonable"—Was Only a Legal Conclusion.* The complaint alleged that the rule requiring vaccination "is arbitrary, capricious and unreasonable"; and plaintiffs argue that the effect of the demurrer was to admit such allegations to be true. The law is well settled, that a demurrer admits only facts well pleaded and does not admit conclusions of law. See *Herndon* v. *Gregory,* 190 Ark. 702, 81 S. W. 2d 849, 82 S. W. 2d 244; *Hudson* v. *Simonson,* 170 Ark. 243, 279 S. W. 780; *State* v. *Stevenson,* 2 Ark. 260, 1 c., page 278; and see, also, 49 C. J. 438 and 41 Am. Jur. 463. A few cases will serve to illustrate the application of the foregoing recognized rule:

(a) In *Main* v. *Drainage Dist.,* 204 Ark. 506, 162 S. W. 2d 901, we said:

"It was further alleged that the collection of the delinquent assessments is barred by the statute of limitations, and that proper notice was not given of the suit to collect them to confer jurisdiction upon the court to

[2] The word, "contraindicate," in medical parlance is defined by Webster's Dictionary to mean: "To indicate treatment contrary to that which the general tenor of the case would seem to require."

render the foreclosure decree. It is insisted that the demurrer to the intervention, which the court sustained, admits the truth of these allegations, and that the decree should, therefore, be reversed. But not so. We have many times held that a demurrer admits only facts which are well pleaded, and that legal conclusions are not admitted by a demurrer. A recent case to that effect, which cites others to the same effect, is that of *Wilburn* v. *Moon,* 202 Ark. 899, 154 S. W. 2d 7."

(b) In *Texarkana School Dist.* v. *Ritchie,* 183 Ark. 881, 39 S. W. 2d 289, the complaint alleged that the County Judge "pretending to be sitting as a court, made a void order." We said of that allegation:

". . . This is but a legal conclusion not admitted to be true by the demurrer, which does not admit that the county judge made the order on a day or at a time when the court was not in session. A demurrer admits only those facts, which are well pleaded; . . ."

(c) In *Pierce Oil Corp.* v. *City of Hope, Arkansas,* 248 U. S. 498, 63 L. Ed. 381, 39 Sup. Ct. 172, there was an allegation that an ordinance of the City was "unnecessary and unreasonable," and a demurrer was sustained to such allegation. Mr. Justice HOLMES said:

". . . The averment that the ordinance is unnecessary and unreasonable, if it be regarded as a conclusion of law upon the point which this court must decide, is not admitted by the demurrer. If it be taken to allege that facts exist that lead to that conclusion, it stands no better. For if there are material facts of which the court would not inform itself, . . . an averment in this general form is not enough. . . . Only facts well pleaded are confessed."

These cases suffice to show that plaintiffs' allegation about the vaccination rule being "arbitrary, capricious and unreasonable" was a mere conclusion which the demurrer did not admit to be a fact. While we need not go into the merits of the requirement for smallpox vaccination, nevertheless, we do point out that the cases from other jurisdictions are in accord with the holdings of our Court: see the Annotation, "Power of municipal

or school authorities to prescribe vaccination or other health measure as a condition of school attendance," as contained in 93 A. L. R. 1413, *et seq.* The plaintiffs insist that they should have a right to present—in some forum—their contention regarding vaccination being unreasonable and dangerous to health; and they claim that they were entitled to make such presentation in this case. We hold that the plaintiffs have misconceived the situation. We held in *State* v. *Martin* (*supra*) that the State Board of Health had authority to make the specific regulation here complained of. If the plaintiffs had thought that recent discoveries showed vaccination to be dangerous, then they could have presented such matters to the State Board of Health which has the power to make all necessary and reasonable health rules and regulations.

IV. *The Plaintiffs' Rights Under the United States Constitution Are Not Invaded by the Vaccination Rule Here Involved.* In *Jacobson* v. *Massachusetts,* 197 U. S. 11, 49 L. Ed. 643, 25 Sup. Ct. 358, the Supreme Court of the United States considered the matter of compulsory vaccination as infringing on rights claimed under the United States Constitution, and held that a State law requiring compulsory vaccination did not deprive a citizen of liberty guaranteed by the United States Constitution. More recently, in the case of *Zucht* v. *King,* 260 U. S. 174, 67 L. Ed. 194, 43 Sup. Ct. 24, the United States Supreme Court again considered the matter of compulsory vaccination; and Mr. Justice BRANDEIS, speaking for the Court, said:

". . . Long before this suit was instituted, *Jacobson* v. *Massachusetts,* 197 U. S. 11, 49 L. Ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765, had settled that it is within the police power of a state to provide for compulsory vaccination."

In view of these cases, we consider the Federal question to be definitely settled in favor of the validity of the requirement of compulsory vaccination.

The decree of the Chancery Court is in all things affirmed.

HOLT, J., not participating.

ISAACS *v.* WATSON.

4-9459 237 S. W. 2d 879

Opinion delivered March 26, 1951.

[redacted]

Opie Rogers, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

GRIFFIN SMITH, Chief Justice. A mixed question is presented. The factual phase has been settled by the jury's verdict for which there was substantial support. The legal issue is whether an instruction should have been given that self-care does not require a pedestrian to look before stepping onto a highway for the purpose of crossing it.

Appellant, who is nearly 77 years of age, resides with her husband just north of Highway No. 16. This highway connects with Nos. 9 and 110 at a point slightly southwest of Shirley.

Appellant's rural mailbox is on the south side of Highway 16, approximately six miles north of Clinton,

and in reaching it from the Isaacs home the graveled road had to be crossed.[1]

Wendell H. Watson, who is superintendent of the Shirley public schools, had driven to Clinton the day Mrs. Isaacs was injured and was returning. There was testimony that the road curves at a distance of 175 yards from the mailbox, and it is insisted that appellee was required, as a matter of law, to note appellant's position when he rounded the bend. Appellee testified that he saw appellant standing at the mailbox, but did not reduce his speed from 35 miles per hour until Mrs. Isaacs suddenly started across the road. The weather was clear, there were no cars or other traffic ahead, and consequently no dust to obstruct appellee's vision. He supposed Mrs. Isaacs would remain at or near the mailbox in a place of safety until his car passed.

Appellee became aware of Mrs. Isaacs's situation when his car was 50 or 60 yards from her. When appellant suddenly started across the road appellee applied his brakes with sufficient force to lock the wheels and skid, coming to a stop six or seven feet beyond the mailbox and near the center of the road. Mrs. Isaacs was struck on the front part of one leg below the knee, with resulting bone fractures extending to the knee joint.

Mrs. Isaacs testified that she opened her mailbox, found it empty, then "trotted back across the road." She looked up and down the highway and saw a car about 175 yards away in the direction of Clinton. It was not in motion, or had just stopped. She "guessed" the car was in front of a house "where somebody lives." Just before being struck she heard the [Watson] car, but did not see it.

Counsel for appellant cites *Missouri & North Arkansas R'y Co.* v. *Clayton,* 97 Ark. 347, 133 S. W. 1124, and *Brakensiek* v. *Nickles,* 216 Ark. 889, 227 S. W. 2d 948, in emphasizing the rule that contributory negligence is for the jury's consideration. Upon this premise it is insisted

[1] Actual direction of Highway 16 is northeast, southwest, but for practical purposes the Isaacs home is spoken of as being north of the highway, and the mailbox on the south side.

that prejudice resulted from the court's refusal to instruct that the plaintiff was not required to look in either direction before "trotting" [as she expressed it] from the mailbox across the highway.

We have said that (irrespective of increased highway perils) courts have not gone to the extent of declaring as a matter of law that a pedestrian who is about to cross a highway must look and listen, etc. *Brotherton* v. *Walden,* 204 Ark. 92, 161 S. W. 2d 391. But the same rule, applied conversely, would reject a declaration that, as a matter of law, a pedestrian owes no duty of care to himself or herself. Facts in a particular case are the pertinent considerations, and it is for the jury to say whether the plaintiff's conduct amounts to contributory negligence. Here a verdict for the defendant was the result of a trial free of error, and it must be affirmed.

POYNTER *v.* WILLIAMS, CHANCELLOR ON EXCHANGE.

4-9439 237 S. W. 2d 903

Opinion delivered March 26, 1951.

Reece Caudle and *Richard Mobley,* for petitioner.

Hays, Williams & Gardner, for respondent.

GRIFFIN SMITH, Chief Justice. Petitioners contend that when three chancery actions—as to which the plaintiffs' testimony had been heard—were consolidated with No. 6549, (the fourth of a series dealing with related matters) the court in effect refused to grant or deny a motion by the defendants challenging sufficiency of the evidence. Act 470 of 1949, *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225.

The controversy concerns the estate of W. H. Poynter, Sr., who died in 1931. A son, S. L. Poynter, was made administrator. Debts chargeable against substantial assets could not be paid during the depression years, but through coöperation of the heirs and indulgence by creditors a solvent status was attained in 1947. It is said that real property estimated to be worth $50,000 is left. In a narrative way respondents say that most of the obligations paid by the administrator were notes signed by W. H. Poynter, Jr., B. W. Poynter, Guy Poynter—sons of W. H. Poynter, Sr.,—and that distributive shares of the estate were obligated because of the elder Poynter's actions in becoming an accommodation indorser of the notes. Guy Poynter is dead and his heirs have been brought into the litigation.

On April 3, 1948, the administrator sued B. W. Poynter, W. H. Poynter, Jr., and John Poynter *et als.* These cases were docketed as Nos. 6541, 6542, and 6543, respectively. An undated notation by Chancellor J. B. Ward refers to the fourth suit—case No. 6549—and treats it as a companion in respect of the involved litigation. This suit, said the Chancellor, "appears to be [a proceeding] on behalf of some of the heirs for an accounting and con-

tribution on the part of the other heirs for their proportionate part of funds paid out by the administrator to equalize an equitable distribution. The demurrers will be overruled with the *suggestion* that this case be consolidated for trial with Nos. 6541-42, and '43, and [with] the further suggestion that a decision in this case might settle the entire controversy."

Although there is no record of an *order* consolidating the first three cases, they were treated as though this had been done, notwithstanding the caption to depositions showing that No. 6541 was under consideration. But emphasizing the understanding that consolidation had been directed is the fact that some of the parties named in each of the suits are listed as defendants. The deposition of the administrator was taken September 12, 1950, and insofar as the result here is concerned the testimony will be treated as though the actions filed April 3d were consolidated and that proof in 6541 went to the merits of the three cases.

The fourth case referred to by Chancellor Ward was filed April 12, 1948, by Mrs. Della Brown and others. B. W. Poynter and others were named as defendants. The plaintiffs alleged that the administrator held $3,733.31, that as heirs they were tenants in common as to lands, and that a division should be made, subject to certain equitable adjustments.

The defendants against whom relief was sought in the first three cases moved to dismiss when the plaintiffs rested. They asserted (a) that the *competent* testimony offered on behalf of the plaintiffs did not entitle them to the relief sought; (b) the *competent* testimony shows that there is a defect of parties defendant; (c) the *competent* testimony shows that there is a defect of parties plaintiff; (d) the *competent* testimony does not show a cause of action cognizable in a court of equity, and (e) in the alternative these cases should be transferred to the proper court, "if any there be."

When this motion was argued the Chancellor on exchange directed that the three actions be consolidated with No. 6549. Petitioners insist that they were entitled

to a decision on the merits of the cases submitted, irrespective of the fourth complaint. We agree with the conclusion that in ascertaining whether the plaintiffs had established their rights a question of law was presented. The motion was in effect a demurrer to the evidence. Ark. Stat's, § 27-1729. This was the holding in the *Werbe-Holt* case.

It is highly improbable that the General Assembly, by Act 470, intended to deprive a chancellor of discretion to consolidate actions where, as here, the parties are numerous and the subject-matter relates to distinct classes of plaintiffs and defendants, and contentions are the outgrowth of a unitary cause. Lawmaking bodies are beset with unusual difficulties when by a particular statute they seek to cover all essential phases of administrative and executive conduct. The difficulty comes from the necessity of using general terms with such complete precision that the judicial branch feels compelled to hold the expressions mandatory in an isolated case. Experience teaches that subsequent to the promulgation of a law transactions will arise that no one could have foreseen; and, while courts in construing the legislative intent will go as far as the so-called policy of liberality will permit, reported decisions supply a wealth of instances where the practical construction of a statute differs substantially from the result that would attend either a strict or unstinted interpretation.

In the case before us the facts are so unusual, and a correct determination of relative rights is so interdependent, that formality of procedure should not be allowed to impair the final result; but even so, we would treat the Act as applicable to defendants' motion and say it required an express ruling one way or the other if a single suit or consolidated actions and nothing else had been before the court. That is not the case here. Seemingly the Chancellor felt that each of the four suits was so much a part of correlated factors that the ends of justice could not be served without consideration of No. 6549, hence the order consolidating this action with the three cases in which the plaintiffs' testimony had been com-

pleted had the effect of overruling the statutory motion. We are not willing to say that in a case of this kind the Act was intended to cut off the court's discretion to withhold final judgment. For all practical purposes the motion was denied, though without affirmative judicial expression to that effect.

Act 470 provides that where a motion challenging sufficiency of the plaintiff's evidence has been overruled exceptions may be saved and an appeal taken. In the three consolidated cases the testimony has been brought into the record but has not been abstracted. However, petitioners do not suggest that we should determine the matter on its merits. Rather, they confine their prayer for relief to an order requiring the Chancellor to make a definite finding.

The petition is denied, but without prejudice to defendant's right of renewal when No. 6549 has been tried.

PAUL WARD, J., dissenting. Act 470 of 1949, omitting portions that do not affect its meaning as applied to this case, reads as follows:

"Upon the closing of plaintiff's proof and an announcement to that effect in any cause pending in chancery court, the defendant may file a written motion challenging the sufficiency of the evidence.

"*Thereupon,* the chancellor *shall* consider and *determine* such motion."

Other provisions of the Act go on to state the effect of such determination both in the lower court and the Supreme Court; and the emergency clause states the purpose is to save time and money.

It is hard to understand how language could be made any plainer than the language in this act. It is a dangerous and unauthorized procedure for this court or any court to place its own interpretation upon a statute contrary to the plain and unambiguous wording given it by the law making body.

Upon the trial of these three consolidated cases the plaintiffs introduced all their evidence and then rested.

The defendants, perceiving the plaintiffs had not made out a case, filed their written motion (pursuant to the statute) challenging the sufficiency of plaintiffs' evidence. Thereupon the chancellor (pursuant to the statute) should have determined the motion.

However, the chancellor, instead of doing what the statute directed him to do, refused to *determine* the motion and, instead, ordered a consolidation with case No. 6549 which contained different parties and different issues. This means the petitioners' motion will not be passed on until the consolidated cases are tried which, in all probability, will mean a delay of several months. This defeats the purpose and plain wording of the act. Once this departure is made other departures, made with equal logic, could easily result in an effectual repeal of the statute.

GARRETT *v.* ARKANSAS POWER & LIGHT COMPANY.

4-9424 237 S. W. 2d 895

Opinion delivered March 26, 1951.

Kenneth C. Coffelt, for appellant.

House, Moses & Holmes, Thomas C. Trimble, Jr., and *Edward B. Dillon, Jr.,* for appellee.

PAUL WARD, J. On December 16, 1944, Tommy Garrett, then 17 years old, was injured by coming in contact with a "live" electric wire when he climbed a light pole belonging to the defendant, Arkansas Power & Light Company. The extent of injury is not an issue here, because the lower court directed a verdict in favor of the defendants.

The scene of the accident is an old rock crusher located near the Little Rock Country Club, to the northwest, and also south of the Arkansas River. The land belonged to appellee, V. C. Johnson, and the pole and other electrical equipment were placed there some years ago by the Arkansas Power & Light Company to furnish power for the rock crusher, which has not been in operation for some time. There was another pole a few feet from the one mentioned and there was a platform built between on which rested the transformers. The platform was about ten feet from the ground; the poles were about twenty-nine feet tall; and three large insulated wires ran from the top of the transformers to the said building, but were not "live" wires when the accident happened.

Appellant's testimony is to the effect that the entire locale looked dilapidated and that young people had been

using it as a playground and picnic-ground for several years, at which time they would climb the poles and slide down the three long wires to the old building and would play around the building and the grounds; and that it was on such an occasion when Tommy climbed up one of the poles and contacted a "live" wire, evidently at the top of the transformer and was injured.

Since the question before us is whether there was sufficient evidence to make a jury question it seems proper to set out portions of appellants' complaint and to fully abstract the pertinent testimony.

The original complaint was filed by Charles D. Garrett, father and next of friend of Tommy Garrett, a minor, in his own behalf and on behalf of Tommy Garrett, and Tommy Garrett, a minor, in his own behalf, against Arkansas Power & Light Company, and V. C. Johnson, d/b/a Johnson Team and Dray Company, defendants, and states that the ground or location of the poles and high power lines was owned by the defendant, Johnson. Certain allegations of negligence were made in the complaint, but an amendment to the complaint was later filed which contained substantially the same allegations from which we quote: ". . . said negligence being that high voltage lines not in use were abandoned and left by the defendants in the area of the tower and old rock crusher grounds where children and young people had access to said grounds and place and were in the habit of frequenting said place for recreational purposes, such conditions at the time and place being known to defendants or with the exercise of ordinary care could and should have been known to them; that no warning signs were posted and no information given to the public that said power lines or transmission lines were charged with heavy voltage; the said line was abandoned and left in such condition as to cause reasonable minds to believe the line was dead and unattended. The line, in fact, and the premises in connection therewith were unattended; that the grounds were not enclosed and were left free and open to the public, thereby extending invitation to the public to enter thereon; and the defendants

had knowledge that said dangerous condition existed which the public did not have and that said wires were left exposed and accessible to this minor plaintiff, . . ."

Appellees filed separate but similar answers in which they denied all material allegations and further stated that the accident occurred on December 16, 1944, and that the amended and substituted complaints should have been filed within three years after the accident occurred, and further stated that any injuries sustained by Tommy Garrett were due to his own negligence, carelessness and malicious acts; and that this private property was under fence with locked gate, and that the plaintiff as a trespasser willfully, maliciously and carelessly subjected himself to come in contact with the electric wire.

Appellees pleaded the three-year statute of limitations, but have not stressed the point in their briefs. It appears that no new issue was raised in the amendment to the complaint, and so we hold this statute is not available to appellees as a defense.

Charles D. Garrett, Sr., states: he has lived in Little Rock for the past twenty years, and brings this suit for himself and son. At the time of the accident his son was seventeen years of age. Until the accident occurred witness knew nothing of the premises. Three days later he went to the scene where he saw the old rock crusher, which was about three stories high; it has stair steps and here set two poles right in the open place just before it goes over into the valley. It was just a short distance from the rock crusher to the poles. He went back later and the gate had been nailed up and signs posted. Then he went back again and everything had been torn down and he took some pictures of the surroundings. There was no gate when he first went there and there was no fence around the property. The property looked dilapidated, and there were a lot of gun shells around, and plenty of people had been down there. There were wires hanging down, and he couldn't imagine the place being left open. When he went back the second time a gate had been put up and posted "Keep Out Danger". The dynamos in the rock crusher were corroded and rusted.

The transformers on the electric wire poles were eight and one half or nine feet from the ground. There were a good many loose wires hanging around the poles, and the property showed no appearance of having been used recently. It looked like they were trying to move it away instead of building it. The meter box on the pole is about half way from the ground to the transformers. It is a good step from the ground to the meter box, and from the meter box on to the platform where the transformers are on the wire pole. Long cables ran from the landing on the pole where the transformers were situated on down into the valley where the children could slide down on the wires and could easily be reached from the ground. The rock crusher was a half a mile from the street that runs north and south just west of St. John's down where the rock crusher was.

Thomas Garrett states: he has been going down to the grounds where the rock crusher was and electric poles were ever since "he was able to get away from home." Very seldom went by himself, usually with a group, all ages. While there they would climb through the old building, climb over everything. Sometimes they would have picnics. There were three wires there and it was great sport to get on those wires and slide down them to the valley. You could reach up and get hold of those wires and put your foot on the bottom one and slide down to the building. This has been going on as long as he can remember. He had climbed up the poles many times, and has seen others do the same. The rock crusher has not been in operation since he can remember, and he started going there when he was eleven or twelve years old, and was seventeen when hurt.

"Q. Tell the jury what occurred down there, what happened. A. I had been playing around on the three big cables and climbing up on the top of the platform. The last time I hit it I don't remember. It was just that quick. Q. How did you get up there on that platform? A. At that particular time, hand over hand up the three cables. I stepped on this box then you take another step and you go up on the platform. It is three or four feet

from the top of the box to the platform. I'd say it was about one hundred fifty feet from where these cables were tied into the top of the pole to where they run down to the buildings. Q. Was there many activities out there at all that came to your attention that would show anybody had charge of that property? A. None, and there never had been that I know about. Q. Do you think anybody thought there was electricity up there? A. No sir. Q. Is there any fence about that property out there, Tommy? A. No, other than what my dad said. Q. You realized, of course, Mr. Garrett, those were electric wires for the purpose of serving electricity, did you not? A. I thought— Q. You knew, however, it had been and was put there for the purpose of conveying electricity? A. I didn't think about it. Q. Well, for what purpose did you think the line was put there, Mr. Garrett? A. At the time to tell you the honest truth, I thought it was for me to play on. Q. You knew, Mr. Garrett, that those were electric wires, did you not? A. I didn't know they had electricity in them. Q. You knew that electricity and electric wires as such might be dangerous, did you not? A. Well, if they had electricity in them, yes."

He remembers climbing up to the platform, but does not remember anything for quite some time. It was a damp drizzly day and some of them had been down there gathering mistletoe for Christmas. The transformers had big gaping holes in the side of them and he did not think about them. There was water or acid that day coming out of them.

"Q. You knew that was some kind of electrical equipment, did you not? A. Well, I know it now. I knew it then, but somehow as many times as I have been over there, I didn't think about it."

Yes, he guessed he knew that those transformers were some kind of electrical equipment and knew that the wires running down something like one hundred fifty feet were electrical wires, and estimated the distance from the ground to the transformers to be eight or nine feet. Discovered the holes in the transformers the day

of the accident because he thought there might be acid and that it might be dangerous if he contacted it. When he got up on the platform it was his intention to slide down the three wires. He was right there at the transformers.

Sherman Henry states: he was twenty-one years of age and was with Garrett when he was injured. He has been there many times when there were fifteen or twenty young folks having picnics and playing around on the various objects. The ground was used generally for recreational purposes, and the young people would play around on the old structures and wires and poles; would slide down and climb down the side of the mountain up to the old rock quarry. "When Tommy was injured to the best of my knowledge he went up the guy wire."

"Q. What would you climb those wires for? A. A lot of times we would see who could climb it the most times—more or less a strength test. Q. Would you climb up to where the transformers were on the platform? A. Yes, sir."

The wires and the poles didn't look like they were being used and looked as though they were all falling down and there was no fence around the property. The boys and girls who played around there came from all over town and were usually fifteen to seventeen years old.

He was not looking at Garrett when he was hurt. The last he saw he was going up the wire hand over hand and to the best of his knowledge he fell from the platform as he stepped on it.

Mrs. Thomas Garrett is the wife of Thomas Garrett and was with him when he was injured. Thomas climbed up to the platform and everything started buzzing. The telephone poles were in a dilapidated condition. Some of the cans had holes in them and looked like they hadn't been used in years. At the time she was sixteen years old and had been going down there practically all of her life with other young people on picnics. They would climb up on the platform and slide down wires. She has

seen them do it many times, and has seen them climb the poles some times.

Leland Gunn is twenty years of age, lives in Little Rock, knows Tommy Garrett, is familiar with the premises. Knows that the young people frequently go down to this place, and knows that sometimes ten or twelve people would congregate on the premises. The premises have the appearance of having been abandoned, and have looked that way since 1940. He saw the young people climbing the poles and going down the wires hand over hand and knows the property was not under fence.

Conrad Courtney is twenty-two years of age and knows Tommy Garrett and is familiar with the property around the rock crusher; has been down there on a picnic with his Sunday School Class and on several occasions members of the Boy Scout Troop went out there; there were no signs there which said "Keep Out" and no signs which said "High Voltage".

Hubert Knight has been going out there five or six years and still goes down there occasionally to shoot a rifle, and seldom missed a week end. The young people climb up the poles and go down the wires hand over hand.

Testimony on the part of the defendant, Arkansas Power & Light Company, was to the effect that their line which ran to the rock crusher and to the pole in question comes from a sub station and carries 3,000 volts on poles approximately thirty feet high and there is a transformer station which cuts the voltage down to 2,300 volts; that the platform on which the transformers rested was ten feet and ten inches from the ground, and the cross arms at the top of the poles were twenty-nine feet and three inches from the ground; and "dead end" on the insulators when the current is disconnected. The three wires which ran from the poles or transformers were service wires connecting with the rock crusher building but had been disconnected and were not "live" wires at the time of the accident. Examination after the accident showed that two holes had been knocked in the transformer and it looked like it had been done with an ax.

A disconnection had been previously made at the plant and this was made at a distance of seventeen feet and three inches from the ground; that before anyone standing on the platform on which the transformers rested could reach a "live" wire it would be necessary to climb or reach up six feet and five inches from the platform; that it followed standard procedure when they made the disconnection. It had never been requested to discontinue service there on a permanent basis, but had several times been requested to discontinue service for short periods since about 1930, and at the time of the accident it had not been informed there would be no further need for electric service.

Appellee, Johnson, is seventy-one years old and lives in Little Rock and acquired this property about the year 1906 and operated the same for about eighteen years, a part of the time it had been leased to others; he wanted the transformers to stand until he disposed of the property; and it was in January, 1945, about thirty days after the accident, when he first notified the Arkansas Power & Light Company he would not want electric power any longer. He stated a fence had been around the property ever since he owned it, but that the Boy Scouts and other young people would tear it down every Saturday and Sunday and that he had an "awful" job keeping them off the property, and that at times he maintained a watchman; that the young people had been going on the premises from time to time over a period of years, but he would tell them to stay away.

As stated before, the lower court instructed a verdict for appellees and thereby refused to allow the testimony to be considered by the jury. The well established rule of this court is that a directed verdict for the defendant is proper only when there is no substantial evidence upon which the jurors, as reasonable men, could find for the plaintiff, and the trial judge must give the plaintiff's evidence its highest probate value. It is in accordance with this rule that we view the pleadings and the testimony in this case. Apparently appellants rely on two main propositions to sustain their contentions. The first

is that Tommy Garrett was an invitee or permittee upon the premises, and the second is that the attractive nuisance doctrine applies. We will discuss them in the order mentioned.

To sustain their contention that Tommy Garrett was an invitee appellants cite the following cases: *Skerl* v. *Willow Creek Coal Co.,* 69 Pac. 2d 502, 92 Utah 474; *Searles* v. *Ross et al.,* 134 Me. 77, 181 Atl. 820, and *Roux* v. *Lawand,* 131 Me. 215, 160 Atl. 756. The *Skerl* case cannot be cited as controlling in this instance because there the plaintiff with four other boys and girls were invited by the defendant company to visit its mine. The *Searles* case throws no light on the question whether Tommy Garrett was an invitee for the reason that the plaintiff, a child nine years old, was living with his family on a farm belonging to the defendant under an arrangement with some charitable organization. They were permitted to live on the farm and to pick berries, plant a garden, etc. On the occasion of the injury the defendant, who was running a mowing machine called to the plaintiff and asked him to come over and "touch up" the horses which defendant was driving, and while doing so the plaintiff was injured. In the *Roux* case the plaintiff was an employee of the defendant firm and was injured when he struck a match to light a cigarette in the back part of the hat cleaning and shoe shining shop. The lighted match came in contact with a pail of inflammable fluid which burst into flames and injured the plaintiff. We can find nothing in this case to support appellants' contention that Tommy Garrett was an invitee of the defendants herein. We are unable to find anything in the record in this case upon which a jury could have based a finding that appellant, Tommy Garrett, was an invitee when he entered on the premises of appellee Johnson, or upon the poles or equipment belonging to appellee, Arkansas Power & Light Company.

In the case of *Armour & Co.* v. *Rose,* 183 Ark. 413, 36 S. W. 2d 70, the plaintiff, Rose, was held to be an invitee and not a licensee where he had gone to the defendant's place of business to purchase meat, a thing

which he had been doing for seven or eight years. However, Judge MEHAFFY, speaking for the court, laid down what seems to be the general rule in this state, and we quote: "The general rule is that the owner or occupier of premises is under no duty to protect those from injury who go upon the premises as volunteers or merely with his express tacit permission from motives of curiosity or private convenience in no way connected with business or other relations with the owner or occupier. A person going on one's premises under such circumstances would be a bare licensee, . . ."

In the case of *St. Louis I. M. & S. Ry. Co.* v. *Dooley*, 77 Ark. 561, 92 S. W. 789, the plaintiff Dooley sued the Railway Company to recover damages suffered by her from a fall through steps erected by the defendant over and across a fence, constructed by it along its right of way. It was alleged that the injury occurred because of the negligent failure of the defendant to keep the steps in repair. Judge BATTLE, speaking for the court, p. 566, used this language: "The bare permission of the owner of private grounds to persons to enter upon his premises does not render him liable for injuries received by them on account of the condition of the premises. But if he expressly or impliedly invites, induces or leads them to come upon his premises, he is liable in damages to them—they using due care—for injuries occasioned by the unsafe condition of the premises, . . ." Even though we were of the opinion that the evidence in this case poses a question for the jury to say whether the defendants had expressly or impliedly invited Tommy Garrett upon its premises, it would still be of no avail to appellants because it could not be inferred from this that the appellees had impliedly invited the plaintiff to climb up the electric light pole to a place where he could come in contact with a "live" wire. In the case last cited there was clearly an implied invitation to cross over the steps which the railroad company had built.

It is sometimes difficult to distinguish between an invitee and a licensee, especially where each is implied, but a rule to do so was quoted with approval in the case

of *Knight* v. *Farmers' & Merchants' Gin Co.,* 159 Ark. 423, 252 S. W. 30, as follows: "It is not always clear under a given state of facts as to what inference may be drawn as to a person being a licensee or an invitee but one of the sure tests is whether or not the owner of the premises is interested in the presence of the visitor." Obviously it cannot be seriously contended here that either of the appellees was interested in Tommy Garrett's presence on the premises.

Having arrived at the conclusion that Tommy Garrett was not an invitee but was a licensee it remains to consider what duty the law imposes on appellees in regard to him as such licensee. Our law seems to be well settled in this regard. In the case of *Knight* v. *Farmers' & Merchants' Gin Co., supra,* the court said:

"In all our decisions on the subject—and there are many—we have adhered to the rule that one who goes upon the premises of another as a mere licensee is in the same attitude as a trespasser so far as concerns the duty which the owner owes him for his protection; that he takes his license with its concomitant perils, and that the owner owes him no duty of protection except to do no act to cause his injury after his presence there is discovered."

And in the case of *St. Louis I. M. & S. Ry. Co.* v. *Pyles,* 114 Ark. 218, 169 S. W. 799, the Court said:

"It is well settled, however, that a bare licensee under circumstances of this kind is not entitled to any affirmative act of protection on the part of the owner who grants the license. In this respect the case stands the same as if someone else owned the premises instead of the railway company.

" 'The bare permission of the owner of private grounds to persons to enter upon his premises does not,' said this court in the case of *St. Louis I. M. & S. Ry. Co.* v. *Dooley,* 77 Ark. 561, 92 S. W. 789, 'render him liable for injuries received by them on account of the condition of the premises.' "

Other cases could be cited to the same effect but we think the law in this connection is so well settled that it is not necessary. Under the facts in this case as set out above we are driven to the conclusion that the lower court committed no error in refusing to submit to the jury the question of appellees' negligence. Conceding that the premises had been used as a playground on numerous occasions and over a number of years and that the buildings and surroundings gave the appearance of having been abandoned there is no allegation or proof that the Arkansas Power & Light Company's electrical installation was not in accordance with usual procedure and regulations or that it was inherently dangerous. The two poles in question were about twenty-nine feet tall and the insulators were on a platform built between at a height of ten feet from the ground. The only "live" or dangerous wire was located on or near a cross beam which was itself about six and one-half feet above the platform on which the insulators rested. It is not contended that anyone could come in contact with a dangerous wire without first climbing up on the platform and then climbing or reaching up to the cross beam. It is not entirely clear from the testimony just how Tommy Garrett reached the platform, but it does appear that he reached it either by stepping on the meter box which was attached to one of the poles below the platform or he climbed hand over hand up the three heavy wires which ran from the poles to the rock crusher plant. However it makes no difference since in either event he did so upon his own initiative and not because of any expressed or implied invitation. Likewise it is not clear just how he came in contact with the wire that injured him but again that is not material because in all events it happened in pursuit of a venture of his own choosing and because there is no contention there was a "live" wire anywhere closer to the ground than approximately seventeen feet.

Appellants' next contention is that the attractive nuisance doctrine applies. After careful consideration we have reached the conclusion that such doctrine cannot

be invoked in this case. It must be remembered that Tommy Garrett, at the time of the accident, was seventeen years old and a junior in high school where he received some rudimentary training in electricity, and it is our opinion that this doctrine can be applied only for the protection and benefit of children of tender years. This position is fully supported by the great weight of, if not all the authorities on the subject. In the case of the *Arkansas Valley Trust Co.* v. *McIlroy,* 97 Ark. 160, 133 S. W. 816, 31 L. R. A., N. S. 1020, we find this language:

"The leaving upon the premises of a dangerous object attractive to children does not alone constitute negligence; the act of negligence consists in leaving such object under such circumstances that one of ordinary prudence might reasonably expect that a child too young to appreciate the danger would be allured to and attracted thereby."

In no instance have we found the doctrine to be extended to apply to a person seventeen years of age. In *Barnhill's Adm'r.* v. *Morgan Coal Co.,* 215 Fed. 608, the court indicated it would be limited to persons fourteen years old. In the case of *Pollard* v. *Oklahoma City Ry. Co.,* 36 Okla. 96, 128 Pac. 300, the decision did not directly involve this question but the court used language which is significant:

"The Justes boy, being past fourteen years of age, and a trespasser on the company's premises, was, judging solely from his testimony as shown by the record, not entitled to the protection of that law which requires owners of premises to use care in keeping the same in safe condition on account of the unreasoning and natural impulses of children of immature years, who happen to enter thereon either as trespassers or invitees."

The Supreme Court of Missouri in *State ex rel. Kansas City Light & Power Company* v. *Trimble,* 315 Mo. 32, 285 S. W. 455, reversed the Court of Appeals in a well considered case wherein the company was alleged to have negligently caused injury to Marvin Miller, a minor past fourteen years of age, in that it negligently erected and

maintained a pole with metal steps beginning two feet from the ground and leading to the wire at the top (in violation of a city ordinance) and to have known, or by the exercise of ordinary care could have known, the same to be "attractive to deceased and boys of his age, experience, and capacity, and constituted an invitation and lure to deceased and such boys to climb upon such pole and come in contact with said wires, and thereby to occasion his death or injury." The Court, in refusing to extend the attractive nuisance doctrine, used these words:

". . . it is inconceivable that a bright, intelligent boy, doing well in school, past fourteen years of age and living in the city, would not understand and appreciate the fact that it would be dangerous to come in contact with an electric wire, and that he was undertaking a dangerous feat in climbing up the pole. . ."

In the light of the well established rule applicable to the attractive nuisance doctrine, considering the undisputed evidence in this case, we hold that it cannot be invoked by appellant Tommy Garrett.

Since we find the trial court committed no error the case is affirmed.

TAYLOR, GUARDIAN *v.* SCHLOTFELT.

4-9425 237 S. W. 2d 890

Opinion delivered March 26, 1951.

Rehearing denied April 16, 1951.

G. B. Colvin, for appellant.

J. G. Moore, for appellee.

HOLT, J. The question presented by this appeal is the manner of reinvesting funds from the proceeds of certain United States Savings Bonds (now due) issued in the name of co-owners, one of whom is now incompetent and under guardianship.

The facts are not in dispute. The parties stipulated that on January 12, 1949, Samuel H. Wilson (now 89 years of age) was declared incompetent and Baylor House duly appointed guardian. House died May 20, 1949, and appellant, S. V. Taylor, was appointed guardian in succession.

It was further stipulated: "Description of Bonds—No. D159738D—Date, Dec. 1939, Issued to Mr. Samuel H. Wilson, Mercer, Mo., or Mrs. Ruth Schlotfelt, Orchard, Iowa—$500. No. M275405D—Date, April 1940, Issued to Mr. Samuel H. Wilson, Mercer, Mo., or Mrs. Ruth Schlotfelt, Orchard, Iowa—$1,000. No. M390036D—Date, May 1940, Issued to Mr. Samuel H. Wilson, Mercer, Mo., or Mrs. Elizabeth Jane Wile, Trenton, Mo.—$1,000.

"That the present value of the estate of the incompetent is approximately $27,500 which includes the above described bonds and of which approximately $17,500 is in cash in banks; that Samuel H. Wilson is now 89 years of age.

" * * * Said bonds being in the possession of S. V. Taylor, Successor Guardian, he has the power to cash the same without the co-owners joining in the request therefor.

" * * * In the event of the death of Samuel H. Wilson prior to the cashing of said bonds, the co-owners would

become the absolute owners thereof, with power to cash same, without the request therefor being joined in by the personal representative of the estate of Samuel H. Wilson.

" * * * All of the bonds hereinbefore described were purchased with money furnished and belonging solely to Samuel H. Wilson and that neither Mrs. Ruth Ann Schlotfelt nor Mrs. Elizabeth Jane Wile furnished any of said money."

A letter in reference to the present case dated July 26, 1950, from the Commissioner of "Bureau of Public Debt, Treasury Department Fiscal Service, Washington," was a part of this stipulation and recited: "The regulations governing savings bonds do not permit the registration of a bond in the names of an individual and the guardian of an incompetent as co-owners. However, the registration in the names of an individual and an incompetent as co-owners with only a reference to the guardianship is permitted. Especially does it seem proper in this case where bonds were purchased by co-owners when they were both competent and the desired action is the reinvestment of the proceeds of the bonds whereby the interests of the incompetent are in no way prejudiced.

"The form of registration which would seem appropriate and perfectly proper under the present circumstances would be the following: 'A or B, an incompetent under legal guardianship of C.' "

One of the appellees, Mrs. Ruth Schlotfelt, testified that she was 42 years of age, a teacher, had known Mr. Wilson for about thirty years, knew that her name was on two of the bonds in question, that Mr. Wilson had shown them to her, and that "the first bonds were made out about the time I was married. These first bonds were for a wedding gift. The others were made out at later dates, as payment for helping him with his business. My husband and I made many 500 mile trips to help him or take him on trips."

Appellee, Mrs. Elizabeth Jane Wile, testified that she was 56 years of age and had known Mr. Wilson for

about 46 years. She knew her name was on one of the bonds in question and that "Samuel H. Wilson has stayed at my house off and on over 35-year period, sometimes as long as three months at a time. He gave me two cows once. He gave me chair once. He never bought any groceries. I suppose he put my name in the bonds for past favors."

Upon a hearing, the trial court ordered the guardian to convert the bonds into cash (§ 57-624, Ark. Stats. 1947) and "to reinvest the proceeds of said bonds in the same manner as the original bonds," that is, $1,500 to Mrs. Ruth Schlotfelt or Samuel H. Wilson, incompetent, under the legal guardianship of S. V. Taylor, and $1,000 to Mrs. Elizabeth Jane Wile or Samuel H. Wilson, incompetent, under legal guardianship of S. V. Taylor.

As indicated, appellant questions the correctness of this order.

We hold that the order and judgment of the trial court was correct and should be affirmed.

The bonds in question were issued to co-owners, (permitted under the Regulations governing United States Savings Bonds, Department Circular No. 530 (as revised) § 315.4 (a), subdivision (2)) and had they become due before Mr. Wilson became incompetent, could have been cashed by either co-owner without consulting the other, or paid to both co-owners upon their joint request (§ 315.45 (a) of above Circular 530).

We think there can be no doubt but that Mr. Wilson intended to make a gift of these bonds to the appellees and that they should receive the proceeds at his death, unless he elected to cash them during his lifetime and use the proceeds. As indicated, according to the Regulations, the death of a co-owner operates to complete the gift to the other co-owner.

Section 315.45 (c) provides: "Payment or reissue after the death of one co-owner.—If either co-owner dies without the bond having been presented and surrendered for payment or authorized reissue, the surviving co-owner will be recognized as the sole and absolute owner

of the bond and payment or reissue, as though the bond were registered in his name alone, will be made only to such survivor. If the survivor requests reissue, he must present proof of the death of the other co-owner."

If, as appears, the administrator of a deceased co-owner, cannot cash the bonds, then, we think, it would follow (in the absence of a contrary Government rule or regulation) that the guardian of an insane co-owner cannot cash the bonds, (except for reinvestment as above indicated) unless the proceeds from said bonds were needed in the care and support of Mr. Wilson, his ward.

The above Treasury Department Rules and Regulations have the same force and effect as federal law and are controlling over state laws. We said in *Meyers* v. *Hardin, Administrator,* 208 Ark. 505, 186 S. W. 2d 925, that "Treasury regulations * * * not being in excess of the power conferred by Congress have the same force and effect as federal law and are controlling over any State law that may be in conflict."

Our holding here is in accordance with the interpretations above of said Federal regulations, made by the Treasury Department in this case.

Accordingly, the judgment is affirmed.

GRIFFIN SMITH, Chief Justice, dissenting. Regulations of the U. S. Treasury Department governing payment of the class E bonds in question here provide that during the lives of both co-owners "the bond will be paid to either co-owner upon his separate request without the signature of the other co-owner."

Admittedly the two bonds involved in this litigation are in the guardian's possession, and they have matured. It is the guardian's duty to act for the best interest of his ward. Taylor may cash the bonds, (Regulations, subpart J, § 315.38) and this action may be taken irrespective of co-owner claims, because Wilson is alive. Having received money in lieu of the bonds, the guardian should apply to the court for investment directions.

The majority opinion says "there can be no doubt that Mr. Wilson intended to make a gift of these bonds to

the appellees and that they should receive the proceeds at his death.'' The reasoning is unsound because, in effect, it makes a will for the incompetent. What Wilson very likely intended was the consummation of an arrangement whereby the co-owners would receive the bonds in the event of his death before the appreciation securities became due—that is, within ten years. We have only a slight hint of what he *might* have done but for the intervention of mental incompetency. Why should we prejudge this mere possibility and in effect determine a question of fact on the meager testimony of the interested witnesses?

Mr. Justice GEORGE ROSE SMITH joins in this dissent.

PENNY *v.* HUDSON DAIRY.

4-9426 237 S. W. 2d 893

Opinion delivered March 26, 1951.

Lee Ward, for appellant.

Reid & Roy and *Wm. S. Rader, Jr.,* for appellee.

PAUL WARD, J. This is an appeal from the circuit court of Greene County which affirmed the decision of the Arkansas Workmen's Compensation Commission. Both the Commission and the lower court denied appellants' claim for two reasons. First, because the deceased was an independent contractor; and second, because the deceased, at the time of the accident which caused his

death, was not acting within the scope of his employment even though he had been classified as an employee rather than an independent contractor. Since we are affirming the case on the second ground, the question whether the deceased was an independent contractor or an employee will not be discussed.

The deceased, Alfonzo Penny, was killed June 25, 1949, in an automobile collision in Greene County, Arkansas. Appellants herein, who are the widow and children of the deceased, instituted an action before the Arkansas Workmen's Compensation Commission against appellees for recovery of compensation. At the time of his death the deceased was employed by Hudson Dairy of Paragould and had been so employed since December 7, 1948. Appellee, Hudson Dairy, carried compensation insurance with appellee, Maryland Casualty Company, a corporation. The Hudson Dairy operated a dairy at Paragould and purchased raw milk from the farmers in that community. It employed approximately eighteen people, five of whom worked on routes delivering its products. Some of the raw milk was delivered to the dairy by the farmers themselves, but a portion of it was gathered up by the deceased and brought to the dairy. There was no written contract setting forth the relationship and duties of deceased to the dairy, but part of his employment required him to use his own pick-up truck and to gather up the raw milk along a certain designated route and bring it to the dairy where it was unloaded. He then took the empty cans in his truck and returned to his home. Another and distinct part of his employment was to deliver bottled milk to the schools at Noble and some intervening points, but only when school was in session at such places. However, this part of his employment has no bearing on this opinion since school was not in session at the time of the accident.

The deceased's home was near Beech Grove on Highway No. 34 and was some fifteen or sixteen miles to the northwest of appellee's dairy plant. It was on this highway and seven or eight miles from the plant that deceased was killed on a Saturday morning at about eleven

forty-five on the date mentioned above. His activities on this morning were about the same as on every other morning when he made the same run to pick up and deliver milk to the dairy. With empty milk cans in his truck he left home and went over a gravel road some seven or eight miles in a northeasterly direction and crossed Highway No. 1-W and after crossing the last mentioned highway he proceeded on in the same direction some eight or ten miles on a gravel road, and then doubled back to the said highway, during which time he left empty cans and picked up the milk. Thence his route continued toward Paragould and the dairy where he arrived about eight or eight-thirty A. M. There he unloaded the milk and again loaded his truck with empty cans. Ordinarily on all days except Saturday, his work finished, he would go back to his home, first traveling on Highway No. 1-W and then turning to the left on Highway No. 34. On all occasions he would leave the empty cans in his truck preparatory to starting a new run the next morning. The deceased was always paid by the dairy on Saturday afternoon for his work during that week.

On the Saturday when he was killed, after deceased had unloaded the milk at the dairy, he washed his truck and, according to testimony, remained at the dairy for an hour or an hour and a half. There is no testimony showing what his activities were until he was killed at eleven forty-five that morning. After the accident it was found that his truck contained some groceries, some empty cans and some cans which had contained soured milk, but which had been spilled as a result of the accident. The evidence showed that on occasions some of the milk would be spoiled or soured and that frequently the deceased would buy this soured milk from the dairy for the price of seventy cents a can and would sell it for ninety-five cents a can to some of the farmers along his route who raised hogs, and that once in a while he would take some of the soured milk to his home and feed it to his own hogs. At other times the soured milk was returned to the owners by deceased as a part of his employ-

ment. On this occasion the dairy records do not show that the deceased had brought in any soured milk or had purchased any of it for himself or others. The records however are not conclusive because on some occasions the soured milk was detected before it was weighed and in some cases no record was made. Also it was conceded that the deceased might have been carrying some of this milk for himself or his customers and intended to account and pay for it upon his return. It is not denied by appellants that the deceased was acting upon his own when on these occasions he would buy the soured milk from the dairy and take it to his customers, and likewise when he took it home for his own use. The Hudson Dairy admits that on some occasions after the deceased had completed his run in the morning and after he had unloaded that he would do odd jobs for the plant and that they felt free to call on him once in a while, however the manager of the Hudson Dairy testified that after the deceased had unloaded his milk in the morning that he was free to go and do whatever he pleased until he began his run the next morning and that on the morning of the accident, after the unloading was completed, the plant made no further demands on the services of the deceased. The evidence shows that the deceased on all occasions did not go home for dinner on Saturday but would always wait until he had received his check.

Since, for the purpose of this opinion, but without deciding the point, we are treating the deceased as an employee of the Hudson Dairy the question for us to decide is, was there substantial evidence on which to base the findings of the commission that the deceased was not acting within the scope of his employment when he was killed? Ordinarily an employee's day's work does not include the time spent in going to or returning from his place of employment. The following language in the case of *Stroud* v. *Gurdon Lumber Co.*, 206 Ark. 490, 177 S. W. 2d 181, was quoted with approval:

"Where employee, after day's work has ended, proceeds to leave place of labor, choosing his own route and method of travel, master not having contracted to fur-

nish him transportation, for his personal convenience voluntarily mounts truck not property of nor under employer's control and is injured by mishap to truck not on premises of employer, injury was not received in 'course of employment' and is not compensable under Workmen's Compensation Law."

Due to the fact the record is silent on deceased's activities from the time he left his place of employment any where from nine to ten-thirty Saturday morning, it becomes necessary to consider what inferences the Commission was justified in drawing from certain facts and circumstances shown by the testimony. After the accident the truck was found to contain three items that might be considered significant, *viz*: groceries, empty milk cans and milk cans which contained soured milk. It could reasonably have found that the presence of groceries did not indicate, at least conclusively, that he was going home for dinner because he had never before done so on Saturday, but had always waited for his check. The presence of empty cans has little if any significance because he at all times kept these in his truck even when using it for his own use. Appellants insist however that the presence of cans which had contained soured milk (it was spilled as a result of the accident) is an indication that he was on business for his employer because it was a part of his employment to return soured milk to the original owners. The Commission, however, could have found that other facts and circumstances overcame this inference. There is nothing in the record to indicate that deceased had been directed to return any soured milk on this occasion but, on the other hand, it shows affirmatively that he had not been given any such orders. Under the testimony the milk could have been for his own use or for his own customers to whom he often sold it. Moreover it could be concluded from the evidence and particularly from the plat introduced that deceased was not on the road which apparently he would have taken had he been returning soured milk to the owners. He was killed on Highway No. 34 which leads directly to his home, while it appears his milk customers were on Highway No. 1-W,

and that he left the latter highway when he turned off onto Highway No. 34.

From the above we conclude that there is substantial evidence to justify the Commission and the lower court in holding the deceased was not within the scope of his employment when he was killed and the judgment must therefore be affirmed.

JOHNSON *v.* STOUT.

4-9422 238 S. W. 2d 97

Opinion delivered April 2, 1951.

O. W. (Pete) Wiggins, for appellant.

Tommy Russell and *Byron Bogard,* for appellee.

PAUL WARD, J. On April 1, 1944, Marshall Stout gave Troy Johnson a check of same date drawn on the Twin City Bank of North Little Rock, in the sum of $6,000, payable to cash, and when it was presented to the Bank payment was refused because of insufficient funds. On July 29, 1946, suit was filed on the check, alleging Johnson paid cash and merchandise for it, and judgment

was prayed in the sum of $6,000 with interest thereon. In response to a motion filed by Stout, the complaint was amended September 29, 1949, to state that the only merchandise delivered was a bottle of whiskey valued at $5.00 and the balance was paid in cash. Stout filed an answer on November 4th in which he admitted signing the check, but stated there was no consideration for same because he and the plaintiff had engaged in a dice game in which he wound up owing the plaintiff $6,000 as an illegal gambling debt and only at plaintiff's insistence had he given him the check. On the above issue the case was finally tried before a jury on April 20, 1950, judgment was rendered in favor of the defendant, and the plaintiff prosecutes this appeal.

We do not agree with appellant's contention that there is no substantial evidence to support the verdict of the jury. Johnson owned and operated a liquor store and used car lot in North Little Rock near which place there were located some tourist cabins. Stout says he and Johnson, together with a man named Bailey, began a dice game in one of the cabins soon after dinner and played until after five o'clock in the afternoon, that he soon lost $200 which he had and then began to lose large amounts to Johnson for which he gave I.O.U. notes; and that in trying to recoup his losses he wound up owing Johnson $6,000. Stout says when the game was over Johnson insisted that he give him a check for said amount, which he did; that he does not know why he did except that he was worn out. He also states that he was earning $75 per week working for his mother and he never had as much as $6,000 in the bank at any one time. Bailey was not called by either side to testify.

Although Stout's version of what occurred is not corroborated by any other witness and is denied *in toto* by appellant, and in part by his employee at the time, we think his testimony when taken together with the attending facts and circumstances constitutes sufficient evidence to support the verdict of the jury.

Appellant, however, contends that this case should be tested by the rules announced in the case of *Johnson*

v. *Godden,* 33 Ark. 600, from which he quotes the following: "One who pleads the gaming act in defense against a note and mortgage fair on their face, must prove the defense by clear and strong proof."

The above rule was applied in a chancery case where it was sought to defeat a note and mortgage on real estate on the ground that the consideration was in fact a gambling debt and it was held that the terms of a written instrument could not be changed except by clear and convincing evidence. We think the proper rule and the one applicable here is the one approved by this court in the case of *Bynum* v. *Brady,* 82 Ark. 603, 100 S. W. 66, where this court approved the following instruction:

"Gentlemen of the Jury, the plaintiff sues to recover money lost in a game of poker. If you believe from a preponderance of the evidence that plaintiff played in a game of poker with these men, the defendants, and that they won his money, he can recover and you will render a verdict for the amount of money won from him."

Appellee's defense was set forth in the instruction embracing the statute on gambling debts properly given over the objection of appellant, which reads as follows:

"Section 34-1604 of the Statutes of Arkansas provides that all judgments, conveyances, bonds, bills, notes, securities and contracts, where the consideration or any part thereof is money or property won at any game or gambling device, or any bet, or wager whatever, or for money or property lent to be bet at any gaming or gambling device, or at any sport or pastime whatever, shall be void.

"You are instructed that if you find from a preponderance of the evidence that the check sued on in this case was given to the plaintiff in payment of gambling losses to the plaintiff, then, if you so find, your verdict will be for the defendant."

Appellant insists that the court erred in refusing to give a number of requested instructions. All of these except the one discussed below were based on the Nego-

tiable Instrument Law were not responsive to testimony, and therefore properly refused.

Appellant requested an instruction giving him the right to open and close the arguments before the jury. There seems to be no contention by appellant that the court was in error when he placed the burden of proof on the defendant to prove the check was given for a gambling debt, and having properly done so the court was, we think, correct in giving appellee the right to open and close. Section 27-1727, Sub. § 6 of the Ark. Stats., provides: "In the argument the party having the burden of proof shall have the opening and conclusion; . . ." The above provision was sustained in the case of *Roberts* v. *Padgett,* 82 Ark. 331, 101 S. W. 753, and this case was approved in subsequent cases.

No error appearing the judgment of the lower court is affirmed.

LAMB *v.* STATE.

4650 238 S. W. 2d 99

Opinion delivered April 2, 1951.

E. J. Butler, for appellant.

Ike Murry, Attorney General and *R. Ben Allen,* Special Assistant Attorney General, for appellee.

ED. F. MCFADDIN, Justice. Appellant was convicted of second degree murder for the admitted homicide of John L. Gage. The motion for new trial contains five assignments.

I. *Sufficiency of the Evidence.* Assignments 1, 2, and 3 in the motion for new trial are embraced in this topic. Appellant and deceased, both mature men, had a dispute concerning cultivation of a six acre tract, and appellant claimed his life was threatened. He consulted his brother and others; and the next morning armed himself with a shotgun and went to his work in the field near the disputed tract. He and deceased soon met, and appellant shot the deceased, causing instant death. Appellant testified that he fired in necessary self-defense, and his witnesses tended to support his claim.

The witnesses for the State—none being an eye witness—testified to facts and circumstances tending to show that the killing was murder: deceased was shot twice in the head; the shots entered the skull behind the right ear and emerged from the skull near the left eye socket; two shots were fired some minutes apart; deceased, at most, had only a tractor crank handle and pocket knife as weapons; there was no struggle, fight or encounter at close range; appellant admitted deceased was at a distance of ten or eleven feet when the shots were fired; appellant had armed himself with a single-barrel shotgun before leaving his home, and had sufficient time to reload the gun between the shots. One witness testified as to what the appellant told him about the killing:

"... he (appellant) told us he got up that particular day and carried his gun to the woods with him, or to the thicket, and he left his gun there and went out where Mr. Gage was; he also stated that they finally resumed the argument they had the previous day, and Mr. Gage jumped off the tractor and grabbed the crank and that he (appellant) ran to the woods and got his gun and shot him."

Another witness testified that appellant gave him this version of the killing:

"... he (appellant) said Mr. Gage took after him with a knife and the crank and he stayed out of his way and he said when he picked up the gun Gage said, 'You can kill me, Lamb, if you want to, but you will go to the electric chair,' and he (appellant) said he turned and he shot him."

Considering all the testimony and all the facts and circumstances, including the course of the bullets through the skull of the deceased, it is clear that a question of fact was presented as to whether the appellant committed murder or acted in self-defense. When we view the evidence in the light most favorable to the jury verdict, as we do when the defendant appeals from a verdict of guilty,[1] we reach the conclusion that the evidence supports the verdict.

II. *Refusal to Give an Instruction Requested by Appellant.* This is Assignment No. 4 in the motion for new trial. The requested and refused instruction reads:

"The Court instructs the jury, that if any reasonable view of the evidence is or can be adopted which admits of a reasonable doubt of the guilt of the defendant, A. T. Lamb, then it is your duty to adopt such view and acquit him."

Appellant says that the instruction should have been given and cites *Price* v. *State,* 114 Ark. 398, 170 S. W. 235, as authority. The reason the trial court did not give the

[1] Such is the rule on appeals in criminal cases. See *Trotter* v. *State,* 215 Ark. 121, 219 S. W. 2d 636, and *Slinkard* v. *State,* 193 Ark. 765, 103 S. W. 2d 50.

Instruction No. 3 was not because of any claimed vice or defect in it, but because the trial court said the point had been covered by other instructions. In this we hold the trial court was correct:

(A)—The Court told the jury:

"The burden in the whole case is on the State; and when evidence is introduced either on the part of the State or the defendant which tends to justify or excuse the act of the defendant, then if such evidence in connection with the other evidence in the case raises in the minds of the jury a reasonable doubt as to the guilt of the defendant, the jury must acquit."

(B)—Also, the Court told the jury:

"Under the law he is presumed to be innocent and that presumption attends and protects him throughout the trial or until such time as it is overcome by legal and competent evidence upon the part of the State."

(C)—Again, the jury was instructed:

"You are instructed that the State is required to prove all of the material allegations in the information and to prove them to your minds beyond a reasonable doubt. A reasonable doubt is not a mere possible or imaginary doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt; but it is such a doubt as would cause a prudent person to pause or hesitate in the graver transactions of life; . . ."

(D)—And, finally, the Court gave an instruction of several pages stating the various verdicts that the jury could render—*i. e.*, first degree murder, second degree murder, manslaughter, and not guilty—and the instruction concluded in this language:

"In other words, gentlemen, if you find the defendant guilty of some degree of homicide and if you entertain a reasonable doubt as to whether it is first degree or second degree, then you shall resolve that doubt in his favor and you will find him guilty of murder in the second degree; or if you entertain a reasonable doubt as

to whether he is guilty of murder in the second degree or guilty of manslaughter, then you shall resolve that doubt in his favor and find him guilty of the lesser degree, that is, manslaughter. However, gentlemen, if upon the whole case you entertain a reasonable doubt as to whether the defendant is guilty or innocent, then you shall resolve that doubt in his favor and acquit him. . . . ''

It is apparent that in the foregoing instructions the Court covered the same point as that involved in the refused Instruction No. 3. Therefore, no error was committed by the Court in refusing to give the requested instruction. See *Campbell* v. *State,* 215 Ark. 785, 223 S. W. 2d 505, and *Meador* v. *State,* 201 Ark. 1083, 148 S. W. 2d 653.

III. *Objection to the Giving of an Instruction.* The Court gave the jury Instruction S-9 which reads:

''You are instructed that a bare fear on the part of the defendant that the taking of the life of the deceased was necessary to save his own life or to prevent his receiving great bodily injury, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the defendant in killing the deceased, really acted under the influence of such fears, and not in a spirit of revenge.''

To the giving of this instruction, the defendant made a general objection and saved an exception and made it Assignment No. 5 in his motion for new trial.

In order to see whether the instruction should have been given, it is well to see what other instructions were given that made this cautionary instruction proper. The Court, at the request of the appellant, gave detailed instructions covering the matter of self-defense:

(A)—The Court told the jury:

''You are instructed that under the law a person does not have to wait until the party attacking has actually done

him violence before he has a right to strike in his own self-defense; but if the defendant as a reasonably prudent person acting upon the facts and circumstances as they appeared to him, and from his standpoint, actually believed that the deceased was attempting to kill him or do him great bodily injury, then the defendant had the right to defend himself; so if you believe from the evidence in this case that the defendant acting as a reasonably prudent person at the time he killed the deceased, and upon the facts and circumstances as they appeared to him and from his standpoint, believed that the deceased was attempting to kill the defendant or do him great bodily injury, then the defendant had the right to stand his ground and defend himself and shoot the deceased at the time."

(B)—In another instruction the Court told the jury:

"You are instructed that, to justify a killing in self-defense, it is not essential that it should appear to the jury to have been necessary; but it is sufficient, if the defendant honestly believed, acting upon the facts and circumstances from his standpoint, and without fault or carelessness on his part, that the danger was so urgent and pressing that the killing was necessary to save his own life or to prevent him from receiving great bodily injury."

(C)—And in another instruction the Court told the jury:

"The jury is instructed that in passing upon the question of whether the defendant, A. T. Lamb, at the time of firing the shot that killed the deceased, acted in self-defense as defined by other instructions given you by the Court, it is your duty to place yourselves as nearly as possible in the position of the defendant, A. T. Lamb, at the time of the shooting, taking into consideration all the facts and circumstances that then and there surrounded the defendant, A. T. Lamb, taking into consideration the excitement and confusion surrounding the situation, and the defendant, A. T. Lamb, should not be held to the same deliberate care in ascertaining the danger and the force necessary to repel it as would be used

by a person in afterward viewing the situation from a place of safety uninfluenced by excitement or danger, but all that would be required of him is that he act as a reasonable prudent person would under the same circumstances and condition."

We have quoted the foregoing instructions, not for the purpose of approving them but, in order to show how far the Court went, at the request of the defendant, in instructions on self-defense. Certainly in view of these instructions, it was proper for the Court to also give the Instruction S-9 which is practically in the language of § 41-2235, Ark. Stats., which reads:

"Bare fear no justification.—A bare fear of those offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing; it must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under their influence, and not in a spirit of revenge. (Rev. Stat., ch. 44, div. 3, art. 2, § 24; C. & M. Dig., § 2374; Pope's Dig., § 3000.)"

A careful review of the entire record discloses no error and the judgment is affirmed.

HOLCOMB *v.* STATE.

4647 238 S. W. 2d 505

Opinion delivered April 2, 1951.

Hebert & Dobbs, for appellant.

Ike Murry, Attorney General and *R. Ben Allen,* Special Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. The defendant was sentenced to a one-year prison term for stealing a cow. The motion for a new trial listed eight alleged errors, some of which are not argued. This is the second time Holcomb has been tried for the same offense. In an opinion rendered June 5, 1950, we reversed and remanded because an erroneous instruction had been given. *Holcomb* v. *State,* 217 Ark. 407, 230 S. W. 2d 487. In the cited case it was said that the evidence would support the verdict. In the appeal now before us there was substantial testimony—given by the defendant—that he bought the cow from Mancel Robbins and paid the seller $95 in currency. Robbins flatly contradicted this assertion. The jury had the right to believe either. Its rejection of the defendant's explanation is a matter we are not at liberty to undo if the trial in other respects was free of prejudicial error.

First.—After witnesses had been put under rule counsel for Holcomb called the court's attention to the presence of Robbins and his wife, who jointly owned a herd of 28 cattle from which the missing cow was said to have been stolen. The judge declined to include Robbins and his wife in the list of witnesses placed under the rule, and an exception was saved. No reason was assigned other than the court's general order relating to those who were to testify. It was not asserted that the presence of these two would prejudice the defendant's case.

It is within the court's discretion to enforce the rule as to particular witnesses and the exercise of this right cannot be successfully challenged where it is not shown that injury would attend a refusal to grant the motion. See *Mikel* v. *State,* 182 Ark. 924, 33 S. W. 2d 397, and other cases to the same effect.

Second.—During a colloquy between state and defense counsel while Holcomb was being cross-examined the court asked Mr. McCoy (assisting the prosecuting attorney) what the purpose of certain questions was. Mr. McCoy replied that they were to show that "Holcomb came down here after the cow sale was over and was so anxious to get rid of this *hot cow* that was on his hands"— At this point counsel for the defendant objected and asked that McCoy be reprimanded. There were requests that the statements be disregarded. Mr. McCoy then said, "I withdraw them, Your Honor," and the court replied: "The jury is told to disregard the statements of counsel in regard to the cow." There was no suggestion that the court's action was insufficient, hence the point as a count in the motion for a new trial was not well taken. It is not necessary to comment on what the effect would have been if an exception had been saved, but in any event it should be observed that the court did exactly what the defendant's counsel asked.

Third.—Appellant seems to have staked his appeal primarily on his belief that the court erred in admitting as evidence a certified copy of an old verdict. Holcomb was asked if he had ever been convicted of a crime—"of anything." He answered, "nothing [except that I paid a little fine], drinking, or something like that."

Question: "Were you, on February 6, 1925, convicted for false pretense?" Mr. McCoy then began reading: "Now on this day comes the State of Arkansas, by [its] prosecuting attorney, William G. Bouic"—

McCoy was cut short with an objection. McCoy explained that he was endeavoring to refresh the defendant's memory. Defense counsel then said: "He has denied it, and until they have introduced the official record his denial stands." The court sustained the objec-

tion and the prosecuting attorney said: "I offer in evidence a certified copy of the judgment of the Montgomery Circuit Court." In chambers the proffered evidence was taken under advisement, whereupon the jury was dismissed until the following morning.

When court reconvened Judge Brown announced that he had decided to permit the certified copy to be introduced. Defendant's counsel objected (a) because the copy was not signed by the judge of the Montgomery Circuit Court, and there was nothing to show that a sentence or judgment had been pronounced; (b) the jury's verdict, showing conviction, was insufficient, and (c) the instrument was offered while the defendant was still on the stand and prior to the introduction of rebuttal testimony by the state. A fourth objection went to the general proposition that the testimony would prejudice the defendant's rights.

Was the verdict admissible?

The certified copy, styled *State of Arkansas* (No. 576) v. *Oscar Holcomb,* followed by the words "False Pretense," was: "Now on this day comes the State of Arkansas by its prosecuting attorney, William G. Bouic, and comes the defendant in person and by attorney, Jerry Witt, and both sides announcing ready for trial, a jury of twelve good and lawful men were selected and sworn to try the issues, and after hearing the testimony adduced, instructions of the court, and argument of attorneys, the jury retired to the jury room for the deliberation of the evidence, and returned into the court the following verdict: 'We, the jury, find the defendant guilty and fix his punishment at imprisonment in the penitentiary for a period of one year. O. J. Goobehere, foreman.' " This record was duly certified by the circuit clerk.

Appellant's counsel emphasize the provisions of Ark. Stat's, § 28-707, where the methods of impeaching a witness are set out, closing with the phrase, ". . . except that it may be shown, by the examination of a witness, or record of a judgment, that he had been convicted of a felony."

Our cases do not appear to have held to the strict language of the statute. It was taken from Act 52 of 1905, and Act 52 amended § 3138 of Kirby's Digest. Kirby's § 3138 was § 2902 of Mansfield's Digest (1884), and Mansfield's section was in effect when Judge HEMINGWAY wrote the court's unanimous opinion in *Hollingsworth* v. *State,* 53 Ark. 387, 14 S. W. 41, in 1890. In discussing the admissibility of impeaching evidence, Judge HEMINGWAY said:

"The rules of law do not allow specific acts of misconduct or specific facts of a disgraceful character to be proved against a witness by others. *He may be proved by record evidence to have been convicted of an infamous crime,* but not to have done other infamous deeds, nor to have undergone personal disgrace. And even as to previous conviction of infamous crimes, the rule is seldom of any great service, because no one can be expected to know in advance what witness may appear, nor what may have been their history. *Unless the remedy is found in cross-examination,* it is practically of no account."

The distinction between proving by a record that a witness had been convicted of a crime, without showing judgment, and the necessity for proving by the record that judgment unconditional had been pronounced, came up for consideration before the common law interdiction against testimony of a felon was relaxed. By Act of March 24, 1885, it was provided that on the trial of indictments and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, "the person so charged shall, at his own request, but not otherwise, be a competent witness." The statute was mentioned in *Ransom* v. *State,* 49 Ark. 176, 4 S. W. 658. It was held that the Code of Civil Procedure making certain classes of offenders incompetent to testify did not extend to criminal procedure. Mansfield's Digest, § 2859. But, said Mr. Justice WILLIAM W. SMITH in the Ransom case, since infamy was a disqualification in criminal cases at common law, it continued unless removed by statute; and when *Ransom* v. *State* was decided at the May 1887 term the modification heretofore spoken of

permitted the accused to testify. Act No. 222 of 1913, Ark. Stat's, § 28-605, removed all disability imposed by the common law, but it expressly states that "evidence of his former *conviction* of any crime by a court of this or any other state, territory, or the United States, shall be admissible for the purpose of going to his credibility or the weight to be given to his testimony."

It will thus be seen that we have two statutes, one enacted in 1913 authorizing the introduction of evidence of a *conviction,* and the other, enacted in 1905, permitting proof of conviction to be shown by the judgment record. The Act of 1913 mentions both civil and criminal actions.

In an appeal decided in 1908, *Owen* v. *State,* 86 Ark. 317, 111 S. W. 466, Mr. Justice HART said the universal rule is that "It is not the guilt that disqualifies the witness. . . . It is the judgment itself that renders him infamous." Clarence Sellman was offered as a witness, and counsel for Owen, the defendant, complained on appeal that the trial court should have excluded the evidence because of Sellman's conviction of grand larceny on a plea of guilty. The official entry read: "Wherefore it is the judgment of the court that sentence be withheld during the good behavior of the defendant." Although Judge HART said that the plea without judgment did not go to the competency of the witness, he did draw the distinction between the proceeding resulting in the court's right to pronounce judgment, (the plea) and concluded that only the judgment would render the defendant infamous.

A somewhat similar situation arose when (judgment affirmed in 1912) the contention was made that a defendant was incompetent to testify as a witness for himself. *Michigan-Arkansas Lumber Co.* v. *Bullington,* 106 Ark. 25, 152 S. W. 999. Herbert Bullington sued the lumber company for the loss of an arm. The record of a competent Missouri court was produced, showing that the plaintiff had been tried for robbery and convicted by a jury. After mentioning these facts Chief Justice MCCULLOCH said, ". . . but the record does not show the rendition of a judgment of conviction by the court. There were

attempts to show by oral testimony, on the one side, that the verdict of the jury had been set aside and a new trial granted, and on the other side that the judgment had not been set aside, but that the [defendant in the criminal case] was paroled upon his own good behavior."

The court's conclusion is thus stated by the Chief Justice: "The record itself, which is the sole evidence of the conviction, fails to show any judgment. It is earnestly contended on behalf of the defendant [in the Arkansas action] that it is the conviction by the jury, and not the judgment of the court, which disqualifies the witness. This court has, however, (in the case of *Owens* v. *State*) held to the contrary, and we must treat that question as settled."

This opinion was rendered before Act 222 of 1913 became a law. While the 1913 enactment did not by any express language repeal the provision now appearing as Ark. Stat's, § 28-707, and there is no repugnance that necessarily repeals or modifies that part of the 1905 statute permitting the state to contradict a witness by the record of a judgment, the issue here is one of credibility alone. Holcomb was not asked whether he had been *sentenced* on a criminal charge. Rather, the question was whether he had been convicted. The record introduced was in judgment form, but went no further than the recital of a conviction. It contradicted the witness on a material point and was, we think, admissible on the issue of truth or falsity. There was no objection that the Oscar Holcomb mentioned in the verdict and otherwise referred to in the court record was not the same person who was being tried in the case at bar.

We have, without analyzing the statute in question, repeatedly said that when a defendant in a criminal case undertakes to testify for himself his credibility may be impeached *by proof of a former conviction* of an infamous crime. *Smith* v. *State,* 74 Ark. 397, 85 S. W. 1123. In the cited case Judge McCulloch mentioned the statute making a defendant in a criminal case a competent witness in his own behalf, then added: "But the fact of his conviction of the infamous crime can be used to affect his

credibility, the same as against any other witness." [In the Smith case a confession was involved.]

In *Hunt* v. *State,* 114 Ark. 239, 169 S. W. 773, L. R. A. 1915B, 131, Judge McCulloch cited *Benton* v. *State,* 78 Ark. 284, 94 S. W. 688, and the *Hollingsworth* case; also *Vance* v. *State,* 70 Ark. 272, 68 S. W. 37. He said that for the purpose of testing credibility of a witness he may be asked "about a judgment of conviction." Certainly by this language it was not intended to restrict cross-examination to instances where conviction had been followed by judgment.

Mr. Justice Riddick wrote the opinion in *Vance* v. *State* and cited *Southern Insurance Co.* v. *White,* 58 Ark. 277, 24 S. W. 425, and *Scott* v. *State,* 49 Ark. 156, 4 S. W. 750. But even before the *Bullington* case we had discussed "the record of a judgment" statute from the standpoint of conviction alone, for in *Vance* v. *State* Judge Riddick said:

". . . Now, it is very probable that in passing this statute the legislative mind was directed mainly to the subject of impeaching witnesses, but it seems to me that the language is broad enough to cover any case where the conviction is proved for the purpose of affecting the testimony of the witness by whom it is proved, whether the effect of the conviction be to exclude his testimony by showing that he is incompetent, or whether it goes only to his credibility as impeaching testimony. As the statute by express terms permits the fact that a witness has been convicted to be shown either by his examination or the record, it seems to me that when that fact has been established, whether by a record or the testimony of the witness, the effect is the same. I see no valid reason for making a distinction in the method of proof between the case where the conviction goes merely to the credibility of the witness and when it renders him incompetent, nor do I believe that there is any such distinction in the statute. If the conviction is one that goes only to the credibility, it is for the jury to consider it with his testimony, but if it be a conviction that renders the witness incompetent, it seems to me that it is proper

for the presiding judge to exclude his testimony. . . . But, after a very careful and full consideration of this question, a majority of the judges have come to a different conclusion. . . . In the opinion of the majority of the judges, the [section dealing with impeachment] has reference only to the method of impeaching witnesses. They hold therefore that when the *conviction* of a witness is shown by his examination only, such conviction goes only to the credibility of the witness. In order to exclude the testimony of a witness on the ground that he has been convicted of a crime, they are of the opinion that *the record of his conviction* must be produced, when accessible. . . . The case of *Cash* v. *Cash,* 67 Ark. 278, 54 S. W. 744, is not [according to the majority view] in conflict with this conclusion, for the reason that in that case the conviction of the witness was admitted by the party to the action, and thus dispensed with further proof of that fact."

In the *Cash* case Mr. Justice HUGHES said: ". . . Having been convicted of petit larceny [the witness] was incompetent to testify, as there is no proof she had been pardoned."

The cases to which attention has been called are cited to show that the term "conviction" has been used repeatedly, particularly where, as here, the issue was one of credibility.

Thus we return to the reason for the rule: a rule that upon the one hand—as Judge MCCULLOCH said in the *Bullington* case—requires production of the judgment record (under the old law) where, as there, the purpose was to exclude testimony on the ground of incompetency based on infamy, and upon the other hand permits credibility to be put in issue by asking the witness if he had been convicted of a crime, with recourse by the adverse party to an authenticated record (if the conviction is denied) showing that a verdict of guilty had in fact been rendered.

Our conclusion is that in those cases where the question is confined to inquiries regarding *conviction* and there is denial, then contradiction may be shown by the

record as limited in this case, thus permitting the jury to consider the weight that should attach to any material statement made by such witness.

A discussion of witness impeachment will be found in vol. 3 of the Arkansas Law Review. It is part of a Review of Recent Arkansas Evidence Cases, written by Professor Ralph C. Barnhart, and begins at p. 40.

Affirmed.

ROBINSON, J., dissenting. In my opinion a reversible error was committed when the trial court permitted the State to introduce evidence calculated to impeach the defendant, when such evidence is not admissible in accordance with § 28-707, Ark. Stats., which is as follows:

"*Impeachment of witness of opposite party.*—A witness may be impeached by the party against whom he is produced, by contradictory evidence by showing that he has made statements different from his present testimony, or by evidence that his general reputation for truth or morality render him unworthy of belief, but not by evidence of particular wrongful acts, except that it may be shown, by the examination of a witness, or record of a judgment, that he had been convicted of a felony." The Statute specifically provides that a witness cannot be impeached by evidence of particular wrongful acts except "by the examination of a witness, or record of a judgment, that he has been convicted of a felony."

The defendant was cross-examined in regard to any wrongful acts he may have committed and no complaint is made on permitting this cross-examination. However, the State was then permitted to introduce in evidence a record of a jury verdict to impeach the defendant. The Statute does not provide that a witness may be impeached by introducing in evidence a jury verdict, but a witness may be impeached by "record of a judgment that he has been convicted of a felony."

A jury verdict and a judgment are not one and the same thing. "When the law speaks of conviction, it means a judgment and not merely a verdict, which in

common parlance is called conviction." (24 C. J. S. 16). "Conviction" in the legal sense means a final judgment, conclusively establishing guilt. *Smith* v. *Todd,* 155 S. C. 323, 152 S. E. 506, 70 A. L. R. 1529.

The verdict may have been set aside within minutes after it was returned. It may be that no judgment was ever entered on the verdict. In fact, the record in this case indicates that there is no judgment of conviction. When objection was made to the introduction of the jury verdict as impeaching testimony, the objection was taken under advisement by the court, and the jury was dismissed until the following day. Thus, the State had ample opportunity to produce the record of a judgment of conviction if there had been one in existence to produce. No record of a judgment was brought forth.

The opinion of the majority points out that Act 222 of 1913 provides for the impeachment of a witness by evidence of his former conviction of a crime. The primary purpose of the 1913 Act was to remove, as a disqualification of a witness, the fact that he had been convicted of a felony. Prior to the passage of that Act, Judge RIDDICK, in the case of *Vance* v. *State,* 70 Ark. 272, 68 S. W. 37, had said:

"We take this occasion also to call attention to the backward state of the law in this state in reference to the competency of witnesses convicted of felony. The statutes which render such witnesses incompetent belong to a class of antiquated laws which suppress evidence, and which the wisdom of modern ages has discredited and shown to be unreasonable and injurious. They are of the same class as the laws which formerly forbade the parties to the suit from testifying and closed the mouth of the defendant on trial for his life, and should be repealed as these laws have been repealed, for such matters should go only to the credit or impeachment of the witness—not to the exclusion of his testimony."

Moreover, the 1913 Act did not change the law as to the kind of evidence necessary to show a former conviction, which always has been a record of a judgment of

conviction. That is what the Statute says: "Record of a judgment"—not a jury verdict. In fact, up to this time it has been held that there is no conviction until there has been entered a judgment of conviction.

"Where disabilities, disqualifications, and forfeitures are to follow upon a conviction, in the eye of the law, it is that conviction which is evidenced by sentence and judgment, and that where sentence is suspended, and so the direct consequences of fine and imprisonment are suspended, or postponed indefinitely, so also the indirect consequences are likewise postponed." *State Medical Board* v. *Rodgers,* 190 Ark. 266, 79 S. W. 2d 83.

In the case of *Hollingsworth* v. *State,* 53 Ark. 387, 14 S. W. 41, the court held that a witness could not be impeached by proving specific acts of misconduct, but "he may be proved by record evidence to have been convicted of infamous crimes." When the court said record evidence of a conviction, it refers to a judgment of conviction because there is no conviction until the entry of a judgment.

The case of *Owen* v. *State,* 86 Ark. 317, 111 S. W. 466, is directly in point with the case at bar, the only distinction being that in the Owen case an attempt was made to impeach a witness by the introduction of a court record showing that he had pleaded guilty to the crime of grand larceny. There, Mr. Justice HART said:

"It is of no consequence here, and it is not necessary to decide whether or not a circuit court has the power to indefinitely suspend or postpone sentence or judgment where there has been returned a *verdict of guilty,* or where the defendant has entered his plea of guilty, *for the reason that it is not shown that sentence was subsequently pronounced.* If the guilt of the party should be shown by his plea of 'guilty,' which has not been followed by judgment, the proof does not go to the competence of the witness. 1 *Greenleaf on Evidence,* (16th Ed.), § 375. *The universal rule is that it is not the guilt that disqualifies the witness, but that it is the judgment itself that*

renders him infamous. 1 *Bishop on Criminal Law* (5th Ed.), § 975; 1 *Wigmore on Evidence,* § 521."

The case of *Michigan-Ark. Lbr. Co.* v. *Bullington,* 106 Ark. 25, 152 S. W. 999, is also directly in point with the case now under consideration. We quote therefrom as follows:

"The first contention is, that the plaintiff was incompetent as a witness in his own behalf on account of conviction for an infamous crime in the State of Missouri, and that the court erred in allowing his testimony to be introduced. The record of a court of competent jurisdiction in the State of Missouri was introduced, showing that plaintiff was indicted and placed on trial for the crime of robbery, and that he was *convicted by the jury, but the record does not show the rendition of a judgment of conviction by the court.* There were attempts to show by oral testimony, on the one side, that the verdict of the jury had been set aside and a new trial granted and, on the other side, that the judgment had not been set aside, but that the plaintiff was paroled upon his own good behavior.

"The record itself, which is the sole evidence of the conviction, fails to show any judgment. It is earnestly contended on behalf of defendant that it is the conviction by the jury, and not the judgment of the court, which disqualifies the witness. This court has, however, held to the contrary, and we must treat that question as settled. *Owen* v. *State,* 86 Ark. 317, 111 S. W. 466."

In the case of *State Medical Board* v. *Rodgers,* 190 Ark. 266, 79 S. W. 2d 83, decided in 1935, which, of course, was subsequent to the 1913 Act mentioned in the majority opinion, the Owen case and the Michigan-Ark. Lumber Company case were considered to be the law of this State, and, in addition to the quotation previously made from the Medical Board case, Mr. Justice McHaney speaking for the court said:

"In *Huddleston* v. *Craighead County,* 128 Ark. 287, 194 S. W. 17, one Jim Float was indicted in Craighead County charged with a felony, to-wit, unlawfully selling

liquor. He entered a plea of guilty to the charge, and a judgment of guilty of said crime was entered and sentence suspended. The judgment of guilty carried with it the costs against said Float, but the Court found that he had no money or property out of which the costs could be collected, and it was adjudged that Craighead County was liable for the costs which the Clerk was ordered to certify to the county court, including the fee of the prosecuting attorney. The county court refused to allow the fee of the prosecuting attorney, and the circuit court, upon appeal, made a similar order. On appeal here the court said: 'The question to be decided is, whether the plea, upon which the judgment set out above was entered, constitutes a conviction, within the meaning of the § 3488, of Kirby's Digest.' And we answered the question in the negative. After citing and quoting the section of the Digest relating to the fees of the officers, the court said: '*Notwithstanding his conviction, by the verdict of a jury or a plea of guilty, the accused does not become a convict until there has been a judgment and sentence by the court.*' Citing *Owen* v. *State,* 86 Ark. 317, 111 S. W. 466; *Michigan-Ark. Lbr. Co.* v. *Bullington,* 106 Ark. 25, 152 S. W. 999. The court further said: 'In the case of *Barwick* v. *State,* 107 Ark. 115, 153 S. W. 1106, there was a plea of guilty and a continuance of the case under the direction that the fine be imposed at the pleasure of the court, but that the costs should be immediately paid by the defendant.' It was there said: 'It may well be doubted whether the costs should be collected until final judgment was entered against appellant.'

"It was not necessary to decide in that case whether it could be done or not. However, we are now called upon to confirm the doubt there expressed; and we do now so hold. The judgment rendered is not a final one. . . . There has been no conviction within the meaning of the Statute. There has been no final judgment entered because the sentence has been suspended, and the appellee has not been required to surrender himself in execution of such judgment." . . . .

If the rule which has prevailed in this State up to this time to the effect that there is no conviction until there is a judgment of conviction is to be departed from, and hereafter a person may be impeached by the proof of a jury verdict, and a judgment of conviction is not necessary as provided in the Statute, where is the stopping point? If a conviction can be shown by a record of a jury verdict where, apparently, there is no judgment record of conviction, then can a conviction be shown by oral testimony as was attempted in the case of *Michigan-Ark. Lumber Co.* v. *Bullington, supra?* Of course, the answer would be in the negative because the Statute does not authorize such evidence. Neither does it authorize impeachment of a witness by showing a previous conviction by any method other than "by the examination of a witness, or a record of a judgment, that he had been convicted of a felony."

For the reasons set out herein I respectfully dissent and am authorized to say that Mr. Justice McFaddin and Mr. Justice George Rose Smith join me in the view expressed herein.

Cramer *v.* State.

4655 238 S. W. 2d 482

Opinion delivered April 2, 1951.

Rehearing denied April 30, 1951.

John C. Sheffield, for appellant.

Ike Murry, Attorney General and *R. Ben Allen,* Special Assistant Attorney General, for appellee.

George Rose Smith, J. Josh Cramer appeals from a judgment sentencing him to fifteen years' imprisonment for having murdered Harold Hurt, the husband of Cramer's stepdaughter. The only issue presented to us is whether there is evidence to support the jury's finding that Cramer is guilty of murder in the second degree. We find the testimony amply sufficient.

Cramer admits that he killed Hurt with a shotgun on April 8, 1950, but contends that he acted in self-defense. On this question the testimony is in conflict. For more than a year the Cramers and the Hurts had lived together in a small dwelling. There was animosity between Cramer and Hurt, the testimony indicating that each had threatened to kill the other. According to Agnes Hurt, the widow of the deceased, she and her husband had a mild quarrel on the night that he was killed. Agnes' mother, Effie Cramer, "butted in" and was pushed by Hurt. Mrs. Cramer called to her husband, who came in with a shotgun and shot Hurt while he was unarmed and in the act of lighting a cigarette. It is undisputed that Cramer directed his wife to take the responsibility for the crime and that she did confess guilt. After Mrs. Cramer had been in jail for several days Cramer admitted that he had killed Hurt. At the trial both Cramer and his wife testified that Hurt was threatening or beating Cramer with a club when the shooting occurred.

Agnes Hurt's testimony that the killing was unprovoked is plainly substantial evidence supporting the verdict. The jury evidently accepted Mrs. Hurt's version rather than the Cramers', perhaps because Cramer is the accused and his wife is manifestly under his domination. It is argued that malice was not proved, but we think it unnecessary to cite our numerous cases holding that the law implies malice when the killing is with a deadly weapon and without provocation.

Affirmed.

4-9449 238 S. W. 2d 482

Opinion delivered April 2, 1951.

Rehearing denied April 30, 1951.

[redacted]

Kenneth C. Coffelt, for appellant.

Clayton Freeman and *Robert E. Diles,* for appellee.

MINOR W. MILLWEE, Justice. This appeal involves the custody of a six-year-old girl, Bobbie Sue Brown. Susan Brown obtained a divorce from appellant, Leonard Brown, in the Pulaski Chancery Court in August, 1947, on the ground of general indignities and was granted custody of their three minor children of the ages of 6, 4

and 2 years, respectively. The parties had been separated about six months or a year before rendition of the decree which also directed appellant to pay $100 per month for support of the children.

After the divorce Susan and the two older children resided in the home of the children's grandmother, Mrs. Susie Summerville, at Traskwood in Saline County, while the youngest child, Bobbie Sue, remained in the home of her uncle and aunt, Mr. and Mrs. Mike H. Sullivan, in Little Rock, Arkansas. Mrs. Sullivan is Susan's sister. Appellant remarried May 1, 1948, and Susan remarried in December, 1949.

In January, 1950, appellant was cited for failure to pay support money as provided in the original decree and an order was entered which recites that Susan should retain custody of the children; that the two older children should remain in the home of the grandmother; and that Bobbie Sue should remain with the Sullivans. The order further directed appellant to pay $50 a month for support of the two older children and make a "private contract" with the Sullivans for the support of Bobbie Sue. The Sullivans never requested support money for Bobbie Sue and appellant has paid none. Susan died in March, 1950.

On September 2, 1950, appellant filed a motion to modify the original decree by awarding him the custody of his children. After a hearing, a decree was entered giving appellant custody of the two older children, but directing that Bobbie Sue remain in the custody of the Sullivans. This appeal is from that part of the decree denying appellant custody of Bobbie Sue.

The evidence discloses that appellant was in the armed services at the time of Bobbie Sue's birth and for six months thereafter, during which time Susan resided with the Sullivans and received the regular allotments from the government. After Susan moved to Traskwood with the two older children, she divided her time between the home of the grandmother and that of the Sullivans where Bobbie Sue remained. At the time of the hearing

Bobbie Sue had been with the Sullivans about two and one-half or three years, was nearly six years of age, and had started to school. The Sullivans have no children of their own and have furnished a good home for the child.

At the time of the trial appellant had been regularly employed for 19 months as maintenance engineer for a bakery. His present wife is also employed from eight a. m. to four p. m. Appellant defaulted in the payments of $100 per month as provided in the original decree, but made the reduced payments of $50 per month to Mrs. Summerville until he filed his motion for modification of the custody decree. He stated that he was out of work when he defaulted in the $100 payments and borrowed money to make partial payments. The amount of his default in the $100 payments is not shown. He frankly admitted that he had not visited the children as often as he should have, but stated that he had visited Bobbie Sue nearly every Friday, which was his day off from his work. He and his present wife were buying a home and paying on an automobile at the time of the trial and his wife planned to quit work as soon as the car was paid for. In the meantime they planned to have the seventeen-year-old sister of appellant's present wife live with them and help care for the children. Appellant's present wife testified that the children had visited in their home at different times, that she got along well with them and was willing and able to care for them. Both appellant and the Sullivans were renting their homes at the time of the hearing.

The general rule applicable in cases of this kind is stated in 27 C. J. S., Divorce, § 314, as follows: "On the death of a parent, the power of the court over custody of the child derived from the divorce action, together with the effectiveness of the decree, terminates, and the surviving parent ordinarily succeeds to the right of custody. So, in a proceeding between the surviving parent and a third person, the parent, if fit, is properly awarded custody, but where the surviving parent is an unfit associate for the child or has not evidenced an affectionate and

solicitous attitude toward the child, its custody will not be taken from respectable relatives of deceased parent." In an exhaustive annotation in 128 A. L. R. 990 it is stated: "It is a general rule that where the custody of children is granted to their mother by a decree of divorce, such custody does not forever cut off and bar the father's right to their custody so long as the decree is unmodified, but only establishes the right of custody between the two spouses during their lives, and that upon the death of the mother her right does not descend nor can it be transmitted, but that the right of the father to the custody of the children is revived, provided, of course, he is a person suitable for the custody of the children."

In Keezer, Marriage and Divorce (3rd Ed.), § 725, the rule is succinctly stated, as follows: "Upon the death of the spouse given custody the right to such custody usually devolves upon the surviving parent unless such survivor is unfit or the best interests of the child would otherwise require." See, also, Schouler, Divorce Manual, § 316; 17 Am. Jur., Divorce & Separation, § 689. In all cases affecting the custody of infants, this court has repeatedly stated that the interest and welfare of the child is the primary and controlling consideration by which courts are to be guided. Justice ROBINS, in the opinion in *French* v. *Graves,* 205 Ark. 409, 168 S. W. 2d 1108, said: "The paramount consideration in this case, as in all other cases involving the custody of a minor child, is the welfare of the child, but the rights and feelings of the parents must also be weighed and due regard given to the natural desire of the parents to have and rear their offspring." In several recent cases we have repeated our approval of the following statement from *Johnston* v. *Lowery,* 181 Ark. 284, 25 S. W. 2d 436: "The law recognizes the preferential rights of parents to their children over relatives and strangers, and where not detrimental to the welfare of the children, they are paramount, and will be respected, unless special circumstances demand that such rights be ignored. *Herbert* v. *Herbert,* 176 Ark. 858, 4 S. W. 2d 513; *Loewe* v. *Shook,* 171 Ark. 475, 284 S. W. 726.

"The courts will not always, however, award the custody of an infant to the father, but, in the exercise of a sound discretion, will look into the peculiar circumstances of the case, and act as the welfare of the child appears to require considering primarily three things: '(1) Respect for parental affection, (2) Interest of humanity generally, (3) The infant's own best interest.' " The facts in every custody case are different and no hard and fast rule can be laid down in determining what is best for the permanent welfare of the child. *Kirk* v. *Jones,* 178 Ark. 583, 12 S. W. 2d 879.

It is clear from a consideration of our own cases and the authorities generally that appellant is entitled to the custody of his child unless he is an unsuitable person to be entrusted with its care, or the circumstances are such as to render such custody inimicable to the best interests of the child. The facts and circumstances in the instant case do not warrant the conclusion that appellant is an unfit person to have custody, or that he has forfeited the preferred right which the law gives him. The chancellor recognized this by giving him custody of the two older children. The question whether the child's permanent welfare demands that it remain with its uncle and aunt is most perplexing and one that is, of course, fraught with speculation. This opinion could be unduly extended by listing arguments on both sides of the question. Both appellant and the Sullivans are apparently able to furnish a suitable home for the child. Unless exceptional circumstances are involved, this court has indicated that young children should not be separated from each other by dividing their custody. *Vilas* v. *Vilas,* 184 Ark. 352, 42 S. W. 2d 379. To affirm the decree appealed from would mean the continued separation of Bobbie Sue from her brother and her sister as well as the loss of companionship and guidance of a father. Under all the circumstances, we have concluded that the permanent welfare of the child would be best served by allowing appellant to have the custody of all his children. That part of the decree awarding custody of Bobbie Sue to the Sullivans is accordingly reversed and the cause remanded with directions to award such custody to appellant.

GRIFFIN SMITH, Chief Justice, dissenting. When Bobbie Sue's mother procured a divorce from appellant, the parents had been separated for six months, hence Bobbie Sue was a year and a half old when her father's acts of indignities directed toward the mother of his three children justified the chancellor in granting a divorce and in awarding the mother full custody of all of the children.

As the majority opinion points out, there were subsequent court proceedings disclosing appellant's want of respect for the duties of fatherhood. There is a presumption—conclusive in the absence of an appeal—that considerations of sound social policy motivated the decrees and orders. Appellant did not provide the means of support found by the court to be necessary, but that is not the question here.

The mother's sister and the sister's husband—Bobbie Sue's uncle and aunt—took the infant at a tender age and have bestowed upon her all that love can supply or that material means require. The father stood by with an attitude of partial contempt in respect of court orders directing him to contribute to the little girl's support; and he permitted bonds of love and affection to grow to such an extent that the foster parents, and the child who is now six years of age, each look upon the other with emotions that fondness acquired through association, and love instilled through reciprocal dependence, alone can supply.

Of paramount consideration is the child's welfare. If I could be persuaded that the father (who turned from the mother of his three children in her hour of direst need, and who to the extent of his parental responsibilities allowed the discarded mother's sister and her husband to compensate Bobbie Sue for his errancy and the frailties of his nature)—if I could believe that this father is now a better person, and that he and his young wife would follow a course that would erase from the infant's active consciousness the substituted ties of parenthood the uncle and aunt have supplied, then I would say that these relatives who have done so much for Bobbie Sue could have no alternative but the satisfaction that comes

to those who have served well in circumstances of extraordinary duty, and their reward would be memories of childish laughter and the recollection of things that entered into a beautiful relationship abruptly brought to an end.

But the record does not justify this degree of punishment in a crisis where the father's fault destroyed a home and transplanted his youngest offspring into an environment where love and solicitude have supplied the deficiencies he brought about.

I know that my associates who make the majority opinion have been beset with doubts. Their problem has not been lightly treated, nor has the result been reached without conscientious consideration. It is therefore with reluctance that this dissent is written; but, feeling as I do, there is no other course.

Ed. F. McFaddin, Justice (Dissenting). As I have stated in a previous dissenting opinion,[1] these child custody cases are the most serious ones we are called upon to decide. The best interest of the child is the primary concern; but to determine what is such best interest requires prayerful consideration.

The Judges making the majority opinion in the case at bar have earnestly and conscientiously tried to ascertain what is for the best interest of the little girl, Bobbie Sue Brown, now 6 years of age; and I trust future events will prove the majority to be correct. But, with what I hope is also equal earnestness and conscientiousness, I have likewise tried to ascertain what is for the best interest of the little child; and I am convinced that the little girl should remain with the aunt (Mrs. Paralee Sullivan), just as the Chancellor decreed; and we must remember that he personally saw the parties, whereas we see only the typed record.

Here is the situation as I visualize it: the father, Mr. Leonard Brown, never had the care and custody of the little girl; even during the lifetime of the natural mother

[1] See *Nutt* v. *Nutt*, 214 Ark. 24, 214 S. W. 2d 366.

the aunt, Mrs. Paralee Sullivan, had the care and custody of little Bobbie Sue Brown; the stepmother (Mrs. Tessie Brown) is only 22 years of age and has never reared any children; by the court order made, she suddenly has the responsibility of being a mother to the two older children, Betty Jean, age 9, and James Earl, age 7.

I think that the care and custody of *two children* is enough burden to put on the young stepmother at one time. She works at the State Health Office from 8:00 A.M. until 4:00 P.M. In order to get two children dressed and ready for school, with lunches prepared, and her husband off to work, and herself to work by eight o'clock, this stepmother will have to get up about 5:30 every morning. All this is going to prove terribly trying. I feel that we should see how she gets along with the care of the two older children before we trust her with a third child, the little girl, Bobbie Sue, only 6 years of age. If Mr. and Mrs. Brown successfully shoulder the responsibility of caring for the two older children, then a year from now, or later, the Court can, in the light of such experience, review the situation to see what would *then* be for the best interest of the little girl, Bobbie Sue.

As previously stated, the stepmother is at work from 8:00 A.M. to 4:00 P.M. The little girl will doubtless get out of school 3:30 each afternoon, since she is in the elementary grades. When she reaches home there will be no one to greet her and look after her until the stepmother gets there sometime after 4:15 P.M. Again, suppose the little girl should get sick or hurt at school, who is to care for her until the stepmother's return home at 4:15 P.M.? During the time of school vacation the children will be alone all day without proper supervision which presents a worse problem than during the school term. Little girls should not be left to roam at will.

Contrast all the foregoing with the conditions that prevail in the home of the aunt, Mrs. Sullivan, where the real mother placed the little girl, and where the Chancellor ordered that she remain: the aunt stays at home all day; she has no other children to look after; she has no outside work; her life is devoted to looking after little

Bobbie Sue whom she has practically reared to her present age. So for the next few years of the little girl's life I think it would be better to leave her with her aunt, Mrs. Sullivan, who already knows her, rather than to place her with a "new mother" who does not know the little Bobbie Sue and who will certainly be very busily occupied with the two older children and with her work at the Health Department. Because of these reasons, I dissent from the majority.

MR. JUSTICE HOLT concurs in this dissent.

UMBERGER *v.* WESTMORELAND.

4-9461 238 S. W. 2d 495

Opinion delivered April 9, 1951.

Giles Dearing, for appellant.

J. L. Shaver, for appellee.

Ed. F. McFaddin, Justice. In this suit the husband is seeking to claim as his own certain property that was in his wife's possession at the time of her death.

W. R. Umberger[1] and Maggie Umberger were married in Tennessee in 1919, and from 1923 lived in Cherry Valley in Cross County, Arkansas. They had no children. Mrs. Umberger died August 28, 1947, and by her will gave her husband (a) the use of the family residence for his lifetime, and (b) one-seventh interest in her estate. The other six-sevenths interest went in equal shares to Mrs. Mattie Lou Westmoreland (a niece whom the Umbergers had reared), and to Mrs. Westmoreland's five children. Mr. Umberger and Mrs. Westmoreland were named co-executors of the will. When Mrs. Umberger's bank safety deposit box was opened in the presence of the interested parties on September 10, 1947, there were found the will, some deeds, Government bonds, postal savings certificates, bank books, and cash in excess of $6,500.

On September 22, 1947, Mr. Umberger (appellant) filed the present suit in the Chancery Court, seeking to recover all the cash in the safety deposit box, and to have title to the real estate vested in him. The defendants, as the issues were finally joined, were Mrs. Westmoreland (individually and as executrix) and also Mrs. Westmoreland's five children. The defendants pleaded by general denial. Evidence, taken by depositions over a period of many months, has resulted in a transcript in excess of 400 pages, in addition to voluminous exhibits.

[1] In some places the name is spelled "Umberger," and in others it is spelled "Umbarger."

The Chancery decree was adverse to Mr. Umberger in every respect except as to $840 in the safety deposit box; and he has appealed. Mrs. Westmoreland, as executrix, has prosecuted a cross-appeal (a) from that portion of the decree which gave Mr. Umberger $840 of the cash in the safety deposit box, and also (b) from that portion of the decree concerning alleged gifts of the money in the safety deposit box.

I. *The Real Estate.* In Mrs. Umberger's safety deposit box there was a deed, dated and recorded in 1937, whereby John Dye, and wife, conveyed to Mrs. Umberger a tract of approximately six acres. Mr. Umberger testified that Mrs. Umberger handled the details connected with the acquisition of this tract; that he gave her the money to pay for the land; that they agreed the deed was to be made to them as tenants by the entirety; that she told him it was so made; and that he did not know otherwise until after her death. With such testimony, he cites *McCollum* v. *Price,* 213 Ark. 609, 211 S. W. 2d 895, as authority for his claim that the deed should be reformed to show him as tenant by entirety.

But there is testimony that Mr. Umberger admitted this tract belonged to his wife. The witness, Owens, testified that she lived near the tract in question:

"Q. Did you ever talk to Mr. Umberger about buying a strip off that six acres?

"A. I asked him one time if he would sell me an acre and he said he couldn't; that it belonged to 'the madam.'

"Q. When was that conversation?

"A. I don't remember. It was after we moved there; in the last four or five years. I tried to buy it from her, too."

Such disclaimer of ownership made by Mr. Umberger is at complete variance with the claim he is now making; and in the light of the foregoing testimony, and other testimony showing ownership in Mrs. Umberger, we are unable to say that the Chancery decree is in error in refusing Mr. Umberger's claim to the six acre tract.

In the safety deposit box there was a deed dated in 1937, and recorded in 1938, whereby Mr. Umberger conveyed to his wife an 80 acre tract and also some town property in Cherry Valley. The title to all of this property had been originally in Mr. and Mrs. Umberger, as tenants by the entirety, and he deeded the property to her in 1937. In seeking to have the said deed to his wife cancelled, Mr. Umberger first denied the execution of such deed,[2] and then made two claims as to why the

[2] Here is a portion of his testimony:

"Q. A deed was found in there dated December 18, 1937, from W. R. Umberger to Maggie Umberger for all of your lands, together with some live stock. Did you execute such a deed to her?

"A. If I did I didn't know it. The 80 acres of land that we agreed that when I was in that law suit with Mr. Marberry and them, she thought they was going to get a judgment against me, and she asked me to make a deed to the 80 acres of land until we got it settled so if they got a judgment against me that they wouldn't get the land. That is all that is supposed to be in the deed and I didn't know any better until the lock box was opened."

[3] Here is his testimony:

"Q. In that box was found that day a note signed by you to Mrs. Umberger for the sum of $320, did you give her such a note?

"A. I don't never remember giving her such a note.

"Q. I will ask you whether or not you knew a Floy Williams?

"A. Yes, sir, I knew Floy Williams.

"Q. Was Floy Williams a man or woman?

"A. A woman.

"Q. What business was she engaged in?

"A. A grocery store.

"Q. Where?

"A. In Cherry Valley.

"Q. Did you or not trade with her?

"A. I think I bought my first groceries from her when I first landed in Arkansas.

"Q. Did you continue to trade with her?

"A. I traded with her as long as she lived.

"Q. Tell the court whether or not you or Maggie ever got any money from Mrs. Floy Williams.

"A. I can't answer that correctly. If she did I can't remember. If I did I paid her back. I never kept no account of that. I could have but I couldn't tell you what it was for.

"Q. You don't know now what it was for?

"A. No, sir, I couldn't.

"Q. Tell the court whether or not Mrs. Umberger came to you and reported to you that Mrs. Williams was demanding $320.

"A. Yes, sir, she did.

"Q. Did she or not offer to let you have the $320 to pay Mrs. Williams?

"A. As far as I remember she did or went and paid it off, one.

"Q. You mean she either gave you the money or gave it to Mrs. Williams?

deed should be set aside: First, he claimed he executed the deed to put the title in his wife until some of his "troubles" were surmounted, and then she was to deed the property back to him. In this claim Mr. Umberger was seeking to ingraft by parol and express trust on a written instrument; and his attempt must fail. See § 38-106, Ark. Stats.; *Glover* v. *Glover,* 153 Ark. 167, 240 S. W. 716; *Harbour* v. *Harbour,* 103 Ark. 273, 146 S. W. 867. *Carpenter* v. *Gibson,* 104 Ark. 32, 148 S. W. 508.

Secondly, Mr. Umberger claimed that he executed the deed to Mrs. Umberger as a mortgage to secure a debt of $320; and he claims the debt has been fully paid. It is true that a deed may be shown to be a mortgage; but the evidence to such effect, in a case like this one, must be "clear, unequivocal and convincing." See *Edwards* v. *Bond,* 105 Ark. 314, 151 S. W. 243 and 151 S. W. 281. See, also, cases collected in West's Arkansas Digest, "Mortgages," § 36. Mr. Umberger claimed that he might have executed a lien of some kind to Floy Williams, and then conveyed the property to Mrs. Umberger as security in order to obtain money to repay Floy Williams. Mr. Umberger's testimony is very indefinite on this point[3]; but he claims that Mrs. Umberger left a written memorandum that the deed to her was a mortgage.

At least five "books" were introduced in evidence, each said to be in the handwriting of Mrs. Umberger. We have examined the originals and find them to contain all sorts of information and writings. The dates and entries do not follow in any sort of continuity. The entries appear to be addresses, telephone numbers, memoranda, diary entries, debits, credits, and similar matters which were probably quite intelligible to the person making the entries but which, to us, appear to be too haphazard to constitute sufficient evidence on which to declare a deed to be a mortgage. The writing relied on by Mr. Umberger is found on page 123 of one such "book," which reads:

"A. Yes, sir.

"Q. Were any papers fixed up between you and Mrs. Umberger at that time?

"A. Well, I couldn't say positive but I believe it was. I don't remember. As it stands I must have."

"Dec 18, 1937, paid W. R. Umberger three hundred twenty dollars on Floy Williams Mortgage hold mortgage at ten cents per year on dollar
Mar, 1938, paid Dearing twenty-five
May 31, 1938, paid $200 for W.R.U. License mortgage two bales of cotton & car

"9/16 6.31
2.00 on tire

8.31"

Mr. Umberger claims that the first portion of the above entry shows that the deed he executed to Mrs. Umberger was a mortgage. This entry could just as well mean that Mrs. Umberger paid Mr. Umberger the money so that he could pay Floy Williams; it could mean that Floy Williams had executed a mortgage to Mr. Umberger which Mrs. Umberger was paying; or it could mean some entirely disconnected transaction not disclosed by the evidence. At all events, in view of Mr. Umberger's indefinite testimony we cannot say that this memorandum, susceptible as it is of several interpretations, is sufficient to be that "clear, unequivocal and convincing" evidence which is required to show that a deed is a mortgage. So we affirm the Chancery decree which denied Mr. Umberger's claim as to all of the real estate, with Mr. Justice Robinson of the opinion that the Chancery decree should be reversed as to the real estate.

II. *Cash in the Safety Deposit Box.* Approximately $6,530 in currency was found in Mrs. Umberger's safety deposit box; and Mr. Umberger claims this to be his money which Mrs. Umberger had purloined. He testified that in order to prevent her from cashing checks on his account, he began the practice, sometime after 1935, of exchanging his money for large currency ($10, $20, $50 or $100 bills), and then concealing such currency in and around his liquor store and home. He introduced a book in which he claimed he had made entries from time to time so he could remember the amounts of money at the various places of concealment, such as "in bottom trunk," "behind picture," "in wardrobe," "under cash register," etc. He further testified that Mrs. Umberger

found his money in the various hiding places and appropriated it to her own use, and that the currency in the safety deposit box was the identical currency that he had secreted in the various hiding places.[4]

To say the least of it, Mr. Umberger's story is quite bizarre: the husband and wife had been married since

[4] Here are specimens of his testimony:

"Q. When did you first discover that this money was stolen?

"A. I never put down no date, Mr. Shaver, because when I went to see about it it was gone and I didn't know what date it left.

"Q. You were the only one who had the key?

"A. Part of the time I had the key and part of the time I didn't.

"Q. Who else had the key?

"A. My wife had the key but she didn't know it was hid there.

"Q. You don't say your wife stole that money?

"A. Yes, sir, she got it.

"Q. Mr. Umberger, did you ever report any of these thefts to the law?

"A. No, there wasn't no need of it. She was my wife and I would ask her about it.

"Q. You just didn't want to have her arrested?

"A. No, sir, I didn't. I had to live with her.

. . . . .

"Q. Did you say anything to her about it?

"A. I got after her about these things but she, if she wanted to answer me she did and if she didn't she wouldn't give me any answer at all.

"Q. And that was satisfactory to you?

"A. There was no need of my saying nothing because I knew I couldn't make her give it back to me.

"Q. Did she say she got it?

"A. I don't remember she ever give me any answer.

. . . . .

"Q. Did you ever report that?

"A. I asked her about it. She admitted sometimes that she'd take it and sometimes I couldn't get anything out of her.

. . . . .

"Q. You knew she had a lock box?

"A. She told me she had, I didn't know.

"Q. She didn't let you in it?

"A. No, sir.

"Q. So the bonds were a thousand dollars and five hundred dollars that she told you about.

"A. She told me about taking out some more.

"Q. When was that?

"A. I don't remember what date it was but that wasn't all the money she got out of my pocket. She got $400 one time and she said she took out a $400 bond and another time I went to Memphis and come back and she got $600 and I got after her about that and she said she took that out in a $600 bond. I didn't see it. I asked her about it and she said she had them up in the bank."

1919; and he says he continued to live with her while he knew she was stealing over $6,000 from his "hiding places"!! The Chancellor rejected Mr. Umberger's story; and we do likewise. The entries in his "book" are self-serving and of no probative value. From the evidence it is shown that Mr. Umberger was having "women troubles"—as one witness expressed it. It therefore seems plausible that he and Mrs. Umberger divided the money from time to time and that she placed her part in the safety deposit box. What he did with his part is not known, since his present worth is not disclosed. At all events, we conclude that he acquiesced in all that Mrs. Umberger did in claiming as her own the currency found in her safety deposit box. We affirm so much of the decree as is adverse to Mr. Umberger regarding the currency.

The Chancery Court gave Mr. Umberger $840 of the currency in the safety deposit box. This was found in a paper sack. The evidence regarding the "paper sack money" is no different from the evidence regarding the other currency. Mr. Umberger's notation in his "book" said this:

"5-7-1944—put in wardrobe papper sack—with handchief pind up—840—all in 20 but 2—10—"

He admitted that he discussed the disappearance of this money with his wife:

"Q. Did you ever report that?

"A. I asked her about it. She admitted sometimes that she'd take it and sometimes I couldn't get anything out of her."

We reverse so much of the Chancery decree as awarded the $840 to Mr. Umberger, and hold it to be a part of Mrs. Umberger's estate.

III. *Undelivered Gifts of Money.* In Mrs. Umberger's safety deposit box there were several envelopes, each containing money and each envelope having some name or names on it. Illustratively we describe two:

(a)—An envelope had written on it, "For Gene Giles, Aubrey Sitz, Marilyn and Mary Ann Westmoreland," and contained $1,040 in currency.

(b)—An envelope had written on it, "This is for Mary Ann Westmoreland," and contained $540 in currency, as well as other matters.

The Chancery Court decreed that each such envelope or package constituted a complete gift of the contents to the person or persons named on the envelope, even though Mrs. Umberger was the only person who had access to the safety deposit box. There was no completed gift. In *Carter* v. *Greenway,* 152 Ark. 339, 238 S. W. 65, Mr. Justice HART quoted the law:

"'. . . To consummate a gift, whether *inter vivos* or *causa mortis,* the property must be actually delivered, and the donor must surrender the possession and dominion thereof to the donee . . .'"

The case at bar, on this point, is ruled by that case as well as by *Neal* v. *Neal,* 194 Ark. 226, 106 S. W. 2d 595, and *Stifft* v. *W. B. Worthen Co.,* 176 Ark. 585, 3 S. W. 2d 316. See, also, *Myers* v. *Hardin,* 208 Ark. 505, 186 S. W. 2d 925, in which we held envelopes, similarly marked and found in the deceased's safety deposit box, to be undelivered gifts. We reverse the portion of the decree which held the gifts to be completed, and we hold that the contents of the envelopes belong to the estate of Mrs. Umberger.

IV. *United States Government "Co-owner" Bonds.* In Mrs. Umberger's safety deposit box there were nine United States Government bonds totaling $2,200, each of which was a "co-owner" bond, in that it listed as payee Mrs. Umberger and some other named person. We hold that each of these nine co-owner bonds belongs to the survivor named as co-payee. In *Myers* v. *Hardin,* 208 Ark. 505, 186 S. W. 2d 925, we had occasion to consider United States Government bonds, wherein the payee was "Mrs. Cecilia Hickey, payable on death to," a named person. In that case we held that, under the United States Treasury regulations, each bond, on the death of Mrs. Hickey, belonged to the named person. The nine United States bonds in this case were "co-owner" bonds, issued under the same Treasury regulation as involved in the case of *Myers* v. *Hardin, supra*; and, as between

Mrs. Umberger's estate and the named co-owner, each bond belongs to such named co-owner.[5] Mrs. Umberger's estate is entitled to the postal savings account and all the other bonds, except the nine co-owner bonds.

V. *Necessity of Making Timely Objection in the Trial Court to Incompetent Evidence in Order to Raise the Question on Appeal.* What we have heretofore said disposes of the issues of this case; but we have unanimously decided that now is the time to call attention of the Bench and Bar to the matter stated in this topic heading. It will be observed that we have, in some instances, quoted Mr. Umberger's testimony as to conversations with Mrs. Umberger. Of course, such testimony—insofar as it was directed against the estate of Mrs. Umberger—was inadmissible as violative of § 2 of the Schedule to our Constitution which reads:

"... in actions by or against executors ... in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements of the testator ... unless called to testify thereto by the opposite party."[6]

In the case at bar, appellee made timely objections in the trial court to all such incompetent evidence: so a statement by the Court at this time will not affect the results in the present case, but will apprise the Bench and Bar that we are clarifying the conflict that exists in our holdings on the point stated in this topic heading.

(A)—In law cases, the rule has always existed that failure to object to incompetent testimony when offered in the trial court, constituted a waiver of such objections. From *Gage* v. *Melton,* 1 Ark. 224, to *Sandidge* v. *Sandidge,* 212 Ark. 608, 206 S. W. 2d 755, and even later, this rule has been stated and followed in scores of cases. They may be found quoted in West's Arkansas Digest, "Appeal and Error," Key No. § 204.

[5] A recent case involving "co-owner" bonds is that of *Taylor* v. *Schlotfelt, ante,* p. 589, 237 S. W. 890.

[6] An article, entitled "The Dead Man's Statute in Arkansas," may be found in University of Arkansas Law School Bulletin, Vol. 9, No. 2, Page 63.

(B)—Originally, in probate cases, the same rule existed (see *Heaslet* v. *Spratlin,* 54 Ark. 185, 15 S. W. 461); because prior to Constitutional Amendment No. 24 (adopted in 1938) probate cases came to this Court on appeal from the *Circuit Court.*

(C)—It is in chancery cases that our holdings have shown lack of harmony regarding the necessity of making an objection in the trial court to alleged incompetent evidence. Then, when by the Constitutional Amendment No. 24 the Chancellor became the Judge of the Probate Court, the diverse holdings regarding chancery appeals were likewise applied to probate appeals.

In *Allen* v. *Ozark Land Co.,* 55 Ark. 549, 18 S. W. 1042, we were deciding a *chancery case* on appeal; and we held that the failure to register an objection, when incompetent evidence was offered in the trial court, constituted a waiver of such objection. Here is Mr. Justice BATTLE's language:

"It is contended that the testimony of Cobbs as to the contents of the records in his office was not competent, because the records or certified copies thereof were the best evidence of their contents. This is true. But it does not appear in the record in this case that there was any objection to its admission as evidence. Appellant had the right to waive the production of the records or certified copies of the same, and accept proof of their contents, and did so by his silence. Failing to object, he thereby lulled the appellee into repose and deprived it of the opportunity of offering better evidence. Had the testimony of Cobbs been incompetent for any purpose or on any condition, the circuit court should have given it no consideration, and in weighing the evidence should have excluded it on its own motion. In such cases the failure of a party to object does not add to the probative force of the incompetent testimony; but in case of secondary evidence, if he waives the conditions on which its admissibility depends, he thereby gives to it its full force as evidence. This is the rule in actions at law. *Frauenthal* v. *Bridgeman,* 50 Ark. 348, 7 S. W. 388. The same rule prevails in actions in equity. 3 Greenleaf on Evi-

dence (14th Ed.), § 357; *Barraque* v. *Siter,* 9 Ark. 545. Having failed to object to Cobb's testimony below, appellant cannot object to it here. *Eden* v. *Earl of Bute,* 1 Brown's P. C., 465; 2 Daniell's Ch. Pl. and Pr. (4th Ed.), pp. 1504, 1127; 1 Barb., Ch. Pr. (2d Ed.), pp. 419, 386."

The case of *Allen* v. *Ozark Land Co., supra,* has never been expressly overruled on the point above quoted but a *rival* line of cases has grown up, holding exactly to the contrary. In *Cox* v. *Smith,* 99 Ark. 218, 138 S. W. 978, parol evidence was allowed in the trial court to defeat a written contract. No objection was offered to such parol evidence in the trial court. Nevertheless, this Court held that the parol testimony was incompetent and refused to give it any consideration on appeal, although it was not objected to in the trial court. We there said:

"It is urged by counsel for defendant that objection to the introduction of this parol testimony was not made by the plaintiff in the lower court, and on this account should not be considered here. But chancery cases are tried upon appeal *de novo.* It is presumed that the chancellor heard the case only upon evidence that was competent and relevant to the issues made. Upon appeal in chancery cases errors which relate to rulings upon the introduction of evidence will not be passed upon; but in the trial of such chancery cases upon appeal any evidence that was improperly excluded below will be considered, and evidence that was improperly received will be disregarded, and the case will be decided here solely upon competent evidence. *Niagara Fire Ins. Co.* v. *Boon,* 76 Ark. 153, 88 S. W. 915; *Latham* v. *First Nat. Bank of Ft. Smith,* 92 Ark. 315, 122 S. W. 992."

The rule stated in *Cox* v. *Smith, supra,* has been extended and cited in frequent cases, whereas the rule stated in *Allen* v. *Ozark Land Co., supra,* has remained as the original—and correct—holding. In *Campbell* v. *Hammond,* 203 Ark. 130, 156 S. W. 2d 75, the majority followed the rule of *Cox* v. *Smith,* using this language:

"We, therefore, hold that appeals from the probate court are tried *de novo,* just as in chancery appeals, and

that this court will consider only the competent evidence in the record, whether formally objected to or not."

But to *Campbell* v. *Hammond,* Mr. Justice FRANK G. SMITH wrote a concurring opinion in which, in his usual careful manner, he reviewed the cases and authorities generally, and said:

"I perceive no reason why if the incompetency of a witness may be waived in a law case, the incompetency may not also be waived in an equity case. The text writers on evidence make no such distinction. If the incompetency of a witness is waived—and it is waived when the witness is permitted to testify without objection—then his testimony is competent, and may not be disregarded when the case reaches this court on appeal. . . . If the competency of a witness is waived, it is waived, as well in a chancery case, as in a case at law, and the rule adopted by the majority is not in harmony with our previous decisions, and is not conducive to the administration of justice."

Even though subsequent cases have followed *Campbell* v. *Hammond,*[7] nevertheless, after careful study we are convinced that the rule of *Allen* v. *Ozark Land Co.*—rather than that of *Campbell* v. *Hammond*—is the correct one. It is much fairer to litigants, as well as to trial judges in probate and equity cases, that they should know, when the case is decided in the trial court, what evidence is to be considered on appeal. Unless a timely objection be made by the litigants in the trial court, then the trial judge can be trapped into deciding a case on evidence that may later be held inadmissible, when objected to for the first time on appeal. This situation cannot result under the rule of *Allen* v. *Ozark,* whereas it has frequently come about under the rule of *Cox* v. *Smith* and *Campbell* v. *Hammond.* Therefore, we unanimously hold that in cases hereafter tried, all objections to evidence and witnesses must be made in a timely manner in the trial court, and if not so made, such objections will be considered as waived when the case reaches us on appeal. In other words, the rule stated in *Allen* v. *Ozark,*

[7] One such case is *Smart* v. *Owen,* 208 Ark. 662, 187 S. W. 2d 312.

and all the time existing in law cases, will be our rule in chancery cases and probate cases.

BUXTON *v.* DEAN.

4-9472 238 S. W. 2d 487

Opinion delivered April 9, 1951.

Claude Duty and *Vol T. Lindsey,* for appellant.

J. Wesley Sampier, Clayton N. Little and *William H. Enfield,* for appellee.

MINOR W. MILLWEE, Justice. On December 2, 1949, appellee, Hubert Dean, sustained a disabling injury to his left hand while working for appellant, Ray Buxton, in building a house in Rogers, Arkansas. Appellee's claim before the Workmen's Compensation Commission was controverted on the ground that appellant was not

"engaged in building or building repair work" within the meaning of the Workmen's Compensation Law at the time of the injury. This appeal is from the judgment of the circuit court affirming an award of the Compensation Commission in favor of appellee.

Appellee has been engaged in work as a carpenter for eighteen years. In April, 1949, appellee and three other workmen began construction of a house for appellant on Chestnut Street in Rogers, Arkansas, being paid an hourly wage for their work. Appellee worked until the house was completed about two months later when he began work in the construction of a house for Mrs. Jewell Buttry in Rogers. Appellant had talked with appellee about building the house for Mrs. Buttry prior to completion of the first house. Appellant ordered all materials and did other supervisory work in connection with the construction of the Buttry house, which was completed about July 15, 1949. Appellee did some work for others until November 3, 1949, when he again went to work for appellant on a second house which the latter was constructing on Maple Street in Rogers. Appellee was working on this house at the time of his injury on December 2, 1949.

Appellant moved to Rogers, Arkansas, in 1946 from Union County, Iowa, where he had been engaged in farming for twenty-seven years. Since moving to Arkansas, appellant has rented his Iowa farm to the same tenant each year on a "cash and crop share" basis and has made annual trips to Iowa for the purpose of collecting the farm rents. In 1946 appellant bought and sold a tourist court near Rogers. He did some trading in real estate in 1947 and worked with a real estate agency for a time in 1948. Appellant lives in a rented cabin and built both houses in Rogers in 1949 for rental purposes. There is some evidence that he contemplated further building. Appellant has not been engaged in farm work since he left Iowa and, insofar as the evidence discloses, has no intention of resuming his former occupation.

The opinion of the commission recites: "The record is clear that Ray Buxton built two houses for the purpose

of renting them. One of the houses was completed in the summer of 1949, and is being rented for $45 per month. The other house lacks only the installation of plumbing and will be rented as soon as possible. The Commission is of the opinion that Ray Buxton was in the business of building houses for rent and that he, therefore, comes within and is bound by the provisions of the Arkansas Workmen's Compensation Law, as he was carrying on an employment in the State of Arkansas in which two or more employees were employed by him in building work. It is also the opinion of the Commission the claimant was not a casual employee.

"The fact that the respondent rented a farm in the State of Iowa does not, in the opinion of the Commission, exclude him from being in the business of building and renting houses. It appears from the evidence that the respondent spent a very small portion of his time each year in the State of Iowa in connection with the rental of his farm and it further appears that he had not been in Iowa to see about his farm since the spring of 1949."

For reversal appellant contends that appellee's employment was casual and not in the course of business of his employer and that there is no substantial evidence upon which to base the commission's finding to the contrary. In § 2(b) of the Workmen's Compensation Law (1949 Cum. Pocket Supp., Ark. Stats., § 81-1302(b)) an employee is defined as "any person . . . in the service of an employer . . . but excluding one whose employment is casual and not in the course of the trade, business, profession or occupation of his employer. . . ." One of the definitions of "Employment" is given in § 2(c)(2) of the act (1949 Cum. Pocket Supp., Ark. Stats., § 81-1302 (c) (2)) as meaning "every employment in which two or more employees are employed by any person engaged in building or building repair work." It is noted that before an employment is excepted from the operation of the act, it must be both casual and not in the usual course of the employer's trade or business. The authorities generally support the rule that an employment in building or repairing a structure is not to be regarded as casual where the work for

which the claimant was engaged will require a considerable length of time for its completion, or will extend for an indefinite period; but if such employment is to last only a few hours, or a few days, it is ordinarily considered casual employment. 58 Am. Jur., Workmen's Compensation, § 98.

Under a Connecticut compensation act containing provisions similar to ours, it was held that the employment was not casual where the owners of a warehouse employed a carpenter to construct a loading platform and shelving which would take several weeks to perform, even though such employment was to cease upon completion of the work specified. *DeCarli* v. *Manchester Public Warehouse Co.,* 107 Conn. 359, 140 Atl. 637, 60 A. L. R. 1191. Also in *Kaplan* v. *Gaskill,* 108 Neb. 455, 187 N. W. 943, the court held, under a similar statute, that the employment was not casual where one was employed to repair a store building requiring from ten days to two weeks when it was contemplated that he should continue working at other miscellaneous repair jobs for the employer throughout the summer. There are numerous cases to the same effect cited in annotations on the question in 15 A. L. R. 735, 33 A. L. R. 1460, 60 A. L. R. 1200, 107 A. L. R. 939.

It has been held that an employer may have more than one trade, business, profession or occupation within the meaning of a compensation act. It is also said that the line of demarcation between what is and what is not employment in the usual course of the trade or business of the employer is vague and shadowy, and that each case must, of necessity, depend largely upon its own facts and circumstances. *Nelson* v. *Stukey,* 89 Mont. 277, 300 Pac. 287, 78 A. L. R. 483; 58 Am. Jur., Workmen's Compensation, § 83.

Appellant earnestly insists that the undisputed testimony shows that he was engaged in farming and not in building or building repair work at the time of appellee's injury. We cannot agree with this contention. Appellant had not actually engaged in farming since 1946 and the fact that he returned to Iowa once each year to collect

the rent from his farm did not necessarily establish his occupation in 1949 as that of farming. In April, 1949, he began constructing houses for rent and the second such house was nearing completion when appellee was injured. Appellee's employment for several months in building these houses cannot be classed as irregular, occasional or casual under the decisions.

We conclude that there was substantial evidence to sustain the conclusions of the Compensation Commission that appellee's employment was neither casual nor without the usual course of appellant's business. The judgment is accordingly affirmed.

STRICKLAND *v.* WEST.

4-9462 238 S. W. 2d 489

Opinion delivered April 9, 1951.

Alonzo D. Camp, for appellant.

Guy B. Reeves, Otis H. Nixon and *J. R. Booker,* for appellee.

PAUL WARD, J. This is an appeal by Ora Lee McClain Strickland, hereafter referred to as Ora Lee, from a chancery decree, which found she was indebted to Dr. E. W. West in the sum of $842.45, with interest at ten per cent, amounting to $72.79, on a note secured by a mortgage on Lot 40, Block 17 of Booker Terrace Subdivision, in sections 16 and 21, township 2 north, range 11 west in Pulaski County; and the decree also found she was indebted to the Industrial Bank of Saint Louis in the sum of $964.16 with interest at six per cent from August 22, 1950, on a note given for repairs on the above mentioned property. Judgment was rendered for both amounts and foreclosure was ordered on the first judgment, and the second judgment was declared a lien on the same property, subject only to the said mortgage lien.

The suit originated by Dr. West suing to foreclose his mortgage. The decree of the lower court will be affirmed as to this phase of the appeal, without further discussion because Ora Lee, in the lower court, admitted signing the note and the mortgage and did not question the amount of the judgment, and makes no contention to the contrary here.

On motion of appellant the chancellor ordered service of summons on the Arkansas Home Building & Repair Company, S. L. Kay, and the General Contract Purchase Corporation, and all were thus made defendants. Then, after denying the allegations of Dr. West's complaint, appellant filed a cross-complaint against the other defendants in which she made the following allegations: That she entered into a contract November 8, 1948, with the Arkansas Home Building & Repair Company (hereafter referred to as Company) whereby the Company agreed to make certain repairs on the property above described (and apparently on Lots 41 and 42 of the same addition, which were owned by appellant) for a consideration of $1,400 and that the Company knew all the time

it did not intend to perform the contract; that in said contract the Company also agreed to take up the Dr. West note and to allow her ten years' time to pay both amounts; that the Company tricked and deceived her into signing a second contract on December 10, 1948, which was similar to the first one with the exception that it eliminated the said ten-years feature, and bound her to sign a note for said repairs payable "36 @ 35.14 G.C.P.C."—the meaning of which was not explained to her; that the Company on November 20, 1948, tricked her into signing an FHA Title I note for said repairs and without her knowledge sold same to the General Contract Purchase Corporation (hereafter referred to as Corporation); that, beginning February 27, 1949, she made monthly payments in the amount of $35.14 to the Corporation, totaling $300.62, believing that it was pursuant to the November 8th contract with the Company; that some repairs, but only to the extent of about $500, were made by the defendant Company before January 31, 1949; and she prays damages against the Company and S. L. Kay (Kay was an officer and agent of the Company) and asks for cancellation of the note held by the defendant Corporation.

After a general denial by the Company, Kay, and the Corporation, the Industrial Bank of Saint Louis intervened, stating that on January 10, 1949, it purchased from the Corporation the note in litigation, before maturity, without notice, for a lawful consideration, and was a holder in due course, and prayed judgment in the sum of $964.16.

The testimony fully sustains the finding of the chancellor that the Bank was the holder of said note in due course, for a lawful consideration, and since appellant offers no evidence to the contrary and admits signing the note, the judgment in this respect is here affirmed.

This brings us to a discussion of appellant's claim against the Arkansas Home Building & Repair Company. A photostatic copy of the November 8, 1948, contract and a ribbon copy of the December 12, 1948, contract are attached to and contained in the record. The

first one shows two long marks in the form of an "X" on its face. It details certain repairs and contains the words "To Fur Mtg. Loan for 10 yrs." Appellant contends Kay cancelled it without her authority while she was in his office, although she admits making several monthly payments on the note which was executed by her pursuant to the second contract. The first contract was signed by appellant and one Etheridge for the Company and contained these words, "Acceptance is subject only to the approval of our Credit Department and shall be considered an order to proceed with the improvements." Appellant admits she can read and that she did read both contracts as well as the note when she signed them.

Appellant contends the repairs were not made as called for in the contract of December 10, 1948, which details the things to be done, and contains everything embodied in the November 8, 1948, contract. Appellant's testimony fails to substantiate her contention that repairs were not made, except as to a small amount of piping for which the Company has reimbursed her. The finding of the chancellor that appellant was not entitled to recover from the Arkansas Home Building & Repair Company is not contrary to the weight of the evidence and the judgment of the lower court in this respect is likewise affirmed.

The decree of the lower court gave the Industrial Bank of Saint Louis a lien on appellant's property, subject only to the lien given Dr. West, to secure its judgment. We are unable to find anything in the record to justify this part of the decree. The Bank in its interplea made no such contention and no lien is asked for in the prayer. Also the note itself makes no mention of any lien and the record does not show that a lien was perfected under the statute providing for a materialmen's lien. The only lien the Bank would have under these circumstances would be that of a judgment creditor. In this connection the record does not disclose definitely whether the property involved constituted appellant's homestead or, if it is her homestead, the exact amount of land it embraces. It will be remembered that Dr. West foreclosed on Lot 40, but appellant also owns Lots 41

and 42. The Bank would not have a judgment lien on the homestead or on the surplus of the proceeds thereof if sold under Dr. West's mortgage lien. See *Sims* v. *McFadden,* 217 Ark. 810, 233 S. W. 2d 375.

The judgment of the lower court will be affirmed in all respects except as to the part giving the Bank a lien on appellant's property, and as to this it is reversed with directions to the lower court for further orders respecting the Bank's lien not inconsistent with this opinion.

MOTORS INSURANCE CORPORATION *v.* COKER.

4-9465 238 S. W. 2d 491

Opinion delivered April 9, 1951.

R. Coker Thomas, for appellant.

Bert B. Larey, for appellee.

ROBINSON, J. On the 28th day of April, 1949, Ellen Kerksieck and Marshall Coker, while driving their automobiles, had a collision. Ellen Kerksieck carried with the appellant herein a property damage insurance policy covering the damage to her car. On the 4th day of May, 1949, the Insurance Company paid her $833.47 in settlement of the damages to her automobile under the terms of the policy.

On the 7th day of May, 1949, Ellen filed suit against Coker asking for damages by reason of personal injuries she received at the time of the collision. Subsequently, she settled with Coker and dismissed with prejudice the case which she had filed against him. Thereafter, on the 24th day of October, 1949, the Motors Insurance Corporation, the appellant herein, filed suit against Coker alleging that the Insurance Company had paid Ellen for the damages she sustained to her automobile, and, by assignment, the Insurance Company was subrogated to Ellen's rights as against Coker for the damages to Ellen's car. The defendant Coker entered a plea of *res judicata.* After consideration of the Stipulations and Agreements of counsel (which do not appear in the record), the Court dismissed the suit for the reason that there was only one tort committed, that Ellen had but one cause of action, which had been exhausted, and that the issue was *res judicata.* We agree with the trial court.

In the case of *Robinson* v. *Mo. Pac. Trans. Co.,* 192 Ark. 593, 93 S. W. 2d 311, Mr. Justice MEHAFFEY, speaking for the Court said: "It is well-settled doctrine in this jurisdiction that a judgment of a court of competent jurisdiction is conclusive of all questions within the issue, whether formally litigated or not. It extends not only to questions of fact and law which were decided in the former suit, but also to the grounds of recovery or defense which might have been, but were not, presented." A long line of cases supporting this view are cited therein.

In the case of *Ozan Lumber Co.* v. *Tidwell,* 213 Ark. 751, 212 S. W. 2d 349, Tidwell had sued the Lumber Company for personal injuries, and, after recovering a

judgment, filed another suit for property damage growing out of the same tort. We held the second suit to be *res judicata* and there said:

"Appellee, Tidwell, alleged in his first Complaint, filed in 1945, not only a cause of action for personal injuries, but also a cause of action for the destruction of, or damages to his truck, but he did not pray for any property damage, a right that was open to him and which in view of the allegations in his complaint he should have litigated in his first suit. We hold, therefore, that the former judgment was conclusive not only of all damages for personal injuries, but for any damages to his truck." And the Court quoted from *McDaniel* v. *Richards,* 141 Ark. 453, 217 S. W. 478, as follows:

"Mr. Justice Wood, speaking for the court, said: 'When a complaint on its face shows that a cause of action stated therein was between the same parties and involving the same subject-matter as that determined or which could have been determined in a former suit between them, the complaint fails to state a cause of action which the plaintiff can maintain against the defendant and is demurrable. The demurrer in such case will be treated as a plea of *res judicata,* and the case disposed of the same as if such formal plea had been filed.' "

In the instant case, Ellen Kerksieck is not a party. However, before the suit could be maintained properly, it would be necessary to make her a party. § 27-802 Ark. Stats. provides: "When the assignment [of the thing in action] is not authorized by Statute, the assignor must be a party as plaintiff or defendant."

In the case of *C., R. I. & Pac. Ry. Co.* v. *Cobbs,* 151 Ark. 207, 235 S. W. 995, Cobbs suffered a fire loss of about $20,000. The insurance Companies paid Cobbs $8,200. Cobbs sued the Railway Company alleging that the fire was caused by the Railway Company's negligence and asked judgment for the loss suffered less the amount of insurance. The Insurance Companies also sued in the same case asking judgment on their claims of subrogation. The question arose as to whether the Insurance

Companies were proper parties in that particular suit. Speaking for the Court, Chief Justice McCulloch said:

"The insurance companies, by virtue of the assignment to them of a portion of the right of actions are possessed of an interest in the subject-matter in controversy, and are therefore necessary parties. Cobbs, the other plaintiff, was a necessary party, not only from the fact that he was the owner of an interest in the subject-matter of this controversy, but also for the reason that he was assignor of that part of the cause of action which was assigned to the insurance companies, and since it is a right of action not assignable under our statute (Crawford & Moses' Digest, § 475) [now Ark. Stats., § 68-801], the assignor was a necessary party to a suit to recover. *St. L., I. M. & S. Ry. Co.* v. *Camden Bank,* 47 Ark. 541, 1 S. W. 704. Under the Statute cited above, only agreements or contracts in writing are assignable, and the cause of action in the present instance was not based on an agreement in writing. The insurance companies succeeded, by the assignment, to the right of action by Cobbs for the recovery of unliquidated damages on account of the wrongful act of the railway company. . It follows, therefore, that the cause of action, for the reasons stated, are not separable."

"Where the assignment of a thing in action is not authorized by Statute the assignor must be a party as plaintiff or defendant." *Young* v. *Garrett,* 149 Fed. 2d 223.

Appellant strongly relies on the case of *Underwriters at Lloyds Insurance Company* v. *Vicksburg Traction Co.,* 106 Miss. 244, 63 So. 455, 51 L. R. A., N. S. 319. However, we think this case is in conflict with our case of *Railway Co.* v. *Cobbs, supra,* as it was held in the Mississippi case that the assignor was not a necessary party to the litigation. But, even if the Mississippi case was not distinguishable, we would not follow it, because we think the best rule is to the effect that a defendant should have to stand but one lawsuit growing out of one tort when the cause of action is in one person or those holding through such person.

If it were otherwise, a defendant would not dare settle a case for fear that, at a later date, someone would make another claim against him by reason of being subrogated to some right of the injured party, either through having paid a property damage claim, or loss of time claim, or accidental injury claim, or some other claim. In fact, even though the defendant may have paid a judgment in favor of the injured party, he would never know where he stood until the alleged tort was barred by the Statute of Limitations.

Affirmed.

McFaddin, J., concurs.

Ed. F. McFaddin, Justice (Concurring). I concur in the result reached by the majority but for a reason entirely different from that stated in the majority opinion: my reason is that the record before us is incomplete and therefore the case must be affirmed.

I cannot agree that the judgment must be affirmed on *res judicata;* because the record now before us does not contain a copy of the complaint filed on May 7, 1949, in the first case brought by Ellen Kerksieck against Marshall Coker. Until we see the allegations contained in that complaint, it is impossible to say whether it was sufficiently similar to the one in *Ozan Lumber Co.* v. *Tidwell,* 213 Ark. 751, 212 S. W. 2d 349, as to make the adjudicated case *res judicata* of the case now at bar. It would have been legally possible for Ellen Kerksieck to have alleged, in her first complaint, that she had split her cause of action and had assigned to the Motors Insurance Company so much of the cause of action as related to her property damage, and that she was, in her said first complaint, suing only for her personal injuries. If the complaint had contained such allegations, then I hardly see how the majority could reach its present conclusion as to *res judicata.* So I make the point that until we see the complaint that Ellen Kerksieck filed in the first case against Marshall Coker, we are in no position to hold the rule of *res judicata* to be applicable.

But the reason which requires affirmance of the Circuit Court judgment in the present case is the fact that the record now before us does not contain the *stipulation* made by the parties at the time of the trial in the present case. That there was some such stipulation is attested by the judgment in the present case which contains this recitation:

". . . and said cause was submitted to the court upon *stipulations* and upon the pleadings set forth hereafter; the complaint of the plaintiff, answer and cross-complaint of the defendant, and amended and substituted answer and cross-complaint of the defendant setting forth a plea of *res judicata;* and the court, after hearing argument of counsel, *stipulations and agreements* therein, and argument of counsel for plaintiff and counsel for defendant, doth find: . . ." (Italics our own.)

The words italicized show that the Miller Circuit Court, when it rendered its judgment of dismissal from which comes this appeal, had before it some sort of "stipulations and agreements." Now there are no stipulations or agreements in the record here; and in the absence of such, we must presume that the matters presented to the trial court were sufficient to justify the conclusion that was reached. In *School Dist.* v. *Lake City Special School District,* 144 Ark. 362, 223 S. W. 381, we said:

". . . The judgment and recitals therein are the last expressions of the court and the highest evidence by which to determine the course, conduct and result of the suit. Whenever it conflicts with the recitals in docket entries or in a bill of exceptions, the recitals in the judgment will control and all else must yield. If the judgment roll contains an erroneous recital, the only remedy is to obtain a correction thereof. In the instant case, the judgment recites that the case was heard upon other evidence than that set out in the abstract, and we can not treat the recital therein as *dictum,* in accordance with the suggestion of appellant."

So in the final analysis, I rest my views of affirmance on the fact that the trial court had before it some stipula-

tions and agreements of some kind between the opposing counsel, and that such stipulations and agreements are not in the record before us; and so we must indulge the presumption that the absent matters support the judgment rendered by the trial court.

HARLOW *v.* RYLAND.

4-9467 238 S. W. 2d 502

Opinion delivered April 9, 1951.

Hendrix Rowell, for appellant.

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

HOLT, J. Susie Ryland Harlow (appellant) while riding as a guest in an automobile, owned and operated by her nephew, George Ryland (appellee), received personal injuries. She sued for damages in Federal Court. Appellee filed motion to dismiss (which was treated as a demurrer) since the complaint admitted the relationship of the parties to be that of aunt and nephew and therefore within the third degree of relationship by consanguinity or affinity.

In support of his demurrer, appellee affirmatively pleaded § 75-915, Ark. Stats. 1947, which provides: "No person transported or proposed to be transported by the owner or operator of a motor vehicle as a guest, without

payment for such transportation, nor the husband, widow, executors, administrators or next of kin of such person, shall have a cause of action for damages against such owner or operator, or other persons responsible for the operation of such car, for personal injury, including death resulting therefrom, by persons while in, entering, or leaving such motor vehicle, unless such injury shall have been caused by the willful misconduct of such owner or operator. And in no event shall any person related by blood or marriage within the third degree of consanguinity or affinity to such owner or operator, or the husband, widow, legal representative, or heirs of such person, have a cause of action for personal injury, including death resulting therefrom, against such owner or operator while in, entering or leaving such motor vehicle, provided this act (section) shall not apply to public carriers. (Acts 1935, No. 179, § 1, p. 481; Pope's Dig., § 1304.)"

Appellant responded to the demurrer, alleging that the above section, insofar as it denies a cause of action to a guest related to the operator of the automobile as was appellant here, is unconstitutional, contravening Art. II, §§ 8 and 13 of the Constitution of the State of Arkansas, and the 14th Amendment to the Constitution of the United States.

The Federal District Court sustained the demurrer and dismissed appellant's complaint, and on appeal to the Circuit Court of Appeals, the judgment of the District Court was affirmed. In affirming, the Circuit Court of Appeals said: "It is our conclusion that the District Court and this Court are justified in *assuming and deciding* that the provision is constitutional unless and until the Supreme Court of Arkansas shall have ruled otherwise."

Following the above decision of the Circuit Court of Appeals, appellant filed complaint in the Lincoln Circuit Court in which the parties and cause of action were identical and again sought to recover damages.

Appellee filed answer in which he affirmatively pleaded as a complete bar to appellant's cause of action, the defense of *res judicata*.

The trial court sustained appellee's plea of *res judicata* and dismissed appellant's complaint. This appeal followed.

The parties agree, as stated by appellant, that "the sole question to be decided upon this appeal is whether or not the plea of *res judicata* should apply as a complete bar to the right of Susie Ryland Harlow to proceed against George Ryland in the Lincoln Circuit Court, in view of the judgments rendered against her in Federal District Court in Little Rock, Arkansas, and the Circuit Court of Appeals, Eighth Circuit, St. Louis, Missouri."

Appellant, after admitting that the present suit "involves the same parties and the same cause of action," as in the former action in the Federal Court, contends that there was lacking a final adjudication in a court of competent jurisdiction.

Appellant chose the tribunal in which the first suit was filed, and we find nothing in the record here, and appellant fails to point to anything, showing lack of jurisdiction in the Federal Court. Clearly, we think the Federal Court had jurisdiction and we so hold. We also hold that the trial court correctly sustained appellee's plea of *res judicata,* and correctly dismissed the present action.

The rule is well settled in this State that a judgment sustaining a demurrer which challenges the sufficiency of a complaint, without pleading further, as here, is a final judgment on the merits, and unless reversed on appeal is conclusive on the parties on the issues reached by the demurrer and the litigation as between the same parties is at an end.

In *Robinson* v. *Pringle,* 196 Ark. 219, 117 S. W. 2d 25, we said: "We are of the opinion that the demurrer went to the merits of the case, was a final order from which no appeal was taken, and, whether right or wrong, is a bar against said appellants from maintaining the present action. In *McNeese* v. *Raines,* 182 Ark. 1091, 34 S. W. 2d 225, we said: 'It is well settled in this state that a judgment sustaining a demurrer is equally conclusive by way of estoppel of the facts admitted in the demurrer as a verdict finding the same facts would have been. The

reason is that the judgment is upon the merits of the action as presented by the complaint and admitted by the demurrer and is as effectual as if there had been a verdict upon the same facts, for they are established by way of record in either case. When the facts are established, the litigation as between the same parties and their privies is at an end. Therefore, when the party declines to plead further and judgment is rendered against him, it is a final one. *Luttrell* v. *Reynolds,* 63 Ark. 254, 37 S. W. 1051, and *Barrentine* v. *Henry Wrape Co.,* 113 Ark. 196, 167 S. W. 1115,' " and in *Barber* v. *Sager,* 141 Ark. 1, 216 S. W. 36, we find this language: "It is unnecessary to determine here whether the demurrer was properly sustained or not; any error committed in that respect could have been cured by appeal. On the other hand, only those matters are concluded by the decree on the demurrer which were within the allegations of the complaint. * * *: but the decree is final and conclusive as to all the allegations contained in the complaint, etc."

In *Tri-County Highway Improvement District* v. *Vincennes Bridge Company,* 170 Ark. 22, 278 S. W. 627, we said: "In a case note to 13 A. L. R. p. 1104, it is said that it is well settled that the judgment rendered upon sustaining a demurrer is equally conclusive by way of estoppel of the facts confessed by the demurrer as a verdict finding the same facts would have been; and, accordingly, that, where the demurrer goes to the merits, a judgment sustaining it is a bar to a subsequent suit on the same cause of action. * * *

"For the same reason the value of a plea of *res judicata* is not to be determined by the reasons which the court rendering the former decree gave for doing so. (Citing cases.) Hence it may be taken as settled that, in order to render a plea of *res judicata* available, it makes no difference whether the facts upon which the court proceeded in determining the merits were proved by evidence upon an issue joined, or were admitted by way of demurrer to a pleading stating the facts."

"It is well settled that a judgment upon demurrer or upon motion to dismiss is as conclusive upon the par-

ties as a judgment rendered upon proof. * * * A general judgment or a decree of dismissal, without more, renders all the issues in the case *res judicata,* and constitutes a bar to any subsequent suit for the same cause of action," *Brooks* v. *Ark.-Louisiana Pipe Line Co.,* 77 Fed. 2d 965 (CCA 8th).

As indicated, appellant, although she could have brought her cause of action in the State Court in the first instance, elected to present her cause in the Federal Court, a court of competent jurisdiction. She has had her day in court and since it is undisputed that the parties and cause of action in the State Court were the same, the judgment of the District Court of the United States in her former action, which was affirmed by the Circuit Court of Appeals, is *res judicata* and conclusive on appellant.

Affirmed.

HEARNSBERGER *v.* MCGAUGHEY.

4-9394 239 S. W. 2d 17

Opinion delivered March 12, 1951.

Rehearing denied May 28, 1951.

Purifoy & Purifoy, for appellant.

L. B. Smead and *J. Bruce Streett,* for appellee.

GRIFFIN SMITH, Chief Justice. In December, 1948, Gladys McGaughey was severely injured when Frank McGaughey's automobile in which she was riding was struck by a truck driven by Ellis Ford. The complaint sought $70,000 to compensate severe personal injuries and other losses. From a judgment for $13,600 the defendants have appealed.

Mrs. McGaughey is a registered nurse who because of former injuries had temporarily abandoned her profession. Her husband, Jack McGaughey, has been dead for some time, and appellee resides with Frank McGaughey, who was Jack's uncle.

In December, 1948, appellee resumed work on a part-time basis, earning $7 per day. When the collision resulting in this appeal occurred, appellee was being driven in Frank McGaughey's car on Highway 79, southwesterly. Seven miles from Camden a side-road or cut-off intersects Highway 79 northeast of Buena Vista. Ford, driving for Ellis Graham with several other Negroes, was taking a truck of pulpwood to the International Paper Company's Mill at Camden. There was substantial testimony for the jury's finding that Ford was traveling at a high rate of speed and struck the McGaughey car on appellee's side of the road. This determination was not contrary to physical facts and was responsive to testimony that placed the truck over the median line. We can not say as a matter of law that Ford's negligence did not cause the collision, or that appellee's conduct was a contributing factor.

The most perplexing phase of the controversy involves the relationship between H. G. Hearnsberger and Graham. The paper company did business with several procurers of raw material, assigning territory to each. Hearnsberger was one upon whom the company depended. Weekly price lists, specifications, etc., would be sent out by the mill, indicating the quantity of wood desired and the price to be paid. The offer to buy specified delivery at Camden by rail or truck. Four such dealers were on the mill's list in December, 1948.

Graham, who owned a truck, was frequently engaged by Hearnsberger to haul pulpwood. There was no testimony contradicting Graham's assertion that he employed his own men when Hearnsberger assigned to him a designated task, nor is it shown that Hearnsberger told any of the employes how the work was to be done, thereby supervising means and methods touching physical operations. In this respect the general principles discussed in *Moore and Chicago Mill & Lumber Co.* v. *Phillips,* 197 Ark. 131, 120 S. W. 2d 722, are applicable. It was there said that even though control [with the right of] direction be retained by the owner [or employer], the relationship of master and servant is not destroyed unless such control involves the physical conduct of the contractor in the performance of the work "with respect to the details thereof." While we adhere to the rules expressly affirmed in that case, the factual situation here is different in that the pulpwood cut at Graham's direction was taken from a tract of land formerly owned by Homer Ingram of Pine Bluff. The right to take pulpwood from the land was conveyed to Hearnsberger October 20, 1948, when Ingram delivered his deed to all pine measuring eight inches and above, at the stump, together with any such smaller timber the grantee might need in removing the primary purchase from the land. The consideration was $835, cash.

Hearnsberger testified that on October 25th—five days after receiving the timber deed—he sold the property to Ellis Graham and thereby divested himself of all interest in the subject-matter, and that he paid Graham

$11.50 per cord for the pulpwood delivered at the International mill. While Ingram's deed to Hearnsberger permits the pine to be taken, Hearnsberger's deed to Graham recites fee simple ownership, and the price was the same that Hearnsberger had paid Ingram, "$835 in cash, the receipt of which is hereby acknowledged." This language was followed by a conveyance of the pine timber. But in the deed to Graham, Hearnsberger retained "such possession of said land, at all times, as shall not interfere with [Graham's] rights under this deed for the purpose aforesaid." Mildred Thomas was employed by the First National Bank of Fordyce and Hearnsberger was chairman of the board of directors. Miss Thomas, a notary public, identified her signature to Hearnsberger's acknowledgment and testified that the deed was executed the day of its date—October 25th. It was not recorded.

It thus appears *prima facie,* that ownership of the timber passed to Graham for the same amount Hearnsberger had paid, although testimony disclosed that cash was not paid, and the deed does not recite retention of a lien. Mill tickets showing receipt of the wood for credit purposes listed Hearnsberger as owner of the land from which the cutting originated; and, while the information may have been given the mill superintendent by Ford or Graham, it is conceded that Hearnsberger expected to recoup through payments made to Graham.

The mere fact that Hearnsberger was treated as owner of the land would not be sufficient to sustain a finding that as between Graham and Hearnsberger the relationship of independent contractor and employer did not exist, but it is a circumstance carrying weight when considered with Graham's ownership of the truck that featured in the wreck. It had been bought in June, 1948, for something in excess of $800 with a down payment of $200. Having ascertained that pulpwood-hauling was profitable, the truck owner employed three other Negroes to assist with the work. He did not know Hearnsberger when the purchase was made. Mechanical repairs and other expenses were his independent obligations. But,

said Graham, "I paid for gasoline out of the wages I made with this truck." Here, again, is language indicating employment, and while it may be true that legal niceties—such as the difference between independent contractor and master and servant—should not be dealt with in a manner imputing to Graham an understanding of technicalities, yet the jury that heard him and observed his demeanor might have inferred that use of the term *wages* was an inadvertence revealing more than its casual use in other circumstances might suggest.

After the collision Hearnsberger formed a corporation called Southern Pulpwood Co., completing it February 14, 1949. In the meantime Ingram had complained that timber substantially smaller than the deed of October 20th called for had been cut. Ingram had formerly resided in Ouachita county near Buena Vista, not far from the land sold to Hearnsberger.[1] After ascertaining that undersize timber had been cut, Ingram called Hearnsberger at Fordyce by telephone, and later received two letters. During the telephone conversation Hearnsberger told Ingram he thought $200 asked for the undersize cutting was excessive—"that I was a little high in my estimate of the trees." Hearnsberger also told Ingram he had lost money on each tract—"including the one described in Graham's deed."

The first letter, dated April 22, 1949, was on the printed stationery of "H. G. Hearnsberger — Railroad Ties, Logs, and Pulpwood." It merely informed the claimant that Hearnsberger had been down to look over "that timber." Ingram was invited to come to Fordyce for a personal conference. In his second letter, April 28, 1949, Hearnsberger expressed regret that Ingram would not meet him at Buena Vista "so that we could look over the tract together." Hearnsberger then mentioned the number of stumps he had counted, saying, "I was sorry to see even this small number [of undersized trees] cut against your specifications. However, I can very easily see how it was done by knowing the general intelligence

[1] When Hearnsberger bought the timber on the 60 acres sold to Graham for $835, he acquired from the same grantor another tract, or rather the timber on it, paying in all $1,860.

of the Negro cutter, . . . even though each one had been cautioned that your job was to have been cut to eight inches instead of the six inches they cut to on most other jobs. Each one was provided with an eight-inch measure, *and they were supervised by one of our best men.*"[2] The claim was settled for $175.

When Hearnsberger was asked why his name appeared on the paper company's tickets issued to Graham he explained that at times the company's requirements were large; that he bought from several independent sources; that the difference between what he paid those who filled his orders and what he received for the pulpwood was profit, and that delivery information was necessary before he could settle with sellers like Graham. The company's agent in charge of checking deliveries would ask drivers where the wood came from.

It is not denied that the load being hauled by Ford for Graham when the collision occurred came from that part of the Ingram tract sold to Hearnsberger,[3] and that Hearnsberger in discussing erroneous cutting with Ingram said that removal of the timber had been supervised by "one of our best men."

Appellees attach significance to Ingram's testimony, not contradicted, that in April following the December incident, Hearnsberger asserted that he lost money on the Buena Vista tract, notwithstanding the contention that Graham, through installments, had settled for the purchase price, and had also repaid the item of $175 representing Hearnsberger's adjustment with Ingram.

While giving direct testimony regarding his business transactions, Hearnsberger was asked: "During December, 1948, [while] Ellis Graham was selling wood to you f. o. b. the mill, could he also offer to sell to anybody else he wanted to?" A. "Yes, sir." Q. "In short, you didn't have a binding agreement to buy the wood: if [Graham] could purchase it you would take it from him,

[2] Italics supplied.

[3] The load featuring in the collision was the second one Graham took from the Ingram tract December 7th.

or anybody else you could get it from?" A. "That is right."

In explaining the payment of $175 to Ingram, Hearnsberger testified: "I sold this tract of timber to Ellis Graham and made him a deed to it. Under this sale I contract with Graham to buy the pulpwood billets he cut from it. Some of the timber was sawlogs: I didn't buy that—just the pulpwood." Later, in mentioning the pulpwood, Hearnsberger spoke of it as "the part I contracted to buy." The jury could have found that these explanations were inconsistent with the contention that there was no binding agreement to take the pulpwood.

We realize, of course, that witnesses do not always employ appropriate expressions to convey a particular meaning. Here it is possible that Hearnsberger had in mind that his purpose was not to hold Graham to the contract if the owner of the legal title could do better in a different market. But the implication throughout is that in selling to Graham, Hearnsberger expected to receive reimbursement through sale of the pulpwood. The second part of the question directed to Hearnsberger was, of course, broad enough to include wood taken from other land; but, aside from niceties of language and doubt cast by inconclusive statements, the jury could have been perplexed with the two answers; and since the finders of facts are charged with the duty of basing reasonable conclusions upon natural inferences, there was substantial testimony either for or against the collateral issue.

Although as appellate judges we might not question a single affirmative statement or discount any denial Hearnsberger made respecting his dealing with Graham, that is not the issue before us. It is, rather, What substantial testimony did the jury have, with attending circumstances, for finding that this appellant was not referring to Graham when he asserted the timber cutting was supervised "by one of our best men?" The answer must be that there was a question of fact in support of appellee's theory that Graham was Hearnsberger's servant.

No single act in party relationships would be sufficient to overcome the *prima facie* showing that Graham was an independent contractor, but when all are considered it is not reasonable to say that factual substance was lacking. In charging a jury District Judge ROBERT P. DICK of the Western District of North Carolina, (*United States* v. *Searcey,* 26 Fed. 435) said:

"Circumstantial evidence, strictly speaking, consists of a number of disconnected and independent facts, which converge toward the *fact at issue* as a common center. These concurrent and coincident facts are arranged in combination by a mental process of reasoning and inference, enlightened by common observation, experience, and knowledge. When presumptions arise from a number of connected and dependent facts, every fact essential to the series must be proved. Such evidence is like a chain, in which no link must be missing or broken which destroys its continuity. Circumstantial evidence is, like a wire cable, composed of many small associated but independent wires. . . . The strength of the cable depends upon the number of wires which are combined, but some of the wires may be broken, and yet the cable be sufficiently strong to uphold the structure. As no chain is stronger than its weakest link, a chain is less reliable when it has a great number of links, but a wire cable is strengthened by an increase in the number of its wires. This combination of attenuated wires may be stronger than a solid rod of iron of the same size which may have flaws affecting its strength. Where circumstantial evidence consists of a number of independent circumstances, coming from several witnesses and different sources, each of which is consistent and tends to the same conclusion, the probability of the truth of the fact in issue is increased in proportion to the number of such circumstances."

In the case at bar we are not willing to say that the uncontradicted facts, when reinforced with inferences arising from the combination of circumstances, did not present a question for the jury.

Affirmed.

SCOBEY, ADMINISTRATRIX *v.* SOUTHERN LUMBER COMPANY.

4-9441 238 S. W. 2d 640

Opinion delivered March 26, 1951.

Rehearing denied April 23, 1951.

Wilson, Kimpel & Nobles, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

ROBINSON, J. The Workmen's Compensation Commission denied a claim for compensation arising by reason of the death of W. Fred Scobey, and such action of the Commission was sustained by the Circuit Court. Scobey died from cancer of the lungs. The sole question is whether death was due to accidental injuries which arose out of, and in the course of, his employment.

Scobey worked for the Southern Lumber Company almost continuously from 1918 to April, 1942, at which time he went to Barnes' Hospital in St. Louis where he died April 22, 1942. Scobey was employed by the Lumber Company as a saw-filer and performed his work in a room on the second floor of the mill building. This room, according to the undisputed testimony, was poorly ventilated and had no provisions for the removal of the emery dust, filings and saw-dust. It is undisputed that the filing of the saws caused small particles of emery dust to fill the air and that the floor of the room was improperly sealed, containing large cracks and holes. Directly below the filing room were located large saws used in cutting lumber, and dust and fumes from this operation drifted upward through the cracks into the filing room and contributed to the hazardous condition of the air.

Subsequent to Scobey's death, a claim was filed in which the nature of the accident was given as "inhaling emery and steel dust," and the cause of injury or death as "epitheliomatous cancer."

"All the courts of this country are agreed that, in determining whether a disputed claim under the Workmen's Compensation law should be allowed, the terms of the Act must be given a liberal interpretation in favor of the claimant; and the Act itself provides that in a proceeding to enforce a claim under the Act 'there shall be a *prima facie* presumption that the claim comes within the provisions of this Act.' " *Batesville White Lime Co.* v. *Bell,* 212 Ark. 23, 205 S. W. 2d 31.

Epitheliomatous cancer is listed as an occupational disease in the Workmen's Compensation Act, Ark. Stats., § 81-1314. Dr. Evarts A. Graham, Professor of Surgery, Washington University and Chief Surgeon at Barnes Hospital, wrote that Scobey died of epitheliomatous cancer. However, the epitheliomatous cancer, which is listed as an occupational disease in the Workmen's Compensation Act, refers to one caused by tar pitch, bitumen, mineral oil, or any of those products, and there is no showing that decedent's cancer was caused by any of these substances. The question that necessarily follows is: Was

the cancer caused or aggravated by an injury resulting in death? There is no substantial evidence in the record to the effect that the cancer was not aggravated by an injury. To sustain its case, the Lumber Company relies chiefly on two letters written by Dr. Graham. Dr. Graham wrote J. R. Wilson, one of the attorneys for appellant, as follows:

"I have your letter of August 21. Both Dr. Goodof and I will be able to see you on the morning of September 1st between 10:00 A. M. and noon. Before you come here, however, I wish you to have a clear understanding that I cannot honestly express any opinion which would indicate that Mr. Scobey's occupation had anything to do with the cancer in his lung. There is no evidence of any kind at the present time which would support such an opinion. I feel very sorry for Mrs. Scobey, and, of course, I would be very glad to help her obtain some money if I could do so honestly.

"I told her when she was here, in fact before Mr. Scobey's death, that I could not make out any connection between his occupation and his cancer, and I have told her so twice since his death in letters to her. I am unwilling to make any statement which would imply that I felt that his cancer was due to his occupation."

On May 19, 1944, Dr. Graham advised a representative of appellee:

"Following up our conversation, I am writing you this letter concerning the case of Mr. Fred William Scobey, of Warren, Arkansas, who died in the Barnes Hospital of a carcinoma of the right lung, on April 20, 1942.

"There is no evidence that is trustworthy that the inhalation of emery dust, or of fumes of tar, pitch, bitumen, mineral oil or paraffin has anything to do with the production of a cancer of the lung. The same may be said for inhalation of the products themselves, including the inhalation of steel filings. At the present time, there is no satisfactory explanation of the origin of a primary cancer of the lung. Certainly there is no justification for any claim that in Mr. Scobey's case, his cancer was in any

way connected with the fact that he might possibly have inhaled some of the things mentioned."

But, these letters must be considered along with other testimony of Dr. Graham. In referring to the cancer that caused the death of decedent, Dr. Graham was asked the following question:

"Q. Are you able to state the cause of such a cancer, Dr. Graham?

"A. Unfortunately not. No one knows the cause of such a cancer."

And again:

"Q. * * * As I get it, in all of the opinions that you have expressed about it, you have indicated that you don't think that the exposure to the emery dust and to these fumes caused the cancer, but that they would accelerate a cancerous condition, aggravate it and make it worse?

"A. I said 'might' instead of 'would,' Mr. Wilson.

"Q. You said 'might.' Well, that is an expression that doctors use, isn't it, when they mean it does do it in some cases?

"A. Yes, that is right."

The effect of Dr. Graham's testimony is that he does not know what causes cancer, but that the exposure to emery dust and fumes might accelerate or aggravate a cancerous condition. Therefore, it necessarily follows that his testimony is not substantial evidence to the effect that emery dust, saw filings and saw-dust did not aggravate a cancer, which resulted in the death of Scobey.

Dr. F. O. Mahoney, a graduate of the Medical Department of Tulane University and past President of the Arkansas Medical Association, testified that it was the emery dust that caused the cancer by constant irritation, and Dr. George F. Burton, radiologist specializing in treatment of cancer by using x-ray and radium, made a thorough study of this case, including the evidence given by Dr. Graham, and he testified: "Irritation on any part

of the body has a tendency to produce cancer. * * * We do have some evidence that irritation in the lungs will produce cancer. This has been borne out in the last 10 years. Cancer in the male has been more frequent than in the female. That ratio is 10 to 1. In the last 10 years that ratio has decreased and the ratio in the male and female is becoming more nearly equal. We think that has occurred because of the increase in smokers in women."

Dr. Burton further testified that, in his opinion, the inhalation of any irritant would aggravate a cancerous condition. Normal tissue has a tendency against cancer. If you destroy or damage tissue you make cancer worse. Irritation of a cancer would bring about earlier death. Scobey's cancer probably developed a year or a year and a half before his death. The fact that it took the cancer about a year and a half to kill Scobey after it started, does not make it any less an accident.

In the case of *Murch-Jarvis Co., Inc.* v. *Townsend,* 209 Ark. 956, 193 S. W. 2d 310, this Court said: "Appellants insist, however, that appellee did not suffer an accidental injury because no definite date or occasion can be fixed as to when the aggravation happened. Schneider, in his Workmen's Compensation Text, Vol. 4, Perm. Ed., p. 387, has this to say on the question: 'Diversity of opinion exists as to what constitutes the customarily required definite time and place of an accident. On this question the expressions of the courts vary from the statement that 'accidents do not happen all day' to decisions to the effect that it may require as much as six months for an accident to culminate in a disabling injury. A reasonably definite time is all that is required. A certain fixed and definite event or occurrence is required from which time can be calculated. No stated period can be given as sudden as applied to each case, each must naturally depend on its own circumstances."

Also, in the case of *Lee Mathew Shipping Corporation* v. *United States Employee's Compensation Commission,* 56 Fed. 2d 860, where the inhalation of dust from shoveling copper ore over a period of several days aggravated the preëxisting disease of bronchiectasis, the re-

sulting disability was held to be an "injury," under the Longshoremen's and Harbor Workers' Compensation Act. And, the Missouri Court, in *Vogt* v. *Ford Motor Company,* 138 S. W. 2d 684, held that asthma was a compensable action where it was contracted over a four months period from paint dust.

In the case of *McGregor & Pickett* v. *Arrington,* 206 Ark. 921, 175 S. W. 2d 210, it is said: "As stated in some of the cases it is no less an accident when a man suddenly breaks down than when there is a like mishap to the machine he is operating, nor is it a defense that a workman had some pre-disposing physical weakness, but for which he would not have broken down. If the employment was the cause of the collapse, in the sense that, but for the work he was doing, it would not have occurred when it did, the injury arises out of the employment."

Schneider, in his Workmen's Compensation Text, Vol. 4, § 1328, p. 543, states: "It may be stated generally that if the conditions of the employment, whether due to over-exertion, excessive heat, *excessive inhalation of dust and fumes,* shock, excitement, nervous strain or trauma, tend to increase an employee's blood pressure sufficiently to cause a cerebral hemorrhage, such result constitutes a compensable accident within the intent of most Compensation Acts, though the employee may have been suffering from a preëxisting diseased condition, which predisposed him to such results, or where such result would have occurred in time due to the natural progress of such preëxisting conditions. * * * "

"In determining the sufficiency of the evidence, doubts should be resolved in favor of the claimant, and the evidence should be reasonably construed in his favor." *Herron Lumber Co.* v. *Neal,* 205 Ark. 1093, 172 S. W. 2d 252.

In a very recent case of *Triebsch* v. *Athletic Mining & Smelting Co., ante,* p. 379, 237 S. W. 2d 26, it is said: "We have many times held that the Workmen's Compensation Law should be broadly and liberally construed; and that doubtful cases should be resolved in favor of the claimant. See *Hunter* v. *Summerville,* 205

Ark. 463, 169 S. W. 2d 579; *Elm Springs Canning Co.* v. *Sullins,* 207 Ark. 257, 180 S. W. 2d 113; *Nolen* v. *Wortz Biscuit Co.,* 210 Ark. 446, 196 S. W. 2d 899, and *Batesville White Lime Co.* v. *Bell,* 212 Ark. 23, 205 S. W. 2d 31.

"The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment, because of and in the course of which he has been injured. And this is not to impose liability upon one person for an injury sustained by another with which the former has no connection; but it is to say, that it is enough if there be a causal connection between the injury and the business in which he employs the latter—a connection substantially contributory, though it need not be the sole or proximate cause." *McGregor & Pickett* v. *Arrington, supra.*

The conditions under which Scobey worked, as shown by the undisputed evidence; the testimony of Dr. Mahoney and Dr. Burton; the testimony of Dr. Smith and Dr. Rowland, who, according to the Commission's opinion, testified that the condition under which Scobey worked caused or aggravated the cancer, all considered together is substantial evidence to the effect that the constant inhalation of the emery dust and saw-dust caused an irritation in the lung which accidentally aggravated a cancerous condition, within the meaning of the Workmen's Compensation Law, and caused the death of Scobey. This evidence and the further fact that Dr. Graham's testimony upon which appellee relies, viewed as a whole, is not substantial evidence to the contrary, justifies an award.

While the claim for compensation was pending before the Compensation Commission, appellant filed suit in the Circuit Court asking for judgment against the Lumber Company on the theory that if the Commission should hold that Scobey's death was not the result of a compensable injury, then the appellant would be entitled to recover under the law as it existed in such cases prior to the enactment of Workmen's Compensation Law. On the motion of appellee, this suit was dismissed in Circuit

Court, and in view of our holding that the appellant is entitled to recover under the Workmen's Compensation Law, it necessarily follows that the trial court committed no error in the action taken in that respect, and is, therefore, affirmed.

Judgment of the Circuit Court on the compensation claim is reversed and the cause is remanded with directions that the claim be remanded to the Workmen's Compensation Commission with directions to make an award in accordance with this opinion.

The Chief Justice and WARD, J., dissent.

GRIFFIN SMITH, C.J., dissents. Insofar as I have been able to ascertain, the decision in favor of appellants stands alone as a judicial finding of fact that dust aggravates lung cancer and hastens death—a finding that clashes head-on with the frank admissions of medical men the world over who say they do not know what causes cancer, but are groping scientifically to find the answer and to determine what irritation affects it. Seemingly this court's majority is the only agency holding the heretofore undisclosed key. I would permit the Commission to be the finders of facts, just as the Bradley Circuit Court did.

HAYES *v.* COATS.

4-9446 238 S. W. 2d 935

Opinion delivered March 26, 1951.

Rehearing denied May 21, 1951.

Melvin T. Chambers, for appellant.

Keith & Clegg, for appellee.

Ed. F. McFaddin, Justice. This suit involves the application of our "After-acquired Title" Statute, which is § 50-404, Ark. Stats., and reads:

"If any person shall convey any real estate by deed purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterwards acquire the same, the legal or equitable estate afterwards acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance. (Rev. Stat., ch. 31, § 4; C. & M. Dig., § 1498; Pope's Dig., § 1798.)"

In 1922 W. G. Hayes mortgaged certain lands to D. D. Goode, and thereafter executed the five mineral deeds here in question, *each of which contained a covenant of general warranty.* The mortgage and mineral deeds were promptly recorded. Thereafter, in 1933, Goode foreclosed his mortgage and made Hayes and all the mineral deed holders defendants in the foreclosure suit, in order to cut off the rights of all junior title claimants. A decree was duly rendered and Goode purchased the property at the foreclosure sale. Two years later, in 1935, Goode reconveyed all of the property to Hayes, the same person who had executed the mineral deeds that contained the covenants of general warranty.

The holders of the mineral deeds claimed, that when Hayes reacquired title to the property then our "After-acquired Title" Statute estopped Hayes from disputing the validity of the mineral conveyances which he had executed and which contained the covenants of general warranty. Hayes instituted this suit to have his title quieted against the mineral deed holders. The Chancery Court sustained the claims of the mineral deed holders, and Hayes has appealed.

We affirm the Chancery decree. Our "After-acquired Title" Statute comes to us from the Revised

Statutes of 1836, and has been applied by this Court in many cases, of which the following are only a few: *Stone* v. *Morris,* 177 Ark. 745, 7 S. W. 2d 796; *Broadway* v. *Sidway,* 84 Ark. 527, 107 S. W. 163; *Lewis* v. *Bush,* 171 Ark. 192, 283 S. W. 377; *Sheppard* v. *Zeppa,* 199 Ark. 1, 133 S. W. 2d 860; and *Fox* v. *Three States Lmbr. Co.,* 85 Ark. 497, 108 S. W. 1137.[1] See, also, Jones "Arkansas Titles", § 129.

In *Lewis* v. *Bush, supra,* Bush had executed a mortgage on lands, and then sold a portion thereof by a deed containing a covenant of general warranty. Bush suffered the mortgage to be foreclosed and bought the lands in at the foreclosure sale. Lewis, holding under the warranty deed executed by Bush, claimed that Bush's reacquisition of title inured to the benefit of Lewis under the "After-acquired Title" Statute. Mr. Justice Wood, in upholding Lewis' claim, quoted the "After-acquired Title" Statute as applicable, after first saying:

". . . When Bush sold the land by warranty deed, he became liable to those who deraigned title from him to make his title good. Therefore, when he failed to pay the notes on which he was liable for the original purchase money, and thus permitted the land to be sold, and acquired title to the same by purchasing at the foreclosure sale, he became in reality a trustee to those who deraigned title under him. To hold otherwise would enable him to perpetrate a fraud upon them."

In the case at bar Hayes did not purchase at the foreclosure sale, but remained in possession of the property and purchased from Goode two years later; but when Hayes reacquired the title, the Statute (§ 50-404) served to pass his after-acquired title to the persons who held the mineral deeds which he had executed.

In *Stone* v. *Morris, supra,* Tyson executed a first mortgage to Harlan and thereafter a second mortgage to Wexman. Tyson defaulted on the first mortgage and allowed it to be foreclosed; and the property was pur-

[1] Other cases may be found in West's Arkansas Digest, "Estoppel," § 35, *et seq.*

chased by Harlan. When Tyson repurchased the property from Harlan this Court held that the reacquisition of title by Tyson served to reinstate the Wexman mortgage, and cited our "After-acquired Title" Statute as authority for such holding.

In *Sheppard* v. *Zeppa, supra,* in passing on the "After-acquired Title" Statute, we said concerning Mrs. Geneva Sheppard Miller:

"In other words, in the deed which she executed as guardian on behalf of Lowell Harrison Sheppard, she expressly warranted the title. Conceding that she, personally, had nothing at that time but a life estate, and irrespective of validity of the probate court proceedings, the fact remains that when she subsequently acquired the interest of Lowell Harrison Sheppard . . . such title as she had previously attempted to convey and warrant to Zeppa passed to him and to his grantees. Section 1798 of Pope's Digest. . . ."

From the above review it is evident that our cases have applied our "After-acquired Title" Statute to situations in all respects similar to that here presented, and such cases have become a rule of property. Because of such holdings there is no occasion to quote from cases from other jurisdictions; but even so, many States, having similar after-acquired title Statutes, hold to the same effect as do our cases. See the Annotation, "After-acquired title rule as applicable to title acquired by grantor through enforcement of mortgage or lien", in 168 A. L. R. 1149.

The decree of the Chancery Court is affirmed.

George Rose Smith, J., dissenting. It is easy to criticize the majority opinion on the ground that it is unjust. Ever since 1933 every party to this case has believed that the foreclosure decree completely extinguished the appellees' title to the disputed minerals. For seventeen years the appellees silently admitted by their inaction that they had no claim to the property. It is not even shown that the appellees knew that the land had been repurchased in 1935, much less that they were aware

that such a repurchase might have given them a toe hold for a claim under the after-acquired title statute. They do not say that during those seventeen years they paid one penny of the taxes assessed against this property or in any other way asserted a claim of ownership. It was not until they were named as defendants in this suit to quiet title that they suddenly realized that they had owned the property all along. In the meantime it was the appellants who believed themselves to be the owners—who sold these same minerals to others for value —who presumably paid whatever taxes were assessed.

My principal concern, however, is not with the fact that the appellants are being treated unfairly; for it must be conceded that in real property law the important goal is certainty. If a rule of property must be applied inflexibly to prevent ninety-nine men from losing title to their homes, it does not matter much that the rule is apparently unjust to the hundredth man. What bothers me now is that the majority decision not only produces an unjust result but actually creates uncertainty where it did not exist before.

For this case cannot be reconciled with *Lewis* v. *Bush,* which the majority cite but do not expressly overrule. There Bush gave a warranty deed to land which he had not yet paid for. When Bush's vendor foreclosed his outstanding lien, Bush bought at the sale. Bush's grantees excepted to the report of sale, asking that Bush be declared to hold the title as trustee for them. We sustained the grantees' contention, mentioning the after-acquired title statute only to show that Bush could be required to perform his warranty by specific restitution of the title that he bought at the foreclosure sale. We remanded the case with instructions to the chancellor "to require the appellee Bush to make good his warranty by conveying the lot in controversy to the appellants." Thus we held that the after-acquired title statute had not automatically vested title in Bush's grantees and that it was necessary for him to perform specifically his covenant of warranty by conveying the title acquired at the foreclosure sale.

Today's decision is wholly inconsistent with the *Bush* case. Under the earlier decision these appellees had only a cause of action for restitution when the appellants bought at the foreclosure sale in 1935. That cause of action is undeniably barred by their fifteen years of delay. The appellees can be saved only by saying that the appellants' title passed automatically in 1935 under the after-acquired title statute, but the *Bush* case holds that it did not. It follows that we now have conflicting cases as to this rule of property, and for that reason I dissent.

WARD and ROBINSON, JJ., join in this dissent.

STRINGER *v.* GEORGIA STATE SAVINGS ASSOCIATION OF SAVANNAH.

4-9458 238 S. W. 2d 629

Opinion delivered March 26, 1951.

Rehearing denied April 23, 1951.

Gordon & Gordon and *John G. Moore,* for appellant.

J. M. Smallwood, for appellee.

GEORGE ROSE SMITH, J. This is a foreclosure suit filed by the appellees seventeen years ago, on March 23, 1934. The plaintiffs sought to foreclose the lien of a deed of trust which M. Reich and his wife had executed in 1929 to secure a debt of $1,800. The Reichs made no defense, but the suit was resisted by the appellants, W. H. Stringer and his wife. In 1933 Stringer acquired a tax title to the two lots conveyed by the deed of trust and has been in possession ever since. The chancellor held the tax title void and ordered foreclosure.

On this appeal the appellants do not argue the case on its merits but insist that the decree should be reversed because (a) the original complaint that was filed in 1934 was fraudulently withdrawn from the court files and replaced by a substituted complaint containing different allegations, and (b) the plaintiffs were guilty of laches in failing to bring the case to trial during a long period of years.

In order to show that the court files were tampered with the appellants have brought up the original documents for our examination. The ostensible complaint is a seven-page document that was obviously typed on a single typewriter, on sheets that bear identical watermarks. There is nothing in the appearance of the paper or typing to indicate that all seven pages were not typed at the same time.

The appellants proved, however, that their original attorney, Edward Gordon, Sr., had obtained from the clerk a carbon copy of the complaint. This copy is only four pages long and lacks the detailed attack on the appellants' tax title that is contained in the seven-page complaint. The first two pages of Mr. Gordon's copy are indisputably carbon copies of the first two pages of the original, but the remaining pages of the two documents are entirely dissimilar. It is the appellant's theory that an agent of the appellees fraudulently altered the complaint in order to assert a new cause of action after the statute of limitations would have barred such an amendment. The appellants disclaim any intimation that

either the appellees' original attorney or their present one had any part in the asserted fraud.

For either of two reasons we are unable to accept the appellants' theory. First, circumstantial evidence to establish fraud must be so strong and well connected as clearly to show fraud. *DuFresne* v. *Paul,* 144 Ark. 87, 221 S. W. 485. Here the implications of fraud are quite inconclusive. The last page of the ostensible complaint is signed by J. W. Johnston as attorney, verified by D. O. C. Cleveland, the appellees' Arkansas representative, and attested by a notary public. Thus three persons must have participated in this alleged wrongdoing for the facts to have been as the appellants now argue. Cleveland testified that as far as he knew the complaint was signed on the date that it bears, March 23, 1934. He also produced from his files an exact carbon copy of the longer complaint, which he had obtained from Mr. Johnston when the latter withdrew from the case in 1944. With Johnston exonerated of any complicity in the matter it is difficult to see how this copy came to be in his files unless it is genuine. On the whole it seems to us much more likely that the complaint was partly retyped before it was filed and that by mistake a carbon copy of the complaint as originally drawn was filed.

The appellants also rely on the fact that the exhibits to the complaint were verified in Savannah on March 28, five days after the suit was filed. This circumstance is also susceptible of an innocent explanation. The complaint was evidently prepared hurriedly, blanks having been left and filled in with ink. The State's tax title had been confirmed on March 23, 1933, and the suit was filed a year later to the day. It is quite possible that Johnston was afraid to wait more than a year after confirmation to bring his suit, and therefore filed his complaint without waiting for the exhibits to arrive from Georgia. The tardy filing of exhibits is hardly a basis for dismissing the entire suit.

Second, the asserted substitution did not assert a new cause of action. Mr. Gordon's copy of the complaint stated that Stringer claimed some interest in the prop-

erty under a tax certificate dated March 27, 1933, and that he was joined as a defendant that his rights might be adjudicated. Part of the prayer was that the plaintiffs' lien be declared superior to any interest held by Stringer. These allegations would certainly have been good against demurrer, and all that the longer complaint did was to make them more specific. For these reasons we do not think the appellants have been hurt by any substitution that may have occurred.

Nor do we see how the appellants can complain that the case was not brought promptly to trial. They had been served with summons and knew that the suit was pending. During the years the case lay dormant they filed no motion to dismiss it for want of prosecution nor made any effort to bring the matter to trial. The delay was an indulgence to the mortgagors, and for all that the record shows it was fully acquiesced in by the appellants. That the appellants repaired and improved the property while occupying it rent-free for seventeen years is not a basis for a finding of laches, since they must be taken to have risked the possibility of the plaintiffs' prevailing.

Affirmed.

DUKE *v.* LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE.

4-9440 238 S. W. 2d 631

Opinion delivered March 26, 1951.

Rehearing denied April 23, 1951.

Wilson, Kimpel & Nobles, for appellant.

Dinning & Dinning, for appellee.

MINOR W. MILLWEE, Justice. On February 23, 1948, William G. Duke died of a heart attack suffered while performing his usual duties as foreman of the band saw department of Pekin Wood Products Company at West Helena, Arkansas. The face amount of two five hundred dollar insurance policies issued to Duke by appellee, Life & Casualty Insurance Co. of Tennessee, was promptly paid to appellant, Bessie M. Duke, as beneficiary and the policies surrendered to appellee's agent.

On March 16, 1950, appellant filed this action under the double indemnity provisions of the two policies which provide for payment of accidental death benefits in case of, "bodily injuries affected solely through external, violent and accidental means, of which, except in the case of drowning, there is a visible contusion or wound on the exterior of the body of the insured, causing death, . . ."

The complaint alleges: "That on or about the 23rd day of February, 1948, while said policies were in full force and effect, William G. Duke received a personal

injury through external, violent and accidental means, to-wit: In the performance of his duties as foreman of the bandsaw department of the Pekin Wood Products Company of West Helena, Arkansas, William G. Duke exerted himself and exposed himself to cold, thereby aggravating a diseased heart which caused a severe heart attack, and accelerated his death."

Appellee answered with a general denial and trial to a jury resulted in a verdict and judgment for the insurance company.

Insured was foreman of the band saw department located in the "Town and Country Building" of the Pekin plant. This building was separated from the "Old Mill Building" in which the "glue room" was located. The buildings were about 120 feet apart and a concrete walkway was used in going from one building to the other. The temperature in the Town and Country Building and the glue room of the other building was controlled by thermostat at about 70° Fahrenheit. On the day of his death the insured, while in the performance of his regular duties as foreman, walked from the Town and Country Building across the walkway to the Old Mill Building and through that building for a distance of several hundred feet to the glue room. About thirty minutes later he returned to the band saw department and was standing in the middle of the building with one foot on some stock when he suddenly fell to the floor, slightly bruising his face in the fall. He was carried to a first aid station and then to a hospital where he died within a few minutes. On the morning in question the weather was foggy and the temperature near freezing. Insured was forty-three years of age, five feet seven inches tall, and weighed about 190 pounds. In traveling from one building to the other he walked at his usual brisk pace.

Dr. John E. Greutter, Jr., a specialist in heart diseases, in answer to a hypothetical question, stated that since no autopsy was performed, a positive diagnosis of the cause of insured's death was impossible to make, but that the most likely cause was coronary artery occlusion.

He also stated that in the presence of the diseased coronary artery, multiple exposure to cold weather would precipitate or increase the likelihood of an attack of angina pectoris, but he further testified: "So far as acute coronary artery occlusion is concerned, we do know that there are instances on record in which this state has followed unusual exertion. It must be admitted, this state has followed when an individual is at complete rest. In angina pectoris which is coronary artery sclerosis or hardening, deaths have occurred from this state without occlusion, associated with unusual exertion. It is impossible in this instance to say whether this man died in an acute attack of angina or whether he actually sustained stoppage or thrombosis of the coronary artery. In the presence of coronary artery disease, I would feel that any act which represented unusual exertion could precipitate a fatal attack."

Dr. George R. Storm, who examined insured and was present at the time of his death, testified: "Q. Is there any way of determining when the heart will stop? A. No, sir. Q. Can a person with a coronary occlusion suffer a fatal attack as well in bed as when they are working? A. Yes, sir. Q. Is it possible that a sudden physical exertion in lifting will cause a fatal attack? A. Of course, exertion might precipitate an attack, a lot of them die in their sleep. I don't know anything about his physical condition. I think he told me he had been having some stomach trouble. Q. Could the stomach trouble cause the coronary occlusion? A. No, sir, a lot of them have pains in the stomach and they think it is the heart. Q. A person suffering from coronary occlusion can suffer a heart attack while they are asleep? A. Yes, sir. Q. Or while standing? A. Yes, sir. Q. Or even under any circumstances? A. Yes, sir."

Omitting consideration of the question whether the evidence, in aspects most favorable to appellant, is sufficient to support a finding of accidental death, we proceed to an examination of the assignments of error urged by appellant. The principal contention for reversal is that the trial court erred in giving appellee's requested in-

struction No. 1. This instruction authorized, but did not require, a finding in favor of appellee unless the jury found from a preponderance of the evidence that the insured "came to his death, independently of all other causes, by reason of bodily injuries affected solely through external, violent and accidental means, of which there is a visual contusion or wound on the exterior of the body of the insured, causing death."

This instruction is in the language and terms of the policies. However, appellant insists that it conflicts with instructions given at her request and that it ignores the interpretation which this court has placed on similar policy provisions in the leading case of *Fidelity & Casualty Co.* v. *Meyer,* 106 Ark. 91, 151 S. W. 995, 44 L. R. A. (N. S.) 493, and similar cases cited in *The Travelers Insurance Company* v. *Johnston,* 204 Ark. 307, 162 S. W. 2d 480. The effect of these decisions is that an insurer may be held liable under such policy provision where it appears that death resulted when it did on account of the aggravation of a latent disease from an accidental injury. If the questioned instruction stood alone, it would be open to the objections urged against it. But this is not the case. Appellant requested and the court gave several instructions which authorized the jury to find in her favor if they found that deceased's activities on the day of his death resulted in such exertion and exposure to cold as to cause an unusual shock to his body and which aggravated a diseased heart and thereby hastened death. These instructions define the terms, "external, violent and accidental means," "independently of all other causes," and "visible contusion or wound on the exterior of the body" as used in the policies and appellee's instruction No. 1. Appellant's requested instructions are somewhat lengthy and were skillfully drawn to conform to this court's interpretation of these terms in the cases cited by appellant and had the effect of explaining rather than contradicting instruction No. 1 given at appellee's request. Moreover, the trial court gave the usual instruction cautioning the jury not to single out any one instruction as the law of the case, but to consider them together and as one harmonious whole.

Appellant also relies on the recent case of *Metropolitan Casualty Insurance Co.* v. *Fairchild,* 215 Ark. 416, 220 S. W. 2d 803, where we held the evidence sufficient to sustain a finding that the insured suffered a disabling injury through accidental means under a state of facts materially different from those in the instant case. In that case the undisputed evidence showed that the insured suffered a coronary occlusion while his body was in an awkward, unusual and strained position, a fact not present here.

When viewed as a whole and read together, the instructions given in the case at bar permitted the parties to submit to the fact finding body the respective theories on which each expected to prevail. Under our well settled rule this was proper, and the instructions given at appellant's request fully covered her rights of recovery under the double indemnity provision of the policies. The jury adopted the theory of appellee and found that the insured's death was not accidental under the instructions given and the facts adduced in evidence. We conclude that the giving of appellee's requested instruction No. 1 did not constitute reversible error.

Appellant next challenges the sufficiency of the evidence to support the verdict in favor of appellee. It is argued that the verdict is clearly against the preponderance of the evidence, but this is not the test to be applied after the trial court has overruled the motion for new trial. It is true that we have held that the trial court should grant a motion for new trial when convinced that the verdict of the jury was clearly against the preponderance of the evidence. After the trial court has found to the contrary by overruling the motion, as in the instant case, the verdict will be sustained if there is any substantial evidence to support it. Under the evidence adduced here, the jury was warranted in concluding that the heart attack from which insured died occurred while he was performing his customary duties in his usual manner without the intervention of any unusual exertion, exposure or other condition of an accidental nature.

On cross-examination appellant was asked whether she ever notified appellee of her claim for accidental death benefits and answered that she did not. Appellant objected on the ground that failure to give notice was not alleged in the answer. Appellant argues that the admission of the question and answer resulted in prejudicial error in that it left an impression with the jury that she was a grasping woman who was grossly unfair in pursuing a dubious claim. On redirect examination appellant explained in detail why she had not sooner made a claim and stated that she did not know how her husband had met his death at the time she executed the proof of death. It was also shown that her attorney did notify appellee of the claim for accidental death benefits under the policies. Under these circumstances, we hold that prejudicial error did not result from the admission of this testimony.

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

KOTZ *v.* RUSH.

4-9432 238 S. W. 2d 634

Opinion delivered March 19, 1951.

Rehearing denied April 23, 1951.

[redacted]

H. G. Leathers, for appellant.

Claude A. Fuller, for appellee.

MINOR W. MILLWEE, Justice. Appellants, E. W. Kotz and wife, owned and operated a business known as "White River Camp" located at one end of the bridge over White River on U. S. Highway 62 in Carroll County, Arkansas. The camp consists of a cafe, store building, garage apartment and several cabins and boats.

In February, 1949, appellee, Blanche M. Rush, who lived in Dallas, Texas, entered into negotiations with appellants to purchase the property. After two trips to Arkansas, a contract was entered into in March, 1949, whereby appellee agreed to purchase the property at a price of $26,750. Appellee exchanged a lot in Dallas, Texas, and paid $1,000 cash on the purchase price leaving a balance of $14,837.50, to secure the payment of which she executed a note and mortgage of the camp property to appellants payable $150 per month. After making six monthly payments appellee defaulted. Appellants instituted this suit to foreclose the mortgage on April 15, 1950.

Appellee filed an answer and cross-complaint alleging that appellants made certain false and fraudulent representations as to profits earned in the business in 1947 and 1948 and the number of reservations for "float" trips for the 1949 season. Appellee asked that the mortgage be cancelled and for recoupment of damages sustained by reason of said false representations to the extent of the balance of the purchase price alleged due.

The chancellor found for appellee on her cross-complaint and directed that $8,000 be deducted from the balance due on the mortgage because of false representations by appellants which induced the execution of the contract and mortgage. Appellants were awarded judgment for $5,965.43 after allowing the credit of $8,000 and foreclosure was ordered.

To sustain the allegations of her cross-complaint appellee introduced several witnesses who were present

during the negotiations between the parties. Appellee and others present testified that appellant E. W. Kotz told appellee that he realized a net income of $6,500 per year from the operation of the camp during the seasons of 1947 and 1948. When appellee asked him to produce some record evidence of such earnings, Kotz stated that he did not keep accurate records, that he did very little banking business and facetiously remarked that he just kept his books in his hip pocket.

Carl Rucker, a real estate agent of Dallas, Texas, testified that he represented both parties in the negotiations and accompanied appellee on both trips to Eureka Springs. Based on Kotz's representations, Rucker advised appellee that the income from the property seemed to justify the investment contemplated.

While appellee was experienced in other lines of business, she had not previously engaged in the operation of a resort. She testified that at the time of the negotiations Kotz also told her that he already had reservations for all cabins and boats for the first thirty days of the 1949 fishing season, and that only one reservation was turned over to her. She lost money in the operation of the business in 1949.

Gerden Whitner testified that he worked for both the appellants and appellee in their respective operations of the camp; that both parties did about the same volume of business and that he had heard Kotz say that he was not making any money out of the business.

Walter Hamblin owned the business from 1929 to 1946. He stated that he operated the camp most of the time, and others operated it for him at times, during his period of ownership. He described the business as "a white elephant" and stated that although he tried hard, he had never been able to operate the business at a profit. He sold the business for $4,000 in 1946. Several real estate dealers estimated the market value of the camp at $9,000 to $12,000.

Appellant E. W. Kotz admitted that he represented to appellee that he made approximately $6,500 out of the

business in 1947, but stated that he told her he did not make that much in 1948. Although he filed an income tax return for 1947, he could not remember whether he reported an income of $6,500 from the business that year, nor could he remember how many reservations he turned over to appellee for the 1949 season. There was some evidence by appellants to the effect that appellee did not operate the camp efficiently.

The authorities generally seem to recognize the rule that false representations by the seller as to present or past income of the property sold or conveyed will, if relied upon by the purchaser, constitute actionable fraud. The following statement is found in 23 Am. Jur., Fraud and Deceit, § 68: "A false representation by an owner of land, or his agent, seeking to dispose of the property commercially, as to the present or past income, profits, or produce thereof or as to the amount of rent received therefor is regarded as a statement of fact upon which fraud may be predicated if it is false, since these are matters within the representor's own knowledge. The same is true of an assertion that the profits of a business are or have been a certain sum annually, or a false statement as to what a business now earns." See, also, Williston on Contracts, § 1492, 55 Am. Jur., Vendor and Purchaser, § 84; *Hecht* v. *Metzler,* 14 Utah 408, 48 Pac. 37; *Whitney* v. *Bissell,* 75 Or. 28, 146 Pac. 141, L. R. A. 1915D, 257; *Cross* v. *Bouck,* 175 Cal. 253, 165 Pac. 702; *Hogan* v. *McCombs Bros.,* 190 Ia. 650, 180 N. W. 770; *Vouros* v. *Pierce,* 226 Mass. 175, 115 N. E. 297.

The remedies of a purchaser in cases of this kind are set forth in *Danielson, et al.* v. *Skidmore, et al.,* 125 Ark. 572, 189 S. W. 57, as follows: "He may rescind the contract and by returning or offering to return the property purchased within a reasonable time entitle himself to recover whatever he had paid upon the contract. Again he may elect to retain the property and sue for the damages he has sustained by reason of the false and fraudulent representations, and in this event the measure of his damages would be the difference between the real value of the property in its true condition and the price

at which he purchased it. Lastly to avoid circuity of action and a multiplicity of suits, he may plead such damages in an action for the purchase money and is entitled to have the same recouped from the price he agreed to pay. *Matlock* v. *Reppy,* 47 Ark. 148, 14 S. W. 546; *Ft. Smith Lumber Co.* v. *Baker,* 123 Ark. 275, 185 S. W. 277."

Appellee chose the last remedy mentioned above and the only issue is whether the chancellor's findings are against the preponderance of the evidence. We think the greater weight of the evidence supports the conclusion that appellants wilfully misrepresented their past income from the property; that appellee made a diligent effort to ascertain the truth or falsity of such representations, which were within the peculiar knowledge of appellants; and that appellee relied on such false representations to her damage in the amount fixed by the court. The decree is, therefore, affirmed.

PYRON *v.* BLANSCET.

4-9372 238 S. W. 2d 636

Opinion delivered March 26, 1951.

Rehearing denied April 23, 1951.

Jeta Taylor and *John Cravens*, for appellant.

Mark E. Woolsey and *Yates & Yates*, for appellee.

George Rose Smith, J. This is a suit in ejectment brought by the appellees to recover two small pieces of land. A jury trial resulted in a verdict and judgment awarding the possession of both tracts to the plaintiffs.

Only a question of law was presented below as to the first tract, which is the north half of a segment of a railroad right-of-way that was abandoned by the railroad company in 1936. At that time J. H. Jacobs owned land on both sides of the right-of-way. The land on the north side was later sold to the appellees, and that on the south was later sold to the appellants. Both deeds contain metes and bounds descriptions that extend to the edge of the right-of-way and thence along the right-of-way for given distances. Thus, according to the deeds, the appellees' south boundary is the north side of the right-of-way, and the appellants' north boundary is the south side of the right-of-way. The appellants, in addition to their original deed, obtained from Jacobs' heirs a quitclaim deed to the disputed section of the right-of-way.

The appellees insist that the legal effect of their deed is to convey to the center line of the abandoned right-of-way, and several cases from other jurisdictions are cited to support this contention. In practical effect there is much to be said in favor of this view, since the opposite rule often leaves in the grantor the ownership of a narrow and inaccessible strip of an abandoned railroad right-of-way, street, alley, etc.

The appellants rely chiefly upon *Fordyce* v. *Hampton,* 179 Ark. 705, 17 S. W. 2d 869, and with some reluctance we concede that case to be controlling. There we held that although a conveyance of land bounded by an alley is usually presumed to carry title to the center line, the presumption does not arise when the alley has been vacated or abandoned. In the opinion we recognized the fact that two lines of authority exist and chose the rule that the grantee takes to the center of an abandoned easement only when the grantor explicitly expresses that

intention. Those of us who are joining in this opinion do not think the doctrine of the *Fordyce* case to be a desirable one, since a grantor does not ordinarily intend to retain title to an abandoned right-of-way that is of little practical value. But the *Fordyce* case laid down a rule of property. No doubt sales have been made and titles have been approved in reliance upon that decision. For us now to overrule it would destroy property rights that were acquired in the belief that this court would abide by its choice between lines of authority that have about equal support in the cases. If the rule is to be changed it should be done by legislation that operates prospectively rather than by judicial decision that is retroactive. Since we adhere to the rule announced in the *Fordyce* case the trial court erred in submitting to the jury the question of the ownership of the first tract. The appellants acquired title by their deed from the Jacobs heirs. As to this tract the judgment is reversed and the cause dismissed.

The second tract is half an acre lying between the railroad right-of-way and a national highway. The appellees assert title by adverse possession, and we think the testimony presented an issue for the jury. Mrs. Blanscet, one of the appellees, testified that she and her husband had planted alfalfa on this tract in 1939 and had harvested hay from the land in every year from 1939 through 1947. There is convincing evidence to the contrary, but it cannot be said that the record is without evidence to show that the appellees have acquired title by adverse possession. On this phase of the case the judgment is affirmed.

McFaddin, J., concurs; Holt, J., dissents.

Holt, J., dissenting. I think the judgment should be affirmed on both phases of the case.

This is a suit in ejectment involving two separate tracts of land in the NW¼ of the NE¼, Section 16, Township 9, Range 26 West, Franklin County, approximately 40 acres. One tract (which we shall refer to as the Railroad Right of Way) is the North half of the

abandoned railroad right of way of the Missouri Pacific Railroad Company. This right of way was 100 feet wide. The other tract of approximately one-half acre is contiguous to the railroad right of way.

The parties here claim title from a common source.

J. H. Jacobs died intestate in 1923, seized and possessed of the 40 acre tract, above described. He was survived by his widow and certain heirs. Before J. H. Jacobs acquired title, the Little Rock and Fort Smith Railroad Company (now the Missouri Pacific Railroad Company (had acquired a 100 foot right of way, running diagonally across this tract in a northwesterly direction. All interest in this right of way was abandoned by the railroad in 1936. Bordering this abandoned right of way on the north is State Highway 64, approximately 80 feet in width.

In 1911, Bill Logan and wife conveyed to J. H. Jacobs the lands lying south of the railroad (approximately 20.74 acres) using the following description: "Part of the northwest quarter of the northeast quarter of Section 16, Township 9 North, Range 26 West, more particularly described as commencing at the southeast corner of said northeast quarter of Section 16, Township 9 North, Range 26 West, thence west 20 chains, thence north 18 chains and 73 links to the right of way of the Little Rock and Fort Smith Railway; thence south 50 degrees east 26 chains and 10 links; thence south 2 chains and 2 links to the place of beginning, containing 20.74 acres, more or less."

In 1912, James Snell conveyed to Jacobs the lands lying north of the railroad under the following description: "Part of the Northwest quarter of the Northeast quarter of Section 16, Township 9 North, Range 26 West, to-wit: Commencing at the Northeast corner of said Northwest quarter of the Northeast quarter, running thence south 12 chains, thence West 3 chains and 15 links, thence south 1 chain and 46 links to the Little Rock and Fort Smith railroad right of way, thence 50 degrees west 20 chains and 94 links to the north line of said Northwest

quarter of the Northeast quarter, thence east 19 chains and 20 links to the place of beginning."

March 31, 1947, the widow and heirs of Jacobs conveyed to Ted Adams and wife the land conveyed by Snell above, employing the same description in their deed as that employed from Snell to Jacobs.

In July of that same year, Adams and wife conveyed said lands to appellees under the same description.

In September 1947, the widow and heirs of Jacobs conveyed to appellants the Logan lands, employing the same description as that employed in the deed from Logan and wife to Jacobs. About eight months later, in 1948, appellants obtained from the widow and heirs of Jacobs a quitclaim deed purporting to convey all of their interest in the abandoned railroad right of way, and erected a fence on the north side thereof.

It is conceded here that appellees own approximately 13 acres north of the railroad right of way and appellants own approximately 20.74 acres south of the right of way.

Thereafter, the present suit was filed by appellees in which they alleged, in effect, that at the time the widow and heirs of Jacobs executed the warranty deed, using the descriptions above, they (grantors) intended to, and did, convey all title and interest in the lands, including said railroad right of way, and that it was not the intention of the widow and heirs to reserve or retain title to the right of way, but that it was the understanding of all parties that the grantors were conveying in each deed to the center line of the railroad right of way, and therefore this center line was the boundary line between the lands of appellants on the south and appellees on the north. Appellees further alleged that they were entitled to the one-half acre tract by adverse possession.

Appellants interposed a general denial and asserted that they were entitled to all of the right of way as well as the one-half acre tract.

Upon a jury trial, there was a verdict in favor of appellees and this appeal followed.

As to the railroad right of way tract, appellants contend that appellees were not entitled to any part of the railroad right of way whereas appellees assert that they are entitled to the possession of the north half of the railroad right of way abutting on their lands. Appellees concede that appellants would be entitled to one-half of the right of way bordering on the north boundary of their 20.74 acres.

At the outset, we point out that the following principles of law set forth in appellees' brief are well established:

1. A conveyance of land abutting on a street, alley or highway, ordinarily carries with it the fee to the center line of such street, alley or highway, when same is owned by the grantor in such private conveyance.

2. Where the street, alley or highway has been abandoned at the time of such private conveyance, and the conveyance is made without reference to such street, alley or highway, the conveyance carries no title to such street, alley or highway.

3. Where the street, alley or highway has been abandoned or vacated, but the private conveyance is made with reference to same, or where it is made the boundary, the rule stated in number 1 above obtains, that is, the conveyance carries to the center of the street, alley or highway where this was owned at the time by the grantor, unless a contrary intent appears in the instrument of conveyance. *Taylor et al.* v. *Armstrong et al.,* 24 Ark. 102; *McGee* v. *Swearengen,* 194 Ark. 735, 109 S. W. 2d 444.

In the present case, the right of way had been abandoned and vacated by the railroad in 1936 and the conveyances to appellees and appellants were thereafter made with reference to the railroad right of way as a boundary line. All of the deeds beginning with the deeds from Logan and wife in 1911, and from Snell in 1912 to Jacobs, and the deeds from Jacobs' widow and heirs to appellants and to Adams and wife, appellees, grantors, have described the lands conveyed with reference to the right of way of the Little Rock and Ft. Smith Railroad

(now the Missouri Pacific Railroad), therefore, in the circumstances, these conveyances carry to the center of the right of way, since no contrary intention appeared in any of the deeds.

In 11 C. J. S., Boundaries, Section 45, page 594, the text writer says: "Although a contrary rule has been expressed, generally a conveyance of land bounded by a railroad right of way will give the grantee title to the center line of the right of way if the grantor owned so far, unless the grantor has expressly reserved the fee to the right of way, or his intention not to convey the fee clearly appears. This is by application of, or analogy to, the rule, stated in § 35 a, as to conveyances of land bounded by public highways."

Appellants argue, and the majority so holds, that the rule announced by this court in *Fordyce* v. *Hampton,* 179 Ark. 705, 17 S. W. 2d 869, is contrary to appellees' contentions here and that this case "completely covers the law." I think the Fordyce case is distinguishable and not controlling, for the reason that in that case we pointed out that in the conveyance of the lots involved there, in the description "no mention was made of the alley nor that it was made according to said plat," and also we there held that Hampton acquired the alley in question not because it had been abandoned and was contiguous to other property owned by him but because he acquired it by adverse possession.

HEMBEY *v.* POSTAL LIFE & CASUALTY COMPANY OF KANSAS CITY.

4-9463 238 S. W. 2d 647

Opinion delivered April 2, 1951.

Rehearing denied May 7, 1951.

P. L. Smith, for appellant.

Tom Kidd, for appellee.

HOLT, J. This is a suit on an accident insurance policy and from a decree in favor of the defendant, Insurance Company, (appellee here) is this appeal.

April 15, 1948, appellant procured from appellee a limited accident insurance policy, paying therefor the annual premium of $3.65. Provisions of the policy material here were:

"Does hereby insure Hosea O. Hembey (hereinafter called insured) against loss resulting directly and independently of all other causes, from bodily injuries sustained through external, violent and accidental means and under the conditions hereinafter set out in Parts One and Two, upon the terms and subject to all provisions and limitations herein contained, for a term of one year. * * *

"Part One. The Company will pay the benefits named in Parts Three and Four for loss resulting from bodily injuries sustained in the following manner. * * *

"Steamship-Motor Buses-Taxicabs. (4) As a result of an accident to any motor bus or public automobile stage plying for public hire in regular passenger service while the Insured is riding therein as a fare-paying passenger, or on a pass, in a place regularly provided for the sole use of passengers. * * *

"Exceptions in Policy. (A) No accidents except those described and set forth in Parts One and Two of this policy are covered, and no indemnities and benefits provided herein are payable except for loss or disability resulting directly and independently of all other causes from bodily injuries sustained through external, violent and accidental means and in the manner and under the conditions described in Parts One and Two of this Policy."

Appellant alleged in his complaint that on July 7, 1948, while he was a fare-paying passenger on a motor-bus in regular passenger service from Idabel, Oklahoma, to Arkadelphia, Arkansas, he suffered accidental injuries at Okolona, Arkansas (within the coverage of the above policy). He sought recovery in accordance with its terms and also the statutory penalty and attorney's fees.

Appellee denied any liability. Appellant filed his complaint in equity, voluntarily invoking chancery aid, and by agreement the suit was tried in that court, (*Davis* v. *Harrell,* 101 Ark. 230, 142 S. W. 156).

The cause is here for trial *de novo,* and following our long established rule, we must affirm unless the findings of the trial court are against the preponderance of the evidence, (*England* v. *Scott,* 205 Ark. 47, 166 S. W. 2d 1014).

Appellant was the only witness who testified as to the manner, or how, he received his alleged injuries. His version was: "Q. Tell the court what happened, if anything did happen? A. As we came into this sub-stop at Okolona I asked the bus driver to stop at this place so I could go by my boarding house. As you go into Okolona it is downgrade for a good many yards. He was running pretty fast, and I asked him to stop there and he said he would. I told him to stop, so I rose up and he saw me in the mirror about the same time, and just then he slammed on the brakes and I was rising or standing up and it threw me across the aisle over a back of a seat and down between the seats to the floor. I had an injury to my back and I was partly unconscious for something like eighteen or twenty hours. * * * Q. Do you say that you stepped on

the shoe string and that caused you to fall? A. No, I will say the stopping of the bus caused me to fall. Q. There was no wrecking of the bus, was there? A. No, sir, it just stopped suddenly."

The policy here, as indicated, protects the insured against the result of bodily injuries received during the life of the policy and caused by external, violent and accidental means, by any accident to the bus in which he was riding at the time he was injured.

We hold that any injury that appellant may have received was not covered by the policy. Under its plain and unambiguous language, appellant could not recover for injuries unless "as a result of an accident to any motor bus," while he was a passenger. Certainly, the preponderance, if not all, of the testimony shows that there was no accident to, or wreck of, the bus. Appellant's injuries were caused solely, as he admits, "by the stopping of the bus, * * * it just stopped suddenly," and not as a result of any accident to the bus.

In so construing the policy, we do not lose sight of the rule that the contract was prepared by the insurer and all doubts, if any, as to its meaning must be resolved in favor of the insured.

The case of *Life & Casualty Insurance Company of Tennessee* v. *Barefield,* 187 Ark. 676, 61 S. W. 2d 698, relied upon by appellant, is clearly distinguishable. While the policy in that case contained provisions similar, in effect, to Part One (4) above, the stipulated facts were different. There, a passing car ran over a stick and "flipped the said stick in the direction of the car in which the plaintiff was riding, striking the said car at the front of the left-hand door. The stick was hurled into the car and struck the plaintiff in the right eye, causing said plaintiff to lose the total and irrecoverable sight of said right eye." We there held that there was an accident to the car within the meaning of the policy and recovery was upheld.

Here, as indicated, there is a total absence of any injury to the bus in which appellant was a passenger.

Finding no error, the judgment is affirmed.

FINCH *v.* HOLMES.

4-9454 238 S. W. 2d 644

Opinion delivered April 2, 1951.

Rehearing denied April 23, 1951.

[redacted]

M. A. Hathcoat, for appellant.

Henley & Henley, for appellee.

ROBINSON, J. This appeal involves the title to certain real estate owned at the time of his death by Lee Holmes, father of Hilliard, Ava, Bonnie, and Lowry Holmes. Lee Holmes died intestate in 1943; Hilliard died in August, 1949; a few days thereafter Lowry died, intestate and without issue. G. C. Holmes is the son, and Stella Holmes is the widow, of Hilliard Holmes. They filed this suit to partition the above mentioned property. G. C. Holmes is the only heir of Hilliard, and is claiming a one-third interest in the property, subject to the dower of his mother, Stella Holmes.

Ava Holmes, whose married name is Finch, and Bonnie Holmes, whose married name is Andrews, claim that they are the rightful owners of such property by virtue of an agreement with their father whereby they deeded certain lands to Hilliard. They further state that the consideration for such agreement was that they were to receive eventually the interest in the Lee Holmes home place that Hilliard otherwise would have received.

On the 25th day of January, 1919, Ava, Bonnie and Lowry transferred by deed their 3/28ths undivided inter-

est in certain lands to Hilliard. The consideration named in the deed was $482.15, receipt of which was acknowledged. However, Ava and Bonnie now say that they did not actually receive the $482.15, as recited by the deed which was executed, acknowledged and delivered, but, in lieu thereof, were to have received Hilliard's interest in the Lee Holmes home place.

Parole evidence is admissible to prove that the consideration named in the deed is not the true consideration. *Mitchell* v. *Smith, Admr.,* 206 Ark. 936, 175 S. W. 2d 201; *Whitlock* v. *Barham & Duncan,* 172 Ark. 198, 288 S. W. 4; *J. H. Magill Lumber Co.* v. *Lane White Lumber Co.,* 90 Ark. 426, 119 S. W. 822.

An examination of the record, however, does not reveal evidence sufficient to set aside the decree of the Chancellor, which was in favor of appellees.

Affirmed.

MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE *v.* UNITED BRICK AND CLAY WORKERS UNION LOCAL NO. 602.

4-9406 238 S. W. 2d 945

Opinion delivered April 9, 1951.

Rehearing denied May 21, 1951.

Richard M. Ryan, W. J. Smith, William H. Donham and *Henry Donham,* for appellant.

Mullinax, Wells & Ball, Charles J. Morris and *Edwin Cash,* for appellee.

George Rose Smith, J. This suit arises from a strike which is taking place at the Acme Brick Company's plant near Malvern. There are two means of access to the Acme plant, one by a public road leading to the company's gates and the other by a spur track from the appellant's main line. The striking employees, members of the appellee labor union, established picket lines at the highway gates and also at a point about a quarter of a mile from the plant where the main line crosses a public highway. The railroad company brought this suit to enjoin the union from maintaining the latter picket line. At the conclusion of the plaintiff's proof the chancellor sustained the union's motion to dismiss the complaint for want of equity.

The chancellor, in passing upon the motion to dismiss, was required to view the evidence in the light most favorable to the plaintiff, *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225, and we follow the same rule upon appeal. So considered, the testimony shows that Acme's employees went on strike in May, 1950. Acme employed other workmen and continued to operate its plant in spite of the strike. The picket line now complained of was established by the union at a point as close to the Acme plant as the strikers could occupy without trespassing on property of Acme or of the railroad.

The proof makes it plain that the pickets' purpose is to convey their message to trainmen who are on their way to the Acme plant. During most of the day the pickets sit idle, paying no attention to passing motorists

or to the appellant's through trains. But when a switch engine destined for the Acme plant comes in view the pickets stand on the highway and display their signs. The railroad's regular crews invariably refuse to drive across the picket line. Hence the railroad company has been sending supervisory employees from Little Rock on each trip to the Acme plant. When the picket line is reached the regular crews stop the train and alight, and the supervisory employees take charge and run the train into the plant to pick up loaded cars or to leave empty ones. The regular crews resume control when the train repasses the picket line. This system has been so inconvenient to the railroad company that it sends trains only twice a week instead of daily, as it used to do.

In its argument the appellant concedes the union's right to maintain a peaceful picket line for a lawful purpose. This case differs from the average only in that the pickets patrol an isolated railroad crossing instead of a sidewalk used by the general public. But the railroad track is a means of access to the Acme plant, and we think it immaterial that the railroad company alone habitually uses this entrance. It is easy to imagine a sawmill situated in a forest, accessible only by rail. Unless pickets could present their message to persons arriving by train such a mill would be immune from the usual means of advertising the existence of a strike.

The appellant, to distinguish this case from ordinary sidewalk picketing, insists that this picket line is maintained for an unlawful purpose and therefore may be enjoined under the doctrine of *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 69 S. Ct. 684, 93 L. Ed. 834, and similar decisions. In an effort to show that the appellee's purpose is illegal the appellant presents a threefold argument.

First, it is said that the picketing prevents the railroad from complying with its duty to provide equal and nondiscriminatory service to all shippers. Ark. Const., Art. 17, §§ 3 and 6. This argument is unsound. It is at least questionable whether a railroad is required to provide service when impeded by a strike beyond its control.

See *Gage* v. *Ark. Central R. Co.,* 160 Ark. 402, 254 S. W. 665. But a more clear-cut answer to this contention is that the purpose of the picketing is not to prevent the carrier from performing its duties; that is merely an incidental result. And that result comes about only because the railroad's own employees, over whom it presumably has control, are refusing to cross the picket line. Carried to its logical end the appellant's argument would outlaw all picketing, since it could always be shown that some employee of a motor carrier or other public utility had refused to enter the strike-bound premises.

Second, we have an 1868 statute making it a misdemeanor for any person to do any willful act whereby a railway engine is stopped or obstructed. Ark. Stats., 1947, § 73-1105. Construing this penal statute strictly, we think it inapplicable to the present case. The statute is manifestly aimed at physical obstructions or other conduct endangering lives or property; indeed, it gives the railroad treble damages for ensuing injuries to its property. Under a like statute it has been held not an offense for a passenger wrongfully to pull an emergency signal-cord, causing the engineer to stop the train. *Commonwealth* v. *Killian,* 109 Mass. 345, 12 Am. Rep. 714. There it was said: "This evidence fails to prove a criminal obstruction of the train, within the reasonable meaning of the statute. The law was not intended to apply to a case where the train is stopped by an engineer, or other person having control, in consequence of a false signal communicated in this manner by a passenger. . . . If the terms of the statute do not imply an actual physical obstruction, they at least require something more than the use of the agencies here employed." We agree with the Massachusetts court and think it rather far-fetched to suppose that by this law the General Assembly intended in 1868 to establish a policy making a picket line unlawful simply because sympathetic railway employees prefer not to cross it.

Third, it is contended that since the appellant alone is hampered by the picket line it amounts to a secondary boycott and is therefore unlawful. See 29 U. S. C. A.

§ 158 (b), and *Boyd* v. *Dodge, Chancellor,* 217 Ark. 919, 234 S. W. 2d 204. If we assume, without deciding, that a secondary boycott is unlawful in Arkansas, we find no such boycott in the appellee's conduct. The picket line is maintained as close to Acme's plant as is possible without a trespass. As we have already seen, the fact that the appellant alone is affected is immaterial. Like most picket lines this one has among its purposes that of discouraging outsiders from doing business with the strikers' former employer. In its present location the picketing is primary and not secondary.

As to the federal law, the exact point was decided adversely to the appellant in *Ryan Construction Corp.,* 85 N. L. R. B., No. 76. There the strikers picketed the entire premises, including a gate which had been cut in the fence for the exclusive use of a construction company which was working on a project for the strike-bound employer. The employees of the construction company refused to cross the picket line at their special gate. The Board held that the picketing, even though it affected only the construction company, was primary and therefore not an unfair labor practice under the cited section of the Taft-Hartley Law. So here, the appellee is picketing both entrances to the Acme plant, and the strike is not directed against the appellant merely because it is the only visitor using this particular entrance.

Affirmed.

Ed. F. McFaddin, Justice (Dissenting). The Railroad Company is the innocent third party to the labor dispute between (a) Acme Brick Company and (b) its employees: yet the majority opinion is allowing the innocent third party to be injured by those engaged in the quarrel. It is conceded by all parties that since the decision of the United States Supreme Court in *Giboney* v. *Empire Storage & Ice Co.,*[1] an injunction should be granted against any picketing which causes a violation of the State law. I am strongly of the opinion that the pickets, in the case at bar, are violating § 73-1105, Ark. Stats., and therefore the injunction should be granted.

[1] 336 U. S. 490, 93 L. Ed. 834, 69 Sup. Ct. 834.

The majority opinion in one paragraph brushes aside our said Statute. The paragraph begins:

"Second, we have an 1868 statute making it a misdemeanor for any person to do any willful act whereby a railway engine is stopped or obstructed. Ark. Stats. 1947, § 73-1105. Construing this penal statute strictly, we think it inapplicable to the present case. The statute is manifestly aimed at physical obstructions or other conduct endangering lives or property; indeed, it gives the railroad treble damages for ensuing injuries to its property."

And the same paragraph in the majority opinion ends with the sentence:

"We . . . think it rather far-fetched to suppose that by this law the General Assembly intended in 1868 to establish a policy making a picket line unlawful simply because sympathetic railway employees prefer not to cross it."

I think a more thorough consideration of § 73-1105, Ark. Stats., leads to a conclusion entirely different from that reached by the majority. Act 71 of the Arkansas Legislature of 1868 is entitled "An Act to Provide for a General System of Railroad Incorporation." This was, and is, a comprehensive Act of 45 Sections covering such matters as the number of stockholders; meetings of stockholders; duty of railroad companies to construct lines; and also the general powers, liabilities and restrictions of railroad companies. Most of the Sections of this Act 71 are still the law in Arkansas, as found in § 73-301, *et seq.*, Ark. Stats.[2] Section 37 of Act 71 of 1868 is now § 73-1105, Ark. Stats., and the germane portion reads:

"If any person shall wilfully do, or cause to be done, any act or acts whatever, whereby any . . . engine . . . shall be stopped . . . the person or persons so offending shall be guilty of a misdemeanor. . . ."

It is definitely shown that the deliberate picketing in the case at bar has caused the engine to be stopped:

[2] On Page 1121 of Volume 8 of Arkansas Statutes, there is a table which shows what has happened to each Section of the said Act 71 of 1868.

and such is the offense at which § 73-1105 is aimed, regardless of the date of the legislative enactment. Undoubtedly this § 37 of the Act of 1868 came to us from the English Statute (24th and 25th Victoria, Chapter 97, § 36, adopted by the English Parliament in 1861) which reads:

"Whosoever, by any unlawful Act, or by any wilful Omission or Neglect, shall obstruct or cause to be obstructed any Engine or Carriage using any Railway . . . shall be guilty of a Misdemeanor . . ."

Here are two cases decided by the English Courts under the said Statute:

(1)—In the case of *Regina* v. *Hadfield,* decided June 4, 1870 (Vol. 1, Crown Cases Reserved, P. 252), the facts were that the accused had changed some railway signals at a station. The change caused a train, which would have passed the station without stopping, to slacken speed and to come to almost a complete stop. It was held that the accused had *obstructed a train* within the meaning of the Statute. One of the Judges said "there was as much an obstruction as if a log of wood had been placed across the rails."

(2)—In the case of *The Queen* v. *Hardy,* decided January 21, 1871 (Vol. 1, Crown Cases Reserved, P. 277), there was a prosecution under the same Statute. The accused, who was not an employee of the railroad company, stood on the right-of-way between two lines of rails; and as the train was approaching he *held up his hands* in the manner used by inspectors of the line when desirous of stopping a train. Such act by the accused caused the train to stop, just as the accused had planned. The Court held that the accused was guilty of *obstructing a train* within the meaning of the Statute.

The similarity of our Statute and the English Statute makes the English cases full authority for the interpretation that I am giving to the Arkansas Statute. The English case said that *holding up of hands*—if designed to stop the train—constituted an *obstruction.* In the case at bar the strikers, by holding up the picket sign, caused the engine to stop. The English Courts held that any

stopping of the train was a violation of the Statute. I submit the same rule should apply here, since our Statute is not a safety statute but is one to guarantee the continuous operation of trains.

In this connection, it is also well to note the Federal Statute on obstructing the mail. It is U. S. C. A., Title 18, New Section 1701; and it reads:

"Whoever knowingly and wilfully obstructs or retards the passage of the mail shall be fined not more than one hundred dollars, or imprisoned not more than six months, or both."

In *United States* v. *Thomas,* 55 Fed. 380, some boys placed an obstruction on the track of an electric railway, whereon the mails were being carried; by so doing, the boys delayed the mail. They were held guilty of the crime of obstructing the mail. A recent case involving the same Federal Statute is *United States* v. *Anderson,* 101 Fed. 2d 325 (*certiorari* denied by U. S. Supreme Court, 307 U. S. 625, 83 L. Ed. 1502-1509, 59 Sup. Ct. 822-826). In that case some coal miners in Illinois, in furtherance of their strike blasted the railroad tracks and thereby delayed the mail. The Federal Court held that the strikers had violated the Statute and they were given sentences.[3]

The majority cites *Commonwealth* v. *Killian,* 109 Mass. 345, 12 American Reports 714, wherein the Massachusetts Court decided a case in March 1872 under a statute in which the prohibited act affected the *safety of the passengers.*[4] In the Massachusetts case the defendant, while a passenger on the train, pulled the signal cord which caused the engineer to stop the train. It was not shown whether the defendant did the act willfully and maliciously, or because he actually thought that the train should be stopped. The Massachusetts Court said that, regardless of his motive, the pulling of the bell cord was not within the purview of the Statute because the

[3] The fact that this Federal Statute has been upheld by the United States Supreme Court in the instance of a labor dispute leads me to believe that our State Statute, on stopping an engine, would likewise be upheld.

[4] The Massachusetts Act said: "or endangers the safety of persons conveyed in or upon" the train.

pulling of the bell cord merely caused the engineer to stop the train.[5] It is most important to notice that the Massachusetts Statute specifically says that the act must be one that endangers the *safety* of the passengers. Our Statute is not designed as a safety measure but as a measure to guarantee the free and uninterrupted flow of transportation.

Likewise, in the case of *Bullion* v. *State,* 7 Tex. Ct. of Criminal Appeals Reports 462 (decided 1879), Texas had a statute [6] which, like the Massachusetts Statute, was designed to protect the safety of life. In that case the accused placed an obstruction on a track near Dallas; but the Texas Court reversed his conviction because it was not shown whether the track was a main track, or a switch track, nor at which speed cars were accustomed to move in passing the point of obstruction. In other words, there was no showing that the act endangered human life. As previously mentioned, our Statute (§ 73-1105) is not designed as a safety statute, but as a Statute to guarantee the free and uninterrupted flow of commerce. So I think the Massachusetts and Texas cases are clearly distinguishable.

The majority has not mentioned our case of *Tomlin* v. *Williams,* 214 Ark. 632, 217 S. W. 2d 832, in which was involved a picketing of the Williams Roofing Plant at Camden. The picket lines there were placed at a gate through which railroad cars moved. We allowed the picketing at the railroad gate "if this can be done without intruding upon appellees' property and without trespassing upon the property of others." I have examined the briefs in the above case and I find that § 73-1105, Ark. Stats., was not called to our attention. Furthermore, our opinion in *Tomlin* v. *Williams* was delivered nearly two months *before* the Supreme Court of the United States decided *Giboney* v. *Empire Storage & Ice Co.* So the case at bar is clearly distinguished from

[5] The Massachusetts Court discussed *The Queen* v. *Hadfield* (the case where the men altered the railway signals), but did not discuss the case of *The Queen* v. *Hardy* (which was the case where the man stood on the tracks and gave a signal by holding up his hands).

[6] The Texas law said that the prohibited act must be one "whereby the life of any person might be endangered . . ."

Tomlin v. *Williams* because (a) the Statute here involved was not then relied on; and (b) until *Giboney* v. *Empire Storage & Ice Co.* was decided by the Supreme Court of the United States, we still adhered to the old understanding that any kind of picketing could be done so long as there was no physical violence.

To summarize:

(1)—Our Statute—§ 73-1105, Ark. Stats.—makes it a misdemeanor for any one to willfully do any act whereby an engine shall be stopped.

(2) This was and is a Statute to guarantee to the railroads the right to operate their engines.

(3) In the case at bar the strikers, by picketing the railroad tracks, have violated this Statute. And

(4)—Under *Giboney* v. *Empire Storage & Ice Co.* *(supra)* the strikers should be enjoined from interfering with the operation of the railroad engine.

Labor has its right to strike and to peacefully picket, but it must not use that right so as to interfere with the rights which the law guarantees to others. In this case the law has guaranteed to the railroad company that its engines will not be stopped. The railroad company is not a party to this labor dispute; and the pickets should not be allowed to stop the railroad engines.

For these reasons I respectfully dissent; and I am authorized to say that Mr. Justice HOLT joins in this dissent.

HAYES *v.* SANGER.

4-9450 239 S. W. 2d 22

Opinion delivered April 9, 1951.

Rehearing denied May 28, 1951.

George E. Steel, E. K. Edwards and *Keith & Clegg,* for appellant.

J. G. Sain, Robert Steel and *Arnold & Arnold,* for appellee.

GRIFFIN SMITH, Chief Justice. Mrs. Mary Harriett Hayes died in June, 1947. She devised certain realty to appellant, to whom she had been married since 1925. *Prima facie* Mrs. Hayes had title, subject to life interests, through conveyances executed by Libbie and Laura Sanger December 12, 1945. Libbie and Laura were sisters of Blanch Withrow. A brother, Will Sanger, died in 1944. Several months after signing the deeds the Sanger sisters requested that appellant—in whose possession the documents were known to be—return them. Hayes evaded the direct issue by sending copies; and then, for the first time, it was ascertained that the papers Libbie and Laura had signed were deeds. Libbie died in February, 1949, at the age of 79, but in 1947 the sisters took steps through the execution of a will and quitclaim deeds to undo what Laura contended in this proceeding

was a fraudulent imposition. Kathleen White is Mrs. Withrow's daughter, and was therefore Mrs. Hayes' sister. They were substituted by Laura and Libbie as beneficiaries in lieu of the niece whose husband is alleged to have deceived them.

The chancellor found that the degree of imposition exerted upon Laura and Libbie amounted to fraud and directed that the deeds procured by appellant in 1945 be cancelled. The briefs refer to city lots in Nashville, Ark., and to nearby rural property—all having a value of $27,500. The questioned conveyances include lands in Texas worth $10,000.

Appellant undertook to show that in presenting deeds to the Sanger sisters he was attempting to carry into effect wishes they had expressed in favor of their niece—Hayes' wife—who was their favorite. The documents, by the clearest of terms, were not to take effect during the life of either grantor, hence the result, said Hayes, would be the same as a will. However, Hayes strenuously denied that wills were intended, asserting that the sisters were not deceived in any respect. Hayes thinks the changed attitude came when their niece predeceased them and they then concluded that their sister, Mrs. Withrow, and their other niece, Mrs. White, ought to be provided for.

The chancellor attached significance to the fact that when appellant went to the Sanger home with prepared deeds he not only took a notary public, but had two witnesses to sit in on the transaction and sign the two documents.

Laura Sanger testified that neither she nor Libbie knew very much about business. For this reason their affairs were handled by their brother Will until his death. For a short time thereafter Attorney Sam Rodgers advised them when occasion required, but Libbie (who was described by the witness as "the one who always wanted to save") felt that they should permit Hayes to act for them. This proposal first came from Hayes, who at one time had suggested that Libbie adopt him. On one occasion Hayes borrowed (but repaid)

$2,500. They made him a gift of jewelry worth $2,500. There was testimony that Mrs. Withrow gave Mrs. Hayes a home in Little Rock. Hayes did not live at Nashville, but traveled a great deal.

In explaining the extent of their business incompetence, Laura testified to their unfamiliarity with methods and forms; even their taxes had been paid by Will. Mrs. Withrow's husband was dead, and in 1945 Hayes was the only male member of the family. The sisters had talked with Hayes about Mary and had told him they wanted to leave something to her, but hadn't said how much. They believed Hayes wanted to help them, and thought everything "would go straight along."

In describing how the deeds were signed the witness said that Hayes came to the house and brought the prepared documents. With him were the notary public and two other men. Hayes was only told that "they" wanted to leave something to Mary. He had previously advised them against employing a lawyer, explaining that the expense was unnecessary. When appellant came with the three men he took the papers from an overcoat pocket, handed them to Libbie, and said he had "something for us to sign." They understood that two witnesses were essential to the validity of a will, so when the men who accompanied Hayes signed as witnesses they supposed everything was as had been indicated and that "something" was being willed to Mary. No mention was made of a deed—then or at any previous time.

After the papers had been signed Hayes remarked that he had to do a little more work on them: they were not finished. In explaining why she did not notice the printed title "Warranty Deed," the witness demonstrated how the top, containing the caption, was folded back. She also said that she did not have her glasses, did not try to read the papers and didn't ask that they be read to her, but signed in entire reliance upon Hayes. Some time later Libbie and Laura began speculating on what they had done, realizing how careless they had been, and telephoned Hayes to return the papers. Instead, he sent copies. Hayes testified that he sent photostatic

copies, but typed copies were in the hands of appellees and they contained slight variations from the originals.

Dr. W. A. Hale, one of the witnesses to the deeds, testified that none of the papers was read to the Sanger sisters and nothing was said about a deed. Because of some circumstance suggesting to him that something was to be added to one of the papers, Dr. Hale wrote, "Witness to signature." He verified discussions regarding another paper—a notarized direction to W. B. Worthen Company, Bankers, in which Libbie asked that her savings deposit be treated as a joint account with Mary Hayes.

Mrs. Hayes died from cancer of the breast. Testimony is conflicting regarding the time a pathological condition was noticed. Hayes insisted that the fact was not ascertained until ten days after the deeds were executed. But Mrs. Withrow testified that she discussed the symptoms with Mrs. Hayes six months before the period in question.

Dave McKay, an attorney of Magnolia, testified that Hayes approached him in 1944 or 1945 and asked if an instrument could be drawn that would be as effective as a will, yet allow the party to retain possession of the property. The attorney gave Hayes temporary use of a deed he (McKay) had prepared for a client. It was later returned. This was prior to the time Mrs. Hayes' illness required hospitalization.

Alvin Gibson, a citizen of Nashville and a co-witness to the deeds, testified that Hayes requested that he get Dr. Hale and Hunter Hughes, explaining that they were wanted to witness some papers that were to be signed. Gibson took Hayes and the other two in his car and they went to the Sanger house. Hayes did not read the papers to Libbie or Laura before or after they were signed, but picked up the documents and left with them. In respect of defendant's exhibit No. 1—Laura's deed to 738 acres in Bowie county, Texas—the witness testified that the deed was blank when signed. He subscribed as a witness to Laura's signature and not to the deed. Hayes explained [presumptively to Dr. Hale, Hughes, and Gibson]

that the deed would be filled in at a later date. This witness then said: "We signed papers crowded up like that (apparently indicating); then (pointing to the deeds) there are some strike-over letters in there that don't look right; and property is mentioned that is not in the other papers they had." No one asked the Sanger sisters regarding their understanding of what was being done.

The notary public handed the papers to Hayes. This was admitted by Hughes, who said that while his memory was somewhat vague respecting some of the details, his impression was that when the four men reached the Sanger home "Miss Laura came out first, and quite a little bit later Miss Libbie came. She was old and physically incapacitated. I stood in the corner while they came in. The papers were not read to either of the sisters [while this witness was there], nor did they read them." Hayes paid the notary public for his services.

On cross-examination Hughes admitted that in conversations with attorneys for Hayes he had told them that when the papers were signed he informed Miss Laura and Miss Libbie that they were deeds; but after thinking the matter over he doubted that this was done. His final position was one of uncertainty. Although Hughes, as notary public, had attested the acknowledgment of many deeds, "this was the first time anyone had thought it necessary to have witnesses present."

In explaining reasons for the decree Chancellor Will Steel wrote a lengthy opinion. The primary inquiry was whether a relationship of trust and confidence existed between Hayes and the Sanger sisters, for [said the Judge] "Relief in equity will always be afforded against transactions in which influence has been acquired and abused [and] where confidence has been reposed and betrayed." *Young* v. *Barde,* 194 Ark. 416, 108 S. W. 2d 495. The expression is taken from a quotation by Mr. Justice BUTLER who wrote the Young-Barde opinion; but in declaring the law applicable to the controversy there the Court said that under settled law involving mere gifts a duty rests upon the donee to establish by clear and convincing testimony that the transaction was free and voluntary.

While in the case at bar the questioned deeds did not convey directly to appellant, the trial court believed that with or without knowledge—or, let us say, a substantial suspicion—that his wife was ill, Hayes had through a process of ingratiation won the confidence of his wife's elderly aunts to such an extent that they did not question his business proposals.

The weakest link in the chain of evidence is Laura's admission that she and Libbie did not mention what property should be included in the wills. The natural inference would be that this was a detail left to Hayes' discretion and that the intent was to acquiesce in what he did in that respect, and in the circumstances here there must have been a willingness to include everything of value. But even so, the grantors knew that a will could be revoked or destroyed while the party executing it had the mental capacity to act; and if in fact the two women were erroneously persuaded to sign the documents under a belief that wills were being made, then even a mistaken belief by Hayes that he had sufficiently informed his *in-laws* concerning the documents would not defeat cancellation if in fact gifts in revocable form were intended.

The deeds recited ten dollars and other valuable considerations "to me in hand paid" and it was sought to show that the money did not pass. We have held that where the purpose is to defeat a deed by showing that there was no consideration estoppel may be invoked. The principle was quoted with approval by Mr. Justice Frank G. Smith in *Whitlock* v. *Barham & Duncan,* 172 Ark. 198, 288 S. W. 4, where it was said that "The only effect of a consideration clause in a deed is to estop the grantor from alleging that the deed was executed without consideration, [but] for every other purpose it is open to explanation, and may be varied by parol proof."

There was no contention at trial that the deeds were responsive to any consideration other than love and affection; but, conceding that testimony was not admissible in contradiction of the recitals, still there is no rule of law or equity denying to an alleged grantor an opportunity to show that the volition of a reputed grantor was

lacking and that fraudulent conduct by one in a position of confidence procured the naked signature.

The Chancellor treated Hayes as the agent of his wife "whom [the Sanger sisters] wanted to help when *they* were gone." Significant, also, was the fact that the deeds were not filed for recording purposes for more than a year. *Levy* v. *Meyere,* 208 Ark. 389, 186 S. W. 2d 427. The cited case is not entirely in point, for there the mother who sought cancellation alleged that when the deeds were executed it was agreed that they would not be recorded. Three days after the promise relating to recordation was disregarded, Mrs. Levy sued for cancellation.

In the case at bar the Sanger sisters undertook to have the deeds returned. Hayes testified that he sent photostatic copies in response to a telephone call from Laura. In one explanation he said the copies were mailed, but later he asserted that he *knew* he brought them in person, but did not remember delivery. The evidence does not support Hayes' contention that photostatic copies were made.

In mentioning the fact that new wills and deeds were made by Laura and Libbie when they discovered the erroneous conduct Hayes is alleged to have motivated, the Chancellor thought it significant that the deeds were recorded during the lifetime of Hayes' wife, "therefore," says the opinion, "Hayes was put on notice of the steps these old women were taking, and I think that if any move was to be made it was his, and not theirs."

Whether Hayes persuaded the Sanger sisters they did not need a lawyer for general purposes, or whether the idea was one of economy originating with Libbie—the answer is not controlling. The evidence clearly supports a finding that Hayes, an experienced man of business, had sufficient doubt in respect of the design he had in mind to utilize two men in addition to the notary public; and there is convincing testimony that the documents were placed before the grantors without explanation—a practice frowned upon in *Luther* v. *Bonner,* 203 Ark. 848, 159 S. W. 2d 454, where a confidential relationship exists.

We are not persuaded that the rule applied in *Blackburn* v. *Nichols,* 149 Ark. 669 (text not printed), 234 S. W. 495, can be applied in a manner substantially helpful to appellant. It is true that, after discovering that deeds were executed, Libbie and Laura did not immediately initiate legal action. A circumstance in appellant's favor is that most of the property was owned by Libbie who was dead when the cause was heard. This, however, does not clear the record of facts and circumstances convincingly showing a design by Hayes to procure irrevocable grants without disclosing to his wife's aunts that deeds were being made.

Affirmed.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS *v.* MISSOURI PACIFIC RAILROAD COMPANY, THOMPSON, TRUSTEE.

4-9476 238 S. W. 2d 950

Opinion delivered April 9, 1951.

Rehearing denied May 21, 1951.

T. J. Gentry, Wm. P. Alexander and *J. K. Shamburger,* for appellant.

Henry Donham, Thomas B. Pryor, Jr., and *Thomas Harper,* for appellee.

GEORGE ROSE SMITH, J. This case is in all material respects similar to *Mo. Pac. R. Co.* v. *United Brick & Clay Workers Union, Local No. 602,* also decided today, *ante,* p. 707, 238 S. W. 2d 945. Here the railroad company was successful in obtaining an injunction to prevent the appellants from maintaining a picket line upon a highway at a point where the railroad spur track crosses the highway just before entering the plant of the Ozark Hardwood

Company, whose employees are on strike. For the reasons given in the other opinion the decree is reversed and the cause dismissed.

ED. F. MCFADDIN, Justice (Dissenting). For the reasons more particularly stated in our dissent to the case of *Missouri Pacific Railroad Company* v. *United Brick & Clay Workers Union, Local No. 602, ante,* p. 707, 238 S. W. 2d 945, (opinion delivered April 9, 1951), Justice HOLT and I dissent from the majority opinion in the case at bar.

SMITH *v.* STATE.

4654 238 S. W. 2d 649

Opinion delivered April 9, 1951.

Rehearing denied May 7, 1951.

John C. Sheffield, for appellant.

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

MINOR W. MILLWEE, Justice. Appellant, Aubrey Smith, was convicted of murder in the first degree in the killing of Ray Campbell and his punishment fixed by the jury at death.

The appellant, Aubrey Smith, and Peter Dorsey are negro residents of St. Francis County, Arkansas. On the night of August 2, 1950, they stole a cow and calf from Dorsey's neighbor, Tom Norsworthy, and brought the animals to North Little Rock, Arkansas, in the trailer of appellant's automobile. In attempting to sell the stolen cattle the next morning at the North Little Rock Stock Yards, one of the men gave a fictitious name and their actions aroused the suspicions of the manager of the stockyards who called the Pulaski Sheriff's Department. Following an investigation by Pulaski County officers, appellant and Dorsey were taken into custody and officers in St. Francis County were notified.

In response to a call from the Pulaski County Sheriff, Otis Tatum and Ray Campbell, deputy sheriffs of St. Francis County, drove to Little Rock arriving about 6 p. m., August 3rd. Appellant and Dorsey were turned over to the St. Francis County officers. On the return trip to Forrest City the officers stopped about twenty minutes at a roadside cafe on the outskirts of North Little Rock where they ate sandwiches while appellant and Dorsey remained in the back seat of the car. At that time appellant and Dorsey had some discussion about escaping from the officers. On resuming the journey to Forrest City the two officers were riding in the front seat of the two-door sedan driven by Tatum and each carried a pistol in a short strapless holster on his right side. Appellant was riding on the left side of the back seat with Dorsey to his right and appellant's right hand was handcuffed to Dorsey's left hand.

The evidence on behalf of the state is that the group had reached a point on Highway 70 about seventeen miles from Forrest City when appellant, with his left hand, and Dorsey, with his right hand, simultaneously reached for and took the two officers' guns. Appellant procured Tatum's gun and shot the latter in the left

shoulder as he brought the speeding car to a stop. In the ensuing melee officer Campbell was shot in the head and right chest and died almost instantly. Tatum was shot twice, one of the bullets being later removed by a physician and the other bullet was still lodged in his back at the time of the trial.

A bullet found on the floor between the car seats after the shooting with human tissue and blood on it was identified by a ballistics expert as having been fired from Tatum's gun. The bullet that entered Campbell's chest came out about the collar bone. Campbell's dead body was lying across Tatum who was slumped in the driver's seat when he regained consciousness. Tatum succeeded in opening the left door of the car and fell out on the concrete highway. When passing motorists failed to stop, he "threw himself in front of the cars" and a motorist stopped and an ambulance was summoned.

After the shooting appellant and Dorsey fled with the officers' guns and succeeded in removing the handcuffs. The next day they stopped at a house to get a man to take them to Marianna. Dorsey was there apprehended, but appellant again fled. When appellant was about to be captured on the morning of August 5, he shot himself twice, the first shot grazing and the second shot entering his chest. He was taken to University Hospital in Little Rock for treatment. While in the hospital on August 7, appellant gave and signed a written statement to officers describing the shooting and subsequent events. The statement was introduced at the trial without objection.

At the trial appellant gave testimony relative to the shooting not materially different from that related in the written statement. However, he testified at the trial that, while being held in the Pulaski County jail on August 3rd, the Pulaski County officers and Tatum subjected him to severe beating with their fists and a boat paddle, "stomped" on his legs and burned his hair with matches; that he related the burning and beating to the officers who took his statement at the hospital, but the latter refused to incorporate this in the written state-

ment. This was denied by Tatum and the officers who took the statement from appellant. A physician who examined appellant shortly after his capture found no evidence of beatings or burns. Appellant also testified that on the return trip to Forrest City, Campbell threatened to beat appellant and Dorsey, but this was also denied by Tatum.

Appellant was charged with murder in the first degree by information filed in the St. Francis Circuit Court. On September 22, 1950, he applied for a change of venue from St. Francis County on the ground that the inhabitants of the county were so prejudiced against him that he could not obtain a fair and impartial trial therein. This application was granted and the cause ordered removed to the circuit court of Phillips County, Arkansas, where the case proceeded to trial on November 20, 1950.

Appellant first contends that error was committed in the trial court's refusal to quash the information. Under the procedure authorized by Amendment 21 to our State Constitution appellant was tried upon an information filed by the prosecuting attorney instead of an indictment by a grand jury. It is argued that this procedure is violative of appellant's rights under the 5th and 14th Amendments to the Constitution of the United States. We have rejected this contention in several cases. *Penton* v. *State,* 194 Ark. 503, 109 S. W. 2d 131; *Smith, et al.* v. *State,* 194 Ark. 1041, 110 S. W. 2d 24; *Higdon* v. *State,* 213 Ark. 881, 213 S. W. 2d 621; *Brown* v. *State,* 213 Ark. 989, 214 S. W. 2d 240. The same result was reached in the recent case of *Washington* v. *State,* 213 Ark. 218, 210 S. W. 2d 307, which was appealed to the United States Supreme Court and certiorari denied in *Washington* v. *State,* 335 U. S. 884, 69 S. Ct. 232, 93 L. Ed. 423. In that case we said: "The United States Supreme Court has repeatedly held that a State can—if it so desires—provide for a prosecution by information instead of by indictment. Some of these cases are *Hurtado* v. *California,* 110 U. S. 516, 28 L. Ed. 232, 4 S. Ct. 111; *Bolln* v. *Nebraska,* 176 U. S. 83, 44 L. Ed. 382, 20 S. Ct. 287; and *Gaines* v. *Washington,* 277 U. S.

81, 72 L. Ed. 793, 48 S. Ct. 468." It follows that the trial court did not err in overruling the motion to quash the information.

Appellant next filed a motion to quash the regular panel of petit jurors and to summon a special venire. The motion alleged that appellant, being charged with murdering a white deputy sheriff, was entitled to have his case heard by an impartial jury; that the regular panel of the jurors selected for the November, 1950, term of court was composed of 22 white jurors and 2 negro jurors. The motion further alleged: "The defendant further states that the jury commissioners, following a practice of many years standing in Phillips County, Arkansas, have pursued a policy of selecting jurors discriminating against the selection of negroes, because of race. That during the past several years, it has been the practice of the jury commission to select not more than three negroes, and such selection was done deliberately for the purpose of undertaking to meet the charge of discrimination, and that such action has not been done in good faith, but was mere subterfuge."

Before this motion was ruled on and after final selection of the jury to try the case, appellant filed a motion to quash and set aside the jury as finally selected. This motion alleged that the regular panel was exhausted before completion of the jury; that the court instructed the sheriff to summon a special jury list without regard to race, color or creed and that of the special list summoned and used there were 12 white and 2 negro jurors. It was further alleged: "That the defendant exhausted all twelve of his peremptory challenges and still there were left on the jury as finally made up 2 negro jurors and 10 white jurors, and that this jury is not an impartial jury within the meaning and spirit of the Constitution of the State of Arkansas and the United States, and under the facts and circumstances as set out in the original motion and brought forward into this motion; that under the facts and circumstances as set out herein, this defendant cannot have a fair and impartial

trial by a fair and impartial jury as guaranteed to him as above stated."

The two motions were heard together upon the testimony of one of the jury commissioners and the following stipulations: "The Court: It is agreed by and between counsel for the State of Arkansas and counsel for the defendant, Aubrey Smith, that the records in the Circuit Clerk's office of Phillips County, Arkansas, do disclose that there have been negroes upon the regular panels or jury lists for the regular terms of the Circuit Court of Phillips County, Arkansas, for the past ten years, that at several terms there was only one negro on the list; that at several terms there were two negroes on the list, or panels, and that at least one term three negroes were on the panels, the regular panels; and that at the present term there are two negroes on the regular list of petit jurors.

"It is agreed by and between counsel for the State of Arkansas and counsel for the defendant, Aubrey Smith, that the present panels of petit jurors were selected from the list of electors which paid their poll taxes before October 1, 1949, and that the regular term of court met and said jurors were empaneled after October 1, 1950, and that each member of the petit jury was examined under oath and asked if he possessed the new, or current, poll tax receipt before he was sworn in as a regular juror.

"Mr. Sheffield: It is agreed that after the regular panel was selected and during the current term of the Circuit Court a number of the regular panel have been excused, at their request, and that vacancies have been filled by the Court from the list of voters for 1950, that is, those who have paid their poll taxes between October 1, 1949, and October 1, 1950, and that the poll tax list of voters for 1950 shows that there were 5,144 white voters and 2,616 negro voters; Whereas, the tax books for the period immediately preceding that showed 1,477 negro voters and 3,200 white voters."

C. E. Mayer, one of the three jury commissioners who selected the jury panels for the November, 1950,

term of court, testified that the commissioners made their selections from the current list of qualified electors containing the names of 3,200 white electors and 1,477 negro electors; that 22 white electors and 2 negro electors were placed on the regular panel of petit jurors and 12 white electors on the list of alternates; that the selections were made in accordance with the court's instructions to select fair-minded, intelligent people qualified to weigh problems arising in law suits; that the selections were made without regard to race, creed or color; that the commissioners considered at least three other Negroes who were deemed qualified but who were not selected because one was an undertaker, another a ginner and farmer who was busy in the cotton ginning season, and the commissioners failed to find the address of the third elector; that there was no discussion among the commissioners to the effect that the number of negro jurors should be limited; that the court instructed them to include Negroes in their selections without indicating any certain number; that most of the negro electors qualified for jury service were of the professional type and their number comparatively small; and that the 1940 population of Phillips County was about 63 per cent negro and 37 per cent white. There was no evidence of the percentage of white and colored population for 1950, probably because such census figures were not available at the time of trial.

It was alleged in the motions to quash and is earnestly argued that the trial court's action in overruling the motions to quash the regular jury panel, and the jury as finally selected, is violative of appellant's right to an impartial jury under Amendments 5, 6 and 14 of the Constitution of the United States and §§ 3 and 10 of Article II of the Constitution of Arkansas.

It is observed from the stipulation that there has been a systematic inclusion rather than exclusion of Negroes by the commissioners in selecting the jury panels in Phillips County for the past ten years. The facts in this case in reference to the ratio of white electors to negro electors are similar to those in *Washington* v.

State, supra. In that case no Negroes had been selected as members of the petit jury panels in Jefferson County for thirty years until an adjourned term of court held shortly before the regular term at which the defendant was tried. Three Negroes were placed on the regular panel as alternates for the term at which Washington was tried. In answer to the same argument urged by appellant in the case at bar, we quoted the following language from the opinion in *Akins* v. *Texas,* 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276: "Petitioner's sole objection to the grand jury is that 'the commissioners deliberately, intentionally and purposely limited the number of the Negro race that should be selected on said grand jury panel to one member.' Fairness in selection has never been held to require proportional representation of races upon a jury. *Virginia* v. *Rives,* 100 U. S. 313, 25 L. Ed. 667; *Thomas* v. *Texas,* 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 393. Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination 'in the selection of jurors on racial grounds.' *Hill* v. *Texas, supra,* (316 U. S. 404, 86 L. Ed. 1559, 62 S. Ct. 1159). Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and not on the theory that racial groups must be recognized. *Norris* v. *Alabama,* 294 U. S. 587, 79 L. Ed. 1074, 55 S. Ct. 579; *Hill* v. *Texas,* 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159; and *Smith* v. *Texas,* 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164, 211, *supra.* The mere fact of inequality in the number selected does not in itself show discrimination."

The facts in the instant case are clearly distinguishable from those in the case of *Patton* v. *Mississippi,* 332 U. S. 463, 68 S. Ct. 184, 92 L. Ed. 76, where systematic exclusion had been practiced for thirty years and there were no Negroes on the venires for the term at which the defendant was tried. In § 11 of an annotation to the Patton case found in 1 A. L. R. 2d 1291, numerous cases, federal and state, are digested which follow the holding in *Akin* v. *Texas, supra.* Many of these cases involve factual matters similar to those in the case at bar and uniformly hold that the fact that there was not an exact mathematical ratio or balance between qualified members of different races or classes in the selection of a jury list is not proof, in itself, of discrimination.

The petit juror occupies a high office in our system of jurisprudence. The quality of his decisions in matters involving rights of property, liberty and life itself is of gravest concern to his fellow men and the well-being of society in general. The mere fact that a person is a qualified elector does not *ipso facto* render him eligible for jury service in Arkansas. In making up the jury lists our statutes require the commissioners to select "persons of good character, of approved integrity, sound judgment and reasonable information." Ark. Stats. §§ 39-206, 39-208. The commissioners are under oath to refrain from selecting any person as a juryman whom they believe unfit and not qualified. Ark. Stats. § 39-201. Although they may be eligible, all persons over 65 years of age and many others who are members of certain occupations and professions, including undertakers, are exempt from jury service. Ark. Stats., §§ 39-104, 39-114.

We cannot agree with counsel's contention that the testimony of Commissioner Mayer discloses that discrimination was actually practiced in violation of the rights of appellant. The witness gave frank and unevasive answers to all questions. Viewed as a whole, his testimony reflects an honest and sincere effort on the part of the jury commissioners to select qualified jurors without any showing of bad faith or design to limit the selection of, or discriminate against, persons of appellant's race. In our opinion his testimony tends to sup-

port his denial that racial discrimination was practiced in making the selections. On the basis of this testimony and the stipulations entered into at the hearing, we conclude that no error was committed in overruling appellant's separate motions to quash the jury panels.

Appellant next contends that error was committed by the trial court in modifying his requested instruction No. 1. The instruction as requested reads: "In this case, the accused says that when he made the statement which has been introduced in this case as his signed confession, that he made other statements as a part of the confession which the officers taking the statement would not incorporate into the written statement. You are instructed that the law is that if a defendant makes a confession, that the statements made by him in explanation of the crime, or other statements made by him at the time appearing favorable to him, and intended by him to be a part of the confession, must all be included in the confession introduced as evidence. In other words, the confession in its entirety must be offered, if it is to be considered by you as a confession, and if only that portion of the statement given by the accused which is adverse to him is incorporated, leaving out that which might appear favorable to him, then it is your duty to disregard the entire confession offered by the State in evidence." The court gave the instruction as modified by substituting the following in lieu of the last sentence of the requested instruction: "So if you find that the defendant made certain statements at the time which were not included in the written confession, you shall consider them as a part of the confession offered in evidence, even though such statements appear favorable to the defendant."

As previously indicated, appellant made no objection to the introduction of the confession. At the time of its introduction there was no suggestion that it was not freely and voluntarily made, or that it did not contain the entire statement of appellant, and it was unnecessary that the court hear preliminary testimony in chambers prior to admission. *Burton* v. *State,* 204 Ark.

548, 163 S. W. 2d 160. The instruction as requested was misleading in that the jury could have readily concluded from the language used that they were bound to accept as true the statement of appellant that he made certain statements which were not incorporated in the written confession. This was a highly disputed question of fact for the jury's determination, which was made crystal clear by the court's modification. The jury were told in the second sentence of the instruction that the entire statements must have been included in the confession in accordance with the decision in *Williams* v. *State,* 69 Ark. 599, 65 S. W. 103, relied on by appellant. All of the matters which appellant claimed were omitted from his written statement are contained in his testimony. It was within the province of the jury to determine the truth or falsity of all or any part of the evidence, including the confession. *Smith* v. *State,* 216 Ark. 1, 223 S. W. 2d 1011. We find no error in the modification of the requested instruction.

Although not brought forward in the motion for new trial, appellant also objected to the court's instruction on "flight" for the reason "that said instruction is abstract and because the declaration of law, as given, has no application to the facts developed in this case." The instruction told the jury that if they found that defendant fled from the scene of the shooting for the purpose of avoiding arrest and trial, they could consider such fact along with all the other facts and circumstances in determining guilt or innocence. We have held that flight of the accused is admissible as a circumstance in corroboration of evidence tending to establish guilt. *Stevens* v. *State,* 143 Ark. 618, 221 S. W. 186. There was ample evidence of flight in the case at bar and the instruction is not open to the objection urged against it.

The final insistence for reversal is covered by the first three and the eighth assignments in the motion for new trial which challenge the sufficiency of the evidence to support the verdict. It is argued that there is no substantial evidence to establish appellant's guilt of any degree of homicide higher than manslaughter and that

the testimony on behalf of the state is so inconsistent with certain physical facts as to be unworthy of belief. In this connection great stress is laid on testimony relating to a shirt discarded by appellant shortly after leaving the scene of the shooting. This shirt was found by officers the next day, but was not offered in evidence by the state. Appellant introduced the shirt in evidence and testified that the blood thereon came from his mouth as the result of beatings administered by officers at the Pulaski County Jail. He further testified that his companion tore the shirt from his body shortly after they left the scene of the shooting because the white color of the shirt might more readily lead to their detection. But the jury could have reasonably concluded that the shirt was discarded because it was stained with the blood of the slain officer or his companion. The distinction between principals and accessories before the fact in felony cases has been abolished in this state and all accessories before the fact are deemed principals and punished as such. Ark. Stats. § 41-118. In testing the sufficiency of the evidence, we consider it in the light most favorable to the state. When so considered, the jury was warranted in concluding that appellant willfully shot and killed the deceased, Ray Campbell, after deliberation and premeditation and with malice aforethought, or, that if he did not actually fire the fatal shot, he was present aiding and abetting his companion in the commission of such felonious act.

We find no prejudicial error in the record and the judgment is affirmed.

HUBBARD *v.* WATSON.

4-9477 238 S. W. 2d 656

Opinion delivered April 16, 1951.

E. M. Fowler, Rex W. Perkins and *Chas. W. Atkinson,* for appellant.

James R. Hale, for appellee.

HOLT, J. Taylor Hubbard and Albert King were rival candidates for the office of County Treasurer of Madison County, Arkansas, in the November 7, 1950, General Election.

November 13, 1950, Hubbard filed in the Madison Circuit Court complaint,—twice amended,—against appellees, three election commissioners, praying for a writ of mandamus to compel them to certify him elected to said office as shown by the returns of the judges and clerks of said election held November 7, 1950. King was not made a party to the suit.

Demurrer was filed by two of the commissioners and was sustained and the complaint dismissed "for grounds that the Court does not have jurisdiction to grant the relief prayed for by writ of mandamus, as requested by the plaintiff against the election commissioners for the reason that no fraud, misconduct or abuse of authority has been alleged against the election commissioners, and that said matter should be raised in an election contest."

This appeal followed.

The trial court was correct in sustaining appellees' demurrer.

The complaint, in effect, alleged: "The entire votes of Madison County resulted in plaintiff being elected to said office of Treasurer, and that the said defendants, the election commissioners, have canvassed the vote as returned by the various election precincts in said county including the absentee ballot box in accord with the tally

sheets except the absentee vote which was contained, of course, in a separate box; that said absentee ballot box and the valid votes therein cast would be the determining factor in the election or defeat of the plaintiff; that as a whole, including said ballot box and the remainder of the vote of all Madison County shows plaintiff elected to said office by a majority of eight votes."

That said Commissioners have refused to certify the vote as counted and unless restrained, will certify the election results without the vote contained in the absentee ballot box, and will also recount a number of invalid votes cast in the election instead of certifying the votes as returned by the "judges of election, and will go behind the return as made from the various precincts and absentee ballot box as certified by the judges and heretofore accepted by said election commissioners as the vote cast in various precincts of said county and the absentee ballot box; that unless the said election commissioners certify said vote as required by law of all the votes cast within and for Madison County, plaintiff will be declared defeated in said election whilst as a matter of fact the valid ballots cast as before stated show him to be elected."

The complaint further "challenges the integrity of the ballot box used in Ward 2 of the City of Huntsville, Arkansas. . . . That in said ward there were cast in said election 216 ballots, the same being counted after the close of the polls of said election officials, tallied and certified as the law provides; that in said ballot box plaintiff obtained, and the same were counted for him, 74 votes, and his opponent for the above named office, Albert King, received 132 votes which were counted, tallied and certified by said election officials; that said election officials performed their duties in said manner as the law requires; that they carefully inserted said ballots in the box and delivered same in good condition, and as were counted, to the election commissioners of said county, having taken the names and addresses of the electors in said ward, and inscribed same on the talley sheets and stubs of the ballots as provided by law, and delivered same to the election commissioners, except the stubs of

the ballots which were delivered to the Treasurer of Madison County for safe-keeping; . . . that according to said count, tally and ballot stubs, ten of said electors failed to vote for the said treasurer's office; that after said tally sheets and ballots were delivered, according to law, to the election commissioners of Madison County, Arkansas, Lester Keck, Clarence Watson and Leo Hudson, said ballot box was ravaged by some person or persons unknown to plaintiff, and nine ballots, all cast, counted and tallied for plaintiff, were stolen from said ballot box; that the names of the voters in said ward were shown at the time and are shown in the tally sheets of said ward as written by said election officials and certified by them, and the said stubs of the ballots and the names on the tally sheets, if submitted to the court, will disclose this to be true."

It was further alleged that "there was a voting precinct in said county named Hilburn Township No. 7," and that in this township "there were cast for plaintiff ninety-seven (97) votes and for his opponent, Albert King, sixty (60) votes." That said ballots were carefully counted and returned to the election commissioners. "That after said votes were counted, tallied, numbered and inserted in the ballot box by the election officers of said township a number of said officers carefully conveyed all of said election equipment, including the ballots, stubs, tally sheets and all matters pertaining to said election in said precinct and delivered the same intact to the election commissioners of Madison County. That thereafter a recount was asked by said Albert King, which was granted by the election commissioners, and upon recount of said votes it was discovered that thirteen (13) ballots cast in said precinct had been stolen from plaintiff and taken out of the ballot box. . . . That plaintiff is prepared and prays the court to permit him to prove said theft and the original vote as cast in said precinct by all of the judges, clerks and others who know the same to be true."

We think it clear from the reading of the above allegations in appellant's complaint that it, in effect, though imperfectly in some respects, stated a cause of

action for an election contest, and therefore, under our General Election statutes, the County Court alone has jurisdiction to hear and try such action.

Section 3-1205, Ark. Stats. 1947, provides: "When the election of any clerk of the circuit court, sheriff, coroner, county surveyor, *county treasurer,* county assessor, justice of the peace, constable, or any other county or township office, the contest of which is not otherwise provided for, shall be contested, it shall be before the county court, and the person contesting any such election shall give to the opposite party notice in writing ten (10) days before the term of the court at which such election shall be contested, specifying the grounds on which he intends to rely, and, if any objections be made to the qualifications of voters, the names of such voters, with the objection(s), shall be stated in the notice, and the parties shall be allowed process for witnesses. (Act Jan. 23, 1875, No. 34, § 71, p. 92; C. & M. Dig., § 3850; Pope's Dig., § 4837.)"

We find no other statutory provision providing for a contest for the election of the office of *county treasurer* other than this section.

In the comparatively recent case of *Denney* v. *Hankins, County Judge,* 212 Ark. 618, 206 S. W. 2d 968, we held, in construing the effect of §§ 3-1201 and 3-1205, Ark. Stats. 1947, that "in an action by D to contest the election of appellant to the office of sheriff, held that the venue for the contest and the *court in which* the contest must be filed are definitely fixed by the statutes."

We hold that jurisdictional requirements are the same in contests for the office of County Treasurer as a contest for that of Sheriff, and must be originally brought in the County Court where jurisdiction has been definitely fixed under § 3-1205.

Accordingly, the judgment is affirmed.

[redacted]

ACME BRICK COMPANY *v.* HAMILTON.

HAMILTON *v.* BRALEI HOMES.

4-9447 238 S. W. 2d 658

Opinion delivered April 16, 1951.

Rehearing denied May 7, 1951.

[redacted]

Sherrill, Gentry & Bonner, for appellant.

W. S. Miller, Jr., and *Martin K. Fulk,* for appellee.

GRIFFIN SMITH, Chief Justice. Orville E. Hamilton and his wife contracted with Bralei Homes, Inc., for the construction of a brick-veneered home for $10,254. All materials and work were to be provided by Bralei, but the prospective homeowners were given the right to designate the brick type, with particular reference to color. Acme Brick Company, of Malvern, maintains a showroom in Little Rock. The Hamiltons were informed that they should make the selection and convey their preference to the contractor for inclusion in the written agreement. Brick displays, including four color shades, were arranged for convenient inspection in Acme's showroom, with assigned numbers or labels.

The Hamiltons alleged in their suit against Bralei and Acme that Nos. 743 to 746M were selected, but were not supplied; nor did the color of the bricks that were delivered to Bralei correspond with those shown in the display panel. The discrepancy was not discovered until the walls had been finished and cleaned by removing surplus mortar, etc. When the vice was observed and Bralei declined to make satisfactory adjustments, suit was filed. The complaint alleged that it would cost $1,381 to remove the off-color veneer and replace it with brick the contract called for. It was estimated that in other respects the construction as a whole was $3,653 short of completion. A temporary impasse resulted and work was stopped. Damages based on rentals at $50 per month paid by the Hamiltons were alleged, to which was added interest charged on money borrowed to pay the contractor. Bralei entered a denial and also cross-complained against Acme.

Acme's defenses were multiple. (a) The Hamiltons failed to notify the company that a mistake had been made; (b) after inspection of the walls in their incompleted form the color variations should have been discovered, therefore the mistake was waived; (c) the bricks

delivered, in respect of color, were substantially like the samples upon which the order was based, and (d) there was no privity of contract between Acme and the Hamiltons. In its cross-complaint Acme contended that Bralei knew, or ought to have known, that the error had been made, hence as between Acme and Bralei the latter had waived any right to recover. Specifically it was urged that a printed form, used by Acme as an invoice in lieu of delivery tickets, contained a provision for prompt inspection and notification of error on penalty of waiver.

The decree gave the Hamiltons $1,300 to compensate removal and replacement of the veneer, and interest and rental costs aggregating $201.27—a total of $1,501.27 adjudged against Acme. Bralei, on its cross-complaint, was given judgment for $157.71 against Acme. The Hamilton complaint against Bralei and Acme's cross-complaint were dismissed. Acme appealed here, as did the Hamiltons.

First—Relationship Between the Parties.—Acme contends that the Hamiltons were merely incidental beneficiaries of its contract with Bralei and therefore have no cause of action. One of the most recent cases dealing with rights of a third party beneficiary was decided on January 10th of this year by the Maryland Court of Appeals, *Marlboro Shirt Co.* v. *American Dist. Tel. Co.*, 77 Atl. 2d 776. The three kinds of third party beneficiaries are discussed — donee, creditor, and incidental. Marlborough Shirt Co. sued American District Telegraph Company. The Shirt Company had leased part of a building owned by Rosenbloom. After the Shirt Company's occupancy began Rosenbloom contracted with the Telegraph Company to install and maintain as part of an existing sprinkler system an automatic signaling device designed to register in the Telegraph Company's office any leakage that might occur. A substantial leak developed and the signal service failed to function, with consequential damage to goods stored by the Shirt Company. The trial court sustained a demurrer to the complaint and the order of dismissal was upheld on appeal.

In the opinion written by Judge GRAYSON the question was stated in this way: Was the demurrer properly sustained where the facts alleged showed negligence on the part of [the Telegraph Company] and where the facts further show that the contract in question of necessity had to be for the benefit of [the Shirt Company?] The Telegraph Company's contention was that the contract was not intended to benefit the Shirt Company. The Maryland decisions, said Judge GRAYSON, have receded from the common law rigidity requiring privity of contract before an action can be maintained, even though the contract is for the benefit of a third party: . . . "[The old rule] has gradually relaxed, so that now, in this state, a person for whose benefit a contract is made can maintain an action upon it. But before one can do so it must be shown that the contract was intended for his benefit; and, in order for a third party beneficiary to recover for a breach of contract it must clearly appear that the parties intended to recognize him as the primary party in interest and as privy to the promise." See Restatement, Contracts, § 133. (Acme has cited § 147 of the Restatement.)

A hypothetical relationship where a cause of action does not lie is given by the Maryland court: "If A enters into a contract with B and [B?] does not know that A intends C to be the beneficiary under the contract, C cannot enforce the promise made by A, for it would not appear that A and B recognized C as the primary party in interest and as privy to the promise. . . . [But] there are cases where the name of the beneficiary is not stated, but where he can recover under the contract. In such cases the facts and circumstances surrounding the transaction show clearly that a particular person (though not named) is the beneficiary. Williston on Contracts, Revised Ed., vol. 2, § 378."

When tested by these rules did Acme owe to the Hamiltons a duty of more than incidental importance?

The Brick Company admits that it did not supply Bralei from stock corresponding with the identifying numbers displayed. Nor is it denied that the Hamiltons

were told that better results would be obtained if they inspected houses where the identical colors represented by numbers 743 to 746M had been used. Bralei had built extensively and is a substantial Acme patron; but, according to the Hamiltons, they had a right to select from stocks offered by Acme or the Hope Brick Company. An Acme salesman, in furtherance of an obvious purpose to procure the order—and also being anxious to extend any reasonable accommodation that might prove helpful—mentioned three houses where the bricks had been used.

Orville E. Hamilton testified that the Acme office manager urged him and Mrs. Hamilton to inspect the houses mentioned—"He insisted that we go to these sites to help us in deciding which brick we wanted". The manager explained that the office samples would not look exactly like a finished wall would appear, hence the importance of viewing a completed house. The manager for Acme, with commendable forthrightness, admitted error in writing the order after the selection had been made from the inspections referred to and from samples. It appears conclusive, therefore, that at a time when the Hamiltons had a right under their contract with Bralei to designate either Acme or Hope Brick Company products, they were urged into a course of moderate inconvenience in consequence of which Acme hoped to procure the order. In these circumstances the benefits flowing to Acme were substantial, and reliance by the third party was more than incidental. The Hamiltons had a subsisting and material concern in the result of these solicited inspections, and Acme at all times knew that the result of any selection made would become an integral of the contract it had with Bralei for the benefit of these prospective homeowners.

The argument that Acme, without obligating itself to Bralei's contractees, could induce the homeowners to select its brick and forego the right to look elsewhere, and then in the face of admitted error evade responsibility by relying upon the strict letter of its agreement with Bralei,—this construction omits consideration of the incentive for most business transactions: the profit stimulus. It does not answer Acme's permissible purpose

to best competition, and it obscures the business factor and contractual equation whereby Bralei sent the Hamiltons to Acme for the furtherance of an end intended to be beneficial from three standpoints.

We have said that where a promise is made to one party upon a sufficient consideration for the benefit of another, the beneficiary may sue the promissor for a breach of the promise. *Green* v. *Whitney,* 215 Ark. 257, 220 S. W. 2d 119. The opinion goes on to say that while court decisions are not in complete harmony as to certain limitations where the right to sue has been upheld, the principle has been consistently recognized.

An interesting discussion of third party rights is a part of the opinion of Mr. Justice Baker, *Freer* v. *J. G. Putman Funeral Home, Inc.,* 195 Ark. 307, 111 S. W. 2d 463. A paragraph from pp. 311-12 of the Arkansas Reports (South Western Reporter pp. 465-6) is shown in the margin.[1]

After holding that in appropriate circumstances a third party beneficiary may sue, the *Freer* opinion says: ". . . We are not pioneering in making these announcements. We are following the modern trend as being one by which absolute justice may be had without doing violence to any substantial right."

Second—Invoice Stipulations.—While evidence preponderates that delivery tickets, as distinguished from invoices, were to be sent with each load of brick, it is conceded that invoices in multiple form were sent and that delivery was acknowledged by a Bralei employe.

[1] "We are confronted with the argument," said Judge BAKER, "that formerly the courts held that there must have been some privity or obligation as between Finney and the appellee in order to bind appellant; that none being shown here the appellee is without remedy. We find that formerly under some of the more ancient authorities that proposition might have been deemed as well considered. We prefer, however, to take a different view, which we think is more consonant with absolute justice, as well as in conformity with the contract. That view is supported by a substantial array of authorities to the effect that the more nearly absolute becomes the duty of the defendant to pay, in the same proportion is the power to sue increased. Here there is an absolute duty to pay. It admits of no denial and none is offered. There is the correspondingly increased right to sue."

At the bottom of these invoices appeared the matter shown in the footnote.[2]

The last sentence, "In no event shall this company be in any way liable after the material has been used", is relied upon by Acme. By reading the full marginal text it will be seen that contingencies primarily sought to be guarded against were "counts", "shortages", and "apparent shortages". These designations were followed by the statement that all materials would be considered accepted after reasonable time had been allowed the purchaser or his agent for inspection. There is grave doubt that the provision relied upon was intended to apply to a situation like the one presented here. Testimony on behalf of Bralei is that the disclaimer was not on the *purchase order* delivered to Acme and accepted by it as the basis of the buyer-seller relationship; that during a period of ten years no person with Bralei in a position of responsibility had noticed the relatively obscure print, and that receipt of the brick was acknowledged by an employe miscellaneously engaged. The so-called invoices were not sent to Bralei's office. The effect of a workman's signature could not, therefore, have the effect of creating a new contractual obligation relieving Acme of negligence no one suspected would be involved. Bralei had a right to assume that Acme would deliver the commodity ordered and we find nothing to justify interposition of the abstract sentence renouncing liability in all cases where use had been made of the thing ordered, and where the error, as here, was not of a character reasonably discernible.

Third—Cross-Complaints, etc.—Bralei's primary liability to the Hamiltons includes all consequential damages not tied to physical replacement of the veneer; but

[2] A condition of this sale is that our yard count shall govern settlement. Count your material before it is unloaded if possible, otherwise while it is being unloaded or immediately afterwards. If there is an apparent shortage call us, by wire if we have no local representative, and we will come and settle shortage before any of the material is used, with the understanding that you will pay the expenses if our yard count is correct. No shortage claim will be recognized under any other circumstances. All material shall be considered accepted after the purchaser or his agent has had reasonable opportunity for its inspection. In no event shall this company be in any way liable after the material has been used.

as to such replacement both Acme and Bralei are accountable. Acme's manager testified that an estimate of $1,300 or $1,318 for this work "sounded about right", although the company's charge for the brick was slightly less than $400 and the complaint as to color was not made until approximately fifty days after delivery. The Hamiltons had been on the premises two or three times while the work was under way. Mrs. Hamilton testified that the veneering was near the ground-floor windows—probably four or five feet high—when a casual inspection was made for the purpose of noting structural progress, but scaffolding obstructed the view to a certain extent and the off-shade bricks were not noticed.

When the Hamiltons complained to Bralei work was stopped, but later a written agreement was entered into in consequence of which all work was accepted except the veneer. It was this delay that occasioned damage to the Hamiltons in excess of replacement cost of the brick structure. It is not shown that Acme was a party to the work-stoppage or that it contributed to the interim delay in any manner. The damage caused by Acme's error was as great the day the veneering was finished as it was two, three, or four months later.

The judgments must be affirmed in part and reversed in part. Since the Hamiltons had a cause of action against Bralei *and* Acme, the order relieving Bralei will be reversed. Upon remand judgment should be rendered against Bralei and Acme in favor of the Hamiltons for $1,300. On Bralei's cross-complaint against Acme it should have judgment for $1,300. The Hamiltons should have judgment against Bralei (in addition to the item of $1,300) for $201.27. It is so ordered.

George Rose Smith, J., not participating.

MEYER *v.* PEEL.

4-9494 238 S. W. 2d 663

Opinion delivered April 16, 1951.

Rehearing denied May 21, 1951.

[redacted]

Eugene Coffelt and *Robert M. Coffelt,* for appellant.

Jeff R. Rice and *Little & Enfield,* for appellee.

GEORGE ROSE SMITH, J. This is a suit by the appellants to recover $1,500 of earnest money that was forfeited by L. G. Clark when he failed to perform a contract to buy a farm from the appellants. The money had been deposited with the appellees, two real estate brokers, who contended below that they were entitled to half of the deposit as a commission for having brought about the sale. The trial judge, sitting as a jury, upheld the contention of the appellees and accordingly awarded $750 to the appellants and a like amount to the appellees.

The appellants are residents of Missouri, and the farm is in that State. In 1950 the appellants, in Missouri, orally listed their farm for sale with the appellees, who are a Missouri broker and an Arkansas broker. The agreement was that the appellees should have as their commission all of the purchase price in excess of $21,000. It does not appear that the parties at first considered

whether the sale would be for cash or on terms of credit. The appellees interested Clark in the farm, and on June 23, 1950, the sellers and Clark signed a contract by which Clark agreed to buy the property for $23,000, subject to the title being good. Clark paid earnest money of $1,500 and agreed to pay $5,000 in cash when the deed was executed and the balance in specified installments over a period of ten years.

While the title was being examined Clark was alerted for military duty and notified the sellers that he would be unable to complete his purchase. The contract to sell provides that in this situation the sellers have the option of insisting upon performance or of declaring a forfeiture of the earnest money. The sellers chose the latter course, but the appellees refused to surrender the entire $1,500. They contended that they were entitled to $750 (*a*) under their contract of employment, (*b*) by custom in such cases, or (*c*) on a *quantum meruit* basis.

The contract between these litigants was made in Missouri and contemplated performance in Missouri, since the appellees would evidently be required to show the farm to prospective buyers. Hence the law of Missouri governs. Leflar, Conflict of Laws, §§ 94 and 95. Since we have concluded that under Missouri law the brokers could have recovered their entire commission of $2,000, we find it unnecessary to consider their second and third contentions.

In the absence of a decision by the Supreme Court of Missouri upon this exact point we regard as controlling the case of *McCormick* v. *Obanion,* 168 Mo. App. 606, 153 S. W. 267. There Obanion orally employed McCormick to sell a farm, the commission to be all that the farm sold for in excess of $6,000 cash. The broker found a purchaser who was willing to buy the property for $6,800, but the buyer could not pay the full amount in cash. The seller then agreed to accept a down payment and notes payable over a period of years. When McCormick sued for his commission of $800 the farm was only about half paid for, and Obanion contended that the suit was premature. The court held, however, that

by agreeing to accept notes instead of cash Obanion had elected to treat the notes as payment. The sale was therefore a completed transaction, so that McCormick was entitled to his commission without waiting for the notes to be paid. It was indicated that the rule might be different if the purchaser had defaulted and proved to be insolvent.

In the case at bar the same reasoning applies. These appellees found a purchaser, Clark, who agreed to pay $23,000 for the farm. The sellers and Clark signed a binding contract for a sale upon deferred payments. By this contract the appellants elected to treat the obligation to pay in installments as the equivalent of payment. While the notes were not actually signed in this case, the sellers could have enforced specific performance had they chosen to. *Norris* v. *Letchworth,* 167 Mo. App. 553, 152 S. W. 421; Walsh on Equity, § 68. It is not intimated that Clark is insolvent, but the appellants elected to release him from his obligation and to accept instead a forfeiture of the earnest money. In these circumstances we think the appellees had earned their commission under Missouri law, and of course the appellants cannot complain because the appellees have asked for only $750.

Affirmed.

CALVERT *v.* HALEY.

4-9437 238 S. W. 2d 664

Opinion delivered April 16, 1951.

Rehearing denied May 21, 1951.

Mahony & Yocum and *Joseph Morrison,* for appellant.

Hendrix Rowell, for appellee.

PAUL WARD, J. The Farelly Lake Levee District was organized several years ago pursuant to legislative enactment and embraced approximately 100,000 acres of land situated in Arkansas and Jefferson counties. The tax burden was heavy and in time a great many of the landowners were unable to pay, which resulted in a receivership through the chancery court. Several foreclosure suits were filed by the receiver, but they were allowed to pend for approximately twelve years without any decree being taken. Following this the District made arrangements with the R.F.C. to furnish the money to buy up the original bonds for twenty-five cents on the dollar, and thereafter the District owed the reduced debt to the government agency. Notwithstanding this arrangement the levee taxes were still burdensome and approximately sixty per cent of the lands forfeited to the District.

In a salutary effort to help the taxpayers and in an effort to retire the indebtedness to the R.F.C., the District worked out a plan to allow the landowners to redeem or buy their lands. The Board of Commissioners of the Levee District passed a resolution in 1940 which was approved the next year by the R.F.C., giving the landowners a right to "pre-pay" the assessments of benefits against their lands and thereby retain a clear legal title to the same. This resolution was to be effective for a period of one year only, but, actually, it was renewed by the board each year and much publicity was given to it,

advising the people of its effect and provisions. Apparently the plan was successful. The first resolution became effective in 1941 or 1942 and by May, 1947, the indebtedness of the District was reduced from over $400,000 to approximately $66,000.

Lands belonging to appellants became delinquent several years before the said resolution was adopted and the District obtained a decree in chancery court foreclosing same. A commissioner's sale followed and the same was confirmed. On February 12, 1947, the Farelly Lake Levee District executed its quit claim deed conveying to appellees some of the lands belonging to appellants, but which had been foreclosed by the District in the manner mentioned above. The said quit claim deed embodied the resolution of the District which was heretofore mentioned. Appellants, seeking to take advantage of the provisions of the resolution whereby they could "redeem" these lands from the District, made tender of the amount due after the sale to appellees, but before the resolution expired on the first day of May, 1947.

On October 27, 1947, appellees filed this suit in chancery court, alleging the execution of the quit claim deed; that the defendants (appellants) "erroneously and unlawfully claim some right, title and interest in and to the property aforesaid," that "none of said defendants has any lawful or legal right, title or interest in and to the property aforesaid, and that accordingly the title thereto should be quieted and confirmed in these plaintiffs." The prayer asked that the title to said property be quieted and confirmed in the plaintiffs. To the above complaint appellants filed a demurrer stating it did not state facts sufficient to constitute a cause of action. Evidently one of the grounds urged under this demurrer was that the complaint did not allege the plaintiffs were in possession, because later the plaintiffs (appellees) amended their complaint to state that immediately after they purchased the lands from the District they went in and upon said property, took exclusive possession thereof, and are now in possession. Thereupon appellants moved to transfer to the circuit court and, in response thereto, appellees again stated that they and their agents

were in possession. The court heard testimony on the motion to transfer and on October 4, 1949, entered an order overruling the same. Saving their exceptions, appellants then filed answers in which they made certain allegations attacking the validity of the District's foreclosure proceedings and claiming certain rights to "redeem" under the resolution discussed above.

We are not concerned here with the merits of the contentions set forth in appellants' answers nor will we discuss the testimony introduced to sustain and to controvert those contentions, because we are of the opinion that the learned chancellor should, after hearing the evidence, have granted appellants' motion to transfer to the circuit court. We gather from the record that this question gave the chancellor much concern and, in arriving at his conclusion, it appears that he gave too much weight to the interpretation of a certain statute as will be discussed later.

To begin with it must be conceded that these appellants were in possession of the lands they owned at the time the District foreclosed, and further, that in said foreclosure proceedings, no Writ of Assistance was asked for and none was granted. The appellants, therefore, were, up to the time of the deed from the District to appellees, in possession of their lands. The testimony shows that much of the land was unimproved and part of it was a lake which has been and is now used for duck hunting, but it also shows that some fencing was done by appellants and some parts of it had been in cultivation and one or more duck blinds had been built and used by appellants and their friends. Testimony on the part of appellees tending to show possession is principally to the effect that they meant to take possession when they bought the land; that they and their friends and agents had hunted on it some and had built or repaired a duck blind. In our opinion the weight of the evidence clearly shows that appellants never relinquished possession of the lands involved and, to the same effect, it fails to show that appellees ever gained such possession as, under the law, would entitle them to maintain their action to quiet title.

The court, however, took a different view as is shown by the following quotation from its opinion: "After looking into this question very thoroughly, it is apparent to me that the question of who was, or is, in possession of the premises is totally immaterial." Section 20-1143 Ark. Stats., 1947, provides as follows: (here the opinion sets out the wording of the statute). It is sufficient here to state that the said statute provides that when a commissioner's deed is approved, as in this case, "the purchaser shall have the right to the possession of the lands and premises so sold and may have process therefor . . .". It must be admitted that here the District had a right to possession of appellant's lands when it foreclosed on them through chancery court and also had a right to ask for a Writ of Assistance to give it possession, but it did not ask for any such Writ and none was issued. Later the lands were sold by the District to appellees who now bring this suit to quiet title in them.

The chancellor may have taken the position that since both suits were brought in the same court, it is possible now to give appellees possession. We cannot agree with this conclusion for two reasons. First, the statute requires that one bringing a suit to quiet title must be in actual possession. It would not be a compliance with the statute to seek possession in the very suit which pre-supposes possession before the suit is filed. In the second place, the parties involved in this suit are not the same parties involved in the foreclosure by the District and the right to ask for a Writ of Assistance was not transferred to appellees by virtue of their deed from the District. In addition to this, it must be remembered that appellants have filed answers in which they question the title of appellees and under such circumstances the courts should be cautious in directing a writ of possession. 37 Am. Jur., p. 208, § 819 makes this statement: "The exercise of the power to grant the writ rests, however in the sound discretion of the court, and the power will never be exercised in a case of doubt, nor under color of its exercise will a question of legal title be tried or decided."

For the reasons stated the cause will be reversed and remanded with directions to transfer to circuit court.

HAMPTON *v.* ARKANSAS STATE GAME & FISH COMMISSION.

4-9409 238 S. W. 2d 950

Opinion delivered April 16, 1951.

Rehearing denied May 21, 1951.

Gene Baim, George E. Pike, A. F. Triplett, Hendrix Rowell, Lawrence Blackwell and *Coleman, Gantt & Ramsay,* for appellant.

Ed E. Ashbaugh, for appellee.

Joseph Morrison, amicus curiae.

ED. F. MCFADDIN, Justice. This appeal presents the question, whether the Arkansas State Game and Fish Commission is authorized to exercise the power of eminent domain to acquire lands on which to establish a public duck hunting project.

Appellee, Arkansas State Game and Fish Commission (hereinafter called "Commission") filed complaint in the Circuit Court naming a number of parties as defendants, and seeking to acquire by eminent domain all of the defendants' rights in 1320 acres of described real estate in Jefferson County, to be a part of a contemplated plot of approximately 40,000 acres, lying in Jefferson and Arkansas Counties, and designated as the Bayou Meto "Wildlife Management Area" or "Bayou Meto Land Acquisition Area". The complaint alleged, *inter alia*: that the Commission was created by Amendment No. 35 to the Arkansas Constitution; that the Commission was empowered to exercise the right of eminent domain to fulfill its duties; that the Commission had the "obligation, duty, authority and responsibility of acquiring, developing and maintaining hunting and fishing facilities for the use and benefit of sportsmen"; and that in discharging such duties the Commission had determined that the lands of the defendants should be taken by eminent domain and made a part of the Bayou Meto "Wildlife Management Area".

The defendants (sometimes herein referred to as landowners) filed separate answers, one of which stated:

"That he denies that" the Commission "is authorized by the Constitution of the State of Arkansas or by any statute to condemn the lands . . . for the purposes set out in the complaint, or any such purpose, and he

denies particularly that" the Commission "is authorized to acquire the lands . . . through condemnation proceedings.

"That he denies that under the provisions of Amendment No. 35 to the Constitution of the State of Arkansas the said Commission is charged with the obligation, duty, authority or responsibility of acquiring, developing or maintaining hunting or fishing facilities for the use or benefit of sportsmen in the State of Arkansas, and he denies that the said Commission is vested with any authority to acquire lands by condemnation . . . for such purpose or to administer, manage, develop or maintain such areas."

The defendants, in thus challenging the Commission's claimed right of eminent domain, asked that the proceedings be transferred to equity which was done.[1] In that forum all other issues were reserved by the terms of a stipulation, reading:

"As of the beginning of the trial, it is stipulated that the question to be presented to the Court at this time, is the question of the right of the plaintiffs to condemn the lands involved in this action for the purposes shown by the pleadings and proof for such condemnation."

The Chancery Court, in its decree, stated the issue:

"With the consent of the Court it was stipulated and agreed that the sole question to be passed upon by the Court at this time is whether the Arkansas State Game and Fish Commission has the authority to condemn the lands in question for the purpose set out in the complaint herein and shown by the testimony presented . . ."

The Chancery Court—relying largely on our opinion in *Wrape Stave Co.* v. *Arkansas State Game and Fish Commission,* 215 Ark. 229, 219 S. W. 2d 948—entered a decree to the effect that the Commission could exercise the power of eminent domain in this case; and the dissatisfied landowner defendants have appealed.

[1] Such procedure was approved in *Wrape Stave Co.* v. *Arkansas State Game and Fish Commission,* 215 Ark. 229, 219 S. W. 2d 948.

Some fundamental matters may be stated at the outset:

(A)—A landowner may challenge, by Chancery proceeding, the attempted exercise of eminent domain: see *Burton* v. *Ward, ante,* p. 253, 236 S. W. 2d 65, and cases there cited.[2]

(B)—The right of eminent domain is to be strictly construed against the condemnor and in favor of the landowner. As stated in 18 Am. Jur. 976:

". . . The legislation defining and granting such power must be strictly construed in favor of the property owner, and those asserting the power must be confined within the limits of the legislative grant . . ."

See Lewis on Eminent Domain, 3rd Ed., § 388; Cooley on Constitutional Limitations, 8th Ed., vol. 2, p. 1122; Nichols on Eminent Domain, 3rd Ed., § 3.213; *Peavy-Wilson Lumber Co.* v. *Brevard County,* 159 Fla. 311, 31 So. 2d 483, 172 A.L.R. 168; and *Pontiac Implement Co.* v. *Board of Com'rs, Cleveland Dist.,* 104 O. St. 447, 135 N. E. 635, 23 A.L.R. 866.

(C)—At the General Election in 1944, the People of this State adopted Amendment No. 35 to the Constitution, sometimes referred to as the "Game and Fish" Amendment. Portions of the Amendment germane to the present litigation read:

"Section 1. The control, management, restoration, conservation and regulation of birds, fish, game and wildlife resources of the State, including hatcheries, sanctuaries, refuges, reservations and all property now owned, or used for said purposes and the acquisition and establishment of same, the administration of the laws now and/or hereafter pertaining thereto, shall be vested in a Commission to be known as the Arkansas State Game and Fish Commission . . .

"Section 8. . . . Said Commission shall have the power to acquire by purchase, gifts, eminent domain, or

[2] In the case at bar, it is not necessary for us to discuss the claimed right of taking "title to the land in fee simple," rather than a mere easement. That question is reserved.

otherwise, all property necessary, useful or convenient for the use of the Commission in the exercise of any of its duties, and in the event the right of eminent domain is exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the State Highway Commission . . ."

It will be observed that § 8 gives the Commission the power of eminent domain "in the exercise of any of its duties"; so we have to examine § 1 to ascertain the duties of the Commission. This section, as previously copied, gives to the Commission "control, management, restoration, conservation, and regulation of birds, fish, game and wildlife resources of the State, including hatcheries, sanctuaries, refuges, reservations."

With the foregoing thoroughly understood, we turn to the facts in the case at bar. The Commission's Executive Secretary, T. A. McAmis, was a candid witness. He admitted that the Commission had been working for several years on the project here involved. It was originally called "Bayou Meto Public Duck Shooting Area", but the name was changed later to Bayou Meto "Wildlife Management Area" or "Bayou Meto Land Acquisition Area". He stated that public shooting would be on 75 per cent of the 40,000 acres hoped to be included in the project. This appears in his testimony:

"THE COURT: What is the primary purpose of this plan in its inception and carrying out—the Number 1 purpose?

"A. The Number 1 purpose is duck hunting and shooting."

And again this appears:

"Q. With reference to the duck situation, couldn't your purposes be accomplished to give ducks the refuge and protection they need without ownership?

"A. Yes; the Federal Government has aided materially; they have two refuges in the State."

Mr. McAmis, on cross examination, identified and allowed to be introduced in evidence the report of T. H.

Holder to the Commission. Mr. Holder has the title "Co-ordinator of Federal Aid"; and his report, relied on by the Commission as influencing its actions, tells of the Commission's real intentions in this proceeding. The report is of 23 pages, but we copy typical sentences:

"The greatest accomplishment which this Commission can make is in the acquisition of suitable areas for public hunting. . . . The Commission is well under way toward completing the acquisition of the Bayou Meto area. We are now ready for the final push which will make one public hunting ground an accomplished fact rather than just something that we say we are going to do . . . Prior to and during the 1920's and early 1930's, duck hunting was commercialized to a considerable extent by professional guides. . . . The decline in the national duck population made hunters realize that ducks could no longer be killed at just any place; . . . There are less than 3,000 duck hunters, who really have a place to hunt, and about 40,000 would-be duck hunters in Arkansas . . . It is uncertain just how much longer most duck hunters will buy hunting licenses and duck stamps, with only a faint hope of getting to go on a good duck hunt. . . . The only possibility of doing something constructive, however, is through the purchase of public hunting areas. We are about 15 years late in getting started, but not too late to take advantage of several outstanding areas that are still available . . . In 1943, the Commission established a public shooting ground in the 22,000-acre Fisher Body tract on the east side of White River, in Monroe County . . . The Monroe County area provided excellent duck shooting whenever it happened to be inundated by flood waters during the open season. . . . In the spring of 1946, an investigation was made of the possibility of establishing a public shooting ground in the Bayou Meto Area of Arkansas and Jefferson Counties. . . . The area is physically well adapted for use as a duck hunting area and has an excellent reputation in this respect. . . ."

From the foregoing, it is crystal clear that Mr. McAmis was absolutely accurate when he said that the "Number 1 purpose" of the project was to provide a duck hunting ground for the public. While it was testi-

fied that squirrel, turkey, deer and other wildlife would be brought to the area for propagation, still it was admitted these could be protected by a closed season, independent of the exercise of eminent domain to acquire a preserve. It was also tacitly admitted that a closed season on migratory fowl, if made by the Federal Government, would serve to protect and preserve the duck population. So, in the final analysis, the evidence shows that this is primarily a duck hunting project, and not a project to preserve wildlife. The plan is to entice ducks to fly to Bayou Meto—rather than down the Mississippi River—thus enabling the hunters to shoot the ducks on their flight from Canada to the warm climate of the Gulf Coast area.

In the light of the evidence and the rules concerning eminent domain, as previously stated, we have no hesitancy in holding that Amendment No. 35 does not give the Commission power of eminent domain to establish a public hunting ground. The words of the Amendment are:

"... control, management, restoration, conservation and regulation of ... wildlife. ..."

The plan here is to kill ducks; and killing is certainly the antithesis of restoration and conservation. Neither can killing be said to be control, management or regulation. When read in the light of the letter and spirit of the Amendment No. 35, it is reasonably clear that ducks will not be conserved or restored by the establishment of a public hunting area. The Commission, in its control of wildlife, may include "hatcheries, sanctuaries, refuges, reservations". A public shooting ground could hardly be likened to any of these.

The Commission claims that the case of *Wrape Stave Co.* v. *Arkansas State Game and Fish Commission,* 215 Ark. 229, 219 S. W. 2d 948, is authority for what the Commission is here undertaking, because we there said:

"... The Game and Fish Commission is given a very broad discretion in determining how wildlife shall be conserved. ..."

So we examine that case. In it the Commission proposed to create the Palarm Lake of about 6,000 acres as a fishing preserve. It was recognized that the project would also create a recreational area where fishing would be permitted at certain seasons of the year. The opinion recites that T. A. McAmis testified that the project was

"... for the conservation of birds, fish, game and (other) wildlife, and to create a recreational area for use of the citizens of the State at large."

But it is apparent that in the Palarm Lake case, the first and primary purpose of the lake was for the propagation of fish. Such primary purpose—propagation or conservation of ducks—is not present in this case. In fact, the record reflects that the prime purpose is the shooting of ducks. There is no similarity between building a lake where fish may live and propagate, and creating a public shooting ground, for the purpose of attracting migratory fowl, in order to provide sport for those who kill them.

We said in the Wrape case that in discharging its duty to control, conserve and regulate the State's wildlife resources, the Commission had a broad discretion in determining *how* these resources shall be conserved. The proof in the case at bar does not show that conservation or propagation is promoted by intermittent shooting, or what might be termed a "thinning-out process". Of course *all* of the area may be lawfully acquired as a *sanctuary* or *refuge,* and for *breeding* purposes. We feel, however, that the plan to utilize three-fourths of the land as shooting grounds goes beyond the intentions of Amendment No. 35. Since it is conceded that only one-fourth of the area of approximately 40,000 acres will ever be used as a refuge where wildlife will be conserved through propagation and non-molestation, it is impossible to see how the right to condemn the excess acreage can be inferred from Amendment No. 35[3]. In *Selle* v. *Fay-*

[3] In the oral argument in this Court, it was stated on behalf of the Commission that the power of eminent domain was claimed solely under the Constitutional Amendment, and not under any Statute. We held in *Arkansas Game and Fish Commission* v. *Edgmon, ante,* p. 207, 235 S. W. 2d 554, that the Legislature could not amend or repeal Constitutional Amendment No. 35.

etteville, 207 Ark. 966, 184 S. W. 2d 58, we recognized that a municipality could not condemn land for an announced purpose and then forthwith sell the land to private individuals for another purpose.

So here the State cannot, under the guise of a game refuge, take the property of private citizens and then convert the property to a public hunting ground to satisfy the sporting instincts of other citizens.[4] A careful study of the entire Amendment No. 35 shows that it is not the duty of the Commission to acquire lands by eminent domain in order to establish shooting grounds where the public may kill migratory fowl. That is the basic question in this case; and we hold that the Commission does not have such power.[5]

Therefore, the decree of the Chancery Court is reversed and the cause is remanded to allow further proceedings not inconsistent with this opinion.

George Rose Smith, J., dissenting. By implication the majority recognize that the project in question is for a public purpose, and with that view I agree. It is no longer uncommon for states and municipalities to own recreational facilities, such as swimming pools, golf courses, and athletic stadiums. There would undoubtedly be a widespread use of these duck-shooting areas by the general public. To illustrate, last year the State issued 233,796 hunting licenses and 255,602 fishing licenses, the total revenue being $932,660.05. These figures show how numerous are our citizens who participate in hunting and fishing.

But, say the majority, Amendment 35 does not vest in the Commission the power to condemn land for a combined game refuge and hunting area. In the *Wrape* case, cited by the majority, we sustained the Commission's power to condemn land for the creation of a lake where fish would be grown for the recreation of anglers. I cannot escape the feeling that by today's decision the

[4] See Cooley on Constitutional Limitations, 8th Ed., vol. 2, p. 1124, *et seq.;* see also Annotation entitled "Condemnation of land by public authority, to provide hunting and fishing" in 172 A. L .R. 174.

[5] There is not presented in this appeal any question concerning the power of the Commission to acquire lands by purchase.

majority has discriminated against hunters as compared to fishermen.

It is hard to see how the people, in their effort to vest in the Commission complete control over the taking of fish and game, could have used broader language than that contained in Amendment 35. The amendment gives the Commission the general power to control, manage, and regulate our wildlife resources, as well as specific authority to declare bag limits, to fix open and closed seasons, to establish protected areas, etc. I am not convinced that these broad powers stop short of authorizing the proposal now condemned by the majority.

To begin with, one-fourth of the 40,000-acre area will be used as a game refuge, where hunting will be prohibited. For all that this records shows, the shooting area will be subordinate, or at least complementary, to the game refuge. The latter will unquestionably increase the wildlife population, by providing a sanctuary for the birds on their flight southward. The Commission could easily regulate the open seasons and bag limits in the public shooting area in such a manner that the end result of the entire project would be an increase in the State's wildlife. Thus the facts do not support the majority's view that this proposal is the antithesis of conservation.

Next, the amendment provides: "Said Commission shall have the power to acquire by purchase, gifts, eminent domain, or otherwise, all property necessary, useful or convenient for the use of the Commission in the exercise of any of its duties." The power to condemn is patently as broad as the power to purchase; it could not logically be less unless the public will is to be thwarted by a landowner who refuses to sell. Granted that this purpose is a public one, I do not suppose anyone would seriously argue that the Commission lacks the power to purchase property to be used as a game refuge and shooting area. There is not a syllable in the amendment to indicate that a different rule is to prevail in condemnation proceedings.

Finally, I think the majority have confused the meaning of "conserve" with that of "preserve." The latter means to protect entirely from danger, but conservation "stresses the idea of maintenance of an existing condition." Webster's New International Dictionary, Second Edition. On the point of conservation the majority distinguish the *Wrape* case by saying that there the primary purpose was the propagation of fish. True, but propagation for what purpose? So that the fish could be caught by fishermen, of course. That is conservation as the term is used in Amendment 35—a program whereby the wildlife population may be maintained at a level that will permit extensive hunting and fishing. That is the purpose of the project at bar, and I do not think the Constitution requires us to strike it down.

HOLT and MILLWEE, JJ., join in this dissent.

LEFFINGWELL *v.* GLENDENNING.

4-9466 238 S. W. 2d 942

Opinion delivered April 16, 1951.

Rehearing denied May 21, 1951.

Josh McHughes, for appellant.

Wright, Harrison, Lindsey & Upton, for appellee.

GRIFFIN SMITH, Chief Justice. Appellant and appellees are adjoining homeowners. Appellant's lot is on ground higher than appellees' and natural drainage from Leffingwell's land has frequently flooded appellees' property. To fend against such recurring problems the Glendennings let a contract for a stone-and-cement wall 140 feet long, 70-ft. of which is along the dividing line between Leffingwell and the Glendennings. Leffingwell complained that the structure encroached upon the southern extremity of his lot and that overlapping varies from a fraction of an inch to almost a foot. The extreme estimate is in respect of the substructure or foundation.

Leffingwell sought by mandatory injunction to have the entire wall removed, or, inferentially, cut back to the true property line. The contractor who built the wall testified that it was not practicable to cut into the stone and concrete, since the impact of tools would crack the wall and loosen the stones.

Upon conflicting testimony the Chancellor found that there was an encroachment 26 feet in length beginning at a point 17.2 feet east of the west end of the wall. It was caused by a structural curve that carried the wall three-tenths of a foot onto Leffingwell's property at the point of maximum departure. It was also found, that J. J. Hocott, who contracted with the Glendennings to build the wall, had been shown boundaries established by a survey made by C. T. Brandt & Co., and that Hocott was directed not to encroach on Leffingwell. While the wall was being built Leffingwell employed the county surveyor and others to define his southern boundary. It was then ascertained that some of the construction was on Leffingwell's land and correctional work was undertaken. However, the net result was that for a distance of 26 feet the protusion infringed the adjacent proprietor's rights, and under evidence we are not required in the circumstances of this case to admeasure to determine whether the weight lies with the plaintiff or defendant, the Chancellor declined to compel appellees to remove the encroachment, but held that title to the small strip over which the wall protruded should not pass from appellant, who

was given the right to remove and rebuild the 26 feet at his own expense.

In his brief appellant's position is that the Chancellor correctly found that there was a 26-ft. encroachment, but erred in refusing to direct its removal.

Leffingwell testified that he did not complain to Glendenning or his wife until the work had been finished. Mrs. Leffingwell says she tried to talk with Glendenning, but that he would not let her. Glendenning denied this, saying that if Mrs. Leffingwell made such an effort he did not hear her.

The amount of land involved is of slight monetary value. Appellant does not contend that he is inconvenienced or that the wall interferes with any of his buildings or the incidents of his property; and a preponderance of the evidence indicates that he has been benefited rather than injured.

We have held that the *de minimis non curat lex* doctrine does not apply to real property, although the rule is different in some states. There are decisions holding that if the encroachment is unintentional, of no inconvenience to the adverse party, and the invasion is relatively insignificant, the protesting claimant will be relegated to damages.

In *Reeves* v. *Jackson,* 207 Ark. 1089, 184 S. W. 2d 256, there is the statement that the doctrine of *de minimis* does not apply to the invasion of the property of another, citing 26 R. C. L., p. 762. That citation, however mentions, the right to bring an action for the value of property. The Reeves-Jackson action was in circuit court where Reeves sought recovery of a small strip of land and damages for the wrongful use. Judgment on a jury's verdict for the defendant was reversed as a matter of law. Applicability of that case to the litigation here goes only to the proposition there expressed—that the *de minimis* doctrine does not apply to the invasion of another's realty. Of course, if this expression should be treated as an absolute—a rule to be invoked either at

law or in equity—there is no escape from appellant's conclusion that the chancellor was without discretion.

Many cases are reviewed in 96 A. L. R. in the annotation beginning at p. 1287. At page 1291 citations in 14 and 31 A. L. R. are supplemented. There is the statement that while the right to a mandatory injunction under proper circumstances is firmly established, [yet] "the injunction may be refused because of the absence of proper circumstances, especially inequitable incidents." Each case of a permanent obstruction, said the Superior Court of Pennsylvania, *Glinn* v. *Silver,* (1916) 64 Pa. Super. Ct. 383, "must be decided on its own circumstances." Decisions are mentioned in the A. L. R. summation where the courts have denied mandatory injunction upon the ground that the encroachment was the result of mistake, the damage to the plaintiff trivial, and the cost of removal disproportionate to the injury caused the plaintiff, who may be adequately compensated by a grant of damages. The *Glinn-Silver* controversy to which attention has been called involved a bulge in a wall resulting in a slight invasion of the plaintiff's property and "due to the negligent manner in which [the defendant] had built it."

Valuable property in New York City was the subject of equitable relief when the owner of land on West 125th street complained that the adjoining proprietor built a one-story brick extension to his home and encroached three or four inches on the plaintiff's property. The opinion contains this statement: "It is needless to say that the foundation encroachment is just as serious as that above the surface of the land. The plaintiff is thus effectually deprived of the right to build upon the full width of her land, and the defendant has, in effect, taken part of her land from her."

A different result was reached in *Swedish Evangelical Lutheran Church* v. *Shivers,* 16 N. J. Eq. 453, 458, where it was said that courts of equity sit to administer justice in matters of substantial interests to the parties, "not to gratify their passions or to foster a spirit of vexatious litigation." To the same effect is the comment

in *Carr* v. *Inglehart,* 3 Ohio St. 457. The other extreme is reflected by the decision in *Crosby* v. *Blomerth,* 258 Mass. 221, 154 N. E. 763. There the injunction compelled removal of a building, "even though it was found that the value of the land encroached upon by the foundation and overhanging eves amounted to $6.55, and the cost of removing the building would be $1,900."

Evans v. *Pettus,* 112 Ark. 572, 166 S. W. 955, is a case where a mother who was co-tenant with her two minor children undertook to bind the children by allowing an adjacent property-owner to build an encroachment. While circumstances there were more detrimental to the interests of the children than was construction of the Glendenning wall in the case at bar,[1] Chief Justice McCulloch, in speaking for the court, said that use of the wall amounted to a permanent encroachment; that the owner of a building does not have to show actual damages in order to prevent an encroachment upon his premises, [and], . . . "there being no remedy at law save to recover damages, which is inadequate, a court of equity should afford relief by preventing the encroachment. . . . It was within the jurisdiction of a court of equity to grant relief by compelling the wrongdoer to withdraw the encroachment. . . ."

The case went off on demurrer, the lower court having held that an equitable cause of action was not stated. It is to be doubted, therefore, that what the court said is authority for the argument that in all similar transactions a court of equity would abuse its discretion should it refuse to issue a mandatory injunction in every case where a slight invasion has occurred; nor is *McGill* v. *Miller,* 172 Ark. 390, 288 S. W. 932, (cited by appellant) conclusive. The encroachment there was on an alley—property dedicated to the public. It has been uniformly held that a private proprietor will be compelled to remove obstructions from streets, alleys, highways, etc. [But

[1] The complaint alleged that appellee took possession of the east half of the brick wall and attached a building thereto, "making plaintiffs' said wall a part thereof; that the said defendant cut into plaintiffs' wall and put her joists and sleepers therein so as to support the upper and lower floors of her said building, and also attached her roof thereto," etc.

see *State ex rel. Latta* v. *Marianna,* 183 Ark. 927, 39 S. W. 2d 301].

The decree in the instant case reserved to appellant his property right in the land onto which the wall curved, hence the statute of limitation would not run. There is ample evidence of a sincere desire on the chancellor's part to reach an equitable result without permitting the encroachment to take permanently from appellant the three or four inches of land occupied by the wall. However, a majority of the court take the view that the cost to appellees of removal is not disproportionate to the value appellant appears to place on the land, and for that reason they think it was error not to issue the injunction, restricted to the 26-ft. strip described in the decree.

Reversed.

BRIDGMAN *v.* DRILLING.

4-9479 238 S. W. 2d 645

Opinion delivered April 16, 1951.

Charley Eddy, for appellant.

Gordon & Gordon, for appellee.

MINOR W. MILLWEE, Justice. Appellee, C. W. Drilling, Jr., operates the Farmers Exchange, a retail grocery and feed store at Morrilton, Arkansas. On October 15, 1949, he filed a complaint in the Conway Circuit Court seeking judgment against appellant, W. A. Bridgman, in the sum of $516.83 on an open account for merchandise allegedly purchased "during the years from 1940 to 1946." Summons was issued on February 24, 1950, and served on appellant the next day.

On April 8, 1950, appellant filed an answer containing a general denial, alleging that he had not traded with appellee since 1945 and specifically pleading the three-year statute of limitations (Ark. Stats. § 37-206) as a bar to the action.

On October 2, 1950, appellee filed an amendment to the complaint alleging that appellant made the last payment on the account on June 23, 1947, in the amount of $15.30. On the same date appellant filed a demurrer to the complaint pleading the statute of limitations. The trial court treated the demurrer as a motion to make more definite and certain and permitted the filing of the amendment to the complaint by appellee. Appellant renewed his demurrer to the complaint as amended and the demurrer was overruled.

At the trial appellee introduced the original sales and credit tickets showing the last items to have been purchased by appellant on December 19, 1946, and the last payment on the account of $15.30 on June 23, 1947.

Appellant testified that he had not traded with appellee since 1945 and denied making the $15.30 payment. The jury returned a verdict in favor of appellee for $516.83 and this appeal is from the judgment based thereon.

Appellant insists that the trial court erred in overruling the demurrer to the complaint and the amendment thereto and in refusing to direct a verdict in his favor. It is argued that the amendment to the complaint of October 2, 1950, not having been filed within three years from June 23, 1947, the date of the last payment alleged therein, was barred by the statute of limitations when filed because the amendment introduced a new cause of action to which appellant was entitled to plead the statute separately. In overruling this contention the trial court ruled that the amendment to the complaint did not constitute a new cause of action, but related back and became a part of the original complaint.

Our cases hold that where there is an amendment to a complaint stating a new cause of action or bringing in new parties interested in the controversy, the statute of limitations runs to the date of the amendment and operates as a bar when the statutory period of limitation has already expired. In other words, if the plaintiff amends his complaint after commencement of the suit by introducing a new cause of action, the statute continues to run until the filing of the amendment which does not relate back to the commencement of the suit. *Wood* v. *Wood,* 59 Ark. 441, 27 S. W. 641, 28 L. R. A. 157; *Buck* v. *Davis,* 64 Ark. 345, 42 S. W. 534; *Love* v. *Couch,* 181 Ark. 994, 28 S. W. 2d 1067. If, however, the amendment to the complaint does not set forth a new cause of action, but is merely an expansion or amplification of the cause of action already stated, then the amendment relates back and takes effect as of the date of the commencement of the original action. *Little Rock Traction & Electric Co.* v. *Miller,* 80 Ark. 245, 96 S. W. 993; *Western Coal & Mining Co.* v. *Corkville,* 96 Ark. 387, 131 S. W. 963.

In the case of *Paris Purity Coal Co.* v. *Pendergrass,* 193 Ark. 1031, 104 S. W. 2d 455, we approved the rule stated in 37 C. J. 1068 as follows: "An amendment of a

declaration, petition or complaint which sets up no new cause of action or claim, and makes no new demand relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. This is in substance the language of the statute in some jurisdictions, and the rule applies, although the limitation is by contract and not by statute; and courts have been liberal in allowing amendments expressly to save a case from the statute of limitations when the cause of action is not totally changed." See, also, 54 C. J. S., Limitations of Actions, § 279a; 34 Am. Jur., Limitation of Actions, § 260.

We have repeatedly stated that the trial court is invested with broad discretion in allowing amendments to pleadings under Ark. Stats. § 27-1160 in order to effectuate the manifest purpose of the statute to permit the trial of litigation upon its merits. *Foster-Holcomb Inv. Co.* v. *Little Rock Publishing Co.,* 151 Ark. 449, 236 S. W. 597. It is also well settled that, in order to obtain the benefit of a defense of the statute of limitation, it must be pleaded either by demurrer or answer. *Keith* v. *Drainage Dist. No. 7 of Poinsett Co.,* 183 Ark. 384, 36 S. W. 2d 59. An action is commenced within the meaning of the statute of limitations when the complaint is filed and the summons is issued thereon. *St. Louis A. & T. Ry. Co.* v. *Shelton,* 57 Ark. 459, 21 S. W. 876.

We agree with the trial court that the amendment to the complaint did not constitute a new cause of action. Appellee had, and alleged, only one cause of action against appellant and the amendment merely amplified and expanded the cause of action already stated in the original complaint. If appellant had not pleaded the statute of limitations, a recovery upon the original complaint would have barred any recovery under the amendment and the same evidence would have supported both. See *Cottonwood Lumber Co.* v. *Walker,* 106 Ark. 102, 152 S. W. 1005, 45 L. R. A., N. S., 429. It follows that the filing of the amendment to the complaint on October 2, 1950, related back to the commencement of the action on February 24, 1950, and became effective as of that date. Under the pleadings and the proof on behalf of

appellee, the three-year statute of limitations commenced to run anew on June 23, 1947, the date of the last payment on the account, and ceased to run on February 24, 1950, which was within the three-year period. The trial court correctly so held and the judgment is affirmed.

JENNINGS *v.* TANKERSLEY BROTHERS PACKING COMPANY.

4-9478 238 S. W. 2d 625

Opinion delivered April 16, 1951.

[redacted]

Martin L. Green and *A. A. McCormick,* for appellant.

Paul M. Lynch and *Floyd E. Barham,* for appellee.

PAUL WARD, J. On April 12, 1950, appellee filed a complaint in the Sebastian County Chancery Court for the Fort Smith District against appellants in which it made the following allegations: That the Tankersley Brothers Packing Company, a corporation, (hereinafter referred to as the Company) obtained a judgment against O. C. Jennings, one of the appellants, on March 29, 1950, in the amount of $1,553.27 with interest and cost; that it caused to be issued an execution against the property of O. C. Jennings and that it was returned showing that said Jennings had no property; that the said O. C. Jennings, prior to July 11, 1949, was the owner of certain real estate located in Fort Smith District of Sebastian County, describing the property; that said Jennings on July 11, 1949, and Edna Jennings, being husband and wife, conveyed said real estate to J. H. Payne, and on the same date said J. H. Payne conveyed said property to the defendant Edna Jennings; that said conveyance was made with the intent to defraud the creditors of O. C. Jennings, including this Company, and was made for the purpose of putting the property of O. C. Jennings beyond the reach of his creditors, and asked the court to cancel and set aside the purported conveyances mentioned above and order the interest and equity of the said O. C. Jennings sold to satisfy the judgment of the Company; and that each of the defendants be required to disclose their true assets. A *lis pendens* notice was filed by the Company.

On April 13, 1950, the appellants answered denying each and every material allegation of the complaint.

The record does not disclose that any evidence was taken on the above pleadings although the decree states that oral and documentary proof was introduced. The matter was heard on May 24, 1950, and the decree was dated June 6, 1950, which in effect held as follows: That O. C. Jennings prior to July 11, 1949, was the owner of the real estate in question: that he and his wife as tenants

by the entirety on said date conveyed said property to J. H. Payne and on the same date the said J. H. Payne conveyed the property to the said Edna Jennings; that said conveyance was made with intent to defraud the creditors of O. C. Jennings, including this plaintiff, and to put the property of O. C. Jennings beyond the reach of his creditors; that said conveyances should be and the same are cancelled, set aside, held for naught and the title in said lands is divested from Edna Jennings and revested in O. C. Jennings and Edna Jennings as tenants by the entirety; that said land or the interest of O. C. Jennings therein be sold to satisfy the Company's judgment in the sum of $1,553.27, plus interest and cost. The decree then ordered the land to be sold upon a credit of three months and that upon a sale of said lands and property and the confirmation thereof by this court "all of the right, title, claim, interest, equity or estate of said defendant, O. C. Jennings, in and to said property, and every part thereof, shall be and same is hereby decreed to be forever barred." A Commissioner was appointed to execute the sale.

On July 17, 1950, appellants filed a motion stating that they were owners by the entirety in the real estate involved; that O. C. Jennings "is a resident of Sebastian County, State of Arkansas, married and the head of a family; that he owns no personal property; that if his equity in the aforesaid property be sold that he claims his exemptions as provided for in § 7184 of Pope's Digest out of the proceeds of said sale"; and that the said judgment was for debt by contract. In said motion it was prayed that before his equity be sold that same be appraised by three disinterested householders to determine the true value of such equity; that out of the proceeds of said sale he claims his exemptions as provided for in Art. IX of the Constitution of this State and for all other relief. On August 4, 1950, the above motion was overruled by the court. Pursuant to the order of the court the land was advertised to be sold on the 15th day of September, 1950, at 11:00 a. m. The interest of O. C. Jennings was described as "being a right of survivorship as a tenant by the entirety in a part of (here the

land is described)''. The notice stated that the sale would be made on a credit of thirty days. The Commissioner's report of sale was filed on September 15, 1950, and it showed that the notice provided for a credit of three months, and that appellee herein bid and offered the sum of $250 and that this being the last and best bid the land was sold to it for that sum.

On September 18, 1950, appellants filed a ''Motion'' which appears to also be an exception to the Commissioner's report of sale, which makes the following allegations: (1) The court erred in the decree on the 6th day of June, 1950, finding that O. C. Jennings owned, on the 11th day of July, 1949, the real estate in question; (2) that the court erred in its order of June 6, 1950, by decreeing a lien on said lands to secure the payment of the debt of O. C. Jennings; (3) that the court erred in appointing a receiver to take charge of said property and collect the rents; (4) that the court erred in overruling plaintiff's motion presented to said court on August 4, 1950, to modify said decree; (5) that the Commissioner erred in not complying with the court's order to sell on a credit of three months, when in fact said notice stated that the sale would be on a credit of thirty days; (6) later the motion was amended to include inadequacy of price.

On October 6, 1950, the court heard testimony on appellant's motion and exceptions and on October 12, 1950, the court rendered a decree and confirmation of sale in which it found: That the exceptions numbered one, two, three and four in defendant's motion are without equity and should be overruled; that exception number five is well taken, however, the sale, as had, did not prejudice the rights of said defendant, and should be overruled; that the objection numbered six made by O. C. Jennings, that the property sold for an inadequate price, is without merit and should be overruled; that all exceptions to the Commissioner's report of sale should be overruled and the report of sale as made by the Commissioner and filed herein is in all things approved. To the above ruling the defendants excepted and prayed an appeal to the Supreme Court which was granted.

Mrs. Jennings testified that there was a quonset building on the property in question and that her son ran a grocery store in it; and that the property in question is located at 4243 Newlon Road and that she lived at 1415 N. Greenwood.

E. S. Williams testifying for appellants stated that he was in the real estate business and had been for six or seven years; that he knew the property fairly well and he "guessed" that it would rent for from $35 to $55 a month and that he thought the market value was about $5,000.

We agree with the chancellor that exceptions one, two, three and four made by appellants in their motion filed September 18, 1950, are without merit and should be overruled. In the first exception Jennings contends that the court erred in the decree of June 6, 1950, in finding that O. C. Jennings owned the said real estate on July 11, 1949. As mentioned above the decree states that certain testimony and documentary evidence was introduced but none of it is brought forward in the record, and it will be assumed that the court had before it sufficient evidence upon which to base this finding. The same reasoning applies to the second exception, which states that the court erred in its order of June 6, 1950, by decreeing a lien on said lands to secure the payment of the debt of O. C. Jennings. In the third objection appellants contend that the court had no right to appoint a receiver to take charge of said property and collect the rents. No evidence having been introduced to the contrary it will be assumed that the court's finding was based upon sufficient evidence. In the fourth exception appellants contend that the court erred in overruling his motion submitted to the court on August 4, 1950, to modify the decree. We find no motion presented on said date but assume appellant was referring to his motion filed on June 14, 1950, in which he attempted to claim his exemptions as provided for in § 7184 of Pope's Digest out of the proceeds of said sale. The section referred to above applies to personal property and would not be applicable here as the property involved is real estate and the testimony shows clearly that this property was not the home-

stead of appellants. Furthermore appellants did not comply with § 30-209 Ark. Stats. which specifies that "he shall prepare a schedule, verified by affidavit, of all his property, including moneys, rights, credits and choses in action held by himself or others for him and specifying the particular property which he claims as exempt under the provisions of said article, . . .". In the case of *Scanlan* v. *Guiling,* 63 Ark. 540, 39 S. W. 713, decided in 1897, Justice RIDDICK, speaking for the court, stated: ". . . a defendant cannot be allowed exemptions unless they are claimed in the manner provided by statute." Again in the case of *Griffin* v. *Puryear-Meyer Grocer Company,* 202 Ark. 495, 151 S. W. 2d 656, the following language is used: "Under our statute a debtor, claiming property to be exempt from execution, is required to make a schedule of all his or her property including moneys, rights, credits, and choses in action specifying the particular property claimed as exempt under the constitution . . .". For these reasons we hold that the chancellor was justified in overruling this exception on the part of appellants.

It is next insisted by appellants that the court erred in refusing to set aside the sale because of inadequacy of the price. Appellee bought the property for the sum of $250. Testimony offered by appellants indicates that the property would rent for $35 to $55 per month and that it was probably worth around $5,000. The record however shows that this property was owned by Mr. and Mrs. Jennings by an estate of entirety and that appellee only bought the right of survivorship which was owned by O. C. Jennings. No mortality table was introduced by either side. No testimony was introduced to show that the property would have brought more money if there had been another sale. In view of these facts and considering that the learned chancellor had before him the parties, we are unable to say that his refusal to order another sale is not supported by sufficient evidence.

It is finally insisted that this cause should be reversed because the court ordered the property sold on a credit of three months whereas the notice of sale stated that it would be sold on a credit of thirty days. It is

admitted by appellee that this discrepancy does appear. The case of *Johnson* v. *Campbell,* 52 Ark. 316, 12 S. W. 578, throws some light on the question here involved. Campbell brought suit against Johnson to recover the amount of certain promissory notes executed by the latter for the purchase money of a tract of land and to enforce his lien on the land. The court ordered the land sold on a credit of four months, but the sale was actually made on a credit of three months. In its opinion the court stated: "It was made upon a credit of three months, however, instead of four, as the decree directed. The defendant showed no injury resulting from the departure from the direction, and the court being satisfied that none had resulted therefrom, did not abuse its discretion in confirming the sale." Here appellants introduced no evidence tending to show they were in any way injured because the sale was had on a credit of thirty days instead of ninety days as ordered by the court. The record discloses that appellee in open court consented to a resale if there was any chance that a larger price could be obtained thereby. According to the case cited above it was a matter about which the chancellor could use his discretion and we think his refusal to order another sale of the property was sustained by sufficient testimony. Moreover it appears that § 8199 of Pope's Digest relied on by appellants would not apply in this case as it refers only to the foreclosure of mortgages or liens on land. The section itself does not mention mortgages or liens, but the three sections preceding and the section immediately following all mention a mortgage or a lien. This section was referred to in the case of *Overton* v. *Porterfield,* 206 Ark. 784, 177 S. W. 2d 735. Here a partition of land was involved and the chancery court ordered a sale for cash and it was urged that the sale should have been upon a credit of three months. The court stated that § 8199 of Pope's Digest provided that the sale of real property made by the court shall be on a credit of not less than three nor more than six months—to be determined by the court. The court then used this language: "That section (8199 of Pope's Digest) was § 407 of the Civil Code. Sections 405, 406 and 408, preceding

§ 407, all have to do with the foreclosure of mortgages or liens, and all the cases cited under § 407 are concerned with such foreclosures. So § 8199, being § 407 of the Civil Code, has no reference to sales by order of court in partition proceedings."

The sections referred to above are all grouped by the digester under the heading "Upon Foreclosure of Mortgage Or Lien," and the three sections preceding § 8199 contain respectively the following phraseology; ". . . in any action upon a mortgage or lien . . ."; "In the foreclosure of a mortgage . . ."; and "In an action on a mortgage or lien . . .". This suit was not an action upon or to foreclose a mortgage or lien, but was a suit to set aside a fraudulent conveyance.

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

CLEMENTS *v.* BRONAUGH.

4-9455 239 S. W. 2d 1

Opinion delivered April 23, 1951.

Rehearing denied May 28, 1951.

[redacted]

House, Moses & Holmes and *William M. Clark,* for appellant.

Burke, Moore & Burke, for appellee.

HOLT, J. In May, 1919, The White River Drainage District of Phillips and Desha Counties, was organized under Act 279 of the Acts of the General Assembly of 1909 (and acts amendatory and supplementary thereto) for the overall purpose of building levees, drainage districts, flood gates, outlets and pumping plants, to eliminate flood and surface water. The District embraced approximately 169,000 acres belonging to some 1,600 property owners. The two appellants own 5,101.5 acres within the district. Total benefits assessed against all lands amounted to $8,500,000. Appellants' lands were assessed anticipated benefits in the amount of $340,477 against which taxes could be levied. By proper procedure, the improvement was undertaken and with Government aid of approximately $8,000,000, the levee has been built. The District has expended less than $500,000 to date.

September 2, 1949, the Board of Commissioners determined that additional drainage was necessary, to cost approximately $500,000, and filed petition in the Circuit Court for a bond issue in the amount of $230,850 to retire principal and interest on the then bonded debt. It was alleged in the petition, among other things, "that the construction of the pumping plant provided in the original plans cannot be begun at this time, but that it will be constructed later." The Circuit Court entered an order granting the petition. The order contained this recital:

"It is understood that the construction of the pumping plant provided for in the original plans cannot be begun at this time, but that it will be constructed later; that it will be necessary to issue additional bonds to do the work in an amount not to exceed $275,000, which will be on a parity as to security with the said $230,850 of

bonds to be issued at this time; and that the Commissioners will at the proper time call upon the Court to levy an additional tax."

The present suit was filed August 22, 1949, in the Phillips Circuit Court by the two landowners, appellants, to require the Commissioners of the District to re-assess benefits to the extent of reducing same by reason of the Federal aid in construction of the levee as a public improvement, and to report the amount to be expended and taxes necessary to be collected to complete the entire enterprise.

Appellees answered with a general denial and affirmatively pleaded that all issues of law and fact had previously been adjudicated and determined adversely to appellants in a former suit brought by appellants in the Phillips Chancery Court (and later on appeal, affirmed by this Court in *Harris* v. *Blackburn,* 215 Ark. 195, 219 S. W. 2d 922) in which the same parties, lands and cause of action were involved; and appellees pleaded *res judicata* as a bar to the present suit. Following the filing of this response, the parties in a pre-trial conference (§§ 27-2401 to 27-2403, incl., Ark. Stats., 1949 Supplement) stipulated that the entire record and transcript of the proceedings in *Harris* v. *Blackburn,* above, should be submitted and considered by the Circuit Court along with certain exhibits presented in the present suit including "Petition for Tax Levy, filed September 2, 1949, by Commissioners of said District; and Order of the Court, levying tax, order rendered September 2, 1949."

The case was taken under advisement by the trial court and October 18, 1949, appellees' plea of *res judicata* was sustained. The Court's order recited: "By agreement of counsel the transcript of the record in the previous Chancery Court proceeding (containing the testimony, pleadings, documentary evidence, rulings and decrees), the decision on Appeal and Petition for Rehearing of the Appeal were submitted to this Circuit Court for the determination of the plea of *res judicata,* together with briefs filed by all parties on the previous

appeal from the Chancery Court. Also submitted were the Tax Levy Order of this Circuit Court issued September 2, 1949, and petition for same (filed by respondents on September 2, 1949), docketed in this Court as No. 3417, the petition being entitled 'In the Matter of White River Drainage District of Phillips and Desha Counties, Arkansas,' and headed 'Petition for Tax Levy,' and the Order levying a tax to be collected in annual installments from 1950 to 1965, the Order having been issued without notice to petitioners herein and without any opportunity for them to be heard in respect thereto. . . .

"That the issues of law and fact presented in this cause (including contentions made by petitioners that they are being deprived of their property without due process of law, that their property is being taken, appropriated and damaged for public use without just compensation, that they are being denied equal protection of the laws, all in violation of Article 2, §§ 2, 3, 21, and 22 of the Constitution of Arkansas and of the Fourteenth Amendment to the Constitution of the United States) are the same issues of law and fact which were presented or could have been presented in the previous litigation in chancery wherein the same parties were plaintiffs and defendants, respectively; that all issues of law and fact arising in this action were duly adjudicated by the Chancery Court of Phillips County, Arkansas, and the Supreme Court of Arkansas in the previous proceeding; that the plea of *res judicata* asserted by the respondents herein should be sustained and that this cause should be dismissed."

We hold that the trial court was correct in sustaining appellees' plea of *res judicata.*

As has been pointed out, the previous original suit was filed May 27, 1947, in the Phillips Chancery Court and the present action was filed August 22, 1949, in the Phillips Circuit Court.

Appellants state the purpose of the present suit in this language: "Judgment for damages offsetting benefits, measured by the amount of benefits attributable to the pumping plant construction originally contemplated

as a major part of the improvement for which the District was organized in 1919, but which is omitted from the construction program now being instituted. . . . In the alternative, petitioners assert their right to an Order of this Court, the ultimate effect of which will be that the improvement as planned (pumping plants) will be constructed, in accordance with the plain duty of the Commissioners."

It appears undisputed that appellants were parties to the former suit and the same lands and assessment of benefits were there involved and we hold that, in effect, the same allegations were contained in both cases and the relief sought, in effect, the same.

In the former suit, appellants alleged, among other things that "the benefits assessed for construction of levees were made at a time when the district contemplated construction of the levees at its own expense, but since the United States has constructed this levee for the benefit of all the property owners who are protected by the levee, it is a common and not a special benefit, and the assessment levied for this purpose should be cancelled and set aside."

Their prayer was: "That the Court declare all actions of the Board of Commissioners in the levying or assessing of taxes against the lands of the plaintiffs and others similarly situated, to be illegal and void.

"That the Court direct the Commissioners to refund to these plaintiffs all taxes heretofore paid by them for the past several years.

"That the Court declare the action of the Commissioners in changing the plans, to be illegal, and all actions of the Commissioners subsequent to such change in plans to be declared void and of no effect.

"That if the plaintiffs are not entitled to the relief prayed for in the foregoing paragraphs, that then the Court enter an order directing the Commissioners to reassess the benefits in view of the present conditions.

"That when such re-assessment has been made, the Court enter an order directing the Commissioners to refund to the plaintiffs the taxes paid for the last several years.

"That the Court enter an order directing the Commissioners to file a complete report, giving a detail year by year of all taxes collected, all expenditures made by the Commissioners, accounting for all moneys borrowed and the obligations outstanding, together with copies of all contracts heretofore let for drainage structures in the northern end of the district."

We said on the former appeal: "The appealing landowners urge with considerable force that a re-assessment became imperative when the Government 'stepped in' and relieved the district to the extent heretofore shown. This would be true if building the levee constituted such a radical change in plans that a materially different undertaking resulted. Answer comes from most of the witnesses who in discussing the conceptions of 1919-21, testified that a primary levee was required. It was projected under the Connolly plan, so named because of Connolly's cooperative work. Appellees' engineer testified that this plan afforded better protection than the one suggested by Harrington, Howard & Ash."

In the present suit, appellants sought the following relief:

"First. (a) For a re-assessment of the benefits standing against their lands, and, to the extent of the reduction of benefits by reason of Federal aid in the construction of the levee as a common or public improvement, for judgment for damages against the defendants; and (b) for a writ of mandamus directed to the defendants compelling them to report the amount of the deficiency of past and now proposed taxes to complete the originally planned improvement (that is to say, the amount of additional money which will be sufficient and will be required to complete said improvement) and, further, upon reporting, to take such action as may be found

necessary to the purpose of completing the said improvement in its entirety.

"Second, and in the alternative. (a) For a reassessment of benefits standing against their lands, and, to the extent of the reduction of benefits on all grounds appearing in this petition, for judgment for damages pursuant to statute, against the defendants in the following amounts."

It thus appears, as indicated, appellants sought, in effect, the same relief in both cases.

In the present suit, appellants are not questioning the validity of the additional bond issue, nor the tax levy, but as in the former case, are asking the Court to reassess the benefits against their lands, a request that was refused under the former appeal. Appellants have not pleaded or shown any such change in plans or conditions from those existing in the former equity case to warrant an order at this time requiring the Commissioners to reassess benefits against their lands. The construction or installation of pumping plant or plants was clearly provided as part of the original improvement and also included in the order for the new bond issue and these pumps must be provided by the Board. In fact, appellees concede that they must be provided and that they have no intention of omitting them from the improvement. However, under the undisputed evidence, it appears that the Board, under the advice of skilled and competent engineers, adopted a plan of construction involving three stages: First, building the levees; second, drainage, and, third and last, the pumping plant or plants.

Broad powers and a large amount of discretion must be, and is, given the Board of Commissioners in making and building this tremendous and costly enterprise through all of its various stages of construction. We cannot say that the Board has abused its discretion by delaying the building of the pumping plant until the last.

As indicated, the sustaining of the plea of *res judicata* does not preclude the appellants from taking

suitable action looking toward the installation of the pumping plant or plants when the proper time arrives.

Since we are affirming the judgment on its merits, it is unnecessary to discuss the issue the appellees have raised concerning the motion for new trial.

Accordingly, the judgment is affirmed.

COLBERT *v.* STATE.

4652 238 S. W. 2d 749

Opinion delivered April 23, 1951.

Ovid T. Switzer and *W. P. Switzer,* for appellant.

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

GRIFFIN SMITH, Chief Justice. Appellant as the defendant below was tried on grand jury charges that he operated a gaming house, "in violation of Title 41-2001, Arkansas Statutes, 1947." Punishment was fixed by the jury at the minimum permitted by law. It is contended (a) that the gaming house in question was a stretch of

woodland traversed by a railway used in hauling logs; (b) it was a mile from human habitation and inaccessible to automobiles; (c) the equipment consisted of several bench-tables made from planks nailed between posts, three of which were used for crapshooting purposes; and, (d) the court erred in not directing acquittal.

State witnesses fixed the gaming operations at a point near the railroad in West Crossett—"about a mile from Ruth Norman's place, between Crossett and West Crossett." There was testimony that crapshooting had been going on there for about two years. There were three tables. The defendant had stated that one was his. He would hold the money—"keep it straight." When this witness patronized the place there would usually be "a bunch" [in attendance] when he got there. Everett Colbert was "the boss" of operations at his table.

Another witness replied affirmatively when asked, "Do you know whether there is a regular crap game played on a regular crap table out by West Crossett [near] the railroad track?" He had never seen anyone running "that particular game" except the defendant.

This witness, after explaining how the planks were nailed to posts, was asked on cross-examination, "Do they have a blanket over them, or anything?" A. "Yes, they have some kind of cloth or something over them." The largest crowd gathered for gaming Saturdays—"morning or afternoon, but they don't gamble on Saturday nights." The witness then said: "I play a little here (referring, presumptively, to the defendant's operations), and if I lose there I go to another table. It is a general meeting place—a place to congregate and gamble."

The statute mentioned in the indictment extends to all persons who are interested, directly or indirectly, in keeping, conducting, or operating a gambling house, *"or place where gambling is carried on."* While the indictment did not expressly differentiate between "keeping or conducting a gambling house" and "keeping or conducting a place where gambling is carried on," the offense

alleged was mentioned as a violation of Ark. Stats., § 41-2001, and the section contains the interdiction against conducting a *place* where gambling is engaged in. In charging the jury this statute was read.

Appellant calls attention to certain expressions in *Turner* v. *State,* 153 Ark. 40, 239 S. W. 373, and emphasizes the fact that his place was not equipped with lights and that operations were not carried on at night. The jury, of course, could have inferred that night games were dispensed with because lights would attract public attention. In the *Turner* case Judge Wood said that the statute was leveled at the specific offense of keeping, conducting, or operating a house *or place* for the purpose of allowing gambling to be carried on. An instruction told the jury that if it believed Turner was guilty of knowingly permitting a gaming table to be maintained . . . in a certain house "used and controlled by said defendant," then under the evidence he would be guilty.

From the Turner case, and from statements in *Cain* v. *State,* 149 Ark. 616, 223 S. W. 779, and *Sorrentino* v. *State,* 214 Ark. 115, 214 S. W. 2d 517, it is argued that conviction cannot be upheld unless the defendant had control and supervision of the premises. Since the locale was part of a railroad right-of-way there could not, in appellant's view, be control sufficient to justify an application of the statute. In *Tully* v. *State,* 88 Ark. 411, 114 S. W. 920, the state was required to show that the defendant was interested in the poker game "as a banker or exhibitor," and this case is cited in support of the contention that control of the premises was essential. But the statute in that case (Kirby's Digest, § 1732) is not the enactment relied upon in this appeal. It appears as Ark. Stats., § 41-2003.

In the instant case the thing prohibited, as has been pointed out, is keeping, conducting, or operating any gambling house, *or place where gambling is carried on.*

It is not unreasonable to believe that the lawmakers, in adding the words [that have been italicized for the purpose of this opinion] contemplated extraordinary cir-

cumstances where the thing sought to be prohibited,—that is, gambling at the invitation of one operating for profit—might be at a *place* as distinguished from a house. Here the place had been operated regularly for a long time. It was known to large numbers, and the location was near enough to Crossett and West Crossett to satisfy the purpose of the operator. Appellant did not own the land, but insofar as his patrons were concerned he controlled it. This was sufficient.

Affirmed.

HOLT, WARD and ROBINSON, JJ., dissent.

HOLT, J., dissenting. The indictment charged Everett Colbert, Negro appellant, as follows: "The Grand Jury of Ashley County, in the name and by the authority of the State of Arkansas, accuse Everett Colbert of the crime of Keeping Gambling House committed as follows, to-wit: The said Everett Colbert in the county and State aforesaid, on the 15th day of July, A. D., 1950, did unlawfully keep, conduct and operate a gambling house in Violation of Title 41-2001, Ark. Stats. (1947), and against the peace and dignity of the State of Arkansas."

Material facts appear not in dispute.

Appellants and a number of other Negroes gathered in a stretch of woods located on the west boundary of the right of way of the log railroad running north and south from the timber holdings of the Crossett Lumber Company. This stretch of woods constituted the "gambling house," approximately one mile from human habitation and inaccessible by automobile. There were several tables or benches, consisting of two planks nailed between posts or trees at this particular site, and had been for a number of years. These tables were utilized for "crap shooting," or playing dice, for money and one of these tables appears to have been set up and operated by appellant.

On these facts appellant was convicted of a felony under § 41-2001, Ark. Stats. (1947), which provides: "§ 41-2001. Keeping gambling house—Penalty.—Every person who shall keep, conduct or operate, or who shall

be interested, directly or indirectly, in keeping, conducting or operating any gambling house, or place where gambling is carried on, or who shall set up, keep or exhibit, or cause to be set up, kept or exhibited, or assist in setting up, keeping or exhibiting, any gambling device, or who shall be interested directly, or indirectly in running any gambling house, or in setting up and exhibiting any gambling device or devices, either by furnishing money, or other articles for the purpose of carrying on any gambling house, shall be deemed guilty of a felony, and on conviction thereof, shall be confined in the State penitentiary for not less than one (1) year nor more than three (3) years. (Acts 1913, No. 152, § 1, p. 613; C. & M. Dig., § 2632; Pope's Dig., § 3322.)''

Another section of the statute, 41-2003, provides: ''§ 41-2003. Keeping gaming device—Penalty.—Every person, who shall set up, keep, or exhibit any gaming table, or gambling device, commonly called A. B. C., E. O., roulette, rouge et noir, or any faro bank or any other gaming table or gambling device, or bank of the like or similar kind, or of any other description although not herein named, be the name or denomination what it may, adapted, devised or designed for the purpose of playing any game of chance, or at which any money or property may be won or lost, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined in any sum, not less than one hundred dollars ($100.00), and may be imprisoned any length of time, not less than thirty (30) days nor more than one (1) year. (Rev. Stat., ch. 44, div. 6, art. 3, § 1; C. & M. Dig., § 2630; Pope's Dig., § 3320.)''

Appellant earnestly insists that on the record here he was not guilty of a felony and was prosecuted under the wrong section. I think appellant is correct in his contention. As I view it, he was guilty of a misdemeanor under § 41-2003.

We must bear in mind that appellant was charged with the crime of ''keeping a gambling house'' which is a felony under § 41-2001.

Just what did the Legislature have in mind by this statute? What specific phase was it intended to cover? This court has given, I think, a rather clear answer to these questions in *Turner* v. *State,* 153 Ark. 40, 239 S. W. 373, where it said: "This statute is leveled at the specific offense of 'keeping, conducting or operating a house or place' for the purpose of allowing gambling to be carried on therein, or any gambling device or devices to be set up and exhibited therein. The gravamen of the offense is the maintaining of a house or place where those who desire to engage in gambling or to exhibit any gambling device, or devices, may resort and find shelter, so to speak, while indulging in their gambling practices. The gist of the offense is the keeping of the house or place for the purposes named therein."

It seems obvious to me that our lawmakers never intended that a few crude planks set up out in the open woods upon which dice games are played should come within the purview or meaning of a gambling house as this court has pointed out in the Turner case, above. If the term "gambling house" as used in § 41-2001, be construed to include every place where gambling is carried on, then why did it not omit "gambling house" and use "the place where gambling is carried on" only. Section 41-2001 (Act 152, § 1, p. 613 of 1913) did not repeal the misdemeanor statute above (41-2003).

In *Johnson* v. *State,* 101 Ark. 159, 141 S. W. 493, a Negro dice game in the woods was held to be a violation of the misdemeanor statute above setting up a gambling device.

It is "a settled rule of statutory construction that statutes relating to a subject must be considered as a whole and to get at the meaning of any part thereof we must read it in the light of other provisions relating to the same subject," *Wolf & Bailey* v. *Phillips,* 107 Ark. 374, 155 S. W. 924.

"The legislative intent is to be derived from a fair and reasonable construction of the act, having in mind the thing desired to be accomplished or the evil to be

remedied, * * *." *State* v. *Handlin,* 100 Ark. 175, 139 S. W. 1112.

"All laws are to be given sensible construction, and literal application of statute which would lead to absurd consequences should be avoided whenever reasonable application can be given consistent with legislative purposes." *Merritt* v. *No Fence District No. 2, Jefferson County,* 205 Ark. 1129, 172 S. W. 2d 684.

I am firmly of the conviction that our Legislature never intended that any man, white or black, should be branded as a felon and confined in the State Penitentiary on a state of facts which this record presents.

I am unable to join the majority in solemnly declaring that our lawmakers intended that a few planks set up under the trees, and on which the game of "shooting dice" is played, should constitute a gambling house within the common sense meaning of that term as used in § 41-2001. Appellant was guilty here of a misdemeanor and nothing more, and the judgment should be reversed.

ROBINSON, J., joins in this dissent.

PAUL WARD, J., dissenting. For two reasons I cannot agree with the majority opinion.

In the first place, § 41-2001 contemplates some kind of a house or building and not the wide open spaces. A different interpretation is reached by the majority apparently because the statute contains the word "place," but to get the significance of the use of the word "place" the entire context must, of course, be read and considered. The first part of the section reads as follows:

"Every person who shall keep, conduct or operate, or shall be interested, directly or indirectly, in keeping, conducting or operating any gambling *house,* or *place* where gambling is carried on . . . "

It seems to me that a fair construction of the English language indicates that the Legislature, by using the phrase "or place where gambling is carried on," intended to clarify the *thing* to be prohibited rather than to clarify

the *place* where it was to be prohibited. If, by the above language, the Legislature meant to clarify the "place" then it was not only meaningless but also confusing to use the word "house" in the first instance.

In the second place, I think the cause should have been reversed because the State failed to show the defendant had some kind of interest as a banker or exhibitor in the gambling activities. This was held to be necessary in the case of *Tully* v. *State* which was cited by the majority. The majority opinion, however, attempts to distinguish the *Tully* case on the ground it construed § 41-2003 of the Ark. Statutes whereas this defendant was convicted under § 41-2001. A casual reading of both sections discloses that neither says anything about the defendant having any "interest" in the activities. The only evidence set out in the majority opinion approaching the question of "interest" is the following: "He (defendant) would hold the money—'keep it straight.' Everett Colbert was 'the boss' of operations at the table." In the *Tully* case it was admitted the defendant controlled the room and the table and held the money and cashed the "chips." I can think of no reason why the reasoning applied in the *Tully* case should not be applied in this case.

LOGUE *v.* HILL.

4-9471 238 S. W. 2d 753

Opinion delivered April 23, 1951.

Robert A. Zebold and *Harry T. Wooldridge,* for appellant.

T. S. Lovett, Jr., and *G. D. Walker,* for appellee.

Ed. F. McFaddin, Justice. Stripped of extraneous matters, this is a suit brought by appellee, Hill, against appellant, Logue, to recover the contract sale price of $1,400 for a second-hand tractor and attachments. Logue's defense was a breach of the express warranty. The Chancery Court,[1] by its decree, inferentially found that there was an express warranty and breach thereof and allowed Logue credit for $240.35 from the sale price of $1,400. Logue has appealed from the decree of $1,159.65 against him and Hill has cross-appealed from the decree allowing Logue credit for $240.35.

I. *Express Warranty.* Section 68-1412, Ark. Stats., is a part of the Uniform Sales Act adopted by Act 428 of the 1941 Arkansas Legislature and says:

"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty."

The evidence shows that Logue had never owned or operated a tractor and knew nothing about one, whereas Hill had owned and operated this one for a year. The evidence shows that in order to induce Logue to buy the tractor, Hill told him that "it was in first class shape," and that "it was in A-1 shape." In the light of the foregoing Statute, and our case of *Williams* v. *Maier,* 213

[1] The case was in Chancery because Hill claimed a landlord's lien on crops raised by Logue and claimed that the tractor was "a necessary supply" under § 51-203, Ark. Stats. Due to the wording of the supersedeas bond filed by Logue, preparatory to perfecting this appeal, it becomes unnecessary for us to consider anything except the matters herein discussed.

Ark. 359, 210 S. W. 2d 499, the Chancery Court was correct in holding that Hill's statements amounted to an express warranty.

II. *Breach of Warranty.* That the tractor was not in "first class shape," or "A-1 shape," when sold to Logue is established by an abundance of evidence. It needed some new rings, connecting rods, and other parts to be "in first class shape" for the work contemplated by the parties. Logue produced paid receipts for $240.35 covering various repairs, and testified to other items for which he had no receipt. Even when we disregard—as we do—the repairs necessitated by the damage to the tractor caused by Logue's son, nevertheless, we cannot say that the amount of $240.35 allowed by the Chancery Court is shown to be excessive: particularly when Hill's brother testified that the tractor was not in good running condition; and the witness, Goins, testified that the cylinders were so worn that some of the rings broke.

III. *Logue's Claim of Rescission.* Logue claims that he rescinded the purchase contract as soon as he found the tractor to be defective; and therefore he says he is not liable for any part of the purchase price. He claims rescission under § 68-1469, Ark. Stats.,[2] which provides in subdivision (1) (d):

"Where there is a breach of warranty by the seller, the buyer may, at his election—rescind the contract to sell or the sale and . . . if the goods have already been received, return them or offer to return them to the seller. . . ."

But in making this claim for rescission, Logue has failed to bring himself within the requirement of subdivision (3) of the same Statute, which reads:

"Where the goods have been delivered to the buyer, he cannot rescind the sale . . . if he fails to notify the seller within a reasonable time of the election to rescind. . . ."

[2] The words in Black Face type at the beginning of § 68-1469, Ark. Stats., are *NOT* a part of the Statute as enacted by the Legislature.

The evidence in the case at bar shows that Logue kept the tractor, used it all during the spring and summer of the crop year, and made no offer to return it until after he had gathered his cotton crop in the fall of the year. Logue's own witnesses placed a value of several hundred dollars on the tractor independent of the value of the attachments. From the evidence, it is apparent that Logue did not rescind within the time and manner required by the Statute. Thus, all the relief that Logue can claim is that provided in subdivision (1) (a) of the same section, which says:

"Where there is a breach of warranty by the seller, the buyer may at his election— . . . keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution . . . of the price." The chancery decree allowed Logue such relief in the sum of $240.35, as previously stated.

We affirm on both direct appeal and cross-appeal.

GOTT *v.* MOORE.

4-9481 238 S. W. 2d 754

Opinion delivered April 23, 1951.

J. H. A. Baker, for appellant.

Reece Caudle, Robt. J. White and *Richard Mobley,* for appellee.

George Rose Smith, J. This dispute is about the ownership of the timber on seventy-eight acres of land. Appellee Moore brought the suit to enjoin the appellants from interfering with Moore's efforts to cut and remove the timber. The complaint concedes that appellants own the land but alleges that they bought it subject to Moore's title to the timber. The appellants defended the suit on the ground that Moore had no title to the timber. The chancellor upheld Moore's title and entered a decree permitting him to cut and remove the timber.

The parties' claims derive from a common source of title. In 1941 the land was owned in fee by W. J. Massey, who was then a patient in the State Hospital. The property had forfeited to the State for nonpayment of taxes. Massey's wife redeemed the land in 1941 and undertook to sell the timber. By mesne conveyances this claim to the timber passed to Moore.

Later on Massey was discharged from the State Hospital, and in 1943 he and his wife conveyed the land in fee to C. B. Wait, Jr., who later conveyed it to the appellants. Wait was aware of the outstanding timber deed that Mrs. Massey had executed, but Wait's attorney advised him that Mrs. Massey's deed was void. These are all the material facts.

The appellees have filed two motions for affirmance on technical grounds. First, it is contended that the testimony should be disregarded because it does not bear the chancellor's approval. The controlling statute for this chancery district is similar to that construed in

Johnson v. *United States Gypsum Co.,* 217 Ark. 264, 229 S. W. 2d 671, and it is argued that that decision governs this case. But there the testimony had been taken by the reporter in open court, and we held that the statute required the chancellor to approve the bill of exceptions. Here all the testimony is in the form of depositions taken before a notary public. We have often held, as in *Feldstein* v. *Feldstein,* 208 Ark. 928, 188 S. W. 2d 295, that in chancery cases a bill of exceptions is not needed to bring depositions into the record.

Second, it is contended that the appellants' abstract does not comply with our Rule 9. The abstract is undoubtedly deficient in some respects. The pleadings have been copied in full instead of being summarized, as the Rule requires. Some of the testimony is narrated in the abstract, while other testimony appears in the printed argument. This arrangement is not as helpful to the court as a better prepared abstract would be, but we do not think it fatally defective. There is really only one material issue in the case—the validity of the timber deed executed by Mrs. Massey—and all the testimony pertinent to this issue appears in the abstract and brief. Under our holding in *Hyner* v. *Bordeaux,* 129 Ark. 120, 195 S. W. 3, this is a sufficient compliance with Rule 9. Both motions are denied.

On the merits the decree must be reversed. When Mrs. Massey attempted to convey her husband's timber her only semblance of title was the redemption deed from the State. It is settled, however, that such a redemption amounts to a mere payment of the delinquent taxes and does not purport to convey title. *Pyburn* v. *Campbell,* 158 Ark. 321, 250 S. W. 15. Hence Mrs. Massey's timber deed, through which the appellee claims, was completely ineffectual. It is immaterial that Wait knew of the timber deed when he bought the fee from Massey, for Wait's knowledge could add nothing to a void conveyance.

Reversed.

CURL *v.* EARLY.

4-9475 238 S. W. 2d 756

Opinion delivered April 23, 1951.

W. M. Lee, for appellant.

Sharp & Sharp, for appellee.

ROBINSON, J. This appeal involves a question of fact. Appellant paid to appellee $650 and received a title retaining note on which there was a balance owed of $333.04, and which had been given by Luther Butler as part-payment on the purchase price of a gasoline engine. Appellee did not have with him the Butler note when he was paid the $650 by appellant, but mailed it to him a short time later. Appellant claims that it was upon receipt of the note that he discovered the balance owed thereon was only $333.04, rather than $650.

The undisputed evidence is that the engine was well-worth $650. Later the appellant took possession of the engine and sold it, but the price received is not shown. Appellant filed suit alleging that appellee had falsely represented there was a balance of $650 owed on the note and asked judgment for $316.96, the difference between $333.04 and $650. The Chancellor found that there had been no false representation and rendered a decree in favor of the appellee.

Butler had paid $325 cash and given a title retaining note for the balance of $333.04, which included $8.04 carrying charge. Butler, who operated a sawmill, borrowed the down-payment of $325 from G. C. Duncan, who was to be repaid in lumber. Later, Butler made a deal to furnish lumber to appellant and, as part of the

consideration, appellant agreed to advance to Butler money to pay certain obligations to help him straighten out his financial affairs. The money owed on the gasoline engine was one of the debts appellant agreed to pay. Butler represented that $650 was owed on the engine. Appellant and appellee disagree in regard to the exact conversation between them as to the balance owed by Butler. There was a balance owed on the note of $333.04; however, in addition Butler owed Duncan $325 which he had borrowed to make the down-payment.

Appellee testified that he made no representation to appellant whatever except that he would warrant the title to the engine; that appellant made the statement that he understood from Butler that $650 was owed. Appellee further testified that he knew Butler had borrowed $325 from Duncan to make the down-payment and had not repaid Duncan; that he accepted the $650 from appellant and offered to pay Duncan the amount Butler had borrowed to make the down-payment, but Duncan stated that he did not want it because he was going to be paid in lumber by Butler.

Appellee then paid Butler $316.21 by check, which was introduced in evidence. Undoubtedly, Butler represented to appellant that he owed $650 on the engine. In this statement he was not far wrong, as he had borrowed $325 from Duncan to make the down-payment, which had not been repaid, and still owed $333.04 on the title retaining note. The Chancellor's finding that there was no false representation on the part of appellee is not against the preponderance of the evidence.

Affirmed.

ORIENT INSURANCE COMPANY *v.* COX.

4-9469 238 S. W. 2d 757

Opinion delivered April 23, 1951.

Lem C. Bryan and *Warner & Warner,* for appellant.

Franklin Wilder and *Gutensohn & Ragon,* for appellee.

MINOR W. MILLWEE, Justice. This is an action on four separate fire insurance policies issued to appellee by the appellants covering the stock and fixtures of appellee's business at Fort Smith, Arkansas. The case was tried to a jury resulting in a verdict and judgment in favor of appellee for $8,195.71.

Appellee owns and operates an auto supply business specializing in sales and service of motorcycles and bicycles. On November 14, 1949, the local agents of appellants issued the four policies to appellee totaling $12,500. At that time appellee's business was located at 403 N. 18 Street in Fort Smith where he previously had a fire in January, 1949. Early in December, 1949, appellee moved to a new location on Towson Avenue and the policies were endorsed to show the new location with a rate increase from $1.35 to $1.89 per hundred. The building on Towson Avenue consisted of a brick showroom, 35 x 25 feet facing east, and a storeroom, 25 x 70 feet which extended west, with a connecting door to the showroom. The storeroom was constructed of sheet metal attached to 2 x 4 inch wooden studding with the exception of the south wall, which was constructed of concrete blocks and provided a dividing wall with an adjoining lumber company. The service department was located in the west end of the storeroom next to an alley.

Upon moving to the new location merchandise was placed in both the showroom and storeroom. During the last week in December appellee moved most of the merchandise to the storeroom. On Saturday, December 31, 1949, Bon Ami was placed on some of the windows of the building partially obstructing the view. On the same date about 6 p. m. appellee purchased ten gallons of gasoline at a nearby service station, six gallons being put in the tank of his automobile and four gallons were placed in a five-gallon can which he left in the service department of the storeroom. On Sunday, January 1, 1950, appellee purchased ten gallons of gasoline from another service station about 6 p. m., putting five gallons in his automobile tank and five gallons in a can in the back of his car.

Appellee testified that he went to his place of business on the evening of January 1, 1950. After writing some letters and moving the last of the merchandise from the display room to the storeroom, he drove his Cadillac automobile through the back door of the service department and worked on it for a while. He then went to a picture show by bus returning to his shop about 11 p. m. and resumed work on his car. He drained several gallons

of gasoline from the tank which were placed in jars, jugs, cans and bottles which he placed at various places in the building. Some of the containers were capped and some uncapped. A night watchman looked through a window of the storeroom at 12:46 a. m. and observed appellee working at his bench. He waved to appellee and the latter recognized the officer. Appellee left his place of business about 1 a. m. and walked about six blocks to Garrison Avenue where he took a taxi to his home.

A police patrol discovered appellee's place of business on fire at 2:11 a. m., January 2, and firemen arrived within a few minutes. In attempting to extinguish the blaze which was confined to the storeroom, the firemen counted several explosions and stated that burning gasoline floated out of the building on top of the water used to extinguish the flames. The fire was brought under control in about twenty minutes. After the fire was extinguished, firemen found about fifteen gallons of gasoline at different places in the building in eighteen or twenty jugs, jars and cans ranging in size from one quart, or less, to five gallons. Eight of the containers were uncapped.

Appellee was notified by telephone at his home and arrived at the scene after the fire had been extinguished. He was arrested at the scene for having excessive gasoline (more than five gallons) stored in his place in violation of a city ordinance and was later convicted and paid a fine on the charge. The fire department reported the cause of the fire as unknown.

Appellee testified that all of the merchandise was removed to the storeroom and service department preparatory for some remodeling to the showroom which he had arranged to have started on January 2, 1950. The contractor who was to do this work corroborated appellee's statement in this regard and testified that he requested appellee to remove all merchandise from the showroom.

Appellee also testified that he purchased the first ten gallons of gasoline on the evening of December 31, 1949, because a friend was having a formal opening of

his new service station and offering a premium with each ten gallons purchased; that he took the four gallons to his shop for use in the service department; that he purchased the extra five gallons on January 1, 1950, and took it to his home for use in cleaning paint brushes and other miscellaneous uses; that Bon Ami was placed on the windows for the purpose of cleaning them; that in working on his car on the night of January 1, he found sediment in the filter bowl which indicated there was dirt either in the fuel line or gasoline tank; that he did not test the fuel line, but decided to remove and clean the tank and proceeded to drain the gasoline from the tank using the only available containers for that purpose; that he thought it would be safer to scatter the containers at different places in the building than to have them all concentrated in one place; that he did not remove all of the gasoline from the tank and planned to finish the job when he returned to work later in the morning. He denied that he willfully or intentionally set fire to, or caused, the property to burn.

Appellants insist that the trial court erred in refusing to direct a verdict in their favor because they say the undisputed evidence shows that the fire was of incendiary origin, caused, procured or connived in by appellee in violation of law and the insurance contracts. In this connection it is urged that the undisputed evidence shows such gross negligence and recklessness on the part of appellee as to amount to fraud, as a matter of law, and preclude a recovery on the policies. The insured's willful burning of the property would, of course, be an absolute defense regardless of whether the policies contain an express provision to that effect. If there is a dispute in the evidence on the question of whether the fire is of an incendiary origin, caused or connived in by the insured, then that question is for the jury's determination. *Banker's Fire Ins. Co.* v. *Williams,* 176 Ark. 1188, 5 S. W. 2d 916; *North River Ins. Co. of N. Y.* v. *Loyd,* 180 Ark. 1030, 23 S. W. 2d 988.

The law generally on the question of gross negligence or recklessness is stated in Couch, Cyclopedia of Insurance Law, Vol. 6, § 1479, as follows: "As to whether or

not gross negligence or recklessness will evince such a fraudulent purpose as will release an insurer from liability, the authorities are not entirely agreed, although the weight thereof undoubtedly supports the affirmative. Thus, if an insured stands by, and, having means at hand to extinguish a fire or prevent it from spreading, negligently or carelessly permits it to burn, whereby the insured property is injured or destroyed, there is something more than mere negligence, for, if the insured has failed to exercise good faith and common honesty, there may be room for a fair inference of such gross negligence as evinces a fraudulent purpose or design; or, at least, such a willingness, that the question might arise whether the insurers could avail themselves of such acts as a defense. But in such cases all the surrounding circumstances ought to be fairly considered, for such acts, under the particular facts of a case, might not justify an inference of a willingness having the character of a fraudulent purpose or design, and the question should be fairly presented by the evidence, and be left to the jury, for there is a distinction between a mere omission to do a thing which a prudent person might have been expected to do, and a fraudulently and willfully negligent act. If, however, the negligence is so gross as to create or authorize a presumption of fraud, the insurer is not liable. In fact, while it is a well-established rule that losses occasioned by the mere fault and ordinary negligence of one holding a fire policy are within the protection of such policy, it is held that, notwithstanding this rule, gross negligence or recklessness on the part of the insured may preclude a recovery. Some cases, on the other hand, take the view that gross negligence will not avoid the risk, unless fraud be shown, or there be such a degree of negligence as evinces a corrupt design."

The rule is stated in 5 Appleman, Insurance Law and Practice, § 3114, as follows: "Negligence of the insured or his servants, not amounting to fraud, will not defeat recovery upon the policy though such negligence constitutes one of the direct and proximate causes of loss. Consequently, it is erroneous to charge that it was the insured's duty to exercise ordinary care to protect his

property from fire, and that where loss occurred as the direct result of negligence, the insured could not recover. On the other hand, the insurer is not liable for such reckless and inexcusable negligence as tends to show fraudulent purpose or design. This is particularly true where the consequences thereof must have been palpably obvious to the insured at the time, the court presuming under such circumstances that the results must have been intended."

In *Beavers* v. *Security Mutual Insurance Co.,* 76 Ark. 595, 90 S. W. 13, this court approved the following statement from 2 May on Insurance, § 408, as the law on the subject: "Mere carelessness and negligence, however great in degree, of the insured, or his tenants or servants, not amounting to fraud, though the direct cause of the fire, are covered by the policy. Indeed, one of the principal objects of insurance against fire is to guard against the negligence of servants and others; and, therefore, while it may be said generally that no one can recover compensation for an injury which is the result of his own negligence or want of care, the contract of insurance is excepted out of the general rule. Nor does it make any difference whether the negligence is that of the insured himself or of others." In *Home Insurance Co.* v. *Springdale Motor Co.,* 200 Ark. 893, 141 S. W. 2d 522, the court said: "We have very recently held that something more than mere negligence on the part of the insured in causing a fire, or in failing to extinguish it, is required to exonerate the insurer from liability, and that there must be willfulness in one or the other of these respects before the insurer's liability is discharged. *Farmers' Union Mutual Ins. Co.* v. *Jordan,* 200 Ark. 711, 140 S. W. 2d 430."

Appellants cite several chancery cases in which this court held that the finding of the trial court on the question as to whether the fire was of incendiary origin was either supported, or unsupported, by the preponderance of the evidence. The question here is not whether the verdict is supported by the preponderance of the evidence, but whether there is any substantial evidence to support it. Under all the facts and circumstances pre-

sented in evidence, we hold that the question whether the fire was of incendiary origin, caused or procured by appellee, and the question whether appellee was guilty of such gross negligence and recklessness as to show a fraudulent design, were properly for the jury, and there was no error in the court's refusal to direct a verdict for appellants.

The policies contain a provision excluding liability for loss occurring "while the hazard is increased by any means within the control or knowledge of the insured. . . ." It is insisted that the placing of more than fifteen gallons of gasoline at different places in the building amounted to such change in the use and condition of appellee's stock of merchandise as to violate this provision of the policies and bar a recovery by appellee as a matter of law, and that the trial court erred in refusing to so hold. In reference to this provision the general rule is stated in 29 Am. Jur., Insurance, § 677, as follows: "Such a provision is valid and enforceable and must be given a reasonable construction. It relates to a new use which would increase the risk or hazard of fire, and not to a continuation of a former or customary use, or to a change in risk without increase of hazard. It contemplates an alteration in the situation or circumstances affecting the risk which would materially and substantially enhance the hazard, as viewed by a person of ordinary intelligence, care, and diligence. The provision does not prohibit the owner from exercising the usual and ordinary acts of ownership, or exempt the insurer from liability resulting from the carelessness or negligence of the insured, unless it amounts to fraud or willful misconduct, or unless it is so continuous or of such a nature as to increase the hazard more or less permanently. While there is authority to the effect that the provision is broken by a temporary increase of risk which is caused by the manner of using the premises and which is not a casual, inadvertent, or inevitable thing, the general rule may be said to be that the provision applies to changes of a permanent nature, and not to mere temporary changes in the use of the premises."

In an extensive annotation to the case of *Angier* v. *Western Assurance Co.,* 10 S. D. 82, 71 N. W. 761, appearing in 66 Am. St. Rep. 695, numerous cases construing the provision in question are cited to the effect that a casual or temporary change in the use or condition of the insured property will not ordinarily be sufficient to avoid the policy. The Angier case involved a fire caused by insured's negligent use of kerosene and the court said: "Undoubtedly, the use of the kerosene in the manner detailed by the witness was a careless and negligent act, but it was not such an act as is understood by the term 'increase of hazard.' The stipulation of the policy is that 'the entire policy . . . shall be void . . . if the hazard be increased by any means within the control or knowledge of the insured.' Keeping kerosene upon the premises in no manner violated the stipulations of the parties, and could not, therefore, be held to constitute an increase of the hazard, within the meaning of the policy. The term 'increase of hazard' denotes an alteration or change in the situation or condition of the property insured which tends to increase the risk. These words imply something of duration, and a casual change of a temporary character would not ordinarily render the policy void, under the stipulations therein contained. . . . In the case at bar, the contention of counsel for appellant that the use of kerosene oil at only one time, in the manner detailed, constituted an increase in the hazard, in the sense in which that term is used, in the policy, is not tenable."

Another leading case on the question is *Nash* v. *American Insurance Co.,* 188 Iowa 127, 174 N. W. 378, 10 A. L. R. 724. It was there held that the starting of a temporary fire on the concrete floor of a silo by the insured was not within the provision. The court held that such clause in the insurance contract had reference to changes in the use, situation or exposure of the property permanent in their nature, saying: "Nor does it include mere acts of negligence on his part, unless these are so continuous and of such a nature as to increase the hazard more or less permanently. It is to be presumed that the contract was entered into with reference to the

character of the property and the owner's use of it, and it would greatly impair the advantages of insurance were trivial or temporary variations permitted to defeat the contract." In Couch, Cyclopedia of Insurance Law, § 960, it is said: "Primarily, an increase of hazard is some alteration or change in the situation or condition of the property insured which tends to increase the risk, and ordinarily refers only to such hazards as result from physical changes in the insured property after the issuance of the policy. The term 'increase of hazard,' however, refers to an increase of either the physical or moral hazard. And 'moral hazard' has been defined as the risk, danger, or probability that the insured will destroy, or permit to be destroyed, the insured property for the purpose of collecting the insurance, and any change in the insured or the insured property that will increase the probability of such a destruction increases the moral hazard; as, for example, any act or change that increases the temptation to destroy, or any act that reduces the value of the property in proportion to the amount of insurance, or the procuring of insurance materially in excess of the reasonable cash value of the property. As a general rule, an increase of risk or hazard also infers something of duration, as distinguished from a casual change of a temporary character." In the same section it is also said that the increase of risk or hazard is a question for the jury, unless the evidence is so conclusive that reasonable minds cannot differ. In *Emery* v. *Lititz Mut. Ins. Co.*, 228 N. C. 532, 46 S. E. 2d 309, where the insured's testimony was equivocal on the issue of avoidance, or increased hazard within the meaning of the policy, the court held that the question as to whether the use which the insured was making of a barn increased the hazard should be submitted to the jury. See, also, *Pool* v. *Milwaukee Mechanics' Ins. Co.*, 91 Wis. 530, 65 N. W. 54.

Appellants rely on *Washington County Mutual Fire Ins. Co.* v. *Williams,* 202 Ark. 283, 150 S. W. 2d 44. It is true that the policy in that case contained the same clause as involved here. However, it also contained a clause specifically prohibiting the use of the insured property (hen house) as a brooder house except upon

special permit endorsed on the policy. It was found that the building was being used as a brooder house at the time of the fire, which was of incendiary origin, in violation of the specific prohibition against such use and not under the general "increase of hazard" clause. Appellants also cite many cases from other jurisdictions where recovery was denied because of a violation of an express provision in the policy prohibiting the keeping or use of highly inflammable substances on the premises. The policies in the case at bar contain no provision prohibiting the keeping of gasoline on the premises. The trial court in instructions 5 and 6 requested by appellee and instruction 22 requested by appellants correctly submitted the issue of increased hazard to jury.

The most serious question in the case relates to the giving of instructions Nos. 7 and 9 at the request of appellee. Instruction No. 7 was given as modified by inserting the words shown in italics, as follows: "You are instructed that defendants, insurance companies, have alleged in their answer that 'any fire that occurred or loss of said property by fire was of incendiary origin, caused, procured, and connived in by plaintiff in violation of law and said contracts and defendants plead same as bar to recovery.' In this regard, you are instructed that although circumstantial evidence is admissible, the burden of proof is upon defendants to show by a preponderance of the evidence that the said fire was of incendiary origin; it is not sufficient that it prove a mere suspicion of incendiarism, and the mere fact that plaintiff failed to account for the origin of the fire or that its origin is now unknown is not an incriminating circumstance, and in this regard you are further instructed that if the circumstances are as consistent with innocence as with guilt, they should be rejected and if such circumstances can be freed of the imputation of fraud or deliberate incendiary acts on the part of Cox, then and in that event you should disregard such circumstances unless you find from a preponderance of the evidence that the said Cox is guilty of the willful and fraudulent acts *or gross negligence or recklessness with regard to* incendiarism as alleged herein."

Appellee's requested instruction No. 9 was given, as modified by striking the words in italics, as follows: "You are instructed that there is no presumption that an unexplained fire is of incendiary origin. On the contrary the presumption is that such fire was caused by accident or at least that it was not of *criminal or* incendiary design; and so in this case it is your duty to consider this presumption under all the law and the evidence given to you in this case and before defendants, insurance companies, can rely upon the incendiary origin of this fire, the burden of proof is upon them to prove by a preponderance of the evidence that said fire was of incendiary origin and not by accidental means."

Appellants made numerous specific objections to the giving of instruction No. 7. It is argued that the instruction is abstract, misleading and prejudicial in that it employed language which is only applicable in criminal cases and invaded the province of the jury by commenting on the weight of the evidence. The well settled rule in this country in civil cases is that facts constituting a crime need not be proven beyond a reasonable doubt and only a preponderance of evidence is required to sustain a charge of arson made in defense of a suit on a fire insurance policy. Anno. 124 A. L. R. 1380. While instruction No. 7 declared that only a preponderance of evidence was required, there is other language used which applies the test in criminal cases where circumstantial evidence and the presumption of innocence are involved and proof beyond a reasonable doubt is required. This language was misleading in that it in fact had the effect of requiring more than a preponderance of the evidence to establish incendiarism. In directing the weight that should be given to certain circumstances it invaded the province of the jury and amounted to a comment upon the weight of the evidence in violation of the well settled rule.

Instruction No. 9 gave effect to a presumption that the fire was accidental where evidence had been introduced by appellants tending to rebut the presumption. Our cases generally follow the rule as stated in Wigmore, Evidence (2d Ed.), § 2491, as follows: "The peculiar

effect of a presumption 'of law' (that is, a real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule. . . . It is, therefore, a fallacy to attribute (as do some judges) an artificial probative force to a presumption, increasing for the jury the weight of the facts, even when the opponent has come forward with some evidence to the contrary." See *Ford & Son Sanitary Co.* v. *Ransom,* 213 Ark. 390, 210 S. W. 2d 508, and cases there cited which distinguish between presumptions of law and presumptions of fact. In *Union Central Life Ins. Co.* v. *Sims,* 208 Ark. 1069, 189 S. W. 2d 193, we also drew a distinction between statutory presumptions and presumptions founded upon the laws of nature and self-preservation, such as the presumption against suicide, and held that the latter would stand throughout the trial and until overcome by evidence which outweighs the presumption. The jury were required in instruction No. 9 to consider the presumption that the fire was accidental as evidence after the introduction of testimony to rebut it. We cannot agree with appellee's contention that the presumption involved here is of the character and strength of a presumption such as that against suicide. The language in instruction No. 9, "and so in this case it is your duty to consider this presumption under all the law and evidence given to you in this case . . ." gave effect to the presumption as evidence after rebutting evidence had been adduced and this was error.

The trial court was faced with the task of passing on some forty-four instructions requested by the parties, in a case where the issues were not particularly complicated. Several of the instructions requested by appellants were repetitious and there was no basis in the evidence to support others. In the rush of a jury trial this places a tremendous burden on the trial judge. We have examined the other assignments of error urged by appel-

lants in the giving or refusal to give certain instructions and the refusal to admit certain evidence, and find no merit in them. On account of errors indicated in the giving of instructions 7 and 9 requested by appellee, the judgment is reversed and the cause remanded for a new trial.

HOLT, J., not participating.

ANDERSON *v.* FRANK REID BURIAL ASSOCIATION, INC.

4-9492 239 S. W. 2d 12

Opinion delivered April 30, 1951.

Rehearing denied May 28, 1951.

Phillip H. Loh, III, for appellant.

Gordon & Gordon, for appellee.

GEORGE ROSE SMITH, J. This is a suit brought by the appellant to recover judgment for $300, the complaint alleging that the defendant burial association had contracted to contribute that sum toward funeral expenses incident to the burial of appellant's father. The association denied liability upon the ground that

appellant's membership in the organization had lapsed as a result of her failure to pay quarterly assessments. The circuit court, sitting without a jury, entered judgment for the defendant.

Most of the facts are undisputed. The appellant joined the burial association in 1935, receiving a certificate of membership that entitled her to burial benefits of $300 upon the death of her father or other member of her family. The by-laws, which are made a part of the contract, require the members to pay such assessments as are levied by the association. If a membership lapses for failure to pay an assessment the member is required by the by-laws to sign a certificate of good health in order to rejoin the association.

The record indicates that the appellant paid all assessments through the year 1946. She paid none of the four assessments that were levied in 1947. In 1948 she made a payment in February, which the association accepted without requiring a certificate of good health. The next two assessments, due within fifteen days after June 1 and September 1 respectively, were not paid. The appellant mailed the payment that was due on December 1, the association issuing its receipt on December 6. The appellant's father died five days later, on December 11. The association denied liability because the certificate of good health had not been submitted.

The trial court, in finding for the defendant, held that the appellant's father had the affirmative duty of forwarding the necessary certificate. The court reasoned that the association was entitled to hold the December payment while awaiting the requisite proof of good health, although it is admitted that the receipt was forwarded to the appellant without any request for such proof. The court concluded that for want of the necessary certificate the appellant's membership had not been reinstated.

We are unable to agree with the view that the association was entitled to hold the payment without notifying the appellant that proof of good health would be

insisted upon. It is true that by statute burial associations are investment companies rather than insurance companies, *Herndon* v. *Wasson,* 188 Ark. 329, 66 S. W. 2d 633, but the contract itself is so similar to an insurance policy that the principles governing such policies are applicable. A requirement that proof of good health be made as a condition to the reinstatement of an insurance policy is for the benefit of the insurer and may be waived by it. McEwen, "Reinstatement of Life Insurance Policies in Arkansas," 2 Ark. L. Rev. 105. If there were no question of fraud in this case the association would be liable upon the ground that its acceptance of the December payment was a waiver of the certificate of good health.

There is, however, an issue of fraud that has not been decided by the trial court. We have said that "the mere fact of making application for reinstatement without disclosing the illness of the member is itself an implied statement that he is in good health." *Modern Woodmen of America* v. *Seargeant,* 188 Ark. 1098, 69 S. W. 2d 397. In the absence of an incontestable clause an insurer may cancel a policy for the insured's fraud in obtaining reinstatement. *Pacific Mut. Life Ins. Co.* v. *Butler,* 190 Ark. 282, 78 S. W. 2d 813. Here the by-laws contain nothing in the nature of an incontestable clause.

The appellant's conduct in forwarding the December payment was an implied representation of good health, but it was not necessarily fraudulent. A representation that the insured believes to be true does not avoid the policy. *Aetna Life Ins. Co.* v. *Mahaffy,* 215 Ark. 892, 224 S. W. 2d 21. The appellant testified that her father had not been in good health for about a year prior to his death, but the evidence does not indicate whether the appellant was aware of the seriousness of his condition. The physician's death certificate recites that the immediate cause of death was of only three days' duration. Since it is not our place to decide such controverted issues in the first instance the judgment must be reversed and the cause remanded for a new trial.

4-9484 239 S. W. 2d 14

Opinion delivered April 30, 1951.

Rehearing denied May 28, 1951.

[redacted]

Carl Langston, for appellant.

Wood & Chesnutt, Richard Hobbs and *Bailey & Warren,* for appellee.

HOLT, J. Appellant, Arkansas State Board of Optometry, brought this suit against appellees, D. P. Keller and five named physicians, to enjoin them from violating Act 94 of the General Assembly of 1941, a statute governing the practice of optometry.

From some time in 1932, D. P. Keller, a layman—whom it is conceded has never been licensed to practice optometry or medicine—was employed by the American Optical Company as its manager in Hot Springs, Arkansas. During this time and up until February, 1950,

Keller personally handled the "dispensing service" in the preparation of patients' spectacles, which included the measurement of patients' pupilary distance, temple length, bridge size, lens size and shape, and after the spectacles were prepared in accordance with Keller's measurements, he would properly fit them to the patient's face.

Early in 1950, Keller resigned his position with American Optical Company and on February 16, 1950, he, together with the five appellees, physicians, entered into a written partnership agreement to engage in the wholesaling and retailing of optical supplies and filling prescriptions under the name of "The Medical Arts Optical Service." The partnership bought the property and equipment of American Optical Company in Hot Springs.

The complaint in the present suit (filed June 22, 1950) alleged, in effect, (appellant's brief) "that the partnership agreement was unlawful in that the doctors were aiding and assisting Keller, an unlicensed person, in the unlawful practice of optometry; that the partnership agreement between the doctors and Mr. Keller was contrary to law in that it authorized the partnership to practice optometry without a license; that Keller was himself unlawfully practicing optometry; and that the so-called credits, rebates, refunds, and commissions to the doctors were unlawful." The partnership agreement was made a part of appellant's complaint.

On appellees' motion and over appellant's objections and exceptions, certain parts of the complaint were stricken. Appellees answered with a general denial.

Upon a hearing "the court decreed that the defendant, Keller, prior to the filing of this suit, was dispensing glasses and spectacles in a manner which violated the optometry law of this State in that he actually made facial measurements and fitted the spectacles to the purchaser's face and eyes; immediately after the filing of this suit, and upon advice from counsel, Keller discontinued this practice, and since that time has fully com-

plied with the optometry statutes; there is no probability that he will in the future conduct his business in any manner other than consistent with the State law; that the doctors have not, in the past, nor at the time of the decree, conspired with Keller to assist him in the violation of the State law governing optometry; that the defendants, doctors, have not violated any of the laws of the State of Arkansas governing the practice of optometry in accepting the so-called kick-backs, rebates and credits in connection with the sale of spectacles or parts thereof."

Injunctive relief was denied and the complaint dismissed for want of equity. This appeal followed.

Appellant contends that Keller, an unlicensed person, has not ceased to practice optometry, that appellees, physicians, are aiding and abetting him, The Medical Arts Optical Service partnership is now assisting Keller in the unlawful practice of optometry and said physicians are receiving rebates or "kick-backs."

Appellant, in summary, says: "D. F. Keller, an unlicensed person was practicing optometry by dispensing and adapting the lens and frames to the patient's face both in the presence and in the absence of physicians. That he would make the frames comfortable for the patient and make them fit by bending the nose-piece; and after the glasses were in order, he would collect the retail price and later, rebate to the doctors."

After a review of the evidence, which we think it unnecessary to detail, we are unable to say that the Chancellor's findings are against the preponderance thereof.

Briefly, the evidence here shows that the examining oculist determines any deficiencies in the patient's vision, notes on a prescription the type and power of corrective lenses and facial measurements, for correct size of frames. The patient takes the prescription to the Medical Arts Optical Service, or any other optician of his choice, to be filled. When taken to Medical Arts,

Keller displays different styles of frames to the patient and where the physician or oculist has so requested, he, Keller, will check or verify the facial measurements, and should he discover what he conceives to be an error, he notifies the oculist who would, after rechecking, make any corrections he deemed necessary. This final decision always rested with the oculist or physician and not with Keller. After final instructions from the oculist, Keller has the lenses ground in accordance with the prescription, and affixes them to the correct style frame (as the customer may select). All that remains to be done after the actual delivery to the patient is to see if the glasses fit comfortably, which service Keller performs. In some cases, the bridge may pinch or the nose hook may need adjusting, in which event Keller, by bending the offending parts, makes it comfortable.

Act 94 (Ark. Stats. 1947, § 72-801, *et seq.*) provides that any person who "prescribes, dispenses, adapts, or duplicates lenses, . . . shall be deemed to be engaged in the practice of Optometry."

In construing this section of the act in *Dellinger* v. *Arkansas State Board of Optometry,* 214 Ark. 562, 217 S. W. 2d 338, we said: "It provides (§ 1) that any person who 'prescribes, dispenses, adapts, or duplicates' lenses for the correction, relief or aid of the eyesight shall be deemed to be engaged in the practice of optometry. As we interpret the statute, it was the legislative intention to divide the process of prescribing, making and fitting spectacles into three steps. First is the prescription, based upon an examination of the patient. Only physicians and optometrists are permitted to prescribe glasses. Second is the manufacture of the lenses. This is the normal work of an optician, for which no license is required. The third step is the dispensing and adapting of the glasses, being the adjustment of the lenses and frames to the patient's face. The testimony shows that technical skill is required in this part of the process and that inaccurate measurements may result in glasses that injure the vision. With an exception to be

mentioned, the Act provides that only physicians and optometrists may dispense and adapt lenses."

We hold, as did the Chancellor, that the above simple acts which Keller was performing here did not amount to "dispensing and adapting of the glasses" and "lenses" within the meaning of the above section, or to a violation of the optometry law.

We also hold, as already indicated, that the Chancellor's finding that the five appellees, physicians, had not violated the Optometry law, nor any statute, in their partnership arrangement with Keller, was correct and not against the preponderance of the testimony.

Appellant earnestly contends, however, that appellees were violating § 70-307, Ark. Stats., 1947, referred to as the "Unfair Practices Act" and that the Chancellor erred in refusing to allow appellant to introduce testimony on this issue. We hold that there was no error here. Section 70-307 provides: "The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, firm, partnership, corporation, or association resorting to such trade practice shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in section 11 (§ 70-311) of this act, (Acts 1937, No. 253, § 7, p. 914; Pope's Dig., § 14317)."

The complaint does not allege that the rebates or "kick-backs" were "not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor." In fact, the complaint, in effect, alleges the contrary. Appellant made the partnership agreement a part of its complaint and this agreement specifically provides that "the partnership shall maintain an establishment list of wholesale prices, subject to change from time to time, and shall charge a standard dispens-

ing fee for filling prescriptions. Customers having prescriptions filled shall be charged a retail price to be established by agreement among the partners. The difference between the wholesale price plus dispensing fee and the retail price shall be credited to the oculist making the prescription. Such credit balance due oculists shall be paid by the partnership monthly. The privilege of participating in such retail profits shall be open to all licensed oculists and shall not be restricted to the partners."

In construing the above statute, we said in the recent case of *Baratti* v. *Koser Gin Company,* 206 Ark. 813, 177 S. W. 2d 750: "But the regulatory law . . . does not forbid all rebates nor does it make illegal all agreements for rebates. Before any agreement for a rebate can be said to violate the provisions of this act such rebate must: First, be secret; second, not be paid to all patrons upon like terms and conditions; and, third, must tend to destroy competition. It devolved upon appellee to show that all these requisites of illegality existed."

We hold that appellant failed to state a cause of action against appellees on this issue of rebates or "kickbacks," and therefore, as indicated, the Chancellor did not err in refusing to hear testimony on this point.

Finding no error, the decree is affirmed.

GRIFFIN SMITH, C.J., concurs.

AMERICAN REPUBLIC LIFE INSURANCE COMPANY *v.* FLYNN.

4-9482 238 S. W. 2d 937

Opinion delivered April 30, 1951.

Talley & Owen and *Robert L. Rogers, II,* for appellant.

Willis & Walker, for appellee.

ROBINSON, J. On the 1st day of September, 1945, the appellant, insurance Company, executed and delivered to the appellee, Flynn, a policy of insurance providing, among other things, for monthly indemnity by reason of loss of time due to illness. At that time it was recognized by both parties that Flynn had been, or was then, afflicted with heart trouble. A rider, or policy supplement, was made a part of the policy, which provided:

"This policy does not cover disability caused directly or indirectly as a result of the recurrence of heart trouble in any form.

"If, after a period of two years, evidence satisfactory to the Company by medical examination including electrocardiogram discloses no heart trouble, rider will be removed."

On the 17th day of February, 1950, the insured suffered a heart attack. On February 23, 1950, in response

to an inquiry from S. T. Phifer, the agent who wrote the policy, (it is not clear as to just when Phifer made his inquiry), a letter was written to the insured signed by I. J. Elrod, Vice-President of the appellant Company, the letter being as follows:

"A few days ago, Mr. S. T. Phifer left your H & A policies in this office and asked that the rider for Heart Trouble be removed.

"The fact that the policy supplement mentions the length of time that the rider is to be effective, automatically removed the rider at the expiration of the time clause that is shown on your policy. This letter, of course, may be attached to show that the rider is not effective, but it would not alter the policy one way or the other since the time element appears in the supplement which was made a part of the policy at the time it was issued.

"We trust that this is the information desired and if we can be of further service please don't hesitate to call on us.

"Yours very truly,

/s/ I. J. Elrod,

"IJE/mm Vice-President."

The insured filed his proof of loss. The Insurance Company denied liability and this suit followed in which the insured recovered judgment for the time lost due to the heart trouble.

The appellant, insurance Company, contends that, notwithstanding the Vice-President's letter to the insured, it was the duty of the insured to take steps to have the rider removed at some time before he became disabled, and that the Vice-President had no authority to waive the Company's rights in this respect. There is a provision in the policy as follows:

"No change in this policy shall be valid unless approved by the President of the Company and such approval be endorsed thereon."

Appellant cites authority to the effect that a contract of insurance cannot be waived or modified except by endorsement of the proper officer of the Company. However, we are of the opinion that the case is governed by the insurance Company's interpretation of the rider, as set out in its Vice-President's letter of February 23, 1950. In the particular policy involved here, the Company, as shown by the letter of its Vice-President, interpreted the rider as being no longer effective after the two-year period had expired. The rider was for the benefit of the Company. It was prepared by the Company. The Company knew what it wanted for protection at the time of preparing the rider, and knew what construction it intended should be placed on the rider. The letter is positive evidence of the construction placed on the rider by the Company, and there is no evidence in the record indicating that the Company intended any other construction.

In the case of *Beasley* v. *Boren,* 210 Ark. 608, 197 S. W. 2d 287, this Court said: "The parties to a contract may, by their mutual actions in carrying it out, furnish an index to its meaning, which the language thereof fails to do. After all, the written instrument is but an evidence of what the signers thereof propose to bind themselves to do, and when, by their conduct in carrying out the agreement, both of the parties to the contract demonstrate an intention to heal an uncertainty in the contract, the courts will generally adopt this practical construction."

In the case of *Continental Insurance Company* v. *Harris,* 190 Ark. 1110, 82 S. W. 2d 841, the Court said: "Where, from the terms of the contract or the language employed, a question of doubtful construction arises, and where it appears that the parties themselves have practically interpreted their contract, courts will generally follow that practical construction.

"It is to be assumed that parties to a contract know best what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party

is alert to protect his own interests and to insist on his rights, and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the meaning of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them seeks a construction at variance with the practical construction they have placed upon it of what was intended by its provisions."

Likewise, in the case at bar, the insurance Company's construction of the rider with regard to the expiration date thereof is clearly set out in the Vice-President's letter to the appellee. And, insofar as this particular case is concerned, we are of the opinion that the Company cannot now successfully contend that a different construction from that expressed in the letter was intended.

Appellee's attorneys were allowed a fee of $150 in Circuit Court and have asked that an additional $100 be allowed by this court for the appeal. We think this request is reasonable and appellee's attorneys are, therefore, allowed an additional $100 fee. *Bankers' Reserve Life Insurance Co.* v. *Crowley,* 171 Ark. 135, 284 S. W. 4.

Affirmed.

George Rose Smith, J., dissenting. If the insurer's letter had been written before the appellee became disabled I should agree to affirm the judgment, since the appellee might have relied upon the letter as a reason for not attempting to have the rider removed. But here the rights of the parties had already become fixed when the company's vice-president undertook to construe the policy. The policy is simply a contract between the insurer and the insured, and I can think of no legal theory by which a purely unilateral misinterpretation of an unambiguous agreement becomes binding upon either party, especially when no consideration is given for the erron-

eous opinion and when there has been no reliance upon it. Certainly if the insured should gratuitously construe his policy too favorably to the company the courts would not hold him to his construction, and I do not understand how the opposite result can be reached when it is the insurer who makes the error.

ARKANSAS INSPECTION & RATING BUREAU *v.* INSURANCE COMPANY OF NORTH AMERICA.

4-9442 238 S. W. 2d 929

Opinion delivered April 30, 1951.

Verne McMillen and *Wright, Harrison, Lindsey & Upton,* for appellant.

John C. Phillips and *Blake Downie,* for appellee.

HOLT, J. This appeal questions an order of the Arkansas Insurance Commissioner, affecting a rating plan filed by the Insurance Company of North America and certain allied companies, all permitted to write and engage in writing fire insurance in Arkansas under Act 50

of 1947 (Ark. Stats., 1947, §§ 66-401 to 66-416, inclusive). The order in question was made August 15, 1950, and permitted appellees in writing fire insurance to use what is known as the Installment Premium Endorsement Plan. On appeal to the Pulaski Circuit Court, the above order was affirmed in part and reversed in part September 26, 1950.

The question presented is of first impression here.

Arkansas Inspection & Rating Bureau, appellant, (to which we shall refer as Bureau) is a private rating organization functioning under § 66-406 of the above rating law, its primary purpose being to file fire insurance rates, rating plans, schedules, and rules with the Insurance Commissioner for approval under said rating law, on behalf of the member insurance subscribers of the Bureau.

Appellee, Insurance Company of North America (to which we shall refer as North America) is the oldest, and one of the largest, stock fire insurance companies in the United States.

The present appeal of the Bureau challenges that part of the judgment of the Pulaski Circuit Court which upheld the Insurance Commissioner's order permitting North America to use and attach to its fire insurance policies written for term of three or five years, the Installment Premium Endorsement.

North America has cross-appealed from that part of the judgment of the Circuit Court which reversed so much of the Insurance Commissioner's order as held that North America's filing under the rating law was not a deviation, but a direct filing.

The order of the Insurance Commissioner, to which reference is made above, recited:

"1. The Rating Bureau, which is the rating organization duly qualified under the Arkansas Fire Insurance Rating Law, has filed with the Commissioner a rating rule, known as the 'term rule,' which permits fire insurance companies to write policies on prescribed classes

of risks at the premium produced by two and one-half times the annual rate for terms of three years, and by four times the annual rate for terms of five years.

"2. The Installment Premium Endorsement of the North America Companies is an endorsement which may be attached to fire insurance policies written under the aforesaid term rule. For the attachment of the endorsement, the policyholder is required to pay the insurer, in addition to the full term premium, an extra charge to compensate the company for the cost to it of deferring collection of the premium, and for providing that the insurance coverage of the policy shall not be reduced by the payment of a loss.

"3. The Rating Bureau does not have on file with the Commissioner, under the provisions of the Arkansas Fire Insurance Rating Law, any rate, rating schedule, rating plan, rule, or regulation with which the use of the Installment Premium Endorsement is inconsistent or from which the Installment Premium Endorsement is a deviation. Installment Payment of Premium is a change of custom only, not statute. In fact, there is no filing of the Rating Bureau which requires premiums on fire insurance policies to be paid in full at the inception of the policy, and there is no filing of the Rating Bureau which provides that insurance coverage provided by fire insurance policies shall not be reduced by the payment of losses.

"4. The use of the Installment Premium Endorsements in Arkansas by North America and other companies provides persons, whose risks qualify for fire insurance under the term rule, with a method of taking advantage of the term rule discounts, without being required to pay the term premium in full at the inception of the policy. The need for such a facility is demonstrated by the fact that there are financial institutions in Arkansas engaged in lending insureds money on notes, the security being the unearned premium value of term fire insurance policies, for the purpose of permitting such insureds to take advantage of the said term discounts.

"5. There is no requirement of Arkansas law which prevents the use of the Installment Premium Endorsement. The Rating Bureau has a rule on file with the Department which permits term fire insurance policies to be written on a budget plan, and also a rule which permits term fire insurance policies to be written on farm property on an installment plan. Installment plans are customary in virtually every type of insurance other than Fire, such as Life, Inland Marine and Casualty. Morever, it is permissible in Arkansas for the insurer to accept from the policyholder a promissory note in lieu of cash in payment of the premiums on fire insurance policies.

"6. Installment Premium Payment Plan is not limited to North America Companies. In fact, as of this date, *36* fire insurance companies have sought and received permission to use the endorsement in Arkansas, which fact is a matter of public record as reflected by the records in the office of the Insurance Commissioner, which records are kept as required by law and of such records, Courts will take judicial knowledge. *Riggs* v. *Brock,* 208 Ark. 1050, 189 S. W. 2d 367; *State* v. *Guthrie,* 203 Ark. 60, 156 S. W. 2d 210, and *State, ex rel. Atty. General* v. *State Board of Education,* 195 Ark. 222, 112 S. W. 2d 18. Since the endorsement may be used by all fire insurance companies, upon request to and approval by the Commissioner, there has been no monopolistic practices by any of the companies. By making available term fire insurance on the installment basis, the endorsement makes it possible for a larger portion of the insuring public to purchase more adequate fire insurance, which is desirable and in the public interest.

"7. The evidence presented at the hearing does not show that the rates produced by the filing of the North America Companies are excessive or inadequate. The endorsement has not yet been sufficiently used in Arkansas to determine by statistics whether the rates charged are too high or too low. The filing was based, on the judgment of the insurer, in conformity with the Arkansas Fire Insurance Rating Law, Ark. Stats., §

66-404. Likewise, justification for the prepaid term rule is based on the judgment of the insurer, since no statistics are on file with the Commissioner supporting said rule. It may be presumed from the fact that the endorsement continues to be offered for sale, and purchased by policyholders in this and 34 other states, that the rates are neither inadequate nor excessive. The Commissioner may exercise his statutory authority at any appropriate time to examine the records of the insurers using the endorsement to determine whether the charges are proper after sufficient experience has been acquired.

"8. The Installment Premium Endorsement Plan is not unfairly discriminatory; provided, the endorsement is made available to any and all prospective purchasers whose risk would be acceptable and qualifies for prepaid term insurance under the term rule.

"9. The Installment Premium Endorsement is an enforcible obligation, and it is therefore not necessary to require the policyholder to give the insurer a negotiable instrument for the payment of the premiums and installments. See 44 C. J. S., §§ 353, 355 (a), 355 (b), and 358 (e).

"10. The ruling of my predecessor in office, Honorable JACK G. MCKENZIE, that unearned premium reserves need not be set up as installments are paid, is affirmed.

"11. The Commissioner finds that had the Legislature intended that he be given authority to regulate or prohibit installment premium payments, it would have so stated in clear and unambiguous language. The General Assembly of the State of Arkansas, by Ark. Stats., § 66-401, *et seq.,* regulated the premium rates for fire, marine and inland marine insurance and authorized the establishment and operation of rating organizations; and in so doing did not give to the Commissioner authority or power to prohibit or control installment payment of premiums. The silence of the Legislature on installment payments of premiums impliedly inhibits the Commissioner from thus regulating or prohibiting said installment payment of premiums. *Cook, Commissioner of*

Revenues v. *Arkansas-Missouri Power Corporation,* 209 Ark. 750, 192 S. W. 2d 210.

"12. The Commissioner finds that the Installment Premium Plan enables the Fire Insurance industry to serve its policyholders in the same way that many other businesses have been doing for years. The Installment Premium Plan reduces the occasion for resorting to outside agencies to perform functions which the Fire Insurance industry itself is capable of doing. Indeed, it is the Commissioner's findings that the insuring public is better served by the Installment Premium Plan, which plan is less complex and less expensive than facilities offered by other agencies. Furthermore, in the absence of statutory authority, the Commissioner, as a practical matter, is of the opinion that he had no authority to adopt any policy which tends to deprive insurers of the right to finance directly the payment of premiums on policies which they write. Any other position by the Commissioner would, as reflected by the record, lead to the use of other agencies, which would accomplish the same result by indirection as does the Installment Premium Plan, and, in the process would increase the cost to the policyholder."

The Commissioner, having reviewed the evidence, concluded as follows:

"I. (a) The Installment Premium Endorsement as filed with the Commissioner by the North America Companies is a filing within the meaning of the Arkansas Fire Insurance Rating Law, Ark. Stats., § 66-404, and is not a deviation, but merely variation from a custom of the prepaid term rule.

"(b) The said filing complies in all respects with the Arkansas Fire Insurance Rating Law, Ark. Stats., § 66-403.

"(c) The said filing is justified and the Installment Premium Endorsement of the North America Companies may be continued in use in Arkansas according to the terms and conditions of said filing, provided, all

prospective purchasers whose risks would be acceptable by the insurer on the prepaid term plan, must, at the option of the purchaser, be permitted to purchase said insurance on Installment Premium Payment Plan.

"II. Determination of whether said Installment Premium Endorsement is a deviation under Ark. Stats., § 66-407, is, in final analysis, a legal question. If the Court holds said plan to be a deviation, then, in that event, it is the Commissioner's finding that said rates as set forth in the endorsement are not excessive, inadequate or unfairly discriminatory."

The Circuit Court found:

"1. That part of the order which holds the Installment Premium Endorsement not to be a deviation under Ark. Stats., 1947, § 66-407, is in error and should be reversed for the reason that the use of the endorsement is a variation from the long established practice or custom in the fire insurance business of requiring premiums for term fire insurance policies to be paid at the inception of the policy, and also because the Installment Premium Endorsement, in providing that the amount of insurance afforded by the policy to which it is attached shall not be reduced by the payment of a loss, is a variation from the long established custom or practice in the fire insurance business of reducing the amount of fire insurance policies by the amount of losses paid during the term of such policies.

"2. That all other portions of the order are correct and should be affirmed."

A question of law is presented.

The facts appear not to be in dispute and we think support the Commissioner's findings.

Act 50 of 1947, above, provides in part:

"Section 1. *Purpose of Act.* The purpose of this Act is to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory, and to authorize

and regulate cooperative action among insurers in rate making and in other matters within the scope of this Act. Nothing in this Act is intended (1) to prohibit or discourage reasonable competition or (2) to prohibit or encourage, except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates, rating systems, rating plans or practices. This Act shall be liberally interpreted to carry into effect the provisions of this section. . . .

"Section 3. . . . (a) 2. Rates shall not be excessive, inadequate or unfairly discriminatory. . . . (b) No insurer, nor any rating bureau, shall fix or charge any rate which discriminates unfairly between risks in the application of like charges and credits, or which discriminates unfairly between risks of essentially the same hazard, territorial classification, and having substantially the same degree of protection. (c) Except to the extent necessary to meet the provisions of subdivision 2 of subsection (a) of this section, uniformity among insurers in any matters within the scope of this section is neither required nor prohibited. . . .

"Section 4. . . . (a) Every insurer shall file with the Commissioner, . . . every manual, minimum, class rate, rating schedule or rating plan and every other rating rule, and every modification of any of the foregoing which it proposes to use. . . .

"Section 7. *Deviations.* Every member of or subscriber to a rating organization shall adhere to the filings made on its behalf by such organization except that any such insurer may make written application to the Commissioner for permission to file a deviation from the class rates, schedules, rating plans or rules respecting any kind of insurance, or class of risk within a kind of insurance, or combination thereof. . . . In considering the application for permission to file such deviation the Commissioner shall give consideration to the available statistics and the principles for rate making as provided in § 3 of this Act. The Commissioner shall issue an order permitting the deviation for such insurer to be filed if he

finds it to be justified and it shall thereupon become effective. He shall issue an order denying such application if he finds that the resulting premiums would be excessive, inadequate or unfairly discriminatory. . . ."

The Installment Premium Endorsement Plan permits the insured, after paying 25% of the total premium in advance, to pay the remainder of the premium, on three or five-year term insurance policies to which the Installment Endorsement is attached, in annual installments instead of in full when the policy is procured. It also provides that the coverage offered shall not be reduced by payment of a loss, which provision is, in effect, an automatic reinstatement. On this Installment Endorsement Plan, open to all policyholders, the insured pays the insurance company the full term premium and an extra charge of 3% on the deferred installments, as cost to the company for carrying and deferring the payment of premium collections and providing automatic reinstatement in case of loss.

There is on file with the Bureau a rating "term rule" used by all fire insurance companies, which permits fire insurance policies written for a term of three years to be sold for two and one-half times the annual premium, and for a five-year term, at four times the annual premium. Under this "term rule" insured is required to pay the entire premium in cash. In order to take advantage of the above "term rule" many policyholders who are unable to pay the full term premium in cash in advance, take advantage of the discount or savings offered, by borrowing the necessary money from financial institutions and repaying these loans in installments with interest thereon, which, in effect, made this method more expensive than the Installment Endorsement Plan by North America.

The first purpose of Act 50 was to promote the public welfare to whatever extent that might be done through regulation of insurance rates within the phases dealt with. They must not be excessive, inadequate, or unfairly discriminatory, hence cooperative rate-making was authorized under a formula not intended to *discourage*

reasonable competition; secondly, there was no thought of prohibiting or *encouraging* (a) uniformity in the rates, (b) uniformity in the rating systems, and, (c) uniformity in rating plans and practices—except to the extent that the three uniformities were necessary to accomplish expressed purposes of the Act.

It is noteworthy that the lawmakers used the word "discourage" in negativing an intent to prohibit reasonable competition, while "encourage" was employed to disaffirm matters mentioned in (a), (b), and (c). Section 1 of Act 50 is part of a uniform law presumptively prepared by insurance companies, and has been adopted in other states as a sequence to the decision in *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440, decided in 1944. It was there held that an insurance company doing a substantial part of its business "among the several states" was engaged in interstate commerce within the meaning of the Sherman Anti-Trust Act. An illustration of the uniformity with which the insurance companies sought to meet the issue is to be found in a comparison of § 1 of Act 50 with other state legislation. See Laws of Maryland, 1949, ch. 510, pp. 1232-3. The word "encourage" appears in the Maryland statute.

Here, all fire insurance companies charge the same basic rate on each one hundred dollars of coverage, and all, including North America, may sell Term Insurance, but North America proposes to sell also under the Installment Term Endorsement Plan.

The Insurance Commissioner found that North America was entitled to sell under the Installment Term Endorsement Plan, as filed with the Commissioner.

Before the Rating Bureau was created its predecessor dealing with related matters was Arkansas Fire Prevention Bureau. The plan of deferred premium payments and other variations now thought by the Bureau to be deviations had been proposed by North America through endorsement forms similar to those now being used. This occurred in 1946, supplemented by supporting data ten days later. Act 50 became effective July 1, 1947,

but by subdivision (i) of § 4 "All filings of rates which insurers propose to make effective on January 1, 1948, (must be in the hands of the Commissioner) not later than October 1, 1947, and all such rates not disapproved by the Commissioner prior to December 1, 1947, shall be considered approved."

The Commissioner called North America's attention to Act 50 October 17, 1947. However, three days earlier North America had resubmitted the existing plan. It was reapproved in succeeding years.

North America takes the position that the law itself gives effect to the rates because the identical method of writing insurance now objected to by the Bureau was on file prior to December 1, 1947, and it was not disapproved.

Appellant insists that when the Commissioner notified North America that it should refile, and North America acquiesced, the parties thereby construed the requisite procedure, hence they cannot now be heard to plead otherwise. It is also insisted that the courts are bound by such inter-party construction, citing *Yarrington* v. *John Hancock Mutual Life Insurance Company,* 211 Ark. 474, 201 S. W. 2d 763. But in the Yarrington case a contract (as distinguished from a statute) was involved. Courts are not required to adopt the construction interested persons have placed on a legislative act, although where the language is doubtful and a subdivision of the State is involved, high regard will be accorded a construction accepted over a substantial period of time.

In the instant case we find nothing in North America's plan that involves a violation of the law, and it is difficult to rationalize appellant's contentions that the rate filing placed with the Commissioner and not disapproved prior to December 1, 1947, did not automatically become effective.

Accordingly, the judgment is affirmed on direct appeal and on cross-appeal reversed and remanded, with

directions to enter a judgment consistent with this opinion.

GEORGE ROSE SMITH, J., dissenting. If I correctly understand the majority opinion the court holds that the installment premium indorsement is not a deviation for the reason that it was not disapproved prior to December 1, 1947. I do not see why this fact makes any difference. The Act provides that all filings shall become effective after fifteen days unless disapproved by the Commissioner within that period. Ark. Stats. 1947, § 66-404 (*d*). Evidently the legislature wanted to provide a waiting period before the Act went into effect, so that insurance could still be sold at existing rates until new rates could be filed under the Act. All that § 66-404 (*i*) does is to designate the period between October 1 and December 1, 1947, as the time for filing the initial rates under the new law. If the installment premium indorsement was then a deviation, and I think it too plain for argument that it was, the fact that it happened to be one of the initial filings is immaterial. I agree that the plan is not unfairly discriminatory, but I do think it a deviation and so would affirm the judgment on cross appeal.

MILLER *v.* PORTER.

4-9470 238 S. W. 2d 940

Opinion delivered April 30, 1951.

James R. Hale, for appellant.

E. J. Ball and *Rex W. Perkins,* for appellee.

Ed. F. McFaddin, Justice. Appellant, Miller, instituted suit to rescind a contract of purchase he made with appellee, Porter. The rescission was sought on the claim that Porter made material and false representations which induced Miller to sign the contract. The Chancery Court refused the prayed relief; and Miller has appealed.

Porter owned a farm of 80 acres on which was his home and dairy herd (of 10 cows) that he handled as his business. In employing Newlin, a real estate broker, to sell the farm, cattle and other personal property, Porter represented that he received $400 a month from the business. Through Newlin, appellant Miller, a resident of New Mexico, became interested in Porter's proposition; and to Miller, Porter made the representation that his gross receipts from the dairy herd were $400 per month. Relying on such representations, Miller signed the contract of purchase, paying $3,250 cash, and agreeing to pay the balance of $12,250 in payments of $200 per month for the first year, and $150 per month thereafter. As soon as Miller discovered the falsity of Porter's representations—as to the gross monthly receipts from the dairy herd—he immediately attempted to rescind the contract.

When we consider the situation of the parties, and all the surrounding circumstances, the right of rescission becomes apparent. Miller detailed his financial status to Porter: he only had $3,750 in cash and no other income; he was willing to make a cash payment of $3,250 on the total contract price of $15,500 if the receipts from the dairy herd would allow Miller and wife a living, and also take care of the monthly payments to Porter. Thus the amount of monthly receipts from the dairy herd was

known by both parties to be a most important factor in the transaction.

Porter gives some rather unconvincing explanations about his $400 per month representation: first, he admits he named that figure to Newlin, but claims it referred to all receipts of the farm, including the sale of chickens, as well as the sale of cattle; and then, secondly, he builds up a theory that with $500 Miller could have made the down payment for the purchase of four additional cows which, with Porter's herd, would have increased the gross receipts from milk to somewhere near the $400 per month figure. But scrutiny of all Porter's testimony discloses that the greatest amount he ever received from milk, in any one month, was $222.45; and that the average per month over his entire experience was about $200. Furthermore, in the twelve months preceding the representation the total amount he made from the sale of chickens was only $110, and the total amount he made from the sale of cattle was only $700. Porter finally admitted on cross-examination that his *total gross income* for the preceding year did not exceed $2,000 *from all sources.* It is thus apparent that Porter never had an income of $400 per month even from his combined sources, and that his representations, to such effect, were material and false.

Porter says, that Miller was on the farm for more than a week and helped milk the cows, and thus had an opportunity to see the amount of milk produced: and, thus, Porter argues that Miller knew the truth, independent of any representation. But here, again, Porter shrewdly explained away to Miller every suspicious circumstance: Miller knew only about the butterfat and milk weights from Jersey cattle; Porter's cattle were Holsteins; and Porter told Miller that one Holstein would produce twice as much as two Jerseys. Thus Porter made it appear plausible that a herd of only nine or ten Holstein cows could produce enough milk to gross $400 per month. Furthermore, when Miller saw one check for a semi-monthly payment to be only $113, Porter—ever ready with explanations—said that the check was small

because some of the milk had been lost due to spring onions, and that such situation would not occur again. In short, Porter smoothed out all suspicious matters, with the result that Miller relied on the representation that the gross monthly revenue was $400.

Porter knew that Miller could not support himself and wife and also make the required contract payments unless the farm revenue was $400 per month; and Porter represented that it was that amount. With that material fact misrepresented by Porter and relied on by Miller, the case at bar is ruled by our holdings in *Fausett & Co.* v. *Bullard,* 217 Ark. 176, 229 S. W. 2d 490, and *Kotz* v. *Rush, ante,* p. 692, 238 S. W. 2d 634 (opinion delivered March 19, 1951). In *Fausett* v. *Bullard (supra)* we said:

"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 . . ." citing *Brown* v. *Le May,* 101 Ark. 95, 141 S. W. 759, and *Myers* v. *Martin,* 168 Ark. 1028, 272 S. W. 856.

In *Kotz* v. *Rush (supra)* we said:

"The authorities generally seem to recognize the rule that false representations by the seller as to present or past income of the property sold or conveyed will, if relied upon by the purchaser, constitute actionable fraud. The following statement is found in 23 Am. Jur., Fraud and Deceit, § 68: 'A false representation by an owner of land, or his agent, seeking to dispose of the property commercially, as to the present or past income, profits, or produce thereof or as to the amount of rent received therefor is regarded as a statement of fact upon which fraud may be predicated if it is false, since these are matters within the representor's own knowledge. The same is true of an assertion that the profits of a business are or have been a certain sum annually, or a false statement as to what a business now earns.' See, also, Williston on Contracts, § 1492; 55 Am. Jur., Vendor and Purchaser, § 84; *Hecht* v. *Metzler,* 14 Utah 408, 48 Pac. 37; *Whitney* v. *Bissell,* 75 Or. 28, 146 Pac. 141, L. R. A. 1915 D, 257; *Cross* v. *Bouck,* 175 Cal. 253, 165 Pac. 702; *Hogan* v.

McCombs Bros., 190 Ia. 650, 180 N. W. 770; *Vouros* v. *Pierce*, 226 Mass. 175, 115 N. E. 297."

The decree of the Chancery Court is reversed and the cause is remanded, with instructions to grant the plaintiff the relief prayed in the complaint.

WILSON *v.* KITCHENS.

4-9453 239 S. W. 2d 270

Opinion delivered April 16, 1951.

Rehearing denied June 4, 1951.

Keith & Clegg and *Gaughan, McClellan & Gaughan,* for appellant.

W. H. Kitchens, Jr., E. B. Kimpel, Jr., and *J. R. Wilson,* for appellee.

ROBINSON, J. On the 24th day of July, 1936, certain lands, some of which were owned individually by Wade Kitchens, some owned individually by J. B. Wilson, and others owned jointly by both parties, were sold at an exe-

cution sale on a judgment in favor of R. S. Warnock against Kitchens and Wilson. The sale was subject to a mortgage on the lands in favor of T. P. Lester. Alvin Rogers was the purchaser at the execution sale and, in turn, conveyed the property to J. B. Wilson.

On December 30, 1936, Mrs. Maude Bird, daughter of J. B. Wilson, acquired the mortgage lien of T. P. Lester and foreclosed this mortgage on September 11, 1937. Mrs. Bird bought the lands at the Lester mortgage foreclosure sale subject to a one-year statutory period of redemption in favor of the then owner J. B. Wilson. At that time Kitchens was contending that he and J. B. Wilson were partners and, since undoubtedly Wilson had the right to redeem from the sale under the Lester mortgage, Kitchens thought that, as a partner of Wilson, he could also redeem. He endeavored to get Wilson to join him in redeeming the lands from Wilson's daughter, Mrs. Bird; but Wilson steadfastly refused to do so.

On the next to the last day before the one-year statutory period of redemption expired, Kitchens paid into the registry of the court the amount of the judgment on the T. P. Lester mortgage, also the interest, costs, and taxes, totalling a sum of $8,303.13. The Clerk of the Court paid this money to Mrs. Bird, who accepted it as payment in full for her interest in the lands.

The dealings between Kitchens and Wilson were involved and complicated, resulting in litigation between the parties which reached this Court in the case of *Bird* v. *Kitchens,* 215 Ark. 609, 221 S. W. 2d 795. Kitchens claimed in this case that he and Wilson were partners. In speaking of Wilson and Kitchens, the Court said: "We hold, therefore, that they were not partners, but were dealing at arms length with a joint obligation at the time of this execution, in the circumstances, and no fiduciary relationship existed between them."

Such being the case, Kitchens had no right to redeem from the foreclosure of the Lester mortgage. He had lost all interest in the lands by reason of the execution sale on the Warnock judgment, the lands having been bought at such sale by Rogers and transferred to Wilson, and the

period of redemption having expired. But, both Kitchens and Mrs. Bird thought and agreed that Kitchens had the right to redeem and, at that time, this Court had not held that Kitchens and Wilson were not partners.

Wilson could have redeemed from his daughter, Mrs. Bird, and, since it developed that Kitchens had no right to redeem, Wilson could have redeemed from Kitchens at any time before the one-year statutory period of redemption expired.

"Where one who is not entitled under the Statute to redeem nevertheless does so, and has his redemption money accepted, he may become a redemptioner for all purposes, and holds the property subject to further redemption by others." 59 C. J. S. 1594.

Wilson failed to redeem and thereby lost all interest he had in the lands. Wilson died in 1946 and his heirs have no interest in the property because Wilson had lost all interest prior to his death by not redeeming within the period of redemption. Section 51-1111, Ark. Stats., provides: "In all cases where real property is sold under an order or decree of the Chancery Court, or a court exercising chancery jurisdiction in the foreclosure of mortgages and deeds of trust, the mortgagor, his heirs or legal representatives, shall have the right to redeem the property so sold at any time within one year from date of sale. * * * "

On page 48 of appellants' brief, it is stated: "It is the contention of the appellants that, if Wade Kitchens had the right to redeem at all, his redemption had the same effect that any other redemption would have under our Statute, and that the redemption had the effect of extinguishing the mortgage lien and satisfying the mortgage, and the title to the lands was revested in the original mortgagors, subject to the right of contribution from the heirs of J. B. Wilson for their proportionate part of the amount paid to redeem."

The answer to this contention is that, since this court has held that Kitchens and Wilson were not partners but dealt at arms' length, Kitchens had no right to redeem,

having lost his interest in the property at the execution sale on the Warnock judgment.

Since the Wilson heirs own no interest in the property because of J. B. Wilson's failure to redeem from the foreclosure sale on the Lester mortgage within the statutory period of redemption, it necessarily follows that the next question is: Did Kitchens acquire title by equitable assignment from Mrs. Bird when he paid and she accepted the $8,303.13 for what they both thought was a redemption by Kitchens? The clear weight of authority is that, in circumstances of this kind, the redemptioner acquires the title.

In the case of *Ackerman, et al.* v. *First-Trust Joint Stock Land Bank of Chicago,* 228 Ia. 275, 291 N. W. 150, it is said: "Assuming the truth of appellants' contention that defendant did not have a right to redeem we hold that he is entitled to a sheriff's deed to the land as an equitable assignee. Defendant clearly thought he had a right to redeem from the sale and attempted to make a statutory redemption. The bank accepted the money that the defendant paid into the clerk's office and surrendered the certificate to the clerk, assigning it to the defendant. As between the bank and defendant, the redemption was accomplished."

"A stranger, having no interest in the mortgaged premises or no lien thereon, has no right to redeem, and an attempted redemption by a stranger is ineffective; but if the person entitled to the redemption money accepts it on the offer of a stranger, and retains it, an actual redemption is effected, and, as considered *infra* § 875, the rights of the person thus paid off, whether it be the mortgagee or the purchaser at the foreclosure sale, are terminated, and he cannot afterward repudiate the transaction; * * *." 59 C. J. 1594.

"The holder of a mortgage superior to the one foreclosed, assuming to be a redemptioner, when not made so by statute, who tenders the amount necessary to redeem, becomes, by the issuance to him of a certificate of redemption and the acceptance and retention by the holder of the certificate of sale of the money tendered, as between

himself and the party who parts with the certificate, a 'redemptioner.' However, one who is not made by statute a redemptioner, but thus acquires the rights of a redemptioner, also assumes the obligations and liabilities of a redemptioner, and it follows that he must permit the lawful redemptioner to redeem from him within the period given by statute to a subsequent lien holder by judgment or mortgage for such purpose." 37 Am. Jur. 215.

In the case of *White* v. *Costigan,* 134 Calif. 33, 66 Pac. 78, it is said: "Whether a person seeking to redeem from a sheriff's sale is authorized to make such redemption is a question which concerns him and the purchaser alone. If the purchaser is willing to consider him as a redemptioner, and accepts and retains the redemption money paid by him, he cannot thereafter question the effect of such redemption. *Abadie* v. *Lobero,* 36 Cal. 390; *Pearson* v. *Pearson,* 131 Ill. 464, 23 N. E. 418; *Hervey* v. *Crost,* 116 Ind. 268, 19 N. E. 125. If a redemption made by a disqualified person is acquiesced in by the purchaser or other person from whom the redemption is made, it will estop such person, after he has received the redemption money, from denying the validity of the redemption."

Even though Kitchens had lost all interest in the property by not redeeming from the execution sale on the Warnock judgment, he contended until this court held otherwise, that he was a partner with Wilson and had a right to redeem from the foreclosure sale on the Lester mortgage. Mrs. Bird also thought he had this right and consented to the redemption.

Since it developed that Kitchens had no right to redeem, the transaction amounted to an equitable assignment, and the Chancellor's decree in this respect is correct.

The case is affirmed.

THOMPSON *v.* THOMPSON.

4-9473 239 S. W. 2d 276

Opinion delivered April 23, 1951.

Rehearing denied June 4, 1951.

J. R. Wilson, C. M. Martin and *Henry B. Whitley,* for appellant.

Streett & Harrell and *Gaughan, McClellan & Gaughan,* for appellee.

PAUL WARD, J. Appellants, plaintiffs below, filed a complaint in chancery court to set aside certain probate orders in connection with the sale of real estate. Appellees, defendants below, filed a motion to dismiss the complaint on the plea of *res judicata* which was sustained by the chancellor and plaintiffs have appealed.

In order to make the issue clear, it will be necessary to abstract at length the plaintiffs' complaint and the defendants' exhibits to their plea of *res judicata.*

On the ..... day of November, 1947, the complaint consisting of nineteen numbered paragraphs was filed and in substance alleged: That the plaintiffs together with the defendant, Luther Thompson, are the sole surviving heirs at law of William Thompson, who departed this life intestate on the 7th day of May, 1933, seized and possessed of certain real estate and personal property of the value of $771.39, as shown by the inventory at-

tached and marked Exhibit "A"; that on or about the 17th day of November, 1933, the defendant, Luther Thompson, was appointed administrator of the estate of the deceased, taking charge of the property and collecting rents from the farm lands; that the debts of the estate consisted of three claims in the amount of $43.48, $558.42, and $250; that the administrator, never having accounted for the personal property shown in the inventory, and at the instigation of one of the creditors, filed his petition in probate court for an order to sell the real estate, falsely representing that there was no personal property out of which to pay the debts of the estate, and that he fraudulently concealed these facts from the court; that on the 19th day of May, 1936, the probate court made an order for the sale of said real estate, a copy of which order is attached marked Exhibit "B", and that there was collusion and fraud in connection with the appraisal; that thereafter and on the 27th day of July, 1936, the administrator acting under the irregular and void order of June 27, 1936, sold said real estate to one of the creditors, Dr. S. A. Thompson, for the sum of $1,075 and that said sale was approved and confirmed by the court, a copy of which confirmation is attached and marked Exhibit "E", but that said confirmation was void for the reason that the court was without jurisdiction to sell the real estate; that on October 27, 1936, the administrator executed his first and final settlement as shown by Exhibit "G", in which the administrator fraudulently failed to charge himself for the personal estate listed in the inventory, but that the court on October 27, 1936, made and entered an order confirming the said settlement, a copy of which is attached and marked Exhibit "H"; that on July 25, 1941, these plaintiffs filed their petition in the probate court, setting forth the above facts substantially as herein set out, and sought relief against the same defendants which they now seek from this court; that the said S. A. Thompson filed his separate answer to said petition and the cause was tried on its merits before the probate judge who later died before rendering a decision, and that finally on the 23rd day of October, 1946, the probate

court dismissed said petition for lack of jurisdiction; that the acts and conduct of the administrator, Luther Thompson, and the said S. A. Thompson were a fraud upon the probate court and a fraud upon these plaintiffs; that the purported orders and judgments of the probate court are void and of no effect for the reason that said court had no jurisdiction or authority to order the sale of said real estate. Then the plaintiffs pray that they be restored to possession of the property, that the administrator's deed and the orders and judgment for sale of the lands be cancelled and held for naught and also that the final settlement be set aside.

To the above complaint the appellees filed a demurrer stating that the court had no jurisdiction of the subject matter; that the complaint shows on its face that it was barred by the statute of limitations; and that the complaint does not state facts sufficient to constitute a cause of action. This demurrer was overruled by the court. Thereupon appellees filed a plea of *res judicata* in which they alleged: That on the 21st day of July, 1941, the plaintiffs herein filed in the probate court a pleading against these same defendants; that these defendants filed a motion to dismiss and that upon consideration of the same the court entered a finding of facts and conclusions of law and then entered a decree dismissing the plaintiffs' complaint; that on December 5, 1946, the court allowed the plaintiffs to amend their original complaint which in turn was also dismissed by the court; that subsequently the plaintiffs (appellants) appealed said cause to the Supreme Court of Arkansas as reported in the case of *Thompson* v. *Thompson,* 212 Ark. 812, 208 S. W. 2d 445; that the matters and things alleged in the complaint filed in this court are the same as the matters and things alleged in the complaint filed in the probate court in the original proceedings, and that the parties in the two proceedings are the same, and that the subject matter of the action and the relief sought are the same. To the above plea of *res judicata* were attached exhibits from "A" to "G" inclusive showing all of the proceedings, complaints and orders had and done in the original probate proceeding.

A careful comparison of the complaint filed in this case with the complaint filed in the former probate proceedings shows clearly that both involve the same parties and contain practically the same allegations. Apparently this is not seriously questioned by appellants because they are relying on an entirely different point for a reversal. It is appellant's serious contention that although the two complaints cover the same subject matter the order of the probate court dismissing their complaint was based solely on the question of jurisdiction and that it did not go to the merits of the case, and therefore could not be the basis for the plea of *res judicata.* Several cases are cited by appellants to sustain this contention, but we deem it unnecessary to review the same because we agree with appellants' interpretation of the law in this respect. The question however, for us to decide is whether the original probate proceedings were dismissed on the sole ground of lack of jurisdiction or was there a determination of the case upon its merits.

Appellants' contention that the order of the probate court dismissing its complaint was based solely on the question of jurisdiction finds apparent support in the wording of the "Findings of the Court" made on November 23, 1946. These "Findings of the Court" consist of six pages of the transcript and set forth a resume of all the facts and circumstances proved and developed in the probate proceedings, but the language to which we refer is the following: "There is no doubt, in the mind of the court that the chancery court not only has jurisdiction in this case, but is the only court in which suit may be filed for the relief sought by the plaintiffs in this action." If this was the only finding made by the court we would be strongly inclined to agree with appellants' contentions herein. After making the above quoted statement the court, in the same findings, made the following statement: "However, there are other questions of fact presented in the pleadings and argued by the parties in their briefs submitted to the court and no doubt the parties desire a finding on those issues of fact." The court then proceeded to review the record and made certain findings relative to the question of fraud, the regu-

larity of the sale of the real estate and other matters complained of by the plaintiffs and concluded with all findings in favor of the defendants. Also on the same date the court signed and caused to be entered of record an "Order and Decree" in which no mention was made of the question of jurisdiction and after referring to the allegations of the complaint, the exhibits and statements of counsel "and all this evidence" the court found; that the proceedings of the probate court appeared to have been regular and that the court had jurisdiction to make the order of sale, and approve the same; that there is no evidence of fraud practiced on the court in procuring its orders and there is no evidence of bad faith on the part of the defendant, S. A. Thompson, in purchasing the said land or the price paid therefor; that no fraud was practiced on the court in representing that there was not sufficient personal property to pay the debts, and that there has not been sufficient showing to justify this court in vacating or modifying former orders of the court; and that therefore it is decreed that plaintiffs' prayer for relief be denied and that the defendants' motion to dismiss for want of jurisdiction be sustained and the plaintiffs' complaint be dismissed.

The contention of appellants here that their complaint in the probate court was dismissed solely on the ground of the lack of jurisdiction does not appear to be consistent with their actions following the decree set forth above. On January 15, 1947, appellants filed an amended and substituted petition in the same proceedings consisting of sixteen numbered paragraphs, in which they make practically the same allegations and contentions that were made in the original complaint. Appellees promptly filed a motion to dismiss the amended and substituted petition and it was sustained by the court. At no time was the question of jurisdiction raised or mentioned.

The order of the probate court mentioned above dismissing appellants' complaint was appealed to the supreme court where it was affirmed January 19, 1948, as reported in *Thompson* v. *Thompson,* 212 Ark. 812, 208

S. W. 2d 445. The above cited decision discloses that the question there presented was not considered or decided on the issue of the lack of jurisdiction of the probate court, but on the other hand that it was decided on the merits of the case.

Judging from the language in the first part of his "Findings" as quoted above the Probate Judge, in considering the original issues, apparently thought at first that his court did not have jurisdiction. However, he apparently changed his mind later and, we think, properly so. As stated in the case of *Sullivan* v. *Times Publishing Co.*, 181 Ark. 27, 24 S. W. 2d 865, and other decisions of this court, the probate court is a court of superior jurisdiction. Under the provisions of § 29-506 Ark. Stats. the probate court had jurisdiction to pass upon the matters presented by the complaint in this instance, with the exception to be mentioned hereafter. Having jurisdiction, the probate court did pass on the merits of the allegations contained in appellants' complaint, finding all issues in favor of the defendants (appellees). This decision of the probate court, as stated above, was appealed to and affirmed by this court. That being true appellants cannot now try the same issues, between the same parties, in a court of chancery, and the Chancellor was right in sustaining appellees' plea of *res judicata* in so far as it relates to appellants' petition to set aside the administrator's sale of the land involved.

In addition to asking to have the administrator's sale set aside, appellants' complaint, both in the instant case and in the probate case, asked to have the administrator's final account set aside and surcharged, and in this respect appellants must prevail. The administrator's inventory showed that certain personal property came to his hands, but his final account made no mention of personal property. Since the final settlement had been approved by the court and the administration closed the probate court had no jurisdiction to reopen the settlement. This jurisdiction rested solely in chancery court. *Beckett* v. *Whittington,* 92 Ark. 230, 122 S. W. 633. The order of the Probate Court dismissing appellants' complaint made no mention of the final settlement, but whether the court

meant to cover this item or not it could not be *res judicata* as to the allegations relative to final settlement in the complaint filed herein. Under the authority of *Dyer* v. *Jacoway,* 50 Ark. 217, 6 S. W. 902, it makes no difference that the error in the final account was apparent on its face.

In so far as it relates to the administrator's sale the cause is affirmed, but in so far as it relates to the administrator's final settlement the cause is reversed with directions to the lower court to proceed thereon consistent with this opinion.

Justice McFaddin concurs.

Bright *v.* Perkins.

4-9483 239 S. W. 2d 281

Opinion delivered April 30, 1951.

Rehearing denied June 4, 1951.

Frank C. Douglas, for appellant.

Marcus Evrard, James M. Gardner, Reid & Roy and *Elsijane Trimble Roy,* for appellee.

GRIFFIN SMITH, Chief Justice. Charles Bright sought reformation of a deed he delivered to W. A. Whistle and has appealed from an order dismissing the complaint allegation that grantor and grantee were mutually mistaken regarding the boundary of Lot 7.

Bright acquired Lot 6 in 1921, and in 1937 he bought Lots 7, 8, and 9. He sold the last three to Whistle February 11, 1939.[1] That same day Whistle conveyed to Bright "All [land] adjacent to the northeast corner of Lot 7 and south of the south line of Lot 6, . . . being accretion lands consisting of 200 feet north and south along the southeast line of said Lot 7 and running back to water's edge, same being a mound of land adjacent to Lot 7." Bright did not have this deed recorded until August 12, 1941.

Bright contends that when the conveyance was made he owned the area now contended for, with accretions to the lots along the meander line of Big Lake, but when the deeds were executed true lines had not been established. He had a ditch dug along the west side of Big Lake just south of the highway. Another ditch was dug from the lake toward the highway, and in each undertaking dirt was used to form a mound, the design being to create high ground for use during overflow periods. This second 200-ft. ditch, running in a general north-south direction, was thought by appellant to be the eastern boundary of Lot 7, and the excavated dirt was dumped onto the accretion lands to the east.

Lot 6 is still owned by appellant. A surveyor's rough drawing shows that the area of contest is a part of Lot 7, embracing 1.62 acres south of Lot 6. The northeast corner of Lot 7 is the section line, and the disputed land is marked on this chart (introduced by appellant) as Lot 7.

On August 11, 1939, Whistle conveyed to A. J. Lewis. The deed calls for Lots 7, 8, and 9, and the acreage is 79.69, more or less. In December, 1947, Lewis conveyed

[1] The deed description is Lot 7, north half southeast quarter, Lot 8, north half southwest quarter, and Lot 9, south half of south half, all in section 9, township 14 north, range 9 east, containing 79.69 acres, more or less.

to Perkins 360 acres, ". . . together with all accretion lands adjacent to the northeast corner of Lot 7 and south of the line of Lot 6, . . . being accretion lands consisting of 200 feet north and south along the southeast line of Lot 7 and running southwest to water's edge."

Lewis occupied the mound through his tenant, Ernest Wilson. The complaint alleges Lewis knew when he purchased that the mound "along the water's edge of Big Lake" was not included. Because of the encroachment by Lewis, Bright brought an action in ejectment, resulting in a plaintiff's judgment (January 22, 1945) for "A tract of land lying adjacent to the northeast corner of Lot 7 and south of the south line of Lot 6, . . . being accretion land consisting of 200 feet north and south along the southeast line of Lot 7 and running southeast to water's edge, same being a mound of land adjacent to Lot No. 7."

A writ of possession was placed in the sheriff's hands in June, 1949. That officer's return is a certification that the property could not be located with sufficient definiteness to sustain service, hence the court's directions were asked. It was then that appellant sought equitable relief.

Whistle died before the reformation suit was brought. Lewis, in addition to other defenses, pleaded estoppel when Perkins cross-complained. Other pleas, including an answer by the administrator of Whistle's estate, were filed.

The diagram discussed by appellant in his brief shows clearly that a line running due south from the northeast corner of Lot 7 would leave a triangle of land, or land and water, east and southeast of the mound contended for. Appellees say the accretions conveyed in Whistle's deed are to be found there.

Appellant testified that the mound was formed from ditch cuttings and could not possibly be as far east as appellees say it is. However, the size of the elevated ground is not shown. But the line from the northeast

corner of Lot 7 southwesterly, as disclosed by appellant's exhibit, extends 390 feet to an indicated point and does not correspond with the 200-ft. description. Taking the admitted northeast corner of Lot 7 as a starting point, the diagram projects a line west 475 feet, thence south with a slight westward variation 200 feet, east with a southern variation 175 feet, thence northeastward 390 feet to the starting point. If appellant's contentions are maintainable the 200-ft. north-south accretion area "along the southeast line of said Lot 7" would begin 475 feet west of the admitted northeast corner. There is an express deed reference to the "mound of land," but it is placed "adjacent to Lot 7." Appellant says that he once had possession of the mound and used it.

Conceding such original possession, the difficulty is that appellant sold all of Lot 7 to Whistle, then took back Whistle's quitclaim deed containing the description now assailed, and he would reform it ten years later because of mutual mistakes, and subsequent to the grantor's death.

One of appellant's contentions is that an innocent purchaser is not involved because, before buying the lot from Lewis, Perkins knew of the adverse claim. The evidence shows that before the Lewis-Perkins deed was delivered a contract of purchase was executed and earnest money paid. This occurred before Bright notified Perkins that the mound was his. He did not discuss the matter with Perkins, but sent word by another. It was not shown that the message was delivered. Aside from Perkins' pleading in which it is asserted that he did not have notice of Bright's claim, both Lewis and Perkins take the position that as between Bright and Lewis the rights of each became fixed when judgment in the ejectment suit was rendered. Bright did not record his deed from Whistle until two years after Whistle sold to Lewis.

During trial it was stated by counsel for appellant that when the quitclaim deed was made "It was not thought that this mound was any part of Lot 7."

When appellant sought ejectment he knew as much about the land conveyed by Whistle by the quitclaim

deed as he did when the present action was instituted. He knew, of course, that he should have 200 feet of accretions along the southeast line of Lot 7, running to water's edge. This is all he is entitled to, for there was no appeal from the circuit court judgment.

At the close of appellant's testimony the defendants asked for a decree of dismissal. The motion was argued without a request that the defendant be required to overcome the *prima facie* case appellant had made on issues other than *laches*. The provisions of Act 470 of 1949, Ark. Stat's, § 27-1729, (see *Werbe* v. *Holt,* 217 Ark. 198, 229 S. W. 2d 225) are not invoked; and unless we hold as a matter of law that the plaintiff (whose prayer on appeal is that the decree be reversed with judgment here for reformation of the deed) could not treat testimony introduced in his behalf as sufficient, and on the strength of it ask for the relief sought, the statute in its application to this case is not before us.

We are unwilling to say that Act 470 deprives a litigant of the right to regard his case as having been developed and that he cannot, on the strength of his own testimony, ask for a decree when the issues are argued on their merits.

Affirmed.

ELDERS *v.* SEALS.

4-9491 240 S. W. 2d 657

(Original opinion delivered April 30, 1951.)

Rehearing granted opinion amended June 11, 1951.

Digby & Tanner, for appellant.

Fred Newth, Jr., and *John Bailey,* for appellee.

MINOR W. MILLWEE, Justice. On January 10, 1951, appellee, Norma Jean Seals, filed a petition in the Pulaski Chancery Court against appellant, Aline Elders, as follows: "Comes your Petitioner, Norma Jean Seals, the daughter and heir of E. W. Elders, Deceased, and does hereby respectfully state in her own right and on behalf of the Estate of E. W. Elders, deceased, her petition as follows: "Your Petitioner alleges that at the death of her father, E. W. Elders, the said Respondent, Aline Elders, did have in her possession money and currency in the sum of Ten Thousand Dollars ($10,000) which was the property of the said E. W. Elders. Petitioner further states that unless restrained and enjoined, that the said Respondent, Aline Elders, will waste said moneys, which should be deposited into the registry of the Court and there to be administered under the provisions of the statute providing for the administration of estates, and that unless so ordered, Petitioner believes that Respondent will abscond beyond the jurisdiction of this Court with said moneys.

"Wherefore, your Petitioner prays that the Respondent, Aline Elders, be ordered to deliver up and deposit into the registry of the Pulaski Chancery Court all moneys held by her or her agents or banks that have come to her from the Deceased, E. W. Elders, during his lifetime, and that said moneys be held until the proper order of the Probate Court for Pulaski County be made and entered."

On the date of the filing of the unverified petition, the chancellor entered an order which recites: "That

Aline Elders be and she is hereby ordered to deliver to the Sheriff of Pulaski County or one of his duly authorized deputies all moneys, bonds and things of value that have come to her from E. W. Elders, the same to be deposited into the registry of the Court and there held until further orders of this Court or for the administration of the estate of E. W. Elders, Deceased.

"And if the said Respondent, Aline Elders, fails and refuses to do so it shall be treated as contempt and the Sheriff of Pulaski County or his duly authorized deputy is ordered to bring her forthwith before this Court." On the same date the sheriff of Pulaski County served a copy of the summons and the above mentioned order on appellant taking from her $7,630 which was deposited into the registry of the chancery court.

On January 11, 1951, appellant filed a demurrer to the petition alleging: (1) lack of jurisdiction of the subject matter, (2) defect of parties, and (3) the allegation of insufficient facts to state a cause of action. On January 17, appellant also filed a motion to dissolve and set aside the order of January 10 alleging that same was void, either as an injunction or attachment, because it was issued without notice to appellant and without the posting of bond as required by applicable statutes. The prayer of the motion was that said order be dissolved, set aside and the moneys taken from appellant returned forthwith.

After a hearing on the demurrer and motion to dissolve held without introduction of evidence, the chancellor sustained the demurrer to the petition. Upon appellee's refusal to plead further, the order of January 10 was dissolved and the cause of action dismissed at the cost of appellee, but the court refused to order return of the money to appellant and directed that it be delivered to the clerk of the Pulaski Probate Court to be held subject to the disposition and orders of that court. This appeal is prosecuted from that part of the decree overruling appellant's motion that said moneys be returned.

In their briefs counsel for both parties argue certain alleged facts which do not appear in the record. Thus appellant asserts that in serving the void order of January 10, the sheriff arrested appellant and forcibly removed the moneys from her person and appellee says that an administrator has been appointed for the estate of E. W. Elders, deceased, and that proceedings are pending in the probate court to determine ownership of the moneys now deposited in the registry of that court. There is nothing in the record before us to support these assertions and the question whether the chancellor erred in refusing to return the money must be resolved from the pleadings, the order of January 10 and the decree.

In sustaining the demurrer to the petition and dismissing the cause of action, the chancellor recognized the invalidity of the order of January 10, 1951. This order, having been issued upon an unverified petition without notice or the posting of a bond, was clearly void in its entirety and subject to every defect urged against it in the motion to dissolve.

Insofar as appellee's right to injunctive relief is concerned, the rule generally is that the conditions at the time of the hearing are material and govern in determining whether a plaintiff is entitled to the relief sought. 28 Am. Jur., Injunctions, § 8. There is nothing in the record disclosing that an administrator had been appointed for the estate of E. W. Elders, deceased, at the time of the hearing, or that any action was then pending in the probate court with reference to the subject matter of the instant suit. Under this state of the record, appellant was, at that time, entitled to the return of the money wrongfully taken from her under the void order. The question whether jurisdiction of the chancery court over the parties and subject matter has been ousted or supplanted by another court of competent jurisdiction since the hearing herein is, of course, a matter that cannot be determined in this suit. The decree is accordingly reversed and the cause remanded with directions to the chancery court to return the subject monies to appellant.

BLANKENSHIP *v.* MONTGOMERY.

4-9490 239 S. W. 2d 272

Opinion delivered May 7, 1951.

Rehearing denied June 4, 1951.

T. B. Vance and *James F. Vance,* for appellant.

A. L. Burford and *Shaver, Stewart & Jones,* for appellee.

ED. F. MCFADDIN, Justice. This case, while not a sequel, is an aftermath to the case of *Montgomery* v. *Blankenship,* 217 Ark. 357, 230 S. W. 2d 51 (hereinafter called "the first case").

On January 27, 1944, Mrs. Ida M. Bottoms executed two instruments: one was a "Living Trust," and the other was her Last Will and Testament. Mrs. Bottoms died on December 21, 1944, a resident of Miller County, Arkansas; and on January 3, 1945, the Miller Probate Court entered a judgment admitting her will to probate. In the first case, the heirs at law of Mrs. Bottoms sought to have the "Living Trust" instrument declared null and void; but we sustained the "Living Trust" because it was incorporated by reference into Mrs. Bottoms' will. We said:

"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.

". . . 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."

Our opinion in the first case was delivered May 29, 1950; and on June 15, 1950, the heirs at law of Mrs. Bottoms filed the present action in the Miller Probate Court, seeking to set aside the judgment of January 3, 1945, which admitted Mrs. Bottoms' will to probate. In their complaint the heirs alleged: (a) that fraud was practiced on the Probate Court[1] in procuring the said judgment admitting the will to probate; and (b) that the

[1] This is the fourth ground stated in § 29-506, Ark. Stats., for vacating a judgment after the term.

heirs had meritorious grounds of attack on the said will—*i. e.,* they claimed Mrs. Bottoms lacked mental capacity, and also that she was unduly influenced in the execution of the alleged will. The defendants (the executor and beneficiaries of the will of Mrs. Bottoms) demurred to the complaint; and the Probate Court sustained the demurrer, and dismissed the complaint when the heirs refused to plead further. From the said order of dismissal the heirs of Mrs. Bottoms prosecute this appeal.

The judgment admitting Mrs. Bottoms' will to probate was on January 3, 1945; and the present action to set aside the judgment was not filed until June 15, 1950. It is apparent that if the judgment, admitting the will to probate, is a valid judgment, then the present attempt of the heirs, to contest the will, is barred by limitations; and this is true whether the applicable statute be Act 401 of 1941[2] (which limits the period of contest to six months), or section 53 of Act 140 of 1949[3] (which in some instances allows a longer time within which to contest a will). Assuming that the heirs of Mrs. Bottoms have sufficiently alleged meritorious grounds for attacking Mrs. Bottoms' will, nevertheless, the heirs necessarily have the additional burden of alleging—by sufficient facts—a cause of action to the effect that the judgment of January 3, 1945, was procured by fraud practiced on the Court.

Therefore, we direct our attention to the question of the sufficiency of the allegations regarding such fraud. And in this connection, we point out that such "fraud in procurement" must be fraud extrinsic of the matters and facts on which the judgment[4] was based. What we said in

[2] This Act may be found in § 60-210, Ark. Stats.

[3] This is from the Probate Code of 1949; and the particular section mentioned may be found in Pocket Parts to Ark. Stats., § 62-2114.

[4] The Probate Court judgment of January 3, 1945, admitting Mrs. Bottoms' will to probate, reads in part:

"On this the 3rd day of January, 1945, this cause coming on to be heard upon the petition of T. A. Clark and Winston Montgomery, in their capacities as Executors of the estate of Mrs. Ida M. Bottoms, deceased, for the probation of the Will of said Testatrix, Mrs. Ida M. Bottoms, deceased; and J. K. Wadley and William G. Fuller, being then present in Court and being first duly sworn that the testimony that they should give in the matter of the probation of the Will of said decedent should be the truth, the whole truth and nothing but the truth, having given their testimony which was taken in writing by the Clerk of this Court, and is now ordered to be filed as a part of the

Manning v. *Manning,* 206 Ark. 425, 175 S. W. 2d 982, is apropos:

" '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.' *Parker* v. *Sims,* 185 Ark. 1111, 51 S. W. 2d 517."

Also, in *Alexander* v. *Alexander,* 217 Ark. 230, 229 S. W. 2d 234, we quoted from the leading case of *United States* v. *Throckmorton,* 98 U. S. 61, 25 L. Ed. 93:

" '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

records in this cause; and upon the taking of said testimony, the Court, having heard the same and being satisfied that the said Will was executed in manner and form as required by law, and that the decedent was at the time of her death and prior thereto a citizen and resident of the County of Miller and State of Arkansas, and then was of sound and disposing mind and memory, doth find:

"That the paper writing filed with the Clerk in this cause purporting to be the Last Will and Testament of the said Mrs. Ida M. Bottoms is in truth and in fact her Last Will and Testament and is entitled to probate as such; and from the testimony of the attesting witnesses taken before the Court, the Court further finds that said Will has been attested and executed in manner and form required by law; . . .

"IT IS THEREFORE considered, ordered and adjudged by the Court that the paper writing here and now offered for probate, dated the 27th day of January, 1944, be, and the same is hereby admitted to probate as the Last Will and Testament of the said Mrs. Ida M. Bottoms, deceased, and the Clerk of this Court is hereby ordered and directed to record the same in the Will Records of Miller County, Arkansas, together with the proof by the attesting witnesses to said Will. . . ."

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.' "

The complaint of the heirs in the case at bar says: "That said Frauds practiced upon the Court in obtaining said Order are as follows"; and the complaint then contains four numbered paragraphs which we now summarize and discuss:

(1)—The complaint alleged that the attorney and proponents of the will, in seeking the said order of probate, failed to exhibit the original will to the Court, and that only a *copy* was exhibited when the said judgment was obtained, admitting the will to probate. The answer to this allegation is obvious. If it was represented to the Court that the will presented was the original will, and it later proved to be only a copy,[5] then such representation was not extrinsic, because the existence and exhibition of the original will to the Court as the time of probate was one of the *intrinsic* matters in the hearing and judgment. It is only for fraud extrinsic of the matter at issue that a judgment will be set aside.

(2)—The complaint alleged that the attorney and witnesses for the proponents of the will fraudulently concealed from the Probate Court that the Testatrix lacked mental capacity when she executed the will. The answer to this is: the mental capacity of the testatrix was the question at issue; it was intrinsic to the hearing and judgment made. Even if the witnesses testified falsely regarding the sanity of the testatrix, and even if the witnesses withheld evidence on this matter of mental capacity, nevertheless, such was not extrinsic.

(3)—The complaint alleged that the attorney and proponents of the will, in addition to misrepresenting

[5] The complaint refers to a withdrawal of the original will and says: "A copy of said transaction, as evidenced by Attorney's Receipt Number 3047, is attached hereto, marked Exhibit 'D' and made a part hereto." No such "Exhibit D" is attached to the complaint.

Mrs. Bottoms' mental condition, also persuaded the Probate Court to appoint the executors without requiring that they execute a bond, as set forth in Act 203 of 1943 (§ 62-223, Ark. Stats.). These allegations were also intrinsic: assuming the law requires a bond, nevertheless, the failure of the Probate Court in term time to require a bond is a matter of intrinsic mistake and not of extrinsic fraud. Furthermore, the failure to require a bond of the executors is an omission that would go to the appointment of the executors, and not to the merits of the judgment probating the will.

(4)—The complaint alleged that the attorney and proponents of the will fraudulently concealed from the Probate Court the fact that Mrs. Bottoms' will made reference to the 26-page "Living Trust" instrument; and that they failed to exhibit such "Living Trust" instrument for probate as a part of the will. The answer to this allegation is found in appellants' pleadings. As an exhibit to the complaint, the heirs attached what they claimed to be a copy of the will as probated; and such exhibit recites:

"I hereby will and bequeath, and charge my Executors with the making of the dispositions, unto the persons listed in Schedule 'A' which is in the custody of the Texarkana National Bank, and identified by my initials on each separate sheet and consisting of Twenty-six (26) pages, the items of personal property therein indicated."

Again, the copy of the will, attached to the plaintiff's complaint, has this language:

"I have signed my name on the margin of each of the sheets of paper upon which this will is written, they being numbered from One (1) to Two (2) consecutively and inclusively, and to sheets numbered One (1) to Twenty-six (26) of the Exhibit 'A' referred to herein, this the 27th day of January, A. D. 1944."

Thus, when the will was presented to the Probate Court it showed on its face two distinct references to the 26-page "Living Trust" instrument which we held in the

first case to have been incorporated into the will by such references. Certainly, therefore, the existence of such 26-page instrument was intrinsic to the trial in the Probate Court which resulted in the judgment probating the will; and any misrepresentation or suppression of information about the 26-page "Living Trust" instrument was not extrinsic of the trial which resulted in the judgment probating the will.

In the case at bar the complaint, in all of its allegations as to fraud in the procurement of the judgment, stated only matters intrinsic to the issue actually tried and decided in the proceedings that resulted in the judgment of January 3, 1945, probating the will; and did not allege any fraud in matters extrinsic of that hearing. Therefore, the complaint failed to state a cause of action based on "fraud in procurement," and the judgment of dismissal was correct, and is in all things affirmed.

NORRELL *v.* COULTER.

4-9347 239 S. W. 2d 280

Opinion delivered May 7, 1951.

Rehearing denied June 4, 1951.

Wilson, Kimpel & Nobles and *Paul Roberts,* for appellant.

Thomas Compere and *DuVal L. Purkins,* for appellee.

GRIFFIN SMITH, Chief Justice. Jurisdiction was conferred when appellants filed their certified copy of the decree. Writs of *certiorari* failed to bring up the bill of exceptions in a timely manner, but on February 19th the appellants, including Oscar Norrell as intervener, were given fifteen days to abstract and brief any errors that might appear on the face of the record.

The decree contains a factual summary under nine topical divisions, preceded by a reference to oral testimony heard in open court. The witnesses were named.

The first finding established what the court said were correct descriptions of the lands in controversy, including "Frl. SW ¼ of NW ¼ . . . containing two acres, more or less, [giving section, township, and range]."

It is contended that this description is void, and in the main this is the error claimed to be revealed by the record, although other rights are alleged to have been invaded.

Appellants are incorrect regarding the description. *Part* of fractional is meaningless, but "fractional" may or may not be sufficient. Standing alone it is not void. *State* v. *Guthrie,* 203 Ark. 60, 156 S. W. 2d 210.

There are other reasons for affirming the decree.

Pleadings may be treated as having been amended to conform to the proof—a trial procedure involving court discretion. If a judgment or decree shows that the cause was heard on pleadings mentioned, and on such pleadings alone, (repelling any theory under which the result could have been reached through testimony having the effect of amending the written declarations or admissions) then the record would be conclusive, and the issue would rest upon disclosed pleadings and the court's findings. Inferences deducible from a judgment or decree do not depend upon express words. *Warden* v. *Middleton,* 110 Ark. 215, 161 S. W. 151. The converse of what Judge HART said in the Middleton case would be that decretal findings—though not responsive to the pleadings—will, in the absence of a bill of exceptions—be

sustained if the vice complained of could have been cured by matters treated as amendatory.

The presumption of verity inherent in judgments and decrees is not to be impaired if by fair construction the trial court could have had before it evidence sufficient to sustain what was done.

Affirmed.

YAHRAUS *v.* CONTINENTAL OIL COMPANY.

4-9448 239 S. W. 2d 594

Opinion delivered May 7, 1951.

Rehearing denied June 11, 1951.

J. H. Carmichael, Jr., and *Josh W. McHughes,* for appellant.

Moore, Burrow, Chowning & Mitchell, for appellee.

HOLT, J. December 15, 1942, a written "Bulk Station Commission Agreement" was entered into between appellant and appellee, Continental Oil Company. The contract provided, in effect, that Yahraus would sell and distribute appellee's products to retail dealers, in DeQueen and certain adjacent territory, and for such service was to be compensated on a percentage of the sales as provided in the agreement. Appellant had never before sold oil and gas products. The contract was subject to termination by either party on ten days' notice, and contained no provision that either party should furnish any equipment to retail dealers to induce the handling of appellee's products. However, it is conceded that both parties did furnish certain dealers certain equipment to induce the handling of appellee's products.

The contract, among other things, contained the following provisions: "Representative, for the consideration hereinafter stated, agrees to take charge of plant and stock of Conoco located at DeQueen. * * * Items specified herein for commissions and expenses cover sole reimbursement to Representative for services to be rendered hereunder and expense of operation of plant and equipment and other expenses to be borne by Representative, and sole compensation to Representative for furnishing equipment and furnishing services of any necessary employees of Representative as herein provided. * * * Unload tank cars and other cars and promptly report the arrival, unloading and return of all cars consigned to above station of Conoco. * * * Solicit orders and make deliveries to the trade, take receipts from all parties to whom deliveries are made, report the receipt, delivery and shipment of stock according to instructions from Conoco and satisfactorily account for all stocks entrusted to him. * * *

"Faithfully transact the business in his charge and make reports, all in accordance with this agreement and instructions from the Division Manager of Conoco at Ponca City, Oklahoma. * * * Collect and remit promptly for all sales made. Any credit sales made by Representative which have not been duly authorized by the credit department of Conoco shall be at the sole risk of Repre-

sentative (appellant) and he shall be liable to Conoco for the payment of the amount of any and all such accounts arising out of any such sales, etc. * * * In consideration of the performance of this agreement by Representative and subject to the provisions herein Conoco will pay for said work and as commission and expense certain commissions as listed in said agreement. * * * Will furnish the necessary licenses (except auto and truck licenses) to cover the business of Conoco, etc. * * * No passenger other than an employee of Conoco, or of Representative shall be carried on such automotive equipment while engaged in and about Conoco's business."

December 29, 1947, appellee terminated the contract agreement with appellant, whereupon the present suit was filed by appellant in which he alleged that the above contract had been orally modified since its execution to provide: "When the appellant (Yahraus) found a prospective retailer in each and every instance he would take the matter of supplying such equipment up with the appellee and was instructed by the appellee that the appellee would not furnish equipment to such prospective retail dealers and the appellee agreed with the appellant for the appellant to furnish such equipment to said dealers, and in consideration therefor the retail dealers would become the individual customers of the appellant," that appellee had breached the contract and sought damages which he alleged he had sustained by reason of unlawful and fraudulent interference with his customers causing them to breach their contracts with appellant, for alleged confiscation and conversion of filling station equipment owned by him and for punitive damages for malicious, willful and unlawful confiscation and conversion of appellant's property.

Appellee answered with a general denial.

At the close of all the testimony, the trial court gave a peremptory instruction to the jury to return a verdict for the appellee. This appeal followed.

The question presented is whether the court erred in taking the case from the jury. In deciding this question, we must determine whether there was substantial evi-

dence to support either of the following contentions of appellant: "That the Bulk Station Commission Agreement was modified; that the appellee unlawfully interfered with appellant's customers, causing said customers to breach their contracts with the appellant to his injury; or that appellee converted appellant's property to its own use."

We must also keep in mind our well established rule that "in determining on appeal the correctness of the trial court's action in directing a verdict for either party, the rule is to take that view of the evidence that is most favorable to the party against whom the verdict is directed, and where there is any evidence tending to establish an issue in favor of the party against whom the verdict is directed, it is error to take the case from the jury." *Barrentine* v. *The Henry Wrape Company,* 120 Ark. 206, 179 S. W. 328.

The undisputed evidence shows that appellee and appellant occupy the position of principal and agent, respectively, under the written Bulk Station Commission Agreement here in question. This relationship imposed certain well defined duties and obligations on appellant.

"It is well settled that an agent is a fiduciary with respect to the matters within the scope of his agency. The very relation implies that the principal has reposed some trust or confidence in the agent. Therefore, the agent or employee is bound to the exercise of the utmost good faith and loyalty toward his principal or employer. He is duty bound not to act adversely to the interest of his employer by serving or acquiring any private interest of his own in antagonism or opposition thereto. His duty is to act solely for the benefit of the principal in all matters connected with his agency. This is a rule of common sense and honesty as well as of law. Any custom subversive of this principle must be deemed to be unreasonable, opposed to the policy of the law, and hence of no effect. Indeed, it has been stated that in the usual case, it is the duty of the agent to further his principal's interests even at the expense of his own in matters connected with the agency. But no presumption of fraud will be

deemed to arise against an agent unless it appears that he has personal interests conflicting with those of the principal.'' 2 Am. Jur., § 252, pp. 203-204.

It is undisputed that appellant sold appellee's products on a percentage commission basis. The more retail dealers he induced or procured to sell Conoco products, obviously the greater would be his earnings. There was nothing in the contract to prevent either appellant, or appellee, from furnishing any equipment to prospective retail dealers to induce them to handle Conoco products. Neither, however, was required under the contract to do so. Appellant did furnish a number of dealers certain equipment and when his contract was terminated all of this equipment, or its value, was returned to appellant. It is undisputed, in fact, Yahraus readily admitted, that his agreement with these retail dealers was ''to buy Continental products as long as he used my equipment'' and that they bought only Conoco products from appellant as Conoco's agent ''until I was checked out and wouldn't supply them any more.''

But, as above indicated, appellant says he had an oral agreement with the Oil Company, aside from the written agreement, to the effect that should appellant furnish certain equipment to dealers, then any such dealers were to become appellant's individual customers and not Conoco's.

On this point, appellant testified: ''Q. Before you bought the equipment and put it in the station at W. H. Lightfoot's, known as Hillcrest Service Station, did you talk to the Continental Oil Company? A. I talked to J. T. Davis, District man. Q. What was that conversation? A. The same as with Boots (Dover). I could get no credit or Continental to furnish the equipment. In every case they refused to furnish the equipment. I said I have this man ready to go with me, if you don't want to do it I would like to do it and they said if you want to do it yourself go ahead, we won't do it. * * *

''In each and every case, without any exception, prior to the time I installed any equipment I first took it

up with J. T. Davis, Continental Oil's District supervisor, and he said the Continental Oil Company would absolutely refuse to install any equipment at any new account. They didn't want any account if they had to furnish any equipment. I told Davis since I had taken up time trying to get the account I would like to go ahead and furnish the equipment myself and he said if you want to go ahead and take that account on for your own and furnish equipment well go ahead. Then I went back to the dealer and told him I would furnish the equipment and install it under one condition, that he buy all his petroleum products from me for at least a year and as long thereafter as he used my equipment. * * *

"Q. If I understand your theory of this case, what your complaint is, you came to the conclusion if you went out and got a new customer to handle Continental Oil Company's products under the provisions of this agreement and you say to Continental the customer won't sign up unless you let him have a truck lift, two computing tanks (pumps), this, that and the other and the company said we don't think it is profitable and we refuse to do that and you would say I will and you went out and installed it, you conclude by virtue of that fact that that party became your customer? A. Absolutely. Q. You base that conclusion solely on that? A. If he promises to buy Continental Products as long as he used my equipment. Q. At the very time you did that you were attempting to carry out the provisions of this contract? A. Absolutely."

While much of appellant's testimony (all of which we do not detail) appears to be somewhat conflicting and vague, we are unable to say, as a matter of law, that a case was not made for the jury.

Reversed and remanded.

GRIFFIN SMITH, C.J., and ROBINSON, J., dissent.

GRIFFIN SMITH, Chief Justice, dissenting. I would affirm the judgment. It is true that appellant undertook to prove a subsequent oral contract, but when pressed on cross-examination he invariably fell back upon the agency agreement. Furthermore, his knowledge of

the business in hand was sufficient to put any reasonable person on notice that the so-called conversations with Davis could not amount to company representations constituting variants from the written contract. There was no contradiction of testimony that any arrangements made by Davis—conceding, for the sake of argument, that the conversations occurred in circumstances where the construction given by Yahraus could attach—would have to be ratified by the home office. There are instances (and this is one of them) where the testimony of an interested party is so vague, uncertain, contradictory, and altogether unreliable, that a trial court is warranted in finding that it is wanting in that substantial quality necessary to sustain a verdict. I agree with Judge Cockrill that the legal sufficiency of the evidence relied upon became a judicial question, hence a verdict for the defendant was properly instructed.

QUILLIN *v.* STATE.

4653 239 S. W. 2d 5

Opinion delivered May 7, 1951.

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

PAUL WARD, J. Berlin A. Quillin, appellant, was tried and convicted on an information charging him with the

crime of violating the Banking Act, alleging that on the first day of July, 1948, he unlawfully, willfully and feloniously gave a check in the amount of $105 drawn on the First National Bank of Hope, Arkansas, payable to W. R. Atkins; that payment of said check was refused by said bank because the said Berlin A. Quillin did not have sufficient funds to his credit in said bank to pay the check; that he well knew at the time he gave said check that he did not have sufficient funds to his credit in the said bank to pay the same, and that after being given ten days notice to pay said check he willfully and feloniously refused to make said check good or pay the same. It appears the information was drawn under §§ 67-714, 67-715 and 67-716 of the Ark. Stats. 1947. The first cited section provides that any person who, with intent to defraud, shall make or draw any check for the payment of money upon any bank, knowing at the time that he does not have sufficient funds for the payment of such check upon its presentation, shall be guilty, etc. The second cited section provides that the making and delivering of such a check upon which payment is refused shall be *prima facie* evidence of intent to defraud, and of knowledge of insufficient funds, provided such maker shall not have paid the drawee the amount thereof together with costs and protest fee within ten days after having received notice. The last cited section provides that if any such check shall exceed the sum of $25 the maker shall be deemed guilty of a felony and upon conviction shall be imprisoned in the penitentiary not less than six months or more than two years.

The evidence, viewed in the light most favorable to the State, shows that appellant gave W. R. Atkins a check dated July 1, 1948, in the amount of $105, drawn on the First National Bank of Hope, Arkansas, for which Atkins paid appellant $105 in cash; that said check was delivered to the said Atkins or his son-in-law at his place of business, and that same was sent to the said bank for deposit within a day or two after it was delivered to him and it was returned marked "insufficient funds"; that Atkins notified appellant, but appellant has failed, after nearly two years, to pay back the money or make the check good.

Appellant defended on the ground that the check was delivered without any intention that it would ever be cashed; that it was given to Atkins as security against any damage which he might cause to one of Atkins' cars which he had in his possession and was driving at the time. Appellant and Atkins were the only witnesses who testified in the case and the question of appellant's guilt or innocence was submitted to the jury upon their testimony. The jury returned a verdict finding the defendant guilty as charged and fixed his punishment at one year in the penitentiary.

Appellant filed a motion for a new trial in which he made the usual allegations that the verdict of the jury was contrary to the law and the evidence and, as a fourth assignment, that he had discovered new evidence which was material, in that he had found his bank statement for the year "1947" when said check was written (the information and the testimony show that the check was given in the year 1948) and that the evidence was not available at the time of the trial and had become lost, although a diligent search had been made. No affidavits were attached and no testimony was taken on the motion, therefore it cannot be considered here.

In our opinion there is ample evidence to support the verdict of the jury and the trial court committed no error in overruling appellant's motion for a new trial. No objections were made to any of the court's instructions and the judgment of the lower court must be affirmed.

ROBINSON, J., dissents.

[redacted]

KIRK *v.* KIRK.

4-9502 239 S. W. 2d 6

Opinion delivered May 7, 1951.

[redacted]

O. E. Williams, for appellant.

Wood & Smith, for appellee.

MINOR W. MILLWEE, Justice. Appellee, Hugh A. Kirk, was granted a divorce from appellant, Mary Jane Kirk, on the ground of three years separation without cohabitation. The principal issue on this appeal is the sufficiency of the evidence to support the chancellor's finding that appellee was a *bona fide* resident of Arkansas for the statutory period.

The parties were married in 1941 and lived in San Francisco, California, where appellee was employed as a patent attorney for the Shell Development Company until 1945 when they moved to New York where appellee was self-employed as a patent attorney for about a year. In July, 1946, appellee was sent to Antwerp, Belgium, by his employer, the International Telephone & Telegraph Company. In December, 1946, appellant went to Antwerp where the parties resided until May 10, 1947, when she left appellee after they had executed a separation agreement and property settlement. Appellant returned to California where she instituted a suit for divorce on December 29, 1947. Before service by publication against appellee was completed in the California action, appellant went to Washington, D. C., where she has since resided and is employed in patent drafting.

Appellee remained in Belgium where he engaged in private practice as a patent attorney during 1948 and 1949. He returned to this country early in 1950 and came to Arkansas in February, 1950. On June 16, 1950, he instituted the instant suit for divorce. After filing a petition for alimony *pendente lite,* suit money and attorney's fee, appellant filed an answer alleging that appellee was not a *bona fide* resident of this state and praying dismissal of the complaint for want of jurisdiction.

At the trial on November 1, 1950, appellee testified that he returned to this country because of the dangerous international situation and a decline in his practice as a patent attorney; that upon investigation he found that Arkansas was one of three states without a patent attorney; that he came here for the purpose of opening an office as patent attorney, but was without sufficient funds to do so. He obtained a room at the YMCA in Little Rock on February 23, 1950, and subsequently made formal application to three companies for a position as patent attorney and registered with several employment agencies. On April 26, 1950, he secured a job as clerk in the Washington Hotel at Fayetteville, Arkansas, where he moved and was still employed at the time of the trial at a salary of $100 per month and room and board.

Appellee testified that while he was primarily interested in securing employment in patent work, he accepted the hotel job until such work became available; that he intended to remain in Arkansas permanently and had applied for a position at the University at Fayetteville. He stoutly denied any intention of returning to Belgium or establishing a residence elsewhere than in Arkansas. He removed all his personal effects except a few books from Antwerp to Fayetteville. Although he was still registered as a patent attorney in Antwerp, he did not maintain an office there, but a friend permitted him to use his address in the Tower Building in Antwerp for registration purposes. He stated that he had accepted no new business from Belgium clients since leaving that country and was still working on a few cases that had not been completed when he left.

An executive of an insurance agency, the head of an employment agency and the secretary of the YMCA in Little Rock, Arkansas, corroborated appellee's testimony as to his residence in Little Rock, his attempts to secure interim employment, and his efforts to secure a position as patent attorney. Appellee joined and attended with regularity a Sunday School class while in Little Rock. He still had a California driver's license which he kept for identification purposes and had not owned a car since he left California in 1945.

The deposition of appellant contains much in the way of opinion, argument and hearsay which was objected to at the trial. It is undisputed that appellee has actually resided in Arkansas continuously since February 22, 1950. However, appellant earnestly insists that the facts and circumstances are insufficient to show an intention on his part to remain in Arkansas permanently. It is argued that appellee's claim that he was forced to take interim employment as a hotel clerk at a small salary is ridiculous in view of his educational background, professional qualifications and the fact that his father is a successful patent attorney in Ohio. In this connection appellee testified that he and his father had been incompatible since 1936 and appellant, to some extent, corroborated his testimony in this regard by stating that since their marriage his parents had done everything in their power to disrupt the union. Throughout his testimony appellee denied that he has either sought or received financial assistance from his father or that he had any source of income other than his salary as hotel clerk.

In urging that appellee was not a *bona fide* resident of Arkansas for the statutory period appellant relies on *Cassen* v. *Cassen,* 211 Ark. 582, 201 S. W. 2d 585, and several subsequent cases where we held that it was encumbent on the plaintiff to establish domicile as a jurisdictional prerequisite in a divorce action. It is also insisted that corroboration of appellee's testimony as to residence is lacking. We have held that proof of residence must be corroborated the same as any other essential fact. *O'Keefe* v. *O'Keefe,* 209 Ark. 837, 192 S. W. 2d 556. The purpose of the rule requiring corroboration

is to prevent the procuring of divorces through collusion, and where it is plain there is no collusion, the corroboration may be comparatively slight. *Morgan* v. *Morgan,* 202 Ark. 76, 148 S. W. 2d 1078; *Goodlett* v. *Goodlett,* 206 Ark. 1048, 178 S. W. 2d 666.

In the Morgan case we approved the following statement of the general rule in 17 Am. Jur., Divorce and Separation, § 386: "It is not necessary that the testimony of the complaining spouse be corroborated upon every element or essential of his or her divorce. It has been said that since the object of the requirement as to corroboration is to prevent collusion, where the whole case precludes any possibility of collusion, the corroboration only needs to be very slight.

"If an essential fact is difficult of proof, corroboration may be sufficient though weak."

A difficult question always arises when one of the essential elements to a divorce is mental in its nature, such as the intent to remain permanently in a certain place. While statements made by the parties may be considered, it is also true that their actions speak louder than words. Here we have more than the bare assertion by appellee that he intends to remain in Arkansas and pursue his profession as a patent attorney. There is some corroboration of his statements manifested by overt acts which tend to support his declaration of intention. It is clear that there is no collusion in the instant case. While the corroborative evidence is not as strong as it might be, we cannot say the chancellor's finding of *bona fide* residence for the statutory period is against the preponderance of the evidence.

Appellant also insists that if the case is affirmed on the jurisdictional question, she is entitled to a decree for alimony. Under the separation agreement and property settlement of May 9, 1947, appellee agreed to pay appellant $200 per month support money during his life or until appellant's remarriage in the event of a divorce by either party. Appellee defaulted in these monthly payments. When the chancellor offered to enforce this agreement, counsel for appellant stated that he did not want

the matters involved in the property settlement litigated, apparently on the theory and under a misapprehension that appellant might thereby enter her appearance for all purposes and waive her right to object to jurisdiction. Consequently the issue of permanent alimony was not determined by the chancellor. We have held that even though a plaintiff husband was not a resident of Arkansas, the chancery court, nevertheless, has jurisdiction for the purpose of granting the wife maintenance or alimony. *Kennedy* v. *Kennedy,* 205 Ark. 650, 169 S. W. 2d 876; *McDougal* v. *McDougal,* 205 Ark. 945, 171 S. W. 2d 942; *Mohr* v. *Mohr,* 206 Ark. 1094, 178 S. W. 2d 502.

We try the case *de novo* and have concluded that under all the facts and circumstances appellee should be required to pay appellant alimony in the sum of $30 per month. This modification of the decree shall not prejudice appellant's right to enforce the property settlement of May 9, 1947, and, in such event, appellee will be given credit on said property settlement to the extent of the payments made by him of said $30 per month alimony. Appellee is also directed to pay $100 for appellant's attorney's fee in addition to the amounts heretofore allowed. With these modifications, the decree is affirmed. The cause will accordingly be remanded with directions to enter a decree consistent with the modifications indicated.

GRIFFIN SMITH, Chief Justice, not participating.

COLLIER-DUNLAP COAL COMPANY *v.* DICKERSON.

4-9496 239 S. W. 2d 9

Opinion delivered May 7, 1951.

Harper, Harper & Young, for appellant.

Yates & Yates, for appellee.

ROBINSON, J. The appellee, Dickerson, is a coal miner and has been so engaged about thirty years, which is practically all of his adult life. On the 7th day of March, 1949, he became disabled with silicosis. At that time he had been working as a miner for the appellant, Collier-Dunlap Coal Company, for 25 months. Dickerson filed his claim with the Workmen's Compensation Commission and was allowed compensation for his disability.

The appellant contends that there is no evidence in the record showing that there was any silica dust in its mine and no evidence to the effect that Dickerson was exposed to the hazard of silicosis, while an employee of the appellant.

In our opinion appellant is correct in this contention. There is no evidence in the record showing that any silica dust was ever in appellant's mine. In fact there is no evidence on the point one way or the other.

Appellee contends that the circumstantial evidence, which included evidence to the effect that he has worked

for so many years as a miner, that undoubtedly he has silicosis, that he was able to work for appellant for 25 months before becoming disabled, also that appellant's mine was dusty, is sufficient to support the award.

Section 81-1314(b)(2), Ark. Stats., provides: "In the absence of conclusive evidence in favor of the claim disability or death from silicosis or asbestosis shall be presumed not to be due to the nature of any occupation within the provision of this section, unless during the ten years immediately preceding the date of disablement the employee has been exposed to the inhalation of silica dust or asbestos dust over a period of not less than five years." There is no showing that appellee was so exposed. The circumstantial evidence relied on by appellant is not conclusive evidence in favor of the claim and therefore is not sufficient to sustain an award without a showing that he was exposed to the hazard of silicosis in appellant's mine.

To affirm this case we would have to take judicial knowledge that the hazard of silicosis existed in appellant's mine. This Court will not take judicial knowledge of such alleged fact.

In the case of *Phelps Dodge Corporation* v. *Ford* 68 Ariz. 190, 203 Pac. 2d 633, decided in 1949, the same contention was made as is made here. In that case it was contended that the court should take judicial notice of the presence of silicon dioxide dust in the Bisbee area where claimant worked without the necessity of evidence in support thereof. The court refused to take judicial notice of such alleged fact and said:

"In order for any tribunal, whether it be judicial or *quasi*-judicial to take judicial notice of any fact, it must be so notoriously true as not to be subject to reasonable dispute, or must be capable of an immediate accurate demonstration. (57 Harvard Law Review 273.) A high degree of probability of the truth of a particular proposition cannot justify a tribunal in taking judicial notice of its truth. (57 Harvard Law Review 274.) A fact of which a court may take judicial notice must be indisputable."

If the rock, coal, or other elements in appellant's mine give off silica dust causing the hazard of silicosis to exist, then such fact can be proved without great difficulty. Without such fact being proved the evidence is not sufficient to warrant the making of an award. Section 81-1325(b), Ark. Stats., provides for remanding a case for rehearing where there is not sufficient evidence in the record to warrant the making of an award.

The case is reversed with directions that the Circuit Court remand it to the Compensation Commission for further development with regard to presence of the hazard of silicosis existing or not existing in appellant's mine.

AMERICAN REPUBLIC LIFE INS. CO. *v.* CUMMINGS, JUDGE.

4-9517 239 S. W. 2d 10

Opinion delivered May 7, 1951.

Talley & Owen and *Robert L. Rogers, II,* for petitioner.

F. O. Butt, for respondent.

GEORGE ROSE SMITH, J. This petition for a writ of prohibition was filed by the American Republic Life Insurance Company, asking us to prohibit the circuit court of Carroll County from entertaining a suit brought by Denver Ames against the petitioner. In the complaint below Ames alleged that he had been a policyholder of

the petitioning insurance company from 1945 until the insurer canceled the policy in 1950. The complaint avers that while the policy was in force the insurer regularly collected from the plaintiff three times the amount of the agreed premium. The prayer is for judgment in the sum of $240, being the amount of the plaintiff's overpayments.

The defendant appeared specially and moved to quash the service on the ground that Carroll County is not the proper venue. It is shown that this insurance company is an Arkansas corporation having its only office in Pulaski County. The insurer insists that a suit of this kind can be maintained only in Pulaski County. The circuit court overruled the motion to quash service, and this application for a writ of prohibition was then filed.

Ames, the plaintiff below, concedes that ordinarily a domestic corporation must be sued in the county where it has its principal place of business, with some exceptions not now material. Ark. Stats. 1947, § 27-605. It is contended, however, that § 66-516 permits Ames to bring his suit in the county of his residence. This statute reads: "When any loss shall occur by fire, lightning or tornado, in the burning, damage or destruction of property upon which there is a policy of insurance, or when any death has occurred of a person whose life shall have been insured, or in case of death or injury of any one having a policy of accident insurance, the assured or his assigns, in case of fire insurance, on automobile or motor vehicle, may maintain an action against the insurance company taking the risk, in the county where the loss occurs, or in the county where the insured resides and maintains his residence at the time said fire occurred. And the beneficiary or his assigns, in case of life insurance, may maintain an action against the insurance company that has taken the risk, in the county of the residence of the party whose life was insured, or in the county where the death of such party occurred. And the beneficiary in the case of a policy of accident insurance may maintain an action against such accident company that has taken the risk,

in the county of the residence of the party insured, or in the county where the accident occurred . . ."

Ames' suit is to recover excessive premiums paid upon a policy of accident insurance. We find nothing in the quoted statute that authorizes the bringing of such a suit in the county of the plaintiff's residence. The first sentence of the statute relates to suits for a loss under the policy. The word "loss" has an established meaning in the field of insurance, which is: "Death, injury, destruction, or damage, in such a manner as to charge the insurer with a liability under the terms of the policy." Webster's New International Dictionary, Second Edition. It is evident that a suit to recover overpaid premiums is not an action for an insurance loss.

The second and third sentences of the statute deal with suits by the beneficiary of the policy. Ames' action is manifestly not brought in the capacity of a beneficiary, who is "the person named in a policy of insurance . . . as the one who is to receive the proceeds or benefits accruing thereunder." Webster's, *supra*. Here Ames must bring his suit as the insured, and the statute in question is not broad enough to include such an action.

Writ granted.

MONTGOMERY, EXECUTOR *v.* BLANKENSHIP.

4-9500 239 S. W. 2d 758

Opinion delivered May 14, 1951.

Rehearing denied June 18, 1951.

A. L. Burford and *Shaver, Stewart & Jones,* for appellant.

T. B. Vance and *James F. Vance,* for appellee.

ED. F. MCFADDIN, Justice. The present case is the sequel to *Montgomery* v. *Blankenship,* 217 Ark. 357, 230 S. W. 2d 51, decided by this Court on May 29, 1950 (and hereinafter referred to as "the first case"). In the opinion in that case we (a) sustained the "Living Trust" —against the claim of lack of mental capacity of Mrs. Bottoms—because the "Living Trust" was incorporated by the reference into Mrs. Bottoms' Last Will and Testament, and the will had not been contested in due time; and (b) we adjudged that the $17,426.33 fund in Court went to Mrs. Bottoms' heirs at law, because the executors, and also the trustee of the "Living Trust," had *failed* to appeal from the order of the Chancery Court adjudging said fund ($17,426.33) to belong to the heirs.

In accordance with our opinion in the first case, the Miller Chancery Court entered a decree after mandate; and directed that the said fund be paid into the Miller Probate Court, intending thereby that the Probate Court would distribute the fund upon proof of heirship. But in the Probate Court the executor, Montgomery,[1] insisted that the said fund should be used to pay the debts of the deceased, rather than be distributed to the heirs. The Miller Probate Court ordered the executor to pay the fund to the heirs;[2] and from that order the executor has appealed.

We affirm the Probate Court order here challenged. In our opinion in the first case, we said:

"As to the cash item of $17,426.33, an additional question is presented. . . . 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

[1] He is now the sole executor because of the death of his co-executor, Clark.

[2] By stipulation the proof of heirship and the amount to go to each separate person are not issues in this appeal.

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'. . . . 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."

What might have been our decision regarding the payment of debts out of the said fund—if the executors had excepted to, and appealed from, the Chancery adjudication of the fund in the first case—is a matter that cannot now be discussed. The determinative facts are that: (1) in the trial in the Chancery Court in the first case the executor was a party; (2) he then knew of debts against Mrs. Bottoms' estate; (3) he had ample opportunity in the first case to make all of his claims to the fund ($17,426.33) then before the Court; (4) the Chancery Court awarded the said fund to the heirs; and (5) the executor acquiesced by failing to except to, or appeal from, such portion of the decree in the first case. Because of these facts we hold that the executor cannot now be allowed to defeat the adjudication made in the first case. See *Williams* v. *Wheeler*, 131 Ark. 581, 199 S. W. 898.[3] The decree in the first case is *res judicata* of the issue regarding the said fund.

Affirmed.

Justice PAUL WARD dissents.

PAUL WARD, J., dissenting. I do not agree with the majority that the $17,426.33 (herein referred to "cash item") should be turned over directly to the heirs of Mrs.

[3] In that case we used this language applicable to the case at bar:

"In the instant case, however, it was not only a fund in court, but the rights of all parties to the suit in it had been finally adjudicated. Unless they could obtain a cancellation, modification or reversal of the decree, they were remediless."

Bottoms. It should have been placed in the hands of the executor, as assets of the estate, to be used and distributed according to the provision of the Probate Code and particularly § 62-2903 (sup.) Ark. Statutes. This cash item has in some way been involved in four separate court actions and the question all the time has Court, the executor listed this item as assets of the estate, but at the same time he listed three stock certificates as belonging to the Trustee. Second, suit was brought in Chancery Court by the heirs (primarily we can assume) to have the certificates placed back in the hands of the executor, and it was there so held. Third, the last ruling was appealed to this court where the chancellor was reversed holding that the certificates belonged to the Trustee. The cash item was not directly involved, but the court commented (as set out in the majority opinion) as follows: (a) . . . "the trial court . . . ordered the . . . cash turned over to the executor." (b) 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." This leaves the cash item in the hands of the executor where it was placed in both previous actions. The fourth action involving this cash item, of course, is the probate suit resulting in this appeal. The heirs have no right to demand this money from the executor until he has had an opportunity to liquidate all lawful claims against the state.

CITY OF LITTLE ROCK *v.* STANNUS.

4-9516 239 S. W. 2d 283

Opinion delivered May 14, 1951.

O. D. Longstreth, Jr., Dave E. Witt, Wm. J. Kirby and *Joseph Brooks,* for appellant.

Verne McMillen and *H. B. Stubblefield,* for appellee.

MINOR W. MILLWEE, Justice. Appellees own the west half of the north half of Block 1, Moore and Penzel's Addition to the City of Little Rock, Arkansas, upon which they propose to erect a modern one-story grocery, or supermarket, with off-street parking facilities. The property is located on the south side of Wright Avenue between Wolfe and Battery Streets and is classified as "C," two-family residence district, under a city ordinance. After exhausting all administrative remedies to have the property reclassified in the "F," commercial district, appellees instituted this suit against appellants, the City of Little Rock and its officers, seeking such relief.

J. C. Childress, who owns residential property south of and adjacent to appellees' lots, was allowed to intervene as a co-defendant in the suit. He alleged that a rezoning of appellees' property would decrease the value of his property and adopted the answer of the city and its officers, but has not appealed from the decree rendered in favor of appellees. The chancellor found that appellants acted arbitrarily and unreasonably in denying the relief sought and ordered issuance of the building permit to appellees.

The proposed supermarket will front upon Wright Avenue, a heavily traveled interstate and intrastate truck route through the City of Little Rock. The building will be constructed on the east lots owned by appellees with an off-street parking area to the west at the southeast corner of Wright Avenue and Battery Street and with a screening hedge along a rock wall four feet high which separates appellees' property from the residential property of J. C. Childress facing Battery Street on the south.

Dr. B. T. Kolb owns and occupies his home and office on the property directly across Battery Street west of

appellees' property. He testified that the proposed building would be a definite improvement over the present appearance of appellees' lots and the area generally. The property adjacent to appellees' property on the east is zoned for commercial use. There is a filling station further east in the same block at the southwest corner of Wright Avenue and Wolfe Street, which has been in operation since 1925, as authorized by the decision in *Herring* v. *Stannus,* 169 Ark. 244, 275 S. W. 321. The north side of Wright Avenue directly across the street from the property in question is built up with commercial properties consisting of a garage and battery shop, grocery store and drug store which have been in operation for more than twenty years. The rental agent for a large dwelling adjacent to these business houses on the west testified that in normal times it was difficult to rent the property because the traffic and noise made it undesirable for a residence, and that it would rent for twice as much if located away from the business section. There are business houses on both sides of Wright Avenue in the adjacent blocks to the east and a picture show and grocery have been built on the south side within the past ten years.

It is unnecessary to detail the testimony given by real estate experts, businessmen and residents of the affected area. The preponderance of this evidence is to the effect that appellees' property is located in a well-established business district which is expanding westward, that it has a high value for commercial use, is undesirable for residential purposes, and that its intended use as a site for a supermarket in the manner planned would not adversely affect the use or value of residential property in the vicinity. It was also shown that there has been a substantial increase in residential construction in that section of the city in the past few years which has resulted in an existing need for the type of business contemplated by appellees.

In many respects the facts in the case at bar are similar to those in several cases where we upheld the chancery court in holding that the action of municipal authorities in refusing to revise a zoning classification

and in denying a building permit was unreasonable and arbitrary. See *City of Little Rock* v. *Pfeifer,* 169 Ark. 1027, 277 S. W. 883; *City of Little Rock* v. *Bentley,* 204 Ark. 727, 165 S. W. 2d 890; *City of Little Rock* v. *Joyner,* 212 Ark. 508, 206 S. W. 2d 446; *City of Blytheville* v. *Lewis, ante,* p. 83, 234 S. W. 2d 374.

Appellants' principal contention for reversal is that construction of the supermarket will result in such increase of traffic as to endanger the lives and property of citizens of the southwestern section of the city. In this connection the captain of the city traffic bureau testified that any new business construction in or near the intersection of Wright Avenue and Battery Street would naturally bring in more people and cars and cause traffic to be more congested at that point. He would not say that it would cause as much congestion in traffic as that existing at some other intersections in the city, nor did he state that a dangerous condition would be created. The City Planning Director gave similar testimony and stated that the 135-foot off-street parking area contemplated was three feet less than standard. Intervener, J. C. Childress, felt that the construction of the supermarket would interfere with the movement of fire trucks over Battery Street which has a 90-foot offset where it intersects with Wright Avenue. The effect of the testimony on behalf of appellees was that all traffic entering Wright Avenue at this point must slow down in order to make the sharp turn necessitated by the 90-foot offset and that the off-street parking area west of the proposed supermarket will leave the southeast corner of the intersection free of obstruction and thereby render the intersection safer for all traffic.

The testimony as a whole does not warrant the conclusion that the lives and properties of the inhabitants of the southwestern section of the city would be jeopardized by the erection of the business contemplated by appellees. The decree is supported by the preponderance of the evidence and is accordingly affirmed.

BURBRIDGE *v.* BRADLEY LUMBER COMPANY.

4-9486 239 S. W. 2d 285

Opinion delivered May 14, 1951.

Leffel Gentry and *U. A. Gentry,* for appellant.

Williamson & Williamson, for appellee.

ROBINSON, J. The appellee, Bradley Lumber Company, cut, removed and converted to lumber some five hundred thousand feet of timber from lands belonging to appellant, Burbridge, under the honest but mistaken belief that the land belonged to the Lumber Company. It is stipulated that the market value of the stumpage, *i. e.,* the timber standing in the tree, was $4.50 per thousand, and the cost of converting the timber into lumber was $11.61 per thousand; that the lumber, the finished product, had a market value of $25 per thousand. Adding the value of the stumpage to the cost of conversion makes a total of $16.11 which leaves a net profit of $8.89 per thousand.

The parties hereto each claim they are entitled to this profit. Our cases have laid down two different rules regarding the measure of damages for the innocent conversion of timber. The conflict arises where the converter has added value to the timber by cutting it into cross-ties, stave bolts, lumber, etc. By one rule, which we will call the Eaton rule, the measure of damages is the value of the wood in its manufactured state, less the cost of the converter's labor and expenditures. The effect of this rule is to give the original owner whatever increase in value there may have been over and above the

actual cost of manufacture. The second rule, which we will call the United States rule, gives the original owner only the stumpage value of the timber, which has the effect of giving the converter whatever profit has resulted from his conversion.

It may be noted that some confusion has arisen from the word "stumpage." The dictionary defines stumpage as the value of timber standing in the tree, and all the cases in *Words & Phrases* give this definition. But, one or two of our cases seem to use the word as meaning the timber after it has been felled and cut into logs. This is not true stumpage, and under the Eaton rule the converter should be given credit for his expense in felling and cutting up the trees.

Eaton v. *Langley,* 65 Ark. 448, 47 S. W. 123, 42 L. R. A. 474, is the first and leading case in our Reports on this subject. There Judge BATTLE, for the majority, reviewed the cases from some other jurisdictions and stated that since there was no Arkansas precedent, the court felt free to adopt what it considered to be the "wisest and most just rule." He then laid down with perfect clarity the Eaton rule, which gives the profit to the original owner rather than to the wrongdoer.

Central Coal & Coke Company v. *John Henry Shoe Co.,* 69 Ark. 302, 63 S. W. 49, cited the Eaton case with approval but as dictum, since the trespass was willful.

United States v. *Flint Lbr. Co.,* 87 Ark. 80, 112 S. W. 217, marks the first intrusion of what we have designated herein as the United States rule. That was an insolvency proceeding in which the United States filed a claim for the value of timber cut by one who had homesteaded federal land with the fraudulent purpose of denuding it of its timber. The trespass was willful; so the reference to an innocent trespass is dictum. As such dictum the court stated that the measure of damages is the value of the property when first taken. The only cases cited to support this statement are three decisions of the United States Supreme Court. The Eaton case is not cited.

Randleman v. *Taylor,* 94 Ark. 511, 127 S. W. 723, follows the Eaton rule completely with no mention of the United States rule. This case should have dispelled any doubt about the dictum in the preceding case being the law in Arkansas, but unfortunately it did not have that effect.

Newhouse Mill & Lumber Company v. *Avery,* 101 Ark. 34, 140 S. W. 985, inadvertently added to the doubt. There the trial court had instructed the jury that if the trespass was innocent the measure of damages would be the stumpage value, which seems to state the United States rule. But, the contested issue was whether the plaintiff should have single or triple damages. The jury gave the plaintiff a verdict, and it was the defendant who appealed. Obviously if the plaintiff had wanted to complain about the court having given the United States rule to the jury, he would have had to cross appeal. Since there was no cross appeal, there was no occasion for the Supreme Court to point out that the instruction was too favorable to the appellant. Therefore, this case is not really authority for the United States rule.

Bradley Lumber Company v. *Hamilton,* 117 Ark. 127, 173 S. W. 848, is rather difficult to follow. The trial court, by a master, found that the value of the timber in the trees was $2.00 a thousand feet, but that the market value was $3.20 a thousand. A decree for the latter amount was affirmed by this court. The court cited the Eaton rule as authority for the, perhaps, erroneous statement that the measure of damages is the value at the time and place of conversion. It does not seem to have been shown that any labor had been expended, other than the mere cutting of the trees into logs. The decision not only cited the Eaton case, but also affirmed an award in excess of true stumpage. Consequently, it is certain that the court did not intend to desert the Eaton rule.

Foreman v. *G. D. Holloway & Son,* 122 Ark. 341, 183 S. W. 763, innocently added to the confusion. Here a mortgagor had cut and sold timber from his mortgaged lands. When the mortgagee foreclosed he joined the vendee as a defendant and asked for the value of the timber in its

manufactured state. The court properly held that since the mortgagee was not the owner of the land, all he was entitled to was a decree giving him a judgment to the extent of his damages. Since his security had been impaired only to the extent of the timber in the trees, that was the rule to be applied. Thus, this case merely applied the United States rule to peculiar facts, involving a mortgagee, where the rule was plainly proper. Nevertheless, the case has been later cited as authority for the application of the United States rule in cases of actual trespass, thus adding to the confusion. It was also followed in *Baker-Matthews Lbr. Co.* v. *Bank of Lepanto,* 170 Ark. 1146, 282 S. W. 995, which is another mortgage case, and therefore not at all inconsistent with the Eaton rule.

In *Bunch* v. *Pittman,* 123 Ark. 127, 184 S. W. 850, for the first time the court states both rules. The court first says that the measure of damages is the stumpage value and then quotes the opposite rule from the Eaton case. This case by itself might not have seriously impaired the Eaton rule, but it was almost immediately cited as authority for the United States rule in two later cases. *Hampton Stave Co.* v. *Elliott,* 124 Ark. 574, 187 S. W. 647, and *Beene* v. *Green,* 127 Ark. 119, 191 S. W. 915, are the two cases just mentioned. Either expressly or by implication these opinions say that the stumpage value is the measure of damages, citing the Bunch case.

Brown & Hackney v. *Daubs,* 139 Ark. 53, 213 S. W. 4, goes back to the Eaton rule and cites the Eaton case as authority.

Augusta Cooperage Co. v. *Bloch,* 153 Ark. 133, 239 S. W. 760, says that the measure is the stumpage value, but the only cases cited are United States decisions, and, of course, they are authority for that statement. It may be added that there was no showing of any added value except the mere cutting and removal of the logs, so this may be another instance of misunderstanding the true meaning of stumpage.

Hudson v. *Burton,* 158 Ark. 619, 250 S. W. 898, as dictum repeats the Eaton rule in a case involving a landlord and tenant.

Arkansas Power & Light Co. v. *Decker,* 179 Ark. 592, 17 S. W. 2d 293, is rather interesting as an analogy to the rule in timber cases. There the question was the measure of damages for the conversion of minerals. The court held that if the trespass was innocent the measure would be the value of the minerals in place in the ground, but if the trespass was willful the measure would be the value at the mouth of the mine, (thus depriving the trespasser of his expenditures in mining out the property). The Court cites the Eaton case to support its decision.

Jones v. *Vaughan,* 184 Ark. 174, 41 S. W. 2d 986, is another case where the United States rule was properly applied to the particular facts. There a contract for the sale of timber contained a provision that the timber had to be sawed at a mill located on the timber tract itself. There was a violation of this provision, but of course the court held that the measure of damages was governed by the contract, which provided for sale at a certain stumpage value. Hence all that case did was to enforce a contract that happened to embody the United States rule.

Kansas City Fibre Box Co. v. *Burkhart, Mfg. Co.,* 184 Ark. 704, 44 S. W. 2d 325, involves a willful trespass, but as dictum the court first says that in innocent trespass cases the measure is the stumpage value. The court then quotes the contrary rule from the Eaton case.

Bailey v. *Hammonds,* 193 Ark. 633, 101 S. W. 2d 785, states that the measure is the value at the time and place of cutting and then cites the Eaton case, thus recognizing both rules. In referring to the Eaton case the Court said: "The case last mentioned was an action in replevin where the rule is laid down with reference to damages for the cutting of timber by trespassers and the reasons for the rule are stated by Judge Battle with great learning and clarity, and it is perhaps the leading

case in this state on the subject. Appellant contends that the rule applies only in actions in replevin, but in this he is mistaken, as the case just quoted from was not such an action, but a simple action for damages for conversion."

Brewer v. *Fletcher,* 210 Ark. 110, 194 S. W. 2d 668, the most recent case, involved a willful trespass, but as dictum the court states the United States rule.

The case at bar presents the issue of which rule this court is now going to follow as the law of this State. We are of the opinion that the rule as laid down in the Eaton case is the "wisest and most just," as stated there by Mr. Justice BATTLE, and we therefore follow that rule. Mr. Justice BATTLE said:

"In considering the justice of permitting the appellant to appropriate the cross-ties to his own use, the invasion of his rights and the injury done to him by appellee should not be overlooked. The trees belonged to him. They were standing upon his land, and he had the right to hold them as they were. No one had the right to take them from him, convert them into ties, and force him to accept their value at the time of the conversion. He may have preferred to have them to stand; and, if left standing for a few years, they might yield him great profit, and the enhancement of their value by the labor of appellee might be a poor compensation for the wrong done. But, whether he wished to sell or not, it would be gross injustice to permit appellee to force him to sell. He is entitled to the protection of the laws. Deny to him the right to the cross-ties, and force him to accept the value of his timber when appropriated by a trespasser, as it was at the time of the conversion, and he has no adequate protection. The injury inflicted by the trespasser would be borne in part by the innocent owner, and the guilty would escape. 'Such a doctrine,' as said by Chief Justice COOLEY, 'offers a premium to heedlessness and blunders, and a temptation by false evidence to give an intentional trespass the appearance of an innocent mistake.' "

In the Eaton case it was recognized that in some instances the cost of conversion and the value added by reason of the conversion would be out of all proportion to the value of the original article, and the injustice of permitting a recovery of the value of the property as converted would be apparent at first blush. However, we are not dealing with an instance of that kind in the case at bar.

The original owner is entitled to recover the value of the property in its new form less the cost of labor, material and incidental items necessarily expended in transforming it, provided the expenditures do not exceed the increase in value which was added by the transformation, in which event he should recover the value of the property in its new form, less the increase in value.

Reversed, with directions to enter a decree not inconsistent with this opinion.

EDGE *v.* BUSCHOW LUMBER COMPANY.

4-9495 239 S. W. 2d 597

Opinion delivered May 14, 1951.

Wood & Chesnutt and *Ray S. Smith, Jr.,* for appellant.

Witt & Witt and *Tom Kidd,* for appellee.

PAUL WARD, J. On August 22, 1923, Joseph A. Coffman patented (from the United States) the SE¼ of the SE¼ of Sec. 33, Twp. 4 S., R. 26 W., 40 acres, lying in Montgomery County. Coffman and wife conveyed the land to D. W. Edge, September 12, 1925. Edge failed to pay the taxes for the year 1928 and the land was sold to the State June 10, 1929. After the expiration of the two years redemption period the land was certified to the State, and the State confirmed its title through chancery court by decree dated November 5, 1934. In 1938 Edge deserted his wife and children and has not been heard of since 1943. On April 2, 1943, the State deeded the land to the Buschow Lumber Company and this company, on February 21, 1950, conveyed the land by warranty deed to the Murfreesboro Lumber Company. It is admitted by both sides that the land is wild and unimproved.

On March 30, 1950, the wife and children of D. W. Edge filed suit in the chancery court against the Buschow Lumber Company asking "that the purported sale of said land be cancelled and set aside; that the deed of the State

of Arkansas to the defendant purporting to convey the said land to the defendant be declared to be void and be cancelled and set aside and that the defendant be required to account to the plaintiffs for all timber removed from the said lands." The complaint alleged that the land was not subject to taxation in the year 1919 (as stated above the land was not patented by the government until the year 1923) but notwithstanding this the land was sold for taxes for that year and consequently certified to the State of Arkansas; that the State, claiming title to said land by virtue of said tax forfeiture for the year 1919, deeded said land on April 2, 1943, to the defendant Buschow Lumber Company; that said sale to the State and by the State to the defendant were void. On March 31, 1950, the plaintiffs filed an amended complaint in which it was alleged: "That the plaintiffs herein are the wife and children of the said D. W. Edge; that the said D. W. Edge deserted his wife and children in the year 1938 and departed the State of Arkansas and has not been heard of since that time; that the said D. W. Edge is presumed in law to be dead and the plaintiffs herein are his widow and sole heirs at law; that if the said D. W. Edge is living, this action is brought by the plaintiff, Mrs. D. W. Edge, under the provisions of § 27-822, Ark. Stats. (1947); that said lands were offered for sale for taxes for the year 1928 and that no one bid on said lands at said sale and that they were certified to the State of Arkansas for the nonpayment of the taxes for the said year."

The complaint then sets out seventeen alleged reasons why the tax forfeiture and the sale to the State based thereon was irregular and void and contains the same prayer as set forth in the original complaint.

On April 18, 1950, defendant Buschow Lumber Company filed its answer to the complaint and amended complaint in which it denies each and every allegation and states that the defendant is the owner in possession of said land and is entitled to have his title confirmed. On June 6, 1950, the Buschow Lumber Company filed its amended and substituted answer, in which it was alleged: That it has been in constructive possession of said lands from the 2nd day of April, 1943, paying the taxes each

and every year thereafter; that it sold said lands to the Murfreesboro Lumber Company on the 21st day of February, 1950; that plaintiffs' complaint was filed on March 30, 1950, and that at that time the defendant was not the owner of said land, but that the Murfreesboro Lumber Company was the owner; that this defendant and the Murfreesboro Lumber Company have owned said land and been in possession of same, paying the taxes each and every year since April 2, 1943, and have had open, peaceful and adverse possession of said lands for a period of more than seven years.

On June 23, 1950, the Murfreesboro Lumber Company, a partnership, filed their intervention alleging: that they deny all the allegations in the plaintiffs' complaint; that on February 21, 1950, they purchased the said lands from the Buschow Lumber Company, receiving a warranty deed and paying therefor the sum of $1,650; that said Buschow Lumber Company had purchased the lands from the State of Arkansas on April 2, 1943; that the said lands had sold for taxes for the year 1928 and had been certified to the State; that on November 5, 1934, the State confirmed its title in said lands through the chancery court; that they admit the lands are wild and unimproved and they interpose a plea of the Statute of Limitations, having been in constructive possession under color of title, and paid the taxes thereon for more than seven years. Interveners also filed a cross-complaint against the Buschow Lumber Company praying judgment in the sum of $1,650 with interest if the plaintiff should prevail in this suit.

This appeal presents several interesting and close questions which call for a decision and in discussing and deciding them we will refer to the testimony as it relates thereto.

First, the lower court found in favor of appellee, Murfreesboro Lumber Company, and quieted its title on the ground that it had color of title to said land and had paid the taxes thereon for seven years. We quote the following from the court's decree:

" . . . That the intervener, Murfreesboro Lumber Company and those under whom it claims title to the lands involved in this action, to-wit: the SE¼ of the SE¼ of Sec. 33, Twp. 4 South, Range 26 West, have paid the taxes on said lands under color of title for seven consecutive years and that the said lands are wild lands; . . ."

The statute on which the court must have based the above ruling is § 37-102 of the Ark. Stats. which is set out below:

"Unimproved and uninclosed land shall be deemed and held to be in possession of the person who pays the taxes thereon if he have color of title thereto, but no person shall be entitled to invoke the benefit of this act [section] unless he and those under whom he claims shall have paid such taxes for at least seven (7) years in succession, and not less than three (3) of such payments must be made subsequent to the passage of this act."

As stated above the Buschow Lumber Company received a deed from the State of Arkansas on April 2, 1943, and the Buschow Lumber Company deeded the land to appellee, Murfreesboro Lumber Company, on the 21st day of February, 1950. Appellant's complaint was filed on March 30, 1950, but the Murfreesboro Lumber Company was not made a defendant and did not become a party to the action until it filed its intervention on June 23, 1950. A tax statement was introduced in evidence showing that the two lumber companies had paid taxes on the land in question for the years 1943 to 1949 inclusive, and it is admitted by all parties that the land is wild and unimproved. Thus, it would at first appear that since the Murfreesboro Lumber Company and the Buschow Lumber Company had together had color of title and possession of the lands from April 2, 1943, to June 30, 1950, and had paid the taxes thereon for seven years the appellee, Murfreesboro Lumber Company, would come under the provisions of § 37-102 quoted above. However, our court has held many times, beginning with the case of *Updegraff* v. *Marked Tree Lumber Company,* 83 Ark. 154, 103 S. W. 606, that there must be an unbroken possession

for a period of seven years from the date of the first payment of taxes. It appears from the tax statement mentioned above that the first payment of the taxes made by the Buschow Lumber Company was on August 22, 1944, consequently less than seven years had elapsed before the Murfreesboro Lumber Company intervened and made itself a party to this suit. From what has been said it follows that the lower court was in error and that the Murfreesboro Lumber Company is not entitled to have its title quieted on this ground.

Appellee, the Murfreesboro Lumber Company, contends that the sale to the State of Arkansas for the forfeiture of 1928 was regular in every way and if not that the 1934 confirmation suit cured all irregularities and that therefore, the deed from the State of Arkansas to the Buschow Lumber Company on April 2, 1943, conveyed a good and valid title and that consequently the deed from the Buschow Lumber Company dated February 21, 1950, to it conveyed good title. For these reasons the Murfreesboro Lumber Company contends that it is entitled to have the title to said lands confirmed in it. This contention would be sound unless the power to sell was lacking when the lands forfeited and were sold to the State of Arkansas for the taxes of 1928. Appellants contend the power to sell was lacking.

The record shows that the total tax on these lands for the year 1928 was $2.78 and that the total tax and penalty for which the lands sold was $3.91. This total included a penalty of 28 cents about which there is no question, the clerk's fee of 25 cents, about which there is no question, and the sheriff's fee of 10 cents, about which there is no question, and an advertising fee of 50 cents which appellants contend is 25 cents excessive. In our opinion appellants are correct, and the proper advertising fee should have been 25 cents instead of 50 cents.

It is admitted by appellees that 25 cents per call was the correct advertising fee under the provisions of § 6806 of Crawford & Moses' Digest, but this section was amended by Act 92 of the Acts of 1929, which provides that the advertising fee for each tract shall be 50 cents.

This act was approved March 7, 1929, but did not contain an emergency clause. Appellees contend that the act would be in full force and effect 90 days after March 7, 1929, that is it would be effective on June 5, 1929. The record shows that the tax sale in question was held on June 10, 1929, thus it is contended by appellees that the 50 cents advertising fee was the correct fee on the date of sale. Acts of the Legislature for 1929 show that the Legislature adjourned on March 14, 1929. This court held in the case of *Gentry* v. *Harrison,* 194 Ark. 916, 110 S. W. 2d 497, that an act of the Legislature which did not contain the emergency clause became effective 90 days after the Legislature adjourned. Thus it appears that Act No. 92 mentioned above could not have been effective prior to June 12, 1929, which was two days after the lands were offered for sale. It follows that there was an unlawful charge of 25 cents against appellants' lands. This excessive charge defeated the power to sell as has been held many times by this court. See *Lumsden* v. *Erstine,* 205 Ark. 1004, 172 S. W. 2d 409, 147 A. L. R. 1132. The state's confirmation decree of 1934 did not cure the defect mentioned above as was held in the last cited case. It follows that the deed from the State of Arkansas to the Buschow Lumber Company was void, and consequently the Murfreesboro Lumber Company has no title by virtue of its deed from the Buschow Lumber Company.

It is earnestly insisted by able counsel for appellees that this case must be affirmed because the appellants have no standing in court. As set out above appellants are the wife and children of D. W. Edge who was the owner of the land in controversy at the time it forfeited to the State. It is insisted by appellants that they have a right to bring this action in their own names pursuant to the provisions of § 62-1601, Ark. Stats. (1947), which reads as follows: "Any person absenting himself beyond the limits of this State for five (5) years successively shall be presumed to be dead, in any case in which his death may come in question, unless proof be made that he was alive within that time."

In the case of *Wilks* v. *Mutual Aid Union,* 135 Ark. 112, 204 S. W. 599, and in the case of *Burnett* v. *Modern*

Woodmen of America, 183 Ark. 729, 38 S. W. 2d 24, our court has interpreted the above mentioned section as applying only to residents of this State at the time of disappearance. A review of the evidence shows that D. W. Edge left his family about the year 1938 and has not been heard from since about 1943 although inquiry and diligent search have been made. However, nowhere in the testimony does it appear affirmatively that D. W. Edge was a resident of the State of Arkansas when he absented himself, this being a necessary element and not having been proved his wife and children could not maintain this action.

It will be noted from the abstract of the complaint set forth above that appellants brought this action under the provisions of § 27-822, Ark. Stats., which reads as follows: "Where a husband, being a father, has deserted his family, the wife, being a mother, may prosecute or defend in his name any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had."

In our opinion appellants' pleadings and proof bring them within the provisions of this statute and under it they have a right to maintain this action. It is not denied that D. W. Edge left his wife and children as stated above and has not been heard from for something like seven years and has not been seen by them since 1938. Under the last mentioned section any recovery had by appellants would have to be in the name of D. W. Edge.

The decree of the lower court is reversed with directions to enter an appropriate decree vesting title to said lands in D. W. Edge after appellants have satisfied the lawful claims by appellees for money expended for taxes pursuant to *Buschow Lumber Co.* v. *Witt,* 212 Ark. 995, 209 S. W. 2d 464, and for further proceedings on appellants' claim for timber cut off said lands.

The Murfreesboro Lumber Company has cross-appealed against the Buschow Lumber Company asking judgment in the amount of $1,650 which it paid the Buschow Lumber Company for a warranty deed on February 21, 1950. No defense to this part of the action

has been made by the Buschow Lumber Company and the Murfreesboro Lumber Company is entitled to judgment for the amount stated above together with interest at six per cent. from February 1, 1950, and it is so ordered.

DEW *v.* REQUA.

4-9498 239 S. W. 2d 603

Opinion delivered May 14, 1951.

Rehearing denied June 11, 1951.

[redacted]

Wright, Harrison, Lindsey & Upton, for appellant.

Carl Langston, for appellee.

HOLT, J. Appellant, Mrs. Mary Ollie Requa Dew, is one of the three daughters of appellee, Mrs. Nora Requa. The present suit involves title to certain real and personal property.

December 1, 1938, Mrs. Requa's husband, T. P. Requa, (and Ollie's father) died testate. He gave $1.00 to each of his three daughters and all the remainder of his property to Mrs. Requa.

Prior to his death (in December, 1936) T. P. Requa and Mrs. Requa had conveyed by warranty deed for a consideration of $1.00 and other "valuable considerations" Lot 7, Block 1, W. B. Worthen's Addition to the City of Little Rock, to their daughter, Ollie. September 10, 1936, they had also transferred to Ollie 43 shares of Preferred Arkansas Power & Light Company stock, which Ollie later, November 15, 1942, cashed for $4,750. At this time Ollie was married to Frank Bauer but they had separated.

March 9, 1937, Mr. and Mrs. Requa sued Ollie to require her to reconvey Lot 7 and the 43 shares of stock, to them. On June 10, 1937, Chancellor Dodge entered a decree vesting title to the 43 shares of stock, and a life estate in Lot 7 (referred to as the homeplace) in Mr. and Mrs. Requa, with the remainder in Ollie.

At the time of Mr. Requa's death (December 1, 1938) Mrs. Requa was left the following property: Cash of her own, $500; Cash left by Mr. Requa, $500; Cash from Railway local, $500; Dividends from A. P. & L. Stock $760.81; Metropolitan Insurance, $2,000; Railway Con-

ductor—Insurance, $2,000. She also owned the following: A life estate in Lot 7, Block 1, W. B. Worthen's Addition (3724 W. 13th), household furniture, 43 shares of Arkansas Power & Light Stock, also Plots 179, 247, Section 4, Pine Crest Memorial Park (16 graves).

Soon after her father's death, Ollie moved into her mother's home (Lot 7), took charge of her mother's affairs, and placed the above cash items in a lock box in a local bank in their joint names and each was issued a key. Ollie appears to have had no property of her own.

July 27, 1939, Mrs. Requa bought Lot 8, Block 1, W. B. Worthen's Addition to the City of Little Rock (adjoining lot 7) and took title in the name of Ollie. The purchase price was $2,250. This property was rented for $27.50 per month from July, 1939, to October 31, 1941, and the rent money used for living expenses. The homeplace (Lot 7) was converted into a duplex in 1943, rented, and Ollie and her mother moved into the house on Lot 8.

April 13, 1940, administration of the estate of Mr. Requa was finally settled and closed, the 43 shares of stock were transferred to Mrs. Requa, and on the same day, Mrs. Requa transferred this stock to Ollie, and on May 19, 1941, Mrs. Requa transferred the cemetery property (valued at about $500) to Ollie.

Ollie married Ernest Dew in May, 1941, and in June, 1942, she took proper steps to create an estate by the entirety in herself and Ernest in Lot 8, and later on June 25, 1943, a similar estate was created in them in the shares of stock. December 23, 1942, Ollie and Ernest purchased as tenants by the entirety a farm in Ashley County, described as follows: "The west fractional part of section thirty-three (33) in township nineteen (19) south, range five (5) west, containing 70 acres more or less, and more particularly described as follows: All the land west of ditch, north of ditch, leading from Cypress brake into Bayou Bartholomew, and known as the old Lou Eckels Ditch. All an undivided half interest in a woven wire fence that is situated on the east side of

the 70 acres of land that divides the land as a line fence.'' This farm appears to have been purchased with Mrs. Requa's money.

The present suit was filed by Mrs. Requa September 13, 1949, in which she asked that Lot 8, above, be reconveyed to her by appellants, title thereto vested in her, and that they account for all rents thereon, and also for all rents on the ''homeplace,'' Lot 7, Block 1, that they be required to reconvey to her title to the cemetery property and title to the above farm property in Ashley County, along with the crop proceeds.

The case was tried March 8th and 9th, 1950, but a final decree was not rendered until July 31, 1950. The record reflects that on April 27, 1950, Mrs. Requa, after having been away from appellants since she filed the present suit (September 13, 1949) returned to them, and on April 28th, the day following her return, she informed her attorney and the trial court that she desired to dismiss her suit against appellants. In the afternoon of the same day, Mrs. Requa's attorney at the instance of Mrs. Beck, another daughter of Mrs. Requa, filed her (Mrs. Beck's) petition in the Pulaski Probate Court, seeking the appointment of a guardian for Mrs. Requa. This petition was presented to the same judge who tried the present suit. Hearings were had on the petition for guardian May 5th and 16th, a guardian was appointed for Mrs. Requa, and this guardian was joined as a party plaintiff with Mrs. Requa. Mrs. Requa's request that her suit be dismissed was denied and the court, on July 31, 1950, entered a decree vesting fee simple title to Lot 8 and the cemetery property, above, in Mrs. Requa and Lot 7 in Mary Ollie Requa (now Dew), subject to the life estate of Mrs. Requa. There was also a decree in favor of Mrs. Requa for certain rents and properties and the proceeds from the sale of the 43 shares of stock and dividends therefrom.

The case comes here for trial *de novo*.

After a review of the somewhat extended record, we have concluded that the trial court erred in denying

Mrs. Requa's request that her suit against appellants be dismissed and in appointing a guardian for her for the reason that the preponderance of the testimony is against the court's finding that Mrs. Requa was incompetent, incapable of handling her own affairs, or in need of a guardian. While the testimony as to Mrs. Requa's competency to handle her own affairs (which we think it unnecessary to detail) was somewhat conflicting, we hold, as indicated, that she was sane for all purposes of this litigation. Her own testimony, in which she answered questions clearly and intelligently, given in open court, (although she was about 79 years old) impresses us that she was competent and capable of handling her own business within the meaning of the test many times announced by this court, in such circumstances.

In *Pulaski County* v. *Hill,* 97 Ark. 450, 134 S. W. 973, one of our leading cases on the test of competency, we said: "But the question in all such cases where incapacity arising from defect of the mind is alleged is, not whether the mind is itself diseased or the person is afflicted with any particular form of insanity, but rather whether the powers of the mind have become so affected, by whatever cause, as to render him incapable of transacting business like the one in question. As a general rule, it may be stated that, in order to have that measure of capacity required by law to be of sound mind, a person must have capacity enough to comprehend and understand the nature and effect of the business he is doing; and where it is clearly made to appear that the mental incapacity and imbecility is of such a degree as to render the person unable to conduct the ordinary affairs of life and leaves him in a condition to be the victim of his infirmity, then such person is in contemplation of law not of sound mind. Weakness of understanding is not alone sufficient to show mental unsoundness if capacity remains to see things in their true relations and where the individual has a moderate comprehension of his immediate duties and of the value and use of his property." Reaffirmed in many subsequent decisions, among the latest being that of *Kelley* v. *Davis,* 216 Ark. 828, 227 S. W. 2d 637.

Even if the probate's adjudication that Mrs. Requa was incompetent was legal,—a matter which we need not decide—that adjudication is *prima facie* only and does not preclude us from inquiry in the case at bar. "No conclusive presumption can be given to judgment of probate court adjudging person insane, and such judgment is but *prima facie* evidence of insanity." *Mason* v. *Graves et al.,* 167 Ark. 678, 265 S. W. 667, (Headnote 1), (not reported in the Arkansas reports.)

Mrs. Requa should therefore have been allowed to dismiss her suit, as above indicated. She had absolute control over her own litigation. "It is settled law that an attorney cannot compel his client to continue litigation, and that the client may dismiss or settle the cause of action without consulting his attorney." *Purvis* v. *Walls,* 184 Ark. 887, 44 S. W. 2d 353.

Mrs. Requa testified that she was devoted to her daughter, Mary Ollie, that Ollie loved her, and that Mr. Dew, Ollie's husband, was kind and good to her, and that she wanted to live with them the remainder of her life.

Mary Ollie freely and frankly admitted and conceded that she was morally obligated to care for and support her mother for the remainder of her life and wanted to do so.

Ernest Dew admitted that Mrs. Requa should look to Ollie and him for care and support.

The gift of the Arkansas Power & Light Stock (or its proceeds) by Mrs. Requa to her daughter, Ollie, was intertwined with and grew out of the other conveyances by Mrs. Requa to Ollie and is supported by the same consideration: that is, Ollie's obligation properly to care for, support and provide for Mrs. Requa during her entire life and then to provide suitable burial.

The Ashley County farm was purchased with the proceeds of the Arkansas Power & Light Stock, so that farm, as well as all the other property, should be and is impressed with the trust, (*Bowen* v. *Frank,* 179 Ark. 1004, 18 S. W. 2d 1037),—acknowledged by Mrs. Dew

in her testimony—that Mr. and Mrs. Dew are to properly care for, support and provide for Mrs. Requa during her life and then to provide suitable burial.

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

SLOAN, TRUSTEE *v.* ROBERT JACK POST NO. 1322 VETERANS OF FOREIGN WARS.

4-9464 239 S. W. 2d 591

Opinion delivered May 14, 1951.

Lonnie Batchelor and *Ralph W. Robinson,* for appellant.

Rains & Rains, for appellee.

GRIFFIN SMITH, Chief Justice. This is a friendly suit to settle controversies regarding funds publicly donated for a purpose now impossible of fulfillment. It is controversial in the sense that each group of litigants,

while differing, has proceeded in good faith, but was unwilling, without judicial sanction, to yield to the other's construction of asserted rights.

Early in 1946 committees—appointed, upon the one hand, by Robert Jack Post No. 1322, Veterans of Foreign Wars, and upon the other by the local American Legion Post—asked citizens of Fort Smith, Van Buren, and nearby communities to donate money for construction of a Veterans Hut in Van Buren. It is undisputed that when solicitations were made there were assurances that the Hut would be available to all veterans, regardless of membership in any organization. As money was received it was turned over to Charles Matlock—one of three trustees—who deposited it in a Van Buren bank. The account is designated Veterans Building Fund. It amounts to $1,910, including $110 realized from a carnival sponsored by the Legion.

The suit was filed by Robert Jack Post, hereafter referred to as V. F. W. The Veterans Building Fund, as a personification, was listed as a defendant. Other defendants were Ed Sloan, Charles Matlock, and Lonnie Batchelor, trustees, and the depository bank. The American Legion Post, as such, was not named, but its activities and the interest it claimed in the deposit were set out. Prayer of the complaint was that the bank be directed to turn the money over to the V.F.W. quartermaster for use in erecting a Hut conforming (as to use) to representations made when donations were solicited; but in the alternative it was asked that the court determine what rights the plaintiff had in the fund.

The trustees in answering denied that the money could not be utilized as the donors intended. Inferentially, however, the answer admitted that a new Hut would not be built, but that in the alternative, and as substantial performance of the trust, a plan that should prove satisfactory to all could be adopted whereunder an existing building could be acquired, "title thereto to be taken and held in such manner that its utility will be available to all veterans, as originally intended."

The complaint, in asking that the money be paid to the V. F. W. quartermaster, concedes that if the plaintiff prevails the fund will be used "for the purpose of erecting a Hut or building for the veterans of foreign Wars, which is the next closest purpose for which the said money was solicited," thereby tacitly conceding that the *actual* intent must to some extent miscarry.

What is referred to as an agreed statement of facts appears in the record, but it is not signed by either party. Included in the statement were minutes of a meeting of V. F. W. held February 4, 1946. A committee reported "on the building of the Hut with the American Legion." This was followed by adoption of a tentative plan to "go on with the Legion." Minutes of Legion meetings were copied showing that all of the activities, whether by V. F. W. or the Legion, contemplated a Hut for joint accommodation of the two organizations, but available to all veterans, irrespective of membership.

In 1949 V. F. W. demanded of the Legion "an accounting and division" of the money. This, however, was coupled with the assertion that restitution should be made, "in keeping with the reputation and respect which the V. F. W. now enjoys." Refusal of the trustees to acquiesce in this demand resulted in the present suit. The chancellor rejected plaintiff's claim to all of the fund under the *cy pres* doctrine, (a contention advanced during trial but not expressly asserted in the complaint) but thought that the contending parties stood on a parity because of equal participation in making solicitations,—the term "parties" having reference to V. F. W. and the American Legion as distinguished from the trustees and the bank. It was decreed, first, that the costs of the suit be paid from the fund, and secondly that net proceeds be divided equally between the two organizations.

Uncontradicted testimony was that V. F. W. membership is restricted to veterans who saw foreign service, while any veteran, regardless of foreign service, may be a member of the Legion. Less than a third of the known

veterans in Crawford county affiliate with either organization.

Witnesses who seemingly spoke for the Legion as a body testified to plans for purchasing an old structure and converting it into suitable quarters. Appellee (the cross-appellant here) refers to the structure as a "one-story ramshackle building used for many years for storage of berry crates." V. F. W. insists that it will construct quarters in all respects suitable for use of veterans, and that in addition the building may serve as a community center. The cross-appeal is from that part of the decree denying V. F. W.'s contention at the trial that its substituted plans were better in point of veteran requirements than those offered by the Legion, and that the *cy pres* doctrine ought to prevail.

The briefs are in accord regarding the nature of the trust: that is, the donations were made for a public as distinguished from a private or self-serving purpose. We agree that insofar as the several trust classifications are to be considered, rules governing charitable trusts are applicable, although neither litigant as an organization can be regarded by the public or in law as coming within the sphere of philanthropy. No responsible spokesman for veterans has ever urged attention upon a basis other than patriotic considerations—consideration responsive to impulses of gratitude for services actually performed, hence the term "charity" as applied to this litigation is no more than the common denominator in the law of trusts; and nothing else is implied.

A point that, on appeal, seems to have been subordinated to the claims of the litigating parties is the dominant purpose the donors had in mind when they contributed to the fund. There is nothing in the record showing that any distinction was made between interests of V. F. W. and the American Legion. Testimony and the agreed statement justify a finding that the two agencies began harmoniously and that donations were made in the belief that when the Hut was built it would be accessible to veterans generally. But now, if utility is restricted to those who saw service abroad, or if the

range is broadened and a community center is provided, the paramount purpose visualized by those who gave will have been substantially altered. The same is true if the fund is divided between the contending groups.

In some respects the principle here is analogous to *State* v. *Van Buren School District,* 191 Ark. 1096, 89 S. W. 2d 605. There the school district was required to repay money it had borrowed from a fund bequeathed in trust to an established place of learning known as the Crawford Institute. The will was executed in 1856 and it designated trustees who were to administer the fund within terms of the gift and as the Institute's needs required. It ceased to function because of Civil War difficulties and was not reëstablished; but, the purpose being educational, the trustees felt that loans to the district would not be inconsistent with the donor's objective. The Institute was created by a legislative Act in 1854 as a corporate entity under the care and patronage of the Methodist Episcopal Church, South. A broader factual understanding may be had by reading the opinion of Mr. Justice MEHAFFEY, delivered in 1936. The claims of Hendrix College were upheld in a finding that the donor had established a perpetual trust to support an institution of learning under supervision of the Church.

In discussing the *cy pres* doctrine the opinion quotes from *Schell* v. *Leander Clark College,* 10 Fed. 2d 542. The rule there announced and discussed by Judge SCOTT is pertinent here. Where it becomes impracticable or impossible [said the Judge] to administer a charitable trust according to its terms, "a court of equity will assume jurisdiction thereof, and, in the exercise of its broad general powers, direct the trustees to administer the same, [or the court will] apply the *cy pres* doctrine thereto."

The doctrine is one of approximation and is never resorted to unless difficulties in complying with the trust according to its terms are so great as to become administratively impracticable; but the general objective is never lost sight of.

In the instant case neither litigant disputes the general proposition that those who donated did so under representations that the Hut would be built for the convenience and accommodation of all veterans.

We think the court erred in recognizing the claim of either litigant. When the undisputed testimony revealed construction programs substantially at variance with representations made to donors, and an unwillingness by the two groups to compose their differences and perform the implied contract, the trust failed, and the court was without power to apply equity in respect of V. F. W. and the Legion when dominant rights of contributors intervened.

The item of $110 realized from the Legion-sponsored carnival is basically different from the donations and can not be refunded. The cost of this suit may be paid from it and the balance will be subject to division. All contributions, however, should be repaid.

Reversed.

HUNT *v.* MCWILLIAMS.

4-9238 240 S. W. 2d 865

Opinion delivered November 20, 1950.

Rehearing denied December 15, 1950.

Gaughan, McClellan & Gaughan and *Mahony & Yocum,* for appellant.

Keith & Clegg, for appellee.

GRIFFIN SMITH, Chief Justice. Counsel for appellee McWilliams state the substance of the jurisdictional problem in this controversy when they assert that because their client is sole owner of the forty acres he may sue for cancellation of an oil and gas lease; and this may be done without bringing into the litigation non-participating royalty holders whose aggregate interests were 98/113ths. The trial court held that the royalty owners were not indispensable parties, since their concern was with oil [and gas] as such, in contradistinction to operations or plans pertaining to production, or use of the land from which such minerals might be taken and brought to the surface as merchantable commodities.

In 1938 McWilliams and others who then owned the land executed an oil and gas lease to J. E. Childers on 80 acres in Columbia County. The primary period was ten years. Before the suit resulting in this appeal was filed McWilliams acquired the interests of those who were associated with him in 1938. Since legal descriptions are not important here, the two tracts will be referred to as the *east* forty, and the *west* forty. By assignment leasehold estates were created, with the result that in October, 1948, all of these leases were owned by Hassie Hunt Trust, subject to overriding royalties in favor of one individual and three oil companies, and by another whose interest is spoken of by appellee as "an oil payment."

Under permit issued in October, 1939, an oil well was drilled on the *east* forty at a cost of slightly more than $60,000. Since that time it has been producing sufficiently to come within the allowable fixed by the Arkansas Oil & Gas Commission. The original lease provided that it should remain in force after the ten year period if gas or oil should be produced.

Early in 1940 a dry hole was drilled on the *west* forty at a cost approximately equal to expenditures for the producing well. If, in leasing the land in 1938, the

two tracts had been treated separately through use of words from which the legal conclusion would attach that life of the grant of one forty did not depend upon development of the other, it might be argued that the explorations made in good faith in 1940 with consequent failure of production terminated the lease on *that* acreage when the primary period expired. But the two forties are treated as a whole in the lease: "The northwest quarter of the northwest quarter of section fifteen and the northeast quarter of the northeast quarter of section sixteen, all in township eighteen south, range nineteen west, *and containing eighty acres,* more or less." It follows that the producing well, *prima facie,* continued the lease on the full eighty acres, and the initial question is whether a court of equity had the right to entertain a petition by appellant for cancellation on the allegation that there had been a failure to reasonably develop the *west* forty, and to decree relief without consent of the royalty owners and in circumstances where they were not given an opportunity to be heard. Appellants concede that the dry hole on the *west* forty has been abandoned, but say the acreage has not. Because of the comparatively new technique in developing oil lands, and the ability of drillers to go deeper than formerly (while at the same time taking care of shallow production) it is contended that abandonment is not implicit in the mere fact of prolonged failure to drill. We do not deal with merits of the petition for cancellation, but rest the decision upon equitable rights of the royalty holders to be heard.

The point does not appear to have been decided by this court in litigation involving royalty owners situated as were those with whom we are dealing. In other jurisdictions where similar issues have been adjudicated results have sometimes been influenced by domestic statutes.

We assume—and the assumption presupposes that none of the parties here was actuated by ulterior motives—that in seeking cancellation the landowner did not intend to serve his own interest to the detriment of roy-

alty owners. McWilliams relies upon words in the royalty deeds reserving to the grantor the exclusive right to lease in whole or in part "without interference or hindrance upon the part of the [royalty owners"]. He also assumes that the right to lease and the right to cancel and *re*-lease amount to the same thing.

The original Chancery action was removed to Federal Court (El Dorado District) upon a showing of diversity of citizenship. McWilliams then amended his complaint by alleging interests of the royalty holders and petitioning that they be made parties. Judge Miller ruled that this had the effect of destroying complete diversity, hence he sent the cause back to Chancery. It was Judge Miller's belief that the royalty holders were indispensable parties, and the record shows that their addresses were known to the plaintiff. Because of these facts class or virtual representation is not involved, the essential knowledge having been shown.

A Federal case bearing upon issue similar to those raised by appellants here is *Calcote* v. *Texas Pac. Coal & Oil Co.,* (Fifth Circuit) 157 Fed. 2d 216. While the question involving jurisdiction based on diversity of citizenship is extensively discussed, the opinion on rehearing closes with these statements: ". . . These royalty grantees had separate and distinct vested mineral interests, which would necessarily be prejudicially affected by confirmation as well as cancellation of the lease. . . ." The Court then quoted from *Mallow* v. *Hinde,* 12 Wheat. 193, 198, 6 L. Ed. 599, where a jurisdictional question was being considered. Said Mr. Justice TRIMBLE: "We [put this case upon a ground much broader than that of jurisdiction] which must equally apply to all courts of equity, whatever may be their structure or jurisdiction. We put it on the ground that no court can adjudicate directly upon a person's rights without the party being either actually or constructively before the Court."

The Supreme Court of Kansas, *Thiessen* v. *Weber,* 278 Pac. 770, held that failure of certain royalty grantees

to be joined in a suit to cancel leasehold rights did not prevent action by other owners. But the persons who complained of the lower Court's dismissal for non-joinder of necessary parties were asked to join in the suit. When they declined to do so they were made defendants. The appellate Court said that the unwillingness of one or more of those holding royalty interests to permit cancellation did not prevent others from maintaining the action "to the extent of his interest."

In *Matthews* v. *Landowners Oil Ass'n,* opinion by the Texas Court of Civil Appeals, (Amarillo District) 204 S. W. 2d 647, it was held that oil and gas lessors and their assigns were necessary parties to a suit to cancel leases involving a pool of lessors' interests in royalties arising from production on any of the land included in the pool, the alternative contention being that the leases created a trust with the lessee as trustee, so as to render a lessee the only necessary party. Numerous facts distinguish the case from the litigation at bar. However, the opinion contains this expression: "In a suit to cancel a written instrument all persons whose rights or relations with the subject-matter of the suit will be or might be affected by cancellation, are necessary parties."

Judge JOHN E. MILLER, *Alphin* v. *Gulf Refining Co.,* 39 Fed. Supp. 570, cites Prof. Summers' text on Oil and Gas v. 3, § 514, Permanent Edition, where undivided shares in royalty interests are mentioned.

The Supreme Court of Texas, *Shell Oil Co.* v. *Howth,* 159 S. W. 2d 483, in passing on an oil and gas controversy used this expression: "Furthermore, it appears that after Howth executed the lease to the Shell Company he conveyed a part [of his royalty interest] to other parties. These vendees were not made parties to the suit. They were necessary parties to the action to cancel the original lease." The Court cited *Sharpe* v. *Landowners Oil Ass'n,* 92 S. W. 2d 435, 127 Tex. 147. In the Sharp case it was said: "It is settled beyond all question in this state that in a suit to cancel a written instrument all persons whose rights, interests, or relations with or through

the subject-matter of the suit will be affected are necessary parties."

Arkansas Statutes, § 27-814-15 (§§ 36-37 of the Civil Code) were construed for this Court by Mr. Justice BATTLE in 1886. An excerpt from the opinion is: "From these provisions of the statute it is clear that it is within the discretion of the court, in an action for the recovery of real or personal property, to order any person having an interest in the property to be made a party when he applies and asks that it be done. But this discretion is limited to the right to determine the controversy between the parties already before the court. The obvious intention of the statute is to require all persons to be made parties to an action who will be necessarily and materially affected by its result, and to forbid the court from determining any controversy between the parties before it when it cannot be done without prejudice to the rights of others, or by saving their rights. In such cases it is the duty of the court to allow such persons to be made parties, to the end that they may protect their interests." *Smith* v. *Moore,* 49 Ark. 100, 4 S. W. 282.

The decree authorizing McWilliams to cancel the lease contains a provision that it shall not affect the rights, if any, of the non-participating royalty owners . . . "in the [*west* forty"]. Unfortunately cancellation of itself affected the holders of these interests, for the decree cleared the way for the landowner to contract anew. This later lease may or it may not be advantageous to the old royalty grantees; but the fact remains that their rights to oil and gas taken from property under a lease existing when the royalties were conveyed were destroyed as to *that* lease, and this was done while they were legally absent. This does not mean that, as to non-participating royalty owners, they would have to be consulted in circumstances where a new lease could be legally negotiated.

It is conceivable (though not suggested in this case) that collusive action between lessor and lessee could so adversely affect royalty grantees as to destroy or impair their property rights.

Our conclusion is that adjudication without giving the absent interests an opportunity to be heard was improper, hence the decree must be reversed. The cause is remanded for a new trial.

Mr. Justice McFaddin and Mr. Justice Millwee dissent.

Ed. F. McFaddin, Justice (Dissenting). The majority is holding that the owner of a *nonparticipating* royalty[1] is a *necessary* party in a suit to cancel an outstanding oil and gas lease; and I dissent from such holding.

In May, 1938, McWilliams and others, as owners of the surface and minerals, executed to Childers an oil and gas lease, which, by assignment, is now owned by the appellants, Hunt, *et al.* This was a regular 88 and 1/8th commercial oil and gas lease, in which the lessors were to receive 1/8th royalty of all oil, etc., produced. After the execution of the lease, McWilliams acquired the interest of the other landowners; and thereafter, McWilliams executed certain nonparticipating royalty deeds, hereinafter to be discussed; but he continued, at all times, to be the owner of the lands and the participating mineral rights.

In 1948, McWilliams, as plaintiff, brought this suit against Hunt, *et al.,* to cancel the lease, because there had been no development[2] on the 40 acres here involved. Hunt, *et al.,* claimed that all of the nonparticipating royalty holders should have been made parties to this suit; and the majority is holding that Hunt's contention was correct. There is no suggestion that McWilliams, in seeking to cancel the lease, is prompted by motives that would fraudulently affect the holders of the nonparticipating

[1] In 3 Arkansas Law Review 190, there is an article entitled "Arkansas Form of Royalty Deed for Oil and Gas Conveyances"; and in speaking of "a nonparticipating royalty interest" the writer says, "By which is meant only the right to share in the royalty to be delivered by lessee under a present or future lease, . . ."

[2] See *Poindexter* v. *Lion Oil Co.,* 205 Ark. 978, 167 S. W. 2d 492; *Ezzell* v. *Oil Associates,* 180 Ark. 802, 22 S. W. 2d 1015; *Standard Oil Co.* v. *Giller,* 183 Ark. 776, 38 S. W. 2d 766; and *Drummond* v. *Alphin,* 176 Ark. 1052, 4. S. W. 2d 942.

royalty.[3] The only point decided by the majority is that a nonparticipating royalty holder (holding under an instrument now to be copied) is a necessary party to this suit; and that is the point on which I dissent.

Essential to an understanding of this case—and, from my point of view, determinative of the issues—is the exact wording of the nonparticipating royalty deed here involved. I copy the pertinent provisions: McWilliams conveyed to one grantee "An Undivided 5/113 interest in and to all of the oil, gas and other minerals, in, under and upon the following described lands." Then follows the description of the 80 acres. Immediately after the description, the deed contains the language which makes it a *nonparticipating* royalty deed and which reads as follows:

"The grantor herein expressly reserves to himself, his heirs or assigns, the exclusive right to lease said lands, or any part thereof, for oil and gas purposes, without interference or hindrance upon the part of the grantee, her heirs or assigns; and the grantee herein, her heirs or assigns, shall never be entitled to receive any part of the consideration, cash or otherwise, paid or to be paid, for any oil and gas mining lease heretofore or hereafter executed covering said land, or any part thereof, nor shall the grantee, her heirs or assigns, ever be entitled to receive any part of any delay rentals to defer the commencement of drilling operations provided by any such lease; and the grantee herein, her heirs or assigns, shall not be required to join in the execution and delivery of any oil and gas mining lease covering said land, or any part thereof, in order to convey good title to lessee thereunder, PROVIDED, that the grantor herein expressly covenants with the grantee that no oil and gas mining lease shall ever be executed covering the above land, or any part thereof, that shall reserve to the grantor herein, his heirs and assigns, as royalty, less than one-eighth of all of the oil and gas produced and saved from

[3] In the majority opinion there is the statement, "We assume—and the assumption presupposes that none of the parties here are actuated by ulterior motives—that in seeking cancellation, the landowner did not intend to serve his own interest to the detriment of royalty holders."

said land and this covenant shall be deemed a covenant running with the land.

"It is the intention of the parties hereto that the grantee herein, her heirs, or assigns, shall be entitled to receive hereunder 5/113 of all oil and/or gas run to the credit of the royalty interest reserved under and by virtue of any oil and gas mining lease now in force and effect covering said land, and under any oil and gas mining lease hereafter executed covering said land, or any part thereof; and in any event the grantee herein, her heirs or assigns, shall be deemed the owner of and shall be entitled to receive 5/904 part of all oil and gas produced and saved from said land, or any part thereof."

Except as to the interest conveyed, each of the other nonparticipating royalty deeds executed by McWilliams contains language identical to that copied above; and I maintain that the plain language of the nonparticipating royalty deed makes the majority holding indefensible. I point out:

(1)—Clearly, the parties to the nonparticipating royalty deed intended that McWilliams should have the unrestricted right to again lease the land for the production of oil and gas after the termination of the existing lease. If Hunt had voluntarily released the oil and gas lease on the west 40 acres, McWilliams could have executed a new lease without consulting the nonparticipating royalty holder. Why, then, is it necessary for McWilliams to bring in these nonparticipating royalty holders in his suit to obtain a cancellation from Hunt, when if Hunt had voluntarily surrendered, McWilliams could have leased without consulting the nonparticipating royalty holders?

(2) At the time the nonparticipating royalty deeds were executed in this case, it was well known to all informed persons that *a portion* of an oil and gas lease covering lands in Arkansas could be forfeited for nondevelopment.[4] Such forfeiture is not self-executing but must be effected by a decree in Chancery. If a part of an entire tract could be forfeited for nondevelopment of

[4] See cases cited in Footnote No. 2, *supra*.

such part, then by no process of reasoning can I see why one royalty holder cannot declare his part free of a lease without being required to bring in all of the other royalty holders.

(3)—I submit that if the holder of a nonparticipating royalty deed is a necessary party to a suit to cancel a pre-existing lease—as the majority holds—then the same reasoning carried to its logical conclusion would mean that the holder of a nonparticipating royalty deed is an essential party to sign a new oil and gas lease on the premises. I don't believe the majority of the Court will ever go that far. It would certainly be revolutionary in the oil business for a person holding such an instrument as the one here copied to have to be consulted about the execution of a lease, when the very instrument under which he claims, says that he has no right to be consulted.

The majority opinion cites five cases but only one of these is a case involving a nonparticipating royalty deed. That case is *Calcote* v. *Texas Pacific Coal and Oil Co.,* 157 Fed. 2d 216, 167 A. L. R. 413, and is an opinion from the Circuit Court of Appeals of the Fifth Circuit. The full text of the nonparticipating royalty deed there involved is not contained in the opinion. But at all events, the zealousness, with which Federal Courts watch the matter of *diversity of citizenship* and *indispensable parties,* is well known; and that opinion from a Federal Court in another Circuit should not be seized upon as sufficient justification to change the contractural rights between parties as stated in the instrument under which they claim. A recent case not cited by the majority, and apparently opposed to the Calcote case, is that of *Superior Oil Co.* v. *Stanolind Oil Co.,* 230 S. W. 2d 346. It was decided by the Eastland Texas Court of Civil Appeals, and a writ of error was granted by the Supreme Court of Texas on January 10, 1951 (148 Texas 648).

The crux of the whole question in the case at bar is whether the rights of the grantor and grantee in a *nonparticipating* royalty deed are to be determined by the clear language of the said instrument.

MAGNOLIA PIPE LINE COMPANY *v.* ARKANSAS STATE GAME & FISH COMMISSION.

4-9407 240 S. W. 2d 857

Opinion delivered March 19, 1951.

[redacted]

Armistead, Rector & Armistead, for appellant.

E. E. Ashbaugh and *Clark & Clark,* for appellee.

PAUL WARD, J. The appellee, Arkansas State Game and Fish Commission, filed a condemnation suit against the appellant and others seeking to condemn an easement over and across several thousand acres of land in Faulkner County for the purpose of constructing a lake near Conway.

The appellant, Magnolia Pipe Line Company, is the owner and operator of a twenty-inch interstate crude oil pipe line running from a point in Texas to a point in Illinois, which line crosses the area involved. This line was constructed before this suit was filed.

Appellant challenged unsuccessfully the right of appellee to condemn and an appeal was taken from the decision of the Chancery Court to this court, where it was affirmed on May 2, 1949, in the case of *W. R. Wrape Stave Co.* v. *Ark. State Game and Fish Com.,* 215 Ark. 229, 219 S. W. 2d 948. It then became the duty of the Chancery Court to try the issues framed by the complaint and answer for the purpose of assessing such damages as the defendant might sustain from the construction of the contemplated lake. Appellant waived any rights it had to a trial by a jury and the parties agreed to a trial before the Chancellor.

From the Chancellor's findings of fact we quote the following: "A jury was waived by the parties and this issue was submitted to the court on the 19th of July, 1949. Testimony was taken before the court by Boyd Keathley, court reporter, and by him transcribed and has been filed as depositions in this cause."

Appellee in its brief sets out what it contends is a quotation from the judge's docket: "On this the 19th day of July, 1949, comes on for hearing the matter of assessing damages to the Magnolia Pipe Line Company for property taken or damaged by the plaintiff. The said defendant, Magnolia Pipe Line Company, expressly waives any right it may have to trial by jury and agrees to submit all questions of damage to the court sitting as a jury."

In the light of the above appellee contends that this court should not disturb the finding of the lower court if there is any substantial evidence to support it the same as if the case were tried by jury. But we are not in agreement with this contention. In the first place, if appellant had wanted the issue tried by a jury his remedy would have been to move to transfer the cause to the Circuit Court. Moreover, we do not hold that appellant would be bound by a finding of fact made by the court as quoted above nor by any notation that the court made on its docket as in neither instance was it signed by appellant. The matter will be tried *de novo* by this court.

The lower court gave appellant judgment in the amount of $10,000 from which comes this appeal.

It is not denied that appellant is entitled to some damages and the question for us to decide is whether the weight of the evidence supports the finding of the lower court and if not then how much damage is the appellant entitled to receive. The learned Chancellor made special findings of fact on which he based the allowance or disallowance of damages and we think it would help to clarify the issues here to quote or paraphrase some of those findings, and also some of the findings which were requested by appellant and were disallowed by the Chancellor.

Appellant's request No. 1 is as follows: To "find that this defendant would be damaged by the construction of the proposed dam and lake to the extent that the cost of affording cathodic protection to its pipe line is increased by reason of the flooding of its right of way by the proposed construction, and to fix the amount of such damage in such sum as the evidence shows such cost will be increased." In refusing the above requested finding the court said that the evidence was mostly opinion and was too general in its nature for the court to determine with any degree of certainty to what extent if any such protection would prolong the usable life of the pipe line; that the reason for the proposed erection of cathodic protection is the fact that the sewage from the City of Conway flows through the creek and that the corrosive elements of the water would be more likely to cause a break in the pipe wrapping exposing metal to these elements or incident acid content by reason of this sewer disposal; that this protection would be of no value so long as the pipe wrappings remained intact; that appellant used strict precaution to protect its line at this point and that this treatment would be of no value so long as the pipe wrapping remained intact. But that if the sewerage is diverted it would no longer be a dangerous element. That there is no justification for a finding that there would be any more necessity for additional cathodic protection after the lake is built than presently exists in the water-logged area in which the company elected to lay its pipe line. Also that the value of such protection is still in its embryonic stage.

Appellant's request No. 4 asked the court to find that its damage would be the cost of relocating and replacing 6.18 miles of its line and that the cost would be $297,507.59. In response the court found that the building of the lake would not make it necessary for the pipe line company to relocate its line for the distance mentioned above.

Appellant's request No. 3 defines perhaps the most important issue we are to consider and we set it out in full: "That by the construction of the proposed dam and

lake, such defendant's right to access to its right of way covered by the water of the lake for purpose of maintaining, repairing, conditioning and operating its pipe line will be destroyed or greatly impaired and its measure for such destruction or impairment is the difference in the cost of maintaining, repairing, operating and conditioning such line over and above what the cost would have been if the lake is not constructed, and to fix its damages in whatever amount the testimony justifies.'' In response to the above the court found appellant to be damaged to the amount of $10,000. We find that we are not wholly in accord with the conclusion reached by the trial court and in testing this conclusion it is necessary to abstract the testimony at some length.

Abstract of Appellant's Testimony

A. G. Pressly states he is an engineer, employed by appellant and has been for 24 years; he would not know how much more of the line would be under the water level after the lake is built, but it would be considerable; observation of the drainage basin is confined to the years beginning with 1946 and 1947. They were pretty dry years. The line was laid in July and August, 1947, a very dry part of the year.

J. E. McGeath has been employed by appellant for 25 years; the last 3 years has been assistant general superintendent; is sure building the lake over the line will damage it; thinks the best thing for appellant to do is to relocate that portion of its line. The line going across Stone Dam Creek was encased because it was discovered that some sewage was coming down into the creek. It would cost $297,507.59 to relay the line. In the event the lake is built over the line he would expect leaks in that area to begin to show up within 3 years. You can protect the line to some extent by cathodic protection and in that case he would not expect leaks for 10 years. The normal life of the line as now laid is about 30 years. Even with cathodic protection we would expect about 2 breaks or leaks a year. Over a period of 20 years we would expect 40 leaks. If the water is not over the line it would cost about $500 to

repair each leak, otherwise it would cost $2,000 to $2,500 each; if the water was over the line in order to repair we would have to build a coffer dam. Could wait until the water receded to make the repair, but would not know how long you would have to wait. To build a coffer dam would take about 2 days and the gross income from the pipe line is $30,000 a day, during which time the line would be out of use. There is a difference between casing a line and wrapping and coating a line. All of the line to this area has been wrapped and coated. If the wrapping and coating hold you will not have any leaks; leaks are what make the line corrode. Under normal conditions would expect to recondition the line in 20 to 25 years, which would extend the life seventy-five per cent. This pipe would have been cased if it had run through the lake as it was built. Planning to establish about 30 cathodic treating plants along the line of 650 miles or an average of 1 in every 20 miles. Normally would expect to recondition every 20 to 25 years, but if the line is under water would have to recondition in 20 years. Normally would expect 5 or maybe 15 or 20 years more life. Replacing costs more than reconditioning. There has been no recent soil or water analysis made at this place that he knows of; plan to use cathodic protection where the line crosses Stone Dam Creek, regardless of whether the lake is built or not. Thinks alternate wetting and drying of the soil traversed by a pipe line would set up soil stresses and if the protective covering is broken thereby the pipe line is rendered subject to corrosion. All of the pipe through this area is double wrapped and 114 feet where the pipe line crosses Stone Dam Creek is encased. It is double wrapped with fiberglass and felt; normally would expect leaks in 10 years and after that time 10 or 15 breaks per year for each 100 miles.

D. H. Levy is 56 years of age, and has a Bachelor of Science Degree in Electrical Engineering from Texas A. and M.; been employed by appellant for 22 years and is General Superintendent of Telegraph Telephone and Electrical and Corrosion Department. Cathodic protec-

tion of a pipe line consists in reversing the natural current that flows from a pipe line into the earth. It is recognized by industry as the best known way of protecting a steel pipe line against corrosion. If there were no breaks in the coating there would be no corrosion. Plans to make 30 such installations on the whole line; already made two. If the lake is built plan two more cathodic installations. If the lake is built the sewerage would be dispersed with the acid content throughout the basin and would cause an increased rate of decay of vegetable matter with constant increase of acid conditions, would cost $21,000 to install a cathodic protection unit and it would cost $42,000 to install two more; agrees with Mr. McGeath that he would relocate the line with cathodic protection and after 10 years would have perhaps two leaks per mile per year. Has made no tests to determine what electrical currents are passing through the pipe line now. Glass and asbestos will stay there and hopes the coal tar will stay there; this is the best wrapping known. In all bottom lands this line was wrapped in fiberglass plus asbestos. Have not made any soil tests or analyses in this area; don't figure they are worth a "tinker's dam", spent $100,000 making soil tests on a 60-mile line several years ago. At two of the creeks where there was no sewage the pipes were not cased; under normal conditions that ought not to give any more trouble than the rest of the system. The water that goes through those creeks is natural water, it will run off, here today and gone tomorrow. Assuming that there will be two feet of evaporation a year every five years you will have double the saline content for the water, and in five years you would have evaporated the whole thing. Also you are submerging 6,000 acres of grass, weeds and trees and brush and these acids would have a tendency to form in the basin, but admits 60 inches of rain a year would dilute the water, but the sediment is going to stay in the lake. If the lake has a spillway that would have a tendency to dilute.

"Q. Wouldn't that be beneficial to the pipe by diluting the solution? A. Dilution would be, but the best

thing is to remove the water from the pipe line. The process of evaporation, continuing over a period of years will cause salinity to increase. By salinity is meant the salt content, that is any of the salts; it will cost practically the same to recondition as to lay a new pipe line."

C. I. Sims is a Corrosion Engineer, graduated from Texas School of Mines; has never been employed by appellant. Agrees that there should be three cathodic units, one at each creek crossing, and in that event leaks would be expected within 10 years if not under water, but if under water within three years. Leaks from faulty construction and faulty welds usually appear within a month after the line is laid. If lake is built and there is no cathodic protection, expect leaks in three months, but if lake is not built, leaks in five to 10 years.

"Q. Will that wrapping pull off of the pipe by the alternate wetting and drying? A. It has been known to. However, I think your greatest damage is done from contraction and expansion of your pipe. Between the two different extreme seasons, that is winter and summer."

Thinks the normal life of the line across Palarm Creek Bottom, that is the three creek bottoms, would be slightly under 30 years, and that the life would be reduced 50 to 60 per cent in the event the lake is built, and no cathodic protection. With cathodic protection, it would be reduced 20 to 25 per cent, even if the sewage were diverted there would be enough corrosive agent in the water to reduce the life of the line 20 or 25 per cent. If sewage has been deposited over a portion of an area for a period of 30 years I think the soil would become impregnated, especially near the creek, 100 feet on each side.

Abstract of Appellee's Testimony

C. E. Corder lives in Little Rock, employed by the Van Trump Testing Laboratory. Attended N. Little Rock High School and Layne Tech. in Chicago. Had 17 years laboratory experience as a chemist. Recently made

some soil and water tests in the area of Stone Dam Creek where the Magnolia Pipe Line crosses. Dug five holes in the soil in that vicinity. Hole No. 1 was near the pipe line and dug approximately 30 inches. Water started pouring in at a depth of 10 inches; the PH value was 4.6. PH is the measure of acidity. Three hundred feet south dug Hole No. 2, 20 inches deep and water poured in at 12 inches; PH value 4.4; 700 feet south of test hole No. 1 dug Hole No. 3, 30 inches deep, water poured in at 16 inches below the ground; PH value 4.6; came back to Stone Dam Creek for test No. 4 and dug it approximately 75 feet south of the center line of the creek, approximately 30 inches deep and water poured in at 12 inches below ground level. Test No. 5 was made 75 feet north of center line of creek, dug approximately 30 inches; this hole did not show free water pouring into it. Thinks the acid concentration will be diluted in the event the lake was filled, and the area continually submerged. There would be less acid with the other water on top and thinks it would be less harmful to things that might be submerged in the water.

"Q. 4.4 PH—how acid is that with reference to neutral 7? A. That is rather strongly acid, comparatively."

If the sewage was stopped from flowing into Stone Dam Creek considering there is a 7,000-acre lake it would not be noticeable anyway.

Col. John Buxton lives in Little Rock, is a Civil Engineer, graduate from Missouri State at Cape Girardeau; has had about 30 years general practice. Was with Arkansas State Highway Department about four years. Experience limited to construction, maintenance and operation of the natural gas distribution system at Camp Robinson and similar work as Post Engineer at Amarillo Army Air Field in Texas and at Camp Barker at Abilene, Texas. In the latter camps had charge of the maintenance of all under ground distribution systems. Put in nearly 100,000 feet of pipe at Camp Robinson in November and December, 1940. Found that none of the pipe had been protected and none of it had corroded to a

point of failure, when it was removed. Has made a personal inspection of the Stone Dam Creek area and does not think electrolysis would have any effect upon the pipe line unless there were breaks in the covering. "If the pipe covering should happen not to have any failures, the electrolysis would be practically non existent. That is, of course, a hoped-for extreme which is hardly ever reached." Has read a report by McCullum & Peters, and based on this report I would say that after moisture content passes 40 per cent there is no increase in the corrosion factor. His experience with a pipe line is that more leaks occur in spring and fall as a result of expansions and contractions due to temperature changes. Other causes would be faulty work and faulty welding at joints; the other cause of leaks of course is corrosion. If the pipe line is covered by water temperature changes would be more uniform and less rapid, does not think there would be any material difference in the life of the pipe line in the Stone Dam Creek area as between present conditions and conditions created by building a lake over the line. If the tests mentioned before showed a moisture content of 24 per cent he does not understand this but thinks that if free water ran into the hole the whole thing would be saturated. Thinks perhaps the samples were tested after they were carried to Little Rock.

Joe Burlingame lives in Little Rock, is an engineer for the Game and Fish Commission. Went to Centenary College at Shreveport and had two years at the University of Arkansas. Was in the oil business for 10 years and was with the State Department of Public Utilities for four years as an appraisal and depreciation engineer on gas and water properties, in which time he had occasion to inspect gas pipe lines. Spent 10 years in east Texas oil fields as pipe line superintendent for two small companies. Duties were to construct and maintain oil and gas pipe lines, crude oil gathering systems. Even though the line is wrapped with fibre glass and a composition of other materials, there would still be damage to the line by corrosion if there was a "void" or "holi-

day". Says the wrapping which was used on the line is good as could be obtained and that it is the last word.

"Q. From your experience how many years would you say this wrapping would last in an area such as Stone Dam Creek? A. I wouldn't hazard a guess. I don't see how any man can pick out a particular spot or pipe line and say that it is going to leak in five or 12 years or any number of years. Q. Anything that any man would say about it would be purely guesswork? A. Entirely guesswork, and the damage to be sustained is guesswork."

A break in the coating would cause corrosion and corrosion would cause leaks and therefore damage to the pipe line. There would be no point in putting cathodic protection along this line unless it was first determined that there was an electrolysis present and that can be determined with instruments. He does not think the construction of a lake would increase the corrosiveness of the area. Thinks the alternate wetting and drying of the soil in the Stone Dam area will be more damaging to the pipe line than if it was completely submerged at all times. It is his opinion that the additional water from the lake would be beneficial to that part of the pipe line in the area of Stone Dam Creek. Thinks changes in temperature have something to do with the cracking and breaking of the wrapping on the pipe; it is theoretically true. If the pipe is all under water the temperature changes would be more uniform and there would not be so much variation in temperature changes. Doesn't think the temperature would have much to do with the breaking of the wrappings, as the pipe is laid below the frost line and if the line is covered with water there would be less variation in temperature. Does not think the decaying timber in the lake the size contemplated would cause greater corrosion on the pipe as there is much rainfall in this area. There are a number of fresh water streams emptying into the basin and water will be flowing through the lake at all times except probably 50 days in extreme dry season of August and September. Thinks that when the lake is built water will only be lost by

evaporation and leaving the timber in the lake will minimize evaporation.

Edgar Parker is the mayor of Conway, city has been discussing an expansion of the sewage facilities, but is waiting to see if the lake is built.

Walter Dunaway has lived in Conway all his life and is not an engineer; thinks the lake will be 300 feet wide where it crosses Caney Creek; 1,700 feet wide where it crosses Stone Dam Creek; and 1,100 feet wide where it crosses Gold Creek; that he measured Stone Dam Creek crossing with the County Surveyor. Based on 20 years observation thinks much of this land would be under water a minimum of 45 days a year and a maximum of 100 days; it is low land.

STIPULATIONS. The records of the United States Engineers' office at Little Rock for years 1927 to 1945 inclusive show the number of days a year the water in this region stood above the 260 contour level; it averaged 34.7 days each year.

A report of rainfall at Conway for the months of January through June, 1949, shows 30.24 inches and the normal is 26.94 inches.

Appellee, through its attorney, agreed that in the event of the necessity of repairs in the pipe line where it is covered by the law, it would lower the lake level and open its gates at the dam.

Appellant's brief shows a detailed cost analysis of 6,400 feet of pipe covered by the lake to be $60,343.54.

In the beginning frankness compels the admission that it is impossible to fix any stated amount as appellant's damages with complete assurance it would be correct. From the very nature of the case many elements of proposed damages are to a large degree speculative. For instance, no one, even an expert, can tell what labor and material costs will be in the future, nor can he tell how long it will be before a break in the pipe line will occur or how many will occur in future years. We agree with the Chancellor that the proposed erection of two

extra cathodic plants is properly excluded as a basis of determining damages. It appears to us that the most reasonable basis upon which to estimate the damages which the building of the lake has caused appellant is the difference in the cost to maintain its line if the lake had not been built and the cost of maintenance because it has been built. As stated before, it is conceded that appellant has been damaged in some amount.

From the nature of this case the testimony all relates to damages which the appellant expects to suffer in the future as a result of the building of the proposed lake, and since this is true much, if not all, of the testimony is in the nature of opinions. Two things, however, stand out with some clarity. One is, there will be during the life of the pipe line breaks in the coating of that portion of the line which will be covered by water and leaks will occur which will have to be repaired; and the other is, it will cost more money to make such repairs with the line under water than it would cost to make same repairs if the line were not under water. Considering these facts along with all the other facts and circumstances mentioned in the testimony we have come to the conclusion that the learned Chancellor should have awarded the appellant the sum of $15,000 for its damages.

The cause is reversed with directions to the lower court to enter judgment in accordance with this opinion.

Griffin Smith, Chief Justice, dissenting in part and concurring in part. I agree that the additional item of $5,000 allowed by this Court is not unreasonable, but do not believe it is possible at this time to determine how much damage will result from the causes complained of. The case is unusual in that Magnolia—a public utility with the right of condemnation—finds itself within the borderline of condemnation in that its pipelines have been covered with water. A preponderance of appellant's evidence shows tremendous damage, or extraordinary cost to partially protect against corrosion. Result of the litigation is that the Commission's rights have been superimposed upon pipeline rights in circumstances where each is entitled to operate geographically, and each occupies

the same area for different purposes—objectives not necessarily inconsistent. A practical solution would be to remand with directions to retain jurisdiction until sufficient time had elapsed to permit actual proof of deterioration and attending loss.

DENEMARK *v.* ED B. MOONEY, INC.

4-9309 237 S. W. 2d 41

Substituted Opinion delivered April 2, 1951.

Original Opinion delivered January 22, 1951.

Earl J. Lane, Arvey, Hodes & Mantynband, Louis M. Mantynband and *J. Herzl Segal,* for appellant.

Hebert & Dobbs, for appellee.

ROBINSON, J. The appellants herein, Mr. and Mrs. Emil Denemark, are residents of Chicago, and are partners owning a string of horses and operating a racing stable.

In the fall of 1948, they decided to build a stable near the race-track at Hot Springs, Arkansas, and had plans and specifications prepared by an architect in Chicago. Denemark brought these plans and specifications to Hot Springs and consulted with Mr. Joe McRae, Secretary-Treasurer and, apparently, Manager of the appellee Ed B. Mooney, Incorporated.

McRae gave Denemark an estimate of the costs of building a stable according to the plans and specifications which Denemark exhibited to him. The parties disagree as to the amount McRae estimated it would cost to build the stable. The plans also provided for living quarters for the grooms in connection with the same building. But, be that as it may, it is agreed that whatever price McRae gave Denemark, it was more than Denemark wanted to spend on the structure.

Denemark then returned to Chicago where he had other plans and specifications prepared for a cheaper barn and a two-story frame residence. After another meeting with McRae at Hot Springs, it was agreed that appellee was to build the structures. The parties are in hopeless disagreement as to the estimate that McRae gave as the cost. McRae says it was $37,817 for the stable and $9,500 for the house. Denemark says the estimate on the barn and house together was $26,500.

In any event, it was agreed that appellee was to construct the buildings on a cost-plus arrangement, either cost plus ten per cent or a straight fee. Denemark returned to Chicago and had his secretary, Mr. Frank J. Kotnour, send appellee $10,000 as part payment.

On November 18th McRae wrote to Kotnour as follows:

"This will acknowledge receipt of the check No. 4632 in the amount of $10,000 which is to be applied upon the costs of the construction of the house and stable

building now under construction by us for Mr. Denemark in Hot Springs, Arkansas.

"I am enclosing the daily report copies of the costs to date on the job, which has been set up on a strict actual cost basis plus 10%, with us to furnish all small tools (hand tools such as picks, shovels, mortar hoes, electric saws, vibrators and allied hand tools that would be used on the job), at no cost to the owner except for re-sharpening. This I discussed with Mr. Denemark when he was here, and he advised me to go ahead and we would agree on either this basis or a straight fee for my services, so I have set it up this way, and he and I will agree on the final figure at a later date when he is down here.

"On all purchases we will furnish you with the original copy of the purchase order with each report at the completion of the job, will furnish you with the invoices to cover same. In this way you will have a complete breakdown of the cost of the labor and material used in the construction of these buildings."

On the 27th of November, Denemark made another trip to Hot Springs at which time he authorized certain changes in the structures and the addition of a one-story bunk-house. McRae was unable to obtain the metal roofing and Denemark, at the cost of about $4,000, obtained it in Chicago, and paid for it.

On December 12th McRae wrote to Kotnour, Denemark's secretary, as follows:

"Enclosed please find the copies of the daily reports for the week ending December 10th together with the Estimate No. 4 and the cash statement to accompany same.

"I will try to give you an over-all picture of the progress of the job for the week as it stands today:

"Barn; all concrete block work 100% complete. Posts for stall framing all erected and cut to finished grade. Sills to carry loft floor are erected except circle corner at ends. Floor joists and loft floor 65% complete. Will complete Monday if we get a full day's work

without rain. Steel columns to carry roof section erected complete, all bolts set in walls and the concrete sill under window section ready for the steel. Steel for roof and roof materials will be delivered to the job complete on Tuesday of this week, steel workers all set to start Wednesday morning. Hardware for stall doors all in town, ready when needed.

"Big house: 80% completed; carpenters will finish installation of all sheet rock on walls and ceilings Monday, will start trim on windows and door frames sometime Monday; should start hanging doors in house by Wednesday and painter crew will start Monday to taping joints of sheet rock. Brick mason has the fireplace 70% complete—will complete Tuesday of this week. House will definitely be completed and ready before the 1st of January.

"Small house: Plumbing all roughed in, floor and foundation poured 100% complete, brick masons now laying exterior tile walls. Should complete all the walls and partitions this week.

"On an over-all picture of the job, barring as much as 4 or 5 days' rain between now and next Tuesday, one week from now, the entire project will be completed in time to use on the 1st of January, or shortly thereafter.

"One other thing that I imagine that Denemark is interested in will be the final anticipated cost of the entire project, which is of course impossible to guage accurately, but we are attempting to give your office a picture of the project as best we can.

"Project cost to date is	$16,533.03
Cost of steel framing & roof erected for barn is	12,500.00
Estimated costs to finish stalls & barn, bunkhouse & big house complete	10,000.00
Total	$39,033.03

"I do not think that the costs will vary more than 10% either way from the above estimate unless we get

other changes that we do not know about at the present time."

On December 18th Denemark made another trip to Hot Springs at which time he authorized the addition of a one-half bath in the two-story frame house, a second story to the bunkhouse consisting of one room and bath, and the construction of a four-car garage.

On December 31st appellee sent Denemark a statement showing the cost of the project as $38,984.87, which included appellee's 10% commission. On January 5th appellee sent Denemark a statement showing the cost to be $54,737.05. When Denemark received this $54,737.05 statement, it was for more than he had anticipated. He immediately went to Hot Springs, arriving there on January 8th, and had a conference with McRae on the 9th, at the conclusion of which Denemark gave McRae a check for $19,737.05. Denemark states that he paid this under protest; that McRae assured him he would have an audit made of everything and if Denemark was entitled to a refund he would get it; that he was led to believe that he would get a refund. McRae states that the check for the additional $19,737.05 made a total of $54,737.05 paid by Denemark and was to pay for the labor and materials used on the project plus 10%, as shown by his Estimates 1 to 9 inclusive, and that it did not take into consideration any work or material used after January 6th, and that it did not take into consideration the bills of the sub-contractors. The painting, plumbing, steel and electrical work had been done by sub-contractors employed by appellee.

Finally, on the 4th day of March, 1949, appellee sent Denemark a bill for balance due of $18,309.60, which Denemark refused to pay. Then appellee filed suit alleging that the project cost $73,114.59, that $54,737.05 had been paid thereon, and there was a balance due of $18,377.54, for which it asked judgment.

Later on an Amended Complaint was filed in which it was alleged that the correct balance due was $556.87

in addition to the amount sought in the original Complaint.

Denemark filed an Answer and Cross-Complaint denying that he was indebted to plaintiff in any sum and alleging that the total value of the labor and material used in the project did not exceed $40,000, and that, as a matter of fact, due to the unskillful, improper and defective manner in which the buildings were constructed, they were not worth more than $35,000; that they had over-paid the plaintiff $19,737.05, and prayed that an accounting be taken of the damages suffered by the defendants, and that they have judgment for whatever amount that might be found due.

Later the defendants filed an Amendment to the Answer in which they allege that they disputed the amount of $54,737.05, for which plaintiff had rendered a statement on January 6th, and that they had compromised and settled their dispute by defendants paying to the plaintiff $19,737.05, making a total of $54,737.05 paid by the defendants, and that the parties agreed that the cost to the defendants would not exceed that sum.

O. C. Green, doing business as O. C. Green Lumber Company, filed an Intervention in which he claimed $565.94 was due him for material furnished on the project, and that such amount was included in the amount for which plaintiff was asking judgment.

The Chancery Court found for the plaintiff in the sum of $18,368.47, subject to credits in favor of the defendants as follows: $247.97 for four heating stoves furnished by Brennan Plumbing Company for use in residence building; $105.47 for Social Security overcharged by the plaintiff; $505.84 for Contractor's Liability Insurance overcharged by the plaintiff; and 10% thereon; $830 for repair and restoration of a floor of the residence building located on the property; $500 for repair and restoration of the roof on the barn building; $150 for pointing up the concrete block walls of the stable; $186 for charge made by the plaintiff for hauling workmen to the job; $40 for repair

and restoration of the roof of the porch on the residence building; $150 for repair and restoration of the sewerage system, making a total credit to be allowed the defendants of $5,652.23, and that the plaintiff have judgment against the defendants in the sum of $12,716.23, and that the Intervener O. C. Green have a lien in the sum of $565.94 for materials furnished.

The defendants appealed to this Court. The plaintiff took a cross-appeal contending that the Chancellor was in error in not allowing the plaintiff a charge of 4% as overhead.

The rule is that the findings of the Chancellor will not be reversed unless against a preponderance of the evidence, and this Court has held many times that where the Chancellor's findings are against the preponderance of the evidence, the case will be reversed. *Chapman* v. *Liggett,* 41 Ark. 292; *Leifer Manufacturing Company* v. *Gross,* 93 Ark. 277, 124 S. W. 1039; *Carr* v. *Fair,* 92 Ark. 359, 122 S. W. 659.

The record in this case is voluminous. It consists of 8 volumes; appellants' abstract of the testimony requires 393 pages. We have carefully studied the entire record and briefs of the parties, and we are of the opinion that the Chancellor's findings are contrary to the preponderance of the evidence.

In the first place, the undisputed evidence is that the first estimate made by McRae was for more than Denemark wanted to spend. McRae says that the first estimate was for one amount and Denemark says it was for another, but, regardless of their disagreement as to the amount of the estimate, it is agreed that McRae's estimate was for less money than finally paid by Denemark and more than he wanted to spend. This is important only to the extent of whatever light it sheds on the intentions of the parties.

On December 12th, when the project was within one week's work of being completed, McRae wrote to Denemark: . . . "On an overall picture of the job, barring as much as 4 or 5 days' rain between now and next Tues-

day, one week from now, the entire project will be completed in time to use on the 1st of January or shortly thereafter". The letter is ambiguous in that it can be construed to mean that the entire project will be completed "by next Tuesday", one week from the time that the letter was written unless they had "as much as 4 or 5 days' rain". On the other hand it could mean that if they did not have as much as 4 or 5 days' rain, it would be completed by the 1st of January or shortly thereafter. It was near enough to completion for McRae to be able to tell within 20% of what the final cost to Denemark would be, and in his letter of December 12th his estimate of the final cost was $39,033.03. He had figured it down to the penny. In that same letter he stated that he did not believe that the cost would vary more than 10% either way from that figure, giving himself a leeway of 20%.

It is true that on the 18th day of December, Denemark authorized an addition of a one-half bath to the residence, a second story consisting of one room to the bunkhouse, a four-car garage, and a few small items, but the record does not justify a finding that these additions cost in excess of $11,800.72 over and above McRae's top estimate of $42,936.33, (10% more than $39,033.03), which sum together with $11,800.72 is the amount that Denemark actually paid: $54,737.05. In addition Denemark spent $4,000 on the metal roofing.

We think the preponderance of the evidence shows that for all practical purposes the project was completed on the 6th of January, with the exception of a little work to be done on the garage and a few odds and ends.

In McRae's testimony he states:

"Q. Was there any agreement existing between you and the defendants with reference to the time this job should be completed? A. Yes. Q. State to the Court what that agreement was. A. He wanted us to get it done by January 1st and we agreed to make every effort to do it; and did so. Q. When did you turn possession of the premises over to the Denemarks? A. As far as the stable and the frame house and the tile residence—part

of his horses came in on the 6th of January, and the rest of them on the 7th.

. . . . . .

"Q. The accounts which you have filed here indicate considerable overtime. Did you have to work on holidays and on Sundays on this job? A. We had to work every available minute we could in order to complete the job. Q. And did you do that? A. Yes—we missed it by 6 days. Q. You missed the completion by January 1st by 6 days? A. That is right."

We believe that a preponderance of the evidence shows that it was intended by both parties that the $19,737.05 paid by Denemark on January 9th was a final payment on the job. On January 19th, ten days after the payment on the 9th, the appellee sent Denemark the following affidavit:

"I, Bernice McRae, certify that I am the duly elected and acting President of Ed B. Mooney, Inc., and Arkansas Corporation with principal offices at Hot Springs, Arkansas. I further certify that beginning on the 15th day of November construction was started on the Denemark stables and homes, and that on the date of January 6, 1949, we had submitted Estimates No. 1 to No. 9 inclusive, for work done and material supplies up to and including the date of January 6, 1949, said estimates having daily report sheets and partial audits supporting the estimates, and that on the date of January 8th, we received payment of Estimate No. 9 in the amount of $19,737.05, which made a total of $54,737.05, spent on the job up to and including the date of January 6, 1949, and that there are no outstanding bills due for labor or material used on the job between the dates aforementioned.

"/s/ Bernice McRae, President
Ed B. Mooney, Inc.,
General Contractors.

"The above statement subscribed and sworn to before me on this the 19th day of January, 1949.

"/s/ J. G. McRae
Notary Public."

In the first letter written by McRae to Kotnour, Denemark's secretary, on November 18th, McRae had stated: "I am enclosing the daily report copies of the costs to date on the job which has been set up on a strict actual cost plus 10% with us to furnish all small tools . . . This I discussed with Mr. Denemark when he was here and he advised me to go ahead and we would agree either on this basis or a straight fee for my services, so I have set it up this way, *and he and I will agree on the final figure at a later date when he is down here.*" (Italics ours).

Moreover McRae testified as follows:

"Q. At the time he gave you this check for $19,737.05, then did you promise to send him anything? A. He says 'I have given you an awful lot of money and just for my protection how do I know you are going to pay these bills?' I said 'Mr. Denemark, under state laws a contractor is required upon the completion of the job to give you a lien waiver showing that all bills for labor and material have been paid in full.' I said 'if we fail to give you that and somebody brings a bill up, then it would be our responsibility and not yours.' He said 'I would like to have one.' I said 'Allright. When I pay the bills that are included in this estimate I will prepare you a lien release on this much of the work, and when we are through and you get the final bill, I will send you one showing everything is paid for.' "

This conversation was held on the 9th day of January, two or three days after, according to McRae's own testimony, the job was completed. He had testified that they had promised to finish the job by January 1st and, as a matter of fact, finished it six days later. At the time of this conversation of January 9th, Denemark made a payment of $19,737.05, and was insisting that he be

furnished something showing that all the bills had been paid, and McRae did furnish an affidavit of Bernice McRae, his wife and President of Ed B. Mooney, Inc., to the effect that there were no outstanding bills due for labor or materials used on the job between the dates of the 15th of November and January 6th inclusive.

McRae claims that the affidavit dictated by him and signed by his wife, President of the appellee corporation, on January 19th in which it was stated that there were no outstanding bills due for labor or materials used on the job between November 15th and January 6th inclusive, did not apply to any debts that may have been owed to sub-contractors. McRae's statement in this respect is contrary to the preponderance of the evidence. He must have taken these items into consideration when he wrote to Kotnour on December 12th giving his estimate of the final cost as $39,033.03, not to vary over 10% one way or the other.

The sub-contractors' bills for work authorized by Denemark on December 18th could not have increased the bills a great deal compared to the total cost of their work. He certainly took the Arkansas Foundry's bill into consideration because that was specifically set out in his estimate made on December 12th, in which the amount was stated as $12,500.00. As a matter of fact, the Arkansas Foundry's bill for material and labor was $11,403.46. The Arkansas Foundry's labor bill was dated December 31, 1948. The dates on some of the Akers' electrical bills are missing from the top of the bill-heading, and other of the Akers' bills are dated December 12th and January 1st. The only substantial amount of work apparently done by Akers and material furnished after January 7th was on the garage and that amounted to $193.90. Brennan's Plumbing Company bills are dated from December 3, 1948, to January 1, 1949, with one bill dated "1/25/49" and marked "for extra work $579.14," $466.63 of which was for a jet pump and storage tank. The Maddox bills for painting are dated from December 4th to December 31st, and it appears

that he did work amounting to about $108 after January 7th.

After McRae's letter to Kotnour on December 12th, Denemark had every right to believe that the structures were going to cost not over $42,936.33, which is 10% more than $39,033.03, with the additional sum of whatever the half-bath in the two-story house, the four-car garage, and the second story consisting of one room addition to the bunkhouse would cost. Only six days after he had received a bill for $38,984.87 Denemark received another bill under date of January 5th for $54,737.05.

It is true the record shows that the Akers, Maddox and Brennan bills for work done and materials furnished subsequent to January 6th amounted to $880.04, but, the Chancellor found that the Denemarks were entitled to credits in the total sum of $5,652.23 because of defective work. When everything is taken into consideration the project cost the appellants $54,737.05 paid to appellee, $4,000 for roofing, and $5,652.23 to correct defects, making a total of $64,389.28. The record does not justify a finding in favor of appellees for any sum in addition to the amount heretofore received; neither do we hold that the appellants should recover any sum from appellees. Thus, the project will then have cost appellants the aforesaid approximate sum of $64,389.28.

O. C. Green is entitled to a lien against the property for $565.94, but, since we are holding that appellee Mooney has been paid in full including Green's account, the appellants may have their remedy against appellee Mooney for whatever sum is paid in satisfaction of Green's aforesaid lien.

On the cross-appeal the Mooney Corporation contends that the Chancellor erred in not allowing it a charge of 4% as overhead and 10% thereon as cost-plus. The Chancellor's ruling denying the appellee's contention in this respect is in accordance with the weight of authority. 17 C. J. S. 827; 9 Am. Jur. 15; *Lytle, Campbell & Co.* v. *Summers, Fiddler Todd & Co.,* 276 Pa. 409,

120 Atl. 409; *Mailanders* v. *Continental State Bank of Beckville,* 11 S. W. 2d 615.

The cause is reversed with directions to enter a decree not inconsistent with this opinion, the appellee to pay the costs of this appeal.

GRIFFIN SMITH, Chief Justice, dissenting. When the decree was reversed January 22d on a majority finding that an accord had been reached between the parties, with satisfaction, the dissents of the Chief Justice, Mr. Justice McFADDIN, and Mr. Justice GEORGE ROSE SMITH were noted. In expressing disagreement the Chief Justice said:

"The appeal is being disposed of on the ground of accord and satisfaction when most of the testimony shows that nobody was satisfied and that accord did not assume the dignity of a whisper. Clear inferences to be drawn from a case heard originally by one of the state's most careful chancellors is that Denemark [whose wife operates a string of racehorses] had more money than business sense, and chief concern [of the Denemarks] was to implement their contact with the race track racket as expeditiously as possible; hence their urge was predicated primarily upon speed to the full extent that dollars could produce that result. Changes in plans were made from time to time, but always there was the cost-plus consideration; and the final reckoning required payment of actual construction outlay with ten percent to the contractor. It is urged that sub-contracting—such as wiring, plumbing, and specialized work—could not be included for commission purposes. Certainly it was contemplated that Mooney would be paid over-all on the basis of ten percent of the finished product; and while a few items possibly amounting to $3,000 [may have been] erroneously included and should have been added to deductions made by the Chancellor, it is not necessary in this dissent to burden the record with a discussion regarding them, since by a process of reasoning satisfactory to the majority there has been a finding that what appears to me to have been discord between the parties

was an amicable adjustment sustained by a preponderance of the evidence."

On rehearing the majority's decision that an accord had been reached and that payments mentioned satisfied the entire obligation, was withdrawn, and on April 2d, 1951, there was a substituted opinion. A reference to the opinion printed in The Law Reporter January 22, and that appearing April 9, 1951, will disclose the majority's action in receding from the theory of accord and satisfaction and finding that the Chancellor was not sustained by a preponderance of the evidence. Again the same three justices dissented.

Briefly, the facts are that the Chancellor heard many of the witnesses, patiently listened to their direct testimony and cross-examination, and concluded that Denemark and his witnesses were not to be believed regarding some of the transactions. Certainly there were conflicting factual issues, and in the final analysis the trial court had to accept the testimony thought to be credible and reject what appeared most unreasonable. With relatively slight variations mentioned in my dissent of January 22d it seems to me that by far the stronger case was made by Mooney, hence I am unable to fathom the mathematical and factual processes by which this Court's majority reached the conclusion that the decree was erroneous in all of its aspects not clearly favorable to the race track operators whose need for speed in construction patently outbalanced their financial judgments.

Ed. F. McFaddin, Justice (Dissenting). I am now compelled to dissent *twice* in the same case. On January 22nd, 1951 the Supreme Court delivered an opinion in which it reversed the trial court. The basis of the Supreme Court's opinion was, that there had been an accord and satisfaction between the Denemarks and Mooney when, on January 9, 1949, Mr. Denemark had paid the $19,737.05. Three Justices (the Chief Justice, Justice George Rose Smith, and myself) dissented, because we could not find, in the evidence, sufficient facts to substantiate the "accord and satisfaction" theory. To the majority opinion of January 22nd, 1951 Mooney filed

a petition for rehearing, showing the absence of the essentials of "accord and satisfaction." The petition for rehearing remained under submission until April 2nd, 1951, when the majority delivered the present opinion to which there is a dissent by the same three Justices—*i. e.* the Chief Justice, Justice GEORGE ROSE SMITH, and myself.

The only real difference between the majority opinion of January 22nd and the majority opinion of April 2nd, is a deletion, in the latter opinion, of all reference to "the accord and satisfaction." No other legal principle is substituted for such deletion, so that now the majority has reversed the Chancery decree and has stated no legal principle for so doing.

Specifically, near the end of the present (April 2nd, 1951) opinion there is a paragraph reading:

"After McRae's letter to Kotnour on December 12th, Denemark had every right to believe that the structures were going to cost not over $42,936.33, which is 10% more than $39,033.03, with the additional sum of whatever the half-bath in the two-story house, the four-car garage, and the second story consisting of one room addition to the bunkhouse would cost. Only six days after he had received a bill for $38,984.87 Denemark received another bill under date of January 5th for $54,737.05."

Every word of the April 2nd opinion, from the beginning down to the above quoted paragraph, is exactly the same as in the opinion of January 22nd, 1951 and contains all the statement of facts. On such statement of facts the majority, on January 22nd, decided there was an "accord and satisfaction." But when convinced on rehearing, as it evidently was, that the stated facts did not contain the essentials of accord and satisfaction, the majority has, in lieu of such theory, substituted the four concluding paragraphs of the present opinion, in one of which paragraphs this language appears:

"When everything is taken into consideration the project cost the appellants $54,737.05 paid to appellee, $4,000 for roofing, and $5,652.23 to correct defects, mak-

ing a total of $64,389.28. The record does not justify a finding in favor of appellees for any sum in addition to the amount heretofore received; neither do we hold that the appellants should recover any sum from appellees. Thus, the project will then have cost appellants the aforesaid approximate sum of $64,389.28."

The language last quoted is the only language in the opinion that attempts to give any reason for reversing the Chancery decree; and that language merely says that $64,389.28 was enough for the Denemarks to have to pay for what they received.

I submit that no Chancery decree should be reversed until and unless the reviewing Court is able to point out some express basis in law or in fact for such reversal. In this case the Chancellor spent several days, seeing witnesses and hearing evidence, and reached a definite conclusion: yet this Court is reversing the Chancery decree upon the mere *ipse dixit* that the appellant should not prevail. I am thoroughly familiar with the rule that the Arkansas Supreme Court is not required to deliver written opinions. Such has been the law since *Vaughn* v. *Harp,* 49 Ark. 160, 4 S. W. 751. But when the Court does deliver a written opinion, it should state the applicable rules of law and pertinent reasons for the Court's conclusion: this, because when a written opinion is delivered it becomes a guide for future cases. As is clearly stated in 15 C. J. 968:

"It has been considered, however, that even though an opinion is not required by statute, one should be written where the case involves the application of an old principle. . . ."

Such is the situation here. The trial court is being reversed and yet the majority has been unwilling to assign any reason for such reversal, except that $64,389.28 is enough money for appellants to pay.

It is my view that the decree of the Chancery Court should not be reversed unless and until either (1) a legal principle can be stated to sustain the majority view or (2) a mistake of fact can be demonstrated in the Chan-

cery decree. The majority opinion in the case at bar does neither of these. Therefore, I respectfully dissent from the reversal.

WATSON *v.* SUDDOTH.

4-9513 239 S. W. 2d 602

Opinion delivered May 21, 1951.

Rehearing denied June 11, 1951.

Appellant *pro se.*

Burke, Moore & Burke, for appellee.

HOLT, J. This suit involves title to a 150-acre tract of farm land in Phillips County, Arkansas.

This is the fourth appearance of this case here, *Watson* v. *Dulaney,* 202 Ark. 1197, 149 S. W. 2d 563; *Watson* v. *Suddoth,* 208 Ark. 205, 185 S. W. 2d 932; *Watson* v. *Suddoth,* 209 Ark. 940, 193 S. W. 2d 326, opinion March 18, 1946.

It also appears that appellant had at one time, after removing to Missouri, invoked the aid of the Federal Courts in an effort to establish title to, and right to possession of, this 150-acre tract, *Watson* v. *Suddoth, et al.,* 177 Fed. 2d 371.

In each of the above cases, appellant was unsuccessful.

In the present suit, appellant again claimed title to the land, right of ownership, and prayed that title be quieted in him.

Appellee filed motion to dismiss on two grounds, (1) that appellant was not in possession but that appellee had been in possession, cultivating the land for a number of years, and that appellant's remedy was at law and not in a court of equity, (2) that "all issues of law and fact arising herein have been duly adjudicated and determined by this Court, the Supreme Court of the State of Arkansas and the Federal Courts, including the United States Supreme Court, and therefore movant pleads *res adjudicata* as a complete bar to this proceeding."

While both of appellee's contentions, above, might well be sustained, in an effort to put an end to this litigation, we place our decision on his second contention and hold that his plea of *res adjudicata* must be sustained.

The decree contains this recital: "All of the issues of law and fact arising herein have been duly adjudicated by this Court in the several proceedings heretofore filed herein; . . . appeals have been taken to the Supreme Court of Arkansas and affirmed; . . . In addition thereto the issues of law and fact arising herein have been duly adjudicated adversely to the plaintiff in a proceeding instituted by the plaintiff against the intervener, L. G. Suddoth, in the District Court of the United States, Eastern Division of Arkansas, . . . which judgment of the District Court was affirmed by the Eighth Circuit Court of Appeals and writ of certiorari was granted and then dismissed by the Supreme Court of the United States; . . . The plea of *res judicata* should be sustained."

Appellant testified that he was not in possession of the land. He claimed title by deeds of conveyance from the heirs of Terrill and Grundy Walker. It appears that we decided this identical contention in 208 Ark. 205, 185 S. W. 2d 932, above. We there said: "The documentary evidence which is brought forward in the transcript tends to show that the heirs of Grundy and Terrill Walker had no title or interest to convey to appellant for the reason that

their ancestors had, years before, conveyed their interest in the lands to appellee's predecessors in title."

We said in *Missouri Pacific Railroad Company, Thompson, Trustee,* v. *McGuire,* 205 Ark. 658, 169 S. W. 2d 872: "Briefly stated, the doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction."

It appearing that the issues presented here have already been litigated by the same parties and determined against appellant, we hold that the record fully supports the above findings of the Chancellor.

Affirmed.

DAVIS *v.* STONECIPHER.

4-9503 239 S. W. 2d 756

Opinion delivered May 21, 1951.

Rehearing denied June 18, 1951.

G. E. Snuggs, for appellant.

A. R. Cheatham, for appellee.

Ed. F. McFaddin, Justice. In this suit appellees claimed to own certain mineral interests and sought to cancel appellants' tax title thereto.

Appellees alleged that A. N. Stonecipher and his co-appellees owned 1/128th interest in the minerals under one 40-acre tract (referred to as the Wingfield tract), and ⅛th interest in the minerals under another 40-acre tract (referred to as the Hicks tract). No oil or gas has been produced from either tract, so far as the evidence discloses. The appellants claim that the said mineral interest on each tract forfeited to the State in 1938 for the non-payment of the taxes of 1937, and that appellants received a deed from the State of Arkansas in 1942 for such mineral interests. From a decree cancelling their deed, appellants prosecute this appeal; and two decisive questions are presented.

I. *Validity of Appellants' Tax Title.* Regardless of other defects in the tax sale, appellants are met—at the threshold of their defense—with our holding in *Sorkin* v. *Myers,* 216 Ark. 908, 227 S. W. 2d 958.

The appellees' mineral interest in the Wingfield tract was listed on the tax books in the name of A. N. Stonecipher "1/128th interest" in the 40-acre tract, and shown as "non-producing." The appellees' mineral interest in the Hicks tract was listed on the tax books in the name of Mary E. Stonecipher[1] "⅛th interest" in the 40-acre tract, and shown as "non-producing." The names of the said owners were arranged alphabetically on the tax books, and the mineral interests were not arranged by section, township, and range, as is required for real estate. The same erroneous method—of arranging the names of the owners alphabetically, rather than arranging the land by section,

[1] Mary E. Stonecipher died while this suit was pending, and the cause as to her interest was revived in the name of her husband (A. N. Stonecipher) and her children, who are the appellees.

township and range—as described in *Sorkin* v. *Myers, supra,* exists in the case at bar. And our holding in *Sorkin* v. *Myers* is ruling here: the result being that the appellants' tax title is void. The mineral interests were never legally and validly assessed, so the purported sale was a nullity. Furthermore, since the minerals were (a) constructively severed from the soil by the mineral deeds, and (b) were non-producing, it follows that there was no possession of the minerals by anyone within the purview of § 34-1419, Ark. Stats. See *Skelly Oil Co.* v. *Johnson,* 209 Ark. 1107, 194 S. W. 2d 425.

II. *Appellees' Proof of Title.* Appellants urge that the appellees failed to prove any title to any mineral interests and therefore should not be allowed to maintain this suit to cancel appellants' tax deeds. The law is well established that a plaintiff must show title in himself before he will be allowed to attack the tax title of another. See *Bowles* v. *Dierks Lumber & Coal Company,*[2] 217 Ark. 892, 233 S. W. 2d 632. But we have held that in a suit to cancel a void tax deed, the plaintiff need not deraign title with the same exactness as is required in actions in ejectment or in suits to quiet title.

In *McMillen* v. *East Arkansas Investment Co.,* 196 Ark. 367, 117 S. W. 2d 724, we said of a suit to cancel a void tax deed:

"Appellees insist that the decree of the trial court must be affirmed because appellants failed to prove that they owned the land. It is true that appellees specifically denied that appellants were the owners of the land at the time of the sale thereof to the State, or that they thereafter acquired title to same, and also true that appellants did not deraign their title in their complaint or refer to a deed or other muniments of title, but they did allege ownership of the land and introduced proof to sustain the allegation."

Again, in *Cecil* v. *Tisher,* 206 Ark. 962, 178 S. W. 2d 655, we said:

"Finally appellant contends that appellees have failed to prove title to the tracts of land in question and

[2] See, also, cases collected in West's Arkansas Digest, "Taxation," Key No. § 796.

that in order to prove title it was necessary for appellees 'to plead and prove his title from the patent through the *mesne* conveyances down to himself.'

"Appellee, Friend, produced in evidence a warranty deed to the land in controversy executed to him by Rufus Friend and M. E. Friend on March 18, 1919. Appellee, Tisher, introduced in evidence a deed executed to him by C. O. Ward on January 7, 1940. Both deeds were recorded. Both of the appellees testified that they were the owners and in possession of the tracts of land involved and appellant offered no evidence to the contrary save the tax deeds on which he based his claims. We think this evidence sufficient to meet the final contention of the appellant."

In the light of these cases, we find that the Stonecipher title was established sufficiently to support this action to cancel the void tax deeds. Mr. Stonecipher testified that he received deed to the 1/128th interest from Wingfield, and that his wife received the deed to the ⅛th mineral interest from Hicks. While Mr. Stonecipher was thus testifying as to ownership, the following occurred:

"Mr. Cheatham: That is my contention. I have an abstract.

"The Court: That was the common source of title.

"Mr. Snuggs: If he didn't own it it has no right in here. The State sells the land.

"The Court: He is relying on the Tax Title."

When the trial court thus announced that the appellants were relying on their tax title, rather than appellees' lack of title, the appellants apparently acquiesced, because they offered no objection to the Court's remark, did not cross-examine Stonecipher as to his title, and did not object to any of his testimony. Thus the matter of appellees' title was not made an issue after the above quoted excerpt. Under this state of the record, we hold that appellees' title —if not actually conceded by appellants—passed out of the area of unproved matters.

The decree is affirmed.

COMMERCIAL CREDIT PLAN, INC. *v.* CHANDLER.

4-9511 239 S. W. 2d 1009

Opinion delivered May 28, 1951.

Barber, Henry & Thurman, for appellant.

Josh W. McHughes, for appellee.

GRIFFIN SMITH, Chief Justice. The Chancellor found that appellant's contracts with Winston G. Chandler were usurious, therefore unenforcible. We agree with this determination.

Act 111 became effective March 3, 1941, without the Governor's signature. It authorizes Industrial Loan Institutions and empowers the State Bank Commissioner to promulgate control rules and regulations.

Loan and investment companies were recognized by Act 354, of 1927, as amended by Act 109 of 1931 and 264

of 1933, but they were originally supervised by the Railroad Commission. Section 14 of the Act mentions the Morris Banking Plan—a term not defined. Enlarged powers were conferred by Act 111 of 1941. Now they may sell, discount, or negotiate bonds, notes, or other choses in action, and issue as evidence therefor investment certificates, contracts, or agreements under any descriptive name.[1]

The capital stock, surplus, and undivided profits of an Industrial Loan Institution doing business in a city of 50,000 or more shall be not less than $200,000 as to corporations organized under Act 111, but this provision is not applicable to corporations supervised by the State Bank Department at the time the legislation was adopted.

In 1940 Commercial Credit Plan, Inc., applied to the Bank Department for authority to operate as a finance corporation with a capital structure of $50,000. A permit issued Sept. 23 bears the restrictive indorsement: "Investment certificates shall not be sold to the public for cash, but will be issued solely to persons who borrow from the corporation in connection with loans made to them similar to the Morris Method".

The form of certificate given departmental approval carried an acknowledgment that Commercial Credit Plan Incorporated was indebted to the holder in the principal amount of [dollars blank], "in consideration of the purchase money note of even date and corresponding number herewith, executed by the original holder and delivered to Commercial Credit Plan Incorporated, herein, in payment for this certificate, which note is payable . . ." etc.

April 2, 1941, the corporation's attorney wrote the Bank Commissioner that he had been informed the Attorney General had issued an opinion to the effect that Act 111 was not mandatory, but that existing organiza-

[1] The investment certificates ". . . may bear such interest, if any, as their terms may provide, and which may require the payment to said 'industrial loan institution' of such amounts from time to time as their terms may provide, and permit the withdrawal or cancellation of amounts paid upon the same, in whole or in part, from time to time, and credit of amounts thereon upon such conditions as may be set forth therein".

tions might voluntarily place themselves within its reach. In reply the Commissioner issued the department's certificate under Act 111, dated April 30, 1941.

December 7, 1944, the corporation informed the Bank Commissioner of its desire to discontinue the issuance of certificates of investment "in connection with loans". This request was referred to the Attorney General, together with Form No. 2352, offered in substitution for Form No. 2310. The new form (approved by the department Dec. 29) omitted all references to any note. It certified that the person named was the owner of an investment certificate for the amount set out and that the certificate had been registered on the books of the corporation. The owner promised to pay the corporation the sum stipulated "in equal successive monthly installments of [dollars blank], each, beginning", etc. The corporation agreed to accept the certificate as collateral for any loan made by it to the holder, but reserved the right to refuse applications for loans "for any reason it might deem sufficient", and "upon maturity of any loans made upon the security of this certificate, Commercial Credit Plans Incorporated agrees to accept from the holder all or part of this certificate in payment of said loan". Across the left end of the certificate printed in blackface type notice was given that the security was invalid unless countersigned, *"or if in excess of $1,000"*. Such certificates do not bear interest.

In its letter of Dec. 7, 1944, the corporation asked the Commissioner in unequivocal language whether it be permissible "to make loans without the necessity of issuing [investment] certificates". The department's reply approved the printed form suggested, but did not authorize loans when certificates were not issued. On the contrary, a copy of the Attorney General's letter of Dec. 19th was enclosed. The concluding paragraph is: "It is therefore my opinion that the words 'investment certificate', used in § 4 [of Act 111], are mandatory requirements in connection with loans made by these institutions".

. . . . . .

On April 11, 1949, Winston G. Chandler applied to appellant for a loan of $959. An attached financial statement shows that it was to run for eighteen months and that $809 would be used to pay the balance on a title-retaining note for the purchase price of a Ford automobile—an obligation to Commercial Credit Corporation. An additional $150 was needed to pay insurance required by appellant. Thus, with the automobile debt-free, and money in hand for prepayment of insurance for eighteen months, appellant advanced $959 when Chandler executed his note for $1,128.24, due in eighteen months, with interest at eight percent after maturity. Concurrently an investment certificate for $1,128.24 was executed and pledged by Chandler as security for the loan.

The note mentions assignment of the investment certificate, but does not say what its value is or how it is to be paid. The note permits the lender to call for additional collateral "if such should be deemed necessary", and accelerates payment in the event default should occur "on any installment on any property pledged". The [makers] agree that the holder "*shall not be compelled to resort first to the collateral hypothecated for the payment of this note,* and [the corporation] may at its option require [any whose signature appears on the note] to pay."

It is significant that the only instrument showing what the monthly payments were to be is the chattel mortgage, in which 18 equal monthly payments of $62.68 are set out. The only other debt reference to be found in the mortgage is a paragraph providing for insurance "for not less than the total amount owing on said note until fully paid". An obligation of the note is that the holder may, at its discretion, call for additional collateral when the existing security is thought to be insufficient. If it is not furnished (or if other enumerated possibilities should materialize) the note became immediately due at the option of the holder, who was empowered to sell "said collateral at public or private sale"; nor was the holder compelled "to resort first to the collateral hy-

pothecated for the security of this note," but it might, at its option, "require any of the undersigned to pay".

. . . . . .

In June, 1950, Chandler sued in equity for cancellation of the note and mortgage, alleging usury. In its answer appellant invoked the protection of Act 111 of 1941, insisting that the transaction was expressly sanctioned. Denial of usury was predicated upon a paragraph in the note that reads: "We agree that in the event that the amount actually loaned shall be less than the face amount herein, liability shall be for the amount actually loaned, or for any balance remaining unpaid". By way of cross-complaint judgment was sought for an alleged balance of $624.72. It was admitted that Chandler's first payment was made May 16, 1949, and that default did not occur until February 16, 1950. Although appellant's accountant agreed with Chandler in stating that the January installment was paid, and he did not contend that any other remittance was less than $62.68, this witness did testify that the aggregate of sums paid was $503.52. [Nine payments, including May through January, at $62.68 would be $564.12, or exactly half of $1,128.24 payable in 18 months].

In advancing its dual defenses appellant contended (a) that the note and mortgage were one transaction, and (b) the investment certificate was a disassociated matter.

A tabulation of interest on a partial payment basis on $959 for 18 months, computed according to formula set out in *Lyttle* v. *Mathews Investment Co., Inc.*, 193 Ark. 849, 103 S. W. 2d 47, discloses charges of $108.63 in excess of ten percent when full effect is given the note.

We agree with appellant that if all transactions had been represented by the note and mortgage, and if their execution resulted in the inclusion of an excess rate of interest in circumstances indicating mere error, as distinguished from the lender's deliberate design to exact a promise from Chandler for the payment of more interest than the law allows, there would be no usury. *Starling* v. *Hamner*, 185 Ark. 930, 50 S. W. 2d 612. But

that is hardly the case here; nor is confidence in the integrity of the transaction enhanced by the evidence offered. Appellant's assistant treasurer, who is its local manager, testified that the unpaid balance was $562.04, although the cross-complaint alleged $624.72 to be due after admitting receipt of $503.52. The two items mentioned in the cross-complaint, where judgment for the larger sum and foreclosure were asked, equal the face of the note—$1,128.24. Furthermore, this witness testified that his company was entitled to collect all installments on the investment certificate; that no payments had been made on the note, but after maturity appellant would be entitled to eight percent on it; that $959 would satisfy the note, but $1,128.24 "was put into it because we make them up to agree with the investment certificate", but the note is one thing and the certificate another—wholly separate contracts, neither [inferentially] depending upon the other.

The Chancellor was justified in rejecting this construction. Assuming, as appellant insists, that the corporation contributed its facilities as an aid to investors in systematically saving, and that lending money on the security of such accumulated payments was merely incidental, yet the fact remains that the certificate did not bear interest, and in the case at bar it was definitely tied in with the loan by conduct no reasonable person could fail to understand. The note by express language contemplated the possibility of default "on any property pledged," then authorized the holder to disregard hypothecated collateral, (in this case the certificate) and look to the makers or indorsers.

The test here is whether the borrower promised to pay a greater rate of interest than the law permits, and the lender knowingly entered into a usurious contract, intending to profit by the methods employed. Usury will not be presumed, *Cammack* v. *Runyan Creamery,* 175 Ark. 601, 299 S. W. 1023, and where one resists payment of a *prima facie* obligation on the ground that the contract is tainted with usury, such defense must be established by clear and convincing evidence. *Baxter* v. *Jackson,* 193 Ark. 996, 104 S. W. 2d 202.

We have held that collateral contracts entered into contemporaneously with a contract for the lending and borrowing of money, where the collateral agreement is in itself lawful and made in good faith, will not invalidate the contract for the loan of money as usurious, although its effect might be to exact more from the borrower than the sum which would accrue to the lender from a legal rate of interest. *Hogan* v. *Thompson,* 186 Ark. 497, 54 S. W. 2d 303. But it is equally well settled that where, as here, the primary purpose is to lend money through multiple transactions devised to cloak the real intent to collect excessive interest, courts will analyze the scheme and ascribe to it the contemplated purpose, disregarding as preconceived emergency defenses such language as that found in appellant's note limiting recovery to the actual amount loaned.

Affirmed.

Mr. Justice McFaddin and Mr. Justice Millwee, concur.